

IN THE UTAH COURT OF APPEALS

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State of Utah,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiff and Appellee,	)	
	)	Case No. 20051142-CA
v.	)	
	)	F I L E D
Michael L. Paolone,	)	(August 30, 2007)
	)	
Defendant and Appellant.	)	<span style="border: 1px solid black; padding: 2px;">2007 UT App 285</span>

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Second District, Farmington Department, 961700208  
The Honorable Rodney S. Page

Attorneys: Scott L. Wiggins, Salt Lake City, for Appellant  
Mark L. Shurtleff and Laura B. Dupaix, Salt Lake  
City, for Appellee

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Before Judges Bench, Greenwood, and Billings.

PER CURIAM:

Michael L. Paolone appeals the district court's order denying his motion for reinstatement of his right to a direct appeal. We affirm.

In 1996, Paolone was convicted of one count of forcible sexual abuse. He did not pursue a direct appeal of his conviction. Paolone claims that his right to a direct appeal should be reinstated because the district court failed to treat a letter he wrote prior to sentencing as a notice of appeal and because his trial counsel was ineffective by failing to file a notice of appeal after being so directed by Paolone. The State responds that Paolone's claim is barred by res judicata because it was fully resolved in a prior post-conviction proceeding.<sup>1</sup>

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<sup>1</sup>The district court denied Paolone's motion for reinstatement of his direct appeal on grounds relating to its interpretation of Manning v. State, 2005 UT 61, 122 P.3d 628, rather than on the issue of res judicata. The district court denied the motion without seeking a response from the State or holding a hearing that would have elicited the State's arguments  
(continued...)

Res judicata has two branches: claim preclusion and issue preclusion. See Snyder v. Murray City Corp., 2003 UT 33, ¶13, 73 P.3d 325. Issue preclusion, or collateral estoppel, "prevents parties or privies from relitigating facts and issues in the second suit that were fully litigated in the first suit. In effect, once a party has had his . . . day in court and lost, he . . . does not get a second chance to prevail on the same issues." Buckner v. Kennard, 2004 UT 78, ¶12, 99 P.3d 842.

A party seeking to invoke collateral estoppel must establish that: (1) the issue decided in the prior adjudication is identical to the one presented in the instant action; (2) the party against whom issue preclusion is asserted was a party, or in privity with a party, to the prior adjudication; (3) the issue in the first action was completely, fully, and fairly litigated; and (4) the first suit resulted in a final judgment on the merits.

Id. at ¶13.

The record demonstrates that Paolone's current claims are barred by collateral estoppel. In 1997, Paolone filed a petition for post-conviction relief alleging that his trial counsel was ineffective because he failed to file a notice of appeal as Paolone directed. Accordingly, he sought to be resentenced so that he would regain his right to a direct appeal. The central issue in that case was whether Paolone made the choice to not appeal his conviction or whether his trial counsel failed to follow Paolone's directive to file a notice of appeal. As part of the review, the post-conviction court was forced to address whether Paolone withdrew an alleged notice of appeal filed before sentencing. After an evidentiary hearing, in which Paolone was

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<sup>1</sup>(...continued)  
on the matter. However, it is well settled that an appellate court may affirm the judgment appealed from if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action, and this is true even though such ground or theory is not urged or argued on appeal by appellee, was not raised in the lower court, and was not considered or passed on by the lower court.  
Bailey v. Bayles, 2002 UT 58, ¶10, 52 P.3d 1158.

represented by counsel, the post-conviction court found that Paolone had several discussions with his counsel about whether to appeal his conviction and Paolone made the final decision not to appeal the conviction. In regard to the presentence letter that Paolone alleges was a notice of appeal, the post-conviction court found that Paolone "acknowledged that he wanted to withdraw his previously filed letter." Based upon these facts each element of collateral estoppel is present.

First, the issue decided in the prior post-conviction hearing is identical to the one presented in this action. Specifically, Paolone asserts that he lost his right to an appeal through no fault of his own because his presentencing letter was not treated as a notice of appeal and because his counsel was ineffective in failing to file a notice of appeal. However, the post-conviction court found that Paolone had withdrawn his letter and that it was Paolone who made the final choice not to pursue his appeal. Second, Paolone was a party to the post-conviction case. Third, the post-conviction proceeding was completely, fully, and fairly litigated. The post-conviction court appointed counsel to represent Paolone and conducted a complete evidentiary hearing. At the conclusion of the hearing, the post-conviction court concluded that Paolone was not entitled to the remedy he sought, i.e., resentencing in order to restart the time for a direct appeal. Lastly, the post-conviction proceeding resulted in a final judgment on the merits. Based upon the evidence, the district court entered an order dismissing Paolone's petition for post-conviction relief. Paolone appealed the dismissal. The post-conviction court's decision was then affirmed on appeal. See Paolone v. State, 1999 UT App 339. Thus, all elements of collateral estoppel have been met.

Paolone argues that collateral estoppel does not apply because the remedy he seeks, reinstatement of his direct appeal, was not available until 2005, when the remedy was created by the Utah Supreme Court in Manning v. State, 2005 UT 61, 122 P.3d 628. This argument is incorrect. As the State correctly points out, Manning changed the procedure for defendants seeking to have their right to appeal reinstated. See id. at ¶¶25, 31, 42. In so doing, it allowed indigent defendants to file a motion in their original case so they could be appointed counsel to assist them in presenting their motion. See id. at ¶42. However, Manning did not alter the test for obtaining relief. See id. at ¶31. Just as before Manning, a defendant still has the burden of proving that he was "unconstitutionally deprived through no fault of his own, of his right to appeal." Id. The post-conviction court heard and resolved Paolone's claim that he was deprived of

his right to an appeal through no fault of his own. Paolone may not relitigate the same facts a second time.

Affirmed.

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Russell W. Bench,  
Presiding Judge

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Pamela T. Greenwood,  
Associate Presiding Judge

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Judith M. Billings, Judge