No. 23-5004

FILED
OCT 16 2023
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Hazhar A. Sayeal — PETITIONER
(Your Name)

vs.

The State of Colorado — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Colorado Supreme Court
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Hazhar A. Sayeal, #133608
(Your Name)
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(Address)

Limon, Co. 80826
(City, State, Zip Code)

Unknown
(Phone Number)

RECEIVED
OCT 27 2023
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SUPREME COURT, U.S.

QUESTION(S) PRESENTED

Whether the Colorado Court of Appeals misapplied the standard of review applicable to assertion of justifiable excuse or excusable neglect for belated postconviction motion?

Whether both postconviction attorney(s) rendered ineffective assistance of counsel by failing to raise claims related to prior counsels' performance at trial and on appeal?

Did postconviction attorney(s) rendered ineffective assistance of counsel by failing to file a timely motion for reconsideration of sentence under Crim.P.Rule 35(b)?

LIST OF PARTIES

[x] 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:

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TABLE OF AUTHORITIES CITED

Cases

Colorado Revised Statute

OTHER

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[ ] has been designated for publication but is not yet reported; or, [ ] is unpublished.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[ ] has been designated for publication but is not yet reported; or, [ ] is unpublished.

[x] For cases from state courts:

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

[ ] reported at_____; or,
[ ] has been designated for publication but is not yet reported; or,\
[x] is unpublished.

The opinion of the Colorado Court of Appeals appears at Appendix **D** to the petition and is

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[x] is unpublished.

JURISDICTION

[ ] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was_____.

[ ] 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).

[x] For cases from state courts:

The date on which the highest state court decided my case was Sept. 11, 2023.
A copy of that decision appears at Appendix **E**.

[ ] 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

United States Constitution, Amendment Six:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment Fourteen:

Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Hazhar A. Sayed did not receive a meaningful opportunity to present his postconviction claims. His first appointed postconviction counsel did not investigate or file a petition for postconviction relief and was ultimately sanctioned for failing to communicate with clients. Mr. Sayed's second appointed postconviction counsel failed to supplement the (pro-se) claims alleging ineffective assistance of trial and appellate counsel. The district court found that those facts sufficiently alleged justifiable excuse and excusable neglect. On appeal, however, a division of the Colorado Court of Appeals determined that justifiable excuse and excusable neglect was not supported by the record.

This Case involves a lengthy procedural history that began with a 2006 conviction for sexual assault and sentence to twenty-four years to life in prison. Mr. Sayed's conviction was affirmed on direct appeal. The mandate issued August 24, 2007.

Appellate counsel failed to inform Mr. Sayed about the Status of his appeal and that the mandate issued. Mr. Sayed learned about the mandate through his former trial counsel, but the 126-day deadline for reconsideration of sentence under Crim.P.Rule 35(b) had already passed. Trial counsel then requested, and was granted, an extension of time to file a motion for reduction of sentence. However, trial counsel failed to file a motion under Crim.P.Rule 35(b).

In 2008, Mr. Sayed filed a (Pro-Se) motion for reconsideration of sentence. He did not receive a ruling on those motions.

On November 6, 2008, Mr. Sayed filed a timely petition for postconviction relief under Cim.P.Rule 35(c). He was appointed counsel. In January 2009, the first postconviction counsel filed an entry of appearance. That counsel did not further correspond with Mr. Sayed or file anything on his behalf. That counsel was later sanctioned by the Office of the Presiding Disciplinary Judge related to a separate client. See Appendix **A** & **B**.

STATEMENT OF THE CASE (continued):

A second postconviction attorney was appointed in September 2011. That attorney missed the deadline for filing a supplemental petition and instead, a year later, filed a motion for a new trial based upon newly discovered evidence. In September 2013, the district court denied the motion without a hearing. Mr. Sayed appealed that ruling.

While the case on appeal, the Colorado court of appeals ordered a limited remand to permit the district court to rule on Mr. Sayed's pro-se Crim.P.Rule 35(c) motion. The Colorado Court of Appeals then affirmed the district court's summary denial on both the motion for new trial and the pro-se Crim.P.Rule 35(c) motion. The mandate issued on April 20, 2016.

In 2017, Mr. Sayed filed a pro-se petition for (D.N.A) testing to prove his actual innocence. The district court denied that motion and Mr. Sayed appealed. The order was affirmed on appeal and the mandate issued December 13, 2019.

In March 2020, court-appointed counsel filed a motion to permit postconviction claims to be heard on their merits. Counsel argued that prior postconviction counsel was ineffective in failing to investigate and supplement Mr. Sayed's pro-se claims. In the motion, Counsel requested "to continued to represent [Mr. Sayed] and that she be permitted to supplement the claims with detailed allegations based upon the through review of the record".

The district court found that "excusable neglect is shown" for the untimely filing of the postconviction petition. It also found that Mr. Sayed was entitled to a hearing on his Crim.P.Rule 35(b) motion for reconsideration of sentence. However, it denied without a hearing Mr. Sayed's ineffective assistance of counsel claims. After the hearing on reconsideration of sentence, the district court denied the Crim.P.Rule 35(b) motion. See Appendix **C**.

On direct appeal, the division concluded that justifiable excuse and excusable neglect was not established. It therefore affirmed the district court's order on other grounds, finding that the petition was untimely. See Appendix **D**, ¶ 16.

REASONS FOR GRANTING THE PETITION

The Division of the Colorado Court of Appeals Decided A question of Substance in A was Not in Accord With Close v. People, 180 P.3d 1015(Colo. 2008); People v. Wiedemer, 852 P.2d 424 (Colo. 1993); and Swainson v. People, 712 P.2d 479 (Colo. 1986).

A. Justifiable excuse and excusable neglect standards

A person may petition under Crim.P.Rule 35(c) to have a judgment of a conviction set aside on various grounds. Ordinary, a motion under Crim.P.Rule 35(c) must comply with the time limits set forth in § 16-5-402 C.R.S. Crim.P.Rule 35(c)(3)(I); People v. Wiedemer, 852 P.2d 424, 427 (Colo. 1993). As applicable here, the deadline under § 16-5-402 (1) C.R.S., is three years from the date of the direct appeal mandate. People v. Stanley, 169 P.3d 258, 259 (Colo. App. 2007). § 16-5-402 (2)(d) C.R.S., provides an exception to the deadline if the failure to timely file was the "result of circumstances amounting to justifiable excuse or excusable neglect."

"Whether a defendant qualifies for this statutory exception is a question of fact ordinary to be resolved by the trial court" Wiedemer, 852 P.2d at 442 (citing, Swainson v. People, 712 P.2d 479, 481 (Colo. 1986)). "[I]n order to entitle [a petitioner] to a hearing on the applicability of this exception to the time bar," the petitioner must "alleged facts that, if true, would establish justifiable excuse or excusable neglect [.]" Close v. People, 180 P.3d 1015, 1019 (Colo. 2008).

Claim One (continued):

B. The Division of the Colorado Court of Appeals Confused the Standard for a hearing on Justifiable Excuse or Excusable Neglect with the Standard for Establishment of Justifiable Excuse or Excusable Neglect.

The parties and the district court agree that the three-year deadline was not met in this case. The district court, however, determined that Mr. Sayed sufficiently alleged justifiable excuse or excusable neglect:

> Under these specific facts, of the first postconviction counsel Failing to file any reconsideration motion, and the second postconviction counsel not filing any claims based on ineffectiveness of prior counsel seeking a reconsideration hearing, the Court finds that excusable neglect is shown and the Court will consider the claims to determine if they justify a hearing.

See Appendix **C.**

The division of the Colorado Court of Appeals disagree with the district court and instead concluded that the facts did not establish justifiable excuse or excusable neglect because "even assuming Sayed had grounds for establishing justifiable excuse or excusable neglect through April 2016, he did not allege any facts that, if true, would demonstrate why his failure to assert the ineffective postconviction counsel claims until nearly four years later was the result of justifiable excuse or excusable neglect." See Appendix **D,** ¶ 19.

STATEMENT OF THE CASE (continued):

That conclusion is not in accord with other opinion of the Colorado Supreme Court because it sets forth the standard for a hearing on justifiable excuse or excusable neglect, not a final determination on justifiable excuse or excusable neglect. The district court already determined that no hearing was necessary because the motion sufficiently alleged justifiable excuse or excusable neglect. The Colorado Supreme Court repeatedly held that justifiable excuse or excusable neglect determinations are best made by the trial court. See e.g., Smith v. People, 872 P.2d 685, 686 (Colo. 1994); Wiedemer, 852 P.2d at 442; Swainson, 712 P.2d at 481.

The Colorado Supreme Court has also set forth a non-exhaustive list of factors to be considered in making the justifiable excuse or excusable neglect determination:

- whether circumstances or outside influences prevented a timely challenge to a conviction;
- the extent to which the defendant, having reason to question the constitutionality of a conviction, timely investigated its validity and took advantage of available avenues of relief;
- whether the defendant had any previous need to challenge a conviction and either knew it was constitutionally infirm or had reason to question its validity;
- whether the defendant had other means of preventing the government's use of a conviction, so that a postconviction challenge was previously unnecessary; and
- whether the passage of time affects the prosecution's ability to defend against the challenge.

People v. Chavez-Torres, 2019 CO 59, ¶ 14, 442 P.3d 843, 847-48.

The division of the Colorado Court of Appeals did not consider these factors when rejecting the fact-finder's decision. The division also failed to consider the fact that the district court lacked jurisdiction to rule on a postconviction motion from 2017 to late 2019, when the mandate issued following the appeal of the (D.N.A) ruling. Under these circumstances, the division failed to "give effect to the overriding concern that defendants have a meaningful opportunity to challenge their convictions as required by the due process." Close, 180 P.3d at 1019.

The tortured procedural history in this case bears out the fact that Mr. Sayed did not have a meaningful opportunity to challenge his convictions. Mr. Sayed respectfully moves this Court to grant certiorari on this issue.

2) Whether postconviction attorney(s) rendered ineffective assistance of counsel by failing to raise claims related to prior counsels' performance at trial and on appeal?

Mr. Sayed has the statutory right to effective counsel in postconviction proceedings, especially where that counsel is appointed by the State. See Silva v. People, 156 P.3d 64, 1168 (Colo. 2007). The effectiveness of Mr. Sayed's postconvicton counsel is evaluated through the familiar two prong standard created in Strickland v. Washington, 467 U.S. 1267 (1984). The Strickland standard requires Mr. Sayed to have demonstrated that (1) that the acts or omissions of counsel were "outside the range of professionally competent assistance"; and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Silva, 156 P.3d at 1169.

Claim Two (continued):

The Court failed to separately analyze the conduct of Mr. Sayed's postconviction attorneys in its order, instead focusing on the alleged conduct of the trial attorney and the appellate attorney. See Appendix C. On examination, neither of Mr. Sayed's postconviction attorneys met the standard for effective assistance of counsel during the postconviction phase.

A complete failure to take any action on the part of an attorney can amount to deficient performance. See People v. Cole, 775 P.2d 551, 554 (Colo. 1989). Although the failure in Cole was perpetuated by a trial attorney, the court's reasoning remains applicable here. In Cole, the record demonstrated that the attorney "failed to interview witnesses before trial, did no legal research, and failed to consult experts in the accounting or insurance fields. In short, there was virtually no investigation or preparation before the trial." Cole 775 P.2d at 555. Similarly, here, Mr. Sayed's first postconviction attorney failed to file anything with the court except for an entry of appearance. See Appendix **A & B**. Further, based on Mr. Sayed's pro-se motion requesting the status of the postconviction proceeding, it was clear that postconviction one had also failed to communicate with Mr. Sayed about his progress in the investigation and drafting of a petition for postconviction relief. See Appendix **A & B**. This failure to communicate was substantiated as a pattern of practice by the presiding disciplinary judge's decision to take action against postconviction counsel for lack of communication with another client. See Appendix **A & B**. This total inaction on the part of postconviction attorney one is enough to satisfy the deficient performance prong of Strickland v. Washington, supra. To demonstrate deficient performance, the proper standard is "reasonably effective assistance" and thus Mr. Sayed must show that "counsel's representation fell below an objective standard of reasonableness." Ardolono v. People, 69 P.3d 73, 76 (Colo. 2003). One important exception to this analysis is where there is evidence that appellate counsel made a strategic choice not to file an appeal in postonviction proceeding based on "through investigation of the law and facts relevant to plausible options." Id. In this case, because the Colorado court of appeals in its opinion concluded that justifiable excuse and excusable neglect was not established.

Claim Two (continued):

It therefore affirmed the district court's order on other grounds, finding that the petition was untimely. See Appendix **D**, ¶ 16. So, the only evidence presented in the record supports Mr. Sayed's assertion that postconviction one's decision not to file anything amount to deficient performance and not to a strategic decision.

Next, to prevail on his claim of ineffective assistance of postconviction counsel, Mr. Sayed must also have affirmatively demonstrated prejudice. Strickland, 466 U.S. at 693. In other words that, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id, at 694. When the prejudice is a complete denial of a proceeding, however, then prejudice is presumed. See e.g., People v. Long, 126 P.3d 284, 286 (Colo. App. 2005). Here, Mr. Sayed lost his opportunity to have counsel assist him in specifically articulating the deficiencies in performance of both trial and appellate counsel during postconviction proceedings. Although he was subsequently appointed a second postconviction attorney, because the second postconviction attorney failed to raise any constitutional issues related to trial and appellate counsel, the prejudice of failing to file a petition for postconviction relief in the first instance was not cured.

In addition, the second postconviction attorney filed more than a mere entry of appearance, indicating to the court that she had reviewed "over five thousands pages of material" and that she had "some investigation to complete". She affirmatively stated that she estimated being able to file a petition motion by December 31, 2011. However, nothing was filed. It also appears that she did not convey her strategy or thinking with Mr. Sayed, since he subsequently filed a pro-se supplemental petition four months after counsel's self-imposed deadline. If counsel had been reasonably adequate, she would have known that such pro-se filing did not hamstring her ability to file a subsequent supplemental petition alleging ineffective assistance of trial and appellate counsel based on successiveness. See People v. Walker, 46bP.3d 495, 496 (Colo. App. 2002).

Claim Two (continued):

Thus, without addressing any claims of ineffective assistance of counsel, counsel elected to file a motion for a new trial based on newly discovered evidence. These bare bones filings support Mr. Sayed's subsequent claims that postconviction counsel two was ineffective.

Because the claims are inadequately briefed in the record, prejudice can also be presumed. See Long, 126 P.3d at 286. By failing to supplement or make any record at all about the deficiencies of trial and appellate counsel, postconviction two's deficient performance waived Mr. Sayed's right to a constitutional claim without his permission. Because the record was inadequate to support any theory that this was a strategic decision by postconviction counsel, thus Mr. Sayed respectfully moves this Court to grant certiorari on this issue. This as well as all available relief is respectfully requested.

3) Did Mr. Sayed receive ineffective assistance of counsel when postconviction counsel failed to raise a claim about failure to file a timely motion for reconsideration of sentence under Crim.P.Rule 35(b)?

Mr. Sayed alleged that his trial and appellate counsel were ineffective for failures to file a timely motion for reduction of sentence pursuant to Crim.P.Rule 35(b). See Appendix **C.** In support of these allegations, he attached two letters supporting his communication with the trial attorney about getting the motion filed and her failure to do so. See Appendix **C.** Neither one of the postconviction attorneys appointed to file petition for postconviction relief raised this issue in postconviction proceedings. Because the motion for reduction of sentence was never filed and was subsequently not raised by postconviction counsel, prejudice should have been presumed in this instance as well. See Long, 126 P.3d at 286. Because of all four of the attorney's failure to raise the claim related to the motion for reduction of sentence, Mr. Sayed lost out on his opportunity to be heard on his arguments with regard to reducing his sentence in this case.

Claim Three (continue)

Although the trial court agreed on this claim, the trial court subsequently erred by not hearing any evidence related to the issue and instead proceeding straight to a reconsideration hearing without entering a ruling on this claim of ineffective assistance of postconviction counsel. See Appendix **F.** In its order, the trial court concluded that the alleged failures of trial counsel and appellate counsel to file a motion for reconsideration of sentence, if true, to meet the first Strickland prong. See Appendix **C.** The Court also concluded that this deficient performance prejudiced Mr. Sayed "since he was unable to exercise his legal right to have a court review his sentence and consider a reduction." See Appendix **C.** The court then set this claim for a hearing and, also, "to allow evidence and argument as to the underlying motion for reconsider sentence." See Appendix **C.** At the beginning of the hearing, however, postconviction counsel stated that she and the district attorney "agreed that the order meant to have a reconsideration hearing and so that's what the order meant to have a reconsideration hearing and so that's what we both said to plain that this would be on." See (Transcripts 04/30/2021, p. 6:14-21). The Court therefore did not hear any evidence on the claims of ineffective assistance of counsel, going straight to the reconsideration of the sentence in this case. The Colorado court of appeals in its opinion found that the error to be constitutionally harmless. See Appendix **D, at *6-7.** Mr. Sayed respectfully moves this Court to grant certiorari on this issue. This as well as all available relief is respectfully requested.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted this 25th day of Sept., 2023.

Hazhar Sayed

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