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Gomez v. State Appellant's Brief Dckt. 41344

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Appellant

COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

OSCAR GOMEZ)
)
Appellant,)
)
vs.)
)
STATE OF IDAHO)
)
Respondent.)
)

Case No. 41344

APPELLANT'S BRIEF

Appeal from the District Court of the THIRD Judicial District
for CANYON County.
The Honorable JUNEAL C. KERRICK, District Judge presiding.

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STATEMENT OF THE CASE

- A. Introduction Appeal From dismissal of Post-Conviction Petition.
- B. Statement of Facts and Course of Proceedings

Petitioner Pled guilty, via Plea bargain, to a charge of Second degree murder, on October 16, 2006. He was then sentenced on January 23, 2007, to a term of indeterminate life, with the first twenty-five (25) years fixed.

Petitioner filed a timely appeal and motion for a Rule 35, both were denied, via Remittitur, Idaho Court of Appeals January 15, 2008.

Petitioner then filed a Petition for Post-Conviction Relief, on May 27, 2008, which was dismissed on June 26, 2013.

ISSUES PRESENTED ON APPEAL

1. Whether the Court erred, when it dismissed Petitioner's Post-conviction, when evidence showed that Petitioner was lied to, tricked and coerced, into Pleading guilty.

2 Whether the Court erred, when it dismissed Petitioner's Post-conviction, when evidence showed that the State's Prosecutor committed Prosecutorial misconduct, when he "Bryan W. Knox" violated the Plea agreement at the sentencing hearing.

3. Whether the Court erred, when it dismissed Petitioner's Post-conviction, when the evidence showed that Petitioner received ineffective assistance of counsel with regard to [his] guilty Plea.

ARGUMENT

A. Introduction This man was tricked, coerced and lied to, in order to induce a guilty plea,

B. Argument

1. WHETHER THE COURT ERRORED, WHEN IT DISMISSED PETITIONER'S POST-CONVICTION, WHEN EVIDENCE SHOWED THAT PETITIONER WAS LIED TO, TRICKE AND COERCED INTO PLEADING GUILTY.

Petitioner complained to the District Court, That his own attorney violated the Plea agreement, (RT P. 000008, Par. 12..)

This happened when defense counsel, "Jayme L. Beaber" (hereinafter - "Beaber", asked the court to give her client a 30 year indeterminate sentence.

The court was wrong to dismiss the petition, when it knew, that both defense counsel and the state had agreed, and told the petitioner, that if he plead guilty, he would receive no more than twenty-five (25) years.

The court itself memorialized that fact for counsel(s) at the Change of Plea hearing - Page 1 lines 17-21,

"Second degree. Mr. Gomez will be changing his plea to guilty to the amended charge. The State will be recommending no more than 25 years fixed with respect to sentencing negotiations. The defense is free to argue for less." (R. t. P. 000113 - P. 6, li. 17-21.)

However, when it came to sentencing hearing, defense counsel argued for a 30 year sentence, and the state argued for an indeterminate life sentence.

"While I think rehabilitation is important¹ and while I think the defendant should go away for 25 years at a minimum, I think the court should consider imposing a indeterminate life sentence." (R. t. P. 000104, P. 13, li. 12-14.)

The state had made a plea agreement with Mr. Gomez to recommend no more than 25 years.

However, here the state ask for no less than 25 years followed by life.

Both upper and lower recommendations violated the plea agreement that the state used to induce Mr. Gomez to plead guilty, for this reason this court should follow prior decisions, and remand, with instructions to vacate and allow Mr. Gomez to have a new trial. See: Fontaine v. U.S., 411 U.S. 213, 93 S. Ct. 1461, 36 L. Ed. 2d 169 (1973):

1. This statement was made by the state.

"Petitioner who Plea guilty to bank robbery and later Filed a 2255 motion stating his plea had been induced by a combination of Fear, Coercive Police tactics and illness, including mental illness, was entitled to an evidentiary hearing on his 2255 motion."

Fontaine, ease into, Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971);

"On this record, Petitioner 'bargained' and negotiated for a particular plea in order to secure dismissal of more serious charges, but also on condition that no sentence recommendation would be made by the prosecutor. It is now conceded that the promise to abstain from a recommendation was made, and at this stage the prosecution is not in a good position to argue that its inadvertent breach of agreement is immaterial."

"(w)e conclude that the interest of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case to the state courts for further consideration."

2. WHETHER THE COURT ERRORED, WHEN IT DISMISSED PETITIONER'S POST-CONVICTION, WHEN EVIDENCE SHOWED THAT THE STATE'S PROSECUTOR COMMITTED PROSECUTORIAL MISCONDUCT, WHEN HE "BRYAN KONX" VIOLATED THE PLEA AGREEMENT AT THE SENTENCING HEARING.

The State made Gomez a plea agreement, which was memorialized by the court not once, but twice.

APPELLANT'S BRIEF-8

once at the change of Plea hearing (R.t. P. 000113, - P.P. 1, li. 17-21)
then again at the sentencing hearing; (R.t. P. 000102, - P.P. 8, li. 16-19);

"The state will be recommending no more than 25 years Fixed with respect to sentencing negotiations."

_____ The Court at Change of Plea hearing; (R.t. P. 000113, - P.P. 1, li. 17-21.)

"And the state had agreed, Pursuant to Plea negotiations, not to recommend more than 25 years Fixed and that the defendant may -- defense may argue for less."

_____ The Court at sentencing hearing; (R.t. P. 000102, - P.P. 8, li. 16-19.)

The State never said anything to Gomez about any indeterminate sentence, following the Fixed sentence.

This was trickery on the part of the state, (a trick by way of omission) used to induce a guilty plea from Mr. Gomez.

Then, after that trickery, the state violated the agreed upon terms of the Plea agreement.

The state made the promised Gomez [it] would seek no more than 25 years, see Rt. cited above.

However, instead of seeking (no more) than 25 years, the state sought (no less) than 25 years; (R.t. P. 000104, P.P. 13, li. 12-13.);

"I think the defendant should go away for 25 years at a minimum."

That is a violation of the Plea agreement, by itself.

but then, the state takes another step, it recommends to the court, that it "ought to consider an indeterminate life sentence, (R.t. P. 000104, P.P. 13, li. 13-14.);

"I think the court ought to consider imposing a indeterminate life sentence."

The state admits that it did not tell Gomez that it would ask for a minimum of 25 years, (R.t. P. 000048, Par. 1.) but it did agree to recommend a maximum of 25 years with no mention of any indeterminate sentence.

An indeterminate life sentence is more than a fixed 25 year sentence; State v. Jenkins, 105 Idaho 166, 667 P.2d 269 (Ct. App. 1983); State v. Wilson, 107 Idaho 506, 690 P.2d 1338 (1984)

An indeterminate life sentence is 30 years, therefore the state did in fact recommend more than the 25 years fixed it promised Gomez in order to induce the plea of guilty.

The process of the plea bargain was unfair to Gomez, the indeterminate life sentence was not mentioned during the plea negotiation was not mentioned.

The fact that the court mentioned what the charge carried, does not impact Gomez's decision to plead guilty, as Gomez's attorney and the state had already promised [him] he would not get over 25 years.

Gomez was never told by his attorney, the state or the court, that the court did not have to follow the recommendation, [even though no one recommended what was promised].

3. WHETHER THE COURT ERRORED, WHEN IT DISMISSED PETITIONER'S POST-CONVICTION, WHEN IT HAD EVIDENCE THAT SHOWED THAT PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WITH REGARD TO [HIS] GUILTY PLEA.

Petitioner "Gomez" received ineffective assistance of Counsel, during Plea negotiations, when Counsel failed to get the Plea agreement in writing.

Counsel never told Gomez that there was a Rule 11 in the court rules, that could memorialize the Plea agreement.

Counsel, "Beaber" told Gomez that the State had agreed to give him 25 years maximum, but that [she] could try to talk the Judge into giving him less.

"Beaber" told Gomez that [he] did not take the deal, he would either spend the rest of his life in Prison, or be put to death!

But when Gomez told [her] he would take the deal [she] failed to seek a Rule 11 agreement, violating [her] duty to [her] client. Bettancourt V. Willis, 814 F.2d 1546 (11 Cir, 1987); "Trial Counsel's Failure to memorialize alleged Sentence reduction, either by letter, affidavit or otherwise, based on Counsel's representation to defendant that Judge had

agreed to reduce defendant's sentence after plea, constituted ineffective assistance of counsel," McAloney v. United States, 539 F.2d 282 (1st Cir. 1976); "Trial Counsel's misrepresentation that government's attorney had agreed to recommend that defendant would receive a three (3) year sentence, used to induce guilty plea, where in reality no such agreement existed constituted ineffective assistance, defendant received a seven (7) year sentence. The judgment and guilty plea ~~should be set aside~~, were set aside."

This Counsel's actions in the instant case, were worse than Counsel's actions in "McAloney and Betancourt" put together. Any relief [they] got, Gomez should get double.

Counsel's ineffectiveness didn't end there, because the state violated the plea agreement, see (sec. 2. herein) and Counsel did not bother to object, this violated Appellant's 6th. Amend rights: U.S. v. DeLaFuente, 8 F.3d 1333 (9th Cir. 1993); "Trial counsel's failure to contest the government breach of plea, where the government failed to move for downward departure below the mandatory minimum, pursuant to U.S.S.G. § 5K1.1 constitutes ineffective assistance and established cause for procedural default."

Then, not only did [she] not object to the state's violation of the plea agreement, but [she] then violated the plea agreement, against her own client.

The plea agreement was that Gomez receive, or be recommended no more than 25 years, leaving defense counsel free to argue for less than that, (R.t. P. 000102 + P. 000113), but Counsel turns around and betrays [her] client and argues for

more than 25 years, (R.t. P. 000104, P.P. 16, li. 23-25,) this was a clear betrayal of [her] duty and a clear violation of the stated Plea agreement.

A violation so unique, one would be hard pressed to find case law to fit such a situation, but lots of case law that states that a defendant's attorney cannot act with such disregard to her client's interest, or even as far as acting in the interest of the State. Strickland v. Washington, 104 S.Ct. 2065 (1984); "Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable testing process."

This applies to plea negotiations as well as when counsel violated the plea agreement.

When counsel did that, she changed sides and advocated the State's cause, violating Gomez's 6th Amended rights under, U.S. v. Cronk, 104 S.Ct. (1984); "If no actual assistance for the accused's defense is provided if the constitutional guarantee has been violated!"

CONCLUSION

Therefore, for all those reasons given herein Appellant ask this court to Affirm and Remand to the district court, with instruction, to reverse and Vacate Judgment and withdraw the Plea of guilty, and allow Mr. Gomez to enter a new Plea.

Dated this 6th day of December, 2014,

Most Respectfully; Oscar Gomez
Oscar Gomez

CERTIFICATE OF MAILING

I, Oscar Gomez, do hereby certify that I have mail/ Filed the afore document by Placing said document into the Prisons legal mail system in accordance with State v. Lee, with the understanding that my document is deemed Filed when I Placed it into that box on the date indicated below, with Prepaid First class postage attached.

Mailed to:

Deputy Attorney General
P.O. Box 83720
Boise, Idaho, 83720-0010

Done on this 6th day of Dec. 2014

By: Oscar Gómez
Oscar Gomez