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Ewell v. State Appellant's Reply Brief Dckt. 38373

IN THE SUPREME COURT OF THE STATE OF IDAHO

ERIC HAROLD EWELL, Petitioner-Appellant, v. STATE OF IDAHO, Respondent.	)	DOCKET NO. 38373 APPELLANT'S REPLY BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE CHERI C. COPSEY
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Eric Harold Ewell appeals from the district court's order summarily dismissing his petition for post-conviction relief. He asserts that the district court erred by dismissing one of his claims because the court misperceived that claim and wrongfully concluded that it could have been raised on appeal and that it was not meritorious.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Ewell's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Did the district court err by dismissing one of Mr. Ewell's claims because it misperceived the nature of that claim?

ARGUMENT

The District Court Erred By Dismissing One Of Mr. Ewell's Claims Because It Misperceived The Nature Of That Claim

A. Introduction

Mr. Ewell asserts that, because the district court misperceived the nature of his claim regarding ineffectiveness of his appellate attorney, the district court improperly granted summary dismissal as to this claim.

B. The District Court Erred By Dismissing One Of Mr. Ewell's Claims Because It Misperceived The Nature Of That Claim

The State has raised three defenses to Mr. Ewell's claim on appeal: 1) that the claim was not properly raised in the petition for post-conviction relief; 2) the claim may not be raised for the first time on appeal; and 3) any error is harmless. Mr. Ewell will address all of the State's assertions.

1. The Claim Was Properly Before The Court

The State asserts that, because the facts in support of the claim are raised only in Mr. Ewell's affidavit, rather than in the petition, the claim was not properly before the district court. (Respondent's Brief, p.10.) The State is incorrect. In his petition, Mr. Ewell asserted that his Sixth Amendment rights were violated. (R., p.4.) He further alleged that "counsel admitted shortcomings." (R., p.4.) A claim of ineffective assistance of counsel is a claim of a Sixth Amendment violation. *See Strickland v. Washington*, 466 U.S. 668 (1984). Therefore, Mr. Ewell, in his petition, asserted a Sixth Amendment claim and then properly used his affidavit to support that claim with facts.

Moreover, the district court was clearly aware that Mr. Ewell was supplementing his petition with facts in his affidavit, as it considered the claim that *Stuart v. State,* 145 Idaho 467 (Ct. App. 2007), should have been overruled, which is not asserted in Mr. Ewell's petition, but only in his affidavit. (See, e.g., R., p.133; *cf* R., pp.3-7.) The State also acknowledges as much in its brief, where it states that the district court treated allegations raised in the affidavit as claims of a double jeopardy violation. (Respondent's Brief, p.7 n.1.) The district court considered the assertions raised in the petition as alleging claims. Mr. Ewell properly used his affidavit to supplement his petition with assertions of fact. The claim at issue on appeal was properly before the district court.

2. The Issue May Be Raised For The First Time On Appeal

The State asserts that the court specifically addressed the factual allegations underpinning the ineffective assistance of counsel claims it deemed raised in Ewell's petition – i.e., that counsel was ineffective in relation to the presentence investigation and evaluation processes. (Respondent's Brief, p.14.) The State acknowledges that the district court "did not address the factual allegation in Ewell's affidavit that trial counsel failed to 'preserve the primary issues for appeal when [he] did not renew the motion to dismiss after the state amended the information (concerning the Prior Misd. Charge) (R., p.74)." (Respondent's Brief, p.14.) Despite acknowledging that the district court did not address the factual allegation in the affidavit that is at issue on appeal, the State asserts that "Ewell cannot complain for the first time on appeal that the court misperceived the allegations of his petition." (Respondent's Brief, p.15.) The State's argument is without merit.

First, the State acknowledges that a petitioner need not respond to the district court's notice of intent to dismiss in order to preserve a claim that the petition was improperly dismissed. (Respondent's Brief, p.15. (*citing Garza v. State*, 139 Idaho 533 (2003)). Nevertheless, the State asserts that, pursuant to *DeRushé v. State*, 146 Idaho 599, 601-02 (2009), "where, as here, a represented petitioner receives notice of the bases for dismissal and fails to respond, he cannot later claim on appeal that petition was dismissed without adequate notice." (Respondent's Brief, p.15.)

However, as *DeRushé* is limited to circumstances in which the State files a motion for dismissal as opposed to where, as here, the court filed a notice of intent to dismiss, the State's argument lacks merit. In *Kelly v. State*, 149 Idaho 517 (2010), the Supreme Court noted that, "*DeRushé* clearly holds than appellant may not challenge the sufficiency of the notice **contained the state's motion for summary disposition**, and accompanying memoranda, for the first time on appeal." *Id.* at 521-22 (emphasis added). The *DeRushé* court left the *Garza* rule intact. *DeRushé,* 146 Idaho at 602. Because this case deals with the contents of a court's notice of intent to dismiss, the rule in *Garza* applies and the claim may be raised for the first time on appeal.

Further, the notice was insufficient. In the order dismissing the petition, the district court set forth what it believed the claim to be and then asserts, "[Mr. Ewell] did not support any **of these statements** with any other affidavits or evidence." (R., p.121 (emphasis added).) While the court generally stated that Mr. Ewell's claims were not supported by evidence, it was concluded that the specific claims it was addressing were not supported by the evidence. The State acknowledges that the district court "did not address the factual allegation in Ewell's affidavit that trial counsel failed to 'preserve the

primary issues for appeal when [he] did not renew the motion to dismiss after the state amended the information (concerning the Prior Misd. Charge) (R., p.74)." (Respondent's Brief, p.14.) The court therefore failed to give proper (or any) notice of intent to dismiss the claim at issue on appeal.

3. The Error Is Not Harmless

Finally, the State asserts that any error by the district court was harmless. (Respondent's Brief, p.17.) The State is incorrect. If the district court orders dismissal *sua sponte*, it must first give the petitioner twenty days' notice and allow the petitioner to respond to the notice. I.C. § 19-4906(b). The purpose of this requirement is to give the petitioner an opportunity to challenge the decision before it is finalized. *Baruth v. Gardner*, 110 Idaho 156, 159-60 (Ct. App. 1986). Thus, this requirement is strict; it makes no difference whether the petitioner's claims appear to be meritorious or not. The Idaho Supreme Court has noted the following:

> **Under these circumstances the district court cannot be faulted for determining that appellant's application for post-conviction relief is meritless** and dismissing the action. However, we do find error in the court's failure to follow the provisions of I.C. § 19-2906(b). The district court failed to notify appellant of its intention to dismiss the application and thus offer appellant an opportunity to reply within twenty days. **This error requires that the judgment denying appellant's application for post-conviction relief be reversed**.

Cherniwchan v. State, 99 Idaho 128, 129-30 (1978) (emphasis added). Thus, even in cases where it appears that the petition is "meritless," error in providing notice requires reversal.

The State cites *Gomez v. State*, 120 Idaho 632 (Ct. App. 1991) for the proposition that harmless error applies in post-conviction cases. (Respondent's Brief,

p.18.) In *Gomez*, the Court of Appeals held that, although the district court erred in failing to follow the twenty-day notice requirement, the error was harmless because there was nothing in the record from which the petitioner could have established the timeliness of his petition. *Id.* at 634. To the extent that this case is inconsistent with *Cherniwchan*, it is not good law in this State as it is in conflict with Idaho Supreme Court precedent.[1] The rule in Idaho is that even if the factual assertions in the application are insufficient to make a prima facie showing of a right to relief, during the twenty-day period for response to the dismissal motion the applicant is entitled to present supplemental evidence to support the claims. *See, e.g, Saykhamchone v. State*, 127 Idaho 319 (1995).

On the merits of Mr. Ewell's claim, the State has adopted the district court's ruling the underlying criminal case regarding Count VII with regard to luring and luring with a sexual motivation. (Respondent's Brief, p.20.) As Mr. Ewell has already briefed the challenge to Count VII with regard to luring with a sexual motivation in docket number 35093, Mr. Ewell adopts the argument made in the Appellant's Brief in #35093 and incorporates that argument herein by reference that luring and luring with a sexual motivation are not substantially similar to an Idaho offense. Regarding the prior conviction of communication with a minor for an immoral purpose, the Supreme Court of Washington has interpreted RCW 9.68A.090 to prohibit "communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct." *State v. McNallie*, 846 P.2d 1358, 1363-64 (Wash. 1993). The State has

[1] In this context, the *Gomez* Court also stated the timeliness of a post-conviction petition was a jurisdictional issue. *Gomez*, 120 Idaho at 634. This was specifically disavowed in *Anderson v. State*, 133 Idaho 788 (Ct. App. 1999).

asserted that such a crime is substantially similar to attempted lewd conduct, attempted sexual battery of a minor child sixteen or seventeen years of age, and attempted enticing of children over the internet. (Respondent's Brief, p.21.) The State's argument fails. Regarding lewd conduct, I.C. § 18-1508 sets forth specific acts that constitute lewd conduct, such as manual-genital, oral-genital, and genital-genital contact. I.C. § 18-1508. Washington's law requires only a showing of "sexual misconduct," which could be acts other than those required for a conviction of lewd conduct. Attempted sexual battery requires findings not required by Washington's law, namely that the crime be convicted by a person who is at least five years older than a minor child who is sixteen or seventeen years of age. I.C. § 18-1509A. Finally, enticing children over the internet requires the crime be committed by a person over the age of 18 against a child under the age of 16, and, obviously, that the perpetrator utilize the internet. I.C. § 18-1509A. Washington's law applies to "any person" who communicates with "a minor." RCW 9.68A.090. In sum, there are several important distinctions between Idaho and Washington law regarding this subject. These differences are sufficient at least, that it was error for the district court not to consider the claim and give notice to Mr. Ewell of its intent to dismiss this claim. Remand is appropriate to fully litigate the issue in the district court.

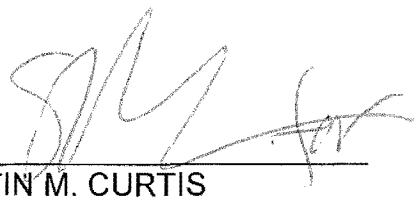
It was Mr. Ewell's claim that counsel was ineffective for failing to move to dismiss after the information was amended. The district court was required to provide Mr. Ewell with notice of why it believed any motion to dismiss would have failed and provide him with an opportunity to rebut the allegations. Because he was never afforded this

opportunity, the error was not harmless and Mr. Ewell's case must be remanded to litigate this claim in district court.

CONCLUSION

Mr. Ewell requests that the district court's order summarily dismissing his petition be reversed and that his case be remanded for further proceedings.

DATED this 13th day of February, 2012.



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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 13th day of February, 2012, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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