

2-28-2012

## Byington v. State Appellant's Brief Dckt. 38995

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/not\\_reported](https://digitalcommons.law.uidaho.edu/not_reported)

---

### Recommended Citation

"Byington v. State Appellant's Brief Dckt. 38995" (2012). *Not Reported*. 407.  
[https://digitalcommons.law.uidaho.edu/not\\_reported/407](https://digitalcommons.law.uidaho.edu/not_reported/407)

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

IN THE SUPREME COURT OF THE STATE OF IDAHO

MICHAEL BYINGTON, )  
 )  
 Petitioner-Appellant, ) NO. 38995  
 )  
 v. )  
 )  
 STATE OF IDAHO, ) APPELLANT'S BRIEF  
 )  
 Respondent. )  
 \_\_\_\_\_ )

COPY

\_\_\_\_\_  
**BRIEF OF APPELLANT**  
\_\_\_\_\_

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ADA**

\_\_\_\_\_  
**HONORABLE RONALD J. WILPER**  
District Judge  
\_\_\_\_\_

**SARA B. THOMAS**  
State Appellate Public Defender  
State of Idaho  
I.S.B. #5867

**KENNETH K. JORGENSEN**  
Deputy Attorney General  
Criminal Law Division  
P.O. Box 83720  
Boise, Idaho 83720-0010  
(208) 334-4534

**ERIK R. LEHTINEN**  
Chief, Appellate Unit  
I.S.B. #6247

**SPENCER J. HAHN**  
Deputy State Appellate Public Defender  
I.S.B. #8576  
3050 N. Lake Harbor Lane, Suite 100  
Boise, ID 83703  
(208) 334-2712

APR 28 2012

**ATTORNEYS FOR  
PETITIONER-APPELLANT**

**ATTORNEY FOR  
RESPONDENT**

**TABLE OF CONTENTS**

	<u>PAGE</u>
TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE CASE .....	1
Nature of the Case.....	1
Statement of the Facts and Course of Proceedings .....	1
ISSUE PRESENTED ON APPEAL.....	3
ARGUMENT .....	4
The District Court Erred When It Found Mr. Byington’s Suppression Related Claim Of Ineffective Assistance Of Counsel To Be Waived Because It Was Not In His Original Petition .....	4
A. Introduction .....	4
B. The District Court Committed Erred When It Found Mr. Byington’s Suppression Claim To Be Waived Because It Was Not In His Original Petition .....	4
CONCLUSION.....	8
CERTIFICATE OF MAILING .....	9

**TABLE OF AUTHORITIES**

Cases

*Palmer v. Dermitt*, 102 Idaho 591 (1981)..... 7  
*Stuart v. State*, 118 Idaho 932 (1990)..... 6

Statutes

I.C. § 19-4908..... 7

## STATEMENT OF THE CASE

### Nature of the Case

Michael Byington appeals from the district court's Order Denying Petition for Post Conviction Relief. Mr. Byington asserts that the district court erred when it dismissed a claim he raised via a supplemental petition on the grounds that it had been waived because it was not contained in his initial petition for post-conviction relief.

### Statement of the Facts and Course of Proceedings

Mr. Byington was convicted of aggravated assault following a jury trial. He received a unified sentence of five years, with two years fixed, which was suspended in favor of five years of probation. (R., p.4.) After he lost a motion for new trial based on newly discovered evidence, Mr. Byington appealed the denial of that motion, losing on direct appeal. *State v. Byington*, 2009 Unpublished Opinion No. 616 (Idaho Ct. App. 2009). The post-conviction action underlying this appeal followed.

In his petition for post-conviction relief, Mr. Byington raised a number of claims, all of which involve allegations that he received ineffective assistance of counsel at trial.<sup>1</sup> (R., p.5.) At the evidentiary hearing on the petition, counsel for Mr. Byington, the State's attorney, and the district court discussed a claim that was not raised in the initial petition for post-conviction relief. That claim concerned trial counsel's failure to file a motion to suppress evidence discovered during a warrantless, non-consensual search of Mr. Byington's residence, and post-arrest statements obtained during an interrogation

---

<sup>1</sup> None of the claims raised in the initial petition for post-conviction relief are being pursued on appeal.

of Mr. Byington prior to his being provided with *Miranda*<sup>2</sup> warnings. (Tr., p.58, L.1 – p.66, L.6.) Mr. Byington was allowed to present evidence in support of the new claim. (R., p.65.)

After allowing evidence concerning the new claim to be presented, the district court issued an order requesting additional briefing on the claim. (R., pp.41-42.) In response to this order, counsel for Mr. Byington filed a Supplemental Petition for Post Conviction Relief and a supporting Memorandum of Additional Briefing. (R., pp.46-58.) The State then filed a Memorandum in Support of Objection to New Claim Not Raised in Petition in which it argued that the new claim “was known or should have been known by the petitioner at the time of the filing of his petition” and, as such, was “permanently waived” when it was not included in the first petition.<sup>3</sup> (R., pp.60-61 (citing *Palmer v. Dermitt*, 102 Idaho 591 (1981), and *Stuart v. State*, 118 Idaho 932 (1990)).)

Ultimately, the district court issued an Order Denying Petition for Post Conviction Relief in which it rejected the new claim as follows:

The Petitioner attempted to and in fact was allowed by the Court to introduce evidence of an alleged illegal custodial interrogation and subsequent search. These matters were not raised in the original Petition for Post Conviction Relief. Therefore, the Court now rules that those claims were waived and will not be considered.

(R., p.65.) Mr. Byington filed a Notice of Appeal timely from the judgment dismissing his petition for post-conviction relief. (R., p.69.)

---

<sup>2</sup> See *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>3</sup> The State also provided argument disputing the merits of the new claim. (R., pp.61-63.) It is not necessary to recount the State's argument on the merits, as the district court declined to consider the new claim on the merits, instead accepting the State's waiver argument. (R., p.65.)

ISSUE

Did the district court err when it found Mr. Byington's suppression related claim of ineffective assistance of counsel to be waived because it was not in his original petition?

## ARGUMENT

### The District Court Erred When It Found Mr. Byington's Suppression Related Claim Of Ineffective Assistance Of Counsel To Be Waived Because It Was Not In His Original Petition

#### A. Introduction

The State's argument, adopted by the district court, that by not raising the suppression motion claim in his original post-conviction petition he waived the claim, is unsupported by the case law cited by the State and is, in fact, incorrect as a matter of law. As such, the district court's refusal to consider his suppression motion claim on the merits was error, and this matter must be remanded to the district court for consideration on the merits.

#### B. The District Court Committed Error When It Found Mr. Byington's Suppression Claim To Be Waived Because It Was Not In His Original Petition

In opposing Mr. Byington's Supplemental Petition for Post Conviction Relief, the State argued,

Claims that are not asserted in a Petition for Post-conviction Relief are deemed waived. Idaho Code § 19-4908 requires that all legal and factual grounds for relief must be raised in the first petition for post-conviction relief. Any grounds for relief not raised are permanently waived if the grounds were known or should have been known at the time of the first petition. *Palmer v. Dermitt*, 102 Idaho 591, 635 P.2d 955 (1981). In the presentation of the substantive case and as shown by the testimony of Mr. Porter, the sequence of the defendant's interaction with Officer Young relating to the consent to retrieve the weapon was used by the defense to show that the defendant was cooperative. It was clearly an issue that was known to counsel and the defendant. Specifically, the officer was questioned as follows:

Q: Now, you said you gave him – you didn't really speak with him, that you simply gave him instructions?

A: Correct[.]

Q: Did he comply with all of those instructions?



A: Yes, he did.  
Q: Was he belligerent in any way?  
A: No, not at all.  
Q: And then you placed him in your patrol car?  
A: Correct[.]

Trial transcript Page 116, lines 16-25. The sequence of the contact and subsequent consent was well established during trial and was known or should have been known by the petitioner at the time of the filing of his petition. Any grounds for relief not raised are permanently waived if the grounds were known or should have been known at the time of the first petition. *Stuart v. State*, 118 Idaho 932, 801 P.2d 1283 (1990).

(R., pp.60-61.)

The district court declined to reach the merits of Mr. Byington's new claim, instead adopting the State's waiver argument. Specifically, the district court held,

The Petitioner attempted to and in fact was allowed by the Court to introduce evidence of an alleged illegal custodial interrogation and subsequent search. These matters were not raised in the original Petition for Post Conviction Relief. Therefore, the Court now rules that those claims were waived and will not be considered.

(R., p.65.) An examination of the case law and statutory authority cited by the State in support of its waiver argument demonstrates that both the district court and the State have misinterpreted the law on this issue.

What the State failed to note in its response opposing Mr. Byington's Supplemental Petition was that the portion of the *Stuart* opinion from which it quoted (it neglected to place quotation marks around what was an exact quote from *Stuart*)<sup>4</sup> is followed by two additional sentences that clarify that the State's reading of the case (and Idaho Code § 19-4908) is absolutely wrong. The complete paragraph from which the State quoted reads as follows:

Idaho Code § 19-4908 requires that all legal and factual grounds for relief must be raised in the first petition for post-conviction relief. Any grounds for relief not raised are permanently waived if the grounds were known or should have been known at the time of the first petition. Subsequent petitions are allowed if the appellant states a sufficient reason for not asserting the grounds in the earlier petition. *Hence, there is no absolute prohibition against successive petitions for relief. Palmer v. Dermitt*, 102 Idaho 591, 635 P.2d 955 (1981).

*Stuart*, 118 Idaho at 933-34 (emphasis added).

It makes sense that the Court in *Stuart* would opine about successive petitions, considering the fact that Stuart had filed a successive petition<sup>5</sup> which had been dismissed and which was the subject of the appeal. *Id.* at 933. The relevance and applicability of the *Stuart* case to the facts of this case are limited in that Mr. Byington had not filed a successive petition for post-conviction relief; rather, he had presented evidence concerning a new claim, with the permission of the district court, and did so via a Supplemental Petition for Post Conviction Relief, through which he was supplementing his first (and only) petition for post-conviction relief. (R., pp.46-58, 65.)

An examination of the text of the statute provides further support for Mr. Byington's argument that a supplemental petition is a part of the original petition for post-conviction relief. Idaho Code § 19-4908 provides:

All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not

---

<sup>4</sup> The specific language taken from *Stuart* and used by the State in its memorandum is, "Any grounds for relief not raised are permanently waived if the grounds were known or should have been known at the time of the first petition." (R., p.61.)

<sup>5</sup> It was styled as a "Second and Subsequent Petition for Post-Conviction Relief." *Id.* at 933.

asserted or was inadequately raised in the original, supplemental, or amended application.

I.C. § 19-4908 (emphases added).

Interpreting the statute with respect to successive petitions, the Idaho Supreme Court has held,

The intent of this language is clear: all allegations relating to a request for postconviction relief should be asserted in one petition. However, the language of I.C. s 19-4908 does not prohibit successive petitions for postconviction relief in every case, but rather, only prohibits successive petitions in those cases where the petitioner “knowingly, voluntarily and intelligently” waived the grounds for which he now seeks relief, or offers no “sufficient reason” for the omission of those grounds in his “original, supplemental or amended petition.” Thus, it is necessary that the trial court find the failure to include newly asserted grounds for relief *in the prior postconviction relief proceeding* was without sufficient reason before the application may be summarily dismissed on the ground of waiver.

*Palmer*, 102 Idaho at 593 (emphasis added). This passage from *Palmer* and the plain language of the statute make it clear that the original, supplemental, and amended petitions are to be considered part of a single petition made within a single post-conviction relief proceeding. It is only when a new, successive petition, initiating a successive proceeding, is filed that the issue of waiver of a claim or claims arises.

The district court was misled by the State's failure to provide the full context for the authorities cited, and erred when it found the suppression related claim of ineffective assistance of counsel to be waived and dismissed the claim without considering it on its merits. As such, this Court should vacate that portion of the district court's Order Denying Petition for Post Conviction Relief in which it concluded that the suppression related ineffective assistance of counsel issue was waived, and remand this matter for the district court to consider that claim on its merits.

CONCLUSION

For the reasons set forth herein, Mr. Byington respectfully requests that this Court vacate the portion of the district court's Order Denying Petition for Post Conviction Relief dismissing his suppression related claim of ineffective assistance of counsel without considering it on its merits, and remand this matter to the district court for a consideration of the claim on its merits.

DATED this 28<sup>th</sup> day of February, 2012.

  
\_\_\_\_\_  
SPENCER J. HAHN  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 28<sup>th</sup> day of February, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

MICHAEL BYINGTON  
1416 PONDERAY ROAD  
BOISE ID 83705

RONALD J WILPER  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

JOE ROCKSTAHL  
ATTORNEY AT LAW  
E-MAILED BRIEF

KENNETH K. JORGENSEN  
DEPUTY ATTORNEY GENERAL  
CRIMINAL DIVISION  
PO BOX 83720  
BOISE ID 83720-0010

Hand delivered to the Attorney General's mailbox at the Supreme Court.

  
EVAN A. SMITH  
Administrative Assistant

SJH/eas