

ENTERED
JAN - 6 1992
FILE # 4

CIRCUIT COURT OF OREGON

STATE OF OREGON
MARION COUNTY COURT

MARION COUNTY

JAN 6 1992

FILED
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ELIZABETH DIANE DOWNS,

Petitioner,

-- v.

ROBERT SCHIEDLER,
Superintendent, Oregon
Women's Correctional Center,

Defendant.

No. 87-C-11753

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

Petitioner filed a Petition for Post-Conviction Relief under

ORS 138.510. Defendant filed several motions, including a Motion

to Make More Definite and Certain, and several Motions to

Dismiss, all of which were decided, and preliminary Orders

entered. In addition, Defendant filed a Motion for Summary

Judgment, and the Court granted relief as indicated below. The

remaining issues were tried by the Honorable Duane Ertsgaard on

June 24-26, 1991. Petitioner appeared in person and with her

attorney, Steven Gorham. Defendant appeared through Pamela

Johnstone Walsh and Lynn David Larsen, Assistant Attorneys

General.

I. ALLEGATIONS IN FIFTH AMENDED PETITION

In the Fifth Amended Petition for Post-Conviction Relief,
the final petition filed by petitioner, petitioner alleges that
she should be granted post-conviction relief based on the
following grounds for relief:

A. First Claim for Relief (¶7)

That petitioner's imprisonment was and is illegal in the

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1 proceedings as set forth above and they resulted in a substantial
2 denial of petitioner's rights in violation of
3 ORS 138.530 in that the petitioner was denied the assistance of
4 effective **appellate counsel** under the Sixth and Fourteenth
5 Amendments to the Constitution of the United States and under
6 Article 1 Section 11 of the Constitution of the State of Oregon
7 in that petitioner's **appellate counsel**, even after being
8 instructed to do so by petitioner,

9 A. Did not adequately raise the illegality of
10 Petitioner's sentence.

11 (1) The sentence was based on emotion and
12 vindictiveness which is unconstitutional in
13 Oregon.

14 (2) Did not adequately raise the illegal
15 restitution sentencing issue.

16 (3) Did not raise the illegal consecutive
17 gun minimum issues.

18 B. Did not raise the issue of the restriction
19 placed on the Defense in contacting Christie
20 (prosecution's main witness) which severely
21 prejudiced the defense.

22 C. Did not raise the issue of the denial of
23 providing of grand jury notes to the
24 defense.

25 D. Did not raise the issue of the illegality of
26 Petitioner's sentence in that the trial

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1 Court lacked jurisdiction at the time of the
2 sentence and therefore while Petitioner was
3 found guilty by a jury she has not been
4 legally sentenced.

5 B. -- Second Claim for Relief (§9)

6 That petitioner's imprisonment was and is illegal in the
7 proceedings as set forth above and they resulted in a
8 substantial denial of petitioner's rights in violation of
9 ORS 138.530 in that the petitioner was denied the assistance of
10 effective **trial counsel** under the Sixth and Fourteenth
11 Amendments to the Constitution of the United States and under
12 Article 1 Section 11 of the Constitution of the State of Oregon
13 in that petitioner's **trial counsel**, even after being instructed
14 to do so by petitioner,

15 A. Did not object nor move for a mistrial after
16 the prosecution several times misread
17 crucial pieces of evidence in front of the
18 jury.

19 B. Did not properly investigate the case and
20 prepare an adequate defense in that trial
21 counsel did not:

22 (1) Go through all of the physical evidence
23 supplied to it and thus did not present an
24 adequate defense.

25 (2) Go through all of the discovery supplied
26

1 to it and thus did not present an adequate
2 defense.

3 (3) Investigate and call all potentially
4 helpful witnesses and thus did not present
5 -- an adequate defense.

6 C. Did not move for a change of Venue.

7 D. Did not request a jury poll.

8 C. Third Claim for Relief (¶11)

9 That petitioner's imprisonment was and is illegal in the
10 proceedings as set forth above and they resulted in a
11 substantial denial of petitioner's rights in violation of
12 ORS 138.530 in that the petitioner was convicted after
13 prosecutorial misconduct in that the prosecution and
14 authorities:

15 A. Did not provide the Petitioner with the
16 following discovery:

17 (1) Many pages of medical reports which were
18 exculpatory in nature.

19 (2) All of the physical evidence so that an
20 adequate defense could be prepared.

21 B. Provided the Petitioner with physically
22 tampered documentary discovery.

23 C. Destroyed evidence.

24 D. Tampered with evidence and testimony.

25 E. Allowed perjured testimony to be admitted.

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F. Intentionally misread evidence into the
record and intentionally mislead the jury.

D. Fourth Claim for Relief (§13)

That petitioner's imprisonment was and is illegal in the
proceedings as set forth above and they resulted in a
substantial denial of petitioner's rights in violation of
ORS 138.530 in that the trial Court lacked jurisdiction to
sentence Petitioner when it did sentence her. While Petitioner
was found guilty by a jury she has not yet been legally
sentenced.

II. MOTION TO DISMISS AND MOTION FOR FOR SUMMARY JUDGMENT

The court has previously granted defendants' Motion to
Dismiss paragraph 7C of petitioner's Fifth Amended Petition. In
addition, regarding defendants' Motion for Summary Judgment,
there are no disputes of material fact, and the defendants are
entitled to summary judgment on the following claims alleged in
petitioner's Fifth Amended Petition:

A. First Claim for Relief: Appellate Counsel

¶7A(1): vindictive sentencing

¶7B: restriction on contacting Christie Downs

¶7C: grand jury notes (dismissed on m/dismiss)

B. Second Claim for Relief: Trial Counsel

¶9C: change of venue

¶9D: jury poll

C. Third Claim for Relief: Prosecutorial Misconduct

¶11A(1): Danny Downs medical reports not provided

¶11A(2): Peckels photo in hospital

¶11B: Peckels blurred report

¶11C: Destruction of evidence (fingerprints, car wash, Pond reports, blood spatter evidence in car)

¶11D: "Brainwashing" of Christie, and Wahwahsuk investigation

¶11E: Allowed perjured testimony (Kim Morrison, Evelyn Slaven, Judy Patterson, Jim Murdock)

¶11F: Intentionally read information into record (Danny Downs medical records and the diagnoses of two psychiatrists)

II. FINDINGS OF FACT

The court tried the issues remaining after the rulings on defendants' Motion to Dismiss and Motion for Summary Judgment. The court issues the following findings of fact on the remaining issues.

A. First Claim for Relief (¶7)

1. The trial court sentenced petitioner on August 28, 1984, and entered a sentence Order the same day. The State was allowed 30 days to submit information regarding the amount of restitution. The trial court had jurisdiction to sentence petitioner.

2. Petitioner filed a Notice of Appeal on September 19, 1984.

1 3. The trial court held a hearing and entered an
2 Order of Restitution on October 30, 1984. An Amended Order of
3 Restitution was entered November 9, 1984.

4 4. The trial court did not have jurisdiction to enter
5 the order of restitution because petitioner filed a notice of
6 appeal before the order of restitution was entered.

7 B. Second Claim for Relief (¶9)

8 1. As a general finding, the performance by
9 petitioner's trial counsel, James Jagger, was more than
10 adequate. Jagger exercised valid tactical judgment in all the
11 instances alleged by petitioner. In addition, petitioner
12 presented a difficult case to defend because of the various
13 versions of the shooting she told the authorities.

14 2. Petitioner has failed to establish ineffective
15 assistance of counsel in any of the alleged instances.

16 3. James Jagger had no basis to move for a mistrial
17 regarding any of the three incidents petitioner alleged in
18 paragraph 9A of the Fifth Amended Petition. Jagger made valid
19 tactical judgments, after consulting with petitioner, to not
20 seek a mistrial for any of the three alleged incidents.

21 4. The prosecutor's reading of the Danny Downs
22 medical records was not grounds for a mistrial. This evidence
23 could be construed as favorable to petitioner's case, or at
24 least equivocal.

25 5. The prosecutor's quotation from the report and
26 cover letter of Dr. Mann was not grounds for a mistrial. The

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1 report was introduced in this proceeding. The prosecutor did
2 not misquote those documents.

3 6. The prosecutor's cross-examination question to
4 petitioner regarding the Polly Jamison report was not grounds
5 for a mistrial. There was nothing improper about the
6 prosecutor's question, which came during a very lengthy
7 cross-examination of petitioner.

8 7. James Jagger adequately reviewed all the evidence
9 that was available to him, and properly and adequately dealt
10 with the evidence at petitioner's trial.

11 8. There was nothing exculpatory about the photograph
12 of the car which petitioner asserts should have been introduced
13 at trial. A photograph of the driver's seat was introduced at
14 trial and it also is not exculpatory.

15 9. The report by James Pex, indicating that a blood
16 droplet on the back of petitioner's pants dripped downward, was
17 not exculpatory, or even evidence that petitioner was standing
18 when she was shot. Mr. Pex states in his affidavit that the
19 blood droplet was consistent with a theory that petitioner was
20 sitting when shot. The pants were introduced as evidence at the
21 trial. The report added nothing.

22 10. James Jagger introduced all available x-rays of
23 petitioner's left arm. The x-rays do not show that
24 petitioner's bones were "jammed back." Rather, the x-rays show
25 only an injury consistent with a gunshot wound.

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1 11. There were no photographs of petitioner at the
2 hospital on the night of the shootings for James Jagger to
3 introduce.

4 12. James Jagger thoroughly reviewed the report by
5 "Roy Pond" regarding an interview with Judith Patterson. His
6 decision not to introduce the report did not prejudice
7 petitioner, because the report was not really inconsistent with
8 Patterson's testimony.

9 13. James Jagger received and reviewed all the
10 medical reports of Danny Downs that the State had received from
11 Sacred Heart General Hospital before or during the time of
12 trial. The records from May 25, 1984 to June 21, 1984 were
13 introduced in evidence in this proceeding. Neither the State,
14 nor Jagger had received these reports before or during trial.
15 Nothing in those reports, however, is exculpatory to petitioner,
16 and petitioner was not prejudiced by not having those reports at
17 trial.

18 14. Neither the legible "property report" of John
19 Peckels, nor the blurred copy of that report are of any
20 significance to petitioner's case. Petitioner was never in
21 custody at any time she made statements to the police. James
22 Jagger is not to be faulted for failing to obtain a legible copy
23 of the property report, especially when the defense received
24 hundreds of pages of discovery.

25 15. Petitioner clearly misunderstands the trial
26 testimony of James Murdock, and the evidence submitted in this

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1 proceeding on the issue of whether Murdock should have been
2 impeached. Murdock's trial testimony clearly linked the casings
3 found in petitioner's car and at the scene of the crime with
4 cartridges found in a rifle in petitioner's home the night of
5 the shootings. The only expert testimony introduced in this
6 proceeding is that Murdock's trial testimony was completely
7 correct. Petitioner confuses the terminology of the experts and
8 does not understand the nature of the expert testimony. There
9 was no impeachment of James Murdock that James Jagger could have
10 effectively accomplished. This is highlighted by petitioner's
11 own expert, Bart Reid, who agreed with the analysis and
12 testimony of Murdock.

13 16. James Jagger was not ineffective for failing to
14 introduce the psychological reports of Dr. Paul Mann and Dr.
15 Fred Lipovich (which is actually a report by Dr. Mario Tafur,
16 who was associated with Lipovich). The reports do not support
17 petitioner's defense that she was unemotional, and they contain
18 many negative conclusions which would have hurt petitioner's
19 defense. Jagger's decision not to use these reports was a
20 validly exercised tactical judgment, and entirely appropriate.

21 17. James Jagger was not ineffective for failing to
22 call Dr. Polly Jamison as a witness at trial. Dr. Jamison's
23 testimony would not have been relevant, and would have
24 potentially allowed the prosecutor to extensively inquire into
25 petitioner's psychological profile. Jagger wisely chose not to
26 have Dr. Jamison testify.

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1 18. James Jagger was not ineffective for failing to
2 call Dr. Jerry Vergamini as a witness at trial. Jagger made a
3 valid tactical decision not to call Dr. Vergamini.

4 19. James Jagger was not ineffective for failing
5 contacting a potential witness, Burrell Webb. Burrell Webb had
6 no relevant information regarding petitioner's guilt or
7 innocence, and would have detracted from the credibility of
8 petitioner's defense.

9 C. Fourth Claim for Relief (¶13)

10 1. The Trial Court sentenced petitioner on August 28,
11 1984, and entered a sentence Order the same day. The State was
12 allowed 30 days to submit information regarding the amount of
13 restitution. At the time of the sentencing on August 28, 1984,
14 the court had jurisdiction to sentence petitioner.

15 2. The trial court did not have jurisdiction to
16 impose the restitution order on October 30, 1984, or the amended
17 restitution order on November 9, 1984, because petitioner had
18 filed a notice of appeal on September 19, 1984.

19 III. CONCLUSIONS OF LAW

20 The Court issues the following Conclusions of Law relating
21 to the claims remaining after the rulings on defendants' Motion
22 to Dismiss and Motion for Summary Judgment.

23 A. First Claim for Relief (¶7)

24 1. The second and third consecutive minimum sentences
25 imposed on petitioner on August 28, 1984 under ORS 161.610 are
26 vacated pursuant to State v. Hardesty, 68 Or App 591, 682 P2d

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1 824 (1984), aff'd., 298 Or 616, 695 P2d 569 (1985). The first
2 consecutive minimum sentence imposed under ORS 161.610 was
3 proper and is not vacated.

4 2. The trial court had jurisdiction to sentence
5 petitioner on August 28, 1984, and the sentence petitioner
6 received on that day remains valid, except for the vacation of
7 the second and third minimum sentences imposed under ORS
8 161.610.

9 3. The Order of Restitution dated October 30, 1984
10 and the Amended Order of Restitution dated November 4, 1984, are
11 vacated pursuant to State v. Rickey, 97 Or App 41, 775 P2d 327
12 (1989).

13 4. Based on the rulings above, petitioner's claim of
14 ineffective assistance of appellate counsel is moot, and the
15 court makes no specific ruling on whether appellate counsel was
16 or was not effective.

17 B. Second Claim for Relief

18 1. Petitioner received the effective assistance of
19 trial counsel.

20 2. Trial counsel had no basis to move for mistrial
21 regarding any of the incidents alleged by petitioner.

22 3. Trial counsel's investigation and preparation for
23 petitioner's trial was more than adequate.

24 4. Trial counsel exercised valid tactical judgments
25 regarding all the incidents alleged by petitioner, including
26

1 counsel's decision not to call the the witnesses identified by
2 petitioner.

3 C. Fourth Claim for Relief

4 1. The trial court had jurisdiction to sentence
5 petitioner on August 28, 1984, and the sentence petitioner
6 received on that day remains valid, except for the vacation of
7 the second and third minimum sentences imposed under ORS
8 161.610.

9 IV. ORDER

10 A. Defendants are granted summary judgment on the issues
11 stated in paragraph II. above.

12 B. Petitioner is granted relief only as follows:

13 1. The second and third consecutive minimum sentences
14 imposed on petitioner on August 28, 1984 under ORS 161.610 are
15 vacated pursuant to State v. Hardesty, 68 Or App 591, 682 P2d
16 824 (1984), aff'd., 298 Or 616, 695 P2d 569 (1985). The first
17 consecutive minimum sentence imposed under ORS 161.610 was
18 proper and is not vacated.

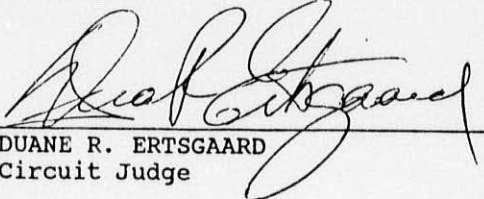
19 2. The Order of Restitution dated October 30, 1984
20 and the Amended Order of Restitution dated November 4, 1984,
21 are vacated pursuant to State v. Rickey, 97 Or App 41, 775 P2d
22 327 (1989).

23 C. Petitioner is denied relief on every other claim
24 remaining after summary judgment, and petitioner's conviction
25 and sentence remains valid in all respects except as stated
26

1 above. Except for the relief granted above, the Fifth Amended
2 Petition is hereby dismissed with prejudice.

3 D. Judgment shall be entered accordingly.

4 DATED this 6 day of January, 1992.

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8 DUANE R. ERTSGAARD
Circuit Judge

9 Submitted by: Lynn David Larsen
10 Assistant Attorney General
of Attorneys for Defendant

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