12-4-2013

Daniels v. State Respondent's Brief Dckt. 40811

IN THE SUPREME COURT OF THE STATE OF IDAHO

CECIL G. DANIELS,	)	
	)	No. 40811
Petitioner-Appellant,	)	
	)	Kootenai Co. Case No.
vs.	)	CV-2011-7510
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

BRIEF OF RESPONDENT

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
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

DAPHNE J. HUANG
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR
RESPONDENT

DEBORAH WHIPPLE
Nevin, Benjamin, McKay & Bartlett
303 W. Bannock
Boise, Idaho 83701
(208) 343-1000

ATTORNEY FOR
PETITIONER-APPELLANT

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STATEMENT OF THE CASE

Nature of the Case

Cecil G. Daniels appeals from the denial of his petition for post-conviction relief after an evidentiary hearing.

Statement of Facts and Course of Proceedings

Daniels was charged with felony driving under the influence (DUI). (37054 R., p. 56.) He filed a motion to suppress which the district court denied. (37054 R., pp. 95-101, 125-29.) Daniels proceeded to trial and a jury found him guilty of felony DUI. (37054 R., pp. 282-83.) The district court sentenced Daniels to a unified term of ten years in prison with three years fixed. (37054 R., pp. 307-10.) Daniels filed a Rule 35 motion to reconsider and reduce his sentence. (37054 R., pp. 312-13.) The district court denied the motion. (37054 R., p. 350.)

Daniels timely appealed his judgment of conviction and sentence, and the order denying his Rule 35 motion to reduce his sentence. (37054 R., pp. 319-24, 341-47.) The Court of Appeals affirmed the judgment of conviction and sentence, and the order denying Daniels' Rule 35 motion. State v. Daniels, Docket No. 37054, 2010 Unpublished Opinion No. 671 (Idaho App., October 15, 2010). (R., p. 78.) Daniels then filed a timely petition for post-conviction relief. (R., pp. 5-8; see December 2010 Remittitur in Docket No. 37054.)

In an amended petition, Daniels asserted two claims: failure of trial counsel to preserve his right to appeal the denial of his suppression motion, and failure of his appellate counsel to argue on appeal that the denial of his suppression motion was in error. (R., pp. 46-48.) The state opposed the petition

and requested summary dismissal. (R., pp. 52-55.) The district court heard oral argument and denied Daniels' ineffective assistance of trial counsel claim, based on post-conviction counsel's concession there was no basis for the claim. (R., p. 68.) The district court conducted an evidentiary hearing on the ineffective assistance of appellate counsel claim. (R., pp. 71, 77.)

At the hearing, the district court heard testimony from Daniels' appellate counsel that she "made a strategic decision to not appeal the motion to suppress ruling," and challenged only Daniels' sentence on appeal. (R., p. 82.) Daniels testified he told his appellate counsel that he wanted all issues set forth in his notice of appeal – including the suppression issue – raised on appeal. (R., p. 81.) He also testified he was not told he could file his own brief; his appellate counsel confirmed this. (R., p. 81.) Ultimately, the district court dismissed Daniels' petition, concluding he failed to establish ineffective assistance of appellate counsel. (R., pp. 85-86.) Daniels timely appealed. (R., pp. 88, 97; see 3/20/13 Notice of Appeal.)

ISSUE

Daniels states the issue on appeal as:

> 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?

(Appellant's brief, p. 3.)

The state rephrases the issue as:

Has Daniels failed to show the district court erred in denying post-conviction relief?

ARGUMENT

Daniels Has Failed To Show The District Court Erred In Denying Post-Conviction Relief

A. Introduction

In his amended petition, Daniels alleged appellate counsel was ineffective for failing to argue the district court erred in denying his suppression motion. (R., p. 47.) Following an evidentiary hearing, the district court denied relief, concluding Daniels failed to meet his burden of proving either deficient performance by appellate counsel, or resulting prejudice. (R., pp. 84-85.) Daniels argues the district court erred in applying the law to the facts, and thus denying post-conviction relief. (Appellant's Brief, pp. 3-10.) Applying the relevant legal standards to the evidence presented, Daniels' arguments fail.

B. Standard Of Review

A claim of ineffective assistance of counsel presents mixed questions of law and fact. A petitioner for post-conviction relief has the burden of proving, by a preponderance of the evidence, the allegations on which her claim is based. Idaho Criminal Rule 57(c); Estes v. State, 111 Idaho 430, 436, 725 P.2d 135, 141 (1986). A trial court's decision that the petitioner has not met his burden of proof is entitled to great weight. Sanders v. State, 117 Idaho 939, 940, 792 P.2d 964, 965 (Ct. App. 1990). Further, the credibility of the witnesses and the weight to be given to the testimony are matters within the discretion of the trial court. Rueth v. State, 103 Idaho 74, 644 P.2d 1333 (1982).

C. Daniels Has Failed To Show Error In The District Court's Determination That He Failed To Prove Appellate Counsel Provided Ineffective Assistance

To prove a claim of ineffective assistance of counsel, a post-conviction petitioner must demonstrate both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989). With respect to the deficient performance prong, the United States Supreme Court has said a petitioner must show "that counsel's representation fell below an objective standard of reasonableness," applying "a strong presumption that counsel's representation was within the wide range of reasonable professional assistance." Harrington v. Richter, 131 S.Ct. 770, 787 (2011) (citations and quotations omitted). The petitioner must show counsel's errors were "so serious that counsel was not functioning as the counsel guaranteed" by the Sixth Amendment. Id. "The question is whether an attorney's representation amounted to incompetence under **prevailing professional norms**, not whether it deviated from best practices or most common custom." Premo v. Moore, 131 S.Ct. 733 (2011) (emphasis added)(citation omitted); see also Missouri v. Frye, 132 S.Ct. 1399, 1408 (2012) ("Though the standard for counsel's performance is not determined solely by reference to codified standards of professional practice, these standards can be important guides."); Steele v. State, 153 Idaho 783, ___, 291 P.3d 466, 473 n.8 (Ct. App. 2012) (noting the petitioner's failure to "present any evidence that his attorney's conduct was objectively unreasonable under prevailing professional norms").

To establish prejudice, a defendant must show a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Richter, 131 S.Ct. at 787. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citations and quotations omitted). "It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding." Id. Rather, "[c]ounsel's errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id.

The two-prong Strickland test for ineffective assistance of counsel applies to claims of ineffective assistance of appellate counsel. Baxter v. State, 149 Idaho 859, 243 P.3d 675 (Ct. App. 2010) (citing Mintun v. State, 144 Idaho 656, 661, 168 P.3d 40, 45 (Ct. App. 2007)). In order to establish ineffective assistance of appellate counsel, a petitioner has the burden of proving that his counsel's representation on appeal was deficient and that the deficiency was prejudicial. Evitts v. Lucey, 469 U.S. 387 (1985); Mitchell v. State, 132 Idaho 274, 276, 971 P.2d 727, 730 (1998). Even if a defendant requests that certain issues be raised on appeal, appellate counsel has no constitutional obligation to raise every non-frivolous issue requested by the defendant. Jones v. Barnes, 463 U.S. 745, 751-53 (1983); Aragon v. State, 114 Idaho 758, 765, 760 P.2d 1174, 1181 (1988) (citing Jones, 463 U.S. at 751-754). The relevant inquiry is whether there is a reasonable probability that, but for counsel's errors, the defendant would have prevailed on appeal. Smith v. Robbins, 528 U.S. 259, 285

(2000); Schoger v. State, 148 Idaho 622, 629, 226 P.3d 1269, 1276 (2010) (citing State v. Payne, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008)).

Daniels asserts appellate counsel was ineffective because the failure to raise the suppression motion issue "amounted to a denial of representation." (Appellant's brief, pp. 4-7.) This argument is contrary to established case law, providing that appellate counsel has no constitutional obligation to raise every non-frivolous issue requested by the defendant. Jones, 463 U.S. at 751-53; Aragon, 114 Idaho at 765, 760 P.2d at 1181. The Court should therefore reject this argument.

Alternatively, Daniels argues the suppression motion issue was clearly stronger than the only issue raised by appellate counsel – a challenge to Daniels' sentence. (Appellant's Brief, pp. 7-10 (citing Mintun v. State, 144 Idaho 656, 168 P.3d 40 (Ct. App. 2007)).) In Mintun, the Court of Appeals noted, "[O]nly when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." 144 Idaho at 661, 168 P.3d at 45 (citation omitted). Daniels failed below to present any evidence to show the suppression issue he wanted raised was "clearly stronger" than the issue appellate counsel chose to raise on appeal.

As the petitioner, Daniels bore the same burden of proof imposed upon a civil plaintiff. Paradis v. State, 110 Idaho 534, 536, 716 P.2d 1306, 1308 (1986); Esquivel v. State, 149 Idaho 255, 258 n.3, 233 P.3d 186, 189 n. 3 (Ct. App. 2010). If Daniels believed appellate counsel was ineffective for failing to raise a claim on appeal regarding the denial of his suppression motion, it was incumbent

upon him to present evidence to the district court demonstrating why counsel's failure to do so resulted in constitutionally ineffective assistance. Daniels argues that, because the sentencing argument was "extremely weak," the suppression issue was "clearly stronger." (Appellant's brief, p. 8.) Evidence of one argument's weakness, alone, does not prove the relative strength of an alternative argument. Although he asked the court to take judicial notice of the underlying criminal record, Daniels never argued or presented evidence to show he would have succeeded on appeal had his appellate counsel raised the suppression issue. (See 1/28/13 Tr.)

The state, on the other hand, called appellate counsel as a witness and she testified that, in her analysis, the suppression issue "would not have been successful on appeal." (1/28/13 Tr., p. 19, Ls. 18-19.) On her review of the record and transcript, she believed she "could not get around" the recent decision in State v. Cantrell, 149 Idaho 247, 233 P.3d 178 (Ct. App. 2010), "that basically allowed . . . search incident to arrest to look for alcohol or evidence of the DUI inside the vehicle." (1/28/13 Tr., p. 22, Ls. 18-24.) Appellate counsel testified that, as appellate defense counsel, "We make strategic decisions all the time of which issues are going to be most successful, which issues are going to obtain the client's objectives . . . And certainly, I did evaluate that in this case." (1/28/13 Tr., p. 24, Ls. 1-7.) Finally, appellate counsel testified that the trial court had denied the suppression motion, finding the officer had conducted a valid "search incident to arrest," and that there was probable cause based on the passenger telling the arresting officer that Daniels had marijuana under the

driver's seat. (1/28/13 Tr., p. 27, Ls. 8-20; 37054 R., pp. 126-27.) These facts highlight the challenges of pursuing the suppression issue on appeal.

As to prejudice, Daniels argued that, had the suppression issue been raised, he "could have made a convincing argument that arrest for a DUI standing alone is not sufficient to support a warrantless 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." (Appellant's brief, pp. 9-10 (citations omitted).) This argument ignores Cantrell, 149 Idaho 247, 233 P.3d 178, as well as the evidence that Daniels' passenger told police Daniels had marijuana under the driver's seat (37054 R., pp. 126-27).

Daniels failed to carry his burden of proving that appellate counsel's failure to raise the suppression issue was based on ignorance of the law or lack of preparation or that he would have prevailed had the issue been raised. See State v. Dunlap, ___ P.3d ___, 2013 WL 4539806 at *36 (2013)(citing Pratt v. State, 134 Idaho 581, 584, 6 P.3d 831, 834 (2000)). That current appellate counsel thinks the issue was worthy of consideration by an appellate court is not evidence and does not excuse Daniels' failure to prove his claim before the district court. Moreover, that current appellate counsel would have made a different tactical decision does not mean counsel on direct appeal was objectively unreasonable in deciding which issues to raise. See Richter, 131 S.Ct. at 788 ("Rare are the situations in which the wide latitude counsel must have in making tactical decisions will be limited to only one technique or approach.") (citation and quotations omitted); Cullen v. Pinholster, 131 S.Ct.

1388 (2011) (quoting Strickland, supra) ("The Court acknowledged that '[t]here are countless ways to provide effective assistance in any given case,' and that '[e]ven the best criminal defense attorneys would not defend a particular client in the same way.'").

Daniels has failed to show error in the dismissal of his ineffective assistance of appellate counsel claim.

CONCLUSION

The state respectfully requests this Court to affirm the district court's order and judgment denying Daniels' petition for post-conviction relief.

DATED this 4th day of December, 2013.

DAPHNE J. HUANG
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 4th day of December, 2013, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

DEBORAH WHIPPLE
NEVIN, BENJAMIN, McKAY & BARTLETT
303 W. Bannock
P.O. Box 2772
Boise, ID 83701

DAPHNE J. HUANG
Deputy Attorney General

DJH/pm