1-19-2010

State v. Ellington Supplemental Respondent's Brief Dckt. 33843

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 33843
	)	
vs.	)	
	)	
JONATHAN W. ELLINGTON,	)	
	)	
Defendant-Appellant.	)	
	)	

SUPPLEMENTAL BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Jonathan W. Ellington appeals from his convictions for second degree murder and two counts of aggravated battery. During the appellate briefing process, the district court denied Ellington's motion for a new trial. Ellington raises the denial of his motion for a new trial as a supplemental issue on appeal.

Statement Of Facts And Course Of Proceedings

The statement of facts and course of Ellington's criminal proceedings are set forth in the Respondent's brief, filed June 19, 2008. (Respondent's Brief, pp.1-5.)

On June 24, 2008, Ellington filed a motion for a new trial, alleging that he had discovered new, material, and exculpatory evidence. (Supp. R., pp.3-7.) The Idaho Supreme Court suspended his ongoing appeal to allow the district court to decide the motion. (Supp. R., p.8.)

The particular facts relevant to the issues raised in Ellington's supplemental brief are as follows. At trial, the state called Idaho State Police reconstruction and accident investigation program manager Fred Rice as a rebuttal witness. (Trial Tr., p.1651, L.21 - p.1652, L.22.) Rice rebutted testimony of defense witness Dr. William H. Skelton, Jr., regarding average perception and reaction times, and the value of crash debris to the reconstruction and incident investigation. (Trial Tr., p.1652, L.16 – p.1682, L.16.)

In his motion for a new trial, Ellington contended that he obtained new evidence that, at trial, Rice had testified inconsistently with testimony he gave

during another criminal proceeding, *State v. Ciccone*, Elmore County Case No. CR-2003-4441, two and a half years earlier.[1] (Supp. R., pp.3-7; Appellant's supplemental brief, pp.4-10; 24-26.) He also submitted documentation indicating that Rice's testimony regarding reaction/perception times was inconsistent with Idaho State Police training materials that he had authored.[2] (R., p.25, 33-34; Appellant's supplemental brief, pp.5-13; 24-26.) Ellington contended that this inconsistency revealed perjury, and amounted to new, material, and exculpatory evidence that warranted a new trial. (Supp R., pp.3-7; See generally, Appellant's supplemental brief.)

After a hearing and briefing by the parties, the district court denied the motion, finding that the evidence of Rice's prior inconsistent testimony was not material, and that the new evidence would not alter the outcome of a new trial. (Supp R., pp.32-46.) Ellington timely appealed, and the Idaho Supreme Court

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[1] By order dated December 10, 2009, this Court augmented the Clerk's Record with "Defendant's Exhibit A (Transcript of a portion of the trial in *State v. Ciccone* – believed to have been filed on October 17, 2008)", and "Defendant's Exhibit B (preliminary hearing transcript from *State v. Ciccone*, believed to have been filed on October 17, 2008)." While these exhibits were never file-stamped by the district court, Ellington represents, the record indicates, and the state does not contest that they were properly before the court at the time of its consideration of Ellington's motion for a new trial. (Supp. R., pp.33, 39; Appellant's supplemental brief, pp.6-7; 10/20/08 Tr., p.3, L.15 – p.4, L.3.)

[2] By order dated December 10, 2009, this Court augmented the Clerk's Record with Defendant's Exhibit D (accident reconstruction training materials – believed to have been filed on December 22, 2008). While this exhibit was not file-stamped by the district court, Ellington represents, the record indicates, and the state does not contest that it was properly before the court at the time of its consideration of Ellington's motion for a new trial. (Supp. R., pp.25, 33-34; Appellant's supplemental brief, p.11; 12/22/08 Notice Of Filing In Support Of Defendant's Motion For New Trial.)

granted him leave to file a supplemental appellant's brief on this issue. (Supp. R. pp.47-49.)

SUPPLEMENTAL ISSUE

Ellington states the supplemental issue on appeal as:

> Did the district court abuse its discretion in denying Mr. Ellington's motion for a new trial?

(Appellant's brief, p.15.)

The state wishes to rephrase the supplemental issue on appeal as:

Has Ellington failed to show that the district court abused its discretion in denying his motion for a new trial?

ARGUMENT

Ellington Has Failed To Show That The District Court Abused Its Discretion By Denying His Motion For A New Trial

A. Introduction

Ellington contends that the newly discovered evidence of state rebuttal witness Rice's apparently inconsistent testimony in a prior criminal proceeding warrants a new trial in this case. (See generally, Appellant's supplemental brief.) He also contends that the district court erred by utilizing the four-part *Drapeau* standard in analyzing his motion. (Appellant's supplemental brief, pp.17-24.)

Because any evidence of Rice's prior inconsistent testimony in the prior case is not material to this one, and because the newly obtained evidence would not alter the outcome of the trial, Ellington has failed to show that the district court abused its discretion in denying his motion for a new trial.

B. Standard Of Review

Granting or denying a motion for a new trial is within the district court's discretion and will not be disturbed on appeal unless that discretion is abused. State v. Jones, 127 Idaho 478, 481, 903 P.2d 67, 70 (1995); State v. Pugsley, 119 Idaho 62, 63, 803 P.2d 563, 564 (Ct. App. 1991).

C. Ellington's Argument That Some Standard Other Than The *Drapeau* Test Controls His Motion For A New Trial Is Without Merit

A defendant may obtain a new trial "[w]hen new evidence is discovered material to the defendant, and which he could not with reasonable diligence have discovered and produced at the trial." I.C. § 19-2406(7). In State v. Drapeau, 97

Idaho 685, 551 P.2d 972 (1976), the Idaho Supreme Court articulated the four-part test a defendant must satisfy in order to be entitled to a new trial based upon newly discovered evidence. That test requires a defendant to show that the evidence offered in support of his motion for a new trial (1) is newly discovered and was unknown to the defendant at the time of trial; (2) is material, not merely cumulative or impeaching; (3) will probably produce an acquittal; and (4) failure to learn of the evidence was due to no lack of diligence on the part of the defendant. Id. at 691, 551 P.2d at 978; see also Grube v. State, 134 Idaho 24, 30, 995 P.2d 794, 800 (2000).

In announcing this four-part test, the Court cited Professor Wright's text on Federal Practice and Procedure and specifically noted his comment, "after a man has had his day in court, and has been fairly tried, there is a proper reluctance to give him a second trial." Drapeau, 97 Idaho at 691, 551 P.2d at 978 (citation omitted). "Motions for a new trial based on newly discovered evidence are disfavored and should be granted with caution, reflecting the importance accorded to considerations of repose, regularity of decision making, and conservation of scarce judicial resources." State v. Stevens, 146 Idaho 139, 144, 191 P.3d 217, 222 (2008) (internal quotations and citations omitted) (quoting State v. Hayes, 144 Idaho 574, 577, 165 P.3d 288, 291 (Ct. App. 2007)).

In the present case, the district court utilized the *Drapeau* standard in denying Ellington's motion for a new trial. (Supp. R., pp.32-46.) Ellington, however, argues that the district court erred by not using an alternative test

adopted by the Idaho Supreme Court in State v. Scroggins, 110 Idaho 380, 716 P.2d 1152 (1985). (Appellant's supplemental brief, pp.16-24.)

In Scroggins, the defendant claimed that he discovered evidence that the only eyewitness at his trial had since recanted his testimony. Scroggins, 110 Idaho at 384, 716 P.2d at 1156. The Idaho Supreme Court relied on a Seventh Circuit case, Larrison v. United States, 24 F.2d 82 (7th Cir. 1928), in concluding that, "in appropriate circumstances, where a defendant submits an affidavit by a government witness in which the witness recants his testimony and specifies in what ways he dishonestly testified and in what ways he would, if given the opportunity to testify again, change that testimony and where a defendant makes a showing that such changed testimony may be material to a finding of his guilt or innocence, a new trial should be held."[3] Scroggins, 110 Idaho at 385, 716 P.2d at 1157. Clearly, such a standard is not applicable in the present case, where there has been no recanting, and no affidavit from any government witness.

Further, subsequent to the Idaho Supreme Court's decision in Scroggins, the Larrison standard it was based on was rejected by the Seventh Circuit, and the case itself overruled, in United States v. Mitrione, 357 F.3d 712 (7th Cir. 2004) (vacated on other grounds by Mitrione v. United States, 543 U.S. 1097 (2005)), where the court specifically adopted the four part test used in other circuits – the

[3] The Idaho Supreme Court ultimately held that, because the newly discovered evidence was subject to multiple inferences, and did not constitute an affidavit, the record was too insufficiently developed to permit the Court to conclude that the trial court abused its discretion in denying the defendant's motion for a new trial. Scroggins, 110 Idaho at 385, 716 P.2d at 1157.

same test adopted from the federal courts in State v. Drapeau, 97 Idaho 685, 691, 551 P.2d 972, 978 (1976). Mitrione, 357 F.3d at 717-18.

While Scroggins has not been overruled in Idaho, the Idaho Court of Appeals has clearly indicated its intent to limit its application to cases in which the defense can show that a government witness has recanted his trial testimony:

> Idaho case law calls for application of the *Scroggins/Larrison* test when a trial witness has recanted his or her trial testimony and evidence of that recantation has been presented to the trial court. **Any other type** of new evidence presented by a defendant as an alleged basis for a new trial, **including other types of proof of perjury** and evidence of a recantation that has itself been subsequently disavowed by the trial witness, are subject to the *Drapeau* test.

State v. Griffith, 144 Idaho 356, 366, 161 P.3d 675, 685 (Ct. App. 2007) (citations omitted) (emphasis added).

More recently, in State v. Stevens, 146 Idaho 139, 191 P.3d 217 (2008), the Idaho Supreme court set forth the four-prong *Drapeau* test in affirming the district court's denial of the defendant's motion for a new trial. In Stevens, the defendant's "newly discovered evidence" included allegations that one of the state's expert witnesses had lied about his credentials during the trial. Id. at 147, 191 P.3d at 225. The Court did not reference the Scroggins test.

Ellington is asking this court to decline to apply the test always applied to newly discovered evidence, and to instead create a separate test applicable where there is any new evidence of perjury by a government witness.

(Appellant's brief, pp.23-24.) However, Ellington has provided no sound basis for deviating from the long-established *Drapeau* test.

This case simply does not involve a recantation by a material factual witness. Scroggins provides no authority for the proposition that Ellington is entitled to a new trial without analysis of the materiality of the alleged perjury, its probable effects on the trial, and the diligence of the defense in finding the evidence that ultimately revealed it. The district court properly analyzed Ellington's motion for a new trial under the *Drapeau* standard.

D. Ellington Has Shown No Abuse of Discretion In The District Court's Application Of The *Drapeau* Test

Application of the *Drapeau* test shows that the district court did not abuse its discretion by denying Ellington's motion for a new trial. As determined by the district court, the newly discovered evidence in question is not material but is instead merely impeaching, and the evidence would not "probably produce an acquittal."

First, from a close review of the context of the challenged testimony, it is not even clear that Rice testified inconsistently at the prior unrelated criminal proceeding, let alone that he committed perjury.

At Ellington's trial, defense witness Dr. Skelton, a reconstruction expert, explained how the debris from the site of the incident helped to shape his opinions regarding the placement of the vehicles during the impact of Ellington's Blazer and Jovon and Joleen Larsen's Honda. (Trial Tr., p.1440, L.21 – p.1443, L.15.)

To rebut Dr. Skelton's testimony, the state called Rice, who testified as follows:

> Q. In terms of any of your training, has that focused on debris fields?
>
> A. Yes, sir, that's part of the collision.
>
> Q. You have had years of training in that regard?
>
> A. Yes, I have actually crashed vehicles together to see what happens during the crash.
>
> Q. Can you determine, let me ask it this way. How precise of an area can you put a collision at by looking at the debris field?
>
> A. Not at all.
>
> Q. Why is that?
>
> A. What happens is is [sic] during the collision, parts are crunching, glass is breaking. It can strike off of an object, bounce off of it, it can go in many different directions. In fact it will absorb the speed of another obstruct that it strikes. So basically you know an accident happened someplace on that highway.
>
> Q: Does it have any reliability at all in terms of placing a vehicle in one lane as opposed to the next?
>
> A: No, we would look for the physical evidence. Debris can be moved, kicked around, like I said, it sprays.

(Trial Tr., p.1659, L.18 – p.1660, L.13.) While it is possible to construe Rice's testimony as universally discrediting the evidentiary usefulness of incident debris (though it would seem unlikely that he would have "years of training" in a field that he believes has no evidentiary value), it is equally possible that Rice may have been simply highlighting the unreliability of such evidence in this particular case, or even when it comes to crash debris' usefulness in placing, generally, "a

vehicle in one lane as opposed to the next." This becomes clearer later during Rice's testimony:

> Q. In terms of the debris field that we have in this particular case, maybe I should get to a photograph that shows it. Number 23 has a good view of the debris field. In this photograph number 23 there is debris in the eastbound lane, is that right?
>
> A: Yes, sir.
>
> Q: Is that any indication of where the actual impact occurred.
>
> MS. TAYLOR: Objection, Your Honor, he has already answered the question about debris fields.
>
> THE COURT: He has. Hopefully his answer will be consistent. You can answer the question.
>
> A: I see a lot of debris all over the road here, it's not going to tell me where the point of impact happened. I see more in the westbound than I do in the eastbound. I see some –
>
> MS. TAYLOR: Your Honor, I'm going to object, he's narrative again.
>
> THE COURT: I think he has answered the question.
>
> Q: Is there any way at all to put that Honda in the eastbound lane based on that debris field?
>
> MS. TAYLOR: Your Honor, I'm going to object to that. He has talked to him about the debris field and he's getting into another theory, should have been brought up in his case in chief if he wanted it.
>
> The COURT: I believe he has already answered that question that he can't make that determination. I'll sustain the objection.

(Trial Tr., p.1672, L.3 – p.1673, L.6.) On cross-examination, defense counsel did not inquire about Rice's views about debris fields, either generally, or with regards to this case. (Trial Tr., p.1682, L.21 – p.1685, L.7.)

Previously, at the *Ciccone* trial, Rice had testified that, in that case, debris at the incident scene was more helpful in determining the point of impact:

> Well, we started picking up the glass because the headlight was broke. Now, as the vehicle is traveling and the glass is above the ground, when it is broke out, it is not going to fall immediately to the ground. It is going to continue on at the speed of what that car is until gravity pulls it to the ground. So what's going to happen is it is going to travel a distance before it actually hits the ground.
>
> So, we see that the glass is at this point. So, if the automobile is traveling at any speed at all, that definitely coincides with where the impact point is.

(Defendant's Exhibit A, p.1110, Ls.8-20).

In *Ciccone*, Rice did not testify that debris fields are *always* instructive as to points of impact, nor did the factual scenario in *Ciccone* exactly match that of the present case. Thus, without a clear explanation for any apparent discrepancy in Rice's testimony, it is unclear whether this "newly discovered evidence" would even be particularly useful to the defense as impeachment evidence. It would be quite a drastic remedy for a district court to invalidate a jury verdict and order a new trial in such a scenario.

At Ellington's trial, defense witness Dr. Skelton also testified that in his investigation of the incident, in coming to the conclusion that Ellington did not have time to see and react to the Honda before the collision, Dr. Skelton had worked with the assumption that it would have taken Ellington three quarters of a second to perceive that he was on a collision course with the Honda, and another

three quarters of a second to act in response, for a total of one-and-a-half seconds. (Trial Tr., p.1424, L.16 – p.1425, L.9; p.1447, L.3 – p.1448, L.3) Dr. Skelton explained that "the total perception reaction time is generally accepted as 1.5 seconds." (Trial Tr., p.1425, Ls.3-5.)

In rebuttal, Rice testified as follows:

> Q: Dr. Skelton put a 1.5 second reaction perception time on the contact between the Blazer to the Honda, do you remember that?
>
> A: I was in the classroom, or in the courtroom for that.
>
> Q: Is that applicable to this situation?
>
> A: Absolutely not.
>
> Q: Why not?
>
> A: Number 1, there is no average perception reaction time in the world.
>
> MS. TAYLOR: Your Honor, I'm going to object again, it's narrative and it's improper rebuttal.
>
> THE COURT: I think that response will stand, overruled, continue.
>
> Q: What do you mean by that?
>
> A: There is no two people that see things, respond to them in the exact same way. You can not [sic] come up with an average time. Again, am I looking straight ahead? In the test that he talked about coming up with his 1.5 average, was the person looking right at the back of the vehicle –
>
> MS. TAYLOR: Objection, narrative.
>
> THE COURT: Sustained.
>
> Q: In terms of the perception time from the Blazer starting forward to impacting with Mrs. Larsen, again I think he talked about the 1.5 figure, does that sound right?

A: Sure.

Q: Is there anything about his assumption that Mr. Ellington couldn't have seen Mrs. Larsen that you disagree[?]

MS. TAYLOR: Your Honor, I'm going to object, it's improper rebuttal.

THE COURT: Again sustained.

(Trial Tr., p.1679, L.4 – p.1680, L.10.)

Rice thus did not testify that it is never appropriate for an investigator to utilize the one-and-a-half second perception/reaction time. He did express disagreement with its use in "this situation," and stated that "there is no average perception reaction time in the world." Defense counsel did not further inquire on the subject during cross-examination, so the basis of Rice's disagreement is unknown, though he did reference his uncertainty with whether Ellington was "looking straight ahead" at the time of the impact.

Previously, during the preliminary hearing of the *Ciccone* case, Rice testified that he had, in fact, utilized three quarters of a second as the reaction time when computing a formula during his investigation of that particular case. (Defendant's Exhibit B, p.65, L.25 – p.66, L.12.)

Again, due to the lack of cross-examination on the subject, and Rice's limited role as a rebuttal witness, it is unclear from the record why he felt that one-and-a-half seconds should not have been used as the perception/reaction time in Dr. Skelton's calculations for the Ellington trial, but three-quarters of a second was properly used as the reaction time in *Ciccone*. While such an

inconsistency may constitute impeachment evidence, it does not, as Ellington contends on appeal, necessarily show false testimony, or perjury.

While the district court understandably expressed concern with the apparent discrepancies of Rice's testimony,[4] it properly recognized that evidence that Rice testified inconsistently at a prior criminal proceeding is not material to Ellington's guilt or innocence – it only potentially impeaches Rice's credibility. (Supp. R., pp.39-44.)

Ellington argues that the evidence is both impeaching and material. (Appellant's supplemental brief, pp.32-33.) Even assuming, as Ellington argues, that the new evidence would have "tarnished" and "obliterated completely" Rice's credibility, the evidence is still only impeaching. While Ellington also contends that the "evidence would have done more than call Rice's veracity into question; it would have provided substantive support for Dr. Skelton's calculations and opinions – all of which pointed to an accident, not a crime," this is an argument without merit. (Appellant's supplemental brief, p.33.)

"Impeachment evidence is offered to attack the credibility of the witness rather than to establish the existence or non-existence of a disputed fact." State v. Pugsley, 119 Idaho 62, 803 P.2d 563 (Ct. App. 1991). That Rice apparently testified inconsistently based on different facts at a previous trial does not establish the existence or non-existence of any disputed fact, or make Ellington's

[4] However, the district court also noted that it had only "a limited snapshot of the inconsistent testimony of Fred Rice and therefore it is difficult to conclude that he has intentionally or carelessly attempted to mislead the Ellington jury." (Supp. R., p.43.)

guilt or innocence more likely. Therefore, evidence of this inconsistency is not admissible for any purpose other than impeachment.

Even if Rice's testimony at Ellington's trial were clearly inconsistent with his testimony in *Ciccone*, Ellington cannot show which proceeding involved false or perjured testimony, and which did not. Such a question highlights the potential usefulness of the inconsistency as *impeachment* evidence, but does not indicate materiality. The district court properly determined that Ellington did not satisfy the materiality prong of the *Drapeau* test.

Finally, the district court also properly determined that there was no basis to believe that the new evidence would "probably produce an acquittal." (Supp. R., pp.44-45.) The district court, who also presided over the original trial, questioned the persuasive value of Rice's testimony, noting in a footnote that, "[f]rom the perception of the court it is likely that the only one impressed with the testimony of Fred Rice was Fred Rice." (R., p.44, fn.6.) The district court also noted the highly speculative nature of any impact of the "new evidence," stating that in the event of a new trial, "Rice would be given an opportunity to qualify or distinguish the perceived inconsistencies in his testimony as it may relate to the two cases." (R., p.44.) Finally, the district court recognized that while Ellington, in his motion for a new trial, was attempting to focus attention on the split second decision prior to the vehicle impacts, there was much more for the jury to

consider beyond those seconds, and the respective experts' reconstruction of them.[5] (Supp. R., pp.41-43.)

Ellington's claim to a new trial on the basis of newly discovered evidence thus fails on at least two prongs of the applicable standard.[6] The proposed evidence, at best, constitutes evidence that is merely impeaching, and it would not probably produce an acquittal in any new trial. Ellington has failed to show that the district court abused its discretion in the denial of his motion.

CONCLUSION

The state requests this Court to affirm the district court's denial of Ellington's motion for a new trial.

DATED this 19th day of January 2010.

MARK W. OLSON
Deputy Attorney General

[5] The district court explained: "Regardless of the location of the Honda or Ellington's ability to perceive and react, his deliberate act of turning his vehicle into harms [sic] way sufficiently demonstrated to the jury the implied malice necessary to support the murder verdict. While the disputed evidence relating to the motion for a new trial arguably negates any intent initially to commit a battery upon the sisters in the Honda, other evidence supports the State's position that Ellington persisted with the use of force from his vehicle to drive the Honda out of his way." (Supp, R., p.43.)

[6] The district court concluded that Ellington satisfied the other two prongs of the *Drapeau* standard: that the newly discovered evidence was unknown to the defense at trial, and that the failure to learn of the evidence was due to no lack of diligence on the part of the defendant. (Supp., R., pp.39-40.)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 19th day of January 2010 served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

ERIC R. LEHTINEN
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

MARK W. OLSON
Deputy Attorney General

MWO/pm