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Gorringe v. State Appellant's Brief Dckt. 43565

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IN THE SUPREME COURT OF THE STATE OF IDAHO

| | | |
|-----------------------|---|------------------------------|
| MAX J. GORRINGE, |) | |
| |) | |
| Petitioner/Appellant, |) | Supreme Court No. 43565-2015 |
| |) | |
| vs. |) | Canyon County District Court |
| |) | Case No. CV-2014-3455 |
| STATE OF IDAHO, |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

OPENING BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE
THIRD JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF CANYON

HONORABLE MOLLY J. HUSKEY,
District Judge

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I. TABLE OF AUTHORITIES

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II. STATEMENT OF THE CASE

A. *Nature of the Case*

This is an appeal from an order denying a motion to reconsider the summary dismissal of Max Gorringer's petition for post-conviction relief. R 381-384, 390-393. The question before this Court is whether the district court erred in failing to decide the IRCP 60(b) aspects of Mr. Gorringer's *pro se* motion which was entitled "Motion to Reconsider (set aside) Dismissal of Postconviction (5-20-15); Rule 59(e), 60(b) or any other rule that may Grant Relief and or in the alternative Motion to Review the record." Mr. Gorringer submits that the district court erred and that the order of denial should be vacated and the matter remanded for proper consideration.

B. *Procedural History and Statement of Facts*

On November 1, 2011, Mr. Gorringer entered a guilty plea pursuant to a written binding plea agreement to a single count of attempted strangulation. R 189-190. Mr. Gorringer filed an appeal. R 190. The Court of Appeals denied relief, the Supreme Court denied a petition for review, and the Court entered a remittitur. *Id.* Thereafter, Mr. Gorringer filed a *pro se* petition for post-conviction relief. *Id.*

The district court appointed counsel who filed an amended petition. R 190-195. The amended petition raised a claim of ineffective assistance of trial counsel based upon a conflict of interest, based upon deficient performance in advising Mr. Gorringer to enter a guilty plea because he had a winning appeal issue when in fact the issue had already been abandoned, and based upon counsel's failure to correct factual errors in the PSI which the district court then relied upon in sentencing Mr.

Gorringe. *Id.*

The district court summarily dismissed the amended petition on May 19, 2015. R 245-258. That same day, the court entered its final judgment. R 261-262.

On June 2, 2015, Mr. Gorringe signed and had notarized his *pro se* “Motion to Reconsider (set aside) Dismissal of Postconviction (5-20-15); Rule 59(e), 60(b) or any other rule that may Grant Relief and or in the alternative motion to review the record” was filed. R 265. Although the pleading was signed and notarized on June 2, 2015, it was not filed in the court record until June 5, 2015. R 265.

On July 14, 2015, the district court denied the *pro se* motion. R 381-384. The court first denied the motion because it was untimely given the lack of evidence that it was placed in the prison mail no later than June 2, 2015. R 382. The court also held that even if the motion had been timely, it would be denied because the motion does not identify legal or factual errors in the dismissal of the petition, but rather attempts to raise new claims (mental health status and ineffective assistance of post-conviction counsel) and identifies discovery that would be needed to establish the new/additional claims not raised in the petition. The court concluded:

A motion filed pursuant to I.R.P.C. 59(e) is not the vehicle to raise additional claims or present new evidence, but instead is designed to identify factual or legal errors made by the Court; Petitioner has failed to identify any such errors.

R 382.

Although the court also appointed counsel (prior counsel having withdrawn) to provide assistance in establishing that the *pro se* motion to reconsider was placed

in the prison mail system so as to make the motion timely under IRCP 59(e), no evidence of timeliness was ever entered into the record. R 385-387.

Thereafter, the district court entered its final judgment. R 388-389. And, Mr. Gorringer filed a timely notice of appeal as to the denial of the motion for reconsideration. R 390-393.

III. ISSUE PRESENTED FOR REVIEW

Did the district court err in considering Mr. Gorringer's motion filed under both IRCP 59(e) and 60(b) as only a Rule 59(e) motion and thus failing to decide Rule 60(b) matters?

IV. ARGUMENT

The District Court Erred in Not Deciding the Rule 60(b) Aspects of Mr. Gorringer's Motion

Mr. Gorringer filed his motion under both IRCP 59(e) and 60(b). However, the district court addressed the motion as only an IRCP 59(e) motion and therefore found it untimely and also found that the attempt to raise new claims was foreclosed because Rule 59(e) is not an appropriate vehicle to raise new claims. The court did not address any Rule 60(b) aspects of the motion. In failing to address the Rule 60(b) aspects of the motion, the district court erred.

A motion to alter or amend a judgment under IRCP 59(e) allows the court to correct errors of fact and law that occurred in the proceedings and thus circumvent an appeal. *Slaathaug v. Allstate Ins. Co.*, 132 Idaho 705, 706, 979 P.2d 104, 108 (1999); *First Security Bank v. Neibaur*, 98 Idaho 598, 603, 570 P.2d 276, 281 (1977).

The rule requires that the motion be made no later than 14 days after the entry of the judgment. IRCP 59(e).

By contrast, IRCP 60(b) allows a court to relieve a party from a final judgment, order, or proceeding for several reasons including any reason justifying relief from the operation of the judgment. IRCP 60(b)(6). Review is not limited to mistakes of fact and law. Further, Rule 60(b) motions may be made more than 14 days after the entry of the judgment. Depending upon the basis for the motion, the motion must be filed within six months or within a reasonable time of the entry of the judgment. IRCP 60(b).

Mr. Gorringer's motion was made under both IRCP 59(e) and 60(b). R 265-353. And, as the district court noted in deciding the IRCP 59(e) portion of the motion, the bulk of the motion argued reasons for relief which were not cognizable under IRCP 59(e) as they were not based upon mistakes of fact or law in the judgment dismissing the petition. Rather, they were "attempts to raise new claims (his mental health status and ineffective assistance of post-conviction counsel) . . ." R 382. These new claims, while not cognizable under IRCP 59(e) may be considered under IRCP 60(b)(6) which allows relief for "any other reason justifying relief from the operation of the judgment." *See Hopkins v. Troutner*, 134 Idaho 445, 447, 4 P.3d 557, 559 (2000) noting that IRCP 60(b) "gives wide latitude to the trial court in determining those circumstances under which to relieve a party from the effects of an order." In *Hopkins*, a Rule 60(b) motion was properly granted where the district court determined a lawyer had given legal advice to an unrepresented party in

settling a claim, thereby coming into conflict with a comment to the Model Rules of Professional Conduct, even though the comment had not been adopted in Idaho. *Id.* In *Dawson v. Cheyovich Family Trust*, 149 Idaho 375, 234 P.3d 699 (2010), the Supreme Court noted that Rule 60(b) relief may be available where a district court grants relief that is inconsistent with the pleadings and evidence in the case. In *Maynard v. Nguyen*, 152 Idaho 724, 274 P.3d 589 (2011), the Supreme Court upheld relief under Rule 60(b) where the attorney representing Maynard failed to disclose the purport of the correspondence directed toward the judge at a default hearing when no default had been entered into the record. Likewise here, claims of ineffective assistance of post-conviction counsel which led to an improper dismissal of the petition fall within the ambit of Rule 60(b). *Eby v. State*, 148 Idaho 731, 737, 228 P.3d 998, 1004 (2010), holding that ineffective assistance of counsel in a post-conviction proceeding which is the exclusive means for challenging the validity of a conviction or sentence other than by direct appeal may present the “unique and compelling circumstances” in which IRCP 60(b)(6) relief may be warranted.

A district court’s failure to rule on a Rule 60(b) motion is error. *Dawson v. Cheyovich Family Trust*, 149 Idaho at 380, 234 P.3d at 704, citing *Montgomery v. Montgomery*, 147 Idaho 1, 6-7, 205 P.3d 650, 655-67 (2009) (holding that the trial court abused its discretion by failing to rule on the admissibility of certain evidence prior to granting summary judgment); and *Miramar Hotel Corp. v. Frank B. Hall & Co. of California*, 163 Cal.App.3d 1126, 210 Cal.Rptr. 114, 115 (1985) (holding that

“a trial court’s failure to issue a [ruling] when there has been a timely request therefor is per se reversible error.”)

In *Dawson*, the Supreme Court held that the district court’s failure to rule on Dawson’s Rule 60(b) motion was error, even if the failure to rule could have been interpreted as a denial of the motion, writing:

The district court’s failure to rule on the motion leaves this Court without an adequate basis upon which to understand the premise behind the district court’s determination, and thus the district court abused its discretion by failing to issue a ruling on Dawson’s Rule 60(b) motion.

149 Idaho at 380, 234 P.3d at 704.

Based upon this error, the Supreme Court remanded the case for the district court to rule upon the motion. *Id.*, 149 Idaho at 377, 234 P.3d at 701.

Likewise in this case, this Court should remand to the district court for a ruling on the Rule 60(b) elements of Mr. Gorringer’s motion. This is especially so because as in *Eby, supra*, and *Dawson, supra*, the district court may find the unique and compelling circumstances sufficient to justify relief under IRCP 60(b)(6). Mr. Gorringer’s claim of ineffective assistance of post-conviction counsel may amount to circumstances which would allow relief. Ineffective assistance of post-conviction counsel no longer is sufficient reason for filing a successive petition. *Murphy v. State*, 156 Idaho 389, 395, 327 P.3d 365, 371 (2014). Yet, at the same time, post-conviction is most often the first and only remedy for an unconstitutional deprivation of effective assistance of counsel at trial. *Grant v. State*, 156 Idaho 598,

603-04, 329 P.3d 380, 385-86 (Ct.App. 2014). Thus, the only remedy for a petitioner who has not sufficiently raised claims of ineffective assistance of counsel in the initial petition because of the ineffective assistance of post-conviction counsel is a Rule 60(b) motion and claims of ineffective assistance of post-conviction counsel may present reason for relief under the rule. *Eby, supra*. In this case, this Court should remand with directions to the district court to decide the Rule 60(b) part of Mr. Gorringer's motion.

V. CONCLUSION

The district court erred in not ruling on the Rule 60(b) part of Mr. Gorringer's motion. He asks that this Court grant relief by remanding the case for a decision by the district court.

Respectfully submitted this 10th day of March, 2016.

/s/ _____
Deborah Whipple
Attorney for Max Gorringer

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es):

Idaho State Attorney General
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Dated and certified this 10th day of March, 2016.

_____/s/_____
Deborah Whipple