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Barnes v. State Respondent's Brief Dckt. 40092

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

MARJORY ANN BARNES,)	
)	No. 40092
Petitioner-Appellant,)	
)	Kootenai Co. Case No.
vs.)	CV-2011-1334
)	
STATE OF IDAHO,)	
)	
Respondent.)	

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF KOOTENAI**

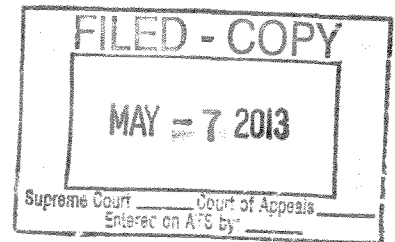
**HONORABLE FRED M. GIBLER
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STATEMENT OF THE CASE

Nature Of The Case

Marjory Ann Barnes appeals from the district court's order denying her petition for post-conviction relief after an evidentiary hearing.

Statement Of Facts And Course Of Proceedings

The Idaho Court of Appeals described the facts underlying Barnes' criminal convictions as follows:

Following a report of concerns that Barnes and her boyfriend, Gregory Klundt,^[FN] were manufacturing methamphetamine in their shared residence, law enforcement obtained a warrant to search their house. The search revealed a number of items associated with the manufacture of methamphetamine. The state charged Barnes with conspiracy to traffic in methamphetamine by manufacture, I.C. §§ 37-2732B(a)(3) and 18-204; trafficking in methamphetamine by manufacture, I.C. §§ 37-2732B(a)(3) and 18-204; and possession of a controlled substance, pseudoephedrine, with intent to manufacture methamphetamine, I.C. § 37-2732(a)(1)(A). After trial, a jury found Barnes guilty. Barnes was sentenced to concurrent determinate terms of five years for each count.

FN Klundt was also charged with the same crimes. The district court joined Barnes's and Klundt's cases for trial. However, the cases were not consolidated on appeal.

State v. Barnes, Docket No. 37995, 2012 Unpublished Opinion No. 305S at p.2 (Idaho App. May 4, 2012).¹ "Barnes was also found guilty of manufacture of a

¹ Pursuant to Barnes' motion, the Idaho Supreme Court has entered an order taking judicial notice of the following transcripts from Barnes' criminal case: (1) suppression hearing held on March 18, 2010; (2) the opening and closing statements from the jury trial; (3) the jury trial; and (4) the sentencing hearing held on July 29, 2010. (Order Granting Motion to Take Judicial Notice, dated February 25, 2013.) The Court has not taken judicial notice of the Clerk's Record or exhibits from Barnes' criminal case. (See id.)

controlled substance where a child is present, I.C. § 37-2737A, and was sentenced to a consecutive indeterminate two-year term.” Id. at p.2 n.2.

In her criminal case, Barnes was originally represented by John Redal, who also represented Klundt. (R., p.100.) “The joint representation continued through the motion to suppress which was made on behalf of both defendants and which was denied.” (R., p.100.) “Following the decision on the motion to suppress Redal withdrew as Barnes’ attorney and Michael Palmer was appointed to represent her.” (R., p.100.) Palmer appeared on May 7, 2010, and the trial began on May 25, 2010. (R., p.100.) As noted, a jury convicted Barnes of the charged offenses. Barnes’ convictions were affirmed on appeal. Barnes, supra.

While her appeal was pending, Barnes filed a *pro se* petition for post-conviction relief alleging numerous claims of ineffective assistance of counsel against both Redal and Palmer and one claim of prosecutorial misconduct. (R., pp.5-9.) Barnes’ petition included a request for counsel, which the court granted. (R., pp.8, 11.)

The state filed an answer and a motion for summary disposition after which post-conviction counsel filed an amended petition again alleging several ineffective assistance of counsel claims and a misconduct claim. (R., pp.13-16, 19-23.) The state filed an answer to the amended petition and Barnes filed a response to the state’s initial motion for summary dismissal. (R., pp.28-33.) The state filed a reply, seeking summary dismissal of Barnes’ claims with the exception of three ineffective assistance of counsel claims, which the state “concede[d] . . . should be resolved by evidentiary hearing.” (R., pp. 34-35, 39-

40.)

The court held a hearing on the state's motion for summary dismissal after which the court ordered an evidentiary hearing on the following claims: (1) "Ineffective assistance of counsel for failing to communicate"; (2) "Ineffective assistance of counsel for failing to advise [Barnes] of her rights"; (3) "Ineffective assistance of counsel for preventing [Barnes] from presenting her defense"; (4) "Ineffective assistance of counsel by . . . engaging in representation of [Barnes] while under a conflict of interest"; and (5) "Ineffective assistance of counsel for failing to adequately prepare for [Barnes'] defense at trial." (R., pp.21, 42; see generally Tr., pp.10-20.) Barnes withdrew the remaining claims in her amended petition and they were dismissed. (R., p.42.)

After the evidentiary hearing, the court entered an order denying relief and a judgment dismissing Barnes' petition. (R., pp.99-113.) Barnes filed a timely notice of appeal. (R., pp.115-116.)

ISSUE

Barnes states the issue on appeal as:

Whether the district court erred when it denied post conviction relief after an evidentiary hearing, rejecting Petitioner's assertion that she had received ineffective assistance of counsel due to a conflict of interest arising from her attorney's concurrent representation of a co-defendant?

(Appellant's Brief, p.3.)

The state rephrases the issue on appeal as:

Has Barnes failed to show error in the district court's denial of her petition for post-conviction relief following an evidentiary hearing?

ARGUMENT

Barnes Has Failed To Show Error In the District Court's Denial Of Her Petition For Post-Conviction Relief Following An Evidentiary Hearing

A. Introduction

Although Barnes alleged a number of claims in her amended petition, all of which were dismissed, on appeal she only challenges dismissal of one of those claims. Specifically, Barnes “is only pursuing the main conflict of interest claim in this appeal.” (Appellant’s Brief, p.6.) With respect to that claim, Barnes contends the district court erred in denying relief because, she argues, Redal had an actual conflict of interest during the period of time he represented both her and her co-defendant, and, as a result, he failed to advise her to plead guilty. (Appellant’s Brief, p.16.) Barnes’ claim fails because there is no evidence that Redal actively represented conflicting interests much less that she was prejudiced as a result of any alleged conflict. To the contrary, the record shows that Redal acted to avoid a potential conflict of interest. Accordingly, Barnes has failed to show error in the district court’s dismissal of her conflict of interest claim.

B. Standard Of Review

“Applications for post-conviction relief under the UPCPA initiate civil proceedings in which, like a civil plaintiff, the applicant must prove his or her allegations by a preponderance of the evidence.” McKay v. State, 148 Idaho 567, 570, 225 P.3d 700, 703 (2010) (citing Hauschulz v. State, 144 Idaho 834, 838, 172 P.3d 1109, 1113 (2007); I.C.R. 57(c)).

When the district court conducts an evidentiary hearing and enters

findings of fact and conclusions of law, an appellate court will disturb the findings of fact only if they are clearly erroneous, but will freely review the conclusions of law drawn by the district court from those facts. Mitchell v. State, 132 Idaho 274, 276-77, 971 P.2d 727, 729-730 (1998). A trial court's decision that a post-conviction petitioner has not met his burden of proof is entitled to great weight. Sanders v. State, 117 Idaho 939, 940, 792 P.2d 964, 965 (Ct. App. 1990).

The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. Peterson v. State, 139 Idaho 95, 97, 73 P.3d 108, 110 (Ct. App. 2003).

C. Barnes Failed To Meet Her Burden Of Establishing She Was Entitled To Post-Conviction Relief Based On An Alleged Conflict Of Interest

"Joint representation of defendants is not per se ineffective assistance of counsel." State v. Hairston, 133 Idaho 496, 511, 988 P.2d 1170, 1185 (1999) (citation omitted). Rather, a defendant seeking relief based on an alleged conflict of interest, to which she did not object at trial, must demonstrate that counsel "actively represented conflicting interests" and that the conflict of interest actually affected the adequacy of the lawyer's performance. Hairston, 133 Idaho at 511, 988 P.2d at 1185; see also Cuyler v. Sullivan, 446 U.S. 335, 348 (1980) (where defendant alleges a conflict based upon his counsel's simultaneous representation of defendant and the prosecutor's key witness, defendant must demonstrate that an actual conflict of interest adversely affected his lawyer's performance); State v. Severson, 147 Idaho 694, 703, 215 P.3d 414, 423 (2009)

("Whether a trial court's failure to adequately inquiry, but the defendant did not object to the conflict at trial, the defendant's conviction will only be reversed if he or she can prove that an actual conflict of interest adversely affected his lawyer's performance.") An actual conflict is defined by its effect on counsel, not by whether there is a "mere theoretical division of loyalties." Mickens v. Taylor, 535 U.S. 162, 171, 172 n.5 (2002). "[T]he possibility of conflict is insufficient to impugn a criminal conviction." Dunlap v. State, 141 Idaho 50, 62, 106 P.3d 376, 388 (2004) (citations omitted). Absent such a showing, a defendant is not entitled to reversal of her conviction. Mickens, 535 U.S. at 173-74; Burger v. Kemp, 483 U.S. 776, 785 (1987).

At the evidentiary hearing, Redal testified there are circumstances in which he has been asked to represent two people charged with the same or similar offenses. (Tr., p.27, L.20 – p.28, L.10.) In those cases, Redal "inform[s] the clients of the potential conflicts and things that could arise." (Tr., p.28, Ls.18-20.) Redal elaborated:

I generally [inform them] in a verbal conversation because, when that issue comes up, you obviously see the issue when they're both sitting in your office because they're asking you to represent both of them. So you generally go over -- the main one that I always go over is it could become a problem if the State were to ask one of you, "I'll dismiss your case if you agree to testify against the other party." And then I said that seriously creates a conflict. And if something like that ever were to happen, then I always -- I inform the client that I probably would not represent both of them after that offer had been made.

(Tr., p.28, L.22 – p.29, L.8.)

Redal testified that although he did not specifically recall discussing the potential conflict issue with Barnes and Klundt, he believed he did because "that

would be a standard thing that [he] would do.” (Tr., p.29, L.16 – p.30, L.13.) Redal explained that he ultimately withdrew from representing Barnes after concluding he “should only continue to represent one of them because it was clear the case was going to be going to trial.” (Tr., p.30, L.25 – p.31, L.6.) Redal further explained:

And given the nature of the case, oftentimes when you get ready for something like that, you can point the finger at the other party and blame them since they were both there, and one of them would. And I believe at that time Gregory Klundt was still in custody and [Barnes] was out. And we talked about that, and [Barnes] felt that it was best for her to go to the public defender’s office.

(Tr., p.31, Ls.6-14.) Redal, therefore, withdrew from Barnes’ representation and Palmer was appointed to represent her with Redal continuing to represent Klundt. (Tr., p.31, Ls.15-16; see R., p.100.)

Redal’s testimony demonstrates his representation was entirely consistent with his obligations under the Sixth Amendment. Redal represented both Barnes and Klundt through the suppression hearing and there is no evidence that their interests were inconsistent up to that point. In fact, Redal testified that he did not believe his dual representation “impacted” either Barnes or Klundt and that, if he “would have thought that, [he] would have withdrawn.” (Tr., p.34, Ls.8-14.) It is well-established that a court may rely on counsel’s statements regarding the existence of a conflict. Sullivan, 446 U.S. at 346-47 (“Absent special circumstances, therefore, trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist.”); State v. Koch, 116 Idaho 571, 574,

777 P.2d 1244, 1247 (Ct. App. 1989) (“When neither the defendant nor his lawyer objects to concurrent representation of a co-defendant, the trial court generally is entitled to assume that no conflict exists or that the defendant knowingly has accepted such a risk.”).

With respect to Redal’s joint representation, the district court found : “No facts were presented by Barnes to show that in connection with the suppression hearing her interests were different from those of Klundt or that Redal failed to present facts or arguments on her behalf at the suppression hearing.” (R., p.108.) Barnes does not challenge the court’s finding in this regard, but instead criticizes the court’s statement, arguing the court “seems to misunderstand the claim.” (Appellant’s Brief, p.13.) Barnes perceives a misunderstanding because she contends:

The point is not that the co-defendants had different interests at the suppression hearing or that Redal failed to do something at the suppression hearing due to the conflict. Rather, the point is that throughout the joint representation the co-defendants had different interests and the attorney’s ability to act in the best interest of Ms. Barnes was inhibited by the attorney’s duties to Mr. Klundt.

(Appellant’s Brief, p.13.) According to Barnes, she and Klundt had divergent interests because, she claims, she was less culpable than Klundt and it was in her “best interest” to “enter into an early plea bargain in the case which would avoid the 5 year mandatory minimum sentence and/or the two year mandatory consecutive sentence.” (Appellant’s Brief, pp.13-15.) Barnes’ arguments fail for at least two reasons.

First, Barnes is incorrect in her assertion that the court’s finding regarding the lack of any evidence of a conflict in relation to the suppression hearing is

irrelevant. Barnes' failure to present any evidence that Redal actively represented conflicting interests in the context of the suppression hearing demonstrates the absence of any actual conflict during the period of joint representation. In the end, Redal did precisely what he should have. Upon realizing that the case was going to trial, and that Barnes may want to "point the finger" at Klundt, he advised her to get a different attorney. (Tr., p.31, Ls.3-14.) As a result, Barnes got precisely the remedy she would have been entitled to at the time had an actual conflict existed. See Holloway v. Arkansas, 435 U.S. 475 (1978).

Second, Barnes' argument is predicated on a theoretical conflict that is unsupported by any evidence, rather than actual conflict, which she was required to prove. Barnes suggests that if Redal had not jointly represented both her and Klundt prior to trial, Redal would or should have secured a plea agreement for her. Barnes, however, presented no evidence of such. She did not elicit any testimony from Redal on this point, nor did she elicit any testimony from Palmer that there was a plea offer she could have taken. (See generally Tr., pp.35-40, 64-94.) If anything, Barnes' testimony that neither Redal nor Palmer discussed "an offer of settlement" demonstrates no such offer existed to discuss, which testimony was consistent with Redal's testimony that if he represented co-defendants and an offer was made to one, he "would not represent both of them after that offer had been made." (Tr., p.29, Ls.1-8; p.102, Ls.11-13.)

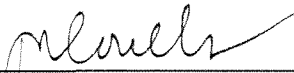
Because Barnes failed to meet her burden of showing an actual conflict of interest, much less that Redal's performance was adversely affected by an actual

conflict of interest, she has failed to show error in the dismissal of her post-conviction petition and her conflict of interest claim.

CONCLUSION

The state respectfully requests that this Court affirm the district court's judgment dismissing Barnes' petition for post-conviction relief.

DATED this 7th day of May 2013.

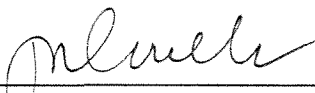


JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of May 2013, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

GREG SILVEY
Attorney at Law
PO Box 565
Star, Idaho 83669



JESSICA M. LORELLO
Deputy Attorney General