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Green v. State Appellant's Reply Brief Dckt. 41235

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IN THE SUPREME COURT OF THE STATE OF IDAHO

LEE EDD GREEN JR.)
)
 Petitioner/Appellant) Supreme Court Case No. 41235
)
 vs.)
)
 STATE OF IDAHO,)
)
 Respondent.)
 _____)

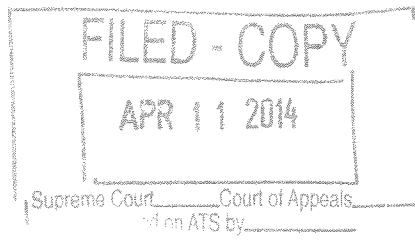
APPELLANT'S REPLY BRIEF

Appeal from the District Division of the District Court of the Third Judicial District of
the State of Idaho, in and for the County of Owhyee

Honorable Molly J. Huskey
District Judge, Presiding

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Attorney At Law
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Caldwell, Idaho

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State of Idaho
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Boise, Idaho 83702-0010



COPY

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ARGUMENT

1. *The commencement of a Post-conviction proceeding may be filed within one year from the expiration of the time for an appeal, or from the determination of an appeal or from the determination of a proceeding following an appeal.*

Idaho Code Section 19-4902 provides:

(a) A proceeding is commenced by filing an application verified by the applicant with the clerk of the district court in which the conviction took place. An application may be filed at any time within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal, whichever is later....

In this case the Judgment and Conviction occurred on November 8, 2011, with the court retaining jurisdiction. Without the provision retaining jurisdiction the time for the filing of an appeal would have expired after December 20, 2011. But the Court qualified the Judgment by retaining jurisdiction.

2. *Even though the Judgment and Conviction was entered on November 8, 2011, the court retained jurisdiction and a final determination was not entered until the rider review which occurred on June 8, 2012.*

Idaho Appellate Rule 11(c) defines what are appealable judgments and orders in criminal cases:

Rule 11(c) (6) Any judgment imposing sentence after conviction....

Rule 11(c)(9) Any order after judgment effecting the substantial rights of the defendant or state.

Idaho Appellate Rule 14 provides for an enlargement of time for the filing of an appeal where jurisdiction is retained by the court:

Rule 14. Time for filing appeals. All appeals permitted or authorized by these rules, except as provided in Rule 12, shall be taken and made in the manner and within the time limits as follows:

...If, at the time of judgment, the district court retains jurisdiction pursuant to Idaho Code Sec. 19-2601(4), the length of time to file an appeal from the sentence contained in the criminal judgment shall be enlarged by the length of time between entry of the judgment of conviction and entry of the order relinquishing jurisdiction or placing the defendant on probation; provided that all other appeals challenging the judgment must be brought within 42 days of that judgment.

Both Rule 11(c)(6) and (9) are applicable in this case. Certainly, the Order of the Court relinquishing jurisdiction was an order effecting the substantial rights of the defendant. And Rule 14 provides that where jurisdiction is retained by the Court in pronouncing its judgment and conviction, the length of time to appeal is tolled or "enlarged by the length of time between entry of the judgment of conviction and entry of the order relinquishing jurisdiction..."

Such is precisely the case here. The court retained jurisdiction enlarging the time for the filing of an appeal. The retained jurisdiction was released by the Court on June 8, 2012. From that date the Defendant had 42 days to file an appeal. For purposes of the Post-conviction relief statute the one year period in which to file a post conviction relief petition commenced on July 20, 2012.

The Petition for Post-conviction relief in this case was filed on March 6, 2013, well within the one year period. The district court erred in dismissing Appellate's Petition.

3. *The time for filing an appeal should have occurred forty-two days after the Court released jurisdiction, to wit: July 20, 2012, because the Judgment and Conviction was not final until the contingency of the rider was determined and the Judgment did not become a final judgment until the decision to release jurisdiction occurred.*

In this case there was no practical reason for the defendant to straightway appeal the Judgment and Conviction within the 42 day period after November 8, 2011. The defendant had bargained for retained jurisdiction and he received a retained jurisdiction,

what he had asked for. The problem arose and the substantial rights of the defendant were effected when the court relinquished jurisdiction. Then there was a reason for the defendant to exercise the right of appeal.

4. Because of the contingency of the retained jurisdiction the Judgment and Conviction entered on November 8, 2011, was not a final order and was not ripe for appeal.

Because Rule 14, IAR, enlarges the time in which to commence an appeal, the time to file a petition for post-conviction relief is likewise enlarged. I.C. 19-4902 provides that a petition under the act must be filed within one year from the expiration of the time for filing an appeal. The substantial rights of the defendant were effected when the court released jurisdiction which occurred on June 8, 2012. The defendant's rights under I.C. 19-4902 commenced to run upon the expiration of the appeal time of July 20, 2012. That makes the filing of the Petition here on March 6, 2013 timely.

5. The trial court in dismissing the Petition for Post-conviction on grounds of untimeliness placed the decision to dismiss the Petition beyond the reach of the appellate process.

The trial court did not consider the provisions of Rule 14, IAR, in dismissing the Petition of the defendant/appellate here. By doing so the court placed beyond review the issue of whether the court abused its discretion in relinquishing jurisdiction. The prosecuting attorney moved the court for summary dismissal of the Petition, essentially on grounds of the waivers set forth in the Rule 11 plea agreement. The court dismissed the Petition on timeliness grounds without addressing specifically the potential prosecutorial misconduct of demanding the waivers. That issue has been discussed in Appellate's opening brief.

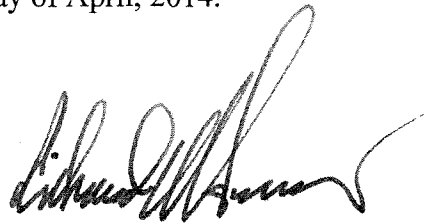
6. *The ineffective assistance of counsel claim raised by Appellate occurred because of counsel's consent to the waiver of Appellate's right to appeal, file a Rule 35 motion and waiver of post conviction proceedings.*

Because of the overreach of the prosecuting attorney in demanding waivers of all of defendant's post conviction rights and defense counsel's acquiescence in relinquishing those rights, the Appellate has been substantially harmed by that ineffectiveness. He is serving a very lengthy. But for the reasons set forth above and previously, Appellate is requesting this Court for relief and for a hearing on the merits of whether he was deprived of effective representation and due process.

CONCLUSION

For the reasons set forth above and previously in Appellate's opening brief, it is requested the Court remand this matter back to the trial court for further proceedings on the issue of whether ineffective assistance of counsel occurred.

Respectively submitted this 11 day of April, 2014.



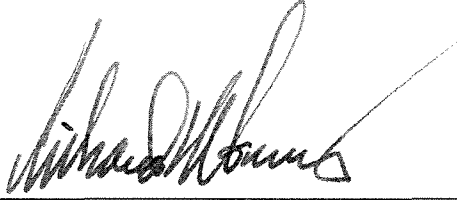
Richard L. Harris
Attorney for Appellate

CERTIFICATE OF SERVICE

I the undersigned do certify that a true and correct copy of the foregoing instrument was served on the following on this 11 day of April, 2014, as described below:

Lawrence Wasden
Attorney General
State of Idaho
P.O. Box 83720
Boise, Idaho 83702-0010

UNITED STATES MAIL
 COURTHOUSE BASKET
 FACSIMILE



RICHARD L. HARRIS