

9-30-2014

State v. Nilan Appellant's Reply Brief Dckt. 41764

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
)
 Plaintiff-Respondent,) No. 41764
)
 v.)
)
 MITCHELL NILAN,) APPELLANT'S REPLY BRIEF
)
 Defendant-Appellant.)
 _____)

APPELLANT'S REPLY BRIEF

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

HONORABLE MICHAEL MCLAUGHLIN
District Judge

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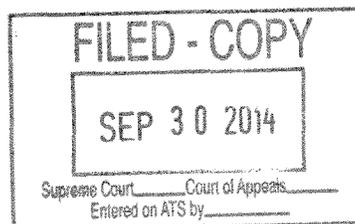


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In response to the respondent's brief, the appellant makes the following legal arguments.

1. The District Court Erred In It's Order Of Dismissal And Mr. Nilan Is Entitled To Relief On The Merits.

The State is correct that the only issue preserved for appeal was whether the magistrate abused its discretion by declining to entertain Mr. Nilan's Motion to Suppress. (Respondent's Brief, p. 17). A review of the record and applicable law does not support the determination of the Magistrate that no good cause or excusable neglect existed to justify an enlargement of time.

A. Standard of Review

Motions to dismiss filed under I.C.R. 12(b) "must be filed within twenty-eight (28) days after the entry of a plea of not guilty or seven (7) days before trial whichever is earlier." I.C.R. 12(d). *State v. Glenn*, 156 Idaho 22, 319 P.3d 1191, 1192 (2014). The trial court however, does have the discretion to "enlarge the time provided herein, and for good cause shown, or for excusable neglect, may relieve a party of failure to comply with this rule." *Id.* The trial court's decision will be upheld when the court "(1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) reached its decision by an exercise of reason." *Id.*

B. The Magistrate Abused Its Discretion When It Failed To Make Any Findings Regarding Good Cause Or Excusable Neglect

The State in its argument asserts that the only justification for the late filing of Mr. Nilan's Motion to Suppress is that the "suppression was "meritorious," that the state could not "show any prejudice," and that, despite having received discovery from the State on April 16, 2013, counsel was unable to ascertain all the facts to support the suppression motion until she spoke with her client at the pretrial conference on May 13, 2013. (Respondents Brief, p.19)

This is simply untrue. While the Public Defender's office may have been appointed on April 5, 2013 the office did not receive notice of that until April 10, 2013. The disclosure by the state was made April 16, 2013. (R. p.15-16). A supplemental discovery disclosure was made by the State on April 26, 2013. (R. p.21-22). At the suppression hearing, counsel cited the delay in the Ada County Clerk's Office between appointment and receipt of notice of appointment. (7/1/13 Tr. p.4 ls.12-20). Counsel further cited the public defender's case load and addressed the fact that the Motion to Suppress was filed just 22 days from the date of receipt of discovery. (7/1/13 Tr. p.11 ls.21-25) (7/1/13 Tr. p.12 ls.22-25).

While case law is scant regarding what actually constitutes good cause or excusable neglect, the Supreme Court of Idaho has held that "A rule of practice must not be allowed for any technical reason to prevail over a constitutional right," –and any rule which does so is not founded upon reason or justice. *State v. Arregui*, 44 Idaho 43, 254 P. 788, 793 (1927). The purpose of Idaho Criminal Rule 12(d) is to provide notice to the State. In *State v. Cutler* the defense filed its motion to suppress fifty-seven days after the entry of plea, thus 29 days after the permissible date to file his motions. 143 Idaho 297, 301, 141 P.3d 1166, 1170 (Ct.App.2006). In that case the "District Court determined that the mere assertion of a heavy caseload was insufficient to support a finding of excusable neglect or good cause under Rule 12(d)." *Id.*

In this case the only findings of the magistrate were as follows: (1) the rules are in place for a reason; (2) it is not the Court's function to arbitrarily enlarge time for motions, because the court believes the motion to be meritorious; (3) 28 days from the date of entry of plea unless good cause or excusable neglect occurs. (R. p. 37). The magistrate never made any findings regarding the lack of good cause or excusable neglect, and instead just denied Defendant's suppression motion and granted state's motion based on late filing. As is similar to *Glen*, the

magistrate was silent as to why it disallowed the motion, which makes it difficult to determine whether the court properly exercised its discretion. Mr. Nilan asserts that based on the Courts statements regarding arbitrarily enlarging time, and its failure to cite any findings regarding good cause or excusable neglect the magistrate failed to perceive the issue as one requiring the exercise of discretion and failing to reach its conclusion by any exercise of reason.

Although not controlling, specifically of note is Justice Huntley's dissenting opinion in *State v. Alanis*, 109 Idaho 884, 712 P.2d 585 (1985).

The majority concludes that “[i]t is abundantly clear that none of the requirements for exemption from the rule's [I.C.R. 12] filing requirement have been met.” The majority remarks that “a court may not arbitrarily enlarge or shorten the filing requirements of the rule,” presumably concluding that the court's actions resulted in an enlargement of the filing requirements in the present case. It is of course clear that defense counsel was unable to satisfactorily explain his reason for the *delay in bringing the motion*. From that fact, however, the majority mistakenly concludes that good cause did not exist for the court to *hear* the motion. The majority's interpretation of I.C.R. 12 is both grudging and narrow. In fact, I.C.R. 12 permits the court to hear a suppression motion when there has been excusable neglect, which counsel was unable to establish, *or* when good cause otherwise exists, which the court *sua sponte* found to be the case.^{FN1} The district court concluded that even though defense counsel had been unable to establish good cause for the delay in filing the motion, good cause to hear the motion nonetheless existed because Alanis should not have to go through trial and then raise the issue of counsel competency on appeal or in a petition for post-conviction relief simply because her counsel had not been conscientious.^{FN2}

FN1. In oral argument before the district court, even the *prosecutor* argued that a continuance might be in order or that the motion should be heard when the evidence was sought to be introduced at trial “*to protect the defendant's rights*.” Protection of a defendant's rights might well fall within the rubric of “good cause.”

FN2. Under the holding of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) a defendant in order to succeed with a claim of ineffective representation must show the existence of a reasonable probability, but for defense counsel's errors, the result would have been different. This is a very difficult standard to meet. It is naive to

think that a criminal defendant in a post-conviction relief proceeding raising the issue of counsel competency where counsel failed to bring a suppression motion which should have been granted is in nearly as advantageous a position as a criminal defendant whose suppression motion is heard prior to or at the time of trial. Prior to trial or during trial, a criminal defendant only need show that the evidence sought to be suppressed is the fruit of the police illegality. If the State is unable to purge the taint of the illegality, the evidence will be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). After trial, even if the defendant can make that showing, it will be to no avail unless that defendant can also meet the much higher standard of the “no conviction but for the admission of the evidence” test.

State v. Alanis, 109 Idaho 884, 879, 712 P.2d 585, 590 (1985).

The majority in *Alanis*, held that the intent of ICR 12(d) is that pre-trial motions should be disposed of prior to trial. Bringing such motions at the last minute unfairly deprives the responding party the opportunity to gather evidence to meet the merits of the movant’s arguments. *Id* at 888. The State was aware of the Motion to Suppress and would have had ample opportunity to gather evidence to meet the merits of the movant’s arguments. Further, in this case it cannot be said that the Motion to Suppress was made at the last minute, was used as a delay tactic or was in any way anything other than excusable neglect or good cause. The Motion to Suppress in this case was made 35 days after the entry of plea, 30 days after the notice of appointments was received and just 22 days after receipt of discovery.

The Court in *Stockwell v. State* observed that “The overriding concern in a criminal prosecution is ... that justice shall be done ...” 98 Idaho 797, 802, 573 P.2d 116, 121 (1977). Justice has not been the predominant factor in this case and the integrity of the judicial system is put into question when constitutional rights of a defendant are put aside in preference of promulgated rules for courtroom efficacy.

CONCLUSION

For the reasons set forth above, Mr. Nilan respectfully requests that his case be remanded to the magistrate to be heard on the merits of his suppression, or in the alternative remanded to the District Court, a new briefing schedule be ordered and that the case be heard on the merits.

DATED this 30th day of September 2014.



HEIDI JOHNSON
Attorney for Defendant

CERTIFICATE OF MAILING

I **HEREBY CERTIFY**, that on this 30th day of September 2014, I caused to be served a true and correct copy of the foregoing document in the above-captioned matter to:

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DEPUTY ATTORNEY GENERAL
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Hand delivered to Attorney General's mailbox at Supreme Court.

By interdepartmental mail



Irene Barrios