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Fordyce v. State Respondent's Brief Dckt. 39243

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

CHARLES G. FORDYCE)	
)	
Petitioner-Appellant,)	NO. 39243
)	
vs.)	
)	
STATE OF IDAHO,)	
)	
Respondent.)	
)	

BRIEF OF RESPONDENT

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

HONORABLE MICHAEL R. MCLAUGHLIN
District Judge

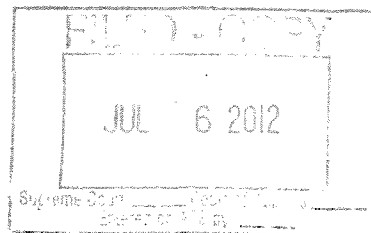
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STATEMENT OF THE CASE

Nature Of The Case

Charles Glenn Fordyce appeals from the district court's denial of his motion for relief from judgment.

Statement Of The Facts And Course Of The Proceedings

In 2004, Fordyce pled guilty to aggravated battery and malicious injury to property. (#38453 R.,¹ p.107.) The district court entered judgment and imposed a unified sentence of ten years with five years fixed. (#38453 R., pp.107-11.) The district court then suspended that sentence and placed Fordyce on probation for a period of ten years. (Id.) Fordyce did not file a notice of appeal. (See generally #38453 R.)

In 2008, Fordyce violated his probation and the district court revoked that probation and executed the underlying sentence. (#38453 R., pp.142-43.) Again, Fordyce did not file a notice of appeal. (See generally #38453 R.) Fordyce did, however, file a petition for post-conviction relief timely from the order revoking probation, wherein he alleged ineffective assistance of counsel for failing to file a notice of appeal in the underlying criminal case. (R., pp.4-10.) After several answers and amendments, the district court held an evidentiary hearing on Fordyce's petition. (R., pp.65-67.) At the close of that hearing, the district court decided it would grant relief and directed the "defense"² to prepare the order. (R., p.66.) On January 4, 2011, the

¹ Contemporaneous with the filing of this brief, the state filed a motion requesting the Court to take judicial notice of the record in the underlying criminal case.

² "Defense" in this context appears to refer to Fordyce's post-conviction petition counsel. On the same page of the minutes, referring to Fordyce, it states that "Defendant has shown Evidence to be allowed to file Appeal." (See R., p.66.)

district court filed its order, drafted by Fordyce's counsel, granting Fordyce relief pursuant to his post-conviction petition and reinstating his appellate rights from the 2008 order revoking probation. (R., pp.68-69.) Subsequently, the district court filed an amended order revoking probation in the underlying criminal case (#38453 R., pp.145-46), and Fordyce filed a timely notice of appeal (#38453 R., pp.148-50). In an unpublished opinion, the Idaho Court of Appeals affirmed the revocation of Fordyce's probation. State v. Fordyce, Docket No. 38453, 2011 Unpublished Opinion No. 700 (Nov. 15, 2011).

While his appeal in the criminal case was pending, Fordyce filed a *pro se* motion for clarification in the post-conviction case, requesting that the district court reinstate his appellate rights from his 2004 conviction. (R., pp.70-71.) The district court denied this motion on July 13, 2011, on the grounds that Fordyce had counsel. (R., p.70.) On August 15, 2011, Fordyce filed another *pro se* motion to correct the order granting him post-conviction relief under Idaho Rules of Civil Procedure 60(a) and (b), which he characterized as a motion for relief from judgment. (R., pp.73-74.) The district court again denied Fordyce's motion. (R., p.73.) Fordyce filed a notice of appeal timely from the district court's denial of his motion for relief from judgment. (R., pp.76-77.)

ISSUE

Fordyce's issue statement is set forth on pages 4 and 5 of his Appellant's brief and, due to its length, is not repeated here.

The state rephrases the issues on appeal as:

1. Has Fordyce failed to establish error in the district court's denial of his motion for relief from judgment?
2. Has Fordyce failed to preserve for appeal the district court's lack of findings in its denial of his motion for relief from judgment?

ARGUMENT

I.

Fordyce Has Failed To Establish Error In The District Court's Denial Of His Motion For Relief From Judgment

A. Introduction

More than six months after the district court granted Fordyce post-conviction relief, Fordyce moved the district court under Idaho Rules of Civil Procedure 60(a) and (b) to correct its order granting that relief. (R., pp.73-74.) Motions for relief from judgment brought under Idaho Rule of Civil Procedure 60(b) due to alleged mistake, inadvertence, surprise, or excusable neglect, which Fordyce asserted, must be made within six months of the order the movant seeks to have amended. I.R.C.P. 60(b). Because it was brought more than six months after the order had been entered, Fordyce's motion was not timely under Rule 60(b). Motions under Rule 60(a), however, may be brought at any time to correct clerical mistakes. I.R.C.P. 60(a). Construing Fordyce's motion as a motion to correct a mere clerical oversight, his motion was timely submitted and appellate review is appropriate on that basis.

Fordyce contends that the district court erred by denying his motion for relief from judgment, arguing that the district court made a clerical error by restoring Fordyce's appellate rights from the revocation of his probation in December 2008 instead of his underlying conviction in November 2004. (Appellant's brief, pp.4-6.) On the record before this Court, Fordyce has failed to establish that the district court granted post-conviction relief different from what the district court intended to provide. The merits of Fordyce's underlying argument rely on assumptions that cannot be substantiated on the inadequate record he has provided on appeal. Because Fordyce has failed to establish

that the district court made the alleged clerical error in its order granting relief, he has failed to show error in the district court's denial of his motion for relief from judgment.

In the alternative, the district court may have denied Fordyce's *pro se* motion without reaching its merits on the proper basis that Fordyce was represented by counsel and thus had no right to hybrid representation. Fordyce has failed to show error in the district court's denial of his motion on that alternative basis.

As a separate alternative basis, on the record before this Court, Fordyce is not entitled to the reinstatement of his appellate rights from the underlying 2004 judgment of conviction because his petition for post-conviction relief was not timely from that underlying conviction. His petition is timely, however, from the 2008 order revoking probation and executing his underlying sentence. The district court, therefore, did not commit a clerical error by not granting relief to which Fordyce was not entitled.

B. Fordyce Has Failed To Establish Error By The District Court

It is well established that the actions of the district court are presumed to be proper, and that the party alleging error has the affirmative duty to establish that error on the record. Idaho Power Co. v. Cogeneration, Inc., 134 Idaho 738, 745, 9 P.3d 1204, 1211 (2000); Clear v. Marvin, 86 Idaho 87, 92, 383 P.2d 346, 349 (1963). Fordyce claims that the district court erred by denying his motion for relief from judgment, asserting that the district court made a clerical error by granting relief from his counsel's failure to appeal the court's 2008 order revoking probation rather than granting relief from his counsel's failure to appeal his 2004 judgment and conviction. (Appellant's brief, pp.4-6.) Contrary to Fordyce's assertions, however, the record before this Court does not establish that the district court made a clerical error in its order

granting post-conviction relief. The record shows that, after an evidentiary hearing, the district court found that “[Fordyce] has shown Evidence to be allowed to file Appeal.” (R., p.66.) The record further shows that the district court reentered the 2008 order revoking probation so Fordyce would be allowed to file an appeal. (#38453 R., pp.145-46.) The record thus shows no inconsistency between the relief the district court intended to grant and the relief the district court actually granted, and Fordyce has failed to establish error on the record before this Court.

Fordyce’s argument that the district court made a clerical error in its order granting relief rests on the assumption that, because Fordyce’s post-conviction petition sought relief from his 2004 judgment and conviction, that was the only relief the court could grant after the hearing. (Appellant’s brief, pp.4-6.) In civil proceedings, this is a faulty assumption. A petition for post-conviction relief is a civil proceeding, to which the Idaho Rules of Civil Procedure apply. Pizzuto v. State, 146 Idaho 720, 724, 202 P.3d 642, 646 (2008); Hooper v. State, 127 Idaho 945, 949, 908 P.2d 1252, 1256 (Ct. App. 1995). Under Idaho Rule of Civil Procedure 15(b), “[w]hen issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings,” and “failure ... to amend [the pleadings] does not affect the result of the trial of these issues.” I.R.C.P. 15(b). Under Rule 15(b), the defense must object to evidence which is beyond the scope of the original pleadings and must satisfy the court that it would be prejudiced by that additional evidence, or the court may still allow the amendment, even after judgment. *Id.* This rule has been interpreted to allow a court to grant relief on grounds that were implicitly presented at trial, even if not specifically asserted in the complaint. See, e.g.,

Cady v. Pitts, 102 Idaho 86, 90, 625 P.2d 1089, 1093 (1981); Anderson-Blake, Inc. v. Los Caballeros, Ltd., 120 Idaho 660, 665, 818 P.2d 775, 780 (Ct. App. 1991).

There are indications that Fordyce may have implicitly or explicitly amended his petition during the evidentiary hearing. Petitions for post-conviction relief are governed by the Uniform Post-Conviction Proceedings Act. I.C. § 19-4901, *et seq.* To be timely, petitions for post-conviction relief must be brought within a year of final judgment. I.C. § 19-4902(a). Fordyce's petition for post-conviction relief, seeking relief from his 2004 judgment, was filed more than five years after the judgment became final and was therefore untimely on its face. (Compare #38453 R., pp.107-11 with R., pp.4-13.) The state, in its answer, asserted the time-bar. (R., pp.32, 59.) Fordyce even alludes to his original petition's lack of timeliness in his appellant's brief. (See Appellant's brief, p.6.) Fordyce's petition for post-conviction relief, however, was timely filed within one year of the entry of the order revoking his probation. (Compare #38453 R., pp.142-43 with R., pp.4-13.) Recognizing this, Fordyce may have argued alternative theories for relief and the district court granted the relief from 2008, which was not time-barred.

The record also shows that Fordyce's counsel was charged with preparing the order granting post-conviction relief, which granted relief from the failure to appeal the 2008 order revoking probation. (R., p.66.) Referencing the order granting relief, the district court filed an amended order revoking probation in the underlying case. (#38453 R., pp.145-46.) Fordyce then in fact appealed from that amended order. (#38453 R., pp.148-50.) This all suggests that the district court intended to order relief from the 2008 order, not the 2004 order, and thus there was no clerical error to correct.

Contrary to Fordyce's argument, the record does not establish that the district court made any clerical errors when granting relief from 2008 instead of 2004. The record only shows that, after an evidentiary hearing, the district court found that Fordyce had shown sufficient evidence to be allowed to file an appeal (R., p.66), and that the district court granted post-conviction relief to Fordyce allowing him to file an appeal (#38453 R., pp.145-46). Fordyce has not included in the appellate record the transcript of the evidentiary hearing at which the district court determined to grant relief. The minutes of that hearing do not establish whether the parties only argued the failure to appeal from the 2004 judgment or if they implicitly or explicitly amended the petition to also encompass, or even solely address, the failure to appeal from the 2008 order revoking probation. The appellant bears the burden of presenting a sufficient record on appeal to meaningfully evaluate the merits of his challenge. State v. Mowery, 128 Idaho 804, 805, 919 P.2d 333, 334 (1996); Slickpoo v. State, 126 Idaho 212, 214, 880 P.2d 242, 244 (1994). In the absence of an adequate record to support the appellant's claim, this Court will not presume error. State v. Longoria, 133 Idaho 819, 823, 992 P.2d 1219, 1223 (Ct. App. 1999); State v. Beason, 119 Idaho 103, 105, 803 P.2d 1009, 1011 (Ct. App.1991). Rather, missing portions of the record must be presumed to support the action of the trial court. Mowery, 128 Idaho at 805, 919 P.2d at 334; Longoria, 133 Idaho at 823, 992 P.2d at 1223 (citing Kugler v. Drown, 119 Idaho 687, 690, 809 P.2d 1166, 1169 (Ct. App. 1991)). Because Fordyce failed to provide the transcript that might have shown the exact basis on which the district court granted relief, that transcript must be presumed to support the district court's actions in denying Fordyce's motion to correct the alleged clerical error.

The actions of the district court are presumed to be proper. Idaho Power Co., 134 Idaho at 745, 9 P.3d at 1211; Clear, 86 Idaho at 92, 383 P.2d at 349. Fordyce has failed to overcome that presumption. On the record before this Court, Fordyce has failed to show that the district court granted post-conviction relief other than what the district court intended to grant. Having failed to establish a clerical error, Fordyce has failed to show that the district court erred by denying his motion for relief from judgment. On the merits, the district court's order denying Fordyce's motion to correct the alleged clerical error should therefore be affirmed.

C. Denial Of Fordyce's Pro Se Motion For Relief From Judgment Was Appropriate Because Fordyce Was Represented By Counsel

For pursuit of his petition for post-conviction relief, Fordyce requested and was granted counsel. (R., pp.22-24, 27.) At the district court's direction following an evidentiary hearing, Fordyce's counsel prepared an order granting Fordyce post-conviction relief, which the court signed and filed. (R., pp.68-69.) Fordyce then filed, *pro se*, a series of motions claiming, alternatively, that the district court's order granting post-conviction relief needed clarification, or that the district court had made a clerical error by granting relief from 2008 instead of 2004. (See R., pp.70-75.) The district court denied each of these motions, succinctly giving its reasoning on the first as, "You [Fordyce] have counsel." (R., p.70.)

There is no right to hybrid representation. See United States v. Halbert, 640 F.2d 1000, 1009 (9th Cir. 1981) ("A criminal defendant does not have an absolute right to both self-representation and the assistance of counsel."). After granting Fordyce's request for the appointment of counsel, the district court was not required to consider

and respond to any of Fordyce's subsequently filed *pro se* motions as though he were unrepresented. See United States v. Bergman, 813 F.2d 1027, 1009 (9th Cir. 1987) (district court did not err by refusing to acknowledge defendant's *pro se* filings when he was represented). To do so would effectively nullify the appointment of counsel and potentially interfere with the attorney-client relationship. Therefore, the district court could properly deny Fordyce's motion on the basis that he had counsel and was thus not entitled to bring the motion *pro se*. The district court's order denying Fordyce's *pro se* motion should therefore be affirmed on this alternative basis.

D. Alternatively, The District Court's Order Should Be Affirmed Because, On The Record Presented To This Court, Fordyce Had No Right To Relief From The 2004 Judgment

As discussed above, to be timely, petitions for post-conviction relief must be brought within a year of final judgment. I.C. § 19-4902(a). Fordyce's petition for post-conviction relief, seeking relief from his 2004 judgment, was filed more than five years after the judgment became final and was therefore untimely on its face. (Compare #38453 R., pp.107-11 with R., pp.4-13.) The state, in its answer, asserted the time-bar. (R., pp.32, 59.) Fordyce alludes to his original petition's lack of timeliness in his appellant's brief. (See Appellant's brief, p.6.) Because his petition was not timely from the 2004 judgment, Fordyce was not entitled to relief from that judgment.

Fordyce's petition for post-conviction relief, however, was timely filed within one year of the entry of the 2008 order revoking his probation. (Compare #38453 R., pp.142-43 with R., pp.4-13.) Thus, on the record presented to this Court, the district court's order granted Fordyce all the relief to which he was potentially entitled, and

Fordyce has failed to show that the district court made any clerical errors in its order granting that specific relief.

II.

Fordyce Failed To Preserve The Lack Of Findings In The District Court's Order Denying His Motion For Relief By Filing A Rule 52(b) Motion With The District Court

On appeal, Fordyce argues that the district court violated his rights under Idaho Rule of Civil Procedure 52(a) by dismissing his motion for relief from judgment without opinion or reasoning. (Appellant's brief, pp.5-6.) Fordyce's argument fails. First, Rule 52(a) does not create an entitlement to findings on motions. Second, even if it did, Fordyce still failed to preserve for appeal the issue of the district court's failure to put on the record its analysis in its denial of Fordyce's motion. Because the issue has not been properly preserved, this Court should not address it.

Post-conviction proceedings are governed by the Uniform Post-Conviction Procedure Act. I.C. § 19-4901, *et seq.* A petition for post-conviction relief is a civil proceeding to which the Idaho Rules of Civil Procedure generally apply. Pizzuto v. State, 146 Idaho 720, 724, 202 P.3d 642, 646 (2008); Hooper v. State, 127 Idaho 945, 949, 908 P.2d 1252, 1256 (Ct. App. 1995). As correctly noted by Fordyce, Rule 52(a) of the Rules of Civil Procedure requires that, "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." I.R.C.P. 52(a). As is clear from its plain language, Rule 52(a) deals with *trials*, not motions. Fordyce has failed to cite any authority for his proposition that Rule 52(a) entitles him to findings in the denial of a motion and has consequently waived this issue on appeal. See State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996).

Even if Rule 52(a) was read to include an entitlement to findings on motions, Fordyce still failed to preserve that claim of error for appeal. Rule 52(b) states that “[n]o party may assign as error the lack of findings unless the party raised such issue to the trial court by an appropriate motion.” I.R.C.P. 52(b). Fordyce failed to file a Rule 52(b) motion with the district court. He has therefore failed to preserve this issue and “cannot assign as error” the lack of findings by the district court.

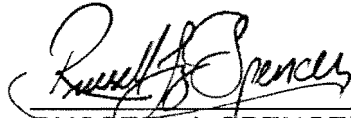
Fordyce also argues that the district court denied his motion for clarification, filed July 11, 2011, without reason or opinion. (Appellant’s brief, p.5.) Fordyce’s notice of appeal, filed October 4, 2011, was not timely from the denial of his motion for clarification, filed July 22, 2011. I.A.R. 14. This Court therefore lacks jurisdiction over Fordyce’s appeal as it regards the denial of that motion. I.A.R. 21. If this Court considers Fordyce’s claim, it nevertheless fails for the same reasons articulated above: Rule 52(a) does not create an entitlement to findings on motions and, even if it did, Fordyce still failed to preserve the issue by filing a Rule 52(b) motion. Finally, the state notes that, contrary to Fordyce’s assertions on appeal, the district court in three words provided a reason for its denial of the motion: “You have counsel.” (R., p.70.)

Fordyce was not entitled to findings on the denial of his motion. Even if he were, his argument that the district court erred by not providing a reason for its order denying his motion for relief from judgment is not preserved. Fordyce did not file a Rule 52(b) motion with the district court, as required by the Idaho Rules of Civil Procedure. Fordyce, therefore, cannot assign as error the district court’s lack of findings. This Court should not address this unpreserved issue on appeal.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order denying Fordyce's motion for relief from judgment.

DATED this 26th day of July, 2012.



RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 26th day of July, 2012, served a true and correct copy of the attached BRIEF OF RESPONDENT by placing a copy in the United States mail, postage prepaid, addressed to:

Charles G. Fordyce
IDOC # 47040
ICC
PO Box 70010
Boise, ID 83707



RUSSELL J. SPENCER
Deputy Attorney General

RJS/pm

