

Uldaho Law

Digital Commons @ Uldaho Law

Not Reported

Idaho Supreme Court Records & Briefs

5-29-2018

State v. Black Appellant's Reply Brief Dckt. 45316

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/not_reported

Recommended Citation

"State v. Black Appellant's Reply Brief Dckt. 45316" (2018). *Not Reported*. 4428.
https://digitalcommons.law.uidaho.edu/not_reported/4428

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ Uldaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ Uldaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 45316
)	
v.)	ADA COUNTY NO.
)	CR-FE-2015-520
JAMES DARNELL BLACK,)	
)	
Defendant-Appellant.)	
_____)	

REPLY 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 MELISSA MOODY
District Judge

ERIC D. FREDERICKSEN
State Appellate Public Defender
I.S.B. #6555

ANDREA W. REYNOLDS
Deputy State Appellate Public Defender
I.S.B. #9525
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985
E-mail: documents@sapd.state.id.us

**ATTORNEYS FOR
DEFENDANT-APPELLANT**

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

**ATTORNEY FOR
PLAINTIFF-RESPONDENT**

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Nature of the Case	1
Statement of Facts and Course of Proceedings	1
ISSUES PRESENTED ON APPEAL	2
ARGUMENT	3
I. The District Court Abused Its Discretion In Denying Mr. Black’s Motion Pursuant To Idaho Criminal Rule 25(b)(4) To Disqualify The District Court Judge From Presiding Over This Case On Remand	3
A. Introduction	3
B. The State Relies On Cases That Are Either Inapplicable Or Factually Distinguishable	3
C. The State Minimizes The Evidence Of Actual Bias, And Fails To Address Mr. Black’s Argument That If The District Court Had Imposed Anything Less Than The Maximum Sentence At Resentencing, It Would Have Implicitly Admitted Error In Its Earlier Conclusion That Mr. Black’s Mental Condition Would Not Be A Significant Factor At Sentencing	5
II. The District Court Abused Its Discretion When It Sentenced Mr. Black To Five Years Fixed, The Maximum, Considering Mr. Black’s Intellectual Disability And Low IQ	8
A. Introduction	8
B. The Sentence Imposed By The District Court On Mr. Black Was Not Reasonable	9
III. Mr. Black Was Denied Due Process Of Law When The District Court Relied At Sentencing Upon Information That Was Materially False Regarding His Criminal History	10
CONCLUSION	12
CERTIFICATE OF MAILING	13

TABLE OF AUTHORITIES

Cases

Atkins v. Virginia, 536 U.S. 304 (2002).....9

Bach v. Bagley, 148 Idaho 784 (2010).....3, 4

Hall v. Florida, 134 S.Ct. 1986 (2014).....9

Liteky v. United States, 510 U.S. 540 (1994)4

State v. Beam, 115 Idaho 208 (1988).....4, 5

State v. Black, 2017 Opinion No. 19 (Ct. App. March 2, 2017).....6

State v. Dunnagan, 101 Idaho 125 (1980).....9

State v. Durham, 146 Idaho 364 (Ct. App. 2008).....10

State v. Justice, 152 Idaho 48 (Ct. App. 2001).....9

State v. Shackelford, 155 Idaho 454 (2013)4

Statutes

Idaho Code § 19-2522.....10

Rules

I.C.R. 25(b)(4)5

I.C.R. 354, 5

STATEMENT OF THE CASE

Nature of the Case

Mr. Black appeals from his judgment of conviction for criminal possession of a financial transaction card, arguing the district court abused its discretion in denying his motion to disqualify the district court judge from presiding over this case on remand, and abused its discretion when, at resentencing, it imposed upon Mr. Black the maximum sentence of five years fixed. Mr. Black also contends he was denied due process of law when the district court relied at resentencing upon information that was materially false regarding his criminal history. He submits this Reply Brief to respond to the State's legal argument.

Statement of Facts and Course of Proceedings

Mr. Black included a statement of facts and course of proceedings in his opening brief, which he relies on and incorporates herein. (Appellant's Br., pp.2-4.)

ISSUES

- I. Did the district court abuse its discretion in denying Mr. Black's motion pursuant to Idaho Criminal Rule 25(b)(4) to disqualify the district court judge from presiding over this case on remand?
- II. Did the district court abuse its discretion when it sentenced Mr. Black to five years fixed, the maximum, considering Mr. Black's intellectual disability and low IQ?
- III. Was Mr. Black denied due process of law when the district court relied at sentencing upon information that was materially false regarding his criminal history?

ARGUMENT

I.

The District Court Abused Its Discretion In Denying Mr. Black's Motion Pursuant To Idaho Criminal Rule 25(b)(4) To Disqualify The District Court Judge From Presiding Over This Case On Remand

A. Introduction

Mr. Black argued in his opening brief that the district court abused its discretion in denying his motion pursuant to Idaho Criminal Rule 25(b)(4) to disqualify the district court judge from presiding over this case on remand because the judge was actually biased against him in a way that rendered it improbable (and, ultimately, impossible) for him to receive a fair and impartial resentencing. (Appellant's Br., pp.6-9.) The State argues in its Respondent's Brief that the district court did not abuse its discretion, but it relies on cases that are either inapplicable or distinguishable. In addition, the State minimizes the evidence of actual bias, and fails to address Mr. Black's argument that if the district court had imposed anything less than the maximum sentence at resentencing, it would have implicitly admitted error in its earlier conclusion that Mr. Black's mental condition would not be a significant factor at sentencing.

B. The State Relies On Cases That Are Either Inapplicable Or Factually Distinguishable

As an initial matter, the State cites *Bach v. Bagley*, 148 Idaho 784, 791-92 (2010), for the proposition that there is no basis for judicial recusal unless there is a demonstration of pervasive bias. (Respondent's Br., p.5.) But this is not the proper test under Rule 25(b)(4). Rule 25(b)(4) provides that "[a]ny party to an action may disqualify a judge from presiding in any action on [the grounds] . . . that the judge is biased or prejudiced for or against any party or that party's case." There is no requirement that a party must demonstrate "pervasive bias."

In *Bach*, the appellant alleged the district court was biased, citing to the syllabus of a United States Supreme Court case interpreting federal judicial recusal statutes, *Liteky v. United States*, 510 U.S. 540 (1994). 148 Idaho at 791. The Idaho Supreme Court discussed the holding in *Liteky*, but made no mention of Rule 25(b)(4). Mr. Black filed his motion in the district court pursuant to Rule 25(b)(4), and it is clear under that rule that disqualification is necessary “where the trial judge has actual bias against the defendant of such nature and character as would render it improbable that under the circumstances the party could have a fair and impartial [hearing].” *State v. Shackelford*, 155 Idaho 454, 460 (2013) (quotation marks and citation omitted). Mr. Black was not required to show pervasive bias, but was instead required to show that the district court judge was actually biased against him in a way that rendered it improbable that he would have a fair and impartial resentencing. Mr. Black made this showing.

The State also contends Mr. Black’s argument fails because, under *State v. Beam*, 115 Idaho 208 (1988), the fact that a trial judge previously sat on a case and, therefore, necessarily prejudged it does not constitute bias within the meaning of Rule 25(b)(4). (Respondent’s Br., pp.6-7.) But *Beam* was a post-conviction case, and is thus inapposite. In *Beam*, the defendant filed a motion to disqualify the original trial judge from hearing his post-conviction and sentence reduction proceedings after the Court of Appeals affirmed his conviction and sentence on direct appeal. 115 Idaho at 209. In concluding the trial judge did not abuse its discretion in denying the defendant’s motion for recusal, the Court of Appeals recognized that “[e]very trial judge who rules upon a post conviction review proceeding or an I.C.R. 35 motion to reduce sentence will previously have pre-judged the matter, often forming extremely strong opinions as to the sentence which should be imposed and will no doubt be convinced that the procedure followed and the sentence imposed was correct, particularly where the trial court

proceedings have been affirmed on appeal by this Court.” *Id.* at 215. The Court held that “[c]oming to the case with that frame of mind does not constitute bias or prejudice within the meaning of I.C.R. 25(b)(4) and does not require disqualification of the trial judge.” *Id.* The Court then explained that “when faced with [a Rule]. 25(b)(4) motion to disqualify for bias and prejudice in a post conviction or I.C.R. 35 proceeding, the trial judge need only conclude that he can properly perform the legal analysis which the law requires of him” *Id.*

The State quotes at length from *Beam*, see Respondent’s Br., pp.6-7, but fails to recognize that the instant proceeding was not before the district court on a post-conviction proceeding or Rule 35 motion. The fact that the district court may have prejudged Mr. Black here, perhaps even forming “extremely strong opinions as to the sentence which should be imposed” *does* constitute bias or prejudice within the meaning of Rule 25(b)(4), especially considering the fact that the Court of Appeals *did not* affirm the judgment and sentence in Mr. Black’s first appeal, but instead remanded the case for a psychological evaluation and resentencing. If the district court had already concluded Mr. Black’s mental condition would not be a significant factor at sentencing—even prior to reading Dr. Sombke’s report—then the district court was actually biased against Mr. Black and abused its discretion denying his Rule 25(b)(4) motion.

C. The State Minimizes The Evidence Of Actual Bias, And Fails To Address Mr. Black’s Argument That If The District Court Had Imposed Anything Less Than The Maximum Sentence At Resentencing, It Would Have Implicitly Admitted Error In Its Earlier Conclusion That Mr. Black’s Mental Condition Would Not Be A Significant Factor At Sentencing

Whether the district court recognized it or not, it was actually biased against Mr. Black in a way that rendered it improbable that he would receive a fair and impartial resentencing. In the first appeal, the Court of Appeals held the district court made a legal error when it concluded

Mr. Black's mental condition would not be a significant factor at sentencing. *State v. Black*, 161 Idaho 867, 871-72 (Ct. App. 2017) ("Opinion"). On remand, the district court was understandably motivated to show it had not erred. The district court said as much at resentencing, when it imposed on Mr. Black the same sentence it had previously imposed, despite having additional information regarding Mr. Black's mental condition, which should have resulted in a lesser sentence. The State argues this Court cannot consider the fact that the district court imposed the same sentence on Mr. Black at resentencing because Mr. Black did not raise this argument below. (Respondent's Br., p.6.) But Mr. Black could not have raised this argument at the hearing on his motion to disqualify, as that hearing preceded the resentencing hearing. The issue Mr. Black raises on appeal is the very same issue he raised in the district court—that the district court should have recused itself under Rule 25(b)(4) due to actual bias, but Mr. Black now has additional evidence of this bias, based on the sentence the district court imposed at resentencing.

The State asserts the primary basis for Mr. Black's claim of bias in the district court was that the district court judge had contacted the appellate attorneys after the Court of Appeals issued its decision, but before it issued the remittitur. (Respondent's Br., p.5.) As an initial matter, this was not the primary basis for Mr. Black's claim of bias. Counsel for Mr. Black identified four reasons he believed the district court judge was biased against Mr. Black. (R., pp.133-34; *see also* Tr. 5/12/17, p.7, Ls.16-17 (district court recognizing Mr. Black's motion to disqualify "is based on several grounds.") The first reason was the contact with the appellate attorneys. (R., p.133.) Equally important was the second reason:

On April 13, 2016 Judge Moody issued an Order Denying Motion for Psychological Evaluation stating that Mr. Black's mental condition will not be a significant factor at sentencing. Mr. Black believes this to be further evidence of bias against him as he has a long history of mental issues detailed in letters to the

court from his mother and Aunt, as well as a document from the Kentucky Correctional Psychiatric Center showing mild mental retardation

(R., p.134; *see also* Tr., 5/12/17, p.10, L.16 – p.11, L.9, p.14, Ls.12-16.)

More importantly, the State minimizes the significance of the district court's involvement in this case on appeal. Contrary to the State's argument on appeal, the reason the district court judge contacted the appellate attorneys was not simply to correct the record. (*See* Respondent's Br., p.5.) Instead, the district court judge contacted the appellate attorneys because she believed the Court of Appeals' decision was wrong. The district court judge emailed appellate counsel before the opinion was final, and ultimately prepared a transcript that had not previously been transcribed, without anyone requesting it. (*See* Motion to Aug., Ex. A, pp.1-2, Appx. A.) The State ultimately determined the newly-transcribed hearing would not affect the Court's analysis, but nonetheless filed a motion to correct appellate opinion. (*See* No. 44191, Motion to Correct Appellate Opinion And Statement in Support Thereof, filed March 15, 2017.)

This case presents a rather unique factual circumstance. The district court disagreed with the Court of Appeals' conclusion that it had erred. The only way for the district court to prove it had not erred was to impose the same sentence on Mr. Black the second time around, regardless of what the psychological evaluation showed. The district court was biased or prejudiced against Mr. Black and thus did not reach its decision to deny his Rule 25(b)(4) motion through an exercise of reason.

II.

The District Court Abused Its Discretion When It Sentenced Mr. Black To Five Years Fixed, The Maximum, Considering Mr. Black's Intellectual Disability And Low IQ

A. Introduction

Mr. Black argued in his opening brief that the district court abused its discretion when it imposed the maximum sentence on him at resentencing, notwithstanding his intellectual disability and low IQ. (Appellant's Br., pp.10-14.) The State recognizes in its Respondent's Brief that Mr. Black "appears to have some cognitive disabilities." (Respondent's Br., p.9.) Surely this is an understatement. Dr. Sombke evaluated Mr. Black, and determined he has an IQ of 48, placing him in the 0.1 percentile range (meaning that, in a random sample of 1000 people of his age, he would have scored better than less than one of them). (Psych. Eval., p.4.) Dr. Sombke diagnosed Mr. Black with severe stimulant use disorder, mild intellectual disability, a personality disorder with antisocial and paranoid traits, and a depressive disorder. (Psych. Eval., p.5.) Dr. Sombke noted treatment was available for all of these conditions apart from Mr. Black's intellectual disability, which is "chronic and lifelong." (Psych. Eval., p.6.) Notwithstanding these significant cognitive disabilities, the State contends the sentence imposed by the district court was reasonable "in order to protect society from Black's continued criminality." (Respondent's Br., p.9.) But the State fails to address Mr. Black's argument that his mental condition was inherently mitigating, and should have been considered as such by the district court at resentencing.

B. The Sentence Imposed By The District Court On Mr. Black Was Not Reasonable

The State asserts the sentence the district court imposed upon Mr. Black was reasonable considering the required sentencing factors of deterrence, rehabilitation, retribution, and protection of society. (Respondent's Br., p.8.) It was not. With respect to deterrence and retribution, it is questionable whether someone with an intellectual disability and low IQ can be meaningfully deterred and rehabilitated. *See Hall v. Florida*, 134 S.Ct. 1986, 1993 (2014) ("As for deterrence, those with intellectual disability are, by reason of their condition, likely unable to make the calculated judgments that are the premise for the deterrence rationale."); *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (noting that "[b]ecause of their impairments . . . [mentally retarded persons] by definition have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others"); *see, e.g., State v. Dunnagan*, 101 Idaho 125, 126 (1980) (reducing sentences imposed on two young men with very low IQs).

With respect to retribution, Mr. Black committed a non-violent property crime which is simply not the kind of crime for which society would expect severe retribution. *See State v. Justice*, 152 Idaho 48, 54-55 (Ct. App. 2001) (stating crimes consisting of theft of a pickup and forgery of stolen checks are "not the kind for which society would expect severe retribution" and concluding sentences imposed were "longer than reasonably necessary to accomplish the goal of retribution"). Moreover, the United States Supreme Court has recognized "[t]he diminished capacity of the intellectually disabled lessens moral culpability and hence the retributive value of the punishment." *Hall*, 134 S. Ct. at 1993.

Finally, with respect to protection of society, there is no indication that Mr. Black warrants the maximum sentence of imprisonment in order to protect society. The presentence investigator concluded Mr. Black might pose a risk to the community, but it would be a risk of non-violent crimes. (PSI, p.26.) Dr. Sombke noted Mr. Black “does not appear to be particularly violent” and concluded that “[i]f Mr. Black is able to get his drug addiction under control and remain drug free, his risk to the community can be significantly reduced.” (Psych. Eval., p.8.) In addition, Mr. Black faces charges in Oregon, where he will likely be transferred when he is released from prison in Idaho. (7/24/17 Tr., p.13, Ls.2-9, p.12, Ls.1-3; PSI, pp.26, 29-30, 148-56; 4/29/16 Tr., p.38, Ls.23-25.)

Most importantly, and as discussed at length in Mr. Black’s opening brief, the district court failed to appropriately weigh and consider Mr. Black’s mental condition at resentencing. (Appellant’s Br., pp.11-14.) The Court of Appeals remanded this case to the district court so that Mr. Black could be evaluated pursuant to Idaho Code § 19-2522. The purpose of a § 19-2522 evaluation is, among other things, to “assist[] the sentencing court in assessing the defendant’s capacity to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law at the time of the offense.” *State v. Durham*, 146 Idaho 364, 371 (Ct. App. 2008). The district court did not consider Dr. Sombke’s evaluation of Mr. Black for this purpose, which was an abuse of discretion.

III.

Mr. Black Was Denied Due Process Of Law When The District Court Relied At Sentencing Upon Information That Was Materially False Regarding His Criminal History

On this issue, Mr. Black relies on the argument contained in his opening brief. (Appellant’s Br., pp.15-17.) He includes this section here only to challenge the State’s assertion

that the district court did not make materially false statements regarding Mr. Black's criminal history. (Respondent's Br., pp.11-12.) At resentencing, the district court told Mr. Black it "[could not] recall seeing an individual who has a more extensive criminal history than you" and said Mr. Black's criminal history "spans three decades and most of the states." (7/24/17 Tr., p.26, L.20 – p.27, L.1.) The State asserts the district court's statement was "literally true" because Mr. Black "has hardly consolidated his criminality to one corner of the country." (Respondent's Br., p.11.) Mr. Black has been charged with crimes in 11 states, and convicted of crimes in 10 states. (PSI, pp.6-16.) The fact that these 10 states are geographically separated does not mean he has a criminal history in "most of the states."

The district court denied Mr. Black his constitutional right to due process of law when it relied on this materially false information at sentencing, and this error was not harmless, as Mr. Black's sentence could well have been different if the district court had considered his actual criminal history, which the district court said was the most important factor influencing its sentencing decision. (7/24/17 Tr., p.27, Ls.2-4.)

CONCLUSION

For the reasons stated above, as well as those set forth in his opening brief, Mr. Black requests that this Court vacate his sentence and, instead of remanding for a third sentencing, reduce Mr. Black's sentence to three years fixed, considering the time he has already been incarcerated and the fact that he has charges pending in Oregon. Alternatively, Mr. Black request that this case be remanded to the district court for a third sentencing hearing before a different district court judge, to be conducted on an expedited basis.

DATED this 29th day of May, 2018.

_____/s/_____
ANDREA W. REYNOLDS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 29th day of May, 2018, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JAMES DARNELL BLACK
INMATE #119050
ISCI
PO BOX 14
BOISE ID 83707

MELISSA MOODY
DISTRICT COURT JUDGE
E-MAILED BRIEF

RANSOM J BAILEY
ADA COUNTY PUBLIC DEFENDER
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

AWR/eas