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Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

JEFFREY MARSALIS,	)	
	)	
Petitioner-Appellant,	)	**NO. 45583**
	)	
v.	)	**Blaine Co. CV-2013-408**
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

APPELLANT'S REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

HONORABLE JONATHAN P. BRODY
District Judge

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ARGUMENT

THE COURT ERRED BY SUMMMARILY DISMISSING THE PETITION FOR POST-CONVICTION RELIEF BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL

A. Failure to object to the state's expert testimony on intoxication and/or to call a defense expert

While the state takes a scattershot approach with its complaints about Petitioner's arguments, this issue really boils down to what the proposed defense experts would have established. In short, the state is wrong when it claims the proposed defense experts only would have impeached Dr. LeBeau's methodology but not his conclusions.

The state is wrong because the proposed defense experts would have established that Dr. LeBeau's methodology could not result in conclusions for either the supposed BAC or the stage of alcohol influence from the Dubowski chart because they would be based on nothing but speculation. And expert opinion that is speculative is of no assistance of the jury and is therefore inadmissible.

As the Idaho Supreme Court explained in *Adams v. State*, 158 Idaho 530 (2015):

> Only expert opinions that are based upon a proper factual foundation are admissible at trial. Expert opinion that is speculative, conclusory, or unsubstantiated by facts in the record is of no assistance to the jury in rendering its verdict, and is therefore inadmissible as evidence under I.R.E. 702. Testimony is speculative when it " theoriz[es] about a matter as to which evidence is not sufficient for certain knowledge." District courts may properly exclude expert opinion that merely suggests possibilities because it would only invite conjecture.

Id., p. 538 (internal citations omitted).

The first proposed defense expert, Dr. Anstine, begins by opining that due to the myriad (described) parameters affecting it ". . . extreme caution must be used when the subjective results of a hypothetical if not arbitrary range of values from a Widmark calculation are generated." Affidavit of Dr. Anstine, para. 4 (emphasis added). (R. p. 435.)

As to the Dubowski chart, Dr. Anstine warned that "great caution" must be used in assessing stages of alcohol influence as each individual is unique and how different individuals are affected has enormous ranges of influence. (R. p. 436.) The scientific assessment of an individual's actual BAC is very complex due to the wide range of the person's unique physiological and biochemical parameters, so it is not a good scientific practice to rely too heavily on any single technique. Rather, it is best to look at multiple overlapping, albeit subjective, techniques. (R. p. 437.)

Dr. Anstine concluded:

> 7. In the case of Mr. Marsalis, the state did not have blood or breath analysis, nor did it have any video or audio files. To my knowledge the

State relied solely on Dr. LeBeau's Widmark calculations that he based off a bar tab and eye witnesses to establish a possible level of intoxication for both Mr. Marsalis and [K.G.]. From these highly subjective assumptions he estimates a BAC of 0.28 for [K.G.], peaking at around 1:30-2:30 a.m. He likewise estimates a BAC of 0.16 for Mr. Marsalis around the same time. From these very crude and subjective estimations, Dr. LeBeau makes sweeping conclusions about their "stage of alcoholic influence" based solely on the highly subjective Dubowski charts.

[paragraph break inserted for ease of reading]
In one of his published articles, Dr. Dubowski says, "In forensic practice, expert witnesses are often requested to engage in speculative retrograde extrapolation of an experimentally found BAC to an assumed BAC at a prior time. In addition to the uncertainty of the presumed post-absorptive state during the entire extrapolated interval, the assumed linearity and regularity of the BAC decrease with time are also open to serious challenge in any given individual instance. When these considerations are coupled with the established unpredictable occurrence of the steepling effect in the BAC time curve and with the wide range of the elimination rate, it becomes clear that the speculative retrograde extrapolation of the BAC to any point from an experimentally determined value must be avoided in forensic practice, or so qualified by stated assumptions that the exercise becomes pointless." (Dubowski K. M. *Alcohol Technical Reports, 1976,5:* 55-63).

[paragraph break inserted]
Dr. LeBeau's statement that [K.G.] would have been in a "stupor" and Mr. Marsalis would have been in a state of "excitement" is pure speculation and not based on any objective scientific facts.

8. In summary, it is my opinion that the State relied too heavily on one single technique, specifically the Widmark formula, and from these speculative calculations made sweeping assumptions, based on the Dubowski chart, concerning the levels of intoxication and its influence on Mr. Marsalis and [K.G.]. Scientifically, there is no way to know either of their levels of intoxication with any accuracy or certainty based solely on Widmark calculations. Without knowing their level of

> intoxication, any discussion concerning the "stages of alcoholic influence" is complete speculation.

Affidavit of Dr. Anstine, para. 7-8 (emphasis added). (R. p. 437-438.)

In other words, Dr. Anstine's opinion is that the Widmark formula is speculative and cannot produce an accurate or certain enough BAC to rely on and therefore claiming people were in a particular stage of alcohol influence based on the unreliably determined BAC is pure speculation.

More significantly, Dr Anstine included in his affidavit above (where the first paragraph break was inserted), an opinion from Dr. Dubowski himself admonishing that retrograde extrapolation must be avoided in forensic practice, which will be repeated below for this Court's convenience:

> In one of his published articles, Dr. Dubowski says, "In forensic practice, expert witnesses are often requested to engage in speculative retrograde extrapolation of an experimentally found BAC to an assumed BAC at a prior time. In addition to the uncertainty of the presumed post-absorptive state during the entire extrapolated interval, the assumed linearity and regularity of the BAC decrease with time are also open to serious challenge in any given individual instance. When these considerations are coupled with the established unpredictable occurrence of the steepling effect in the BAC time curve and with the wide range of the elimination rate, it becomes clear that the speculative retrograde extrapolation of the BAC to any point from an experimentally determined value must be avoided in forensic practice, or so qualified by stated assumptions that the exercise becomes pointless." (Dubowski K. M. *Alcohol Technical Reports, 1976,5:* 55-63.

Affidavit of Dr. Anstine, para. 7 (emphasis added). (R. p. 437-438.)

As an aside, our case is more egregious than the scenario described by Dr. Dubowski above because it did not even concern retrograde extrapolation from a known BAC. In our case there never was a known BAC to work back from, and instead, a future BAC was predicted based on the bar tab and witness testimony and assumptions such as all drinks were fully consumed and the tab drinks were divided equally. In any event, for simplicity's sake Appellant will shorthand the extrapolation in our case to be the same as in the admonition.

Back to the point. This is not just simply a matter of the defense expert disagreeing with the state's expert. Rather, in addition to Dr. Anstine opining that the Widmark calculation is speculative, here, Dr. Dubowski, the expert that the state's expert relies on for his more important point (the Dubowski chart and accordingly how K.G. would have been influenced by alcohol), also opines that Dr. LeBeau's methodology "must be avoided." While Dr. LeBeau did testify that the Widmark formula was not exact, he certainly did not qualify it "by stated assumptions that the exercise becomes pointless" as required by Dr. Dubowski. Rather, Dr. LeBeau presented it to the jury as science it could rely on.

The state argues that the proposed defense expert's position doesn't render the Widmark formula inadmissible nor does it meaningfully diminish the strength of the state's case. Actually, it does both because Dr. Dubowski' s opinion is exceptionally problematic for the state. Again, this is not a simple battle of the

experts and a matter of the defense being able to obtain an expert willing to testify to something favorable. Here, Dr. Dubowski, the very expert that the state needs to provide meaning to the raw BAC number through his chart, says in no uncertain terms to not do the very thing that the state's expert did because it is too speculative, which is extrapolate a BAC to a different time. Making things even more difficult for the state is the fact that its methodology also relies in a different way on Dr. Dubowski in that he is the one who came up with the alcohol ratios for males and females which are used in the Widmark formula. (R. p. 434.)

In other words, the state is in the untenable position of having to argue that Dr. Dubowski is right for some things, most significantly his chart, but wrong for other things, to wit, his admonition not to use extrapolation forensically. Thus, had a motion in limine been brought, there is a reasonable probability that Dr. LeBeau's evidence of the Widmark formula would have been ruled too speculative to be admissible which also would have kept the Dubowski chart out of evidence since it required the Widmark derived BAC.

Alternatively, even if the evidence had come in, the evidence of Dr. Anstine (and Dubowski) counters it in a way that cross examination by an attorney cannot accomplish. Given the strength of the opinions, had Dr. Anstine (and Dr. Fromme, discussed below) testified at trial there is likewise a reasonable probability that the jury would have rejected the conclusions of the state's expert and the outcome of

the trial would have been different. Thus, the consideration of the proposed defense experts' affidavits should have been sufficient to have this issue survive summary dismissal and go to an evidentiary hearing.

Next was Dr. Fromme, the memory expert. First as to his affidavit, the following paragraph also finds fault with the BAC calculation.

> 14. I have reviewed Dr. Mark LeBeau's report for his BAC estimations and opinions about [K.G.'s] physical and mental capacity. Dr. LeBeau's BAC estimations for five hypothetical amounts of alcohol consumption were based on [K.G.s] self-report, a bar record of sales, and a bartender's recollection of drinks purchased on the night in question. BAC estimations based on self-reports or eyewitness reports are of questionable validity because memory is a reconstructive process that is highly susceptible to distortion (Lacy & Stark, 2013; Schacter, Guerin, & St. Jacques, 2011).

Affidavit of Dr. Fromme, para. 14 (emphasis added). (R. p. 443.)

The unreliability of eyewitness testimony is yet another reason to not admit the Widmark calculation as too speculative or to attack its reliability if admitted. This consideration was indirectly mentioned by Dr. Anstine by his comment that the state did not have any audio or video files. But Dr. Fromme's statement about the eyewitness testimony is also is important for another reason.

While it is of course not addressed in the district court's one sentence ruling about the proposed defense experts, the state's fallback position in its brief is that

the prosecution also presented eyewitness testimony of K.G.'s condition that night.[1]

A memory expert like Dr. Fromme who could testify not only about blackouts, but who could also generally explain the reconstructive process of memory and how it can be distorted, would have been of great assistance to the jury.

Furthermore, some of K.G.'s observed/testified to conditions can occur well below her Widmark calculated BAC of .28. For example, Dr. Fromme's affidavit stated that blackout can occur at BACs as low as .07 but normally occurs at .15. (R. p. 443.) Significantly, this was directly contrary to non-memory expert Dr. LeBeau, who told the jury blackouts did not start to occur until .25, which also coincided with where stupor began on the Dubowski chart. (Trial Tr. p. 660, 664.) Likewise as to her vomiting, Dr. LeBeau was quite frankly disingenuous when he testified that vomiting is specifically listed in the stupor category of the Dubowski chart (.25-.40). While it is, Dr. LeBeau did not advise the jury that vomiting is also specifically listed in the excitement category (.09-.25), at least in the Dubowski chart attached to Dr. Anstine's affidavit. (R. p. 436; Trial Tr. p. 674.)

Again, Dr. Fromme's conclusion regarding the Dubowski chart was as follows:

---

[1] Which is again why trial counsel should have called favorable taxi cab witness John Hampton as addressed in Appellant's opening brief. However, Appellant will stand on his Opening brief as to this issue and not further discuss it in this reply.

> 15. Further, Dr. LeBeau's [sic] opinions about [K.G.'s] physical and mental capacity were based exclusively on the Dubowski Chart (copyright 1976). Although this chart was copyrighted by Dr. K.W. Dubowski, and is included in both Dr. LeBeau's book on forensic psychology, as well as numerous other non-peer reviewed books, <u>there is no basis for the specific signs and symptoms associated with the BAC levels in the Dubowski chart</u>. In addition, the BAC levels in each category are so large that they are not useful for any given person. The lower and upper limits differ by an average of .15 g% BAC; which is a large difference in drinking quantity. Most importantly, <u>I have not been able to find any scientific basis for the signs and symptoms attributed to the categories of BAC in the Dubowski chart</u>.

Affidavit of Dr. Fromme, para. 14-16 (emphasis added). (R. p. 443-444.)

Just like with the Widmark formula, trial counsel should have used an expert witness and brought a motion in limine to keep the Dubowski chart out of evidence as speculative and unreliable or if admitted, to counter it and explain to the jury just why it is not scientifically based.

Contrary to the state's claims in its brief, the testimony of Dr. LeBeau and the proposed defense experts was not consistent, nor was Dr. LeBeau's testimony adequately addressed by cross examination as found by the district court. While Dr. LeBeau testified that the Widmark calculation and Dubowski chart were estimates and/or not exact measurements he did not testify they were pure speculation or completely lacking in scientific basis.

The state in its brief also raises questions that the proposed defense experts did not answer in their affidavits. That is because the district court summarily

dismissed the case rather than allowing it to proceed to evidentiary hearing where they could have testified rather than attempting to anticipate everything in an affidavit.

Finally, trial counsel's failure to use expert witnesses is an objective shortcoming that can be reviewed. This is not some claim that defense counsel should have used a hired gun expert to attempt to impeach indisputably good science of the state's expert.

Rather, in our case the state presented an expert witness who told the jury that the Widmark formula which produces a BAC, and then Dubowski chart which produces a stage of alcohol influence based on that BAC, is good science. While cross examination may well be able to extract concessions such that it is an estimate or there is some individual variation, cross examination of course can never establish that those conclusions are pure speculation or without scientific basis. In short, the jury would never have a reason to disbelieve or disregard the state's expert.

As well put in the Declaration of Charles F. Peterson, the attorney expert witness who submitted his declaration below (ignored by the district court), the state's case would rise or fall on the testimony of Dr. LeBeau. (R. p. 568.) Likewise, the attorney stated that the failure to challenge the testimony cannot have been the result of any strategic decision on the part of the lawyers. (R. 571.) In short,

given the state's theory of the case, to not seriously challenge Dr. LeBeau's testimony is to not seriously defend the case. But we know from the affidavits that there was real reason to challenge Dr. LeBeau's conclusions in this case.

We also know from the proposed experts' affidavits that there are readily available experts. Dr. Anstine has no more exotic profession than chemistry professor (Dr. LeBeau also had a degree in chemistry) and post-conviction counsel did not need to go to any more exotic locale to find him than Nampa.

More important, Dr. Anstine was able to bring to bear not only his opinions, but Dr. Dubowski' s learned writings as well. And Dr. Dubowski removes any suggestion of a hired gun expert and again, puts the state in the difficult position of having to rely on an expert for one point who also strongly disagrees with its methodology on another.

B. Failure to advise Petitioner of the time limits for trial in the Interstate Agreement on Detainer statute and the remedies available for breach of that statute.

Again, Appellant argued that the petition and the state's motion for summary dismissal addressed defense counsel's failure to advise Petitioner about the Interstate Agreement on Detainers' 120 day time limit and whether or not Petitioner's waiver was accordingly valid or invalid. The district court, on the other

hand, addressed whether or not the criminal defendant even has a personal right to exercise regarding speedy trial under the Interstate Agreement on Detainers and held he did not and so counsel was not ineffective for exercising that right for him by waiving it.

The state argues as follows in its brief:

> Although the state never specifically argued that counsel's decision to get a continuance and a change of venue rendered whether the waiver was knowing a nullity, such is implicit in both the state's argument and the district court's analysis.

Respondent's brief, p. 24.

The state is wrong on both counts. That argument is explicit in the district court's analysis and entirely absent from the state's.

Next the state argues in this brief:

> Because neither the state nor the district court took the position that securing a waiver of IAD speedy trial rights without adequate explanation of those rights was not deficient performance, both addressed their analysis to the prejudice prong.

Respondent's brief, p. 24.

The state is wrong again because both the state and the district court took the position that correction explanation of IAD speedy trial rights was not required.

The state in its brief acknowledges it had argued below:

> "Even if Petitioner was erroneously given information that speedy trial was 180 days versus 120 days from the time he was brought back to Idaho, Petitioner waived these rights to take advantage of receiving

> additional discovery materials including a DNA semen blood match and the favorable change of venue." (R., p. 467.)

Respondent's brief, p. 23.

In the district court the state argued that this was not deficient performance. (R. p. 467.) In other words, the state exactly took the position that obtaining Petitioner's waiver after erroneously telling him his speedy trial rights was not deficient performance.

Likewise, the district court ruled:

> Even if defense counsel did not know of the 120 day time limit, his behavior did not fall below an objective standard of reasonableness, nor does the waiver affect the outcome at trial.

Order, p. 11 (emphasis added). (R. p. 586.)

In other words, the court ruled that the attorney can waive the client's IAD speedy trial rights without even knowing them himself, which necessarily means he does not need to adequately explain them to his client, and that is not deficient performance. Thus, the district court did take this position, which Appellant asserts is error.

Regardless of all that, the state does not address at all Appellant's arguments about the district's court's prejudice ruling, which follows in full:

> Even if defense counsel did not know of the 120 day time limit, his behavior did not fall below an objective standard of reasonableness, nor does the waiver affect the outcome at trial. The venue of the trial needed to be changed to ensure a substantive right would be granted,

> and the plaintiff would have been more severely prejudiced by a failure to continue the trial than he is by supposition the defense counsel did not know the correct time frame for trial.

Order, p. 11 (emphasis added). (R. p. 586.)

Quite frankly, a close review of the court's ruling shows that it doesn't really make sense, in that the court is comparing the prejudice of not continuing the trial with supposing his attorney did not know the speedy trial deadlines. In any event, the court's point is clear, to wit, Appellant was better off continuing the trial than not. Appellant asserts this ruling is wrong because the outcome of the proceeding would have been different had counsel honored his speedy trial rights instead of continuing the case.

Contrary to the state's assertion, because of the odd wording the district court did not actually rule that a trial held within 120 days was not more likely to produce a different outcome than the trial in fact held. This is not just some nit to pick, because as explained in Appellant's opening brief, the first question is whether he could even be tried in time.

Again, the time lime is that the trial was set for January 5, 2009, the speedy trial issue first came up in court on December 1, 2008, the stipulation to continue the trial was filed on December 5, 2008, the court entered its order continuing the trial on December 8, 2008, and the 120 day speedy trial clock ran on December 17, 2008.

There is simply no evidence in this case that Mr. Marsalis could have been tried in time. There was no current trial setting within the 120 days and without the stipulation to continue it would have given the court approximately a two week period to set the case, call a jury and empanel a jury in a high profile case in a small county right before the holidays. The same factors that that led to the change of venue would make it difficult, if not impossible, to empanel a jury.

Assuming arguendo a jury was empaneled, the state then had to get its three or four out of state witnesses to trial on short notice, weeks before the previously existing trial setting. This included Dr. LeBeau, the Unit Chief of the Chemistry Laboratory at Quantico, Virginia, and the cab driver was living in Yuma, Arizona at the time. Also, the state had not yet provided the DNA discovery to the defendant and it was presumably after the discovery deadline and so if anything, could not be used. In any event, Mr. Marsalis did not use a DNA expert at the trial that happened so he would not have been in a worse position.

In short, there is simply no evidence in this case that Mr. Marsalis could have been tried within the speedy trial time and given the realities discussed above and not controverted by the state in its brief in any way, there is a reasonable probability that the outcome of the proceeding would have been different, to wit, the criminal case would have been dismissed with prejudice. Alternatively, even if the trial began, there is no evidence in this case that the state could have proceeded

weeks before the previously set trial date and given the realities discussed above, there is a reasonable probability that Mr. Marsalis would have been acquitted at trial.

In any event, the summary dismissal of this issue should either be reversed and remanded for an evidentiary hearing or alternatively, for further summary disposition proceedings.

CONCLUSION

Wherefore, for the reasons above stated, Appellant respectfully requests the district court's order summarily dismissing his petition for post-conviction relief be reversed and remanded to the district court for an evidentiary hearing and/or for further summary dismissal proceedings on appropriate claims.

DATED this 14th day of January, 2019.

/s/ Greg S. Silvey
Greg S. Silvey
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of January, 2019, I caused a true and correct copy of the foregoing brief to be served via the file and serve system to the email identified as the party's service contact:

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

Dated and certified this 14th day of January, 2018.

/s/ Greg S. Silvey
Greg S. Silvey