2-3-2012

# Gosch v. State Respondent's Brief Dckt. 38791

IN THE SUPREME COURT OF THE STATE OF IDAHO



KIRK JULLIARD GOSCH,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

NO. 38791

# 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

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## STATEMENT OF THE CASE

### Nature Of The Case

Kirk Julliard Gosch appeals from the district court's order denying his petition for post-conviction relief entered after an evidentiary hearing.

### Statement Of The Facts And Course Of The Proceedings

Gosch petitioned for post-conviction relief asserting a single claim of ineffective assistance of counsel. (R., pp. 1-11, 22-24, 44-47, 55-58.) Specifically, Gosch alleged that his attorneys talked him out of appealing his manufacture of marijuana and possession of marijuana with intent to deliver convictions by informing him that if he appealed the state would be able to re-file a cocaine trafficking charge despite the fact the jury acquitted him of that charge at trial. (R., p. 56-57; see also R., pp. 41-42.)

At the hearing on the petition Gosch testified, "If I was given the right advice, I would have definitely appealed." (Tr., p. 12, Ls. 1-2.) He testified that right after the trial he asked his attorney to file an appeal but that she told him if Gosch appealed he would risk being charged with the cocaine charge again. (Tr., p. 14, Ls. 1-9; p. 15, L. 7 – p. 16, L. 8.) Gosch testified, "That's why I didn't file an appeal." (Tr., p. 15, L. 22.) Gosch was the only plaintiff's witness. (Tr., p. 4.)

Gosch's criminal trial attorney testified when called by the defense. (Tr., p. 4.) She testified that Gosch had requested an appeal immediately after the trial and she told him to schedule an appointment to discuss the appeal and what issues to raise, but he never again contacted her about an appeal. (Tr., p. 34, L.

2 – p. 38, L. 15.) She denied ever having told Gosch that he could be retried on the cocaine trafficking count. (Tr., p. 40, Ls. 9-23.)

After the evidentiary hearing petitioner's counsel argued that there were "two avenues of relief." (Tr., p. 56, Ls. 2-3.) The first was that no appeal was filed despite the post-verdict request and the second was that counsel had talked Gosch out of the appeal based on an erroneous statement. (Tr., p. 56, Ls. 3-9.) The prosecutor responded to both of these arguments in his closing. (Tr., p. 57, L. 19 – p. 59, L. 19.)

The district court entered the following findings of fact:

> 1. The only time Petitioner expressed his desire to "appeal everything" was walking to the Public Defender's Office, with his attorneys, immediately after the verdict had been taken in CR-F05-403.
>
> 2. This expression of his desire to "appeal everything" occurred prior to sentencing, and prior to judgment.
>
> 3. This statement was made during a time of stress and confusion for the petitioner, as he had learned of his verdict just prior to making this statement.
>
> 4. Upon expressing a desire to "appeal everything", Petitioner was directed by his attorneys to contact them the next day by scheduling an appointment.
>
> 5. Petitioner was instructed to contact his counsel the next day because his attorneys believed Petitioner was in a confused and stressful state due to the recent verdict. Therefore, waiting a day would allow Petitioner to digest the verdict, and more clearly articulate what exactly he wanted to appeal.
>
> 6. After the verdict Petitioner never scheduled an appointment, nor spoke with his attorneys in regards to an appeal.
>
> 7. The Public Defender's Office made several attempts to contact Petitioner following his request to "appeal everything".

> 8. These attempts included an attempt to make available to Petitioner the services of the Public Defender's Investigator, prior to Petitioner's sentencing.
>
> 9. Despite numerous attempts to contact Petitioner, however, the Public Defender's Office was unsuccessful in its attempts to reach him.
>
> 10. At his sentencing, Petitioner was notified, in writing, of his right to appeal.

(R., pp. 105-06.) The district court concluded that, because the request to "appeal everything" occurred "during a time of confusion and stress" and before Gosch's appeal rights had vested, trial counsel had acted reasonably in trying to arrange an appointment to discuss whether to ultimately pursue the appeal. (R., p. 109.) Petitioner's subsequent failure to follow up on an appeal resulted in an inadequate communication of the desire to appeal by the time an appeal could be filed. (R., pp. 109-10.) Because Gosch ignored repeated attempts by his counsel to contact him, "[c]ounsel reasonably believed that Petitioner had abandoned any desire to file an appeal." (R., p. 110.) The district court also found that trial counsel had never informed Petitioner "that he could be retried on the cocaine charge for which he was acquitted, if he filed an appeal." (R., p. 110.)

The district court entered judgment denying relief and dismissing the petition with prejudice. (R., p. 112.) Gosch timely filed his notice of appeal. (R., p. 114.)

## ISSUE

Gosch states the issue on appeal as:

> Did the district court err when it dismissed Mr. Gosch's petition for post-conviction relief?

(Appellant's brief, p. 11.)

The state rephrases the issue as:

Has Gosch failed to show that the district court erred in concluding he had failed to prove his claim of ineffective assistance of counsel because Gosch does not challenge the district court's finding that trial counsel reasonably concluded Gosch had abandoned his desire for an appeal because of Gosch's actions?

## ARGUMENT

### Gosch Has Failed To Show That The District Court Erred In Concluding He Had Failed To Prove His Claim Of Ineffective Assistance Of Counsel

### A. Introduction

The district court concluded that trial counsel reasonably concluded that Gosch had abandoned his desire for an appeal between the time he requested an appeal and the time when an appeal would actually have been filed. (R., p. 110.) Gosch does not dispute this. (See generally Appellant's brief.) Having failed to even address the core of the district court's findings and analysis, Gosch has failed to show error.[1]

### B. Standard Of Review

A petitioner seeking post-conviction relief has the burden of proving, by a preponderance of the evidence, the allegations upon which his claim is based. Estes v. State, 111 Idaho 430, 436, 725 P.2d 135, 141 (1986); Clark v. State, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); 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). 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

[1] The state concedes that it waived any objection that the trial court was deciding an issue beyond the scope of the pleadings. (See Appellant's brief, pp. 14-16.)

solely within the province of the district court. Peterson v. State, 139 Idaho 95, 97, 73 P.3d 108, 110 (Ct. App. 2003). 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).

C. Gosch Has Failed To Show That He Proved Either Deficient Performance Or Prejudice

The parties both agree that the applicable legal authority in this case is Roe v. Flores-Ortega, 528 U.S. 470 (2000). (See Appellant's brief, pp. 16-17.) In that case Flores-Ortega applied for habeas corpus relief on the basis that his attorney had failed to file a timely appeal. Roe, 528 U.S. at 474-75. The trial court found that there was no consent to a failure to file an appeal, but that Flores-Ortega had also failed to show a specific request for an appeal. Id. The Ninth Circuit held that lack of consent to not file an appeal was sufficient to show deficient performance where an appeal was not filed. Id. at 475-76.

The Supreme Court applied the two prong test of Strickland v. Washington, 466 U.S. 668 (1984), where the petitioner must show both deficient performance and prejudice. Roe, 528 U.S. at 476-77. The Court rejected the Ninth Circuit application of the deficient performance prong of the test requiring counsel to obtain an affirmative waiver of the right to appeal. Id. at 478. The Court stated that there was a spectrum of performance from a lawyer who disregards his client's express wishes to appeal and is therefore deficient at one end to the lawyer who respects his client's wishes to not appeal and is therefore not deficient at the other. Id. at 477. The Court held that "counsel has a

constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal ..., or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Id. at 480. "In making this determination, courts must take into account all the information counsel knew or should have known." Id.

Gosch failed to show, based on all the information counsel knew or should have known, that counsel failed in her duty to consult with him about a potential appeal. Gosch presented no proof to the district court, and makes no argument on appeal, that "a rational defendant would want to appeal" the judgment in his case. Instead Gosch appears to argue that because he stated a specific desire to appeal after the trial the evidence showed that "this particular defendant reasonably demonstrated to counsel that he was interested in appealing." However, when counsel instructed Gosch, who appeared very emotional at the time, to contact her office and make an appointment to discuss an appeal Gosch did not do so, made no further effort to talk to his counsel about an appeal, and reasonable efforts to contact Gosch also failed. Thus, the trial court's finding that counsel, based on the information available to her at the time to file the appeal, reasonably concluded that Gosch had abandoned his desire shows no deficient performance under the Roe standard.

Gosch argues that counsel no longer had a duty to consult with him, but instead had an absolute duty to file an appeal, because Gosch affirmatively requested an appeal. (Appellant's brief, pp. 17-20.) By considering events

between the request and the time to file that appeal, argues Gosch, the district court erroneously "grafted additional requirements onto [the Sixth Amendment] standards." (Appellant's brief, p. 17.) It is Gosch, not the district court, that is applying a legally incorrect standard, however. The Supreme Court of the United States requires the trial court to "take into account *all the information* counsel knew or should have known." Roe, 528 U.S. at 480 (emphasis added). This the district court did when it considered events and actions between the end of the trial (when Gosch expressed a desire to appeal) and the entry of the judgment (which triggered the ability to appeal). Gosch's argument that the district court was required to ignore some or even most of the information known to counsel at the time the appeal could have been filed is contrary to applicable law.

In this case Gosch stated his desire to appeal at a time of high emotion, just after being convicted of two felony marijuana charges.[2] (R., pp. 105, 109.) This clearly triggered counsel's duty to consult with her client about an appeal. Roe, 528 U.S. at 480. It did not trigger the duty to file an appeal because no appeal was ripe prior to entry of judgment. (R., p. 109.) Counsel fulfilled her duty to consult about an appeal by instructing Gosch to make an appointment for

[2] The state believes a reasonable interpretation of the evidence is that Gosch was particularly interested in appealing the district court's ruling allowing the state to withdraw from a plea agreement (Tr., p. 36, Ls. 6-21), but he was told that if he prevailed a possession of cocaine charge would necessarily have been reinstated to complete the bargain and therefore reinstating the plea agreement might also result in a longer sentence (Tr., p. 37, Ls. 2-24). Thus, an appeal specifically requesting enforcement of the plea agreement might have effectuated a double jeopardy waiver and possibly a greater sentence. This information convinced Gosch that an appeal was not in his best interests. (Tr., p. 15, L. 7 – p. 16, L. 3.)

that very purpose, and then even trying to follow up by contacting Gosch when he failed to make such an appointment. (R., pp. 106, 109.) The reason no consultation occurred was Gosch's inaction. (R., p. 109.) "[Taking] into account *all the information* counsel knew or should have known," Roe, 528 U.S. at 480 (emphasis added), the district court properly concluded that counsel "reasonably believed that [Gosch] had abandoned any desire to file an appeal" (R., p. 110).

Because the district court properly concluded, based on the unchallenged findings of fact, that Gosch's own conduct had prevented consultation on the issue of whether to file an appeal, which led to the reasonable conclusion that Gosch was no longer interested in pursuing an appeal, Gosch has failed to show that he proved that counsel's performance was deficient.

Gosch likewise failed to prove prejudice. To show prejudice Gosch had the burden of proving that, "but for counsel's deficient performance, he would have appealed." Roe, 528 U.S. at 484. This standard "mirrors the prejudice inquiry" applied in Hill v. Lockhart, 474 U.S. 52 (1985), requiring the petitioner to "show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Roe, 528 at 485 (internal quotation marks omitted). To prove deficient performance a petitioner may rely on evidence of nonfrivolous grounds for appeal and "evidence that he sufficiently demonstrated to counsel his interest in the appeal." Id. at 486. "But such evidence alone is insufficient to demonstrate that, had the defendant received reasonable advice from counsel about the appeal, he would have instructed his counsel to file an appeal." Id.

Here Gosch presented evidence that the district court had in fact made rulings he could have challenged on appeal. (Plaintiff's Exhibit 1-3.) Such is true of every case, however. Gosch did not demonstrate below, or argue on appeal, how appellate challenges to those rulings would have been nonfrivolous. Likewise, although he presented evidence that he had in fact expressed a desire for an appeal he presented no evidence that he would have continued in that desire had he actually made and kept an appointment with counsel to discuss the matter. In fact, Gosch himself admitted that he did abandon his desire to appeal, albeit he claimed he did so based on incorrect advice. (Tr., p. 15, L. 22 – p. 16, L. 3 ("That's why I didn't file an appeal.").) In short, Gosch failed to prove any prejudice.

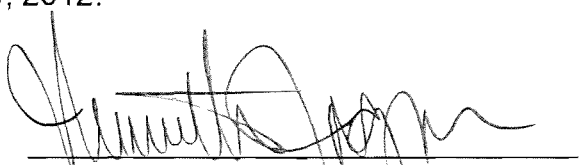
On appeal Gosch assumes that he is entitled to prevail because he presented evidence, and the court found, that he had expressed his desire to appeal to counsel after the trial. (Appellant's brief, pp. 16-21.) In fact he accuses the district court of disregarding the law by looking at any fact other than his expression of a desire for an appeal. (Appellant's brief, p. 17.) The correct legal standard, however, required the trial court to consider all of the information available to counsel, not just the one fact. It also required Gosch to prove that he would have persisted in his desire to appeal after reasonable consultation, a burden not met below and unmentioned on appeal. Gosch has failed to show error in the district court's determination that trial counsel's performance was not deficient for not filing an appeal when counsel "reasonably believed that [Gosch] had abandoned any desire to file an appeal." (R., p. 110.) He has also failed to

show that he presented evidence, much less proof of prejudice. For these reasons, Gosch has failed to show error in the district court's determination that Gosch had failed to prove ineffective assistance of counsel.

## CONCLUSION

The state respectfully requests this Court to affirm the district court's order and judgment denying Gosch's petition for post-conviction relief.

DATED this 3rd day of February, 2012.



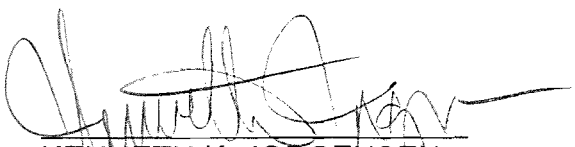
KENNETH K. JORGENSEN
Deputy Attorney General

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 28th day of September 2011, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SARAH E. TOMPKINS
STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



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KKJ/pm