

8-28-2014

Grist v. State Appellant's Reply Brief Dckt. 41409

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/not_reported

Recommended Citation

"Grist v. State Appellant's Reply Brief Dckt. 41409" (2014). *Not Reported*. 1632.
https://digitalcommons.law.uidaho.edu/not_reported/1632

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIdaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

HAROLD S. GRIST,)	
)	
Petitioner-Appellant,)	S.Ct. No. 41409-2013
)	
vs.)	D.Ct. No. CV-2012-1249
)	(Nez Perce County)
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

REPLY BRIEF OF APPELLANT

Appeal from the District Court of the Second
Judicial District of the State of Idaho
In and For the County of Nez Perce

HONORABLE CARL B. KERRICK
Presiding Judge

Deborah Whipple
NEVIN, BENJAMIN, McKAY & BARTLETT
303 West Bannock
P.O. Box 2772
Boise, ID 83701
(208) 343-1000

Attorneys for Appellant

IDAHO ATTORNEY GENERAL
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010

(208) 334-2400

Attorneys for Respondent

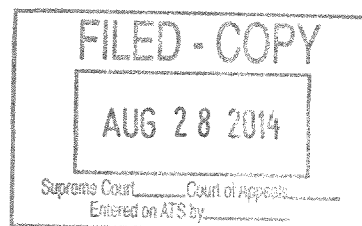


TABLE OF CONTENTS

I. Table of Authorities ii

II. Argument in Reply 1

 A. The District Court Erred in Summarily Dismissing the Due Process Claim
 Without Proper Notice 1

 B. The District Court Erred in Summarily Dismissing Mr. Grist’s Claim of
 Ineffective Assistance of Counsel in Failing to File a Meritable Rule 35 Motion
 Without Proper Notice 4

 C. The District Court Erred in Failing to Address Mr. Grist’s Stand Alone Fifth
 Amendment Claim Relating to the Improper Use of the PSE at the Second
 Sentencing 4

III. Conclusion 9

I. TABLE OF AUTHORITIES

FEDERAL CASES

<i>Crawford v. Washington</i> , 541 U.S. 36, 124 S. Ct. 1354 (2004)	3
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052 (1984)	8

STATE CASES

<i>Buss v. State</i> , 147 Idaho 514, 211 P.3d 123 (Ct. App. 2009)	3, 4
<i>Campbell v. State</i> , 130 Idaho 546, 944 P.2d 143 (Ct. App. 1997)	8
<i>DeRushé v. State</i> , 146 Idaho 599, 200 P.3d 148 (2008)	5, 7, 8
<i>Donndelinger v. Donndelinger</i> , 107 Idaho 431, 690 P.2d 366 (Ct. App. 1984)	6
<i>Estrada v. State</i> , 143 Idaho 558, 149 P.3d 833 (2006)	5, 8
<i>Kelly v. State</i> , 149 Idaho 517, 523, 236 P.3d 1277, 1283 (2010)	1, 2, 3, 4
<i>Morris v. Frandsen</i> , 101 Idaho 778, 621 P.2d 394 (1981)	6
<i>Owen v. Boydston</i> , 102 Idaho 31, 624 P.2d 413 (1981)	6
<i>Pope v. Intermountain Gas Co.</i> , 103 Idaho 217, 646 P.2d 988 (1982)	5
<i>Schneider v. Curry</i> , 106 Idaho 264, 678 P.2d 56 (Ct. App. 1984)	5
<i>Spencer v. Idaho First National Bank</i> , 106 Idaho 316, 678 P.2d 108 (Ct. App. 1984)	6
<i>State v. Payne</i> , 146 Idaho 548, 199 P.3d 123 (2008)	8
<i>Stecklein v. Montgomery</i> , 98 Idaho 671, 570 P.2d 1359 (1977)	6

STATE STATUTES

Idaho Code § 19-4901	1, 2, 3
----------------------------	---------

II. ARGUMENT IN REPLY

A. The District Court Erred in Summarily Dismissing the Due Process Claim Without Proper Notice

Mr. Grist has argued that the district court erred in dismissing without proper notice his due process claim based upon the presence of Mr. Hendrickson on the jury. Appellant's Opening Brief pages 6-8. In particular, the court erred in dismissing the claim on the basis that it could have been raised on direct appeal when the state did not identify this as a basis for summary dismissal in its motion and brief. *Id.*

The state agrees that “[W]here a trial court dismisses a claim based upon grounds other than those offered by the State’s motion for summary dismissal, and accompanying memoranda—the defendant seeking post-conviction relief must be provided with a 20-day notice period.” *Kelly v. State*, 149 Idaho 517, 523, 236 P.3d 1277, 1283 (2010).” Respondent’s Brief page 7. However, the state maintains that Mr. Grist did receive proper notice, citing page 35 of the Clerk’s Record, wherein the state cited I.C. § 19-4901(b) in its brief to the district court. Section 19-4901(b) does state that issues which could be raised in direct appeal, but were not, are forfeited and may not be raised in post-conviction. However, the state’s citation to that statute was not with regard to the claim of a due process violation in the presence of Mr. Hendrickson on the jury.

The state’s citation to the statute occurs in the introductory paragraph of the argument section of its brief in support of summary dismissal. R 35. The paragraph states:

Petitioner’s claim for Post-conviction Relief is without merit for three reasons. First, Petitioner claims his right to due process was violated when a person who was known to him and the victim sat on the jury. Second, Petitioner asserts his counsel was ineffective for failing to properly advise him of his rights. And third,

Petitioner asserts the court lacked sufficient evidence to bind him over to trial. Petitioner's claims fail because there was no actual or implied bias by the jury, no deficient or prejudicial conduct by counsel, and the issues are procedurally barred under I.C. § 19-4901(b). Thus, the petition fails to establish a cognizable claim under Idaho Code § 19-4901(a) and should be summarily dismissed.

R 35.

The state then set out its arguments in three subsections. Only the first addressed the claim of a due process violation as a result of Mr. Hendrickson's presence on the jury. R 35-37. In this section, the state did not cite I.C. §19-4901(b), but rather argued that Mr. Hendrickson was merely an acquaintance without a personal relationship to either party, that he affirmed there was nothing that would keep him from being fair, and that the court "will not refute his opinion." R 37. The state did not argue in this section that the due process claim could have been raised on appeal and was not and thus forfeited. R 35-37.

The only subsection of the state's brief which referred to I.C. § 19-4901(b) is the third subsection. In that subsection, the state argued that the claim of insufficient evidence to bind over to trial "is not a valid claim for post-conviction relief because issues raised on direct appeal are forfeited and may not be considered in a petition for post-conviction relief. Idaho Code § 19-4901(b)." R 41.

Reading the state's reference to I.C. § 19-4901(b) in full and in context, it is clear that the state argued that the procedural bar applied only to the claim that the evidence was insufficient to bind over for trial - the state did not argue or give notice that the claim regarding Mr. Hendrickson was barred because it could have been raised in direct appeal.

Therefore, pursuant to *Kelly, supra*, the order of summary dismissal of this claim must be reversed and the matter remanded for further proceedings.

The state also argues in a footnote that even if it did not give sufficient notice in its brief to allow for summary dismissal of the due process claim, the court's decision to dismiss on the basis of forfeiture was similar enough to the arguments that the state did raise that the dismissal should be affirmed. Respondent's Brief page 10. However, that argument does not make sense. The state's notice in district court asserted that there was no actual prejudice resulting from Mr. Hendrickson's service on the jury. R 35-37. There is simply no overlap between that argument and a conclusion that Mr. Grist is procedurally barred because he should have raised the issue in direct appeal.

The state goes on in its brief in this appeal to argue that Mr. Grist should be denied notice because the district court was ultimately correct in summarily dismissing his claim. Respondent's Brief pages 10-14. Mr. Grist disagrees with the state's analysis of whether the district court's reasoning was correct. Appellant's Brief pages 8-9. Moreover, the state's analysis of whether the district court's reasoning was correct is irrelevant - notice is required. There are no exceptions, nor should there be. *Buss v. State*, 147 Idaho 514, 517, 211 P.3d 123, 126 (Ct. App. 2009); *Kelly v. State, supra*. Creating an exception for situations in which the court hits upon an analysis, even though the state does not, and then dismisses without an independent notice to the petitioner effectively eliminates the requirement of notice and the opportunity for the petitioner to amend his pleadings or supplement his proof and argument to avoid dismissal. An exception would read I.C. § 19-4906(b) out of existence.¹

¹ Procedure and process are important even when the court may believe that the outcome will be the same regardless of the procedures and processes applied. *See Crawford v. Washington*, 541 U.S. 36, 62, 124 S.Ct. 1354, 1371 (2004), stating, "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."

B. The District Court Erred in Summarily Dismissing Mr. Grist's Claim of Ineffective Assistance of Counsel in Failing to File a Meritable Rule 35 Motion Without Proper Notice

Mr. Grist has argued that the district court erred in dismissing his ineffective assistance of counsel claim relating to the failure to file a meritable Rule 35 motion without giving independent notice when the state did not offer any reasons for summary dismissal of the claim. Appellant's Opening Brief pages 9-10. The state does not dispute that it did not specifically reference the claim in its notice and brief in the district court, but asserts that its motion which referenced, "no genuine issue of material fact" at R 30 and its brief which used the words "no genuine issue of material fact" at R 35 gave Mr. Grist sufficient notice. Respondent's Brief page 14-15. (It should be noted that the reference at R 35 was only to the standard allowing summary dismissal and did not discuss whether that standard was or was not met in Mr. Grist's petition. Rather than asserting that Mr. Grist had failed to present a genuine issue of material fact at page 35 of the record, the state argued for summary dismissal because there was no actual or implied bias by the jury, no deficient or prejudicial conduct by counsel and the issues were procedurally barred. *Id.*)

In truth, the state did not mention the Rule 35 claim at all in its notice. Failure to mention the claim should not be construed as appropriate notice under *Buss, supra*, and *Kelly, supra*. To hold otherwise is to make a mockery of the requirement for notice.

C. The District Court Erred in Failing to Address Mr. Grist's Stand Alone Fifth Amendment Claim Relating to the Improper Use of the PSE at the Second Sentencing

Mr. Grist has set out how the district court erred in failing to address his Fifth Amendment claim stemming from the improper use of the PSE in the second sentencing.

Appellant's Opening Brief pages 10-11, citing *DeRushé v. State*, 146 Idaho 599, 200 P.3d 148 (2008).

The state concedes that "Grist unquestionably cited the Fifth Amendment as part of his *Estrada* claim[.]" Respondent's Brief page 22, citing *Estrada v. State*, 143 Idaho 558, 149 P.3d 833 (2006). However, the state argues that Mr. Grist cannot now argue for remand for a ruling on the Fifth Amendment claim because he did not file a motion to amend the findings in the district court. Respondent's Brief page 21. The state further argues that despite citing the Fifth Amendment in his petition, Mr. Grist only raised a Sixth Amendment ineffective assistance of counsel claim and so cannot now complain that his Fifth Amendment claim was not addressed in the district court.

The state's first argument - that Mr. Grist cannot appeal the failure of the district court to address his Fifth Amendment claim because he did not move to amend the district court's findings - is contrary to IRCP 52(a) and the case law.

IRCP 52(a) specifically states, "Requests for findings are not necessary for the purposes of review." Furthermore, the case law holds that the failure to make findings on a claim requires remand, as requested by Mr. Grist in this case. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982) states:

. . . The absence of findings and conclusions may be disregarded by the appellate court only when the record is clear, and yields an obvious answer to the relevant question. Absent such circumstances, the failure of the trial court to make findings of fact and conclusions of law concerning the material issues arising from the pleadings, upon which proof is offered, will necessitate a reversal of the judgment and a remand for additional findings and conclusions, unless such findings and conclusions would not affect the judgment entered.

103 Idaho at 225, 646 P.2d at 988 (citations omitted). *See also, Schneider v. Curry*, 106 Idaho

264, 268, 678 P.2d 56, 60 (Ct. App. 1984), holding that even if the appellant does not raise the sufficiency of the findings as an issue on appeal, the appellate court may raise and address the issue of the district court's failure to enter findings and conclusions on a specific claim. *Further see, Spencer v. Idaho First Nat'l Bank*, 106 Idaho 316, 678 P.2d 108 (Ct. App. 1984); *Donndelinger v. Donndelinger*, 107 Idaho 431, 690 P.2d 366 (Ct. App. 1984).

In fact, the case law specifically rejects the state's argument in this appeal:

The record [in this case] does not reflect that following the trial court's failure to make findings . . . that the appellant objected to the failure or made any motion to request a specific finding or to amend the findings as made. IRCP 52(b); IAR 13(b). However, it is the rule in Idaho that neither an objection to findings nor a request or motion for findings is a prerequisite to appellate review and such failure to bring the matter to the attention of the trial court does not waive the right to bring it up on appeal. *Stecklein v. Montgomery*, [98 Idaho 671, 570 P.2d 1359 (1977)]; IRCP 52(a); 5 Moore's Federal Practice PP 52.10 and 52.11(4)(2d ed. 198). E.g. *Morris v. Frandsen*, [101 Idaho 778, 621 P.2d 394 (1981)]. Cf *Stecklein v. Montgomery, supra* (Bistline, J., specially concurring (general discussion of effect of IRCP 52(a)).

Owen v. Boydston, 102 Idaho 31, 35, 624 P.2d 413, 418 (1981).

Based on the civil rules and the case law, this Court should reject the state's argument that Mr. Grist may not seek remand for consideration of his Fifth Amendment claim because he did not file a motion to amend the findings in the district court.

The state's second argument against appellate relief is that even though Mr. Grist unquestionably cited the Fifth Amendment right to remain silent he was not raising a Fifth Amendment claim in his petition but only a Sixth Amendment right to counsel claim. Respondent's Brief at page 22-23. The pleading in the district court refutes this argument. Mr. Grist's petition makes the claim: "Petitioner's right to due process was violated by the court allowing and using an outdated psychosexual evaluation that was ordered and prepared in

violation of the petitioner's 5th and 6th Amendment rights as found under the U.S. Constitution.”

R 15. This statement of the claim clearly raises both a Fifth Amendment and a Sixth Amendment claim.²

DeRushé is instructive. In that case, as stated by the Supreme Court, Mr. DeRushé's *pro se* petition “alleged errors in the underlying criminal proceeding by his trial counsel, by the prosecuting attorney, and by the jury.” 146 Idaho at 600, 200 P.3d at 1149. Nonetheless, the Supreme Court held that the district court erred in analyzing Mr. DeRushé's Fifth Amendment claim as alleging ineffective assistance of counsel rather than as alleging denial of his right to testify in his own behalf. If in *DeRushé*, where the claims raised were errors by counsel, errors by the prosecutor, and errors by the jury, a stand alone Fifth Amendment claim was raised, then a stand alone Fifth Amendment claim was obviously raised in this case where Mr. Grist specifically alleged that his Fifth Amendment right against self-incrimination was violated.

The state next argues that Mr. Grist is incorrect when he states that implicit in the district court's conclusion that counsel was deficient in failing to object to the use of the PSE at the second sentencing hearing was a conclusion that an objection to the use of the PSE would have been sustained because the use of the PSE would have violated the Fifth Amendment. However, the state does not explain how the district court could have found counsel deficient without

² There is an irony in the state's position that it can give notice that it was seeking dismissal of the Rule 35 claim merely by writing the magic words “genuine issue of material fact” without tying those words to or even mentioning the Rule 35 claim, when at the same time it is arguing that Mr. Grist's specific reference to the Fifth Amendment as the basis of his post-conviction claim does not raise a Fifth Amendment claim. The irony is especially strong because Mr. Grist's petition was a *pro se* petition. R 19. The state is asking that its attorneys, educated in the law and admitted to practice before the courts of Idaho, be held to a lesser standard than non-lawyers being held in prison without access to either the education, the experience, or the scope of library materials available to county prosecutors.

having found that counsel failed to object to something which would have been excluded had an objection been made. In other words, the state does not cite any case law for the proposition that failing to make a motion which would have been denied can be deficient performance.³

Moreover, the reason why an objection to use of the PSE would have been granted is that the use of the PSE would have violated the Fifth Amendment as well as the Sixth Amendment. *See Estrada v. State*, 143 Idaho 558, 564, 149 P.3d 833, 839 (2006), “Imposition of a harsher sentence . . . based on a defendant’s statements in a psychological evaluation is a violation of the right against self-incrimination.”

Lastly, the state argues in its respondent’s brief on appeal that if Mr. Grist did raise a free standing Fifth Amendment claim, the claim should be dismissed because it could have been raised on direct appeal. Respondent’s Brief page 24. This argument must be rejected because Mr. Grist could not raise the claim on direct appeal. Mr. Grist could not raise the claim in his direct appeal because to establish the claim Mr. Grist needed to present evidence that his original attorney did not, at the time of the PSE after the first trial, advise him of his Fifth Amendment rights. As noted in the Opening Brief, when evidentiary proof beyond the trial court record is required to establish a claim, the claim is appropriately raised in a petition for post-conviction relief. *Campbell v. State*, 130 Idaho 546, 549-550, 944 P.2d 143, 146-147 (Ct. App. 1997).

As set out in the Opening Brief, Mr. Grist did raise both a Fifth and a Sixth Amendment claim, but the district court failed to rule on the Fifth Amendment claim. As in *DeRushé*, this

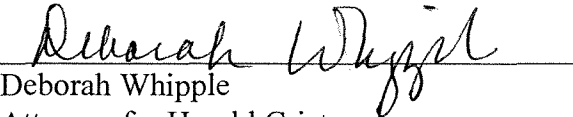
³ In fact, the case law holds the opposite. *See, State v. Payne*, 146 Idaho 548, 562, 199 P.3d 123, 137 (2008), holding that where the alleged deficiency is counsel’s failure to file a motion, a conclusion that the motion, if pursued, would not have been granted, is generally determinative of both prongs of the *Strickland* test. (*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).)

Court should vacate the order denying post-conviction relief and remand for consideration of the stand alone Fifth Amendment claim.

III. CONCLUSION

For the reasons set forth in the Opening Brief and above, Mr. Grist asks that this Court reverse the order of partial summary dismissal and the order denying post-conviction relief and remand with directions for further proceedings in the district court.

Respectfully submitted this ^{28th}20 day of August, 2014.


Deborah Whipple
Attorney for Harold Grist

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of August, 2014, I caused two true and correct copies of the foregoing document to be:

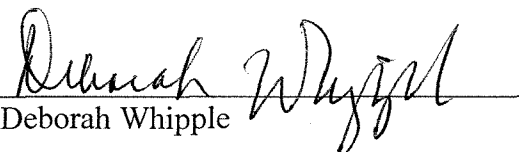
mailed

hand delivered

faxed

to:

Jessica Lorello
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010


Deborah Whipple