

1991

Ronnie Lee Gardner v. Tamara Holden, Warden of teh Utah State Prison of Utah : Petition for Rehearing

Utah Supreme Court

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Recommended Citation

Legal Brief, *Gardner v. Holden*, No. 910500.00 (Utah Supreme Court, 1991).
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IN THE SUPREME COURT, STATE OF UTAH

RONNIE LEE GARDNER,)	
)	
Plaintiff-Appellee)	PETITION FOR REHEARING
and Cross-Appellant,)	
)	
v.)	
)	
TAMARA HOLDEN, Warden of the)	Case No. 910500
Utah State Prison, State of Utah)	
)	
Defendant-Appellant)	Category No. 3
and Cross-Appellee.)	

PETITION FOR REHEARING OF THE COURT'S NOVEMBER 10, 1994 DECISION, AFFIRMING IN PART AND REVERSING IN PART AN ORDER OF THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY GRANTING IN PART AND DENYING IN PART A PETITION FOR POSTCONVICTION RELIEF.

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Utah State Prison, State of Utah)	
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Defendant-Appellant)	Category No. 3
and Cross-Appellee.)	

Plaintiff-Appellee and Cross-Appellant Ronnie Lee Gardner, through his volunteer counsel, requests this Court to vacate its decision of November 10, 1994 and rehear this appeal and cross-appeal. This Petition for Rehearing is supported by the following argument and authorities:

INTRODUCTION

In this capital case, the reasons for the Court's decision to overturn the district court's grant of a new sentencing and new appeal, and to affirm the denial of relief on other grounds, are only partially known. Chief Justice Zimmerman and Justice Durham concurred in the result only, and did not explain the grounds for their decision. In the absence of a majority opinion of any opinion by Chief Justice Zimmerman or Justice Durham, this Petition can respond only to the opinion by Justice Stewart, which was joined by Justice Howe. The Stewart opinion will be cited as "Slip op." and referred to in the text as "Opinion".

ARGUMENT

Habeas Review

Justice Stewart's statement that six issues would not be reviewed on the merits is inconsistent with rulings in other habeas corpus and postconviction cases. As Chief Justice Zimmerman has said, the essential question under the "unusual circumstances" test is: Is there a sufficiently good reason why issues were not raised earlier? Dunn v. Cook, 791 P.2d 873 (Utah 1990) (Zimmerman, J., concurring).

In Dunn, Chief Justice Zimmerman concluded that deficient representation on appeal constituted an unusual circumstance, allowing consideration of an ineffective assistance claim in a collateral attack. 791 P.2d at 878. Justice Stewart, joined by Justice Durham, determined in Dunn that the cause and prejudicial standard used by federal habeas corpus courts to resolve procedural default issues is too strict to be applied by Utah state courts. 791 P.2d at 876. Under the federal standard, ineffective assistance of counsel is cause for the failure to raise an issue. Murray v. Carrier, 477 U.S. 478 (1986). Therefore, at least three members of the Court would find unusual circumstances if the failure to raise an issue on appeal was the result of ineffective assistance of counsel.

Mr. Gardner continues to contend that he received ineffective assistance of counsel on appeal. See, infra, at 8 . Further, in stating that the claim based on Robert Macri's hypnotically enhanced testimony would not be reviewed, Justice Stewart condones an unfair process by allowing the State to withhold waiver arguments in the district court, yet assert them on appeal. The defense of procedural bar must be pleaded and proved by the State, and, after consideration of the facts and arguments offered in response by a petitioner, the

district court should enter findings of fact as to the circumstances under which an issue was not previously raised.

Hypnotically Enhanced Testimony

Justice Stewart misapprehended the facts in ruling that the admission of hypnotically enhanced testimony was not fundamentally unfair because it went only to a collateral issue. The defense presented at trial centered on the contention that Mr. Gardner did not intentionally kill Mr. Burdell. See State v. Gardner, 789 P.2d 273, 290-91 (Utah 1989) (Zimmerman, J., concurring). Trial counsel attempted to show that Mr. Gardner was in shock from the wound in his chest and lung, and that he accidentally shot Mr. Burdell when the closing door startled him.

As trial counsel Andy Valdez explained in the postconviction hearing, Robert Macri's testimony at the preliminary hearing was important to this defense. Mr. Macri testified there that the events in the file room occurred in a matter of seconds, and that the door started to close "practically simultaneously" with the shot. (T. 960-61, 964). Based on the preliminary hearing testimony, trial counsel believed that there had not been enough time for Mr. Gardner to plan and intend the shooting. (H. 141). However, on the day before the trial began, counsel learned that Mr. Macri's account of the events had changed, and that his difference in his testimony would be "devastating." (H. 141-42). In his trial testimony, Mr. Macri asserted that Mr. Gardner was moving the gun toward Mr. Burdell, and that he caused the door to close as he attempted to avoid being shot. (T. 2217). Rather than being "collateral," the issues of how the door closed and whether Mr. Gardner was startled into firing the gun were crucial to his defense based on lack of intent.

Victim Impact Evidence

In ruling that no injustice resulted from testimony and arguments about commendable characteristics of the victim, Michael Burdell, Justice Stewart failed to address the inequity of allowing the prosecution to place this information before jurors while precluding the defense Gardner from advising them that he would not have wanted the death penalty for Mr. Gardner. It was unfair to allow evidence praising and invoking sympathy for Mr. Burdell without the balancing fact he would not have approved of a death sentence imposed to his punish his death, and that his family and friends did not seek Mr. Gardner's execution in retribution for the crime.

Ineffective Assistance at Trial

(1) Mitigation

In reversing the district court's decision that trial counsel provided ineffective assistance in the penalty phase of the case, Justice Stewart misapprehended the issue raised by Mr. Gardner, the conclusion reached by the court below and its supporting facts. The Opinion characterized the issue as follows: "The district court vacated Gardner's death sentence and granted him a new penalty hearing because defense counsel failed to provide Gardner's expert psychiatric witness sufficient time to examine Gardner prior to testifying at the penalty hearing." (Slip op. at 9).

However, Mr. Gardner's Petition for Postconviction Relief and/or Writ of Habeas Corpus included the claim that trial counsel had provided ineffective assistance in investigating and presenting a case in mitigation. The trial court's ruling also addressed more than the issue of whether counsel had provided enough time for Dr. Peter Heinbecker's

interview of Mr. Gardner. The court below found that trial counsel failed to present a cohesive and understandable theory of mitigation, that they did not adequately investigate mental health issues before trial and that a satisfactory mental health evaluation had never been conducted. (Memorandum Decision, at 23-24).

In this ruling, the trial court's findings focus not only on the fact that trial counsel contacted Dr. Heinbecker "a mere 24 hours before he testified," (Memorandum Decision, at 23), but also on the facts that counsel did not seek testimony from Dr. Mark Rindflesh, and that after discussing the case with Dr. Agnes Plenk, "[n]o further effort was made to seek professional assistance for petitioner, nor seek State assistance in doing so." (Memorandum Decision, at 24). Rather than addressing only the "failure to provide more time to Dr. Heinbecker to prepare," (Slip op. at 13), the district court considered all of counsel's actions and omissions in failing to investigate and obtain effective mental health mitigating evidence.

Justice Stewart also misapprehended the facts in deciding that Mr. Gardner was not prejudiced by any insufficiency of the case in mitigation. Although the State argued below that there was no evidence of organic brain dysfunction in the record, Justice Stewart concluded that there was no prejudice in part because "Dr. Heinbecker testified [at the penalty hearing] that Gardner suffered from organic brain damage." (Slip op. at 11).

At the sentencing hearing, Dr. Heinbecker's testimony was tentative and equivocal, and he made a point of informing jurors out that he had not had enough time to prepare. In interviewing Mr. Gardner for one hour, discussing him with family members for about 2.5 hours and reviewing incomplete records, Dr. Heinbecker "tried to pick out ... general factors that were important," and found in early records "some evidence that he had organic brain

damage" as a result of meningitis and sniffing glue and gasoline. (T. 2796). Cross-examination focused on whether organic brain syndrome had ever been actually diagnose or was merely a possibility. The prosecution effectively challenged Dr. Heinbecker's interpretation of the old records, and impeached him with a report he had not reviewed. Dr. Heinbecker's trial testimony only established that additional testing was required to prove or rule out organic brain syndrome.

Justice Stewart also noted that Dr. Heinbecker discussed three other factors. But again, only a superficial treatment of these factors was possible, and the language Dr. Heinbecker used was equivocal. Overall, the testimony from Dr. Heinbecker and other defense witnesses painted a picture of Mr. Gardner as a wilful child who simply chose to avoid discipline from his father, to skip school, to experiment with drugs and to run from juvenile placements. Dr. Heinbecker's suggestion that Mr. Gardner grew up in an unstable environment, that his parents had been inadequate and neglected him and that his antisocial personality might have been genetic in origin did little to explain or ameliorate this portrait.

Finally, Justice Stewart concluded that Mr. Gardner did not satisfy his "burden, in the habeas proceeding, to adduce what favorable evidence could have been presented in his behalf." (Slip op. at 11). In the absence of investigative and expert assistance, Mr. Gardner has not had a full and fair opportunity to litigate this issue. Mr. Gardner sought but was refused assistance in investigating and evaluating psychiatric, psychological and sociological mitigation. Dr. Heinbecker was not called as an expert in how to investigate mitigation, and he has never performed an adequate evaluation of Mr. Gardner. He was called to testify about the facts surrounding his penalty phase testimony. He did identify tests which should

have been conducted to explore organic brain syndrome, but his testimony was not and could not have been a substitute for that of a defense expert. Justice Stewart seems to suggest that Mr. Gardner should have elicited testimony from requiring Dr. Heinbecker faulting his own evaluation and penalty phase testimony. It is fundamentally unfair to hold that Mr. Gardner has not established prejudice when the State has refused to fund the defense services essential to this showing.

(2) Other trial issues

In his opinion, Justice Stewart summarily disposed of three ineffective assistance claims on the basis that they had been decided on direct appeal, directly or "in substance." (Slip op. at 7). These claims were that: (1) counsel were ineffective in deciding that Mr. Gardner should testify and pressuring him to do so; (2) counsel were ineffective in eliciting Mr. Gardner's criminal record during his direct examination; and (3) counsel were ineffective in failing to request a bifurcated proceeding to address the aggravating circumstance of a prior violent crime, under with Utah Code Ann. Section 76-5-202(1)(h). Mr. Gardner contends that this summary disposition rests on an incorrect reading of the opinion in his direct appeal, State v. Gardner, 789 P.2d 273 (Utah 1989) [Gardner I].

As for claims (2) and (3), Justice Stewart concluded that they were resolved in two concurring opinions in Gardner I. However, then-Justice Zimmerman, joined by Justice Durham, and Justice Stewart decided only that the trial court's error in allowing evidence of two robbery convictions in the guilt phase, before the jury had found Mr. Gardner guilty of a knowing or intentional murder, was not prejudicial. 789 P.2d at 290-91. This issue is distinct from the postconviction claims that counsel should not have questioned Mr. Gardner

in the guilt phase direct examination about his criminal record, which included inadmissible convictions for aggravated assault and homicide, and that they should not have acquiesced in the non-bifurcated procedure used by the trial court. Although Justice Stewart correctly noted that the use of the robbery convictions was found to be harmless in Gardner I, that resolution does not answer the ineffective assistance claims here. The conclusion that any error was harmless relied in part on the fact that "Gardner took the stand and disclosed his extensive criminal record, which included other convictions that were more prejudicial than the two robberies." 789 P.2d at 290.

Similarly, the claim that trial counsel acted unreasonably in deciding that Mr. Gardner should testify is different from the issue determined on direct appeal -- that his alleged statements to Officer Jorgensen were admissible to impeach that testimony. Other important factors that were asserted in this claim were: counsel's belief that Mr. Gardner's criminal record would be admitted if he testified and that jurors would receive a negative impression when he refused to disclose the name of his accomplice. Although the Opinion does not address these factors, taken as a whole they establish that the decision to have Mr. Gardner testify was ineffective.

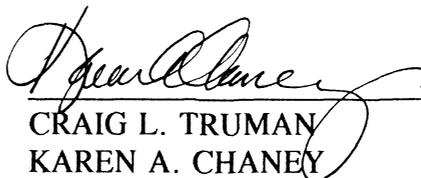
Ineffective Assistance on Appeal and in Conflicts of Interest

For the reasons stated in his briefs, Mr. Gardner contends that Justice Stewart's opinion is erroneous in its analysis of the conflicts of interest and ineffective assistance on appeal claims.

Appointment of Experts and Investigators

Justice Stewart's opinion presents indigent, condemned prisoners with an impossible "Catch-22" -- a defendant in a postconviction proceeding is entitled to funding for experts and investigators, if he can show that a constitutional right was violated in his conviction, but in many cases can't establish a constitutional violation without investigative and expert assistance. (Slip op. at 18-19, n.5).¹ This dilemma is illustrated in the instant case, with the result that Mr. Gardner has not had a full and fair opportunity to challenge his conviction and death sentence. It is absurdly paradoxical to conclude that funding for defense services was not required because Mr. Gardner did not show "that he could not adequately pursue habeas claims without appointed investigators and experts," while holding that the lack of expert testimony to establish prejudice defeats his ineffective assistance claims.

DATED this 27th day of December, 1994.


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¹ Justice Stewart's suggestion, although perhaps attempting to deal with the recognized inequities of requiring capital defendants to litigate their postconviction claims without compensated counsel or the assistance of experts and investigators, will be difficult to implement, and will have some unusual ramifications. Delaying compensation until constitutional issues have been finally resolved by the courts does little to provide the funding necessary to prepare the case. Further, tying the right to compensated assistance to the demonstration of a constitutional violation appears similar to authorizing a contingent fee agreement in a criminal case.

CERTIFICATE OF MAILING

I certify that a copy of this Petition for Rehearing was placed in the United States Mail, postage prepaid and addressed to Marian Decker, Office of the Attorney General, 236 State Capitol, Salt Lake City, Utah 84114, on this 27th day of December, 1994.

A handwritten signature in cursive script, appearing to read "J. Michael", is written over a horizontal line.