2019

State of Utah, Plaintiff/Appellee, v. Reynaldo Thomas Martinez, Defendant/Appellant : Reply Brief

Utah Court of Appeals

Case No. 20170498-CA

In the Utah Court of Appeals

STATE OF UTAH,
Plaintiff/Appellee,

v.

REYNALDO THOMAS MARTINEZ,
Defendant/Appellant.

On appeal from the Third Judicial District Court, Salt Lake County,
Honorable Paul B. Parker presiding
Defendant is incarcerated

REPLY BRIEF OF MR. MARTINEZ

Sean D. Reyes (7969)
John Nielsen (11736)
Utah Attorney General's Office
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114
(801) 366-0180

Counsel for Appellee

Ron Fujino (5387)
Law Office of Ronald Fujino
195 East Gentile Street # 11
Layton, Utah 84041
Telephone: (801) 682-8736
Facsimile: (801) 719-6123

Counsel for Appellant

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MR. MARTINEZ'S REPLY BRIEF

INTRODUCTION

Mr. Martinez relies on his opening brief for the statement of the issues, the statement of the case, and the statement of the facts. He otherwise replies to the State's brief as follows.

ARGUMENT

A. COUNSEL'S PERFORMANCE WAS DEFICIENT, AND SUCH DEFICIENCIES PREJUDICED THE DEFENSE

The State attempted to minimize or discount defense counsel's ineffectiveness in not instructing the jury with the required *Long* eyewitness identification jury instruction and in not obtaining an expert witness as denoted by our supreme court in *Clopten*. *See State v. Long*, 721 P.2d 483 (Utah 1986); *State v. Clopten*, 2009 UT 84, 223 P.3d 1103. Contrary to the State's claim, it was not reasonable for an attorney to disregard the long-

standing need to properly instruct the jury (pursuant to the *Long* instruction and/or through expert witness testimony) about the fallibility of eyewitness identification, particularly in a case where I.D. was the key issue. As the district court observed, "This is an identification case, as everyone seems to have acknowledged and argued." R.1111.

The record or lack of record unequivocally established that defense counsel did not include the *Long* instruction and there was no expert witness to teach the jury about the "deficiencies inherent in eyewitness identification." Both omissions by counsel or the lost opportunities to educate the jury with either one (or both) of such necessary cautionary teachings cannot be deemed to have been reasonable. *State v. Lujan*, 2015 UT App 199, ¶ 10 (citing *Long*, 721 P.2d at 488 ("The Utah Supreme Court indicated that such clarification was necessary because 'the scientific literature . . . "is replete with empirical studies documenting the unreliability of eyewitness identification"'")).

> In *Long*, the Court accepted the invitation to "either abandon any pretext of requiring a cautionary eyewitness instruction or make the requirement meaningful" by deciding "to follow the latter course." [*Long*, 721 P.2d] at 487. The Court did this by "abandon[ing its] discretionary approach to cautionary jury instructions and direct[ing] that in cases tried from th[at] date forward, trial courts shall give such an instruction whenever eyewitness identification is a central issue in a case and such an instruction is requested by the defense." *Id*. at 492.
>
> Then, after [*State v. Ramirez*, 817 P.2d 774 (Utah 1991)], the Court considered another aspect of cases involving eyewitness identifications—expert testimony. In *State v. Butterfield*, 2001 UT 59, 27 P.3d 1133, the Court affirmed a trial court's exclusion of an expert witness because the trial court had found that the proposed expert testimony "did not deal with the specific facts from [that] case but rather would constitute a lecture to the jury about how it should judge the evidence." *Id*. ¶ 44 (internal quotation marks omitted). The issue was

> revisited in *State v. Hubbard*, 2002 UT 45, ¶ 14, 48 P.3d 953. In *Hubbard*, while leaving *Butterfield* untouched, the Court did invite trial courts "to specifically tailor instructions other than those offered in *Long* that address the deficiencies inherent in eyewitness identification." *Id*. ¶ 20.
>
> But in *State v. Clopten*, 2009 UT 84, 223 P.3d 1103, the Court . . . announc[ed] "that the testimony of a qualified expert regarding factors that have been shown to contribute to inaccurate eyewitness identifications should be admitted whenever it meets the requirements of rule 702 of the Utah Rules of Evidence." *Id*. The Court "expect[ed] this application of rule 702 [to] result in the liberal and routine admission of eyewitness expert testimony." *Id*.

State v. Lujan, 2015 UT App 199, ¶ 10 n.1 (cited in Appellant's Opening Brief, pp 25-27)

Even a cursory glance at case law would have led counsel to the unmistakable rule (since 1986) that "trial courts shall give such an instruction whenever eyewitness identification is a central issue in a case. . . ." *State v. Long*, 721 P.2d 483, 492 (Utah 1986). All counsel had to do was request one. *See* MUJI 2d, CR404 (a pre-made stock MUJI jury instruction, entitled, "Eyewitnesses Identification [Long instruction]," was already created in response to the 1986 *Long* opinion).

Counsel's failure to research or to prepare on such a fundamental matter that was critical to the I.D. defense at trial was not reasonable. *Cf. Hinton v. Alabama*, 134 S. Ct. 1081 (2014) (per curiam) ("[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance"); *Wiggins v. Smith*, 539 U.S. 510 (2003) ("'strategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on

investigation.'"); State's brief, page 16 n.11 (in contrast to the State's claim that more proof was needed on appeal regarding what an expert witness would have said, this Court reversed the defendant's conviction in *Lujan*, 2015 UT App 199, without such an expert proffer, and the Utah Supreme Court's reversal in *Clopten,* 2009 UT 84, similarly did not require such evidence by an expert; instead, existing precedent and guidelines were relied upon – which trial counsel failed to do in the case at bar).

The State notes that counsel's performance should be viewed "on the basis of the law in effect at the time of trial." State' brief, page 14. As the cited authorities in the indented quotation above make clear, *Long* and *Clopten* (and other law) were in effect at the time of Reynaldo Martinez's trial and for many years beforehand. *See Ramirez*, 817 P.2d at 778 (The prosecution bears the burden of demonstrating the admissibility of eyewitness identification evidence. To satisfy this burden, the prosecution must "lay a foundation upon which the trial court can make any necessary preliminary factual findings and reach any necessary legal conclusions." Then, the trial court must act "as gatekeeper" and "carefully scrutinize" the evidence for constitutional defects before admitting or excluding the evidence from the jury). The proposed rule, Utah R. Evid. 617, may not have been then in effect, albeit the content from the proposed rule did not ignore such existing appellate authority and Dep't of Justice guidelines.

In an analogous context, the Supreme Court indicated that prevailing professional norms should not be ignored and counsel may act unreasonably by not

adhering to such professional guidelines. Prior to *Padilla v. Kentucky*, 130 S. Ct. 4235 (2010), ABA Standards suggested that clients should be told about the risk of deportation following a conviction (for certain offenses), although such professional norms in the context of deportation lacked the force of Utah appellate law on the "deficiencies inherent in eyewitness identification." Just as it was unreasonable for Mr. Padilla's counsel to not then advise his client regarding the risk of deportation (vis-a-vis the less authoritative ABA guidelines), it was unreasonable in Mr. Martinez's case to not act as an advocate by properly educating the jury with a proper eyewitness identification instruction and/or an expert witness (vis-a-vis governing Utah appellate authority).

> The first prong [of *Strickland*]–constitutional deficiency–is necessarily linked to the practices and expectations of the legal community," described in *Strickland* as "prevailing professional norms." While ABA standards and the like "are 'only guides,' and not 'inexorable commands,' these standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law." Here, the Court cited the ABA Standards for Criminal Justice, NLADA standards, and others in finding, with some qualification, that "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation."
>
> . . . But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear. In addressing whether there is a distinction between giving bad advice and no advice, the Court found "no relevant difference 'between an act of commission and an act of omission' in this context."

Padilla v. Kentucky, 130 S. Ct. 4235 (2010); *cf. Strickland*, 466 U.S. at 688—689 ("Prevailing norms of practice as reflected in American Bar Association standards and the

like … are guides to determining what is reasonable"); *cf.* Utah R. Crim. P. 11 (although the rule governing plea bargains does not contain a subsection on deportation, an attorney's failure to so advise would be an ineffective act of omission under *Padilla*).

The deficient performance prong was established. *State v. Lujan*, 2015 UT App 199, ¶16 ("We agree with Defendant that the State bears the burden of convincing us that the improperly admitted eyewitness identifications were harmless beyond a reasonable doubt"); *Chapman v. California*, 386 U.S. 18, 24 (1967) ("[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.").

Defense counsel's inescapable duty was to prepare diligently for trial. And preparation includes investigation. "If counsel does not adequately investigate the underlying facts of a case, including the availability of prospective defense witnesses, counsel's performance cannot fall within the 'wide range of reasonable professional assistance.'" *State v. Templin*, 805 P.2d 182, 188, ¶11 (Utah 1990) (quoting *Strickland*, 466 U.S. at 686); *accord Wiggins v. Smith*, 539 U.S. 510 (2003) (ineffectiveness applies if the "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment"); *cf. Williams v. Taylor*, 529 U.S. 362, 415 (2000) (O'Connor, J., concurring) (noting counsel's duty to conduct the "requisite, diligent" investigation into his client's background).

The State's contentions in its attempt to justify what may or may not have occurred below is inappropriate prosecutorial second-guessing. *Cf. Wiggins v. Smith,* 539 U.S. 510 (2003) ("the 'strategic decision' the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a post-hoc rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing").

In regards to the prejudice prong, the State claims that there was "overwhelming evidence of Martinez's guilt", State's brief, pages 2-3, yet it acknowledges that, "Before trial, no witness had identified Martinez as the suspect." State's brief, page 2. With no eyewitness identification of Martinez as the suspect, the evidence cannot be considered overwhelming. Rather, defense counsel didn't do their job during trial.

Going from no witness identification to purported "overwhelming" evidence occurred because defense counsel was not prepared for trial. Not investigating or not preparing is not a reasonable tactical decision. *Cf. Hinton v. Alabama*, 134 S. Ct. 1081 (2014) (per curiam) ("[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance").

The State's brief outlined many of the pitfalls or evidentiary weaknesses relating to uncertain or belated identifications:

> *Pre-trial identification attempts.* Police showed photo line-ups—which included Martinez's picture—to two witnesses: Barnes's neighbor Troy, and

> Clay, who had witnessed the traffic accident. R1037. Troy identified another man in the lineup as the robber. R1038. Clay did not identify anyone in the lineup, but went back and forth between Martinez's picture and another picture, trying (unsuccessfully) to settle on one. R1040.

State's brief, page 10. A witness' misidentification of a man in the lineup and another witness' unselected hesitation over a lineup picture is not overwhelming evidence. An additional witness had passed away prior to trial.

The only in-court identification that came from an actual eyewitness was made by Mindy Sipes, after she had already expressed to law enforcement that she did not think she could identify the man if she saw him again. R.1014, 62.

The other in court identifications came from Detective Hill, R.945, and Nathan Evans, R.894, neither of whom observed the crimes charged and both of whom were identifying the defendant to connect his name to the person sitting in the courtroom at trial – the only non-lawyer seated at counsel's table. *See* Appellant's Opening Brief, page 36 ("Detective Hill was able to skirt well-established principles of photo lineups by suggesting that Clay had identified Defendant when he had not. *Cf. State v. Mecham*, 2000 UT App 247, ¶ 9, 9 P.3d 777 (mentioning that a police investigation "appeared to be at a dead end" when a "photo lineup . . . failed to produce a positive identification")).

Defense counsel failed to object to the lack of foundation for the admission of the pictures from Harmon's. A lack of advocacy may not be considered reasonable, where objective evidence ran contrary to the trial judge's ruling, "I [the court] would note that they [Harmon's pictures] are not being offered with any time and date." R.619. The

court's ruling was plainly erroneous and evident by the imprints on the Exhibits themselves and due to counsel's lack of objection. Foundation was not established for the claimed identification and the Harmon's pictures did in fact have a time and/or date.

The parties also agreed that the car belonged to Jacob "Stevey" Manzanares, yet for reasons unknown Mr. Manzanares' fingerprints were not found inside his car. Such a "fact" was problematic for the State in terms of the reliability of the claimed fingerprint evidence. The gun evidence (bb gun vs a real gun) did not synch or match to the one used in the robbery.

Moreover, the parties did not dispute that Erika Vigil and Reynaldo Martinez knew Mr. Manzanares, and Manzanares did not allege that Reynaldo stole the car. Indeed, the fact that Manzanares, Vigil, and Martinez were friends explains that hanging out together in the past may have included getting into a car together (e.g. fingerprints may have been from prior friendship encounters unconnected in time to the incident alleged at trial) and/or it would not have been unusual for a passenger to leave innocuous items like a baseball cap in the car (e.g. the cap containing Martinez' DNA was knocked out of the car by Joey in his haste to flee the scene).

An officer may not have believed[1] Erika Vigil's explanation (which in and of itself was improper police vouching for the jurors, *see* footnote 1, but it is the jury's determination or their ability to properly consider and weigh the flaws inherent in eyewitness identification that counted.

This appeal does not address the insufficiency of the evidence. Rather, the eyewitness evidence was not overwhelming and an expert identification witness and/or the *Long* jury instruction (in accordance with governing law) should have been a pre-trial gate-keeping determination that precluded their admissibility from trial and/or to caution the jury (via the expert witness or *Long* instruction) about why or how such identification testimony may "get better" during the heat of trial. *Lujan*, 2015 UT App 199, ¶ 11, 357 P.3d 20 (citing *Ramirez*, 817 P.2d at 783 regarding cautionary identification instruction concerning "whether the witness's identification was made spontaneously and remained

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[1] When an expert undertakes to tell the jury what result to reach, this does not aid the jury in making a decision, but rather attempts to substitute the expert's judgment for the jury's. When this occurs, the expert acts outside of his limited role of providing the groundwork in the form of an opinion to enable the jury to make its own informed determination. In evaluating the admissibility of expert testimony, this Court requires the exclusion of testimony which states a legal conclusion. . . . we were particularly concerned that the witness repeatedly tracked the exact language of the statutes and regulations which the defendant had allegedly violated and used judicially defined terms such as "manipulation," "scheme to defraud" and "fraud" in opining on the defendant's conduct.

United States v. Duncan, 42 F.3d 97 (2nd Cir. 1994); *Mukhtar v. California State University*, 299 F.3d 1053, 1065 (9th Cir. 2002).

consistent thereafter or whether it was a product of suggestion [and] includes considering the length of time that passed between the witness's observations at the time of the event and the identification of the defendant, the witness's mental capacity and state of mind at the time of the identification, the witness's exposure to information from other sources, instance when the witness failed to identify the defendant, instances when the witness gave descriptions that were inconsistent with the defendant, and the circumstances under which the defendant was presented to the witness for identification").

In *Lujan,* the sufficiency of the evidence was not the issue. Enough evidence existed for the robbery suspect with a black beanie to be linked with Mr. Lujan, who was also found with a black beanie. The suspect was Hispanic; Mr. Lujan was Hispanic and found hiding inside an air conditioning unit. Other factors collectively pointed to Mr. Lujan as being the appropriately identified suspect, yet this Court reversed. "Because we determine that the trial court erroneously admitted unreliable eyewitness testimony, we reverse and remand for a new trial." *Lujan,* 2015 UT App 199, ¶ 1. The same result is required in Mr. Martinez's case. Defense counsel failed to provide the *Long* eyewitness identification jury instruction, a minimal long-standing case law requirement. Counsel similarly failed to call an expert witness to educate the jury on such identification pitfalls. "[S]uch clarification was necessary because 'the scientific literature . . . "is replete with empirical studies documenting the unreliability of eyewitness identification."'" *State v. Lujan*, 2015 UT App 199, ¶ 10 (citing *Long*, 721 P.2d at 488).

CONCLUSION

Prior counsel performed deficiently and prejudicially. The ineffective assistance of counsel standards were met. Mr. Martinez asks this Court for a new trial.

DATED this 4th day of June, 2019

/s/ Ron Fujino
Attorney for Mr. Martinez

CERTIFICATE OF DELIVERY

I hereby certify that on June 4, 2019, the Reply Brief of Appellant was served upon counsel of record by email at johnnielsen@agutah.gov and this Court at courtofappeals@utcourts.gov. I further certify that an electronic copy of the Reply Brief in searchable portable document format (pdf) will be filed with the Court on a CD or by email and served on appellant within 14 days, together with the original and five copies of the Reply Brief hard copies delivered upon the Court and counsel within 7 days (to wit: the Utah Court of Appeals, 450 South State, 5th Floor, P. O. Box 140230, Salt Lake City, Utah 84114-0230, and two copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114

/s/ Ron Fujino

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24, I certify that this brief contains 3183 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Corel WordPerfect X8 in Times New Roman 13 point and does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute rule, order, or case law (non-public information).

/s/ Ron Fujino