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Elkins v. State Appellant's Brief Dckt. 41211

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IN THE SUPREME COURT OF THE STATE OF IDAHO

JAMES H. ELKINS,)	
)	NO. 41211
Petitioner-Appellant,)	
)	ADA COUNTY NO. CV 2012-9145
v.)	
)	
STATE OF IDAHO,)	APPELLANT'S BRIEF
)	
Respondent.)	

COPY

BRIEF OF APPELLANT

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

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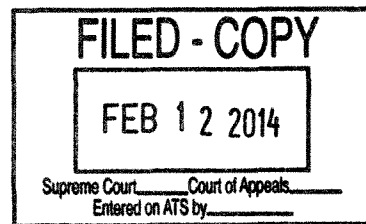


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STATEMENT OF THE CASE

Nature of the Case

James H. Elkins appeals from the district court's order summarily dismissing his petition for post-conviction relief. He asserts that the district court lacked authority to dismiss his petition because it failed to rule on the simultaneously filed motion to disqualify the district court judge. Because the district court's orders are void and have no effect, this matter should be remanded to the district court for further proceedings.

Statement of the Facts and Course of Proceedings

Mr. Elkins pleaded guilty to lewd conduct with a minor under the age of sixteen and the district court imposed a unified sentence of life, with fourteen years fixed. (R., pp.49-50.) He did not appeal. (R., p.5.) On May 21, 2012, Mr. Elkins filed a petition for post-conviction relief. (R., p.4.) He alleged ineffective assistance of counsel, misrepresentation of his attorney, that he was coerced into pleading, and "false claims." (R., p.5.) Specifically, Mr. Elkins stated that his attorney failed to obtain records from the Boise Police Department concerning other allegations, failed to procure affidavits or letters from his family members and friends, and informed him that he would get a lesser sentence. (R., p.6.)

That same day, Mr. Elkins moved, pursuant to Idaho Criminal Rule 25(b)(4), to disqualify the district court judge for bias and because the judge used "erroneous information" during sentencing. (R., pp.15-16.) No action was taken by the district court on this motion. (*See generally*, R.) The court appointed counsel. (R., p.24.)

The State then moved for summary dismissal. (R., p.33.) The State asserted that Mr. Elkins' claims were bare and conclusory and that there was no allegation of prejudice with regard to the first two claims. (R., p.43.) With regard to the claim that counsel informed Mr. Elkins that he would receive a lesser sentence, the State asserted that Mr. Elkins was aware of the terms of the plea agreement and there was no evidence that he was coerced. (R., p.44.)

Subsequently, Mr. Elkins filed an amended petition. (R., p.49.) This petition alleged that counsel was ineffective for:

- 1) Failing to fully investigate the case and the factual allegations that were made against Mr. Elkins;
- 2) Failing to adequately communicate with Mr. Elkins;
- 3) Failing to adequately explain the procedure of the case and the potential consequences of certain decisions to Mr. Elkins;
- 4) Failing to object to errors in the presentence investigation and psychosexual evaluation;
- 5) Failing to clarify the record when various misstatements were made by the prosecution and the Court at various times in the proceedings; and
- 6) Failing to adequately explain the full details of the plea agreement.

(R., pp.50-51.) Mr. Elkins also asserted that the district court erred by accepting various non-factual allegations and statements and adopting those in the sentence. (R., p.51.) Mr. Elkins attached an affidavit detailing his claims. (R., p.54.)

The State again moved for summary dismissal. (R., p.71.) The district court granted the motion, holding that the petition and affidavit failed to allege any conduct that constituted deficient performance or prejudice, with regard to the entry of the guilty plea or the imposition of sentence. (R., p.149.) With regard to the court's reliance on

erroneous information, the court noted that this claim should have been brought on direct appeal, and that at the sentencing hearing, the court merely found that it believed the victim more than Mr. Elkins. (R., p.150.) The court also found no prejudice because it would have imposed the same sentence even if it believed Mr. Elkins's account. (R., p.151.)

Mr. Elkins appealed. (R., p.162.) He asserts that the district court erred by failing to rule on his motion to disqualify the judge.

ISSUE

Is the district court's dismissal of Mr. Elkins's successive petition for post-conviction relief void and of no effect because the district court failed to rule on the motion to disqualify the district court judge, filed simultaneously with the petition?

ARGUMENT

The District Court's Dismissal Of Mr. Elkins's Petition For Post-Conviction Relief Is Void And Of No Effect Because The District Court Failed To Rule On The Motion To Disqualify The District Court Judge, Filed Simultaneously With The Petition

A. Introduction

The district court lacked authority to dismiss Mr. Elkins's petition for post-conviction relief because it failed to rule on the simultaneously filed motion to disqualify the district court judge. The district court's orders are void and have no effect and, therefore, this matter should be remanded to the district court for further proceedings.

B. All Orders Signed By The District Court Judge Who Was The Subject Of The Motion To Disqualify Are Void And Have No Effect

Mr. Elkins filed a motion to disqualify the district court judge for cause simultaneously with his petition for post-conviction relief. (R., pp.15-16.) He asserts that the district court judge was without authority to rule on any motions until it ruled on the motion for disqualification. Mr. Elkins therefore submits that all orders, including the order dismissing his successive post-conviction petition, must be vacated and his case remanded for further proceedings.

Due process requires an impartial trial judge. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927); *State v. Lankford*, 116 Idaho 860 (1989); *Pizzuto v. State*, 134, Idaho 793 (2000). Even the most conscientious judge is susceptible to the dangers of bias. As noted by the U.S. Supreme Court, "the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." *Tumey*, 273 U.S. at 532.

Generally, the Idaho Rules of Civil Procedure govern post-conviction actions because the relief sought is civil in nature. *Lamm v. State*, 143 Idaho 763, 764 (Ct. App. 2006). Unlike a criminal case, a post-conviction petitioner may only remove a judge from hearing the case for cause. Compare I.C.R. 25 with I.R.C.P. 40(d). Idaho Rule of Civil Procedure 40(d)(2) sets forth the grounds and requirements for an action to disqualify a judge for cause. I.R.C.P. 40(d)(2). The rule authorizes any party to disqualify any judge for cause from presiding over the matter if one of the following conditions exists:

1. That the judge or magistrate is a party, or is interested, in the action or proceeding.
2. That the judge or magistrate is related to either party by consanguinity or affinity within the third degree, computed according to the rules of law.
3. That the judge or magistrate has been attorney or counsel for any party in the action or proceeding.
4. That the judge or magistrate is biased or prejudiced for or against any party or the case in the action.

I.R.C.P. 40(d)(2).

In addition to these grounds, the Idaho Supreme Court has suggested, in *dicta*, that a district court should disqualify itself if it appears that the court will be called to testify as a witness during post-conviction proceedings. See *Lankford v. State*, 127 Idaho 100, 101 (1995). Idaho courts have ruled that the decision whether to grant the motion to disqualify is left to the discretion of the trial judge. *Sivak v. State*, 112 Idaho 197 (1987).

Here, Mr. Elkins claimed that the district court judge used erroneous information when it sentenced him, and that the court showed “clear bias and prejudice in its

decision to sentence” him. (R., pp.15-16.) “Upon the filing of a motion for disqualification, the presiding judge shall be without authority to act further in such action except to grant or deny such motion for disqualification.” I.R.C.P. 40(d)(5). Although I.R.C.P. 40(d)(2)(B) suggests that the district court should conduct a hearing before ruling on the motion, our appellate courts have determined that an evidentiary hearing on the motion is not required. *State v. Pratt*, 128 Idaho 207, 211 (1996); *Lamm v. State*, 143 Idaho 763, 766 (Ct. App. 2006). Whether or not the presiding judge conducts a hearing on the motion, the judge shall be without any authority to act except to rule on the motion to disqualify. *State v. Beard*, 135 Idaho 641, 644 (Ct. App. 2001). The Idaho Supreme Court has held that until the court rules on the motion for disqualification, the court is without authority to act and, therefore, any orders issued prior to ruling on a motion for disqualification are void and have no effect. *Lewiston Lime Co. v. Barney*, 87 Idaho 462, 467 (1964).

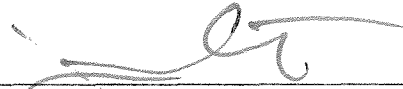
Mr. Elkins acknowledges that he filed his motion pursuant to Idaho Criminal Rule 25. (R., p.15.) However, substance, not form, governs. See, e.g., *Dionne v. State*, 93 Idaho 235, 237 (1969). Mr. Elkins clearly alleged bias, which is a ground provided in I.R.C.P. 40(d)(2). In substance, this was a proper motion under Civil Rule 40(d)(2), and the district court was required to rule on it before ruling on anything else.

Here, the district court failed to take any action on Mr. Elkins’s motion to disqualify the judge for cause. All subsequent orders issued by the district court are void and without effect because the district court judge failed to rule on the motion to disqualify.

CONCLUSION

Mr. Elkins requests that the district court's order summarily dismissing his petition be reversed and his case remanded for further proceedings.

DATED this 12th day of February, 2014.



JUSTIN M. CURTIS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 12th day of February, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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