6-3-2014

Brummett v. State Appellant's Brief 2 Dckt. 41127

David Brummett #41949
I.C.C. unit, F-1-116
P.O. Box 70010
Boise, Idaho 83707

IN THE SUPPREME Court OF
THE STATE OF IDAHO

David Brummett
Petitioner,

vs.

State of Idaho
Respondent.

Case No. 41127
Ada Co Dist Court No. 2011-19332

SUPPLEMENTAL BRIEF

Comes Now David Brummett, Petitioner, respectfully Submits the following Supplemental brief. The reasons for this Supplement is petitioner was unable to get access to case cites, until Now.

Statement of Facts and course of proceedings:

The underlying Statement of facts and course of proceedings in this case are set forth in Mr. Brummett's Appellants Brief. They are not reiterated herein, but are incorporated by reference.

ISSUES:

IS counsel at trial ineffective for withdrawing a rule I.R.E 29 Motion for Judgement of Aquittal of burglary and not Subjecting the prosecution's case to meaningful adversarial testing that Such prejudice is presumed from counsels actions?

IS Counsel at trial ineffective for failing to object or challenge the Sufficiency of the evidence to Support the conviction of burglary?

Was counsel ineffective for not objecting or bringing to attention the faulty in court identification, based on the blank's video Surveillance of March 11, 2007 that no one was operating?

Was counsel ineffective at trial for not objecting, filing for a dismissal and raising that Mr. Brummett is innocent of burglary, therefore was he convicted under a wrong Statute?

[redacted]

Was counsel ineffective for remanding back without a waiver from Mr. Brummett, having (2) preliminary hearings, when law requires when in custody (1) must be done in no more than (14) days, and should counsel have seeken a dismissal to protect due-process?

Was counsel ineffective for not objecting to the prejudicial and misleading jury instructions?

Was Trial counsel ineffective for not objecting to the introduction of the lately dislosed video of March 11th 2007, that the video's poor quality is so substantial as to render the recording as a whole untrustworthy?

Was this prosecutorial misconduct to introduce the late disclosure of exculpatory evidence of March 11th 2007 video?

Was this judicial misconduct to allow the video of March 11th 2007 that was exculpatory and prejudicial?

Was Appellate counsel ineffective for not raising the issue of the late disclosure of exculpatory evidence?

Was it prosecutorial and judicial over reaching by the testimony of a theft by Mr. Brummett of June 11th 2007 which was supposedly on video tape that hasn't been produced?

Was it prosecutorial and judicial over reaching by testimony of identification and supposed attempted theft without video of this and hasn't been produced?

[redacted]: Case Cites And Authorities:

P. 5 U.S. Mullaney V. Wilbur 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). (L. 10-11)
P. 5 U.S. In re Winship 397 U.S. 358, 90 S.Ct. 1068 25 L.Ed. 2d. 368 (1970). (L. 11)
P. 5 U.S. In re Winship 397 U.S. at 363, 90 S.Ct. at 1072. (L. 16)
P. 5 U.S. United States V. Ortiz, 445 F.2d 1100 (10th Cir 1971), cert. denied. (L. 30-31)
404 U.S. 993, 92 S.Ct. 541, 30 L.Ed.2d. 545 (1971).
P. 5 U.S. Lewis V. United States 420 F.2d 1089 (10th Cir 1970). (L. 31-32)
P. 5 U.S. Curley V. United States 81 U.S. App. D.C. 389, 160 F.2d 229 (1947), cert (L. 32-34.)
denied, 331 U.S. 837, 67 S.Ct. 1511, 91 L.Ed. 1850 (1947). (L. 32-34.)
P. 6 U.S. V. Gainey 380 U.S. 63, 85 S.Ct. 754, 13 L.Ed. 2d. 658 (1965). (L. 3)
P. 6 U.S. V. Dukes, 139 F.3d 469, 473 (5th Cir. 1998). (L. 32)
P. 6 U.S. V. Powers, 75 F.3d 335, 341 (7th Cir. 1996). (L. 33)
P. 6 U.S. Neil V. Biggers 409 U.S. 188, 196, 93 S.Ct. 375, 38, 34 L.Ed. 2d. 401 (1972). (L. 39)
P. 6 U.S. Stoval V. Denno 388 U.S. 293, 301-02, 87 S.Ct. 1967, 1972, 18 L.Ed. 2d. 1199 (1967). (L. 40)
P. 7 U.S. Darden V. Wainwright 477 U.S. 168 (1986). (L. 17-18.)
P. 7 U.S Taylor V. Kentucky 436 U.S. 478, 485 (1978). (L. 26.)
P. 8 U.S Manson V. Brathwaite 432 U.S. 98, 97 S.Ct 2243, 53 L.Ed. 2d. 140 (1977). (L. 1-2.)
P. 4 State V. Grow 93 Idaho 588, 593, 468 P.2d 320, 325 (1970). (L. 32)
P. 5 State V. Riggs 8 Idaho 630, 70 P. 947 (1902). L. 6
P. 5 State V. Gowin 97 Idaho 766, 554 P.2d 944 (1976). (L. 18.) (L. 1-2)
P. 5 State V. Marcoe 33 Idaho 284, 286, 193 P. 80, 80 (1920). (L. 25.)
P. 5 State V. Wilson 62 Idaho 282, 284, 111 P.2d 868, 868 (1941). (L. 42-43.)
P. 6 State V. Smith 48 Idaho 558, 283 P. 529 (1929). (L. 2)
P. 7 I. C. R. 12 (b) (3) (L. 5.)
P. 7 State V. Smith 117 Idaho 891, 898 792 P.2d 916, 923 (1990). (L. 16.)
P. 7 State V. Phillips 144 Idaho 82, 87, 156 P.3d 583, 588 (Ct App. 2007). (L. 16-17.)
P. 7 State V. Raudebaugh 124 Idaho 758, 769, 864 P.2d 596, 607 (1993). (L. 21-22)
P. 7 State V. Phillips 144 Idaho at 86, 156 P.3d at 587. (L. 22.)
P. 7 State V. Lovelass 133 Idaho 160, 168, 983 P.2d 233, 241 (Ct App. 1999) (L. 23)
P. 7 State V. Missamore 144 Idaho 879, 882, 761 P.2d 1231, 1234 (Ct App. 1988) (L. 24)
P. 7 I.R.E 603- State V. Gerardo 147 Idaho 22, 26, 205 P.3d 671, 675 (Ct. App. 2009) (L. 36)
P. 7 State V. Koch 115 Idaho 176, 765 P.2d 687 (Ct. App. 1988).
P 8 Federal Rules of Criminal Procedure, Rule 5, 5.1(c) and (d), 5.1(g), 5.1(e),
P 8 5.1(a), Rule 58 (L. 20.)
P 8 U.S. V. Green 305 F. Supp. 125 (S.D.N.Y. 1969). (L. 25)
P. 8 U.S. V. Kysar 459 F.2d. 422 (10th Cir. 1972). (L. 27-28)
P. 8 U.S. ex rel. Wheeler V. Flood 269 F. Supp. 194 (E.D.N.Y. 1967). (L. 31)

ARGUEMENT:

Counsel at preliminary and Post trial, Trial was ineffective for failing to challenge the Sufficiency of the evidence to Support the conviction of burglary.

Counsel before trial and at trial failed to file a rule 29. Motion for judgement of aquittal for lack of element of intent required before entry of the Store, that was open for buisness at the time.

At trial officer Sonada, aressting officer, falsely testified as to what Mr. Brummett said. officer Sonada Stated: "Mr. Brummett admitted to entering the Store with the intent to steal" (9-10-08 Tr., P. 315, L. 4 - Pg. 316 L. 7)

However if you listen to the audio tape of this Mr. Brummett responded "No" when asked if he had intent to steal (9-10-08 Tr. Pg. 320, L.S. 5-22).

Officer Sonada also lied about how much money Mr. Brummett had trying to ridicule Mr. Brummett's credibility and increasing the likelihood of intent. The booking/Arrest Sheet said Mr. Brummett had $8.50 which is a big difference than just $2.00 like officer Stated at trial (Tr. Pg. 311 L. 20.) Also a copy of this was Served to the prosecutor, See exhibit booking and arrest Sheet at the bottom where it states a copy was provided.

The prosecutor during his closing arequement Stated to the jury: "Now ladies and gentelmen; there's other evidence to show that defendant had intent to commit the crime of theft when he went in on this date. What is the other evidence? Well, he had only $2. cash on him. He had $2. (9-10-08 Tr., P. 382. L.S 2-6).

During trial Counsel then made an oral Idaho Rule 29. Motion for judgement of aquittal on charge of burglary based upon the lack of intent. (9-10-08 Tr., Pg. 325, L. 25 - P. 326, L. 1). However, counsel withdrew that motion shortly thereafter (9-10-08 Tr., P. 327, L.S. 11-12). Thus by failing to Subject the prosecutions case to a meaningful adversarial testing by the actions above by not filing a dismissal, object, or mention any above to the court as a defense, Nor investigate before trial any of this. See, State V. Grow 93 Idaho 588, 593 468 P. 2d. 320, 325 (1970), where it was held that "the elements of the crime which the State 'proved' were not sufficient in law to warrant a conviction". Brummett, Petitioner argues that the State has not presented any direct evidence establishing burglerious intent at the time of the talking, and that the circumstantial evidence is as easily taken as manifesting an honest

[redacted] mistake as it is toward proving a felonious intent, for which reason counsel failed to protect this right, the conviction cannot be sustained. Burglary is a crime of specific intent. The burden of proving the requisite mental state beyond a reasonable doubt belongs to the prosecution. State v. Riggs 8 Idaho 630, 70 P. 947 (1902). Recent U.S. Supreme court decisions make it clear that any attempt to shift that burden to the defendant is an error of constitutional dimensions. It is the prosecution which must prove the requisite mental state beyond any reasonable doubt. Mullaney v. Wilbur 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed 2d. 508 (1975); In re Winship 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 2d. 368 (1970). No other procedure is compatible with safeguarding the presumption of innocence "that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." In re Winship 397 U.S. at 363, 90 S.Ct. at 1072.

While proof of felonious intent may be by circumstantial evidence, State v. Gowin 97 Idaho 766, 554 P.2d 944 (1976), this court has long held that "... the circumstances must be consistant with the guilt of the defendant and inconsistant with the innocence, and incapable of explanation on any other reasonable hypothesis than that of guilt." If the evidence can be reconciled either with the theory of innocence or of guilt, the law requires that the theory of innocence be adopted." State v. Marcoe 33 Idaho 284, 286, 193 P. 80, 80 (1920).

With the element of felonious intent, and if the evidence is such that reasonable jurors must necessarily have a reasonable doubt as to the proof of that element, we can not allow the verdict to stand. This has come to be known as the "Substantial evidence rule," united States v. ortiz, 445 F.2d 1100 (10th cir 1971), cert. denied. 404 U.S. 993, 92 S.Ct. 541, 30 L.Ed. 2d. 545 (1971); Lewis v. united States 420 F.2d. 1089 (10th cir. 1970); curley v. united States 81 U.S. App. D.C. 389, 160 F.2d 229 (1947), cert. denied, 331 U.S. 837, 67 S.Ct. 1511, 91 L.Ed. 1850 (1947), and was announced by the court years ago: "It takes more than mere suspicion to send a man to prison, for a felony in Idaho - there must be Substantial evidence, either direct and positive, or circumstantial. Circumstantial evidence must be not only consistant and compatible with the guilt of an accused, but it must also be inconsistent and compatible with the guilt of an accused, but it must also be inconsistent with any reasonable theory of his innocence" (Emphasis added.) State v. Wilson 62 Idaho 282, 284, 111 P.2d. 868, 868 (1941). In Idaho the necessary element of intent can be

[redacted] inferred from the circumstances. State V. Cowin 97 Idaho 766, 554 P.2d 949 (1976); State V. Smith 48 Idaho 558, 283 P. 529 (1929); U.S. V. Gainey 380 U.S. 63, 85 S.Ct. 754, 13 L.Ed 2d. 658 (1965). Mr. Brummett's counsels failed to protect this, Nor mention that he wanted to plead guilty to the petit theft so it would not be used in trial to also prejudice the case on the burglary since they both contain the same intent elements But instead counsel did nothing.

Trial counsel and Appellate counsel was ineffective For Not objecting, Raising that the March 11th 2007 video's poor quality is so substantial as to render the recording as a whole untrustworthy; Counsel should have objected to the late dislosure of exculpatory evidence. upon playing this lately dislosed video that was used at trial by the prosecution from March 11th, 2007 9-9-08 Tr. P. 259, L. 8 - P. 260, L. 5.) counsel pointed out the poor quality of this video, and the general difficulty of discerning what, if anything, the person dipicted in this video is doing. 9-9-08 Tr. P. 260, L. 5. 7-24.) Counsel objected to the attempt on part of the State to adduce evidence regarding the video tape of March 11th, 2007 9-9-08 Tr., P. 187, L. 25 - P. 188, L. 21.) Counsel objected to any testimony regarding the contents of the tape based on hearsay and foundation grounds, as well as the "best evidence" Rule 9-9-08 Tr., P. 187 L. 25 - P. 188, L. 5. on page 000124 of Tr. Pg. 212, L. NS 6-7). counsel pointed out that it's questionable whether its exculpatory, but Counsel played it and therefore ineffective See. 000056. Tr. Pg. 213, L. NS. 2-4). And therefore was prosecutorial and judicial misconduct letting it in. See page. 000058. Tr. Pg. 202 L. 5 5-16 from counsel; Then [redacted] Read same from prosecutor, 000058. Tr. Pg. 202 L. 19 - Pg. 206 L. N. 25 And judges statements thats contrary to law (See U.S. V. Dickes and U.S. V. Powers)

Was counsel's Ineffective for Not objecting, Suppressing, Raise as a issue the faulty incourt Identification on a blurk video Surveillance of March 11th 2007, that no one was operating? Thus by using incourt identification "so unnecessarily suggestive" that they are "Conductive to irreparable mistaken identification" Neil V. Biggers 409 U.S. 188, 196, 93 S.Ct 375, 38, 34 L.Ed. 2d 401 (1972) (quoting Stoval V. Denno 388 U.S. 293, 301-02, 87 S.Ct 1967, 1972, 18 L.Ed. 2d. 1199 (1967). AS stated above and in the original brief, counsel was ineffective for not Suppressing, or object to using this prejudicial incourt identification through this late disclosure of exculpatory evidence pg. 6 of 9 Supplemental Brief.

[redacted] that was through this March 11th, 2007 video and testimony-L.1
identification of other supposed video that hasn't been produced-L.2
to police, Nor court to take the testimony of the identification, -L.3
or a burglary or a theft. This was impermissibly used, counsel -L.4
should have objected and filed a I.C.R. 12(b)(3) Motion to Suppress -L.5
Video and identification through this video, or other supposed video's -L.6
exculpatory, unmanaged, and unproduced to take the testimony. -L.7
Because if it did Mr. Brummett would have been charged before -L.8
and it most likely would have been reported to police. -L.9
This is an obvious "Fundamental error", judicially, prosecutorially -L.10
and by the inadequate 6th Amendment right to effective assistance -L.11
of counsel's at trial and on appeal for not Mentioning this. -L.12
Counsel at trial was ineffective for not objecting, to the misleading -L.13
and prejudicial jury instructions. -L.14
Prejudice of the jury through inflammatory tactics are improper. -L.15
State v. Smith 117 Idaho 891, 898, 792 P.2d [redacted] 916, 923 (1990); State v. Phillips -L.16
144 Idaho 82, 87, 156 P.3d. 583, 588 (ct. App 2007); Darden v. Wainwright -L.17
477 U.S. 168 (1986). -L.18
Mischaracterization of the defense by the prosecutor by distorting -L.19
the defense. A closing arguement may not misrepresent the law -L.20
or the reasonable doubt burden. State v. Raudebaugh 124 Idaho 758, -L.21
769, 864 P.2d. 596, 607 (1993); Phillips 144 Idaho at 86, 156 P.3d. at 587; State -L.22
v. Levelass 133 Idaho 160, 168, 983 P.2d. 233, 241 (ct. App 1999); State -L.23
v. Missamore 144 Idaho 879, 882, 761 P.2d 1231, 1234 (ct. App. 1988). -L.24
Official suspicion, indictment, or continued custody are not grounds -L.25
for a conviction. Taylor v. Kentucky 436 U.S. 478, 485 (1978). -L.26
It is plainly improper for a party to present closing arguement that -L.27
misrepresents or mischaracterizes the evidence. -L.28
The prosecutor during closing arguement stated to the jury: "Now -L.29
ladies and gentelmen, there's other evidence to show that the -L.30
defendant had the intent to commit the crime of theft when he -L.31
went in on this date. What is the other evidence? Well, he had only $ -L.32
2. cash on him. He had $2. (9-10-08 Tr., P.382, LS 2-6). -L.33
No counsel, at trial, Nor appeal, challenged any of this. -L.34
No person may testify in court unless first placed under oath -L.35
I.R.E. 603; State v. Gerardo 147 Idaho 22, 26, 205 P.3d 671, 675 (ct. App 2009). -L.36
Thus by stating petitioners in Sorveillance video, and he had intent to -L.37
Steal because he had only $2., So at trial and during closing -L.38
arguement, the prosecutor improperly testified to facts not in -L.39
evidence, thereby rediculing Mr. Brummett's credibility. -L.40
These said "Fundamental error's is which profoundly distorts the trial -L.41
that it produces manifest injustice a deprived the accused of his -L.42
constitutional right to due process. State v. Koch, 115 Idaho 176, 765, -L.43
Pg. 7 - of - 9 Supplemental Brief.

[redacted] P.2d 687 (Ct. App. 1988). Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct 2243, 53 L.Ed. 2d. 140 (1977).

Counsel was ineffective for remanding and having (2) two preliminary hearings without Mr. Brummett's waiver:

This also caused this case to go past Mr. Brummett's Speedy trial, that counsel was late in filing for dismissal, which resulted in the State using faulty prejudicial evidence that was explained. (See also preliminary No. 2 transcript of Record.) (See. Federal Rules of Criminal Procedure in support.)
Time for holding examination, Rule 5.1(c) and (d)
See. 5.1(g) which deals with the recording of the proceedings.
See. Rule 5.1(e) which deals with the finding of probable cause, that the preliminary stated that the State produced no evidence to support the misdemeanor charge of petit theft, let alone the Felony burglary charge. (See. Prelim Tr., P.16, L.17-P.17, L.18.). Counsel should have filed a motion to dismiss the misdemeanor charge, then the State would have been barred from refiling.
Rule 58.1 is regarding "Petty offenses and other misdemeanors."
Rule 5.1(a) Provides in general for a preliminary hearing with specified exceptions, including waiver.
"A posponement of the examination for the examination for more than 60 days without the defendant's consent violates the rule's requirement that the hearing be held within a reasonable time". U.S. v. Green 305 F. Supp. 125 (S.D.N.Y. 1969).
"A second preliminary hearing held subsequent to an [redacted] indictment is improper as an invasion of the province of the grand jury." U.S. v. Kysar 459 F.2d 422 (10th Cir. 1972). "The government must produce evidence at the preliminary hearing, and the defendant is entitled to produce evidence, subpoena witnesses and cross examine government witnesses". U.S. ex rel. Wheeler v. Flood 269 F. Supp. 194 (E.D.N.Y. 1967). S.G.T Olsen, one of the arresting officer's. Thus Mr. Brummett suffered a deprivation that reaches constitutional magnitude by infringing the Sixth Amendment's guarantee of effective counsel at every critical stage of the criminal proceedings.

Relief:

Therefore Mr. Brummett respectfully request relief, or an evidentiary hearing to show that attorney was ineffective and that he was prejudiced.

David Brummett

[redacted] CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 8 day of May, 2014, I mailed a true and correct copy of this Supplemental Brief in the prison mail system for processing to the U.S. mail system to:

Attorney General
Criminal Division
P.O. Box 83720
Boise, Idaho 83720-0010