

FILED: August 13, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

SHAWN W. FIELD,
Petitioner-Appellant,

v.

RICK COURSEY, Superintendent, Eastern Oregon Correctional Institution,
Defendant-Respondent.

Umatilla County Circuit Court
CV101492

A150431

James R. Hargreaves, Senior Judge.

Submitted on March 18, 2014.

Erin Galli and Chilton & Galli, LLC, filed the brief for appellant.

Mary H. Williams, Deputy Attorney General, Anna M. Joyce, Solicitor General, and
Carson L. Whitehead, Assistant Attorney General, filed the brief for respondent.

Before Sercombe, Presiding Judge, and Hadlock, Judge, and Tookey, Judge.

TOOKEY, J.

Affirmed.

1 TOOKEY, J.

2 Petitioner appeals a judgment denying his petition for post-conviction
3 relief. He argues that he received inadequate assistance of appellate counsel when, after
4 his judgment of conviction was affirmed by this court, appellate counsel failed to file
5 either a petition for review with the Oregon Supreme Court or a motion to withdraw as
6 counsel. Because petitioner failed to preserve his arguments regarding the nature of the
7 alleged prejudice that he suffered as a result of appellate counsel's representation, we do
8 not address them on appeal and, accordingly, we affirm the decision of the post-
9 conviction court.

10 The following procedural facts are not in dispute. Following a jury trial,
11 defendant was convicted of murder, ORS 163.115; assault, ORS 163.175; criminal
12 mistreatment, ORS 163.205; and manufacture of a controlled substance, *former*
13 ORS 475.999 (2003), *renumbered as* ORS 475.904 (2005). Petitioner appealed to this
14 court, challenging three of the trial court's rulings: (1) the denial of a motion to suppress
15 petitioner's statements; (2) the denial of a motion for a mistrial; and (3) the imposition of
16 consecutive sentences. We affirmed the judgment of conviction in September 2009.
17 *State v. Field*, 231 Or App 115, 218 P3d 551 (2009).

18 In October 2010, petitioner initiated post-conviction proceedings. In a
19 formal petition for post-conviction relief, petitioner claimed, among other things, that
20 appellate counsel had provided inadequate assistance following his direct appeal in the
21 Court of Appeals:

1 "Petitioner * * * alleges that he was denied effective assistance of
2 appellate counsel in violation of Article I, section 11 of the Oregon
3 Constitution and the 6th Amendment of the U.S. Constitution, made
4 applicable to the states by the 14th Amendment to the United States
5 Constitution and *Strickland v. Washington* [466 US 668, 104 S Ct 2052,
6 80 L Ed 2d 674 (1984)] in the following manner:

7 "a. Appellate Counsel was ineffective in failing to keep
8 Petitioner fully informed of the status of his appeal, therefore causing
9 Petitioner to lose additional time that may be required in order to file his
10 federal habeas corpus.

11 "b. Appellate Counsel was ineffective in failing to assist
12 Petitioner in what steps he needed to take in order to further preserve his
13 constitutional rights.

14 "c. Appellate [C]ounsel was ineffective in failing to adequately
15 communicate with Petitioner regarding the status of his appeal and the next
16 procedural steps Petitioner would need to take in order once his appeal was
17 final."

18 At the post-conviction trial, petitioner provided evidence that, beginning in April 2010,
19 he had repeatedly asked appellate counsel about the status of his appeal, and that he had
20 asked appellate counsel to "please withdraw from his services so that he could continue
21 on his appellate process with * * * a public defender or court-appointed attorney."
22 Petitioner stated that he had "received absolutely no response from [appellate counsel]
23 regarding what was going on [or] what [he] needed to do." Petitioner stated that, as a
24 result, he "lost some very precious time for his federal habeas corpus time," and that
25 appellate counsel "did not actually even file a motion to withdraw until October of 2010
26 so that [petitioner] could go forward on his process."

27 For its part, the state¹ relied on the trial memorandum that it had submitted

¹ Defendant is the superintendent of the Eastern Oregon Correctional Institution.

1 to the post-conviction court. In that memorandum, the state asserted that, "[i]n order to
2 prevail on a claim of ineffective assistance of appellate counsel, petitioner must establish
3 '(1) a competent appellate counsel would have asserted the claim, and (2) that had the
4 claim of error been raised, it is more probable than not that the result would have been
5 different.'" (quoting *Guinn v. Cupp*, 304 Or 488, 496, 747 P2d 984 (1987)). The state
6 contended that petitioner had failed to state a claim for relief, because petitioner's alleged
7 prejudice--"los[ing] additional time that may be required in order to file his federal
8 habeas corpus"--was a "prospective[,] potential harm" that had "nothing to do with the
9 proceedings that resulted in conviction." According to the state, petitioner's three claims
10 "fail[ed] to show how petitioner's constitutional rights were violated in the underlying
11 criminal proceedings." The state added that, even if petitioner's complaints stated a claim
12 for post-conviction relief, petitioner had failed to submit sufficient evidence to prove his
13 claims.

14 The post-conviction court denied petitioner's petition, stating, "in short, I
15 would say that I agree a hundred percent with [the state]." Regarding petitioner's three
16 claims of inadequate assistance of appellate counsel, the court stated, "I see no basis in
17 post-conviction for these at all, and so they--they don't even state a claim."² Petitioner
18 now appeals.

For clarity, we refer to defendant in these post-conviction proceedings as "the state."

² The post-conviction judgment does not indicate that the petition was dismissed as meritless pursuant to ORS 138.525, and as such, is not appealable.

1 On appeal, petitioner argues that appellate counsel was inadequate when he
2 failed to either file a petition for review in the Supreme Court or take steps to withdraw
3 as counsel so that petitioner could "pursue other options." He contends that appellate
4 counsel's failure to act prejudiced him in two ways: first, he lost the opportunity to seek
5 review from the Supreme Court, which "could have resulted in the reversal of his
6 convictions"; second, he will likely be foreclosed from raising claims for habeas corpus
7 relief in federal court because he was unable to exhaust his state remedies.

8 Our review in post-conviction proceedings is for legal error. ORS 138.650;
9 ORS 138.220. A petitioner is entitled to post-conviction relief if he establishes "[a]
10 substantial denial in the proceedings resulting in petitioner's conviction, or in the
11 appellate review thereof, of petitioner's rights under the Constitution of the United States,
12 or under the Constitution of the State of Oregon, or both, and which denial rendered the
13 conviction void." ORS 138.530(1)(a). When a petitioner claims that he received
14 inadequate assistance of legal counsel in violation of Article I, section 11, of the Oregon
15 Constitution, the petitioner must show, by a preponderance of the evidence, that counsel
16 "failed to exercise reasonable professional skill and judgment and that the petitioner
17 suffered prejudice as a result." *Holloway v. Gower*, 225 Or App 176, 180, 200 P3d 584
18 (2009) (citing *Trujillo v. Maass*, 312 Or 431, 435, 822 P2d 703 (1991)). In *Holloway*, we
19 also noted that "[t]o prevail under the Sixth Amendment [to the United States
20 Constitution], a petitioner must prove that counsel's performance 'fell below an objective
21 standard of reasonableness * * * under prevailing professional norms' and that there is a

1 'reasonable probability that, but for counsel's unprofessional errors, the result of the
2 proceeding would have been different.'" *Id.* (quoting *Strickland*, 466 US at 694)
3 (omission in *Holloway*).

4 Similarly, the Oregon Supreme Court has explained that

5 "[a] plaintiff seeking post-conviction relief stemming from a claim
6 of inadequate assistance of appellate counsel for failing to assert a claimed
7 error must establish (1) that a competent appellate counsel would have
8 asserted the claim, and (2) that had the claim of error been raised, it is more
9 probable than not that the result would have been different. In short, the
10 post-conviction plaintiff must show that he or she was prejudiced."

11 *Guinn*, 304 Or at 496. Thus, a petitioner seeking post-conviction relief based on a claim
12 that appellate counsel failed to assist him in filing a petition for review in the Supreme
13 Court must establish that (1) a competent appellate counsel would not have failed to
14 assist petitioner in filing a petition for review and (2) had appellate counsel assisted
15 petitioner in filing a petition for review, it is more probable than not that the result would
16 have been different.³

³ We note that when a petitioner seeks post-conviction relief based on a claim that counsel failed to file a timely notice of appeal after trial, the deprivation of appellate review is itself sufficient to satisfy the prejudice requirement. *See Shipman v. Gladden*, 253 Or 192, 199, 203, 453 P2d 921 (1969) (stating that "[t]he failure of counsel to timely file a notice of appeal after he has been requested or agreed to do so is incompetence as a matter of law and a denial of due process" and "[s]ince the state's criminal process would be found lacking in fundamental fairness if it permitted the deprivation of appellate review by the culpable neglect of counsel, the state must provide a remedy adequate to restore the impaired right"); *Daniel v. Cupp*, 54 Or App 824, 829, 636 P2d 452 (1981), *rev den*, 293 Or 103 (1982) (when a petitioner's counsel fails to timely file a notice of appeal, he is entitled to a delayed appeal "without establishing, as a precondition, that his appeal would be meritorious"). However, this case is distinguishable from *Shipman* and *Daniel* because petitioner in this case, unlike a petitioner whose counsel's actions deprived him of appellate review, had already had appellate review in the Court of Appeals.

1 Here, petitioner failed to sufficiently preserve before the post-conviction
2 court the arguments that he now makes regarding prejudice. Accordingly, he cannot
3 prevail on his challenge to that court's ruling.

4 ORAP 5.45(1) provides that, "[n]o matter claimed as error will be
5 considered on appeal unless the claimed error was preserved in the lower court * * *."
6 *See also Ailes v. Portland Meadows, Inc.*, 312 Or 376, 380, 823 P2d 956 (1991) (noting
7 that, generally, an issue must have been preserved in the trial court for the appellate court
8 to address it on appeal). We have a "duty to determine, *sua sponte*, whether the
9 arguments that an appellant raises on appeal are adequately preserved for our review."
10 *State v. Cossette*, 256 Or App 675, 680, 301 P3d 954 (2013). As we have explained,
11 "[p]reservation principles apply in the context of post-conviction relief and, as a general
12 rule, arguments not made to the post-conviction court in support of a claim will not be
13 considered on appeal." *Hale v. Belleque*, 255 Or App 653, 660, 298 P3d 596, *adh'd to on*
14 *recons*, 258 Or App 587, 312 P3d 533, *rev den*, 354 Or 597, 312 P3d 533 (2013). The
15 preservation requirement serves several goals, including judicial efficiency, fairness to
16 opposing parties, and full development of the record. *Peeples v. Lampert*, 345 Or 209,
17 219-20, 191 P3d 637 (2008). As the Oregon Supreme Court has explained, "a party must
18 provide the trial court with an explanation of his or her objection that is specific enough
19 to ensure that the court can identify its alleged error with enough clarity to permit it to
20 consider and correct the error immediately, if correction is warranted." *State v. Wyatt*,
21 331 Or 335, 343, 15 P3d 22 (2000). In sum, the petitioner "must have alerted the trial

1 judge and opposing counsel to the substance of the position that is advanced on appeal."
2 *State v. Taylor*, 198 Or App 460, 469, 108 P3d 682, *rev den*, 339 Or 66 (2005).

3 As noted above, petitioner's petition for post-conviction relief alleged that
4 appellate counsel was "ineffective in failing to keep Petitioner fully informed of the status
5 of his appeal, therefore causing Petitioner to lose additional time that may be required in
6 order to file his federal habeas corpus"; that appellate counsel was "ineffective in failing
7 to assist Petitioner in what steps he needed to take in order to further preserve his
8 constitutional rights"; and that appellate counsel was "ineffective in failing to adequately
9 communicate with Petitioner regarding the status of his appeal and the next procedural
10 steps" he needed to take once his appeal was final. Petitioner's arguments in the
11 proceeding before the post-conviction court mirrored those set forth in his petition.

12 On appeal, however, petitioner first argues that Oregon Supreme Court
13 review "could have resulted in the reversal of his convictions" and second, that he will
14 "likely be foreclosed" from raising claims for federal habeas corpus relief, because he has
15 been prevented him from exhausting his state remedies, and therefore may be found to
16 have procedurally defaulted. *See* 28 USC § 2254(b)(1)(A) ("An application for a writ of
17 habeas corpus on behalf of a person in custody pursuant to the judgment of a State court
18 shall not be granted unless it appears that * * * the applicant has exhausted the remedies
19 available in the courts of the State[.]"); *but see Coleman v. Thompson*, 501 US 722, 750,
20 111 S Ct 2546, 115 L Ed 2d 640 (1991) (federal court can consider the merits of a
21 procedurally defaulted claim if the petitioner can demonstrate "cause for the default and

1 actual prejudice as a result of the alleged violation of federal law, or demonstrate that
2 failure to consider the claims will result in a fundamental miscarriage of justice").

3 As such, the arguments presented to the post-conviction court were
4 qualitatively different from those now presented to this court. While in his petition for
5 post-conviction relief and in proceedings before the post-conviction court, petitioner
6 argued that appellate counsel did not keep him fully informed of the status of his appeal,
7 failed to assist him in what steps he needed to take in order to further preserve his
8 constitutional rights, and failed to adequately communicate with him regarding the status
9 of his appeal, neither in his petition nor in the proceeding before the post-conviction court
10 did petitioner advance the arguments he now makes before this court.

11 Regarding petitioner's first argument on appeal, petitioner did not argue to
12 the post-conviction court that he might have prevailed in the Oregon Supreme Court, or
13 present or explain the basis on which he believes that his criminal conviction could have
14 been overturned. As a result, petitioner's arguments in the proceeding before the post-
15 conviction court would not "have alerted the [post-conviction trial] judge and opposing
16 counsel to the substance of the position that is advanced on appeal." *Taylor*, 198 Or App
17 at 469.

18 Similarly, regarding petitioner's second argument on appeal, petitioner did
19 not argue to the post-conviction court that he will likely be foreclosed from raising claims
20 for habeas corpus relief in federal court because he was unable to exhaust his state
21 remedies. Thus, as with petitioner's first argument on appeal, the petitioner's arguments in

1 the proceeding before the post-conviction court would not "have alerted the [post-
2 conviction trial] judge and opposing counsel to the substance of the position that is
3 advanced on appeal." *Id.*

4 Because petitioner failed to preserve his arguments regarding the nature of
5 the alleged prejudice that he suffered as a result of appellate counsel's representation, we
6 do not address them on appeal and, accordingly, we affirm the decision of the post-
7 conviction court.

8 Affirmed.