

IN THE SUPREME COURT OF THE STATE OF IDAHO

SONNY DEAN FARROW,)
) No. 45753
 Petitioner-Appellant,)
) Kootenai County Case No.
 v.) CV-2017-3419
)
 STATE OF IDAHO,)
)
)
 Defendant-Respondent.)
 _____)

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF KOOTENAI**

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STATEMENT OF THE CASE

Nature Of The Case

Sonny Dean Farrow appeals from the judgment dismissing his petition for post-conviction relief, challenging the district court's denial of his motion for a continuance.

Statement Of The Facts And Course Of The Proceedings

In the underlying criminal case Farrow was convicted of two counts of domestic battery. (R., p.4.) Following a guilty plea, Farrow was sentenced to consecutive prison sentences of nine years, with five years fixed, and three years, with one year fixed. (R., pp.4-5.)

Farrow filed a *pro se* petition for post-conviction relief. (R., pp.4-10.) He alleged that trial counsel gave ineffective assistance "by neglect[ing] to file [a] motion for a rule 35 on time." (R., p.5.) The state filed an answer (R., pp.11-14) and a motion for summary disposition, in which it argued that even if the failure to file a Rule 35 motion was deficient performance, "which is not conceded by the State, there is nonetheless simply no support for any contention that Petitioner was prejudiced" (R., p.41).

The district court appointed counsel. (R., pp.30-31.) Farrow's counsel filed a stipulation with the state to continue the hearing on the state's summary disposition motion. (R., pp.44-45.) Thereafter, the district court denied the parties' stipulation without any initial explanation why. (R., pp.46-47.)

At the disposition motion hearing the district court explained that it denied the stipulation to continue "primarily because there was no reason given for that stipulation." (Tr., p.3, Ls.17-20.) The court also pointed out that Farrow's counsel had not submitted

anything “in response to [the state’s] motion for summary disposition.” (Tr., p.3, Ls.8-16.) Because the state had no objection to the late filing, the district court allowed post-conviction counsel to file an affidavit from trial counsel (Tr., p.6, Ls.6-24), who stated that “I did not timely file the requested Rule 35 Motion due to misreading my calendar” (R., p.49).

The state maintained that, even assuming trial counsel’s administrative blooper showed deficient performance, Farrow had not “met his burden with regard to the *Strickland*¹ prejudice prong” because there was no evidence that the Rule 35 motion would have been granted. (Tr., p.9, L.6 – p.10, L.16.)

Farrow’s counsel then made an “offer of proof for this hearing,” explaining what Farrow “would be able to tell Court” to show his Rule 35 motion would have been granted. (Tr., p.17, L.23 – p.19, L.5.) The district court pointed out counsel’s offer of proof was not admissible evidence, and noted there was no other evidence in front of it, such as “a late affidavit of Mr. Farrow just like you filed the late affidavit of [trial counsel].” (Tr., p.19, Ls.6-15.) Farrow’s counsel agreed there was no such admissible evidence before the district court, but, offered that “I would be happy to, in addition to the offer of proof, have Mr. Farrow either prepare an affidavit or I would ask to continue this.” (Tr., p.19, Ls.4-21.)

Without directly addressing the remark about a continuance, the district court concluded Farrow failed to show prejudice:

[The prosecutor] is correct that there is no evidence before me at all that had [trial counsel] timely filed a Rule 35 motion that that motion would be

¹ Strickland v. Washington, 466 U.S. 668 (1984).

successful, and my questions have gone to I guess the building blocks for that ultimate conclusion, and the building blocks are not even present.

There's—there's no evidence before me today [of what] the two remedies Mr. Farrow sought—would've sought in his Rule 35 motion, whether it be a correction or a reduction. There's no proof as to what Mr. Farrow's institutional performance was or what new information or what additional information that was [not] given to the Court at the rider review. There's nothing, and the time for that, the presentation of that was any time after the petition was filed on May 1st, 2017, up to today....

There's been all this time to file an affidavit from Mr. Farrow, and there's no affidavit from Mr. Farrow. The—there's no prejudice that's been demonstrated, no likelihood of success on the merits of a Rule 35, so there's a *Strickland* prong that's completely unsatisfied.

(Tr., p.20, L.17 – p.21, L.16.) The district court accordingly granted the state's motion for summary disposition and dismissed the post-conviction petition. (R., pp.15-16.) Farrow timely appeals. (R., pp.17-19.)

ISSUE

Farrow states the issue on appeal as:

Did the district court abuse its discretion by denying Mr. Farrow's motion for a continuance?

(Appellant's brief, p3.)

The state rephrases the issue as:

Has Farrow failed to show the district court abused its discretion by denying the stipulation to continue or any implied motion to continue?

ARGUMENT

Farrow Fails To Show The District Court Abused Its Discretion In Denying The Stipulation For A Continuance Or Any Implied Motion For A Continuance

A. Introduction

The district court explained that it previously denied the state's and Farrow's stipulation for a continuance "because there was no reason given" for it. (Tr., p.3, Ls.17-20.) Later on, confronting his proof problems in surviving the state's dismissal motion, Farrow remarked that "I would ask to continue this so we can get him on the phone...." (Tr., p.19, Ls.20-21.) The district court summarily dismissed the petition without explicitly² mentioning the remarks about another continuance. (Tr., p.20, L.14 – p.21, L.24.)

Claiming error on appeal, Farrow appears to have merged these two separate events: Farrow uses the monolithic shorthand of "the motion for a continuance" when talking about the stipulation to continue, but also when referring to counsel's remarks during the summary dismissal hearing. (See generally, Appellant's brief.) Farrow argues that his "interest in obtaining a continuance [was] extremely high, because without evidence of prejudice he could not prevail on a motion for summary dismissal," and concludes "in weighing his interests against those of the State, it is clear that the district court abused its discretion in denying the motion for a continuance." (Appellant's brief, pp.5-6.)

² The district court's statement that "[t]he motion's denied," could plausibly be a reference to Farrow's remarks about a continuance. (See Tr., p.21, L.24.) But, it is unclear from the transcript whether this is what the court meant.

Farrow fails to show the district court abused its discretion. To be clear from the start, there was no single “motion for a continuance” encompassing the original stipulation and Farrow’s latter offhand remarks about a continuance. (R., pp.44-45; Tr., p.3, L.17 – p.4, L.4; p.19, Ls.17-25.) These were separate things and should be disentangled and analyzed separately on appeal.

As for the stipulation to continue, the district court denied it because Farrow did not provide any reason for it. (Tr., p.3, Ls.17-20.) Farrow fails to show this was abuse of discretion. And as for Farrow’s subsequent remarks at the hearing—even assuming they amounted to another motion for a continuance—Farrow fails to show the district court abused its discretion by denying the implied motion.

B. Standard Of Review

Whether “to grant or deny a motion for a continuance rests within the sound discretion of the trial court.” State v. Ransom, 124 Idaho 703, 706, 864 P.2d 149, 152 (1993); State v. Carman, 114 Idaho 791, 793, 760 P.2d 1207, 1209 (Ct. App. 1988). When an appellant claims the district court abused its discretion, “the inquiry involves (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason.” Ransom, 124 Idaho at 706, 864 P.2d at 152.

C. Farrow Fails To Show The District Court Abused Its Discretion In Denying The Parties' Stipulation For A Continuance

Generally speaking, “unless an appellant shows that his substantial rights have been prejudiced by reason of a denial of his motion for continuance, appellate courts can only conclude that there was no abuse of discretion.” State v. Cagle, 126 Idaho 794, 797, 891 P.2d 1054, 1057 (Ct. App. 1995); State v. Laws, 94 Idaho 200, 202, 485 P.2d 144, 146 (1971). ““Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons.”” Cagle, 126 Idaho at 797, 891 P.2d at 1057 (quoting Carman, 114 Idaho at 793, 760 P.2d at 1209); Morris v. Slappy, 461 U.S. 1, 11, 103 (1983).

In light of these standards the district court had a perfectly good reason to deny the stipulation to continue: Farrow did not say why a continuance was necessary. As the court pointed out at the hearing,

There was a stipulation to continue this hearing, and I read through that stipulation *and I denied it primarily because there was no reason given for that stipulation*. The Supreme Court's been consistent in telling us judges that there are certain things that should be in place any time a motion for continuance or even a stipulation is given, and one of those things is that the client, him or herself, was contacted and consented. *I didn't see any reason given for the stipulation*. I certainly didn't see any of the ordinary things I would expect to see addressed in a motion to continue or a stipulation to continue.

That's why I denied the motion.

(Tr., p.3, L.17 – p.4, L.4 (emphasis added).)

This was not an abuse of discretion. Farrow gave no reason at all why he needed a continuance, nor did he allege any negative outcome whatsoever—much less a

“substantial rights” deprivation—would occur without one. (See R., pp.44-45.) The district court was thus well within its discretion to deny the motion—because it is plainly not an abuse of discretion to deny an unsupported motion.

Farrow now argues that the district court abused its discretion by not explicitly weighing the parties’ competing interests in a continuance. (Appellant’s brief, pp.4-6.) Citing to Ransom, 124 Idaho at 707, 864 P.2d at 153, Farrow argues that the court’s “proper role relative to evaluating [a] motion for a continuance necessitate[s] weighing the competing interests of the State and the defendant,” and that “[b]ecause the district court did not weigh the competing interests, it [did] not apply the proper legal standard and did not reach its conclusion through and exercise of reason.” (Appellant’s brief, p.4.)

This argument fails. While the state admittedly had no “competing” interest in denying the requested continuance (insofar as the state stipulated it should be granted), the district court did not abuse its discretion by not explicitly weighing the interests. Since Ransom, the Idaho Supreme Court explained why the “weighing” exercise mattered—not because it was a compulsory part of the legal standard, but because the exercise itself showed the district court was correctly apprehending its discretion and acting within it:

The weighing process reflects the fact that the district court perceived the issue as one of discretion and the record demonstrates that it acted within the boundaries of that discretion.

State v. Miller, 133 Idaho 454, 458, 988 P.2d 680, 684 (1999).

Here, regardless of the lack of any explicit weighing, the record still shows the district court acted within its discretion. The district court denied the motion because it was unsupported, which shows an equal amount of discernment and thoughtfulness as

any weighing exercise. (See Tr., p.3, L.17 – p.4, L.4.) And even assuming a weighing exercise was called for here, a denial still would have been appropriate. Because Farrow never stated what the actual interest in a continuance was, there was no weight tipping the scales in favor of granting the stipulation. In any event, Farrow fails to show the district court abused its discretion by denying the stipulation to continue.

D. Even If There Was A Subsequent Implied Motion To Continue, Farrow Fails To Show The District Court Abused Its Discretion By Denying It

After the district court explained why it had denied the parties' stipulation for a continuance, the court turned to the state's motion to summarily dismiss Farrow's petition for post-conviction relief. (Tr., p.4, Ls.4-6.) The state argued, and the district court agreed, that Farrow had not alleged any facts that would show he was prejudiced by his counsel's failure to file a Rule 35 motion. (See Tr., p.10, Ls.4-16; p.17, Ls.5-22.) That discussion led to the following exchange:

THE COURT: I'll just quote Idaho Code 19-4903. "A petition for post-conviction relief cannot provide mere notice but must be verified with respect to facts known by the petitioner and present admissible evidence supporting the allegations," so what you just argued, there's nothing in the record to support any of that. [Farrow's] performance in prison, how a lesser sentence would put him in better stead or sooner stead [sic] with the parole commission, I don't have any of that in front of me by way of admissible evidence.

[Post-Conviction Counsel] MR. PIERCE: And I'm making an offer of proof for this hearing.

THE COURT: An offer of proof isn't admissible evidence.

MR. PIERCE: That's—that's correct, Your Honor.

THE COURT: So you had an opportunity up until 30 minutes ago when we started this to file a late affidavit of Mr. Farrow just like you filed the late affidavit of [trial counsel] but one that maybe gave me more

admissible evidence as to facts that Mr. Farrow knew, and I don't have that, correct?

MR. PIERCE: Not at this time, Your Honor, no.

THE COURT: All right. Any other argument?

MR. PIERCE: Well, I would—I would be happy to, in addition to the offer of proof, have Mr. Farrow either prepare an affidavit or I would ask to continue this so that we can get him on the phone to explain to the Court what he's been doing in prison and what he's learned about the sentence and how it affects work crews and things such as that. Now I would—well, I will leave it at that.

(Tr., p.18, L.19 – p.19, L.25.) The district court granted the state's motion for summary disposition without explicitly mentioning counsel's remark that he "would ask" to continue. (Tr., p.20, L.14 – p.22, L.10.)

Even if this sequence amounted to an implied motion to continue (and denial of the motion), Farrow fails to show an abuse of discretion. "A bare claim that additional investigation could have been conducted is not sufficient to demonstrate unfair prejudice so as to support a motion for a continuance." State v. Row, 131 Idaho 303, 311, 955 P.2d 1082, 1090 (1998); State v. Tapia, 127 Idaho 249, 255, 899 P.2d 959, 965 (1995); State v. Spradlin, 119 Idaho 1030, 1034, 812 P.2d 744, 748 (Ct.App.1991). That is exactly what Farrow is now alleging on appeal: had the district court granted the implied motion, Farrow's counsel could have gone off and conducted some investigation, to drum up the "absolutely crucial" evidence that he belatedly realized he needed to provide. (See Appellant's brief, pp.5-6.)

But this is insufficient to justify a motion to continue. That is especially true here, where the district court pointed out that counsel, for months, had "all this time to file an affidavit from Mr. Farrow" containing the "absolutely crucial" evidence. (Tr., p.19,

Ls.10-16; see Appellant’s brief, p.5.) And despite having that “opportunity up until 30 minutes ago,” counsel, without explanation, had not done so. (Tr., p.19, Ls.10-16.) Not only that, but counsel had *already* filed another untimely affidavit earlier in the hearing— with no logical explanation for the delay³—which the district court only “reluctantly” allowed in because the state had no objection to the late filing. (Tr., p.6, Ls.6-23.) In light of counsel’s repeated failures to timely file crucial affidavits, the district court was not required to keep overlooking counsel’s failures to do “what any reasonable counsel should’ve done,” and indulge yet another unexplained entreaty for a late submission of evidence. (Tr., p.21, Ls.18-23.)

In light of post-conviction counsel’s inexplicable failure to timely prosecute his case, and because bare requests for additional investigation are insufficient to support a continuance request, the district court was well within its discretion to dismiss the petition and deny any implied motion for a continuance.

³ Post-conviction counsel’s explanation for the first late filing left much to be desired:

THE COURT: I’m really not understanding your reasons why [the first affidavit] wasn’t filed sometime in the last five weeks.

MR. PIERCE: I was going to file it with my brief in response.

THE COURT: But you didn’t file a brief in response timely relative to the hearing which is today.

MR. PIERCE: That’s—that’s correct Your Honor.

(Tr., p.6, Ls.6-14.)

CONCLUSION

The state respectfully requests this Court affirm the judgment dismissing the petition for post-conviction relief.

DATED this 3rd day of December, 2018.

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 3rd day of December, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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/s/ Kale D. Gans
KALE D. GANS
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KDG/dd