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Gonzales v. State Appellant's Brief Dckt. 39517

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IN THE SUPREME COURT OF THE STATE OF IDAHO

2013 JAN 31 A 9:05

Christopher Gonzales,)
)
Appellant,)
)
V.)
)
State Of Idaho,)
)
Respondent.)
_____)

DOCKET No. 39517-2012

APPELLANT BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

John K. Butler
DISTRICT JUDGE

Idaho Attorney General
Criminal Law Division
P.O.Box 83720
Boise, ID 83720-0010

Christopher Gonzales
91053
ICC W-1-B
P.O.Box 70010
Boise, ID 83707

RESPONDENT

APPELLANT

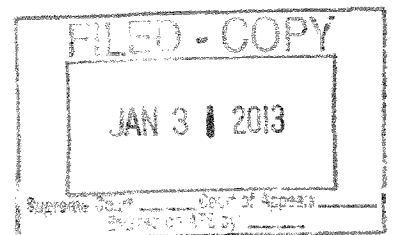


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CASE HISTORY

On February 16, 2008, Mr. Gonzales was arrested for aggravated assault and attempted strangulation.

On February 19, 2008, an arraignment was held and domestic battery, aggravated battery, first degree kidnapping, assault with intent to commit a serious felony, and battery were additionally charged.

On February 29, 2008, a preliminary hearing was held and charges were bound over to district court.

On September 15, 2008, a pretrial conference was held to address the issues of alibi witness, 404(b) evidence, and expert testimony.

On September 24, 25, 26 2008, trial was held and on the third day (September 26, 2008) the jury found Mr. Gonzales guilty of attempted strangulation, aggravated battery with a weapon enhancement, second degree kidnapping, two counts of domestic battery, two counts of aggravated assault with a deadly weapon enhancement, and battery.

On December 15, 2008, sentencing was held and Mr. Gonzales received 6 years fixed, 19 years indeterminate for a total of 25 years.

On December 18, 2008, a notice of appeal was filed on the behalf of Mr. Gonzales.

On December 19, 2008, a motion for reduction of sentence (i.e. rule 35) was filed.

On January 7, 2009 an order denying rule 35 motion without hearing was issued.

On February 10, 2010, an unpublished opinion of appeal was filed with the remitter following on March 5, 2010.

On January 28, 2011, a petition for post-conviction relief was filed and was amended on March 10, 2011.

On September 13, 2011, an evidentiary hearing on post conviction was held

On October 5, 2011, judgment of dismissal with prejudice was filed.

This appeal follows.

FACTS OF THE CASE

On February 19, 2008, the petitioner was charged with Domestic Battery, A misdemeanor(count IX), which was alleged to have occurred on February 12, 2008. He was also charged with Attempted Stangulation, a felony (count III); and Domestic Battery, a misdemeanor (countIV); together with a weapon enhance-ment, all were alleged to have occurred on February 13, 2008. Lastly, the petitioner was charged with Assault with the Intent to Commit a Serious Felony, a felony (count VI), and Battery, a misdemeanor (count VII), together with a weapons enhancement, which were alleged to have occurred 16, 2008.

On September 26, 2008, a jury returned a verdict of guilty as to the charges of Attempted Strangulation, Aggravated Battery with a weapons enhancement, second degree kidnapping, two counts of misdemeanor Domestic Battery, two counts of Aggravated Assault with a weapons enhancement, and misdemeanor battery.

JUDICIAL REVIEW

To prevail on ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient, and that the defendant was prejudiced by the deficiency. Hassett v. State, 127 Idaho 313,316,900 P.2d 221,224 (ct.App 1995) Davis V. State, 116 Idaho 401,406,775 P.2d 1243,1248 (ct. App. 1989)

To establish a deficiency, the appellant has the burden of showing that the attorney's representation fell below a objective standard of reasonableness. Argon V. State, 114 Idaho 758,760,760 P.2d 1174,1176 (1988)

To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. Aragon V. State, 114 Idaho 758,760,760 P.2d 1174,1176 (1988)

The govern legal standard plays a critical role in defining the question to be asked in assessing the prejudice from council's errors. When a defendant challenges a conviction the question is whether there is a reasonable probability that, absent the errors the fact finder would have had a reasonable doubt respecting guilt. Srtickland V. Wasnington, 104 s.ct. at 2069

ARGUMENT

1. Was Counsel's Representation Deficient By Legal Standards And Was That Deficiency Prejudicial?

The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the constitution. Strickland V. Washington, 466 U.S. at692

In certain Sixth Amendment contexts, prejudice is presumed. United States V. Cronic, 466 US. At 659

Mr. Gonzales asserts that counsels performance at and before trial was deficient, and as a result of the deficiency, manifest injustice has occurred when the jury returned guilty verdicts to counts I,II,III,V,and VI.

At an evidentiary hearing on Mr. Gonzales post-coviction petition held on September 13, 2011, the district court, in denying the States' motion for a direct verdict, cTr p.49, ln.11-22 dicta, found that:

11. There is testimony in the record that the
12. defendant was never shown Exhibit 102, of Exhibit A
in this
13. proceeding prior to the admission evidence. Clearly
14. if in fact as the defendant testified it was something
that
15. he had not prepared, then certainly there would have
been
16. grounds to object to it.
17. At this point in time the court does not find
18. that there was any reasonable basis to believe that
counsel
19. would allow Exhibit A, because certainly I think that
20. Exhibit A was prejudicial to the defendant, based on
all
21. the evidence presented in the trial. So the States
motion
22. for a directed verdict will be denied.

Mr. Gonzales testified at his post-conviction hearing (Tr. p.35, ln 2-12) that he never had the opportunity to view Exhibit 102, now Exhibit A, prior to trial; that he never provided counsel with any written statements indicating his guilt of untruths as to his whereabouts on February 13, 2008 (Tr.p.33, ln.4-11) and that no objection was made by counsel at trial to the admission of Exhibit 102 (Tr.p.35,ln. 18-21)(sic)(Lisa Moore testified at trial that the letter was written by Mr. Gonzales)(Tr.p.13-21)

The Strickland, court agreed that the Sixth Amendment imposes on counsel a duty to investigate, because reasonably effective assistance must be based on professional decisions and informed legal choices can be made only after investigation of options, Strickland V. Washington, 104 s.ct. at 2061

The Strickland court further went on to state that; If there is only one plausible line of defense...counsel must conduct a "reasonably substantive investigation" into that line of defense, since there can be no strategic choice that renders such an investigation unnecessary. Id at 1252. The same duty exists if counsel relies at trial on only one line of defense... Id at 1253(quoting Rummel V. Estelle, 590 F.2d 103,104(CAS 1979)

The scope of the duty,however, depends on such facts as the strength of the governments case and the likelihood that pursuing certain leads may prove more harmful than helpful. 693 F.3d at 1253, n 16

Mr. Gonzales has always maintained his innocence as to those most serious of charges; count I, attempted Strangulation; count II, aggravated battery w/ I.C. §19-2520 weapons enhancement; count III, kidnapping in the 2nd degree; count V, aggravated assault w/ I.C. §19-2520 weapons enhancement; and countVI aggravated assault w/ I.C. §19-2520 weapons enhancement.

The petitioner asserts that counsel's representation at trial was grossly inadequate to the advisarial process by not informing him of the existence of Exhibit 102 prior to its admission in open court and by allowing Lisa Moore to testify as to its authenticity without objection. If counsel had performed a "reasonably substantive investigation" into Exhibit 102 (i.e. a handwriting analysis), then counsel would have provided the defendant the ability to refute the testimony of Lisa Moore, through expert testimony; as well as through his alibi witnesses.

Mr. Gonzales asserts that an expert; as to his handwriting on Exhibit 102 when presented to Lisa Moore for her testimony; would have put enough doubt into the jury's minds as to his guilt to counts I, II, III, V, and VI. Mr. Gonzales has always maintained his innocence to those charges, and counsel's only strategy for trial was actual innocence whether that be by alibi witnesses not called, or by refuting Lisa Moore's testimony at trial.

Fundamental error is one that so profoundly distorts the proceedings that it produces manifest injustice, depriving the criminal defendant of the fundamental right to due process; error which goes to the foundation or basis of a defendant's rights, goes to the foundation of the case or takes from the defendant a right which was essential to his or her defence and which no court could or ought to permit to be waived. State V. Rozajewski, 130 Idaho 644, 945 P.2d 1390 (ct.app. 1997)

Mr. Gonzales' fundamental right to a fair and impartial trial and the right to confront and cross-examine the state's case was deprived him by counsel's failure to; a) inform him of Exhibit 102 prior to its admission at trial and; b) by denying him the right to put the state's witness and evidence to its fullest test through an expert witness (handwriting analyst), to refute Lisa Moore's testimony as to the authenticity of exhibit 102.

The district court has acknowledged that exhibit A (Tr. Ln. 19-21) was prejudicial to the defense, (...I think that exhibit A was prejudicial to the defendant, based on all the evidence presented in the trial.). The court further acknowledges that the foundation for Lisa Moore's testimony regarding exhibit A was not established (Tr. p.44, ln. 18-21)(... certainly the testimony of Lisa Moore does not lay the foundation for the admissibility of it? There was no foundation laid to establish that it was something written by the defendant.)

Mr. Gonzales avers that by comparing addendum A (Exhibit 102) and addendum B (handwriting sample) this court can see that a handwriting analysis should be of consequence to support his claim of ineffective assistance of counsel.

At Mr. Gonzales' post-conviction hearing, lead counsel, (Dan Taylor), testified that he had found a so-called confession letter (Tr.p.56 ln. 13-25; p.57, ln.1-8) a week before trial which led him to decide not to call Mr. Gonzales' alibi witnesses at trial.

Co-counsel (Stacy Gosnell) testified at the same hearing (Tr. p.83, ln. 15-20) that it was one or two days before trial prior when she personally discovered the so-called confession letter. She also testified that the alibi witnesses had already been prepped for trial prior to its discovery.

Both counsel and Co-counsel said that the so-called confession letter is not in the file, nor can either counsels remember how and when it got in the file.

Mr. Taylor also testified (Tr.p.51 ln.16-25, p.52 ln.1) (Tr.p.53 ln.2-10) that he had just taken over the Public Defender Contract a mere 3 weeks prior to the scheduled trial. Mr. Taylor also testified that he did not speak with Mr. Gonzales until a week or two after he knew about Mr. Gonzales' case.

This court has long adhered to the proposition that tactical and strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law or other shortcomings capable of objective evaluation. Howard V.State, 126 Idaho 231, 233, 880P.2d 261, 263 (ct.app. 1994)

Counsel's lack of preparation for trial by not having a handwriting expert verify the authenticity of exhibit 102, the failure to even object to its admission at trial, preserving the issue for direct appeal, cannot be found to be either adequate representation, or strategic or tactical decision, acceptable to the adversarial process.

Further, counsels performance, or lack thereof, has contributed not only to findings of guilt due to inadequate preparation for trial but also by not presenting proper jury instructions regarding the deadly weapons enhancement, I.C. §19-2520.

The United States Supreme Court in Apprendi, stated that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior convictions) that increases the maximum penalty for a crime must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt" (citing Jones V. United States, 526 U.S. 227, 119 S.Ct. 1215 (1999) Apprendi V. New Jersey, 530 U.S. 466 (2000))

The Apprendi, court so found that the Winship's due process and associated jury protections extend, to some degree, "to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence." Almendarez-Torres, 523 U.S. at 251, 118 S.Ct. 1219 (Scalia J. dissenting)

Under Apprendi, the court reasoned that; (1) constitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense, *id* at 85-88, 106 S.Ct. 2411, and (2) that a state scheme that keeps from the jury facts that "expos[e][defendants] to greater or additional punishment." *id* at 88, 106 S.Ct. 2411, may raise serious constitutional concerns.

Even Idaho law speaks to this matter in that Idaho Code §19-2520 requires that the state must charge the weapons enhancement prior to the preliminary hearing.

Charging weapons enhancements as separate counts in indictment was required by statute I.C. §19-2520 State V. Rhoades 119 Idaho 594, 809 P.2d 455 (1991) Because the firearm enhancement statute increases the maximum penalty for the charged offense by fifteen years, the jury must find the facts that trigger the enhancement. I.C. §19-2520 State V. McLeskey, 138 Idaho 619, 69 P.3d 111 (2003)

Mr. Gonzales avers that the jury was not even informed of the weapons enhancement at trial nor were they given the opportunity to find those facts necessary to trigger said enhancement. The jury was only provided a questionnaire in the form of yes and no and a discription of a deadly weapon, to wit, a knife, which was the element of aggravated battery, count I; and the aggravated assaults in count V and VI.

Because aggravated battery and aggravated assault requires a firearm or other deadly weapon be used to commit the offense of aggravated battery and aggravated assault the jury did not find the facts necessary to trigger the enhancement nor were they provided the choice of jury nullification as to its application to the underlying offense charged.

Had the trial proceeded with an information or verdict part II, charging Mr. Gonzales specifically with I.C. §19-2520, the jury would not have found Mr. Gonzales guilty of the weapons enhancement after first finding him guilty of aggravated battery I.C. 18-907 and aggravated assault 18-905, both which require the use of a deadly weapon in its commission.

The long standing practice in Idaho with regard to enhancements (i.e. I.C. §19-2514) persistent violator enhancement, and I.C. §18-8005(5) DUI enhanced penalty statute, is through bifurcating said trial.

At no time was the jury presented with an information or verdict part II at trial specifically addressing the enhancement charge, I.C. §19-2520.

By not insuring that Mr. Gonzales' trial was bifurcated as to the enhancement charge, Mr. Gonzales was further prejudiced by improper jury instructions not given regarding the enhanced penalty statute which attached itself to counts II, V, and VI, thereby making counsels representation inadequate.

Conclusion

Mr. Gonzales has shown that his counsel was deficient in representing his interests at trial. The district court and the state both agreed that counsel's failure to object to exhibit 102 at trial was deficient. The court believed him to be prejudiced by that evidence at trial.

In the interest of justice the Appellant moves this court for an Order of Remand and Reversal of Conviction and moves this court for a new trial.

Submitted this 27 day of January 2013



Christopher Gonzales

CERTIFICATE OF SERVICE

I CERTIFY that on this 29 day of January 2013, I caused a true and correct copy of the foregoing document to be:

mailed

hand delivered

faxed

to: Idaho Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010


Christopher Gonzales

APPENDICE A

Lisa,

I don't know where to start, and
don't really understand how to handle this.
I did something I never known to be
capable of.

I can't even ~~imagine~~ ~~imagine~~ ~~imagine~~ ^{imagine}
how scared you are. It haunts me for
days now as they come and go. To be truthful
I don't know what quite to say, but to
ask a chance to talk, perhaps over a
meal anywhere, but ask you please grant me
this one last thing.

I don't know what else to say.

Chris

ADMITTED
DATE 9-25-08
CASE # CR2008-773



APPENDICE B

IN THE SUPREME COURT OF THE STATE OF IDAHO

Christopher Gonzales,)
)
Appellant,)
)
v.)
)
State of Idaho,)
)
Respondent,)

DOCKET NO. 39517-2012

AFFIDAVIT OF CHRISTOPHER
GONZALES

State of Idaho)
) ss
County of Ada)

I, Christopher Gonzales, after first being daly sworn upon his oath deposes and says:

1. That I am currently incarcerated at the Idaho Correction Center located in south Boise and am under the care custody and control of Tim Wengler, warden.
2. That I am the autnor of the attached hand written statement made for the purpose of analysis by the court and in support of my appellant argument.

DATED this 29 day of January 2013.



Christopher Gonzales

*Sworn and Subscribed this 29th day of January 2013
James G. Quinn
COMMISSIONER OF COURTS, IDAHO*

JAMES G. QUINN
NOTARY PUBLIC
STATE OF IDAHO

EXHIBIT A

00501

I don't know where to start and don't really understand how to handle this. I did something I never known to be capable of.

I can't ever imagine how scared you are. It haunts me for days now as they come and go. To be truthful I don't know what quite to say but to ask a chance to talk perhaps over a meal any where but ask you please grant me this one last thing. I don't know what else to say.

-Gillie

IN THE SUPREME COURT OF THE STATE OF IDAHO

Christopher Gonzales,)
Appellant,)
v.)
State of Idaho,)
Respondent,)

DOCKET NO. 39517-2012
AFFIDAVIT OF CHARLES E. SMITH

State of Idaho)
County of Ada)ss)

I Charles E. Smith, after first being duly sworn upon his oath, deposes and says:

1. That I am an inmate at the Idaho Correctional Center located in south Boise, and am under the direct care custody and control of Tim Wengler, warden.
2. That I read from Exhibit 102 to Mr Gonzales the words that appeared thereon.
3. That I witnessed Mr. Gonzales writing said words on a separate piece of paper labeled as exhibit A and attached to his affidavit.

DATED this 29 day of January 2013.

Charles E. Smith
Charles E. Smith

Sworn and Subscribed this 29th day January 2013
James G. Quinn, Notary
COMMISSION EXPIRES: 9/10/2013

