2-24-2012

State v. Ferrier Respondent's Brief Dckt. 39109

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 39109
	)	
vs.	)	
	)	
ERIC THOMAS FERRIER,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

HONORABLE RANDY J. STOKER
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

RUSSELL J. SPENCER
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR
PLAINTIFF-RESPONDENT

DEBORAH WHIPPLE
Nevin, Benjamin, McKay & Bartlett
303 W. Bannock
Boise, Idaho 83701
(208) 343-1000

ATTORNEY FOR
DEFENDANT-APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

RULES

STATEMENT OF THE CASE

Nature Of The Case

Eric Thomas Ferrier appeals from the district court's denial of his Rule 35 motion for correction of sentence.

Statement Of The Facts And Course Of The Proceedings

On May 8, 1998, a grand jury indicted Ferrier for the murders of Walter Jesse Ellison and Jafra Janelle Sumaya, which had occurred on March 30, 1996. (#29576 Supp. R.,[1] pp.13-14.) The indictment charged two counts of first degree murder, each with weapon enhancements. (Id.) Pursuant to a plea agreement, the state amended the indictment to two counts of second degree murder and Ferrier pled guilty. (#29576 Supp. R., pp.34-38.) The district court entered judgment against Ferrier and imposed two concurrent fixed life sentences. (R., pp.22-23.) Ferrier had been represented by the Twin Falls Public Defender's Office. (Id.)

More than a decade later, Ferrier filed a motion for correction or reduction of sentence under Idaho Criminal Rule 35. (R., pp.11-17.) In his Rule 35 motion, he alleged that his sentences were illegal, expressing the theory that Idaho Code § 18-4004, read in conjunction with Idaho Code §§ 19-2515(7)(c)[2] and 19-2513, does not allow for the imposition of fixed life sentences. (Id.) Ferrier requested counsel (R.,

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[1] On August 31, 2011, the Idaho Supreme Court issued an order augmenting the appellate record in this case with the appellate record from Ferrier's prior appeal in docket no. 29576. Citations to that record include the docket no., while citations to the record on appeal in this case do not.

[2] In both his Rule 35 motion to correct sentence and on appeal, Ferrier actually cites to "I.C. § 19-2515(c)." That code section does not exist. Based on the context of Ferrier's argument, the state assumes he intended to cite to I.C. § 19-2515(7)(c), and addresses his argument accordingly.

pp.18-20), and the district court appointed the Twin Falls Public Defender's Office (R., p.24). Ferrier subsequently moved the district court to appoint substitute counsel, arguing that the public defender's office was ineffective, as its prior representation had resulted in his current sentences, and this created a conflict of interest. (R., pp.27-31.) The district court did not rule on the motion to appoint substitute counsel.

After a hearing on the Rule 35 motion, the district court denied the motion on the ground that the sentences imposed were not illegal on the face of the record. (R., pp.33-37.) Ferrier filed a timely notice of appeal. (R., pp.39-41.)

ISSUES

Ferrier states the issues on appeal as:

> 1. Does the complete failure of the District Court to consider and rule upon the motion for appointment of conflict counsel require reversal of the order denying Mr. Ferrier's Criminal Rule 35 motion?
>
> 2. Was the Rule 35 motion erroneously denied because a fixed life sentence may not legally be imposed for second degree murder?

(Appellant's brief, p.2.)

The state rephrases the issues as:

1. Has Ferrier failed to establish error in the district court's denial of his frivolous Rule 35 motion?

2. Because Ferrier's Rule 35 motion was frivolous, is any error in the district court's failure to address and rule on Ferrier's motion for substitute counsel harmless?

ARGUMENT

I.
Ferrier Has Failed To Establish Error In The District Court's Denial Of His Frivolous Rule 35 Motion

A. Introduction

Ferrier asserts that Idaho Code § 18-4004, when read in conjunction with Idaho Code §§ 19-2513 and 19-2515(7)(c), does not permit the imposition of a fixed life sentence for second degree murder, and so the district court erred in denying his Rule 35 motion to correct his sentence. (Appellant's brief, pp.5-6.) Ferrier's argument lacks merit. Idaho Code § 18-4004 expressly permits the imposition of a fixed life sentence for second degree murder. On the face of the record, there is nothing illegal about Ferrier's sentence. His Rule 35 motion is therefore frivolous and he has failed to show error in the district court's denial of that motion.

B. Standard Of Review

Whether a sentence is illegal is a question of law that is freely reviewed by the court on appeal. State v. Clements, 148 Idaho 82, 84, 218 P.3d 1143, 1145 (2009). Likewise, statutory interpretation is a question of law over which appellate courts exercise free review. State v. Peregrina, 151 Idaho 538, 539, 261 P.3d 815, 816 (2011); State v. Mosqueda, 150 Idaho 830, 833, 252 P.3d 563, 566 (Ct. App. 2010).

C. Ferrier's Rule 35 Motion Is Frivolous

Idaho Criminal Rule 35 is a narrow rule that allows a trial court to correct at any time a sentence that is illegal from the face of the record. I.C.R. 35(a); Clements, 148 Idaho at 84, 218 P.3d at 1145. Rule 35 is not a vehicle designed to re-examine the

facts underlying the case to determine whether a sentence is illegal; rather, the rule only applies to a narrow category of cases in which the sentence imposes a penalty that is simply not authorized by law. Clements, 148 Idaho at 84, 218 P.3d at 1145. An illegal sentence under Rule 35 is one in excess of a statutory provision or otherwise contrary to applicable law. State v. Alsanea, 138 Idaho 733, 745, 69 P.3d 153, 165 (Ct. App. 2003). Applying these correct legal standards, Ferrier has failed to show that his sentence is illegal.

On April 16, 1999, Chief Justice Burdick, as the district judge, entered judgment against Ferrier on two counts of second degree murder and sentenced him to a "fixed term of life without the eligibility of parole" on each count, with the sentences running concurrently. (R., pp.22-23.) Ferrier's sentence is not "in excess of a statutory provision." The punishment for second degree murder is set forth in Idaho Code § 18-4004. By its express terms, that statute authorizes a fixed life sentence for second degree murder. It reads, in pertinent part, "[e]very person guilty of murder of the second degree is punishable by imprisonment not less than ten (10) years and the imprisonment may extend to life." I.C. § 18-4004. Nor is Ferrier's sentence "otherwise contrary to applicable law." Idaho appellate courts have routinely upheld fixed life sentences imposed on convictions for second degree murder. See, e.g., State v. Delling, Docket Nos. 36920/36921, 2011 Opinion No. 128 (Dec. 1, 2011); State v. Windom, 150 Idaho 873, 876-77, 253 P.3d 310, 313-14 (2011); State v. Cope, 142 Idaho 492, 502, 129 P.3d 1241, 1251 (2006); State v. Burdett, 134 Idaho 271, 276, 1 P.3d 299, 304 (Ct. App. 2000). Ferrier's sentence is not "illegal from the face of the record." The district court, therefore, properly denied Ferrier's Rule 35 motion.

On appeal, Ferrier rehearses his arguments from below, contending that Idaho Code § 18-4004, when read in conjunction with §§ 19-2513 and 19-2515(7)(c), does not allow a fixed life sentence for second degree murder. (Appellant's brief, pp.5-6.) The district court rejected this meritless argument (R., pp.35-36), and this Court should, too. As already noted above, Idaho Code § 18-4004 expressly permits the imposition of a fixed life sentence for second degree murder. Idaho Code § 19-2513 reads, in pertinent part:

> The court *shall* specify a minimum period of confinement and *may* specify a subsequent indeterminate period of custody. The court shall set forth in its judgment and sentence the minimum period of confinement and the subsequent indeterminate period, *if any*, provided, that the aggregate sentence shall not exceed the maximum provided by law.

I.C. § 19-2513 (emphasis added). By the express terms of this statute, the district court is required to specify a minimum term of confinement; it is not required to pronounce any subsequent indeterminate period of custody. The district court's sentence specifies the minimum period of Ferrier's confinement: Life, without the possibility of parole. (See R., pp.22-23.) There is, therefore, no subsequent indeterminate period of custody to pronounce. Finally, Idaho Code § 19-2515(7)(c) applies to convictions for first degree murder and is not applicable in the context of second degree murder. Even if it were applicable, it would only require that the district court impose a life sentence with at least ten years fixed, and would still permit the district court to make the entire life sentence determinate. See I.C. § 19-2515(7)(c).

On the face of the record, Ferrier's sentence does not exceed any statutory provisions, nor is it otherwise contrary to applicable law. Ferrier has failed to show any error in the district court's rejection of his entirely meritless Rule 35 motion for correction

of sentence. The district court properly denied Ferrier's Rule 35 motion and its order denying relief should be affirmed.

II.
Because Ferrier's Rule 35 Motion Was Frivolous, The District Court's Error In Failing To Address And Rule On Ferrier's Motion To Appoint Substitute Counsel To Pursue His Rule 35 Motion Was Harmless

A. Introduction

Ferrier contends, alternatively, that the district court committed reversible error by not ruling on his motion for substitute appointed counsel and/or by not inquiring into the conflict of interest alleged by Ferrier in that motion, before denying Rule 35 relief. (Appellant's brief, pp.2-4.) Because Ferrier's Rule 35 motion was frivolous, he had no right to appointed counsel to pursue it. Accordingly, any error committed by the district court in not ruling on Ferrier's motion for substitute counsel was harmless.

B. Ferrier Had No Right To Counsel To Pursue His Frivolous Rule 35 Motion And, As Such, Any Error Committed By The District Court In Failing To Rule On The Motion For Substitute Counsel Is Harmless

Ferrier argues that the district court's failure to rule on his motion to appoint substitute counsel is reversible error. (Appellant's brief, pp.2-4.) Even assuming error, however, such error is necessarily harmless. Failure to rule on a motion for appointment of counsel on a Rule 35 motion before determining the merits of the underlying Rule 35 motion is harmless error where the Rule 35 motion is frivolous as a matter of law. See State v. Wade, 125 Idaho 522, 525, 873 P.2d 167, 170 (Ct. App. 1994). As argued above, Ferrier's Rule 35 motion is frivolous as a matter of law (see

Argument I.C, *supra*); therefore, any error in failing to address or rule on Ferrier's motion to appoint substitute counsel is also harmless.

A criminal defendant has the statutory right to counsel at all stages of the criminal process, including pursuit of a Rule 35 motion.[3] Murray v. State, 121 Idaho 918, 923 n.3, 828 P.2d 1323, 1328 n.3 (Ct. App. 1992). This right, however, is not boundless; a district court may deny appointment of counsel if the Rule 35 motion is frivolous or one that a reasonable person with adequate means would not be willing to bring at his or her own expense. I.C. § 19-852(b)(3). A determination of whether a Rule 35 motion is frivolous for purposes of applying I.C. § 19-852(b)(3) is based on the contents of the motion itself and any accompanying documentation that may support the motion. Wade, 125 Idaho at 525, 873 P.2d at 170. Ferrier's Rule 35 motion was frivolous because, on its face, there is absolutely nothing illegal about the sentence Ferrier received. (See Argument I.C, *supra*.) The mere exercise of a district court's discretion in appointing counsel on a Rule 35 motion does not translate into a right to appointed

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[3] On appeal, Ferrier also asserts that criminal defendants have a constitutional right to counsel under the Sixth Amendment to pursue a Rule 35 motion. (Appellant's brief, pp.2-3.) That is an incorrect statement of the law. The Sixth Amendment guarantees a criminal defendant the right to counsel during all "critical stages" of the adversarial proceedings against him. Estrada v. State, 143 Idaho 558, 562, 149 P.3d 833, 837 (2006) (citing United States v. Wade, 388 U.S. 218, 224 (1967); State v. Ruth, 102 Idaho 638, 637 P.2d 415 (1981)). "The determination whether [a] hearing is a 'critical stage' requiring the provision of counsel depends ... upon an analysis 'whether potential substantial prejudice to defendant's rights inheres in the *** confrontation and the ability to help avoid that prejudice.'" Coleman v. Alabama, 399 U.S. 1, 9 (1970) (asterisks original) (quoting Wade, 388 U.S. at 227). A Rule 35 motion, however, can "only benefit the defendant by reducing his sentence which had already become final," and does not entail a "do-over of an original sentencing proceeding." United States v. Taylor, 414 F.3d 528, 537 (4th Cir. 2005). Rule 35 challenges, therefore, do not create a critical stage of the proceedings and there is no Sixth Amendment right to counsel on a Rule 35 motion. Taylor, 414 F.3d at 537; United States v. Jackson, 923 F.2d 1494, 1496-97 (11th Cir.1991); United States v. Paloma, 80 F.3d 138, 142 (5th Cir. 1996).

counsel. In fact, because Ferrier's Rule 35 motion was frivolous, he had no right to appointed counsel at all, much less a right to the appointed counsel of his choosing.

"Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." I.C.R. 52. Because Ferrier has no right to appointed counsel to pursue a frivolous Rule 35 motion, any error committed by the district court in not ruling on the motion to appoint substitute counsel could not have affected Ferrier's substantial rights to counsel and is necessarily harmless.

C. Ferrier Has Failed To Show That The District Court Has A Duty To Inquire Into Alleged Conflicts Of Interest In Cases That, At Best, Merely Implicate The Statutory Right To Counsel

Alternatively, Ferrier argues that the district court committed reversible error by failing to inquire into his alleged conflict of interest with his attorney. (Appellant's brief, pp.3-4.) The Sixth Amendment has been interpreted to encompass the right to be represented by conflict-free counsel. Wood v. Georgia, 450 U.S. 261, 271 (1981). "Whenever a trial court knows or reasonably should know that a particular conflict may exist, the trial court has a duty of inquiry" to ensure that criminal defendants are not deprived of the effective assistance of counsel under the Sixth Amendment. State v. Lovelace, 140 Idaho 53, 60, 90 P.3d 278, 285 (2003); see also Cuyler v. Sullivan, 446 U.S. 335, 347 (1980). But this duty to inquire has only been applied in cases that implicated the defendant's Sixth Amendment right to counsel, not the statutory right to counsel. See, e.g., Cuyler, 446 U.S. at 347; Holloway v. Arkansas, 435 U.S. 475, 488 (1978); State v. Severson, 147 Idaho 694, 703, 215 P.3d 414, 422 (2009); Lovelace, 140 Idaho at 60, 90 P.3d at 285. Having failed to provide either argument or authority that the duty to inquire should be extended to cases which, at best, only implicate the

statutory right to counsel, Ferrier has waived this issue and it should not be considered on appeal. State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996).

Even were this Court to determine that the duty to inquire should be extended to cases which only implicate the statutory right to counsel, Ferrier has still failed to show error in the district court's lack of inquiry. The requirements of an adequate inquiry are fact specific and should be determined on a case-by-case basis. Atley v. Ault, 191 F.3d 865, 872 (8th Cir. 1999). In order for there to be a conflict of interest, there must be separate interests that actually conflict. See, e.g., Cuyler, 446 U.S. at 350; Holloway, 435 U.S. at 481-82. The so-called "conflict of interest" that Ferrier asserted was that the public defender's office had, more than ten years previously, provided what he characterized as ineffective assistance of counsel, and that resulted in what he claimed was an illegal sentence. (R., pp.27-28.) Even assuming, *arguendo*, that all of Ferrier's specious claims were true, he still failed to allege a conflict of interest. Rather, he has merely asserted a lack of confidence in his appointed counsel's competence, and that is not a sufficient basis for substitute counsel. See State v. Gamble, 146 Idaho 331, 336, 193 P.3d 878, 883 (Ct. App. 2008) ("Notably, the right to counsel does not necessarily mean a right to the attorney of one's choice, and mere lack of confidence in otherwise competent counsel is not necessarily grounds for substitute counsel in the absence of extraordinary circumstances.") (citations omitted); State v. Lippert, 145 Idaho 586, 594, 181 P.3d 512, 520 (Ct. App. 2007) (same) (citations omitted).

Furthermore, even if Ferrier had asserted a cognizable conflict of interest, it would still be improper to impute such a conflict to the entire public defender's office. See State v. Cook, 144 Idaho 784, 794, 171 P.3d 1282, 1292 (Ct. App. 2007)

("automatically disqualifying a public defender where another attorney in the office has a conflict of interest would significantly hamper the ability to provide legal representation of indigent clients"). A per se rule imputing conflicts of interest to affiliated public defenders is inappropriate "where there is no indication the conflict would hamper an attorney's ability to effectively represent a client." Id. Therefore, even if Messrs. Olson and Riggins (the public defenders that represented Ferrier at his original sentencing hearing, see R., p.22) had a conflict of interest, that conflict could not be imputed to Mr. Anderson (Ferrier's public defender on his Rule 35 motion more than a decade later, see R., p.33) absent some indication that the conflict would hamper Mr. Anderson's ability to effectively represent Ferrier. Because there was no imputable conflict about which to inquire, the district court's failure to inquire is necessarily harmless.

Ferrier has failed to show that a district court has a duty to inquire into alleged conflicts of interest in cases that only implicate the statutory right to counsel. Even if the duty to inquire is extended to those cases, because Ferrier failed to allege an actual conflict of interest, the district court's failure to inquire is harmless.

CONCLUSION

The state respectfully requests that this Court affirm the district court's denial of Ferrier's frivolous Rule 35 motion.

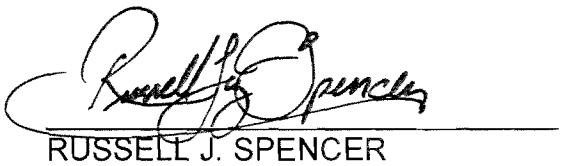
DATED this 24th day of February, 2012.

RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 24th day of February, 2012, 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:

DEBORAH WHIPPLE
Nevin, Benjamin, McKay &
Bartlett, LLP
PO Box 2772
Boise, ID 83701



RUSSELL J. SPENCER
Deputy Attorney General

RJS/pm