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Anderson v. State Respondent's Brief Dckt. 43800

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IN THE SUPREME COURT OF THE STATE OF IDAHO

WAYNE D. ANDERSON, II,)	
)	No. 43800
Petitioner-Appellant,)	
)	Canyon County Case No.
v.)	CV-2015-3509
)	
STATE OF IDAHO,)	
)	
Defendant-Respondent.)	
<hr/>		

BRIEF OF RESPONDENT

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

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STATEMENT OF THE CASE

Nature of the Case

Wayne D. Anderson, II, appeals from the district court's order summarily dismissing his post-conviction petition.

Statement of Facts and Course of the Proceedings

In February 2012, pursuant to an agreement with the state, Anderson entered an Alford¹ plea to one count of lewd conduct with a minor. (See R., pp.65-70.) Prior to sentencing, Anderson moved to withdraw the plea on the ground that his wife coerced him into pleading guilty. (See R., pp.44-48.) The district court denied the motion, as well as Anderson's motion for reconsideration. (Id.); State v. Anderson, 156 Idaho 230, 232-233, 322 P.3d 312, 314-315 (Ct. App. 2014). The court then imposed a unified 40-year sentence with 15 years fixed. (R., pp.49-50.) On direct appeal, Anderson alleged that his sentence was excessive and that the district court erred by denying his motion to withdraw his guilty plea. Anderson, 156 Idaho at 233-237, 322 P.3d at 315-319. The Idaho Court of Appeals affirmed the determinations of the district court. Id.

In April 2015, Anderson filed a *pro se* petition for post-conviction relief. (R., pp.4-15.) Anderson alleged that this trial counsel was ineffective for failing to present certain evidence regarding Anderson's mental health issues to the district court prior to the entry of his guilty plea, and in support of the subsequent motion to withdraw his guilty plea. (Id.) The district court granted Anderson's

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

motion for appointment of counsel to represent him in the post-conviction proceeding. (R., pp.27-28.)

On July 29, 2015, the district court entered its notice of intent to dismiss the post-conviction petition on the ground that Anderson failed to allege facts which, if true, demonstrated he was entitled to relief on any of his post-conviction claims. (R., pp.80-91.) Pursuant to the notice, Anderson had until August 14, 2015, to respond with an amended petition or additional evidence. (R., p.90.) After the court granted two requests from Anderson's counsel to extend the time to respond, Anderson's response became due on October 10, 2015. (R., pp.92-96, 99-103.) In his two motions for extensions of time, Anderson's counsel represented to the court that he had reviewed the underlying criminal file, met with Anderson's trial counsel, communicated with staff at the Canyon County Jail about obtaining records regarding Anderson's mental health and behavior while incarcerated, communicated with Anderson about the evidentiary hurdles facing his post-conviction claims, and initiated an investigation of potential witnesses. (R., pp.93,100.)

On October 14, 2015, Anderson filed *pro se* motions requesting an additional continuance so he could discharge his appointed counsel, represent himself, and file an amended *pro se* petition. (R., pp.104-105.) In the motion, Anderson asserted that his post-conviction counsel had provided ineffective assistance. (Id.) At a status conference held on October 19, 2015, the district court considered the *pro se* motions filed by Anderson. (Tr., p.3, Ls.5-9.) Anderson's counsel represented to the court that his investigator had followed up

with the potential witnesses identified to him by Anderson, but that he was unable to obtain evidence sufficient to support an amended post-conviction petition. (Tr., p.3, Ls.14-18.) Therefore, Anderson's counsel continued, he would not be filing an amended petition. (Tr., p.3, Ls.19-25.)

The district court denied Anderson's *pro se* motions. (R., pp.108-109; Tr., p.4, Ls.1-7.) The court concluded that Anderson had not provided any facts to warrant a third extension of time. (Tr., p.4, Ls.1-3.) The court further concluded that because Anderson had no constitutional right to the effective assistance of post-conviction counsel, Anderson's assertion of ineffective assistance was not a valid basis upon which to grant his motions. (Tr., p.4, Ls.4-7.) The district court then summarily dismissed the post-conviction petition on the grounds previously set forth in its notice of intent to dismiss. (R., pp.110-121; Tr., p.4, Ls.7-9.) Anderson timely appealed. (R., pp.122-124.)

ISSUE

Anderson states the issue on appeal as:

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?

(Appellant's brief, p. 7.)

The state rephrases the issue as:

Has Anderson failed to show that the district court abused its discretion by denying his motions for a third extension of time to respond to the notice of intent to dismiss, to discharge his counsel, and to proceed *pro se*?

ARGUMENT

Anderson Has Failed To Show That The District Court Abused Its Discretion By Denying His Motions For A Third Extension Of Time To Respond To The Notice Of Intent To Dismiss, To Discharge His Counsel, And To Proceed *Pro Se*

A. Introduction

Anderson contends that the district court abused its discretion by denying several *pro se* motions he filed prior to the summary dismissal of his post-conviction petition. (See generally Appellant's brief.) Specifically, Anderson contends that the district court erred in failing to continue the post-conviction proceeding a third time to allow Anderson to discharge his appointed counsel, represent himself, and file an amended *pro se* post-conviction petition. (Id.) Anderson's arguments fail because he had no constitutional or statutory right to self-representation in a post-conviction proceeding, and because the district court acted well within its discretion in declining to further delay the case where Anderson had provided no valid basis to do so.

B. Standard Of Review

The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court. Charboneau v. State, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004). For the reasons discussed below, the state submits that it is likewise a matter of the district court's discretion whether to permit a post-conviction petitioner to discharge his counsel and proceed *pro se* after counsel has been appointed. See Leonard v. State, 461 N.W.2d 465, 468 (Iowa 1990) ("Discretion to deny counsel [in a post-conviction proceeding], we think, necessarily implies discretion to deny dispensing with counsel.")

Decisions relating to whether to grant a party's motion for a continuance are also within the discretion of the court. State v. Ward, 98 Idaho 571, 574, 569 P.2d 916, 919 (1977).

C. The District Court Acted Well Within Its Discretion In Denying Anderson's Pro Se Motions

In a post-conviction proceeding, the decision to grant or deny a motion for a continuance is vested in the sound discretion of the trial court. Hall v. State, 156 Idaho 125, 131, 320 P.3d 1284, 1290 (Ct. App. 1998) (citing State v. Payne, 146 Idaho 548, 567, 199 P.3d 123, 142 (2008); State v. Wood, 132 Idaho 88, 106, 967 P.2d 702, 720 (1998)). In order to prevail on appeal, the petitioner must show that the trial court abused its discretion and that his substantial rights have been prejudiced. Id. (citing Payne, 146 Idaho at 567, 199 P.3d at 142.)

A criminal defendant has a constitutional right of self-representation which derives from the Sixth Amendment. Faretta v. California, 422 U.S. 806, 818 (1975). However, this right of self-representation does not extend to either direct appeals or post-conviction proceedings. See Martinez v. Court of Appeal of Cal., Fourth Appellate Dist., 528 U.S. 152, 163 (2000) (a defendant has no constitutional right of self-representation in a direct appeal of a criminal conviction); Isom v. State, 953 So. 2d 604, 605 (Fla Dist. Ct. App. 2007) (the post-conviction court has discretion as to whether to discharge appointed post-conviction counsel); In re Jerry Chapman, 581 A.2d 1041, 1043-1044 (Vt. 1990) (constitutional right to self-representation is inapplicable in post-conviction relief proceeding); Bittick v. State, 105 S.W.3d 498, 501 (Mo. App. 2003) ("The [United

States] Supreme Court has not determined whether an incarcerated postconviction motion civil litigant has the same right to self-representation” (footnote omitted).).

Further, while some states and the federal government provide for a right of self-representation in collateral proceedings through state constitutions and statutes (see, e.g., Smith v. Baptiste, 694 S.E.2d 83, 91 (Ga. 2010) (“Even today the right of self-representation in *federal* civil cases is protected only by statute” (citing 28 U.S.C. § 1654) (emphasis in original); McCracken v. State, 518 P.2d 85, 90-91 (Alaska 1974) (holding that the Alaska constitution guarantees a right to self-representation in a post-conviction proceeding), the Idaho appellate courts have not recognized such a state constitutional or statutory right to self-representation in Idaho post-conviction proceedings.

To the extent, as Anderson asserts on appeal (Appellant’s brief, pp.9-11), that there is a common law right to self-representation in Idaho civil cases,² the state submits that this right, even if it applies to convicted criminal defendants in post-conviction petition proceedings, is not absolute. Instead, a court may weigh factors, such as its interest in the efficient resolution of cases, in determining whether to permit a post-conviction petitioner to discharge counsel. See, e.g., Lovin v. State, 286 S.W.3d 275, 286 (Tenn. 2009) (“When a prisoner desires to

² For this proposition, Anderson cites Weston v. Gritman Mem’l Hosp., 99 Idaho 717, 720, 587 P.2d 1252, 1255 (1978) and Idaho State Bar Ass’n v. Idaho Pub. Utils. Comm’n, 102 Idaho 672, 676, 637 P.2d 1168, 1172 (1981). (Appellant’s brief, p.9.) In both of these cases, the Idaho Supreme Court noted, in dicta, that an individual has an “inherent” right to represent himself, but that this right did not extend to the representation of other entities. The Idaho Supreme Court did not specifically identify the source of this right or define its parameters and limitations.

discharge a retained lawyer [in a post-conviction proceeding], the appropriate focus is on balancing the prisoner's right to discharge his or her lawyer against the court's obligation to administer justice efficiently by avoiding unreasonable delay." (citations omitted)).

Therefore, as Anderson ultimately acknowledges on appeal (see generally Appellant's brief), it is a matter left to the district court's discretion whether to permit a post-conviction petitioner to discharge his appointed counsel and proceed *pro se*. In this case, Anderson has failed to demonstrate that the district court abused its discretion in denying his motions because he failed to show any valid basis for discharging his appointed counsel and subjecting the post-conviction proceeding to additional delay.

First, Anderson's requests were untimely. Even in the context of the established constitutional right of self-representation at a criminal trial, a court may consider the timeliness of the request for self-representation in determining whether to grant the request. See State v. Lippert, 145 Idaho 586, 597, 181 P.3d 512, 523 (Ct. App. 2007) (citing United States v. Jones, 938 F.2d 737, 742-743 (7th Cir. 1991); Adams v. Carroll, 875 F.2d 1441, 1444 (9th Cir. 1989); Raulerson v. Wainwright, 732 F.2d 803, 808 (11th Cir. 1984)). In this case, Anderson did not request that he be permitted to represent himself until approximately six months after the court granted his motion for appointment of counsel (R., pp.27-28), approximately two and one-half months after the court entered its notice of intent to summarily dismiss the petition (R., pp.80-91), and only after Anderson's appointed counsel requested, and was granted, two extensions of time to

respond to the court's notice (R., pp.92-96, 99-103). The district court appropriately considered the late timing of Anderson's request (Tr., p.3, Ls.11-13; p.4, L.3), and acted within its discretion to prevent further delays.

Further, as the court also noted (Tr., p.4, Ls.1-3), Anderson's requests were not supported by any evidence or assertions that warranted the case being delayed further. Anderson did not explain what evidence he would have been able to obtain, as an in-custody *pro se* inmate, if only he had more time to do so, or how such evidence would have cured the defects in his post-conviction petition. (See R., pp.104-105.) Anderson likewise failed to allege or demonstrate that his attorney's representations to the court about the fruitlessness of the investigation were incorrect. (See id.) Anderson was not automatically entitled to discharge his counsel and proceed *pro se* just because he was apparently not pleased with his counsel's conclusions.

Finally, as the district court also correctly recognized (Tr., p.4, Ls.4-6), Anderson's assertion that his post-conviction counsel provided ineffective assistance could not provide a valid basis to discharge counsel and continue the case in these circumstances because there is no constitutional right to the effective assistance of post-conviction counsel. See Murphy v. State, 156 Idaho 389, 391, 327 P.3d 365, 367 (2014).

In the alternative, even if the district court abused its discretion by failing to permit Anderson to discharge his appointed counsel, such error is harmless because the court, as discussed above, acted well within its discretion in denying Anderson's motion for a continuance. See I.R.C.P. 61 ("the court must disregard

any error or defect in the proceeding which does not affect the substantial rights of the parties.”) In this case, even if Anderson had the right to discharge his counsel, his post-conviction petition would still have been summarily dismissed after the district court denied the motion to continue the case. Therefore, Anderson cannot demonstrate prejudice.

For the foregoing reasons, Anderson has failed to show that the district court abused its discretion by denying his motions for a third extension of time to respond to the notice of intent to dismiss, to discharge his counsel, and to proceed *pro se* in the post-conviction proceeding.

CONCLUSION

The state respectfully requests that this Court affirm the district court’s order denying Anderson’s *pro se* motions, and its order summarily dismissing Anderson’s post-conviction petition.

DATED this 13th day of October, 2016.

/s/ Mark W. Olson
MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 13th day of October, 2016, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

BEN P. McGREEVY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Mark W. Olson
MARK W. OLSON
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MWO/dd