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IN THE SUPREME COURT OF THE STATE OF IDAHO

MARK BLACK,)
)
Petitioner/Appellant,) Supreme Court No. 45432
v.)
) District Court Case No. CV01-17-5039
THE STATE OF IDAHO,)
)
Respondent/Appellee.)

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District
of the State of Idaho, in and for the County of Ada

HON. JASON D. SCOTT, DISTRICT JUDGE

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I.

WAIVER

The concept of waiver stands before this case like the *Colossus of Rhodes*¹. Nothing in the way of a legal argument may pass now if it could have been raised before. Like the *Colossus* itself, the waiver concept, as applied here, is a complete fiction. The idea that a convicted drug addict would have the wherewithal to pursue a constitutional claim on direct appeal without counsel is devoid of any rational basis, unless this drug addict happened to be well-versed in constitutional law - clearly that is not the case with Black. It is an inconvenient truth that most criminal defendants could not have raised an issue on direct appeal, in any practical sense, if they had not been put on notice by someone that such an issue was available to pursue. This waiver barrier places the State at a tremendous advantage when defendants are put on notice of a potential claim after the 42-day period for appeal has run. Once the door of conviction has closed, it is exceedingly difficult to pass the waiver barrier.

This difficulty presents itself here where Respondent argues that Black has waived his direct constitutional attack on the *trafficking* statute because of the operation of the waiver provisions of Idaho Code §19-4901(b). This argument tracks the analysis of the District Court in applying both the general rule of waiver, and the exception, to conclude that a direct constitutional attack has been waived (Respondent's Brief, p. 6, 7). The District Court considered the application of the exception and concluded that, even assuming a substantial doubt about the reliability of guilt, Black identified no reason why the constitutional challenge could not have been raised in a timely fashion in the trial court or the appellate court, or both, and therefore, it was waived (R, p. 152).

¹ Ancient Greek statute of sun god.

Aside from the apparent fiction here, the problem with this argument is that the District Court utilized the same test for waiver under both the general rule and the exception. However, there are two different standards involved. Idaho Code §19-4901(b) defines these two tests as follows:

Any issue which **could have been raised on direct appeal**, but was not, is forfeited and may not be considered in post-conviction proceedings, **unless** it appears to the court, on the basis of a substantial factual showing by affidavit, deposition or otherwise, that the asserted basis for relief raises a substantial doubt about the reliability of the finding of guilt and **could not, in the exercise of due diligence, have been presented earlier.**

(emphasis added)

The District Court, as well as Respondent, recognized no distinction in the language of the statute with regard to what constitutes waiver. The general rule focuses on whether an issue “could have been raised” whereas the exception focuses on “due diligence”. These concepts cannot be the same or there would be no exception.

With regard to the general rule, theoretically, Black could have raised his constitutional claim on direct appeal had he been made aware of it; however, he had not (R, p. 143). Perhaps the District Court recognized that this theoretical possibility was impractical and proceeded to consider the exception to the general rule. But the District Court did not consider what “due diligence” Black failed to exercise. Unfortunately, “due diligence” has been left undefined, both statutorily and by case law. Consequently, this Court must ask: What reasonable steps constituting “due diligence” should Black have undertaken to discover his claim? Black concedes that such reasonable steps would have included contacting an attorney, hiring an attorney and asking for an opinion as to any defects in his prosecution, all while being processed and integrated into institutional life. This is precisely what Black did and the constitutional claim was ultimately presented in

these proceedings. However, the District Court and the Respondent are suggesting that Black should have done all this within 42 days of his conviction. Apparently, this was the failure to exercise “due diligence” which Respondent requests this Court to find.

The logical extension of the District court analysis here is that, since Black brought his constitutional claim after the expiration of the 42-day period for direct appeals, as opposed to within the 42-day period, Black has been foreclosed from pursuing the merits of his claim. The District Court has conflated the two standards, thus eliminating any distinction between the general rule of waiver and the exception by focusing on the 42-day time period. “Due diligence” presumes an awareness of what should or could be done and a considered waiver of taking those reasonable steps. Essentially, waiver under the exception standard is a lower barrier because of the additional, required showing of a substantial doubt about guilt.

Black also argues that waiver is inapplicable to his front-line, or merit claims, that the statute in issue is unconstitutional because of the “fundamental error doctrine”. These errors, usually constitutional in nature, cannot be waived without an explicit acknowledgement of the specific constitutional issue waived. “Fundamental error” has been defined in Idaho as an error “which so profoundly distorts the process that it produces manifest injustice and deprives the accused of his constitutional right to due process (*State v. Perry*, 150 Idaho 209, 245 P.3d 961 (2010); *State v. Mauro*, 121 Idaho, 178, 180, 824 P.2d 109, 111 (1991)).

Respondent argues that the “fundamental error” doctrine does not apply to post-conviction proceedings and is a concept solely applicable to appellate review, not collateral review (Respondent’s Brief, pp. 8 -10). Respondent cites to *Mintun v. State*, 144 Idaho 656, 168 P.3d 40 (Ct. App. 2017), *Bias v. State*, 159 Idaho 696, 365 P.3d 1050 (Ct. App. 2015) and *Grove v. State*, No. 43537 (Ct. App. 2017) in support of this proposition. None of these

authorities stand for the proposition that the “fundamental error” doctrine does not apply to post-conviction proceedings. In all of these cases, direct appeal was taken. The Court of Appeals simply found that the merit claims involved were waived because they were not raised in the respective direct appeal. Black’s case is distinguishable – there was no direct appeal.

The “fundamental error” doctrine should apply in post-conviction proceedings, just as it applies in direct appeals, notwithstanding a failure to raise it in the lower court, because it is the validity of the conviction that is at stake. There is no rational basis to distinguish the application of the doctrine in the two different forums – an invalid conviction in either forum is what counts. Finally, Respondent does not even address the fact that Idaho Appellate Courts have deemed that the Uniform Post-Conviction Relief Act is available “to cure **fundamental errors** occurring at the trial which affect either the jurisdiction of the court or the validity of the judgment, even though these errors could have been raised on appeal.” (*Ricca v. State*, 124 Idaho 894, 865 P.2d 985 (Ct. App. 1993) citing *Maxfield v. State*, 108 Idaho 493, 499, 700 P.2d 115, 121 (Ct.App.1985), quoting *Smith v. State*, 94 Idaho 469, 474-75, 491 P.2d 733, 738-39 (1971) (emphasis added).

In summary, Black questions the validity of the conviction here, directly, because the *trafficking* statute is unconstitutional. It is a matter of such a fundamental nature that relief should not hinge on what vehicle Black brings this claim – direct appeal or post-conviction.

II.

INEFFECTIVE ASSISTANCE

As stated above, Black argues that the waiver issue is inapplicable here and that this Court should address the merit claim directly. Notwithstanding, even if this Court agrees with

the District Court and Respondent, resolution of this appeal arrives at the same destination when considering whether Black's trial counsel was ineffective for failing to raise the constitutional issue.

A. STANDARD

To determine whether trial counsel was ineffective, Idaho courts have employed a two-prong analysis – deficiency and prejudice. The appropriate analysis was recently set forth in *Bias v. State*, No. 45037 (Ct. App. 2018) which presents remarkably similar facts to this case. The issue in *Bias* was the alleged failure to file a motion to suppress and Bias claimed that he would not have plead guilty had his trial counsel filed a motion to suppress. Here, Black maintains a similar position – he would not have plead guilty had his trial counsel filed a motion challenging the constitutionality of the *trafficking* statute (R., p. 143). The *Bias* court affirmed the District Court's finding of both deficiency and prejudice and articulated the appropriate analysis as follows:

To prevail on an ineffective assistance of counsel claim, the petitioner must show that the attorney's performance was deficient and that the petitioner was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Self v. State*, 145 Idaho 578, 580, 181 P.3d 504, 506 (Ct. App. 2007). To establish a deficiency, the petitioner has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988); *Knutsen v. State*, 144 Idaho 433, 442, 163 P.3d 222, 231 (Ct. App. 2007). Where, as here, the petitioner was convicted upon a guilty plea, to satisfy the prejudice element, the petitioner must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pled guilty and would have insisted on going to trial. *Plant v. State*, 143 Idaho 758, 762, 152 P.3d 629, 633 (Ct. App. 2006). This Court has long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. *Gonzales v. State*, 151 Idaho 168, 172, 254 P.3d 69,73 (Ct.App.2011).

To show that trial counsel's representation fell below an objective standard of reasonableness where the claim of ineffective assistance of counsel centers on trial counsel's failure to file a motion to suppress, the Court's inquiry is two-fold. First, the Court must determine whether or not the motion should have been granted. *Wurdemann*

v. State, 161 Idaho 713, 718, 390 P.3d 439, 444 (2017). **Once it has been determined that the motion should have been granted had it been filed, 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. *Id.***

(emphasis added)

In this case, the District Court only addressed the first prong of the analysis – the deficiency prong - concluding that the “the court takes note of the dearth of evidence that, at the time of trial, it was the prevailing practice of defense attorneys to challenge section 37-2737B on constitutional grounds” (R., p. 154). The District Court further concluded that “Consequently, Black’s nine challenges to section 37-2737(B)(a)(6)(B)’s constitutionality need not be analyzed on the merits” (R., p. 155). Thus, the prejudice prong was never addressed.

B. THE DEFICIENCY PRONG

Essentially, the District Court determined that trial counsel was not deficient because a similar constitutional challenge had not been raised before. This was not surprising to the District Court because Black’s constitutional challenges were “highly similar” to challenges already rejected by Idaho courts (citing late-1990’s cases) (*Id.*). However, the District made no record or took no judicial notice of what prior *trafficking* cases, similar to Black’s, had come before it with no challenge to the statute in issue. The Presentence Investigation Report (“PSI”)² is revealing on this point. The comparative sentencing set out in the IDAHO SENTENCING DATABASE INFORMATION (PSI, p. 21) shows that of the 44 comparators, none received a 10-year fixed sentence. Of the 40 *traffickers* treated most harshly, all were sentenced to a fixed three-year sentence. Had these comparator offenders been exposed to as harsh a sentence as Black’s, it is more likely trial counsel would have considered a constitutional challenge for obvious reasons.

² The PSI was added to the record on appeal by order dated 9/7/18.

The District Court makes the sweeping conclusion that Black's claims are "highly similar" to earlier claims without addressing the merits of Black's claims. Absent an analysis of the factual basis in support of Black's claims, there is no way to conclude whether they were similar to what was presented to the courts 20 years ago. These claims may have been similar with respect to the constitutional basis for the claims that is, due process, equal protection, cruel and unusual punishment, etc. However, the real question is what factual basis for the earlier claims was presented – the answer is none. This foray into what had been raised before is the core error in this case. Taking the District Court's circular reasoning to its logical extension would have truncated major seminal cases in legal history including *Brown v. Bd of Educ*, 347 US 483 (1954), *Roe v. Wade*, 410 US 113 (1973) and *Gideon v. Wainwright*, 372 US 353 (1963). Similar claims were raised earlier in all these major cases, but different factual bases ultimately arose which provided the distinction Courts need to overrule past precedent. Such is the case here.

According to the District Court, this Court could not have ruled as it did in *Estrada v. State*, 143 Idaho 558, 149, P.3d 833 (2006) where the Fifth Amendment was held to apply to psychosexual evaluations for the first time. The real issue in the case was the scope of the Fifth Amendment:

While no Idaho Supreme Court or United States Supreme Court case has specifically articulated a Fifth Amendment right against self-incrimination as it applies to psychosexual evaluations that may support a harsher sentence in a non-capital case, the case law nevertheless indicates that the Fifth Amendment applies to psychosexual evaluations. We affirm the district court's conclusion that Estrada's attorney was deficient in failing to inform his client of this right.

(*Id* at P. 564, emphasis added)

Moreover, the District Court's focus on the prevailing practice of defense counsel was a false inquiry into past practice rather than on strategy and tactic. Trial counsel's performance

should have been tested on an objective standard of reasonableness based on tactical or strategic decisions. As in *Bias* (supra), there was no tactical or strategic advantage here by foregoing a motion to dismiss based on the constitutionality of the *trafficking* statute. Had the motion been granted, it would have terminated the prosecution to Black's advantage. Had the motion been denied, Black could still have plead guilty and preserved the constitutional challenge on appeal. Clearly, trial counsel never discussed a possible constitutional challenge with Black and probably never thought about it. The only way to develop such a challenge is to garner support from the professional community as Black has done in these post-conviction proceedings. It is apparent on this record that the last place the District Court wanted to go was the factual record supporting the constitutional challenge.

Finally, Black's constitutional challenge below was not a novel theory or undeveloped in the context *Schoger v. State*, 148 Idaho 642, 226 P.3d 1269 (2010), cited in Respondent's Brief, p. 16. Indeed, as the District Court recognized, similar constitutional challenges to the *trafficking* statute had been raised. The difference here is the record in support of the constitutional challenge; the record before this Court extensively supports the challenge and this is the distinguishing feature of the case that the District Court should have addressed.

C. THE PREJUDICE PRONG

To answer the question as to whether trial counsel's deficiency prejudiced Black in failing to file a motion challenging the constitutionality of the *trafficking* statute, this Court must consider the probability of success on the motion (*Bowman v. State*, 129 Idaho 520, 927 P.2d 910 (Ct. App. 1996)). The District Court made no real effort to discern whether such a motion would have succeeded. The District Court did not cite to Black's supporting Declarations. The District

Court simply speculated that “none of them [nine challenges] strike the Court as at all likely to have succeeded” (R, p. 155).

Respondent contends that Back has failed to overcome the “strong presumption of constitutionality”, suggesting that all of Black’s challenges fail on the merits without actually addressing those merits (Respondent’s Brief pp. 18 -36). Respondent also fails to cite to the factual record which was undisputed. That record supporting Black’s nine constitutional challenges is set forth in Appellant’s Brief, pp. 19 – 28 and will not be repeated here. The supporting Declarations (R, pp. 17 – 73) comprise the bulk of the undisputed record from below. These Declarations cite, in part, to the PSI and are very specific as to the factual basis for the Court to conclude that the *trafficking* statute is arbitrary and irrational, etc. As mentioned above, the comparative sentencing database (PSI, p. 21) of the 44 comparators, none received a 10 year fixed sentence. This disproportionate sentencing is the driving force behind this appeal – mandatory minimum sentencing is not only unconstitutional, it is grossly unfair in its application.

Respondent’s recurring argument on appeal is that Black’s claims are unsupported by legal authority. The nine claims are primarily supported by state and federal constitutional provisions including the Fifth, Eighth and Fourteenth Amendments. Whether the *trafficking* statute violates these Amendments is factually driven and the State has failed to dispute any of the expert assertions contained in the supporting Declarations. As stated in Appellant’s Brief: “It is this theme, that is, that Appellant was prosecuted and sentenced not for trafficking in drugs but for using drugs to satisfy an uncontrollable habit, that runs through all the alleged claims herein” (p. 20.) The mere possession of seven grams or more of heroin does not, rationally, transform a drug addict into a high large-scale or high-asset drug *trafficker*.

Respondent further contends that prior legal authorities have ruled against Black's constitutional claims, particularly with respect to due process, equal protection and the separation of powers issue. These authorities include *Rogerson v. State*, 132 Idaho 53, 966 P.2d 53 (Ct. App. 1998), *State v. Payan*, 132 Idaho 614, 977 P.2d 228 (Ct. App. 1998), *State v. Puetz*, 129 Idaho 842, 934 P.2d 15 (1997) and *State v. Pena-Reyes*, 131 Idaho 656, 962 P.2d 1040 (1998). Black has distinguished these cases in his Appellant's Brief. Moreover, and equally important, is the fact that all the arguments presented in these older cases were legal only. There was no factual basis presented in these cases, unlike the record here which fully supports Black's legal claims with undisputed facts.

Suffice it to say here that mandatory minimum sentencing, in the illegal drug *trafficking* context, may have been based on sound factual support when initially legislated. True *trafficking* was deemed to be so egregious or so threatening to public health, safety, and welfare that the Idaho Legislature determined that possession, alone, of threshold quantities of illegal drugs was sufficient criminal conduct such that forfeiture of any discretionary leniency by the courts was necessary to curb such conduct. These offenders were to be incarcerated to serve every day of a definite and lengthy prison sentence. These mandatory minimums were designed to grant assurance that offenders would receive stern punishment, that they will not be at liberty to reoffend for a substantial period of time and that they and others will not commit these crimes now or in the future. However, as long as the conduct sought to be punished, banished, and deterred by mandatory sentences is clearly defined and truly circumscribes only the intended evil and wicked acts, these sentences work comfortably within the limits of its logic. But when the language over time is shown to be too broad or vague or no longer serves the intended purpose,

then these sentences expand to circumscribe conduct manifestly not deserving of minimum mandatory prison sentences. Such is the case here as recognized by the District Court:

But I think it's very, very unlikely that I would have given Mr. Black ten years fixed, very unlikely. Would he have gone to prison for some period of time? That may have happened. That's probably likely. But ten years fixed, I don't think that would have happened, and I think a lot of judges would rather not have their hands tied by mandatory minimum sentences. I do think they produce results which the sentencing judge might subjectively consider to be unjust or unwise or unfair or whatever adjective you want to use in any number of cases.

(Tr, p. 30, L. 16 -23)

The District Court's candid unease with the mandatory sentence he was required to impose against Black is revealing and appreciated, but it should have been the starting point of the analysis. Had the District Judge actually studied the factual record before, he may have concluded that it was time to seriously consider whether the *trafficking* statute was, in fact, unconstitutional in one way or another. Instead, the District Court never actually considered the factual record.

CONCLUSION

For the above and foregoing, this Court should reverse the District Court and hold that the *trafficking* statute is unconstitutional. In the alternative, this Court should remand the case to the District Court for a meaningful analysis of Black's constitutional claims on the factual merits.

Dated this 3rd day of October, 2018.

/s/ John C. Lynn
JOHN C. LYNN
Attorney for Petitioner/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October, 2018, I electronically filed the foregoing document with the Clerk of the Court using the ICOURT system, which sent a Notice of Electronic Filing to the following to:

Kale D. Gans
ecf@ag.idaho.gov
Attorney for Respondent

DATED This 3rd day of October, 2018.

/s/ John C. Lynn
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Attorney for Petitioner/Appellant