

10-26-2016

Tapp v. State Appellant's Reply Brief Dckt. 43347

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IN THE SUPREME COURT FOR THE STATE OF IDAHO

CHRISTOPHER C. TAPP,)	
)	
Petitioner-Appellant,)	
)	
vs.)	S.Ct. No. 43347
)	Bonneville Co. CV-2012-5881
)	
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Seventh
Judicial District of the State of Idaho
In and For the County of Bonneville

HONORABLE JOEL E. TINGEY,
District Judge

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II. ARGUMENT IN REPLY

The order granting summary disposition should be vacated because the court's finding that the evidence was not exculpatory or material under *Brady v. Maryland*, 373 U.S. 83 (1963), is not supported by any evidence in the record. The state's alternative bases for affirmance are either without merit, or should not be considered for the first time on appeal, or both.

A. Remand is required because the district court's resolution of the Brady claim is based on evidence outside of the record.

In the Supplemental Opening Brief, Mr. Tapp argued that the district court's finding that the withheld evidence was not exculpatory or material under *Brady v. Maryland, supra*, was not supported by sufficient evidence in the record because the transcript of the criminal trial was not taken judicial notice of, was not introduced as an exhibit, and was not filed, either by Mr. Tapp or with the state's answer. In support of that argument, Mr. Tapp referred the Court to *Matthews v. State*, 122 Idaho 801, 808, 839 P.2d 1215, 1222 (1992), where the Supreme Court held "that prior to dismissing a petition for post-conviction relief, the district court is required to obtain that portion of the trial transcript as is necessary to a determination . . . that there are no material issues of fact and that the petitioner is not entitled to post-conviction relief. I.C. § 19-4906(b)." The state, however, does not cite or attempt to distinguish *Matthews* from this case. As *Matthews* has never been

overruled or called into question¹, its holding should be applied in this case.

The state argues that Mr. Tapp's citation to *Matthews* is simply an attempt to avoid the defects in his pleadings. Yet, at the same time, it concedes that it also had a statutory duty to provide the transcripts missing from Mr. Tapp's petition. State's Brief, pg. 20. The district court also had the duty to obtain the portion of the trial transcript needed to determine the state's motion under *Matthews*. Thus, while all parties share in the blame for an inadequate record, the fact remains that the record is inadequate and thus does not support the district court's finding that the withheld evidence was not exculpatory or material under *Brady*.

The state's citation to *Roman v. State*, 125 Idaho 644, 648, 873 P.2d 898, 902 (Ct. App. 1994), does not aid its cause. While it is true that the Court of Appeals stated that the petitioner had the burden of placing a transcript into evidence after the state had moved for summary dismissal, the petitioner in *Matthews* was also faced with defending a motion for summary disposition but the Supreme Court required the district court to obtain the transcript before ruling. Since *Roman* is

¹ While a "judge may take judicial notice of *personal recollection* of prior proceedings to the extent that the judge recalls what occurred," the prior proceedings must be from the same case and a transcript of the prior proceeding must be available so any error is subject to appellate review. *Navarro v. Yonkers*, 144 Idaho 882, 887, 173 P.3d 1141, 1146 (2007) (emphasis added), citing *Matthews, supra*. Here, the matter "recollected" by the district court judge was a trial which he did not preside over and, since judicial notice was not taken, the trial transcripts are not available for this Court to review. However, had the district court or this Court taken judicial notice, the trial transcripts would have shown the district court's finding was in error. See, Opening Brief, p. 10-23.

inconsistent with *Matthews*, the Supreme Court case must be followed. And the general rule is that the moving party bears the burden of production in motions for summary judgment. *See, Gray v. Tri-Way Const. Servs., Inc.*, 147 Idaho 378, 388, 210 P.3d 63, 73 (2009) (District court improperly placed the burden of production on non-moving party to show that the customary rate of pay.); *Chandler v. Hayden*, 147 Idaho 765, 769, 215 P.3d 485, 489 (2009) (“The moving party bears the burden of proving the absence of material facts.”); *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000) (“The party moving for summary judgment initially carries the burden to establish there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law.”). In this regard, it is important to note that the state did not argue that Mr. Tapp had failed to prove the evidence was not exculpatory or material, it affirmatively argued that the evidence was neither exculpatory nor material. R 35. Thus, it should have provided the transcripts needed to support its argument.

Remand is required because there is no way for this Court to determine whether the district court’s ruling that the evidence was not exculpatory or material under *Brady* was correct.

B. The state’s alternative arguments should not be considered for the first time on appeal and/or are without merit.

The state argued in the district court that the evidence was not exculpatory because “[t]estimony regarding another possible suspect does not exculpate or impeach Mr. Tapp’s confession.” R 32. Second, it argued that the evidence was not

suppressed because “defense counsel knew or should have known about Smith’s involvement because that information was present in the police reports of which they had access.” R 33. Finally, it argued that the evidence presented by Mr. Tapp was not material because Mr. Smith was not the contributor of the semen recovered at the crime scene and “[e]ven if Jeff Smith was involved in some other way with Angie Dodge’s rape and murder, his involvement does not affect Petitioner’s guilt nor negate his confession.” R 35.

The state now makes several alternative arguments to support the district court’s ruling. State’s Brief, pg. 15-18. However, since these arguments differ from those made by the state in the district court, they should not be considered for the first time on appeal. To do so would deprive Mr. Tapp of his due process right to notice and a full and fair opportunity to respond. *Caldwell v. State*, 159 Idaho 233, 239, 358 P.3d 794, 800 (Ct. App. 2015). (The Court declined to affirm a summary dismissal based upon an argument raised by the state for the first time on appeal, noting that “were we to affirm the grant of summary dismissal on this alternative basis, it would be tantamount to the district court granting summary dismissal on a basis not identified in the state’s motion for summary dismissal without the twenty days’ notice provided for in I.C. § 19–4906(b).”). Further, the arguments are without merit.

First, the state argues that Mr. Tapp did not show that either Mr. Browning or Ms. Goff had exculpatory information because there is no connection between the

encounter described in the affidavits and the Angie Dodge murder. State's Brief, p. 14-15. This is a different argument than the one the state made below, *i.e.*, that the evidence was not exculpatory in light of Mr. Tapp's (false) confession that he was an accomplice. Thus, the argument should not be considered. *Caldwell v. State, supra*.

Moreover, the fact that Mr. Smith did not confess to killing Angie Dodge does not deprive the evidence of exculpatory value. The facts that Mr. Smith 1) showed up at 3:00 a.m., 2) wearing a bloody shirt, 3) with scratches on his face and 4) a rug burn on his chin, 5) asking to use Mr. Browning's bathroom to wash up exculpates Mr. Tapp even absent an admission to the murder. This is so because there is no evidence linking Mr. Smith to Mr. Tapp. If Mr. Smith is the murderer, Mr. Tapp could not have been his accomplice. It is of no moment that Mr. Smith was not the donor of the semen found at the crime scene, neither was Mr. Tapp. Thus, the evidence shows that Mr. Smith was involved in the murder and was the accomplice to the rape in place of Mr. Tapp.²

Second, the state argues that Mr. Tapp did not show that the state "withheld Browning or Goff as potential witnesses." State's Brief p. 16. However, the district court rejected the state's argument that it did not withhold evidence about Mr. Smith at the summary disposition hearing. Tr., p. 66, ln. 24-25. Moreover, the state

² The state also argues that Mr. Browning's and Ms. Goff's observation of Mr. Smith at 3:00 a.m. on June 13, 1996, was not connected in time to the murder since Mr. Tapp's pleadings never alleged when Ms. Dodge was murdered. State's Brief, p. 14-15. The state, however, overlooks the fact that it filed discovery documents from the criminal case which establish the time and date of the murder as sometime after midnight on June 13, 1996. R 45.

never claimed below that it turned over information about Mr. Browning or Ms. Goff. It only claimed that defense counsel knew or should have known that Mr. Smith was a suspect, not that it turned over evidence that he was seen bloody and injured shortly after the time of the murder. R 33. The documents provided by the state in support of its motion show that Mr. Smith was considered a suspect in the murder, but there is no mention of the incident witnessed by Mr. Browning and Ms. Goff. See R 38-154 (Discovery documents attached as Exhibits B-D to the state's Memorandum in Support of Summary Dismissal). Moreover, the state's speculation that the detective Mr. Browning spoke to might not have passed on the information to the case agents handling the investigation of the brutal murder and rape of an 18-year-old woman is far-fetched, at best.

Finally, the state argues that Mr. Tapp failed to allege facts raising a genuine issue of fact with respect to prejudice. State's Brief, p. 17. This argument should also not be considered because it is different from the argument below which was that the evidence was not exculpatory in light of Mr. Tapp's defense at trial. R 45. In any case, the state failed to file the trial transcripts in support of its motion and thus failed to carry its burden as the moving party to show the absence of a genuine question of material fact.

III. CONCLUSION

For all the reasons set forth above, this Court should vacate the district court's summary dismissal of the second successive petition and remand for further proceedings.

Respectfully submitted this 26th day of October, 2016.

/s/Dennis Benjamin
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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):

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Dated and certified this 26th day of October, 2016.

/s/Dennis Benjamin
Dennis Benjamin