10-9-2013

Daniels v. State Appellant's Brief Dckt. 40811

IN THE SUPREME COURT OF THE STATE OF IDAHO

CECIL G. DANIELS, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent.	)	S.Ct. No. 40811-2013 D.Ct. No. 2011-7510 (Kootenai County)

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the First
Judicial District of the State of Idaho
In and For the County of Kootenai

HONORABLE CARL B. KERRICK
Presiding Judge

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A. Nature of the Case

This is an appeal from the denial of a post-conviction petition following an evidentiary hearing. Relief should be granted because Mr. Daniels received ineffective assistance of appellate counsel when counsel failed to raise the denial of a suppression motion in his direct appeal.

B. Procedural History and Statement of the Case

Mr. Daniels was charged by information with felony DUI; possession of a controlled substance; driving without privileges; and providing false information to law enforcement following a traffic stop in 2008. R 29. He filed a motion to suppress evidence obtained during the traffic stop. R 29-30. However, the motion was denied. R 30. Mr. Daniels filed a motion to reconsider. R 30-31. That motion was also denied. R 31.

At trial Mr. Daniels was convicted of felony DUI, possession of an open container of alcohol, driving without privileges, and providing false information to law enforcement. The jury could not reach a verdict on possession of a controlled substance. R 31.

The court sentenced Mr. Daniels to ten years with a minimum fixed term of three years on the DUI. R 31.

Mr. Daniels filed a timely notice of appeal. R 31. In his notice of appeal, he specifically noted that an issue to be presented on appeal was whether the district court erred in denying the motion to suppress. R 37054, Vol. 8, p. 27.[1]

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[1] This Court took judicial notice of the record of the underlying criminal case in its order entered August 19, 2013.

However, on appeal, appointed counsel raised only the issues that the district court imposed an excessive sentence and later erred in denying Mr. Daniels' Criminal Rule 35 motion for reduction of the sentence. R 28-39. The Court of Appeals denied appellate relief in an unpublished decision that was less than two pages long. R 44-45.

Mr. Daniels filed a timely *pro se* petition for post-conviction relief. R 5-11. The court appointed counsel and an amended petition was filed. R 27, 46-49. The amended petition alleged:

> 2. Petitioner contends that appellate counsel failed to adequately prosecute his appeal in as much as appellate counsel refused, despite Petitioner's specific requests, to argue that the trial court erred by denying Petitioner's motion to suppress, and violated Petitioner's Sixth Amendment right to counsel and right to due process of law, and but for this deficiency Petitioner would have argued that the denial of the motion to suppress was error, and would have prevailed on appeal, resulting in the reversal of his conviction.

R 47.

In response to the state's motion for summary dismissal, Mr. Daniels filed a memorandum which argued that, as appellate counsel had effectively abandoned the appeal, proof of prejudice was not required. R 60-64. The court denied the motion for summary dismissal as to the claim of ineffective assistance of appellate counsel. (A claim of ineffective assistance of trial counsel was dismissed pursuant to Mr. Daniels' concession that there was no basis for it.) R 65-72.

At the evidentiary hearing, Mr. Daniels presented evidence and argument to support his claim that his constitutional right to counsel was violated when appellate counsel did not raise the suppression issue on direct appeal. Tr. 1/28/13. Mr. Daniels requested that the district court reinstate his right to appeal from all the convictions entered in the criminal case, most

specifically the right to appeal the denial of the motion to suppress. R 78.

The district court denied Mr. Daniels' petition holding that Mr. Daniels had failed to establish that appellate counsel's representation fell below an objective standard of reasonableness and further that he failed to establish that the outcome of the appeal would have been different if he had been able to present the suppression issue. R 77-89.

This appeal timely followed. R 88-91.

III. ISSUE PRESENTED ON APPEAL

Did the district court err in denying post-conviction relief because the failure of appellate counsel to raise the suppression motion was constitutionally ineffective assistance?

IV. ARGUMENT

A. The District Court Erred in Denying Post-Conviction Relief

Mr. Daniels presented evidence and argument in the district court in support of two alternate theories for relief: 1) that in failing to raise the suppression issue on appeal, appellate counsel denied Mr. Daniels his right to appeal and therefore was deficient and prejudice should be presumed; and 2) that in the alternative, the suppression issue was clearly stronger than the excessive sentence issue, establishing deficient performance, and that further, had counsel raised the suppression issue there is a reasonable probability of a different outcome, thus establishing prejudice. R 60-64; Tr. 1/28/13, p. 29, ln. 14 - p. 37, ln. 6; p. 39, ln. 21-22. The district court erred in failing to grant relief on either one of these theories.

1. *Appellate Counsel's Failure to Raise the Suppression Issue was Deficient and Presumptively Prejudicial*

An accused has a constitutional right to assistance of counsel, a right which includes the

right to effective assistance of counsel. *Gideon v. Wainwright,* 372 U.S. 335, 344, 83 S.Ct. 792, 796 (1963); *McMann v. Richardson,* 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 1449, n. 14 (1970). The right to effective assistance of counsel extends to the first appeal as a matter of right. *Evitts v. Lucey,* 469 U.S. 384, 396, 105 S.Ct. 830, 836 (1985).

In most cases, a petitioner asserting ineffective assistance of counsel must demonstrate both that counsel rendered deficient performance and that the deficiency resulted in prejudice to the petitioner. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). However, if appellate counsel's actions amounted to a denial of representation, the burden to show prejudice is inapplicable because prejudice is presumed. *United States v. Cronic,* 466 U.S. 648, 104 S.Ct. 2039 (1984). For example, if counsel completely fails to file a notice of appeal, prejudice is presumed without any need to show that the client would have prevailed on appeal. *Lozada v. Deeds,* 498 U.S. 430, 111 S.Ct. 860 (1991).

In *Mintun v. State,* 144 Idaho 656, 168 P.3d 40 (Ct. App. 2007), the Court of Appeals held that the *Cronic* presumption of prejudice should apply in three situations: (1) where the presence of counsel is denied altogether at a critical stage; (2) where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, and (3) where counsel is called upon to render assistance under circumstances where competent counsel very likely could not (as where counsel is appointed the day before trial). 144 Idaho at 660, 168 P.3d at 44. The Court found none of these circumstances for Mintun because counsel was initially appointed to represent Mintun on appeal and before he withdrew he filed an adequate brief and the appellate court considered the issues raised, including claims of errors in evidentiary rulings at trial and a challenge to the denial of Mintun's Rule 35 motion. In finding the circumstances for application

of *Cronic's* presumption of prejudice not met for Mintun, the Court of Appeals carefully noted that "We do not preclude the possibility of a complete denial of appellate advocacy where a merits brief filed by an attorney is so wanting as to be the equivalent of no advocacy at all, see *Jenkins v. Coombe,* 821 F.2d 158 (2nd Cir. 1987), but that did not occur. A competent brief was filed." 144 Idaho at 661, 168 P.3d at 45.

In *Jenkins,* the case cited in *Mintun,* Jenkins' appellate counsel filed a five page brief raising only one issue - specifically that the evidence did not establish guilt beyond a reasonable doubt. In the district court, Jenkins argued that he had received ineffective assistance of appellate counsel, but the district court found that Jenkins had suffered no prejudice because he had filed a 51page *pro se* brief which put his potentially valid appellate issues before the appellate court. The Second Circuit found that *Strickland* did not apply and prejudice was presumed because "Jenkins had no counsel or, at best, nominal counsel to represent his interests on the state appeal." 821 F.2d at 161.

Similarly, the Eighth Circuit held in *Robinson v. Wyrick,* 635 F.2d 757 (8th Cir. 1981), that when counsel files a brief which failed to properly preserve the issues presented for appeal, prejudice is presumed. Noting the deficiencies of the brief in the case before it, the Court wrote, "Under these narrow circumstances . . . we have no difficulty in concluding that Robinson was denied his right to a direct appeal of his conviction and that he was denied his constitutional right to effective counsel just as much as if counsel had never filed a notice of appeal." 635 F.2d at 758.

In this case also, appellate counsel's failure to argue the suppression issue amounted to a complete denial of appellate advocacy so as to require the application of the *Cronic* presumption.

As is explained below, the sentencing issue in this case was so weak that it was either frivolous or barely distinguishable frivolous. To file a brief just raising that issue was the equivalent of filing no brief at all.

While *Jones v. Barnes,* 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983), does state that an indigent defendant does not have a constitutional right to compel appointed appellate counsel to press all non-frivolous arguments that the defendant wishes to pursue, that case involved an indigent appellant who was allowed to file his own *pro se* brief in addition to his appointed counsel's brief - by filing the *pro se* brief, the appellant had an opportunity to place his desired issues before the appellate court. It is that opportunity which is crucial to a constitutional analysis.

As noted by Justice Brennan in his dissent in *Jones*:

> *Faretta* [*v. California,* 422 U.S. 806, 95 S.Ct. 2525 (1975),] establishes that the right to counsel is more than a right to have one's case presented competently and effectively. It is predicated on the view that the function of counsel under the Sixth Amendment is to protect the dignity and autonomy of a person on trial by *assisting* him in making choices that are his to make, not to make choices for him, although counsel may be better able to decide which tactics will be more effective for the defendant. *Anders v. California*[, 386 U.S. 738, 87 S.Ct. 1396 (1967),] also reflects that view. Even when appointed counsel believes an appeal has no merit, he must furnish his client a brief covering all arguable grounds for appeal so that the client may 'raise any points that he chooses.' 386 U.S., at 744, 87 S.Ct., at 1400.

Jones v. Barnes, 463 U.S., at 758, 108 S.Ct., at 3316 (Brennan, J., dissenting) (emphasis original).

Idaho has no mechanism in the appellate rules which allow an appellant to file a *pro se* brief so long as he is represented by counsel. Therefore, the constitutional safety valve present in *Jones* is missing here. While in *Jones,* it was not necessary to declare a constitutional right to

force appointed counsel to raise any specific non-frivolous issue because the appellant could raise whatever issues he/she wished in a *pro se* brief, in Idaho, a constitutional right to force counsel to raise non-frivolous issues is necessary and will remain necessary so long as the appellate rules remain unchanged. *Cf*. Washington Rule of Appellate Procedure 10.10 Statement of Additional Grounds for Review which specifically authorizes an appellant in a review of a criminal case to file a *pro se* statement of additional grounds for review to identify and discuss those matters which the appellant believe have not been adequately addressed by the brief filed by counsel. *See also,* Oregon Rule of Appellate Procedure 5.92 Supplemental *pro se* briefs.

Thus, in this case, deficiency and presumptive prejudice exist because counsel failed to raise the non-frivolous issue requested by Mr. Daniels - whether the evidence obtained in violation of the constitution should have been suppressed - and Mr. Daniels had no other mechanism open to him to get the issue before the state appellate courts. Therefore, the district court should have granted post-conviction relief.

2. *Appellate Counsel's Failure to Raise the Suppression Issue was Deficient Performance that was Prejudicial*

In the alternative, the district court should have granted relief in post-conviction because the failure to raise the suppression motion on direct appeal was deficient performance that was prejudicial. *Strickland, supra.*

When ignored issues are clearly stronger than those presented, the presumption of effective assistance of counsel is overcome. *Mintun,* 144 Idaho 661, 168 P.3d 45. In this case, the presumption is overcome.

In her testimony during the evidentiary hearing, appellate counsel stated that the suppression issue was not frivolous, but that it would not have been successful because of the Court of Appeals' holding in *State v. Cantrell,* 149 Idaho 247, 233 P.3d 178 (Ct. App. 2010), which held that in accord with *Arizona v. Gant,* 556 U.S. 332, 129 S.Ct. 1710 (2009), a DUI arrest supplies a basis for a search of a vehicle. 149 Idaho at 254, 233 P.3d at 186. Tr. 1/28/13 p. 23, ln. 1-7.

However, as acknowledged by appellate counsel, *Cantrell* is not consistent with the case law of some other states and the federal courts and is attackable. Tr. 1/28/13, p. 25, ln. 12-17. Cases inconsistent with *Cantrell* include *United States v. Reagan,* 713 F.Supp.2d 724, 729 (E.D. Tenn. 2010); *United States v. Taylor,* 49 A.3d 818, 823-24 (D.C. App. 2012); *United States v. Vinton,* 594 F.3d 14, 25 (D.C. Cir. 2010); *People v. Chamberlain,* 229 P.3d 1054 (Colo. 2010). *See also, State v. Snapp,* 275 P.3d 289 (Wash. 2012), rejecting *Gant* on state constitutional grounds.

In the suppression issue, appellate counsel had an issue that was by her own admission, arguable. Thus, if the issue was "stronger" than the excessive sentence issue, the failure to raise it was deficient performance. *Mintun, supra.*

A look at the district court's comments at sentencing demonstrates that the excessive sentence issue was extremely weak:

> I don't doubt your sincerity at all in the statement you've given and the letter that you've submitted. But you understand, Mr. Daniels, that I do have to look at your past record here. I mean, that's going to be the one that is concrete that well could be an indication of how things might go in the future.
>
> The prior record, as has been stated, is – is atrocious. Like Mr. Rapp, I couldn't figure out exactly how many prior DUI's you had. I came up with 15, but perhaps

it is 16. The difference between 15 and 16 is really – it's not a great point. But the fact that you have that many DUI's is something that simply cannot be ignored when you're in here for sentencing on another DUI.

The presentence report shows that you have had a tough life, as Mr. George stated, that you an alcoholic, and that has led to all of the several pages of prior violations of the laws.

Mr. George rhetorically asked what's to be gained by sending you to prison. Well, the short answer is protection of society. That's one thing I have to look out for, and particularly in a DUI case is, does it look like someone is worthy of probation or even retained jurisdiction. Or are they going to be the kind of person who might get behind a wheel again in an intoxicated condition and [be] a danger to the public. Based upon your history, I think you are that person. You've done a retained; you've done prison; you've been on probation. And still end up doing this. The request for probation is not anything that I can seriously consider given the prior history here.

The sentence I'm going to impose is a ten year sentence consisting of three years fixed and seven years indeterminate. And that will run consecutive to any prior case. The sentence on the misdemeanors here will be 180 days each, and you'll receive 180 days' credit for time served on each.

Your driving privileges will be suspended absolutely for a period of three years following your release from prison.

Trial Tr., p. 314, ln. 18-p. 316, ln. 8.

No appellate court would ever seriously consider that this sentence imposed for a 16th or 17th DUI was excessive. *See, State v. Lawyer,* 150 Idaho 170, 175, 244 P.3d 1256, 1261 (Ct. App. 2010).

Even the weakest of suppression issues was stronger than the issue that Mr. Daniels received an excessive sentence. Thus, deficient performance was established. *Mintun, supra.*

Likewise, prejudice was established. Had appellate counsel presented the suppression issue, it is reasonably probable that a different result would have been obtained. Specifically, Mr. Daniels could have made a convincing argument that arrest for a DUI standing alone is not

sufficient to support a warrantlesss search of a vehicle in the absence of any other basis to believe that evidence of the crime of DUI will be found in the vehicle. *See Reagan, supra*; *Taylor, supra*; *Vinton, supra*; *Chamberlain, supra.*

The district court erred in not granting relief under this alternate theory.

V. CONCLUSION

For the reasons set forth above, Mr. Daniels respectfully requests that the order denying post-conviction relief be reversed and the case remanded with instructions to grant a reinstatement of his right to appeal.

Submitted this 9th day of October, 2013.

Deborah Whipple
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CERTIFICATE OF SERVICE

I CERTIFY that on October 9, 2013, I caused two true and correct copies of the foregoing document to be:

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