3-22-2018

Bias v. State Appellant's Reply Brief Dckt. 45037

IN THE SUPREME COURT OF THE STATE OF IDAHO

WILLIAM JACK BIAS,	)	
	)	**No. 45037**
Petitioner-Respondent,	)	
	)	**Madison County Case No.**
v.	)	**CV-2015-543**
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

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I.
The District Court Erred By Considering The Unpled Claim That Counsel Should Have Challenged The Reasonable Suspicion For The Stop

A. Introduction

The district court concluded that a claim of ineffective assistance of counsel for failing to challenge the reasonable suspicion for the traffic stop "had been previously raised [by] Bias, at least generally, long before the second evidentiary hearing." (R., p. 59.) The state asserts that this conclusion is not supported by the record, and the district court erred by concluding that the claim had been raised in the petition. (Appellant's brief, pp. 6-12.) Bias tacitly concedes that the state is correct, and the district court erred when it concluded the claim was raised in the petition. (Respondent's brief, p. 18 (events before the second evidentiary hearing are a "red herring" because the "relevant time period here is after the video was discovered").) Bias asserts as an alternative argument that what actually happened was that he moved to amend his petition to include a claim of ineffective assistance of counsel. (Respondent's brief, pp. 17-20.) This argument fails to show that the district court reached the right result but under the wrong analysis because it is not supported by the record or application of the correct legal standards.

B. Contrary To His Appellate Claims, Bias Did Not Make A Motion To Amend His Petition

In the closing argument after the second evidentiary hearing, Bias's counsel stated that he "can't help but raise the issue of probable cause for a stop." (9/19/16 Tr., p. 135, L. 11 – p. 136, L. 14.) The court asked counsel if he was asserting "a new basis for post-conviction relief on failure to suppress the evidence for lack of reasonable suspicion to

pull over the vehicle." (9/19/16 Tr., p. 136, Ls. 15-22.) Counsel responded, "I think we have to" but the court could "also look at it as kind of a two-prong suppression issue, with jurisdiction being one issue and the second issue being probable cause or reasonable suspicion to pull the vehicle over." (9/19/16 Tr., p. 136, L. 23 – p. 137, L. 11.) In addressing the "new issue" counsel argued Bias's car was not "swaying in its lane" and without that factor there was no reasonable suspicion. (9/19/16 Tr., p. 139, L. 2 – p. 142, L. 1.)

Citing this exchange, Bias claims on appeal that "post-conviction counsel moved to amend the pleading." (Appellant's brief, pp. 18-19 (citing 9/19/16 Tr., p. 135, L. 24 – p. 136, L. 1).) Application of the relevant legal standards shows that Bias made no motion to amend his petition.

A motion, even an oral one, must "state with particularity the grounds for the relief sought including the number of the applicable civil rule" and must "state the relief sought." I.R.C.P. 7(b)(1). This rule "requires reasonable particularity," defined as notice "sufficient that the other party cannot assert surprise or prejudice." DeRushe v. State, 146 Idaho 599, 601, 200 P.3d 1148, 1150 (2009). Counsel's statement that he thought he had to raise a new basis for post-conviction relief meets none of the requirements for a motion to amend.

Counsel's argument did not state "with particularity" the "grounds" upon which amendment was sought. As noted below, the grounds for seeking an amendment during and after trial are where a party objects to evidence outside the pleadings or an issue is tried by consent. I.R.C.P. 15(b). Bias did not articulate either of these grounds at all, much less "particularly." Nor did Bias cite I.R.C.P. 15(b), the "applicable civil rule."

Finally, Bias did not at any time actually state he wanted to amend his petition,[1] which would have been the "relief" sought by a motion to amend the petition. Moreover, the district court never treated counsel's argument as a motion to amend and never granted permission to amend. I.R.C.P. 15(a)(2) (amendment after an answer allowed only upon stipulation or court's leave). The record shows that Bias's argument at the conclusion of the second evidentiary hearing was not a motion to amend the petition.

Bias does not present any argument or assert any legal authority for how his counsel's argument at the conclusion of the second evidentiary hearing constituted a motion to amend the petition to raise the new claim of ineffective assistance of counsel for failing to challenge reasonable suspicion for the stop. (Respondent's brief, pp. 17-20 (not citing I.R.C.P. 7(b)(1) or cases on what constitutes a motion).) Application of the correct legal standards to the record shows that no motion to amend was made.

C. Even If A Motion To Amend Had Been Made, It Was Without Merit

No motion to amend the petition to add the new claim of ineffective assistance of counsel for failing to challenge reasonable suspicion for the stop was made. Even if it had been made, application of the correct legal standards shows the district court would have erred to grant it.

[1] A search of the transcripts for all forms of the word "amend" show that it was used in relation to an "amended" exhibit (9/19/16 Tr., p. 90, Ls. 5-7); an "amendment" of jurisdiction effected by an ordinance (9/19/16 Tr., p. 117, Ls. 5-16); and the "Fourth Amendment" (1/12/17 Tr., p. 37, Ls. 4-5).

Amendments of pleadings during and after trial are governed by Rule 15(b), I.R.C.P. An amendment during trial is allowed "[i]f, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended." I.R.C.P. 15(b)(1). This circumstance is inapplicable in this case because no party objected to evidence on the basis that the evidence was "not within the issues raised in the pleadings," and no motion to amend was made during trial in response to such an objection. To the contrary, the video was admitted without objection. (9/19/16 Tr., p. 80, Ls. 14-22.) Indeed, the entire hearing was held because of a stipulation that specifically limited the scope of the hearing to the claim of ineffective assistance of counsel for not challenging the officer's jurisdiction to make the stop. (R., p. 36; 9/19/16 Tr., p. 73, L. 14 – p. 75, L. 21.) Nothing in the record makes I.R.C.P. 15(b)(1) applicable on this record.

Bias cites I.R.C.P. 15(b)(1) and claims, "[t]hat is exactly what occurred here." (Respondent's brief, p. 19.) Specifically, Bias argues, "When the prosecution introduced the video, post-conviction counsel moved to amend the pleadings as discussed above." (Id.) Bias has failed to argue, much less show on the record, the triggering event of an objection "that evidence is not within the issues raised in the pleadings." Bias's argument that I.R.C.P. 15(b)(1) applies is meritless.

The procedure for amending after trial is as follows:

> When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move, at any time, even after judgment, to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

I.R.C.P. 15(b)(2). As pointed out above, the scope of the hearing where the video was admitted was, by stipulation, limited to the issue of ineffective assistance of counsel for failing to challenge the jurisdiction of the officer. Nothing in the record suggests the state expressly or impliedly consented to expanding the scope of the hearing.

Bias acknowledges that the state objected to expansion of the proceedings to consider the new issue, but points out that the court "allowed" the prosecution to "argue the issue" and "meet the evidence with briefing" and presentation of additional evidence. (Respondent's brief, pp. 19-22.[2]) The district court's decision to allow the state to respond, after the court overruled its objection that the issue was not pled and after the district court had written its decision on the merits, did not constitute the state's "express or implied consent" to try the new issue.

The district court erred when it concluded that Bias had pled that trial counsel had been ineffective for failing to challenge the reasonable suspicion for the traffic stop in his petition. Bias does not argue otherwise. Instead, Bias argues he moved to amend his petition. The record does not support this argument and, even if it did, allowing any such amendment would have been error. The district court should be reversed for granting post-conviction relief on an unpled claim.

[2] Bias also argues that the state presented a "disingenuous" argument that "it suffered an injustice due to lack of notice." (Respondent's brief, p. 18.) This misunderstands the state's argument that the *petition* did not provide notice of a claim of ineffective assistance of counsel for failing to challenge probable cause as part of its argument that such a claim was not pled. (Appellant's brief, pp. 6-12.) Bias apparently does not contend that the petition did provide the state notice that he was claiming ineffective assistance of counsel for not challenging the reasonable suspicion for the stop.

II.
The District Court Erred When It Applied An Incorrect Legal Standard To The Claim Of Ineffective Assistance Of Counsel For Not Filing A Suppression Motion

A. Introduction

The district court erred when it concluded that a finding that the suppression motion would have been granted was alone enough to show both elements of an ineffective assistance of counsel claim. (Appellant's brief, pp. 12-18.) Bias contends the state's argument the district court employed an erroneous legal standard "fails because it ignores relevant facts." (Appellant's brief, p. 22.) Bias's argument fails to show that the district court reached a correct result despite applying an erroneous legal standard.

B. The District Court Applied An Incorrect Legal Standard

The district court quoted State v. Porter, 130 Idaho 772, 793, 948 P.2d 127, 148 (1997) (citing Carter v. State, 108 Idaho 788, 795, 702 P.2d 826, 833 (1985)), for the proposition that "'Defense counsel's failure to file a motion to suppress will constitute ineffective counsel if the reviewing court determines that the evidence at issue would have been suppressed.'" (R., p. 64.) The Idaho Supreme Court has declared this standard erroneous. State v. Mathews, 133 Idaho 300, 308, 986 P.2d 323, 331 (1999). The district court thereby erred. (Appellant's brief, pp. 14-15.) Bias does not, and indeed cannot, dispute that the court applied an erroneous legal standard based on Porter. (Respondent's brief, pp. 14-29 (making no mention of Porter or Carter and not addressing the state's argument that a determination that a suppression motion would have been granted is not enough, alone, to show ineffective assistance of counsel).) This Court should find that the district court applied an incorrect legal standard.

C. Application Of The Correct Legal Standards Shows No Ineffective Assistance Of Counsel

Bias's argument that the district court reached the correct result despite applying an erroneous legal standard is without merit. Applying the correct standard as articulated in Mathews, rather than the erroneous standard applied by the district court, leads to the conclusion that counsel's decision to seek a favorable plea agreement instead of filing a motion to suppress, made after reviewing the police reports and consulting with his client, and given the state of the law at the time, was reasonable and not ineffective assistance of counsel. (Appellant's brief, pp. 15-18.) Bias first contends that "trial counsel's strategy was specifically addressed in this case" and he "did overcome the presumption that his trial counsel's actions were within the wide range of permissible discretion and trial strategy." (Respondent's brief, p. 24.) This argument does not withstand analysis.

Bias points out that the district court expressed concern with allowing a lawyer to "'completely rely'" on his client's wishes regarding the case and that discovery of the video might have led to "'greater leverage in negotiating a plea agreement.'" (Respondent's brief, p. 25 (quoting R., p. 69).) The flaw in Bias's argument is that the district court made these comments in the context of the claim that Bias's trial counsel was ineffective for not conducting discovery, a claim the district court specifically found was not raised. (R., p. 69.) Bias does not claim that the ultimate resolution of this claim (denied because not raised in the petition) was error, and therefore this argument is irrelevant. Indeed, because ineffective assistance of counsel for failure to obtain the video through discovery prior to negotiating the plea agreement was not a claim properly before the district court, it was error by the district court to base any determination that

counsel was ineffective because of what was shown on the video. (See Appellant's brief, p. 16.) The claim before the district court was whether trial counsel was ineffective for electing to resolve the case through a plea agreement instead of fight it by filing a motion to suppress based on the information he had; as found by the district court, the question of whether counsel should have investigated the case further before making that decision was a claim Bias had not raised.

Bias also cites, as "[p]erhaps most importantly," the district court's statements about the "'weakness'" of the reasonable suspicion showing and the "'tenuous grounds'" for the stop contained therein. (Respondent's brief, pp. 25-28 (citing R., p. 71).) Review shows this argument is without merit because, even accepting that the facts supporting reasonable suspicion as set forth in the police report were not overwhelming, counsel's conclusion that Bias was unlikely to prevail on a suppression motion, given the state of the law at the time, was not unreasonable.

"Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Stevens v. State, 156 Idaho 396, 413, 327 P.3d 372, 389 (Ct. App. 2013). "The duty to investigate requires only that counsel conduct a reasonable investigation." Id. at 412, 327 P.3d at 388. The police report stated that Bias's "vehicle was stopped for failure to maintain its lane." (State's Exhibit 14, p. 1.) The officer described the driving pattern he observed as "drifting in its lane of travel, driving on top of the white fog line, was under the speed limit, and braked hard when approaching a curve in the road." (Id., p. 7.) Bias's trial counsel testified that

he read this report, that he consulted with his client (including going over the police report with him), that in his experience suppression motions under similar facts were not successful, and so he ultimately elected to pursue a strategy of seeking a favorable plea agreement that would get his client into drug court. (1/12/17 Tr., p. 18, L. 22 – p. 19, L. 3; p. 22, L. 23 – p. 27, L. 21.)

Deciding to recommend pursuit of a plea agreement, rather than bringing a suppression motion, was objectively reasonable. The constitutional right to effective assistance of counsel did not demand, as determined by the district court, that counsel file a suppression motion based on the mere possibility that there might be evidence that would disprove the factual statements in the police report, even if those factual statements did not strongly establish reasonable suspicion. (R., p. 71 (cited at Respondent's brief, pp. 25-26).) Such reasoning directly employs hindsight in contravention of applicable legal standards.

Even more importantly, further investigation would have *confirmed* the salient fact leading to reasonable suspicion that Bias had failed to maintain his lane, namely, that he had driven on the edge line. The *only* basis for claiming a lack of reasonable suspicion of failure to maintain lanes was to anticipate the outcome of State v. Neal, 159 Idaho 439, 362 P.3d 514 (2015). Failure to anticipate the outcome of Neal was not deficient performance. (Appellant's brief, pp. 17-18.)

Bias attempts to undercut the state's argument by stating that in State v. Mathews, 133 Idaho 300, 986 P.2d 323 (1999), the case the state relies on for the proposition that failure to anticipate a development in the law is not deficient performance (Appellant's brief, p. 15), "it appeared that trial counsel properly investigated," whereas in this case

counsel "had no knowledge that an exculpatory video existed." (Respondent's brief, pp. 26-27.) This argument is invalid for several reasons, including that the video is not "exculpatory" in any meaningful sense. It certainly does not show that Bias is innocent of DUI. Moreover, it actually confirms that he drove on the edge line. In short, counsel's understanding of the facts relevant to whether the officer had reasonable suspicion Bias had failed to maintain his lane would have been no different with or without the video. Bias's argument is irrelevant.

Bias also argues that the district court stated its decision was not "'wholly dependent on *Neal*'" and pointed to out-of-state decisions. (Respondent's brief, pp. 28-29 (citing R., p. 61, n. 23[3]).) However, the Court in the portion of Neal cited by the district court addressed cases which held that touching the edge line (or even lane dividing lines) did not alone provide *reasonable suspicion of DUI*. (See R., pp. 61-62, n. 23 (quoting Neal, 159 Idaho at 443-44, 362 P.3d at 518-19).)

Bias's arguments are both premised on reasonable suspicion of DUI being less than overwhelming, and therefore should have been challenged. Bias simply ignores the evidence showing reasonable suspicion of failure to maintain lane, the basis for the stop stated in the police report. Because Bias addresses only the reasonable suspicion for the

[3] Bias's appellate counsel also argues that Neal was not new law because "the statute was clear that … touching [the line] was not" an infraction. (Respondent's brief, p. 29.) This argument is directly contrary to the analysis in Neal, 159 Idaho at 445, 362 P.3d at 520 ("Because we are unable to discern on the face of the statute the meaning of this phrase, we find that it is reasonably susceptible of more than one meaning and therefore is ambiguous."). The judicial finding that the statute is ambiguous reinforces the argument that it was not ineffective assistance of counsel to decline to bring a motion challenging reasonable suspicion in this case.

DUI, his arguments are ultimately irrelevant to the question of whether counsel was ineffective for not challenging reasonable suspicion of failure to maintain his lane.

The officer's stated basis for pulling Bias over was reasonable suspicion that he had failed to maintain his lane of travel because he drove "on top of the white fog line." (State's Exhibit 14, pp. 1, 7.) This salient fact was *confirmed* by the video. (R., p. 59.) It was not deficient performance for counsel to fail to anticipate the decision in Neal, made several years after counsel elected to not file a motion to suppress. The district court's application of an erroneous legal standard is thus fatal to its opinion.

CONCLUSION

The state requests this Court to reverse the judgment of the district court.

DATED this 22nd day of March, 2018.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 22nd day of March, 2018, served a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT by emailing an electronic copy to:

REED P. ANDERSON
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/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
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KKJ/dd