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IN THE SUPREME COURT OF THE STATE OF IDAHO

| | | |
|------------------------------|---|--------------------------|
| GLEN JONES WARD, |) | |
| |) | NO. 46265-2018 |
| Petitioner-Appellant, |) | |
| |) | BONNEVILLE COUNTY |
| v. |) | NO. CV-2016-3569 |
| |) | |
| STATE OF IDAHO, |) | |
| |) | |
| Respondent. |) | |

BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BONNEVILLE**

**HONORABLE DARREN B. SIMPSON
District Judge**

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STATEMENT OF THE CASE

Nature of the Case

Glen Jones Ward appeals from the district court's order and judgment granting the State's motion for summary dismissal, and dismissing his petition for post-conviction relief. He contends the district court abused its discretion in denying his motion to proceed pro se because it was not moot when it was filed, and because a post-conviction petitioner has a right to proceed pro se.

Statement of Facts and Course of Proceedings

In Bonneville County Case No. CR-2013-1329, Mr. Ward was convicted of sexual abuse of a minor under age sixteen after he pled guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970) and was sentenced to a unified term of eighteen years, with seven years fixed. (R., pp.16, 35, 396, 400.) He filed a direct appeal, and the Court of Appeals affirmed in an unpublished decision. *See State v. Ward*, No. 42470, 2015 WL 3939961 (Ct. App. June 26, 2015).

Mr. Ward filed a pro se petition for post-conviction relief on July 8, 2016. (R., pp.16-20.) He alleged: (1) he did not act with the requisite criminal intent; (2) there was a due process violation; and (3) the trial court lacked subject matter jurisdiction. (R., pp.17, 21.) He also alleged he received ineffective assistance of counsel because his trial counsel lied, manipulated his testimony, and coerced him into pleading guilty. (R., pp.21, 33.) The district court appointed counsel to represent Mr. Ward, and Neal Randall entered an appearance on Mr. Ward's behalf. (R., pp.58-60.) The State filed an answer to Mr. Ward's petition, and a motion for summary dismissal. (R., pp.61-68.)

Mr. Ward filed, pro se, a motion he captioned as a motion for the appointment of independent counsel or to compel the performance of current counsel (R., pp.90-93.) Kelly Mallard then filed a motion to substitute himself as counsel for Mr. Ward. (R., pp.103-04.)

Despite the fact that he was now represented by new counsel, Mr. Ward continued to file numerous pro se motions and affidavits, which the district court accepted and largely ruled upon. (Tr., p.19, L.6 – p.20, L.2.) Among others, Mr. Ward filed a pro se motion and affidavit in support of filing an amended petition for post-conviction relief. (R., pp.151-56.) The district court denied the motion without prejudice, stating Mr. Ward’s attorney could file an amended petition on Mr. Ward’s behalf. (Tr., p.11, Ls.16-23; R., pp.157, 270.) Mr. Ward had complained to the district court about not receiving copies of documents filed in the case, and the district court reminded Mr. Ward’s counsel he was responsible for sending copies to Mr. Ward, and also said the court would “make sure we send him copies of everything.” (Tr., p.16, Ls.9-12.)

As instructed, counsel for Mr. Ward filed an amended petition for post-conviction relief and affidavit. (R., pp.274-77.) The amended petition asserted the same claims as in the original petition. (R., pp.275, 396.) The State filed an answer to the amended petition, but relied on the motion for summary dismissal it previously filed, as the amended petition did not include any new or different claims. (R., pp.294-97.)

The district court held a hearing on the State’s motion for summary dismissal on January 24, 2018. (R., pp.298-99.) Mr. Ward appeared telephonically, though it appears he had trouble hearing the proceedings. (Tr., p.31, L.8, p.37, Ls.15-20, p.44, L.25.) Mr. Ward’s counsel did not zealously represent Mr. Ward at this hearing; instead, he said he was in “a tough situation” and all but conceded that none of Mr. Ward’s arguments had merit. (Tr., p.37, L.22 – p.42, L.19.) He relied on one case, but noted the argument made in that case “did not work” and

concluded by saying he “would leave it to [the court’s] wisdom and discretion as to the motion for summary dismissal.” (Tr., p.42, Ls.7-19.) The district court said it would “take the matter under advisement” so it could review the transcript of the change of plea hearing, and would not consider the matter “fully submitted” until it had a chance to “review that [transcript].” (Tr., p.44, L.22 – p.45, L.6.)

On February 26, 2018, before the district court received the transcript of the change of plea hearing, Mr. Ward submitted a pro se motion to the court “respectfully [invoking] his right to self-representation.” (R., pp.323-25.) He filed a supplemental motion with the district court on March 30, 2018, asking the court to enter a written order granting or denying his motion to proceed pro se. (R., pp.366-68.)

The transcript of the change of plea hearing was filed with the district court on February 28, 2018. (Tr., Index, p.1.) It is not clear from the record when the district court reviewed the transcript. The district court entered an order on April 11, 2018, denying as moot Mr. Ward’s motion to proceed pro se based upon the court’s grant of the State’s motion for summary dismissal. (R., pp.393-95.) The district court entered an order granting the State’s motion for summary dismissal on April 12, 2019. (R., pp.396-420.) Mr. Ward filed, pro se, a timely notice of appeal on May 8, 2018. (R., pp.437-40.) The district court entered judgment on September 13, 2018. (R., pp.442-43.)

ISSUE

Did the district court abuse its discretion in denying Mr. Ward's motion to proceed pro se?

ARGUMENT

The District Court Abused Its Discretion In Denying Mr. Ward's Motion To Proceed Pro Se

A. Introduction

The district court denied as moot Mr. Ward's motion to proceed pro se, even though Mr. Ward filed his motion before the State's motion for summary dismissal was fully submitted. The district court abused its discretion in denying the motion because it was not moot when it was filed, and because a post-conviction petitioner has a right to proceed pro se.

B. Standard Of Review

"The right to counsel in post-conviction proceedings is not a constitutional right, but a matter left to the discretion of the trial judge." *State v. Lovelace*, 140 Idaho 53, 71 (2003), *on reh'g*, 140 Idaho 73 (2004) (citation omitted).

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) (quotation marks and citation omitted).

"Justiciability issues, such as mootness, are freely reviewed." *State v. Barclay*, 149 Idaho 6, 8 (2010) (citation omitted).

C. The District Court Did Not Act Within The Outer Boundaries Of Its Discretion And Did Not Reach Its Decision to Deny Mr. Ward's Motion By An Exercise Of Reason Because Mr. Ward's Motion Was Not Moot

The district denied Mr. Ward's motion to proceed pro se because it concluded the motion was moot. (R., pp.393-95.) The district court apparently believed its decision to grant the State's

motion for summary dismissal rendered Mr. Ward's motion moot, even though Mr. Ward filed his motion well before the district court granted the State's motion for summary dismissal, and even before the State's motion for summary dismissal was fully submitted. This was an abuse of discretion, as Mr. Ward's motion was not moot when it was filed, and a court cannot fail to rule on a motion for so long that it becomes moot.

The district court held a hearing on the State's motion for summary dismissal on January 24, 2018. (R., pp.298-99.) The district court said it would "take the matter under advisement" so it could review the transcript of Mr. Ward's change of plea hearing, and would not consider the matter "fully submitted" until it had a chance to "review that [transcript]." (Tr., p.44, L.22 – p.45, L.6.) On February 26, 2018, Mr. Ward submitted a pro se motion to the court "respectfully [invoking] his right to self-representation."¹ (R., pp.323-25.) The transcript of the change of plea hearing was filed with the district court two days later, on February 28, 2018. (Tr., Index, p.1.) It is not clear from the record when the district court reviewed the transcript. On March 30, 2018, Mr. Ward filed a supplemental motion asking the district court to enter a written order granting or denying his motion to proceed pro se. (R., pp.366-68.) On April 11, 2018, the district court entered an order denying as moot Mr. Ward's motion to proceed pro se based upon the court's grant of the State's motion for summary dismissal. (R., pp.393-95.) The district court granted the State's motion for summary dismissal on April 12, 2019. (R., pp.396-420.)

In the district court's own words, the State's motion for summary dismissal was not fully submitted until the court had a chance to review the transcript of Mr. Ward's change of plea

¹ Mr. Ward mailed his motion from the Idaho State Correctional Institution on February 22, 2018. (R., p.325.) Pursuant to the "mailbox rule," which provides documents are deemed filed by pro se inmates when the documents are submitted for mailing, the motion was actually filed February 22, not February 26. See *Munson v. State*, 128 Idaho 639, 643 (1996) (holding "the mailbox rule applies for purposes of pro se inmates filing petitions for post-conviction relief").

hearing, which was not filed until February 28, 2018. It is undisputed that Mr. Ward's motion to proceed pro se was filed before this date. At the time it was filed, Mr. Ward's motion was not moot, as it presented a real and substantial controversy that was capable of being resolved by the court. *See Barclay*, 149 Idaho at 8 (stating "[a]n issue becomes moot if it does not present a real and substantial controversy that is capable of being concluded by judicial relief") (quotation marks and citation omitted).

Our Supreme Court has explained that "an issue is moot if a favorable judicial decision would not result in any relief or the party lacks a legally cognizable interest in the outcome." *State v. Manley*, 142 Idaho 338, 343 (2005) (quotation marks and citation omitted). At the time Mr. Ward filed his motion to proceed pro se, it was not moot, as a favorable judicial decision would have allowed him to proceed pro, and he certainly had a legally cognizable interest in the outcome of the motion and the proceeding. The district court cannot render a motion moot by failing to make a timely ruling on it. The district court thus abused its discretion in denying Mr. Ward's motion as moot.

D. The District Court Did Not Act Within The Outer Boundaries Of Its Discretion And Did Not Reach Its Decision to Deny Mr. Ward's Motion By An Exercise Of Reason Because A Post-Conviction Petitioner Has A Right To Proceed Pro Se

Although it does not appear the Idaho Supreme Court has specifically addressed whether a post-conviction petitioner has a right to proceed pro se, the 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). The reasoning of these cases should apply equally in the post-conviction context, as "[a] petition for post-

conviction relief is a civil proceeding, governed by the Idaho Rules of Civil Procedure.” *Rhoades v. State*, 148 Idaho 247, 249 (2009).

Here, the district court accepted Mr. Ward’s numerous pro se motions and affidavits, and even copied him on all the court filings, which are typically copied only to counsel. (Tr., p.16, Ls.9-12, p.19, L.6 – p.20, L.2.) Mr. Ward filed his motion to proceed pro se after the district court held a hearing on the State’s motion for summary dismissal. Mr. Ward was represented by counsel at this hearing, but Mr. Ward’s counsel did not zealously represent Mr. Ward at this hearing; instead, he said he was in “a tough situation” and all but conceded that none of Mr. Ward’s arguments had merit. (Tr., p.37, L.22 – p.42, L.19.) He relied on one case, but noted the argument made in that case “did not work” and concluded by saying he “would leave it to [the court’s] wisdom and discretion as to the motion for summary dismissal.” (Tr., p.42, Ls.7-19.) Mr. Ward had trouble hearing the proceedings over the telephone, and was not given an opportunity to speak on his own behalf. (Tr., p.31, L.8, p.37, Ls.15-20, p.44, L.25.)

In light of Mr. Ward’s active participation in this case, even while represented by counsel, and considering his attorney’s performance at the hearing on the State’s motion to dismiss, the district court abused its discretion by denying Mr. Ward’s motion to proceed pro se, and should have allowed him to exercise his right to self-representation, as he requested.

CONCLUSION

Mr. Ward respectfully requests that the Court vacate the district court's judgment, reverse the district court's order denying his motion to proceed pro se, reverse the district court's order granting the State's motion for summary dismissal, and remand this case to the district court for further proceedings.

DATED this 21st day of June, 2019.

/s/ Andrea W. Reynolds
ANDREA W. REYNOLDS
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of June, 2019, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

AWR/eas»