6-13-2018

Ozuna v. State Respondent's Brief Dckt. 44895

IN THE SUPREME COURT OF THE STATE OF IDAHO

RICHARD OZUNA, JR.,	)	
	)	**No. 44895**
Petitioner-Appellant,	)	
	)	**Canyon County Case No.**
v.	)	**CV-2015-224**
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
	)	

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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Nature Of The Case

Richard Ozuna, Jr., appeals from the denial of his I.R.C.P. 60(b) motion seeking relief from the judgment denying his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

A jury convicted Ozuna of lewd conduct with a child. State v. Ozuna, 155 Idaho 697, 700, 316 P.3d 109, 112 (Ct. App. 2013). The district court imposed a sentence, enhanced because this was a repeat offense, of life with 20 years determinate. Id. at 700-01, 316 P.3d at 112-13. The Idaho Court of Appeals affirmed the conviction and sentence. Id. at 704–05, 316 P.3d at 116–17.

Ozuna filed a petition for post-conviction relief. (#43659 R., pp. 5-8.[1]) The district court dismissed the petition. (#43659 R., pp. 111-30, 136-37.) Ozuna timely appealed. (#43659 R., pp. 140-42.)

While the matter was on appeal, Ozuna filed a "Declaration of Petitioner" and a "Motion to Set Aside Judgment and Order" under I.R.C.P. 60(b). (R., pp. 7-56 (capitalization altered).) Ozuna claimed his appointed post-conviction attorney "abandoned his client with no notice." (R., p. 47.)

While the motion was pending the Idaho Court of Appeals entered an opinion affirming the summary dismissal of the post-conviction petition. (R., pp. 78-83, 86.) Thereafter Ozuna filed a new "declaration." (R., pp. 88-89.) The state filed an objection to the motion to set aside the judgment. (R., pp. 90-93.)

[1] The Court augmented the record in this case with the record from the prior appeal, docket number 43659, by order dated March 20, 2017. (R., p. 128.)

The district court held a hearing on the motion, at which Ozuna's previous post-conviction counsel testified. (R., pp. 102-03; see also R., pp. 64-65 (state's motion for waiver of attorney-client privilege), 72-73 (order for waiver of attorney-client privilege), 74-75 (order vacating appointment of post-conviction counsel and appointing new post-conviction counsel).) The district court denied the motion. (R., pp. 104-07.) The district court concluded that, although post-conviction counsel did not "file any response to the court's Notice of Intent to Dismiss," there was not a "lack of meaningful representation" because counsel "familiarized himself with the facts of the criminal and post-conviction cases, analyzed the potential issues, discussed those issues with Mr. Ozuna, and determined that there was no additional action to be taken with respect to the petition." (R., p. 106.)

Ozuna filed an appeal timely from the denial of his motion. (R., pp. 109-11.)

ISSUES

Ozuna states the issues on appeal as:

1. Did the District Court commit reversible error denying Mr. Ozuna's Motion and Order for Transport?

2. Did the District Court abuse its discretion in denying Mr. Ozuna's Motion to Set Aside Judgment and Order?

3. Was Mr. Ozuna deprived a meaningful opportunity to properly present his post-conviction relief claims due to his state-provided attorney had abandoned the case without notice to Mr. Ozuna, and resulted in a denial of due process rights that constituted relief from the Judgment and Order?

4. Was Mr. Ozuna deprived a full and fair opportunity to fully exhaust his post-conviction relief claims before the Idaho Supreme Court in order to be able to seek federal habeas review on all of his post-conviction claims he presented to the district court due to his state-provided attorney having abandoned the case without notice to Mr. Ozuna first?

5. Was it an abuse of discretion in permitting Appellate Counsel leave to withdraw from this case?

(Appellant's brief, p. 5 (verbatim).)

The state rephrases the issues as:

1. Has Ozuna failed to show he had a legal right to attend the hearing on the Rule 60(b) motion?

2. Has Ozuna failed to show error in the denial of his Rule 60(b) motion?

ARGUMENT

I.
Ozuna Has Failed To Show The District Court Erred By Denying His Motion To Transport

A. Introduction

At the start of the hearing on the Rule 60(b) motion Ozuna's counsel stated that he "had tendered a motion and order for transport" and it was his understanding that motion had not been granted. (Tr., p. 4, Ls. 7-9.) The district court confirmed this. (Tr., p. 4, L. 10.) Ozuna's counsel then submitted the I.R.C.P. 60(b) motion on the record, including on the two declarations provided by Ozuna. (Tr., p. 4, Ls. 11-15.)

On appeal Ozuna, relying on I.C. § 19-4907(b), claims the court erred by denying the motion to transport him. (Appellant's brief, pp. 5-6.) That statute, which gives post-conviction petitioners the right to attend evidentiary hearings on their petitions under certain circumstances, does not grant any right for post-conviction petitioners to attend hearings on Rule 60(b) motions. Even if applicable, the record shows no abuse of discretion under I.C. § 19-4907(b).

B. This Issue Is Not Preserved And, Even If Preserved, The Plain Language Of I.C. § 19-4907(b) Does Not Grant A Right To Be Transported For Hearings On I.R.C.P. 60(b) Motions

Ozuna argues the district court erred in denying his motion for transport, claiming that I.C. § 19-4907(b), and cases interpreting it, conferred upon him a right to be present for the hearing on his Rule 60(b) motion. (Appellant's brief, pp. 5-6.) Appellate court review, however, "is limited to the evidence, theories, and arguments that were presented below." State v. Dahl, 162 Idaho 541, 548, 400 P.3d 629, 636 (Ct. App. 2017). The record in this case does not show that Ozuna ever claimed to the district court that he had a right

under I.C. § 19-4907(b) to be transported to the Rule 60(b) hearing. Because this theory was not presented to the trial court, it is not preserved for appellate review.

Even if preserved, Ozuna has failed to show on appeal that he had a right under I.C. § 19-4907(b) to be transported to the Rule 60(b) hearing. The statutory language at issue provides that a post-conviction petitioner "should be produced at the hearing on a motion attacking a sentence where there are substantial issues of fact as to evidence in which he participated." I.C. § 19-4907(b). The Court must give these words "their plain, usual, and ordinary meanings" and, if "the statute's language is unambiguous, the legislature's clearly expressed intent must be given effect" and the Court will not "go beyond the statute's plain language to consider other rules of statutory construction." Salinas v. Bridgeview Estates, 162 Idaho 91, 93, 394 P.3d 793, 795 (2017).

By its plain language the statute applies to a "hearing on a motion attacking a sentence." I.C. § 19-4907(b). The hearing in question, however, was a hearing on a motion for relief from a civil judgment under I.R.C.P. 60(b). Nothing in the statutory language of I.C. § 19-4907(b) suggests it applies to Rule 60(b) motions. Because Ozuna has provided no authority that he was entitled to be present for the hearing on his Rule 60(b) motion, he has failed to show the district court erred by denying the motion to transport.

C. Even If I.C. § 19-4907(b) Were Relevant, Ozuna Has Shown Neither An Abuse Of Discretion Nor That The Claimed Error Is Reversible

Granting a hearing at which the petitioner is present under I.C. § 19-4907(b) is discretionary. Deford v. State, 105 Idaho 865, 868, 673 P.2d 1059, 1062 (1983). "A defendant's presence at a hearing on a petition for post-conviction relief is not required unless there exist 'substantial issues of fact as to evidence in which [the petitioner]

participated.'" Lopez v. State, 116 Idaho 705, 707, 779 P.2d 19, 21 (Ct. App. 1989) (brackets original; quoting I.C. § 19-4907(b)). The relevant facts at issue in the hearing were counsel's actions (or inactions) prior to the summary dismissal. Eby v. State, 148 Idaho 731, 737, 228 P.3d 998, 1004 (2010). Specifically, Ozuna was entitled to Rule 60(b) relief if a "complete absence of meaningful representation" led to dismissal of his petition. Eby, 148 Idaho at 737, 228 P.3d at 1004. Ozuna has failed to show a "substantial issue of fact" related to whether he suffered a "complete absence of meaningful representation" in which he "participated."

In this case counsel "familiarized himself with the facts of the criminal and post-conviction cases, analyzed the potential issues, *discussed those issues with Mr. Ozuna*, and determined that there was no additional action to be taken with respect to the petition." (R., p. 106 (emphasis added).) The only possible "substantial issues of fact as to evidence in which [Ozuna] participated," I.C. § 19-4907(b), was the discussion between himself and counsel. There were not, however, "substantial issues of fact" related to that discussion.

Ozuna claimed that his counsel "visited me once for approximately 30 minutes." (R., p. 8.) He asserted they talked specifically about at least two of his causes of action. (R., p. 10.) Although counsel testified that they discussed other issues as well (see Tr., p. 9, L. 10 – p. 10, L. 16; p. 11, L. 18 – p. 13, L. 12), the trial court was neither required to make, nor did it make, findings of fact as to exactly what topics were discussed when it concluded there was not a "complete absence of meaningful representation." Because the only area of dispute in the evidence is exactly what was discussed in their meeting, and the exact scope of the discussion was not a substantial issue, there is nothing in this record suggesting "substantial issues of fact as to evidence in which [Ozuna] participated." I.C.

§ 19-4907(b). Because there was no justification to transport him for the hearing even if the statute did apply, Ozuna has shown no abuse of discretion.

Finally, even if the district court's order could be considered error, Ozuna has failed to show it was reversible error. "The burden is upon the appellant to show prejudicial error." Burgess v. Salmon River Canal Co., 119 Idaho 299, 306, 805 P.2d 1223, 1230 (1991) (citing Carpenter v. Double R Cattle Co., 108 Idaho 602, 604, 701 P.2d 222, 224 (1985) ("The appellants have the burden of showing reversible error on appeal.")). To meet this burden the appellant must show both error and that the error "could have affected or did affect the outcome of the trial." Id. As noted above, the only factual dispute between Ozuna's version of events and post-conviction counsel's version is the scope of topics covered in their meeting. That factual dispute was not substantial to resolving the motion. Because Ozuna has failed to show either error or prejudice, he has failed to show reversible error.

II.
Ozuna Has Failed To Show Error In The Denial Of His Rule 60(b) Motion

A. Introduction

The district court concluded that Ozuna did not suffer a complete absence of meaningful representation because counsel "familiarized himself with the facts of the criminal and post-conviction cases, analyzed the potential issues, discussed those issues with Mr. Ozuna, and determined that there was no additional action to be taken with respect to the petition." (R., pp. 105-06.) Ozuna makes several claims of error (Appellant's brief, pp. 6-14), but has failed to support his claims. He has therefore failed to show an abuse of discretion in the district court's order denying his Rule 60(b) motion.

B. Standard Of Review

A trial court's dismissal of motions brought under Rule 60(b) is reviewed for an abuse of discretion. Berg v. Kendall, 147 Idaho 571, 578, 212 P.3d 1001, 1008 (2009). This standard requires the Court to review "(1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason." Id. at 576, 212 P.3d at 1006 (internal quotations omitted). "A determination under Rule 60(b) turns largely on questions of fact to be determined by the trial court. Those factual findings will be upheld unless they are clearly erroneous." Printcraft Press, Inc. v. Sunnyside Park Utilities, Inc., 153 Idaho 440, 449, 283 P.3d 757, 766 (2012) (internal quotations omitted).

C. Ozuna Has Failed To Show An Abuse Of Discretion

Idaho Rule of Civil Procedure 60(b) allows a court to relieve a party from a final judgment or order for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

I.R.C.P. 60(b). "Although the district court has broad discretion in deciding a Rule 60(b) motion, the motion may be granted only upon a showing of unique and compelling circumstances." Palmer v. Spain, 138 Idaho 798, 802, 69 P.3d 1059, 1063 (2003) (citing

Miller v. Haller, 129 Idaho 345, 348, 924 P.2d 607, 610 (1996)). Moreover, the party seeking relief must also "show, plead or present evidence of facts which, if established, would constitute a meritorious defense to the action." Ponderosa Paint Mfg., Inc. v. Yack, 125 Idaho 310, 317, 870 P.2d 663, 670 (Ct. App. 1994). This is so because "it would be an idle exercise and a waste of judicial resources for a court to set aside a judgment if, in fact, there is no genuine justiciable controversy." Id. The "complete absence of meaningful representation" in a post-conviction action "may present the 'unique and compelling circumstances' in which I.R.C.P. 60(b)(6) relief may well be warranted." Eby v. State, 148 Idaho 731, 737, 228 P.3d 998, 1004 (2010).

The district court concluded that, although Ozuna did not "delineate the specific subsection" of Rule 60(b) he relied upon, because the cases he relied upon related to subsection (b)(6) the motion was brought on that subsection. (R., p. 105.) The court cited the relevant legal standards, including that the decision before it was discretionary. (Id.) The court then concluded that Ozuna did not suffer lack of representation rising to the level of unique and compelling circumstances because his counsel in fact "reviewed the relevant information, analyzed the potential issues, and met with Mr. Ozuna," and "concluded that there were not viable claims to pursue." (R., pp. 105-07.) This record establishes that the court correctly perceived the issue as one of discretion, acted within the boundaries of that discretion and consistently with the legal standards, and reached its decision by an exercise of reason. Therefore, the district court did not abuse its discretion.

Ozuna claims error on appeal, but his arguments are not supported by the record or the law. Ozuna first asserts that he presented newly discovered evidence about DNA

testing. (Appellant's brief, p. 7.[2]) The evidence at issue was letters from the Idaho State Police indicating that the state lab was changing its procedures in relation to Short Tandem Repeat (STR) DNA testing because of errors in the STR population database published in 1999 and 2001. (R., pp. 26-42.) They were also installing new software addressing "Combined Probability of Inclusion (CPI)" where samples contained mixed DNA. (R., p. 43.) There is no evidence in the record, however, indicating this change in testing was relevant to Ozuna's case. For example, he presented no evidence that the lab conducted STR testing in his case or relied upon the 1999 or 2001 databases, or that, even if this happened, it would have changed the DNA analysis in any meaningful way. Having failed to establish the relevance of the letters, Ozuna has fallen far short of showing that counsel's conduct amounted to an abandonment of the case.

Ozuna also argues his counsel failed to inform him of his decision to not respond to the court's notice of intent to dismiss. (Appellant's brief, p. 10.) He presents no authority that this alone is grounds for granting a Rule 60(b)(6) motion. He also presents no cogent argument why this would amount to the "complete absence of meaningful representation" by post-conviction counsel. Eby, 148 Idaho at 737, 228 P.3d at 1004. Finally, his claim that he "could have made some sort of attempt to respond" (Appellant's brief, p. 10) falls far short of meeting his burden of showing that the outcome of the

[2] Ozuna asserts this should have been considered a claim under I.R.C.P. 60(b)(2) as well as 60(b)(6). (Appellant's brief, p. 10.) He did not cite subsection (b)(2) in his documents, however. Even if subsection (b)(2) is considered he has failed to show error. Under this subsection "the movant must show the existence of newly discovered evidence it could not previously have discovered by due diligence." Printcraft Press, Inc., 153 Idaho at 450, 283 P.3d at 767. Ozuna himself alleged that his counsel was aware of this information for almost a year before Ozuna submitted it to the court. (R., p. 11.) The district court properly treated this as an I.R.C.P. 60(b)(6) claim that counsel failed to act on this information.

summary dismissal proceedings might have been different if counsel had so informed him. Yack, 125 Idaho at 317, 870 P.2d at 670 (Rule 60(b) movant must establish grounds for believing different judgment might result if motion granted).

Ozuna has failed to demonstrate an abuse of discretion because the record shows the district court understood it had discretion, acted within the boundaries of that discretion, and reached its decision by an exercise of reason. Ozuna's claims otherwise are not supported by the facts or the law.

CONCLUSION

The state respectfully requests this Court to affirm the district court's order denying the motion for relief from the judgment.

DATED this 13th day of June, 2018.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 13th day of June, 2018, served two true and correct paper copies of the foregoing BRIEF OF RESPONDENT by placing the copies in the United States mail, postage prepaid, addressed to:

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