



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANDRE MCDUGAL,)
)
Defendant Below-)
Appellant,) No. 350, 2018
) ON APPEAL FROM
) THE SUPERIOR COURT OF THE
v.) STATE OF DELAWARE
) ID No. 1011012275
STATE OF DELAWARE,)
)
Plaintiff Below-)
Appellee.)

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF DELAWARE

APPELLANT'S REPLY BRIEF

COLLINS & ASSOCIATES

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Dated: September 19, 2018

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ARGUMENT

CLAIM I: THE SUPERIOR COURT ERRED IN FINDING THAT COUNSEL WAS NOT INEFFECTIVE FOR STIPULATING THAT MR. MCDUGAL WAS A PERSON PROHIBITED BY VIRTUE OF A PRIOR CONVICTION.

The State argues the “an attorney’s failure to sever a PFBPP charge does not *ipso facto* constitute ineffective assistance.”¹ But Mr. McDougal did not make that argument. The argument is that trial counsel’s stipulation that Mr. McDougal was a prohibited person due to a prior conviction caused prejudice to Mr. McDougal.

Nor does the Appellant disagree with the State that this Court confirmed in *Dale v. State* that the petitioner in a postconviction still must prove *Strickland* prejudice when his attorney fails to simply sever the PFBPP charge.² In fact, this is clearly stated in the Opening Brief.³ The State makes the same point Mr. McDougal is making: *Dale* makes clear that each case turns on its own merits. Mr. McDougal was prejudiced because the jury was gratuitously told that Mr. McDougal had a prior conviction, and that is why he could not possess a firearm. Nor was the jury instructed not to infer that because Mr. McDougal committed a crime previously he was more likely to commit the crimes for which he was charged.

¹ State’s Answering Brief (AB) at 6.

² AB at 8.

³ Opening Brief (OB) at 11.

Mr. McDougal's case is different than *Dale*. At least in *Dale* the jury was not told that the defendant had a prior criminal conviction. Here, the prejudice was palpable because the jury was left free to use the knowledge that Mr. McDougal was a convicted criminal when deliberating as to the charges he faced at trial.

This Court's decision in *Dale* does not foreclose a finding of prejudice when a defense attorney stipulates to a person prohibited charge rather than moving to sever. Each such case is different. In Mr. McDougal's case, prejudice has been amply proven. The right to a fair trial by an impartial jury surely includes a jury not being told by stipulation that the defendant is prohibited from possessing a firearm because he has a prior conviction.

Finally, the State joins the Superior Court in divining a lack of prejudice from the jury's verdict.⁴ Neither the State nor the Superior Court has cited to any authority that supports reverse engineering a lack of constitutional prejudice from the verdict. The fact remains that Mr. McDougal was convicted of serious charges and received a life sentence. That he got acquitted of two charges does not mean that he was not unfairly prejudiced by his attorney's deficient performance.

The gun was under a hat on the porch. Maybe the jury did not find that physical proximity sufficient for PFDCF. Speculation about the jury's deliberations are weak data points for deciding whether a postconviction petitioner

⁴ AB at 8.

was constitutionally prejudiced by counsel's failure to perform the very basic task of moving to sever a PFBPP charge.

In sum, Mr. McDougal's lawyer failed to protect him from the jury learning that he was a person prohibited due to a criminal conviction. All counsel needed to do was move to sever, and counsel's failure to do so was deficient performance. That performance resulted in prejudice to Mr. McDougal—that is to say, there exists a reasonable likelihood of a different result had counsel not been deficient. As such, Mr. McDougal seeks reversal of the Superior Court's denial of his Second Amended Motion for Postconviction Relief.

CONCLUSION

For the reasons stated in this brief and the Opening Brief, Mr. McDougal respectfully requests that this Court reverse the judgment of the Superior Court.

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