

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

FEB 28 2007

DAVID JEFFREY BROWN,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

MICHAEL S. RICHIE
CLERK

No. PC 2006-0638

ORDER GRANTING POST-CONVICTION RELIEF AND
REMANDING MATTER TO DISTRICT COURT FOR
FURTHER PROCEEDINGS

On June 12, 2006, Petitioner, by and through counsel Julia D. Allen, filed an appeal of the order of the District Court of Tulsa County denying him post-conviction relief in Case No. CF 2000-5551. Petitioner was convicted by a jury of Count 1 – Manufacturing Controlled Dangerous Substance, Count 3 – Possession of Counterfeit Bill and Count 4 – Larceny By Fraud. He was sentenced to twenty years imprisonment and a \$50,000.00 fine on Count 1, a \$10,000.00 fine on Count 3 and three years imprisonment and a \$3,000.00 fine on Count 4.¹ Petitioner's conviction was appealed to this Court and affirmed in an Opinion issued December 16, 2002, Appeal No. P 2001-1475.^{2,3}

¹ Petitioner's wife, Lori Brown, represented by Todd Cole, was tried with Petitioner. Ms. Brown was convicted of Counts 1 and 3 and also Count 5, Unlawful Possession of Controlled Drug. She was also sentenced to twenty years and a \$50,000.00 fine on Count 1 and \$10,000.00 on Count 2. She was sentenced to two years and a \$5,000.00 fine on Count 5.

² Lori Brown, represented by Joe White, appealed jointly with David Brown. Lori Brown's conviction was also affirmed on appeal.

Petitioner now argues he was denied effective assistance of trial and appellate counsel. The same attorney represented Petitioner at trial and on appeal. Petitioner also argues the "District Court's voluminous findings that counsel's performance was deficient per the *Strickland* standard belie a finding that Petitioner was not prejudiced by all of these instances of ineffective assistance of counsel".

Following an evidentiary hearing in the District Court, the Honorable Caroline E. Wall, Associate District Judge, denied Petitioner's application for post-conviction relief in an order filed May 11, 2006. Applying the standard set forth in *Strickland v. Washington*, 463 U.S. 668, 692-693, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, (1984), Judge Wall concluded Petitioner established his counsel's performance was deficient but that Petitioner failed to demonstrate there was a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.

In an Order issued August 21, 2006, Judge Wall, or her designated representative, was directed to file a response to Petitioner's post-conviction appeal. Judge Wall filed a response in this Court August 31, 2006, stating counsel for the State would file a response on her behalf. However, Judge Wall also responded the trial court did not find that the ineffective assistance of

³ This Court also affirmed Petitioner's and Lori Brown's convictions in Tulsa County District Court Case No. CF 2001-574. See Appeal No. F 2002-0064. In this case Petitioner and Ms. Brown were convicted following a non-jury trial before the Honorable Jefferson Davis Sellers of Count 1 - Manufacturing Methamphetamine with Intent to Distribute, Count 2 - Possession of Methamphetamine with Intent to Distribute, and Count 4 - Possession of Firearm While in Commission of a Felony. Petitioner was sentenced to thirty-three years on Count 1, four years on Count 2 and two years on Count 4. Ms. Brown was sentenced to twenty-eight years on Count 1, four years on Count 2 and two years on Count 4. Joe White represented Petitioner

counsel demonstrated a reasonable probability that the results of the jury trial would have been different "for one basic reason" and that is that "Petitioner's propositions of error had been previously reviewed by the Court of [Criminal] Appeals and the trial court adopted the conclusions as stated by the Court of [Criminal] Appeals in the summary opinion".

On October 19, 2006, a response on behalf of Judge Wall, by and through Fred J. Morgan, Assistance District Attorney, Tulsa County, was filed in this Court. The State responds that Petitioner's chief complaint is that trial counsel did not effectively pursue the issue regarding the coercion of Petitioner's statement to the police and request a jury instruction on that issue. The State asserts that testimony from Scott Rowland indicated trial counsel had done a good job of eliciting testimony at trial regarding the voluntariness of Petitioner's statements. Also, the finding of the Court of Criminal Appeals in their summary opinion that "the record does not support the argument that their confession[s] were obtained by coercion" supported Judge Wall's ruling that the outcome of the trial would not have changed.

The response sets out that at the evidentiary hearing the "trial court received testimony from experienced counsel on behalf of Petitioner and for the State who disagreed as to whether trial counsel's performance at trial was deficient and below professional norms. The trial court in adopting Petitioner's Findings of Fact has chosen to find that trial counsel's performance was deficient but that there was not a reasonable probability that the result of the proceedings

and Lori Brown, co-defendants, at trial and on appeal.

would have been different.”

On November 9, 2006, Petitioner, by and through counsel, filed an application for leave to file a reply brief one day out of time. Petitioner's motion is **GRANTED**. The Clerk of this Court is directed to file the Reply Brief tendered for filing on November 9, 2006.

In Judge Wall's May 10, 2006, order denying relief, following an evidentiary hearing, the trial court made the following findings of deficient performance by Petitioner's counsel:

1. Trial counsel's defense was centered on the unreliability of Defendant's statement as coerced and trial counsel testified it was the most damaging evidence against Defendant.
2. Trial counsel failed to advance an oral or written Motion to Suppress Defendant's statement to police officers.
3. Trial counsel failed to request a hearing on the voluntariness of Defendant's statement.
4. Trial counsel failed to request a jury instruction that requires a finding beyond a reasonable doubt by the jury Defendant's confession was voluntary.
5. There was no hearing on the voluntariness of Defendant's statement conducted off the record and there is nothing in the record of this case referencing any hearings conducted off the record.
6. Trial counsel failed to object to the introduction of Defendant's statement at trial; thus, failed to preserve the error for appeal.
7. Trial counsel *joined* the State in its admission of Defendant's written statement.
8. Trial counsel also represented Defendant on appeal and did not effectively raise the issue of the admissibility of Defendant's statement. The citations to the record were not done pursuant to appellate rules and the applicable authority was not cited.
9. Trial counsel did not raise the issue of the failure to give the jury instruction applicable to confessions on appeal.
10. A Motion to Suppress the statement of Defendant would have been meritorious.
11. The jury was not given the opportunity to make a finding that the confession was involuntary while that was seemingly the only defense advanced by trial counsel.

12. Defendant's confession was the primary subject in the State's closing argument.
13. Defendant was convicted only of those crimes of which he confessed.
14. Because trial counsel failed to lodge an objection to the admission of Defendant's statement, the Court of Criminal Appeals reviewed for fundamental error. Yet, trial counsel provided no authority for fundamental error for the admission of confessions and the failure to give the applicable jury instruction.
15. The argument on appeal relative to the admission of Defendant's statement would have been meritorious.
16. Trial counsel failed to request a severance of the trials of the Defendants.
17. Trial counsel did not request a limiting instruction to the jury to limit the effect of the co-defendant's incrimination of defendant in her confession.
18. Counsel failed to raise any issue relative to the severance of Defendants or the limiting instruction on appeal.
19. The co-defendant's statement to law enforcement officers was admitted without objection by counsel and incriminated Defendant without any instruction to the jury as to its effect.
20. The Court of Criminal Appeals did not consider the severance of the Defendants on appeal while that issue would have been meritorious.
21. Counsel failed to object to the admission of evidence obtained as a result of the search at trial.
22. In attempting to admit the affidavit in support of the search warrant at trial, the State pointed out to the court that its admission would likely make reversible error.
23. Counsel required his client to announce on the record that Defendant was "waiving" the issue of admission of the affidavit for appeal.
24. The issue of the lawfulness of the search was not effectively argued on appeal.
25. The issue of the lawfulness of the search was not preserved for appeal because counsel failed to lodge an objection to its admission at trial.
26. All of the evidence offered by the State was admitted unchallenged.
27. The affidavit in support of the search warrant contained no exculpatory information and contained damaging hearsay.
28. Counsel's failure to object to its admission at trial waived the issue for the Oklahoma Court of Criminal Appeals.
29. Defendant was charged with manufacturing methamphetamine rather than aggravated manufacturing.

30. Counsel argued in Defendant's summation that there was only a minimal amount of methamphetamine as a result of the manufacturing.
31. Counsel's remarks were an admission of guilt for the offense charged.
32. Counsel's cross-examination of the lead detective was directionless and ineffectual and invited evidentiary harpoons.
33. Defendant was convicted of manufacturing methamphetamine.
34. Counsel's remarks were directly contrary to the assertion that the confession to manufacturing was coerced and the evidence did not indicate a methamphetamine laboratory.
35. Counsel's cross-examination was not merely ineffective but damaging to Defendant when evidentiary harpoons were invited by counsel's questions and went unobjected.

Claims of ineffective assistance of counsel are reviewed under the well established rule of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984) which sets forth a two-part test which must be applied to determine whether a defendant has been denied effective assistance of counsel. First, Petitioner must show counsel's performance was deficient, and second, he must show the deficient performance prejudiced the defense. *Id.*, 466 U.S. at 687, 104 S.Ct. 2064. The trial court found counsel's performance was deficient. Therefore, having satisfied one prong of *Strickland*, we look to see if Appellant was prejudiced by this deficient performance

The burden rests with Appellant to show there is a reasonable probability that, but for any unprofessional errors by counsel, the result of the proceeding would have been different. *Id.*, 466 U.S. at 694, 104 S.Ct. at 2068. The trial judge's conclusion that the results would not have been different because this Court reviewed these propositions of error on appeal and found no error is flawed. The allegations of ineffectiveness of counsel and the trial judge's findings of ineffectiveness find trial and appellate counsel ineffective on several

issues not reviewed on the merits by this Court.⁴ Moreover, the numerous instances of ineffectiveness found by the trial judge compel us to conclude that the results of both the trial and the appeal were unreliable and this violates Petitioner's due process rights.

Strickland defines a reasonable probability as a "probability sufficient to undermine confidence in the outcome." *Id.* In this case confidence in the outcome of this trial has been undermined as a result of voluminous significant findings by the trial court establishing counsel's deficient performance

Therefore, as Petitioner has shown entitlement to relief in a post-conviction proceeding, the order of the District Court of Tulsa County denying Petitioner's application for post-conviction relief is **REVERSED** and the matter is **REMANDED** to the District Court to enter an order granting post-conviction relief and a new trial. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18; App. (2007), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this

[Handwritten initials]

day of February 2007.

[Handwritten signature]
GARY L. LUMPKIN, Presiding Judge

⁴ For example, on appeal Petitioner argued the trial court failed to grant severance of trial. However, the merits of this issue were not reviewed on appeal as this issue had been waived by counsel's failure to request a severance of the trials of the defendants.

