

IN THE SUPREME COURT OF THE STATE OF IDAHO

DAXX E. DIAZ)	
)	No. 46798-2019
Plaintiff-Appellant,)	
)	Ada County case no.
v.)	CV01-18-03154
)	
STATE OF IDAHO,)	
)	
Defendant-Respondent.)	APPELLANT'S BRIEF
_____)		

BRIEF OF APPELLANT

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

**HONORABLE MELISSA MOODY
District Judge**

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STATEMENT OF THE CASE

Nature of the Case

Daxx Diaz filed a Petition For Post-Conviction Relief (“PCR”), alleging Ineffective Assistance of Counsel against his trial court attorney. Following an evidentiary hearing, the district court dismissed Mr. Diaz’ petition and entered judgment in favor of the state. Mr. Diaz asserts one claim of error, that the district court committed reversible error by dismissing his PCR case.

Statement of the Facts

Mr. Diaz was convicted at jury trial for Driving Under The Influence in Ada County case CR-MD-2015-9083. (R., p. 6.) The district court sentenced Mr. Diaz to a unified sentence of thirteen years, with five years determinate and eight years indeterminate. (*Id.*)

Following the denial of his direct appeal, Mr. Diaz filed a Petition For Post-Conviction Relief, in which he alleged Ineffective Assistance of Counsel against his trial court attorney, Ransom Bailey of the Ada County Public Defender’s Office. (R., pp. 6-22.) Upon appointment of counsel, once again the Ada County Public Defender’s Office, an Amended Petition was filed. (R., pp. 62-72.)

The district court dismissed seven of Mr. Diaz’ eight PCR claims in summary fashion. (R., 347-49.)

The case proceeded to evidentiary hearing on January 31, 2019. Both sides presented witnesses. Mr. Diaz presented an affidavit from a forensic scientist and toxicologist, Kenn Meneely. (Tr., p. 6, ls. 23-25; R., pp. 314-17). The district court ruled from the bench, denying Mr. Diaz’ petition. (Tr., p. 103, ls. 9-14).

The district court issued its Order Dismissing Claim After Evidentiary Hearing on February 7, 2019. (R., pp. 499-500.) The district court entered its Judgment on the same day. (R., p 502.)

Mr. Freeland filed this appeal, claiming error by the district court in dismissing his PCR Petition. (R., pp. 504-07.)

Course of Proceedings

Daxx Diaz filed his Petition For Post-Conviction Relief, and supporting affidavit and materials, in the Ada County District Court on February 15, 2018. (R., pp. 6-20.)

The district court dismissed seven of Mr. Diaz' eight claims by way of summary disposition. (R., pp. 347-49.)

The district court held an evidentiary hearing on January 31, 2019. The district court denied Mr. Diaz' post-conviction petition. (R., pp. 499-500.) The district court entered judgment against Mr. Diaz and in favor of the State of Idaho on February 7, 2019. (R., p. 502.)

Mr. Diaz filed his Notice of Appeal on February 25, 2019. (R., p. 504-07.)

Issue Presented on Appeal

1. Whether the district court erred by dismissing Mr. Diaz' Petition For Post-Conviction Relief ?

Argument

I. The District Court Erred By Denying Mr. Diaz' Petition For Post-Conviction Relief.

A. Standard of Review

A claim of ineffective assistance of counsel presents a mixed question of law and fact. *Marr v. State*, 163 Idaho 33, 37, 408 P.3d 31, 35 (2017); *see Strickland v. Washington*, 466 U.S. 668, 698, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). When faced with a mixed question of fact and law, the Court will defer to the district court's factual findings if supported by substantial evidence, but will exercise free review over the application of the relevant law to those facts. *Booth v. State*, 151 Idaho 612, 617, 262 P.3d 255, 260 (2011).

B. Legal Standards For Post-Conviction Relief

An application for Post-Conviction Relief ("PCR") under Idaho Code §19-4901 *et seq.*, initiates a special proceeding, which is civil in nature, and is an entirely new proceeding, distinct from the criminal action which led to the conviction. *Paradis v. State*, 110 Idaho 534, 536, 716 P.2d 1306, 1308 (1986); *Reynolds v. State*, 126 Idaho 24, 27, 878 P.2d 198, 201 (Ct. App. 1994). In a post-conviction proceeding, the burden is on the petitioner to establish grounds for relief by a preponderance of the evidence. *Cosio-Nava v. State*, 161 Idaho 44, 48, 383 P.3d 1214, 1218 (2016); *Martinez v. State*, 126 Idaho 813, 816, 892 P.2d 488, 491 (Ct. App. 1995); *Reynolds, supra*; *Odom v. State*, 121 Idaho 625, 626, 826 P.2d 1337, 1338 (Ct. App. 1992).

A defendant in a criminal case is guaranteed the effective assistance of counsel under both the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, § 13 of the Idaho Constitution. A claim of ineffective assistance of counsel may properly be brought

under the post-conviction procedure act. *Goodwin v. State*, 138 Idaho 269, 272, 61 P.3d 626, 629 (Ct. App. 2002).

The landmark case on ineffective assistance of counsel claims is *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In *Strickland*, the United States Supreme Court first defined the right to counsel contained within the Sixth Amendment as the right to the effective assistance of counsel. *Id.*, 466 U.S. at 686 (citing *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970)). Counsel can deprive a defendant of the right to effective assistance of counsel simply by failing to render “adequate legal assistance.” *Id.* (citing *Cuyler v. Sullivan*, 446 U.S. 335, 344, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)). The purpose of the right is, simply, to ensure a fair trial. *Id.* “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Id.*

The *Strickland* case established a two-prong test for analyzing ineffective assistance of counsel claims. To prevail on a claim for ineffective assistance of counsel, the Petitioner must demonstrate (1) that trial counsel’s performance was “deficient”, and (2) that the Petitioner was prejudiced by counsel’s performance. *Strickland*, 466 U.S. at 687. This standard has been adopted by the Idaho appellate courts. *See, e.g., Estrada v. State*, 143 Idaho 558, 561, 149 P.3d 833, 836 (2006).

To establish that trial counsel’s performance was deficient, the Petitioner must show that the attorney’s representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688; *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). The proper measure of attorney performance is “reasonableness under prevailing professional norms.” *Strickland*, 466 U.S. at 688. The Petitioner must overcome a presumption that the attorney’s

conduct falls within a wide range of reasonable professional assistance and sound trial strategy. *Strickland*, 466 U.S. at 689; *Estrada*, 143 Idaho at 561, 149 P.3d at 836.

Proving “prejudice” requires a showing that “there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.” *Saykhamchone v. State*, 127 Idaho 319, 323, 900 P.2d 795, 799 (1995)(citing *Strickland*, *supra.*); *Parrott v. State*, 117 Idaho 272, 275, 787 P.2d 258, 261 (1990). A “reasonable probability” is defined as “a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Booth v. State*, 151 Idaho at 618, 262 P.3d at 261 (citing *McKay v. State*, 148 Idaho 567, 570, 225 P.3d 700, 703 (2010) and *Strickland*, 466 U.S. at 694).

“When evaluating a claim of ineffective assistance of counsel, ‘this 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 preparation, ignorance of the relevant law, or other shortcomings capable of objective review.’” *Marr*, 163 Idaho at 37, 408 P.3d at 35 (citing *State v. Shackelford*, 150 Idaho 355, 382-83, 247 P.3d 582, 609-10 (2010)).

The *Strickland* decision outlines specific duties that trial counsel must honor in representing criminal defendants. Counsel must assist the defendant and owes the defendant a duty of loyalty. *Strickland*, 466 U.S. at 688. Counsel’s “overarching duty” to advocate the defendant’s cause includes the duty to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course” of the case. *Id.* Counsel has a duty to make “reasonable investigations” regarding the case. *Id.*, 466 U.S. at 691. Counsel has a duty to “bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.” *Id.*, 466 U.S. at 688.

The United States Supreme Court has declared that the “ultimate focus of the inquiry must be on the fundamental fairness” of the proceedings throughout the case. *Id.*, 466 U.S. at 696. They further declared that

“In every case, the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.” *Id.*

C. Discussion

Mr. Diaz was convicted in his underlying criminal case of Felony Driving Under The Influence. At the time of his arrest, his BAC was under the legal limit of .08. Law enforcement believed he was intoxicated and therefore pursued a theory that he was under the influence of narcotics. A Drug Recognition Evaluation (“DRE”) was then performed, which led to Mr. Diaz being charged with DUI.

Mr. Diaz was represented by the Ada County Public Defender’s Office. The handling attorney was Ransom Bailey, now an Ada County Magistrate Judge. Notably, and disturbingly, the Ada County Public Defender’s Office also represented Mr. Diaz in the post-conviction proceedings. Counsel believes that this was a violation of the duty of loyalty set forth in *Strickland*, and will encourage Mr. Diaz to pursue that claim in a subsequent post-conviction proceeding, if he is unsuccessful in the present appeal.

During the lead up to the jury trial, Mr. Diaz and counsel argued over trial strategy, and specifically, over the issue of whether they needed expert testimony to rebut the state’s theory. Counsel did not acquiesce to Mr. Diaz’ requests in that regard. Apparently, Mr. Diaz even attempted to contact the trial court and ask for assistance with the appointment of expert witnesses (R., 21-23.)

The issue in Mr. Diaz' case revolved around the testimony of two "experts", Dr. Gary Dawson and the Drug Recognition Evaluation ("DRE") officer. This was required because Mr. Diaz had provided a breath sample below the legal limit of .08. Dr. Dawson testified that upon review of the DRE and the urinalysis testing, he determined that Mr. Diaz was impaired at the time he was operating his motor vehicle. Mr. Diaz was convicted of DUI.

Mr. Diaz's counsel attempted to defend Mr. Diaz by arguing that he did not appear very intoxicated on video. (Tr., p. 21, ls. 5-15; p. 22, ls. 6-12, p. 23, ls. 10-14). Notably, however, counsel failed to present any witnesses, testimony, or expert opinions to attack, discredit or defend against the state's expert witness. In fact, counsel testified that he did not even contact or consult with a scientific expert in this case. (Tr., pp. 20, l. 22 – 21, l. 1; p. 22, l. 6 – p. 23, l. 7; p. 24, ls. 1-4; p. 28, ls. 11-23; p. 49, l. 23 – p. 50, l. 8).

Had counsel done so, an expert could have testified in contradiction of the state's expert's findings regarding impairment. At the PCR evidentiary hearing, Mr. Diaz provided proof of *what* testimony could have been offered in the form of an expert opinion from Kenn Meneely, a forensic toxicologist with nearly forty years' experience. Mr. Meneely stated under oath that a number of the state's expert's opinions were incomplete or inaccurate from a scientific standpoint, including stating matters to a degree of medical certainty, a number of misstatements regarding the specific drugs in Mr. Diaz' system and whether they would register in a drug test, and significant misstatements on whether certain drugs would interact with alcohol such as to impair a person's ability to operate a motor vehicle. (*See Affidavit of Ken Meneely*, Evid. Hrg. Exhibit A, pp. 2-3). Each of the items of evidence played a part in the jury convicting Mr. Diaz. Refuting each of these items of evidence would have helped play a role in disputing the scientific evidence which formed the core of the government's case against Mr. Diaz.

Here, the failure to adequately investigate the science of this case made it such that counsel was not able to effectively cross examine Dr. Dawson or the DRE. As Mr. Meneely's affidavit pointed out, there were several material issues that counsel failed to examine or expose.

First, counsel failed to obtain the rolling log from the State through discovery. As Mr. Meneely explained, this is a necessary tool to be used in evaluating the accuracy of the DRE's conclusions by contrasting the conclusions of the instant case with previous evaluations. (R., p. 315, para. 23.) Without this evidence, Mr. Bailey was unable to effectively cross examine, and defend against, the DRE. Appellate counsel cannot identify any strategic advantage to exposing inaccuracies or not impeaching a critical witness. Rather, this appears to be a simple failure to investigate Mr. Diaz' defenses based on a failure to investigate and prepare a defense.

Next, Mr. Meneely was able to review and analyze all evidence available to Dr. Dawson. The preliminary report of the Pre-Sentence Investigator contained a statement that has been deemed inappropriate and misleading. Because Mr. Bailey did not investigate or consult with an expert, he was unaware of this statement's unacceptance in the scientific community and missed an opportunity on cross examination to expose this statement to the jury or engage in a meaningful examination of Dr. Dawson as to why a credentialed expert witness would include a bolstering statement in his scientific initial report. (*See* R., p. 315, paras. 25-28.)

Next, Mr. Meneely pointed out that if the fact that Mr. Diaz took his prescribed bupirone was accurate, as relied on by Dr. Dawson, then bupirone would have been detected in the urine. (R., p. 315, para. 29 – p. 316, para. 32.) According to Mr. Diaz' post-conviction expert, since bupirone was not present in Mr. Diaz' urine, it should not have been relied upon as a potential impairing substance.

Had Mr. Bailey consulted with an expert in this case he would have been made aware of this, and been prepared to cross examine Dr. Dawson on his experience in regards to current urinalysis screening for buspirone. Further, if a toxicology expert familiar with urinalysis screening for buspirone would have been called to testify at trial it is reasonably probable that the jury would not have relied on the testimony of Dr. Dawson about the impairing effects of buspirone and potentially acquitted Mr. Diaz on Count I of the information. (*See R.*, 316, para. 32.)

Next, Dr. Dawson did not address THC in his initial report, but he testified at length at trial about its effects. (*See R.*, pp. 213-14, containing Trial Tr. pp. 323-27). Dawson opined that a urine test would never show the active component of THC. (*R.*, p. 220, containing Trial Tr., p. 350, ls. 7-11). Mr. Meneely contradicted and disputed this assertion. (*R.*, p. 316, paras. 35-36.) Had trial counsel been aware of this contradictory information, he would have been able to impeach the state's expert witness in regard to not only his familiarity with THC and urinalysis testing, but urinalysis testing procedures as a whole. All of this evidence could have been utilized to help procure an acquittal for Mr. Diaz.

Additionally, Mr. Meneely disputed Dawson's analysis of whether buspirone and alcohol impaired Mr. Diaz. (*R.*, p. 316, paras. 37-42.) Specifically, Mr. Meneely asserted that Dawson ignored the results from the DRE's clinical evaluation, and believed those results to be critical when analyzing cases such as Mr. Diaz's. (*R.*, p. 316, para. 42.) He further pointed out that the American Prosecutor Research Institute takes a critical view of cases where the clinical findings are absent in toxicology cases. (*R.*, p. 316, para. 43.) Mr. Meneely indicated that had Mr. Diaz been impaired, his pupils would have been dilated and he would have had an increased pulse rate. Neither physiological factor was present in Mr. Diaz's case. (*R.*, p. 316, para. 41.)

Had Mr. Bailey consulted with a toxicologist he would have been made aware of these inconsistencies, and potentially had an opportunity to engage in a meaningful cross examination of Dr. Dawson. Counsel failed to do so, and as a result was not prepared to address the specific scientific testimony that lead to Mr. Diaz's conviction.

In summary, Mr. Meneely was able to opine that had trial counsel provided the testimony of a toxicologist at trial, a jury likely would have disagreed with Dawson and acquitted Mr. Diaz of operating a motor vehicle while under the influence of alcohol and drugs. (*See R.*, p. 316, paras. 45-46.)

This evidence, or evidence of a similar nature from any forensic toxicologist or related scientific expert, could have been produced at trial, had trial counsel adequately investigated and prepared for Mr. Diaz' defense, and therefore had been effective in his representation. Counsel testified that he had the ability to do so without much effort or trouble. (*Tr.*, p. 22, ls. 13-23). This evidence, or similar expert testimony, would have radically altered the outcome of the proceedings. (*see Strickland*, 466 U.S. at 689, 694) by refuting the crucial evidence against Mr. Diaz including the ultimate determination that Mr. Diaz was operating a motor vehicle while impaired, resulting in the jury's conviction for DUI.

The District Court disagreed, and denied Mr. Diaz' PCR case, stating in summary that this was only argument and not based on any evidence. (*Tr.*, p. 101, ls. 24-25). The District Court erred in this regard.

Mr. Diaz needed only prove his PCR allegations by a preponderance of the evidence, not beyond a reasonable doubt. *Thompson v. State*, 164 Idaho 821, 825, 436 P.3d 642, 646 (2019). Preponderance of the evidence is defined as that degree of proof which more probable or likely than not. *Black's Law Dictionary* 1182 (6th Ed. 1990).

After Mr. Diaz' presentation of evidence at the PCR trial, he clearly met this low standard. He showed that had his counsel performed up to standards, he could have (1) rebutted the state's main argument, (2) provided expert testimony for the jury to consider, (3) undermined the validity of the state's expert's testimony, and (4) provided an effective defense and, therein, reasonable doubt for jury to acquit Mr. Diaz.

Inexplicably, his counsel took no such efforts. He made no effort to obtain an expert witness and, shockingly, never even consulted with one to assist him in making that determination.

Counsel has a duty to make reasonable investigations regarding his client's case. *Strickland*, 466 U.S. at 691. This duty includes investigating potential defenses and supporting witnesses. Counsel failed in this regard. The District Court put insufficient weight on this factor in holding against Mr. Diaz at the PCR evidentiary hearing.

This Court should remedy that error, and vacate the Judgment against Mr. Diaz.

Mr. Diaz' case is similar to *Marr v. State*, 163 Idaho 33, 408 P.3d 31 (2017). In *Marr*, the district court granted post-conviction relief for the petitioner after his counsel failed to pursue potential defenses for the petitioner's jury trial. The State appealed the decision.

The Supreme Court affirmed the district court's decision. The Court determined that Marr's trial counsel failed to investigate evidence that would have supported a self-defense argument at trial.

The Court held that "[a] lawyer who fails adequately to investigate, and to introduce into evidence, [evidence] that demonstrate[s] his client's factual innocence or that raise[s] sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance.'" *Id.* 163 Idaho at 39, 408 P.3d at 37 (quoting *Hart v. Gomez*, 174 F.3d 1067, 1070

(9th Cir. 1999)). Here, trial counsel admitted under oath that he did no investigation into the issue of challenging the scientific testing results upon which the State relied to convict Mr. Diaz. (Tr., pp. 20, l. 22 – 21, l. 1; p. 22, l. 6 – p. 23, l. 7; p. 24, ls. 1-4; p. 28, ls. 11-23; p. 49, l. 23 – p. 50, l. 8).

“While a tactical decision generally cannot be the basis for relief, a decision constitutes deficient performance when the ‘decision is shown to have resulted from inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review.’” *Id.* (citing *Wurdemann v. State*, 161 Idaho 713, 717, 390 P.3d 439, 443 (2017))(additional citation omitted). In this case, Mr. Diaz offered evidence at the evidentiary hearing that his trial counsel did not provide adequate preparation and investigation into Mr. Diaz’ potential defenses, including failing to present science-based evidence of innocence to the jury. Similar to *Marr*, Mr. Diaz’ trial counsel engaged in deficient performance which fell below objective standards of reasonableness.

Turning to the issue of prejudice, although the district court only summarily addressed the issue in its opinion, Mr. Diaz asserts that his counsel’s deficient performance severely prejudiced him at trial. If Mr. Diaz’ counsel had called a toxicologist to testify at trial, Diaz’ claim would have been more credible, and it is very possible the jury would have acquitted Diaz of the DUI charge. Thus there is a reasonable probability that the result of trial would have been different. *See Marr*, 163 Idaho 39, 408 P.3d at 37. Again, the *Marr* decision mirrors the instant case. Therefore, the second prong of *Strickland* requiring a showing of prejudice is satisfied. *See id.*

Mr. Diaz provided sufficient evidence at his evidentiary hearing to support a showing of ineffective assistance of counsel under *Strickland*. The district court erred by finding that Mr.

Diaz did not make a showing of deficient performance, and ruled in contravention of the Idaho Supreme Court's holdings. This Court should remedy this error.

Conclusion

Mr. Diaz' trial counsel failed to make reasonable efforts to investigate Mr. Diaz' case and defense. He failed miserably in any efforts to refute the science presented by the state, which was the main basis for Mr. Diaz' conviction for DUI since he his BAC results were below the legal limit. Counsel's deficient performance deprived Mr. Diaz of the necessary evidence to gain an acquittal and significantly prejudiced him. Mr. Diaz was therefore deprived of a fair adversarial process. This Court should address this injustice. Mr. Diaz respectfully requests that the Court vacate the district court's judgment against him, and remand with appropriate instructions to grant judgment in his favor.

DATED this 4th day of September, 2019

Paul E. Riggins
Paul E. Riggins
Attorney for Appellant

Certificate of Service

I hereby certify that on September 4th, 2019, I filed the foregoing document utilizing the Court's Odyssey ICourt electronic filing system, which caused a copy to be served on the following party:

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