

IN THE UTAH COURT OF APPEALS

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Sergio Escamilla-Hernandez,)	MEMORANDUM DECISION	
)	(Not For Official Publication)	
Petitioner and Appellant,)		
)	Case No. 20060245-CA	
v.)		
)	F I L E D	
Greg Jacquert,)	(October 26, 2006)	
)		
Respondent and Appellee.)	<table border="1"><tr><td>2006 UT App 441</td></tr></table>	2006 UT App 441
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Third District, Tooele Department, 060300070
The Honorable Randall N. Skanchy

Attorneys: Sergio Escamilla-Hernandez, Gunnison, Appellant
 Pro Se

Before Judges Bench, Billings, and McHugh.

PER CURIAM:

Sergio Escamilla-Hernandez appeals the denial of his petition seeking post-conviction relief. The district court denied the petition, finding "that the petition is frivolous on its face as the claims asserted are grounds for appeal, and not for extraordinary relief, and therefore, do not support such a claim."

Hernandez claims that it was a conflict of interest for Judge Skanchy to consider the petition because the judge was named as a respondent. However, Judge Skanchy was not properly named as a respondent. See Utah R. Civ. P. 65C(h) ("If the petition is a challenge to a felony conviction or sentence, the respondent is the State of Utah."). Rule 65C of the Utah Rules of Civil Procedure requires the petition to be filed with the clerk of the district court in which the judgment of conviction was entered. See Utah R. Civ. P. 65C(b). "On filing of the petition, the clerk shall promptly assign and deliver it to the judge who sentenced the petitioner." Utah R. Civ. P. 65C(f). The petition was appropriately assigned to the sentencing judge in the underlying criminal case. Rules 65C(g) states:

The assigned judge shall review the petition, and, if it is apparent to the court that any claim has been adjudicated in a prior proceeding, or if any claim in the petition appears frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating either that the claim has been adjudicated or that the claim is frivolous on its face.

Utah R. Civ. P. 65C(g)(1).

The Post-Conviction Remedies Act (PCRA) "provides a substantive legal remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies, including a direct appeal." Utah Code Ann. § 78-35a-102(1) (2002). The PCRA provides that "[a] person is not eligible for relief . . . upon any ground that . . . could have been but was not raised at trial or on appeal." Id. § 78-35a-106(1)(c) (2002). Hernandez attempts to avoid the preclusive effect of the statute by contending that he was not advised of the right to appeal by his trial counsel. On that basis, he contends that the district court erred in denying him post-conviction relief based upon failure to raise the claims on appeal.

If Hernandez contends that he was denied the right to appeal, he must pursue that claim under Manning v. State, 2005 UT 61, 122 P.3d 628. Manning established a procedure allowing "the trial or sentencing court [to] reinstate the time frame for filing a direct appeal where the defendant can prove, based on facts in the record or determined through additional evidentiary hearings, that he has been unconstitutionally deprived, through no fault of his own, of his right to appeal." Id. at ¶31. However, "in a criminal case where a defendant has failed to appeal within the required thirty-day time period, the defendant bears the burden of proving [he] has not knowingly or voluntarily waived the right to appeal." Id. at ¶32. If the defendant satisfies the burden of demonstrating by a preponderance of the evidence that he has been unconstitutionally denied the right to appeal, the trial court will reinstate the appeal time frame. See id. In State v. Rees, 2005 UT 69, 125 P.3d 874, the Utah Supreme Court again distinguished the legal status of a defendant who waives the right to appeal by failing to timely file from a defendant who has been unconstitutionally denied the right to appeal. See id. at ¶17. A defendant who fails to file a timely appeal "would reasonably be considered to have exhausted any remedies he might have obtained thereby for purposes of the

PCRA." Id. In contrast, a defendant who is prevented from pursuing an appeal through no fault of their own may pursue a remedy by way of a motion in the underlying criminal case under Manning.

Hernandez pursued a remedy under the PCRA and rule 65C. Each of the claims asserted in the petition could have been pursued on direct appeal; thus, the district court did not err in dismissing the petition. Any claim that Hernandez was unconstitutionally denied a right to appeal must be pursued in the criminal case by a motion under Manning.

We affirm the dismissal of the petition for post-conviction relief.

Russell W. Bench,
Presiding Judge

Judith M. Billings, Judge

Carolyn B. McHugh, Judge