8-16-2012

Fordyce v. State Appellant's Reply Brief Dckt. 39243

IN THE SUPREME COURT OF THE STATE OF IDAHO

CHARLES G. FORDYCE
Appellant

Vs.

STATE OF IDAHO
Respondent

No. 39243

REPLY BRIEF OF APPELLANT

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

HONORABLE MICHAEL R. MCLAUGHLIN
District Judge

Charles G. Fordyce # 47040
ICC P.O. Box 70010
Boise, Idaho 83707

Appellant Pro se

Russell J. Spencer
Deputy Attorney General
P.O. Box 83720
Boise, Idaho 83720-0010
Attorney for Respondent

1. RESPONDENTS HAVE FAILED TO ESTABLISH THAT THE DISTRICT COURT DID NOT ERROR BY NOT ADDRESSING OR GRANTING RELIEF ON THE APPELLANTS MOTION FOR RELIEF FROM JUDGEMENT.

The respondents have come forth with alternative reasonings why the appellant should not be granted relief on this appeal. The state argues that under IRCP Rule 60(b) (1) that appellant was not timely in presenting his Motion for Relief from Judgement; (2) that appellant has failed to establish error on the record before the court; (3) that appellants pro se motions for relief from judgement were inappropriate because he was represented by counsel; (4) that appellant had no right to relief from judgement from his 2004 conviction; (5) that appellant has not properly preserved the courts denial of his motions on appeal. In regard to the states reasoning , appellant disagrees and states that the arguements brought forth by the state should not be considered persuasive and have been brought forth as an attempt to mislead the court about the specific intent of this appeal which has been side-stepped and not been adequately addressed by them.

It is an issue of fact that appellant filed a petition for post conviction relief in November of 2009. The petition raised a single issue that trial counsel provided ineffective assistance for failing to file a direct appeal from the appellants November 2004 conviction for Aggravated Battery. The petition specifically through its arguement and prayer for relief requested that appellants direct appeal right be reinstated from his 2004 conviction. The court granted post conviction relief in December of 2010 by finding that appellant had raised a genuine issue of material fact concerning counsels neglect to file a notice of appeal and granted the appellant the right to file a belated appeal. A timely notice of appeal was filed in accordance with the courts order from his probation revocation of December, 2008. Justin Pintler was appointed from the SAPD's office to represent the appellant. At this time the discrepency in the Judges order surfaced. Accordingly the appellant based upon the relief he saught in his post conviction requested that appellate counsel pursue his appeal rights and issues from his 2004 conviction. Appellate counsel stated that he could only argue the appeal based on the probation revocation consistant with the courts December 2008 sentence inposed and refused to afford the appellate his request. Because of what appellant feels was a serious oversight by the court, the motion for relief from judgement was filed.

Based upon the record the court's order is flawed and not consistant with the relief saught. The sole purpose of petitioning the court through his petition for post conviction was to be given his direct appeal rights from his 2004 conviction, which the district court did not do.

The error in judgement by the court has impeded the judicial process of which the appellant has diligently tried to correct through his motion for relief from judgement. In regard to the states assertion that appellant has failed to establish error on the record before the court, based on the above and the courts failure to acknowledge or correct this matter that error has been shown. F/N 1.

In regard to the states assertion that the motions before the court were improper because the appellant had counsel does not hold true within the facts of this case. Under Idaho Law attorneys are appointed to defendants for a specific purpose. They are bound through the scope of representation and by appointment to not exceed that scope. Meaning if an attorney is appointed to represent a client on an appeal he may not represent a defendant on another non-related matter, such as a post sentencing challenge unless the court has specifically granted the attorney the right or if the defendant has personally retained the services of the attorney. In the instant case counsel was appointed to assist the appellant with his post conviction. Once the post conviction became final which in this case would be the day the court issed relief, counsel's representation was over leaving the appellant to pursue any further legal recources on his own. After appellate counsel refused to raise any issues from his 2004 conviction, appellant had no options other than to file for clarification and relief from judgement himself. Because appellant was not represented by court appointed counsel at this time his motions were properly presented pro se. The state has conceded in their reply that the court has not opined on whether the motions were denied based upon there pro se status as such the states asertion here has no bearing on this matter and therefore should be stricken from consideration by this court.

The state contends that appellant has not properly preserved the issue concerning the courts lack of accountability to opine why it was denying the appellants motions for clarification and relief from judgement is an attempt by the state to distort the facts of this case. Appellant asserts that because of the time factor involved with him becoming aware of the error by the court in its order, that after many months had elapsed waiting for the Court Record, then appointing of a attorney from the SAPD's office did the issue of appellate counsel refusing to raise any direct appeal issues fron the 2004 conviction did arise. Appellant did specifically through numerous letters (Transcripts) F/N1. Had the evidentiary hearing for post conviction been provided as requested for this appeal it would show conclusively that the hearing was held to find whether Tom Widman neglected to file an appeal from the 2004 conviction which he admitted at the hearing. The hearing was about the 2004 conviction not the 2008 conviction as the state now argues.

to Jason Pintler (See Attached Exhibits) made a diligent attempt to resolve his concerns. Appellate counsels refusal to raise the issues as requested promptly forced the appellant to petition the court for clarification and relief from the judgement. Any procedural concerns about the filing of the motions were not addressed by the court and should be considered waived and the matters tolled based upon the information becoming available and the diligence in which the appellant acted upon it.

Although the state filed a response seeking for the district court to dismiss the appellants petition for post conviction relief for varied reasons, including the the timeliness of the petition (CR.Pg.65-67) the court ignored all the states defenses and found favorably for the appellant and seemingly granted post conviction relief. By granting the appellant relief, the court has taken into consideration the states defenses and has denied them on their merit,especially the timeliness of the petition. There can be no mistake about the factual basis of this claim. The record shows conclusively that appellant was pursuing a claim against his prior trial counsel and that the state in its interest to impeach the appellant did in fact track down trial counsel Thomas Widman, who had been disbarred, to testify on the states behalf. There can be no doubt that the state was well aware of the issue in dispute in this litigation and this goes also for the court.

Appellants petition for post conviction relief clearly lays out his issue and the relief sought.(CR. pg.4-13) what is of singular importance here is that the appellant in no way shape or form has ever petitioned the district court for the right or need to appeal from the revocation of his probation imposed on December 18, 2008 . As such the district court has taken it upon itself to issue an order outside of its scope of authority that neither the appellant or the state has filed for any relief on. Based upon this the courts order seemingly has granted relief on a non-existant and immaterial matter and should be defined as an abuse of discretion. by the court.

CONCLUSION

F/N 2 Appellant has refrained from applying any applicable case authorities to support his position on the states arguements, because each allegation by the state has been addressed in general terms showing that the state is simply wrong in their assertions. This appeal need be decided on one specific cause of action and that is whether the district court has imposed an order for post conviction relief that is not consistant with the specific relief sought to file a belated direct appeal from the 2004 conviction and whether the court has abused its discretion for providing the appellant the right to appeal from his December of 2008 order of judgement that appellant has not petitioned the court for relief on.

F/N 2. APPELLANT ONCE AGAIN REITERATES THAT THE COURT THREW A MENTAL EVALUATION HAS FOUND APPELLANT UNABLE TO ACT AS HIS OWN COUNSEL YET, HE IS FORCED TO DO SO IN THESE PROCEEDINGS.

PRAYER FOR RELIEF

Appellant respectfully prays for this honorable courts order to remand this case back to the district court with instructions to grant the appellant the right to file a belated direct appeal from his 2004 conviction for Aggravated Battery.

Dated this 14 day of August, 2012.

Charles G. Fordyce
Appellant

Sworn and Subscribed this 14TH day August 2012
James D. Quinn, Notary
commission expires: 9/10/2013

JAMES D. QUINN
NOTARY PUBLIC
STATE OF IDAHO

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 14 day of August, 2012, I mailed a true and correct copy of this Appellants Reply Brief via the U.S. mail to:

Russell J. Spencer
Deputy Attorney General
P.O. Box 83720
Boise, Idaho 83720-0010

Charles G. Fordyce

AFFIDAVIT IN SUPPORT OF Following: 6-14-11

ATT: SENIOR ATTORNEY FOR IDAHO STATE PUBLIC DEFENDER APPEAL'S OFFICE
(MOLLY HUSKY)

HELLO I AM WRITING YOU IN REGUARDS TO ADDRESS SOME VERY SERIOUS CONCERNS I HAVE WITH THE ATTORNEY "JASON PINTLER" WHOM YOU ASSIGNED TO MY DIRECT APPEAL CASE # 38453.

FIRST OF ALL YOUR OFFICE HAS HAD MY TRANSCRIPTS SINCE AT LEAST 5-3-1 AND ONCE ASSIGNED TO MY CASE I SPOKE WITH MR. PINTLER AND EXSPRESSE MY CONCERNS TO HIM AND ASKED HIM TO LOOK INTO MY CASE FILE. THAT I WOULD CONTACT HIM AGAIN IN SEVERAL WEEKS. ALLOWING HIM TIME AND OPERTUNITY TO ATLEAST BECOME FAMILER WITH MY CASE.

UNFORTUNETLY HE DID NOT, I AM NOW FORCED TO WRITE YOU AND MOVE UP THE CHAIN OF COMAND.

I SPOKE TO MR. PINTLER ON 5-27-11, ON THAT DAY HE STAYTED THAT HE BELEIVED THAT SINCE THE CASE WAS FROM 2004 THAT HE WOULD ONLY BE ABLE TO APPEAL THE JUDGE IMPOSING MY SENTENCE AND DROPPING MY PROBATION THAT HE COULD NOT FILE AN ACTUAL DIRECT APPEAL OF MY ENTIRE CASE. I EXSPLAINED TO MR. PINTLER THAT WAS MOST DEFINETLY NOT THE SITUATIO THAT WE IN FACT ARE ABLE TO GO RETROACTIVE TO ALL THE RIGHTS AND OPTION THAT WERE AVAILABLE AT SENTENCING IN 2004.

I WOULD GIVE HIM SEVERAL WEEKS TO LOOK AT THE CASE AND SEE THAT I AM CORRECT ON THIS MATTER.

THAT IN FACT I HAD ALREADY PROVEN TO THE ORGINAL COURT MY ATTORNEY AT THE TIME WAS INEFFECTIVE ASSISTANCE OF COUNCEL AND THAT HE HAD WILLFULLY FAILED TO FILE MY DIRECT APPEAL AT THAT TIME.

I EXSPLAINED IF MR. PINTLER WERE TO LOOK AT THE END OF THE AMENDED ORDER REVOKING PROBATION AND EXECUTION OF JUDGEMENT OF CONVICTION DATE STAMPED 1-10-11. MR. PINTLER COULD CLEARLY READ IN HIGHLIGHTED BOLD PRINT JUDGE MICHAEL R. McLAUGHLIN WROTE "THIS AMENDED ORDER REVOKING PROBATION AND EXECUTION OF JUDGMENT OF CONVICTION IS BASED UPON THE COURTS RULING THAT THE DEFENDANT'S ATTORNEY WAS INEFFECTIVE AND FAILED TO FILE A TIMELY APPEAL." END QUOTE

HAD MR. PINTLER TAKEN THE TIME OR MADE THE EFFORT TO LOOK AT MY FILE AND VERAFY BY SIMPLY READING THIS, HE WOULD CLEARLY HAVE SEEN I AM CORRECT.

THE LAST TIME I SPOKE WITH MR. PINTLER WAS ON 6-13-11 WHICH WAS THE DAY BEFORE MY ORGINAL OPENING BRIEF WAS SET TO BE DUE BY THE COURT.

NOT ONLY DOES MR. PINTLER STILL BELEIVE HE IS ONLY GOING

TO AT LEAST SEE THE GENERAL DIRECTION THIS CASE MUST GO. IS TRUELY TERAFYING TO ME, AND UN EXCEPTABLE SINCE HE IS UN WILLING TO EVEN LOOK AT WHAT I HAVE REPEATEDLY EXSPLAINED TO HIM ABOUT THE DIRECT APPEAL RIGHTS I HAVE WON BACK. THAT I HAVE ALREADY PROVEN TO THE SENTENCING COURT MY COUNCEL WAS INEFFECTIVE DURING MY PROCEEDING.

I FURTHER SEE THIS AS A CONFLICT of INTEREST BETWEEN MR. PINTLER AND MY SELF AND I RESPECTFULLY REQUEST THAT I BE GIVEN NEW COUNCEL.

SINCERLY

CHUCK FORDYCE

DATED THIS 15 DAY of JUNE 2011

CHARLES G. FORDYCE

SUBSCRIBED AND SWORN TO BEFORE ME THIS 15TH DAY of JUNE 2011

NOTARY PUBLIC of IDAHO

COMMISSION EXPIRES: 9/10/13

STATE OF IDAHO

OFFICE OF THE STATE APPELLATE PUBLIC DEFENDER

June 23, 2011

Charles Glenn Fordyce
Inmate # 47040
ICC
PO Box 70010
Boise ID 83707

RE: Docket No. 38453

Dear Mr. Fordyce:

I have now reviewed your file and, unfortunately, the initial information that was relayed to me about your case is correct - the only issues that can be pursued in your appeal relate to the probation violation allegations and subsequent revocation of your probation. In other words, I cannot raise any issues regarding the motion to withdraw your guilty plea or any other issues stemming from your Judgment of Conviction and Order Suspending Sentence entered November 22, 2004.

In your post-conviction case, although untimely, you very clearly asserted that your trial counsel was ineffective in failing to file a timely Notice of Appeal from your original Judgment of Conviction and Order Suspending Sentence, entered November 22, 2004. However, the Order Granting Petitioner Relief Pursuant to the Uniform-Conviction Procedure Act, prepared by your post-conviction counsel and entered January 4, 2011, specifically states that the appropriate remedy is to re-enter the December 19, 2008, Order Revoking Probation and Execution of Judgment of Conviction. Pursuant to that order, the district court entered an Amended Order Revoking Probation and Execution of Judgment of Conviction on January 10, 2011. You timely appealed from that order.

I can certainly understand why you feel you should be able to appeal issues related to your original judgment of conviction based upon the specific

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ineffective assistance of counsel claim that you raised and the district court's apparent agreement with your position. However, the fact remains that your Notice of Appeal in this case is timely *only* from the Amended Order Revoking Probation and Execution of Judgment of Conviction. As that order essentially replaces the December 19, 2008, Order Revoking Probation and Execution of Judgment of Conviction, I can only raise issues that I would have been able to raise had a timely Notice of Appeal been filed from that probation revocation order. Because a timely appeal from that judgment would not allow me to raise issues relating back to your original judgment, I cannot raise issues stemming from your original judgment in this appeal.

Mr. Fordyce, I know how upsetting this information must be for you but please understand that there is nothing that I can do to change what occurred in your post-conviction case, or the resulting order filed in your criminal case. The bottom line under Idaho law is that you have only appealed from the order revoking your probation. You have told me in the past that you do not wish to raise any issues relating to your probation revocation proceedings; however, you made those statements when you believed that you would be able to raise issues relating to your original judgment. If you no longer wish to pursue this appeal, please let me know and we can discuss your option of voluntarily dismissing this appeal. Otherwise, I will continue to work on your appeal but I will only raise issues related to your probation revocation proceedings.

If you have any questions, please don't hesitate to call.

Sincerely,

JASON C. PINTLER
Deputy State Appellate Public Defender

JCP/ns