

8-9-2012

Eby v. State Appellant's Brief Dckt. 39301

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IN THE SUPREME COURT OF THE STATE OF IDAHO

DANIEL LEE EBY)
)
 APPELLANT,)
)
 vs)
)
 STATE OF IDAHO)
)
 RESPONDENT,)
)

2012-08-09 10:45

CASE No: CV 02-674

SUPREME COURT No: 39301-2011

APPELLANTS BRIEF

Appeal from the District Court Of The First Judicial District
Of The State Of Idaho, In And For The County Of Kootenai

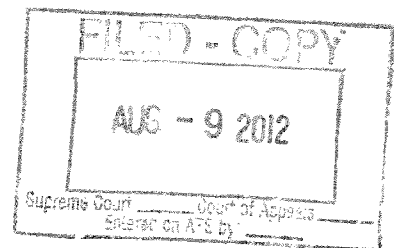
HONORABLE JOHN PATRICK LUSTER
DISTRICT JUDGE

Daniel Lee Eby # 56540
ISCI
PO. Box 14
Boise, Idaho 83707

Lawrence Wasden
Attorney General
PO. Box 83720
Boise, Idaho 83720

APPELLANT

RESPONDENT



ISSUE'S ON APPEAL

A. Did the District Court Error In Denying Mr. Eby's Conflict Of Interest Claim's ?

B. Did The District Court Error In Denying Mr. Eby's Ineffective Assistance Of Counsel Claim's ?

ARGUMENT

1. The right to conflict free representation is derived from the Sixth Amendment Of The United States Constitution and is applied to the state by due process clause of the 14th Amendment. **STATE V. COOK, 144 Idaho 784 (CT. APP. 2007)** The focus of any inquiry into a violation of a defendants right to conflict free counsel must focus on whether or not counsel is subject to "Competing Interest" Id.

2. In this case such a "Competing Interest" is present due to the fact that Mr. Eby's lawyers were employed by counsel for Mr. Eby's Co-defendant. Mr. Adams the counsel for Mr. Eby's Co-defendant had the ability to fire Mr. Eby's Counsel.

3. Referring to Evidentiary hearing transcripts Pg.143 Ln.8-Pg. 144 Ln. 7 **MR. SCHWARTZ:** On Pg. 47 of the Transcript starting at line 11, there is a paragraph where Mr. Baughman is talking. And in that paragraph, he makes it quite clear that the prosecutor's opinion was that there was an apparent and obvious conflict between Mr. Eby and Mr. Schmitz and that the public defenders office shouldn't be representing both of them. The exact quote is, "I have another problem on the same vein, Judge what we have here is a public defender's office representing Mr. Eby who is pointing the finger at Mr. Schmitz, Who is represented by the public defender's office; Mr. Schmitz, Who is pointing the finger at Mr. Eby. we have a serious, serious conflict of interest. I understand its more of a Bar issue than a Judicial issue. But when you realize, Judge that the ethical rules require, for lack of a better term, displacement of a lawyer having a conflict if there is a--and I believe that the quotation is (appearance of an impropriety.) I don't believe the public defender's office ought to be representing Mr. Eby,

but we're way to far in the game for that."

4. This conflict of interest, of which Mr. Eby was never informed Constitutes a breach of his fundamental right to counsel. The prejudice of this conflict is inherent and profound in all aspects of Mr. Eby's Case.

5. This conflict is further shown by the fact that no written waiver of conflict was signed by Mr. Eby as required by rule 1.7 of the Idaho Rules Of Professional Conduct.

6. Mr. Nelson's testimony further establishes this conflict of interest due to the fact that he did not inform Mr. Eby of the nature or even the existence of a conflict of interest. Mr. Nelson testified that no point throughout the process did he discuss this with Mr. Eby. further, Mr. Nelson testified that he had discussed with Mr. Eby other conflicts of interest and even had Mr. Eby sign waivers for those other conflicts. Evidentary hearing Transcript Pg. 31 Ln. 7-13

7. In the context of ineffective Assistance of Counsel claims, an applicant must satisfy two separate tests. *Roman v. State*, 125 Idaho 644 , 649 (CT. App. 1994) The first issue centers on whether, utilizing an objective standard, applicant's counsel fell short of competence standards. *Id.* In making this determination, "there is a strong presumption that counsel's performance falls within the wide range of competent professional assistance" *Id.* In evaluating that performance, "A court must endeavor 'to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's perspective at the time" *Milburn v. State*, 135 Idaho 701 , 706 (CT. App. 2000) quoting *Strickland v. State*, 466 U.S. 668 (1984)

The second step in successfully asserting an ineffective assistance of counsel claim is that the applicant "Must show there is a reasonable probability that, but for counsel's ~~failure~~ unprofessional error's, the results of the proceeding would have been different" *Roman*, 125 Idaho at 649. In other words, the applicant must present sufficient evidence that due to counsel's failure to provide competent representation, applicant

was some how "prejudiced." Id. In summary, a postconviction "applicant must show actual prejudice." Milburn , 135 Idaho at 706.

8. The testimony at the Evidentiary hearing established this claim. Mr. Adams and Mr. Nelson both testified as to the nature of the conflict and noted that it was created due to budget concerns and that since the time of petitioner's trial the practice of having two lawyers in the same office handle co-defendant's has been almost eliminated.

9. Given the existence of this conflict of interest Mr. Eby was denied his right to counsel as guaranteed by the united states constitution and the constitution of the state of Idaho. This conflict is so basic that it pollutes every step of Mr. Eby's case. Every decision that he made was based upon the advice of counsel who were operating under an incurable conflict of interest.

10. Referring to Evidentiary hearing transcripts Pg. 11 Ln. 12- Pg. 12 Ln. 18 Mr. Adams was asked: Q. Now despite this Chinese wall, at that point, you were Mr. Chapman and Mr. Nelson's superior ?

A. Correct.

Q. you had the ability to fire them if you decided to ?

A. Yes. Statute says they are at-will for the public defender.

Q. Are part of your duties as the head public defender to make decisions about expenditures that the office makes ?

A. I take it all your questions are directed at the time this case took place ?

Q. Yes.

A. Would you repeat it again ?

Q. Are part of your duties as the head public defender to make decisions about expenditures that the office might make ?

A. Yes.

Q. So lets say a Deputy wants to get an expert in a case, Do they have to get clearance from you to get that expert ?

A. At that time, Yes.

Q. So in this case, If Mr. Nelson or Mr. Chapman wanted to get an expert for Mr. Eby's case, would they have to run that

~~approval from you, the public defender, before they could get that expert ?~~

decision by you ?

A. I don't recall.

Q. You don't recall in this specific case, but it is the standard practice that a Deputy would have to get clearance from you for an expenditure of an expert ?

A. At that time, Yes.

11. Evidentiary hearing transcripts Pg. 15 Ln. 8-17 Mr. Adams was asked: Q. Did that, In turn, cause prejudice to Mr. Eby?

A. Well, you know, I just said we no longer do that because I think it was unethical. And to have an unethical lawyer representing you, In my book, would be prejudice.

Q. How would it cause prejudice ?

A. You should have an ethical lawyer representing you, one that abides by the rules of conduct.

12. Evidentiary hearing transcripts Pg. 16 Ln. 12-Pg. 17 Ln. 15 Mr. Adams was asked: Q. Do you know whether or not it caused prejudice to Mr. Eby ?

A. If he had a lawyer that was unethical, Yes.

Q. And was he represented by a lawyer that was unethical ?

A. I think it was unethical to have a Chinese wall instead of separate counsel outside of the office.

Q. So you think you acted unethically in this matter ?

A. Yes.

Q. And you think Mr. Chapman acted unethically in this matter?

A. I don't know how he acted. It was my responsibility to make sure everybody appointed to be represented by my office had competent Sixth Amendment Counsel, which would have included competent ethical counsel, and at that time, I didn't do it.

13. Evidentiary hearing transcripts Pg. 18 Ln. 23-Pg. 19 Ln. 11 Mr. Adams was asked: Q. And are you saying that in those years that you ran the office, you were acting unethically ?

A. I think those Chinese walls were, and I think the courts of record and Bar council agree with me. That's why they changed the rules; that's why the opinions were issued; that's why we don't do it anymore.

~~XXXXXXXXXXXXXXXXXXXX~~

and the investigator's wife was investigating the Co-Defendant?

A. I don't know if his wife was investigating the Co-Defendant. she was the investigator assigned to the Co-Defendant's case.

Q. So we have the boss and the wife representing one person, and then the employees and, the husband representing Mr. Eby?

Mr. VERHAREN: Objection; Leading.

THE COURT: Well, Overruled. You can answer the question.

THE WITNESS: Well, I don't know about employees. We had two teams of attorneys on opposite sides and two investigators that are married to one another who were on opposite sides.

19. Evidentiary hearing transcripts Pg. 67 Ln. 19-Pg. 68 Ln.2

THE COURT: Mr. Nelson, did you know when Mr. Durant and Ms. Fisher actually did get married ?

THE WITNESS: They were married, I believe, at the time they came to work for the office in 1995.

20. Evidentiary hearing transcripts Pg. 70 Ln. 16-24 Mr. Chapman was asked: Q. Were you aware when you were representing Mr. Eby that your superior, John Adams, was representing the Co-Defendant, Mr. Schmitz ?

A. Yes.

Q. Did that raise any concerns to you about a possible conflict of interest ?

A. Yes.

Q. Why ?

A. The appearance of impropriety.

21. Evidentiary hearing transcripts Pg. 73 Ln. 7-10 Mr. Chapman was asked: Q. Do you remember having a trial strategy ?

A. Yes.

Q. Do you recall sharing that trial strategy with Mr. Eby ?

A. No

22. Evidentiary hearing transcripts Pg. 83 Ln. 18-24 Mr. Chapman was asked: Q. You talked about in this matter there being an appearance of some impropriety in terms of yours and Mr. Nelson's

representation of Mr. Eby and Mr. Adams' representation of Mr. Schmitz ?

A. Yes.

Q. Why do you say that ?

A. We have two people essentially charged with the same thing. Looks bad.

23. Evidentiary hearing transcripts Pg. 88 Ln. 20-24 Mr. Chapman was asked: Q. How did Mr. Eby suffer prejudice as a result of the dual representation ?

A. As I said, I lost half of the investigation team. Mr. Durant and Ms. Fisher have different strengths in their abilities to assist.

24. Mr. Eby's testimony regarding the supposed murder weapon entitles him to relief under the Idaho Code 19-4901 (4).

Idaho Code 19-4901 (4) states that a petitioner may seek relief if there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.

At the hearing on the petition Mr. Eby testified regarding the different weapons that were allegedly used in the incident. He further stated that the weapon he allegedly used could not have caused the injuries that he was convicted of causing. This information was not presented to the jury and in the interests of justice this requires Mr. Eby's petition be granted.

Conclusion

The conflict of interest taints any claim that Mr. Eby was effectively assisted by his attorneys.

Mr. Eby's Appeal should be granted due to the uncontroverted evidence that he was denied conflict free counsel, That evidence of the murder weapon was never presented to the jury, and that he received Ineffective assistance of counsel which resulted in prejudice against him.

I ask that this appeal be granted and Mr. Eby given a New trial with conflict free counsel.

Dated This 7th day of August 2012

Daniel Lee Eby
By Daniel Lee Eby
APPELLANT

CERTIFICATE OF SERVICE

I Hereby Certify That On The 8th Day Of August 2012, I Sent A True And Correct Copy Of My Appellant Brief In The U.S. Mail System Postage Prepaid To The Following:

Idaho Supreme Courts
Clerk Of The Courts
PO. Box 83720
Boise, Idaho 83720

Lawrence Wasden
Attorney General
PO. Box 83720
Boise, Idaho 83720