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Idaho Supreme Court
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By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

BRANDON MARLOW,	)	
	)	
Petitioner-Appellant,	)	Supreme Court No. 48469-2020
	)	
vs.	)	District Court No. CV28-20-2374
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

REPLY BRIEF OF APPELLANT

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

HONORABLE SCOTT WAYMAN
District Judge

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II. SUMMARY OF ARGUMENT

The state has failed to effectively respond to Mr. Marlow's demonstration of reversible error. It does not address the showing of deficient performance made below. And, its arguments regarding prejudice have been waived or are without merit. Or both.

III. ARGUMENT IN REPLY

A. *The State Does Not Dispute that Trial Counsel's Performance was Deficient under Strickland v. Washington, 466 U.S. 668 (1984).*

The state's only argument on appeal is that Mr. Marlow has not pleaded a prima facie case of prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). It does not address Mr. Marlow's argument that he also presented a *prima facie* showing of deficient performance. See Opening Brief, p. 9-11. Thus, no reply is required.

B. *Mr. Marlow has Pleaded a Prima Facie Claim of Strickland Prejudice.*

1. <u>There is no *res judicata* bar.</u>

   a. *There is no identity of claim.*

The state argued below that Mr. Marlow's claim was barred by *res judicata* because of the final ruling on the motion to withdraw his guilty plea. R 232, citing *Ticor v. Stanion*, 144 Idaho 119 (2007).

It raises the same general argument on appeal claiming that the second *Ticor* requirement – that the claims are the same – "is met because the current claim merely adds an ineffective assistance of counsel layer on top of the claim [Mr.]

Marlow raised in his motion to withdraw guilty plea – that his guilty pleas were not knowing, intelligent, and voluntary." Respondent's Brief, p. 13. But, that is not true. The ineffective assistance of counsel claim is not dependent upon a determination that the guilty pleas were not knowing, intelligent, and voluntary. The deficient performance prong of the claim concerns whether it was deficient performance under *Strickland* for defense counsel to fail to point out and explain the appellate waiver. The *Strickland* prejudice prong concerns whether Mr. Marlow would have chosen to plead guilty had he been aware of the waiver provision. While an invalid plea may be the consequence of this type of *Strickland* violation, it is not an element of the *Strickland* claim.

In addition, the record shows that Mr. Marlow's Motion to Withdraw Guilty Plea was not based upon a claim of ineffective assistance of counsel or even that he was unaware of the appeals waiver provision. The Motion did not state a reason for it to be granted. It only asked for the guilty plea to be withdrawn, cited I.C.R. 33 and I.C. § 19-1714, and said the motion was based upon the records and files in the case. Appendix A.[1] Thus, the claim made in the motion to withdraw guilty plea is not the same claim as the ineffective assistance of counsel claim.

At the motion hearing Mr. Marlow testified that he wanted to withdraw his guilty plea "[b]ecause I wasn't there that day and I didn't do what I was alleged to

[1] As noted by the state, the post-conviction court took judicial notice of some documents from the criminal case. Respondent's Brief, p. 9 n.3. See Aug. R 3. One of those documents was Mr. Marlow's Motion to Withdraw Guilty Plea. *Id.,* p 2. A true and correct copy of the Motion is attached hereto as Appendix A.

have [been] doing." R 153. He said that he "felt pressured and intimidated into accepting the deal." R 154. He felt that way, in part, because he believed that the state had intimidated his alibi witness. *Id.* And Mr. Marlow told the court that he had obtained new evidence. R 156. Mr. Marlow never mentioned the ineffective assistance of trial counsel to explain the appellate waiver – the claim in this case – as a basis for his motion. See R 152-157 (direct examination); 164 (redirect).

Mr. Marlow was asked on cross-examination if he signed the plea agreement. He admitted that he had but explained he "was not aware that I was not able to appeal it or withdraw my guilty plea or else I would not have signed the deal." R 158. The thrust of the state's questioning was to show Mr. Marlow had waived his right to bring the motion. Mr. Marlow's response was to show why he should be able to bring the motion. It was not the reason why the motion should be granted.

Defense counsel did not argue that as a basis for granting the motion. He argued that the fact that Mr. Marlow did not have his reading glasses and was unable to read the plea agreement was a reason to excuse the waiver and allow him to bring the motion. Mr. Marlow's reason for granting the motion was that the plea was not voluntary and that he had discovered new evidence. R 166-167. Defense counsel did not argue the motion should be granted because he acted deficiently by not explaining the terms of the plea agreement to Mr. Marlow.

Nor did the court's conclusion that Mr. Marlow's guilty plea was knowing, intelligent, and voluntary include a subsidiary finding that Mr. Marlow was aware of the appellate waiver. Nor would the record support such a finding. At the plea

colloquy, the state's oral recitation of the settlement offer did not include either waiver. R 79. And, the court never asked Mr. Marlow if he had read the plea agreement or if he understood that the plea agreement contained an appeal waiver during the plea colloquy. R 80-81.

In fact, the court never found that Mr. Marlow was unaware of the waiver of his right to move to withdraw the guilty plea, much less the waiver of his right to appeal. The court stated:

> Interestingly, Mr. Marlow indicated that he did not understand that by accepting this pretrial settlement offer and allowing the charges to be dismissed in connection with that that he was giving up his ability to withdraw his guilty plea. It's written in plain English. It's not a very complicated plea agreement.

R 175. This is not a finding that Mr. Marlow read the appeal waiver provision or that he was informed of that provision by defense counsel. At most, it is a finding that he should have been aware. This is ironic because had "the court been aware of the waiver provisions, it would have been required to ask the defendant if defendant is aware of the waiver of appeal or other proceedings." I.C.R. 11(d)(3). Since that did not occur, the court also must have been unaware of the "plain English" of the agreement.

The legal issues presented in this case are not the same as the issue presented to the district court or this Court on direct appeal. Thus, true *res judicata* (claim preclusion) does not apply here. *Ticor v. Stanion*, *supra*.

b. *The claim presented here could not have been presented in the Motion to Withdraw Guilty Plea.*

The ineffective assistance of counsel claim could not have been raised in Mr. Marlow's Motion to Withdraw his Guilty Plea because defense counsel could not allege ineffective assistance of counsel against himself due to the conflict of interest. I.R.P.C. 1.7(a)(2) (Prohibiting representation in a matter where there is a significant risk that the personal interests of the attorney will materially limit the representation). In fact, just prior to taking up the Motion to Withdraw Guilty Plea, the court denied defense counsel's Motion to Withdraw as counsel. R 110. During the hearing on that motion, defense counsel specifically argued that the Motion to Withdraw Guilty Plea "would be better handled by a different attorney[.]" R 108. Defense counsel noted that Mr. Marlow wanted to call witnesses at the Motion to Withdraw Guilty Plea who were also clients of defense counsel.[2] This situation raises a question of whether there was a conflict of interest due to concurrent representation of Mr. Marlow and his other clients. See I.R.P.C. 1.7(a)(2).

Finally, the state's reliance upon *Carter v. Gateway Parks, LLC*, 168 Idaho 428 (2020), is misplaced. There, a second suit against the same party alleging fraud was barred because "if Carter wished to pursue a separate fraud claim, Carter could

---

[2] Defense counsel argued: "One final thing, Your Honor. My client has asked me to subpoena other clients, therefore creating not just the wedge between he and myself but also other clients, and so -- and I don't see how I can ethically do that. If those other clients wish to be heard, then another lawyer has to be the one to do it, and that's specifically regarding his motion to withdraw the guilty plea, so I -- I just -- I will add that as well." R 109.

and should have brought it in the first suit." *Id.,* at 439. Here, true *res judicata* does not apply because the claim presented could not (and should not have been) have been presented in the Motion to Withdraw Guilty Plea because Mr. Marlow was forced to proceed with conflict-ridden counsel. The Sixth Amendment right to effective assistance of counsel under *Strickland* should not be barred by the operation of *res judicata* (a judicial creation), especially when the bar would be the result of the deprivation of the Sixth Amendment right to conflict-free counsel, as guaranteed by *Cuyler v. Sullivan*, 446 U.S. 335 (1980).

c. *The state is judicially estopped from asserting that the claim of ineffective assistance of counsel should have been raised in the Motion to Withdraw Guilty Plea.*

It is worth noting that the state opposed the Motion to Withdraw as Counsel. R 108-109. Thus, it should be judicially estopped from asserting that Mr. Marlow should have raised the ineffective assistance of counsel claim in that proceeding since it was a party to defense counsel's continued conflict of interest.

> Judicial estoppel precludes a party from advantageously taking one position, then subsequently seeking a second position that is incompatible with the first. The policy behind judicial estoppel is to protect the integrity of the judicial system, by protecting the orderly administration of justice and having regard for the dignity of the judicial proceeding. Broadly accepted, it is intended to prevent parties from playing fast and loose with the legal system. Judicial estoppel protects the integrity of the judicial system, not the litigants; therefore, it is not necessary to demonstrate individual prejudice
> .

McCallister v. Dixon, 154 Idaho 891, 894 (2013). The state here is playing "fast and loose" with the legal system: first by arguing against defense counsel's motion to withdraw so that Mr. Marlow could have conflict-free counsel to prosecute his

motion to withdraw guilty plea and now by "pivoting 180°" and arguing that the ineffective assistance of counsel claim is barred because conflict-ridden counsel did not raise the claim. *Carter v. Gateway Parks, LLC*, 168 Idaho at 438.

2. Issue preclusion does not apply.

a. *The issue is waived.*

The state mentions in a footnote that issue preclusion is "somewhat similar[]" to *res judicata* but it does not argue that it applies in this case. Respondent's Brief, p. 13 n. 4. It could not because it only argued *res judicata* applied below. See R 232; T p.7, l. 14 – p.8, l. 10. "This Court will not consider issues raised for the first time on appeal. Issues not raised below will not be considered by this court on appeal, and the parties will be held to the theory upon which the case was presented to the lower court." *State v. Garcia-Rodriguez*, 162 Idaho 271, 275 (2017) (internal citations omitted).

b. *Issue preclusion does not apply.*

Moreover, the issue sought to be precluded here – that Mr. Marlow had actual knowledge of the appeal waiver – was not actually decided at the motion to withdraw guilty plea. R 170-175 (district court oral ruling on motion). Nor was it decided by this Court in dismissing the appeal. In fact, the dismissal of the appeal is not a determination that Mr. Marlow was aware of the appeal waiver. As the state writes:

> "The rule in Idaho is well established that a party's failure to read a contract will not excuse his performance." Allen v. Reynolds, 145 Idaho 807, 811,186 P.3d 663, 667 (2008) (quoting Irwin Rogers Ins. Agency,

> Inc. v. Murphy, 122 Idaho 270, 273, 833 P.2d 128, 131 (Ct. App. 1992)). Moreover, "[t]he voluntary failure to read a contract does not excuse a party's performance." Swanson v. Beco Const. Co., Inc., 145 Idaho 59, 63, 175 P.3d 748, 752 (2007) (citing Belk v.Martin, 136 Idaho 652, 39 P.3d 592 (2001)).

Respondent's Brief, p. 23. Since that is the case, the question of whether he was aware of the appeal waiver provision was irrelevant to whether the appeal waiver was valid. Thus, appellate counsel's decision to not respond to the state's motion to dismiss the appeal cannot be construed as a concession that trial counsel advised him of the appeal waiver provision or that Mr. Marlow was otherwise aware of it.

Thus, issue preclusion does not apply here. First, the state has not shown that Mr. Marlow "had a full and fair opportunity to litigate the issue decided in the earlier case." He did not, due to the conflict of interest. Nor has it shown "the issue decided in the prior litigation was identical to the issue presented in the present action." It was not, as explained above. Finally, the issue sought to be precluded was not actually decided by either the district court or this Court. *See Ticor Title Co. v. Stanion*, 144 Idaho at 124; *Carter v. Gateway Parks, LLC*, 168 Idaho at 436.

3. The state's argument that a challenge to an appeal waiver must be made during the appeal has been waived and is also without merit.

a. *The argument has been waived.*

The state argues that under *McKinney v. State*, 162 Idaho 286 (2017), Mr. Marlow may not raise the ineffective assistance of counsel claim in post-conviction because he could only challenge the validity of the waiver on appeal. "In sum, McKinney determined that the acceptable forum for challenging an appeal waiver is

the direct appeal[.]" Respondent's Brief, p. 15. As with the state's suggestion that issue preclusion applies, this argument has also been waived because it was not made in the state's motion to dismiss below. *State v. Garcia-Rodriguez*, 162 Idaho at 275.; see R 67-69 (state's reasons for dismissal of claim).

b. *The argument lacks merit.*

Further *McKinney* does not control this case. It only states that:

> If a defendant files an appeal and has waived the right to appeal the only issue(s) that the defendant seeks to raise on appeal, and that fact is brought to our attention before oral argument, we will issue an order conditionally dismissing the appeal in order to give the defendant an opportunity to show good cause why the appeal should not be dismissed. If the defendant cannot do so, we will dismiss the appeal.

McKinney v. State, 162 Idaho at 296. It does not state that this procedure is the exclusive method of raising an ineffective assistance of counsel claim when counsel's deficient performance led to an appellate waiver or that a subsequent challenge is forfeited if not raised during the direct appeal.

In fact, according to the state, such a challenge on direct appeal would have been futile because the appellate waiver was valid under contract principles as Mr. Marlow's failure to "read the Offer sheet cannot be used in any way to excuse his performance of his signed plea agreement[.]" Respondent's Brief, p. 23. The appeal waiver could be enforceable and at the same time the result of deficient performance by defense counsel. Thus, the availability of the *McKinney* procedure to show good cause why an appeal should not be dismissed does not foreclose an

independent action to show trial counsel was ineffective in his actions regarding the waiver.

4. <u>Given the results from the first trial, it would have been entirely rational to reject the plea offer and retry the case.</u>

a. *Again, this argument has been waived.*

The state argues that Mr. Marlow has not shown that a rejection of the plea offer would have been rational under the circumstances. Respondent's Brief, p. 18. This argument has also been waived because it was not made in the state's motion to dismiss below. *State v. Garcia-Rodriguez*, 162 Idaho at 275.; see R 67-69 (state's reasons for dismissal of claim). In addition, since the state did not raise the argument below, Mr. Marlow did not have an opportunity to respond or develop the record with additional evidence as is his right under I.C. 19-2906(b).

b. *This argument is without merit.*

There was a good reason why the state did not raise the issue below. It is without merit. First, Mr. Marlow presented his sworn testimony that he would not have pleaded guilty if he had been told that he was waiving his appellate rights. "Had I known that a waiver of appellate rights was a term of the plea agreement, I would not have plead guilty." R 59-60. His unrebutted sworn statement is sufficient to set out prima facie showing of a "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial," under *Missouri v. Frye*, 566 U.S. 134, 148 (2012), *quoting Hill v. Lockhart*, 474 U.S. 52, 59 (1985). In addition, his actions during the plea hearing and after

demonstrated he wanted to go to trial even before he learned of the appellate waiver. He would not admit to a factual basis at the change of plea hearing, instead entering *Alford* pleas. R 81. And, he moved to withdraw his guilty plea prior to sentencing. R 68-93. This is conclusive evidence that Mr. Marlow would have proceeded to trial if given the opportunity.

Moreover, it would have been entirely rational for him to reject the plea agreement and proceed to the retrial. After all, the first jury acquitted him of one count in the first trial and hung on the seven others. R 76-77. A rational defendant would conclude from this that the jury did not find the state's evidence of guilt to be compelling and that it was worth the risk of going to trial.

Finally, the settlement agreement was not particularly favorable, given that it involved the imposition of a 20-year sentence, with eight years fixed. R 78.

Thus, liberally construing the facts and reasonable inferences in favor of Mr. Marlow as required by *Ricca v. State*, *supra*, he has alleged a *prima facie* case of prejudice under *Strickland*.

5. <u>There is a material question of fact regarding whether Mr. Marlow knew of the appeal waiver.</u>

The state finally argues that Mr. Marlow failed to show he was not aware of the appellate waiver provision when he entered the *Alford* pleas. Respondent's Brief, p. 20. But, and as the state is well-aware, at this point Mr. Marlow does not need to prove anything. All he must do is to establish that "a genuine issue of fact exists based on the pleadings, depositions and admissions together with any

affidavits on file." *Ricca v. State*, 124 Idaho 894, 896 (Ct. App. 1993). Moreover, this Court will liberally construe the facts and reasonable inferences in favor of the non-moving party. *Id.* Under that forgiving standard, there is a genuine issue of fact over whether Mr. Marlow was aware of the appeals waiver at the time of the guilty plea.

First, he alleged that he was not informed of the waiver provisions by defense counsel or the court at the time of the guilty plea and that he did not believe he had waived his appellate rights at that time.

> 31. At no point during this discussion did Mr. Pierce inform me that the pre-trial settlement offer included a term that I was waiving my appellate rights.
>
> . . . .
>
> 34. During the process of accepting my guilty plea, the Court did not inform me that I was waiving my appellate rights as a term of the agreement.
>
> 35. At that time, I did not believe that I had waived my appellate rights.

R 58-59.

The transcript of the change of plea hearing confirms Mr. Marlow's testimony about the plea colloquy. The court did not advise Mr. Marlow that he would be giving up his right to appeal. R 79-82.

On the plea form, the box next to the appellate waiver provision was checked by the drafter of the document using a word processor, not by Mr.

Marlow. R 78. He did not initial that provision. At the bottom of the document there was another waiver section:

I ACCEPT THE ABOVE PRETRIAL SETTLEMENT OFFER AND WAIVE THE FOLLOWING RIGHTS:

1. The right to a jury or court trial.
2. The right to be presumed innocent unless proven guilty beyond a reasonable doubt.
3. The right to confront and question the witnesses against me.
4. The right to compel witness to come to court and testify for me.
5. The right to remain silent.

Defendant	Date	Defense Attorney	Date
Brandon Marlow	5-18-18	[signature]	5/18/18

Id. This waiver section did not contain the appellate waiver. *Id.* A reasonable inference is that Mr. Marlow did not see the appellate waiver section which was not part of the larger general waiver section which he signed.

Further, Mr. Marlow testified at the Motion to Withdraw Guilty Plea that he was not aware of the appellate waiver when he pleaded guilty.

> Q. Okay. Well, you signed that plea agreement, right?
>
> A. Uh, yes, I did.
>
> Q. And you gave up your right to withdraw your guilty plea, right?
>
> A. I didn't -- at the time I did not know of that because I have a hard time reading without glasses, and I was not aware that I was not able to appeal it or withdraw my guilty plea or else I would not have signed the deal. I found that out by my attorney afterwards.
>
> Q. Okay. So you signed a plea agreement that says you can't withdraw your guilty plea, but you didn't know that that was on there. Is that what you're telling us?
>
> A. Yes, sir.

R 75-76. Taking this evidence as true, Mr. Marlow has made a *prima facie* showing that he did not know the appeal waiver was part of the plea agreement at the time he signed the agreement.

There is a genuine question of fact whether Mr. Marlow was aware of the appellate waiver provision. Thus, liberally construing the facts and reasonable inferences in favor of Mr. Marlow, as required by *Ricca v. State*, *supra*, he has alleged a *prima facie* case of deficient performance under *Strickland*.

IV. CONCLUSION

The post-conviction court erred in dismissing this claim of ineffective assistance of counsel. The Judgment should be vacated in part and the case remanded for further proceedings.

Respectfully submitted this 18th day of August 2021.

/s/ Dennis Benjamin
Dennis Benjamin
Attorney for Brandon Marlow

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es):

Idaho State Attorney General
Criminal Law Division
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Dated and certified this 18th day of August 2021.

/s/Dennis Benjamin
Dennis Benjamin