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Carle v. State Respondent's Brief Dckt. 40334

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

PHILLIP RAY LEWIS CARLE)
)
 Petitioner-Appellant,)
 vs.)
 STATE OF IDAHO,)
 Respondent.)

No. 40334
Shoshone Co. Case No.
CV-2005-42

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF SHOSHONE**

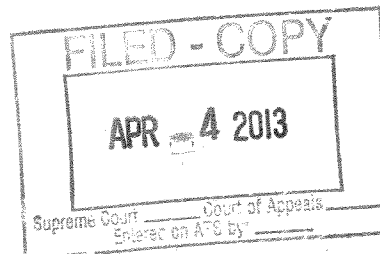
**HONORABLE GIBLER
District Judge**

**LAWRENCE G. WASDEN
Attorney General
State of Idaho**

**PHILLIP R.L. CARLE
IDOC #24859
I.C.I. - Orofino
C-1, B-10
381 W. Hospital Dr.
Orofino, ID 83544**

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

**JOHN C. McKINNEY
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534**



**ATTORNEYS FOR
RESPONDENT**

**PRO SE
PETITIONER-APPELLANT**

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STATEMENT OF THE CASE

Nature Of The Case

Carle appeals the summary dismissal of his second successive post-conviction relief petition following his convictions at trial for two counts of rape and one count of sexual penetration by use of a foreign object.

Statement Of Facts And Course Of Proceedings

In its unpublished decision in Carle's direct appeal, the Idaho Court of Appeals explained the facts and proceedings relative to his convictions and sentences as follows:

In October 2002, Carle was celebrating his birthday at a local bar. A woman from out of town stopped at the bar to visit with the bartender. The bartender introduced the woman to Carle and the two engaged in conversation. Both Carle and the victim were consuming alcohol.

Twice during the evening, the victim went to the bathroom because she was ill. On the second time, Carle went to check on the woman. After some discussion, Carle and the victim walked upstairs to a hotel room located above the bar. The events that occurred in the hotel room led to Carle being charged with four counts of rape and three counts of sexual penetration by use of a foreign object. Carle was also charged as a repeated sex offender based upon a previous rape conviction in which the victims were two seventeen-year-old females.

Carle filed a motion to dismiss three of the four counts of rape and two of the three counts of sexual penetration by use of a foreign object, asserting that the charges stemmed from one continuous incident and that the additional charges were multiplicitous. The district court denied Carle's motion, finding that each charge alleged a separate and distinct act. The case proceeded to trial.

At trial, the victim testified that, after she and Carle entered the hotel room, she got into the bed with her clothes on and passed out. The victim testified that she awoke to find Carle completely

undressed on top of her. According to the victim, she attempted to get away from Carle, but he repeatedly grabbed her by the hair or the neck and threatened to kill her.

The victim testified that Carle forced her to take off her clothes, digitally penetrated her vagina, and then forcefully engaged in intercourse. After some time, according to the victim, Carle stopped and masturbated because he had a problem maintaining an erection. The victim testified that Carle then penetrated her vagina with his tongue and forced her to engage in intercourse a second time. The victim explained that Carle continued to have problems maintaining an erection so he stopped. The victim told Carle that she was going to get sick and needed to use the bathroom. Carle took the victim to the bathroom and then dragged her back to the bed to again digitally penetrate her vagina. The victim testified that Carle then penetrated her vagina with his penis followed by inserting his penis into her mouth. According to the victim, Carle then passed out with his penis in her mouth and his body on top of her. The victim called the police on a cell phone.

Carle, on the other hand, testified that, after he and the victim went up to the hotel room, the victim indicated that she wanted something to drink so he went back downstairs. Carle stated that, upon his return to the room, the victim was wearing only her underwear and went into the bathroom. Carle testified that he then undressed, got into the bed, and passed out. Carle stated that the next thing he remembers is the police waking him up and arresting him.

A jury found Carle guilty of one count of vaginal rape and one count of oral rape. I.C. § 18-6101. The jury also found Carle guilty of one count of sexual penetration by use of a foreign object by digitally penetrating the victim's vagina. I.C. § 18-6608. The district court imposed unified sentences of life imprisonment, with minimum periods of confinement of twenty-five years, for each count. The district court ordered that the sentences be served concurrently.

State v. Carle, Docket No. 30233, 2004 Unpublished Opinion No. 661, pp.1-3

(Idaho App., October 26, 2004).

On appeal, Carle claimed that the district court erred by denying his pre-trial motion to dismiss and by giving him excessive sentences, and the Idaho Court of Appeals affirmed his convictions and sentences. Id.

The district court summarized the procedural history of Carle's post-conviction cases as follows:

Carle originally filed a *pro se* petition for post-conviction relief which was dismissed by the court. On appeal, the parties stipulated that the matter should be remanded and an attorney appointed to represent Carle. Attorney Lonny Sparks was appointed and represented Carle from November 2, 2006 to October 25, 2007 when Linda Payne substituted in as counsel. Trial on issues raised in petitioner's prior post-conviction petition was held on October 21, 2010. The court's Opinion and Order on that petition was filed on January 26, 2011. The court filed its Judgment on that same day. Petitioner appealed that judgment and order. Petitioner filed a "subsequent" petition for post-conviction relief on May 22, 2012.

(R., p.148.)

After Carle filed his "Subsequent Post-Conviction Relief Application" in the current case on May, 22, 2012 (R., pp.1-11), the state filed an Answer (R., pp.16-19) and a Motion for Summary Dismissal of Successive Petition for Post-Conviction Relief (R., pp.20-22). Carle filed a response to the state's motion for summary dismissal. (R., pp.23-145.) The district court filed a notice of intent to dismiss Carle's subsequent post-conviction petition (R., pp.146-153), and Carle filed a motion for a stay pending the outcome of the appeal of his second post-conviction proceeding (R., pp.154-156). The district court deemed Carle's motion to stay to be "a reply to the court's notice [of its] intention to dismiss," and entered an order and a judgment dismissing Carle's subsequent post-conviction petition because he filed it while his second post-conviction proceeding was still

pending appeal. (R., pp.157-160.) About one week later, the Idaho Supreme Court entered an Order Dismissing Appeal in Carle's second post-conviction proceeding due to his failure to file a brief (Supreme Court Docket No. 38510). (R., pp.161-162.) Carle filed a timely Notice of Appeal from the order dismissing his subsequent post-conviction petition. (R., pp.174-177.)

ISSUE

Carle's Appellant's Brief does not state any issues on appeal.

(See generally Appellant's Brief.)

The state phrases the issue as:

Does Carle's failure to comply with the appellate rules and to present argument and authority showing error by the district court preclude appellate consideration of his arguments?

ARGUMENT

Carle's Failure To Comply With The Appellate Rules And To Present Argument And Authority Showing Error By The District Court Precludes Appellate Consideration Of His Arguments

A. Introduction

Appellate review of Carle's arguments is precluded because: (1) he has failed to comply with several requirements under Rule 35 of the Idaho Appellate Rules regarding the content of his Appellant's Brief, and (2) he has not identified any error by the district court, much less presented any argument and authority supporting any claim of error.

B. Standards Of Appellate Review

Idaho Appellate Rule 35¹ requires that an appellant identify the specific issues to be considered on appeal and present argument with citations to the

¹ Rule 35(a), I.A.R., provides in relevant part:

Rule 35. Content and arrangement of briefs.

(a) Appellant's Brief. The brief of the appellant *shall contain the following* divisions under appropriate headings:

.....

(4) **Issues Presented on Appeal.** A list of the issues presented on appeal, expressed in terms and circumstances of the case but without unnecessary detail. The statement of the issues should be short and concise, and should not be repetitious. The issues shall fairly state the issues presented for review. The statement of issues presented will be deemed to include every subsidiary issue fairly comprised therein.

.....

parts of the transcript and record upon which the appellant relies. Vulk v. Haley, 112 Idaho 855, 736 P.2d 1309 (1987). I.A.R. 35 also requires an appellant's brief to include a Table of Contents, Statement of the Case, and a Conclusion. I.A.R. 35(a)(1), (a)(3), (a)(7).

Error is never presumed on appeal. The appellant must affirmatively demonstrate error on the record; the appellate court will not review the record in search of it. Woods v. Crouse, 101 Idaho 764, 620 P.2d 798 (1980); State v. Knight, 128 Idaho 862, 865, 920 P.2d 78, 81 (Ct. App. 1996). Where an appellant fails to comply with the Idaho Appellate Rules, the reviewing court will not consider his assignments of error on appeal. Jensen v. Doherty, 101 Idaho 910, 911, 623 P.2d 1287, 1288 (1981); Drake v. Craven, 105 Idaho 734, 736, 672 P.2d 1064, 1066 (Ct. App. 1983); Knight, 128 Idaho at 865, 920 P.2d at 81.

Pro se litigants are held to the same standards and rules of appellate procedure as are parties appealing through counsel. State v. Sima, 98 Idaho 643, 644, 570 P.2d 1333 (1977); see also Faretta v. California, 422 U.S. 806, 835, n.46 (1975) (“[t]he right of self-representation is not ... a license not to comply with the relevant rules of procedural and substantive law”).

(6) **Argument.** The argument shall contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefor, with citations to the authorities, statutes and parts of the transcript and record relied upon.

(Italics added.)

C. Carle's Failure To Comply With The Idaho Appellate Rules Precludes Appellate Review Of His Contentions

Instead of complying with I.A.R. 35 in preparing his Appellant's Brief, Carle appears to have merely made a few alterations to his third post-conviction petition and re-labeled it "Opening Brief of Appellant."² (Cf. Appellant's Brief with R., pp.1-12.) In doing so, Carle failed to provide a Table of Contents, Statement of the Case, Issues Presented on Appeal, Argument, and Conclusion, as required by I.A.R. 35. (See generally Appellant's Brief.) Carle's failure to comply with the appellate rules, and most importantly, to even state what "issues" based on the district court's ruling he is presenting, precludes appellate review of the contentions raised in his Appellant's Brief. The state cannot respond to arguments and issues never raised by Carle, nor can it speculate about what error(s) Carle believes the district court made in summarily dismissing his successive post-conviction petition. On that basis, this Court should refuse to consider the arguments contained in Carle's brief. Kugler v. Drown, 119 Idaho 687, 691, 809 P.2d 1166, 1170 (Ct. App. 1991).

² Apart from the cover, the only discernible differences between Carle's Appellant's Brief and his third post-conviction petition are: (1) the Appellant's Brief contains a section entitled "Referenced Case Law and Usage," (2) the first sentence of the body of the Appellant's Brief states Carle is "seeking appointment of counsel and a new trial for the reasons and upon the grounds as set forth herein[.]" (3) the Appellant's Brief omits sections J, K, and L of his petition, and (4) there are additional citations to the record and authorities throughout the Appellant's Brief. (Cf. Appellant's Brief with R., pp.1-12.)

D. Because Carle Has Failed To Present Argument And/Or Authority To Support An Issue On Appeal, This Court Is Precluded From Reviewing His Contentions On Appeal

Carle presents no identifiable issues on appeal; he merely restates the allegations in his third post-conviction relief petition. Because Carle presents no appellate issues challenging the district court's grounds for dismissal, he has necessarily failed to present argument, authority, or both, in regard to any such issues, and the contentions raised in his Appellant's Brief should not be considered on appeal.

In State v. Zichko, 129 Idaho 259, 923 P.2d 966 (1996), the Idaho Supreme Court held:

When issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered. Earlier formulations of this rule stated that an issue was waived if it was not supported with argument and authority. A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking. Zichko supported this assignment of error with argument but no authority. Consequently, he waived this issue on appeal.

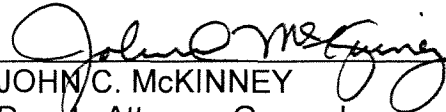
Zichko, 129 Idaho at 263, 923 P.2d at 970 (citations omitted); see I.A.R. 35; see also State v. Trevino, 132 Idaho 888, 895-896, 980 P.2d 552, 559-560 (1999) (forensic pathologist properly permitted to testify as expert by comparing injuries that appeared in photos of defendant's hands to physical characteristics of the murder weapon.)

Inasmuch as Carle has failed to present any appellate issue to this Court, he has also failed to present argument and authority to support an appellate issue, and, pursuant to Zichko, this Court should not consider the contentions in his Appellant's Brief.

CONCLUSION

The state respectfully requests this Court affirm the district court's order summarily dismissing Carle's successive post-conviction petition.

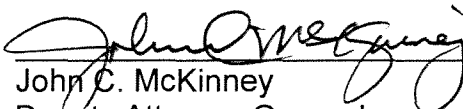
DATED this 4th day of April, 2013.


JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of April, 2013, 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:

PHILLIP R.L. CARLE #24859
I.C.I. Orofino
381 West Hospital Dr.
Orofino, Idaho 83544


John C. McKinney
Deputy Attorney General

JCM/pm