5-23-2012

McCall v. State Respondent's Brief Dckt. 39271

IN THE SUPREME COURT OF THE STATE OF IDAHO

MICHAEL ALAN MCCALL

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

NO. 39271

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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STATEMENT OF THE CASE

Nature Of The Case

Michael Alan McCall appeals from the denial of his post-conviction petition after an evidentiary hearing.

Statement Of The Facts And Course Of The Proceedings

McCall petitioned for post-conviction relief from his conviction for possession of a controlled substance with intent to deliver. (R., p. 5.) All claims asserted in the petition, save a claim of ineffective assistance of counsel for failing to file a motion to suppress, were summarily dismissed by the district court. (R., pp. 214-25.)

At the evidentiary hearing Officer Stephenson testified that he conducted a traffic stop of McCall for failing to signal as he merged into traffic from the side of the road. (Tr., p. 46, Ls. 3-24.[1]) McCall and one other witness, Timothy Jones, testified that McCall properly signaled before entering traffic from the side of the road in front of Jones' house. (Tr., p. 8, L. 19 – p. 9, L. 1; p. 27, Ls. 9-11.) Jones's house is on the 600 block of Second Avenue East. (Tr., p. 6, Ls. 2-5.) The location the officer saw Jones pull away from was on the 500 block of Second Avenue East. (Tr., p. 13, Ls. 11-16; p. 46, Ls. 3-24.[2])

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[1] All "Tr." citations are to the transcript of the September 12, 2011 evidentiary hearing.

[2] The district court took judicial notice of the transcript of the underlying criminal trial. (R., p. 264.) The court then relied on this transcript, specifically quoting it, for the proposition that McCall was stopped for pulling into traffic with signaling on the five-hundred block of Second Avenue East. (R., pp. 269-70.) Because McCall has not included the transcript of the criminal trial in the record on this appeal (R., p. 295), this factual finding is not subject to challenge on appeal.

McCall testified that he demanded his attorney file a suppression motion on the ground that he was not ultimately issued a citation for the illegal merger. (Tr., p. 33, Ls. 7-16.) Jones testified that neither McCall nor his attorneys in the criminal case contacted him about what he knew about the traffic stop, and he never talked to anyone about the incident until contacted in relation to the post-conviction action. (Tr., p. 19, Ls. 8-11; p. 20, Ls. 8-11; p. 24, Ls. 9-13.) McCall's criminal trial attorneys confirmed that McCall never told them that Jones had information about the circumstances of the traffic stop. (Tr., p. 72, Ls. 3-17; p. 83, Ls. 3-7; but see Tr., p. 83, L. 8 – p. 84, L. 4 (did discuss "landlord" who may have been Jones and may have seen the "incident" with someone else in public defender's office).) McCall's criminal trial attorneys testified that they reviewed the police reports and concluded a motion to suppress would be fruitless based on the officer's report that he saw McCall merge into traffic without signaling. (Tr., p. 73, L. 6 – p. 74, L. 5; p. 76, Ls. 1-12; p. 82, L. 15 – p. 83, L. 2; p. 85, Ls. 9-20.)

After the evidentiary hearing, the district court denied relief on the remaining claim and dismissed the petition with prejudice. (R., pp. 255-74.) The district court concluded that the "crux" of McCall's claim was that he used his turn signal when he "pulled away from the residence of Mr. Jones in the 600 block" of the street. (R., p. 269.) Although Jones did so testify, the officer testified McCall had pulled out from a drug house on the 500 block, which was corroborated by a

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State v. Mowrey, 128 Idaho 804, 805, 919 P.2d 333, 334 (1996) (missing portions of record presumed to support decision of trial court).

prior statement from McCall himself. (R., pp. 269-70.) Jones also testified that he did not know if McCall might have made an additional stop one block away before being pulled over. (R., p. 269.) The district court concluded that because there was "no evidence of any suppressible issues" there was no objective shortcoming in electing to not file a motion to suppress. (R., p. 270.) Likewise, McCall failed to "show that the motion to suppress would likely have been granted" and therefore "has not shown prejudice." (R., p. 271.)

McCall filed a notice of appeal timely from the denial of his petition. (R., pp. 278-80.)

ISSUE

McCall states the issue on appeal as:

> Whether the district court erred when it denied post conviction relief after an evidentiary hearing, rejecting Petitioner's assertions that he had received ineffective assistance of counsel?

(Appellant's brief, p. 3.)

The state rephrases the issue as:

On Appeal McCall asserts that the district court applied an incorrect Fourth Amendment standard to his claim of ineffective assistance of counsel. In fact the district court denied his claim because evidence that McCall signaled while pulling into traffic on the 600 block was irrelevant to whether he pulled into traffic without signaling on the 500 block as observed by the officer. Has McCall failed to demonstrate that the district court erroneously found he failed to prove that his counsel was ineffective for failing to file a motion to suppress?

ARGUMENT

McCall Has Failed To Demonstrate That The District Court Erroneously Found He Failed To Prove That His Counsel Was Ineffective For Failing To File A Motion To Suppress

A. Introduction

The district court concluded that McCall failed to prove either prong of his ineffective assistance of counsel claim. (R., pp. 264-71.) On appeal McCall claims "the court found merely that the police officer believed that Mr. McCall failed to use his turn signal" and therefore decided the case solely on the officer's "subjective good faith." (Appellant's brief, p. 15.) McCall asserts his whole claim comes down to "whether the turn signal was used or not" and the court's alleged failure to make that determination requires a remand. (Appellant's brief, pp. 15-17.) McCall's claim that the district court decided this case solely upon "subjective good faith" is not supported by the record. To the contrary, the record establishes that the district court found McCall's evidence of signaling while pulling into traffic on the 600 block of Second Avenue East was irrelevant to any suppression motion challenging the officer's decision to stop McCall for a different traffic infraction (pulling into traffic without signaling on the 500 block of Second Avenue East). McCall has therefore failed to show error by the district court.

B. Standard Of Review

When the district court conducts an evidentiary hearing and enters findings of fact and conclusions of law, an appellate court will disturb the findings of fact only if they are clearly erroneous, but will freely review the conclusions of

law drawn by the district court from those facts. Mitchell v. State, 132 Idaho 274, 276-77, 971 P.2d 727, 729-730 (1998). The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. Peterson v. State, 139 Idaho 95, 97, 73 P.3d 108, 110 (Ct. App. 2003). A trial court's decision that a post-conviction petitioner has not met his burden of proof is entitled to great weight. Sanders v. State, 117 Idaho 939, 940, 792 P.2d 964, 965 (Ct. App. 1990).

C. McCall's Argument That The Court Denied His Claim Of Ineffective Assistance Of Counsel For Failing To File A Suppression Motion Because Of The Officer's Good Faith Belief Is Belied By The Record

A petitioner seeking post-conviction relief has the burden of proving, by a preponderance of the evidence, the allegations upon which his claim is based. Estes v. State, 111 Idaho 430, 436, 725 P.2d 135, 141 (1986); Clark v. State, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); I.C.R. 57(c). A petitioner seeking relief on a claim of ineffective assistance of counsel must prove "that his counsel was deficient in his performance and that this deficiency resulted in prejudice." Murray v. State, 121 Idaho 918, 922, 828 P.2d 1323, 1327 (Ct. App. 1992) (citing State v. Bingham, 116 Idaho 415, 776 P.2d 424 (1989)).

"To establish deficient assistance, the burden is on the petitioner to show that his attorney's conduct fell below an objective standard of reasonableness. This objective standard embraces a strong presumption that trial counsel was competent and diligent." Baldwin v. State, 145 Idaho 148, 153-54, 177 P.3d 362, 367-68 (2008) (internal citations omitted). To meet this burden "requires showing

that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 466 U.S. 668, 687 (1984). "[S]trategic or tactical decisions will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation." Baldwin, 145 Idaho at 153-54, 177 P.3d at 367-68.

To establish prejudice, a defendant must prove a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988); Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 244 (Ct. App. 1999). Where, as here, the allegedly deficient performance was failure to file a suppression motion, the petitioner has failed to prove prejudice if the motion would not have been granted. Huck v. State, 124 Idaho 155, 158, 857 P.2d 634, 637 (Ct. App. 1993); Davis v. State, 116 Idaho 401, 407, 775 P.2d 1243, 1249 (Ct. App. 1989).

Here the district court concluded that McCall presented no evidence that a motion to suppress challenging reasonable suspicion for the traffic stop would have been granted, because all of McCall's evidence related to him signaling when he left the curb from his landlord's house on the 600 block of the street, but the traffic stop occurred when he left the curb at *a different location*—a drug house on the 500 block of the street. (R., pp. 269-70.) The court rejected McCall's testimony that he made no stops after leaving the house on the 600 block based on McCall's prior statement that he was stopped after "'pulling away

from the curb in the 500 Block of Second Avenue East.'" (R., p. 269.) The court's finding that evidence of turn signal use on the 600 block was irrelevant to the question of whether the officer had reasonable suspicion based on failure to use the turn signal when pulling into traffic from a location on the 500 block was supported by the evidence and determinative of whether counsel was ineffective for failing to move to suppress on the basis of that evidence.

In addition, the trial court specifically found that McCall failed to prove "that trial counsel, by a preponderance of the evidence, did not meet the objective standards of competence." (R., p. 270.) Indeed, there was no evidence presented that, in making the tactical decision to not bring a suppression motion, trial counsel failed to review the evidence available, did not understand the applicable legal standards, or decided not to file the motion because of any other objective shortcoming. (See Tr., p. 71, L. 13 – p. 88, L. 17.) McCall did not even present evidence that he, at any relevant time, told his counsel that he was claiming he had in fact signaled and had a witness to support that claim. (Tr., p. 32, L. 10 - p. 34, L. 18; p. 42, L. 1 – p. 43, L. 18.) Likewise, the district court found that both trial counsel had concluded there were not "suppressible issues," that after reviewing the evidence presented in post-conviction the "court would have to agree," and that McCall had not shown that the motion to suppress would likely have been granted. (R., p. 271.)

McCall argues that the district court merely concluded that the officer had a "subjective good faith" belief that McCall had not used his turn signal, then argues the court erred by not determining if he in fact used his turn signal.

(Appellant's brief, pp. 15-23.) No fair reading of the court's written opinion supports this argument. The district court clearly found that McCall's evidence of turn signal use was not relevant to the question of reasonable suspicion for the stop because it related to a different traffic maneuver, not because the actual facts leading to the stop did not matter. (R., pp. 269-70.)

In addition, McCall's argument ignores the fact that the issue was not suppression *per se* but was instead ineffective assistance of counsel. At no point, for example, does McCall even address the district court's finding that there was no objective shortcoming in counsel's tactical decision to not pursue a suppression motion. (Compare R., p. 270 with Appellant's brief.)

McCall has failed to show error by the district court. Taking a few lines of the district court's written opinion out of context, McCall attempts to characterize the district court's decision as merely accepting the good faith of the police officer. This characterization is inaccurate. Instead, the court held that the evidence McCall sought to use to challenge his stop did not relate to the events giving rise to reasonable suspicion for that stop. In addition, McCall does not challenge the district court's determination that he failed to prove any objective shortcoming by counsel or prejudice. For these reasons McCall has failed to show error.

CONCLUSION

The state respectfully requests this Court to affirm the district court's determination that McCall failed to prove ineffective assistance of counsel in the tactical choice to not file a motion to suppress to challenge the basis for the traffic stop.

DATED this 23rd day of May, 2012.

KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 23rd day of May, 2012, I caused a true and correct copy of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

GREG S. SILVEY
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KKJ/pm