

OREGON SUPREME COURT

Gable v. State

353 Or. 750 (2013) · Decided June 27, 2013

SUMMARY

The Oregon Supreme Court affirmed the denial of post-conviction relief to a defendant who claimed trial counsel inadequately advised him about objecting on ex post facto grounds to application of a later-enacted sentencing law. The court held that the petitioner had to establish prejudice by showing that correct advice would have led him to object, and it upheld the post-conviction court’s finding that his testimony on that point was not credible.

CASE DETAILS

COURT	Oregon Supreme Court
WRITING FOR THE COURT	Landau, J.; Baldwin; Balmer; Landau; Walters
JURISDICTION	Oregon
DECIDED	June 27, 2013
DISPOSITION	affirmed
PROCEDURAL POSTURE	Petitioner sought Oregon post-conviction relief based on alleged inadequate assistance of trial counsel, including counsel's failure to advise him of an ex post facto objection to application of a later-enacted sentencing law. After remand for findings on whether proper advice would have changed petitioner's decision, the post-conviction court found no prejudice and dismissed the petition. The Oregon Court of Appeals affirmed without opinion, and the Oregon Supreme Court affirmed.
STANDARD OF REVIEW	The court is bound by the post-conviction court's factual findings when supported by evidence in the record. The legal question of whether those facts establish constitutionally inadequate assistance and prejudice is reviewed under the applicable post-conviction standards.
PRECEDENTIAL VALUE	published and precedential Oregon Supreme Court opinion
PARTIES	Gable v. State

TOPICS

state post-conviction relief

post-conviction relief

ineffective assistance

sentencing

ex post facto

PRACTICE AREAS

criminal post-conviction

ineffective assistance of counsel

sentencing

constitutional law

QUESTIONS PRESENTED

1. Whether the post-conviction court applied an incorrect or more burdensome standard of proof by requiring Gable to establish prejudice by a preponderance of the evidence.
2. Whether the post-conviction court erred in assessing the reasonableness and credibility of Gable's assertion that he would have objected to the application of the later-enacted sentencing law.
3. Whether prejudice from counsel's failure to advise Gable of the ex post facto objection could be presumed without determining whether correct advice would have changed his decision.

HOLDINGS

1. A post-conviction petitioner must prove the factual contentions supporting inadequate assistance, including prejudice-related facts, by a preponderance of the evidence; that burden does not conflict with the Strickland requirement to show a reasonable probability of a different result.
2. Gable failed to establish prejudice because the post-conviction court found that his testimony that he would have objected after receiving correct advice was not credible, and that finding was supported by the record.
3. The existence of an allegedly unlawful sentence does not eliminate the requirement that the petitioner prove prejudice from counsel's deficient advice by showing that correct advice would have changed the petitioner's decision.

KEY QUOTATIONS

“The only issue in that case was the lawfulness of the sentence. This case, in contrast, is a post-conviction case in which the sole question is the constitutional adequacy of counsel.” (at 762)

“The possibility of a minimum is not necessarily determinative in a criminal defendant’s decision to enter a plea. And, if a petitioner would not have changed the plea of guilty or no contest even with knowledge of a possible minimum sentence, there is no reason to set aside the conviction.” (at 763)

“The controlling question in this post-conviction proceeding, as in Moen, is whether the receipt of correct advice about a possible ex post facto objection would have made a difference to petitioner in this case.” (at 763)

FACTUAL BACKGROUND

Gable committed the charged offense in January 1989, when Oregon aggravated-murder law provided death or life with the possibility of parole. Later in 1989, the legislature added life without the possibility of parole, or true life, as a sentencing option. At Gable's 1991 penalty-phase trial, defense counsel requested instructions on all three options, and the jury selected true life rather than death. Gable later asserted that counsel should have

advised him of an ex post facto objection, but the post-conviction court found his testimony that he would have objected not credible.

PROCEDURAL HISTORY

Gable was convicted of murder and aggravated murder and sentenced to life without parole after the jury was instructed on three sentencing options under a law enacted after the offense. In post-conviction proceedings, the Court of Appeals initially held that counsel should have advised Gable of his ex post facto objection and remanded for a prejudice determination. On remand, the post-conviction court found Gable's testimony not credible and concluded that he failed to prove prejudice by a preponderance of the evidence. The Court of Appeals affirmed without opinion, and the Oregon Supreme Court affirmed.

DISPOSITION

affirmed

CASES CITED

- Gable v. State of Oregon, 243 Or. App. 389, 256 P.3d 1099 (2011)
- State v. Wille, 317 Or. 487, 502-04, 858 P.2d 128 (1993)
- State v. Gable, 127 Or. App. 320, 873 P.2d 351, rev. denied, 319 Or. 274 (1994)
- Krummacher v. Gierloff, 290 Or. 867, 871, 627 P.2d 458 (1981)
- Lichau v. Baldwin, 333 Or. 350, 359, 39 P.3d 851 (2002)
- Stevens v. State of Oregon, 322 Or. 101, 110, 902 P.2d 1137 (1995)
- Trujillo v. Maass, 312 Or. 431, 435, 822 P.2d 703 (1991)
- Burdge v. Palmateer, 338 Or. 490, 492, 112 P.3d 320 (2005)
- Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)
- Peiffer v. Hoyt, 339 Or. 649, 660, 125 P.3d 734 (2005)
- Holland v. Jackson, 542 U.S. 649, 650, 654, 124 S. Ct. 2736, 159 L. Ed. 2d 683 (2004)
- Alcorn v. Gladden, 237 Or. 106, 111, 390 P.2d 625 (1964)
- Moen v. Peterson, 312 Or. 503, 512-13, 824 P.2d 404 (1991)
- State v. McDonnell, 329 Or. 375, 381-82, 987 P.2d 496 (1999)
- Gable v. State of Oregon, 203 Or. App. 710, 726, 735, 126 P.3d 739 (2006)