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IN THE SUPREME COURT OF THE STATE OF IDAHO

GREGORY R. HIGGINS, JR.)	
)	
Petitioner-Appellant,)	Supreme Court No. 45752-2018
)	
vs.)	Canyon Co. CV-2015-9195
)	
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

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 CANYON

HONORABLE DAVIS F. VANDERVELDE,
District Judge

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II. STATEMENT OF THE CASE

A. *Introduction*

Gregory Higgins was convicted of first degree murder. He was sentenced to fixed life. The Court of Appeals affirmed the judgment and sentence. *State v. Higgins*, No. 41572, 2014 Ida. App. Unpub. LEXIS 426 (Ct. App. 2014). This is an appeal from the summary disposition of his Amended Petition for Post-Conviction Relief. Limited Clerk's Record ("LCR") 458.

B. *Post-Conviction Proceedings*

Mr. Higgins filed a pro se Petition for Post-Conviction Relief. He later filed an amended petition, which alleged his trial attorney was ineffective for failing to object to a DVD of a police interview where the police officer comments that Mr. Higgins had previously asserted his right to remain silent, and for failing to move for a mistrial after the exhibit had been published to the jury. (Trial Exhibit 5.) LCR 49-50, 62.

The court took judicial notice of the criminal case jury trial transcripts and jury instruction #11. LCR 79. It also informally took judicial notice of the contents of Exhibit 5, which it described as follows:

Exhibit 5 was a DVD containing footage of an interview with Petitioner during which Petitioner invoked his Fifth Amendment right to remain silent. A review of the portion of the trial transcript attached to the Petition reflects that Exhibit 5 was published to the jury and did contain an invocation Petitioner's Fifth Amendment rights.

LCR 72; see also LCR 248 (Criminal Trial Transcripts, pg. 641, ln. 23 – pg. 642, ln. 5).

The court gave Notice of Intent to Dismiss. It presumed for the purposes of the notice that Mr. Higgins has shown that deficient performance under *Strickland v. Washington*, 466 U.S. 688 (1984), had been established. It wrote,

A reference at trial, such as the one in this case, to a defendant’s invocation of a constitutional right may deprive an accused his or her right to due process and a fair trial. Under such circumstance, again for purposes this Notice, the Court finds that the failure to review an exhibit that results in the admission an exhibit referencing Petitioner’s invocation of his Fifth Amendment rights, falls below an objective standard reasonableness and is therefore deficient performance.

LCR 72-73 (internal citation omitted).

The court then stated that it intended to dismiss due to the absence of an allegation of prejudice and/or sufficient facts to show a “reasonable likelihood that the outcome of his trial would have been different.” LCR 73.

Mr. Higgins responded that the error here was fundamental and thus structural error, which did not require a showing of prejudice under *Strickland v. Washington*. LCR 433-434.

The court rejected Mr. Higgins’ structural error argument holding that all *Strickland* claims must establish that but for the deficient performance there is a reasonable probability of a different result. LCR 455-456. It then dismissed the case holding that Mr. Higgins has not shown that he was prejudiced by the reference to his invocation of his right to remain silent. LCR 456.

A Notice of Appeal was filed. LCR 458. Subsequently, a Final Judgment was entered. LCR 470.

III. ISSUES PRESENTED ON APPEAL

1. Does the prejudice prong of *Strickland* always require a showing of a reasonable probability of a different result, even when the deficient performance rendered the proceedings fundamentally unfair?
2. If such a showing is required in this case, was it made?

IV. ARGUMENT

The District Court Erred in Dismissing the Amended Petition Because There was a Showing of Strickland Prejudice.

1. Strickland prejudice

The prejudice showing is in most cases a necessary part of a *Strickland* claim. “That said the concept of prejudice is defined in different ways depending on the context in which it appears. In the ordinary *Strickland* case, prejudice means a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. But the *Strickland* Court cautioned that the prejudice inquiry is not meant to be applied in a mechanical fashion. For when a court is evaluating an ineffective-assistance claim, the ultimate inquiry must concentrate on the fundamental fairness of the proceeding.” *Weaver v. Massachusetts*, ___ U.S. ___, 137 S. Ct. 1899, 1910-11 (2017) (internal citations and quotation marks omitted). The *Weaver* Court assumed for purposes of the opinion that under a proper interpretation of *Strickland*, relief still must be granted if the

convicted person shows that attorney errors rendered the trial fundamentally unfair even if there is no showing of a reasonable probability of a different outcome. *Id.* Thus, it appears that the district court was incorrect when it held that *Strickland* prejudice always means the existence of a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. There is an exception to that rule for deficient performance which renders the proceedings fundamentally unfair. *Weaver v. Massachusetts, supra.*

In this case, however, it may be that the ordinary standard of *Strickland* prejudice applies. While the deficient performance in *Weaver* dealt with a structural error, the deficient performance here, *i.e.*, permitting the jury to hear a comment upon a petitioner's right to remain silent, is an error of the trial type which is subject to harmless error review. *See e.g., Chapman v. California*, 386 U.S. 18 (1967) (applying harmless error analysis to violation of *Griffin v. California*, 380 U.S. 609 (1965)); *Pickens v. Gibson*, 206 F.3d 988, 999 (10th Cir. 2000) (same); *Matire v. Wainwright*, 811 F.2d 1430, 1436 (11th Cir. 1987) (applying harmless error rule to a *Doyle v. Ohio*, 426 U.S. 610 (1976), violation). Thus, such an error would not fall within the fundamental unfairness form of *Strickland* prejudice. But even under the ordinary standard, the court erred in dismissing the *Strickland* claim.

2. Why the error was prejudicial

Both the U.S. and Idaho Constitution guarantee a criminal defendant the right not to be compelled to testify against him or herself.

The U.S. Supreme Court has interpreted this right also to bar the prosecution from commenting on a defendant's invocation of that right. A prosecutor may not use evidence of post-arrest, post-Miranda silence for either impeachment purposes or as substantive evidence of guilt "because of the promise present in a Miranda warning. *If a prosecutor is allowed to introduce evidence of silence, for any purpose, then the right to remain silent guaranteed in Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), becomes so diluted as to be rendered worthless. The prosecutor also may not use any post-custody silence to infer guilt in its case-in-chief. In cases of pre-*Miranda*, pre-arrest silence, the prosecutor may not use that evidence solely for the purpose of implying guilt. The prosecutor may use pre-*Miranda* silence, either pre or post-arrest, for impeachment of the defendant.

State v. Parker, 157 Idaho 132, 146-47, 334 P.3d 806, 820-21 (2014) (emphasis added, internal quotations and citations omitted).

Here, the jury's exposure to Mr. Higgins' assertion of his right to remain silent could have led the jury to convict him. "A defendant's decision to exercise his or her right to remain silent, whether before or after arrest and *Miranda* warnings, cannot be used for the purpose of inferring guilt." *State v. Stefani*, 142 Idaho 698, 701, 132 P.3d 455, 458 (Ct. App. 2005). The rationale behind that rule is that since *Miranda* requires certain warnings, "[s]ilence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested." *Doyle v. Ohio*, 426 U.S. 610, 617-18 (1976) "Moreover, while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings." *Id.*

Moreover, the prejudice was not ameliorated by a cautionary instruction. *Compare State v. Johnson*, --- Idaho ---, 414 P.3d 234, 244 (2018) (finding no reversible error after an improper comment on defendant's right to remain silent when cautionary instruction which informed the jury, *inter alia*, it was to disregard the comment and it to draw no inferences from the stricken comment). Here, trial counsel did not object to the admission of the evidence and did not request the jury to be instructed that it was not to consider it.

Absent a cautionary instruction, the jury likely took Mr. Higgins' assertion of his Fifth Amendment rights during the police interview as an admission of guilt.¹ This was highly prejudicial because the state's case rested largely upon the testimony of two accomplices, Christopher Duran and Cruz Flores. LCR 178 -209 (Duran), 330-348 (Flores) (Criminal Trial Transcript, pg. 358 – 482 (Duran), pg. 969 – 1038 (Flores).) There was no physical evidence such as DNA or fingerprints linking Mr. Higgins to the offense. There was no confession. In fact, the jury was instructed that it could not find Mr. Higgins guilty based solely upon Duran's and Flores's testimony. R 288 (Criminal Trial Transcript pg. 1131, ln. 6 - pg.1132, ln. 17). In light of the absence of corroborative evidence, the jury likely took Mr. Higgins' assertion of his right to remain silent as that corroborative evidence.

¹ While the jury was instructed that it could not draw an inference of guilt from the fact that Mr. Higgins did not testify at trial, it was not instructed it could not draw such an inference from his assertion of Fifth Amendment rights in Exhibit 5. R 288 (Criminal Trial Transcript pg. 1130, ln. 22- pg.1131, ln. 5.)

In light of the above, the post-conviction court erred in dismissing the ineffective assistance of counsel claim because the deficient performance did prejudice Mr. Higgins.

V. CONCLUSION

The post-conviction court erred in dismissing the Ineffective Assistance of Trial Counsel Claim in the Amended Petition for Post-Conviction Relief. The order should be vacated and the case remanded for further proceedings.

Respectfully submitted this 30th day of August, 2018.

/s/ Dennis Benjamin
Dennis Benjamin
Attorney for Gregory Higgins

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):

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Dated and certified this 30th day of August, 2018.

/s/Dennis Benjamin
Dennis Benjamin