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CRIMINAL PROCEDURE—Motion for New Trial Based on Newly Discovered Evidence and Effective Assistance of Counsel: If Counsel is Not Diligent is He Necessarily Ineffective? *Frias v. State*, 722 P.2d 135 (Wyo. 1986).

In the early morning hours of July 6, 1984, Martin Frias opened his bedroom door to a grisly scene. Four-year-old Reena Perea was cradling the head of her mother, Martin's girlfriend, Ernestine Perea. Ernestine had a fatal rifle wound to the midsection.

Frias, an undocumented alien, called the police. He could not give clear directions to his home because of his poor English. Consequently, Frias agreed to meet the police at a local cafe and bring them back to the trailer. At the conclusion of the initial sheriff's investigation that night, Frias requested that the deputy allow him to spend the remainder of the night at the sheriff's office.¹

Several contradictions surfaced during the investigation of the shooting. The initial sheriff's investigation indicated that Perea's death was suicide.² Ms. Perea had a history of suicide attempts.³ Frias claimed that Perea had committed suicide. The state's investigation indicated that Perea had been shot in the back.⁴ The state's experts testified that the bullet had entered from the back and exited through the abdomen. The location of the bullet fragments and blood splatters as compared to the location of the body contradicted the state's expert testimony.⁵ The public defender's investigation also determined that Perea had been shot in the back.⁶ Finally, Reena claimed that she had been the one who had killed her mother.⁷

The state charged Frias with first degree murder despite the contradictory evidence produced during the investigation.⁸ At trial, defense counsel chose not to pursue the suicide theory and instead challenged the state to prove Frias was guilty beyond a reasonable doubt. The defense also argued Frias did not intentionally commit the killing with the requisite premeditated malice.⁹ The jury found Martin Frias guilty of second degree murder.¹⁰

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1. Brief for Appellant at 7-8, *Frias v. State*, 722 P.2d 135 (Wyo. 1986) (No. 85-66) [hereinafter Brief for Appellant]. The State essentially accepted Frias' version of the facts. See Brief of Appellee at 4, *Frias v. State*, 722 P.2d 135 (Wyo. 1986) (No. 85-66) [hereinafter Brief for Appellee].

2. Brief for Appellant at 8.

3. *Id.* at 9, 10.

4. *Id.*

5. *Frias v. State*, 722 P.2d 135, 135-37 (Wyo. 1986).

6. Brief for Appellee at 40.

7. Brief for Appellant at 11.

8. *Frias*, 722 P.2d at 137.

9. *Id.* at 138.

10. *Id.* at 136.

Frias then moved the district court for a new trial based on newly discovered evidence.¹¹ At the motion hearing, three new defense witnesses promoted a suicide theory based on the evidence presented at trial.¹² The district court denied the motion on the grounds that the newly discovered evidence failed to meet the test established in *Opie v. State*.¹³ The *Opie* test requires due diligence to be used during pre-trial investigation. The district court determined that defense counsel could have discovered the expert testimony prior to trial and by failing to do so, did not exercise requisite due diligence in producing the evidence.¹⁴

The Wyoming Supreme Court sustained the denial, agreeing that defense counsel was not diligent in discovering the new evidence. The supreme court held that the volume of evidence indicating suicide should have prompted counsel to investigate the defense prior to trial.¹⁵ However, the Wyoming Supreme Court held that trial counsel failed his duty to investigate because the suicide defense was not pursued.¹⁶ The failure to investigate the suicide defense prejudiced the verdict, rendering it unreliable. The court therefore reversed, holding that Frias received ineffective assistance of counsel in violation of his sixth amendment rights.¹⁷

This casenote focuses on two of the various issues raised by the defendant on appeal.¹⁸ First, whether it was error to deny the defendant's motion for new trial based on the newly discovered evidence.¹⁹ Second, whether defense counsel's lack of diligence in search of helpful testimony denied the defendant effective assistance of counsel as guaranteed by the sixth amendment of the United States Constitution.²⁰

11. *Id.* at 138.

12. *Id.*

13. *Id.*; *Opie v. State*, 422 P.2d 84 (Wyo. 1967).

14. *Frias*, 722 P.2d at 138-39. In addition, the evidence was found to be cumulative.

15. *Id.* at 145.

16. *Id.* at 146.

17. *Id.* at 146-47.

18. *Id.* at 136. The court resolved four other issues on appeal. First, the court found that by failing to object to a juror's presence, counsel waived his right to object on appeal. Second, the court held that the trial court erred when it ruled that the physician-patient relationship did not exist in criminal cases. However, failure to raise an objection to the ruling combined with the voluntary statements made on defendant's health waived the privilege. Third, the defendant claimed he was convicted in violation of his constitutional right not to be compelled to testify against himself. The defense counsel requested that the judge and the jury listen to a tape-recorded interrogation, in which the Wyoming Division of Criminal Investigation harassed and threatened Mr. Frias. The issue was whether, because of the request, the defense counsel had waived his right to a separate hearing on the voluntariness of the taped interrogation. Holding for the defendant, the court found that, when the voluntariness of a statement is seriously in question, the trial court must expressly find that the statements were voluntary. It appears that Wyoming has now moved in line with the 1964 United States Supreme Court decision on voluntariness. See *Jackson v. Denno*, 378 U.S. 368, 391 n.19 (1964). The fourth issue involved the sufficiency of the evidence to support the second-degree murder conviction. In its holding the court found it unnecessary to address the sufficiency issue because it reversed on other grounds.

19. Brief for Appellant at v.

20. *Id.*

BACKGROUND

Newly Discovered Evidence

When moving the court for a new trial, based on newly discovered evidence, a Wyoming defendant must satisfy the requirements listed in *Opie v. State*. Under *Opie*, the defendant has the burden of satisfying all four requirements of the test before a new trial will be granted.²¹ These elements are (1) that new evidence has come to light since the trial; (2) that the defense did not lack due diligence in discovering the new evidence prior to conviction; (3) that the evidence is so material that it would probably produce a different verdict if a new trial were granted; and (4) that the new evidence is not cumulative or impeaching.²²

When considering the defendant's motion for new trial based in newly discovered evidence, the court presumes that the defendant has already received a fair trial.²³ *Opie* furthers a policy favoring finality of the verdict. Without this strong policy of finality,²⁴ convicted defendants would be tireless in their attempts to achieve a new trial.

Effective Assistance of Counsel

The sixth amendment guarantees a criminal defendant the right to court-appointed counsel.²⁵ Appointed counsel must not only render assistance, but he must render effective assistance.²⁶ Ineffectiveness includes failure of counsel's duty to investigate.²⁷ The seminal case dealing with actual ineffectiveness is *Strickland v. Washington*.²⁸ In the *Strickland* appeal to the United States Supreme Court, the defendant claimed that his counsel was ineffective due to a general failure to investigate and that an adequate investigation would have reduced the severity of his sentence.²⁹

The *Strickland* Court articulated a two-part test for determining effectiveness of counsel. First, the defendant must identify those acts and omissions which he believes fell below an acceptable standard of conduct.³⁰ The court uses a subjective standard of reasonableness to measure attorney performance and defined that reasonableness in terms of prevail-

21. *Opie v. State*, 422 P.2d 84, 85 (Wyo. 1967).

22. *Id.*

23. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

24. *Grable v. State*, 664 P.2d 531, 536 (Wyo. 1983).

25. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

26. *McMann v. Richardson*, 398 U.S. 759, 771 (1970).

27. *Strickland*, 466 U.S. at 680.

28. *Id.* at 672-75. The State of Florida indicted the defendant and appointed an experienced criminal lawyer to represent him. By ignoring counsel's advice on trial strategy and preparation, the defendant frustrated his counsel's efforts. At sentencing, defense counsel chose not to pursue character witnesses or to present evidence concerning defendant's emotional state during the crime spree. Instead, he counted on the judge's reputation, arguing that the defendant's remorse, admission of guilt and generally good character should spare him the death penalty. The trial judge found extensive aggravating circumstances and sentenced the defendant to death on each murder charge.

29. *Id.* at 684.

30. *Id.* at 687.

ing professional norms.³¹ Second, the defendant must also demonstrate prejudice.³² In other words, that there is a reasonable probability that his conviction or severity of sentencing would not have occurred but for these failures. The reviewing court is to examine the verdict in light of the error to determine if the result is reliable. If the error renders the verdict unreliable, the defendant is granted a new trial.³³ A decision is unreliable if it is reasonably likely to have been different absent attorney error.³⁴

In *Strickland*, the Court concluded that the sixth amendment imposes on counsel a duty to investigate.³⁵ Counsel cannot render a reasonable decision until he has investigated his options. Counsel's investigatory decisions, however, are assessed in light of the information known at the time the decisions were made, not with the benefit of hindsight.³⁶

The Supreme Court held that if there is more than one plausible defense, counsel should ideally investigate each before choosing on which to rely.³⁷ Even when counsel does not conduct a substantial investigation into each defense, he may still be effective if he has excluded certain investigations for tactical reasons.³⁸

Limitations of time and money are also considered reasonable constraints on the duty to investigate.³⁹ Under these limitations counsel may make early strategic choices based on conversations with the defendant and a review of the state's evidence. When a court is reviewing attorney performance in this context it must consider the attorney's experience, the pursued and unpursued defenses and the potential prejudice by not pursuing a defense.⁴⁰ Applying this two-part test, the *Strickland* majority found that the alleged attorney errors were actually legitimate trial tactics and within the acceptable standard of reasonableness.⁴¹

The Wyoming Supreme Court adopted the *Strickland* test in *Munden v. State*.⁴² In *Munden*, the court presumed counsel to be effective, therefore, the burden was upon the defendant to identify specific attorney error. Upon identifying error, a defendant must prove that counsel's assistance fell below an acceptable standard of reasonableness. When the defendant can establish unreasonable assistance he must then go on to

31. *Id.* at 688.

32. *Id.* at 687.

33. *Id.* at 694.

34. *Id.*

35. *Id.* at 680-81.

36. *Id.* at 689.

37. *Id.* at 681.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 699.

42. *Munden v. State*, 698 P.2d 621 (Wyo. 1985). Wyoming's standard for ineffective counsel prior to 1985 was stated in *Hoskovek v. State*, 629 P.2d 1366 (Wyo. 1981). Attorney performance was presumed to be effective. Defendant carried the burden to prove ineffectiveness, which existed where counsel fell below an acceptable standard of reasonableness. If counsel's performance was reasonable then it was effective and vice versa.

show that the error prejudiced his verdict.⁴³ Both *Munden* and *Strickland* promote a policy of deference to the trial counsel.⁴⁴

THE PRINCIPAL CASE

Frias made two related claims on appeal. First, he argued that the trial court erred in denying his motion for new trial.⁴⁵ The trial court determined that, because defense counsel was able to obtain this "new evidence" with ease post-trial, counsel could have obtained the evidence just as easily prior to conviction. All the indications of suicide should have prompted further pretrial investigation. The trial court found the failure to pursue the suicide defense was not justifiable.⁴⁶ Based on these findings, the trial court denied the motion.

Secondly, Frias claimed he was denied effective assistance of counsel and therefore his conviction was unconstitutionally obtained.⁴⁷ The Wyoming Supreme Court held that defense counsel failed in his duty to investigate and based on *Strickland* this failure rendered the conviction unreliable.⁴⁸

In raising the second issue, the defendant posed an interesting question. If counsel was not diligent, could he be effective?⁴⁹ Counsel stated that the public defender's office was limited by time and money, therefore it was difficult to uncover the exculpatory evidence earlier.⁵⁰ He argued that due to budgetary constraints, the public defender's office must rely upon the state's evidence. In this case all the state's evidence appeared to rule out the suicide defense. The defense urged that the "system" was responsible for counsel's mistaken choice of strategy. Consequently, the system and not Martin Frias should suffer for those errors.⁵¹

After the Wyoming court reviewed the overwhelming evidence indicating suicide, it held that defense counsel failed in his duty to investigate. This resulted in a holding that counsel's actions had fallen below an acceptable standard of reasonableness because he failed to pursue the suicide defense.⁵²

Upon establishing attorney error and following the demands of *Strickland*, the court required a showing of prejudice. The court reviewed the suicide evidence again and speculated on the impact it might have had

43. *Munden*, 698 P.2d at 623.

44. *Strickland*, 466 U.S. at 689; *Munden*, 698 P.2d 621. When examining a claim of ineffectiveness a court looks to whether counsel provided the constitutionally required minimum assistance to the defendant. Defense counsel must fulfill his duty to investigate and to use his skill and knowledge in assisting the defendant in his claim. Upon establishing that counsel fulfilled the minimum requirements, the court gives tremendous deference to counsel's performance.

45. *Frias*, 722 P.2d at 143-44.

46. *Id.* at 144.

47. *Id.* at 145.

48. *Id.* at 145-47.

49. Brief for Appellant at 58.

50. *Id.* at 61.

51. *Id.* at 63.

52. *Frias*, 722 P.2d at 145-47.

on the jury. The majority felt that, if the suicide evidence had been presented to the jury, the verdict could reasonably have been different.⁵³ Furthermore, the court reversed the second degree murder verdict and remanded the case for a new trial.⁵⁴

ANALYSIS

A quick examination of the holding in *Frias* could lead to the faulty conclusion that, where counsel is shown not to have been diligent then he must necessarily have been ineffective. This conclusion is erroneous and arises as a result of the similarities between the test requirements in *Opie* and *Strickland*.

The purpose of the *Opie* test is to evaluate the character of the new evidence presented on the motion for new trial. The purpose of the *Strickland* test is to evaluate attorney performance against constitutionally required standards. To effectuate the purposes of each test it is critical to keep these objectives separate. When the tests are viewed distinctly one can conclude that an attorney who is not diligent may nonetheless still be effective.

The natural question posed by the desire for separation of the tests is obvious: at what point does an attorney's lack of diligence render him ineffective? One can envision a situation where the defense counsel completely lacks diligence in preparation for trial and misses evidence so material as to effect guilt beyond a reasonable doubt. It is in this situation where the development of a bright line separating the purpose of the tests becomes important. This line will differentiate between the case where defense counsel was not diligent but still effective, and where counsel not diligent and subsequently ineffective. Although the Wyoming Supreme Court had an opportunity to develop this point in *Frias* it failed to do so.

The Wyoming Court correctly examined the nature of the newly discovered evidence presented at the post-trial hearing. It agreed with trial court that not only was the evidence cumulative and impeaching but that defense counsel had not diligently searched for the newly discovered testimony.⁵⁵ The key element in this holding was that the court correctly focused upon the evidence itself and how it related to the *Opie* requirements. The question of reasonable diligence in the pre-trial investigation and its relationship to the fundamental fairness of the trial were correctly reserved to be tested under *Strickland*.

When moving from the newly discovered evidence test to the ineffectiveness of counsel test a crucial shift occurs. Under *Opie* there was a bald finding of lack of diligence. Under the *Strickland* analysis the reasonableness of the attorney's diligence becomes the focus of the test for ineffectiveness.

53. *Id.* at 146-47.

54. *Id.* at 147.

55. *Id.*

In applying the ineffectiveness test, the reviewing court should take a subjective view of counsel's overall performance, not an objective view of the attorney's particular failure. If counsel's errors did not adversely effect a reasonable overall performance then the verdict must be upheld. After the subjective review of the attorney's performance, a court may well determine that the attorney was not diligent but still reasonably effective in the overall performance. Under *Strickland*, a finding of this nature would terminate the defendant's sixth amendment claim. Conversely, if the court were to determine that the overall performance was in fact adversely affected by the lack of diligence, the defendant will have satisfied the first prong of *Strickland* leaving the defendant to prove the prejudice element.

The *Strickland* prejudice determination is the appropriate point to develop a bright line. If the defendant can successfully prove that defense counsel's performance was ineffective based on lack of diligence and that it prejudiced his defense, then the defendant should be granted a new trial. This holding concludes that because the defendant was prejudiced by the defense counsel's lack of diligence, the defendant received ineffective assistance of counsel. The second prong of the *Strickland* analysis is clearly the correct point to differentiate between counsel that was not diligent but effective and counsel that was neither diligent nor effective.

Having articulated the difference between the tests and how the prejudice element may be used to develop the dividing line between them, it will be helpful to illustrate these ideas as applied to the *Frias* case. As previously stated, the Wyoming Supreme Court affirmed the denial of the defendant's motion for new trial based on newly discovered evidence. It held the new evidence failed the *Opie* test because defense counsel did not use due diligence in his pre-trial search for the new evidence.

The supreme court correctly applied the *Strickland* test for ineffective counsel. The court agreed with the defendant's claim that defense counsel failed in his duty to investigate and to discover facts supporting a potential suicide defense.⁵⁶ The defendant had repeatedly denied any involvement in the death of Perea.⁵⁷ Defense counsel was aware of Perea's many suicide attempts.⁵⁸ Defense counsel also had knowledge of the conflicting facts discovered during pre-trial investigation.⁵⁹ The court felt all of the evidence known to counsel prior to trial should have prompted an adequate investigation into a possible suicide.⁶⁰ Thus, counsel's lack of diligence adversely affected his overall performance.

In fulfilling the second requirement of the *Strickland* test, the court held that the failure to pursue the suicide defense prejudiced the defense.⁶¹ They felt that there was a reasonable probability that but for counsel's

56. *Id.* at 145-46.

57. *Id.* at 145.

58. *Id.* at 146.

59. *Id.*

60. *Id.*

61. *Id.* at 146-47.

unprofessional errors, the outcome of the trial would have been different.⁶² Ultimately, the holding states that counsel was not diligent and subsequently ineffective.

While the facts used to deny a new trial under *Opie* are the same facts used to remand under *Strickland*, the procedure used to evaluate them was different. The tests were kept separate; the focus under *Opie* was the character of the newly discovered evidence and the focus under *Strickland* was the claimed attorney error.

CONCLUSION

The Wyoming Supreme Court should continue to strive to keep the *Opie* and *Strickland* tests separate in order to maintain their different purposes. The Wyoming Court should also continue to try to define the position of the "bright line" between the point where trial counsel is not diligent yet still effective, and the point where counsel was not diligent and also ineffective.

These points may well be where the new evidence is such that the reliability of the verdict and the fundamental fairness of the proceeding has been adversely affected. Ultimately, when defense counsel's lack of due diligence has prejudiced the defendant, then the interests of justice are best served by granting the defendant a new trial.⁶³

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62. *Id.*

63. On remand, Martin Frias was found not guilty of first degree murder.