

FILED _____

AT _____ O'clock _____ M
CLERK OF THE DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

GARY L. PAYNE,)
)
Petitioner,)
vs.)
)
STATE OF IDAHO,)
)
Respondent.)

Case No. **CV 2009 10767**
Amended
**MEMORANDUM DECISION,
FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND
ORDER DENYING PETITION FOR
POST-CONVICTION RELIEF**

Trial of Gary L. Payne's Petition for Post-Conviction Relief.
Paul Szott, Lawyer for Gary L. Payne.
Donna Gardner, Lawyer for State of Idaho.

I. COURSE OF PROCEEDINGS

This action is a collateral attack on Gary L. Payne's December 17, 2008, sentence conviction in Kootenai County case No. CRF 2006 4173, wherein he was sentenced as follows:

COUNT I – ISSUING A CHECK WITHOUT FUNDS (a felony), Idaho Code § 18-3106, committed on OCTOBER 30, 2003 – to the custody of the Idaho State Board of Correction for a fixed term of ZERO (0) years followed by an indeterminate term of THREE (3) years, for a total term not to exceed THREE (3) years.

COUNT II – GRAND THEFT (a felony), Idaho Code § 18-2403 committed on OCTOBER 30, 2003 – to the custody of the Idaho State Board of Correction for a fixed term of TWO (2) YEARS followed by an indeterminate term of TWELVE (12) years, for a total term not to exceed FOURTEEN (14) years.

COUNT III -- GRAND THEFT (a felony), Idaho Code § 18-2403 committed on OCTOBER 30, 2003 – to the custody of the Idaho State Board of Correction for a fixed term of TWO (2) YEARS followed by an indeterminate term of TWELVE (12) years, for a total term not to exceed FOURTEEN (14) years.

COUNT IV – ISSUING A CHECK WITHOUT FUNDS (a felony), Idaho Code § 18-3106, committed on OCTOBER 28, 2003 – to the custody of the Idaho State Board of Correction for a fixed term of ZERO (0) years followed by an indeterminate term of THREE (3) years, for a total term not to exceed THREE (3) years.
THESE SENTENCES RUN CONCURRENT.

On December 28, 2009, Payne filed his “Petition and Affidavit for Post Conviction Relief” and a “Motion and Affidavit in Support for Appointment of Counsel.” On January 5, 2010, this Court appointed the Kootenai County Public Defender to represent Payne, and on January 8, 2010, deputy public defender Staci Anderson filed a Notice of Appearance. The State filed its “Respondent’s Answer to Petition for Post-Conviction Relief”, and “Respondent’s Motion for Summary Judgment” on January 23, 2010. Staci Anderson, on behalf of Payne, filed no response. On February 26, 2010, a notice of hearing to be held on March 8, 2010, on the State’s Motion for Summary Judgment was mailed to both counsel. On March 1, 2010, deputy public defender Paul Szott substituted for Staci Anderson as Payne’s attorney. At the March 8, 2010, hearing, Paul Szott stated he had just been given Payne’s file, and he requested additional time to file a brief in response to the State’s motion. A deadline of April 25, 2010, was established for Payne’s brief, and any reply brief was due by the State on May 7, 2010. The hearing on the State’s motion for summary judgment was set to be held on May 19, 2010. Payne untimely filed his “Petitioner’s Response to Respondent’s Motion for Summary Judgment” on April 29, 2010, four days late. Following the May 18, 2010, hearing on the State’s Motion for Summary Judgment, on May 21, 2010, this Court entered its “Order Granting Respondent’s Motion to Dismiss in Part, Denying in Part”, in which this Court held:

IT IS HEREBY ORDERED Respondent’s Motion to Dismiss Payne’s claims of “Incorrect information given to the Court by Pre-Sentence report” and “Petitioner’s plea was not knowingly entered because it was induced by promises that were not kept” is GRANTED and those claims are dismissed, as they are matters that could have been

raised on direct appeal; alternatively, those claims are dismissed as Payne has set forth no facts that would support those claims.

IT IS FURTHER ORDERED Respondent's Motion to Dismiss Payne's claim of ineffective assistance of counsel claims is DENIED, as those claims are not covered by the concept that the UPCPA does not permit issues raised which could have been raised on direct appeal. *Matthews v. State*, 122 Idaho 801, 839 P.2d 1215 (1992).

Order Granting Respondent's Motion to Dismiss in Part, Denying in Part, p. 7. On June 18, 2010, this Court scheduled the evidentiary hearing on the remaining ineffective assistance of counsel claim for August 19, 2010. Because Payne would not be allowed to complete his MRT program in prison, a prerequisite for his release on parole on October 7, 2010, Payne was allowed to participate telephonically. Stipulated Motion to Continue Hearing, p. 1. The evidentiary hearing was held on August 19, 2010, and Payne participated telephonically.

Payne did not testify at that August 19, 2010, hearing, and he could have even though he participated telephonically. Payne put on no evidence at that hearing. Payne's counsel at the August 19, 2010, hearing stated Payne rested on his affidavit. The State called Douglas Phelps and Peter Jones, Payne's attorneys in his criminal proceeding. Both of Phelps and Jones testified.

Following the hearing, the Court ordered any additional briefing to be submitted simultaneously by August 26, 2010. On August 26, 2010, the State filed its "Brief in Opposition to Petitioner's Petition for Post Conviction Relief." Also on August 26, 2010, Payne filed his "Petitioner's Written Argument Regarding Post Conviction Relief."

II. ANALYSIS.

A. Introduction.

Both the Sixth Amendment to the United States Constitution and Art. I, §13 of the Idaho Constitution provide criminal defendants with a right to counsel. This entitlement

includes the right to representation by reasonably competent counsel in an adequate fashion. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). To establish that counsel's representation has been ineffective, the applicant must show that the attorney's performance fell below a standard of "competence demanded of attorneys in criminal cases" and that the defendant was prejudiced as a result. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. Demonstration of prejudice requires a showing of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* As noted by the State, 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 or the relevant law or other shortcoming capable of objective review. *Pratt v. State*, 134 Idaho 581, 584 (2000). Brief in Opposition to Petitioner's Petition for Post Conviction Relief, p. 2. There is a strong presumption that counsel's performance fell within the wide range of professional assistance. *Id.*

Payne has utterly failed to meet his burden of showing ineffective assistance of counsel in two ways. First, Payne has failed to prove his former counsel's performance was objectively deficient. Payne has failed to establish any facts showing ineffective assistance of counsel. Second, he has completely failed to show a reasonable probability that any alleged wrongdoing of former counsel Jones or Phelps would have changed the outcome.

B. Payne Failed to Prove His Former Counsels' Performance Was Objectively Deficient.

Payne complains his attorney failed to notify him of court dates and times. Petition,

p. 3. Specifically, Payne claims “Phelps and Associates did not ever notified by certified mail to this Petitioner.” Affidavit of Payne, p. 2. Phelps testimony was that his office practice was to return calls, office procedure was to send out all letters written by Phelps, and Phelps testified Payne was notified of all proceedings. There is no legal requirement such notices be sent by certified mail from an attorney to that attorney’s client. While Payne claims he was not notified, Payne’s credibility was impeached by Jones’s testimony under oath at the August 19, 2010, that Payne asked Jones to tell this Court in his criminal matter that he was handling other criminal matters that he had pending in Southern Idaho, when Jones knew in fact Payne was in Spokane, Washington. Jones refused to commit such a fraud upon the Court. The Court finds Jones’ testimony to be credible, and the Court finds Payne’s claims in his affidavit to not be credible.

Next, Payne claims his former counsel made a false statement when he attempted to withdraw from Payne’s criminal case. Petition, p. 3; Affidavit of Payne, pp. 2-3. However, *this was for the same ethical violation which Payne solicited of his attorney* described above.

Finally, Payne claims his former counsel misled him in his plea to the Court. Petition, p. 3. However, Payne’s affidavit fails to state how this is so. Additionally, as testified to by Phelps, the reason Payne’s Rule 11 plea bargain fell apart was because Payne himself failed to appear on December 17, 2007. Payne was sentenced exactly one year later on December 18, 2008. Payne did not rebut this testimony.

C. Payne Put on No Proof of a Reasonable Probability that any Alleged Wrongdoing Would Have Changed the Outcome.

Payne presented no evidence that even if Phelps and/or Jones had done some act that was ineffective, that the outcome of the case would have been any different. Payne has utterly failed to prove this prong of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct.

2052, 80 L.Ed.2d 674 (1984).

III. FINDINGS OF FACT.

After considering all of the evidence submitted by the parties and having weighed the credibility of the witnesses, I make the following findings of fact.

1. Payne failed to prove his former counsels' performance was objectively deficient.

2. Payne presented no evidence that even if Phelps and/or Jones had done some act that was ineffective, that the outcome of the case would have been any different.

Payne has utterly failed to prove this prong of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

3. If any of the statements in the introduction, Course of Proceedings, discussion, or the Conclusions of Law are determined to be Findings of Fact, they are so deemed and to that extent, they are incorporated into these Findings of Fact.

IV. CONCLUSIONS OF LAW.

Based upon the foregoing Findings of Fact, I make the following conclusions of law.

1. Payne has failed to meet his burden in all aspects on his petition for post-conviction relief.

2. Payne's petition for post-conviction relief is DENIED, the petition is DISMISSED, Payne's sentence in CRF 2006 4173 remains as imposed on December 17, 2008.

3. If any of the statements in the introduction, Course of Proceedings, discussion, or the Findings of Fact are determined to be Conclusions of Law, they are so deemed and to that extent, they are incorporated into these Conclusions of Law.

V. POST-SCRIPT.

All of the above was written on August 27, 2010. At the time the above was authored, this Court was operating under the mistaken belief that Payne's "Petitioner's

Written Argument Regarding Post Conviction Relief” was not timely filed on August 26, 2010. A review of the Court file on August 27, 2010, showed that to be the case. However, on August 27, 2010, the Court failed to check the Register of Action. Had the Court reviewed the ROA on that date, the Court would have discovered Payne had timely filed his “Petitioner’s Written Argument Regarding Post Conviction Relief” On August 30, 2010, the “Petitioner’s Written Argument Regarding Post Conviction Relief” was brought to the Court’s attention. The Court has reviewed that pleading.

Nothing in “Petitioner’s Written Argument Regarding Post Conviction Relief” changes the Court’s finding above that Payne has failed to show that his counsel’s performance was objectively deficient. Those issues are accurately described above in section II. B. As a result of Payne’s request of his counsel to commit a fraud upon the Court, testimony which Payne had the opportunity to rebut and did not, Payne is found to be not credible and Payne’s attorneys’ testimony was found to be credible.

Nothing in “Petitioner’s Written Argument Regarding Post Conviction Relief” changes the fact that Payne has provided no evidence, and indeed no argument, that the outcome would have been any different absent these alleged instances of ineffective assistance of counsel.

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VI. CONCLUSION AND ORDER.

Based upon the foregoing Findings of Fact and Conclusions of Law;

IT IS ORDERED that Payne’s Petition for Post-Conviction Relief is DENIED, Payne’s Petition for Post-Conviction Relief is DISMISSED, and Payne’s sentence in CRF 2006 4173 remains as imposed on December 17, 2008.

Dated this 30th day of August, 2010 (*nunc pro tunc* to August 27, 2010).

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of August, 2010 a true and correct copy of the foregoing was mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Paul Szott

Donna Gardner

Gary L. Payne
IDOC No. 53218
North Dorm (NDE) 22
P. O. Box 8509
Boise, ID 83707

Courtesy copy to:
Douglas Phelps
Peter Jones

Idaho Department of Correction
[certified copy Faxed to (208) 334-2011]

By _____
Jeanne Clausen, Secretary