10-26-2017

Standley v. State Appellant's Brief Dckt. 45262

IN THE SUPREME COURT OF THE STATE OF IDAHO

WESLY STANDLEY, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent.	)	S.Ct. No. 45262 Twin Falls No. CV42-17-15

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Fifth Judicial District of the State of Idaho in and for the County of Twin Falls

HONORABLE ERIC WILDMAN,
District Judge

Dennis Benjamin
ISBA# 4199
Nevin, Benjamin, McKay & Bartlett LLP
303 West Bannock
P.O. Box 2772
Boise, ID 83701
(208) 343-1000
db@nbmlaw.com

Attorneys for Appellant

Lawrence Wasden
Idaho Attorney General
Paul Panther
Deputy Attorney General
Chief, Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

Attorneys for Respondent

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUES & RULES

MISCELLANEOUS

II. STATEMENT OF THE CASE

A. *Nature of the Case*

This is an appeal from an order dismissing Wesly Standley's petition for post-conviction relief. Relief should be granted because the district court erred in dismissing Mr. Standley's claim that the attorney who represented him at the probation revocation proceedings was ineffective under the Sixth Amendment. That order should be reversed and the matter remanded for an evidentiary hearing.

B. *Procedural History and Statement of Facts*

1. Criminal case proceedings

Mr. Standley pleaded guilty to a charge of Possession of Heroin with the Intent to Deliver. R 5.

While on pre-trial release, Mr. Standley entered into a drug addiction treatment program, supervised by David Hadlock, M.D., which consisted of three phases. Dr. Hadlock, who is board certified in addiction medicine and holds a Master's Degree in addiction counseling, included Suboxone treatment in the program. T pg. 8, ln 3-13; pg. 9, ln. 1[1]. Suboxone is a medication for those who are addicted to opiates. It contains a synthetic opiate (buprenorphine) and a second drug (naltrexone) that is intended to counteract the euphoric effect of the opiate. Suboxene is designed to stop drug cravings, while at the same time preventing the user from getting high either from the synthetic opiate or from other opiates. T pg.

[1] A true and correct copy of the Clerk's Record and Transcripts from the direct appeal were attached to the Post-Conviction Petition. R 7.

15, ln. 11 - pg. 16, ln. 25; pg. 23, ln. 2-13.

The first phase of treatment was the Intensive Outpatient Treatment program. Mr. Standley successfully completed the IOP, which required 30 group sessions, each lasting three hours, over a 10-week session, with at least five sessions of individual counseling. T pg. 26, ln. 13-25. Mr. Standley then completed the Relapse Prevention program, which lasted 12 weeks. He was in the ongoing Aftercare Program, with group sessions and individual counseling. T pg. 27, ln. 8-22. Mr. Standley also attended NA meetings. T pg. 31, ln. 1-16. Dr. Hadlock testified Mr. Standley "basically has done everything I could possibly could have asked him to do in regards to reprogramming." T pg. 14, ln. 24-25.

At sentencing, the state recommended a twelve-year sentence with four years fixed. Of importance to this appeal, it noted "we do not believe that [a life sentence] is something that is appropriate[.]" T pg. 40, ln. 5-23. Mr. Standley asked the court to impose a stricter sentence of twelve years with nine years fixed, but to grant him one chance by suspending the sentence and granting probation. T pg. 40, ln. 14-24.

The court, noting neither party was going to "like this sentence" imposed the maximum sentence of life imprisonment with 15 years fixed and the maximum fine of $25,000, suspended the sentence and placed Mr. Standley on ten years probation. T pg. 51, ln. 8-12; R 167. The court imposed what might be called a "one and done" probation. It noted, "This is an all or nothing sentence for Wesly Standley, because I am of the firm belief, Mr. Standley, that if you go back to using drugs, you will go

back to dealing, and we will be right back here again." T pg. 54, ln. 20-23. The court continued, "So hear out what I'm saying here. You come back on a probation violation, you're gone." T pg. 55, ln. 11-12.

One of the general conditions of probation was Mr. Standley "shall not associate with any person(s) designated by any agent of IDOC." R 185. Another general condition required Mr. Standley to "meaningfully participate in and successfully complete any treatment, counseling or other programs deemed beneficial to the Defendant and as directed by the Court or any agent of the IDOC." R 183. The court also imposed several special terms of probation, one of which required:

> The defendant shall complete the Suboxene program that he is currently enrolled in through Dr. David R. Hadlock's office. If the defendant quits the program prior to the completion date as recommended by Dr. Hadlock, such conduct shall constitute a probation violation.

R 190; T pg. 58, ln. 8-11.

The court stated, "I'm here to tell you, Mr. Standley, that is, in fact, a zero-tolerance probation." It concluded:

> Here's the things that will get you in trouble: Obviously using alcohol, it's a trigger; using any drugs, that's clearly going to violate you; associating with people you shouldn't associate with. . . . Your probation officer has the authority to tell you who to not associate with.

T pg. 58, ln. 13-20. There was no objection to the zero-tolerance provision and Mr. Standley accepted the terms of the probation. T pg. 58, ln. 25 - pg. 59, ln. 9. No

Notice of Appeal was filed from the judgment and sentence.

2. Probation violation proceedings

The state filed a motion to revoke probation alleging two probation violations. Count I alleged Mr. Standley had "unapproved contact with Danielle Schreiner and Matt Lewis, who are both under IDOC supervision." R 200. Count II alleged he was "failing to take his Suboxene medication as prescribed. And therefore failing to participate in the Suboxene Program with Dr. Hadlock as ordered by the Court." R 200. Mr. Standley entered a denial to those allegations. R 216.

(a) *Count I*

Probation Officer Frank Neumeyer testified that during a probationary search of Mr. Standley's home, another P.O. noted some "odd texts" on a cell phone "that just didn't seem right." T pg. 63, ln. 12-14. Mr. Standley told P.O. Neumeyer that the texts were from Danielle Schreiner and he had in-person contact with her too. Ms. Schrenier was on probation and a participant in Drug Court. The cell phone also showed a phone call to Matt Lewis' number. Mr. Lewis was also on probation. T pg. 63, ln. 9-25. Copies of the text messages were admitted into evidence. T pg. 67, ln. 8-9; State's Exhibit 1. Some of them showed that Mr. Standley was aware Ms. Schrenier was on probation. T pg. 71, ln. 20 - pg. 72, ln. 4. The text message exchange between them was initiated by her. She texted Mr. Standley with the message she just saw Matt Lewis, who wants to contact him. It may be she is seeking drugs from Mr. Standley for both herself (claiming she had

hurt her back) and for Mr. Lewis, who she claims "likes the opiates big time." Mr. Standley says she could take a quarter of a strip of Suboxene for the pain. State's Exhibit 1 (Evidentiary Hearing).

The court originally found Count I had not been proved, noting:

> The provision that is alleged to have been violated is number 24 of the general conditions. Mr. Standley acknowledged or says, the defendant shall not associate with any persons designated by any agent of IDOC. The allegation is that he had unauthorized contact. What's lacking in this case is evidence that he was told of this condition, and maybe we do this case again. I don't know. That's your choice. But I am not going to find that he is in violation of Count 1 because the State has simply not presented substantial evidence on that allegation.

T pg. 112, ln. 4-13.

After the conclusion of the evidentiary hearing, the state filed a second *Ex Parte* Motion to Revoke Probation. R 227. The single count alleged Mr. Standley had "unapproved contact with Danielle Schreiner and Matt Lewis, who are both known felons and under IDOC supervision." R 228. This allegation was substantially similar to the original Count I which alleged Mr. Standley had "unapproved contact with Danielle Schreiner and Matt Lewis, who are both under IDOC supervision." R 191.

This second probation violation proceeded to an evidentiary hearing without objection from defense counsel. After hearing additional evidence, the court took judicial notice of the general condition of probation #24, which prohibited Mr. Standley from associating with any person designated by the IDOC. It continued: "It is undisputed that Alice McClain [a probation officer] told Mr. Standley at the

time he signed up for probation that he was not allowed to associate with any known felons, anyone in the speciality courts, or anyone involved in criminal conduct without the permission of an IDOC officer." T pg. 157, ln. 7-11. Defense counsel conceded and the court found Mr. Standley had prohibited contact with Ms. Schriener. It did not find he had prohibited contact with Mr. Lewis. T pg. 157, ln. 19 - pg. 159, ln. 20.

(b) *Count II*

During the search of Mr. Standley's home, the probation officer found Mr. Standley had not been taking all of the Suboxene prescribed to him. During a time period where Mr. Standley should have taken 44 strips, only ten were missing from his prescription box. When questioned, Mr. Standley said "he was trying to wean himself off that prescription." T pg. 73, ln. 24-25.

Mr. Standley agreed as part of the Suboxene program treatment to take the medication only as prescribed and to not skip or adjust the dose on his own. T pg. 75, ln. 5-12; State's Exhibit 2, pg. 1.

Dr. Hadlock testified Mr. Standley had been participating in all components of the Suboxene program and Mr. Standley's performance was "phenomenal." T pg. 82, ln. 22. Dr. Hadlock explained it is "addict behavior" for patients "to actually practice medicine on themselves" and part of the goal of treatment is "to change that behavior, that's part of the addictive behavior." T pg. 83, ln. 22 - pg. 84, ln. 4. And, while the treatment agreement requires patients to take the medication as

prescribed, only about 70% of patients who are required to take medications twice a day, as Mr. Standley was, actually do so and noncompliance "is a national problem." T pg. 84, ln. 25.

The doctor noted Suboxene works so well in stopping the craving mechanism it is not uncommon for patients to forget to take it. Unlike other medications, when patients miss a dose of Suboxene they are instructed to not take it. "[W]ith Suboxene, if you miss a dose you're instructed specifically don't take the dose." T pg. 85, ln. 1-8. The doctor testified the problem occurs when patients use extra strips, not when they miss a strip. "I don't want them to use extra without permission. If they forget a strip, that kind of follows the national standards. The medication has such a long half life that it will actually stay in their system for three days so they won't have withdrawals by missing a strip." T pg. 85, ln. 17-22. Missing a strip does not worry the doctor, instead, "I'm worried . . . when they take extra strips, that would be addict behavior." T pg. 90, ln. 18-20. He noted Mr. Standley could have accumulated the extra strips if he had missed just five strips a month of the approximately 60 prescribed for each of the ten months he had been in treatment. T pg. 96, ln. 22-25.

The doctor testified Mr. Standley was still in his Suboxene program and special arrangements had been made for him since he was in jail. T pg. 90, ln. 23-25. The state did not present any evidence that Mr. Standley had not meaningfully participated in the treatment, notwithstanding the violation of one of the terms of

the agreement. The doctor explained the treatment agreement is "not a legal document," but is only intended to set out the ground rules for treatment. It is common for the patients to be noncompliant and the doctor gives them "some latitude" when they have violations of the agreement. T pg. 88, ln. 19-20; pg. 89, ln. 4-11.

When asked if Mr. Standley was noncompliant with the program, the doctor answered:

> No. That's – all of his urines have been clean for me and for his probation officers on a weekly basis. He's attended IOP aftercare, relapse prevention. He still was attending community support meetings. I wish I could get the rest of my patients to be that compliant in the education piece because the medication piece is just a small piece. He took to that and was actually leading some of the meetings, from what I was told by his counselors.

T pg. 100, ln. 12-19.

Nevertheless, the court found Mr. Standley had violated the special condition that he complete Dr. Hadlock's treatment program. The court ruled:

> So there were two components of that order. One component is if he quits, he violates probation, no question about it. And second, that he complete the program. Well, there is no question in my mind that Mr. Standley has not followed that program like he was directed. I don't care whether Officer Neumeyer thinks it's a violation or not, I don't care whether Dr. Hadlock thinks it was a violation or not. And clearly failing to follow the prescribed routine of taking two Suboxenes a day was the deal. It's not up to Mr. Standley to make that decision. I could care less whether 90 percent or a hundred percent of the world failed under these programs and failed to follow the instructions. That's not the issue. The issue is you were told what to do. You made a different decision. That isn't a medical issue. It is an issue, Mr. Standley, very simply that you on your own decided to change the program. That violates the probation, and you are, in fact, in violation of probation on

Count 2.

T pg. 113, ln. 11 - pg. 114, ln. 3.

(c) *Disposition*

The court revoked probation, imposed the life sentence and announced it would not reduce the sentence. T pg. 181, ln. 25 - pg. 182, ln. 1.

A timely Notice of Appeal was filed. R 271.

3. Direct Appeal

The Court of Appeals affirmed the district court in an unpublished opinion. *State v. Standley*, No. 43024, 2016 WL 556365 (Ct. App. 2016). R 9.[2]

Mr. Standley argued on appeal there was not sufficient evidence to prove he committed Count II of the first motion for probation violation. The Court of Appeals did not address the argument because defense counsel "conceded there was unapproved contact with Schreiner that violated his probation." *State v. Standley*, 2016 WL 556365, at *3.

4. Post-conviction petition

Mr. Standley filed a timely petition for post-conviction relief. R 5. He alleged his right to the effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 688 (1984), had been violated. Specifically, defense counsel's performance at the probation revocation proceedings was deficient because she failed to object to a second evidentiary hearing on Count I, which the court found had not been proved

[2] A true and correct copy of the Court of Appeals Unpublished Opinion was attached to the Post-Conviction Petition. R 7.

at the first hearing. This deficient performance was prejudicial because relitigation of Count I was barred by *res judicata*, there was insufficient evidence to prove Count II, and because the court relied upon the violation and the facts presented at the second hearing when it revoked probation, imposed sentence, and refused to reduce the sentence. R 10-17.

On February 7, 2017, Mr. Standley filed a Motion for Summary Disposition, noting the state had not filed a responsive pleading within the 30 days permitted by I.C. § 19-4906(a). R 351-52. On February 16, the state filed an Answer admitting all of the factual allegations in the Petition. R 354. It also filed a Cross-Motion for Summary Disposition. R 403. Mr. Standley filed a response to the cross-motion. R 406.

Mr. Standley argued summary disposition in his favor was appropriate because the record showed trial counsel was deficient as she did not object to the relitigation of Count I of the Probation Violations, even though it was barred by the issue preclusion aspect of the *res judicata* doctrine. R 406-414. Mr. Standley also argued he was prejudiced by the deficient performance because there was insufficient evidence he violated Count II. R 414-416.

After holding a hearing on the cross-motions, the court granted the state's cross-motion. It first held the issue of whether *res judicata* applied to probation violation proceedings could have been raised on direct appeal. R 425. (The court later corrected this error after post-judgment motions. R 470.) It also held the

requirements of *res judicata* were not met in the probation violation case "because the initial ruling on Count I was not a final judgment for purposes of res judicata." R 427. It concluded, "since res judicata did not apply to the second evidentiary hearing, counsel's performance was not deficient for failing to object." R 427. In doing so, the court relied upon the case of *State v. Dempsey*, 146 Idaho 327, 193 P.3d 874 (2008). R 427. It also found "that there was sufficient evidence to support a violation on Count II." R 428.

A judgment was filed. R 419. Mr. Standley filed a Motion to Alter or Amend the Judgment, which was denied by the district court. R 431; 469. He also filed a Motion to Take Judicial Notice of the iCourt dockets in *State v. Shawn Dempsey*, Ada Co. CR-FE-1999-1070, and *State of Idaho vs. Shawn Dempsey*, Ada Co. CR-FE-2002-617. True and correct copies of the dockets were attached to the Memorandum in Support of Motion to Alter or Amend. R 440-460; 467.

The court denied the Motion to Alter or Amend. R 470. It never ruled upon the Motion to Take Judicial Notice. A timely notice of appeal was filed. R 472. An Amended Judgment was filed. R 478. An Amended Notice of Appeal timely followed. R 483.

III. ISSUES PRESENTED ON APPEAL

A. Did the court err in dismissing the petition because there was a material question of fact whether counsel's performance was deficient?

B. Did the court err in dismissing the petition because there was a material

question of fact whether Mr. Standley was prejudiced by the deficient performance?

C. Did the court abuse its discretion in failing to rule on the motion for judicial notice?

IV. ARGUMENT

Introduction

A defendant in a criminal case is guaranteed the effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution. The Sixth Amendment has been incorporated through the Due Process Clause of the Fourteenth Amendment to apply to the states. *See Powell v. Alabama*, 287 U.S. 45, 73 (1932). A criminal defendant has the constitutional right to assistance of counsel at all critical stages of the criminal process. *State v. Ruth*, 102 Idaho 638, 641, 637 P.2d 415, 418 (1981); *State v. Blevins*, 108 Idaho 239, 242, 697 P.2d 1253, 1256 (Ct. App.1985). The right to counsel extends to probation revocation proceedings. *State v. Young*, 122 Idaho 278, 283, 833 P.2d 911, 916 (1992); *State v. Lindsay*, 124 Idaho 825, 828, 864 P.2d 663, 666 (Ct. App.1993); *State v. King*, 131 Idaho 374, 376, 957 P.2d 352, 354 (Ct. App. 1998). This right to counsel includes the right to effective assistance of counsel. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Idaho law also guarantees a criminal defendant's right to counsel. Idaho Const. Art. 1, § 13; I.C. § 19-852.

In general, a claim of ineffective assistance of counsel, whether based upon the state or federal constitution and irrespective of the stage of the proceedings, is

analyzed under the familiar *Strickland v. Washington*, *supra*, standard. In order to prevail under *Strickland*, a petitioner must prove: 1) counsel's performance was deficient in that it fell below standards of reasonable professional performance; and 2) this deficient performance prejudiced the defendant. 466 U.S. at 689. The prejudice prong of the test is shown if there is a reasonable probability a different result would have been obtained if the attorney had acted properly. *Id*.

As explained below, defense counsel's performance at the probation revocation proceedings was deficient because she failed to object to a second evidentiary hearing on the same allegation the court found had not been proved. This deficient performance was prejudicial because there was insufficient evidence to prove Count II and because the court relied upon the violation and the facts presented at the second hearing when it revoked probation, imposed sentence, and refused to reduce the sentence**.**

A. *The evidence establishes a prima facie case that counsel's performance was deficient because she failed to object to the filing of the second ex parte motion to revoke probation after the court had already found the state had not proved the same allegation in the first motion.*

Defense counsel's failure to object to the second motion for probation violation, which realleged the allegation the court found was not proved at the evidentiary hearing, was deficient performance.

1. <u>There is no rule or statutory authority for relitigation</u>

Relitigation of the probation violation was not authorized by any court rule or

statute. Absent such authority, defense counsel's failure to object was objectively unreasonable as there could not be a strategic reason to allow the state a second opportunity to prove the allegations. *See*, *McKay v. State*, 148 Idaho 567, 571, 225 P.3d 700, 704 (2010) (deficient performance shown when there was "no conceivable tactical justification for trial counsel's failure to object" to an erroneous jury instruction).

2. *Res judicata* also precluded the relitigation

Defense counsel's failure to object to the relitigation of Count I was also deficient because it is well-established *res judicata* applies in probation violation cases. *State v. Dempsey*, 146 Idaho 327, 328-31, 193 P.3d 874, 875-78 (Ct. App. 2008). The doctrine of *res judicata* covers both claim preclusion and issue preclusion. *Hindmarsh v. Mock*, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002). Issue preclusion protects litigants from having to relitigate an identical issue with the same party or its privy. *Rodriguez v. Dep't of Corr.*, 136 Idaho 90, 92, 29 P.3d 401, 403 (2001). Five factors are required in order for issue preclusion to bar the relitigation of an issue:

> (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation.

Ticor Title Co. v. Stanion, 144 Idaho 119, 123–24, 157 P.3d 613, 617–18 (2007).

Here, all five factors were present. The prosecuting attorney had a full and fair opportunity to litigate the issue in the first evidentiary hearing. The issue decided in the first hearing was identical to the issue presented in the second. That issue was actually decided in the first hearing and the party against whom the issue was asserted was a party or in privity with a party to the litigation.[3] Lastly, as explained in more detail below, there was a final judgment on the merits.

3. There was a final judgment for purposes of *res judicata*

The post-conviction court erred by concluding there was no final judgment for purposes of *res judicata*. There was a final judgment in this case because the court found there was insufficient evidence to prove the allegations in Count I and "[a] judgment may be final in a res judicata sense as to a part of an action although the litigation continues as to the rest." Restatement (Second) of Judgments § 13 (1982). Comment (g) to § 13, goes on to note "that the decision was subject to appeal or was in fact reviewed on appeal [is a factor] supporting the conclusion that the decision is final for the purpose of preclusion." Here, there was a final judgment for *res judicata* purposes because the court found the state had proved Count II, but not proved Count I. The state could have appealed from that ruling in the event the court decided to reinstate probation. I.A.R. 11(c)(9). If the court decided to revoke probation based solely on Count II, the state could have obtained appellate review when Mr. Standley appealed. Idaho Appellate Rule 11(g), provides:

---

[3] There is no dispute these elements of *res judicata* were present.

> After an appeal has been filed from a judgment . . .a timely cross-appeal may be filed from any interlocutory or final judgment order or decree. If no affirmative relief is sought by way of reversal, vacation or modification of the judgment, order or decree, an issue may be presented by the respondent as an additional issue on appeal under Rule 35(b)(4) without filing a cross-appeal.

Thus, all the requirements for the application of *res judicata* were present in the criminal case.

Moreover, an examination of the facts in *State v. Dempsey*, *supra*., shows that a judgment may be final for *res judicata* purpose even though it is not final for purposes of appeal. Mr. Dempsey was on probation on a 1999 conviction when he pleaded guilty to a new charge in 2002. He was sentenced on the 2002 conviction to ten years, with one year fixed, to be served consecutively to the 1999 probation. The 2002 sentence was suspended and Dempsey was placed on probation. The state later alleged Dempsey had violated his probations. After the evidentiary hearing in the 1999 case, the district judge found Dempsey willfully violated the terms of his probation by failing to participate in sex offender treatment. Thereafter, the state filed a motion in the 2002 case requesting the district court apply the doctrine of collateral estoppel to find Dempsey violated the terms of his probation in the second case by failing to participate in sex offender treatment.

At a hearing set by the district court, the state relied on a certified copy of an audio recording of the oral ruling by the district judge in the 1999 case. Dempsey objected to the use of collateral estoppel to find he had committed a probation violation in the present case. The district court, however, noted it had listened to

the audio recording and ruled the doctrine of collateral estoppel should be applied to the state's alleged probation violation. On appeal, the Court of Appeals affirmed, writing:

> The test of when collateral estoppel should apply is: (1) whether the party had a full and fair opportunity to litigate the issue; (2) whether the issue decided in the previous litigation is identical to the current issue presented; (3) whether the issue was actually decided in the previous litigation and whether the issue was necessary to the prior judgment; (4) whether the final judgment was on the merits; and (5) whether the party who the judgment is asserted against was a party or in privity with the party to the prior judgment.

State v. Dempsey, *supra.* The Court of Appeals then held "that the district court properly applied the doctrine of collateral estoppel to bar Dempsey from relitigating the issue of whether he willfully violated the terms of his probation in the present case." *Id*.

However, the first probation violation proceeding was not final for purposes of appeal at the time it was used at petitioner's second proceeding. This is apparent because the *Dempsey* Court noted "the state relied on a certified copy of an audio recording of the oral ruling by the district judge in the 1999 case" as proof of the court's finding. 146 Idaho at 329, 193 P.3d at 876. Had the 1999 case ruling been final for purposes of appeal, the state would have used the court's written order.

In addition, a review of Mr. Dempsey's district court records shows the first finding was not yet an appealable order when it was used in the second case. Mr. Dempsey was found guilty of a probation violation in the 1999 case on 3/6/2007. R 440-448 (iCourt docket from *State v. Shawn Dempsey*, Ada Co. CR-FE-1999-1070,

attached as Exhibit A to Memorandum in Support of Motion to Alter or Amend). On 4/6/2007, the court in the 2002 case considered that finding to be *res judicata* and used it to find Mr. Dempsey guilty of a probation violation. R 449-460 (iCourt docket from *State of Idaho vs. Shawn Dempsey*, Ada Co. CR-FE-2002-617 attached as Exhibit B to Memorandum in Support of Motion to Alter or Amend). However, the probation violation in the 1999 case was not "final" for purposes of appeal until 5/25/2007 when a "Final Judgment, Order Or Decree" was entered. R 447. Thus, the Court of Appeals considered the probation violation found in the 1999 case to be final for *res judicata* purposes even though it was not yet an appealable order.

Dempsey and the Restatement show the trial court's finding that Count I was not proved was final for purposes of *res judicata*. The post-conviction court erred in holding to the contrary.

4. Counsel's performance was deficient when she failed to object.

The probation violation hearings took place in 2015. *Dempsey* was decided in 2008. The five factors required in order for issue preclusion to bar the relitigation of an issue were announced in 2007. *Ticor Title Co. v. Stanion*, *supra.* Counsel should have been aware of these precedents and objected to the state's refiling of Count I. Moreover, if the failure to object was intentional, it was unreasonable because, as noted above, no strategic or tactical purpose could have been served by letting the state get an undeserved second change to prove Count I. *See McKay v. State*, *supra.*

B. *The evidence establishes a prima facie case that Mr. Standley was prejudiced because there was not sufficient evidence to prove Count II.*

Special condition (e) was not violated. That condition required Mr. Standley to "complete the Suboxone program that he is currently enrolled in" and not quit "the program prior to the completion date as recommended by Dr. Hadlock." The court only found Mr. Standley was not in strict compliance with all of the terms of the treatment agreement because he wasn't taking all of his medication. That fact does not constitute a violation of special condition (e) because the word "quit" means to "[s]top or discontinue (an action or activity)."[4] The court's finding that Mr. Standley quit the program because he was in non-compliance with one aspect of the program is in error because it pushes the meaning of the word "quit" outside the bounds of the English language. Mr. Standley quit taking some but not all of his medication. He did not quit the program.

Moreover, the court did not consider Dr. Hadlock's testimony that Mr. Standley had been participating in all components of the Suboxone program and Mr. Standley's performance was "phenomenal." T pg. 82, ln. 22. It also failed to consider Dr. Hadlock's testimony that it is "addict behavior" for patients "to actually practice medicine on themselves" and part of the goal of treatment is "to change that behavior, that's part of the addictive behavior." T pg. 83, ln. 22 - pg. 84, ln. 4. It also failed to consider Dr. Hadlock's testimony that many patients in the program

[4] https://en.oxforddictionaries.com/definition/quit

are not in total compliance with their medication regime. T pg. 84, ln. 25. It also failed to consider Dr. Hadlock's testimony that if Mr. Standley forgot a dose he was to refrain from taking it. The number of extra strips could be explained if Mr. Standley had forgotten just 5 of his 60 doses per month. T pg. 96, ln. 22-25. Finally, the court did not consider the doctor's testimony that Mr. Standley was still in his Suboxone program and that special arrangements had been made for him since he was returned to jail. T pg. 90, ln. 23-25.

The above evidence also shows Mr. Standley was meaningfully participating in the treatment in compliance with general condition of probation #15. The post-conviction court found that Mr. Standley did not meaningfully participate in the treatment because did not strictly comply with the medication requirements.

> A significant component of the Petitioner's probation was that he continued with the Suboxone medication treatment program. A significant component of the treatment program was that the Petitioner only take the Suboxone medication in doses prescribed by his treating physician. The Petitioner's deliberate failure to take the Suboxone medication as prescribed over an extended period of time without consulting his treating physician sufficiently supports the Court's finding that the Petitioner failed to meaningfully participate in the treatment program. The Petitioner's lack of candor for his failure to take the Suboxone medication as prescribed as evidence by his conflicting explanations further supports the finding that the Petitioner was not meaningfully participating in the treatment program as directed.

R 429. This finding is in error for several reasons.

First the trial court never made a finding Mr. Standley failed to meaningfully participate in the treatment program. It found Mr. Standley failed to obtain 100%

compliance with the program. The trial court said:

> So there were two components of that order. One component is if he quits, he violates probation, no question about it. And second, that he complete the program. Well, there is no question in my mind that Mr. Standley has not followed that program like he was directed. . . . And clearly failing to follow the prescribed routine of taking two Suboxones a day was the deal. It' s not up to Mr. Standley to make that decision. I could care less whether 90 percent or a hundred percent of the world failed under these programs and failed to follow the instructions. That's not the issue. The issue is you were told what to do. You made a different decision. This isn't a medical issue. It is an issue, Mr. Standley, very simply, that you on your own decided to change the program. That violates this probation, and you are, in fact, in violation of probation on Count 2.

But, the issue wasn't Mr. Standley decided to "change the program," the question was whether, even with those changes, he was "meaningfully participating" in the program. That is a question the trial court never addressed.

Moreover, the post-conviction court does not apply the plain meaning of the word "meaningfully" in reaching its conclusion. "Meaningfully" means done "in a serious, important, or worthwhile manner."[5] It does not mean 100% compliance. Dr. Hadlock testified he did not expect perfect compliance with the treatment agreement because it is not unusual for patients to be noncompliant and "some latitude" is given when they have violations of the agreement. T pg. 88, ln. 19-20; pg. 89, ln. 4-11. Mr. Standley did not violate general condition # 15 because he was meaningfully participating in the program even if he was not in 100% compliance with one of the terms.

---

[5] https://en.oxforddictionaries.com/definition/meaningfully

Even considering the change in medication, Dr. Hadlock testified Mr. Standley had been participating in all components of the Suboxone program. T pg. 82, ln. 22. Dr. Hadlock also testified it is "addict behavior" for patients "to actually practice medicine on themselves" and part of the goal of treatment is "to change that behavior, that's part of the addictive behavior." T pg. 83, ln. 22 - pg. 84, ln. 4. And, Dr. Hadlock testified many patients in the program are not in total compliance with their medication regime. T pg. 84, ln. 25.

In fact, Mr. Standley was meaningfully participating in the treatment in compliance with general condition of probation #15. Mr. Standley was meaningfully participating because all of his urine tests were clean. The fact Mr. Standley was abstaining from using heroin, by itself, shows his meaningful participation in the program. After all, the purpose of the program is to prevent heroin use. In addition, however, he had attended IOP aftercare and relapse prevention, and he was attending and leading some of the community support meetings. T pg. 100, ln. 12-19.

Mr. Standley was prejudiced under *Strickland* by defense counsel's failure to object to the relitigation of Count I because there was insufficient evidence to show he violated Count II. And, in the absence of sufficient evidence of either probation violation, the court could not have validly found a probation violation, revoked the probation, or imposed the sentence. Even if it had, Mr. Standley could have presented the issue on appeal and prevailed.

C. *The court abused its discretion in failing to rule on the Motion to Take Judicial Notice.*

Idaho Rule of Evidence 201(d) places a mandatory duty on district courts to take judicial notice when a party makes an oral or written request. The post-conviction court violated this duty in this case, and the violation was prejudicial to Mr. Standley, as the documents further established there was a final judgment in his case for purposes of *res judicata*. Therefore, the order of summary dismissal must be vacated.

The Evidence Rule provides:

> (d) When mandatory. When a party makes an oral or written request that a court take judicial notice of records, exhibits or transcripts from the court file in the same or a separate case, the party shall identify the specific documents or items for which the judicial notice is requested or shall proffer to the court and serve on all parties copies of such documents or items. A court shall take judicial notice if requested by a party and supplied with the necessary information.

Mr. Standley's motion read:

> Wes Standley asks this Court to take judicial notice of the iCourt dockets in *State v. Shawn Dempsey*, Ada Co. CR-FE-1999-1070, and *State of Idaho vs. Shawn Dempsey*, Ada Co. CR-FE-2002-617. This motion is made pursuant to I.R.E. 201(d). True and correct copies of the dockets are attached to the Memorandum in Support of Motion to Alter or Amend filed on May 25, 2017.

R 467. True and correct copies of the dockets were in fact attached to the Memorandum in Support of Motion to Alter or Amend. R 440-460. The court denied the Motion to Alter or Amend without ruling on the motion for judicial notice. Thus, the district court violated its mandatory duty to take judicial notice.

Mr. Standley's request identified the specific documents and items requested.

Reversal is required when a district court violates a mandatory duty. *State v. Tribe*, 123 Idaho 721, 727, 852 P.2d 87, 94 (1992). But, even if a harmless error analysis applies, *Martin & Martin Custom Homes, LLC v. Camas County*, 150 Idaho 508, 248 P.3d 1243 (2011), the error was not harmless in this case. As explained above, the district court documents in the *Dempsey* cases show Mr. Dempsey was found guilty of a probation violation in the 1999 case on 3/6/2007. R 440-448. That guilty finding was not "final" for purposes of appeal until 5/25/2007 when a "Final Judgment, Order Or Decree" was entered. R 447. Nevertheless, the court in the 2002 case considered that finding to be *res judicata* and used it to find Mr. Dempsey guilty of a probation violation on 4/6/2007, seven weeks before the 1999 case was appealable. R 449-460. Thus, in affirming the district court, the Court of Appeals in *Dempsey* considered the probation violation found in the 1999 case to be final for *res judicata* purposes even though it was not yet an appealable order, as it found all five requirements of *res judicata* to be present. *State v. Dempsey*, 146 Idaho at 331, 193 P.3d at 878.

The district court record in *Dempsey* conclusively demonstrates there was a final judgment in this case and the post-conviction court erred in concluding otherwise. For these reasons, the order of summary dismissal should be vacated and the matter remanded for further proceedings.

V. CONCLUSION

For the reasons set forth above, Wesly Standley asks this Court to vacate the order summarily dismissing his post-conviction petition and remand to the district court for further proceedings.

Respectfully submitted this 26th day of October, 2017.

/s/Dennis Benjamin
Dennis Benjamin
Attorney for Wesly Standley

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es):

Idaho State Attorney General, Criminal Law Division
ecf@ag.idaho.gov

Dated and certified this 26th day of October, 2017.

/s/Dennis Benjamin
Dennis Benjamin