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Parvin v. State Appellant's Brief Dckt. 38295

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IN THE SUPREME COURT OF THE STATE OF IDAHO

MICHAEL R. PARVIN,)
)
 Petitioner-Appellant,)
)
 v.)
)
 STATE OF IDAHO,)
)
 Respondent.)
 _____)

NO. 38295

APPELLANT'S BRIEF

COPY

BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF CANYON**

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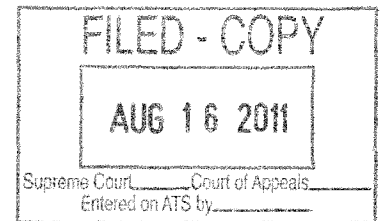


TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Nature of the Case.....	1
Statement of the Facts and Course of Proceedings	1
ISSUE PRESENTED ON APPEAL.....	6
ARGUMENT	7
The District Court Erred When It Found That Mr. Parvin Could Not Raise His Ineffective Assistance Of Counsel Claim As To His Rule 35 Motion Because It Could Have Been Raised On Direct Appeal	7
A. Introduction	7
B. The District Court Erred When It Found That Mr. Parvin Could Not Raise His Ineffective Assistance Of Counsel Claim As To His Rule 35 Motion Because It Could Have Been Raised On Direct Appeal	7
CONCLUSION.....	10
CERTIFICATE OF MAILING	11

TABLE OF AUTHORITIES

Cases

<i>Hughes v. State</i> , 148 Idaho 448 (Ct. App. 2009)	8, 9
<i>Kraft v. State</i> , 100 Idaho 671, 674 (1979).....	9
<i>McKinney v. State</i> , 133 Idaho 695, 700 (1999).....	7
<i>Parrott v. State</i> , 117 Idaho 272 (1990)	9
<i>Rodgers v. State</i> , 129 Idaho 720 (1997).....	8, 9
<i>Russell v. State</i> , 118 Idaho 65, 67 (Ct. App.1990).....	7
<i>State v. Perry</i> , 150 Idaho 209 (2010).....	10
<i>State v. Yakovac</i> , 145 Idaho 437 (2008)	9
<i>Young v. State</i> , 115 Idaho 52, 54 (Ct. App.1988)	7

Rules

I.R.C.P. 52(a).....	7
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STATEMENT OF THE CASE

Nature of the Case

Michael R. Parvin appeals from the district court's dismissal of his petition for post-conviction relief following an evidentiary hearing. Mr. Parvin asserts that the district court erred when it denied and dismissed his petition because it applied an incorrect legal standard to one of his claims, namely, that he received ineffective assistance of counsel when his attorney failed to ensure that a timely ruling was made on his Rule 35 Motion for Reduction of Sentence (*hereinafter*, Rule 35 motion). Mr. Parvin respectfully requests that this Court vacate the district court's order denying and dismissing his ineffective assistance of counsel claim and remand this case to the district court for consideration on the merits.

Statement of the Facts and Course of Proceedings

This case began in 1999, when Mr. Parvin pleaded guilty to one count of lewd conduct with a child under the age of sixteen years. Following his guilty plea, Mr. Parvin received a unified sentence of life, with ten years fixed. Mr. Parvin filed a timely Rule 35 motion, which the district court granted three months later, reducing the sentence to twenty years, with five years fixed. After the State filed a motion for reconsideration "raising the issue of whether the victims' rights were violated and otherwise arguing that the court improperly applied the law in granting the motion[,]" the district court, over Mr. Parvin's objection, vacated its order reducing his sentence, "ruling that the necessary victim notification had not occurred in the Rule 35 proceeding in violation of

the victims' constitutional and statutory rights." *State v. Parvin*, 137 Idaho 783, 784-85 (Ct. App. 2002).

On direct appeal from the district court's decision to set aside its order reducing his sentence, Mr. Parvin argued that the district court's decision was erroneous because it lacked the authority to do so, had no jurisdiction to consider a motion for reconsideration, and reinstating the original sentence violated his due process rights under the Fifth and Fourteenth Amendments. The State's response was to argue that the district court lost jurisdiction to act on his Rule 35 motion before it granted it because it failed to act on the motion in a reasonable amount of time.¹ Ultimately, the Court of Appeals adopted the State's jurisdictional argument, holding that "the record proffers insufficient reason for the district court's delay of more than three months in deciding Parvin's Rule 35 motion[,]" and concluding that "the jurisdiction of the district court had expired" when it issued the order reducing Mr. Parvin's sentence. *Id.* at 786.

In 2003, following the adjudication of his direct appeal, Mr. Parvin filed a *pro se* petition for post-conviction relief, alleging, *inter alia*, ineffective assistance of counsel for failing to ensure that his Rule 35 motion was decided within a reasonable period of time. (Request for Judicial Notice (appended to Motion to Augment²) (*hereinafter*, Request for Judicial Notice), p.50.) In response to Mr. Parvin's request for the assistance of counsel, the district court appointed the Canyon County Public Defender. After

¹ The State alternatively argued that the district court abused its discretion when it granted the Rule 35 motion because it engaged in a comparative sentence review and failed to consider whether the reduced sentence served the goals of sentencing. *Id.* at 785.

² A Motion to Augment is being filed contemporaneously with this Appellant's Brief.

discovering a conflict, the case was transferred to a conflict public defender, Van Bishop. Following the appointment of Bishop,

On January 29, 2004, the State filed a Motion for Summary Dismissal, along with its Answer to Amended Petition for Post Conviction Relief. Van Bishop, attorney for Parvin, filed a Request for Trial and/or Pre-Trial Setting on March 24, 2004. On October 21, 2005, a Notice of Substitution of Counsel was filed by attorney Michael Duggan indicating that Shari Dodge was being appointed as public defender conflict counsel for Canyon County.³ Nothing in the file indicates when Michael Duggan appeared in the matter as counsel for Parvin.

The file reflects that no additional action was taken until January 24, 2007 when a Notice of Proposed Dismissal was filed pursuant to Idaho Rule of Civil Procedure 40(c). On February 26 2007 Judge Morfitt filed an Order of Dismissal.

(R., p.147.)

Mr. Parvin testified that he never received notice, from either the district court or Ms. Dodge,⁴ of the proposed dismissal. When he learned of the dismissal, he filed a Notice of Appeal, which was then “dismissed on procedural grounds, time limits.” (Tr., p.29, L.7 – p.31, L.6; Request for Judicial Notice, p.122.)

Mr. Parvin then filed a *pro se* Second Petition for Post Conviction Relief, alleging the grounds set forth in his original petition, as well as claims that several of his post-conviction attorneys failed to represent him adequately. (R., pp.5-7.) In support of this petition, Mr. Parvin provided an affidavit asserting, *inter alia*, that his trial attorney was ineffective for failing to ensure that the district court ruled on his Rule 35 motion in a timely manner. (R., p.22.) Mr. Parvin also asserted that he was entitled to a successive

³ At the evidentiary hearing, Mr. Parvin testified that Mr. Bishop was removed from his case when “the contract for conflict counsel [in Canyon County] was changed.” (Tr., p.27, Ls.2-12.)

petition “because my claims were not knowingly or voluntarily waived. My claims were dismissed due to the ineffective assistance of post-conviction counsel.” (R., p.24.)

Ultimately, the district court, based on the following findings, held that Mr. Parvin was entitled to a decision on the merits of his successive petition:

The record is clear and undisputed that Shari Dodge was appointed conflict counsel on October 21, 2005 and filed nothing on Parvin’s behalf at anytime [sic] prior to the action being dismissed on February 26, 2007. Especially notable is the fact that Ms. Dodge failed to respond to the Notice of Proposed Dismissal filed on January 24, 2007. Her failure to do so resulted in the action being dismissed, thus denying Parvin the opportunity to have his action decided on the merits. Parvin has alleged, and it is not disputed, that Ms. Dodge failed to contact him at all, but specifically failed to inform him that his case had been dismissed. Thus, Parvin’s attempt to appeal the dismissal of the action was denied as being untimely. The court finds that had Ms. Dodge acted appropriately within her role as conflict counsel in this action, Parvin’s first post conviction proceeding would not have been dismissed on the grounds of failure to prosecute. Parvin was denied of the opportunity afforded to him pursuant to I.C. 19-4901 *et seq* . . . the court finds that Parvin was justified in filing the second post conviction action (CV-2008-97123-C) because he received ineffective assistance of counsel in his first post conviction action because the action was dismissed for counsel’s failure to take any action on his behalf. This court’s finding allows the court to have the 2008 petition relate back to the filing deadlines of the 2003 petition.

(R., pp.155-56.)

The district court then directly addressed the merits of several claims raised in Mr. Parvin’s petition, and with respect to other claims that it did not directly consider, including his claim that he received ineffective assistance of counsel when his trial attorney failed to ensure that his Rule 35 motion was ruled upon in a reasonable period of time, held:

⁴ Ms. Dodge never communicated with Mr. Parvin, and he “didn’t even know about Shari Dodge [being his attorney] until after [he] found out that [his] case had been dismissed.[.]” (Tr, p.28, Ls.16-22.)

[T]he court finds that Parvin's remaining claims were claims that were addressed (even if not in the appellate decision) or should have been addressed on the direct appeal filed in the underlying criminal case. Having so found, this court cannot now revisit those issues as it is prevented from doing so both by Idaho Code 19-4901(b) and relevant case authority.

(R., p.161.)

The district court then denied and dismissed Mr. Parvin's Amended Petition for Post-Conviction Relief. (R., p.161.) Mr. Parvin filed a Notice of Appeal timely from the district court's order. (R., p.163.)

ISSUE

Did the district court err when it found that Mr. Parvin could not raise his ineffective assistance of counsel claim as to his Rule 35 motion in post conviction because it could have been raised on direct appeal?

ARGUMENT

The District Court Erred When It Found That Mr. Parvin Could Not Raise His Ineffective Assistance Of Counsel Claim As To His Rule 35 Motion Because It Could Have Been Raised On Direct Appeal

A. Introduction

The district court erred when it found that Mr. Parvin could not raise his ineffective assistance of counsel claim as to his Rule 35 motion because it could have been raised on direct appeal.⁵ In reaching this conclusion, the district court applied an incorrect legal standard, and, as such, this case must be remanded to the district court for consideration on the merits.

B. The District Court Erred When It Found That Mr. Parvin Could Not Raise His Ineffective Assistance Of Counsel Claim As To His Rule 35 Motion Because It Could Have Been Raised On Direct Appeal

Upon review of a district court's denial of a petition for post-conviction relief when an evidentiary hearing has occurred, Idaho appellate courts will not disturb the district court's factual findings unless they are clearly erroneous. *McKinney v. State*, 133 Idaho 695, 700 (1999) (citing I.R.C.P. 52(a)); *Russell v. State*, 118 Idaho 65, 67 (Ct. App.1990)). When reviewing mixed questions of law and fact, the appellate court defers to the district court's factual findings supported by substantial evidence, but freely reviews the application of the relevant law to those facts. *Id.* (citing *Young v. State*, 115 Idaho 52, 54 (Ct. App.1988)).

⁵ Although Mr. Parvin raised a number of claims in his petition, the only adverse ruling that he pursues on appeal is the one concerning his claim that he received ineffective assistance of counsel when his attorney failed to ensure that the district court ruled on his Rule 35 motion within a reasonable period of time. As such, unless otherwise noted, all references to an ineffective assistance of counsel claim are to this claim.

In denying and dismissing Mr. Parvin's otherwise unanalyzed claims, including his ineffective assistance of counsel claim, the district court explained:

[T]he court finds that Parvin's remaining claims were claims that were addressed (even if not in the appellate decision) or should have been addressed on the direct appeal filed in the underlying criminal case. Having so found, this court cannot now revisit those issues as it is prevented from doing so both by Idaho Code 19-4901(b) and relevant case authority.

(R., p.161.)

The district court's reference to "relevant case authority" is undoubtedly a reference to its earlier statement that:

Idaho appellate courts have affirmed that matters that were considered on direct appeal or those matters that could have been considered on direct appeal are not matters that are proper for consideration in a post conviction action.

(R., p.160 (citing *Hughes v. State*, 148 Idaho 448 (Ct. App. 2009) and *Rodgers v. State*, 129 Idaho 720 (1997).)

The district court erred when it held that Mr. Parvin was required to bring his ineffective assistance of counsel claim on direct appeal because it relied on an incorrect understanding of the law.

First, the district court's reliance on *Hughes* is unavailing, as the opinion in that case did not hold that most, let alone all, ineffective assistance of counsel claims need to be brought on direct appeal. Out of six separate claims of ineffective assistance of counsel, the Court only held that one was properly denied on the ground that it should have been raised on direct appeal. That claim had to do with whether Hughes' counsel was ineffective "by failing to secure an independent psychiatrist for a variety of purposes incident to sentencing." The Court rejected the claim, explaining,

As to the claim that an independent, confidential evaluation should have been obtained to assist with sentencing issues, Hughes' counsel requested funding from the court which was denied. Counsel, therefore, was not ineffective and, moreover, as the district court concluded, the denial of the motion could have been raised as an issue on direct appeal.

Hughes, 148 Idaho at 462.

Applying the holding in *Hughes* to the facts of Mr. Parvin's case make it clear that he did not raise an issue that was capable of being brought on direct appeal. There was no request filed by counsel that was denied. Therefore, no such issue was preserved for direct review as it was in *Hughes*.

The district court also cited *Rodgers* in support of its decision. *Rodgers*, too, is unavailing with respect to the facts of Mr. Parvin's case. In *Rodgers*, the Court held that the district court properly dismissed a claim of prosecutorial misconduct because it "could have been raised during the earlier litigation that also challenged the prosecutor's conduct." *Rodgers*, 129 Idaho at 725 (citation omitted). *Rodgers* is easily distinguishable as misconduct claims, unlike ineffective assistance of counsel claims, do not rely on items outside the record on appeal.

Mr. Parvin's position is further bolstered by this Court's holding, in *Parrott v. State*, 117 Idaho 272 (1990), that

Although a defendant alleging ineffective assistance of counsel may raise the issue on direct appeal or reserve it for post conviction proceedings, he may not do both. If the issue is raised and considered on appeal, it becomes *res judicata*.

Parrott, 117 Idaho at 274 (citing *Kraft v. State*, 100 Idaho 671, 674 (1979)).

The holding in *Parrott* was recently reaffirmed in *State v. Yakovac*, 145 Idaho 437 (2008), in which this Court held that it "has long recognized that a defendant may raise errors in direct appeal and also may pursue an ineffective assistance of counsel

argument in post-conviction proceedings[.]” *Id.* at 443. Furthermore, this Court recently explained in *State v. Perry*, 150 Idaho 209 (2010), that “[i]f there is insufficient evidence in the appellate record to show clear error, the matter would be better handled in post-conviction proceedings.” *Id.* at 226.

Because the district court denied and dismissed Mr. Parvin’s ineffective assistance of counsel claim based on an incorrect understanding of the law, Mr. Parvin is entitled to have this matter remanded to the district court for consideration of his claim on the merits.

CONCLUSION

Mr. Parvin respectfully requests that this Court vacate the district court’s order dismissing his petition for post-conviction relief, and remand this matter to the district court for consideration on the merits.

DATED this 16th day of August, 2011.


SPENCER J. HAHN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16th day of August, 2011, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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A handwritten signature in black ink, appearing to read "Evan A. Smith", is written over a horizontal line. The signature is stylized and extends to the right of the line.

EVAN A. SMITH
Legal Secretary

SJH/eas