4-16-2012

Arambula v. State Respondent's Brief Dckt. 38698

IN THE SUPREME COURT OF THE STATE OF IDAHO

ARMANDO KETO ARAMBULA	)	
	)	
Petitioner-Appellant,	)	NO. 38698
	)	
vs.	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

HONORABLE RANDY J. STOKER
District Judge

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State of Idaho

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PRO SE
PETITIONER-APPELLANT

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STATEMENT OF THE CASE

Nature Of The Case

Armando Keto Arambula appeals from the district court's order summarily dismissing his petition for post-conviction relief.

Statement Of Facts And Course Of The Proceedings

Narcotics Detective Ken Rivers of the Twin Falls Police department assisted Probation and Parole Officer Leslie Horner in conducting a probationary check of Arambula's house, which resulted in the seizure of a digital scale with methamphetamine residue on it, and paperwork that appeared to be a ledger used to record drug transactions. (R., pp.77, 168-171.) Arambula admitted to the detective that he owned the digital scale. (R., p.172.) The state charged Arambula with possession of a controlled substance (methamphetamine or amphetamine) and with being a persistent violator based on having two prior convictions for delivery of a controlled substance. (R., pp.71-74.) Pursuant to a plea agreement, Arambula pled guilty to possession of a controlled substance and the state agreed to dismiss the persistent violator enhancement. (R., pp.83-92; 100-104.) The district court imposed a unified seven year sentence with two years fixed. (R., pp.105-111.)

Arambula filed a *pro se* petition for post-conviction relief alleging (1) "Idaho's possession of a controlled substance statute is unconstitutionally vague," (2) "[c]ounsel of record, Ben Anderson, was inneffective [sic] for failing to file a motion in liminie [sic] in an attempt to suppress the narcotics test," (3) "[c]ounsel was inneffective [sic] for failure to adequately cross examine the states [sic] witness," (4) "[c]ounsel was inneffective [sic] for failing to provide the necessary services due to an indigent prisoner pursuant to

I.C. § 19-852," (5) "[c]ounsel was inneffective [sic] for failure to address the vaguely written chain of custody," and (6) "[t]he district court erred in refusing to provide the petitioner with alternate counsel upon multiple requests to the court." (R., pp. 7-13 (capitalization modified where appropriate).) Arambula also filed a motion for appointment of counsel, which the court granted. (R., pp.45-51.) After the state filed an answer (R., pp.62-65) and a motion for summary disposition (R., pp.134-136), the court entered an order indicating its intent to dismiss Arambula's petition (R., pp.138-145). Arambula filed a response to the state's motion for summary disposition and the court's notice of intent to dismiss. (R., pp.147-157.)

The district court held a hearing on the state's motion for summary disposition and its own notice of intent to dismiss, and after the parties presented argument, the court verbally ruled that Arambula's petition had no merit and dismissed it with prejudice. (Tr., p.4, L.4 – p.27, L.24.) In a follow-up written order dismissing Arambula's petition with prejudice, the court incorporated its verbal ruling and notice of intent to dismiss into the order as its stated grounds for dismissal. (R., pp.181-182.) Arambula timely appealed. (R., pp.183-185.) Although the district court appointed counsel to represent Arambula on appeal (R., pp.186-188), this Court permitted appellate counsel to withdraw after he and two other attorneys with the State Appellate Public Defender's Office reviewed the case and "each of the three attorneys determined that the appeal failed to present any viable issues for review." (Motion for Leave to Withdraw and to Suspend the Briefing Schedule, filed October 5, 2011; Affidavit in Support of Motion for Leave to Withdraw and Motion to Suspend the Briefing Schedule, filed October 5, 2011; Order Granting Motion for Leave to Withdraw and to Suspend the

Briefing Schedule, dated November 7, 2011.) Arambula thereafter filed a pro se Appellant's Brief.

ISSUE

Contrary to I.A.R. 35(a)(4), Arambula's brief does not contain a list of issues on appeal. However, throughout his brief, he presents six issues with the following headings:

> 1. "Idaho's possession of a controlled substance statute is unconstitutionally vague,"
>
> 2. "Counsel of record, Ben Anderson, was inneffective [sic] for failing to file a motion in liminie [sic] in an attempt to suppress the narcotics test,"
>
> 3. "Counsel was inneffective [sic] for failure to adequately cross examine the states [sic] witness,"
>
> 4 "Counsel was inneffective [sic] for failing to provide the necessary services due to an indigent prisoner pursuant to I.C. § 19-852,"
>
> 5. "Counsel was inneffective [sic] for failure to address the vaguely written chain of custody," and
>
> 6. "The district court erred in refusing to provide the petitioner with alternate counsel upon multiple requests to the court."

(Appellant's Brief, pp.6-10 (capitalization modified where appropriate).)

The state phrases the issue on appeal as:

Should the Court decline to consider any of Arambula's claims on appeal as he has failed to support his claims with argument and authority? Alternatively, has Arambula failed to establish error in the summary dismissal of his petition for post-conviction relief?

ARGUMENT

Arambula Has Waived His Claims On Appeal By Failing To Support The Claims With Argument And Authority; Even If Not Waived, Arambula Has Failed To Show Error In The Summary Dismissal Of His Post-Conviction Petition

A. Introduction

Arambula's brief on appeal is not actually a brief. Rather, Arambula has merely photocopied his post-conviction petition's six claims with exhibits, and added the word "brief" in the footers, which he asks this Court to "screen as [his] Appellants [sic] Brief." (Appellant's Brief, p.2; see generally entire Appellant's Brief; cf. R., pp.7-13.) This Court should decline to consider Arambula's claims because he has failed to support them with argument and authority. Alternatively, Arambula has failed to establish the district court erred in summarily dismissing his petition.

B. Standard Of Review

"On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of material fact exists based on the pleadings, depositions and admissions together with any affidavits on file." Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007) (citing Gilpin-Grubb v. State, 138 Idaho 76, 80, 57 P.3d 787, 791 (2002)).

C. The Court Should Decline To Consider Arambula's Claims Because They Are Unsupported By Argument And Authority

"When issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered." State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996). Although Arambula replicates the six claims he set forth in his post-conviction petition, he has failed to cite any authority in support of his claims and has

offered absolutely no argument in support of his claims. (See generally Appellant's Brief.) Accordingly, this Court should decline to consider the merits of any of his claims.

D. Even If This Court Considers The Merits Of Arambula's Claims, He Has Failed To Establish The District Court Erred In Summarily Dismissing His Petition

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief in response to a party's motion or on the court's own initiative. "To withstand summary dismissal, a post-conviction applicant must present evidence establishing a prima facie case as to each element of the claims upon which the applicant bears the burden of proof." State v. Lovelace, 140 Idaho 53, 72, 90 P.3d 278, 297 (2003) (citing Pratt v. State, 134 Idaho 581, 583, 6 P.3d 831, 833 (2000)). Thus, a claim for post-conviction relief is subject to summary dismissal pursuant to I.C. § 19-4906 "if the applicant's evidence raises no genuine issue of material fact" as to each element of petitioner's claims. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing I.C. § 19-4906(b), (c)); Lovelace, 140 Idaho at 72, 90 P.3d at 297. While a court must accept a petitioner's unrebutted allegations as true, the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001)). If the alleged facts, even if true, would not entitle the petitioner to relief, the trial court is not required to conduct an evidentiary hearing prior to dismissing the petition. Id. (citing Stuart v. State, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990)). "Allegations contained in the application are insufficient for the granting of relief when (1) they are clearly disproved

by the record of the original proceedings, or (2) do not justify relief as a matter of law." Id.

In both its Notice of Intent to Dismiss Post Conviction Petition Claims (R., pp.138-145) and its verbal ruling at the end of the hearing on the state's motion for summary disposition and its own notice of intent to dismiss, the district court articulates the applicable legal standards and sets forth, in detail, the reasons Arambula failed to establish a genuine issue of material fact on any of his claims. The state adopts (1) the district court's verbal ruling from the hearing on the state's motion for summary disposition and its notice of intent to dismiss (Tr., p.18, L.14 – p.28, L.18), (2) the court's Judgment of Dismissal (R., pp.181-182), and (3) the court's Notice of Intent to Dismiss Post Conviction Petition Claims (R., pp.138-145), copies of which are attached hereto as Appendices A, B, and C, respectively. Arambula does not challenge any of the courts findings or legal conclusions (see generally Appellant's Brief), and he has otherwise failed to establish the district court erred in dismissing his petition.

CONCLUSION

The state respectfully requests this Court affirm the district court's order summarily dismissing Arambula's petition for post-conviction relief.

DATED this 16th day of April, 2012.

JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of April, 2012, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

ARMANDO KETO ARAMBULA
#56927
125 North 8th Street West
St. Anthony, ID 83445

John C. McKinney
Deputy Attorney General

JMC/pm

APPENDIX A

chain of custody.

In essence, what we have here is Mr. Arambula signing some documents that include the offer form, as well as the plea of guilty form; and he has indicated on the record that he wanted to change his plea, and that he waived his right to appeal, and gave up his right to various claims in this case.

By choosing to plead guilty, the defendant has waived all of the claims that he has made in this post-conviction relief. He has also gained an advantage by entering his plea of guilty, which is that the state agreed to dismiss part two, which was the persistent violator enhancement in this case.

That is something that we believe is crucial. Mr. Arambula took advantage of the offer, pled guilty. The state was then bound by the offer at the time of sentencing. And now he wants to basically undo everything that was clearly done on the record.

Based upon the information in the state's summary disposition brief, as well as our argument today, we would ask that the petition be dismissed in its entirety. Thank you.

THE COURT: Mr. Williams.

MR. WILLIAMS: Thank you, Your Honor.

I have communicated with Mr. Arambula in this

matter, trying to obtain responses to many of the questions that I had in going through the state's brief on each of the issues presented therein in order to overcome what is a clear record that was made previously.

That resulted in the affidavit and the brief which, I grant, is mostly a legal brief. We're requesting the court just apply facts in the record to the law that was supplied. I know that there are a couple of issues that are -- I think one in the court's notice of intent to dismiss and a couple in the state's motion for summary judgment that were not addressed in my brief, very simply, because of the record that was made below.

However, most of the issues have been addressed in that brief, and I would simply submit that for the court's ruling.

THE COURT: Mr. Williams, do you see any factual disputes in this case that would warrant an evidentiary hearing?

MR. WILLIAMS: He has a dispute with the testing of the -- the original testing which occurred with the officer that was questioned at the preliminary hearing stage, whether that first test was -- well, the first and second test were appropriate tests. Those were with a NIK test. But later on, of course, there was a forensics which supported the second test which was taken by the

officer.

I have difficulty with whether that's a factual argument, because part of it's a legal argument, too, due to the doctrine of the waiver of defects at a preliminary hearing if you go to trial or enter a guilty plea. And that encompasses, of course, the motion for suppression -- or the lack thereof that's claimed.

And that there was no appeal that was filed. Actually, that's not at issue, because that's -- the state concedes to that.

THE COURT: Okay, thank you.

Ms. Sweesy, any further argument?

MS. SWEESY: No, Your Honor.

THE COURT: Counsel, I am prepared to rule on this motion at this time. I've studied this file in great depth, and I make these findings for the record:

First, the relief sought by the petitioner in this case is to grant him a new trial. I recognize that this was a pro se filing and that often petitioners don't articulate exactly what they're asking for, but the first issue, I guess, is whether there could be any relief for granting a new trial in this case. Clearly not. There was never a trial to begin with.

I think what Mr. Arambula is suggesting is that he should be allowed to withdraw his plea and start this

case over. So giving great liberality to his pleadings, I'll take that as the position that he advocates here.

I don't find that there are any factual disputes in this case that would warrant an evidentiary hearing. I think the record is very clear as to what occurred.

He was arrested by law enforcement officers. At the time of that arrest, they found a digital scale. Detective Rivers, who was a trained narcotics officer, conducted a NIK field test on that scale. And as I read the preliminary hearing transcript, he did that in less-than-acceptable lighting conditions.

I interpret that to mean that he swabbed the scale; and the first swab, when tested, turned out to be a negative test. Later, when he took that scale back to the police station, he swabbed it again. I interpret his testimony from the preliminary hearing to mean that he swabbed it in a different location, and at that time obtained a positive NIK test result.

Ultimately, the scale was sent to the state laboratory, and the chemist who tested it found the presence of methamphetamine on that scale.

The lab report is attached to the petitioner's -- to the petitioner's petition, and there's no dispute that there was in fact a positive, scientific test for methamphetamine which went well beyond the NIK

test which the officer used.

There's also undisputed that the chain of custody, which is actually Exhibit F of document D-81, which I believe is either the defense counsel's marking or the state's marking in discovery, shows a chain of custody for this particular scale.

This court has the authority to draw reasonable inferences from this record based upon the fact that I am the trier of fact, there's no jury involved in this case. I have seen dozens, if not hundreds, if not thousands of custody -- chain-of-custody documents, particularly from the Twin Falls Police Department; and I've heard testimony in numerous cases concerning procedures involved in transporting documents to and from the state lab; and it appears to me, and I make a finding that the chain-of-custody document is accurate in this case.

It certainly reflects that the scale that was seized by Detective Rivers is in fact the same one that was tested.

Ultimately, the state charged Mr. Arambula with not only possession, but being a persistent violator. Pursuant to the plea agreement, the second enhancement was withdrawn, and he pled guilty to the possession charge.

He did that in front of the Honorable Daniel Meehl, who conducted a hearing not only as to taking that

plea, but also had a hearing as to whether or not Mr. Arambula was dissatisfied with his counsel.

I think the record again is undisputed that Mr. Arambula expressed dissatisfaction with his previous counsel. The trial court granted Mr. Arambula additional time to visit with his counsel about that. And after a period of some three hours, I believe, Mr. Arambula indicated on the record that he was in fact satisfied with his prior counsel's representation.

And I interpret the record to mean that he withdrew any claim of that he had been requesting -- or any claim that he did request change of counsel.

The plea agreement in this case -- Excuse me, not the plea agreement, but the guilty plea advisory form reflects that he acknowledged affirmatively that he was satisfied with the representation of his counsel.

And ultimately was sentenced in accordance with the plea agreement, received the sentence recommended by the state. As part of that plea agreement, he also waived his right to appeal; and I think that is clear on the record, and undisputed in the record that he did that.

Taking up his claims, specifically: First, he argues that the Idaho Code Section 37-2732 is unconstitutionally vague. That is an issue that should have been raised at the trial level before entry of a

plea. By pleading guilty, he waived the right to challenge that, or make that challenge.

Second, I find that even if he had, and even if his counsel had somehow been ineffective in failing to raise that issue for him, that he would not prevail on that issue. The cases cited in the state's briefing in this case make it clear, and the statute makes it clear, that any amount of methamphetamine is sufficient to constitute a criminal act in the state of Idaho. And so even if those issues had been presented either to the trial court or at an appellate court if the case had gone that far, I do not find that those would have been successful arguments.

Therefore, I find there is no merit to that particular allegation.

He next argues that the district court refused to provide him with alternate counsel. The standard, as I understand, is this: Once a defendant expresses a dissatisfaction with counsel, the court is required to conduct a hearing to ferret out the nature of that complaint. There is no particular structure as to how that hearing is to be conducted.

In this case, as I said earlier with regard to my factual findings, Judge Meehl did in fact have a hearing on that issue where Mr. Arambula addressed that

issue with the court. I find that that was a satisfactory hearing for purposes of his challenge to the replacement of his counsel, and that he in fact again withdrew or waived his claim against his prior counsel with regard to any conflict, and he -- when he came back on the record and entered his plea.

Judge Meehl discussed that specifically with him, and I find that there is no merit to this allegation.

He raises several -- four issues with regard to ineffective assistance of counsel, the first of which is that he failed to file a motion to suppress the controlled substance.

The issue in this case is not whether there was a negative test of the substance. If one reads the petition, it makes it sound as though there was a substance that was tested by the NIK method which turned out to be negative; and I don't interpret the preliminary hearing transcript or this record to reflect that.

I think what the record -- what I find the record shows is that the officer swabbed this scale, but what he swabbed wasn't part of the controlled substance. It was simply a swab on the scale; and he, for lack of a better way to put it, missed the substance that was on the scale; and that is far different than having a negative test.

To me, it was no more than a test that's ineffectual. That is demonstrated by the fact that at the police department Detective Rivers again swabbed the scale, obtained a substance under better lighting conditions which did test positive on the NIK test. Then, ultimately, the scale was also sent to the lab and tested positive pursuant to a more formal testing procedure.

So even if there had been a motion to suppress filed, I would find that there would be no prejudice to the defendant in this case, because he has failed to make a showing that there was in fact not a substance on that -- on that scale. It is his burden in a post-conviction proceeding to offer this court some evidence that had that scale been re-tested that it would have been tested to the benefit of the defendant.

There is no showing in this record that he would have -- that that would have occurred.

As the state has further argued, when the defendant entered a guilty plea in this case, by law he waived his right to file a suppression motion.

And so for all of those reasons, I find that, number one, it wasn't ineffective assistance of counsel to begin with; and number two, even if there had been, there would have been no -- nothing served by having filed that motion. He would not have prevailed on the motion to

suppress at the district court level.

The second argument he makes is that he failed to adequately cross examine Detective Rivers -- his counsel failed to adequately examine Detective Rivers at the preliminary hearing.

Well, there are several problems with this. Number one, there was some cross examination by defense counsel of the detective at the preliminary hearing, and I think it was clarified as to what had occurred with regard to the testing of the substance.

The technique of cross examination is a matter of strategy for counsel. I cannot make a finding that prior counsel's cross examination fell below an objective standard of reasonableness with regard to cross examination.

Third, again, it really is a moot point. Whether or not there was effective cross examination was mooted by the entry of a plea in this case. Essentially, any errors at the preliminary hearing are deemed mooted or waived by entry of a plea; and so I find that there is no merit to this allegation, either.

He next argues that his counsel failed to provide necessary services. Well, it goes back to the same point I just made with regard to the suppression motion. A petitioner in a post-conviction relief

proceeding is required to make a showing that had those services been provided that there would have been a different result in this case.

There is no showing in this record that any further testing of this digital scale would have resulted in any different test result than what we have in this case, meaning positive for methamphetamine.

He's failed, simply, to carry his burden in that regard.

The next argument is that his counsel failed to address the vaguely written chain of custody. I already commented on that point. I make a finding for this record that the chain of custody in this case is certainly adequate and would have been adequate had this case ever gone to trial.

Again, which it did not go to trial. By having pled guilty, he waived any defects with regard to that claim of chain of custody. He's made no showing that there is -- in fact that the item tested by the state lab was not in fact the state -- or the item that was seized from his residence, and which he admitted ownership of.

I'm not sure what defense counsel should have done in that regard. There was nothing to challenge, because Mr. Arambula entered a guilty plea in this case.

The last category of claims is what the court

perceives as issues raised by Mr. Arambula which was not addressed by the state's motion to dismiss. That's why I issued a notice of intent to dismiss under the statute dealing with the appeal issues.

There has been no response to those allegations -- excuse me, not to the allegations, but to the state's -- to the court's notice of intent to dismiss.

For the reasons set forth in that notice of intent to dismiss, I find that any claim of ineffective assistance of counsel relating to pursuing Mr. Arambula's appellate rights is not well-taken. And again, I'm not going to re-state everything I said in that notice. I'll simply incorporate that by reference.

As we discussed at the outset of this hearing, assuming that Mr. Arambula files the affidavit that has been proposed in this case, I would not find that any of the contents of that affidavit would alter any of the conclusions that I have reached in this case. He really does not raise any new factual issues beyond that set forth in his original petition.

For all of the reasons stated, I find there is no merit to his petition, and I will dismiss it with prejudice at this time. We will prepare an appropriate order to do that.

Anything further in this record?

MR. WILLIAMS: There is, Your Honor. As I understand the court's wording, technically, you're dismissing his issue that there was no appeal filed because there was no response to it.

Actually, there is a response to it. I just didn't want that to be an appellate point.

THE COURT: Okay. Well, let me correct that.

There is a response in the memorandum filed by Mr. Williams. It doesn't alter my analysis.

But you are correct that there was a response, but that the response does not change my interpretation of this case or the law relating to it.

So I will still dismiss this case, and we will prepare an order to do that.

Thank you, Counsel, for your arguments this morning.

MS. SWEESY: Thank you.

MR. WILLIAMS: Thank you, Your Honor.

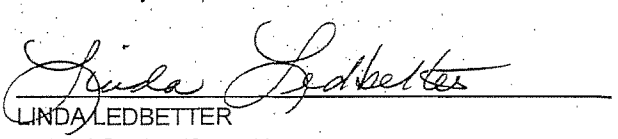
(End of proceedings.)

REPORTER'S CERTIFICATE

STATE OF IDAHO)
) ss
County of Twin Falls)

I, LINDA LEDBETTER, duly appointed, qualified and acting official reporter of the Fifth Judicial District of the State of Idaho, DO HEREBY CERTIFY that I reported in stenotype the proceedings adduced in the above and foregoing cause February 28, 2011; and that the within and foregoing constitutes and is a true and correct copy of the transcript of said requested proceedings, said transcript consisting of pages 1 through 29, inclusive.

IN WITNESS WHEREOF, I have hereunto set my hand this 25th day of April 2011.



LINDA LEDBETTER
Idaho CSR Certificate No. 26
Twin Falls, Idaho

APPENDIX B

DISTRICT COURT
Fifth Judicial District
County of Twin Falls - State of Idaho

FEB 28 2011 11:30 AM

By _____ Clerk

_____ Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

Armando Keto Arambula, Petitioner, vs. State of Idaho, Respondent.	CASE NO. CV 2010-5565 **JUDGMENT OF DISMISSAL**

A hearing on the State's *Motion for Summary Disposition of Petition for Post Conviction Relief* was held on February 28, 2011. For the reasons given on the record during the hearing and for the reasons given in the Court's *Notice of Intent to Dismiss Post Conviction Petition Claims* filed by the Court on January 28, 2011, IT IS HEREBY ORDERED that Armando Keto Arambula's *Petition for Post Conviction Relief* filed on November 26, 2010 is DISMISSED WITH PREJUDICE.

Dated this 28 day of February 2011.

Randy J. Stoker
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 28 day of February 2011, I caused to be served a true and correct copy of the foregoing, by the method indicated below, and addressed to the following:

Jill Sweesy Twin Falls County Prosecuting Attorney P.O. Box 126 Twin Falls, ID 83303	( ) U.S. Mail ( ) Hand delivered ( ) Faxed (✓) Court Folder
Tim Williams Williams Law Office P.O. Box 282 Twin Falls, ID 83303-0282	( ) U.S. Mail ( ) Hand delivered ( ) Faxed (✓) Court Folder

Clerk

APPENDIX C

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

Armando Keto Arambula, Petitioner, vs. State of Idaho, Respondent.	CASE NO. CV 2010-5565 **Notice of Intent to Dismiss Post Conviction Petition Claims**

Petitioner Armando Keto Arambula ("Arambula") filed a *Petition for Post Conviction Relief* ("PCR") on November 26, 2010. The State filed a *Motion for Summary Disposition of Petition for Post Conviction Relief* on January 20, 2011. The State has moved for summary disposition on the following claims raised by Arambula:

1. Idaho Code § 37-2732 is unconstitutionally vague.
2. The District Court erred in refusing to provide the petitioner with alternate counsel.
3. Ineffective assistance of counsel based upon:
    a. Failing to file a motion to suppress the controlled substance test results.
    b. Failing to adequately cross examine Detective Ken Rivers at the preliminary hearing.

c. Failing to provide "the necessary services."

d. Failing to address the "vaguely written chain of custody."

The Court believes that Arambula also raises additional claims involving his right to appeal. These claims are the subject of the Court's notice of intent to dismiss. In addition, the Court takes judicial notice of the sentencing hearing in the underlying criminal case, CR-09-11246, and documents in the requested by the State.[1]

GOVERNING STANDARDS

An action for post-conviction relief is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548 (1983). Like the plaintiff in any other civil proceeding, the applicant must substantiate, by a preponderance of evidence, the allegations upon which his request for post-conviction relief is based. *Idaho Code* § 19-4907; *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654 (Ct. App. 1990). A district court may take judicial notice of the record in the underlying criminal case. *Hayes v. State*, 113 Idaho 736, 739, 745 P.2d 758, 761 (Ct.App. 1987), *aff'd* 115 Idaho 315, 766 P.2d 785 (1988), *overruled on other grounds, State v. Guzman*, 122 Idaho 981, 842 P.2d 660 (1992).

An action for post-conviction relief may be dismissed, either upon a motion for summary dismissal by a party or the court's own initiative. *Idaho Code* § 19-4906; *See Martinez v. State*, 126 Idaho 813, 816, 892 P.2d 488, 491 (Ct. App. 1995). However, under either approach a petitioner must be given notice of the basis for the proposed dismissal. See *Martinez v. State*, 126 Idaho at 892, P.2d at 491. When a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any

[1] The Court has reviewed the electronic recording of the sentencing hearing because a reporter's transcript is not available.

further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for so doing. I.C. § 19-4906(b). The applicant shall be given 20 days to reply to the proposed dismissal. I.C. § 19-4906(b). Summary dismissal is appropriate only when the evidence raises no genuine issue of material fact which, if resolved in the applicant's favor, would entitle him to the requested relief. If such a factual issue is framed, an evidentiary hearing must be conducted. *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159 (Ct. App. 1991); *Hoover v. State*, 114 Idaho 145, 146, 754 P.2d 458 (Ct. App. 1988).

"The Uniform Post Conviction Procedure Act provides a mechanism whereby a person convicted of a crime may present evidence, not presented or heard at trial, which requires vacation of the conviction in the interest of justice". *Parrott v. State,* 117 Idaho 272, 274, 787 P.2d 258 (1990). "As such, the Act provides an appropriate mechanism for considering claims of ineffective assistance of counsel". *Id.* Article I, section 13 of the Idaho Constitution guarantees a criminal defendant "reasonably competent assistance of counsel." *State v. Wood*, 132 Idaho 88, 95, 967 P.2d 702 (1998). Likewise, the Sixth Amendment to the United States Constitution, which is made applicable to the states by the due process clause of the Fourteenth Amendment, assures a criminal defendant effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685–86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174 (1988).

Our Supreme Court has adopted the two-prong *Strickland* test to evaluate whether a criminal defendant received effective assistance of counsel for post-conviction relief purposes. *State v. Mathews*, 133 Idaho 300, 306, 986 P.2d 323 (1999);

Wood, 132 Idaho at 95. A defendant seeking post-conviction relief based upon an alleged lack of effective counsel must prove that 1) counsel's performance was deficient *and* 2) that this deficiency was the source of actual prejudice. To prove prejudice, the defendant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the proceedings would likely have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

Bare or conclusionary allegations, unsubstantiated by any fact, are inadequate to entitle a petitioner to an evidentiary hearing. *Roman v. State*, 125 Idaho 644, 873 P.2d 898 (Ct. App. 2004). Allegations are insufficient for the grant of relief when they do not justify relief as a matter of law. *Stuart v. State*, 118 Idaho 865, 801 P.2d 1216 (1990). Allegations contained in the application for post conviction relief are also insufficient for the granting of relief when they are clearly disproved by the record of the original proceedings. *Workman v. State*, 144 Idaho 518, 523, 164 P.3d 798, 803 Idaho (2007).

ANALYSIS

Arambula raises two claims that were not addressed within the State's *Motion for Summary Disposition*. Arambula states the following on pages C and D of his *Affidavit of Facts in Support of Post Conviction Petition*:

> On May 3rd, 2010 the Court sentenced Arambula to two (2) years fixed with five (5) years indeterminate for a unified term of seven (7) years. The Court in its Judgment and Commitment advised the defendant that he "loses the right to appeal except as to the sentence imposed." Exhibit "A" pg. 3 The Judgment and Commitment goes on to contradict itself stating "Arambula was advised of his right to appeal the judgment within 42 days...." Judgment and Commitment pg 6. In any event Arambula asserts his right to Appeal by way of the 6th and 14th Amendments to the United States Constitution and that to deprive him of this right is a violation of due process of law.

> Moreover, Arambula instructed counsel Ben Andersen to file a direct appeal within the allotted 42 days and he failed to do so.

Arambula first asserts that the deprivation of his right to appeal is unconstitutional. The Idaho Supreme Court addressed the constitutionality of appeal right waivers in *State v. Cope* where it stated, "The right to appeal is purely a statutory right and is not a right guaranteed by any provision of the federal or state constitutions." 142 Idaho 492, 496, 129 P.3d 1241, 1245 (2006) *citing State v. Murphy*, 125 Idaho 456-57, 872 P.2d 719-20 (1994). Arambula's assertion that he has the right to appeal "by way of the 6th and 14th Amendments to the United States Constitution and that to deprive him of this right is a violation of due process of law" is incorrect. Accordingly, the Court gives notice of its intent to dismiss Arambula's claim that the deprivation of his right to appeal is unconstitutional.

Arambula asserts his counsel's failure to file an appeal when instructed is a cognizable claim of ineffective assistance of counsel. The Court agrees. *See Hust v. State*, 147 Idaho 682, 685, 214 P.3d 668, 671 (Idaho App., 2009). However, assuming *arguendo* that Arambula's counsel failed to file an appeal when requested and that failure constitutes ineffective assistance of counsel, Arambula has made no showing of actual prejudice required by the second prong of the *Strickland* test.

As part of the plea agreement reached with the State, Arambula waived his appeal right. The Offer-Plea Agreement states:

> By accepting this officer the defendant waives the right to appeal any issues regarding the conviction, including matters involving the plea or the sentencing and any rulings made by the court, including all suppression issues. However, the defendant retains the right to appeal the sentence if the Court exceeds the State's recommendation.

The sentence Arambula received did not exceed the State's recommendation. During the change of plea hearing Arambula answered, "Yes, sir" when asked if he fully understood the terms of the plea agreement and the guilty plea advisory. *Change of Plea Hearing Transcript* at 15. Further, when asked "could you promise me your decision to plead guilty in this case has been made completely voluntarily and of your own free will" Arambula replied, "Yes, sir." *Id.* at 14. Arambula knowingly and voluntarily waived his right to appeal and if an appeal had been filed it would have been dismissed. The Court finds no actual prejudice would have resulted even if Arambula's counsel failed to file an appeal when requested.

Arambula asserts the statement, "Arambula was advised of his right to appeal the judgment within 42 days", within the *Judgment of Conviction* filed by the sentencing court on May 03, 2010 constitutes independent grounds to file an appeal. The Court disagrees. "Although a written judgment is presumably a correct statement of the judgment pronounced in open court, and for that reason is ordinarily treated as an expression of the judgment itself, the principle remains that the only legally cognizable sentence in a criminal case is the 'actual oral pronouncement in the presence of the defendant." *State v. Wallace*, 116 Idaho 930, 932, 782 P.2d 53, 55 *(Idaho App., 1989) citing United States v. Bergmann*, 836 F.2sd 1220, 1221 (9th Cir. 1988). The Court takes judicial notice of the sentencing hearing held on May 03, 2010 where the sentencing judge specifically instructed Arambula that he had waived his appeal rights and did not advise him of any appeal rights. Because Arambula had waived his right to appeal, the Court gives notice of its intent to dismiss Arambula's claim of in effective assistance of counsel regarding failure of his counsel to file an appeal.

ACCORDINGLY, the Court hereby gives Notice pursuant to I.C. §19-4906 of its intention to dismiss Arambula's claims that deprivation of his right to appeal is unconstitutional and that his counsel was ineffective for failing to file an appeal when requested with prejudice 20 days from the date of this Notice. In issuing this Notice the court is satisfied that no purpose would be served by any further proceedings. Arambula may reply to this Notice as set forth in the statute. The remaining issues raised in the petition shall be addressed at the hearing on State's *Motion for Summary Disposition of Petition for Post Conviction Relief.*

Dated this 28 day of January 2011.

Randy J. Stoker
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 28 day of January 2011, I caused to be served a true and correct copy of the foregoing, by the method indicated below, and addressed to the following:

Jill Sweesy Twin Falls County Prosecuting Attorney P.O. Box 126 Twin Falls, ID 83303	( ) U.S. Mail ( ) Hand delivered ( ) Faxed (✓) Court Folder
Tim Williams Williams Law Office P.O. Box 282 Twin Falls, ID 83303-0282	( ) U.S. Mail ( ) Hand delivered ( ) Faxed (✓) Court Folder

Clerk