9-7-2012

Barcella v. State Appellant's Reply Brief Dckt. 39520

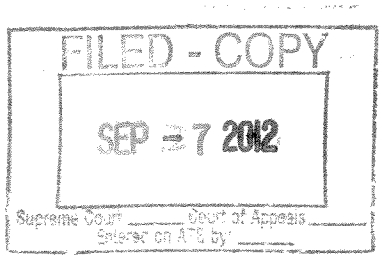
IN THE SUPREME COURT OF THE STATE OF IDAHO

GERALD A. BARCELLA,	)	
	)	
Petitioner-Appellant,	)	
	)	S. Ct. No. 39520-2012
vs.	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent-Respondent.	)	
	)	

REPLY BRIEF OF APPELLANT

Appeal from the District Court of the First Judicial District of the State of Idaho In and For the County of Kootenai

HONORABLE JOHN PATRICK LUSTER
District Judge



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A. The District Court's Finding that Mr. Barcella Waived the Right to Testify is Unreasonable and Clearly Erroneous

> [O]f relevance here, *Hoffman*[1] indicates that a defendant may not be found to have waived the right to testify unless the defendant was aware he or she had such right and also the ultimate authority to decide whether to testify, regardless of counsel's advice.

Rossignol v. State, 152 Idaho 700, 705, 274 P.3d 1, 6 (Ct. App. 2012), *rev. denied.*

Mr. Barcella testified that counsel John Adams told him that he would not allow him to testify at trial; all three members of the defense team testified that they had no recall of any conversation wherein Mr. Barcella was told that he had a right to testify and the ultimate authority to choose whether to exercise the right; there was no advisement by the district court of the right to testify; there was no recorded waiver; and Counsel Adams testified that he would not have allowed Mr. Barcella to waive the right to testify without putting the waiver on the record, especially since this was a death penalty case. "That's how people die, so I wouldn't do that." Tr. 5/29/07, p. 175, ln. 409.

This case falls squarely in line with *Hoffman* and *Cootz*. Mr. Barcella could not be found

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[1] *State v. Hoffman,* 116 Idaho 689, 778 P.2d 811 (Ct. App. 1989), holding that the record did not support a district court determination that Hoffman made a valid waiver of his right to testify because the district court made no finding that Hoffman was aware of the ultimate right to decide whether to testify, the attorney made no claim in the post-trial hearing that Hoffman had been advised of such right, and it did not appear that the district court ever informed Hoffman that he could testify if he so desired. *See also, Cootz v. State,* 129 Idaho 360, 368-69, 924 P.2d 622, 630-31 (Ct. App. 1996), holding that the record did not support the district court finding of a waiver of the right to testify where Cootz stated that he repeatedly told counsel of his desire to testify, but could not say that counsel told him that he could not testify or that the decision to testify was ultimately his and counsel could not recall whether he had advised Cootz that the ultimate decision belonged to him. 129 Idaho at 368-69, 924 P.2d at 630-31.

to have waived the right to testify because there was no evidence that he was aware that he had such a right and also the ultimate authority to decide whether to exercise it regardless of counsel's advice. The district court's finding that Mr. Barcella waived the right to testify was unreasonable and clearly erroneous.

In an attempt to avoid the outcome dictated by *Hoffman* and *Cootz,* without citation to authority, the state asserts that the district court was not required to find "substantial evidence" of Mr. Barcella waiving his right to testify, but only that Mr. Barcella failed to meet his burden of showing that his constitutional rights were violated. Respondent's Brief at page 12. The state follows this assertion out to its conclusion on page 15 of its brief that the evidence created a "strong inference" that counsel had discussed the right to testify with Mr. Barcella and that because Mr. Barcella never attempted to assert the right during the trial proceedings, there was not a sufficient showing that Mr. Barcella's state and federal constitutional rights to testify were violated. This analysis is inconsistent with the law as set out in *Hoffman* and *Cootz.* But, even ignoring that problem, the analysis is inconsistent with the record.

The state cites the following as the evidence that creates a "strong inference" that Mr. Barcella was aware of his right to testify and knowingly waived it:

> Q. Do you have any memory at all of the Judge talking to you about your right, your ability to waive your Fifth Amendment right to testify?
>
> A. I don't know, it's possible.
>
> Q. You don't know though?
>
> A. I don't know. I know John told me. I didn't know anything about the law back then, I only started learning after my appeal.

Respondent's Brief at page 15, quoting Tr. 5/29/07, p. 124, ln. 9-16. In the state's brief, "I know

John told me" is given emphasis by being written in bold.

This statement, "I know John told me" is the only evidence[2] cited by the state as evidence that Mr. Barcella was aware of his constitutional right to testify and that the decision to exercise or waive the right lay with him and only him. Respondent's Brief at page 15.

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[2] The state could not cite John Adams' testimony for evidence that Mr. Barcella had been advised of his constitutional right and that he alone could waive the right because Mr. Adams testified that he had dominated clients many times, that he could not recall advising Mr. Barcella of his right to testify, and that the only explanation he had for the lack of a waiver on the record was that Mr. Barcella did not want to waive his right. Tr. 5/30/07, p. 168, ln. 15 - p. 169, ln. 22, p. 173, ln. 19 - p. 174, ln. 6.

The state could not cite Mr. Gresback's testimony for evidence that Mr. Barcella had been advised of his constitutional right and that he alone could waive the right because Mr. Gresback could not even remember whether he started working on the case prior to or after the preliminary hearing, whether Mr. Barcella had testified at the trial, or even whether they put on a case in chief, let alone any content of discussions had outside the courtroom. Tr. 8/19/11 p. 48, ln. 17-21; p. 57, ln. 13-25. As Mr. Gresback testified, "There's just been a lot of water under the bridge, and I really don't remember." Tr. 8/19/11 p. 57, ln. 25 - p. 58, ln. 1.

And, lastly, the state could not cite Mr. Durant's testimony both because he testified that he could not remember a conversation about the right to testify happening, Tr. 8/19/11 p. 78, ln. 22-24, and because from his testimony it appears that he had an agenda to protect what he believed was Mr. Adams' well-being by denying any possible implication that he had rendered ineffective assistance and to further get even with Mr. Barcella for what he believed was offensive behavior by Mr. Barcella in the course of Mr. Barcella's representation by the public defender's office. Mr. Durant testified that he disagreed with Mr. Adams' testimony because he did not believe that Mr. Adams could have been a better attorney. Tr. 8/19/11 p. 96, ln. 24 - p. 97, ln. 8. He also testified he believed Mr. Adams is a better man than he is. Tr. 8/19/11, p. 97, ln. 7-8. And, although he claimed that his personal feelings about Mr. Barcella did not affect his testimony, he also testified that Mr. Barcella was a difficult client, in fact, the most demanding murder client he had ever been involved with. Tr. 8/19/11, p. 86, ln. 4-11; p. 97, ln. 9 - p. 98, ln. 1. He testified that Mr. Barcalla was "unique" and that Mr. Barcella's written communications to the office and Mr. Durant were abusive. As Mr. Durant testified, "I think that somebody would be upset by his letters, yes, sir." Tr. 8/19/11, p. 86, ln. 20 - p. 87, ln. 4. This appearance of an agenda is reinforced by testimony from Mr. Durant which conflicted with Mr. Adams' testimony and which conflicted with common sense - he testified that he could not remember any time when there had been a serious disagreement between Mr. Adams and a client regarding the exercise of the right to testify even though he had participated in 2500 cases in the public defender's office and even though Mr. Adams testified to disagreements that rose to the level of drag out fights. Tr. 5/30/07, p. 168, ln. 16-17; Tr. 8/19/11, p. 80, ln. 24-25; p. 94, ln. 21 - p. 95, ln. 4.

However, the state has not quoted the full testimony given by Mr. Barcella. The full testimony is:

> Q. Let's talk about the fact that you did not testify at your trial. Did John or Tim talk to you about your right to testify on your own behalf and in your own defense at trial?
>
> A. **John told me he wouldn't allow me to testify.**
>
> Q. Once, multiple times?
>
> A. At least once before the trial. A lot of times during the trial. During jury selection we had two perspective jurors that the first one said that John asked the perspective jurors why I wouldn't take the stand and one guy raised his hand and John picked him, and he stood up and says, everybody in the room knows he's guilty. I know he's guilty, everybody in the room knows he's guilty, that's why he won't testify.
>
> And the guy said I'm sick and tired of getting 20 years for snorting a line of coke and these killers are only getting two or three years. And a couple of minutes later, that guy's buddy, they were hanging around together, laughing, you could tell they were friends, said the same thing.
>
> **And I said, John, I'm going to have to testify. And he said, you're not going to testify, I'm not letting you. I'm not allowing you to take the stand, I think is his exact words.** And I believe it was a technique, whatever, a trial technique or whatever, a trial tactic, **but he wasn't going to let me testify.**
>
> Q. How many times did you communicate to him throughout the trial that you wanted an opportunity?
>
> A. That time after the jury selection and I'm sure right after that again, and the days after that. One of the snitches on the stand told the jury that I shot and killed two other people and never went to court for it, and it wasn't true.
>
> And a lot of this stuff wasn't true. **And I told John, I want to testify.** And we were talking about the character defense at the time, and John said we're not doing a character defense either, right after that. And I said, I want to do a character defense, and I wanted to testify, because these people think I'm some kind of killer going around killing all these people, and it's bullshit. It wasn't true.

I've never been a suspect in anything like that. **And I told John I wanted testify** and tell them my record and stuff, and tell them what all these different snitches were saying wasn't true.

(Defendant upset on the stand.)

The trial was getting worse and worse with all these lies, **and I kept telling him I want to testify, somebody has to straighten out this shit, and he wouldn't let me testify. He said, you're not going to testify, and that's it.**

Q. I don't see anywhere in the trial transcript where the Court or John Adams, outside the presence, goes through a little colloquy with you where you have a right to testify, you waive that right, nobody can compel you to, but did something like that happen perhaps off the record?

A. **I don't think so, no.**

Q. Do you have any memory at all of the Judge talking to you about your right, your ability to waive your Fifth Amendment right to testify?

A. I don't know, it's possible.

Q. You don't know, though?

A. I don't know. I know John told me. I didn't know anything about the law back then, I only started learning after my appeal. I started buying books and reading up about it, so I had to rely on what John told me. I mean I was scared anyway, **I'm not going to allow you to testify, and he told me before the trial and after the trial.** You know, I figured I'd listen to my lawyer.

Tr. 5/29/07 p. 122, ln. 1 - p. 124, ln. 20 (emphasis added).

When Mr. Barcella's testimony is read in full, it is clear that the statement " I know that John told me" refers to the fact that Mr. Adams told Mr. Barcella that he (Adams) would not allow Mr. Barcella to testify. This is not evidence that creates a "strong inference" that Mr. Barcella was aware of his right to testify and the fact that only he could waive the right.

Mr. Barcella did demonstrate that he had been deprived of the right to testify - he was

never informed of the right, he was never informed that the right was his and his alone to exercise or waive, and counsel denied him the right to testify. Thus, the burden shifted to the state to prove beyond a reasonable doubt that the deprivation did not contribute to the conviction. *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824 (1967), *State v. Darbin,* 109 Idaho 615, 708 P.2d 921 (Ct. App. 1985), *Rossignol, supra.* The district court clearly erred in concluding that there was substantial evidence that Mr. Barcella waived his constitutional right to testify.

B. The State Did Not Prove Beyond a Reasonable Doubt that the Deprivation of Mr. Barcella's Constitutional Right to Testify was Harmless.

Both the state and Mr. Barcella agree that the district court erred in applying the fundamental error test of *State v. Perry,* 150 Idaho 209, 228, 245 P.3d 961, 980 (2010), *reh'g denied,* to determine whether the denial of the constitutional right to testify requires post-conviction relief. Appellant's Opening Brief at pages 17-18; Respondent's Brief at p. 6. Both Mr. Barcella and the state agree that *Chapman's* harmless beyond a reasonable doubt standard applies. *Id.*

In his Opening Brief, Mr. Barcella has shown that the state did not carry its burden of proving harmlessness beyond a reasonable doubt because it did not prove that, had Mr. Barcella testified, the jury would have still found the elements of malice and premeditation required to support a conviction of first degree murder. Appellant's Opening Brief at pages 20-22.

The state does not address this showing except to assert that additional evidence about Mr. Barcella's intoxication from his own perspective would have been cumulative of testimony of other witnesses as to the fact that he had been drinking and was intoxicated. Respondent's Brief at pages 19-20. This does not address the salient point - even though other witnesses

testified that Mr. Barcella was drunk, they did not testify, nor could they even know, that Mr. Barcella was in an alcohol and drug induced blackout at the time of the offense. This testimony could only come from Mr. Barcella. And, the state did not prove beyond a reasonable doubt that, had the jury heard Mr. Barcella's testimony, it would have concluded that he could have formed the requisite state of mind to act with malice and premeditation.

The state also attempts to argue that it proved that the denial of the right to testify was harmless beyond a reasonable doubt because Mr. Barcella's testimony would have been inconsistent with the strategic decision of Mr. Adams to present a defense of complete innocence instead of a defense of guilt to only the lesser offense of manslaughter. The state asserts that Mr. Barcella's testimony "which essentially amounted to an argument that he should be convicted of manslaughter rather than first-degree murder, would have been directly contrary to the defense's trial strategy and would not have affected the outcome of the trial." Respondent's Brief p. 19. To support this argument, the state asserts that strategic and tactical decisions are the exclusive province of the attorney after consultation with the client. Respondent's Brief at page 19, citing ABA Standards for the Administration of Criminal Justice, The Defense Function 5.2. ABA Standard 4-5.2(b) states that strategic and tactical decisions, including what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced are to be made by counsel after consultation with the client where feasible and appropriate. However, the Standard does not state that the determination of the objective of the representation - in this case whether to seek total exoneration or whether to seek conviction of a lesser included offense - lies solely with counsel. And, in fact, RPC 1.2(a) provides that with just two exceptions "a lawyer shall abide by a client's

decisions concerning the objectives of representation." Those exceptions, inapplicable here, are that the lawyer may limit the scope of representation in some situations with the client's informed consent and that a lawyer shall not counsel or assist in conduct that the lawyer knows is criminal or fraudulent. The state cannot prove beyond a reasonable doubt that, had Mr. Barcella not been denied the right to testify, counsel would have carried forth with an objective contrary to Mr. Barcella's objective in violation of the Rules of Professional Conduct and that the outcome of the trial would not have been different.

The state did not prove beyond a reasonable doubt that the denial of the right to testify was harmless and the district court conclusion to the contrary is wrong.

III. CONCLUSION

Based on the argument in the Appellant's Opening Brief and above, Mr. Barcella asks that this Court reverse the judgment denying post-conviction relief and remand with instructions to grant relief, vacate the conviction, and grant a new trial.

Respectfully submitted this 7th day of September, 2012.

Dennis Benjamin

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 7th day of September, 2012, caused two true and correct copies of the foregoing document to be placed in the United States mail, postage prepaid, addressed to:

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