

7-10-2014

# Elkins v. State Appellant's Reply Brief Dckt. 41211

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IN THE SUPREME COURT OF THE STATE OF IDAHO

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

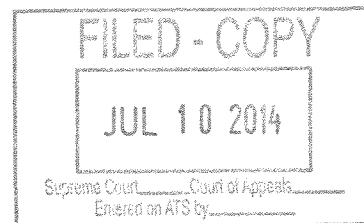
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## STATEMENT OF THE CASE

### 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

The statement of the facts and course of proceedings were previously articulated in Mr. Elkins's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

## ISSUE

Is the district court's dismissal of Mr. Elkins's 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

The State acknowledges that Mr. Elkins, "is correct in the proposition that once a motion to disqualify is filed, the court must dispose of the motion before proceeding further." (Respondent's Brief, p.5.) Nevertheless, the State asserts that Mr. Elkins has failed to show error. (Respondent's Brief, p.5.) The State is incorrect.

The State asserts, citing to *State v. Wolfe*, 2013 WL 6014054 (Ct. App. 2013), that Mr. Elkins abandoned his motion. This argument fails for several reasons. First, the State fails to mention that the Idaho Supreme Court has granted review in *Wolfe*, and thus the Court of Appeals' Opinion has no effect.

Second, this type of motion cannot be abandoned. As Mr. Elkins argued in the Appellant's Brief, and as the State concedes is correct, "once a motion to disqualify is filed the court must dispose of the motion before proceeding further." (Respondent's Brief, p.5.) Thus, regardless of what action the defendant takes (other than perhaps withdrawing the motion), the district court is without authority to entertain *anything* in the

case. The Idaho Supreme Court has held that any orders following the filing of a motion to disqualify are “void.” *Pizzuto v. State*, 127 Idaho 469 (1995). This language indicates that the district court lacks jurisdiction to rule on anything other than motion. *See, e.g., State v. Peterson*, 148 Idaho 610, 612-13 (Ct. App. 2010) (“An order entered without subject matter jurisdiction is void.”) Furthermore, jurisdictional claims cannot be abandoned. *See, e.g., State v. Urrabazo*, 150 Idaho 158, 163 (2010) (abrogated on other grounds by *Verska v. Saint Alphonsus Reg’l Med. Ctr.*, 151 Idaho 889 (2011)) (“subject matter jurisdiction can never be waived or consented to . . .”). A waiver is a voluntary relinquishment or abandonment of a right or privilege. *See, e.g., State v. Lopez*, 144 Idaho 349, 351 (Ct. App. 2007.) Because jurisdictional claims cannot be waived, they cannot be abandoned.

Next, the State asserts that Mr. Elkins did not file an affidavit distinctly stating the grounds upon which disqualification was based. (Respondent's Brief, p.7.) First, the State overlooks the fact that Mr. Elkins *did* file an affidavit in support of his petition on the same day that he filed the motion to disqualify. (R., p.9.) This affidavit alleges that the district court judge made “false claims” against him in the criminal case. (R., p.9.) Further, the motion itself elaborated on the claim, stating that the district court judge used erroneous information at sentencing and showed bias and prejudice. (R., pp.15-16.) Thus, the grounds for disqualification are also set forth in the motion. Further, it is motion itself, not affidavits, that triggers the district court’s responsibility to act. I.C.R.P. 40(d)(5).

The State then relies on *Bradbury v. Idaho Judicial Council*, 149 Idaho 107 (2009), for the proposition that the district court had no duty to rule on the motion until it



was supported by an affidavit. (Respondent's Brief, p.7.) In *Bradbury*, the plaintiff, following oral argument at the Idaho Supreme Court, filed motions to disqualify several of the Justices. *Id.* at 112-13. The Court noted, during its analysis of the issue, that the motions were more akin to motions to disqualify without cause because the motions were not accompanied by affidavits. *Id.* at 112-13. Nothing in the opinion suggests, however, that it is proper to disregard the motion; indeed, the Court specifically addressed the motions and denied them on their merits. *Id.* at 113. Review of the motion by the judge that the party is seeking to disqualify is necessary: "Whether it is necessary for a judicial officer to disqualify himself in a given case is left to the sound discretion of the judicial officer *himself*." *Id.* at 113 (emphasis added) (citing *Sivak v. State*, 112 Idaho 197, 206, 731 P.2d 192, 201 (1986)). Nothing in *Bradbury* suggests that a district court can ignore a motion for disqualification for cause and then hope that a subsequent appellate court finds that the motion lacks merit.

Finally, citing to I.R.C.P. 7(b)(3)(A), the State asserts that the motion failed because Mr. Elkins did not file a proper notice of hearing. (Respondent's Brief, pp.7-8.) Again, it is the motion that deprives the district court of the authority to act on any further matters, not a notice of hearing. I.R.C.P. 40(d)(5). The State cites *Pizzuto v. State*, 146 Idaho 720 (2008), for the proposition that a notice of hearing is required for the court to rule on the motion. In *Pizzuto*, the petitioner filed a motion to disqualify for cause and the district court denied the motion; the motion did not go ignored. *Id.* at 726. The motion upon which the district court did not rule was a motion to amend, which did not state a ground for disqualification. *Id.* The Rules do not require the district court to rule

on motions to amend; they require the court to rule on the motion to disqualify, which the district court in *Pizzuto* did.

Mr. Elkins notes that he did ask for a hearing, he just identified an impossible date on which to hold it. (R., p.17.) While this may have given the district court the authority to deny the motion without a hearing, see I.R.C.P. 7(b)(3)(D); *Lamm v. State*, 143 Idaho 634, 637 (Ct. App. 2006), the district court was still required to rule on the motion before proceeding further.

#### 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 10<sup>th</sup> day of July, 2014.

  
\_\_\_\_\_  
JUSTIN M. CURTIS  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 10<sup>th</sup> day of July, 2014, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

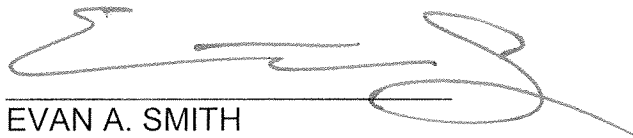
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