IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34271

SHANE McKAY,	)	
	)	**2008 Opinion No. 63**
Petitioner-Appellant,	)	
	)	**Filed: July 2, 2008**
v.	)	
	)	**Stephen W. Kenyon, Clerk**
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

Appeal from the District Court of the Third Judicial District, State of Idaho, Canyon County. Hon. Renae J. Hoff, District Judge.

Order summarily dismissing action for post-conviction relief, reversed in part and case remanded.

Nevin, Benjamin, McKay & Bartlett, LLP, Boise, for appellant. Dennis A. Benjamin argued.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent. Jessica M. Lorello argued.

LANSING, Judge

Shane McKay appeals from the district court's summary dismissal of his petition for post-conviction relief, which sought a new trial following his conviction for vehicular manslaughter. McKay contends that the attorney who represented him in his criminal trial was ineffective for failing to object to a jury instruction which, McKay asserts, omitted or misstated two elements of the charged crime. In the alternative, McKay argues that his appellate attorney was ineffective for failing to raise the jury instruction error as an issue in his direct appeal from the judgment of conviction. We reverse the dismissal of McKay's claim predicated on ineffective assistance of trial counsel.

I.

FACTS AND PROCEDURE

On October 5, 2003, at about midnight, an automobile driven by McKay struck a motorcycle from behind, killing its driver. McKay was charged with vehicular manslaughter, Idaho Code § 18-4006(3)(b), on the allegation that his driving under the influence caused the death of the victim. He was found guilty after a jury trial. McKay appealed from the judgment of conviction, challenging only the length of his sentence and the district court's denial of his motion for a reduction of the sentence. This Court affirmed. *State v. McKay*, Docket No. 31652 (Ct. App. Nov. 22, 2006) (unpublished).

McKay then filed a petition for post-conviction relief, asserting that there were errors in a jury instruction given during his trial that defined the elements of the crime. The post-conviction petition alleged ineffective assistance of McKay's trial counsel for failing to properly object to the instruction, and of his appellate counsel for failing to raise the issue on appeal from the conviction. On the State's motion, the district court summarily dismissed the petition, finding that the error in the instruction benefited, rather than prejudiced, McKay. McKay appeals.

II.

ANALYSIS

The constitutional right of a criminal defendant to counsel, as guaranteed by the Sixth Amendment to the United States Constitution and Article I, § 13 of the Idaho Constitution, is a right to more than the mere presence of a lawyer at trial; it is the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984); *Ivey v. State*, 123 Idaho 77, 80, 844 P.2d 706, 709 (1992); *Aragon v. State*, 114 Idaho 758, 760-61, 760 P.2d 1174, 1176-77 (1988). It means that an accused "is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate." *State v. Tucker*, 97 Idaho 4, 8, 539 P.2d 556, 560 (1975). *See also State v. McCabe*, 101 Idaho 727, 728, 620 P.2d 300, 301 (1980); *Huck v. State*, 124 Idaho 155, 157-58, 857 P.2d 634, 636-37 (Ct. App. 1993). An applicant claiming that he did not receive effective assistance of counsel must satisfy a two-part test. The applicant must prove, first, that the attorney's performance was deficient and, second, that the applicant was prejudiced by the deficiency. *Strickland*, 466 U.S. at 687; *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995); *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). There is a strong presumption that counsel's performance fell within the wide

range of reasonable professional assistance, and to prove deficiency the applicant must show that counsel's representation fell below an objective standard of reasonableness. *Aragon*, 114 Idaho at 760, 760 P.2d at 1176 (1988); *Gabourie v. State*, 125 Idaho 254, 256, 869 P.2d 571, 573 (Ct. App. 1994); *Russell*, 118 Idaho at 67, 794 P.2d at 656. In order to establish prejudice, the applicant must demonstrate that there is a reasonable probability that, but for the attorney's inadequate performance, the outcome of the trial would have been different. *Strickland*, 466 U.S. at 694; *Aragon*, 114 Idaho at 761, 760 P.2d at 1177.

We will begin our review of McKay's claim of ineffective assistance by considering the propriety of the elements instruction given at his trial. The portion of the vehicular manslaughter statute under which McKay was charged, I.C. § 18-4006(3)(b), defines the offense as the unlawful killing of a human being "in which the operation of a motor vehicle is a *significant cause* contributing to the death *because of*. . . [t]he commission of a violation of section 18-8004 . . . Idaho Code." (Emphasis added.) In turn, I.C. § 18-8004 proscribes driving under the influence of alcohol or other intoxicants. In charging the jury, the district court instructed that the State must prove that McKay drove under the influence of alcohol and that McKay's "operation of the motor vehicle caused the death of" the victim. It is readily apparent that this elements instruction was erroneous in two ways. First, it omitted the statutory requirement that the defendant's conduct must be a *significant* cause of the victim's death. Second, it omitted the statutory words "in such unlawful manner," thereby failing to require the jury to find that McKay's driving *while under the influence of alcohol* was a significant cause of the death.

Having determined that the jury instruction was erroneous, we must consider McKay's claim that his attorneys were ineffective for failure to object to the instruction at trial or on appeal. McKay's trial counsel submitted a proposed jury instruction on the elements of vehicular manslaughter, but when the district court declined to use it, trial counsel neither objected on the record to the instruction used by the court nor argued on the record that failure to give his proposed instruction was error.[1] Idaho Criminal Rule 30(b) specifies that "[n]o party may assign as error the giving of or failure to give an instruction unless the party objects thereto

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[1] Moreover, even the instruction proffered by the defense attorney was erroneous because, like the given instruction, it omitted the requirement that McKay's driving in an unlawful manner be a *significant* cause of the death.

before the jury retires to consider its verdict . . . ." Because no objection to the faulty instruction was made during McKay's trial, his appellate attorney cannot be faulted for not attempting to present the issue on appeal. Therefore, if a claim of ineffective assistance of counsel lies here, it rests on the performance of trial counsel.[2]

Given that the jury instruction was erroneous in two respects, McKay has shown deficient performance by his trial counsel. The accuracy of a jury instruction setting forth the elements that the State must prove beyond a reasonable doubt is a matter of due process dimension in criminal cases. *See generally State v. Anderson*, 144 Idaho 743, 748-49, 170 P.3d 886, 891-92 (2007). Therefore, defense counsel, acting as a diligent conscientious advocate, should be aware of the statutorily required elements and take steps to insure that the jury is correctly instructed.

In order to establish prejudice from this deficient performance, McKay must demonstrate that there is a reasonable probability that, but for the attorney's inadequate performance, the outcome of his trial would have been different. *Strickland*, 466 U.S. at 694; *Aragon*, 114 Idaho at 761, 760 P.2d at 1177. The reasonable probability standard does not require proof that counsel's errors more likely than not altered the outcome of the case. *Strickland*, 466 U.S. at 693; *Nix v. Whiteside*, 475 U.S. 157, 175 (1986). Rather, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome of the criminal trial." *Strickland*, 466 U.S. at 694; *Knutsen v. State*, 144 Idaho 433, 443, 163 P.3d 222, 232 (Ct. App. 2007); *Milburn v. State*, 130 Idaho 649, 659, 946 P.2d 71, 81 (Ct. App. 1997). The ultimate benchmark is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. In evaluating whether prejudice is proved, the court "must consider the totality of the evidence before the judge or jury." *Id.* at 695; *State v. Fee*, 124 Idaho 170, 173, 857 P.2d 649, 652 (Ct. App. 1993).

In summarily dismissing McKay's post-conviction petition, the district court found that the omission of the word "significant" from the jury instruction did not prejudice McKay but,

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[2] McKay contends that under the fundamental error doctrine, his appellate counsel could have raised the issue of the propriety of the elements jury instruction on appeal in the absence of an objection below. This Court has held, for a variety of practical and equitable reasons, that no claim of ineffective assistance of appellate counsel lies for failure to raise as fundamental error an issue not preserved in the trial court. *Mintun v. State*, 144 Idaho 656, 661-62, 168 P.3d 40, 45-46 (Ct. App. 2007).

rather, benefitted him. The court reasoned that, as instructed, the jury was required to find that McKay's conduct was the only cause of the death rather that merely a significant one. We cannot agree with this conclusion. It is also possible that the jury believed it must find McKay guilty on finding that his driving was even a slight or indirect contributing cause of the death. We note that the phrase "is a *significant cause* contributing to the" death was added to the vehicular manslaughter statute in 1997. Prior to that amendment, the statute stated the causation element as requiring that "the operation of a motor vehicle causes death. . . ." The Statement of Purpose of the amending legislation stated, "The statute as it presently reads has created confusion and resulted in inconsistent interpretations amongst trial judges as well as juries." H.B. 143, 54th Leg. (Idaho 1997). Here, the term "caused" employed in the instruction was the very term that our legislature deemed confusing and subject to inconsistent interpretations by juries and judges. We cannot conclude that the omission of the term "significant" from the instruction necessarily inured to McKay's benefit.

The omission of the words "in such unlawful manner" from the instruction is also a substantial error. It allowed the jury to convict upon finding that McKay's mere operation of the motor vehicle caused the victim's death without finding the required statutory element that it was his driving *while under the influence* that was a significant cause of the death. The vehicular manslaughter charge required the State to prove that McKay's operation of a motor vehicle caused a death *because* he was driving in an unlawful manner, i.e., under the influence of alcohol. *See State v. Thomas*, 128 Idaho 906, 908, 920 P.2d 927, 929 (Ct. App. 1996). McKay would be guilty of vehicular manslaughter only if his being under the influence of alcohol was a significant cause of the collision. *See State v. Gardner*, 126 Idaho 428, 435, 885 P.2d 1144, 1151 (Ct. App. 1994). The instruction at issue did not require that the jury find this requisite causal connection. This misstatement of an element of the offense in McKay's trial impermissibly lightened the prosecution's burden of proof. *See State v. McNair*, 141 Idaho 263, 269, 108 P.3d 410, 416 (Ct. App. 2005).

The causation element was not uncontested at trial. Indeed, a claimed lack of causation was the primary defense, for McKay contended that the victim's motorcycle was stopped in the traffic lane at the time of the collision and had no working taillight, making it impossible for McKay to see the motorcycle in the darkness. The evidentiary record here and the reasonable inferences that may be drawn therefrom are sufficient to make a prima facie showing that trial

counsel's failure to object to the erroneous jury instruction constituted deficient performance and that counsel's error was of sufficient magnitude to undermine confidence in the outcome of the trial. Therefore, summary dismissal was not appropriate.

The district court's summary dismissal of McKay's claim of ineffective assistance of his trial attorney is reversed, and the case is remanded for further proceedings consistent with this opinion.

Chief Judge GUTIERREZ and Judge PERRY **CONCUR.**