

1 ENTERED
2 SEP 30 2014
3 #18

STATE OF OREGON
Marion County Circuit Courts
SEP 30 2014
FILED

4 IN THE CIRCUIT COURT OF THE STATE OF OREGON
5 FOR THE COUNTY OF MARION

6 Todd Andrew Durbin, SID #13074008,)
7)
8 Petitioner,) Case No. 13C21262
9)
10 vs.)
11 Rob Persson, Superintendent, Oregon State) GENERAL JUDGMENT
12 Correctional Institution,) (After Trial)
13)
14 Defendant.)
15)

16 The above-entitled matter came before the Court on June 19, 2014 for a Trial on Petition for
17 Post-Conviction Relief. Petitioner withdrew the following claims: _____
18 _____
19 _____

20 NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED:

21 1. The Petition for Post - Conviction Relief is:
22 X Allowed and the following relief is granted: judgment
23 vacated. Case returned for new
24 trial.

25 The Petition is dismissed pursuant to ORS 138.525, as meritless, and this
26 judgment is therefore not appealable.

27 Denied.

28 2. The parties stipulated to Petitioner's Exhibits all and Respondent's Exhibits
_____ After considering objections Exhibits all were
admitted and Exhibits _____ were not admitted.

1 3. Pursuant to the burden of proof of ORS 138.620(2), the Court has considered the record
2 evidence submitted by the parties, made determinations as to its relevancy and materiality, assessed the
3 credibility of witnesses and testimony whether written or oral and ascertained for its purposes the
4 probative significance of the evidence presented.

5 4. The Court makes the following findings and conclusions:

6 A. see attached
7 _____
8 _____
9 _____

10 B. _____
11 _____
12 _____
13 _____

14 C. _____
15 _____
16 _____
17 _____

18 D. _____
19 _____
20 _____
21 _____

22 E. With regard to any issues not specifically addressed above, the Court relies upon and
23 adopts the facts and law in Petitioner's Trial Memorandum or Defendant's Trial
24 Memorandum as the Court's findings of facts and conclusions of law. Petitioner has
25 met his burden of proof failed to meet his burden of proof. Except as specifically
26 provided herein, this judgment determines all issues presented.
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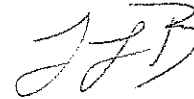
Durbin findings:

13C21262

1. Att considered calling an expert concerning abuse reporting and decided not to for the reasons stated in the affidavit. That was a reasonable strategy decision.
2. Att did not raise issue of whether DA told the victim's parents not to let victim speak to defense because att was sure that didn't happen and that Da would testify as he has sworn in his affidavit. Victim's mother has also submitted an affidavit about what she was told. Court would not have barred testimony. This decision was reasonable.
3. Att decided not to object to DA's opening comments and instead to argue to jury that DA did not prove certain things he had mentioned in opening. That was a reasonable decision.
4. The DA's question to the detective about 1 in 5 girls in Oregon being offended and an offender offending up to 100 times before being caught is troublesome. First of all, this court has a difficult time seeing the relevance of the testimony. Second, the officer didn't know either of those statistics. It may be that the DA had simply failed to discuss this with the Det pretrial and simply assumed that the Det knew the answers. But it clearly left the DA essentially testifying about an issue of some importance, almost inviting the jury to try to right a larger wrong, when they only had to evaluate this case. The attorney should have at least asked for the question to be stricken and some sort of curative given. This court believes it was prejudicial.
5. Failure to object to witness false in part instruction is not inadequate. The instruction is sufficiently neutral to apply to witnesses called by either side.
6. Att did object to the 803 notice testimony based on hearsay and confrontation, but not on the sufficiency of the notice. Under the case law at the time, that was adequate.
7. The "seemed guilty, like he had done something" is an improper comment, but since it was made after V testified about the abuse and is marginally a comment on pet's demeanor, it is not prejudicial.
8. The most significant error by trial attorney was the failure to object and move for mistrial relating to testimony that Mellin felt that V's disclosure was genuine. Defense raised the issue that other young women had jumped on the band wagon and also claimed abuse that Mellin did not believe and did not report. The Da then asked the Det whether Mellin said believed the V. That is not relevant, is a comment on the credibility of another witness, hearsay and not allowed. It should have caused the att to make an objection and a motion for mistrial. The defense here argues that the trial lawyer opened the door. Even if it is possible to open this door, the DA could have/should have handled the issue differently. It is such a sensitive issue that a wise approach would have been to ask to be heard outside the presence of the jury and get a court's ruling. Another approach would have been to call Mellin and ask a series of questions that made it easy for the jury to infer that the witness believed the V, such as a description of the V's demeanor as she disclosed, such as tears, fear in her eyes etc. Or the DA could have emphasized that the witness did not disclose the reports that she felt were untrue, but did disclose this one. Or could have tried to lead the witness about being afraid that the abuse could continue if not reported etc. Instead the question was exactly on credibility. Here

the DA called the Det to report what Mellin had said to the Det. The answer given is exactly what the DA wanted and it was improper. Case law makes it clear that in this type of "he said-she said" case, credibility is crucial. It doesn't matter why Mellin reported. Her state of mind is irrelevant. Mellin's belief is also one of the things the police used in deciding not to have V evaluated by Liberty House. The att should have acted here, even if he thought he opened the door, he had to keep this out. That failure is inadequate representation and prejudicial.

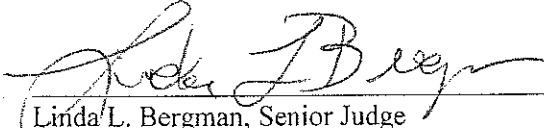
9. The DA's closing also had objectionable comments, especially about revictimizing the V by forcing the case to trial. That comment is prejudicial and should have been objected to or resulted in a motion for a mistrial. This court realizes that these are very emotional, difficult cases to try and that the DA often has a good reason to want to protect victims and convict offenders who prey on children, but that doesn't mean that the constitutional lines can be crossed to ensure convictions.
10. Since this court is granting pcr on the trial level representation, it is not addressing the allegations against the appellate representation.
11. The representation was inadequate as explained above. The errors did prejudice pet. The judgment is vacated and the matter returned to the trial court for retrial.



1 5. If either party contends that it is entitled to costs and/or attorney fees, that party may
2 make application for a Supplemental Judgment pursuant to ORCP 68.

3 6. This matter involves ~~X~~ Federal and/or ~~X~~ State Constitutional Issues.

4 DATED this 26 day of ~~June~~ ^{set}, 2014.

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Linda L. Bergman, Senior Judge