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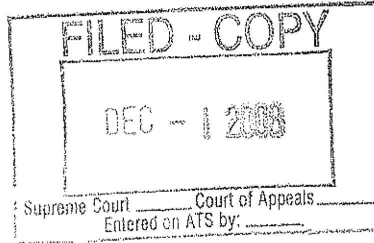
IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

DANIEL LEE EBY,	)	
	)	
Petitioner-Appellant,	)	NO. 34179
	)	
vs.	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	



BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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District Judge

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On October 23, 2002, a notice of appearance was filed by Rolf Kehne (R., pp.42-43), and on October 25, 2002, the public defender filed a notice of substitution of counsel, indicating that Rolf Kehne would replace the public defender as Eby's counsel (R., pp.44-45).

On April 30, 2003, the district court again issued a notice of its proposed dismissal pursuant to I.R.C.P. 40(c). (R., p.46.) A notation on the notice indicates that the notice was sent to an incorrect address for Eby's counsel. (R., p.46.) On May 27, 2003, the district court reissued a notice of its proposed dismissal of Eby's petition pursuant to I.R.C.P. 40(c), sending copies of the notice to Eby's counsel, Rolf Kehne, and to the public defender originally assigned to the case. (R., pp.47-48.) By its notice, the district court gave Eby until June 16, 2003 to file an affidavit "setting forth specific facts justifying retention and setting forth a specific time table for actions necessary to make the case ready for trial...." (R., pp.47-48.) On June 16, 2003, Eby's counsel filed a response and affidavit, representing that an amended petition would be filed on September 15, 2003. (R., pp.49-58.) Apparently satisfied that the case would be moving forward, on June 18, 2003, the district court issued an order retaining the case. (R., p.59.)

On December 15, 2003, the district court issued a notice of its proposed dismissal of the case pursuant to I.R.C.P. 40(c), as nothing had been filed with the court since its June 18 order retaining the case. (R., pp.60-61.) The notice gave Eby until January 2, 2004 to file an affidavit justifying retention of the case. (R., pp.60-61.)

(R., p.92), and assures the court that "[a]n Amended Petition will be filed on or before Friday the 4th of March, 2005, or a sworn declaration explaining why it was not ... will be filed by that date" (R., p.92).

An amended petition was not filed by March 4, 2005, nor was "a sworn declaration explaining why it was not" filed, nor was anything at all filed in the case until June 14, 2005.

On June 14, 2005, the district court dismissed the case pursuant to I.R.C.P. 40(c), "Dismissal of Inactive Cases". (R., p.97.)

On September 6, 2005, Eby himself moved the district court to "review" its decision to dismiss his case, noting that he had "submitted a letter requesting Review of Order of Dismissal" on August 17, 2005. (R., pp.98-109.) On October 3, 2005, Eby filed a motion for appointment of new counsel. (R., pp.111-119.)

On November 17, 2005, the district court appointed new counsel to represent Eby. (R., p.120.) On March 7, 2006, a notice of substitution of counsel was filed, indicating that the public defender had conflicted Eby's case to Linda Payne. (R., pp.121-122.)

Eby's new counsel filed an amended petition for post-conviction relief on August 22, 2006. (R., pp.127-128.) The state objected to the filing of the amended petition on the grounds that the case had been dismissed on June 14, 2005. (R., p.133.)

On April 9, 2007, Eby's counsel moved the court to set aside the June 14, 2005 order dismissing his case pursuant to I.R.C.P. 40(c), on the grounds that his earlier post-conviction counsel had been ineffective. (R., pp.148-149.) The

ISSUES

Eby states the issues on appeal as:

1. Did the district court err in failing to set aside the order of dismissal?

2. On remand, should new competent counsel be appointed?

(Appellant's brief, p.17.)

The state wishes to rephrase the issues on appeal as:

Nearly three months after the district court dismissed his post-conviction case, Eby, although represented by counsel, filed a pro se motion asking the court to "review" its decision to dismiss and to appoint him new counsel. Nearly two years after the district court dismissed the case, new counsel filed a motion to set aside the order of dismissal. Has Eby failed to establish that the district court committed reversible error when it denied Eby's motion to set aside its final order?

Eby's motion was filed 84 days after the order was entered and 42 days after the time for filing an appeal had passed. Eby thereafter moved for new counsel, who explicitly moved to set aside the order, but without citing any rules of civil procedure in support, nearly 21 months after the order became final. As the district court correctly found, pursuant to Castle v. Hays, 131 Idaho 373, 957 P.2d 351 (1998), it was without authority to set aside its order and reinstate the case after the 42 day period for filing an appeal had elapsed. (Tr., p.21, L.15 – p.23, L.6.)

In Castle, the Idaho Supreme Court squarely addressed the issue raised by Eby's motions – whether a district court has authority to set aside its order, pursuant to I.R.C.P. 40(c), dismissing a case for inactivity after the time for filing an appeal from that order has passed. In that case, the district court dismissed a case pursuant to I.R.C.P. 40(c). Seventy-seven days later, plaintiff's counsel "filed a motion to reinstate the action." Castle, 131 Idaho at 373, 957 P.2d at 351. The district court granted the motion, and but later granted the defendant's motion to dismiss the action pursuant to I.R.C.P. 4(a)(2). On appeal from that order, the Court held the district court did not have authority to reinstate the case after dismissal:

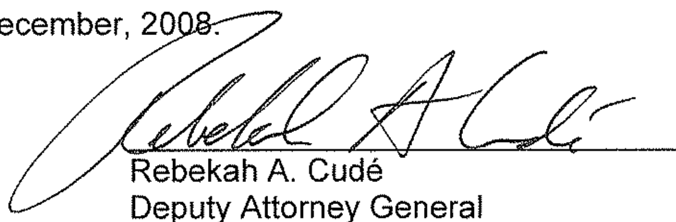
> It has long been recognized that a formal order dismissing an action is in effect a final judgment that puts an end to the suit. *Marshall v. Enns*, 39 Idaho 744, 230 P. 46 (1924). Relief from such an order is limited. A party who disagrees with such an order may, within fourteen days, seek reconsideration in the trial court under I.R.C.P. 11(a)(2)(B), or the party may file an appeal within forty-two days to obtain appellate review of the dismissal order as provided in Idaho Appellate Rule 11(a)(1). *See e.g., Donaldson v. Buckner*, 66 Idaho 183, 157 P.2d 84 (1945). As a corollary, a timely motion for reconsideration tolls the time for filing an appeal

when it so ruled, he simply disagrees with the ruling because Eby's counsel was obviously incompetent. (Appellant's brief, p.23.) However, the fact that counsel on post-conviction relief is incompetent does not require the suspension of the rules of civil procedure nor does it automatically afford a litigant the relief he seeks. *See* Schwartz v. State, 145 Idaho 186, 191, 177 P.3d 400, 405 (Ct. App. 2008). Eby's pro se motion to "review" the order dismissing his case cannot be construed as "a timely motion under Rule 60(b)" simply because he asks, three years later, that it be construed as such. (Appellant's brief, p.23.) Eby has failed to establish that the district court abused its discretion when it found that Eby's circumstances did not satisfy the requirements of Rule 60(b).

CONCLUSION

The state respectfully asks this Court to affirm the district court's order denying Eby's motion to set aside the order dismissing his case.

DATED this 1st day of December, 2008.



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