1-5-2009

Eby v. State Appellant's Reply Brief Dckt. 36568

IN THE SUPREME COURT OF THE STATE OF IDAHO

DANIEL LEE EBY,

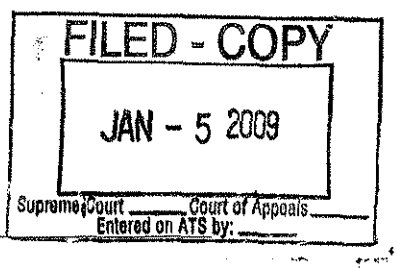
Petitioner/Appellant,

vs.

STATE OF IDAHO,

Respondent/Respondent.

S. Ct. No. 34179



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

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II. ARGUMENT IN REPLY

The District Court Erred in Failing to set Aside the order of Dismissal Pursuant to Daniel's *Pro Se* Rule 60(b) Motion.

In his Opening Brief, Daniel argued that the District Court erred in failing to set aside the order of dismissal for two reasons: 1) because *Castle v. Hays,* 131 Idaho 373, 957 P.2d 351 (1998), does not limit relief in his case to only motions under IRCP 11(a)(2)(B) or direct appeal; and 2) because Daniel did make a satisfactory showing for a grant of relief under IRCP 60(b). Appellant's Opening Brief, p. 18.

Daniel offered two arguments as to why *Castle* does not preclude a motion for relief from a final judgment under IRCP 60(b) in his case: 1) because *Castle* did not consider the applicability of IRCP 60(b) and does not hold that IRCP 60(b) is without meaning or effect when a case is dismissed under IRCP 40(c); and 2) because, if *Castle* does preclude a motion under IRCP 60(b) in this case, then it is in conflict with the civil rules and should be overruled. Appellant's Opening Brief p. 18-21.

The state has addressed neither argument as to why *Castle* does not preclude a motion under IRCP 60(b). Rather, the state has simply quoted language from *Castle* and asserted that the District Court properly applied this language. The state did not offer any rebuttal to Daniel's argument that *Castle* did not mention or consider IRCP 60(b) and therefore does not preclude a motion under IRCP 60(b). Likewise, the state did not offer any argument against Daniel's position that if *Castle* does preclude a motion under IRCP 60(b), then it is in conflict with the civil rules and should be overruled. Instead the state only offers the assertion that "the district court applied the clear language of the Court in *Castle* and recognized that it lacked the authority,

even as of the date of Eby's *pro se* motion (while he was represented by counsel), to set aside the final order dismissing the case." Respondent's Brief p. 8-9.

The failure of the state to offer any rebuttal to Daniel's arguments indicates that the state could not mount any rebuttal. Indeed, it is well established that if an appellant fails to offer argument in support of an issue, the issue is considered waived. *Christensen v. City of Pocatello,* 142 Idaho 132, 124 P.3d 1008 (2005), *citing, East v. West One Bank,* 120 Idaho 226, 230-31, 815 P.2d 35, 39-40 (Ct. App. 1991). And, while the failure of a respondent to address an issue does not mandate reversal of a district court ruling, *Idaho Power Co. v. Cogeneration, Inc.,* 134 Idaho 738, 745, 9 P.3d 1204, 1211 (2000), it is difficult to imagine that if a persuasive legal or equitable argument against Daniel's position on the applicability of *Castle* existed, the state would hesitate to offer it.

In the absence of any argument as to why *Castle* should either be held not to address the availability of an IRCP 60(b) motion or in the alternative as to why *Castle* should not be overruled, Daniel asks that this Court hold that his *pro se* motion was a timely and appropriate motion for relief under IRCP 60(b).

Daniel has also argued that as his *pro se* motion from the order dismissing his case was a timely motion under IRCP 60(b), relief should have been granted because through no fault of his own, he was denied access to the courts and due process by repeated failures of appointed counsel to present his case in a timely manner. Const. Art. I, § 13, U.S. Const. Amend. 5 and 14. Opening Brief p. 23-24.

The state has offered only this argument in reply:

Eby has not demonstrated that the district court abused its discretion 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).

Respondent's Brief at p. 9-10.

The state's reply misconstrues Daniel's argument. Daniel is not arguing that the motion for reinstatement of his case should be granted simply because his counsel was incompetent. Nor is he asking this Court to suspend the Rules of Civil Procedure. Nor is he asking that he be given automatic post-conviction relief.

Rather, Daniel has argued that he was denied access to the courts and constitutional due process by the repeated failures of various appointed counsel to present his case in a timely manner and that this denial of due process is a sufficient reason to justify relief from the dismissal. IRCP 60(b)(6). Opening Brief p. 23-24.

And, in fact, the case cited by the state, *Schwartz v. State, supra,* recognizes that ineffective assistance of counsel which has resulted in a denial of due process in a post-conviction proceeding may constitute sufficient reason for action by a court.

> [I]f an initial post-conviction action was timely filed and has been concluded, an inmate may file a subsequent application outside of the one-year limitation period if 'the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application. I.C. § 19-4908. Ineffective assistance of prior post-conviction counsel may provide sufficient reason for permitting newly asserted allegations or allegations inadequately raised in the initial application to be raised in a subsequent post-conviction application. Additionally, when a second or successive application is presented because the initial application was summarily dismissed due to the alleged ineffectiveness of the initial post-conviction counsel, use of the relation-back doctrine may be appropriate. This is so because failing to provide a post-conviction applicant with a meaningful opportunity to have his or her claims presented may be violative of due process.

Schwartz v. State, 145 Idaho at189, 177 P.3d at 403. (Citations omitted.)

In this case, Daniel had filed a timely *pro se* petition for post-conviction relief. It was dismissed for inactivity because of the inaction of counsel. This inaction amounted to ineffective assistance of counsel which denied Daniel a meaningful opportunity to have his petition heard and thus denied him due process. As noted in *Schwartz*, this denial of due process may be a sufficient reason to allow relief from the initial dismissal.

Daniel has presented a sufficient ground for relief under IRCP 60(b). He therefore asks that the order denying relief be reversed and that the order dismissing his case be reversed.

III. CONCLUSION

For the reasons set forth in the Opening Brief and above, Daniel requests that this Court reverse the order denying his motion for relief from the order dismissing his case and, further, reverse the order dismissing the case. He also requests that this Court order the District Court to appoint new counsel upon remand so that new competent counsel can finally file an amended petition as appropriate.

Respectfully submitted this 5TH day of January, 2009.

Dennis Benjamin
Attorney for Daniel Eby

CERTIFICATE OF SERVICE

I, Dennis Benjamin, hereby certify that on the 5th day of January, 2009, I deposited in the United States mail, postage prepaid, two true and correct copies of the above brief addressed to: Rebekah A. Cudé, Deputy Attorney General, Criminal Law Division, P.O. Box 83720, Boise, ID 83720-0010.

Dennis Benjamin

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