7-15-2009

Barcella v. State Appellant's Reply Brief Dckt. 35502

IN THE SUPREME COURT OF THE STATE OF IDAHO

GERALD A. BARCELLA,

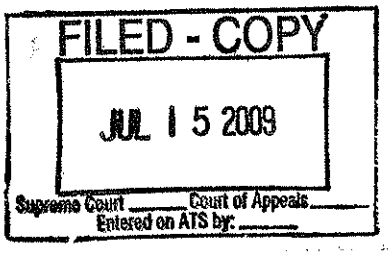
Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent-Respondent.

S. Ct. No. 35502



REPLY BRIEF OF APPELLANT

Appeal from the District Court of the First
Judicial District of the State of Idaho
In and For the County of Kootenai

HONORABLE JOHN PATRICK LUSTER
District Judge

Dennis Benjamin
ISBA# 4199
Deborah Whipple
ISBA # 4355
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
303 West Bannock
P.O. Box 2772
Boise, ID 83701
(208) 343-1000

Attorneys for Appellant

Lawrence Wasden
IDAHO ATTORNEY GENERAL
Stephen A. Bywater
Chief, Criminal Law Devision
Rebekah A. Cudé
Deputy 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

FEDERAL CASES

STATE CASES

STATE STATUTES

II. ARGUMENT IN REPLY

A. The District Court Erred in Granting Summary Dismissal without 20 Days Notice of the Reasons Therefore.

Summary dismissal of a petition for post-conviction relief requires either sufficient notice from the state or a 20 day notice from the court. I.C. § 19-4906(b) and (c); *Saykhamchone v. State,* 127 Idaho 319, 900 P.2d 795 (1995); *Anderson v. State,* ___ Idaho ___, ___ P.3d ___, 2007 WL 322794 (Ct. App. 2007), *rev. granted,* March 21, 2008. See also Respondent's Brief at page 12. In this case, as set out in Appellant's Opening Brief at pages 15-19, summary dismissal was not appropriate, because the required notice was not provided.

In particular, the state's first answer to Gerry's petition included only a blanket denial of all of his allegations, a denial that there were any material facts not previously heard, and a denial that Gerry received ineffective assistance of counsel. Its motion only argued that Gerry had filed no affidavit, record, or other evidence supporting his allegations, an argument that was false as the record contains the 249 page affidavit Gerry filed in support of his petition. In its amended answer, the state incorporated its initial answer and then denied all allegations other than those in paragraphs 1-9 and 11 of the amended petition. In its amended motion for summary judgment, the state, ignoring Gerry's *pro se* petition which was incorporated into the amended petition, asserted that claims of an unconstitutional judgment or sentence or prosecutorial misconduct cannot be raised in post-conviction because they were or could have been raised in direct appeal and that the claim of ineffective assistance of counsel should be dismissed because it was not supported by an affidavit, record, or other evidence. The state's lack of proper notice was made glaringly obvious in the prosecutor's comments to the court on the motion for summary

dismissal; the prosecutor stated that he had not ascertained what issues were raised in the *pro se* petition. See Appellant's Opening Brief at pages 17-19.

Gerry argues on appeal that the lack of notice from the state made summary dismissal of his petition improper. Appellant's Opening Brief at pages 15-19. He also argues that *DeRushé v. State,* 146 Idaho 599, 200 P.3d 1149 (2009), holds that if the state has offered grounds for its motion, but has not stated those grounds with particularity, the petitioner, if represented by counsel, must raise any objection in the district court, prior to raising the issue on appeal. But, the case also holds that a district court errs in dismissing a petition without giving the required twenty-day notice when it acts on its own motion, or on grounds not offered by the state, or when the state has only alleged a failure to comply with the post-conviction statute. Further, it holds that all these issues may be raised for the first time on appeal. Appellant's Supplemental Brief at page 2.

The state has not disagreed with this analysis of *DeRushé.* See Respondent's Brief at pages 11-13.

And, in fact, the only appellate case applying *DeRushé* reaches this same conclusion. *Kelly v. State,* ___ Idaho ___, ___ P.3d ___ 2009 WL 973499 (Ct. App. 2009), states:

> [W]e do not read *DeRushé* to completely eliminate the long-standing notice requirement for summarily dismissing a post-conviction application. Rather, *DeRushé* held only that, upon receiving notice from the state or the court, an applicant cannot challenge the *sufficiency* of the notice for the first time on appeal. *DeRushé* does not preclude an applicant from asserting for the first time on appeal that the district court improperly summarily dismissed a claim without providing *any* notice either through the state's motion or the court's own notice. In addition, *DeRushé* does not hold that, if the state files a motion for summary dismissal but the district court dismisses a claim on a ground not contained in the state's motion without providing additional notice, an applicant is precluded from challenging that dismissal for the first time on appeal.

. . .

> [W]e do not read *DeRushé* as eliminating the requirement that the state's motion identify the deficiency with each post-conviction claim. *See e.g., Garza v. State,* 139 Idaho 533, 537-38, 82 P.3d 445, 449-50 (2003) (enumerating several of Garza's claims and noting that, because the "district court did not give the rationale for dismissing the claims," the notice of intent to dismiss was insufficient; *Franck-Teel v. State,* 143 Idaho 664, 669, 152 P.3d 25, 30 (Ct. App. 2006) (holding that "the broad and generic contentions in the state's motion do not refer to Franck-Teel's specific allegations and, thus, cannot be construed as addressing the perceived flaws in any particular item of evidence or legal analysis, which Franck-Teel needed to address in order to avoid summary dismissal"); *Flores* [*v. State*], 128 Idaho [476,] 478, 915 P.2d [38,] 40 [(Ct. App. 1996)] (holding that, "written in such general terms, the state's motion did not address the insufficiency of Fores's particular claims and failed to give Flores notice of any issues or arguments to which he needed to respond"); *Martinez* [*v. State*], 126 Idaho [813,] 818, 892 P.2d [488,] 493 [(Ct. App. 1995)] (holding that the state's motion "identified no particular basis for dismissal of Martinez's various claims, and was therefore ineffective to give him any notice of any deficiencies in his evidence or any legal analysis he needed to address in order to avoid summary dismissal of his action").
>
> As the Supreme Court elaborated, a "notice of intent to dismiss must state the reasons for dismissal in order to provide an applicant with meaningful opportunity to provide further legal authority or evidence that may demonstrate the existence of a genuine factual issue." *Garza*, 139 Idaho at 537, 82 P.3d at 449. Providing an individualized response to a post-conviction applicant's allegations is necessary to ensure that an applicant can respond with additional authority or evidence if it exists and so that the applicant "cannot assert surprise or prejudice" regarding the basis of dismissal. *DeRushé*, 146 Idaho at 601, 200 P.3d at 1150.

2009 WL 973499 *4, 7 (italics original).

Gerry argued in his Opening Brief and Supplemental Brief that the state's motions for summary dismissal did not address the issues Gerry raised in his *pro se* petition. Given this lack of notice, the order summarily dismissing his petition must be reversed. *DeRushé, supra.* Appellant's Opening Brief at pages 15-19; Appellant's Supplemental Brief pages 1-3.

In response, the state has argued that Gerry is actually arguing that the notice was vague,

not absent, and therefore, summary dismissal was allowed. Respondent's Brief at page 13. The state does not argue that Gerry has not set out the proper analysis of *DeRushé* and that if the notice was lacking, the issue may be raised for the first time on appeal and summary dismissal was not appropriate.

Thus, the question is one of the record. And, the record is clear. The state's answers and motions did not even identify the 29 issues raised by Gerry, let alone identify the deficiency with each issue. *Garza v. State, supra,* as cited in *Kelly, supra.* In no way did the state's answers and motions provide "an individualized response" to Gerry's allegations so as to "ensure that he [could] respond with additional authority or evidence." *Kelly, supra.*

If ever there was a case wherein there was not sufficient notice given of the grounds for summary dismissal, this is it. Summary dismissal is not appropriate when the prosecutor admits that he does not actually know what issues the petitioner has raised and the court states that it was hoping that someone would have clarified the situation so that the issues being raised would be "legible and easy to grasp." Tr. 5/29/07 p. 3, 5; Tr. 1/9/07 p. 16-17.

For the reasons set out in the Opening Brief, the Supplemental Brief, and above, the order granting summary dismissal of all of Gerry's claims except ineffective assistance of counsel should be reversed and the matter remanded for further proceedings on those issues.

B. The Claims of an Unconstitutional Judgment and Sentence and Prosecutorial Misconduct Were Not Waived and Should Not Have Been Summarily Dismissed.

The Opening Brief sets out the case that even if the state's notice was sufficient and summary judgment was appropriate on some issues, the issues of an unconstitutional judgment and sentence and prosecutorial misconduct should not have been summarily dismissed because

those issues could not have been fully raised in the direct appeal. *State v. Windsor,* 110 Idaho 410, 420, 716 P.2d 1182, 1192 (1985). *See also, Raudebaugh v. State,* 135 Idaho 602, 21 P.3d 924 (2001), and *Sivak v. State,* 134 Idaho 641, 8 P.3d 686 (2000). Appellant's Opening Brief at pages 19-22.

The state does not dispute that issues such as an unconstitutional judgment and sentence and prosecutorial misconduct which require proof of facts outside the trial record are properly raised in post-conviction. Rather, the state argues that Gerry's counsel waived those issues. Respondent's Brief at pages 13-16.

As set out in the state's brief, a waiver is a voluntary, intentional relinquishment of a known right or advantage. *Dennett v. Kuenzli,* 130 Idaho 21, 26, 936 P.2d 219, 224 (Ct. App 1997). And, waiver will not be inferred; the intent to waive must clearly appear on the record. *Margaret H. Wayne Trust v. Lipsky,* 123 Idaho 253, 256, 846 P.2d 904, 907 (1993). Respondent's Brief at page 15. *See also, Medical Services Group, Inc. v. Boise Lodge No. 310, Benev. and Protective Order of Elks,* 126 Idaho 90, 94, 878 P.2d 789, 793 (Ct. App. 1994), "Wavier will not be inferred except from a clear and unequivocal act manifesting an intent to waive." *Id.*

The state maintains that Gerry's counsel waived any claims of unconstitutional judgment and sentence and/or prosecutorial misconduct by arguing against the dismissal of claims of ineffective assistance of counsel.

Counsel's remarks were as follows:

> Let me, I guess, start there at the beginning. If – I guess this is somewhat circular, but if the judgment, and therefore, the sentence which followed the judgment, were arrived upon or arrived at due to trial or pretrial proceedings wherein

> ineffective assistance of counsel occurred and/or prosecutorial misconduct in the proceedings, that judgment and sentence should be, and I believe the law allows, subject to collateral attack, which this action certainly is.

Tr. 1/9/07 p. 9.

Following this comment, counsel went on to set out what sorts of investigative efforts he was making on ineffective assistance of counsel issues and asked that he be allowed 30 more days to supplement the record. *Id.*

While counsel's argument was not artful and did not focus on the issues of the constitutionality of the judgment and sentence nor prosecutorial misconduct, counsel never said that he intended to waive those issues. In fact, counsel specifically mentioned prosecutorial misconduct as a basis for collateral attack. In no way were counsel's arguments about ineffective assistance of counsel "a clear and unequivocal act manifesting an intent to waive." *Medical Services Group, Inc. v. Boise Lodge No. 310, Benev. and Protective Order of Elks, supra.*

The state's argument is contrary to the record. This is shown by the failure of the state to cite specific language from counsel's comments wherein counsel makes a clear statement that he intends to waive all issues of unconstitutionality or prosecutorial misconduct. Rather, the state is asking this Court to infer a waiver: "Instead counsel *appeared* to concede the state's point with regard to the first two issues by attempting to instead preserve the first two claims a claims of ineffective assistance of counsel." Respondent's Brief at page 9 (emphasis added). However, the case law is undisputed: a waiver must be clear and unequivocal. *Margaret H. Wayne Trust v. Lipsky, supra; Medical Services Group, Inc. v. Boise Lodge No. 310, Benev. and Protective Order of Elks, supra.* "Appearing" to concede an issue by focusing argument on other aspects of a case is not a clear and unequivocal waiver of the issue.

The state's argument that the issues of unconstitutionality and prosecutorial misconduct were properly summarily dismissed because counsel waived those issues is contrary to the record and should be rejected. As a fallback position, the state has also argued that "Because these claims could have been brought on direct appeal but were not, they were waived and cannot be considered in post-conviction proceedings." Respondent's Brief at page 15. However, the state makes a very brief argument in favor of this position, makes no specific references to the record before the district court, and does not explain how the post-conviction claims discussed in Gerry's Opening Brief could have been raised in direct appeal.

As set out in the Opening Brief, Gerry's claims included that the jury relied upon information not in evidence to convict, that the jury was improperly selected, and that the jury had been contaminated by a prospective juror's comments. Gerry also claimed *Brady*[1] violations, intimidation of witnesses by the state, and tampering with the evidence. See Appellant's Opening Brief at pages 21-22. Each of these issues requires evidence outside the record on appeal. Therefore, none could have been raised in the direct appeal. *State v. Windsor, supra; Raudebaugh v. State, supra; Sivak v. State, supra.*

There was no waiver of the claims of unconstitutionality in the judgment and sentence and/or prosecutorial misconduct. Moreover, those claims could not have been brought in direct appeal. Therefore, the district court erred in summarily dismissing them. The order of dismissal should be reversed and the matter remanded for further proceedings.

---

[1] *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194 (1963).

C. The Error in Denying Gerry the Right to Testify Requires the Granting of Post-Conviction Relief.

As set out in the Opening Brief, if the error in denying Gerry the right to testify in his own behalf is analyzed as a claim of ineffective assistance of counsel, post-conviction relief is required because counsel's performance was deficient and the deficiency was prejudicial. *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052 (1984). Appellant's Opening Brief at pages 22-26. In addition, if the error is analyzed as directed by *DeRushé* as a claim of the denial of a constitutional right, relief is also required because the state cannot demonstrate beyond a reasonable doubt that the error did not contribute to Gerry's conviction. *Chapman v. California,* 386 U.S. 987, 87 S. Ct. 1283 (1967); *State v. Darbin,* 109 Idaho 516, 522, 708 P.2d 921, 927 (Ct. App. 1985). Appellant's Supplemental Brief at pages 3-5.

In its brief, the state does not offer any argument at all that the district court properly analyzed the claim of ineffective assistance of counsel. The state makes no attempt to argue either that counsel's performance was not deficient or that the deficiency was not prejudicial. Respondent's Brief at pages 16-18. The failure to raise any argument to rebut the conclusion that, if the issue is analyzed as ineffective assistance of counsel, post-conviction relief is required, does not, of course, require this Court to find in Gerry's favor. *Idaho Power Co. v. Cogeneration, Inc.,* 134 Idaho 738, 9 P.3d 1204 (2000). However, it is difficult to imagine that counsel for the state would have failed to raise any argument, either that there was not deficient performance or that the deficiency was not prejudicial, if such any such argument, however tenuous, could have been made.

Likewise, the state does not offer any argument that if the claim is to be analyzed as a

deprivation of a constitutional right claim and the *Chapman* standard applies, that either there was no error in depriving Gerry of the right to testify or that if such error occurred it was harmless beyond a reasonable doubt. Respondent's Brief at pages 16-18. Again, this failure to make a counter-argument to Gerry's argument does not require this Court to reverse the order denying post-conviction relief. *Idaho Power Co. v. Cogeneration, Inc., supra.* But, again, it is difficult to imagine that if the state could think of any argument at all that Gerry was not deprived of his constitutional rights or that the deprivation was not harmless beyond a reasonable doubt, it would remain silent.

Based upon the record in this case, Gerry's Opening and Supplemental Briefs and the state's failure to offer any argument in rebuttal, Gerry asks that this Court either analyze the issue as one of ineffective assistance of counsel and find error in the denial of relief, or analyze the issue as one of the deprivation of his constitutional right to testify and on that basis find error in the denial of relief.

The only argument the state does offer is that Gerry is estopped from arguing on appeal that his claim based on the denial of the right to testify should be analyzed as a deprivation of a constitutional right rather than as ineffective assistance of counsel. The state bases this argument upon the doctrine of invited error, stating that because Gerry framed the issue as one of ineffective assistance of counsel in the district court and in his initial brief, he cannot now argue that the issue should be considered as one of denial of a constitutional right. Respondent's Brief at pages 16-18.

In making this argument, the state does not cite *DeRushé.* Yet, *DeRushé* is controlling and calls for the analysis offered in the Supplemental Brief.

In *DeRushé*, the petitioner filed a *pro se* petition alleging errors by his trial counsel,

including that counsel had deprived him of the right to testify in his own behalf. *DeRushé v. State,* 146 Idaho at 601, 200 P.3d at 1149. While the Supreme Court opinion does not contain the full text of the original petition filed by DeRushé, it does describe the document. The Court wrote:

> In his petition and supporting affidavit, DeRushé stated that his attorney in the underlying criminal case had denied his request to testify in his own behalf. He set forth the testimony he wanted the jury to hear, which laid out facts to support a claim of self-defense.

146 Idaho at 605, 200 P.3d at 1152.

Based upon that petition, the district court in *DeRushé* applied an ineffective assistance of counsel analysis. And, the Supreme Court found that to be error.

> The district court erred in analyzing DeRushé's claim as alleging ineffective assistance of counsel rather than as alleging denial of his constitutional right to testify in his own behalf.

Id.

DeRushé set out his claims in the same way Gerry did. DeRushé told the district court that counsel had denied him the right to testify and told the court what his testimony would have been had he given it. This is exactly what Gerry did. And, just as the Supreme Court did not look to the invited error doctrine in *DeRushé* to avoid application of the proper analysis, the invited error doctrine does not apply here.

But, of course, this Court need not even reach this question. As evidenced by the state's lack of argument to the contrary, whether the error in denying Gerry his right to testify is analyzed as a claim of ineffective assistance of counsel or a claim of the denial of a constitutional right to testify, there was error and the error requires reversal of the order denying post-conviction relief.

III. CONCLUSION

Because proper notice was not given, the order summarily dismissing all issues other than ineffective assistance of counsel should now be reversed and the matter remanded for further proceedings on those issues. In the alternative, because the issues of an unconstitutional judgment and sentence and prosecutorial misconduct could not have been raised in direct appeal, the order summarily dismissing those issues should now be reversed and the matter remanded for further proceedings. And, in any event, the order finding ineffective assistance of trial counsel but denying relief because no prejudice was established must now be reversed either because the deficient performance of counsel was prejudicial or because the issue should have been analyzed as the deprivation of the constitutional right to testify which cannot be shown harmless beyond a reasonable doubt.

Respectfully submitted this 15TH day of July, 2009.

Dennis Benjamin

Deborah Whipple by DB

Deborah Whipple
Attorneys for Gerry Barcella

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 2009, I deposited in the United States mail, two true and correct copies of the foregoing, postage prepaid addressed to:

Office of the Attorney General
P.O. Box 83720
Boise, ID 83720-0010

Dennis Benjamin