UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

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| TIMOTHY TIESS, | ) | |
| | ) | |
| Petitioner | ) | |
| | ) | |
| v. | ) | Civil No. 04-61-P-C |
| | ) | |
| JEFFREY MERRILL, | ) | |
| | ) | |
| Respondent | ) | |

**RECOMMENDED DECISION**

Timothy Tiess is pursuing a petition for relief from his conviction in the State of Maine filed pursuant to 28 U.S.C. § 2254 after pleading guilty to twenty-six counts of burglary and eleven counts of theft. I now recommend that the Court **DENY** Tiess § 2254 relief for the reasons that follow.

***Background***

Before proceeding to the merits, there is some pertinent procedural background to this case. Previously I recommended dismissing this petition as the petition, filed through counsel, did not adequately explain Tiess's § 2254 grounds and counsel had not responded to an order to supplement the petition. After my recommended decision entered, however, counsel filed an objection to that recommendation, explaining that his lack of response to the order to supplement was due to his misperception that he need not comply with the order that he received electronically until he received a written order in regular post. Attached to this objection is a nine-page copy of Tiess's memorandum in support of his request for a certificate of probable cause vis-à-vis the denial of his State court petition for post-conviction review. Counsel explains in his objection that Tiess

wishes to resurrect the grounds raised in this memorandum in the federal forum. The District Court Judge reserved decision on my recommended decision in light of this submission and remanded the case to me for a determination as to whether the materials submitted are sufficient to save the petition from dismissal. I concluded that they were sufficient and ordered the State of Maine to answer.

***Discussion***

Tiess presented two grounds under the Sixth Amendment of the United States Constitution in this memorandum seeking a certificate of probable cause.[1] One, he claimed he was denied effective assistance of counsel when his attorney failed to inform him that he was also representing the probation officer who was preparing Tiess's presentence investigation report. Two, he believed he was denied effective assistance of counsel when his attorney failed to file a motion to suppress alleging a violation of Miranda v. Arizona, 384 U.S. 436 (1966). On the night of Tiess's arrest officers, awaiting Tiess's arrival at his residence, approached Tiess with at least one gun drawn and Tiess confessed to a series of burglaries while in a police cruiser without having had his Miranda rights read. The next morning Tiess was read his Miranda rights as a prelude to a drive-about to identify premises that Tiess was involved in burglarizing. Thereafter Tiess was again read his Miranda rights prior to completing an incriminating affidavit. With respect to the motion to suppress issue, Tiess claims that counsel told him that the motion to suppress should not be pursued because it might antagonize the presiding judge and that, if it turned out that he had the same judge for his sentencing, the pursuit of that

[1] Although the State covers its bases in its answer and addresses a third ground, it is clear from Tiess's memorandum that the third ground – concerning the improper credit of time served – was corrected in the state post-conviction proceedings. (Opp'n Rec. Dec. at 6; see also Post-Conviction Review Tr. at 50, 57-60.) As his own memorandum seeking a certificate of probable cause states that the problem was corrected, it is a mystery to me why Tiess did list this ground on his form § 2254 petition.

motion to suppress could result in a harsher sentence. Both these grounds were addressed by the state post-conviction court. (Post-conviction Tr. at 50.)

When it enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), Congress set forth the standard under which I review Tiess's challenge to his state court conviction:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
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> **(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Apropos the two § 2254 prongs, in Williams v. Taylor the United States Supreme Court has made it clear that the "contrary to" and "unreasonable application" clauses of subsection (d)(1) require distinct inquiries. 529 U.S. 362, 404 (2000). In Penry v. Johnson, the Court reiterated the different schematics of the two clauses:

> A state court decision will be "contrary to" our clearly established precedent if the state court either "applies a rule that contradicts the governing law set forth in our cases," or "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." [Williams, 529 U.S.] at 405-406. A state court decision will be an "unreasonable application of" our clearly established precedent if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." Id., at 407-408.
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> "[A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." Id., at 409. Distinguishing between an unreasonable and an incorrect application of federal law, we clarified that even if the federal habeas court concludes that the state court decision applied clearly established federal law

> incorrectly, relief is appropriate only if that application is also objectively unreasonable. Id., at 410-411.

532 U.S. 782, 792-93 (2001).[2]

In general, for purposes of subsection (d)(1), Strickland v. Washington, 466 U.S. 668 (1984), see Williams v. Taylor, 529 U.S. 362, 390 (2000) ("The threshold question under AEDPA is whether Williams seeks to apply a rule of law that was clearly established at the time his state-court conviction became final. That question is easily answered because the merits of his claim are squarely governed by our holding in Strickland v. Washington, 466 U.S. 668 (1984)."), and Hill v. Lockhart, 474 U.S. 52 (1985), see United States v. Colon-Torres, __ F.3d __, , *8 (1st Cir. Sep. 9, 2004), are the clearly established law under which I analyze Tiess's claims that the attorney who represented him through his plea and sentencing was ineffective.

Colon-Torres explicates the Strickland/Hill Sixth Amendment standard:

> The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." It is well settled that this right to effective assistance of counsel attaches at all critical stages of the trial, United States v. Wade, 388 U.S. 218 (1967), including at sentencing. Gardner v. Florida, 430 U.S. 349, 358 (1977) (holding that "sentencing is a critical stage of the criminal proceeding at which [defendant] is entitled to the effective assistance of counsel").
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> The touchstone for any ineffective assistance of counsel claim is the two-part test laid down by the Supreme Court in Strickland v. Washington, 466 U.S. 668(1984).
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> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial

[2] Tiess's attorney rests solely on his arguments made to the state courts; he has made no attempt to explain why Tiess would be entitled to § 2254 relief in view of the limitations of federal review. The State's memorandum sets forth the standard but provides only a terse, conclusory § 2254 analysis of the substance of Tiess's grounds.

> whose result is reliable. Id. at 687. In other words, defendant "must show that counsel's performance was so deficient that it prejudiced his defense." United States v. Ademaj, 170 F.3d 58, 64 (1st Cir.1999) (summarizing Strickland). As the Strickland Court explained, "[u]nless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Strickland, 466 U.S. at 687.
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> In Hill v. Lockhart, 474 U.S. 52 (1985), the Supreme Court applied Strickland's two-part test to ineffective assistance of counsel claims in the guilty plea context. Id. at 58 ("We hold, therefore, that the two-part Strickland v. Washington test applies to challenges to guilty pleas based on ineffective assistance of counsel."). As the Hill Court explained, "[i]n the context of guilty pleas, the first half of the Strickland v. Washington test is nothing more than a restatement of the standard of attorney competence already set forth in [other cases]. The second, or 'prejudice,' requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Id. at 58-59. Accordingly, [the movant] will have to show on remand "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59.

Id. at *7 -8. On my review of the state post conviction transcript (Post-conviction Tr. at 3-4, 50-57; see also id. at 49) I conclude that, although Strickland and Hill were not mentioned by name by the parties or the Court this was the law with which the Court framed its analysis of these two claims.[3] Even if I am mistaken on this score, at the very

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[3] The State's attorney prefaced his argument at the close of the post-conviction hearing by stating that he knew the court was familiar with Laferriere v. State, 1997 ME 169, 697 A.2d 1301. (Post-conviction Tr. at 49.) In Laferriere -- an opinion penned by then Maine Supreme Court Justice Lipez who, as Circuit Judge, penned Colon-Torres -- the Maine Supreme Court stated:

> This case marks the first occasion we have had to apply the Strickland test to an ineffective assistance of counsel claim arising out of a plea proceeding. The Supreme Court has already done so. In Hill v. Lockhart, 474 U.S. 52 (1985), petitioner Hill challenged his guilty plea as involuntary because of the ineffective assistance of counsel. Hill claimed that his lawyer advised him that if he pleaded guilty he would be eligible for parole after serving only a third of his sentence, when in actuality he would not have been eligible until he had served half of his sentence. 474 U.S. at 55. The Court held that "the same two-part standard" of Strickland is "applicable to ineffective assistance claims arising out of the plea process." 474 U.S. at 57. The Court further held that while the first prong of the Strickland test remains the same in a plea proceeding,
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> > [t]he second, or 'prejudice,' requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's

least the court's analysis fits within the Strickland/Hill framework. See Mitchell v. Esparza, 540 U.S. 12, __, 124 S. Ct. 7, 10 -11 (2003) (observing that a state court's decision is not contrary to clearly established federal law simply because the court did not cite a Supreme Court decision; a state court need not even be aware of Supreme Court precedents "'so long as neither the reasoning nor the result of the state-court decision contradicts them'") (quoting Early v. Packer, 537 U.S. 3, 8 (2002)).

The Maine Supreme Court denied Tiess a certificate of probable cause. Therefore, the state decision I review under 28 U.S.C. § 2254 is that of the post-conviction court's, the reasoning of which was stated on the record at the closure of the evidentiary hearing.

***Conflict of Interest***

With respect to ineffective assistance claims premised on a conflict of interest the First Circuit Court of Appeals has stated: "Few commitments from an attorney to a client are more important than 'a duty of loyalty, a duty to avoid conflicts of interest.'" Colon-Torres, 2004 WL 2005624, at *10 (quoting Strickland, 466 U.S. at 688). In Colon-Torres the First Circuit restated its holding that, "'in order to show an actual conflict of interest, a defendant must show that (1) the lawyer could have pursued a plausible alternative defense strategy or tactic and (2) the alternative strategy or tactic was inherently in conflict with or not undertaken due to the attorney's other interests or loyalties.'" Id. (quoting United States v. Soldevila-Lopez, 17 F.3d 480, 486 (1st Cir.1994)).

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errors, he would not have pleaded guilty and would have insisted on going to trial.

474 U.S. at 59.

1997 ME 169, ¶ 7, 697 A.2d at 1304 -05.

Regarding trial counsel's alleged conflict of interest, the post-conviction court reasoned:

> [W]ith reference to the conflict with [the probation officer], there might have been a conflict if [the officer] was on the opposite side of a civil case with [Tiess's attorney]. In fact, an obvious example of say [Tiess's attorney] was representing [the officer]'s wife in a divorce action. That might have been a different situation because that's the type of civil case where people have an intense interest and sometimes aren't happy with the attorney on the other side. This is not that kind of case.
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> Here [the officer], just like the Petitioner, was a client of [Tiess's attorney]. They were fellow clients. There was no conflict in their interests. There would be no basis for [Tiess's attorney] to have divided loyalties, or that either Mr. Tiess's case or [the officer]'s were in any fashion connected. More importantly, [Tiess's attorney] representing [the officer] occurred after the decision to plead guilty was made. And so [the officer]'s only role in this case thereafter was in the presentence investigation, which turned out [, in Tiess's attorney]'s[] view[,] which the court finds to be credible, was a successful approach to a difficult sentencing circumstance where the State wanted 25 years and the defendant and his attorney decided to plead open.
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> Instead, in the end, the court finds that there was no conflict that would have in any way interfered with [Tiess's attorney]'s effective representation of Mr. Tiess or his loyalty to him as a client.

(Post-Conviction Tr. at 50-51.)

I have examined the transcript of the evidentiary hearing and in that proceeding Tiess did not introduce any evidence as to how his attorney's representation of the officer adversely impacted the contents of the pre-sentence investigation and he is not entitled to an evidentiary hearing to do so in this forum. See 28 U.S.C. 2254(e)(2).[4] The testimony

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[4] This subsection of § 2254 provides:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
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> **(A)** the claim relies on—
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> **(i)** a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
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> **(ii)** a factual predicate that could not have been previously discovered through the exercise of due diligence; and

and argument in front of the state court on the issue of the conflict of interest was very limited.

The following timeline helps one follow the testimony on this score. Tiess was on probation at the time he was arrested and indicted on fifty-four counts of theft and burglary in April 2000. In June 2000 Tiess, assisted by the same counsel representing him on the new charges, plead guilty to violating his probation vis-à-vis the new criminal conduct. On August 10, 2000, Tiess changed his plea to guilty on the April 2000 indictment. The probation officer approached his attorney about representing the officer in a civil matter some time early in September 2000. In late October or early November 2000 Tiess contacted another attorney making inquiries about the possible conflict of interest and the quality of his current representation but never attempted to change counsel. On March 7, 2001, Tiess was sentenced to twenty-five-years with all but five-years suspended on the new criminal conduct, followed by ten years of probation to be served consecutively to a seven-year term of imprisonment imposed on the probation violation.

On direct examination by his post-conviction attorney Tiess testified that a week or two after his August 10, 2000, guilty plea to the new criminal charges, his attorney told him about his representation of the probation officer. (Post-conviction Tr. at 5, 17.) "At the time," Tiess stated "I really didn't know what to do because I was [naïve]. I didn't know if it was legal or not. But at the time I thought he was helping me to the best of his ability because I did not know the implications of how it could help me." (Id. at 5.)

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> **(B)** the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

Tiess claimed that his attorney told him that he thought that his having the probation officer as a client could help Tiess. (Id. at 17.) Tiess stated that he contacted another local attorney to verify whether his counsel was doing his best given the conflict of interest and testified concerning a letter in which the local attorney's response was that it was legal for his current attorney to continue with his representation of Tiess and indicated to Tiess that his attorney was doing his best. (Id. at 7, 19, 21.)[5] This second attorney told Tiess that he would need a $5000 retainer if he were to represent him. (Id. at 7-21.) At this juncture, Tiess stated, he was satisfied with his current attorney's representation (id. at 7, 19-20) and he was not concerned about his simultaneous representation of the probation officer (id. at 18). At this point Tiess just wanted to get the sentencing over with, put the matter behind him, and stop doing "dead time." (Id. at 19-20.)

Tiess testified that his family became concerned about the potential for conflict of interest and explained, "I didn't realize what implications it had on my case until after I had a chance to think about it and look in some law books and know what is what." (Id. at 18.) Tiess was then asked, "What implication, what problem do you have with the fact that [your attorney] also represented [the probation officer]?" Tiess responded:

> I have a problem because it's a conflict of interest for one thing. And I believe that not knowing that he was retained by the [probation officer], I believe I should have gone forward with trial and not retained his advice and taken a plea bargain and gone forward with the Miranda violations.... I thought with the Miranda violations that the confession would be suppressed, and at that point I don't believe they had any evidence other than that, if I remember correctly. I may be wrong.

(Id. at 18-19.)

[5] Although this letter was entered into evidence in the state proceeding it has not been supplied by either party to this proceeding. It is not clear to me on what basis this attorney represented to Tiess that his present attorney was doing his best.

Tiess's attorney testified that at some point after the plea and prior to sentencing he had a conversation with Tiess in which the attorney told Tiess that the probation officer had contacted him about handling a civil matter. (Id. at 24.) He stated that he told Tiess that as long as he represented the officer in an appropriate fashion there would be no reason for the officer to hold anything against Tiess and that the officer might even have a more generous view of Tiess's situation, although there was no promise that that would be the case. (Id. at 25.) Counsel testified that he believed the crucial decision in Tiess's criminal case came on June 7, 2000, when Tiess decided to plead guilty to a probation violation and prior to the revocation hearing he and Tiess had a lengthy strategy conversation. (Id. at 38-41.) Counsel did not begin discussing the civil matter with the probation officer until early September 2000. (Id. at 37-38.) At some point after the plea and before sentencing counsel became aware that Tiess had consulted another lawyer. (Id. at 41-42.) He also indicated that Tiess wrote him a lot of letters, some of which expressed dissatisfaction with what was occurring in his case but that Tiess never asked him to withdraw. (Id. at 42.) Counsel testified that he did not think his representation of the officer had the slightest 'interaction' in Tiess's case. (Id. at 43.) After this testimony Tiess's post-conviction attorney did not explore the subject further.

Beyond Tiess's conclusory statement to the effect that if Tiess had realized the implication of his attorney's retention by the probation officer he would have gone forward with trial and sought suppression of his confession, there was nothing before the post-conviction court that identified the nature of Tiess's attorney's divided loyalty and how it negatively impacted a plausible alternative defense strategy or tactic. See Colon-

Torres, 2004 WL 2005624, at *10. In his memorandum seeking a certificate of probable cause, counsel merely stated:

> Once the guilty plea was entered, counsel undertook to advise the probation officer doing the presentence report for his client. Although the two parties were not adversary [sic] or had adverse interests, it would have surely been preferable to delay the probation officer's matter until after sentencing. It is facile to say the two matters were unconnected. As counsel himself acknowledged, the probation officer obviously had no great animus to defense counsel if he hired him. But the real issue is the fate of the petitioner and not counsel's relationship with the probation officer. The better, non prejudicial course would have been to pass on representing the probation officer. Due to attorney client privilege inquiry into the nature of the probation officer's case is limited and not subject to much scrutiny.

(Obj. Rec. Dec. at 11-12.)

It is clear to me that Tiess is not entitled to 28 U.S.C. § 2254 relief based on this conflict of interest/ineffective assistance of counsel claim. As the state court pointed out, the representation of the officer occurred after Tiess's decision to plead guilty and the officer's only role in this case thereafter was in the presentence investigation. And, Tiess's attorney's approach turned out to be successful vis-à-vis a difficult sentencing circumstance in which the State wanted twenty-five years. There was simply no factual basis for the court to conclude that Tiess's attorney's representation of the probation officer had had any detrimental impact whatsoever on Tiess's sentencing. See 28 U.S.C. § 2254(e)(2); see also id. § 2254(e)(1) ("In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."). Based upon the evidence and argument before the post-conviction court the court's conclusion that there were no divided loyalties on the part of

Tiess's attorney is neither contrary to Strickland/Hill nor an objectively unreasonable application of those precedents in this context.

***Failure to File a Motion to Suppress***

It is undisputed that Tiess's attorney considered the pros and cons of pursuing a motion to suppress on the theory that Tiess's first un-Mirandized confession tainted the two Mirandized confessions that followed. It is also clear that counsel made this decision based on his research into the governing case law at the time. See United States v. Ortiz, 146 F.3d 25, 27 -28 (1st Cir. 1998) (analyzing under Strickland a decision to forgo a motion to suppress, taking into account defense counsel's reliance on case law, and concluding this reliance was not misplaced). The cases on counsel's radar screen were the First Circuit's United States v. Esquilin, 208 F.3d 315 (1st Cir. 2000), abrogated in part, __ U.S. __, 124 S. Ct. 2601 (June 28, 2004), and State v. Smith, 675 A.2d 93 (Me. 1996), regarding their interpretation of Oregon v. Elstad, 470 U.S. 298 (1985).

The testimony pertaining to the motion to suppress during the post-conviction hearing covered two relevant areas. One, what was the factual predicate for filing a motion to suppress and, two, how did counsel weigh this factual scenario in view of the governing legal precedents in deciding not to pursue the suppression motion and what kind of input did Tiess have in this decision?

On cross-examination Tiess testified that the police came to his residence on the night in question and arrived there before Tiess. (Post-conviction Tr. at 8-9.) Tiess pulled up in his truck, hours after he had dropped some (at an unidentified location) items stolen that day. (Id. at 9.) At that point police started talking with Tiess and in turn Tiess admitted his involvement in the Belgrade, Maine, burglaries. (Id.) Tiess was not read his

Miranda rights on this day. (Id. at 21.) The police arrested him immediately after this conversation. (Id.) The next morning Tiess agreed to go with the police to show them the places he had broken into and he spent the day doing this, telling the police what items Tiess remembered taking from each of the approximately forty places. (Id. at 10.) Prior to this car ride the police read Tiess his Miranda rights. (Id. at 12, 20.) Also within the first three days following his arrest Tiess met with an assistant district attorney and was asked whether or not he would do an affidavit. (Id. at 10-11.) An affidavit was prepared which Tiess reviewed in a hurry and signed. (Id. at 11.) Prior to signing this affidavit Tiess was read his Miranda rights. (Id. at 12, 20.) Tiess did not have an attorney with him at any of these three interactions with law enforcement personnel. (Id. at 20.)

With respect to the decision to plead guilty versus move to suppress, Tiess testified that he was aware that he had a substantial amount of incarceration hanging over his head as a consequence of the violation of the conditions of his probation on his prior arson conviction. (Id. at 11-12.) At the beginning of Tiess's case his attorney met with him and discussed the option of having a trial or pleading guilty. (Id. at 12.) They discussed the fact that Tiess had admitted his involvement to the police (id.) and, vis-à-vis the first of these admissions, the implications of the fact that Tiess was not read his Miranda rights (id. at 21). Tiess testified that for a long time he wanted to take the matter to trial but, after counsel had looked at the case they discussed the issue, counsel "basically convinced" Tiess to plead guilty. (Id. at 12-14.) Tiess stated that his attorney discussed with him the fact that he had looked at some case law and that he did not think it was worthwhile to try to suppress the confessions. (Id. at 14-15.) Tiess's attorney told

him that he did not want to aggravate the judge. (Id. at 21.) Attorney and client also discussed Tiess's sentence exposure and whether Tiess should "open plea." (Id. at 15.) Counsel told Tiess the sentence that the prosecution was offering if he went with a plea agreement and that offer was high, higher than the sentence Tiess got. (Id. at 15.) Tiess knew that he had the right to file a motion to suppress and he knew at the time he plead guilty in August 2000 that he was giving up that right. (Id. at 22 -23.)

Tiess's attorney, who had been in private practice for fourteen years at the time with half of the practice being criminal (id. at 34), testified that "almost the very first time" Tiess spoke with him Tiess relayed his concern that on the day of his arrest when the officers had approached at least one officer had a gun unholstered which created "a degree of intensity to this encounter." (Id. at 28-29.)[6] But Tiess also told him that after he was in the police car the officers told him that he was free to leave (id. at 29) and that Tiess was not handcuffed (id. at 47).[7] Based on this information the attorney thought that a good argument could be made that the initial comment that Tiess was free to leave was "dishonest and made as a ploy to avoid the necessity of reading the Miranda warning," generating a feasible Miranda ground. (Id. at 29.) He noted that Tiess was read his Miranda rights prior to his car trip with the officers and on the third occasion before executing the affidavit. (Id. at 29, 31.)

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[6] The post-conviction court inquired further into this dynamic at the close of evidence. Tiess's attorney was not clear as to how pointedly the gun was directed at Tiess. He summarized his recollection as being that the officers staked out the place in the expectation that Tiess would arrive. When he did, the officer came out of the bushes with his gun visible. (Id. at 48.) The judge stated: "It probably makes no difference," (id.) to which post-conviction counsel responded that just one of the officers had his gun pointed at Tiess (id. at 49).

[7] The State attempted to bring forth information that it was Tiess who did not want to speak in the residence, which was his girlfriend's, and that the officers asked Tiess if he wanted to go to the station. (Id. at 46-47.) However, this information was never nailed down.

By the time of this discussion Tiess's attorney had reviewed discovery and had listened to the audio tapes made at the scene of the arrest[8] and of his conversation the next morning when he was picked up at the jail and taken on the car tour. (Id. at 29-30.) Asked whether in the initial arrest tape if there was a question of voluntariness on Tiess's part the attorney replied,

> There was not – there was no indication of coercive statements by the police, except I suppose you could make an argument that if it was found that he was lied to, we are not going to arrest you and they fully intended to arrest him. I don't know how that bears on voluntariness, but there was no issue of his understanding of what was being spoken and responding to the questions and respond in an appropriate manner.
>
> He didn't sound tearful. He didn't sound upset. He sounded lucid and gave appropriate responses to the questions asked. So on those voluntary issues, my judgment was that he was fine.

(Id. at 30-31.)

With respect to his legal research on the question, Tiess's attorney explained:

> I was able to find and have in my file a computer print-out of the April 2000 case the First Circuit United States v. Es[quilin]. That happened to involve a situation that arose in Maine. And the issue was, the issue was what is the situation when you have a Miranda violation and then you have a subsequent knowing waiver of Miranda. In essence, a repetition of the same material that was gained in the initial or [il]legal interrogation.
>
> And it's a First Circuit case. It was recent controlling law here. And it makes clear that even if you have an initial Miranda violation, if there was a subsequent Miranda and there is an intelligent waiver on proper Miranda warnings subsequent, that the initial improper interrogation doesn't bar admission of the second statement with one caveat. That is, if—so long as the first statement is voluntary. So if the first statement is voluntary then an appropriate Miranda [waived statement] is admissible.
>
> That case I found. And there was a 1996 Maine case [State v. Smith] that says the same thing. They were all based upon a United States Supreme Court case by the name of Elstad that made it crystal clear that even if you have an initial Miranda violation, a subsequent appropriate administration of Miranda and knowing and voluntary waiver of Miranda makes the second statement admissible.

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[8] Tiess did not recollect that this interview was taped. (Id. at 9-10.)

(Id. at 32-33.) In his opinion if the confession was admitted there was no way that Tiess could prevail at trial. (Id. at 43.)

The cross-examination by Tiess's post-conviction attorney on these legal conclusions focused on the question of whether the first confession was voluntary, the fact that a gun might have been drawn, and the relevance of the confession taking place in the custody-like confines of a police cruiser. (Id. at 44-45.) Tiess's attorney stated that the tapes did not mention that a gun was drawn, and, in his opinion, "it doesn't demonstrate an improper inducement or a threat. So then we are left ... with his mental state and voluntariness.... I listened to that tape. I've tried lots of motions to suppress. In my judgment he didn't have a prayer." (Id. at 45-46.)[9]

With respect to his consultation with his client on this score, Tiess's attorney testified that he met with Tiess several times at the jail prior to the June probation revocation hearing. (Id. at 34.) He remembers that he tried to get that proceeding continued so that it could focus on the bigger criminal case but was unable to get the State to agree. (Id. at 34-35.) So on June 7 he spoke with Tiess for about one and one-half hours to two hours "because this was the fateful day – if he goes in and admits the probation violation, that is a problem." (Id. at 35-36.) He explained:

> The reason I had done the Miranda research is because although the rules don't provide for it, it's my view that if you have a Miranda violation and they seek to admit [this] evidence ... improperly. Evidence obtained in violation of Miranda and they seek to admit during a probation violation, you can litigate that at that point.
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> So we were either going to be admitting the probation violation or if pushed to a hearing we were going to raise the Miranda issue. I told Tim I didn't think he had – I didn't think he had a chance on it because the

[9] In response to this answer, Tiess's post-conviction attorney retorted: "I probably have tried twice as many as you, and I did think he had a prayer. We don't know that because we don't know that?" (Id. at 46.)

> initial statement was voluntary and the subsequent statement was clearly not obtained in violation of Miranda.
> ....
> [I]n June we had a plea bargain offer of where the State wanted an underlying sentence of 40 years and an agreed sentence of 17, which I think was an agreed sentence of 17 years on the new charge, a full revocation on the probation revocation, and extended probation. That's what they wanted for a plea. And what they wanted – and they also offered a cap where they would argue for 25 years, 40 all but 25.
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> And I discussed with Mr. Tiess that the State could prove its case, that I didn't think there was any chance that his statement where he rode around with the police officers was going to be excluded from the evidence.
>
> So we were looking at how do we get the best sentence in this case. We spent a very long time talking about the ramification of the Rule 11, what a cap is, what a joint recommendation is, and what an open plea is. And my recollection of that conversation is that we – Tim looked at me and said can you beat 17 years? And I told him that I thought we could. And he had disclosed to me stuff about the second arson occurring in the context of his being molested by his landlord. He talked about his prior counsel having a psychological evaluation in the file.
>
> So the plan was that we were going to use psychological documentation to assist us at sentencing, and we were going to plead open, because my judgment and what I expressed to Tim was that the State comes in here and asks for 25 years on this case, they are not going to have any credibility. It's going to be left up to us and the judge to argue about the sentence. And so he agreed on my judgment to plead open. And sure enough, we beat the plea bargain offer.
> ....
> That conversation took place on June 7, sitting here in the jury room. We were there a long time.

(Id. at 36, 39-40.) Asked whether, at that point, "the dye was cast" as to how the case was going to be handled, Tiess's attorney responded: "He admitted to the probation revocation with nine years hanging over his head. So he was sunk if he changed his mind." (Id. at 40-41.) Tiess's attorney made it clear that Tiess never told him to file a motion to suppress (id. at 36), that after this conversation he never indicated that he wanted to go to trial (id. at 42-43), and at no point did he ask his attorney to withdraw (id. at 42).

During the August 10, 2000, change of plea hearing Tiess's attorney notified the court of the looming Miranda issue. In the State's version the prosecutor indicated that a trooper involved in Tiess's arrest said that when Tiess arrived at his residence there was a discussion about the furniture in the back of his truck. (R. 11 Tr. at 13-14.) "[A]fter some further discussion," Tiess "was invited first to the police station, which he declined, and, instead, preferred the conversation to take place in the cruiser, and pursuant to a full Miranda warning," Tiess "did acknowledge his involvement in the burglaries in Belgrade which are the latter burglaries in his indictment, and, then, pursuant to further discussion, did describe his involvement in approximately thirty-five or thirty-six burglaries." (Id. at 14.) Tiess was arrested on two burglaries and was taken to jail with the understanding that the next morning he would be escorted on the trip to identify other burglaries, as Tiess had indicated a willingness to do this. (Id.) So the next day Tiess participated in the tour of the sites of his burglaries, identified on Tiess's initiative with Tiess providing descriptions of the items taken. (Id. at 14-15.) The prosecutor also described how Tiess voluntarily took part, after having his Miranda rights read, in the preparation of the affidavit. (Id. at 15-16.)

In his presentation to the Rule 11 court, Tiess's attorney clarified that the statements made by Tiess on the night of his arrest were not preceded by a Miranda warning. (Id. at 17.) Counsel explained:

> My view of it was he was arrested at gunpoint, thrown up against a car and frisked, then he was told, "You're not under arrest." Then he was interrogated to admit to thirty-four burglaries, then he was arrested. And there is an issue there, but it is clear, and also by audio tape, that on a subsequent morning when he was taken from the jail on the ride where he pointed out the burglaries, he was read Miranda and gave a voluntary waiver, and it is clear that that also took place in the district attorney's office, and the relevant case law from the United States Supreme Court, in

> my judgment, and having discussed it with Mr. Tiess, indicates that that cured the initial Miranda violation, and, so, that is something that we have addressed together and it is within his knowledge in making this plea.

(Id. at 17-18.) Counsel told the court that he conferred with Tiess upon receiving the initial discovery in that the first thing that came to his mind was the Miranda violation. (Id. at 19.) He told the court of the importance of this consultation vis-à-vis the decision concerning the probation revocation and that the day of that hearing "really was the fish-or-cut-bait" day. (Id. at 19-20.) As Tiess decided to plead to the violation, counsel explained, all his discussions with counsel subsequent to that day related to negotiating plea offers and the option to plead open. (Id. at 20.)

The Rule 11 court then spoke with Tiess concerning whether he agreed with his attorney's description of what had transpired, whether he was satisfied that the State could prove all the elements of the charges, whether Tiess believed he had had sufficient opportunity to discuss all the circumstances with his attorney, and whether Tiess was satisfied that his tendered pleas were in his best interest. (Id.) Tiess responded in the affirmative to all these queries. (Id.) And after the court announced its determination that Tiess's pleas were knowing and intelligent and that there was a factual basis for the plea, the prosecutor added that Tiess had, unsolicited, generated further admissible evidence of his guilt: he had written to at least one victim acknowledging his guilt. (Id. at 21.)

The decision I review, once again, is the post-conviction court's oral decision as it pertained to this ground:

> So let's turn to the claim that [Tiess's attorney] provided ineffective assistance of counsel with reference to the failure to file a motion to suppress and his representation or counseling Mr. Tiess with reference to

the plea. In the court's view, [Tiess's attorney]'s version of what happened here makes sense and is credible.

Incident[al]ly I also read the Rule 11 which gives an account of what happened here, which actually is somewhat more dramatic than what Mr. Tiess or [Tiess's attorney] remembers. But in any case, [Tiess's attorney] researched the issue and correctly learned that the motion to suppress was unlikely to succeed. The court cannot find that that was a professionally unreasonable assessment. Indeed, there was no evidence to the contrary.

It's true he could have filed a motion to suppress, but the case law from both our Supreme Judicial Court, the First Circuit and the United States Supreme Court was that such a finding that the first statement the night that the defendant was arrested was involuntary. There is nothing in the record before me to suggest that that was so.

So the court must find that the defendant has failed to meet its[sic] burden of persuasion that [Tiess's attorney]'s performance fell short of that of a reasonably fallible attorney. As to that he read the discovery, researched the issue, both the State and Federal cases, and found that the motion would be meritless. From that his assessment that the Petitioner's case was unwinnable and that the best course was to plead guilty and argue about sentence was also not professionally unreasonable.

[Tiess] apparently made two lengthy admissible confessions. He had no triable issues. In the end, [Tiess's attorney] got him a good result, particularly given his record.

So although I've addressed the ineffective assistance of counsel prong first and found that the Petitioner does not meet that standard, the court must also find that he does not meet the prejudice, the burden of persuasion as to the prejudice issue only. In that regard I would find that he does not meet the prejudice issue only. In that regard I would find both from Mr. Tiess's testimony from the Rule 11 hearing that he knew what he was doing at the Rule 11; that this was the plea of guilty by someone who is in fact guilty. And that the court cannot find that there was a reasonable probability that the defendant would have insisted on going to trial had he not received ineffective assistance. Indeed, given what I've been told and what I have in hand here, going to trial on this matter would have been folly.

So the court finds that there was no prejudice and there was no ineffective assistance of counsel. So the petition as to that ground needs to be denied.

(Post-Conviction Tr. at 54-57)(emphasis added).

This decision by the post-conviction court is unassailable under the deferential § 2254 standards given the evidence and argument presented to it in the post-conviction

proceedings. See 28 U.S.C. § 2254(e)(2), (1). Clearly counsel weighed the facts surrounding Tiess's first unwarned statements in light of Oregon v. Elstad, United States v. Esquilin, and State v. Smith which was the controlling law at that juncture.

To broadly paint the parameters of the legal question generated by Tiess's trio of incriminating statements, in Oregon v. Elstad the United States Supreme Court held:

> When police ask questions of a suspect in custody without administering the required warnings, Miranda dictates that the answers received be presumed compelled and that they be excluded from evidence at trial in the State's case in chief.
> ....
> [T]here is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of Miranda, was voluntary. The relevant inquiry is whether, in fact, the second statement was also voluntarily made. As in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements. The fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative. We find that the dictates of Miranda and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied in the circumstances of this case by barring use of the unwarned statement in the case in chief. No further purpose is served by imputing "taint" to subsequent statements obtained pursuant to a voluntary and knowing waiver. We hold today that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings.

470 U.S. at 317-18 (footnote omitted). In State v. Smith the Maine Law Court drew on Elstad and applied it to the facts of the case before it. 675 A.2d at 97.[10]

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[10] The Court reasoned:

> A failure to issue the requisite Miranda warning does not necessarily equate to a constitutional violation, therefore the admissibility of statements made after a subsequent warning turns only on whether the defendant knowingly and voluntarily made those statement(s). Elstad, 470 U.S. at 309.
>
> The facts do not indicate anything coercive about the circumstances in which Smith was interrogated by the police: he was not subjected to physical violence nor did the police use any other deliberate means to wear him down to the point of answering their questions or offering information. See id. at 312. Absent a showing of coercion or improper tactics on the part of the police, Detective Young's administration of proper Miranda warnings cured the assumed element of compulsion that accompanied Smith's

And, in the United States v. Esquilin the First Circuit upheld the denial of a motion to suppress. Esquilin made voluntary unwarned statements and then statements made after a concededly sufficient Miranda warning. 208 F.3d at 319. The defendant distinguished his facts from those of Elstad by pointing out that the two statements involved in Elstad were temporally separate while Esquilin's were made in a single interrogation. Id. The First Circuit stated: "[A]lthough the elapsed time between interrogations is one factor that may dissipate the taint of a coerced confession, the lesser taint of a Miranda violation may be dissipated by subsequent warnings even if the unwarned and warned statements are obtained during the same interrogation." Id. The First Circuit also rejected the defendant's argument that the police used an "improper tactic" in deliberately eliciting the first statement. Id. at 319-20. "This argument" the First Circuit stated, "focuses on some admittedly imprecise language in Elstad while ignoring the Court's emphasis on voluntariness throughout the opinion." Id. at 320. The Court reasoned, in part:

> Esquilin does not contend that [the officer's] allegedly deliberate Miranda violation made his first statement involuntary, and he could not reasonably do so. It is part and parcel of the Elstad holding that a failure to give Miranda warnings does not, without more, make a confession involuntary. See Elstad, 470 U.S. at 306 n.1. The addition of a subjective intent by the officer to violate Miranda, unaccompanied by any coercive conduct, cannot in itself undermine the suspect's free will. In the absence of any police coercion, there was nothing to hinder Esquilin from invoking his right to remain silent after the Miranda warnings were administered, except perhaps his own sense that the initial statement (and the discovery of the cocaine) had "let the cat out of the bag," so that he might as well confess. The Elstad Court, however, said that this sort of effect does not

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> earlier statements to Officer Leadbetter. Id. at 314. The statements that Smith made to the police after the Miranda warnings are admissible and the court did not err in denying Smith's motion to suppress in this regard. For the same reasons the tangible evidence seized after the Miranda warnings was also properly admissible.

Id. The United States Supreme Court's conclusion in Dickerson v. United States, 530 U.S. 428 (2000) that Miranda is constitutionally based abrogates the Maine Law Court's conclusion that Miranda failures do not necessarily violate the constitution.

> qualify as coercion: "This Court has never held that the psychological impact of voluntary disclosure of a guilty secret qualifies as state compulsion or compromises the voluntariness of a subsequent informed waiver." Id. at 312; see also Colorado v. Connelly, 479 U.S. 157, 167 (1986) (holding that confession cannot be involuntary for due process purposes absent "coercive police activity").

Id. at 320-21.

This was the lay of the land at the time that Tiess and counsel made their decision concerning whether or not to proceed with a motion to suppress. Counsel and the court were looking at the same landscape. This landscape has now changed, as this term a divided United States Supreme Court expressly abrogated Esquilin to the extent it rejected an argument that the "tainted fruit" analysis applies when interrogators use an improper question –first tactic of deliberately withholding Miranda warning initially. Missouri v. Seibert, __ U.S. __, 124 S. Ct. 2601 (June 28, 2004). I in no way suggest that counsel, confronted with the same factual scenario, would be ineffective in a post-Seibert world for making the same decision Tiess's counsel made pre-Siebert: Likely not. It is evident to me, based upon the evidence and argument before the post-conviction court the court's conclusion that counsel's performance was not constitutionally inadequate was neither contrary to Strickland/Hill nor an objectively unreasonable application of those precedents in this context.

***Conclusion***

For the reasons set forth above, I recommend that the court **DENY** Tiess § 2254 relief.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

Dated September 27, 2004.

TIESS v. MERRILL
Assigned to: JUDGE GENE CARTER
Referred to: MAG. JUDGE MARGARET J. KRAVCHUK
Demand: $
Lead Docket: None
Related Cases: None
Case in other court: None
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 04/01/04
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: Federal Question

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