8-24-2016

Tappin v. State Appellant's Brief Dckt. 43197

IN THE SUPREME COURT OF THE STATE OF IDAHO

MICHAEL WILLIAM TAPPIN, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent.	)	S.Ct. No. 43197 Ada Co. CV-PC-14-9191

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada

HONORABLE DEBORAH A. BAIL,
District Judge

Dennis Benjamin
ISBA# 4199
Nevin, Benjamin, McKay & Bartlett LLP
303 West Bannock
P.O. Box 2772
Boise, ID 83701
(208) 343-1000
db@nbmlaw.com

Attorneys for Appellant

Lawrence Wasden
Idaho Attorney General
Paul Panther
Deputy Attorney General
Chief, Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

II. STATEMENT OF THE CASE

A. *Nature of the case*

This is an appeal from the summary dismissal of a post-conviction petition. This Court should vacate the dismissal and remand with directions to appoint counsel for the petitioner.

B. *Procedural history*

1. The criminal proceedings

According to the Court of Appeals' unpublished opinion:

> On January 11, 2012, Detective Andreoli, an undercover narcotics officer, arranged to purchase heroin from Steven McDaniel. McDaniel and a friend identified as "Mikey" were to travel to Seattle to pick up some high-quality heroin which McDaniel agreed to sell to Andreoli upon their return. McDaniel kept in contact with Andreoli and delivery was eventually scheduled for January 14.
>
> On that morning Andreoli, with a surveillance team standing by, went to a gas station on Federal Way in Boise where he met with McDaniel for the heroin delivery. McDaniel, however, could not complete the sale at the time because he stated Mikey had his digital scale. Unable to purchase a new scale elsewhere, McDaniel decided they should drive to Mikey's house and get his scale back. As they approached the house, McDaniel had Andreoli stop the car so he could get out and walk the remainder of the way, claiming Mikey did not want others to know where he lived. The surveillance team observed McDaniel return from one of two houses on the street. Upon his return, McDaniel directed Andreoli to drive back to the gas station where he produced a digital scale and completed the drug transaction.
>
> During this time, the surveillance officers continued to observe the two houses. A car, with its driver on the phone, pulled up and parked, made a sudden and illegal U-turn and parked, then pulled forward and parked again, all without signaling. Tappin exited one of the two houses and got into the passenger seat of the car. As the car pulled away from the curb, the officers made a traffic stop. As the stop began,

> officers observed the passenger lean forward and reach his hand toward his waistband or pocket area. Officers removed the driver and passenger from the vehicle and the passenger identified himself as Tappin. An officer asked Tappin if he had any weapons or contraband and for permission to search his person. Tappin granted consent and the officers found a bag containing ten grams of heroin in Tappin's right front pants pocket.
>
> Tappin was charged with conspiracy to traffic in heroin, in violation of I.C. §§ 37–2732B(a)(6)(C), 18–1701, 37–2732(b) and 19–304; trafficking in heroin, I.C. § 37–2732B(a)(6) and 18–204; and possession of drug paraphernalia, I.C. § 37–2734A. Tappin filed a motion to suppress the evidence gathered by the police as a result of the traffic stop alleging there was no legal basis for the stop and no reasonable suspicion of any criminal activity. After a hearing on the motion, the district court denied the suppression motion. Tappin entered into a conditional guilty plea wherein he pled guilty to the trafficking charge and the conspiracy and possession offenses were dismissed by the state. Tappin reserved his right to appeal the district court's denial of his suppression motion. Tappin appealed.

State v. Tappin, No. 40377, 2014 WL 546012, at *1 (Ct. App. 2014).

2. The direct appeal

On appeal, appellate counsel argued "that the officers did not have reasonable suspicion to lawfully expand the length and scope of the traffic stop into a drug investigation." *Id.,* at *2. The Court found that issue had not been preserved for appeal, noting that:

> Although he contested the initial traffic stop in the district court, Tappin concedes on appeal that the stop of the vehicle and detention of its occupants was valid. Tappin now asserts that his detention became illegal and that illegality tainted his consent to search making it ineffective.
>
> . . . .

> After an evidentiary hearing, the district court entered factual findings and ordered that Tappin's motion be denied. The district court concluded that the driver of the car made several traffic violations justifying the stop. The district court further stated, "Once the stop occurred, nothing precluded the officer from asking Tappin for his consent to a search. *There is no challenge to the fact that he voluntarily consented to the search of his person.*" (Emphasis added.) Although Tappin noted in his memorandum in support of his motion that he "reserves the right to make additional arguments based on the evidence adduced at the evidentiary hearing," no evidence was introduced setting forth this challenge and no argument was made raising it to the district court for a ruling on the issue.

Id. Appellate counsel could not and did not challenge the district court's findings that Mr. Tappin had granted consent for the officer to search his person. *State v. Tappin*, *supra.*

The Court of Appeals affirmed the denial of the motion to suppress because Mr. Tappin's trial counsel had not preserved the issue raised by appellate counsel. *Id.*, at *3.

3. The post-conviction proceedings

Mr. Tappin filed a timely *pro se* petition for post-conviction relief. R 4. He alleged that trial counsel was ineffective. He alleged that trial counsel's performance during the suppression hearing was deficient because he failed to challenge and preserve for appeal the issue of whether the scope and duration of the traffic stop was unreasonable and also whether he had consented to the search of his person. In particular, trial counsel failed to call petitioner to the witness stand to refute the state's claims that: 1) the stop started out as a traffic stop; 2) the

petitioner's hands disappeared toward his waistband; 3) the petitioner voluntarily consented to a search of his person. R 2-3.

In support of the allegations, Mr. Tappin filed an affidavit wherein he stated that, he should have been called to testify at the motion to suppress hearing to dispute whether he consented to the search of his person. He said:

> 4. My trial counsel, Mr. Randall Barnum, never called me as a witness to testify on my own behalf.
>
> 5. This would have allowed me the opportunity to dispute the state[']s claim that I had given them consent for a search of my person (6-18[-]12 TR pgs. 79-80 LN 21-25, 1-2).
>
> 6. Based on this evidence alone, it seems clear that Judge Bail had enough reason not to rule in favor of the Defendant/Petitioner.
>
> 7. This is evident in Judge Bail's decision to deny my Motion to Suppress (see Motion to Suppress decision date 07-09-12 pg 4).
>
> 8. I had previously informed Mr. Barnum that I never consented to search, and even requested that the audio of the arrest be obtained and played in open court to support my claim of non-consent.
>
> 9. This would have proved that Det. Cory Bruner was lying about the circumstances surrounding the illegal search and seizure that took place, when he said under oath that Mr. Tappin consented to search (TR pgs 79 & 80 Lns 21-25, 1-2).

Mr. Tappin continued that he should have been called to testify that the police exceeded the permissible scope of the alleged traffic stop. He said that:

> 10. Petitioner made it known to Mr. Barnum on several occasions both before and during the suppression hearing that there was never a routine "traffic stop" as the state leads the court to believe.
>
> 11. Det. Bruner never inquired of the occupants of the vehicle upon stop[p]ing it.

12. Det. Bruner even states during the suppression hearing that the minor traffic violations were not the reason for the "traffic stop" (6-18-12 TR pg. 119 Lns 9-12).

13. Mr. Barnum never called the Petitioner to the stand to give his version of the traffic stop. Not only to refute the state[']s version, but also to get it on record.

14. Had the Petitioner been called to the stand, he would have told the court the he was immediately pulled from the passenger seat at gun point, patted down despite not giving consent, and arrested. There was never any inquiry into traffic violations.

15. Being yanked aggressively from the vehicle at gun point is not consistent with a traffic stop for minor violations.

16. Further, the State never provided any proof that the petitioner or his co-defendant had engaged in any felonious behavior that justified being pulled over in the manner described and removed from the vehicle at gun point.

17. Petitioner asserts that the testimony from Det. Bruner concerning the so called "traffic violations" was given merely a means to justify the validity of the traffic stop, which was clearly treated as a felony stop.

18. Again, according to the State[']s own witness (Det. Bruner) the "traffic violations" were not the reason for the traffic stop (TR pg 119 lns 9-12). Had Petitioner been allowed to testify and provide his version of the traffic stop, it would have eliminated this confusion surrounding the traffic stop. I believe Judge Bail would not have referenced these so called violations as justification for the stop in her decision to deny Petitioner's Motion to Suppress.

R 9-10.

Mr. Tappin also said he asked trial counsel to call him to testify so he could dispute the testimony that he reached toward his waist.

19. Petitioner made known to trial counsel that he never reached "towards his waistband or pocket area" before being contacted by police

> and that he wished to dispute this claim made by the State (TR pgs 77-78 lns 21-25, 1-8).
>
> 20. Petitioner told his counsel, Randall Barnum[,] on many occasions that he did not submit to a search and that he wished to obtain a copy of the police audio recording made during the traffic stop and to play it in court to support this claim. Petitioner advised counsel before and during the suppression hearing that he was never moving his hands and that he was pulled from the vehicle at gun point unnecessarily.
>
> 21. However, counsel never raised these issues, or Petitioner's version of the events of the arrest during the suppression hearing. Nor did he obtain a copy of the police audio recording. Instead he told me we don't need to, we are going to beat this thing."
>
> 22. By not calling me to the stand, he allowed only the State's version of events to be a part of the official record, which is the reference the Judge used to make the decision to deny Petitioner's Motion to Suppress.

R 10-11.

Mr. Tappin asked the court to appoint counsel. R 23-25. The court denied the motion on May 13, 2014. The Order read, in relevant part, as follows:

> The file will be reviewed to determine if there is a basis for post-conviction relief. If the petition is not subject to summary dismissal pursuant to I.C. § 19-4906(b), counsel will be appointed. If the petition alleges facts showing the possibility of a valid claim, counsel will be appointed. *Workman v. State*, 144 Idaho 518, 529, 164 P .3d 798, 809 (2007). The Court will consider whether the facts alleged are such that a reasonable person with adequate means would be willing to retain counsel to conduct a further investigation into the claims." *Swader v. State*, 143 Idaho 651, 654, 152 P.3d 12, 15 (2007). At this point, the motion is denied.

R 28.

The state filed an Answer. R 38-41. It did not move for summary disposition of the petition.

On November 10, 2014, Mr. Tappin filed a second Motion and Affidavit in Support for Appointment of Counsel. R 46-48. Mr. Tappin argued that he had met the burden of demonstrating a potentially valid claim under I.C. §19-4904, stating that he was "afraid the court may be abusing its discretion if the court is denying counsel on the merits of the post-conviction which was prepared pro-se." R 50, *citing Charboneau v. State*, 140 Idaho 789, 793, 102 P.3d 1108, 1112 (2004). Mr. Tappin stated that he only had a ninth grade education, worked in the electrical trade, and had no legal experience. Accordingly, "my petition may be conclusory and/or incomplete, and gives further merit to my request for appropriate counsel." R 50. Mr. Tappin concluded that he had "raised viable claims to further be addressed and the court should appoint counsel in order to give me ample opportunity not only to work with counsel, but to also properly allege the necessary supporting facts." He also stated that, "I believe that had I adequate means to do so, I would seek out and retain counsel to further conduct research into said claim(s)." *Id*.

The Court took judicial notice of the Memorandum of Law in Support of Motion to Suppress, the transcript of the suppression hearing, and the Order Re: Motion to Suppress from the criminal case. R 52.[1]

On February 5, 2015, the court filed a Notice of Intent to Dismiss. R 53. Mr. Tappin did not file a response to the Notice. The court dismissed the petition and entered a Final Judgment, but never ruled on Mr. Tappin's second motion for

[1] A Motion to Take Judicial Notice of these documents has been filed.

appointment of counsel. R 71-72.

A timely Notice of Appeal was filed. R 85. The court granted Mr. Tappin's Motion for Appointment of State Appellate Public Defender. R 89.

III. ISSUE PRESENTED ON APPEAL

Did the court abuse its discretion in denying Mr. Tappin's motion for appointment of counsel since the petition alleges facts showing the possibility of a valid claim?

IV. ARGUMENT

"A decision to grant or deny a request for counsel in post-conviction cases is reviewed for an abuse of discretion." *Shackelford v. State*, 160 Idaho 317, 372 P.3d 372, 380 (2016), *reh'g denied* (2016); *Murphy v. State*, 156 Idaho 389, 393, 327 P.3d 365, 369 (2014). When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the court reached its decision by an exercise of reason. *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

"A request for appointment of counsel in a post-conviction proceeding is governed by I.C. § 19–4904, which provides that in proceedings under the UPCPA, a court-appointed attorney 'may be made available' to an applicant who is unable to

pay the costs of representation." *Shackelford*, at 392–393, 327 P.3d at 368–369 (quoting I.C. § 19–4904). "The standard for determining whether to appoint counsel for an indigent petitioner in a post-conviction proceeding is whether the petition alleges facts showing the possibility of a valid claim." *Id*. at 393, 327 P.3d at 369 (*citing Workman v. State*, 144 Idaho 518, 529, 164 P.3d 798, 809 (2007)). "In determining whether the appointment of counsel would be appropriate, every inference must run in the petitioner's favor where the petitioner is unrepresented at that time and cannot be expected to know how to properly allege the necessary facts." *Melton v. State*, 148 Idaho 339, 342, 223 P.3d 281, 284 (2009) (quotation marks omitted).

Here, it is unclear whether the district court identified the correct legal standard. It first stated that "[i]f the petition is not subject to summary dismissal pursuant to I.C. § 19-4906(b), counsel will be appointed." R 28. That, however, is not the standard for deciding whether to appoint counsel. In the next sentence, it cited the standard as set forth in *Shackelford*. *Id.* In the sentence after that, it said, "[t]he Court will consider whether the facts alleged are such that a reasonable person with adequate means would be willing to retain counsel to conduct a further investigation into the claims," citing *Swader v. State*, 143 Idaho 651, 654, 152 P.2d 12, 15 (2007). *Id*. Thus, only two of the three standards set forth by the district court are correct.

Unfortunately, it is impossible to tell whether the court applied the correct

standard. In its penultimate sentence, the Court stated, without any analysis, "At this point, the motion is denied." R 28. The court did not find the facts required to deny appointed counsel irrespective of which standard is applied. It did not find that the petition was subject to summary disposition. (That occurred later, after the motion to appoint counsel had been denied.) It did not find that the petition failed to allege facts showing the possibility of a valid claim. And it did not find that the facts alleged were such that a reasonable person with adequate means would not be willing to retain counsel to conduct a further investigation into the claims. Thus, in addition to not setting forth the correct legal standard, the court abused its discretion because it did not act consistently with the correct standard and because it did not reach its decision by an exercise of reason.

Mr. Tappin notes that the "at this time" language suggests that the court intended to review the allegations sometime in the future and appoint counsel if it found the pleading sufficient. If that is the case, the court must have applied the incorrect first standard it identified because the only finding it made was that "[t]he petitioner has failed to meet his burden under the *Strickland* test in his ineffective assistance of counsel claims." R 64. That was error because the petitioner does not need to make s *prima facie* showing of a cause of action to be entitled to appointment of counsel. He only needs to allege facts showing the possibility of a valid claim. Showing the possibility of a valid claim is a decidedly lower threshold than establishing a genuine issue of material fact. "The determination whether to appoint counsel and the determination whether a petition is subject to summary dismissal

are thus controlled by quite different standards, with the threshold showing that is necessary in order to gain appointment of counsel being considerably lower than that which is necessary to avoid summary dismissal of a petition." *Judd v. State*, 148 Idaho 22, 24, 218 P.3d 1, 3 (Ct. App. 2009).

In order to *prevail* on a claim of ineffective assistance of counsel, a post-conviction petitioner must demonstrate both that her attorney's performance was deficient, and that she was thereby prejudiced in the defense of the criminal charge. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show deficient performance, a petitioner must demonstrate "that counsel's representation did not meet objective standards of competence." *Id.*, at 687-688. If a petitioner succeeds in establishing that counsel's performance was deficient, he must also prove the prejudice element by showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.,* 466 U.S. at 694. As shown above, Mr. Tappin alleged facts showing the *possibility* of an ineffective assistance of trial counsel claim.

Mr. Tappin alleged that trial counsel was ineffective because he did not challenge the scope of the seizure. Mr. Tappin alleged that he could have been called to testify that "there was never a routine 'traffic stop' as the state [led] the court to believe." R 10. And, "Det. Bruner never inquired of the occupants of the vehicle upon stop[p]ing it." *Id*. Mr. Tappin could have testified that "he was immediately pulled from the passenger seat at gun point, patted down despite not giving consent,

and arrested. There was never any inquiry into traffic violations." *Id*. Had the district court found the scope of the traffic stop had been exceeded it would have suppressed the evidence found in the search. *See, State v. Gutierrez*, 137 Idaho 647, 651-53 (Ct. App. 2002) (Unlawful for an officer to question a driver about matters unrelated to the traffic stop after the officer fulfilled the purpose of the traffic stop by issuing a written warning to the driver.); *State v. Aguirre*, 141 Idaho 560, 564 (Ct. App. 2005) (where the officers abandoned the investigation into the traffic offense to pursue a drug investigation that was not supported by reasonable suspicion). However, "Mr. Barnum never called the Petitioner to the stand to give his version of the traffic stop. Not only to refute the state[']s version, but also to get it on record." R 10. As Mr. Tappin observes, even if the district court denied the motion, the issue regarding the scope of the stop would still have been preserved for appeal.

Further, Mr. Tappin could have testified that he never leaned forward and reached his hand toward his waistband or pocket area, a fact which could have been used to justify a pat down for weapons. *See, Terry v. Ohio*, 392 U.S. 1 (1967). "Petitioner made known to trial counsel that he never reached 'towards his waistband or pocket area' before being contacted by police and that he wished to dispute this claim made by the State." R 10.

Third, Mr. Tappin could have testified that he did not consent to the search. "I had previously informed Mr. Barnum that I never consented to search, and even requested that the audio of the arrest be obtained and played in open court to

support my claim of non-consent." R 10.[2] Absent consent, Mr. Tappin could not have been searched because there was no reason to believe that he was armed. Absent consent, an officer may frisk an individual only if the officer can point to specific and articulable facts that would lead a reasonably prudent person to believe that the individual with whom the officer is dealing may be armed and presently dangerous and nothing in the initial stages of the encounter serves to dispel this belief." *Terry*, 392 U.S. at 27.[3] Additionally, even if a frisk is permitted under *Terry*, the scope of a frisk must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby. *Terry*, 392 U.S. at 26. There was nothing about the baggie discovered in the search which could have led the officer to believe it was a weapon.

Thus, Mr. Tappin has alleged facts which show that he could have called into dispute the facts which led to the district court's denial of his motion to suppress and that his attorney was aware that he could testify to those facts. These facts are sufficient to show the possibility of a valid claim and merit appointment of counsel

---

[2] After judgment was entered, Mr. Tappin filed an I.R.C.P. 60(b) motion. Aug. p. 1. In that motion, he states he never heard the police audio recordings until after August of 2015, five months after the post-conviction petition was dismissed. Mr. Tappin discovered that the police did not record the contact with the vehicle and thus there is no recording of any facts justifying the scope of the stop to be expanded from a traffic stop to an investigatory stop. There is also no recording of the consent to search the police claimed that he gave. Aug. p. 3.

[3] In light of *Terry*, the district court's observation that "once validly stopped, a search of [Mr. Tappin's] person for officer safety reasons would have been standard" is dead wrong. R 63. A *Terry* search for weapons must be supported by articulable facts and is not permitted as standard operating procedure.

under *Shackelford*, *supra*.

Finally, the facts alleged are such that a reasonable person with adequate means would be willing to retain counsel to conduct a further investigation into the claims. Counsel might have been able to obtain the affidavit of the co-defendant, who was driving the vehicle. He also might have been able to obtain an affidavit from trial counsel stating that he did not have a strategic reason to fail to challenge the scope of the stop or whether the search of Mr. Tappin was justified by consent or articulable facts.[4]

Had the evidence been suppressed, the state would have had to dismiss the Trafficking in Heroin charge and the conspiracy charge would have been much more difficult, if not impossible, to prove beyond a reasonable doubt. A reasonable person at trial would focus their resources on the motion to suppress because it was the key to the defense strategy. Likewise, on post-conviction a reasonable person would devote resources to investigate an ineffective assistance of counsel claim which could lead to the eventual suppression of the most important evidence in the state's case. This is sufficient to merit counsel under *Swader v. State*, *supra.*

---

[4] There is no obvious strategic reason for trial counsel to fail to argue additional bases in support of his motion to suppress. A challenge to the scope of the stop and the absence of consent/articulable basis to search Mr. Tappin would not have been inconsistent with trial counsel's argument that there was no basis for a traffic stop. There is also no obvious reason why Mr. Tappin should not have testified in support of the additional bases as his testimony at the suppression hearing would not have been admissible at trial in the state's case in chief. *Simmons v. United States*, 390 U.S. 377 (1968).

V. CONCLUSION

The district court abused its discretion in not appointing counsel to assist Mr. Tappin with his post-conviction petition. For the reasons set forth above, Mr. Tappin asks this Court to vacate the summary dismissal of the petition and remand the matter for appointment of counsel and further proceedings.

Respectfully submitted this 24th day of August, 2016.

____/s/_____
Dennis Benjamin
Attorney for Michael Tappin

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es):

Idaho State Attorney General
Criminal Law Division
ecf@ag.idaho.gov

Dated and certified this 24th day of August, 2016.

_____/s/_____
Dennis Benjamin