12-7-2017

Bias v. State Appellant's 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.	)	
	)	

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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STATEMENT OF THE CASE

Nature Of The Case

The state appeals from the district court's judgment granting post-conviction relief. The district court erred when it ruled on an unpled claim and applied an erroneous ineffective assistance of counsel legal standard.

Statement Of The Facts And Course Of The Proceedings

The state charged William Jack Bias with felony DUI and misdemeanor injury to a child. (#40930 R., pp. 36-37.) Pursuant to a plea agreement he pled guilty to felony DUI and the injury to a child count was dismissed. (#40930 R., pp. 45-46.)

Bias filed a petition for post-conviction relief raising various challenges to his conviction and sentence. (R., pp. 4-7.) One of Bias's claims was that trial counsel did not challenge the "protocol of stop and jurisdiction of law enforcement" and did not file a "motion to suppress for jurisdiction." (R., p. 6 (spelling and capitalization corrected).)

The district court appointed counsel to represent Bias. (R., pp. 9-17.) In its order the district court found the petition "fail[ed] to assert why the stop may have been illegal." (R., p. 15.) The district court gave appointed counsel 30 days to cure this deficiency (R., pp. 16-17), but counsel did not file an amended complaint or otherwise supplement the pleading (see R.). The state filed its answer, generally denying the causes of action asserted in the petition. (R., pp. 20-22.)

The matter proceeded to an evidentiary hearing on July 25, 2016. (R., pp. 29-30.) At the conclusion of the hearing the district court noted that although there was evidence Bias had asked counsel to move to suppress on jurisdictional issues the only evidence that there was an actual jurisdictional issue was Bias's "belief that, because it was a city cop

that arrested him in Sugar, there was some jurisdictional issue that would have denied him the right to make the arrest." (7/25/16 Tr., p. 58, L. 17 – p. 59, L. 14; p. 69, L. 9 – p. 71, L. 1.)

The parties stipulated to re-opening the evidence. (R., p. 36; 9/19/16 Tr., p. 73, L. 14 – p. 74, L. 11.) The prosecution made it clear that the stipulation was limited to evidence regarding the claim of ineffective assistance of counsel for not moving to suppress based on a claim the officer was outside his jurisdiction. (9/19/16 Tr., p. 74, L. 20 – p. 75, L. 21.)

At the conclusion of the second evidentiary hearing Bias's counsel asked to raise a new claim of ineffective assistance of counsel for not moving to suppress evidence based on a challenge to reasonable suspicion for the traffic stop leading to the DUI investigation. (9/19/16 Tr., p. 135, L. 22 – p. 137, L. 11; p. 139, Ls. 4-23.) When asked by the district court to respond regarding the "new area," the prosecutor, Mr. Brown, responded:

> MR. BROWN: Well, as I understand it, Your Honor, we keep delving into new areas. As I understand the last hearing we had, this was raised as a side issue after it was all over.
> THE COURT: Yeah. We've gone down several different rabbit holes in this case--
> MR. BROWN: Yeah. In other words --
> THE COURT: -- no question about it.
> MR. BROWN: In other words, "We can't find this one to have the Court give us what we want; so let's go over here."

(9/19/16 Tr., p. 142, Ls. 7-17.) The district court responded to this argument by stating, "Well, let's assume that we're all in this business because we're trying to get it right. So help me get it right." (9/19/16 Tr., p. 142, Ls. 18-20.) Thereafter the prosecutor made an argument on the merits of the newly asserted claim. (9/19/16 Tr., p. 142, L. 21 – p. 144, L. 6.) At the conclusion of the hearing the court asked, "[i]n light of the new issue that was

introduced today, does either side wish to brief that further?" (9/19/16 Tr., p. 144, Ls. 16-17.)

At a subsequent status hearing, the district court informed the parties that it had been "working on its decision" and had "essentially reached completion on it just a little while ago." (11/28/16 Tr., p. 146, Ls. 19-24.) However, the district court had "come upon a recent ruling of the Idaho Supreme Court," State v. Neal, 159 Idaho 439, 362 P.3d 514 (2015), which could be "potentially dispositive" of the "new issue that was interjected into the case, as to the reasonable suspicion for the stop." (11/28/16 Tr., p. 146, L. 25 – p. 147, L. 4; Ls. 9-12.) However, "because of the manner in which the issue was presented" the State had not been able to address the recent Idaho Supreme Court decision. (11/28/16 Tr., p. 147, Ls. 5-8.) The district court stated that it would find it "very difficult" to rule in the state's favor at that point in the proceedings. (11/28/16 Tr., p. 149, Ls. 1-3.) The district court acknowledged that the prior evidentiary proceeding had been limited to the single issue of ineffective assistance of counsel for failing to move to suppress on jurisdictional grounds, and it was "very clear, that we weren't going to go into new issues." (11/28/16 Tr., p. 149, Ls. 4-14.) The district court stated that presented a "quandary," because it did not "think the State had adequate time to respond either in briefing or with additional evidence." (11/28/16 Tr., p. 149, Ls. 15-20; see also p. 152, Ls. 16-22.) The district court also recognized that there was an issue of "whether the Court should even consider this evidence, since there was an agreement that I wouldn't." (11/28/16 Tr., p. 149, Ls. 21-24; see also p., 152, Ls. 23-25.) The district court ultimately allowed the state to provide additional evidence and briefing. (11/28/16 Tr., p. 157, L. 9 – p. 158, L. 7.)

When the case was next in court the prosecution asked "to put some additional evidence on the record." (1/12/17 Tr., p. 6, Ls. 20-23.) At the conclusion of the evidence the state argued that consideration of the Neal decision would be antithetical to the general ineffective assistance of counsel standards because the court should consider the state of the law at the time trial counsel made his decisions. (1/12/17 Tr., p. 114, L. 10 – p. 116, L. 3.) Thereafter the district court declined any briefing. (1/12/17 Tr., p. 139, Ls. 7-19.)

The district court determined that Bias had failed to demonstrate ineffective assistance of counsel on the claims addressed in the first two evidentiary hearings. (R., pp., 48-60, 65-66.) It further determined that claims of a *Brady*[1] violation and that counsel was ineffective for failing to conduct discovery were not properly raised. (R., pp. 67-71.) It granted relief on the "new issue" of failure to challenge reasonable suspicion for the stop, however, after: (1) overruling the state's objection that the issue of reasonable suspicion was not pled, because "Bias did set forth a claim that his attorney failed to 'challenge the proto call [sic] of the stop'" and therefore raised the issue of "the legality of the stop" (R., pp. 59-60); and (2) concluding that the suppression motion should be granted (R., pp. 59-64). It entered judgment granting the petition. (R., p. 76.) The state filed a notice of appeal within 42 days of the filing of the judgment. (R., pp. 78-80.)

[1] Brady v. Maryland, 373 U.S. 88 (1963).

ISSUES

1. Did the district court err by considering the unpled claim that counsel's performance was deficient for not challenging the reasonable suspicion for the stop?

2. Did the district court err when it applied an incorrect legal standard to the claim of ineffective assistance of counsel for not filing a suppression motion?

ARGUMENT

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 specifically found that "[c]ounsel for the state objected" to consideration of the claim that counsel was ineffective for not challenging the reasonable suspicion for the stop, "noting that the purpose of the second evidentiary hearing was only to consider the jurisdictional issue, not other issues related to the legality of the stop." (R., pp. 58-59.[2]) The court overruled the state's objection, concluding that Bias did assert a claim that counsel was ineffective for failing to assert lack of reasonable suspicion for the stop by alleging counsel should have challenged the protocol of the stop. (R., p. 59.) The district court erred by concluding that Bias pled the theory that counsel was ineffective for filing to challenge the reasonable suspicion for the stop.

B. Standard Of Review

The question of notice is reviewed *de novo*. See Thornton v. Pandrea, 161 Idaho 301, 312, 385 P.3d 856, 867 (2016) (notice in deed).

C. The District Court Erroneously Held That The Theory That Counsel Was Ineffective For Not Challenging The Reasonable Suspicion For The Stop Was Pled

"Pleadings must be construed so as to do justice." I.R.C.P. 8(e). A necessary condition for finding a pleading adequate is that it provides sufficient notice. See Watkins v. Watkins, 162 Idaho 600, ___, 402 P.3d 1053, 1058-60 (2017) (court erred by concluding

[2] This finding of an objection forecloses any claim that the issue was litigated with the express or implied consent of the state. I.R.C.P. 15(b)(2).

that debt was accelerated by complaint where "the language of the complaint was inadequate to give notice of acceleration"); Hull v. Geisler, 156 Idaho 765, 776-77, 331 P.3d 507, 518-19 (2014) (pleading asserting claim of implied contract did not assert theory of express contract where it did not provide "notice that breach of an express contract was at issue"); Brown v. City of Pocatello, 148 Idaho 802, 808, 229 P.3d 1164, 1170 (2010) ("Without a clear and concise statement sufficient to place a reasonable attorney on notice of the plaintiff's *theories* of recovery that must be defended against, whether in the body of the complaint or in the prayer for relief, it cannot be said that a cause of action was sufficiently pled." (emphasis original).) Review of the petition shows it did not provide notice that failure to challenge the reasonable suspicion for the stop was a theory of ineffective assistance of counsel pled by Bias.

In his pleadings Bias asserted counsel was ineffective because he "did not challenge protocol of stop and jurisdiction of law enforcement. Also refused to file motion to suppress for jurisdiction." (R., p. 6 (capitalization and spelling corrected).) In granting Bias's motion for appointment of counsel, the district court specifically stated that the petition "fails to assert why the stop may have been illegal." (R., p. 15.[3]) This statement cannot be reconciled with the district court's later determination that Bias pled the theory that counsel was ineffective for failing to claim the stop was illegal because the officer lacked reasonable suspicion. The language of the petition did not allege a theory that counsel was ineffective for failing to challenge the reasonable suspicion for the stop for the

[3] The district court gave appointed counsel 30 days to fix this deficiency (R., pp. 16-17), but counsel did not move to amend the petition (see R.).

very reason articulated by the district court: the petition "fails to assert why the stop may have been illegal." (R., p. 15.)

Inadequate notice in a pleading can be disregarded where the other party understood and responded to the relevant theory. See Brown, 148 Idaho at 810, 229 P.3d at 1172 ("Even where the Complaint, on its face, appears insufficient to place a reasonable defense attorney on notice of a cause of action, this Court may still find that pleading sufficient where the defendant responds to that cause of action in their answer."); Seiniger Law Office, P.A. v. N. Pac. Ins. Co., 145 Idaho 241, 247, 178 P.3d 606, 612 (2008) ("Despite the glaring deficiencies in the complaint, [Defendant] understood and responded to Jennings's contract claim."). Here the record shows that the state, as well as Bias and the district court, at least through the second evidentiary hearing, did not believe the petition alleged a theory of ineffective assistance of counsel for not challenging reasonable suspicion for the stop.

First, as noted above, the district court's own orders demonstrate it did not believe Bias had alleged a theory that counsel was ineffective for failing to challenge the reasonable suspicion for the stop. The district court, in appointing counsel, specifically found that the petition "fails to assert why the stop may have been illegal." (R., p. 15.) In concluding the issue was before it, the district court stated only that "the legality of the stop had been previously raised [by] Bias, at least generally" in the petition, without explaining how a general claim that the stop was illegal because "protocol" was not followed (see R., p. 6 (spelling altered)) gave the state notice that Bias was alleging his counsel should have asserted the theory the stop was illegal because the officer lacked reasonable suspicion. (R., p. 59.) Again as noted above, the district court's observation, supported by the

language of the petition, that Bias had not alleged why the stop was illegal is incompatible with its later conclusion that Bias had pled the theory that the stop was illegal for lack of reasonable suspicion.

At the hearing following the second evidentiary hearing the district court stated, "At the very end of that hearing, there was a *new issue raised* concerning whether or not there was reasonable suspicion for the stop, and, if not, was it ineffective assistance of counsel not to raise that issue[.]" (9/28/2016 Tr., p. 146, Ls. 12-16 (emphasis added).) It stated that it was comfortable with the other issues, but had questions on the "last issue, which was *the new issue that was interjected into the case*, as to the reasonable suspicion for the stop." (9/28/2016 Tr., p. 146, L. 25 – p. 147, L. 4 (emphasis added).) The district court stated the state had not had "adequate time to respond either in briefing or with additional evidence." (9/28/16 Tr., p. 149.) Even in its order, one page after concluding the petition asserted the theory, the district court characterized the theory as "the new issue which was raised at the conclusion of the second evidentiary hearing." (R., p. 60.) These statements by the district court throughout the proceedings indicate it believed the theory that trial counsel should have challenged reasonable suspicion for the stop was a "new theory" that was not pled and for which the state lacked notice.

Second, the record shows that Bias himself did not believe he had raised a theory that counsel should have challenged the reasonable suspicion for the stop. At the first evidentiary hearing Bias testified he told his trial counsel "[t]wo or three times" that he "wanted to put in a motion to suppress on the jurisdiction of the stop." (7/25/16 Tr., p. 17, L. 20 – p. 18, L. 12.) Even though no evidence of a claim that counsel was ineffective for not challenging reasonable suspicion for the stop was presented, after the hearing Bias

assured the district court that his counsel had argued everything he wanted to have argued. (Tr., p. 71, L. 18 – p. 72, L. 5.) Bias did not give any indication that he believed he had pled a theory other than that his attorney should have challenged the officer's jurisdiction.

Third, the record shows that Bias's post-conviction counsel did not, when the first evidentiary hearing was conducted, believe that reasonable suspicion for the stop was an issue. After the hearing the court noted that the only evidence presented regarding the basis for a motion to suppress was Bias's "belief that, because it was a city cop that arrested him in Sugar, there was some jurisdictional issue that would have denied him the right to make an arrest." (7/25/16 Tr., p. 58, L. 21 – p. 59, L. 3.) Bias's post-conviction counsel offered to brief the issue. (7/25/16 Tr., p. 59, Ls. 15-17.) Bias's counsel did brief the issue of a jurisdictional claim as a basis for suppression. (R., pp. 31-34.) In neither his argument nor his subsequent briefing did counsel address a theory that counsel was ineffective for not challenging reasonable suspicion for the stop. (7/25/16 Tr., p. 57, L. 23 – p. 61, L. 5; R., pp. 31-34.)

As set forth above in more detail, the parties stipulated to reopen the evidentiary hearing, but limited only to the issue of jurisdiction. After the conclusion of the second evidentiary hearing Bias's counsel stated that "looking at the video" admitted as evidence at the hearing "raises a whole new set of issues whether the officer had probable cause or reasonable suspicion to even pull the vehicle over." (9/19/16 Tr., p. 136, Ls. 3-7.) The court noted that it appeared that "the legal issues keep growing, like, exponentially" and asked Bias's counsel if he was "asserting a new basis for post-conviction relief." (9/19/16 Tr., p. 136, Ls. 15-22.) Counsel responded, "Well, I think we have to, based on what we saw today on this video, Your Honor." (9/19/16 Tr., p. 136, Ls. 23-24.) Counsel stated

that the issue raised in the petition was "whether a suppression motion should have been filed based on the jurisdictional limits in this case." (9/19/16 Tr., p. 137, Ls. 2-5.) Counsel then stated, "But I think, upon looking at this, you 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, based upon what we've seen in the video today." (9/19/16 Tr., p. 137, Ls. 5-11.) Counsel's argument fell short of asserting the "whole new set of issues" had been pled, much less rose to demonstrating that the theory trial counsel was ineffective for not challenging the reasonable suspicion for the stop was pled and the state had notice of that theory.

Finally, and most importantly, the prosecutor was surprised when the theory was first presented and he objected. The district court inquired regarding the new issue, "[i]n light of the fact that we've kind of delved into a new area." (9/19/16 Tr., p. 142, Ls. 4-6.) The prosecutor asserted that this was indeed "delving into new areas" and made the objection to consideration of the new issue, as found by the district court. (9/19/16 Tr., p. 142, Ls. 7-17; R., pp. 58-59.) Nothing stated by the prosecutor suggests he believed the theory that trial counsel was ineffective for failing to challenge the reasonable suspicion for the stop was pled. To the contrary, the record shows that he lacked notice in the pleading and addressed the "new issue" only after the district court announced it was going to decide it, with or without the state presenting evidence.

The petition, alleging that counsel was ineffective for failing to "challenge protocol of stop and jurisdiction of law enforcement. Also refused to file motion to suppress for jurisdiction" (R., p. 6 (capitalization and spelling corrected)), did not plead a theory, much less provide notice, that ineffective assistance of trial counsel for not challenging the

reasonable suspicion for the stop was an issue. Moreover, the actions and statements of the district court and the parties, at least until Bias's counsel raised the "new issue" of reasonable suspicion, showed that no one had interpreted the petition as making such a claim. The district court erred when it concluded that the petition asserted a claim of ineffective assistance of counsel for not moving to suppress for a lack of reasonable suspicion for the traffic 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

Even if considered on the merits, the district court erred in granting relief. Specifically, the district court applied an incorrect standard when it concluded that finding that the motion to suppress should be granted was alone sufficient to find deficient performance. Application of the correct standard, which, after concluding the suppression motion would have been granted also requires proof to overcome a strong presumption that tactical choices are reasonable, shows no ineffective assistance of counsel.

B. Standard Of Review

The appellate 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.3d 376, 382 (2004).

C. The District Court Erred By Failing To Apply The Second Step Of A Two-Step Analysis

In order to establish a claim of ineffective assistance of counsel, a post-conviction petitioner must prove both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989). With respect to the deficient performance prong, the United States Supreme Court has articulated the defendant's burden under Strickland as follows:

> To establish deficient performance, a person challenging a conviction must show that counsel's representation fell below an objective standard of reasonableness. A court considering a claim of ineffective assistance must apply a strong presumption that counsel's representation was within the wide range of reasonable professional assistance. The challenger's burden is to show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.

Harrington v. Richter, 562 U.S. 86, 104 (2011) (citations and quotations omitted).

Strategic decisions by counsel will not be second-guessed "unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation." Dunlap, 141 Idaho at 60, 106 P.3d at 386 (citation omitted). Where the claim is that counsel's performance was deficient for failing to file a motion to suppress, the court employs a two-step process of first determining "whether or not the motion should have been granted," and second, if the motion would have been granted, "the petitioner is still required to overcome the presumption that the decision not to file the motion was within the wide range of permissible discretion and trial *strategy*." Wurdemann v. State, 161 Idaho 713, 718, 390 P.3d 439, 444 (2017) (emphasis original, internal citations and quotations omitted).

The district court did not apply this two-step process. Rather, the district court employed the following legal standard: "'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.' *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))." (R., p. 64.) As noted above, this is only the first step of a two-step analysis. The Idaho Supreme Court has specifically rejected a standard whereby merit of the motion is enough alone to show deficient performance.

In State v. Mathews, 133 Idaho 300, 308, 986 P.2d 323, 331 (1999), Mathews cited these same cases and same quote from Porter relied on by the district court in the present case, and argued that he had met his burden of showing deficient performance by showing the suppression motion would have been granted. The Court acknowledged that "standing alone" the quote from Porter supported Mathews' argument. Id. However, further review of the Porter and Carter decisions reveals that such use of the statement "misses the mark." Id. The Court's analysis was as follows:

> In *Carter*, we recognized the two-pronged test a defendant must meet in order to prevail on an ineffective assistance of counsel claim. Although the *Carter* Court held that counsel's failure to file a motion to suppress prejudiced the defendant, the Court also required a showing that counsel's failure to file the motion was deficient. Similarly, in *Porter,* the Court recognized the necessity of satisfying both prongs of the test. Although *Porter* contains the above quoted statement, we interpret the statement in *Porter* only to mean that the failure of counsel to file a motion to suppress will satisfy the prejudice prong of the ineffective assistance of counsel test where the reviewing court determines that the evidence at issue would have been suppressed. Following the statement in *Porter* cited by Mathews, the *Porter* Court went on to evaluate counsel's actions under the deficient performance prong of the ineffective assistance standard finding that counsel's decision not to file a motion to suppress was simply trial strategy and thus not objectively unreasonable.

Id. (internal citations omitted). The Court, "applying a heavy measure of deference to counsel's judgments," concluded that, although the suppression motion based on a lack of a signature on the search warrant should have been granted had it been filed in that case, counsel's decision to not file a motion to suppress was not deficient performance. Id. The district court in this case applied an erroneous legal standard and failed to consider the second step necessary to its analysis.

Moreover, application of the correct legal standard leads to the opposite result reached by the district court. This case is not meaningfully distinguishable from Mathews. Trial counsel testified that, based on his experience with cases with similar facts, the state of the law in 2012, and his reading of the police report and probable cause statement, he would not have been successful in moving to suppress. (1/12/17 Tr., p. 24, L. 10 – p. 26, L. 2.) Because Mr. Bias was more interested in resolving the case than fighting it, counsel switched strategies to getting him the best plea agreement and sentence possible. (1/12/17 Tr., p. 26, L. 6 – p. 27, L. 15.)

Trial counsel's decision to forego a suppression motion and instead seek a favorable plea agreement and sentence was not unreasonable. The facts set forth in the police report and probable cause statement were that Bias's car "was traveling 10 to 15 mph under the 65 mph speed limit, had braked hard during a gentle curve of the road, drifted in its lane, and was 'driving on top of the white fog line.'" (R., p. 59; State's Exhibit 15.) There is neither evidence, nor any finding that, based on counsel's experience with cases with similar facts and the state of the law in 2012, counsel's decision to pursue the suppression issue no further was unreasonable.

To reach the opposite conclusion the district court relied heavily, and improperly, on two things. First, it relied on "many repeated viewings of the dash cam video." (R., p. 63.) Trial counsel, however, made the decision to not file a suppression motion after reading the police reports and consulting with his client. (1/12/17 Tr., p. 24, L. 6 – p. 26, L. 2.) The district court specifically found that Bias had not raised a claim counsel was ineffective for not obtaining the video prior to deciding not to pursue suppression. (R., pp. 67-71.) "'A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" State v. Abdullah, 158 Idaho 386, 418, 348 P.3d 1, 33 (2015) (quoting Strickland, 466 U.S. at 689). By ignoring the decision actually made by counsel, based on the information he had at the time, and instead considering all the evidence related to suppression, the district court effectively second-guessed the decision of counsel with perfect hindsight.

Moreover, even after repeated viewings, the district court still considered the granting of the motion "an admittedly very close question." (R., p. 63.) The district court did not find whether the decision to not file was even a "close question" based on police reports that indicated Bias (perhaps before the video was turned on) "was travelling 10 to 15 mph under the speed limit, had braked hard during a gentle curve of the road, drifted in his lane, and was driving on top of the white fog line." (R., p. 59 (internal quotations omitted, fact finding based on testimony "identical to the observations" in the probable cause statement); State's Exhibit 14.) This finding that the court would have granted the motion as a "very close question," even after considering matters beyond those reviewed by counsel, does not substitute for the proper analysis of whether Bias had overcome the

presumption that the decision not to file the motion was within the wide range of permissible discretion and trial *strategy*.

Second, the district court relied on State v. Neal, 159 Idaho 439, 362 P.3d 514 (2015), a case decided well after the resolution of Bias's criminal case. (R., pp. 60-63.) The proper inquiry, however, is "whether counsel's decision not to file a motion to suppress was reasonable given the prevailing legal standards at the time of the trial." Wurdemann, 161 Idaho at 721, 390 P.3d at 447. The district court therefore erred by considering Neal.

The district court stated its decision was not "wholly dependent on *Neal*" (R., p. 61, n. 23), but, as shown above, counsel was not ineffective for failing to anticipate the holding of an appellate case still years in the future. The only thing the Neal decision tells us about the state of the law in 2012 is that three judges of the Idaho Court of Appeals and two justices of the Idaho Supreme Court would have concluded that Bias's act of driving onto, but not over, the right edge line would have provided reasonable suspicion for the stop[4]—hardly grounds for finding trial counsel's similar conclusion "unreasonable."

The district court applied an erroneous legal standard when it held that its conclusion that a motion to suppress should have been granted was sufficient to support a finding that counsel's performance was deficient. It also erred when it considered both evidence not considered by counsel and legal developments from years after counsel's tactical decision to not pursue a suppression motion. Application of the correct legal

[4] Neal, 159 Idaho at 447, 362 P.3d at 522 (Horton, J., dissenting in part on question of whether driving on the right edge line provided reasonable suspicion for traffic stop with Eismann, J., joining); State v. Neal, Docket No. 41534, 2104 Opinion No. 86 (Idaho App., October 15, 2014) (Opinion by Lansing, J., with Gutierrez, J., and Gratton, J., concurring, concluding that "driving on the line marking the edge of a traffic lane violates I.C. § 49-637(1) absent circumstances that would make it impracticable to stay between the lines").

standards shows that counsel's decision to not pursue a motion to suppress after reviewing the police report, the probable cause statement and talking with his client was reasonable. The district court erred and must be reversed.

CONCLUSION

The state respectfully requests this Court to reverse the district court's judgment granting post-conviction relief.

DATED this 7th day of December, 2017.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 7th day of December, 2017, served a true and correct copy of the foregoing BRIEF OF APPELLANT by emailing an electronic copy to:

ERIC D. FREDERICKSEN
STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

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

KKJ/dd