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Cook v. State Respondent's Brief Dckt. 41449

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IN THE SUPREME COURT OF THE STATE OF IDAHO

SEAN COOK,)	
)	
Petitioner-Respondent,)	DOCKET NO. 41449
)	
v.)	Kootenai Co. Case No. CV-2011-10315
)	
STATE OF IDAHO,)	
)	
Respondent-Appellant.)	

RESPONDENT'S BRIEF

APPEAL FROM THE DISTRICT COURT
OF THE FIRST JUDICIAL DISTRICT, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE, JOHN R. STEGNER
District Judge, Presiding

LAWRENCE G. WASDEN
Attorney General
State of Idaho

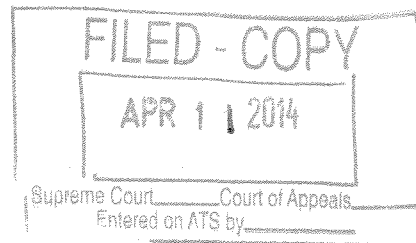
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PETITIONER-RESPONDENT



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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... i

ARGUMENT..... 1

 1. The Trial Court Correctly Applied The Appropriate
 Legal Analysis in Concluding that Cook’s Trial Counsel
 was Deficient in Failing to Object to the Threat Evidence
 Admitted Through Witness Nelson..... 1

 A. Introduction..... 1

 B. Standard of Review..... 1

 C. The District Court Properly Applied the Legal Standard for
 Ineffective Assistance of Counsel Related to Trial Counsel’s
 Failure to Object to the Threat Evidence and Properly
 Held that Trial Counsel’s Failure Fell Below
 an Objective Standard of Representation..... 1

 D. The District Court Correctly Found that Cook was Prejudiced
 by Trial Counsel’s Deficient Performance..... 6

CONCLUSION..... 7

CERTIFICATE OF MAILING..... 8

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Cooke v. State</u> , 149 Idaho 233, 244, 233 P.3d 164, 175 (Ct. App. 20-10).....	1
<u>Dunlap v. State</u> , 141 Idaho 50, 56, 106 P.3d 376, 382 (2004).....	1
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052 (1984).....	2, 6
<u>McKeeth v. State</u> , 140 Idaho 847, 850, 103 P.3d 460, 463 (2004).....	2
<u>Milburn v. State</u> , 130 Idaho 649, 653, 946 P.2d 71, 75 (Ct. App. 1997).....	2
<u>State v. Yakovac</u> , 145 Idaho 437, 444, 180 P.3d 476, 483 (2007).....	2
<u>State v. Pokorney</u> , 149 Idaho 459, 465, 235 P.3d 409 (Ct. App. 2010).....	3
<u>State v. Floyd</u> , 125 Idaho 651, 873 P.2d 905 (Ct. App. 1994).....	3
<u>State v. Piro</u> , 146 Idaho 86, 88, 190 P.3d 905, 907 (Ct. App. 2008).....	6
 <u>RULES</u>	
I.R.E. 403.....	3

ARGUMENT

1. The Trial Court Correctly Applied The Appropriate Legal Analysis in Concluding that Cook's Trial Counsel was Deficient in Failing to Object to the Threat Evidence Admitted Through Witness Nelson.

A. Introduction

In its brief, the State argues that the district court erred in granting Cook post conviction relief based upon improperly admitted threat evidence provided at trial by witness, Paul Nelson. (Brief of Appellant, pp. 3-13.) The State's argument is that the district court incorrectly applied the legal standard for ineffective assistance of counsel, and in doing so, erred in concluding that Trial Counsel's failure to object to the threat evidence fell below an objective standard of representation. Because the district court correctly found that Trial Counsel's failure to exclude this highly inflammatory and inadmissible evidence undermined the proper functioning of the adversarial process at Cook's trial, the State's argument is without merit.

B. Standard of Review

When reviewing the district court's decision on a post-conviction case after hearing, the appellate court "will not disturb the lower court's factual findings unless they are clearly erroneous" but will "exercise free review of the district court's application of the relevant law to the facts." *Cooke v. State*, 149 Idaho 233, 244, 233P.3d 164, 175 (Ct. App. 2010) (citing, *Dunlap v. State*, 141 Idaho 50, 56, 106 P.3d 376, 382 (2004).

C. The District Court Properly Applied the Legal Standard for Ineffective Assistance of Counsel Related to Trial Counsel's Failure to Object to the Threat Evidence and Properly Held that Trial Counsel's Failure Fell Below an Objective Standard of Representation.

Claims for ineffective assistance of counsel are reviewed utilizing the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). See, *McKeeth v. State*, 140 Idaho 847, 850, 103 P.3d 460, 463 (2004). To prevail on such a claim the Petitioner must demonstrate (1) counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's errors the result would have been different. *Id.* In evaluating whether prejudice is proved, the court "must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2068; *Milburn v. State*, 130 Idaho 649, 653, 946 P.2d 71, 75 (Ct. App. 1997).

When evaluating an ineffective assistance of counsel claim, the court does not second guess strategic and tactical decisions, and such decisions cannot serve as a basis for post-conviction relief unless the decision is shown to have resulted from inadequate representation, ignorance of relevant law or other shortcomings capable of objective review. There is a strong presumption that counsel's performance fell within a wide range of professional assistance. *State v. Yakovac*, 145 Idaho 437, 444, 180 P.3d 476, 483 (2007).

At the conclusion of the post-conviction trial, the district court issued its Memorandum Opinion granting Cook post-conviction relief. In its Memorandum Opinion the district court set forth the applicable standard for admission of the threat evidence. The district court stated:

The threat evidence here is arguably relevant because it is probative as to Cook's guilt. However, even relevant evidence may be excluded if it is unfairly prejudicial. Unfair prejudice occurs when the evidence somehow leads the jury to decide the case on an improper basis. Whether evidence is unfairly prejudicial is generally not amenable to broad per se rules because it is determined in the context of the facts and arguments in each particular case. However, evidence that is likely to arouse the jury's hostility or sympathy for one side without regard to the probative value of the evidence, suggests that it is unfairly prejudicial.

(R., pp. 395-396.) (citations omitted.)

After setting forth the applicable legal standard for admission or exclusion of the threat evidence, the district court determined that had Cook's Trial Counsel moved to exclude the evidence, the motion would have been granted. In its rationale, the district court's stated:

[T]he question in this case is whether the potential of the jury's emotional response to the evidence that Cook threatened to rape and murder Nelson's family would have caused the jury to decide Cook's case without regard to the evidence probative value. In the context of the other evidence that had been admitted at Cook's trial, Nelson's testimony about Cook's threats was clearly inflammatory. Given the circumstances, the probative value of Cook's threat was substantially outweighed by the risk of the evidence eliciting a strong emotional response from the jury. As a result, it is likely that a motion to suppress Nelson's testimony that Cook threatened to rape his wife and daughter likely would have been granted. *While it is true that a reviewing court will not second-guess strategic decisions of defense counsel, there is simply no strategic reason to allow highly inflammatory prejudicial evidence to be admitted if it could be excluded.*

(R., p. 396.) (Emphasis added.)

In its brief the State argues that the district court's analysis is flawed because the district court did not apply the legal analysis for ineffective assistance of counsel to the facts of Cook's case. (Appellant's Brief, pp. 8-13.) The state's argument is without merit because the district court not only set out the appropriate legal standard, but then concluded "there is simply no strategic reason to allow highly inflammatory prejudicial evidence to be admitted if it could be excluded." (R., p. 396.) The district court's decision in this regard was correct.

I.R.E., Rule 403 provides: "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice..." While this rule does not require the exclusion of all prejudicial evidence, the rule does require exclusion of evidence which is unfairly prejudicial such that it tends to suggest a decision on an improper basis. *State v. Pokorney*, 149 Idaho 459, 465, 235 P.3d 409 (Ct. App. 2010); *State v. Floyd*, 125 Idaho 651, 873 P.2d 905 (Ct. App. 1994).

In Cook's case, the admitted evidence that Cook allegedly threatened Mr. Nelson, his family and Whitten was unfairly prejudicial. Again, Mr. Nelson's testimony of the threats against his family was that Cook allegedly stated that should Mr. Nelson testify at the preliminary hearing, Cook would have his wife and daughter followed and raped or that they would be taken care of. (Trial Transcript, p. 381, ln. 14 – p. 389, ln. 7.) Although, Mr. Nelson further testified that Cook had stated that Cook would have his girlfriend do the following, (*Id.* at p. 382, ln. 7-11.), Mr. Nelson provided no similar testimony as to who would engage in the alleged rape of his wife and daughter. As a consequence of the introduction of this testimony, along with Mr. Nelson's further testimony of Cook desiring to escape jail so that nobody would be left to testify against him, raised a specter that Cook himself would rape Mr. Nelson's wife and daughter to keep Nelson from testifying. That is the only rational inference to be taken from the testimony.

Mr. Nelson's further testimony that Cook had expressed a desire to escape from jail so that nobody would be left to testify against him and that he would kill Whitten so that she would not be able to testify, was also unfairly prejudicial. This testimony from Mr. Nelson raised the similar specter that Cook would have murdered Whitten prior to trial had he been released from jail. Thus, Mr. Nelson's "threat testimony" suggested to the jury that Cook would freely rape and murder others for his benefit. The testimony painted him as a prospective rapist with murderous intentions that were only being held back by jail walls. The introduction of the "threat evidence" was so overly prejudicial to Cook's case as to deny him his constitutional right to a fair trial. Had Trial Counsel objected to the introduction of this evidence, the district court would have excluded under I.R.E. 403. Accordingly, Trial Counsel was deficient in not

objecting to the introduction of this evidence; rather than stipulating that it was admissible as “part and parcel” of a confession.

In this matter, the State argues that Trial Counsel’s conduct in stipulating to the admission of the treat evidence was a strategic decision and therefore the district court erred. (Appellant’s Brief, p. 9.) The state further argues that there was neither evidence nor any finding of any objective shortcoming associated with that strategic decision and Cook provided no evidence of any shortcoming by Trial Counsel in electing in electing not to object. (Id.) Finally, the State argues the district court failed to find any objective shortcoming by Trial Counsel. (Id.)

In making these arguments, the State suggests that Trial Counsel’s decision not to object to the threat evidence was a strategic decision and not any objective shortcoming by defense counsel. However, Trial Counsel stated that he believed that the threat evidence was admissible as part and parcel of a confession. (Trial Transcript, p. 108, Ls. 4-16; p. 114, Ls. 13-18.) Accordingly, the appearance is that Trial Counsel’s failure to object to the threat evidence was not occasioned by any reasoned strategy he may have possessed, but rather by ignorance of the applicable legal standards related to such evidence.

Moreover, Trial Counsel’s concession to the introduction of the threat evidence occurred during a “conference” during which the jury was not present. (Trial Transcript, pp. 107 – 129.) Because the jury was not present during the “conference”, none of Trial Counsel’s objections to the threat evidence would have been heard by the jury and he would not have drawn any attention to Mr., Nelson’s threat testimony had he properly objected to it.

Based upon these facts, it is apparent that Trial Counsel’s failure to properly object to the threat evidence was not based upon a strategic decision he possessed, but rather to his

shortcoming. The district court concluded that Trial Counsel's failure to object to the introduction of the threat evidence constituted deficient performance and the State has failed to show that conclusion was in error.

D. The District Court Correctly Found that Cook was Prejudiced by Trial Counsel's Deficient Performance.

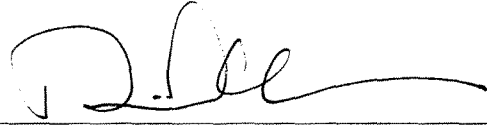
To establish prejudice, an applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *State v. Piro*, 146 Idaho 86, 88, 190 P.3d 905, 907 (Ct. App. 2008). A reasonable probability has been defined as "probability sufficient to undermine confidence in the outcome." *Strickland*, 499 U.S. at 688. The ultimate benchmark is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Id.* at 686. In evaluating whether prejudice is proved, the court must consider the totality of the evidence before the judge or jury. *Id.* at 695.

In Cook's case, the district court concluded that the threat evidence sufficiently undermined confidence in the outcome of Cook's trial. (R., p. 400.) The district court concluded that the jury could not have ignored the inflammatory nature of the threat evidence in determining Cook's guilt, and therefore Trial Counsel's failure to object to the threat evidence undermined the proper functioning of the adversarial process at Cook's trial. (R., pp. 399-400). As a result, the district court concluded that Cook was prejudiced by Trial Counsel's deficient performance. (R., p. 400). The State has failed to show the district court erred in reaching that conclusion.

CONCLUSION

Based upon the forgoing, Petitioner-Appellant respectfully requests this Appellate Court affirm the district court's order and judgment granting post-conviction relief.

Dated this 8th day of April, 2014.

A handwritten signature in black ink, appearing to read 'D. G. Cooper', written over a horizontal line.

DANIEL G. COOPER

Attorney for Petitioner

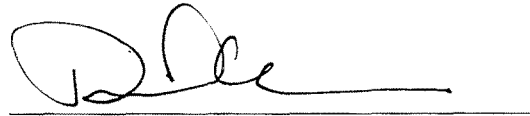
CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same in the interoffice mailbox on the 8th day of April, 2014, addressed to:

Kenneth K. Jorgensen *By U.S. mail, postage prepaid*
Deputy Attorney General

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