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IN THE SUPREME COURT OF THE STATE OF IDAHO

WAYNE D. ANDERSON, II,)	
)	NO. 43800
Petitioner-Appellant,)	
)	CANYON COUNTY NO. CV 2015-3509
v.)	
)	
STATE OF IDAHO,)	APPELLANT'S BRIEF
)	
Respondent.)	
<hr/>		

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 CHRIS S. NYE
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Wayne D. Anderson, II, asserts the district court abused its discretion in his post-conviction proceeding when it denied his motions to proceed as a pro se litigant, dismiss court-appointed counsel, and extend time to prepare an amended petition, because the district court did not recognize his right to self-representation.

Statement of the Facts and Course of Proceedings

In an underlying criminal case, Canyon County No. CR 2011-31445, Mr. Anderson was charged with one count of lewd conduct with a minor under sixteen, one count of sexual abuse of a child under the age of sixteen, and sentencing enhancements on both counts. (R., pp.4, 80.) He entered an *Alford* plea¹ to the lewd conduct count and a previous sex offense conviction sentencing enhancement. (R., p.80.)

Mr. Anderson later moved to withdraw the plea primarily on the basis of undue coercion from his wife, and the district court denied the motion. (R., p.80.) Mr. Anderson then filed a motion to reconsider on the basis he was suffering from undue mental duress and severe depression when he entered the plea, and his plea was therefore not knowing, intelligent, or voluntary. (R., pp.80-81.) The district court denied the motion to reconsider. (R., p.81.) The district court sentenced Mr. Anderson to a unified sentence of forty years, with fifteen years fixed. (R., pp.4, 81.)

¹ See *North Carolina v. Alford*, 400 U.S. 25 (1970).

Mr. Anderson appealed, and the Idaho Court of Appeals affirmed the decisions of the district court. *State v. Anderson*, 156 Idaho 230 (Ct. App. 2014).

Mr. Anderson filed a Petition for Post Conviction Relief, based on ineffective assistance of counsel. (R., pp.4-8.) Mr. Anderson asserted trial counsel “failed to present available evidence from Canyon Co. Jail and Medical Center, of my suicidal state . . . failed to present available testimony evidence from myself of my suicide attempts, including on the day of plea,” and “failed to [counsel] me of need for competency or mental health evaluation to [supply] to the court during withdrawal [proceeding].” (See R., pp.5-6.)

In the attached Affidavit of Facts in Support of Post-Conviction Petition, Mr. Anderson asserted that because of those failings, the State was able to prevail in its argument that he was merely severely depressed, when he was in fact severely suicidal and therefore rendered intellectually and constitutionally incapable of offering a competent *Alford* plea. (See R., p.9.) Mr. Anderson had been placed on suicide watch upon being booked into the Canyon County Jail, but the experience only compounded his misery. (R., p.10.) He stated he learned there to not disclose or hint at his suicidal ideation. (R., p.10.) After being released from suicide watch, he planned to hang himself from the ceiling of his cell, but never made an earnest attempt. (R., p.10.) When he was later placed in protective custody, he planned to hang himself in the shower stalls and made several earnest attempts with that plan. (R., pp.10-11.)

Mr. Anderson also wrote that on the day he entered his *Alford* plea, he planned to end his life after taking the weapon from the armed bailiff who was escorting him back to jail from the hearing (See R., pp.11-13.) Mr. Anderson stated he did not go

through with that plan because there was a good chance he would have to hurt or kill the bailiff. (R., p.13.)

Additionally, Mr. Anderson averred that it never occurred to his trial counsel to request a competency or mental health evaluation, or that Mr. Anderson make any mental or emotional issue known to the district court during the change of plea hearing. (R., pp.13-14.) He further stated trial counsel failed to present evidence of Mr. Anderson's suicidal ideation. (R., p.14.)

Mr. Anderson also filed a Motion and Affidavit in Support for Appointment of Counsel. (R., pp.16-19.) The district court entered an Order Appointing Counsel. (R., pp.27-28.) The State then filed an Answer arguing that Mr. Anderson's claims for post-conviction relief should be denied and/or dismissed. (R., pp.29-32.)

The district court subsequently issued a Notice of Intent to Dismiss Petition. (R., pp.80-91.) The district court stated Mr. Anderson "has presented no evidence that his attorney should have been aware that Petitioner's mental health was compromised to the degree that would have rendered his plea invalid at the time he changed his plea, other than his bare allegations which are rebutted by the Record." (R., p.84.) The district court determined Mr. Anderson "has failed to establish by admissible evidence, deficient performance with respect to the failure to present evidence or request an evaluation at the change of plea hearing." (R., p.89.) The district court also stated it would not consider Mr. Anderson's claim to the extent it was alleging his plea was not knowingly, intelligent, and voluntary separate from the claim of ineffective assistance of counsel, because that claim had been decided on direct appeal. (R., p.89.)

Regarding the claim that trial counsel was ineffective for failing to present testimony and evidence, the district court determined Mr. Anderson “has failed to provide the Court with that evidence. Further, he has failed to show prejudice; that is, that the court would have granted either his motion to withdraw or his motion to reconsider if it had been presented with that evidence.” (R., p.89.) Thus, the district court gave Mr. Anderson notice of its intent to dismiss the post-conviction petition, and gave him twenty days to respond. (See R., pp.90, 95.)

Mr. Anderson’s appointed post-conviction counsel then filed a Motion for More Time to Respond to Notice of Intent to Dismiss, based on counsel’s affidavit averring he needed more time to find and interview potential witnesses Mr. Anderson had identified to corroborate his state of mind at the time of the plea in the underlying criminal case. (R., pp.91-94.) The district court issued an order giving Mr. Anderson approximately twenty more days to file a response before the district court dismissed the petition. (See R., pp.95-96.)

After that deadline passed, post-conviction counsel filed a Second Motion for More Time to Respond to Notice of Intent to Dismiss, based on counsel’s affidavit stating he needed more time to investigate potential witnesses, obtain a release of medical information from Mr. Anderson, and pursue additional leads. (See R., pp.99-101.) The district court issued a second order, giving Mr. Anderson about thirty additional days to respond. (See R., pp.102-03.)

Two days before the new deadline, Mr. Anderson filed, pro se, a “Motion to Proceed Pro Se Litigant,” a “Motion to Extend Time to Prepare Petition,” and a “Motion to Dismiss Court Appointed Counsel.” (See R., pp.104-06.) The first motion stated

Mr. Anderson brought “his motion to proceed as his own Pro Se Litigant in further litigation of his Post Conviction Relief.” (R., p.104.) The second motion stated he brought a “motion to extend time to prepare petition in support of his Post Conviction Relief with forthcoming [evidence] of additional witnesses, and documentation from both Canyon County Medical and Detention Centers.” (R., pp.104-05.)

Mr. Anderson’s third motion, to dismiss court-appointed counsel, stated post-conviction counsel “has provided me with Ineffective Assistance of [Counsel], in so far as I have, as of this date, not [acquired] repeatedly requested documents from Canyon County Medical and Detention Centers; key witnesses have either not been examined or examined ineffectually and all requests [were] met with unreasonable delay leading to repeated requests for extensions.” (R., p.105.)

The district court conducted a status conference nine days after the deadline, where Mr. Anderson was not present but represented by post-conviction counsel. (See R., p.107.) The district court expressed its “intention to deny the motions and dismiss the petition. We’ve extended it a couple times.” (Tr., Oct. 19, 2015, p.3, Ls.11-13.) Mr. Anderson’s post-conviction counsel told the district court he had had some conversations with Mr. Anderson and had his investigator check on some potential witnesses. (Tr., Oct. 19, 2015, p.3, Ls.15-17.) Post-conviction counsel stated, “I have not discovered any good evidence upon which to base an Amended Petition.” (Tr., Oct. 19, 2015, p.3, Ls.17-18.) Post-conviction counsel further stated he had advised Mr. Anderson “that this thing is probably—probably going to live or die based on his own affidavit and his previous petition; that I was not going to file an amended

one. Subsequently, he gave me some witnesses. I've checked on those. They don't change my position." (Tr., Oct. 19, 2015, p.3, Ls.19-25.)

The district court determined "on the motion to extend time, he hasn't provided any facts to warrant an additional extension. It's been extended twice already. So I'm going to deny the motion to extend time." (Tr., Oct. 19, 2015, p.4, Ls.1-4.) The district court continued: "Deny—he doesn't really have a right to counsel on the post-conviction. He can't maintain a claim for ineffective assistance. I'm going to deny the motions." (Tr., Oct. 19, 2015, p.4, Ls.4-6.)

That same day, the district court issued an Order Denying Motions, denying Mr. Anderson's three motions "[f]or the reasons set forth at the hearing." (R., pp.108-19.) The district court also entered an Order Dismissing Petition for Post-Conviction Relief, which noted "[n]o further information has been received by the Court." (R., pp.110-19.) Thus, the district court dismissed Mr. Anderson's post-conviction petition. (R., pp.118, 120-21.)

Mr. Anderson filed, pro se, a Notice of Appeal timely from the district court's Order Dismissing Petition for Post-Conviction Relief and Final Judgment. (R., pp.122-24.)

ISSUE

Did the district court abuse its discretion when it denied Mr. Anderson's motions to proceed as a pro se litigant, dismiss court-appointed counsel, and extend his time to prepare an amended petition?

ARGUMENT

The District Court Abused Its Discretion When It Denied Mr. Anderson's Motions To Proceed As A Pro Se Litigant, Dismiss Court-Appointed Counsel, And Extend His Time To Prepare An Amended Petition

A. Introduction

Mr. Anderson asserts the district court abused its discretion when it denied his motions to proceed as a pro se litigant, dismiss court-appointed counsel, and extend his time to prepare an amended petition. The district court did not recognize Mr. Anderson's right to self-representation. Mr. Anderson had a right to proceed pro se. As a corollary to his right to self-representation, Mr. Anderson had a right to dismiss court-appointed counsel. The district court abused its discretion when it denied those motions because it did not act consistently with the applicable legal standards.

The district court also abused its discretion when it denied Mr. Anderson's motion to extend his time to prepare an amended petition. Because Mr. Anderson chose to proceed pro se but was not present at the status conference, he needed a continuance to exercise his right to self-representation, and being left unable to exercise that right meant Mr. Anderson's substantial rights were prejudiced by the denial of the motion.

B. Standard Of Review

Decisions relating to whether to grant or deny a motion for continuance are within the discretion of the district court. See *State v. Payne*, 146 Idaho 548, 567 (2008); *Hall v. State*, 156 Idaho 125, 131 (Ct. App. 2014). When an exercise of discretion is reviewed on appeal, the appellate court conducts a multi-tiered inquiry into (1) whether the district court rightly perceived the issue as one of discretion; (2) whether the district

court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the district court reached its decision by an exercise of reason.” *State v. Hedger*, 115 Idaho 598, 600 (1989). “Additionally, the denial of a motion for continuance is an abuse of discretion only if the defendant can show his substantial rights have been prejudiced.” *Payne*, 146 Idaho at 567.

C. The District Court Abused Its Discretion When It Denied Mr. Anderson’s Motion To Proceed As A Pro Se Litigant

Mr. Anderson asserts the district court abused its discretion when it denied his motion to proceed as a pro se litigant. The district court did not recognize Mr. Anderson’s right to proceed pro se. Thus, the district court did not act consistently with the applicable legal standards when it denied the motion.

Although it does not appear Idaho’s appellate courts have specifically addressed whether there is a right to proceed pro se in post-conviction proceedings, the Idaho Supreme Court has recognized a right to self-representation in other civil cases. See *Weston v. Gritman Mem’l Hosp.*, 99 Idaho 717, 720 (1978) (“We recognize the inherent right of a natural person to represent himself Pro se, but this right does not extend to representation of other persons or corporations.”); see also *Idaho State Bar Ass’n v. Idaho Pub. Utils. Comm’n*, 102 Idaho 672, 676 (1981) (same).

While the Idaho Supreme Court has not expressly named the source of the right to self-representation in civil cases, the right to proceed pro se seems to be drawn from the common law. As the United States Court of Appeals for the Second Circuit put it, “[t]he origins of the right to appear for oneself in civil proceedings derive from a number

of sources, all deeply rooted in our history and culture.” *Iannaccone v. Law*, 142 F.3d 553, 557 (2d Cir. 1998) (discussing the background of the statutory right to self-representation in federal civil cases under 28 U.S.C. § 1654).²

The common law right to self-representation stems from 13th-century English law. *Cf. VanWormer*, 60 Vand. L. Rev. at 987 (“The right to represent oneself in the federal courts can be traced to medieval England.”). The Magna Carta provides: “We will sell to no man, we will not deny or defer to any man either Justice or Right.” Magna Carta (1297) § XXIX, *available at* <http://www.legislation.gov.uk/aep/Edw1cc1929/25/9/section/XXIX>. Further, the *Iannaccone* Court noted that, “[b]y the middle of the thirteenth century, lawyers so monopolized the courts in London that the King was forced to decree that, except in a few special causes, litigants were entitled to plead their own cases without lawyers.” *Iannaccone*, 142 F.3d at 557.

The right to self-representation carried over to the American legal system. During the American colonial period, “mistrust of lawyers made appearance in court without benefit of counsel the preferred course,” and “the legal process still remained sufficiently simple to permit persons whether rich or poor to plead their own causes.” *Id.* Further, “[c]olonial peoples’ notions of their own individual rights and their reliance on themselves were part of the movement away from religious authority and towards religious freedom,” and colonial Americans’ “broad literacy and . . . political involvement in their democratic institutions transformed the average American into a citizen-lawyer.”

² See generally Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out Of Intestacy*, 53 B.C. L. Rev. 877, 932-35 (2012) (containing additional background on the right to self-representation); Nina Ingwer VanWormer, Comment, *Help At Your Fingerprints: A Twenty-First Century Response To The Pro Se Phenomenon*, 60 Vand. L. Rev. 983, 987-88 (2007) (same).

Id. The Second Circuit wrote the notion was “perhaps best expressed by Thomas Paine, arguing in 1777 for a Pennsylvania Declaration of Rights, who said that to plead one’s cause was ‘a natural right,’ pleading through counsel was merely an ‘appendage’ to the natural right of self-representation.” *Id.*

While the right to proceed pro se in civil actions in federal courts is now guaranteed by federal statute, see *id.* at 556, there is apparently no corresponding Idaho statute expressly codifying the right to self-representation in civil cases. However, Idaho law provides “[t]he common law of England, so far as it is not repugnant to, or inconsistent with, the constitution or laws of the United States, in all cases not provided for in these compiled laws, is the rule of decision in all courts of this state.” I.C. § 73-116; see Idaho Const. art. XXI, § 2 (“All laws now in force in the territory of Idaho which are not repugnant to this Constitution shall remain in force until they expire by their own limitation or be altered or repealed by the legislature.”).

English statutes in force on January 4, 1864, “when the provision contained in I.C. s 73-116 was first enacted . . . are included in the received ‘common law.’” See *Our Lady of Lourdes v. Vanator*, 91 Idaho 407, 411 (1967) (McQuade, J., concurring in the result). Because section XXIX of the Magna Carta was in force in 1864, the right to self-representation derived from its provision that “we will sell to no man, we will not deny or defer to any man either Justice or Right” is part of the § 73-116 received common law.

Thus, Mr. Anderson had a common law right to self-representation in his post-conviction proceeding, like any other litigant in a civil case in Idaho. However, the district court denied Mr. Anderson’s motion to proceed as a pro se litigant without recognizing the denial would deprive him of his right to self-representation. (See

R., p.108; Tr., Oct. 19, 2015, p.4, Ls.1-9.) Because the district court did not act consistently with the applicable legal standards, the district court abused its discretion when it denied the motion to proceed as a pro se litigant. See *Hedger*, 115 Idaho at 600. Thus, the district court's order dismissing Mr. Anderson's motion to proceed pro se should be reversed, and the matter should be remanded to allow Mr. Anderson to exercise his right to self-representation.

D. The District Court Abused Its Discretion When It Denied Mr. Anderson's Motion To Dismiss Court-Appointed Counsel

Mr. Anderson asserts the district court abused its discretion when it denied his motion to dismiss court-appointed counsel. The corollary to the right to self-representation in civil cases is the right to dismiss counsel. Indeed, with respect to the statutory right to self-representation in federal court, the Second Circuit observed the party seeking to assert the right "must clearly and unequivocally discharge any lawyer previously retained." *Iannaccone*, 142 F.3d at 558. The comments to Idaho Rule of Professional Conduct 1.16 provide that "[a] client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services." I.R.P.C. 1.16 cmt. 4.

While the comments to Rule 1.16 also state "[w]hether a client can discharge appointed counsel may depend on applicable law," I.R.P.C. 1.16 cmt. 5, Mr. Anderson submits the restrictions on discharging appointed counsel that apply to defendants in criminal cases do not apply to himself or other post-conviction petitioners.

The right to self-representation in criminal cases is guaranteed by the Sixth Amendment to the United States Constitution. See *Faretta v. California*, 422 U.S. 806,

818 (1975). The United States Supreme Court in *Faretta* acknowledged “the right of an accused to conduct his own defense seems to cut against the grain of this Court’s decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel.” *Id.* at 832. Because an accused choosing to proceed pro se “relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel,” the *Faretta* Court held “in order to represent himself, the accused must knowingly and voluntarily forgo those relinquished benefits.” *Id.* at 835 (internal quotation marks omitted). The accused “should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open.” *Id.* (internal quotation marks omitted).

In light of *Faretta*, the Idaho Supreme Court has held that to be valid, a waiver of the Sixth Amendment right to counsel by a defendant in a criminal case choosing to proceed pro se “must have been effected knowingly, voluntarily, and intelligently.” *State v. Lovelace*, 140 Idaho 53, 64 (2003). The Idaho Supreme Court has identified “contemporaneous *Faretta* warnings” as “perhaps the most prudent means to ensure the defendant’s grasp of the disadvantages of self-representation,” but also clarified it would “look to the record as a whole to determine if a [criminal defendant] knowingly, intelligently, and voluntarily waived his constitutional right.” *State v. Dalrymple*, 144 Idaho 628, 634 (2007).

Conversely, the Idaho Supreme Court has held there is no constitutional right to counsel in post-conviction proceedings, which are civil in nature. See *Murphy v. State*, 156 Idaho 389, 394-95 (2013). Under Idaho Supreme Court precedent, there would be

no danger that a post-conviction petitioner choosing to go pro se would lose the benefits of a constitutional right to counsel. *Cf. Faretta*, 422 U.S. at 835. Thus, based on the decisions of the Idaho Supreme Court, the constitutionally-mandated restrictions on defendants in criminal cases do not apply to post-conviction petitioners seeking to discharge appointed counsel. This approach is in accord with the Second Circuit's approach to the federal statutory right to self-representation in civil cases: the *Iannaccone* Court did not mention *Faretta*-type warnings among the "qualifications" placed on the right. *See Iannaccone*, 142 F.3d at 558.

Here, the district court denied the motion to dismiss court-appointed counsel on the basis Mr. Anderson "doesn't really have a right to counsel on the post-conviction. He can't maintain a claim for ineffective assistance." (See Tr., Oct. 19, 2015, p.4, Ls.4-6.) But even though Mr. Anderson could not raise a valid claim of ineffective assistance of counsel against his post-conviction counsel under the Idaho Supreme Court's decisions, *see Murphy*, 156 Idaho at 395, that does not negate his right to discharge counsel. *See I.R.P.C. 1.16 cmt. 4*. Because the district court did not act consistently with the applicable legal standards, the district court abused its discretion when it denied the motion to dismiss court-appointed counsel. *See Hedger*, 115 Idaho at 600. The district court's order denying Mr. Anderson's motion to dismiss court-appointed counsel should be reversed, and the matter should be remanded to allow Mr. Anderson to discharge his post-conviction counsel.

E. The District Court Abused Its Discretion When It Denied Mr. Anderson's Motion To Extend His Time To Prepare An Amended Petition

Mr. Anderson asserts the district court abused its discretion when it denied the motion to extend his time to prepare an amended petition. Because Mr. Anderson chose to proceed pro se but was not present at the status conference, he needed a continuance to exercise his right to self-representation. Because he was left unable to exercise his right to self-representation, Mr. Anderson's substantial rights were prejudiced by the denial of his motion to extend time to prepare petition.

When reviewing the denial of a request for continuance, Idaho's appellate courts have examined the circumstances surrounding the request. See, e.g., *Everhart v. Washington Cnty. Road & Bridge Dep't*, 130 Idaho 273, 275-76 (1997); *Gubler v. Boe*, 120 Idaho 294, 296-97 (1991). As noted above, "the denial of a motion for continuance is an abuse of discretion only if the defendant can show his substantial rights have been prejudiced." *Payne*, 146 Idaho at 567.

Here, the surrounding circumstances indicate the district court abused its discretion when it denied Mr. Anderson's motion to extend time to prepare petition. Mr. Anderson submitted his motions for mailing before the deadline to respond to the district court's notice of intent to dismiss. (See R., p.106.) In the motions, Mr. Anderson had unequivocally expressed his intention to proceed pro se. (R., p.104.) However, Mr. Anderson was not present at the status conference where the district court denied his motions. (R., p.107.) Thus, because Mr. Anderson chose to proceed pro se but was not present at the status conference, he needed a continuance to exercise his right to self-representation.

Further, Mr. Anderson's motion to extend time to prepare petition stated he wanted more time to "prepare petition in support of his post conviction relief with forthcoming evidence of additional witnesses, and documentation from both Canyon County Medical and Detention Centers." (R., p.105.) While Mr. Anderson had been granted two prior continuances to respond to the notice of intent to dismiss (R., pp.95, 102), those continuances had been requested by post-conviction counsel (R., pp.92, 99), not by Mr. Anderson himself. Post-conviction counsel ultimately did not respond to the notice of intent to dismiss. (See R., p.117; Tr., Oct. 19, 2015, p.3, Ls.19-25.) Further, the district court dismissed Mr. Anderson's post-conviction petition the same day it denied his motions. (R., pp.108, 110-18.) Thus, the denial of the motion to extend his time to prepare an amended petition meant Mr. Anderson was unable to exercise his right to self-representation and file an amended petition or other response to the notice of intent to dismiss.

The surrounding circumstances therefore indicate Mr. Anderson's substantial rights were prejudiced by the denial of his motion to extend time to prepare petition. *Cf. Everhart*, 130 Idaho at 275-76. Thus, the district court abused its discretion when it denied the motion. See *Payne*, 146 Idaho at 567. The district court's order denying Mr. Anderson's motion to extend his time to prepare an amended petition should be reversed, and the matter should be remanded to allow Mr. Anderson an extension of time to prepare an amended petition or other response to the notice of intent to dismiss.

CONCLUSION

For the above reasons, Mr. Anderson respectfully requests this Court reverse the district court's order and judgment dismissing his post-conviction petition, reverse the district court's order denying his motions to proceed as a pro se litigant, dismiss court-appointed counsel, and extend time to prepare an amended petition, and remand the matter to the district court for further proceedings.

DATED this 19th day of July, 2016.

_____/s/_____
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 19th day of July, 2016, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

WAYNE D ANDERSON II
INMATE #103343
ISCC
PO BOX 70010
BOISE ID 83707

CHRIS S NYE
DISTRICT COURT JUDGE
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

BPM/eas»