2-26-2015

Brummett v. State Appellant's Brief Dckt. 42466

IN THE SUPREME COURT OF THE STATE OF IDAHO

DAVID BRUMMETT, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent.	)	No. 42466 CV-2011-3850 (Canyon County)

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Third
Judicial District of the State of Idaho
In and For the County of Canyon

HONORABLE THOMAS J. RYAN
Presiding Judge

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A. Nature of the Case

This is an appeal from the erroneous summary dismissal of David Brummett's petition for post-conviction relief. The district court erred both in summarily dismissing without proper notice and in concluding that Mr. Brummett had not raised a genuine issue of material fact that he was denied his right to effective assistance of counsel when his attorney failed to file a motion to suppress evidence obtained in violation of the state and federal constitutions. Idaho Const. Art. I, §§ 13, 17, Art. XI, § 5; U.S. Const. Amends. 4, 5, 6, and 14.

B. Procedural History and Statement of Facts

According to a police report, on March 21, 2008, Mr. Brummett was walking on the railroad tracks in Nampa. Officer Davis saw him and called him to come over to talk. Mr. Brummett, who was wearing headphones, appeared not to hear Officer Davis. Officer Davis then yelled and Mr. Brummett came to him. They were separated by a chain link fence topped with barbed wire. Officer Davis told Mr. Brummett that he was trespassing and told him to walk towards an overpass and climb over the fence. Mr. Brummett said that he was not going that way and that he wanted to go toward the train station. At that point, Officer Davis told Mr. Brummett that he was not free to leave. R Vol. I, p. 27.

Officer Davis reported that after repeated requests, Mr. Brummett agreed to walk to the overpass. As he was walking, Mr. Brummett stopped, put down his backpack, and put on his headphones. This caused Officer Davis to call for backup and to scale the fence to get to Mr. Brummett. As Officer Davis climbed the fence, Mr. Brummett started running. A train was moving at a slow pace and Mr. Brummett climbed through the middle of two cars. Officer Davis

followed and chased Mr. Brummett to a street. Mr. Brummett tripped on a curb, but got back up. Officer Davis told him to get on the ground and Mr. Brummett remained standing. So, Officer Davis tackled him and put him into handcuffs. *Id.*

Officer Davis wrote that as this happened, Mr. Brummett told the officer that he was not a bad person and that he did not want to get into trouble. *Id.*

Officer Davis searched Mr. Brummett for weapons and found a green leafy substance in his pocket. Then Officer Davis searched Mr. Brummett more thoroughly and found a hypodermic needle in his jacket pocket and a spoon with white residue. R Vol. I, p. 28.

At the preliminary hearing, Officer Davis testified that while there was a no trespassing sign on the east side of the tracks, there was no sign on the west side where Mr. Brummett was. R Vol. II, p. 174. Despite lengthy testimony, Officer Davis never testified that Mr. Brummett's location required him to pass the sign on the other side of the tracks or that he had seen Mr. Brummett view the sign. R Vol. II, p. 171-177. Rather, he testified that there was only a single sign and that it was only visible from the east side of the tracks. R Vol. II, p. 174.

Mr. Brummett eventually pled guilty to possession of methamphetamine. R Vol. II, p. 197-201. In the guilty plea advisory form, he noted that his plea was a conditional plea reserving the right to appeal the illegal search and seizure. R Vol. I, p. 42. He also wrote that he had asked his attorney numerous times to file a motion to suppress, but counsel had refused and he therefore believed that he had had inadequate counsel. R Vol. I, p. 43. In the end, neither he nor his attorney signed the advisory. R Vol. I, p. 45.

In the plea colloquy, Mr. Brummett told the court that he was pleading guilty voluntarily, freely, knowingly, intentionally, and intelligently and did not mention the lack of a motion to

suppress or that the plea was a conditional plea. R Vol. II, p. 197-201.

The court sentenced Mr. Brummett to a minimum term of three years followed by an indeterminate period not to exceed four years for a total term of seven years, concurrent to a sentence being served on an Ada County case. R Vol. II, p. 210.

Mr. Brummett then filed a *pro se* motion to dismiss on the grounds of an alleged speedy trial violation. The court denied the motion. R Vol. II, p. 233-237.

Thereafter, Mr. Brummett filed a *pro se* Rule 35 motion. R Vol. II, p. 238-255. In his affidavit in support of his motion, he noted that he had not even known that he was trespassing at the time he was walking on the tracks. R Vol. II, p. 248.

The court denied the Rule 35 motion. The Court of Appeals subsequently affirmed the judgment of conviction and sentence imposed. R Vol. II, p. 267.

Mr. Brummett then filed a *pro se* petition for post-conviction relief. R Vol. I, p. 3-7. In his *pro se* memorandum in support of the petition, he argued that his attorney was ineffective in failing to file a motion to suppress because the search and seizure was illegal. He argued that the Idaho Constitution Art. XI, § 5 declares that all railroads shall be public highways and consequently, he was not trespassing when he was arrested for trespass, thus rendering the arrest and subsequent search unconstitutional. R Vol. I, p. 11-13.

He also noted in his memorandum that the place where he entered the tracks had no sign warning that it was not open to the public nor any fence. He wrote that he believed that he was free to walk upon this public highway as designated by the state constitution. R Vol. I, p. 23.

Mr. Brummett also quoted from the trespass statute, I.C. § 18-7008, in support of his argument that counsel was ineffective in failing to file a motion to suppress. He noted that the

statute requires the presence of no trespassing signs as a predicate to an offense. R Vol. I, p. 25.

Mr. Brummett supported his petition with several exhibits including a letter to him from trial counsel stating that counsel would not file a motion to suppress. Counsel stated that a motion to suppress was not warranted because Mr. Brummett had run from the police. R Vol. I, p. 37.

Mr. Brummett also supported his petition with his affidavit wherein he averred that "At the place of my entry onto the railroad-public highway, there was at the time no visible, statutory requirements and signs of trespassing." R Vol. I, p. 55.

The court granted Mr. Brummett's request for counsel on the petition. R Vol. I, p. 62-64.

Counsel filed a motion for judicial notice of certain documents from the underlying criminal case. R Vol. II, p. 103-105. Counsel also filed a statement of additional facts. These facts included Mr. Brummett's statement that he had entered the tracks from the north on the right side of the underpass on 11th Avenue in Nampa. From there he crossed over the underpass and walked a very short distance in the direction of the train station. Officer Davis was standing next to the fence on 1st Street South. When Mr. Brummett realized that Officer Davis wanted to talk to him, he walked over, and Officer Davis said that he was trespassing. Mr. Brummett told the officer that he was leaving and then the officer told him to climb over the fence topped with barbed wire. Mr. Brummett said that he was going to an opening past the old Nampa Museum. The officer told him he was not free to go and demanded that he climb over the triple layer of barbed wire. Another officer then arrived and the officer climbed over the fence and ran at Mr. Brummett. Mr. Brummett got scared and ran. He was then tackled, searched and arrested. R Vol. II, p. 261.

The district court entered an order of conditional dismissal. In the order, the court took judicial notice of the underlying criminal case number CR 2008-8390. R Vol. II, p. 266.

The court held that it would dismiss the petition because the ineffective assistance of counsel claim did not raise a genuine issue of material fact. Specifically, the court held that Mr. Brummett had failed to provide admissible evidence to support his assertion that the result of the proceedings would have been different if counsel had argued that he was on a public railroad when he was arrested. The court wrote: "Counsel wrote to Petitioner and explained that a Motion to Suppress evidence of his arrest was not warranted because Petitioner ran from police after he was told to stop walking on the railroad. Counsel provided appropriate case law outlining this conclusion." R Vol. II, p. 271. The court further held that Mr. Brummett had not raised a genuine issue of material fact regarding prejudice because he was informed of his rights at the plea hearing and he nonetheless entered a guilty plea. R Vol. II, p. 272.

Mr. Brummett, through counsel, filed an objection to the order of conditional dismissal. R Vol. II, p. 279-282. Mr. Brummett set out I.C. § 18-7008(9) which defines trespass, noting that for an offense to occur, the property must be posted with no trespassing signs or specific orange fencing. Mr. Brummett then argued that he had not been trespassing when he was arrested. R Vol. II, p. 281-282. Thus, there was a genuine issue of material fact as to whether his attorney was ineffective in failing to file a motion to suppress. R Vol. II, p. 282.

Thereafter, the court entered a memorandum decision and order of dismissal. R Vol. II, p. 285-289. In its decision, the district court acknowledged Mr. Brummett's argument that he was not trespassing at the time he was arrested and then stated that even if he was not trespassing, counsel's failure to file a motion to suppress was not deficient performance because

the arrest could be justified under the community caretaking exception to the Fourth Amendment. R Vol. II, p. 288. However, the court did not explain how the police officer was exercising his community caretaking function when he tackled Mr. Brummett who was not in any danger of being run over by a train or was not a threat to railroad safety as he was by this time on a public street. R Vol. II, p. 285-289. Rather, the court segued to the conclusion that the officer had a reasonable suspicion of criminal activity based upon Mr. Brummett's running away. R Vol. II, p. 288. The court then concluded that Mr. Brummett's claim of ineffective assistance of counsel fails because there was no showing of deficient performance. *Id.*

A final judgment was entered. R Vol. II, p. 290.

This appeal timely follows. R Vol. II, p. 292-296.

III. ISSUES PRESENTED ON APPEAL

1. Did the district court err in summarily dismissing Mr. Brummett's petition without giving notice as required by I.C. § 19-4906(b)?

2. Did the district court err in concluding that Mr. Brummett had not raised a genuine issue of material fact as to ineffective assistance of counsel because the community caretaker exception to the Fourth Amendment allows police to chase, tackle, arrest, and search a person who, while near railroad tracks, is on a public street and in no apparent danger of being injured by a train or anything else and presents no threat to safe railroad operations? U.S. Const. Amends. 4, 6 and 14; Idaho Const. Art. I, § 17.

3. Did the district court err in concluding that Mr. Brummett had not raised a genuine issue of material fact as to ineffective assistance of counsel because the fact that he ran from the police, with nothing more, was sufficient to justify tackling, arresting and searching him? U.S.

Const. Amends. 4, 6 and 14; Idaho Const. Art. I, § 17.

IV. ARGUMENT

A. The District Court Erred in Summarily Dismissing Mr. Brummett's Petition Without Proper Notice as Required by I.C. §19-4906(b)

In its order of conditional dismissal, the district court stated that Mr. Brummett's petition did not raise a genuine issue of material fact as to ineffective assistance of counsel because Mr. Brummett did not provide admissible evidence to demonstrate that had counsel been aware and argued that the Idaho Constitution requires that railroads be treated as public highways that the outcome would have been different. R Vol. II, p. 271.

In response, Mr. Brummett filed an objection which provided evidence to support a finding that Mr. Brummett was not trespassing at the time he was arrested because the area was not signed or marked as required by I.C. § 18-7008. Therefore, his arrest was in violation of the Fourth Amendment and a motion to suppress would have been successful and the outcome of the proceedings would have been different. R Vol. II, p. 281-282.

The district court then dismissed the petition because, even if Mr. Brummett was not trespassing, the officer was engaged in community caretaking when he tackled, arrested and searched Mr. Brummett and also because Mr. Brummett's act of fleeing provided reasonable suspicion for a detention. R Vol. II, p. 288.

As is well established, I.C. § 19-4906(b) requires that a court give 20-days notice when it intends to dismiss a petition on its own motion. The notice must contain the reasons for dismissal. *Id.* And, those reasons must be set out with specificity. *Baker v. State,* 142 Idaho 411, 421, 128 P.3d 948, 958 (Ct. App. 2005). The purpose of the notice requirement is to allow

the petitioner to adequately and appropriately respond to the notice. *Id. See also, Buss v. State,* 147 Idaho 514, 516, 211 P.3d 123, 125 (Ct. App. 2009). Dismissal without proper notice is error. *Ridgley v. State,* 148 Idaho 671, 676, 227 P.3d 925, 930 (2009).

Here, Mr. Brummett did not receive proper notice as the dismissal was on grounds not included in the court's order of conditional dismissal. Therefore, there was error. *Id.*

Moreover, the error was not harmless. A lack of notice of the proper grounds for dismissal of a claim of ineffective assistance of counsel might not be reversible error if the defendant petitioner entered a guilty plea but did not show how counsel's failings influenced the decision to enter the plea. *Id.* However, in this case, Mr. Brummett made it very clear that he would not have pled guilty had a motion to suppress been filed. And, indeed, as will be demonstrated below, had a motion to suppress been filed, it would have been successful and then the state would have had no evidence against Mr. Brummett and the case would have been dismissed.

B. The District Court Erred in Concluding That the Community Caretaking Exception to the Fourth Amendment Applied in This Case

> The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. The reasonableness standard imposed by the Fourth Amendment requires that the nature of the intrusions upon the individual's privacy interest be balanced against the public need and governmental interest promoted by the action taken. The state bears the burden of showing reasonableness, which we evaluate within the totality of the circumstances.

State v. Barrett, 138 Idaho 290, 293, 62 P.3d 214, 217 (Ct. App. 2003) (citations omitted).

A detention may be constitutionally permissible if it is reasonably conducted in furtherance of a government agent's community caretaking function. *State v. Maddox,* 137 Idaho 821, 824, 54 P.3d 464, 467 (Ct. App. 2002), citing *Cady v. Dombrowski,* 413 U.S. 433, 93 S.Ct.

2523 (1973). The community caretaking function arises out of the duty of the police to help citizens in need of assistance and is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Maddox, supra,* quoting *Cady,* 413 U.S. at 441, 93 S.Ct. at 2528.

> In analyzing claims that community caretaking justified a detention, Idaho courts apply a totality of the circumstances test. The constitutional standard is whether the intrusive action of the police was reasonable in view of all the surrounding circumstances. The reasonableness of an officer's action in pursuit of community caretaking is to be tested upon practicable considerations of everyday life on which reasonable persons act. There must be a sufficient public interest furthered by the detention to outweigh the degree and nature of the intrusion upon the privacy of the detained citizen.

Maddox, supra (internal citations and quotation marks omitted).

Community caretaking cannot be invoked to justify the detention of a citizen that is prompted merely by a subjective but unsubstantiated suspicion of criminal activity or even an unwarranted concern that help might be needed. *Id.* Thus, community caregiving did not allow the detention of occupants of a vehicle that moved forward a few feet, then back, then forward in a parking space and then jerked to a stop where the police did not perceive a medical emergency or other exigency, but held subjective suspicions that the driver was connected with recent burglaries. *State v. Fry,* 122 Idaho 100, 104, 831 P.2d 942, 946 (Ct. App. 1991). Nor did community caretaking allow the detention of a motorist passing by an accident scene long after the accident so that police could inquire as to whether the occupants of the vehicle had any information about the accident. *State v. Wixom,* 130 Idaho 752, 947 P.2d 1000 (1997). *See also, State v. Osborne,* 121 Idaho 520, 525, 825 P.2d 481, 487 (Ct. App. 1991) (detention of individual standing by a parked vehicle at 2:15 a.m. near a lumber yard where, earlier in the evening, police

had received a report of lights being shot out not within community caretaking function); *State v. Schmidt,* 137 Idaho 301, 47 P.3d 1271 (2002) (detention of individuals sitting a lawfully parked car on an unimproved pullout after dark in the winter on officer's subjective belief that the car might have run off the road not within community caretaking function); *State v. Maddox, supra* (detention of individual driving car up motor cycle trail in undeveloped foothill area not justified under community caretaking function).

For the community caretaking function to apply, the officer's actions must be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady,* 413 U.S. at 441, 93 S.Ct. at 2528. Thus, the exception did not apply in *Osborne, supra,* where nothing in the record indicates that the officers perceived a medical emergency or other exigency but rather focused on Osborne because of prior reports of vandalism.

In this case, the community caretaker exception to the Fourth Amendment could not apply because Officer Davis was concerned with a trespass violation. *Cady, supra.* Moreover, there was no evidence that Mr. Brummett or anyone else was in any danger. To the contrary, Officer Davis seemed quite unconcerned about Mr. Brummett's safety - he asked him to climb over a fence topped with barbed wire, a very dangerous undertaking and when Mr. Brummett declined, the officer chased him so that he had to jump through moving train cars. And, indeed, the officer did not stop his chase when Mr. Brummett was no longer near the trains. Rather, he tackled Mr. Brummett on a public street - with no evidence that the tackling was done to push Mr. Brummett away from any danger. And, to complete the task, Officer Davis arrested Mr. Brummett and searched him. Even if somehow someone could conclude that the exception

applied at the beginning of the chase, the justification for it ended well before Mr. Brummett was tackled. It could not justify the arrest and search in any event. Clearly, the actions of Officer Davis did not fall within the community caretaker exception to the Fourth Amendment. *Cady, supra*; *Maddox, supra.*

C. The District Court Erred in Concluding That Mr. Brummett Had Not Raised a Genuine Issue of Material Fact as to Ineffective Assistance of Counsel Because the Fact That He Ran from the Police, With Nothing More, Was Sufficient to Justify Tackling, Arresting and Searching Him

The district court also dismissed Mr. Brummett's petition because it concluded that by running from the officer Mr. Brummett created a reasonable suspicion of criminal activity to justify his detention. R Vol. II p. 288. This analysis is flawed because flight is just one element of the applicable totality of the circumstances test. Under the totality of the circumstances, there was not a basis for a stop. Thus, Mr. Brummett did raise a genuine issue of material fact as to whether counsel was deficient in failing to file a motion to suppress.

Per *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868 (1968), an officer may conduct a brief, investigatory stop when the officer has reasonable, articulable suspicion that criminal activity is afoot. 392 U.S. at 30, 88 S.Ct. at 1884. Per *Illinois v. Wardlow,* 528 U.S. 119, 120 S.Ct. 673 (2000), a totality of circumstances analysis is applied when considering whether reasonable suspicion existed. And, flight is but one circumstance, not a definitive circumstance by itself, which is considered in the totality of the circumstances. *Id.*

Insofar as the district court concluded that flight, without more, justified the stop of Mr. Brummett, the court simply failed to apply the required totality of the circumstances analysis. *Id.* Mr. Brummett did, in fact, raise a genuine issue of material fact as to whether counsel was

deficient in failing to file a motion to suppress because if the state could not provide a stronger basis for the stop than simply Mr. Brummett's flight, the motion to suppress would have been successful. The record as it now exists would not have justified the stop: there was no valid reason to arrest for trespass and it was only Mr. Brummett's presence near the railroad tracks that was noted by Officer Davis. There was no behavior that indicated any sort of criminal activity.

And, even if the state could provide more basis for the stop, the question would remain whether the state could justify the seizure of the marijuana, as *Terry* allows a pat down for weapons - not a search for drugs. Unless the marijuana could have been mistaken for a weapon, it was not properly seized. And, it was the seizure of the marijuana that led to the actual arrest which led to the search that revealed the methamphetamine residue. *See Hoffman v. State,* 153 Idaho 898, 905, 277 P.3d 1050, 1057 (Ct. App. 2012), holding that summary dismissal was erroneous when, based upon the record before the district court, a motion to suppress may well have succeeded and altered the outcome of the case. As in *Hoffman,* summary dismissal was inappropriate because based on the record before the district court a motion to suppress may well have succeeded and altered the outcome of the case by eliminating all the incriminating evidence against Mr. Brummett.

V. CONCLUSION

The district court erred in summarily dismissing Mr. Brummett's petition, both because the court failed to give proper notice and because Mr. Brummett did raise a genuine issue of material fact as to whether he was denied effective assistance of counsel when counsel failed to file a motion to suppress. Mr. Brummett asks either that this Court find that counsel was ineffective and grant Mr. Brummett post-conviction relief or that this Court reverse the order of summary dismissal and remand the case for an evidentiary hearing.

Respectfully submitted this 26th day of February, 2015.

Deborah Whipple
Attorney for David Brummett

CERTIFICATE OF SERVICE

I CERTIFY that on February 26, 2015, I caused two true and correct copies of the foregoing document to be:

_x_ mailed

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