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Macklin v. State Appellant's Brief Dckt. 48165

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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

ROBERT SCOTT MACKLIN,	)	
	)	**NO. 48165-2020**
Petitioner-Appellant,	)	
	)	**TWIN FALLS COUNTY**
v.	)	**NO. CV42-19-2532**
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

HONORABLE ROGER B. HARRIS
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Robert Scott Macklin appeals from the district court's judgment dismissing his petition for post-conviction relief following an evidentiary hearing. The district court erred in dismissing Mr. Macklin's petition because Mr. Macklin established that he received ineffective assistance of counsel when his trial counsel failed to contest his termination from drug court, which led to the revocation of his probation. Mr. Macklin proved, by a preponderance of the evidence, that his trial counsel's failure to request a hearing pursuant to *State v. Rogers*, 144 Idaho 738 (2007), fell below an objective standard of reasonableness, and further proved that, but for his counsel's error, there is a reasonable probability that he would not have been terminated from drug court, and thus would have remained on probation. Alternatively, this Court should remand this case to the district court for a new evidentiary hearing because the district court erred in concluding Mr. Macklin's testimony regarding what he learned in drug court was not relevant to his ineffective assistance of counsel claim.

Statement of Facts and Course of Proceedings

Mr. Macklin was convicted of grand theft in Twin Falls County No. CR 2014-7737, and sentenced to five years fixed. (*See* R., pp.7, 99.) The district court suspended the sentence and placed Mr. Macklin on probation. (*See* R., p.99.) Mr. Macklin was later admitted into drug court, and his successful completion of drug court was made a condition of his probation. (*See* R., p.99.)

Mr. Macklin was terminated from drug court on July 18, 2018. (*See* R., pp.56, 63-65, 160; Exs., p.25.) The drug court termination report reflects that Mr. Macklin was terminated because: (1) he had unauthorized contact with an active drug user; (2) he left the Fifth Judicial

District without permission on June 23, 2018 (3) he arrived late for one treatment session, and failed to appear for one urinalysis test; (4) it was discovered on July 18, 2018, that he "was living in a residence which contained alcohol and firearms," and had not disclosed those were present; and (5) he arrived unprepared for a treatment session on one occasion. (R., pp.63-65.) Mr. Macklin's attorney, Dan Brown, did not contest Mr. Macklin's termination from drug court, despite being notified that Mr. Macklin would be returned to drug court "if [he] is found to not have willfully violated the rules as alleged." (R., p.14.)

After Mr. Macklin was terminated from drug court, the State filed a motion to revoke his probation because (1) he failed to successfully complete drug court, and (2) he violated his probation by residing in a location where firearms are present. (R., p.59.) Mr. Macklin admitted to violating his probation by failing to successfully complete drug court, and the State dismissed the second allegation. (*See* Tr., p.120, Ls.7-14.) The district court revoked Mr. Macklin's probation and executed his underlying sentence. (R., pp.99-101.)

Mr. Macklin filed a timely pro se petition for post-conviction relief on June 13, 2019. (R., pp.7-15.) Mr. Macklin filed a motion for appointment of counsel, which the district court granted. (Motion to Augment, pp.3-7.)[1] The State filed an answer to Mr. Macklin's petition, and Mr. Macklin then filed, through counsel, an amended verified petition. (R., pp.16-19, 131-38.) In his amended petition, Mr. Macklin alleged his trial counsel was ineffective in failing to contest his termination from drug court.[2] (R., pp.133-34.)

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[1] The Clerk's Record does not contain a number of documents that were filed in the district court. Simultaneously with the filing of this brief, Mr. Macklin is filing a Motion to Augment to include copies of these documents in the Clerk's Record for this Court's consideration.

[2] Mr. Macklin also alleged his trial counsel was ineffective in failing to investigate the circumstances surrounding the basis for his termination from drug court, and in failing to clarify a factual misstatement regarding his criminal history. (R., pp.134-36.)

Mr. Macklin said he told his attorney that his probation officer, Jeremy Ajeti, had approved him having contact with a known user of prescription pain medication (Wade McCaslin), and from living on a temporary basis in the residence at issue (Mr. McCaslin's parents' house). (R., p.133.) He also said he told his attorney he did not realize he left the Fifth Judicial District when he went fishing with Mr. McCaslin and his father on the Snake River, in June 2018. (R., p.133.) He said he asked his attorney to challenge his termination from drug court, but his attorney did not do so. (R., p.133.) He alleged his attorney's failure to request a *Rogers* hearing "was not strategic" as evidenced by the fact that he could not, at his probation violation hearing, contest the fact that he did not successfully complete drug court. (R., p.134.) He alleged there was a reasonable probability that, if he had been provided the opportunity to do so, he would have succeeded in contesting his termination from drug court, and thus remained on probation. (R., p.134.)

Along with his amended petition, Mr. Macklin submitted two affidavits—one from his probation officer, Mr. Ajeti, and another from his post-conviction counsel, Steven McRae. (Motion to Augment, pp.8-40.) In his affidavit, Mr. Ajeti stated he approved Mr. Macklin residing with Mr. McCaslin's parents without knowing there were guns in the house, and when he learned there were guns in the house, he allowed Mr. Macklin to continue living there "while finding a new place to live." (Motion to Augment, pp.6-7.) He said he "was not too concerned with the firearms being present, as Mr. Macklin did not have access to them." (*Id.*) He also said he knew Mr. Macklin "was in contact with his business partner [Wade McCaslin]" who "used prescription pain killers." (*Id.*) And he said he "would not have objected to Mr. Macklin traveling out-of-district to fish, as it was [his] belief that fishing is a positive activity." (*Id.*)

In his affidavit, Mr. McRae provided notes from Twin Falls Probation and Parole regarding their supervision of Mr. Macklin. (Motion to Augment, pp.9-40.) Mr. Ajeti noted, following a supervision contact with Mr. Macklin, that he "[i]s thinking about going fishing." (*Id.* p.28,) A note from July 31, 2018, indicates Mr. Ajeti received information from an unknown source "that client was living in a residence where there was alcohol and firearms." (*Id.* p.30.) A search was conducted, and it was confirmed that guns were present in a safe in the basement and "they do have alcohol in the house on occasion." (*Id.*)

The district court held an evidentiary hearing on Mr. Macklin's petition on May 8, 2020. (*See* Tr., pp.1-184.) Mr. Macklin presented testimony from seven witnesses, and testified on his own behalf. (*See id.*) Mr. Macklin's counsel asked Mr. Macklin what he learned in drug court, and he answered, "I learned a lot." (Tr., p.137, Ls.21-22.) Mr. Macklin then began describing what he had learned, and the prosecutor objected on relevance grounds. (Tr., p.137, Ls.22-25.) The district court sustained the objection, stating "the proceeding here is about whether or not you're entitled to some type of post-conviction relief, not what you had learned from drug court." (Tr., p.138, Ls.1-6.)

Following the evidentiary hearing, Mr. Macklin submitted a brief in which he argued he received ineffective assistance of counsel because his attorney's conduct in failing to contest his termination from drug court was deficient, and led to the revocation of his probation. (R., pp.146-50.) The district court denied Mr. Macklin's petition, and entered a judgment dismissing his petition. (R., pp.155-68.) Mr. Macklin filed a timely notice of appeal. (R., pp.169-73.)

ISSUES

I. Did the district court err in dismissing Mr. Macklin's petition for post-conviction relief based on his allegation that he received ineffective assistance of counsel when his trial counsel failed to contest his termination from drug court?

II. Alternatively, did the district court err in concluding that Mr. Macklin's testimony regarding what he learned in drug court was not relevant to his claim of ineffective assistance of counsel?

ARGUMENT

I.

The District Court Erred In Dismissing Mr. Macklin's Petition For Post-Conviction Relief Based On His Allegation That He Received Ineffective Assistance Of Counsel When His Trial Counsel Failed To Contest His Termination From Drug Court

A. Introduction

The district court erred in dismissing Mr. Macklin's petition for post-conviction relief based on his allegation that he received ineffective assistance of counsel. Mr. Macklin proved, by a preponderance of the evidence, that his trial counsel's failure to request a *Rogers* hearing fell below an objective standard of reasonableness. He also proved, by a preponderance of the evidence, that but for his counsel's error in failing to request a *Rogers* hearing, there is a reasonable probability that he would not have been terminated from drug court, and thus would have remained on probation. Because Mr. Macklin established both prongs of ineffective assistance of counsel as set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), the district court should have granted his petition for post-conviction relief.

B. Standard Of Review

When reviewing a district court's denial of a petition for post-conviction relief following an evidentiary hearing, this Court will not disturb the district court's factual findings unless they are clearly erroneous. *McKinney v. State*, 133 Idaho 695, 700 (1999). When reviewing mixed questions of law and fact, this Court defers to the district court's factual findings if they are supported by substantial evidence, but freely reviews the application of the relevant law to those facts. *Id.*

C. Mr. Macklin Proved, By A Preponderance Of The Evidence, That His Trial Counsel's Failure To Request A *Rogers* Hearing Fell Below An Objective Standard Of Reasonableness, And That He Suffered Prejudice As A Result

A petitioner may properly bring a claim of ineffective assistance of counsel in post-conviction. *See Grove v. State*, 161 Idaho 840, 854 (Ct. App. 2017). "Like the plaintiff in a civil action, [the petitioner] must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based." *State v. Yakovac*, 145 Idaho 437, 443 (2008) (citations omitted). "To prevail on an ineffective assistance of counsel claim, the petitioner must show that the attorney's performance was deficient and that the petitioner was prejudiced by the deficiency." *Grove*, 161 Idaho at 854 (quoting *Strickland*, 466 U.S. at 687-88; *Self v. State*, 145 Idaho 578, 580 (Ct. App. 2007). "When evaluating an ineffective assistance of counsel claim, 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." *Yakovac*, 145 Idaho at 444 (citation omitted).

In this case, Mr. Macklin satisfied both *Strickland* prongs, and the district court thus erred in dismissing his petition. First, he established that his trial counsel's failure to request a *Rogers* hearing to contest his termination from drug court fell below an objective standard of reasonableness. *See Grove*, 161 Idaho at 854 (stating that, to establish deficient performance, a petitioner has the burden of showing that the attorney's representation fell below an objective standard of reasonableness.) The district court concluded Mr. Brown did not perform deficiently in failing to request a *Rogers* hearing because, based on his experience, he did not believe a hearing would be successful. (R., p.160.) The district court remarked that "[n]ot only had Macklin already admitted that he violated the Drug Court's rules on the record, but Brown's

overall review of Macklin's file convinced him that attempting to challenge the dismissal from the specialty court months after the fact would be fruitless." (R., pp.160-61.)

Even if Mr. Brown believed he would not be successful in contesting Mr. Macklin's termination from drug court, he should still have requested a *Rogers* hearing. In *Rogers*, the Idaho Supreme Court held that a participant in a diversionary program like drug court has a liberty interest in remining in the diversionary program that is "akin to that in probation and parole revocation hearings." 144 Idaho at 741-42. Because of that liberty interest, a participant in a diversionary program is entitled as a matter of due process to a hearing prior to being terminated from the program. *See id.* at 743. Here, the drug court termination report specifically stated that Mr. Macklin would be returned to drug court "if [he] is found to not have willfully violated the rules as alleged." (R., p.14.)

Mr. Brown testified at the evidentiary hearing that Mr. Macklin told him he disputed the basis for his termination "in two areas"—specifically, regarding the presence of firearms in his residence and whether he had permission to live with Mr. McCaslin. (Tr., p.109, Ls.8-21.) Mr. Brown also testified that Mr. Macklin told him he did not know he was leaving the district when he went fishing. (Tr., p.110, Ls.8-10.) Mr. Brown knew or should have known that Mr. Macklin wanted to dispute his termination from drug court, and had sufficient information available to him to reasonably dispute the basis for his termination.

There is no way in which Mr. Brown's decision not to dispute Mr. Macklin's termination from drug court can be seen as strategic. By failing to contest his termination from drug court, Mr. Macklin had no basis for arguing, at the probation revocation hearing, that he did not violate probation by failing to successfully complete drug court. Mr. Brown testified at the evidentiary hearing that he would have challenged the allegations against Mr. Macklin "on the probation

aspect," but did not believe a challenge would be successful "on the drug court aspect." (Tr., p.123, Ls.12-19.) This decision cannot be considered strategic. And it cannot be upheld as constitutionally-sufficient performance.

Turning to the second *Strickland* prong, Mr. Macklin established that he was prejudiced by his trial counsel's failure to contest his termination from drug court. *See Grove*, 161 Idaho at 854 (stating that, to establish prejudice, "the petitioner must show a reasonable probability that, but for the attorney's deficient performance, the outcome of [the proceeding] would have been different"). The district court concluded Mr. Macklin did not make the requisite showing because it was "not convinced the result would have been any different had such a hearing been requested." (R., p.161.) The district court noted that the witnesses Mr. Macklin called at the evidentiary hearing confirmed that he violated the rules of drug court, and that their testimony at a *Rogers* hearing would have "at best, provided an explanation or excuse for Macklin's conduct." (R., pp.161-62.) The district court erred in its analysis.

Mr. Macklin was not terminated from drug court because he used alcohol or drugs or committed a crime. (*See* R., pp.63-65; *see also* Tr., p.96, Ls.3-8.) Rather, he was terminated from drug court based on a number of minor violations. Israel Enriquez, the drug court program coordinator, testified at the evidentiary hearing that there was not one issue that led to Mr. Macklin's termination from drug court; instead, "[t]here was a culmination of issues towards the end of his participation that ultimately led to his termination." (Tr., p.175, Ls.13-17.) While the district court was correct that Mr. Macklin could have, at best, provided an explanation or excuse for his conduct; the court was incorrect in concluding this would not have made a difference.

The drug court termination report reflects that Mr. Macklin was terminated from drug court because: (1) he had unauthorized contact with an active drug user, Wade McCaslin; (2) he left the Fifth Judicial District without permission on June 23, 2018 (3) he arrived late for one treatment session, and failed to appear for one urinalysis test; (4) it was discovered on July 18, 2018, that he "was living in a residence which contained alcohol and firearms," and had not disclosed those were present; and (5) he arrived unprepared for a treatment session on one occasion. (R., pp.63-65.) Had his counsel requested a *Rogers* hearing, Mr. Macklin could have provided reasons for his conduct which might reasonably have led the drug court to allow him to continue with his programming.

With respect to the first allegation (that Mr. Macklin had unauthorized contact with an active drug user), the transcript from the drug court proceedings indicates that, on June 27, 2019, the drug court knew Wade McCaslin had died following an overdose on prescription medication. (*See* Exs., pp.14-20.) But the drug court did not believe this alone was a basis for Mr. Macklin to be terminated from the program. Instead, the drug court asked Mr. Macklin to write an essay on the importance of honesty, and report weekly to drug court. (*See id.*) The drug court explained this was "not just as a sanction," but because "it's traumatic for you, your friend passed away." (Exs., p.13.) The drug court said, "I want to make sure you're okay and have a little bit more oversight over you till you start feeling better." (Exs., p.13.) Moreover, Mr. Macklin's probation officer, Mr. Ajeti, testified at the evidentiary hearing that Mr. Macklin had informed him prior to Mr. McCaslin's overdoes that Mr. McCaslin used prescription drugs. (Tr., p.94, Ls.6-13.)

With respect to the second allegation (that Mr. Macklin left the Fifth Judicial District without permission), Mr. Macklin testified at the evidentiary hearing that he did not know he was leaving the Fifth Judicial District when he went fishing with Mr. McCaslin and his father on the

Snake River. (Tr., p.134, Ls.2-10.) And Mr. Ajeti testified that while he did not give Mr. Macklin permission to go fishing, he "would have been supportive of it." (Tr., p.94, L.23 – p.95, L.12.)

With respect to the third and fifth allegations (that Mr. Macklin arrived late for one treatment session, failed to appear for one urinalysis test, and arrived unprepared for one treatment session), Mr. Macklin could have presented evidence that he was doing well in his treatment program notwithstanding these minor issues. Tammy Park, a drug and alcohol counselor with Twin Falls Treatment and Recovery Clinic, testified at the evidentiary hearing regarding her experiences with Mr. Macklin. (Tr., pp.12-40.) She testified that he did well in their sessions; she had a "good rapport" with him; and he appeared to be "pretty open about things going on in his life." (Tr., p.14, Ls.18-21) Melissa Andrushko, another employee at the Treatment and Recovery Clinic, described Mr. Macklin as a good, respectful participant, who was always prepared. (Tr., p.41, L.25 – p.42, L.10.)

With respect to the fourth allegation (that Mr. Macklin was living in a residence which contained alcohol and firearms), Mr. Ajeti testified that the "the elderly couple" with whom Mr. Macklin lived initially said there were no firearms in their house, but later showed Mr. Ajeti a locked gun safe in the basement. (Tr., p.91, Ls.1-21.) He acknowledged that he gave Mr. Macklin permission to stay in the residence, notwithstanding the guns, "while he looked for other means of residence." (Tr., p.93, Ls.11-14.)

In order to show prejudice, Mr. Macklin had to show only a "reasonable probability" that the outcome of the proceeding would have been different absent his attorney's deficient performance. *See Grove*, 161 Idaho at 854. He made the requisite showing with respect to both

the drug court proceeding and the probation proceeding, and the district court erred in concluding otherwise.

II.

Alternatively, The District Court Erred In Concluding That Mr. Macklin's Testimony Regarding What He Learned In Drug Court Was Not Relevant To His Claim Of Ineffective Assistance Of Counsel

A. Introduction

At the evidentiary hearing, Mr. Macklin testified he "learned a lot" in drug court. (Tr., p.137, Ls.21-22.) When Mr. Macklin began describing what he learned, the prosecutor objected on relevance grounds, and the district court sustained the objection. (Tr., p.137, L.21 – p.138, L.1.) The district court said, "the proceeding here is about whether or not you're entitled to some type of post-conviction relief, not what you had learned from drug court." (Tr., p.138, Ls.3-6.) The district court erred as a matter of law in concluding Mr. Macklin's testimony regarding what he learned in drug court was not relevant to his claim of ineffective assistance of counsel.

B. Standard Of Review

"Proceedings brought under the Uniform Post–Conviction Act . . . are civil actions and are governed, for the most part, by the Idaho Rules of Civil Procedure." *Cook v. State*, 145 Idaho 482, 494 (Ct. App. 2008) (citations omitted). In examining a claim that the district court erred in excluding evidence at an evidentiary hearing, this Court looks to the relevant Idaho Rule of Evidence. *See id.* (looking to I.R.E. 403 to determine whether the district court erred in excluding relevant evidence at an evidentiary hearing). "The question of whether evidence is relevant is

reviewed de novo, while the decision to admit relevant evidence is reviewed for an abuse of discretion." *State v. Garcia*, 166 Idaho 661, __, 462 P.3d 1125, 1133 (2020) (citation omitted).

C. The Evidence Mr. Macklin Sought To Present Was Relevant To His Ineffective Assistance Of Counsel Claim Because It Tended To Make A Fact Of Consequence To His Action More Probable Than It Would Be Without The Evidence

Rule 401 of the Idaho Rules of Evidence defines evidence as relevant if "(a) it has any tendency to make a fact more or less probable than it would be without the evidence[,] and (b) the fact is of consequence in determining the action." In *State v. Garcia*, the Idaho Supreme Court explained that the standard for relevance is low. 166 Idaho at __, 462 P.3d at 1135, n.3 (citing a secondary source for the proposition that I.R.E. 401 "requires only minimal relevance"). Whether a fact is of consequence for purposes of I.R.E. 401 "is determined by its relationship to the legal theories presented by the parties." *Garcia*, 166 Idaho at __, 462 P.3d at 1134 (quotation marks and citation omitted).

In order to succeed on his ineffective assistance of counsel claim, Mr. Macklin had to show that his trial counsel's failure to request a *Rogers* hearing to contest his termination from drug court fell below an objective standard of reasonableness, and that there was a reasonable probability that, but for his attorney's deficient performance, the outcome of the proceeding would have been different. *See Grove*, 161 Idaho at 854. What Mr. Macklin learned from his time in drug court was certainly relevant to his legal theory of ineffective assistance of counsel, as the fact that he learned a lot supported his argument that his attorney should have requested a *Rogers* hearing, and that there was a reasonable probability that the hearing would have been successful, meaning he would have been allowed to continue in drug court.

The district court erred in concluding Mr. Macklin's testimony regarding what he learned in drug court was not relevant, and should have overruled the prosecutor's objection and permitted Mr. Macklin to testify regarding his experience in drug court.

CONCLUSION

Mr. Macklin respectfully requests that this Court vacate the district court's judgment dismissing his petition for post-conviction relief, and remand this case to the district court with instructions to grant the petition. Alternatively, Mr. Macklin requests that the Court vacate the judgment, and remand this case to the district court to conduct a new evidentiary hearing.

DATED this 11th day of January, 2021.

/s/ Andrea W. Reynolds
ANDREA W. REYNOLDS
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of January, 2021, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF to be served as follows:

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/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

AWR/eas»