

5-8-2014

## Elkins v. State Respondent's Brief Dckt. 41211

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IN THE SUPREME COURT OF THE STATE OF IDAHO

**COPY**

JAMES H. ELKINS,	)	
	)	No. 41211
Petitioner-Appellant,	)	
	)	Ada Co. Case No.
vs.	)	CV-2012-9145
	)	
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

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District Judge

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MAY - 8 2014

Supreme Court \_\_\_\_\_ Court of Appeals \_\_\_\_\_  
Entered on ATS by \_\_\_\_\_

ATTORNEY FOR  
PETITIONER-APPELLANT

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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.

### Statement Of Facts And Course Of The Proceedings

The state charged Elkins with rape. (R., p.140.) Pursuant to plea negotiations wherein the state agreed to recommend a sentence not to exceed 10 years fixed followed by 15 years indeterminate and not to file additional charges against him, Elkins pled guilty to an amended charge of lewd conduct with a minor under 16. (Id.; see generally 4/21/11 Tr.) The court sentenced Elkins to life with 14 years fixed. (R., p.140; R., p.90<sup>1</sup> (at p.34, Ls.9-18).) Elkins filed a Rule 35 motion for reduction of his sentence which was denied by the court's written order. (R., p.140.)

On May 21, 2012, Elkins filed a *pro se* petition and affidavit for post-conviction relief, a motion and affidavit in support for appointment of counsel, and a motion to disqualify the district judge. (R., pp.4-17.) The district court appointed counsel nine days later, on May 30, 2012, to represent Elkins in his post-conviction proceedings. (R., p.24.) Through counsel, Elkins filed an amended petition for post-conviction relief and an addendum to the amended petition. (R., pp.49-66, 104-111.)

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<sup>1</sup> The transcript of the June 15, 2011 sentencing hearing is included in the clerk's record on appeal from pages 81-99.

Elkins later filed a motion for conflict counsel for which the court conducted a hearing. (R., p.130-135; see generally 5/23/13 Tr.) The court took the issue under advisement following argument by the parties and ultimately issued a written order denying Elkins' motion for conflict counsel as well as summarily dismissing his petition for post-conviction relief. (R., pp.139-152.) Elkins timely appeals. (R., pp.153, 162-164.)

## ISSUE

Elkins states the issue on appeal as:

Is the district court's dismissal of Mr. Elkins's successive<sup>2</sup> 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?

(Appellant's brief, p. 4.)

The state rephrases the issue as:

Has Elkins failed to establish the district court erred in failing to rule on the motion to disqualify that Elkins filed *pro se* just prior to being appointed counsel and which counsel did not pursue?

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<sup>2</sup> Although Elkins' brief on appeal refers to a "successive" petition for post-conviction relief, it is clear from the record that the *pro se* petition for post-conviction relief filed on May 21, 2012 was the first petition file filed in this case.

## ARGUMENT

### Elkins Has Failed To Establish The District Court Erred In Failing To Rule On His Pro Se Motion To Disqualify Filed Immediately Before He Was Appointed Counsel

#### A. Introduction

Elkins asserts on appeal that the district court was without authority to summarily dismiss his petition for post-conviction relief because “it failed to rule on the simultaneously filed motion to disqualify the district judge.” (Appellant’s brief, p.1.)

#### B. The District Court Did Not Err In Failing To Rule On Elkins’ Pro Se Motion To Disqualify

Elkins simultaneously filed three *pro se* documents: a petition for post-conviction relief, a request for the appointment of counsel, and a document purported to be a motion to disqualify the district court judge. (R., pp.4-26.) The district court granted Elkins’ request for counsel and appointed counsel to represent Elkins in his post-conviction matter nine days after Elkins’ made the request. (R., pp.24-26.) Elkins’ “MOTION TO DIQUALIFY DISTRICT JUDGE” cited Idaho Criminal Rule 25 (6)(4) and sought the court’s disqualification based on the court’s use of “erroneaus [sic] information in the process of sentencing” Elkins as well as showing “clear bias and prejudice in its decision to sentence” him. (R., p.16 (original capitalization modified).) The court never ruled on the motion.

On appeal, Elkins claims “[t]he 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.” (Appellant’s brief, p.5.) The district court, Elkins asserts on appeal, was “without authority to rule on any motions until it ruled on the motion for disqualification” and as such, “all orders, including the order dismissing his successive post-conviction petition, must be vacated and his case remanded for further proceedings.” (Id.) Elkins’ claim fails because Elkins abandoned the motion and because the court was not required to rule on the merits of a facially inadequate motion.

Elkins is correct in the proposition that once a motion to disqualify is filed, the court must dispose of the motion before proceeding further. Specifically, I.R.C.P. 40(d)(5) states: “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.” The Idaho Supreme Court has, therefore, “held that all orders following the filing of a motion to disqualify . . . , but prior to a ruling on that motion, ‘were improper, void and of no effect.’” Pizzuto v. State, 127 Idaho 469, 903 P.2d 58 (1995) (quoting Lewiston Lime Co. v. Barney, 87 Idaho 462, 467, 394 P.2d 323, 326 (1964)). This principle notwithstanding, Elkins has failed to show error in relation to the district court’s failure to rule on Elkins’ *pro se* motion to disqualify.

First, Elkins abandoned the motion. Failure to pursue a motion may result in its abandonment. State v. Wolfe, \_\_\_ Idaho \_\_\_, \_\_\_ P.3d \_\_\_, 2013 WL 6014054, p.7 (Idaho App. 2013) (failure to seek or obtain ruling may result in abandonment). Here, counsel’s failure to pursue the *pro se* motion effected its abandonment.

Upon appointment of post-conviction counsel, Elkins' attorney filed a motion to stay the proceedings and leave to amend the petition for post-conviction relief (R., pp.47), an amended petition for post-conviction relief (R., pp.49-70), a motion to stay the proceedings to supplement the petition (R., pp.101-102), and an addendum to the petition with accompanying affidavits (R., pp.104-117). Counsel did not file an amended motion to correct the procedural errors in the *pro se* motion to disqualify, did not schedule a hearing on the *pro se* motion to disqualify, or make any effort to have this motion addressed by the court. A hearing was scheduled and Elkins was transported to argue for the appointment of conflict counsel. (R., pp.136-138.) There was no mention at this hearing by either Elkins or his court-appointed counsel of Elkins' previously filed motion to disqualify the district court. (See generally, 5/23/13Tr.) The record in this case shows counsel had no intention to pursue the motion, and thus it was abandoned.

Additionally, the motion was not properly before the court for decision on the merits. Rule 40(d)(2)(B), I.R.C.P. states:

(B) **Motion for Disqualification.** Any such disqualification for cause shall be made by a motion to disqualify accompanied by any affidavit of the party or the party's attorney stating distinctly the grounds upon which disqualification is based and the facts relied upon in support of the motion. Such motion for disqualification for cause may be made at any time. The presiding judge or magistrate sought to be disqualified shall grant or deny the motion for disqualification upon notice and hearing in the manner prescribed by these rules for motions.

I.R.C.P. 40(d)(2)(B) (bold original, underlined added).

The record shows Elkins never filed an affidavit “distinctly stating the grounds upon which disqualification” was based. In fact, Elkins’ motion for disqualification was actually filed pursuant to the entirely wrong rule, Idaho Criminal Rule 25. Elkins argues on appeal this was clearly a motion to disqualify the district court based on bias and prejudice and the actual rule cited is unimportant because “substance, not form, governs.” (Appellant’s brief, p.7 (citing Dionne v. State, 93 Idaho 235, 237, 459 P.2d 1017, 1019 (1969) (“It is immaterial whether a petition or application is labeled Habeas Corpus or Post Conviction proceeding. Substance not form governs.”))).) The *pro se* motion is not merely mislabeled, however. The Rule clearly requires that a motion be accompanied by evidence supporting it, in the form of an affidavit. The court had no duty to rule on the merits until those merits were supported by an affidavit. See Bradbury v. Idaho Judicial Council, 149 Idaho 107, 112-113, 233 P.3d 38, 43-44 (2009) (treating a motion to disqualify for cause as a motion to disqualify without cause because not accompanied by affidavits).

Additionally, Elkins never filed a notice of hearing on the motion to disqualify “in the manner prescribed by these rules for motions.” Rule 7(b)(3)(A), I.R.C.P. provides that a “written motion, . . . , **and** notice of the hearing thereon **shall** be filed with the court ....” (Emphasis added.) Elkins’ motion to disqualify was signed and date-stamped May 21, 2012. (R., pp.15-17.) On the back page of the motion, Elkins’ “prayer for relief” requested the court’s disqualification as well as a hearing on the motion on “APRIL 14<sup>th</sup> 2012 @ 9:00 AM, OR TELEPHONE HEARING AT I.S.C.I.” (R., p.17.) This time requested was over

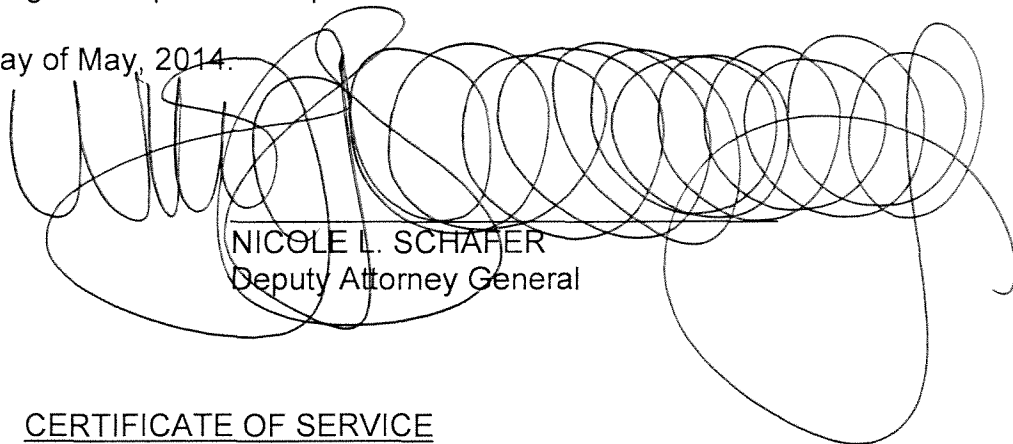
one month **prior** to the signing and filing of Elkins' actual motion. Because Elkins never sought a meaningful hearing on his *pro se* motion to disqualify, he should be precluded from claiming on appeal that the district court erred in failing to rule on this motion. See Pizzuto v. State, 146 Idaho 720, 726, 202 P.3d 642, 648 (2008) (noting counsel filed a motion to amend the motion for disqualification but "did not notice that motion for hearing, and the district court did not rule upon it" and concluding, "[r]egardless, the proposed amendment [to the motion to disqualify] did not state a ground for disqualification"). This is particularly true in light of the fact that Elkins was subsequently represented by counsel and neither counsel nor Elkins pursued the motion despite having the opportunity to do so.

Although a district court must rule on a properly filed motion to disqualify before issuing any further orders or rulings in a case, here there was no properly filed motion. Because the district court could and should have denied the motion on its procedural inadequacies, Elkins has failed to meet his burden of showing error in lack of a ruling on the merits of Elkins' *pro se* motion to disqualify. Because Elkins has failed to establish any error by the district court, he is not entitled to any relief.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order summarily dismissing Elkins' petition for post-conviction relief.

DATED this 8th day of May, 2014.



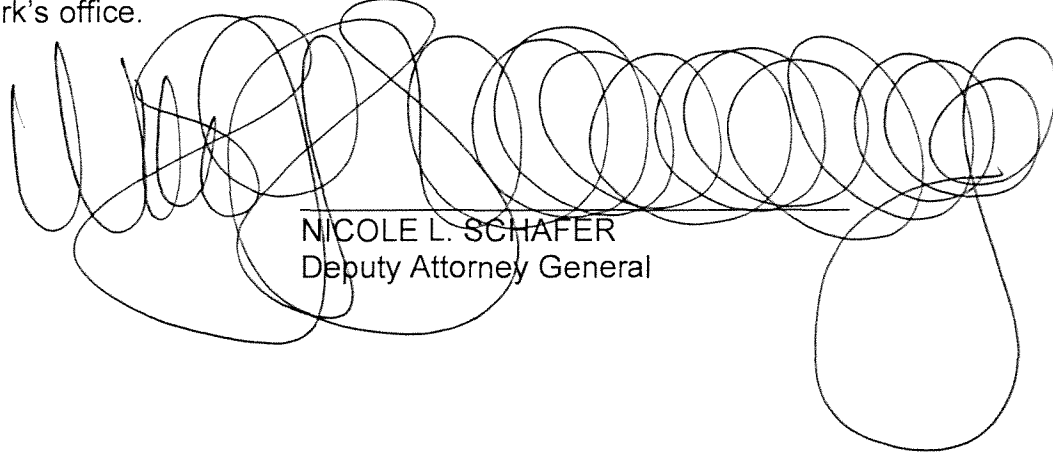
NICOLE L. SCHAFER  
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 8th day of May, 2014, served a true and correct copy of the attached RESPONDENT'S BRIEF by causing a copy addressed to:

JUSTIN M. CURTIS  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in the State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



NICOLE L. SCHAFER  
Deputy Attorney General

NLS/pm