3-26-2009

Esquivel v. State Appellant's Brief Dckt. 35792

IN THE SUPREME COURT OF THE STATE OF IDAHO

CARLOS ESQUIVEL,

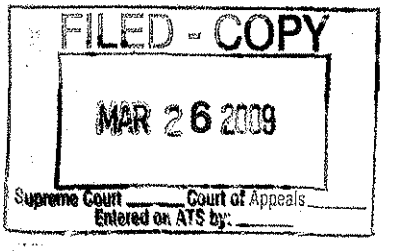
Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent-Respondent.

S. Ct. No. 35792



OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Fourth
Judicial District of the State of Idaho
In and For the County of Ada

HONORABLE CHERI C. COPSEY
District Judge

Dennis Benjamin
Deborah Whipple
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
303 West Bannock
P.O. Box 2772
Boise, ID 83701
(208) 343-1000

Attorneys for Appellant

Lawrence Wasden
IDAHO ATTORNEY GENERAL
Stephen A. Bywater
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

Attorneys for Respondent

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

DOCKETED CASES

FEDERAL STATUTES

STATE STATUTES

II. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from an order dismissing a second amended petition for post-conviction relief. Clerk's Record (CR) 95.

B. Procedural History and Statement of Facts

Appellant Carlos Esquivel was found guilty following a jury trial of three counts of lewd conduct with a minor under age sixteen, I.C. § 18-1508, and one count of sexual abuse of a child under age sixteen, I.C. § 18-1506. Prior to sentencing, the district court ordered him to undergo a psychosexual evaluation, and the results of that evaluation were included in the presentence investigation report (PSI) and considered by the court at sentencing. Carlos was sentenced to concurrent unified terms of thirty years, with minimum periods of confinement of fifteen years for lewd conduct and a concurrent unified term of fifteen years with a minimum term of five years for sexual abuse. A subsequent Rule 35 motion was denied. And, in a direct appeal, the conviction, sentence, and denial of the Rule 35 motion were affirmed in an unpublished opinion. *Esquivel v. State,* Docket No. 32689 (Ct. App. August 3, 2007) Slip Op. p. 1-2.[1]

Carlos then filed a *pro se* petition for post-conviction relief alleging several claims of ineffective assistance of trial and appellate counsel and seeking appointment of counsel in post-conviction. The district court denied the motion for appointment of counsel, and Carlos filed an amended application, and again asked for counsel. Again, the district court denied counsel and ultimately dismissed the petition. *Id.* p. 2.

---

[1] This Court has taken judicial notice of the Clerk's Record and Reporter's Transcript filed in the prior appeal No. 32689. CR 3.

Carlos appealed, counsel was appointed, and the Court of Appeals issued an unpublished opinion on August 3, 2008. The Court affirmed in part, reversed in part, and remanded for further proceedings. In particular, the Court held that the district court did not err in denying counsel in the claim of ineffective assistance of counsel based upon counsel's failure to request that Carlos undergo a polygraph examination. However, the district court did err in denying counsel in the claim of ineffective assistance of counsel based upon the alleged failures of counsel in relation to the psychosexual evaluation. Therefore, the case was remanded for appointment of counsel to assist in pursing this single potentially valid claim. *Id.* p. 7-8.

The Court of Appeals wrote:

> Esquivel asserts the district court erred in denying his request for appointment of counsel to assist him in his post-conviction claim that his trial counsel was ineffective for failing to properly challenge the psychosexual evaluation used against him after Esquivel requested trial counsel to do so. A psychosexual evaluation conducted for sentencing purposes is considered a critical stage of the defendant's case. *Estrada v. State,* 143 Idaho 558, 562, 149 P.3d 833, 837 (2006). Therefore, a defendant has a Sixth Amendment right to counsel's advice regarding his or her participation in an evaluation. *Id.* at 558-59, 149 P.3d at 837-38. Trial counsel's failure to properly advise a defendant regarding his or her Fifth Amendment rights in submitting to a psychosexual evaluation may amount to deficient performance. *See id.* at 564, 149 P.3d at 839. When there is a reasonable probability that the sentence would be different had the psychosexual evaluation not been included, or had been more favorable to the defendant, a trial counsel's deficient performance may also be prejudicial. *See* [*State v.*] *Wood,* 132 Idaho [88,] 101, 967 P.2d [702,] 715, *Estrada,* 143 Idaho at 565, 149 P.3d at 840.
>
> Esquivel's application alleges facts indicating the possibility that his court-ordered psychosexual evaluation was inadequately conducted and that he voiced his concerns about the evaluation to his trial counsel. Esquivel's application, in essence, claims his trial counsel was deficient for failing to either question the conduct of the expert who performed the evaluation or request that a different expert conduct a new psychosexual evaluation. **The record before this Court on appeal demonstrates that the results of Esquivel's psychosexual evaluation were considered by the district court in making its sentencing decision and was a factor contributing to the length of his sentence.**

Esquivel v. State, Slip Op. at p. 6-7 (emphasis added).

The record before the Court of Appeals which supported its finding that the district court considered the psychosexual evaluation in making its sentencing decision was set out in Carlos' Opening Brief. Carlos wrote there:

> . . . Prejudice in this case is clear because the psychosexual report was heavily relied upon by the State in recommending a lengthy prison sentence and by the District Court in determining the sentence and in denying the Rule 35 motion.
>
> At sentencing, the State argued that the evaluation showed Mr. Esquivel needed to be punished severely. It stated:
>
> > [H]e continues to pose a more significant risk. He went to SANE and was evaluated, although he was not particularly forthcoming in the SANE evaluation. He refused to answer the MSI questions because he said he just didn't like the questions and thought that they were just, in his words, sick or perverted or something along those lines. He wouldn't appropriately answer the Millon and so that test couldn't be scored. Unfortunately the examination doesn't give the evaluation – doesn't give the Court as much information as you might have liked, but that is the defendant's doing and he chose not to be cooperative with that. It is interesting to note that Dr. Engle . . . immediately detects that [Mr. Esquivel] has an attitude of arrogance and an attitude that conveys clearly that he is a victim of the instant offense, the criminal justice system, and the evaluation process and that's reflected in Dr. Engle's evaluation of the defendant.
> >
> > . . .
> >
> > So looking at the risk, Judge, I think when Dr. Engle says he's at least a medium risk to reoffend, that's in the best light given that the defendant doesn't finish out on testing in this case. He's in total denial of what happened. . . .
> >
> > Given all that, Your Honor, the State in evaluating this case knows that this is a situation that calls out for a prison sentence. There are issues which involve punishment and retribution. There are concerns that the defendant is not a rehabilitation candidate at this time because he is in total denial[.]

T (30424) pg. 256, ln. 21- pg. 258, ln. 18.

The Court imposed the precise sentence recommended by the state and in doing so relied upon Dr. Engle's report.

> So when I look at all these facts and I look at the fact that Mr. Esquivel was really not cooperative in that evaluation and I realize that there's an argument to be made that a person does this if they are innocent of the charge, but I was concerned when I saw that he didn't complete the part of the test and I don't buy the whole idea that he was uncomfortable with answering questions about his own sexual interests. He was aware that this was an important evaluation that the Court was going to take into consideration in deciding what to do. I'm concerned again with the guarded nature in which he answered some of the questions by the evaluator. True it is that – it's not to be unexpected that an individual will get an evaluation of a moderate level of risk because of denial, but the fact of the matter that the Court cannot ignore the fact that he was evaluated as having a moderate level of risk. Although today he's indicated that he's interested in having and attending the appropriate therapy, I want to note that it's easy to come into this Court and make those kinds of assertions, but all along in his comments to the evaluator he made it clear that he was not interested in having any sort of treatment.

T (30424) pg. 270, ln. 2-22.

Along these same lines, the Court relied upon Dr. Engle's evaluation in denying Mr. Esquivel's Rule 35 motion. It stated:

> The S.A.N.E. evaluation stated Esquivel was a moderate risk to re-offend and the evaluator opined he was not amenable to treatment because in part he denied an offense occurred and was uninterested and unwilling to participate in sex offender treatment.

CR (30424) 121; Memorandum Decision (denying Rule 35 Motion), pg. 4.

Esquivel v. State, Docket No. 32689, Appellant's Opening Brief at pages 21-22.

On remand, the district court appointed counsel, who filed an amended post-conviction petition alleging ineffective assistance of counsel. Specifically, the petition alleged that counsel

rendered deficient performance in failing to properly advise Carlos regarding his Fifth Amendment rights in submitting to a psychosexual evaluation. CR 25.

In response, the state filed a motion to dismiss supported by the affidavit of Carlos' trial counsel. In that affidavit, counsel stated that he "did not tell my client that he had a fifth amendment right not to participate in that psychosexual evaluation." CR 44.

Based upon this affidavit, no evidentiary hearing was held. However, briefing was submitted by both parties. CR 87.

Ultimately, the district court dismissed Carlos' petition. In its opinion, the district court found that Carlos had proven by a preponderance of the evidence that his attorney's advice, or lack thereof, in regard to the psychosexual evaluation was deficient. ". . . Esquivel has proven by a preponderance of the evidence that his attorney's advice, or lack of advice, was deficient." CR 88.

However, the district court then went on to find, contrary to the previous holding of the Court of Appeals, that it had not considered the psychosexual report in fashioning its sentence and therefore there was no prejudice. The district court wrote:

> While the Court of Appeals suggests in its decision that the mention of the psychosexual evaluation implied that the Court relied on the report, that is not the case. This Court determined Esquivel's sentence based on the testimony he gave and the evidence produced at trial and not on the psychosexual evaluation. The psychosexual evaluation did not increase or reduce his sentence. Esquivel did not receive a different sentence, either enhanced or reduced, based on his refusal to cooperate in the psychosexual evaluation or because of its contents. It was his failure to accept responsibility that demonstrated rehabilitation was unlikely.

CR 92 (underscore original).

Finding no connection between the psychosexual evaluation and Carlos' sentence, the

district court held that Carlos had failed to meet the prejudice prong of *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052 (1984), and dismissed his petition. CR 81.

This appeal timely followed. CR 95.

III. ISSUES PRESENTED FOR REVIEW

1. Does the law of the case doctrine prohibit the district court from deciding in direct opposition to the Court of Appeals' holding that counsel's deficient performance was not prejudicial?

2. In the first alternative, given the record, did the district court err in determining that counsel's deficient performance was not prejudicial?

3. In the second alternative, should this case have been analyzed, not as an ineffective assistance of counsel case, but rather as a case involving a denial of the state and federal constitutional rights against compelled testimony, and under such analysis, is reversal required because the state cannot show beyond a reasonable doubt that denying Carlos his constitutional right to remain silent was harmless error?

IV. ARGUMENT

A. The Law of the Case Doctrine Prohibits the District Court from Finding in Opposition to the Court of Appeals a Failure to Demonstrate Prejudice.

In dismissing Carlos' petition, the district court found that counsel had rendered deficient performance, but that the deficient performance was not prejudicial because the psychosexual evaluation did not affect the length of Carlos' sentence. However, this holding is directly contrary to the holding of the Court of Appeals in the appeal of the dismissal of Carlos' initial petition and is prohibited by the law of the case doctrine. Therefore, the order dismissing Carlos'

amended petition must now be reversed.

When the Court of Appeals determined that the district court had erred in denying counsel to assist Carlos in presenting the issue of whether he had been denied effective assistance of counsel in relation to counsel's actions/inactions regarding the psychosexual evaluation, the Court had to determine whether the post-conviction petition had alleged facts that might give rise to a valid claim. *Esquivel v. State,* Slip Op. at page 7, *citing Charboneau v. State,* 140 Idaho 789, 792-93, 102 P.3d 1108, 1111-12 (2004). In making that determination, the Court of Appeals was required to consider both whether Carlos had alleged facts pointing to deficient performance and whether he had alleged facts pointing to prejudice. *Esquivel v. State,* Slip Op. at pages 6-7.

In determining whether there were facts alleged to point to prejudice, the Court of Appeals wrote:

> The record before this Court on Appeal demonstrates that the results of Esquivel's psychosexual evaluation were considered by the district court in making its sentencing decision and was a factor contributing to the length of his sentence.

Esquivel v. State, Slip Op. at page 7.

However, on remand, the district court held to the contrary, stating that it did not rely upon the psychosexual report in deciding what sentence to impose. CR 92.

This holding by the district court violates the law of the case doctrine.

"The 'law of the case' doctrine provides that when 'the Supreme Court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal." *Taylor v. Maile,* ___ Idaho ___, ___ P.3d ___, 2009 WL 213074 * 3 (2009), *citing Suitts v. First Sec. Bank of Idaho, N.A.*, 110

Idaho 15, 21, 713 P.2d 1374, 1380 (1985), *quoting Fiscus v. Beartooth Elec. Coop.,* Inc., 180 Mont. 343, 345, 591 P.2d 196, 197 (1979).

Further, the law of the case doctrine applies to all appellate decisions, not just those of the Supreme Court. *Swanson v. Swanson,* 134 Idaho 512, 515, 5 P.3d 973, 976 (2000). "[A] decision by the appellate court upon a point distinctly made and essential to its determination upon a previous appeal is in all subsequent proceedings, in the same case, a final adjudication." *Brinton v. Johnson,* 41 Idaho 583, 592, 240 P. 859, 861 (1925).

Moreover, the law of the case doctrine applies to mixed questions of law and fact as well as questions of law. *See, Airstream, Inc. v. CIT Financial Services, Inc.,* 115 Idaho 569, 574-575, 768 P.2d 1302, 1307-1308 (1988) (applying the law of the case doctrine to the question of whether CIT was purchasing recreational vehicles from Airstream); *and Insurance Associates Corp. v. Hansen,* 116 Idaho 948, 950-51, 782 P.2d 1230, 1232-33 (1989) (applying the law of the case doctrine to a trial court's original findings of fact which were upheld by the Court of Appeals). "Accordingly, the facts having been decided, they are final, they have become the law of the case, and the Court of Appeals' pronouncement must be adhered to, both in the trial court and on subsequent appeal." *Id.* And, the question of whether prejudice has been established in a post-conviction claim of ineffective assistance of counsel is a mixed question of law and fact. *Young v. State,* 115 Idaho 52, 54, 764 P.2d 129, 131 (Ct. App. 1988).

In this case, the Court of Appeals held that the record established that the psychosexual evaluation did affect the length of the sentence imposed. Therefore, the district court could not revisit that question on remand and find no prejudice relative to counsel's deficient performance in not advising Carlos of his constitutional rights relative to the evaluation. *Taylor v. Maile,*

supra; Swanson v. Swanson, supra; Insurance Associates Corp. v. Hansen, supra; Young v. State, supra.

Having found deficient performance and by the doctrine of the law of the case being required to find prejudice, the district court erred in dismissing Carlos' petition. *Strickland v. Washington, supra.*

B. In the First Alternative, the District Court's Finding that it did not Rely upon the Psychosexual Evaluation in Sentencing Carlos is Clearly Erroneous.

As set out above, the law of the case doctrine requires that the district court decision dismissing Carlos' petition must be reversed. However, the district court decision must also be reversed because it is clearly erroneous.

On review of the dismissal of a post-conviction petition, the appellate court will not disturb the lower court's factual findings unless they are clearly erroneous. I.R.C.P. 52(a); *Queen v. State,* 146 Idaho 502, 503, 198 P.3d 731, 732 (Ct. App. 2008). The appellate court exercises free review of the district court's application of the relevant law to the facts. *Queen v. State,* 146 Idaho at 504, 198 P.3d at 733.

In this case, the district court found that it did not consider the psychosexual evaluation in determining Carlos's sentence. However, because this finding was clearly erroneous, it must now be reversed. I.R.C.P. 52(a), *Queen v. State, supra.*

As set out in Carlos' Opening Brief in his initial appeal and as quoted above, both the state and the district court relied on the psychosexual evaluation in recommending and imposing a sentence. The state spoke of how Carlos had gone to SANE, but refused to answer MSI questions and complete the Millon, and how Dr. Engle found Carlos to be arrogant and at least a

medium risk to re-offend. T (30424) pg. 256, ln. 21 - pg. 258, ln. 18. And, the district court, imposing the precise sentence the state requested, based upon the psychosexual evaluation, also cited the evaluation as supportive of the sentence. T (30424) pg. 270, ln. 2-22. And, then in denying Carlos' Rule 35 motion, the district court again stated its reliance on the psychosexual evaluation. CR (30424) 121; Memorandum Decision (denying Rule 35 Motion), pg. 4.

Although the district court now states that it did not rely on the psychosexual report, but rather only mentioned the report in passing, that finding is contrary to the record. Because the finding was clearly erroneous, it must now be reversed. I.R.C.P. 52(a); *Queen v. State, supra.* And, when the finding that the district court did not rely on the evaluation in sentencing and in denying the Rule 35 motion is reversed, the order denying post-conviction relief must also be reversed. *Strickland v. Washington, supra.*

C. In the Second Alternative, Reversal is Required Because the State Did Not and Cannot Demonstrate Beyond a Reasonable Doubt that the Error in Denying Carlos his State and Federal Constitutional Rights to Remain Silent was Harmless.

The denial of Carlos' petition must be reversed first because it violates the law of the case doctrine and second because it rests upon a clearly erroneous factual finding by the district court. But, the denial must also be reversed because, in accord with *DeRushé v. State,* ___ Idaho ___, 200 P.3d 1148 (2009), the error in denying Carlos his right to remain silent must be analyzed under the constitutional error standard of *Chapman v. California,* 386 U.S. 18, 82 S. Ct. 824, *reh'g denied,* 386 U.S. 987, 87 S. Ct. 1283 (1967), a standard the state did not and cannot meet.

In *DeRushé,* the petitioner filed a *pro se* petition alleging that trial counsel had committed an error in depriving him of the right to testify in his own behalf. Analyzing this claim as an ineffective assistance of counsel claim, the district court rejected it, stating, "There is nothing that

is in front of the court or in the record that [DeRushé's counsel's] decision not to put Mr. DeRushé on breached that standard or breached the duty of counsel." *DeRushé v. State,* ___ Idaho at ___, 200 P.3d at 1152.

The Supreme Court held that the district court erred in making this analysis:

> The district court erred in analyzing DeRushé's claim as alleging ineffective assistance of counsel rather than as alleging denial of his constitutional right to testify in his own behalf.

Id.

The difference between an analysis under the doctrine of ineffective assistance of counsel and an analysis under the doctrine of the denial of the right to testify is explained in *State v. Darbin,* 109 Idaho 516, 708 P.2d 921 (Ct. App. 1985):

> . . . if the failure of a defendant to testify is considered only in the context of deprivation of a fundamental constitutional right, and not in the context of effective assistance of counsel, then the defendant has the burden only to show he was deprived of the right to testify. The burden then shifts to the state to demonstrate that the constitutional violation was harmless error, i.e., the state must convince the reviewing court beyond a reasonable doubt that the alleged error did not contribute to the defendant's conviction. *Chapman v. California,* 386 U.S. [18] at 24, 82 S. Ct. [824] at 828 [*reh'g denied,* 386 U.S. 987, 87 S. Ct. 1283 (1967)].

State v. Darbin, 109 Idaho at 522, 708 P.2d at 927.

In accord with *DeRushé*, the denial of a defendant's right to testify should be analyzed, not as an instance of ineffective assistance of counsel under the Sixth Amendment, but rather as a denial of a constitutional right under the Fifth Amendment. And, in that analysis, the burden is on the state to demonstrate that the error was harmless error. In other words, the state must convince the appellate court beyond a reasonable doubt that denying a defendant of the right to testify did not contribute to his/her conviction and sentence. *Chapman v. California, supra*; *State*

v. Darbin, supra.

The denial of the right to testify, as at issue in *DeRushé,* is analogous to the constitutional right to remain silent. U.S. Const. Amend. 5, Idaho Const. Art. I, § 13. Just as the denial of the right to testify must be analyzed under the *Chapman* harmless error standard, so also must the denial of the right to remain silent be analyzed under the *Chapman* harmless error standard. *See, DeRushé v. State, supra.* In this case, that means that to avoid the grant of relief on post-conviction, the state must demonstrate beyond a reasonable doubt that the psychosexual evaluation did not contribute to Carlos's sentence.

This is a burden the state did not and cannot carry. As set out above, the record is clear and the Court of Appeals has held that the psychosexual evaluation was relied upon by the district court in fashioning its sentence. That being the case, the error in denying Carlos his right to remain silent with regard to the evaluation cannot be found to be harmless error.

Because the state cannot demonstrate harmless error, the order denying post-conviction relief must be reversed.

V. CONCLUSION

The order denying post-conviction relief must be reversed for three reasons: 1) because the district court's finding that it did not rely upon the psychosexual evaluation in sentencing or denying Rule 35 relief, and thus there was no prejudice for purposes of demonstrating ineffective assistance of counsel, violated the law of the case doctrine; 2) because the district court's finding that it did not rely upon the psychosexual evaluation in sentencing or denying Rule 35 relief, and thus there was no prejudice for purposes of demonstrating ineffective assistance of counsel, was clearly erroneous; and 3) because the denial of the constitutional right to remain silent should

have been analyzed under the *Chapman* standard of harmless error, a standard the state did not and cannot meet.

For these reasons, Carlos asks that this Court reverse the order denying post-conviction relief and remand for further proceedings.

Respectfully submitted this 26th day of March, 2009.

Dennis Benjamin

Deborah Whipple
Attorneys for Appellant Carlos Esquivel

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March, 2009, I deposited in the United States mail, two true and correct copies of the foregoing, postage prepaid addressed to:

Office of the Attorney General
P.O. Box 83720
Boise, ID 83720-0010

Dennis Benjamin