IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RANDY DEWAYNE BARRETT,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
v.	)	Case No. F-2002-1351
	)	FILED
THE STATE OF OKLAHOMA,	)	IN COURT OF CRIMINAL APPEALS STATE OF OKLAHOMA
	)	
Appellee.	)	APR 29 2004

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

CHAPEL, JUDGE:

Randy Barrett was tried by jury and convicted of First Degree Murder in violation of 21 O.S.2001, § 701.7 in Tulsa County District Court Case No. CF-2002-810. In accordance with the jury's recommendation, the Honorable Deirdre O. Dexter sentenced Barrett to life imprisonment and a fine of ten thousand ($10,000.00) dollars. Barrett appeals this judgment and sentence.

Barrett raises the following propositions of error:

I. The trial court committed fundamental error by failing to instruct the jury on the lesser-included offenses of second degree felony murder, second degree depraved mind murder, first degree manslaughter, and second degree manslaughter. The evidence supported instructions on those offenses, and Appellant's purported waiver of the right to such instructions was neither knowing nor intelligent, and was the product of bad advice from trial counsel.

II. Appellant's conviction for first degree felony murder should be reversed because the evidence was insufficient to support the underlying felony of kidnapping. Accordingly, Appellant's conviction has been imposed upon him in violation of the Fourteenth Amendment of the United States Constitution and Article II, § 7 of the Oklahoma Constitution.

III. The introduction of irrelevant but highly prejudicial photographs deprived Appellant of a fair trial in violation of the Fourteenth Amendment of the United States Constitution and Article II, § 7 of the Oklahoma Constitution.

IV. The trial court committed reversible error by granting the State's motion in limine regarding the prosecution's charging decisions and forbidding the defense from mentioning the original information filed in the case in which Appellant was not charged with any crime and the homicide of Bradley Dean was described and charged as first degree manslaughter. In the context of the facts of this case such evidence was relevant and was admissible as a party admission. Precluding the defense from using this evidence violated Appellant's rights under the sixth and fourteenth amendments of the United States Constitution and Article II, Sections 7 and 20 of the Oklahoma Constitution.

V. In his closing argument the prosecutor committed reversible error by attributing an inculpatory statement to Appellant that was not in evidence, and accordingly violated Appellant's rights under the Fourteenth Amendment to the United States Constitution and Article II, §7 of the Oklahoma Constitution.

VI. The accumulation of error in this case deprived Appellant of due process of law and necessitates reversal pursuant to the fourteenth amendment to the United States Constitution and Article II, § 7 of the Oklahoma Constitution.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, briefs and exhibits of the parties, we conclude that reversal is required as a matter of law.

Barrett claims that trial counsel was ineffective for improperly advising him to waive viable lesser-included offense instructions. Barrett was charged and convicted of First Degree Felony Murder. At trial, he elected to proceed "all or nothing" even though the evidence suggested that one or more lesser-

included instructions was appropriate.[1] Barrett claims that his actions were driven by his counsel's advice that pursuing a lesser-included offense instruction risked exposure to a sentence exceeding life imprisonment. Trial counsel believed that if the jury heard about Barrett's prior manslaughter conviction (which it would were Barrett convicted of a lesser-included offense), it would sentence Barrett to hundreds of years' imprisonment, amounting to life imprisonment without the possibility of parole. This is inaccurate. Barrett's parole eligibility would have been the same for any sentence of forty-five years' imprisonment or more.

Given this record, this Court ordered the district court to hold an evidentiary hearing to determine: (1) whether trial counsel convinced Barrett to waive lesser-included offense instructions based upon an erroneous legal opinion; (2) whether Barrett waived lesser-included offense instructions based upon his reliance on trial counsel's legally incorrect opinion; and (3) what, if any, lesser-included offense instructions Barrett could have received were he to have pursued them. The evidentiary hearing was held on October 31, 2003. The district court's findings of fact and conclusions of law regarding the remanded issue were filed in this Court on December 15, 2003.

After the hearing, the district court found that Barrett's waiver of lesser-included offense instructions was partly based on trial counsel's erroneous legal opinion that Barrett would have to wait longer for parole consideration if

[1] Barrett argues that the evidence supported instructions on Second Degree Felony Murder, Second Degree Depraved Mind Murder, and First and Second Degree Manslaughter.

he received a sentence exceeding forty-five years for a lesser-included offense.[2] Relying on the testimony of Terry Jenks, Executive Director of the Oklahoma Pardon and Parole Board, and on Board of Pardon and Paroles Policy No. 004[3], the court found that an inmate who receives a life sentence or sentence in excess of forty-five (45) years need not wait any longer for parole consideration than an inmate sentenced to forty-five (45) years' imprisonment. Finally, the trial court found that pursuant to *Shrum v.State,* 991 P.2d 1032, 1036 (Okl.Cr.1999), Barrett was entitled to lesser-included instructions on Second Degree Murder, First Degree Manslaughter, and Second Degree Manslaughter. The question thus distills to whether trial counsel was ineffective for misadvising Barrett.

Ineffective assistance claims require a showing of deficient attorney performance and prejudice to the defendant.[4] Barrett establishes both. A recent and strikingly similar Seventh Circuit opinion illustrates[5]: defendant appealed a conviction on grounds of ineffective assistance after trial counsel induced him to plead guilty based on erroneous information over the length of his potential sentence.[6] The Seventh Circuit found deficient performance in

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[2] The trial court also found that part of Barrett's motivation for waiving the lesser-included instructions was the hope for acquittal if the jury believed he did not kidnap the victim.
[3] Jenks testified that this policy has been effective for approximately thirty (30) years.
[4] *See Williams v. Taylor,* 529 U.S. 362, 390-91, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Strickland v. Washington,* 466 U.S. 668, 686-87, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).
[5] *Moore v. Bryant,* 348 F.3d 238 (7th Cir. 2003)(finding that an Illinois Appellate court acted unreasonably in rejecting an ineffective assistance of counsel claim where trial counsel induced defendant to plead guilty based upon misinformation regarding his sentence).
[6] *Id.* at 242-243.

trial counsel's legally incorrect opinion, which could have been corrected had he analyzed the facts and the law.[7]

The facts presented in this case are similar. Trial counsel clearly misinformed Barrett regarding parole eligibility.[8] Moreover, the testimony indicated that the actual parole eligibility had been the established public and ascertainable policy of the Pardon and Parole Board for approximately thirty (30) years. Nothing suggests that trial counsel's erroneous opinion was based upon any case, statute or policy. Trial counsel gave Barrett an incorrect legal opinion that could have been corrected with a modicum of research.[9] This is deficient performance.[10]

Was there prejudice? In other words, is there a reasonable probability that Barrett would not have waived lesser-included offense instructions had he not been misinformed? Yes. Pursuing a sentence on a lesser-included offense would have given Barrett nothing to lose and a potentially lighter sentence to gain. The instructions were Barrett's for the asking.[11] Assuming that the jury had convicted him of a lesser-included offense after two or more felonies, Barrett's minimum sentence would have been twenty (20) years' imprisonment,[12] making him eligible for parole approximately twenty-five (25)

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[7] *Id.* at 242.

[8] The trial court found that regardless of the actual sentence length, whether life imprisonment or forty-five years plus, Barrett would have been eligible for parole after forty-five (45) years.

[9] The dissent finds that the defense made a reasonable strategic decision to proceed "all or nothing," ignoring the fact that this "strategic decision" was based upon an erroneous premise.

[10] *Id;* (deficient performance where inaccurate advice not grounded in informed analysis).

[11] The trial court found Barrett was entitled to instructions on Second Degree Murder, First Degree Murder and Second Degree Manslaughter.

[12] The maximum sentence for the lesser-included offenses, life imprisonment, equals the minimum sentence for First Degree Murder. Additionally, for First Degree Murder, Second

years earlier than the minimum sentence for First Degree Murder.[13] Thus, Barrett's misinformed waiver was prejudicial. It is reasonable and indeed probable that he would not have waived lesser-included offense instructions but for counsel's error.[14] Having established constitutionally inadequate performance and resulting prejudice, Barrett is entitled to a new trial.

Decision

The Judgment and Sentence is **REVERSED** and **REMANDED** for a new trial.

ATTORNEYS AT TRIAL

JOHN C. HARRIS, III
P.O. BOX 52206
TULSA, OKLAHOMA
ATTORNEY FOR THE DEFENDANT

STEVE KUNZWEILER
ASSISTANT DISTRICT ATTORNEY
500 SOUTH DENVER
TULSA, OKLAHOMA
ATTORNEY FOR THE STATE

ATTORNEYS ON APPEAL

WILLIAM H. LUKER
APPELLATE DEFENSE COUNSEL
O.I.D.S
P.O. BOX 926
NORMAN, OKLAHOMA 73070
ATTORNEY FOR THE APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
WILLIAM R. HOLMES
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OKLAHOMA 73105
ATTORNEYS FOR THE APPELLEE

Degree Murder and First Degree Manslaughter, a defendant must serve no less than 85% of his sentence before he is eligible for parole. 21 O.S. Supp.2002, § 13.1. However, had Barrett been convicted of Second Degree Manslaughter, the 85% rule would not apply.

[13] The dissent suggests that the jury may have convicted Barrett of First Degree Murder and sentenced him to life imprisonment without the possibility of parole after they heard about his prior convictions in determining his guilt. First, the jury would not have heard about Barrett's prior convictions in the first stage of trial unless he testified which he did not do. Second, it is probable that Barrett could be convicted of a lesser-included offense given the evidence. Third, if Barrett were convicted of a lesser-included offense, life imprisonment without the possibility of parole is not a sentencing option. Fourth, regardless of the above, Barrett was entitled to make his decision based upon legally correct advice.

[14] *Moore v. Bryant,* 348 F.3d 238, 243 (7th Cir. 2003)(prejudice where defendant pled guilty based upon trial counsel's erroneous opinion about the length of defendant's sentence).

OPINION BY: CHAPEL, J.
JOHNSON, P.J.: CONCUR
LILE, V.P.J.: DISSENT
LUMPKIN, J.: DISSENT
STRUBHAR, J.: CONCUR IN RESULTS

LUMPKIN, J., DISSENTING.

In Oklahoma, a criminal defendant has the right to affirmatively waive any lesser-included offense instruction that the evidence supports and proceed on an "all or nothing approach." *Shrum v. State*, 1999 OK CR 41, ¶11, 991 P.2d 1032, 1036. Built into that right is the understanding the criminal defendant will consult with his or her attorney and make a tough strategic decision: whether to request lesser-included instructions and risk the possibility of a compromise verdict or make the jury convict of the crime charged and nothing else.

This is exactly what happened in the instant case. Appellant consulted with his attorney about his options concerning lesser-included offenses and then decided, as a matter of trial strategy, to go with the all-or-nothing approach. This was a valid, albeit risky, strategy. And while the Court's opinion today may suggest otherwise, this Court does not second-guess matters of trial strategy. *Welch v. State*, 1998 OK CR 54, ¶ 83, 968 P.2d 1231, 1252.

The Court's opinion reverses on proposition one, finding ineffective assistance of counsel when Appellant's trial counsel "induced" Appellant to waive lesser-included offenses "by misinforming him" about his parole eligibility for possible lesser-included offenses versus his parole eligibility

for First Degree Murder.[1] However, the trial court specifically found trial counsel did not "convince" Appellant to waive lesser-included offenses and that Appellant considered the possibility of acquittal in making his decision. Appellant was also aware a lesser-included offense would result in jurors learning of his prior convictions for manslaughter and embezzlement, a fact that would not help him in regard to the sentencing stage.[2] Further, the trial court found Appellant is sophisticated in terms of the Department of Corrections parole and discharge system due to his previous incarceration on the Manslaughter conviction.

Judicial scrutiny of counsel's performance must be highly deferential. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.*

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[1] According to the trial court's findings and conclusions and the evidentiary hearing transcripts, Appellant's trial counsel misadvised Appellant regarding his parole eligibility for hypothetical sentences of "hundreds of years" or those that "exceed life," if Appellant was convicted of a lesser included offense. The attorneys opinions regarding such sentences is largely irrelevant, however, as the possible lesser-included offenses carried at most a life sentence, when enhanced. An attorney's advice on how parole might be calculated on a hypothetical sentence on a possible lesser-included offense is not a sufficient basis for an ineffective assistance claim, in my opinion, at least under the specific circumstances that occurred here. The record is clear that Appellant knew the lesser-included offenses carried the possibility of shorter sentences. Still, Appellant deliberately chose to waive lesser-included offenses and go forward on a charge that carried a possible sentence of life imprisonment without any parole whatsoever.

[2] Indeed, it is quite likely such information would have resulted in a conviction on the greater offense and a sentence of life imprisonment without the possibility of parole.

Strickland thus warns that, with the benefit of hindsight, it is not difficult to find ineffective assistance, for most criminal trials have error in one place or another. *Strickland* advises Courts to exercise restraint in such matters:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Id.

I believe this case crosses over the line, going too far in search of ineffective assistance.[3] The evidentiary hearing transcripts, held nearly a year after the trial, indicate Appellant's trial attorney recalled making certain assumptions as to Appellant's parole eligibility for possible sentences on possible convictions of possible lesser-included offenses. However, that is what lawyers do when they give advice. Meanwhile, the jury was prevented from hearing damaging testimony regarding prior convictions that would likely have led to a First-Degree Murder conviction and a sentence of life imprisonment without the possibility of

[3] I agree the fault, if any, lies with Appellant's attorney, for the trial court did an excellent job of attempting to follow the dictates of *Shrum* and questioning Appellant and his counsel about the decision to proceed on an all-or-nothing approach.

parole. I fail to find a basis for reversal of this case due to ineffective assistance of counsel.

I am authorized to state Judge Lile joins in this dissent.