11-1-2016

Blackburn v. State Respondent's Brief Dckt. 44184

IN THE SUPREME COURT OF THE STATE OF IDAHO

RODNEY GENE BLACKBURN, JR.,	)	
	)	**No. 44184**
Petitioner-Appellant,	)	
	)	**Canyon County Case No.**
v.	)	**CV-2015-11578**
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Rodney Gene Blackburn, Jr., appeals from the district court's order denying his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

Blackburn pleaded guilty to felony violation of a no-contact order. (See R., pp. 5, 31-32.) He was sentenced to four years prison with one year fixed. (R., pp. 31-32.)

Blackburn filed a petition for post-conviction relief alleging, among other things, that "trial counsels[[1]] advice to forego filing a direct appeal from his conviction and instead file a motion for rule 35 was faulty advice," violating his 6th amendment rights.[2] (R., p. 7.) Blackburn's petition, the sole source of relevant facts in the record on appeal, explained his claim as follows:

> This is an issue where counsels advice has caused petitioner the loss of a guaranteed constitutional right to challenge his conviction on direct appeal. In the instant case petitioner look toward his counsel for guidance. Counsel in this case neglected to discuss with the petitioner the appellate process or the ramifications of not filing an appeal. Instead he said, "An appeal is not necessary" and "that a Rule 35 would be more appropriate". After petitioner became more versed of the appellate process, he finds several

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[1] Quotations from Blackburn's petition will be *sic* throughout.

[2] Blackburn's other post-conviction allegations were that "it was ineffective assistance of counsel for his attorney to ignore the phone calls to his office, where petitioner was requesting for counsel to meet with him to review the information in the PSI," and that "the presentence investigator or other court official has violated his right to confidentiality and disclosure by allowing information from his PSI to be mixed in with another defendants PSI." (R., pp. 7-8.) These claims were summarily dismissed below, and Blackburn has not challenged their dismissal on appeal. (R., p. 57; see Appellant's brief, pp. 4-9.)

> things wrong with his attorneys advice. First the laws of this country provide for every convicted individual the right to a direct appeal. The petitioner contends why would he not avails himself of this right as he had absolutely nothing to lose by appealing and possible much to gain. Therefore counsels advice to not appeal is ineffective assistance and self-serving.

(R., p. 7.)[3]

Regarding the sole issue now on appeal, the court found that Blackburn provided "no facts to show that counsel's advice not to appeal was deficient" due to "inadequate preparation, ignorance of relevant law, … other shortcomings capable of objective evaluation," or was "otherwise not reasonable." (R., pp. 49, 56.) This claim, along with the remainder of Blackburn's petition, was therefore summarily dismissed. (R., pp. 53-61.)

Blackburn timely appealed. (R., pp. 62-65, 80-83.)

[3] To note a secondary issue, Blackburn also claimed that he took issue "with trial counsel because the very reason counsel cited for not filing the notice of appeal was the presentation of a Rule 35, of which he did not do." (R., p. 7.) Blackburn's counsel states on appeal that the Rule 35 motion was in fact filed, but contends upon information and belief that the motion was untimely, unsupported, and ultimately denied. (Appellant's brief, p. 2, n. 1.) In any event, the motion and any documents pertaining to it are not in the appellate record, making its timeliness and disposition unclear. (See R.) Blackburn further states that he "is not moving to augment the [appellate] record with [those documents], nor would it be proper to consider them in this appeal." (Appellant's brief, p. 2, n. 1.) As a result, this response will only address the sole issue Blackburn raises on appeal—his trial counsel's allegedly deficient advice regarding the necessity of an appeal. (See Appellant's brief, pp. 4-9.)

ISSUE

Blackburn states the issue on appeal as:

> Whether the district court erred by summarily dismissing Mr. Blackburn's petition for post-conviction relief.

(Appellant's brief, p. 4)

The state rephrases the issue as:

Has Blackburn failed to show the district court erred by summarily dismissing his claim of ineffective assistance of counsel?

ARGUMENT

Blackburn Has Failed To Show The District Court Erred By Dismissing His Claim That His Counsel Was Ineffective For Advising Him Not To Appeal, Because He Has Not Shown That This Was Deficient Performance, And Has Not Shown That It Was Prejudicial To Him

A. Introduction

The district court summarily dismissed Blackburn's claims for post-conviction relief. (R., pp. 56-61.) Regarding the ineffective-assistance issue now on appeal, the district court held that trial counsel's advice not to file a direct appeal was a "strategic decision" not to be second-guessed, and further found that there were no facts showing that counsel's advice was deficient or otherwise unreasonable. (R., p. 56.)

On appeal, Blackburn contends that his "counsel did not discuss the ramifications of not filing" a direct appeal, and claims that this "alone establishes a genuine issue of material fact in regard to deficient performance because, if liberally construed in Mr. Blackburn's favor, it demonstrates trial counsel did not fulfill his duty to consult with Mr. Blackburn." (Appellant's brief, pp. 6-7.)[4] Blackburn further argues that advice to file a Rule 35 motion instead of an appeal was "objectively unreasonable." (Appellant's brief, p. 7.) Blackburn contends that the advice was also presumptively prejudicial to him, because "but

[4] Blackburn also alleged in a petition heading that "TRIAL COUNSEL COERCED PETITIONER INTO FOREGOING FILING A NOTICE OF APPEAL," but there are no non-conclusory facts in the record showing any coercion. (See R., pp. 4-9.) Blackburn appears to have abandoned his coercion theory on appeal. (See Appellant's brief.)

for the erroneous advice about Rule 35 being a valid alternative to the direct appeal, he would have exercised his right to appeal." (Appellant's brief, p. 8.)

Blackburn's claims fail. The record shows that counsel did not perform deficiently, in fact consulted with Blackburn about whether to file an appeal, and Blackburn did not instruct counsel to file an appeal. Further, even if counsel performed deficiently, Blackburn has not shown any presumptive prejudice, because he has not shown it reasonably probable that *but for* the allegedly deficient advice he would have appealed. Neither has Blackburn shown any other grounds for prejudice. The district court thus correctly summarily dismissed Blackburn's petition for post-conviction relief.

B. Standard Of Review

Summary dismissal of a post-conviction claim "is appropriate only if there exists no genuine issue of material fact which, if resolved in the applicant's favor, would entitle him to the requested relief." Nevarez v. State, 145 Idaho 878, 880, 187 P.3d 1253, 1255 (Ct. App. 2008). If such a genuine factual issue is established, "an evidentiary hearing must be conducted." Id. at 880-81, 187 P.3d at 1255-56. On a review of summary dismissal, this Court examines the record "to determine whether the trial court correctly found that there existed no genuine issue of material fact and that the State was entitled to judgment as a matter of law." Id. at 881, 187 P.3d at 1256. Facts and reasonable inferences are construed in favor of the non-moving party; however, this Court does "not give evidentiary value to mere conclusory allegations that are unsupported by admissible evidence." Id.

C. Blackburn Has Failed To Show His Counsel Was Ineffective For Advising Him Not To Appeal, Because He Has Not Shown That This Was Deficient Performance Or Prejudicial To Him

A criminal defendant has a constitutional right to counsel and to counsel's "reasonably effective assistance." U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 687 (1984). To prove that counsel was ineffective, a defendant must satisfy a two-prong test and show both that 1) "counsel's representation fell below an objective standard of reasonableness," and 2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 687–96. A court's "scrutiny of counsel's performance must be highly deferential" on review; therefore, a reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. Accordingly, counsel's tactical and strategic decisions "will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law or other shortcomings capable of objective evaluation." Howard v. State, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

In the "vast majority" of cases defense counsel will have a duty to consult with the defendant regarding whether to appeal. Roe v. Flores–Ortega, 528 U.S. 470, 485 (2000). In doing so, as is always the case, counsel's representation must meet an "objective standard of reasonableness." See id.; Strickland, 466 U.S. at 688. But ultimately, the choice whether to appeal rests with the defendant. Labelle v. State, 130 Idaho 115, 119, 937 P.2d 427, 431 (Ct. App. 1997) (citing Jones v. Barnes, 463 U.S. 745, 751 (1983); see also Flores–

Ortega, 528 U.S. at 485 ("Like the decision whether to appeal, the decision whether to plead guilty (*i.e.*, waive trial) rested with the defendant…."). Accordingly, as a general rule "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." Flores–Ortega, 528 U.S. at 477.

Where a defendant's appeal wishes are unclear, the Flores–Ortega decision gives specific guidance. Id. There, the Court started with Strickland's first prong and specifically rejected finding "as a *constitutional* matter, that in every case counsel's failure to consult with the defendant about an appeal is necessarily unreasonable, and therefore deficient." Id. at 479 (emphasis in original). Instead, the Flores–Ortega Court held that counsel "has a constitutionally imposed duty to consult with the defendant about an appeal" where there was reason to think a rational defendant would want an appeal, or where the defendant reasonably demonstrated to counsel he was interested in appealing. Id. at 480. The Court found that in those circumstances, failure to consult with the defendant about an appeal results in a presumptive finding that counsel's performance was deficient. See id. at 479-480. To "consult," as defined by Flores–Ortega, "convey[s] a specific meaning—advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes." Id. at 478.

As for Strickland's second prong, the Flores–Ortega Court held that an unjustified failure to consult about appealing could also be presumptively prejudicial, as it led to a "denial of the entire judicial proceeding itself, which a

defendant wanted at the time and to which he had a right." Id. at 481-83. However, the Flores–Ortega Court only afforded this presumption in a particular circumstance: it "[held] that, to show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, *but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed*." Id. at 484 (emphasis added). The Court likewise held that "[i]f the defendant cannot demonstrate that, but for counsel's deficient performance, he would have appealed, counsel's deficient performance has not deprived him of anything, and he is not entitled to relief." Id.

1. Counsel's Advice To Blackburn Was Not Deficient Performance

Here, Blackburn's allegations that counsel advised him to file a Rule 35 motion as opposed to a direct appeal do not establish a viable claim of deficient performance. Blackburn alleges that counsel discussed with him, advised him against filling an appeal that counsel deemed "not necessary," and advised that he thought that a Rule 35 motion would be more appropriate. (R., p. 7.) Blackburn was free to disregard this advice and instruct his counsel to file an appeal. He did not. (See R., p. 7.) Given that the ultimate authority whether to appeal rested with Blackburn, his counsel's advice not to do so was not deficient simply because Blackburn now disagrees with that advice. Moreover, measured advice that a Rule 35 motion "would be more appropriate" than an appeal suggests counsel evaluated both options, recommended a course of action based on those options, and concluded that an appeal was either unnecessary, or less appropriate, or both. Second-guessing that *conclusion* does not mean,

as the district court put it, that the advice itself was "based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation." (R., pp. 49, 56 (citing Howard, 126 Idaho at 233, 880 P.2d at 263).) Accordingly, counsel's advice not to appeal should be analyzed under the "strong presumption" that it fell "within the wide range of reasonable professional assistance" and by that metric, would not be deficient. See Strickland, 466 U.S. at 689.

Moreover, Blackburn pleaded guilty, which "waive[d] all non-jurisdictional defects and defenses, whether constitutional or statutory, in prior proceedings." State v. Al–Kotrani, 141 Idaho 66, 69, 106 P.3d 392, 395 (2005). Blackburn's plea thus limited him to challenging his sentence on appeal, and it is unlikely that he could have successfully persuaded this Court that a four-year sentence, with only one-year fixed—for his third felony conviction—was excessive. (See PSI, p. 17.) Blackburn's limited options and the posture of this case would therefore only heighten the strong presumption that counsel's advice to pursue a Rule 35 motion was within the wide range of reasonable professional assistance.

Blackburn presents two arguments that his counsel performed deficiently by advising him not to appeal. First, he cites to Flores–Ortega and argues that "trial counsel did not fulfill his duty to consult with Mr. Blackburn as that duty has been defined by the United States Supreme Court." (Appellant's brief, pp. 6-7.) This argument fails, because Blackburn's counsel fulfilled that duty. Flores–Ortega defines "consult" as "advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover

the defendant's wishes." Flores–Ortega, 528 U.S. at 478. The facts as alleged by Blackburn are that "Counsel in this case neglected to discuss with the petitioner the appellate process or the ramifications of not filing an appeal. *Instead he said, 'An appeal is not necessary' and "that a Rule 35 would be more appropriate'.*" (R., p. 7 (emphasis added).)

By this account there was a consultation about an appeal: counsel and Blackburn had a discussion; during that discussion counsel advised Blackburn regarding whether to file an appeal; counsel advised that filing an appeal was not necessary; and, counsel recommended an alternative course of action. Advice that an appeal is "not necessary," and that filing a Rule 35 motion was a better course of action, is necessarily a statement about the advantages of not appealing, or disadvantages of appealing, even if counsel did not use those exact words. Further, there is no evidence in the record, nor does Blackburn allege, that counsel did not make a reasonable effort to discover the defendant's wishes. (See R., pp. 4-9.) Thus, while Blackburn might retrospectively disagree with counsel's advice whether to appeal, that does not mean that no advice was given, or that a consultation about appealing did not take place.

Given that there was a consultation about an appeal, Flores–Ortega itself "easily answer[s]" the issue here: Blackburn's counsel would have performed "in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." Flores–Ortega, 528 U.S. at 478. Blackburn has not alleged that he gave express instructions to his counsel during or after their consultation, nor is there any evidence of instructions to appeal,

express or otherwise.[5] (See R., pp. 4-9.) Accordingly, because there was a consultation about an appeal, but no express instructions from Blackburn to file such an appeal, Blackburn fails to show that counsel performed deficiently based on Flores–Ortega.

Blackburn also advances the theory that counsel's advice was deficient because "a Rule 35 motion is not an alternative to a direct appeal," and "[a]s such, trial counsel's advice to Mr. Blackburn – to pursue a Rule 35 motion *instead of* a direct appeal – was objectively unreasonable advice." (Appellant's brief, p. 7 (emphasis in original, citing State v. Huffman, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007).)

This argument fails to show deficient performance. Because while it is clear that Rule 35 is not the same procedural mechanism as an appeal, it is not likewise clear that advice to pursue a Rule 35 motion, in this case, would have been deficient advice. As noted above, Blackburn pleaded guilty, which waived all "non-jurisdictional defects and defenses, whether constitutional or statutory, in

[5] This fact distinguishes this case from Beasley v. State, 126 Idaho 356, 883 P.2d 714 (1994), which Blackburn cites in his briefing. (Appellant's brief, p. 8.) There, it was "undisputed … that Beasley advised his trial counsel of his wish to appeal his conviction." Id. at 360, 883 P.2d at 718. Moreover, there, "[t]he record also clearly show[ed] that trial counsel, and the public defender who assumed Beasley's representation after the entry of his judgment of conviction, understood that Beasley desired to appeal." Id. The Beasley Court concluded, "[h]aving determined that Beasley's counsel either neglected or refused to file an appeal despite Beasley's request, … that ineffective assistance of counsel deprived Beasley of his opportunity to appeal and that prejudice is presumed from this deficient performance." Id. at 362, 883 P.2d at 720. Here, there is no evidence that Blackburn ever advised his counsel he wished to appeal, nor any evidence that his counsel ignored such a request. (See R.) Thus, consistent with the rules set forth in Flores–Ortega, Blackburn would not be entitled to the presumption of prejudice that Beasley was afforded. See 528 U.S. at 477-78.

prior proceedings." Al–Kotrani, 141 Idaho at 69, 106 P.3d at 395. In light of his limited appeal-issue options and the sentence Blackburn received, a Rule 35 motion, practically assessed, likely presented a more viable chance of success—which is precisely why, one presumes, counsel recommended it. In sum, regardless of the legal differences between a Rule 35 motion and an appeal, Blackburn has not shown that the *advice* to pursue the former instead of the latter was at all deficient.

Because Blackburn has not shown counsel performed deficiently, the district court correctly dismissed his claim for ineffective assistance of counsel.

2. Even Assuming That Counsel Performed Deficiently, Blackburn Has Not Shown It Reasonably Probable That But For Counsel's Allegedly Deficient Advice, He Would Have Appealed; Thus, Blackburn Fails To Show That Any Deficient Performance Was Prejudicial

Even if Blackburn has shown that counsel's advice to him constituted deficient performance, he must still show it was prejudicial to him. See Strickland, 466 U.S. at 687. He has not done so.

First, Blackburn has not shown any particularized prejudice arising from the advice to file a Rule 35 motion. In his petition, Blackburn seems to claim counsel's advice was prejudicial because "why would he not avails himself of [his right to appeal] as he had absolutely nothing to lose by appealing and possible much to gain." (R., p. 7.) Or in other words, Blackburn appears to say that advice not to appeal was prejudicial because an appeal would come at no direct cost to him, and there was a chance of receiving a reduced sentence.

The problem with finding prejudice based on these grounds is twofold. First, doing so ignores the opportunity cost of an appeal, and undercuts the value of a Rule 35 motion. While Blackburn's appeal would come at no out-of-pocket cost to him, that does not mean that appealing would be costless or that the Rule 35 motion would be ill-advised—at the very least, filing an appeal instead of the motion would necessarily come at the motion's expense.

Second, this argument fails because it finds prejudice in a circumstance that would *always* be present in indigent cases. If advice not to file a "free" or "nothing-to-lose" appeal opens a door to prejudice, then every indigent defendant could claim such advice is prejudicial, regardless of whether it is actually good advice. Creating an omnipresent prejudice standard not only goes against Flores–Ortega—which held that in unique cases defense counsel need not even *consult* about an appeal to be effective—but Strickland, where the Court held that "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Flores–Ortega, 528 U.S. at 479-80; Strickland, 466 U.S. at 690.

On appeal, Blackburn appears to allege only presumptive prejudice based on the *per se* rule found in Flores–Ortega. (Appellant's brief, pp. 8-9 (citing Flores–Ortega, 528 U.S. at 478).) To prevail on that theory and show that a failure to consult about an appeal is presumptively prejudicial, "a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed."

Flores–Ortega, 582 U.S. at 484. Here, even assuming the consultation was inadequate, no facts would support a *per se* demonstration of prejudice. There is no evidence in Blackburn's petition showing he positively would have appealed but for his counsel's advice, let alone facts that show a reasonable probability of it. (See R., p. 7.)

Blackburn argues to the contrary, and points to the rhetorical question he raised in his petition for post-conviction relief:

> After petitioner became more versed of the appellate process, he finds several things wrong with his attorneys advice. First the laws of this country provide for every convicted individual the right to a direct appeal. *The petitioner contends why would he not avails himself of this right as he had absolutely nothing to lose by appealing and possible much to gain.* Therefore counsels advice not to appeal is ineffective assistance and self-serving.

(R., p. 7 (emphasis added, grammar original).) Blackburn reasons that "[a]lthough framed as a rhetorical question, what Mr. Blackburn alleged is, but for the erroneous advice about Rule 35 being a valid alternative to the direct appeal, he would have exercised his right to appeal 'as he had absolutely nothing to lose and possibl[y] much to gain.'" (Appellant's brief, p. 8 (citing R., p. 7).)

However, even charitably reading Blackburn's rhetorical question does not establish a reasonable probability that but for counsel's advice not to appeal, Blackburn would have appealed. His question, unpacked in context, appears to be *post-hoc* criticism of counsel's advice that an appeal was "not necessary." Because Blackburn had a statutory right to an appeal, and subsequently deemed it a low-risk, high-return strategy, his petition seems to say that in hindsight

appealing would have made perfect sense—"why would he not avail[] himself of this right," he asks. (See R., p. 7.)

But Blackburn never stated below, as he argues now, that *but for* that allegedly bad advice "he would have exercised his right to appeal." (See R., p. 7; Appellant's brief, p. 8.) Instead, Blackburn's conclusion following his rhetorical question was simply that, in light of the now-apparent merits of appealing, the advice not to appeal was "ineffective assistance and self-serving." (R., p. 7.) Additionally, there is no reason to think that Blackburn's skeptical appraisal of counsel's advice even existed at the time the advice was given—per Blackburn, he determined his attorney gave incorrect advice only "[a]fter [Blackburn] became more versed of the appellate process." (R., p. 7.) Accordingly, Blackburn cannot bridge the gap between his post-conviction criticism of counsel's advice, and the standard he must now meet: showing evidence that *but for* that advice, it is reasonably probable that he would have acted any differently at the time it was given. He accordingly cannot show *per se*, presumptive prejudice.

Blackburn has not shown facts establishing a reasonable probability that he would have appealed but for counsel's advice—thus, any failure to consult would not have been presumptively prejudicial. Moreover, Blackburn has not shown any other prejudice from counsel's recommendation to file a Rule 35 motion. Because Blackburn's allegations fail to establish deficient performance or prejudice, he cannot show that he received ineffective assistance of counsel. The district court correctly concluded the same.

CONCLUSION

The state respectfully requests this Court affirm the judgment of the district court.

DATED this 1st day of November, 2016.

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 1st day of November, 2016, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

BRIAN R. DICKSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

KDG/dd