5-7-2014

Adams v. State Respondent's Brief Dckt. 41912

LAWRENCE G. WASDEN
Attorney General
State of Idaho
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

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

JOHN C. McKINNEY
Deputy Attorney General

IN THE SUPREME COURT OF THE STATE OF IDAHO

IRWIN RYAN RAY ADAMS, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent.	NO. 41912 RESPONDENT'S BRIEF ON REVIEW

Nature Of The Case

This matter comes before this Court on Adams' petition for review of the unpublished decision of the Idaho Court of Appeals, Irwin Ryan Ray Adams v. State, Docket No. 39842, 2013 Unpublished Opinion No. 790 (Idaho App., December 12, 2013) (hereinafter "Opinion").

Statement Of The Facts And Course Of Proceedings

The district court explained the factual background of Adams' underlying criminal case as follows:

On October 24, 2009 the petitioner while driving a 1995 Saturn SL automobile at a high rate of speed southbound on 200 East road [sic] in Jerome County lost control of his vehicle resulting in the death of his passenger Allen Larsen.

On May 11, 2010 the petitioner was charged with Vehicular Manslaughter, a felony. On May 17, 2010 the petitioner was appointed the Jerome County Public Defender. . . .

On August 9, 2010 at the request of his appointed counsel the court authorized funds for the appointment of an investigator. On August 25, 2010 at the request of appointed counsel the court authorized funds to retain an expert in accident reconstruction.

. . . On January 3, 2011 counsel for the petitioner advised the state and the court that the expert witness retained by the defense would not be called as a witness at trial. The trial commenced on March 9, 2011 and was concluded on March 11, 2011 with the jury retuning [sic] a verdict of guilty on the charge of vehicular manslaughter, a felony.

It was the theory of the state at trial that on the night of October 24, 2009 the petitioner was chasing his girlfriend who was in a vehicle being driven by Brian Constable and that the petitioner at the time he lost control of his vehicle was travelling approximately 108 mph and that when the vehicle left the roadway it rolled causing the death of his passenger Allen Larsen. . . . The accident was investigated by Sean Walker and Denise Gibbs of the Idaho State Police. Trooper Walker took measurements at the scene of the accident. The evidence at the scene of the accident indicated that the petitioners [sic] vehicle at a crest in the roadway of 200 East went airborne and when it came back to ground it left two parallel gouge marks on the roadway surface approximately 7feet [sic] in length beginning at a distance of approximately 77-80 feet from where it went airborne. The vehicle then went into a "broad slide" for approximately 200 feet where it left the roadway. The vehicle after leaving the roadway traveled approximately another 19 feet until it struck an irrigation ditch and was tripped which caused the vehicle to roll and travel approximately another 138 feet to its point of rest on its side. Over all, the petitioner's vehicle from the time he lost control to point of rest travelled approximately 578 feet. Master Corporal Denise Gibbs and accident reconstructionist for the Idaho State Police used what she described as the "fall formula" to estimate the speed of the petitioner's vehicle at the moment it went airborne. In order to obtain the necessary data for this formula she and Trooper Walker

> took the necessary measurements at the accident scene. This formula consisted of the distance traveled by the petitioner's vehicle from the takeoff point to the first gouges in the road which she determined at 80.33 feet; the height of the vehicle from the roadway surface which she determined to be 1.6 feet; and the takeoff angle which she determined to be 1.8 degrees. The necessary measurements and data was procured by Corporal Gibbs from the accident scene. Based on this formula she determined the speed of the petitioner's vehicle at takeoff to have been 108.02 mph.
>
> At trial it was the theory of the petitioner that at the time of the accident he was being chased by someone in a white or gray Honda and that he was not traveling faster than 75 mph. The petitioner did testify in his own defense at trial. According to the testimony of the petitioner on the night in question he had not seen his girlfriend Shayna Gonzales and that he and Allen Larsen had left his house to go to Twin Falls to purchase a fuel pump. That after he left his house there was a suspicious vehicle following him and that this vehicle was "pushing" him. He decided to go to the Jerome Police Department and was heading south on 200 East. He testified that the last time he looked at his speedometer he was doing approximately 75 mph and the other vehicle was right on his tail. After that he does not remember anything until after his car came to rest.

(R., pp.55-58.)

The district court sentenced Adams to a unified term of ten years with three years fixed. (R., pp.4-5.) Adams filed an appeal from his judgment of conviction. (R., pp.5, 58.) The Idaho Court of Appeals subsequently affirmed Adams' judgment of conviction in an unpublished decision. State v. Adams, Docket No. 38910, 2013 Unpublished Opinion No. 789 (Idaho App., December 12, 2013).

On November 21, 2011, Adams filed a *pro se* petition for post-conviction relief asserting, *inter alia*, that his trial counsel provided ineffective assistance by (1) failing to call vehicle accident reconstructionist Carl Cover as an expert witness to testify that, in his opinion, Adams' vehicle was travelling between 70

and 75 miles per hour when the accident occurred, and (2) failing to present expert testimony that, based on the mechanical condition of its motor, Adams' vehicle could not have traveled at a rate of speed in excess of 75 miles per hour. (R., pp.19-24, 66-74.) The district court appointed Adams an attorney (R., p.53) and issued a Notice of Intent to Dismiss his post-conviction petition (R., pp.55-75). The state filed an Answer, requesting the district court to dismiss Adams' petition on several grounds, including that it "contains bare and conclusory allegations unsubstantiated by affidavits, records, or other admissible evidence, and therefore fails to raise a genuine issue of material fact." (R., pp.76-77.) After Adams filed a response to the district court's Notice of Intent to Dismiss (R., pp.91-107), the district court dismissed Adams' petition, concluding he failed to establish he was entitled to a hearing on any of his claims (R., pp.120-143). Adams filed a timely notice of appeal. (R., pp.155-159.)

Course Of Proceedings On Appeal

On appeal, Adams argued that "the district court erred by summarily dismissing his petition for post-conviction relief because there was a genuine issue of material fact as to whether Adams was prejudiced by: (1) defense counsel's failure to present expert witness testimony from the accident reconstruction expert, and (2) defense counsel's failure to investigate evidence of the engine's mechanical condition." Adams, Slip Op. at 5.

In regard to Adams' first claim, the Idaho Court of Appeals assumed the district court correctly found that "Adams' [two] defense counsel were *deficient* for failing to present the accident reconstruction expert's testimony." Adams, Slip

Op. at 6-7 (emphasis added); see Strickland v. Washington, 466 U.S. 668 (1984). In addressing the prejudice prong of the Strickland test for ineffective assistance claims, the court of appeals held that, even if Adams' trial counsel had proffered expert testimony by Mr. Cover that Adams' car was travelling 70 to 75 miles per hour when the accident occurred, the testimony would have been "conclusory and speculative and therefore would not have been admissible at trial." Adams, Slip Op. at 8-9. The court of appeals further held that even if Adams' trial counsel had succeeded in getting Mr. Cover's expert testimony admitted, it would not have made a difference in the jury's verdict:

> Even if the accident reconstruction expert testified that Adams was driving around 75 mph when he crashed, we are not persuaded that there is a reasonable probability of a different jury verdict at trial. As the district court found:
>
> > The fact remains that [Adams] was driving at such a speed to cause his vehicle to go airborne and, when it returned to the roadway surface, [Adams] lost control which resulted in the death of [the friend]. There can be no dispute that [Adams'] operation of his motor vehicle was a significant cause contributing to the death of [the friend] and that the totality of the circumstances was sufficient to establish gross negligence on the part of [Adams].

Adams, Slip Op. at 9 (brackets original).

In regard to Adams' claim that his trial counsel failed to investigate the pre-existing damage to his car's engine, the court of appeals initially explained, "The district court's analysis focuses on the prejudice element. We assume without deciding that defense counsel was deficient by failing to investigate the alleged mechanical issues." Adams, Slip Op. at 10. The court of appeals proceeded to

hold that Adams again failed to meet the prejudice prong of Strickland, explaining:

> Even if the court accepted the testimony of the accident reconstruction expert and the mechanic, the district court was left with one conclusion: that Adams drove the vehicle at least 20-25 mph over the speed limit. The court then determined that because the evidence as to the mechanical condition of Adams' engine would go to the speed of Adams' vehicle, the same reasons discussed by the district court in its analysis of Adams' accident reconstruction expert would apply, and the speed would not change the jury's verdict and, consequently, not satisfy the prejudice prong of *Strickland*.
>
> We are persuaded that Adams has not raised a genuine issue of material fact as to whether there was a reasonable probability the jury verdict would have changed had defense counsel investigated and presented evidence of the engine's mechanical condition. Even the mechanic's affidavit that Adams presented in support of this claim acknowledged that the affiant could not rule out the possibility that the engine could have produced speeds up to 108 mph. Therefore, his testimony would have done little to rebut the State's case.

Adams, Slip Op. at 10.

The court of appeals affirmed the district court's summary dismissal of Adams' post conviction claims. Id. at 11.

ISSUE ON REVIEW

Adams states the issue on review as follows:

> Should this Court grant Mr. Adams' Petition for Review and ultimately vacate the district court's order summarily dismissing his petition for post-conviction relief and remand this case for an evidentiary hearing?

(Appellant's Brief on Review, p.11.)

The state rephrases the issue as follows:

Did the district court correctly determine that Adams failed to demonstrate a genuine issue of material fact about whether, under Strickland, any deficient performance by his trial counsel resulted in prejudice?

ARGUMENT

The District Court Correctly Determined That Adams Failed To Demonstrate A Genuine Issue Of Material Fact About Whether, Under *Strickland*, Any Deficient Performance By His Trial Counsel Resulted In Prejudice

A. Introduction

Adams claims his trial counsel was ineffective for failing to: (1) present expert witness testimony by the accident reconstruction expert, Mr. Cover, and (2) investigate and present evidence of the car engine's mechanical condition. Both the district court and the Idaho Court of Appeals ruled Adams failed to make a prima facie showing that his trial counsel's performance resulted in prejudice under Strickland. The record supports the district court's determination that Adams failed to make such a showing.

B. Standard Of Review

In reviewing the summary dismissal of a post-conviction application, the appellate court reviews the record to determine if a genuine issue of material fact exists which, if resolved in petitioner's favor, would require relief to be granted. Nellsch v. State, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992). The court freely reviews the district court's application of the law. Id. at 434, 835 P.2d at 669. However, the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001).

When considering a case on review from the Court of Appeals, "this Court gives serious consideration to the views of the Court of Appeals" but "reviews the

district court's decision directly." State v. Lampien, 148 Idaho 367, 371, 223 P.3d 750, 754 (2009) (citing State v. Doe, 144 Idaho 819, 821, 172 P.3d 1094, 1096 (2007)).

C. The District Court Correctly Determined Adams Failed To Demonstrate That His Trial Counsel's Deficient Performance Resulted In Prejudice

A free review of the record shows that, just as the district court concluded, Adams failed to present a genuine issue of material fact which, if resolved in his favor, would require relief. Nellsch, 122 Idaho at 434, 835 P.2d at 669.

1. Failure To Present Testimony Of Accident Reconstructionist

The district court concluded that, although Adams presented a viable claim that trial counsel's failure to call Mr. Cover as an accident reconstruction expert at trial constituted deficient performance, Adams failed to present evidence to support the second prong of Strickland – prejudice. (R. pp.133-140.) To demonstrate prejudice, Adams was required to "show a reasonable probability that the outcome of the trial would be different but for counsel's deficient performance." McKay v. State, 148 Idaho 567, 570, 225 P.3d 700, 703 (2010) (citing State v. Row, 131 Idaho 303, 312, 955 P.2d 1082, 1091 (1998)). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Id. (quoting Strickland, 466 U.S. at 694). The outcome of Adams' trial was that the jury convicted him of vehicular manslaughter based on gross negligence,[1] making his conviction a felony. I.C. § 18-4006(3)(a).

[1] The trial court appears to have instructed the jury pursuant to ICJI 342, which explains that gross negligence "means such negligence as amounts to a wanton,

On review, Adams argues that how fast he was driving just before the crash was a disputed fact in post-conviction. (Appellant's Review Brief, pp.17-22.) However, the issue before the district court was not Adams' speed, but whether Mr. Cover's proposed expert testimony created a reasonable probability the outcome of the trial would have been different. See McKay, 148 Idaho at 570, 225 P.3d at 703. In making that determination, the district court was required to accept Mr. Cover's statements about how he would have testified if given the opportunity – namely, that Adams' car was going 70 to 75 miles per hour -- and determine what, if any, impact such testimony would have had on the jury's verdict. Id. In determining whether there was prejudice under Strickland, the court was not required to accept, or conclude that the jury had to accept, the substance of Mr. Cover's testimony as settled fact, nor even (as the court of appeals concluded) that his proffered testimony would have been admissible. See Adams, Slip Op. at 9 (Mr. Cover's testimony would not have been admissible at trial because it was conclusory and speculative); Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988) (To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different); State v. Thornton, 122 Idaho 326, 332, 834 P.2d 328, 334 (1992) (no prejudice shown by trial counsel's failure to obtain the opinion of another handwriting expert).

---

flagrant or reckless disregard of consequences or willful indifference of the safety or rights of others." (See R. p.70; State v. Taylor, 59 Idaho 724, 735, 87 P.2d 454, 459 (1939).)

Although the district court did not expressly hold that Mr. Cover's anticipated testimony -- that Adams' car was travelling 70 to 75 miles per hour when the accident occurred -- would have been inadmissible at trial, it clearly implied as much. Just after concluding that Mr. Cover's testimony would have been conclusory and speculative, the court quoted Bromley v. Garey, 132 Idaho 807, 811, 979 P.2d 1165, 1169 (1999) (citations omitted), for the following legal principles on the admission of expert testimony:

> "Expert opinion must be based upon a proper factual foundation. Expert opinion which is speculative, conclusory, or unsubstantiated by facts in the record is of no assistance to the jury in rendering its verdict, and therefore is inadmissible as evidence under Rule 702." Expert opinion that merely suggests possibilities would only invite conjecture and may be properly excluded."

(R., p.137.) In turn, the court of appeals not only determined that Mr. Cover's testimony "was conclusory and speculative[,]" it expressly ruled his testimony "therefore would not have been admissible at trial." Adams, Slip Op. at 9.

Both the court of appeals' and district court's bases for holding that Mr. Cover's proposed testimony would have been conclusory and speculative are well-stated in their respective opinions, and are incorporated and relied upon as if fully set forth herein. See Adams, Slip Op. at 6-9; R., pp.66-72 (Notice of Intent to Dismiss, Exhibit A to Respondent's Brief to Court of Appeals, pp.12-18), pp.134-137 (Order Dismissing Petition for Post-Conviction Relief, Exhibit B to Respondent's Brief to Court of Appeals, pp.14-18).

Based on the reasoning employed by both the district court and the court of appeals, because Mr. Cover's testimony would have been conclusory and speculative, it would not have been admissible. Therefore, on that basis alone,

Adams has failed to show any error in the district court's determination that he failed to demonstrate prejudice under Strickland in regard to his accident reconstruction expert claim.

Perhaps more significantly, the district court held that, even if Mr. Cover's testimony would have been presented to the jury, and assuming the jury believed he was travelling between 70 and 75 miles per hour at the time of the accident, the outcome of Adams' trial would not have been different.[2] (R., p.133-140; see p.139 ("Whether the speed of the petitioner's vehicle was 75 or 108 mph or somewhere in between, by reason of the speed in the environment, given the roadway conditions; there was a lessening of control of the petitioner's vehicle to the point where such lack of effective control was likely to bring harm to another, i.e. Mr. Larsen as well as the petitioner.").) The court based its determination that Adams failed to prove prejudice as required by Strickland on the following factors:

---

[2] After ruling that Mr. Cover's testimony would not have been admissible at trial, the Idaho Court of Appeals explained that the evidence "establishes that Adams was driving in excess of the posted speed limit[,]" and even if he was driving around 75 miles per hour,

> [a]s the district court found:
>
> The fact remains that [Adams] was driving at such a speed to cause his vehicle to go airborne and, when it returned to the roadway surface, [Adams] lost control which resulted in the death of [the friend]. There can be no dispute that . . . the totality of the circumstances was sufficient to establish gross negligence on the part of [Adams].

Adams, Slip Op. at 9 (explanation by court of appeals); see ICJI 342.

(1) There is no evidence Adams' car was struck in the rear by another vehicle (R., p.133[3]);

(2) The jury did not accept the defense theory that Adams' car was being chased – vis-à-vis testimony by several witnesses that Adams' car was chasing a car driven by Brian Constable and occupied by Adams' recent girlfriend, Shayna Gonzalez, and her mother (id.);

(3) Mr. Cover's opinion that I.S.P. Master Corporal Gibbs erred in calculating the speed of Adams' car at the time of the accident (108 mph) is "conclusory and speculative" (R., p.137);

(4) It is undisputed that when Adams' car went over the crest of an elevated portion of the roadway, it went airborne for 80 feet before landing (R., pp.135-140); and

(5) "There is testimony in the record from trial that the petitioner made statements that he was travelling in excess of 100 mph and that Mr. Larsen asked the petitioner to stop and let him out of the vehicle" (R., p.139; see #38910 Tr., p.218, L.3 – p.219, L.19; p.224, L.5 – p.226, L.10; p.234, L.4 – p.236, L.8; p.241, L.16 – p.243, L.14; p.247, L.5 – p.249, L.6).

Based on the district court's well-reasoned legal and factual analysis of this issue, set forth in its Notice of Intent to Dismiss and its Order Dismissing Petition for Post-Conviction Relief, (Exhibits A and B to Respondent's Brief to the Idaho Court of Appeals), the state relies upon them as if set forth fully herein. The physical evidence presented at trial alone overwhelmingly showed that Adams drove with gross negligence; his car traveled a total of 578 feet (almost the length of two football fields) after he lost control -- 80 feet in the air, 7 feet of parallel gouge marks where his car landed, 200 feet before going into a skid, 152 feet in a sideways slide on the road, 11 feet off the road and into a ditch, and

[3] Pages 14 and 15 of the Order Dismissing Petition for Post-Conviction Relief are transposed in the Clerk's Record. (R., pp.133-134.)

then it rolled another 130 feet. (#38910 Tr., p.137, L.3 – p.139, L.14; p.156, L.16 – p.157, L.22.) This led directly to the death of Mr. Larsen. The district court similarly observed:

> The fact remains that the defendant was driving at such a speed to cause his vehicle to go airborne and, when it returned to the roadway surface, the petitioner lost control which resulted in the death of Mr. Larsen. There can be no dispute that the petitioner's operation of his motor vehicle was a significant cause contributing to the death of Mr. Larsen and that the totality of the circumstances was sufficient to establish gross negligence on the part of the petitioner. The failure to present expert testimony that the petitioner's speed did not exceed 75 mph in a 50 mph zone does not "clear [Adams] of alleged guilt, excuse his actions, or reduce punishment." [*Baker v. State*, 142 Idaho 411, 422, 128 P.3d 948, 959 (2005)]. The petitioner has failed to present admissible evidence sufficient to undermine the verdict of the jury and, therefore, has failed to present a triable issue relative to the prejudice prong of *Strickland*.

(R., p.140.) Regardless of how fast Adams' car was travelling at the time of the accident, the undisputed facts of the accident -- especially the car going airborne for 80 feet -- unequivocally shows Adams had "a wanton, flagrant or reckless disregard of consequences or willful indifference of the safety or rights" of the victim, Allen Larsen.[4] See ICJI 342.

---

[4] Adams argues:

> Had the jury heard Mr. Cover's testimony that Mr. Adams was travelling at 75 miles per hour and found this testimony to be credible, there is a reasonable probability that the jury would have found all of Mr. Adams' testimony to be credible and found that he was, in fact, being chased. If the jury reached this conclusion, there is a reasonable probability that it would have either found Mr. Adams not guilty of any crime, or guilty of the lesser included offense of vehicular manslaughter *without* gross negligence. In fact, had a single juror found Mr. Adams' story to be credible, there is a reasonable probability that the jury would have been unable to

2. Failure To Investigate And Present Testimony About The Condition Of The Car Motor

Adams also contends the district court erred by failing to permit an evidentiary hearing on his claim that his trial counsel provided ineffective assistance for failing to investigate and present evidence that Adams' car motor was incapable of producing speeds over 75 miles per hour. (Appellant's Brief on Review, pp.22-23.) In addressing this issue, the Idaho Court of Appeals held, once again, that Adams failed to demonstrate prejudice under Strickland, stating:

> Even if the [district] court accepted the testimony of the accident reconstruction expert and the mechanic, the district court was left with one conclusion: that Adams drove the vehicle at least 20 to 25 mph over the speed limit. The court then determined that because the evidence as to the mechanical condition of Adams' engine would go to the speed of Adams' vehicle, the same reasons discussed by the district court in its analysis of Adams' accident reconstruction expert would apply, and the speed would not change the jury's verdict and, consequently, not satisfy the prejudice prong of *Strickland*.
>
> We are persuaded that Adams has not raised a genuine issue of material fact as to whether there was a reasonable probability the jury verdict would have changed had defense counsel investigated and presented evidence of the engine's mechanical condition. Even the mechanic's affidavit that Adams presented in support of this claim acknowledged that the affiant could not rule out the possibility that the engine could have produced speeds up to 108 mph. Therefore, his testimony would have done little to rebut the State's case.

Adams, Slip Op. at 10.

> agree upon a verdict and a mistrial would have been declared - a result different than a conviction.

(Appellant's Brief on Review, p.21 (emphasis original).) The notion that the jury would have responded to Mr. Cover's testimony in any, much less all, of the ways Adams suggests takes speculation and conjecture to their outer limits.

The state relies upon the district court's Notice of Intent to Dismiss (Appendix A; R., pp.72-74) and its Order Dismissing Petition for Post-Conviction Relief (Appendix B; R., pp.140-142) as part of it response to this issue, and incorporates the relevant portions of those opinions into this section of this brief as if fully set forth herein. The state also relies upon its preceding argument, supra, to show that Adams has failed to demonstrate any prejudice under Strickland in regard to this issue.

3. Summary

The district court properly dismissed Adams' claims under I.C. § 19-4906(b), explaining, "based upon the deficiencies of the claims and evidence presented by the petitioner, no purpose would be served by further proceedings" and "there is no genuine issue of material fact, which would entitle petitioner to the requested relief." (R., p.142.) Adams has failed to show any error in the district court's rulings.

CONCLUSION

The state respectfully requests that this Court affirm Adams's conviction and sentence for vehicular manslaughter with gross negligence.

DATED this 7th day of May, 2014.

JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 7th day of May, 2014, served a true and correct copy of the attached RESPONDENT'S BRIEF ON REVIEW by causing a copy addressed to:

JASON C. PINTLER
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

John C. McKinney
Deputy Attorney General

JCM/pm