

5-2-2016

Gorringe v. State Appellant's Reply 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.)	
_____)	

REPLY 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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II. ARGUMENT IN REPLY

A. *Mr. Gorringer's Appeal Was Timely Filed*

The State has argued that Mr. Gorringer's notice of appeal was not timely filed from the order denying the motion to reconsider. R 381-383. Respondent's Brief pp. 3-4.

It is true that Mr. Gorringer's notice of appeal was not filed within 42 days of the order denying the motion to reconsider. The denial of the motion to reconsider was filed on July 14, 2015. R 381. And, Mr. Gorringer's notice of appeal was filed on September 14, 2015. R 390.

However, the State failed to note in its argument that on July 14, 2015, the court also entered an order appointing counsel to establish whether the Rule 59(e) portion of the motion to reconsider had been timely filed. R 385-386. This order affected the finality of the court's order of denial and as the order was not final, any notice of appeal would have been premature and subject to dismissal. *First Security Bank v. Neibaur*, 98 Idaho 598, 603, 570 Idaho 276, 281 (1977), holding that a Rule 59(e) motion destroys the finality of a judgment for purposes of appeal and the full time for appeal commences to run anew from the entry of an order disposing of the motion and restoring finality. In this case, the court's order of denial was not final because the court had simultaneously appointed counsel to challenge its denial of the 59(e) portions of the motion. Until there was a final order, there was not an appealable order. IAR 14(a). *See Weller v. State*, 146 Idaho 652, 653, 200 P.3d 1201 (Ct. App. 2008), holding that generally appeals may be taken only from orders that

are final. It was only on August 14, 2015, when the district court filed its final judgment, that the order of denial previously filed became final. R 388-389. Until that point, the order could have been amended by the court in accord with additional argument and evidence supplied by appointed counsel.

As the State admits, Mr. Gorringer's notice of appeal was timely from the final judgment. Respondent's Brief p. 4, ftnt. 1. Thus, this Court should reject the State's argument that this appeal should be dismissed as untimely.

B. The Record Does Not Support the State's Argument Regarding the Rule 60(b) Elements of Mr. Gorringer's Motion

The State argues that the record demonstrates that the court ruled not only on the Rule 59(e) aspects of Mr. Gorringer's motion to reconsider but also on the Rule 60(b) elements of the motion. Respondent's Brief pp. 6-7.

The record speaks for itself. Mr. Gorringer's motion was entitled "Motion to Reconsider (set aside) Dismissal of Post-conviction (5-20-15); Rule 59(e), 60(b) or any other that may Grant Relief and or in the alternative motion to Review the Record." R 265. And, as discussed in the Opening Brief, the motion raised claims that could only be heard under Rule 60(b) and not under Rule 59(e). R 265-353. However, the district court treated the motion as only a Rule 59(e) motion. R 381-384.

The State argues only that because the court denied the Rule 59(e) portion of the motion that denial included a denial of the Rule 60(b) portion of the motion. The State makes no argument that if the record does not support its belief that the

