ORIGINAL

FILED
08/28/2019
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 18-0687

IN THE SUPREME COURT OF THE STATE OF MONTANA

Douglas P. Pasquinzo,
Pro-Se Petitioner,

V.

State of Montana,
Respondent.

Cause No: 18-0687

Reply to States Response

FILED
AUG 28 2019
Bowen Greenwood
Clerk of Supreme Court
State of Montana

Comes now, Douglas P. Pasquinzo the Pro-Se Petitioner with his reply to States Response. Upon review of State's Response its abundently clear the States argument is misleading and without merit as it stands, clearly the State is not on point under these circumstances. With that being factual Pasquinzo will explain State's misconception.

First; there is a constitutional right to effective counsel in the plea bargain process in which includes the duty of an Attorney to communicate properly regarding to the true negotiated and outcome of State's offered plea bargain. Missouri V. Frye, 566 U.S. 134, 132 S. Ct. 1399, 182 L.Ed 379 (2012), Lafler V. Cooper, 566 U.S. 156, 132 S. Ct. 1376, 182 L. Ed 2d 398 (2012).

Under these questionable set of circumstances the two prong Strickland Standards applies in evaluating ineffective assistance claims in cases which resulted in a negotiated plea agreements. Hill V. Lockhart, 474 U.S. 52, 57, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), Sparks V. Sowelers, 852 F.2d 882, 884 (6th Cir. 1988). In order to satisfy the "Prejudice Prong" in Strickland for a negotiate plea claim, Pasquinzo would have shown there was a reasonable probability that, but for counsel's error(s), he would not have plead no contest but insisted on going to trial. See Hill, supra, at 58; Also Strickland V. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

The Strickland test is objective and not subjective, Plumay V. Rooker, 629 Fed. Appx 662 (6th Cir. 2015), quoting

Pilla V. U.S. 668 F. 3d 368, 373 (6th Cir. 2012). To obtain relief of Pasquinzo "must persuade this court that a decision to reject State's plea agreement would have been justified under the circumstances". See Padilla V. Kentucky, 559 U.S. 356, 372, 130 S. Ct. 1473, 176 L. Ed. 2d 284. The rationality of such rejection is typically based on multiple factors, including the strength of evidence against Pasquinzo, the risk of viable defenses and the benefits of the plea. Pilla, supra, at 373; Haddad V. U.S., 486 F. Appx. 517, 522 (6th Cir. 2012). There is an established deference that is afforded to trial counsel in the area of plea agreement's Bray V. Andrew, 640 F. 3d 731, 738 (6th Cir. 2011).

The bottom line is when a State Court decides on the merit's based upon a Federal Constitutional Claim that is eventually presented to a Federal Habeas Court, the Federal Court must defer to the State Court's decision unless that State Court decision is either (1) objectively unreasonable application of; (2) or contrary to clearly established precedent of the U.S. Supreme Court. Please see 28 U.S.C. 2254 (d) (1); also Harrington V. Richer, 562 U.S. 86 131 S. Ct. 770, 785, 178 L. Ed. 2d 624 (2011); Brown V. Payton, 544 U.S. 133, 140, 125 S. Ct. 1432, 161 L. Ed. 2d 334 (2005).

IN SOME*WHAT CHRONOLOGICAL ORDER: Pasquinzo plea was involuntary on the grounds that Counsel Eastman through psychological warfare improperly coerce and intimidated him into accepting State's plea contract, promising Pasquinzo he would be sentenced to the Montana Department of Corrections, originally it was just 5-years because of his age and mental health, by the time Pasquinzo arrived at the change of plea hearing the State's narrative for sentencing was changed within twenty minutes after the meeting with counsel before the plea hearing from a 5-year D.O.C. sentence to a 15-year sentence to M.S.P.

At the hearing two key events transpired (1) Pasquinzo's plea contract agreement was changed after he signed State's Contract Agreement after the trial Judge added more provision(s) in violation of Webber V. Killon, 66 Mont. 130, 132, 212 P. 852, 853, stating "When a contract has been reduced to writing the contents of such

writing cannot be added to contradicted or altered"; and (2) under questionable circumstances, the change of plea hearing was changed to a sentencing hearing without any notice to Mr. Pasquinzo.

Based on counsel's coercive behavior before the hearing and in the courtroom Pasquinzo could see the writing on the wall and was scared to death to say anything other than what Counsel Eastman coached him to say in the meeting before the change of plea hearing. By the time the hearing was changed to a sentencing hearing it was apperent that Pasquinzo's defense counsel was defending the State as second prosecutor to convict Pasquinzo, thus denying Pasquinzo his Constitutional right through the Sixth Amendment of proper representtation by a compentent Counsel at a very critical stage of the proceeding. Defense Counsel's deficient performance during the plea hearing hindered Pasquinzo's ability to have entered a knowingly and voluntary plea agreement. See Lambert V. Bloodgett, 393 F. 3d 943, 980 (9th Cir. 2004). By midway through sentencing it was clear to Pasquinzo that his Court Appointed Counsel had a conflict of interest with being his counsel.

An actual conflict of interest exists when defense counsel was required to make a choice advancing his interest to the detriment of his clients interest. Such a conflict has an adverse effect on ones defense, but without counsels actual conflict of interest, there was a reasonable likelihood that counsel's performance somehow would have been differant. See Stoia V. U.S., 109 F. 3d 392 (CA 7 1997).

Some great examples of Pasquinzo's counsels conflict of interest (and clearly mentioned in State's response), First; is the fact that the plea hearing went directly into sentencing the Court did not have time to follow statutory requirements by ordering for a pre-sentence investigation. Counsel Eastman had scheduled for Pasquinzo to undergo a psycho-sexual evaluation prior to the sentencing; counsel did not accompany Pasquinzo to the meeting, nor did counsel inform him about the real purpose or legal significance and reprecussions of the interview. At the interview Pasquinzo admitted.

Here Pasquinzo ... asserts that court appointed counsel's failure to understand the importance of relevant conduct to his potential sentence and to (not) advise him regarding to the nature and purpose of the interview, amounted to ineffective assistance of counsel. Noting at no time before or after did counsel inform Pasquinzo of the possibility that anything he may say could lead to higher tier level or the fact the conclusion of the evaluation could be used against him at sentencing for the state and courts benefit without a doubt counsels inactions was not trial strategy for her client, instead it was a farm of adversarial inheritance to benefit the State's position to expedite Pasquinzo to sentencing.

Counsel's representation of Pasquinzo was objectively unreasonable and unprofessional when he failed to understand the importance of the relevant conduct of a potential life sentence. Noting Pasquinzo is 77 years old and anytype of sentencing above five years must be considered a life sentence, Therefore, counsel failed to inform Pasquinzo of the significance being interview at a critical stage without counsel... Mr. Pasquinzo asserts here (and so should this court agree) that he was prejudiced as a result of counsel's deficient performance because of admission of results from a States main argument is primary focused on the fact that Pasquinzo did not file for a direct appeal, but filed a Post Conviction. When Pasquinzo entered State's plea he was not told by counsel that he would terminate his right to appeal, nor does he remember the court informing him of that fact, and that is because the hearing device intermittently was going off.

Regardless of state's conclusion, section 46-8-103 (1) MCA, governs the duration of appointmented represention follows. When counsel has been assigned, that assignment is effective until final judgement, this would include any proceeding upon a direct appeal to the Montana Supreme Court, unless counsel is relieved by order ot the court that assigned counsel.

Further, section (2) is a codification of Ander's V. California, (1967) 368 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 procedure

which appointed counsel must undertake to withdraw from appellate representation. Providing the following: If counsel finds the defendant's case or appeal to be wholly frivolous, counsel shall advise the court of that fact and request permission to withdraw. The request to withdraw must be accompanied by a memorandum referring to anything in the record that might arguably support the appeal. The defendant is entitled to receive a copy of counsels memorandum and the right to file a reply with the court.

In State V. Roger, 2001 MT. 165, (p27) 306 Mont. 130, 32 P. 3d 724, the Anders procedure protects a defendants right to effective assistance of counsel on appeal. A logical extension of this statement is the conversation, i.e. a faliure to follow the Anders procedure frustrates the right to effective assistance of counsel on appeal.

In Pasquinzo's case withdraw was not accompanied by memorandum referring to anything to the record that might arguable support the appeal. The accompanying memorandum requirement in § 46-8-103 (2) MCA serves a vital function. It notifies prospective pro-se litigents of the potentially viable issue for appellate review. It also provides assistance to a court deliberating over merits of a motion to withdraw from appellate representation. As stated in Roger surpa at 26, "a defendant's right to appellate counsel must be safeguarded and allowing counsel to be the final judge on the merits of a appeal does not adequately safeguard this Constitutional Right.

The following issue's were relative for consideration for an appeal, (1) Petitioner's Sixth Amendment Right to counsel was violated at sentencing by counsel's failure to present any mitigating evidence and by affirmatively undermining efforts to secure a lesser sentence.
(2) Ineffective assistance of counsel, it's clear that counsel was aware of her conflict of interest with her client based upon that charge, that counsel went out of her way to abandon the case by presenting a illegal plea to her client.

(3) Counsel had a duty to ensure Pasquinzo received a DOC sentence and yet did nothing when the court stated M.S.P. Under Montana Rule of Criminal Procedure, Rule 11 e (1) (c) the agreement was binding on the court once the court accepted the agreement. Further, the court should have advised Pasquinzo that the court was not required to follow the agreement and had given him the opportunity to have withdrawn from the plea.

When the court pronounced that the court was sentencing Pasquinzo to Montana State Prison, counsel had a obligation to have deferd her client by reminding the court of either to let her client withdraw or sentence him to the department of corrections. This was done and counsel's inactions prove she was ineffective as counsel.

The Sixth Amendment Right to counsel in a criminal trial includes "the right to effective assistance of counsel". See McMain V. Richardson, 379 U.S. 759, 771 (n 14), 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970). This Constitutional Right extends to all critical stages of the criminal proceedings. Iowa V. Tovar, 541 U.S. 77, 80-81, 124 S. Pt. 1379, 156 L. Ed. 2d 2009 (2004).

If counsel was truely concerned about the right of her client then why didn't she change the "no contest to one of guilty" in order to conform with statutory requirements? There can be no agreement and sentence to a illegal plea. See State V. Hurt.

Contrary to state's rational Pasquinzo's claims should be granted for withdraw considering that it was court appointed counsel who controled Pasquinzo 's legal process and he should not be held accountable under the circumstances.

Respectfully Submitted on this 22 day of August, 2019.

Douglas Pasquinzo

Douglas P. Pasquinzo

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing REPLY TO STATE RESPONCE was placed in the U.S. mail, postage prepaid and addressed as follows:

MT. ATTORNEY GENERAL	215 N. SANDERS, HELENA MT 59602-3004

on the 22ND day of AUGUST, 2019.

Douglas Pasquinzo

DOUGLAS PASQUINZO