5-22-2008

Schoger v. State Supplemental Appellant's Reply Brief Dckt. 35917

IN THE SUPREME COURT OF THE STATE OF IDAHO

SHEY MARIE SCHOGER,

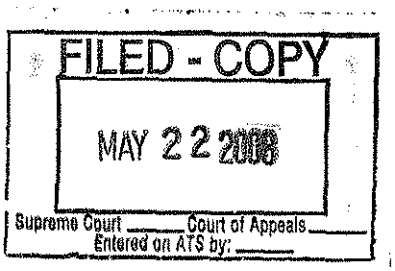
Petitioner/Appellant,

vs.

STATE OF IDAHO,

Respondent/Respondent.

S.Ct. No. 33976



SUPPLEMENTAL BRIEF OF APPELLANT

Appeal from the District Court of the Fourth Judicial District of the State of Idaho
In and For the County of Ada

HONORABLE JOEL D. HORTON,
District Judge

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1. *Introduction.*

Ms. Schoger's Amended Petition alleged that "she informed counsel that she wanted to go forward with a guilty plea, but the court refused to conduct any further inquiry of the factual basis, or to conduct any analysis of whether her plea was appropriate under *Alford v. United States.* [sic]"[1] CR 18. The State, in its Answer, alleged that "the record speaks for itself as to the Court's refusal to conduct any further inquiry as to the factual basis or to conduct any analysis of whether her plea was appropriate under *Alford v. United States* [sic], 400 U.S. 25 (1970). CR 41. The District Court, in its Memorandum Opinion re: State's Motion to Dismiss, did not directly address the claim or the waiver issue. However, as shown below, the District Court did abuse its discretion in refusing to accept Ms. Schoger's proffered *Alford* plea.

2. *Why the Court Abused its Discretion.*

A trial court abuses its discretion if it (1) does not correctly perceive the issue as discretionary, or (2) does not act within the bounds of discretion or fails to apply the correct legal standards, or (3) fails to reach the decision through an exercise of reason. *Sun Valley Potato Growers, Inc. v. Texas Refinery Corp.*, 139 Idaho 761, 765, 86 P.3d 475, 482 (2004). Here, the Court abused its discretion because it rejected the *Alford* plea based upon Ms. Schoger's denial that she possessed at least 200 grams of methamphetamine. However there is no requirement

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[1] *North Carolina v. Alford*, 400 U.S. 25 (1970).

that the defendant establish a factual basis in order for an *Alford* plea to be valid and the District Court should not have rejected her guilty plea simply because Ms. Schoger did not admit guilt to its satisfaction. Therefore, the District Court's rejection of Ms. Schoger's *Alford* plea was not based upon the correct legal standards nor was it based upon an exercise of reason.

The Court stated its reasons for rejecting the *Alford* plea on the record.

> MR. BARNUM: Would the court consider taking this in the manner of an Alford plea at this point? I understand the struggle with the factual basis.
>
> THE COURT: The short answer is no, and I'll tell you why, Mr. Barnum.
>
> By this plea of guilty, she gives up her right to appeal the decision on the suppression motion.

T. Vol. I, pg. 115, pg. 1-9. Of course, this is no reason to reject an otherwise knowing, intelligent and voluntary guilty plea. All non-conditional guilty pleas bar the defendant from challenging pre-trial rulings and the State may have offered the charge reduction because it did not want to face the possibility of losing the suppression issue on appeal. Further, the Court expressly asked Ms. Schoger whether she understood that her plea "is effectively a waiver of [her] right to appeal that decision." Ms. Schoger answered that she understood. T. Vol. I, pg. 107, ln. 17-22. Thus, there is nothing about the loss of appellate rights in this plea or in *Alford* pleas in general which should have caused the District Court to reject it.

The State argued below that the Court did not abuse its discretion because a Court must establish a factual basis before accepting a plea if the defendant refuses to admit his participation in the crime or continues to assert his innocence. However, this argument fails for three reasons.

First, the Court was not required to obtain a factual basis. As the State frankly admits, there is no general requirement that the trial court must establish a factual basis for the crimes charged prior to accepting a guilty plea. *State v. Coffin*, 104 Idaho 543, 545, 661 P.2d 328, 330 (1983); *State v. Peterson*, 126 Idaho 522, 524, 887 P.2d 67, 69 (Ct. App. 1994); *State v. Hawkins*, 117 Idaho 285, 290, 787 P.2d 271, 276 (1990). A factual basis is only needed when the defendant refuses to admit she is guilty of the offense. That is simply not the case here. Ms. Schoger did not refuse to admit her participation in the crime, nor did she continue to assert her innocence. To the contrary, the District Court entered into an extended colloquy with Ms. Schoger, after which it found that the guilty plea met all the prerequisites for acceptance of a plea listed in ICR 11(c)(1)-(5). T. Vol. I, pg. 102, ln. 1 - pg. 111 ln. 9.

> THE COURT: Well, Ms. Schoger based upon what you've told me, then, I find you understand the potential consequences of your decision to plead guilty. I find that your plead of guilty is a voluntary decision. And finally, that you committed the crime of trafficking in methamphetamine in a quantity greater than 200 grams. Do you agree with those finding?
>
> THE DEFENDANT: Yes.

T. Vol. I, pg. 111, ln. 10-19. In light of Ms. Schoger's answers to the Court's questions and the Court's findings, it did not need to obtain a factual basis for the offense.

Second, the State's argument ignores the fact that the factual basis does not need to come from the defendant. Quite to the contrary, the Idaho Supreme Court has stated, "As long as there is a strong factual basis for the plea, and the defendant understands the charges against him, a voluntary plea of guilty may be accepted by the court *despite a continuing claim by the defendant that he is innocent*." *Sparrow v. State*, 102 Idaho 60, 61, 625 P.2d 414, 415 (1981), *citing Alford,*

supra (emphasis added). "The reason for such an inquiry, however, is not to satisfy the court that the defendant is indeed guilty of the crime. Instead, such an inquiry should serve to indicate that the plea is knowingly, intelligently, and voluntarily being entered by the defendant, despite his or her continuing claim of innocence or inability to recall the facts of the incident." *State v. Horkley*, 125 Idaho 860, 862-63, 876 P.2d 142, 144-145 (Ct. App. 1994). In *Horkley* the defendant could not provide a factual basis for the vehicular manslaughter charge because he could not remember what had happened due to injuries suffered during the accident. The District Court in *Horkey* obtained the factual basis from the attorneys. Likewise, in *Alford*, the defendant strongly protested that he was not guilty but wanted to take the deal in order to avoid the death penalty. The state provided the factual basis in *Alford*. 400 U.S., pg. 32. In this case, however, the District Court never asked defense counsel or the prosecuting attorney to present a factual basis. To reject the *Alford* plea under these circumstances was an abuse of discretion.

Third, the State's argument ignores the fact that the District Court did not reject the *Alford* plea for lack of a factual basis. The District Court actually rejected the plea based upon its own beliefs on when such a plea is appropriate.

> What she has just told me is a defense, is a factual innocence assertion as to the charge. It's one thing to enter an Alford pleas under true Alford circumstances, which was, "I don't recall[2], ". . . . But an Alford plea, in my view, is not an appropriate mechanism for a defendant to say, "I didn't commit the crime, but I

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[2] As noted above, the District Court is mistaken about what constitutes a true *Alford* circumstance. The defendant in *Alford* did not claim that he didn't recall the facts of the offense. He asserted that he was innocent. The Supreme Court noted that "[a]fter giving his version of the events of the night of the murder, Alford stated: 'I pleaded guilty on second degree murder because they said there is too much evidence, but I ain't shot no man, but I take the fault for the other man. We never had an argument in our life and I just pleaded guilty because they said if I didn't they would gas me for it, and that is all.'" 400 U.S., pg. 28 ft. 2.

wish to avail myself of a plea offer in the case."

> The reason we have jury trials is to assess guilt or innocence, and this is precisely a case where I think that it would be an abuse of my responsibilities to afford the defendant of her constitutional right to have a guilt or innocence determination rather than extracting a plea of guilty under the threat of increased punishment.

T. Vol. I, pg. 115, ln. 20- pg. 116, ln. 1.

This analysis is misguided. It is the defendant who gets to decide whether to plead guilty, not the Court. The Court can no more reject a guilty plea because it believes the defendant might be innocent than it can force a defendant to plead guilty when it believes the defendant is probably guilty. It is simply not the choice of the Court. If Ms. Schoger, who was admittedly guilty of possession of a controlled substance with the intent to deliver, wishes to plead to the slightly greater charge of Trafficking in 200 grams in order to avoid the risk of being convicted of the much more serious charge of Trafficking in 400 grams, that is her choice. The Court does not stand *in loco parentis* to an adult defendant who is represented by counsel. As stated by the *Alford* Court, the standard for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." 400 U.S., pg. 30. Therefore, the Court's decision, based upon its patronizing and paternalistic attitude toward Ms. Schoger and her ability to make rational choices among unpleasant alternatives, was not based upon an exercise of reason and was an abuse of its discretion.

Moreover, notwithstanding the District Court's view of the proper use of an *Alford* plea, it is common and proper for defendants to accept settlement offers even when they believe they

are innocent, but wish to avail themselves of the settlement offer. No one is so naive as to think that mere factual innocence is a guarantee of a not guilty verdict at trial. There is no doubt that innocent people are convicted by juries, as is demonstrated regularly by the DNA exoneration cases. As reported in the New York Times, "State lawmakers across the country are adopting broad changes to criminal justice procedures as a response to the exoneration of more than 200 convicts through the use of DNA. . . . Studies of wrongful convictions suggest that there are thousands more innocent people in jails and prisons." Solomon Moore, Exonerations Using DNA Brings Change in Legal System, New York Times, October 1, 2007. Of course, the DNA exonerations only cheer those defendants who are lucky enough to have DNA evidence in their cases. People who are convicted on unreliable eyewitness identification or are found guilty by their association with the truly guilty party are equally common.

The reasons why Ms. Schoger might want to hedge her bets instead of going to trial are manifest. Ms. Schoger's defense at trial, *i.e.*, "I only had 56 grams of methamphetamine and didn't know about the other 344 grams my boyfriend had hidden," was obviously problematic, even if true. First, it required her to concede that she was a drug dealer, just not as big of a drug dealer as suggested by the state. That, obviously, is not a defense with a lot of "jury appeal." Second, her protests of lack of knowledge or constructive possession would be viewed suspiciously by jurors who might believe she was only admitting to possessing the 56 grams because she was caught red-handed and was now trying to shift the blame to her boyfriend. The success of the defense also depends on convincing her boyfriend to testify that he hid the methamphetamine from Ms. Schoger and that she was not aware of its presence in the house. Ms. Schoger, however, might have also known at the time she proffered the *Alford* plea that her

boyfriend was not going to testify on her behalf at trial (which, as it turned out, he did not.) Thus, there may have been practical proof problems with the defense case, in addition to the theoretical problems.

3. *Conclusion.*

The District Court's rejection of the *Alford* plea due to its own conception of what was in Ms. Schoger's best interest and its distaste of the use of *Alford* pleas in cases where there is a claim of factual innocence is not consistent with the legal choices available to the Court and was not made by an exercise of reason. This abuse of discretion is disturbing in this case because the District Court was well aware that if Ms. Schoger were to be convicted at trial, she would face a mandatory minimum sentence of 10 years imprisonment and a $25,000 fine. It is especially disturbing because the Court turned out to be flat-out wrong about Ms. Schoger having a viable defense to the charge and the District Court had to impose the more severe sentence. In essence, the Court took a double or nothing bet with Ms. Schoger's life and lost. To do so against her will and against the advice of her attorney was an abuse of discretion. Accordingly, the District Court erred in summarily dismissing this post-conviction claim.

B. <u>Summary Dismissal Was Inappropriate Because There Were Issues of Disputed Material Fact as to the Ineffective Assistance of Appellate Counsel Claim.</u>

1. *Introduction*

In its motion for summary disposition, the State argued that Ms. Schoger's claim that the Court abused its discretion in failing to accept the guilty plea was waived because it could have been raised on appeal. Supp. CR (Brief in Support of Summary Dismissal, pg. 16. While, the

District Court did not address this issue in its memorandum Opinion re: Motion to Dismiss, it is anticipated that the State will renew its waiver argument on appeal. In the event the Court finds that the guilty plea issue could have been raised on direct appeal and is therefore deemed to be forfeited in post-conviction proceedings, *see* I.C. 19-4901(b), Ms. Schoger was deprived of the effective assistance of appellate counsel.

Idaho Code § 19-852 gives a criminal defendant the right to be represented on any appeal. This right guarantees the right to effective assistance of counsel. *Hernandez v. State,* 127 Idaho 685, 687, 905 P.2d 86, 88 (1995). Further, the Due Process Clause of the Fourteenth Amendment requires states to ensure that an indigent appellant receive effective assistance of counsel on his first appeal of right from a judgment of conviction. *Evitts v. Lucey,* 469 U.S. 387, 396 (1985); *Aragon v. State,* 114 Idaho 758, 765, 760 P.2d 1174, 1181 (1988). The *Strickland* standard generally applies to claims of ineffective assistance of counsel on appeal. *See Roe v. Flores-Ortega,* 528 U.S. 470, 476-77 (2000).

2. *It Was Ineffective Assistance of Appellate Counsel to Fail to Challenge the Trial Court's Improper Rejection of the Guilty Plea.*

To show deficient performance, a petitioner must demonstrate that counsel's representation did not meet objective standards of competence. *Hayes v. State,* 143 Idaho 88, 92, 137 P.3d 475, 479 (Ct. App. 2006); *Bagshaw v. State*, 142 Idaho 34, 39, 121 P.3d 965, 969 (Ct. App. 2005). A defendant is entitled to the reasonably competent assistance of a diligent, conscientious advocate. *Huck v. State,* 124 Idaho 155, 157, 857 P.2d 634, 636 (Ct. App. 1993); *State v. Tucker*, 97 Idaho 4, 8, 539 P.2d 556, 560 (1975). Therefore, appellate counsel is required to make a conscientious examination of the case and file a brief in support of the best arguments to be made. *Jakoski v.*

State, 136 Idaho 280, 285, 32 P.3d 672, 677 (Ct. App. 2001); *LaBelle v. State*, 130 Idaho 115, 119, 937 P.2d 427, 431 (Ct. App. 1997). While, as a general matter, courts will not attempt to second-guess counsel's strategic and tactical choices, *see State v. Elison*, 135 Idaho 546, 551, 21 P.3d 483, 488 (2001), this rule does not apply to counsel's decisions that are the result of inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation. *Id.* A post-conviction applicant can overcome the presumption of effective assistance by showing that the ignored issues are clearly stronger than those presented. *See Smith v. Robbins*, 528 U.S. 259, 288 (2000); *Mintun v. State*, 144 Idaho 656, 661, 168 P.3d 40, 45 (Ct. App. 2007), *rev. denied* September 14, 2007.

Appellate counsel's performance in this case was deficient under *Strickland* because he failed to raise the issue that it was an abuse of discretion for the District Court to reject the proffered plea. The issue was preserved for appeal and there is no conceivable strategic reason for appellate counsel to fail to raise the issue.

Moreover, Ms. Schoger was prejudiced because the issue was meritorious, as demonstrated above, while the sentencing issue which was actually raised on appeal was frivolous considering the ten-year fixed term was the lowest possible sentence which could be imposed after trial. To show prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. *Hayes v. State,* 143 Idaho 88, 92, 137 P.3d 475, 479 (Ct. App. 2006); *Bagshaw v. State*, 142 Idaho 34, 39, 121 P.3d 965, 969 (Ct. App. 2005). In this case, as explained above, this Court would have vacated the conviction and remanded the case for entry of a guilty plea to the reduced charge because the District Court abused its discretion by rejecting the voluntary, knowing and

intelligently made plea to the reduced charge. And, the District Court would have imposed a lesser sentence upon remand.

Thus, there is at least a material question of fact as to whether Ms. Schoger was prejudiced by appellate counsel's failure to raise the issue on appeal and the petition should not have been summarily dismissed.

III. CONCLUSION

In light of the above, Ms. Schoger respectfully asks that this Court reverse the district court's order summarily dismissing her petition for post-conviction relief and remand for further proceedings.

Respectfully submitted this 22nd day of May, 2008.

Dennis Benjamin
Attorney for Shey Marie Schoger

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22 day of May, 2008, I caused two true and correct copies of the foregoing to be mailed to:

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