

8-31-2009

Willie v. State Appellant's Brief Dckt. 35506

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs

Recommended Citation

"Willie v. State Appellant's Brief Dckt. 35506" (2009). *Idaho Supreme Court Records & Briefs*. 994.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/994

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law.

IN THE SUPREME COURT OF THE STATE OF IDAHO

FRED WILLIE,)	
)	
Petitioner-Appellant,)	NO. 35506
)	
v.)	
)	
STATE OF IDAHO,)	APPELLANT'S BRIEF
)	
Respondent.)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BEAR LAKE

HONORABLE PETER D. MCDERMOTT
District Judge

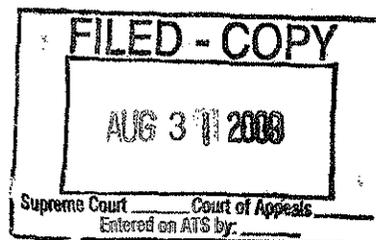
MOLLY J. HUSKEY
State Appellate Public Defender
State of Idaho
I.S.B. # 4843

SARA B. THOMAS
Chief, Appellate Unit
I.S.B. # 5867

DIANE M. WALKER
Deputy State Appellate Public Defender
I.S.B. # 5920
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

ATTORNEYS FOR
PETITIONER-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534



ATTORNEY FOR
RESPONDENT

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE CASE.....	1
Nature of the Case	1
Statement of the Facts and Course of Proceedings	1
ISSUE PRESENTED ON APPEAL	5
ARGUMENT.....	6
I. The District Court Erred When It Dismissed Mr. Willie’s Petition For Post-Conviction Relief Because Trial Counsel Failed To Consult With Mr. Willie About Filing An Appeal When A Rational Defendant In Mr. Willie’s Position Would Want To Appeal	6
A. Introduction.....	6
B. The Proper Standard Of Review After An Evidentiary Hearing Allows The Appellate Court To Set Aside Clearly Erroneous Factual Findings And Freely Review The Application Of Relevant Law.....	6
C. Trial Counsel Had A Duty To Consult With A Defendant About An Appeal If A Rational Defendant Would Want To Appeal, And Therefore Post-Conviction Relief Should Have Been Granted.....	6
CONCLUSION	10
CERTIFICATE OF MAILING.....	11

TABLE OF AUTHORITIES

Cases

<i>Clark v. State</i> , 92 Idaho 827, 452 P.2d 54 (1969)	7
<i>Evensioski v. State</i> , 136 Idaho 189, 30 P.3d 967 (2001)	7
<i>Goodwin v. State</i> , 138 Idaho 269, 61 P.3d 626 (Ct. App. 2002)	6
<i>Mata v. State</i> , 124 Idaho 588, 861 P.2d 1253 (Ct. App. 1993).....	9
<i>McKinney v. State</i> , 133 Idaho 695, 992 P.2d 144 (1999).....	6
<i>Murray v. State</i> , 121 Idaho 918, 828 P.2d 1323 (Ct. App. 1992)	7
<i>Nellsch v. State</i> , 122 Idaho 426, 835 P.2d 661 (Ct. App. 1992).....	7
<i>Roe v. Flores-Ortega</i> , 528 U.S. 470 (2000)	8
<i>Russell v. State</i> , 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990).....	6
<i>State v. Bearshield</i> , 104 Idaho 676, 662 P.2d 548 (1983).....	6
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).....	7
<i>Young v. State</i> , 115 Idaho 52, 764 P.2d 129 (Ct. App. 1988)	6
 <u>Rules</u>	
I.R.C.P. 52(a)	6

STATEMENT OF THE CASE

Nature of the Case

Fred Willie appeals from the district court's Memorandum Decision and Order denying him post-conviction relief. Mr. Willie asserts that the district court erred when it denied his claim that he received ineffective assistance of counsel regarding counsel's failure to consult with him about his appeal rights. The district court erred in denying him post-conviction relief.

Statement of the Facts and Course of Proceedings

Under two separate case numbers, CR 05-896 and CR 05-785, the prosecutor charged Mr. Willie with nine counts of felony criminal conduct involving minors. (R., pp.49-50.) Mr. Willie's case proceeded to trial in mid-November of that year. (R., p.46.) After a two-day trial, the jury acquitted Mr. Willie of five of the eight criminal charges pending against him. (R., p.50.) The jury found him guilty of three counts of lewd conduct with a minor. (R., pp.11, 31, 50.) The district court sentenced Mr. Willie on April 28, 2006. (R., pp.11, 31, 51.) The district court imposed upon Mr. Willie a unified sentence of twenty years, with five years fixed. (R., p.11.) Mr. Willie filed a Rule 35 motion. (R., p.12.) The district court granted Mr. Willie's motion and reduced his sentence to eight years, with three years fixed. (Tr.11/09/2006, p.44, Ls.22-25.)

Mr. Willie filed a timely Petition for Post-Conviction Relief on May 31, 2007. (R., pp.11-15.) Among other things, Mr. Willie alleged that his trial attorney failed to tell him how to appeal his case. (R., p.13.) In his Memorandum of Law in Support of Petition for Post-Conviction Relief, he further explained his claim. (R., pp.25-26.) Mr. Willie

wrote, "Mr. Roark did not explain to petitioner his appeal rights. Defense counsel's failure to inform petitioner of his right to appeal constitutes ineffective assistance of counsel. Lozada v. Deeds, 488 U.S. 430 (1991). Petitioner's attorney was ineffective, offering no assistance to the case, but his presence." (R., pp.25-26.)

The State filed an Answer to Mr. Willie's petition for post-conviction relief generally denying Mr. Willie's claims. (R., pp.30-34.) The State also specifically denied Mr. Willie's claim about his appeal rights. (R., p.32.) Newly retained counsel for Mr. Willie requested additional time to prepare in light of requested transcripts not being ready. (R., pp.35-36.) Counsel filed another Memorandum focusing on other claims raised by Mr. Willie. (R., pp.46-70.) The prosecutor did attempt to file a portion of the sentencing hearing transcript by having his secretary transcribe only Mr. Willie's alleged statements. (R., pp.109-111.) The prosecutor did file the sentencing minutes, which seem to indicate that the court advised Mr. Willie that he had 42 days to file an appeal. (R., p.113.)

The matter proceeded to an evidentiary hearing on May 27, 2008. (R., p.123.) The focus of the evidentiary hearing surrounded trial counsel's failure to investigate Mr. Willie's defense and making decisions without full knowledge. The parties stipulated to submit trial counsel's deposition as evidence for the evidentiary hearing. (Tr.05/27/2008, p.15, Ls.5-15.) Trial counsel stated, "Fred [Willie] was convicted, he received a sentence that I felt was unduly harsh, it was unfair, should not have been

imposed. . . . He's over there under horrible circumstances."¹ (Tr.04/04/2008, p.57, L.20 – p.58, L.7.)²

The district court recognized that Mr. Willie asserted a claim regarding his appeal rights. (R., pp.128, 142.) In denying the claim, the district court wrote:

Mr. Willie also made an allegation of ineffective assistance post trial. Mr. Willie stated: "Defense counsel's failure to inform petitioner of his right to appeal constitutes ineffective assistance of counsel." (Mem. Of Law in Supp. Of Pet. For Post Conviction Relief at 7.) However, Mr. Willie again only makes a general allegation in this regard, offering nothing in support. Mr. Willie submitted an affidavit in support of his petition; however, that affidavit does not include any allegations that Mr. Roark failed to inform the Petitioner of his right to appeal. In his Petition for Post Conviction Relief, Mr. Willie stated: "Mr. Roark lied to Petitioner about what he was doing to prepare his case, and helped the prosecution obtain a conviction, *and told him nothing about how to appeal.*" (Pet. For Post Conviction Relief at 3, emphasis added.) The Supreme court has indicated "that it is prejudice *per se* when a criminal defendant requests that an appeal be filed and his counsel fails to comply with this requests." *Beasley v. State*, 126 Idaho 356, 359, 883 P.2d 714, 717 (Idaho Ct.App. 1994)(citing *Lozada v. Deeds*, 498 U.S. 430, 111 S.Ct. 860, 112 L.Ed.2d 956 (1991)). However, there is no allegation here that such a request was made by Mr. Willie. Furthermore, the Petitioner's current counsel failed to even question Mr. Roark about Mr. Willie's allegations regarding his appeal options. Additionally, no mention of this issue was made in the Memorandum In Support of Defendant's Motion to Set Aside Conviction, Reverse and Remand Upon the Ground of Ineffective Assistance of Counsel, in the latest affidavit submitted by Mr. Willie or during oral arguments regarding this petition. As such, like the other unsupported claims, this claim of ineffective assistance of counsel has also been forfeited.

¹ Mr. Willie's health was not good, at the time of sentencing. (Exhibit, Presentence Report, *hereinafter*, PSI, p.9.) Mr. Willie suffered from chronic fatigue, congestive heart failure, diabetes, and a staph infection. (PSI, p.9.) Dr. Johnson explained that Mr. Willie had three medical issues, which could shorten his life, including brittle Insulin Dependent Type II Diabetes Mellitus, significant diffuse coronary artery disease, and refractory myeloproliferative disease. (PSI, p.9.) Dr. Johnson noted that the combination of the diseases was not good.

² The April 4, 2008 transcript contains the Deposition of Ray Keith Roark. The parties stipulated to the consideration of the deposition at the evidentiary hearing.

(R., p.142.) Thereafter, the district court dismissed Mr. Willie's petition for post-conviction relief with prejudice. (R., p.144.) Mr. Willie timely appealed. (R., pp.145-149.)

ISSUE

Did the district court err when it dismissed Mr. Willie's petition for post-conviction relief because trial counsel failed to consult with Mr. Willie about filing an appeal when a rational defendant in Mr. Willie's position would want to appeal?

ARGUMENT

The District Court Erred When It Dismissed Mr. Willie's Petition For Post-Conviction Relief Because Trial Counsel Failed To Consult With Mr. Willie About Filing An Appeal When A Rational Defendant In Mr. Willie's Position Would Want To Appeal

A. Introduction

Mr. Willie asserts that the district court erred when it denied his claim that he received ineffective assistance of counsel regarding counsel's failure to consult with him about his appeal rights. The district court erred in denying him post-conviction relief.

B. The Proper Standard Of Review After An Evidentiary Hearing Allows The Appellate Court To Set Aside Clearly Erroneous Factual Findings And Freely Review The Application Of Relevant Law

Upon review of a district court's denial of a petition for post-conviction relief when an evidentiary hearing has occurred, Idaho appellate courts will not disturb the district court's factual findings unless they are clearly erroneous. *McKinney v. State*, 133 Idaho 695, 700, 992 P.2d 144, 149 (1999) (citing I.R.C.P. 52(a); *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990)). When reviewing mixed questions of law and fact, the appellate court defers to the district court's factual findings supported by substantial evidence, but freely reviews the application of the relevant law to those facts. *Id.*, (citing *Young v. State*, 115 Idaho 52, 54, 764 P.2d 129, 131 (Ct. App. 1988)).

C. Trial Counsel Had A Duty To Consult With A Defendant About An Appeal If A Rational Defendant Would Want To Appeal And, Therefore Post-Conviction Relief Should Have Been Granted

An application for post-conviction relief initiates a proceeding that is civil in nature. *Goodwin v. State*, 138 Idaho 269, 271, 61 P.3d 626, 628 (Ct. App. 2002) (citing *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Clark v. State*, 92

Idaho 827, 830, 452 P.2d 54, 57 (1969); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992)). The *Goodwin* Court noted that, "an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application." *Id.* at 271-72, 61 P.3d at 628-29 (citation omitted). "In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal." *Id.* at 272, 61 P.3d at 629. In an appeal from post-conviction proceedings, the appellate court will exercise free review of the district court's application of the relevant law to the facts. *Nellsch v. State*, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992) (citations omitted). The review of "a district court's construction and application of a statute, the Uniform Post-Conviction Procedure Act (UPCPA), is a matter of free review." *Evensioski v. State*, 136 Idaho 189, 190, 30 P.3d 967, 968 (2001) (citations omitted).

In order to prevail on a claim of ineffective assistance of counsel, a petitioner must first show that his counsel's performance was so deficient that it resulted in petitioner being denied the right to counsel guaranteed by the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A petitioner must then show that, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

In his verified petition for post-conviction relief, Mr. Willie alleged that his trial counsel failed to consult with him about appealing. (R., p.13.) Specifically, Mr. Willie claimed that his attorney failed to tell him how to appeal his case and later in his

documentation to the district court, he further elaborated that his counsel failed to explain to him his appeal rights. (R., pp.13, 25-26.)

The United States Supreme Court addressed the issue of when trial counsel is constitutionally ineffective for failing to file a notice of appeal when the defendant has not specifically requested that the attorney file the appeal. See *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). When, the defendant has not instructed the attorney to file an appeal or specifically forfeited the process, the question becomes whether the attorney “consulted” with the defendant about the appeal process. *Id.* at 478. The United States Supreme Court identified the term “consult” to convey a specific meaning—advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes.” *Id.* After determining whether trial counsel consulted with the defendant, the question becomes whether the failure to consult with the defendant constitutes deficient performance. *Id.*

The failure to consult with the defendant about whether to appeal is deficient performance under two circumstances. *Id.* at 480. First, a defendant is prejudiced when trial counsel fails to consult with him about an appeal when there is reason to think a rational defendant would want to appeal. *Id.* Second, a defendant is prejudiced by trial counsel's failure to consult when the particular defendant reasonably demonstrated to counsel that he was interested in appealing. *Id.* The United States Supreme Court noted that it expected that in the vast majority of cases, there is a duty to consult with the defendant about filing an appeal. *Id.* at 481.

Here, Mr. Willie alleged that his trial counsel failed to consult with him about appealing. (R., p.13.) Mr. Willie made this assertion in his verified petition for post-

conviction relief, which is the functional equivalent to an affidavit. "A verified pleading that sets forth evidentiary facts within the personal knowledge of the verifying signator is in substance an affidavit, and is accorded the same probative force as an affidavit." *Mata v. State*, 124 Idaho 588, 593, 861 P.2d 1253, 1258 (Ct. App. 1993). Therefore, the undisputed facts were that trial counsel failed to consult with Mr. Willie about his appeal rights. Mr. Willie need not submit anything more to substantiate his claims, logic dictates that there would be absolutely nothing further to add when no conversation took place. Certainly, had the State wanted to defeat Mr. Willie's claim it could have specifically asked Mr. Roark about his failings to consult with Mr. Willie about the appeal. However, that does not change the conclusion that Mr. Willie presented sufficient facts and any conclusion to the contrary is clearly erroneous that trial counsel failed to consult with him about appealing.³

Trial counsel's own statements proved that a rational defendant would want to file an appeal. (Tr., p.57, L.20 – p.58, L.7.) Trial counsel stated, "Fred [Willie] was convicted, he received a sentence that I felt was unduly harsh, it was unfair, should not have been imposed. . . . He's over there under horrible circumstances." (Tr., p.57, L.20 – p.58, L.7.) Therefore, Mr. Willie submits that a rational defendant would want to appeal a judgment of conviction after a jury found him guilty following a two-day trial

³ Mr. Willie submits that the district court's conclusion that Mr. Willie forfeited his claim on this issue is clearly erroneous. Mr. Willie never limited his claims nor abandoned any of his claims. This case went to hearing on affidavits and trial counsel's deposition not live testimony. The evidence in this case as partly identified by the court demonstrates that the claim remained as asserted and proved deficient performance. Mr. Willie submits that he presented all the facts about the issue that were necessary to prove the claim, his verified petition. To the extent that the statement is a legal conclusion, this Court should apply the law as detailed in this brief.

where he claimed innocence. Moreover, a rational defendant would want to appeal the twenty-five year sentence the district court imposed, especially considering Mr. Willie's advanced age, his unfortunate physical health, and the psychosexual evaluators conclusion that Mr. Willie was a low risk to reoffend.

With respect to prejudice, the *Strickland* Court stated that "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693. "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694. Instead, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Here, Mr. Willie demonstrated a reasonable probability that had his attorney consulted with him, he would have filed an appeal because a reasonable person in similar circumstances would have wanted to.

CONCLUSION

Mr. Willie respectfully requests that this Court reverse the district court's Memorandum Decision and Order denying him post-conviction relief.

DATED this 31st day of August, 2009.



DIANE M. WALKER
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

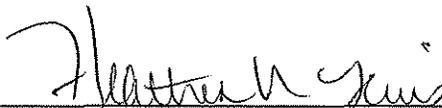
I HEREBY CERTIFY that on this 31st day of August, 2009, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

FRED WILLIE
131 CRESTVIEW DRIVE
TWIN FALLS ID 83301

PETER D MCDERMOTT
BINGHAM COUNTY DISTRICT COURT
PO BOX 4131
POCATELLO ID 83205

DAVID LEROY
1130 E STATE STREET
PO BOX 193
BOISE ID 83701

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720 0010
Hand deliver to Attorney General's mailbox at Supreme Court


HEATHER R. LEWIS
Administrative Assistant

DMW/hrl