1995

Brechlin v. Carver : Petition for Rehearing

Utah Court of Appeals

Marian Decker; Assistant Attorney General; Jan Graham; Attorneys for Appellee.
Roger Brechlin; Appellant Pro Se.

IN THE UTAH COURT OF APPEALS

ROGER L. BRECHLIN	:	
Petitioner/Appellant,	:	Priority No. 2
v.	:	
SCOTT V. CARVER, Warden, Utah State Prison,	:	Case No. 950669-CA
Respondent/Appellee.	:	

PETITION FOR REHEARING

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QUESTION PRESENTED FOR REHEARING

Did the Court, in stating that "Utah law does not require that an attorney provide his client with a copy of an Anders[1] brief prior to filing," Brechlin v. Carver, Case No. 950669-CA, slip op. at 2 (Utah App. December 14, 1995), misapply relevant Utah case law requiring defense counsel to certify that a copy of the Anders brief has been furnished the indigent client with time allowed the indigent client to raise any points he or she so chooses?

STATEMENT OF THE CASE AND FACTS

For purposes of this petition, this Court's statement of the case and facts is generally sufficient. See Brechlin v.

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[1] See Anders v. California, 386 U.S. 738 (1967).

Carver, Case No. 950669-CA, slip op. at 1-2 (Utah App. December 14, 1995) (a copy of the opinion is contained in the addendum).

INTRODUCTION

A petition for rehearing is appropriate when the Court has either "misapplied or overlooked [law] which materially affects the result." See Cummins v. Nielsen, 42 Utah 157, 172-73, 129 P. 619 624 (1913). The argument portion of this brief will demonstrate that the State's petition for rehearing is properly before the Court and should be granted.

ARGUMENT

The State acknowledges that this Court summarily affirmed the trial court's order denying defendant post-conviction relief. State v. Brechlin, No. 950669-CA, slip op. at 2 (Utah App. December 14, 1995). The State does not dispute the propriety of that outcome, but rather petitions the Court solely to clarify its statement that "Utah law does not require that an attorney provide his client with a copy of an Anders brief prior to filing." Brechlin, No. 950669-Ca, slip op. at 2.

This statement is troubling because it is directly contrary to State v. Clayton, 639 P.2d 168 (Utah 1981). Clayton requires that "[a] copy of counsel's brief should be furnished the indigent and time allowed him to raise any points he chooses." Id. at 170. Clayton further specifies that defense counsel's brief must certify that the above requirement has been

met, "*and it should incorporate, in as full detail as appropriate, any points the indigent has raised with counsel.*" Id. (emphasis added).

Traditionally, practitioners viewed the above language as requiring defense counsel to provide an indigent client with a copy of the brief sufficiently prior to filing that defense counsel could then incorporate any additional points the indigent client raised with counsel *before* filing the brief in the appropriate court. This method is the most efficient means by which an appellate court can satisfy itself that the consultation purpose and policy behind the filing of an Anders brief has been met. Indeed, as interpreted by the State, the required Clayton certification definitively demonstrates to the appellate court that the indigent client has reviewed the brief, and after consultation with counsel, approved its content. Clayton, 639 P.2d at 170.

In suggesting that Clayton does not require defense counsel to provide a copy of the brief prior to filing, this Court's ruling in Brechlin undermines the purpose behind the certification rule and leaves many questions unanswered. Indeed, does this Court mean to imply that an indigent defendant is free to file a supplemental brief raising points that were not incorporated in defense counsel's brief? If so, will defense counsel be required to draft the supplemental Anders brief? Will

the Court on its own initiative inform the indigent that he or she has the right to file a supplemental brief, or will that task be assigned to defense counsel? Further, after what period of time does the indigent's failure to file a supplemental brief indicate that that right has been waived? If this Court holds to its interpretation that Clayton does not require defense counsel to provide a copy of an Anders brief prior to filing, the State requests that the Court provide practitioners some guidance regarding the above questions. However, because the consultation purpose behind Anders and Clayton is most expeditiously accomplished by simply requiring defense counsel to provide a copy of the brief sufficiently prior to filing that the indigent client's concerns can be incorporated therein, the State submits that this procedure should be followed and is also the procedure reasonably envisioned in Anders and Clayton.

CONCLUSION

Based on the foregoing, the State respectfully requests the Court to modify its opinion in this case by retracting its suggestion that defense counsel are not required to provide their indigent clients with a copy of an Anders brief prior to filing.

Alternatively, the State requests that the Court provide practitioners guidance as to the filing of supplemental briefs, including whether counsel will be responsible to draft the supplemental brief, whether the court or counsel will be

responsible to inform the indigent of the right to file a supplemental brief, and what the time period will be allowed for the filing of the supplemental brief.

Pursuant to rule 35(a), Utah Rules of Appellate Procedure, the State certifies that this petition is presented in good faith and not for delay.

RESPECTFULLY SUBMITTED this 26 day of December, 1995.

JAN GRAHAM
Attorney General

MARIAN DECKER
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing PETITION FOR REHEARING were mailed, postage prepaid, to ROGER L. BRECHLIN, attorney pro se, Utah State Prison, P.O. Box 250, Draper, Utah 84020, this 26 day of December, 1995.

ADDENDUM

IN THE UTAH COURT OF APPEALS

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Roger L. Brechlin, Petitioner and Appellant, v. Scott V. Carver, Warden, Utah State Prison, Respondent and Appellee.	MEMORANDUM DECISION (Not For Official Publication) Case No. 950669-CA F I L E D (December 14, 1995)

Third District, Salt Lake County
The Honorable Anne M. Stirba

Attorneys: Roger L. Brechlin, Draper, Appellant Pro Se
Marian Decker and Jan Graham, Salt Lake City, for Appellees

Before Judges Davis, Greenwood, and Jackson (Law & Motion).

PER CURIAM:

This matter is before the court on its own motion for summary disposition. Brechlin argues against the motion claiming that both his trial and appellate counsel were ineffective. The State opposes the motion arguing that Brechlin "raises an arguably substantial issue regarding the alleged ineffective assistance of trial and appellate counsel." We disagree.

In State v. Brechlin, 846 P.2d 1274, 1276 (Utah 1993) (per curiam), the Utah Supreme Court specifically rejected Brechlin's claim that his trial counsel was ineffective and affirmed his underlying conviction. Thus, we need not revisit Brechlin's claims regarding his trial counsel. The trial court need not have reconsidered the issue either, but its findings only bolster the supreme court's conclusion that Brechlin's trial counsel was effective.

As for Brechlin's claim that his appellate counsel was ineffective, the Utah Supreme Court said in dicta:

> [Brechlin's] appellate counsel has submitted an Anders brief explaining [Brechlin's] claims. Counsel also complied

> with State v. Clayton, 639 P.2d 168 (Utah 1981), by sending a copy of the brief to Brechlin so that he might raise any additional points he wishes. [Brechlin] has not filed any further pleadings. Counsel's motion to withdraw is granted.

State v. Brechlin, 846 P.2d at 1275 (citation omitted).

Relying upon this statement and our independent review of the record, we could conclude that appellate counsel was effective. Even if we consider the trial court's decision, we reach the same result. The trial court determined that because appellate counsel neglected to provide Brechlin with a copy of the Anders brief before it was filed, his performance fell below an objective standard of reasonableness and was therefore deficient under the first prong of Strickland v. Washington, 466 U.S. 668 (1984). The trial court went on to conclude that Brechlin failed to demonstrate "he suffered any unfair prejudice as a consequence of appellate counsel's deficient performance," the second prong of Strickland.

Utah law does not require that an attorney provide his client with a copy of an Anders brief prior to filing as the trial court suggests. See State v. Clayton, 639 P.2d 168, 170 (Utah 1981); State v. Flores, 855 P.2d 258, 260 (Utah App. 1993). Because appellate counsel provided Brechlin with a copy of the brief when it was filed, which is in keeping with Utah law, this cannot be a basis for concluding his performance was deficient. Id. Moreover, it is evident that the brief contained the arguments Brechlin wanted made. Brechlin even wrote a letter to appellate counsel indicating that he approved of the brief.

We agree with the trial court's conclusion that Brechlin also failed to prove the second prong of Strickland--that he suffered prejudice as a result of his appellate counsel's performance.

The trial court's order denying Brechlin's post-conviction relief is affirmed.

James Z. Davis, Associate Presiding Judge

Norman H. Jackson, Judge