

9-20-2011

## Davis v. State Respondent's Brief Dckt. 38381

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IN THE SUPREME COURT OF THE STATE OF IDAHO

**COPY**

STEPHEN DAVIS,	)	
	)	
Petitioner-Appellant,	)	NO. 38381
	)	
vs.	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	

**BRIEF OF RESPONDENT**

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

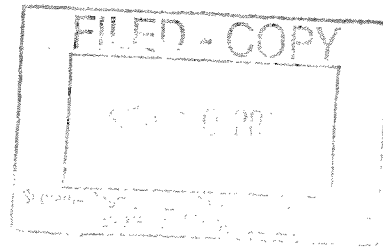
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## STATEMENT OF THE CASE

### Nature Of The Case

Stephen Davis appeals from the district court's order summarily dismissing his "Motion for Injunction Post Conviction."

### Statement Of Facts And Course Of The Proceedings

On August 9, 2010, Davis filed a pleading entitled "Motion for Injunction Post Conviction" ("Motion") in which he appears to seek consideration, or reconsideration, of his trial attorney's alleged "gross negligence." (R., pp.1-7.) Included within Davis's Motion is a request for counsel "for the limited purpose of fully arguing th[e] Motion; or filing an amended U.P.C.P.A., . . . and presenting of [sic] a prima facia [sic] reason to proceed." (R., p.6.) The district court described the course of Davis's case prior to the date he filed the Motion as follows:

On October 29, 1997, [Davis] was charged with one court of rape under Idaho Code § 18-6101(3), and lewd conduct with a child under sixteen under Idaho Code § 18-1508. According to Davis, sentence was later imposed for sexual battery under Idaho Code 18-1508A. Sentencing occurred on December 7, 1998 and the terms of sentence were for 18 months fixed and 13 years indeterminate. On November 9, 1999, [Davis] filed a Petition for Post Conviction Relief ("Petition") alleging, among other things, ineffective assistance of counsel, discovery of new evidence, excessive punishment, habeas corpus, and timeliness. A hearing was held concerning Davis's Petition on August 7, 2000. The Court issued a Minute Entry and Order on August 10, 2000, which stated that Davis's Petition was dismissed.

(R., p.13.)

Noting it was "difficult to discern" whether Davis's Motion was intended as a "Successive Petition for Post-Conviction Relief or a Motion to Vacate Judgment or a Motion to Alter or Amend Judgment," the district court entered a notice of

intent to dismiss the Motion, analyzing it as both a successive petition and a motion to reconsider. (R., pp.12-21.) Treating the Motion as a successive petition, the court advised Davis of its intent to dismiss the "petition" because Davis failed to provide "sufficient admissible evidence to support his claims and raise a genuine issue of material fact." (R., p.21.) The court further advised Davis that if he intended his Motion as a request for relief under I.R.C.P. 60(b) or 59(e), the Motion was untimely and Davis "failed to provide any facts that would allow the Court to consider granting th[e] Motion." (R., p.20.) The court also denied Davis's request for counsel and notified him he had twenty days to respond to the court's notice. (R., pp.17-19, 21.) Twenty-five days later, on October 12, 2010, the court dismissed Davis's Motion, noting it had received no response to the court's notice within the 20-day time period. (R., pp.23-24.)

Ten days later, on October 22, 2010, Davis filed a "reply" to the court's notice of intent to dismiss in which he listed a number of cases for the court to review for purposes of "res judicata [sic]," contended he "lacks the mental ability to research, file, and litigate, a judicial action," asserted there was some unidentified "state created barriers" that violated his due process rights, and claimed he raised a genuine issue of material fact based on the "fact, the judges, court clerks, and most attorneys of the Sixth District are knowledgable [sic] of the misconduct and disbarment of Attorney Souza." (R., pp.25-36.) Davis also asked the court to treat his Motion as "a first action, upon the fact no adjudication [sic] occurred on prior U.P.C.P.A." (R., p.33.) In conjunction with his "reply," Davis filed a motion to reconsider the court's dismissal order claiming "external

factors of prison conditions did cause a delay in timely responding,” although he did not articulate what those conditions were. (R., p.38.)

The district court thereafter entered a second order dismissing Davis’s Motion concluding Davis “fail[ed] to show any new or additional information that would justify reconsideration of th[e] Court’s Intent to Dismiss and prior Dismissal.” (R., pp.39-40.) Davis timely appealed. (R., pp.42-46.) The State Appellate Public Defender initially represented Davis on appeal, but withdrew after concluding there was no viable issue to raise on appeal. (R., p.74; Memorandum in Support of Motion to Withdraw, p.9; Order Granting Motion for Leave to Withdraw and to Suspend the Briefing Schedule.) Davis, with the Court’s permission, thereafter filed a *pro se* “Informal Brief.” (Order Granting Request for Permission for Filing a Non-Conforming Appellant’s Brief.)



## ISSUES

Although Davis's brief includes a section entitled "Issues," this section does not contain a "short and concise" statement of the issues as required by I.A.R. 35(a)(4), but instead contains what appear to be Davis' arguments on appeal. (Appellant's brief, pp.3-4.) The state phrases the issues on appeal as:

Has Davis failed to establish the district court erred in denying his request for counsel or in summarily denying relief on his Motion?

## ARGUMENT

### Davis Has Failed To Establish The District Court Erred In Denying His Request For Counsel And Denying Relief On His Motion

#### A. Introduction

Davis challenges the district court's denial of his request for counsel to represent him on his Motion and the denial of relief on his Motion. (Appellant's brief, pp.3-4.) Both of Davis' arguments fail. Application of the law to the facts supports the district court's determination that Davis failed to establish the possibility of a valid post-conviction claim that would entitle him to the appointment of counsel. Davis has also failed to show error in the dismissal of his Motion whether treated as a successive petition or a motion for reconsideration.

#### B. Standard Of Review And Legal Standards Applicable To A District Court's Decision To Grant Or Deny A Request For The Appointment Of Counsel In Post-Conviction Proceedings

A request for appointment of counsel in a post-conviction proceeding is governed by I.C. § 19-4904. The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court. Charboneau v. State, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004); Hust v. State, 147 Idaho 682, 683, 214 P.3d 668, 669 (Ct. App. 2009). The court's discretion is not unfettered, however. If the petitioner qualifies financially and "alleges facts showing the possibility of a valid claim that would require further investigation on the defendant's behalf," the court must appoint post-conviction counsel to assist the petitioner in developing his or her claims. Swader v. State, 143 Idaho 651,

654, 152 P.3d 12, 15 (2007); Charboneau, 140 Idaho at 793, 102 P.3d at 1112. If, on the other hand, the claims in the petition are so patently frivolous that there appears no possibility that they could be developed into a viable claim even with the assistance of counsel and further investigation, the court may deny the request for counsel and proceed with the usual procedure for dismissing meritless post-conviction petitions. Workman v. State, 144 Idaho 518, 529, 164 P.3d 798, 809 (2007); Hust, 147 Idaho at 684, 214 P.3d at 670.

When a motion for the appointment of counsel is presented, the abuse of discretion standard as applied to I.C. § 19-4904 "permits the trial court to determine whether the facts alleged are such that they justify the appointment of counsel; and, in determining whether to do so, every inference must run in the petitioner's favor where the petitioner is unrepresented at that time and cannot be expected to know how to properly allege the necessary facts." Charboneau, 140 Idaho at 793-94, 102 P.3d at 1112-13. In reviewing the denial of a motion for appointment of counsel in post-conviction proceedings, "[t]his Court will not set aside the trial court's findings of fact unless they are clearly erroneous. As to questions of law, this Court exercises free review." Brown v. State, 135 Idaho 676, 678, 23 P.3d 138, 140 (2001).

C. Davis Has Failed To Show Error In The Denial Of His Request For The Appointment Of Counsel To Pursue His Motion Or In The Dismissal Of His Motion

Davis has failed to establish the district court erred in denying his request for counsel because, as found by the district court, Davis' Motion, whether treated as a successive petition or a motion to reconsider, was frivolous. (R.,

p.19.) Davis has likewise failed to establish he was entitled to a hearing or any other relief on his Motion.

The Uniform Post-Conviction Procedure Act (“UPCPA”) provides: “All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application.” I.C. § 19-4908. A successive petition is allowed only if “the court finds a ground for relief asserted [in the successive petition] which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.” I.C. § 19-4908; see also Stuart v. State, 118 Idaho 932, 933-34, 801 P.2d 1283, 1284-85 (1990); Nguyen v. State, 126 Idaho 494, 496, 887 P.2d 39, 41 (Ct. App. 1994).

In interpreting I.C. § 19-4908, Idaho’s appellate courts have held that “[i]neffective assistance of prior post-conviction counsel may provide sufficient reason for permitting newly asserted allegations or allegations inadequately raised in the initial application to be raised in a subsequent post-conviction application.” Schwartz v. State, 145 Idaho 186, 189, 177 P.3d 400, 403 (Ct. App. 2008) (footnote omitted) (citing Palmer v. Dermitt, 102 Idaho 591, 596, 635 P.2d 955, 960 (1981); Hernandez v. State, 133 Idaho 794, 798, 992 P.2d 789, 793 (Ct. App. 1999)). If a petitioner alleges ineffective assistance of post-conviction counsel as a basis for bringing a successive petition, the relevant inquiry is “whether the second application has raised not merely a question of counsel’s performance but substantive grounds for relief from the conviction and sentence.”

Nguyen, 126 Idaho at 496, 887 P.2d at 41 (quoting Wolfe v. State, 113 Idaho 337, 339, 743 P.2d 990, 992 (Ct. App. 1987)).

It appears from Davis's Motion that he left it in the court's discretion as to whether to treat the Motion as a successive petition or a motion to reconsider. (See generally R., pp.1-7.) If considered a successive petition, in order to be entitled to the appointment of counsel, Davis was required to allege facts showing the possibility of a valid claim that was either not raised or was inadequately asserted in his original post-conviction action due to the ineffective assistance of his original post-conviction attorney. See Swader v. State, 143 Idaho 651, 654, 152 P.3d 12, 15 (2007) (counsel must be appointed only if petitioner alleges the possibility of a valid claim). Davis failed to do so. Indeed, Davis's Motion states no clear claim of ineffective assistance of trial counsel, but merely alleges the Idaho State Bar found "J. Souza, act[ed] in 'gross negligence,' of his duties and obligations to his clients." (R., p.3.) Moreover, there is no evidence that this finding by the Idaho State Bar was even made in relation to Davis's case.

As for a sufficient reason that would justify a successive petition, Davis appears to claim he has experienced "procedural hurdles" or "state created barriers" and "attorney misconduct by not assisting in presenting first [sic] U.P.C.P.A." (R., pp.4-6, 33-34.) Although the "hurdles" and "barriers" to which Davis refers are not entirely clear, to the extent he is claiming the "hurdles" or "barriers" he faced in pursuing his first post-conviction case are related to his "mental ability to research, file, and litigate, a judicial action" (R., p.26), the state

is unaware of any basis for concluding this would be a sufficient reason for filing a successive petition, particularly since Davis was apparently represented by counsel during his first post-conviction action. With respect to Davis's claim that his original post-conviction attorney engaged in "misconduct" by "not assisting in presenting [his] first" petition, Davis has failed to allege any particular deficiency in counsel's representation much less a deficiency adequate to find post-conviction counsel either failed to raise a claim or inadequately pursued a claim that was raised.

Because Davis has failed to show he raised the possibility of a valid claim or a sufficient reason for filing a successive post-conviction petition, he has failed to show error in the district court's denial of his request for counsel or the summary dismissal of his Motion when considered as a successive petition.

Davis has likewise failed to show the district court erred in declining to reconsider the denial of post-conviction relief. In his Motion, Davis appears to request reconsideration of the order dismissing his first post-conviction petition pursuant to I.R.C.P. 59(e) and/or 60(b)(6). (R., p.2.) The district court declined to afford Davis relief under either rule because Davis "failed to provide any facts that would allow the Court to" do so and because any such request was untimely. (R., p.20.) The district court was correct.

Rule 60(b), I.R.C.P. reads, in relevant part:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether

heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), (3) and (6) not more than six (6) months after the judgment, order, or proceeding was entered or taken.

Although a Rule 60(b) motion may be filed in the context of a post-conviction case, State v. Heyrend, 129 Idaho 568, 572, 929 P.2d 744 (Ct. App. 1995), the rule provides a very specific time limit for filing such a motion, *i.e.*, “for reasons (1), (2), (3) and (6), [the motion **shall** be made] not more than six (6) months after the judgment, order, or proceeding was entered or taken.” “[T]he time requirement set forth in Rule 60(b) is jurisdictional and may not be extended ‘except to the extent and under the conditions stated’ in the Rule itself.” Miller v. Haller, 129 Idaho 345, 348, 924 P.2d 607 (1996). The term “made,” as used in the rule, requires that the motion be “filed prior to the six month time limit or is served within that time period and then filed ‘within a reasonable time thereafter.’” Id. (quoting I.R.C.P. 5(d)(1)).

Davis sought relief under subsection (6) of Rule 60(b) (R., p.2); therefore, he was required to file or serve the motion within six months of the date of the order he was seeking to reconsider, *i.e.*, the order denying post-conviction relief. The order denying post-conviction relief was entered August 10, 2000. (See R., p.13.) Davis did not, however, file his Motion until August 9, 2010 (R., p.1), well beyond the jurisdictional limit. Thus, even if he had stated an adequate reason for relief under Rule 60(b)(6), which he did not, the Motion was untimely.

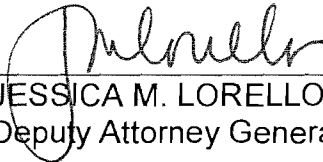
Rule 59(e), I.R.C.P, also contains a time limit. Specifically, a motion filed pursuant to I.R.C.P. 59(e) to “alter or amend the judgment shall be served not later than fourteen (14) days after entry of the judgment.” Given that Davis’ Motion was untimely under the more generous timeframe available under Rule 60(b), it was also untimely under Rule 59(e). The district court correctly concluded as much and Davis has failed to establish this was error.

Because Davis has failed to establish the district court erred in denying his request for counsel or in denying his Motion, he is not entitled to any relief on appeal.

#### CONCLUSION

The state respectfully requests this Court affirm the district court’s order dismissing Davis’s Motion.

DATED this 20th day of September, 2011.

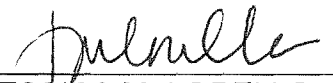
  
\_\_\_\_\_  
JESSICA M. LORELLO  
Deputy Attorney General



CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 20th day of September 2011, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

STEPHEN L. DAVIS  
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JESSICA M. LORELLO  
Deputy Attorney General

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