No. 22-6452

ORIGINAL

Supreme Court, U.S.
FILED
DEC 27 2022
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Michael L Ziliak II — PETITIONER
(Your Name)

vs.

State of Washington — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Ninth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Michael L Ziliak II
(Your Name)

PO Box 2049/Airway Heights Correction Center
(Address)

Airway Heights WA 99001-2049
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

Why was my case denied due to being submitted after the timebar date when another court ruled that it was submitted in a timely manner?

Why was I sentenced to a life indeterminate sentence when I was technically still a juvenile at the time?

Why was I sentenced under 3 felony points from "previous felony sexual convictions" when I have never had any previous felony convictions in general?

Why was I given a state-appointed attorney that never helped me with my case, but instead lied to me and tricked me into signing a plea deal?

Why did the courts discredit me when I brought up that my attorney was not doing her job?

Why was my mental disabilities disreguarded by the courts after I had a mental evaluation?

TABLE OF CONTENTS

INDEX TO APPENDICES

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[✓] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

United States District Court, Eastern District of Washington

RELATED CASES

Case # 22-35060

Case #. 2:21-cv-00257-TOR

State of Washington v. Michael L. Zilliak, No. 37971-III

State of Washington v. Michael L. Zilliak, No. 19-1-00076-02

State of Washington Supreme Court v. Michael L Zilliak, No. 99686-5

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A, to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was September 30, 2022.

[✓] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Statutes:

RCW 9.94A.507
RCW 9.94A.670
RCW 9A.20.021
RCW 9A.44.030(2)
RCW 10.73.140

TABLE OF AUTHORITIES

CASES:

United States Supreme Court:

Washington State Supreme Court:

Washington Court of Appeals:

Washington Statutues:

Washington Court Rules:

Other Authorities:

A. Identity of Petitioner:

Michael L. Ziliak asks this court to accept review of the decision designated in Part B of this motion.

B. Decision to be Reviewed:

The Order Dismissing Personal Restraint Petition filed March 19, 2021.

C. Issues Presented for Review:

This case presents the following question of substantial interest to the citizens of this state:

Does a sworn declaration by a personal restraint petitioner lack evidentiary value simply because the facts set forth therein are deemed to be "self-serving?"

D. Statement of the Case:

On June 27, 2019, Petitioner Michael L. Ziliak entered a plea of guilty to one count of Second Degree Rape and one count of Sexual Exploitation of a Minor. (App., A-16) At the time of entering his plea, Ziliak had not undergone an examination to determine whether he was considered to be amenable to treatment pursuant to the Special Sex Offender Sentencing Alternative (SSOSA) statute, RCW 9.94A.670.

Sentencing was delayed several times at the request of the defense to allow Ziliak to obtain a SSOSA evaluation. (App., A-30) The report provided to the superior court indicated that Ziliak was not a good candidate for SSOSA. (App., A-30) The sentencing court declined to impose a SSOSA sentence, and instead sentenced Ziliak to life in prison

with a minimum term of 120 months on the rape charge, and a term of 55 months on the Sexual Exploitation of a Minor charge. (App., A-9)

One year after being sentenced, Ziliak, acting pro se, file a three page handwritten motion to vacate his sentence pursuant to CrR 7.8. (App., A38) Ziliak set forth three grounds for vacating his plea: (1) his attorney failed to inform him that he had a "credible defense for dismissal of the charges;" (2) his attorney had him plead guilty before obtaining a SSOSA evaluation, and (3) the prosecuting attorney delayed his SSOSA evaluation "possibly causing an unfair report." (App., A-39)

In support of his motion, Ziliak stated that a friend of the alleged victim and the alleged victim had both told him she was 17 years old. (App., A-40) He also stated that he believed the prosecutor had intentionally delayed his SSOSA evaluation, causing the examiner to render an unfavorable opinion.

The State responded to the motion by arguing that Ziliak' claim his attorney had failed to inform him of a potential defense to the charges, which the state construed as a claim of ineffective assistance of counsel, "should be rejected out of hand" because the claim was supported only by Ziliak's "own self serving, conclusory accusations." (App., A-33) The State further argued that, even if Ziliak's attorney failed to inform him of a potential defense to the rape charge, he nevertheless received effective assistance of counsel because the claimed defense - that Ziliak was told the alleged victim was 17 years old - and lacked "any evidentiary support." (App., A-34) Finally, the State argued that defense counsel was not deficient because any defense based on the victim having misrepresented her age would have been "utterly lacking in credibility." (App., A-35)

After finding that the motion was timely filed, the superior court transferred the motion to the Court of Appeals for consideration as a personal restraint petition pursuant to CrR 7.8(c)(2). (App., A-5) The Court of Appeals dismissed the petition pursuant to RCW 10.73.140, finding that the petition was based on frivolous grounds. (App., A-3,4).

V. Argument Why Review Should Be Accepted:

This case presents a question of great importance to the citizens of this State and a significant question of law under the Constitution of the United States: Does a sworn declaration by a personal restraint petitioner lack evidentiary value simply because the facts set forth therein are deemed to be "self-serving?" Or to put it another way, is a personal restraint petitioner required to submit admissible evidence in a form other than his or her own affidavit or declaration to be entitled to a hearing on merits of the petition?

The purpose of collateral review via a personal restraint petition is to provide a forum for meritorious claims by prisoners not subject to direct review. *See, In re Pers. Restraint of James*, 96 Wn.2d 847, 855, 640 P.2d 18 (1982)(Utter, J., concurring). That purpose is undermined when the threshold for obtaining review is such that claims having actual or potential merit are summarily dismissed.

Prisoners, by virtue of the fact of their imprisonment, have limited access to resources outside the prison setting. They cannot on their own conduct investigations, locate and speak to witnesses, or otherwise develop evidence that may be helpful to support a claim for relief. In many cases, the petitioner will have access to nothing more than his or her own knowledge of what happened. When a petition asserts a claim

of ineffective assistance, this limitation may be compounded by the failure of the prisoner's attorney to develop crucial facts and evidence prior to trial or entry of a guilty plea.

Here, the Court of Appeals rejected Ziliak's petition without a hearing on the grounds that it was frivolous. The court deemed Ziliak's sworn statement that the alleged victim and her friend had misrepresented her age to him to be not competent evidence in that the statement was "self-serving" or constituted a "conclusory allegation." The court also characterized the statements made by the alleged victim and her friend (or at least as to the friend) as inadmissible hearsay. The court then concluded that Ziliak's claim that his attorney provided ineffective assistance by failing to inform him of a viable defense to the rape charge lacked any factual basis and was frivolous.

The Court of Appeals ruling is based on clear errors of law. There is no evidentiary rule that allows a court to disregard statements of fact contained in a sworn declaration or affidavit simply because such statements might be characterized as "self-serving." In reality, nearly all such statements are self-serving in that they tend to be favorable to the declarant or affiant in some fashion. It would be unusual indeed for a party or witness to submit a sworn statement that contained significant facts contrary to the interests of the witness.

The only rule regarding the submission of "self-serving" statements in a declaration or affidavit is that such statements will not create a question of fact precluding summary judgment when the statements directly contradict unambiguous testimony given by the witness in a prior deposition. *Taylor v. Bell,* 185 Wn.App. 270,

294, 340 P.3d 951 (2014). Even then, it is not the supposed "self-serving" nature of the statements that deprives them of evidentiary value. Rather, it is the fact that the statements directly contradict previously sworn statements by the same witness. *Id.* A so-called self-serving declaration that does not contradict previously sworn testimony is no different from any other sworn statement and is entitled to the same evidentiary weight and consideration.

The statements by the alleged victim and her friend that she was 17 years old are clearly not inadmissible hearsay. To be hearsay, a statement must be offered as proof of the matter asserted in the statement itself. ER 801(c) It is clear from Ziliak's petition that he is not suggesting the alleged victim was in fact 17 years old. Instead, he is claiming that his attorney failed to inform him that it was a defense to the charge of Rape of a Child in the Second Degree, by far the most serious charge against Zilak and the only charge that carried a mandatory life sentence, that he reasonably believed she was 17 years old based on her and her friend's representations. See, RCW 9A.44.030(2). Thus, neither the statement of the alleged victim nor her friend would be offered at trial for the truth of the matter asserted and would not constitute inadmissible hearsay.

The Sixth Amendment guarantees effective assistance of counsel during the guilty plea process. *State v. Sandoval*, 171 Wn.2d 163, 169, 249 P.3d 1015 (2011). When examining a claim of ineffective assistance of counsel, Washington follows the test set forth in *Strickland v. Washington*, 446 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A person claiming ineffective assistance of counsel must show that counsel's performance was deficient in that it was objectively unreasonable and that they were

prejudiced by counsel's deficient performance. *Id.*, 466 U.S. at 687-92. To show prejudice, the person must show that, but for counsel's deficient performance, the outcome would have been different. *State v. Knotek*, 136 Wn.App. 412, 431, 149 P.3d 676 (2006). Counsel provides effective assistance during the plea bargaining and guilty plea process when counsel "actually and substantially" assists the client in deciding whether to plead guilty. *State v. Cameron*, 30 Wn.App. 229, 232, 633 P.2d 901 (1981).

Here, Ziliak has moved to withdraw his plea because he was not told he may have a viable defense to the charge of Rape of a Child in the Second Degree. That he wishes to withdraw his plea under these circumstances by itself suggests that he would likely not have pled guilty to that charge and subjected himself to a life sentence had he known of the potential defense. Thus, Ziliak has made an initial showing that the outcome of his case would have been different had he been fully informed by his attorney that he was giving up that defense by entering a guilty plea.

Ziliak has also made an initial showing that he was denied effective assistance of counsel. An accused cannot make a rationally based decision whether to give up his or her right to a trial unless he or she is aware of any and all potential defenses and the likelihood of successfully presenting a defense at trial. An attorney who fails to inform a client of a potential defense, the facts needed to establish the defense, and the likelihood of success in presenting the defense at trial has not actually and substantially assisted the client in deciding whether to plead guilty. This is especially true when the charged offense carries a mandatory sentence of life in prison as does Rape of a Child in the Second Degree.[1]

[1] Under RCW 9.94A.507(3)(a), the sentencing court is required to impose the maximum term of imprisonment on a person convicted of Rape of a Child in the Second Degree. Rape of a Child in the

When a client is not informed of a potentially viable defense, the client is likely to agree to plead guilty, since they will mistaken believe they have no other choice and they are giving up nothing by waiving their right to a trial. Counsel's failure to inform the client of a potentially viable defense impedes, rather than assists, the client in making a rational and informed decision whether or not to plead guilty.

In ruling on a personal restraint petition, the appellate court has three options: (1) dismiss the petition, (2) transfer the petition to the superior court for a reference hearing to determine the petition on its merits; and (3) grant the petition. *In re Yates*, 177 Wn.2d 1, 296 P.3d 872 (2013); RAP 16.11(b). Dismissal is necessary where the petitioner fails to make a prima facie showing in support of an alleged constitutional error. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813-4, 792 P.2d 506 (1990). Where the petitioner makes such a prima facie showing, but the merits cannot be determined solely on the record, transfer to the superior court for a reference hearing is appropriate. *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

To avoid dismissal, the petitioner must present facts and evidence on which the claim of unlawful restraint is based. *In re Williams*, 111 Wn.2d 353, 364, 759 P.2d 436 (1988). The petitioner may not rely solely on conclusory allegations or speculation. *Id.*, 111 Wn. 2d at 365; *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.3d 1086 (1992). Under RCW 10.73.140, the court of appeals is directed to dismiss a petition on its own motion without first requiring the state to respond if, upon initial review, the court determines the petition to be frivolous. A petition is frivolous when it

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Second Degree is a Class A felony and has a maximum term of life. RCW 9A.20.021. The only exception to a mandatory life sentence is a SSOSA sentence.

fails to present an arguable basis for relief. *In re Pers. Restraint of Khan*, 184 Wn.2d 679, 686-87, 363 P.3d 577 (2015).

Putting aside whether RCW 10.73.140 impermissibly infringes on the judicial power of the courts (see generally, Philip A. Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems,* 22 SEATTLE U.L.REV. 695 (1999)), the statute more or less tracks with the requirement that a petitioner must set forth specific facts and evidence to support his or her claim in order to avoid dismissal without a hearing. Contrary to the ruling by the Court of Appeals in this case, however, there is no requirement that a petitioner must submit evidence of a particular kind or in a particular form. Any competent evidence will do, and the petitioner need only make a prima facie case to be entitled to a hearing. There is no statute or court rule stating that the petitioner's own affidavit or declaration does not constitute competent evidence simply because it is, by necessity, self-serving. The petitioner's affidavit or declaration is sufficient to avoid dismissal without a hearing, so long as it contains enough facts and evidence to make out a prima facie claim.

Ziliak's declarations meets the threshold requirement of setting forth specific facts and evidence to support his claim of ineffective assistance of counsel. In his declaration, Ziliak states that he was not told it was a defense to the charge of Rape of a Child in the Second Degree that he reasonably believed the alleged victim to be of legal age based on her own statements. Ziliak also states that he was told by both the alleged victim and the friend who introduced them that she was 17 years old. Those facts, if established as true, would constitute a complete defense to the rape charge so long as Ziliak reasonably believed the statements to be true. Thus, Ziliak is entitled to a

hearing. His claim is not based upon mere conjecture or speculation. If Ziliak's statements are true, it is not speculation or conjecture that the alleged victim and her friend would provide corroborating testimony. Presumably, witnesses who are under oath will tell the truth.

In response to the petition, the state argued first that the defense based upon a reasonable belief the victim was of legal age is more restrictive as to the charges of child exploitation and child pornography. (App., 34). But, those charges have a maximum sentence of 10 years, whereas the rape charge has a maximum sentence of life. Even if the defense is harder to prove with respect to the lesser charges, that does not justify Ziliak's attorney in failing to advise him of a potential defense to the more serious rape charge.

The state also argued that the defense would have been "utterly lacking in credibility." (App., A-35) However, matters of credibility are to be determined by a jury. The question before the Court of Appeals was not whether Ziliak would ultimately have been successful in presenting such a defense, but whether he was denied effective assistance of counsel by not being told he had a potentially viable defense to the rape charge.

Whether Ziliak will ultimately be able to meet his burden of proving by a preponderance of the evidence that his counsel's performance was deficient and that he was prejudiced as a result remains to be seen. Nevertheless, he is entitled to a hearing where he can present additional evidence and argument in support of his claim. The Court of Appeals erred by dismissing his petition on the grounds that it was not

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael Wilson

Date: 12/24/2022