10-23-2015

Charboneau v. State Amicus Curiae Dckt. 43015

IN THE SUPREME COURT OF THE STATE OF IDAHO

JAIMI DEAN CHARBONEAU,

Petitioner/Respondent,

vs.

THE STATE OF IDAHO,

Respondent/Appellant.

Supreme Court Docket
No. 43015

Jerome County Civil
Case No. CV-2011-638

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AMICUS CURIAE BRIEF OF THE IDAHO PROSECUTING ATTORNEYS ASSOCIATION

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APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME
THE HONORABLE ROBERT J. ELGEE, DISTRICT JUDGE, PRESIDING

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I. INTRODUCTION.

The Idaho Prosecuting Attorneys Association ("IPAA"), by and through Jan M. Bennetts, Ada County Prosecuting Attorney; James K. Dickinson, Ada County Deputy Prosecuting Attorney, Standards and Practices Division; Barry McHugh, Kootenai County Prosecuting Attorney; Bryan Taylor, Canyon County Prosecuting Attorney; and Grant Loebs, Twin Falls County Prosecuting Attorney, and pursuant to the Court's Order granting IPAA's request to file an amicus curiae brief, submits the following for the Court's consideration. IPAA will focus on the district court's findings relating to special prosecuting attorney Marc Haws, then working as a Deputy Attorney General. Because of this narrow focus, IPAA refers the Court to Appellant State of Idaho's brief for a broader discussion of the facts and history of the proceedings.

II. PROSECUTING ATTORNEYS HAVE DUE PROCESS RIGHTS IN STATE BAR PROCEEDINGS THAT ARE IMPLICATED BY POST-CONVICTION RELIEF PROCEEDINGS.

The IPAA represents the interests of prosecuting attorneys statewide. Based upon the keen interest of its constituency in the issues surrounding accusations of this type, the IPAA Board of Directors applied for, and was granted permission to appear as amicus curiae and file this brief. Given that IPAA members are the sole targets of prosecutorial error, the IPAA is uniquely positioned to share its statewide perspective on this topic.

Unfortunately, in most instances where prosecutorial error allegations are reviewed by this Court, the prosecutor is not personally represented with regard to the accusations. On appeal, the State is represented by a Deputy Attorney General, the Defendant is represented by a Deputy State Appellate Defender or private counsel, but the individual accused of error or misconduct

generally has no counsel.[1] When such allegations are raised, despite the significant property rights (continued/future employment) and reputation, honor and integrity interests[2] at stake,[3] unless the prosecutor is allowed to raise his or her personal defense to the allegations, he or she may be deprived of his/her due process[4] right to disprove such allegations at the trial level, post-conviction level, appellate level or even in a State Bar proceeding.

Because of the understandably great deference given to findings or even comments by any court, Bar Counsel will almost inevitably consider the same when evaluating whether to file a complaint against a prosecuting attorney. Given the import of such determinations, it is vitally important that the record be developed accurately, which necessarily requires input from the accused prosecutor. Even if a State Bar proceeding concludes in an exoneration, the appellate decision, and the attendant employment and/or reputation harm flowing from the decision (even where the decision is mistaken), are potentially permanent. That is why the accused prosecutor must be accorded a due process right, and why a court's erroneous consideration of evidence must be corrected. Without correction, a prosecutor is forever saddled with a record susceptible to misinterpretation by the public and Bar Counsel.

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[1] The Attorney General's Office takes the position that it represents the State's interests, not the prosecutor or the prosecutor's interests.

[2] "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 27 L.Ed. 2d 515 (1971); cited in *Smith v. State*, 146 Idaho 822, 827, 203 P.3d 1221 (2009).

[3] Both trial courts and this Court may impose various sanctions against attorneys. Further, the Idaho Bar Association may bring an action pursuant to the Idaho Rules of Professional Conduct, *e.g.* I.R.P.C. 3.3 or 3.8, and can likewise impose sanctions up to and including disbarment; such allegations may also result in a loss of employment.

[4] "An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.' *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). We have described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.'" *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed. 2d 494 (1985).

III. THE POST-CONVICTION PROCEEDINGS.

In the present post-conviction case, the district court bifurcated summary judgment proceedings; first, considering whether the Tira Arbaugh letter was withheld or concealed from Respondent; and second, if it was, whether state agents played a role in the letter's being withheld or concealed. The district court concluded both questions were properly answered in the affirmative. Charboneau Findings of Fact and Conclusions of Law, April 10, 2014. R. Part 3, p. 142. During the evidentiary hearing, the district court agreed that the "knowledge of family members of facts related to either the underlying claims or matters having to do with the criminal trial would be more appropriately raised at a subsequent time." Evidentiary Hearing Transcript ("Evid. Tr."), p. 263, L.l. 9-21.

The district court reviewed a number of items in considering whether Haws was involved in withholding or concealing information from Respondent, including Exhibit 4, the handwritten note the district court concluded was written by Department of Corrections employee DeWayne Shedd ("Shedd"), or at least acknowledged per his signature below the following statement:

> Per Tim McNeese from the AG's office/instructed to monitor all of inmate Charboneau's personal/legal mail. All incoming and outgoing legal mail, if a letter arrives at ICI-O for Charboneau from Larry Gold, a former sheriff of Jerome County, seize it without notifying Charboneau, look for any documents depicting the name Tira Arbaugh, confiscate any such documents, and notify McNeese immediately. If McNeese is not available then contact another attorney Marc Haws at the Federal Court Building in Boise. His phone number and address is in the directory on my desk. Notified Lt. Unger and he agreed to help me monitor Charboneau's mail.

R. Part 3, p. 121. Shedd worked as a library specialist at the Orofino Department of Corrections facility from March 1997 to May 2007. Evid. Tr., p. 190, L. 11 – p. 191, L.

6. Shedd denied knowing Marc Haws. Evid. Tr., p. 271, L. 25 – p. 272, L. 11. Timothy McNeese worked as a Deputy Attorney General, assigned to the Department of Corrections, from January 1984 to January 2006, when he retired. Evid. Tr., p. 439, L.l. 16-22.

During the evidentiary hearing on the first portion of the bifurcated proceedings, Haws testified he had been a Deputy Attorney General in charge of the Criminal Division. Evid. Tr., p. 231, L.l. 4-9. He testified he had prosecuted Respondent but had no involvement with Respondent's case after the first sentencing. *Id.*, at L.l. 14-23. He denied knowing Shedd or knowing of Shedd and testified that he did not see the Tira Arbaugh letter until sometime during the pendency of this post-conviction relief case. *Id.*, p. 232 at L.l. 7-21. Haws denied instructing anyone to hide or conceal evidence from Respondent; he testified that he had had no contact with Idaho Department of Corrections personnel about Respondent's case since leaving the Attorney General's Office shortly after completing his work in the criminal case. Evid. Tr., p. 432, L. 9 – p. 433, L. 14.

During cross-examination, counsel for Respondent attempted to question Haws on his involvement in "the prosecution of Mr. Paradis." Evid. Tr., p. 436, L.l. 10-12. After a relevance objection by the State's attorney, an offer of proof was submitted by Respondent's counsel: "I was going to ask Mr. Haws if he was involved in any kind of concealment of exculpatory evidence from the Paradis prosecution." *Id.*, at L.l. 15-18. Further argument was presented by Respondent's counsel: "The only relevance, Your Honor, is I believe he was involved in a Brady violation in the Paradis case. This followed shortly after. I think I'm allowed to inquire

whether he was involved in similar conduct in the Charboneau case." *Id.* at p. 436, L. 23 to p. 437, L. 2. The district court asked: "Isn't this just an offer of propensity evidence, did it once, did it twice?" *Id.* at p. 437, L.l. 7-8. After an affirmative response from Charboneau's counsel, the district court stated: "Isn't that what 404(b) excludes? This is not a criminal case. There's no jury present. You're not offering it to prove something other than propensity. I'm not hearing, such as motive, opportunity, intent, absence of mistake or accident, planned knowledge, identity." *Id.* at L.l. 9-15. After the district court asked for an additional offer of proof, and was provided more details from the *Paradis* case and how the allegations in Charboneau's case were similar to findings in *Paradis*, the court responded: "You made your offer. I'm going to exclude it. I'll sustain the objection." *Id.* at p. 437, L. 17 – p. 438, L. 5.

The district court did not make any finding as to whether prison guard William Unger, Deputy Attorney General Timothy McNeese, or Haws were involved in the concealment or withholding of the letter. "The inferences and conclusions the Court draws from the evidence is that McNeese or someone in a similar capacity directed Shedd to do what he did." R. Part 3, p. 136.

The court cited three reasons for not making a finding:

> [N]o such finding is required. The Court need not determine the extent of any conspiracy to seize or confiscate Charboneau's mail. It is sufficient for purposes of this case, at this time, to determine only that someone at IDOC did so, and did not act alone. Second, McNeese has been sanctioned before by the federal court for his conduct involving the letter seized by Shedd in the Gomez case, and he represented Shedd at one point. They are not unknown to each other. Haws, on the other hand, has been involved in another death penalty case in which there was a claim that exculpatory evidence was not disclosed. See, *Paradis v. Arave*,

> 240 F.3d 169.[5] In addition, Tira Arbaugh alleges in her 1989 letter that Haws instructed some of her relations to get rid of Marilyn's Calamity Jane rifle. Haws' name surfaces in Ex. 4 that Shedd authored. His name also appears in both Exs. 7C and D, (though the Court cannot conclude these emails are genuine). The Court does not know what to make of these "coincidences," if they are in fact coincidences. There remains the possibility someone is trying to smear Haws, and there remains the possibility that he was somehow involved. Either way, that brings up the third reason for the Court to avoid making any finding regarding Unger or Haws or McNeese. Whether they were involved, and if so to what degree, may be the subject of future proceedings, and the Court chooses not to make any findings at this point that could be used to support a collateral estoppel argument for either side.

R. Part 3, p. 137-138.

In the second portion of the proceedings to determine the relevance of the Arbaugh letter, its admissibility, and if it were admissible what the appropriate remedy would be, the district court issued a Decision On Motion For Summary Judgment ("Decision"). In the Decision, the district court concluded that **someone** directed Shedd, but did not determine who directed Shedd:

> The inference from all the evidence is that the Arbaugh letter was known about in Jerome County by those in law enforcement commencing soon after delivery to the Jerome County Courthouse in 1989, and it was seized or confiscated or hidden from Charboneau by unknown persons from that time. The conclusion this leads to is that **Shedd was given a mission by Mark Haws or someone in law enforcement with an interest in the Charboneau case** sometime after that, and Shedd looked for and seized the Arbaugh letter, and kept it from Charboneau.

R. Part 4, p. 551-552 (emphasis added).

The district court, despite its own finding that cross-examining Haws on propensity evidence related to the *Paradis* case was inappropriate, found the case relevant in considering Haws' involvement in directing Shedd. R. Part 3, p. 137. It also considered the case in

[5] Correct cite 240 F.3d 1169 (9th Cir. 2001).

evaluating the circumstantial guarantee of trustworthiness of the Tira Arbaugh letter:

> The ninth circumstantial guarantee of trustworthiness is rather coincidental, and might mean different things to different people. Tira Arbaugh, whether she knew it or not, bit off quite a chunk in asserting that Marc Haws, the lead prosecuting attorney assigned to a death penalty case, told her and her family to get rid of a gun that Tira believes her mom had with her at the time of her murder. She made that claim in writing in 1989. It would be hard to convince anyone of the truth of such a claim under the best of circumstances. Tira could not have known when she wrote that letter that many years later, that same type of claim would be asserted in another death penalty case against the same attorney. See, *Paradis v. Arave*, 130 F.3d 385 (9th Cir.1997). Originally, Donald Paradis and Thomas Gibson were convicted of murder and sentenced to death. Marc Haws was the prosecutor. The 9th Circuit determined that his notes of the medical examiner's opinions regarding the time and location of the victim's death were subject to disclosure under *Brady v. Maryland. Paradis v. Arave,* 240 F.3d 1169 (9th Cir. 2001). Both men were freed from prison.

R. Part 4, p. 542 (footnote omitted). On both occasions, the case was cited not for a relevant legal principle, but to point out findings by the Ninth Circuit Court of Appeals regarding Haws' conduct.

IV. ARGUMENTS.

a. Haws' Due Process Rights Are Implicated By The District Court's Correct Decision That The Evidence Did Not Support A Finding that Haws Directed Shedd's Actions.

1. Standard of Review

> Post-conviction proceedings are civil in nature and therefore the applicant must prove the allegations by a preponderance of the evidence. On review, the appellate court will not disturb the lower court's factual findings unless the factual findings are clearly erroneous. The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. When reviewing mixed questions of law and fact, this Court will defer to the factual findings of the district court unless those findings are clearly erroneous. This Court exercises free

review of the district court's application of the relevant law to the facts.

Dunlap v. State, 141 Idaho 50, 56, 106 P.3rd 376, 382 (2004) (citations omitted).

2. Argument

The district court in both parts of the bifurcated summary judgment proceeding considered whether someone directed Shedd to withhold information from Respondent, and twice made a factual finding that insufficient evidence existed to prove who directed Shedd. The district court specifically did not make a finding in the first portion of the bifurcated proceeding. It used disjunctive language in finding "that McNeese or someone in a similar capacity directed Shedd to do what he did." R. Part 3, p. 136. As to Haws, the district court commented that "there remains the possibility someone is trying to smear Haws, and there remains the possibility that he was somehow involved." R. Part 3, p. 137.

In the second part of the bifurcated summary judgment proceeding relating to the admissibility of the Arbaugh letter and an appropriate remedy, the district court again used disjunctive language to emphasize its ruling that the evidence was insufficient to find who directed Shedd.

> The conclusion this leads to is that Shedd was given a mission by Mark Haws or someone in law enforcement with an interest in the Charboneau case sometime after that, and Shedd looked for and seized the Arbaugh letter, and kept it from Charboneau. This conclusion is no stretch of the evidence by the Court. *This is no more than what Exhibit 4 to the Evidentiary Hearing says, in Shedd's own writing.* It would be a fair inference to conclude the letter was concealed by those
>
> with a connection to law enforcement after 1989, but it is not possible to say when that commenced.

R. Part 4, p. 552.

While the language from the two decisions indicates that the district court considered McNeese or Haws as more likely than others to have been involved in directing Shedd, the disjunctive language used by the district court and the district court's focus first on McNeese and then on Haws as the person most likely to have directed Shedd, supports a finding that the district court concluded the evidence was insufficient to find either McNeese or Haws responsible. The district court's language indicating that "the letter was concealed by those with a connection to law enforcement" is another indication that the evidence was insufficient for the district court to find who had directed Shedd. The district court's frustration with the lack of evidence is apparent in a footnote to its opinion:

> A great example of this is that Shedd now gets to claim he doesn't remember details like who told him to confiscate things from Charboneau's mail, or why *he wrote out and signed* Exhibit 4. Now, instead of an all-out (criminal?) investigation or determined effort to find out who might have actively concealed information in a death penalty case, the passage of time makes it possible to yawn and wonder what happened.

R. Part 4, p. 556 n.19.

The district court was clear in its finding that Shedd withheld or concealed the Arbaugh letter from Respondent. What is equally clear is that the district court found that someone directed Shedd, but could not find the evidence sufficient to determine who directed Shedd. Haws worked in the Attorney General's Criminal Division, not for the Department of Corrections. Haws' involvement in Respondent's case ended after Respondent's first sentencing. Exhibit 4 does not provide support for a finding that Haws had any involvement in directing the withholding of documents from Respondent. Nor is there any evidence that Haws

was notified of documents being withheld. If Shedd was directed by someone to withhold documents from Respondent, the language of Exhibit 4 lends itself more to a finding that it was someone in the Department of Corrections chain of command. This evidence leads to a conclusion that the Court should affirm the district court's finding that there was insufficient evidence to find that Haws directed Shedd.

b. Haws' Due Process Rights Are Implicated By The District Court Inappropriately Considering Findings From *Paradis v. Arave* In Its Decisions.

The district court correctly sustained Appellant's objections to questions during the cross-examination of Haws regarding findings from the *Paradis* case. IPAA agrees with Appellant's position that "[t]he district court erred by conducting an extra-judicial investigation into the facts of the *Paradis* case and considering on an *ex parte* basis evidence it ruled inadmissible." Brief of Appellant, pp. 72-74. Such a due process violation should not be endorsed by this Court.

In the alternative, should the Court decide that the district court's reliance on the findings in *Paradis* to be a reversal of its original decision, despite a lack of anything in the record explaining such a reversal, IPAA argues that said reliance was an abuse of the district court's discretion.

1. Standard of Review

> When reviewing a trial court's decision regarding the admissibility of evidence related to a defendant's prior conduct, this Court applies a two-part standard: "(1) whether, under I.R.E. 404(b), the evidence is relevant as a matter of law to an issue other than the defendant's character or criminal propensity; and (2) whether, under I.R.E. 403, the district court abused its discretion in finding the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice to the

defendant."

State v. Joy, 155 Idaho 1, 8, 304 P.3d 276, 283 (2013) (quoting *State v. Johnson*, 148 Idaho 664, 667, 227 P.3d 918, 921 (2010)). The Court can exercise free review of the district court's relevancy determination. *State v. Sheldon,* 145 Idaho 225, 229, 178 P.3d 28, 32 (2008).

2. Argument

The Court's findings in *Joy* support the district court's original conclusion that cross-examination of Haws on the *Paradis* case was inappropriate. "[T]o be admissible under Rule 404(b), evidence of prior misconduct must show more than a superficial similarity to the nature and details of the charged conduct, but must instead show that the defendant's charged and uncharged conduct is linked in a way that permits the inference that the prior conduct was planned as part of a course of conduct leading up to the charged offense." *Id.*, 155 Idaho at 10, 304 P.3d at 285.

The district court stated in its first written reference to *Paradis*: "Haws . . . has been involved in another death penalty case in which there was a claim that exculpatory evidence was not disclosed." R. Part 3, p. 137. The second reference to *Paradis* was similar: "In November 1997, the Ninth Circuit Court of Appeals reversed in part the district court's dismissal of Paradis' second federal petition for writ of habeas corpus, and remanded the case for an evidentiary hearing on his claims that the prosecution breached its duties under *Brady v. Maryland* . . ., by failing to disclose several sets of notes taken by prosecutor Marc Haws." R. Part 4, p. 542, n.12 (citations omitted). The facts in the record do not "demonstrate a planned course of connected behavior" as required by this Court. *Joy,* 155 Idaho at 10, 304 P.3d at 285. Further, as noted by

the district court in its original ruling and supported by this Court, propensity evidence is inadmissible. "In other words, proof of the alleged anal rape would tend to establish the later forcible penetration only via the impermissible inference that 'if he did it once, he probably did it again.'" *Id.*, 155 Idaho at 11, 304 P.3d at 286.

The district court seemed to draw a parallel in that both cases were death penalty cases and that Marc Haws was involved in Respondent's prosecution and in *Paradis*. A similar parallel may exist because in *Paradis* the Ninth Circuit found that notes made by Haws were not disclosed to the defense as required, and here the district court was determining whether Haws had directed Shedd to withhold or conceal evidence from Respondent. These similarities do not meet the *Joy* requirements that the evidence of prior misconduct "was planned as part of a course of conduct leading up to" the suspected conduct.

c. Haws' Due Process Rights In State Bar Disciplinary Actions Are Implicated By The District Court's Decisions.

Section V of the Idaho Bar Commission Rules sets forth the rules relating to Professional Conduct, including the procedure for disciplinary proceedings. Due process relating to allegations of misconduct is provided by proper adherence to those rules.

While a finding that an attorney committed an act that could be a violation of the Rules of Professional Conduct is not dispositive in an investigation by Bar Counsel, it could certainly provide support for a finding detrimental to the attorney. A lack of clarity regarding whether an attorney was found to have acted inappropriately leaves room for a finding by Bar Counsel under Rule 509 of the Idaho Bar Commission Rules that an investigation is justified to determine if the

attorney violated the Rules of Professional Conduct. Clarity in describing findings relating to the conduct of Marc Haws in directing, or not directing, Shedd is important in this matter and important to Haws because of the potential for disciplinary proceedings. IPAA has an interest in seeing that where a prosecuting attorney is accused of misconduct, clarity is achieved regarding a court's findings.

A court's finding that a prosecuting attorney committed an act that is, or could be deemed to be, a violation of the Idaho Rules of Professional Conduct, can have a significant impact on that person's good name, reputation, honor, integrity, and ability to make a living. The stigma of such a finding is evident in this case where Respondent's counsel attempted to question Haws on the findings in *Paradis*, and the district court referred to those same findings in its decisions. Bar Counsel, under Rule 509, can consider a finding of misconduct in evaluating whether to conduct an investigation, and in determining if there are grounds for sanctions.

Here the district court, without saying so specifically, found that the evidence did not support a conclusion that Haws directed Shedd. IPAA's request is for the Court to affirm the district court with a more definitive statement. Clarification will avoid any confusion and the possibility that inappropriate inferences can be drawn in later proceedings, including a disciplinary proceeding.

V. CONCLUSION.

In this matter the Court should determine that the district court inappropriately considered evidence outside the record. If the Court determines that despite its own finding that the evidence was inadmissible, the district court later reversed itself and deemed the evidence admitted, it was done so in violation of the Idaho Rules of Evidence. Regardless of that determination, the Court should affirm the trial court's ruling that the evidence did not support a finding that Haws directed Shedd to withhold or conceal evidence.

A trial court's findings in relation to alleged misconduct can impact the case in which it is being considered, and can have serious repercussions for a prosecutor outside of the case. Complaints to the Idaho State Bar can be bolstered by a court's findings. In this case the facts support the district court's rulings that the evidence was insufficient to find Haws directed Shedd. To the contrary, the evidence supports a finding that if Shedd was directed, it more likely by someone else. This Court should affirm and clarify consistent with that result.

Dated this _____ day of October, 2015.

BARRY MCHUGH
Kootenai County Prosecuting Attorney

By_____
Barry McHugh
Prosecuting Attorney

CERTIFICATE OF SERVICE

Pursuant to I.A.R. 34, I hereby certify that on this ____ day of October, 2015, I caused an original and six (6) bound copies and one (1) unbound, unstapled copy of this Amicus Curiae Brief to be sent via first class mail, postage prepaid, to be filed with the Clerk of the Supreme Court, and further certify that I caused to be served two (2) true and correct copies of the Amicus Curiae Brief via first class mail, postage prepaid, and addressed to the following:

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