

IN THE SUPREME COURT OF GUAM

JACKERY B. WHITE,)
)
 Petitioner-Appellant,)
)
 vs.)
)
ROBERT KLITZKIE, et al.,)
)
 Respondent-Appellee.)
_____)

Supreme Court Case No. **CVA97-020**
Superior Court Case No. **SP0216-94**

OPINION

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Appeal from the Superior Court of Guam

Argued and Submitted on 20 February 1998

Hagåtña, Guam

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BEFORE: PETER C. SIGUENZA, Chief Justice; JOAQUIN C. ARRIOLA, Sr. and EDUARDO A. CALVO, Associate Justices.

SIGUENZA, CJ.:

[1] Jackery B. White appeals the denial of habeas relief by the Superior Court. He asserts that his right to effective assistance of counsel was violated due to his attorneys' conflicts of interest. Although we have no jurisdiction to hear an appeal from the denial of his petition for habeas relief, we elect to treat his appeal as an original petition for relief. However, based on our review of the record and the applicable law, we deny his petition for a Writ of Habeas Corpus.

PROCEDURAL AND FACTUAL BACKGROUND

[2] Jackery B. White was arrested and incarcerated in 1986 for the crimes of robbery and burglary. As a result, the court appointed attorney Peter F. Perez to represent him in numerous criminal cases encompassing the charges. While incarcerated, White apparently heard the admissions of another inmate and became an informant for the government in a murder case. After cooperating with the government, he was released from custody pending resolution of the cases.

[3] In March of 1993, White was again charged with robbery. Again, attorney Peter F. Perez was appointed to represent him. However, Peter F. Perez successfully moved to withdraw from the more recent cases because he was related to the owner of IT&E, a company that had recently been robbed by White. Another attorney, Vicente Perez was appointed to represent the defendant on these later charges. Peter F. Perez continued his representation of White on the previous charges originating in 1986.

[4] On April 20, 1993, White entered a plea agreement in the 1986 cases while represented by attorney Peter F. Perez. He pleaded guilty to four counts of burglary in four different cases. For each count, he received a 3 year sentence, running concurrently. Testimony indicates that in exchange for his guilty pleas, charges in two other cases were dropped. In addition, the prosecutor agreed not to charge ten pending felony matters. Another term of the agreement was that the government would not mention White's prior conviction during the sentencing. These outside terms were not

mentioned in the plea agreement but were testified to at the hearings.

[5] On August 13, 1993, while represented by attorney Vicente Perez, White pleaded guilty to robbery. He also admitted to the special allegation of committing a felony while on release. Sentencing was left to the discretion of the trial judge. Consequently, he was given a 30 year sentence, 10 years for the robbery and an additional 20 years imprisonment for the special allegation.

[6] In August 1994, White filed both a Writ of Habeas Corpus and later, an Amended Writ of Habeas Corpus in the Superior Court. Attorney Mark Beggs was subsequently appointed to represent him.

[7] At a hearing on February 2, 1995, the parties were notified that the writ would issue. The court also ordered that the return of the writ be filed within seven days of the writ's issuance. The court subsequently issued the writ on February 6, 1995. However, the return was not filed within seven days of its issuance.

[8] At the February 2, 1995 hearing, it was also agreed that an evidentiary hearing would take place on February 22, 1995. However, the hearing was not conducted due to a conflict of interest and the resulting withdrawal of attorney Beggs. At that time, attorney D. Paul Vernier was appointed to represent White in this matter.

[9] A hearing on the writ was eventually conducted on September 13, 1995. On this date, the Return was also filed. This was seven months after the Writ had issued. A supplemental return was later filed on October 20, 1995.

[10] At the hearing, Petitioner initially argued a return of the writ was mandatory under Guam law and the government failed to file as required. The assertions contained in the petition, White maintained, were not opposed and should be taken as admitted by the government to be true. Consequently, White asserted discharge was the appropriate remedy in the matter. The court took the issues surrounding the return under advisement and subsequently issued a Decision and Order on September 18, 1996 denying White's request for relief on these procedural grounds.

[11] Testimony was also received at the September 13, 1995 hearing. Peter F. Perez, petitioner's former attorney, was called as a witness. His testimony later concluded on September 20, 1995.

Testimony was again taken at an evidentiary hearing held on January 6, 1997 during which several witnesses were called. At the conclusion of the hearing, the court again took the matter under advisement and later, in a Decision and Order filed on May 12, 1997, denied petitioner's relief.

[12] Petitioner timely filed a Notice of Appeal of the trial court's order denying relief.

ANALYSIS

[13] Although this matter was filed as an appeal of an order denying habeas relief, we elect to treat this matter as an original petition for a writ of habeas corpus. As we decided in *Borja v. Bitanga, et al.*, 1998 Guam 29, this court has no jurisdiction to hear an appeal of a trial court's decision denying a writ of habeas corpus. *Id.* at ¶ 12. However, using our discretion, we may treat this matter as an original petition for a writ of habeas corpus and address the merits of the arguments. *Id.* at ¶ 14. Relying upon the record generated by the trial court, we review the issues *de novo*. *United States v. Span*, 75 F.3d 1383 (9th Cir. 1996).

[14] Appellant first argues he was not properly represented by either counsel because of conflicts of interest. Specifically, both attorneys were related to Joe Perez, the majority shareholder of a company victimized by Petitioner. The company, IT&E, was robbed in March of 1993. These conflicts, White asserts, denied him effective assistance of counsel.

[15] Both parties cite to *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708 (1980). The United States Supreme Court opined "[i]n order to establish a violation of the Sixth Amendment, a defendant who raises no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 348, 100 S.Ct. at 1718. Two elements must thus be shown by a petitioner proceeding on an ineffective assistance claim based on attorney conflicts. First, the petitioner must prove the existence of "an actual conflict of interest." *Stoia v. United States*, 22 F.3d 766, 770 (7th Cir. 1994)(discussing the requirements set out in *Cuyler*). An actual conflict of interest occurs if "the defense attorney was required to make a choice advancing his own interests to the detriment of his client's interests." *Id.* at 771 (citations omitted). The petitioner must also make a showing that the actual conflict had "an adverse effect on the lawyer's performance."

Id. at 770 (citations omitted). An adverse effect results when the actual conflict causes an actual lapse in an attorney's representation. *Id.*

[16] In this matter, White cannot identify an actual conflict adversely affecting either lawyer's performance. He writes:

Such adverse affect should be *assumed* in this case by the fact that the appellant received thirty (30) years imprisonment - with absolutely no plea agreement or sentence "cap" -- and by the fact the [sic] Peter F. Perez, implicitly acknowledged the adverse affect such a conflict would create by moving to withdraw from representing the appellant.

Appellant's Opening Brief, Pg. 7 (emphasis added). Likewise, the court, based on a review of the record, cannot find or identify circumstances that show either attorneys' performance was actually adversely affected by the conflict.

[17] As to attorney Peter F. Perez, the testimony is clear that he negotiated a plea agreement enabling his client to receive minimal sentences on some charges and complete discharge of other crimes. This was accomplished notwithstanding numerous pending criminal allegations, both charged and uncharged. Moreover, Peter F. Perez was able to enter into an agreement whereby the government attorney would not raise the issue of White's prior conviction of a serious felony, thus avoiding enhancement of the sentence.

[18] As to attorney Vincente Perez, his testimony indicates that he did not know of his relationship to the majority shareholder of the victimized company. Thus, without this knowledge of the relationship, he would not and could not have made legal decisions that would have advanced his or his relative's interest. There is no basis to assert that a conflict influenced his representation. Even if a conflict existed, Petitioner again has not made a showing that the performance of attorney Vicente Perez was adversely affected by such conflict. Contrary to Petitioner's contention, the failure to obtain a plea agreement is not indicative of a conflict affecting representation, primarily because a defendant has no right to receive such a plea agreement. Additionally, Vincente Perez testified that he attempted to obtain a plea agreement but the prosecutor was "hard" on his client and declined to enter into a plea. Equally important, the decision to plead "straight up" was discussed between attorney and client several times before proceeding on this course of action.

[19] White also contends that the government failed to timely return the writ as required under

Guam law. As a result, he asserts the allegations in the petition were admitted by the government.

[20] A petitioner initiates habeas relief by filing a petition with the Superior Court. 8 GCA § 135.12 (1993). If it appears that the writ should issue, a judge should grant it without delay and direct the writ to the person having custody of the petitioner. 8 GCA §§ 135.16 and 135.18 (1993). If the writ is not returned, then Guam law provides a remedy. 8 GCA § 135.22 (1993) reads as follows:

Consequences of Failure to Honor Writ. If the person to whom the writ is directed refuses, after service, to obey the same, the court or judge, upon affidavit, shall issue an attachment against such person, directed to the Chief of Police, commanding him forthwith to apprehend such person and bring him immediately before such court or judge; and upon being so brought, he must be committed to the jail until he makes due return to such writ, or is otherwise legally discharged.

This provision appears to be the only statutory remedy available for the failure of a person to return the writ. It places the burden on the petitioner to file an affidavit with the court so that a warrant may be issued for the person required to file the return. The person is then brought before the court, and upon imprisonment or threat of imprisonment, he is forced to file the return.

[21] In this matter, the affidavit was not filed and the respondent never brought before the court as contemplated by 8 GCA § 135.22. This statutory remedy was available to the petitioner but was not utilized. It is clear that this was never done because the parties understood that the issues were disputed and an evidentiary hearing would occur. In fact, the evidentiary hearing was scheduled but later taken off calendar due to the conflict of Petitioner's previous counsel. Consequently, we do not agree with Petitioner that the failure to file the Return in a timely manner is equivalent to admitting the allegations of the petition. Similarly, we disagree that dismissal is an appropriate remedy. In order to ensure a response, 8 GCA § 135.22 is the statutory mechanism for compliance.

[22] Appellant argues that 8 GCA § 135.24 (1993) requires the return to be filed.¹ Although the

¹ 8 GCA § 135.24 reads as follows: The person upon whom the writ is served shall state in his return, plainly and unequivocally:

- (a) Whether he has or has not the party in his custody, or under his power or restraint;
- (b) If he has the party in his custody or power, or under his restraint, he shall

statute contemplates the filing of a return, the only mandate of this section refers to the content of the actual return. The statute, by using the term “shall” requires the return to state plainly and unequivocally certain factual conditions. This particular statute does not require the writ’s return. As discussed earlier, the honoring of the writ by return is addressed in 8 GCA § 135.22.

[23] In *Bleitner v. Welborn*, 15 F.3d 652 (7th Cir. 1994), the appellate court discussed whether the district court should have entered a default judgment for an untimely response in a habeas matter. The return was not filed by the deadline and the motion to extend its filing was submitted two weeks after the return’s original deadline. *Id.* at 653. A default is a sanction, and sanctions should be proportionate to the wrong. *Id.*; see also *People v. Tuncap*, 1998 Guam 13, ¶¶23-29 (stating, in the context of a discovery violation, that a less severe sanction should be imposed if it will accomplish compliance with the court’s order). “Releasing a properly convicted prisoner or imposing on the state the costs and uncertainties of retrying him, perhaps many years after the offense, is apt to be a disproportionate sanction for the wrong of failing to file a timely motion for an extension of time.” *Bleitner*, 15 F.3d at 653. Habeas relief is a strong remedy reserved for serious matters rather than merely technical violations of rights. *Id.* While prompt dispositions of habeas matters are desirable and “at some point delay in the disposition of a petition caused by the government’s willfully refusing to file a response might infringe the petitioner’s right of due process,” the matter should still proceed to the merits of the petition. *Id.* If the petition had no merit, then the delay will have caused

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- state the authority and the cause of such imprisonment or restraint;
- (c) If the party is detained by virtue of any writ, warrant, or other written authority, a copy thereof shall be annexed to the return, and the original produced and exhibited to the court on the hearing of such return.
 - (d) If the person upon whom the writ is served had the party in his power or custody, or under his restraint, at any time prior or subsequent to the date of the writ of habeas corpus, but has transferred such custody or restraint to another, the return shall state particularly to whom, at what time and place, for what cause, and by what authority such transfer took place;
 - (e) The return shall be signed by the person making the same, and except when such person is a sworn public officer and makes such return in his official capacity, it shall be verified by his oath.

no prejudice to the petitioner. *Id.*

[24] If this court were to construe the delay in filing the return as significant in this particular instance, the sanction of dismissal would not be appropriate. As discussed earlier, the circumstances of this case indicated all parties understood the assertions contained in the petition were disputed and that an evidentiary hearing was necessary and, therefore, a hearing was scheduled by the trial court before the return. The failure to file the return was a technical violation. Dismissing the matter for such violation would be disproportionate to the offense. Also, because we find no merit in the Petitioner's allegations, we find that no prejudice has been suffered by him.

CONCLUSION

[25] The court hereby **DENIES** Petitioner's request for habeas relief.

JOAQUIN C. ARRIOLA, SR.
Associate Justice

EDUARDO A. CALVO
Associate Justice

PETER C. SIGUENZA
Chief Justice