5-7-2015

Brummett v. State Appellant's Reply 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)

REPLY 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

Deborah Whipple
NEVIN, BENJAMIN, McKAY
& BARTLETT
303 West Bannock
P.O. Box 2772
Boise, ID 83701
(208) 343-1000

Attorneys for Appellant

Lawrence Wasden
IDAHO ATTORNEY GENERAL
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

Attorneys for Respondent

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II. ARGUMENT IN REPLY

A. Introduction

Mr. Brummett has set out how the district court erred in summarily dismissing his petition for post-conviction relief. Specifically, the court erred in dismissing without proper notice, erred in concluding that the community caretaker function exception to the Fourth Amendment applied in this case, and erred in concluding that Mr. Brummett had not raised a genuine issue of material fact as to ineffective assistance of counsel in not filing a motion to suppress. Appellant's Opening Brief pp. 7-12.

The state has responded by arguing that the court provided proper notice of its intention to dismiss, Respondent's Brief pp. 7-8, and that the court did not err in summarily dismissing the petition because Officer Davis had reasonable suspicion to stop Mr. Brummett and probable cause to arrest him. The state argues that Officer Davis had reasonable suspicion and probable cause to believe that Mr. Brummett had committed the crimes of trespass and resisting and obstructing. Respondent's Brief pp. 9-15. The state also argues that the validity of the search was not argued below and should not be considered on appeal. Respondent's Brief pp. 16-17. In making its argument, the state notes that it will submit the community care taking question on the record below. Respondent's Brief p. 16, ftnt. 3.

Mr. Brummett should prevail in this appeal, despite the state's argument to the contrary, because the notice was deficient, the community caretaker analysis is inapplicable and he did raise a genuine issue of material fact requiring an evidentiary hearing on the question of whether counsel was ineffective in failing to file a suppression motion given that the arrest and search of Mr. Brummett violated the Fourth Amendment of the United States Constitution and Article I, §

17 of the Idaho Constitution.

B. The District Court Erred In Summarily Dismissing the Petition Without Proper Notice

The district court summarily dismissed Mr. Brummett's petition on two grounds: 1) that the officer was acting within his community caretaker function and 2) "the arresting officer had a reasonable suspicion that petitioner was committing criminal activity, particularly when the defendant ran from police." R Vol. II, p. 288.

With regard to the community caretaker function analysis, neither the state nor the court had ever mentioned the analysis prior to dismissal. The state's only filing in this case was its Answer, which does not mention a community caretaker justification for the arrest and search. R Vol. I, pp. 70-73. And, the court did not mention the analysis in its order of conditional dismissal. R Vol. II, p. 265-273. Dismissal on this basis was without notice and improper. I.C. § 19-4906(b); *Ridgley v. State,* 148 Idaho 671, 676, 227 P.3d 925, 930 (2009).

With regard to the justification of a reasonable suspicion of criminal activity, again the state made no mention of this in its Answer. R Vol. I, pp. 70-73. The district court's order of conditional dismissal likewise does not mention that the arrest and search were justified by reasonable suspicion. The closest the court comes to this analysis are these two sentences: "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 then avoids an analysis of reasonable suspicion by noting that Mr. Brummett had pled guilty. The court wrote: "Importantly, Petitioner was informed by the Court of his rights at this

change of plea; therefore, even if the Court found Petitioner's counsel's performance deficient, Petitioner would need to establish prejudice." R Vol. II, p. 272. The court then concluded that given the evidence against Mr. Brummett, the court could not find that the result of the sentencing hearing would have been different and therefore Mr. Brummett had not established prejudice under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984). R Vol. II, p. 272.

Mr. Brummett submits that this was not notice as required by I.C. § 19-4906(b) that the district court intended to summarily dismiss his petition on the grounds that the arresting officer had a reasonable suspicion of criminal activity. R Vol. II, p. 288.

Because the notice of intent to summarily dismiss was inadequate, Mr. Brummett asks that the order of summary dismissal be reversed.

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

Mr. Brummett relies upon his Opening Brief pp. 8-11 to establish that the district court erred in concluding that the community caretaker exception to the Fourth Amendment justified the arrest and search in this case.

D. The District Court Erred in Concluding That Mr. Brummett Did Not Raise a Genuine Issue of Material Fact as to Ineffective Assistance of Counsel in Failing to File a Motion to Suppress Evidence Obtained in Violation of the Federal and State Constitutions.

The district court held the following:

> At the preliminary hearing, the arresting officer testified that he observed petitioner walking on railroad tracks while wearing headphones. He stated that the railroad tracks were surrounded by a barbed wire fence and he believed that the petitioner was trespassing and that he needed to get off of the railroad tracks. The arresting officer testified that he tried to get petitioner's attention multiple

> times and finally, after yelling as loud as he could, petitioner noticed him. The officer told petitioner to get off of the railroad tracks because he believed that petitioner was trespassing. After a brief discussion, petitioner ran from the police. Shortly after, petitioner was apprehended and officers conducted a search incident to arrest and found petitioner in possession of methamphetamine.
>
> Based on these facts, this Court finds that the arresting officer had a reasonable suspicion that petitioner was committing criminal activity, particularly when the defendant ran from police.

R Vol. II, p. 287-288.

Mr. Brummett has argued that the district court erred insofar as it concluded that by running, Mr. Brummett gave the police a reasonable suspicion of criminal activity to justify his detention. Opening Brief pp. 11-12. In reply, the state has argued that Mr. Brummett was not seized until Officer Davis tackled him, and, at that point, Officer Davis had "reasonable suspicion to stop Brummett and reasonable cause to arrest him." Respondent's Brief pp. 10-11. The state goes on to argue that Officer Davis had "reasonable suspicion and probable cause" to believe that Mr. Brummett had committed the crimes of trespass and resisting and obstructing. Respondent's Brief p. 12.

The state cites I.C. § 18-7008(9) (2008) to support its argument. That section states that a person trespasses when the person enters real property of another without permission and the property is marked in specific ways, including containing certain signs and fencing materials. The state argues that Officer Davis knew that the railroad area was marked with a sign and protected by a fence. The state also appears to assert that Mr. Brummett's running from Officer Davis provided reasonable suspicion for a trespass stop. Respondent's Brief pp. 12-13. The state supports this analysis by quoting Officer Davis' testimony that he had seen a single no trespassing sign and that there was a chain link fence and barbed wire. Respondent's Brief p. 12.

The statute the state cites requires no trespassing signs or other specified notifications every 660 feet except when the geographical configuration of the property is such that entry can reasonably be made only at certain points. In that case, the property is posted sufficiently if the signs or other notices are posted at the points of access. I.C. § 18-7008(9)(2008), quoted at Respondent's Brief p. 13.

Officer Davis never testified that the single sign he saw was at the single point of access to the property. In fact, from the record, it appears that there were multiple means of access and that the tracks were not fenced completely in. Officer Davis wrote in his police report:

> I began to scale the fence near the 11th Ave overpass onto the Union Pacific rail road property. As I climbed the fence, I observed the male take off running northbound from his location on the rail road tracks. A train was moving at a slow pace and David climbed through the middle of two railroad cars. The train stopped in time for me to climb through the same location of the two railroad cars. I pursued David northbound towards 12th Ave 1St N. I observed David trip over a curb as he reached the northwest corner of 12th Ave N and 1st St N. David stood up and faced me as I was running towards him. I advised him to get on the ground. David did not get on the ground. I advised him to get on the ground again and he failed to do so. I tackled David to the ground and put him in handcuffs. David advised me that he was not a bad person and that he did not want to get into trouble.

R Vol. I, p. 27.

This narrative does not mention Mr. Brummett or Officer Davis climbing a fence to leave the tracks and get to the curb at the corner or 12th Ave. N and 1 St. N. Given the signage and fencing requirements of the statute and this narrative, Officer Davis did not have reasonable suspicion, let alone probable cause to believe that Mr. Brummett was trespassing.

Moreover, Mr. Brummett fleeing does not create reasonable suspicion of trespass or other criminal activity. *See Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868 (1968), and *Illinois v. Wardlow,*

528 U.S. 119, 120 S.Ct. 673 (2000), requiring a totality of the circumstances analysis when considering whether reasonable suspicion existed with flight but one circumstance, not a definitive circumstance by itself, which is considered in the totality of the circumstances.

Officer Davis did not have a reasonable and articulable suspicion of trespass because there was no evidence that the railroad property was signed and/or fenced as required to establish trespass. He did not articulate any other crime of which he was suspicious. And, while Mr. Brummett "fled" he did not begin to run until Officer Davis began to scale the fence to come get him. Declining to talk to the police and walking away when no crime has been committed is not indicative of criminal activity. *Florida v. Royer,* 460 U.S. 491, 498, 103 S.Ct. 1319 (1983), holding that when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his/her business. And, provoked flight, as occurred here, is considered differently from unprovoked flight. *Illinois v. Wardlow,* 528 U.S. at 125, 120 S.Ct. at 676.

The state argues that Officer Davis had reasonable and articulable suspicion and probable cause to arrest for resisting and obstructing. Respondent's Brief pp. 15-16. However, the resisting and obstructing statute requires that the officer be acting within the duty of his/her office. I.C. § 18-705. The word "duty" in the statute encompasses only lawful and authorized acts of a public officer. *State v. Gamma,* 143 Idaho 751, 754, 152 P.3d 622, 625 (Ct. App. 2006), citing *State v. Holton,* 136 Idaho 499, 502, 36 P.3d 1287, 1290 (Ct. App. 2001); and *State v. Wilkerson,* 144 Idaho 174, 180, 755 P.2d 471, 477 (Ct. App. 1988). Thus, for example, in *Wilkerson,* a new trial was required when the jury was not instructed that if the officer was not in compliance with the law when he ordered a vehicle towed then the defendant could not be guilty

of resisting and obstructing when she obstructed the tow truck driver from removing the vehicle.

In this case, Officer Davis could speak to Mr. Brummett just as he can speak to any person he encounters. However, given that Mr. Brummett was not committing any crime and that Officer Davis did not have reasonable cause to believe he was committing any crime, Mr. Brummett was free to walk away from the encounter. *Florida v. Royer, supra. See also, State v. Guzman,* 122 Idaho 981, 842 P.2d 660 (1992), rejecting the good faith exception to the exclusionary rule under Idaho Constitution Art. I, §17. Mr. Brummett exercised his right to walk away and then when he saw Officer Davis climbing a fence and running toward him, he too began to run. This was not unprovoked flight, but rather provoked flight. Officer Davis was no longer acting within the scope of his duty when he chased down and tackled Mr. Brummett without reasonable suspicion of trespass. Thus, Officer Davis likewise lacked reasonable suspicion of resisting and obstructing. Consequently, the seizure of Mr. Brummett violated the Fourth Amendment and Idaho Constitution Art. I, § 17. The fruits of that violation are not admissible. *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407 (1963); *State v. Guzman, supra.*

Mr. Brummett submits that the entire tackling and subsequent search were unconstitutional as set out above. In his Opening Brief, he also noted that even if the tackling could be justified as a *Terry* stop, the scope of a *Terry* stop is limited to a pat-down for weapons, not a search for drugs. Appellant's Opening Brief p. 12. The state has responded by arguing that the legality of the search was not raised below. Respondent's Brief p. 16. However, Mr. Brummett clearly raised the claim of whether counsel was ineffective in failing to move to suppress the evidence seized in the search and the district court clearly ruled upon the claim.

Given the constitutionality of the search was integral to the claim before the court, the argument that it was not raised below should be rejected.

As an alternative, the state argues that the search was constitutional as it was a search subsequent to an arrest for resisting and obstructing. Respondent's Brief, pp. 16-17. However, as set out above, there was no valid arrest for resisting and obstructing. Therefore, the search cannot be justified as a search incident to arrest.

Mr. Brummett did raise a genuine issue of material fact as to his claim of ineffective assistance of trial counsel. The district court erred in summarily dismissing the case. Two possible remedies are open to this Court. This Court could vacate the order of summary dismissal and remand for an evidentiary hearing to allow Mr. Brummett to bring forth further evidence to establish that counsel was ineffective. *See Padilla v. State,* ___ Idaho ___, ___ P.3d ___, 2014 WL 7263699 (Ct. App. 2014), *rev. denied*, vacating an order denying post-conviction relief following an evidentiary hearing and remanding for factual findings and conclusions of law on the question of whether counsel was ineffective in failing to file a motion to suppress. On the other hand, this Court could rule that the district court simply erred in concluding that the search was in accord with the federal and state constitutions and that counsel was thus ineffective in failing to file a motion to suppress, and thus vacate the order of dismissal and grant relief itself.

III. CONCLUSION

Mr. Brummett respectfully requests that this Court vacate the order of summary dismissal based on either or both the lack of proper notice and the presence of a genuine issue of material fact. He further requests that this Court either grant post-conviction relief itself or remand for an evidentiary hearing on the claim of ineffective assistance of counsel

Respectfully submitted this 7th day of May, 2015.

Deborah Whipple
Attorney for David Brummett

CERTIFICATE OF SERVICE

I CERTIFY that on May 7th, 2015, I caused two true and correct copies of the foregoing document to be:

__✓__ mailed

___ hand delivered

___ faxed

to: Ted Tollefson
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010

Deborah Whipple