

2010

Tamra Rhinehart v. State of Utah : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

TAMRA RHINEHART,

Petitioner/Appellant,

vs.

STATE OF UTAH,

Respondent/Appellee.

Case Number 2010059
District Court Case 08012055

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FILED
UTAH APPELLATE COURTS

AUG 22 2011

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TABLE OF CONTENTS

Table of Authorities:	3
Jurisdictional Statement:	5
Issues on Appeal and Standard of Review:	5
Constitutional or Statutory Provisions:	6
Statement of Case:	10
Statement of Facts:	11
Summary of Argument:	14
Argument:	
Point I: THE TRIAL COURT FAILED TO GIVE PETITIONER PROPER NOTICE OF ITS CONVERSION OF THE STATE'S MOTION TO DISMISS UNDER UTAH RULE OF CIVIL PROCEDURE 12(B)(6) INTQ ONE FOR SUMMARY JUDGMENT	15
Point II: THE TRIAL COURT ERRED IN DISMISSING THE PETITION ON SUMMARY JUDGMENT, BECAUSE THERE WERE GENUINE ISSUES OF MATERIAL FACTS OUTSTANDING	21
Conclusion	25
Proof of Service	26
Addendum:	27

TABLE OF AUTHORITIES

Rules

Utah Rule of Civil Procedure 12	2, 5, 6, 13, 15, 16, 17, 18, 19, 20
Utah Rule of Civil Procedure 56	7, 16, 21

Statutes

Utah Code Annotated §78A-4-103(2010)	5
Utah Code Annotated § 78B-9-110 (2010)	

Case law

	5
<u>Oakwood Vill., L.L.C. v. Albertsons, Inc.</u> , 2004 UT 101, 104 P.3d 1226	5, 16
<u>Tuttle v. Olds</u> , 2007 UT App 10, 155 P.3d 893	5, 16, 17
<u>State v. Holgate</u> , 10 P.3d 346 (Utah 2000).	5, 20
<u>Bahr v. Imus</u> , 2011 UT 19, 250 P.3d 56 (Utah 2011)	6
<u>State v. Rhinehart</u> , 2007 UT 61	12
<u>Strand v. Associated Students of Univ. of Utah</u> , 561 P12d 191 (Utah 1977)	16
<u>Heiner v. S.J. Groves & Sons Co.</u> , 790 P.2d 107 (Utah Ct. App. 1990)	17
<u>Alvarez v. Galetka</u> , 933 P.2d 987 (Utah 1997)	17, 18, 19
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984)	18, 19, 20
<u>Webster v. Sill</u> , 675 P.2d 1170 (Utah 1983)	21
<u>Norton v. Blackham</u> , 669 P.2d 857 (Utah 1983)	21

<u>Frisbee v. K & K Construction Co.</u> , 676 P.2d 341 (Utah 1980)	21
<u>Surety Underwriters v. E & C Trucking, Inc.</u> , 10 P.3d 338 (2000)	22
<u>Lamb v. B & B Amusements Corp.</u> , 869 P.2d 926 (1993)	22
<u>Kilpatrick v. Wiley, Rein & Fielding</u> , 909 P.2d 1283 (Utah App.,1996)	22
<u>Holbrook Co. v. Adams</u> , 542 P.2d 191 (Utah 1975)	22

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a summary dismissal of Rhinehart's Petition for Writ of Habeas Corpus and Post-Conviction Relief. This Court has jurisdiction over this appeal pursuant to Utah Code Annotated §78A-4-103(2)(f) (2010) and § 78B-9-110 (2010).

ISSUES ON APPEAL AND STANDARD OF REVIEW

Point I

DID THE TRIAL COURT ERR BY NOT GIVING THE PARTIES PRIOR NOTICE OF CONVERTING RESPONDENT'S MOTION TO DISMISS INTO ONE FOR SUMMARY JUDGMENT?

STANDARD OF REVIEW: When reviewing the failure to convert a motion to dismiss under rule 12(b)(6) to a motion for summary judgment, "it is reversible error unless the dismissal can be justified without considering the outside documents." Oakwood Vill., L.L.C. v. Albertsons, Inc., 2004 UT 101, ¶ 12, 104 P.3d 1226. A dismissal under Rule 12(b)(6) is a question of law, reviewed for correctness. Tuttle v. Olds, 2007 UT App 10, ¶ 6, 155 P.3d 893.

The improper conversion of a Rule 12(b)(6) into a motion for summary judgment is plain error, requiring no preservation in the court below. Establishment of a plain error requires a showing of: (1) an error; (2) the error should have been obvious to the trial court; and (3) the error is harmful. State v. Holgate, 10 P.3d 346, 350 (Utah 2000).

Point II

IF THE TRIAL COURT DID NOT ERR IN CONSIDERING
RESPONDENT'S MOTION AS A MOTION FOR SUMMARY
JUDGMENT, DID THE TRIAL COURT ERR IN DISMISSING THE
PETITION ON SUMMARY JUDGMENT?

STANDARD OF REVIEW: When reviewing a trial court's dismissal of an action on summary judgment, the dismissal is reviewed for correctness, granting no deference to the district court's conclusions. Bahr v. Imus, 2011 UT 19, ¶ 15, 250 P.3d 56. Petitioner preserved this matter for appeal by filing her Response to State's Motion to Dismiss. (R. 190-210.)

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Rule of Civil Procedure 12(b)(6):

How presented. Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No

defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Utah Rule of Civil Procedure 56

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be

admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith. If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses

which the filing of the affidavits caused, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

STATEMENT OF THE CASE

This matter arose out of Petitioner's Petition for Habeas Corpus and Post Conviction Relief, filed on August 14, 2008. (R. 3-29.) Respondent did not file an answer to the Petition, but filed instead a Motion to Dismiss Petition for Writ of Habeas Corpus and Post Conviction Relief, on March 3, 2009. (R 67.) Respondent argued that Petitioner did not meet her burden through her Petition and requested that the matter be dismissed. (See, e.g., R. at 75; 81; 90; 99.) Respondent attached documents to its Motion to Dismiss, including transcripts of the plea proceeding and the Statement in Advance of Plea. (R 101-163.)

At the hearing, the court was uncertain of the standard to be applied to Respondent's Motion to Dismiss. (R. 271: pp. 6-7.) Although Respondent stated that the hearing should be treated as one for summary judgment, Respondent did not refer to the summary judgment standard, but talked about the sufficiency of the pleadings. (R. 271: pg. 7.) The court determined, ultimately, that Petitioner had not met her burden to establish the elements of her claim through a preponderance of the evidence and dismissed Petitioner's Petition. (R. 236.) Petitioner filed this appeal. (R. 261-262.)

STATEMENT OF THE FACTS

On March 18, 2005, Petitioner, Tamra Rhinehart, pled guilty to one count of aggravated murder in Case Number 031100633. Petitioner directly appealed her conviction to the Utah Supreme Court on several grounds, including that she was deprived of her right to effective assistance of counsel when she entered her guilty plea. The Utah Supreme Court determined that it was without jurisdiction to hear Petitioner's challenge to the lawfulness of her guilty plea, because she never filed a motion to withdraw that plea.

On or about August 14, 2008, Petitioner filed a Petition for Writ of Habeas Corpus and Post-Conviction Relief (the "Petition"). (R. 3-29.) In the Petition, Petitioner asserted that she had received ineffective assistance of counsel during her criminal proceedings, particularly relative to her guilty plea. (Id.) Petitioner also alleged that she received ineffective assistance of appellate counsel, who failed to raise the issue of a misplea on direct appeal. (Id.)

Respondent, the State of Utah, requested three extensions of time in which to respond to the Petition. (R. 50-52; 55-57; 60-62) On March 3, 2009, Respondent filed its Motion to Dismiss Petition for Writ of Habeas Corpus and Post Conviction Relief (the "Motion to Dismiss"). (R 67.) Respondent argued in its Motion to Dismiss that Petitioner had not "carried her burden" of establishing that her trial counsel was

ineffective. (See, e.g., R. at 75; 81; 90; 99.) Respondent also requested that the trial court hold an evidentiary hearing to address any issues not resolved through its Motion to Dismiss. (R. 99.) In support of its Motion to Dismiss, Respondent attached a copy of the opinion in State v. Rhinehart, 2007 UT 61, a copy of Petitioner's Statement in Advance of Plea, and a transcript of the plea hearing, held on March 18, 2005. (R. 101-163.)

Petitioner also requested several extensions of time in which to respond to the Motion to Dismiss. (R. 164; 175-176.) Respondent filed a Notice to Submit on its Motion to Dismiss on June 29, 2010. (R. 167-168.) Petitioner filed a Request for an Evidentiary Hearing on the Petition on June 30, 2010. (R. 169-170.) The trial court granted Petitioner more time to file her response to the Motion to Dismiss, which response was filed on or about October 19, 2010. (R. 177-179.) In her response, Petitioner argued that she had met the procedural requirements to file the Petition. (R. 190-196.) Petitioner argued further that her trial counsel was ineffective, in that she was coercive during pre-plea discussions and at the taking of the plea; that Petitioner did not "knowingly and voluntarily" waive her right to a jury during the sentencing phase of her case; that Petitioner was under the influence of Lexapro at the time of entry of her plea; that counsel misstated information during pre-plea discussions; and that counsel failed to file a motion to withdraw the guilty plea prior to sentencing. (R. 190-197.) Petitioner

attached several exhibits to her response to the Motion to Dismiss, including a photograph taken at the time of the sentencing hearing. (R. at 199.)

The trial court held a non-evidentiary hearing on January 31, 2010. (R. 232.) Counsel for both parties was present. (Id.) Initially, Respondent indicated that it anticipated that the court would treat its Motion to Dismiss as a motion for judgment on the pleadings. (R. 271: pg. 5.) The court then held a conference with counsel in chambers, where the parties discussed how Petitioner's appointed counsel would be compensated and the "exact purpose of this hearing[.]" (R. 271: pp. 5-6.) At first, the court indicated that the purpose of the hearing was a "12(b)(6) review hearing to see if the pleadings are sufficient taking everything that the petitioner is saying as true, sufficient for an evidentiary hearing on this matter to take it essentially to the next level." (R. 271: pg. 6.) Respondent clarified that "we've moved beyond the 12(b)(6) stage to summary judgment stage by virtue of the attachments to the pleadings." (Id.) The trial court indicated that "[t]he standard's the same" whether the parties proceed under 12(b)(6) or summary judgment. (R. 271: pg. 7.) The court did not offer either party an opportunity to provide any additional evidence. (Id.)

The court took argument from the parties and then indicated that a decision would be forthcoming. (R. 271: pp. 36-37.) The court issued its Memorandum Decision on or about May 28, 2011. (R. 233-237.) In its decision, the trial court indicated that it "ha[d]

reviewed the Motion and Memorandum, the Opposition, the Reply, each document submitted before the Court, and the applicable case law and statutory provisions” along with the oral arguments of counsel. (R. 233.) The court found “that the allegations in the Petition are insufficient to prove, by a preponderance of the evidence, that Petitioner’s trial counsel’s representation fell below and objective standard of reasonableness.” (R. 234.)

With regards to Petitioner’s claim that her appellate counsel was also ineffective for failure to raise a misplea, the court found “Petitioner has failed to show that there was ‘a reasonable probability that, but for [her] counsel’s unreasonable failure to file a merits brief, [s]he would have prevailed on [her] appeal.’” (R. 236.) The court concluded by determining that Petitioner “failed to carry her burden of proof on both of her grounds for relief raised in her Petition.” (Id.) The court dismissed the Petition. (Id.) An order dismissing the Petition was signed by the court on July 2, 2010. (R. 238-239.) Petitioner filed her Notice of Appeal on July 16, 2010. (R. 261-262.)

SUMMARY OF ARGUMENTS

The court erred in addressing Respondent’s Motion to Dismiss the Petition. The court did not state whether it would include or exclude matters outside of the pleadings. The court did not give the parties notice until the hearing that it would treat the Motion to Dismiss as one for summary judgment. Even after stating that the standard was summary

judgment, the court failed to apply that standard to the information before it. A review of the Petition under the Rule 12(b)(6) standard would have resulted in a ruling that the pleadings were sufficient to state a claim for relief.

Even if the trial court did not err in converting the Motion to Dismiss to a summary judgment motion without providing any reasonable notice, the court failed to apply the correct summary judgment standard. Respondent had to show that there were no genuine issues of material facts, and that Respondent was entitled to judgment as a matter of law. Petitioner had place several material facts in dispute through affidavits attached to her pleadings. The court inappropriately weighed evidence and made evidentiary determinations.

ARGUMENT

POINT I

THE TRIAL COURT FAILED TO GIVE PETITIONER PROPER NOTICE OF ITS CONVERSION OF THE STATE'S MOTION TO DISMISS UNDER UTAH RULE OF CIVIL PROCEDURE 12(B)(6) INTO ONE FOR SUMMARY JUDGMENT

Utah Rule of Civil Procedure 12(b)(6) provides in pertinent part:

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and

all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

If the court considers any materials outside of the pleadings, the court must convert the motion into a motion for summary judgment. See Utah R. Civ. P. 12; case cite about mandatory language in a rule or statute. A matter outside of the pleadings is “any written or oral evidence ...which ... substantiat[es] ... and does not merely reiterate what is said in the pleadings.” Oakwood Village, at ¶ 12. The court is required to give both parties reasonable notice of the conversion and a meaningful opportunity to submit pertinent summary judgment materials to the court. Tuttle v. Olds, 2007 UT App 10, ¶ 17, 155 P.3d 893. This is particularly important to the party against whom judgment is entered. Strand v. Associated Students of Univ. of Utah, 561 P.2d 191, 193 (Utah 1977).

In this matter, the trial court gave no notice prior to the hearing as to how it would address the matter. The court failed to make any indication as to what it would or would not consider in the process of deciding the Motion to Dismiss. The court did not engage in any discussion with the parties as to whether Petitioner would submit additional information in support of a summary judgment motion. Petitioner had no “reasonable notice” of the conversion and had no opportunity to submit additional information to the court.

The record is unclear as to which standard was actually applied in this matter to reach the order of dismissal. During the January 31, 2010, hearing, the court indicated that whether the review was under rule 12(b)(6) or summary judgment, “the standard’s the same.” Such an ambiguous statement cannot be considered adequate notice of the conversion. The court itself did not articulate under which rule the hearing was to proceed; indeed, even though the State indicated it should be a summary judgment motion, counsel for the state cited almost exclusively to the standard under 12(b)(6). Even the Memorandum Decision issued on or about May 27, 2010, makes no reference to any particular standard that was applied by the court in resolving the motion, making review of the order nearly impossible.

“Because the trial court failed to properly convert [Respondent’s] rule 12(b)(6) motion into one for summary judgment” that dismissal is subject to reversal unless the Court determines, without referring to the matters outside of the pleadings, that Petitioner failed to state a claim for relief. Tuttle, 2007 UT App at ¶6.

This dismissal can only be affirmed under 12(b)(6) if “it appears to a certainty that the [Petitioner] would not be entitled to relief under any state of facts which could be proved in support of [her] claims.” Heiner v. S.J. Groves & Sons Co., 790 P.2d 107, 109 (Utah Ct. App. 1990). The purpose of a 12(b)(6) motion is to test the sufficiency of the pleadings, not the underlying merits of the matters pled. Alvarez v. Galetka, 933 P.2d

987, 989 (Utah 1997). The issue before the lower court was “whether the [P]etitioner has alleged enough in the complaint to state a cause of action, and this preliminary question is asked and answered before the court conducts any hearings on the case.” Id.

In order for Petitioner to state a claim that she received ineffective assistance of counsel, she must plead, first, “that counsel’s performance was deficient” and second, “that the deficient performance prejudiced the defense.” Strickland v. Washington, 466 U.S. 668, 687 (1984). In order to meet the rule 12(b)(6) standard, Petitioner does not have to “prove” anything; she simply has to have pled facts sufficient to state a claim for relief. Petitioner pled multiple facts supporting that her counsel’s performance was deficient: that “she was coerced by her former trial counsel, Mary Corporon, to plead guilty” (R. 6); that trial counsel “promised that if [Petitioner] pled guilty, the trial court would ‘definitely’ sentence her with the possibility of parole” (Id.); that “after the plea hearing, [Petitioner] repeatedly asked Ms. Corporon to file a motion to withdraw her plea, but Ms. Corporon refused to do so” (R. 7). Petitioner further pointed out that, due to the fact that her case was for a capital offense, the ABA Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases apply to the examination of counsel’s deficiencies. (R. 8.) In short, Petitioner pled sufficient facts to support the first prong of the Strickland test, namely that counsel’s performance was deficient.

Similarly, Petitioner also adequately alleged in her Petition that appellate counsel performed deficiently. Petitioner alleged that appellate counsel failed to raise an argument on appeal, the misplea, in spite of evidence that supported such an argument. Petitioner is not tested on the merits under rule 12(b)(6). She only needs to plead facts sufficient to support a claim for relief.

With regards to the second prong of the Strickland test, Petitioner had to plead that she was prejudiced by the deficiencies of counsel. Under her claim of ineffective assistance of trial counsel, Petitioner alleges that but for the coercion of her trial counsel, she would have proceeded to trial. Petitioner alleges further that had trial counsel filed the motion to withdraw her plea, Petitioner would have been able to address deficiencies in her plea before the appellate court. Petitioner clearly pled facts to satisfy the second Strickland prong. See Alvarez, 933 P.2d at 990 (suggesting that allegations showing had counsel offered proper advice that the petitioner would have acted differently suffice to plead prejudice).

Again, Petitioner satisfied the same requirement under her claim of ineffective assistance of appellate counsel. Petitioner alleges that the claim of misplea could be raised at any time, and that her counsel failed to do so. Petitioner further alleges that the results would have been different, based upon the other allegations made regarding the deficiencies of the plea.

Petitioner's pleadings are sufficient to withstand rule 12(b)(6) review. She adequately pled both prongs of the Strickland test for ineffective assistance of counsel. She is entitled to an evidentiary hearing in order to prove her allegations. It was error for the Court to improperly convert Respondent's Motion to Dismiss into a summary judgment motion without giving proper notice. Because the Petition survives a rule 12(b)(6) review, the matter must be remanded for further proceedings below, giving Petitioner an opportunity to prove her allegations by a preponderance of the evidence.

The trial court's failure to provide adequate notice to the parties regarding the conversion from the rule 12(b)(6) motion to on for summary judgment constitutes plain error. Establishment of a plain error requires a showing of: (1) an error; (2) the error should have been obvious to the trial court; and (3) the error is harmful. State v. Holgate, 10 P.3d 346, 350 (Utah 2000). The trial court did not follow the procedure outlined by Rule 12 regarding conversion of the Rule 12(b)(6) motion into one for summary judgment. Because the conversion process is set forth in the language of Rule 12, the error should have been obvious to the court. As demonstrated above, had the trial court proceeded as a Motion to Dismiss, Petitioner would have prevailed.

POINT II

THE TRIAL COURT ERRED IN DISMISSING THE PETITION ON SUMMARY JUDGMENT, BECAUSE THERE WERE GENUINE ISSUES OF MATERIAL FACTS OUTSTANDING

As set out in Utah Rule of Civil Procedure 56(c), summary judgment “. . . shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”

Summary judgment is the process of establishing a right to judgment by law, whereby the court evaluates all evidence in a light most favorable to the non-moving party and, finding no genuine issues of material fact applicable to the rule of law exist, grants the requested relief. Utah courts have explained this purpose is effectuated by allowing the parties to pierce the pleadings and determine whether there is a genuine issue of fact.

Webster v. Sill, 675 P.2d 1170, 1172 (Utah 1983). The mere existence of issues of fact does not preclude summary judgment; issues must be material to the applicable rule of law. Norton v. Blackham, 669 P.2d 857, 859 (Utah 1983). In determining whether genuine issues of material fact exist, the court must evaluate all evidence and all reasonable inferences fairly drawn therefrom in a light most favorable to the party opposing summary judgment. Frisbee v. K & K Construction Co., 676 P.2d 387, 389

(Utah 1980). This does not require the court to turn a blind eye to reasonable inferences based upon uncontested facts. Surety Underwriters v. E & C Trucking, Inc., 10 P.3d 338, 345 (Utah 2000). Finally, the moving party must establish its right to judgment on applicable law as applied to the undisputed material issues of fact. Lamb v. B & B Amusements Corp., 869 P.2d 926, 928 (Utah 1993).

If there are facts that are in dispute then it is not appropriate for the court to weigh the evidence presented by the parties and proceed with a ruling without a trial. Kilpatrick v. Wiley, Rein & Fielding, 909 P.2d 1283, 1292 (Utah App., 1996).

“[i]t is not the purpose of the summary judgment procedure to judge the credibility of the averments of parties, or witnesses, or the weight of evidence. Neither is it to deny parties the right to a trial to resolve disputed issues of fact. Its purpose is to eliminate the time, trouble[,] and expense of trial when upon any view taken of the facts as asserted by the party ruled against, he would not be entitled to prevail.”

Id. at 1101 (quoting Holbrook Co. v. Adams, 542 P.2d 191, 193 (Utah 1975)). Moreover, “ ‘ *it only takes one sworn statement under oath to dispute the averments on the other side of the controversy and create an issue of fact.* ’ ” Id. (quoting Holbrook, 542 P.2d at 193) (emphasis added).

The facts material to Petitioner's claims are: (1) whether Petitioner's counsel, at both the trial and appellate levels, were deficient in their respective performance and (2) whether that deficiency resulted in prejudice to Petitioner. Stated in another way, the court should analyze whether the outcome of the scenario would have been different had counsel not acted in a deficient manner. Respondent presented evidence that Petitioner's plea was knowing and voluntary in the form of the transcript from Petitioner's sentencing hearing and Petitioner's Statement in Advance of Plea (which contained much of the same information as the sentencing hearing transcript.) Respondent relied exclusively on these two documents in refuting Petitioner's claims, indicating that Petitioner's guilty plea creates the presumption that the proceedings were regular and that Respondent's pleas were "knowing and voluntary."

Petitioner, on the other hand, filed affidavits with her Petition, arguing that her plea was not knowing and voluntary. Specifically, Petitioner alleged that her trial counsel "coerced" her into changing her plea of guilty. Petitioner also alleged several instances showing that her plea was not knowing and voluntary, because facts relevant to the plea were not disclosed to her by her attorney. Further, the Petition sets forth other instances where the plea colloquy was contradictory.

In its ruling, the trial court relied upon the transcripts of the plea hearing in supporting the adequacy of the representation. The court cited to the picture provided by

Petitioner, stating “the picture shows concern and comfort by her trial counsel as Attorney Mary Corpoon’s fingers are lightly around Petitioner’s shoulder instead of being ‘firmly pressed’ on her shoulder.” (R 234.) The court concluded that Petitioner did not provide any evidence showing that counsel’s performance was unreasonable.

These findings by the court constitute a weighing of the evidence by the court, improper on summary judgment. Petitioner raised facts via affidavit that she was coerced. She laid out the facts that justified her feelings of coercion: her depression and use of medication; promises made by counsel that a certain sentence was likely; that counsel threatened her by talking about how awful death row was (in spite of the fact that no woman had been sentenced to death in Utah); that counsel told Petitioner that she would have to lie to the judge during the plea colloquy; that counsel incorrectly advised her about an Alford plea; that counsel incorrectly informed her of her rights on appeal; that counsel did not advise her appropriately regarding her waiver of jury trial at the sentencing phase of her case. (R. 18-20.) Petitioner also relied upon these same facts with regards to her claims that waiver of rights in her plea was unknowing and therefore involuntary. By way of her affidavit, Petitioner placed these facts in controversy. Rather than resolve those facts at the summary judgment stage of the proceedings, the court should have denied the summary judgment motion and permitted the matter to proceed to

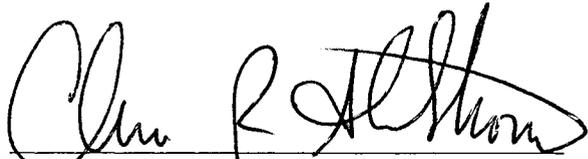
hearing. By reviewing the evidence and making findings regarding it, the court engaged in improper weighing and balancing of the evidence.

CONCLUSION

Based upon the foregoing, Petitioner respectfully requests that the Court remand the matter to the trial court with instructions that the trial court set this matter for evidentiary hearing on Petitioner's Petition.

Dated this 22nd day of August, 2011.

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By: 

Charles R. Ahlstrom
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 2011, I sent a true and correct copy of the foregoing **BRIEF OF APPELLANT** by the indicated method and to the following individual:

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ADDENDUM

FIRST JUDICIAL DISTRICT COURT
COUNTY OF CACHE, STATE OF UTAH

TAMRA RHINEHART,

Petitioner,

vs.

STATE OF UTAH,

Respondent.

MEMORANDUM DECISION

Case No. 080102055

Judge: Kevin K. Allen

THE ABOVE MATTER is before the Court pursuant to Respondent's *Motion to Dismiss Petition for Writ of Habeas Corpus and Post-Conviction Relief*. In preparation for its decision, the Court has reviewed the Motion and Memorandum, the Opposition, the Reply, each document submitted before the Court, and the applicable case law and statutory provisions. In addition, oral arguments were received on March 31, 2010. Having considered the forgoing, the Court issues this Memorandum Decision.

Ineffective Assistance of Trial Counsel:

Petitioner must satisfy a two-prong test in order to prevail on a claim of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* "Additionally, "proof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality." *Nicholls v. State*, 2009 UT 12, ¶36 (Utah 2009) (quoting *Fernandez v. Cook*, 870 P.2d 870, 877 (Utah 1993)).

As to the first prong, Petitioner has failed to demonstrate that her counsel's representation "fell below an objective standard of reasonableness." *Strickland*. at 688. Although Petitioner argues that she was coerced into making the plea by her trial counsel and that her trial counsel

mislead her about the sentence she should receive, the record does not support such contentions. Rather, the record demonstrates that Petitioner repeatedly affirmed that she had adequate opportunity to talk with her attorneys, that she was fully satisfied with her counsel's representation and advice received, and that she was not coerced or made promises in entering her plea. Petitioner also fully waived her right to have Attorney Scott Williams present. In addition, Mr. William's Affidavit acknowledges that the plea "was an appropriate resolution." Moreover, the newspaper picture that Petitioner has submitted does not support her allegation of coercion. Rather, the picture suggests concern and comfort by her trial counsel as Attorney Mary Corporon's fingers are lightly around Petitioner's shoulder instead of being "firmly" pressed on her shoulder. Therefore, the Court finds Petitioner has failed to provide any evidence that would objectively demonstrate that her counsel's representation was unreasonable. *See generally State v. Thorup*, 841 P.2d 746, 748 (Utah Ct. App. 1992).

Coupled with Petitioner's claim of ineffective assistance of counsel is the claim that her plea was not knowingly and voluntarily entered because she was mentally or emotionally unstable. However, this claim is also refuted by the plea colloquy. The court accepted Petitioner's plea only after specifically addressing Petitioner's use of Lexapro and her ability to understand the proceedings and consequences of entering her plea. Also, Petitioner represented to the Court that she did not have any mental or emotional problems or disabilities which would interfere with her ability to understand the proceedings. As such, Petitioner has failed to show that her plea was unknowing and involuntary or that her counsel was ineffective by failing to stop her from entering a knowing and voluntary plea.

Additionally, the meticulous and thorough plea colloquy done by the court accepting Petitioner's plea, overcame any alleged deficiencies in Petitioner's trial counsel's representations regarding the rights given up and consequences of entering her plea. Based on the foregoing, the Court finds that the allegations in the Petition are insufficient to prove, by a preponderance of the evidence, that Petitioner's trial counsel's representation fell below an objective standard of reasonableness. It is reasonable for trial counsel to advise a client to accept a plea offer sparing

them a possible death sentence. *Nicholls*, 2009 UT 12, ¶37. Therefore, Petitioner has failed to satisfy the *Strickland* test.

Ineffective Assistance of Appellate Counsel:

Petitioner argues that her appellate counsel was ineffective by failing to raise the issue of a misplea on appeal. Petitioner argues that her plea was flawed because “[s]he was under the influence of Lexapro, extremely emotional, and collapsed during the proceeding” and because she was not correctly informed of her rights. (Petition, 12). However, the record of the plea-hearing evidences that her plea was not flawed. The court was aware that Petitioner was taking Lexapro. The court on more than one occasion addressed the effects Lexapro had on Petitioner’s ability to enter a knowing and voluntary plea. In all cases, Petitioner stated that the medication did not negatively affect her. More important, Petitioner has failed to provide any evidence that the Lexapro impaired her ability to enter her guilty plea. *Oliver v. State*, 2006 UT 60, ¶11 (Utah 2006) (holding that “[t]he critical question is whether the drugs – if they have a capacity to impair the defendant’s ability to plea – have in fact done so on this occasion”).

In most instances, . . . when a mood-altering drug is given to a defendant by a physician, it is to improve the defendant’s cognitive abilities. In other words, the fact that a defendant has undergone a medical evaluation and is receiving medication to treat a psychological infirmity is often evidence weighing in favor of a finding that the defendant is capable of entering a knowing and voluntary plea.

Id. at ¶14. It has also been established that a trial court need not, *sua sponte*, move for a competency hearing when a defendant is “coherent,” “respond[s] to questions appropriately,” and “repeatedly affirm[s]” [her] choice to plead guilty.” *Nicholls*, 2009 UT 12, ¶29 (quoting *State v. Arguelles*, 2003 UT 1, ¶53 (Utah 2003)). Also, Petitioner has failed to assert that the Rule 11 plea colloquy was improper as was the case in *State v. Lopez*, 2005 UT App. 496, ¶22 (Utah Ct. App. 2005). (holding that the jurisdictional time limit imposed on a motion to withdraw did not effect a court’s ability to set aside a plea when the court finds that the plea was not knowingly and voluntarily made). Rather, the plea hearing record establishes that the court determined, more than once, that the Petitioner in fact was mentally capable of entering a plea and that such plea

was in fact knowingly, freely, voluntarily, and intelligently made.

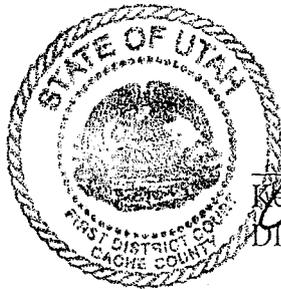
As such, it was not ineffective assistance of counsel for Petitioner's appellate counsel to "fail" to assert a "misplea" claim on direct appeal. Petitioner has failed to show that there was "a reasonable probability that, but for [her] counsel's unreasonable failure to file a merits brief, [s]he would have prevailed on [her] appeal." *Kell v. State*, 2008 UT 62, ¶25 (Utah 2008) (quoting *Smith v. Robbins*, 528 U.S. 259, 286, 120 S. Ct. 746 (2000)). Therefore, Petitioner has failed to meet her burden under the *Strickland* test as to this claim.

Conclusion:

Petitioner has failed to carry her burden of proof on both of her grounds for relief raised in her Petition. Therefore, the Motion to Dismiss is granted. Counsel for Respondent is directed to prepare an order in conformance herewith.

Dated this 27 day of May, 2010.

BY THE COURT:




Kevin K. Allen

DISTRICT COURT JUDGE