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Ciccone v. State Appellant's Brief Dckt. 43075

IN THE SUPREME COURT OF THE STATE OF IDAHO

ALBERT A. CICCONE, Petitioner/Appellant, vs. STATE OF IDAHO, Respondent.	)	Supreme Court No. 43075 Elmore County District Court Case No. CV-2014-0059

OPENING BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

HONORABLE LYNN G. NORTON
District Judge

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II. STATEMENT OF THE CASE

A. Nature of the Case

Appellant Albert Ciccone appeals the denial of post-conviction relief following an evidentiary hearing. This Court should reverse the order denying relief because Mr. Ciccone established that trial counsel was ineffective in failing to submit Dr. Craig Beaver's opinion for sentencing. Specifically, Mr. Ciccone established deficient performance because counsel based the decision to not submit the evaluation results on the basis of mistakes of fact and law. And, Mr. Ciccone met the prejudice prong by establishing a reasonable probability that had the sentencing court been aware of Dr. Beaver's opinion it would have imposed less than a fixed life sentence.

B. Procedural History and Statement of Facts

In 2003, Mr. Ciccone hit his pregnant wife with his car. Both she and the fetus died. He was charged with two counts of first degree murder and convicted of first degree murder for the death of his wife and second degree murder for the death of the fetus. The district court imposed fixed life for first degree murder and 15 years fixed for the second degree murder to run concurrently. Mr. Ciccone appealed. After the case was briefed and argued, the Supreme Court dismissed on the basis of timeliness. Thereafter, pursuant to a stipulation and order entered in post-conviction proceedings, the district court vacated its original judgment and conviction and reentered it as of April 19, 2011. *State v. Ciccone,* 154 Idaho 330, 334, 297 P.3d 1147, 1151 (Ct. App. 2012), citing *State v. Ciccone,* 150 Idaho 305, 246 P.3d 958 (2010).

The stipulation and order resolving the post-conviction proceedings provided that the district court should vacate and reenter judgment and further that the order would have no effect

on any other basis Mr. Ciccone might have for post-conviction relief at a later time including claims besides the ineffective assistance of counsel in not timely filing the notice of conviction raised in the initial petition. R 12-16.

Mr. Ciccone filed a timely notice of appeal from his conviction and sentence raising issues of speedy trial violation, prosecutorial misconduct in comments on his decision to not testify and evocation of sympathy for the victim, and imposition of an excessive sentence. The Court of Appeals denied relief. *State v. Ciccone,* 154 Idaho 330, 297 P.3d 1147 (Ct. App. 2012).

Mr. Ciccone then filed a timely "Verified Successive Petition for Post-Conviction Relief." Mr. Ciccone raised claims of ineffective assistance of trial and appellate counsel. R 17-31.

Counsel was appointed and the case proceeded to an evidentiary hearing. R 30.

At the hearing, while not waiving any of the claims raised in the *pro se* petition, counsel focused on two instances of trial counsel's ineffective assistance: failure to move for a mistrial after a juror performed an independent investigation and shared extra-judicial information with the jury during deliberations; and in failing to present to the Court Dr. Craig Beaver's evaluation undertaken in preparation for sentencing. R 120-132.

The District Court denied relief. R 160-180. The Court entered a final judgment, R 181, and this appeal timely follows. R 183-186.

III. ISSUE PRESENTED ON APPEAL

Did the District Court err in denying relief given that Mr. Ciccone established that trial counsel was ineffective in failing to present Dr. Beaver's evaluation to the Court for sentencing purposes?

IV. ARGUMENT

The District Court Erred In Denying Relief Because Counsel Determined Not to Submit Dr. Beaver's Evaluation Based Upon Mistakes of Fact and Law and Because Mr. Ciccone Established a Reasonable Probability of a Different Outcome Absent the Deficient Performance.

A. Standard of Review

> In order to prevail in a post-conviction proceeding, the applicant must prove the allegations by a preponderance of the evidence. When reviewing a decision denying post-conviction relief after an evidentiary hearing, an appellate court will not disturb the lower court's factual findings unless they are clearly erroneous. 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 within the province of the district court. We exercise free review of the district court's application of the relevant law to the facts.

Bradley v. State, 151 Idaho 629, 631, 262 P.3d 272, 274 (Ct. App. 2011) (citations omitted).

B. Evidence Relevant to Issue

At the evidentiary hearing, Mr. Ciccone testified that trial counsel had him tested by Dr. Beaver's office. Counsel told Mr. Ciccone that he wanted the testing done because his family and personal mental health history could be used as mitigation at sentencing. Tr. 12/12/14 p. 23, ln. 21-p. 26, ln. 19.

Trial counsel testified that he had Dr. Beaver conduct a neuropsychological evaluation of Mr. Ciccone after the conviction, prior to sentencing. Tr. 12/12/14 p. 55, ln. 1-7. Counsel, however, did not obtain a written report, only a verbal report. Tr. 12/12/14 p. 57, ln. 18-25. After hearing the verbal report, counsel instructed Dr. Beaver not to prepare a written report. Tr. 12/12/14 p. 59, ln. 17-20.

Trial counsel testified that a written report would not have been in Mr. Ciccone's best interests. Tr. 12/12/14 p. 59, ln. 23-25. Counsel reached this decision because although Mr.

Ciccone did suffer from major depression, Dr. Beaver had also diagnosed borderline personality disorder. Trial counsel's first wife had borderline personality disorder so counsel concluded that Dr. Beaver meant that Mr. Ciccone was like counsel's ex-wife and was "controlling and abusive." Counsel further testified that Dr. Beaver indicated that Mr. Ciccone was in deep denial of culpability. Counsel testified that he asked Dr. Beaver if Mr. Ciccone would kill again and Dr. Beaver said that he did not know but that "by the time they get to their 40s, they're usually more mature and less violent." Counsel testified that he did not want the Court to have this information. Tr. 12/12/14, p. 63, ln. 6-p. 64, ln. 10. However, counsel also acknowledged that in his 29 years as an attorney he had never ever had a psychological evaluation conducted wherein the evaluator could say that the defendant would never kill again. In making this observation, counsel noted that if he had obtained a written report he would not have asked Dr. Beaver to include an opinion about whether Mr. Ciccone would kill again because of the doors it would open. Tr. 12/12/14 p. 76, ln. 18-p. 77, ln. 15.

Dr. Beaver did not testify at the evidentiary hearing, but his affidavit was an exhibit. In the affidavit, Dr. Beaver averred that had he prepared a written report, he would have included the following:

> a. Mr. Ciccone's MMPI testing results showed a markedly elevated profile indicating significant emotional and/or psychiatric issues;
>
> b. Mr. Ciccone's psychiatric history revealed significant mood instability;
>
> c. Mr. Ciccone's family history revealed a significant history of bipolar disorders;
>
> d. There was a significant mental-health component related to the events surrounding the death of Mr. Ciccone's wife and unborn child.

Petitioner's Ex. B, Affidavit of Craig W. Beaver, PhD, p. 2.

Dr. Beaver also averred:

> 11. Based on my conclusions above, a report to the Court, had one been created, would have assisted the Court in determining Mr. Ciccone's sentence and, in fact, may very well have led the Court to a sentence other than fixed-life.
>
> 12. Because my evaluation of Mr. Ciccone reveals his psychiatric issues resulted in him having a limited appreciation for the ultimate consequences of his actions, had I been consulted and performed my testing prior to trial and testified at trial, the jury would have been provided evidence which very well could have led it to find Mr. Ciccone guilty of a crime less than first degree murder.

Id., p. 3.

Counsel further testified that had he obtained a written report, the state could have moved for its own evaluation by Dr. Estess, whom trial counsel referred to as "Dr. Death." Tr. 12/12/14, p. 64, ln. 23-p. 66, ln. 9.

C. Argument

Trial counsel was deficient because he based the decision to not submit a report from Dr. Beaver based upon both factual and legal errors. And the deficiency was prejudicial because there is a reasonable probability that but for counsel's deficiency the outcome of the proceedings would have been different. Thus, relief was warranted. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984).

Counsel is deficient when he or she fails to investigate and present evidence. This includes evidence of the defendant's mental health status that might go toward mitigation. *Knutsen v. State,* 144 Idaho 433, 443, 163 P.3d 222, 232 (Ct. App. 2007). *See also, Vick v. State,* 131 Idaho 121, 126, 952 P.2d 1257, 1262 (Ct. App. 1998), finding error in summary dismissal of Ms. Vick's petition where she raised a material issue of fact as to whether she received ineffective assistance of counsel at sentencing because her attorney did not request or provide a

report satisfying the requirements of I.C. § 19-2522, did not object to the imposition of sentence without the benefit of such a report, and did not submit other readily available psychological information that provided a more favorable assessment and prognosis.

Counsel is also deficient when he or she acts on the basis of mistakes of fact or law. As demonstrated by *McKay v. State,* 148 Idaho 567, 225 P.3d 700 (2009), tactical decisions based upon inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective relief are deficient performance. 148 Idaho at 530, 225 P.3d at 703.

In this case, counsel decided not to obtain a written report from Dr. Beaver because he did not want the diagnosis of borderline personality disorder revealed to the court, he believed that borderline personality disorder meant that Mr. Ciccone was controlling and abusive, he was concerned that Dr. Beaver did not report that Mr. Ciccone would never kill again, and finally, he was concerned that if he submitted a report, the state would ask for Dr. Estess to prepare a report which would be less favorable. This analysis was deficient because it was based upon mistakes of fact and law.

The mistake of fact was that a diagnosis of borderline personality disorder meant that Mr. Ciccone is controlling and abusive. Counsel used the example of his ex-wife to make the determination of what the diagnosis meant for Mr. Ciccone. However, counsel did not have an expert opinion for this and in fact readily available information is contrary to counsel's conclusion. Respondent's Exhibit 13 which includes counsel's research on borderline personality disorder does not reference controlling and abusive behavior, nor does the National

Institute of Mental Health's webpage discussing the disorder.[1] Instead, the website notes that "People with this disorder also have high rates of co-occurring disorders, such as depression, anxiety disorders, substance abuse, and eating disorders, along with self-harm, suicidal behaviors, and completed suicides." This is consistent with Dr. Beaver's finding of major depression. The NIMH goes on to note that "recent research shows that BPD can be treated effectively, and that many people with this illness improve over time." The former observation is a factor against the imposition of a fixed life sentence and the latter observation is consistent with Dr. Beaver's observation that people by the time they are in their 40s are usually more mature and less violent. Finally, the NIMH notes that Cognitive Behavioral Therapy (CBT) "can help people with BPD identify and change core beliefs and/or behaviors that underlie inaccurate perceptions of themselves and others and problems interacting with others." This type of therapy is available in four of the Idaho Department of Corrections treatment "Pathways" for offenders.[2] Thus, trial counsel was mistaken in his understanding of BPD and how that diagnosis might affect the sentencing decision.

The first mistake of law was that any written report would even have to include a diagnosis. Idaho Code § 19-2522(3)(b) which controls the content of written reports requires: "A diagnosis, evaluation or prognosis of the mental condition of the defendant." A compliant written report could include any one of those three items and be satisfactory. Dr. Beaver could have produced a report consistent with his affidavit in post-conviction which would have included an

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[1] http://www.nimh.nih.gov/health/topics/borderline-personality-disorder/index.shtml#part_145386

[2] https://www.idoc.idaho.gov/content/document/treatment_pathways_by_site

evaluation of Mr. Ciccone's mental health situation and his prognosis without including the term "borderline personality disorder" had counsel determined that the term was excessively prejudicial and did not fully explain Mr. Ciccone's mental health and its impact on his behavior surrounding the deaths of his wife and child.

And, the second mistake of law was that any presentation of a written report would result in the District Court authorizing a second evaluation from Dr. Estes. The defense request for an evaluation was made pursuant to I.C. § 19-2522 which does allow the appointment of more than one psychiatrist or licensed psychologist. I.C. § 19-2522(1). However, the decision to authorize an evaluation lies within the discretion of the court. ICR 32(d); *State v. Adams,* 137 Idaho 275, 276, 47 P.3d 778, 779 (Ct. 2002). And, there is no statutory provision allowing a second evaluation simply because the state wishes to dispute the original court appointed expert's conclusions. Even assuming trial counsel's worse fears regarding the appointment of "Dr. Death" came true, Mr. Ciccone could not have been made to participate in that evaluation. He simply could have refused to speak to Dr. Estess and the doctor would not have been able to conduct a second evaluation. See, *Estrada v. State*, 143 Idaho 558, 564, 149 P.3d 833, 839 (2006)(finding Fifth Amendment right to refuse to participate in psychosexual evaluation).

While strategic decisions based on a knowledge of the facts and law are not a basis for a finding of deficient performance, when as here, counsel's decision was based upon mistakes of fact and law, deficient performance has been established. *McKay v. State, supra*; *Booth v. State,* 151 Idaho 612, 618, 262 P.3d 255, 261 (2011).

Moreover, the deficiency was prejudicial. Mr. Ciccone presented Dr. Beaver's affidavit which stated that there was a significant mental health component related to the offenses. It is

reasonably probable that had the Court been aware that Mr. Ciccone's actions were influenced by mental health factors, the Court would have imposed a sentence less than fixed life – specifically a sentence that would have allowed a possibility of parole if at some point in the future Mr. Ciccone's mental health status improved so that he was not a danger to society. As stated by the Idaho Supreme Court:

> A fixed or determinate sentence is a serious penalty, and should not be imposed lightly . . .
>
> > a fixed sentence should not be regarded as a judicial hedge against uncertainty. To the contrary, a fixed life term, with its rigid preclusion of parole or good time, should be regarded as a sentence requiring a high degree of certainty – certainty that the nature of the crime demands incarceration until the perpetrator dies in prison, or certainty that the perpetrator never, at any time in his life, could be safely released.

State v. Jackson, 130 Idaho 293, 294-95, 939 P.2d 1372, 1373-74 (1997), quoting *State v. Eubank,* 114 Idaho 635, 638, 759 P.2d 926, 929 (Ct. App. 1988).

Had the District Court been aware of the fact that Mr. Ciccone's actions were influenced to a significant degree by his mental health, it is reasonably probable that the Court in accord with *Jackson, supra,* and *Eubank, supra,* would have imposed a sentence that would have allowed for parole at some time in the future rather than a sentence that requires that Mr. Ciccone die in prison.

For these reasons, the District Court erred in denying post-conviction relief.

IV. CONCLUSION

Based on the above as well as all the claims in his petition and all evidence presented in support of those claims, Mr. Ciccone asks that the order denying post-conviction relief be

reversed and the case remanded with instructions to grant relief.

Respectfully submitted this 18th day of September, 2015.

Deborah Whipple
Attorney for Albert Ciccone

CERTIFICATE OF SERVICE

I CERTIFY that on September 18, 2015, I caused two true and correct copies of the foregoing document to be:

✓ mailed

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