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Hansen v. State Respondent's Brief Dckt. 39779

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

BEAU HANSEN,)	
)	
Petitioner-Appellant,)	NO. 39779
)	
vs.)	
)	
STATE OF IDAHO,)	
)	
Respondent.)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

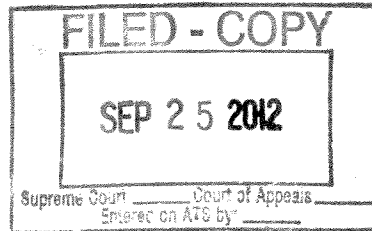
HONORABLE DAVID C. NYE
District Judge

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Attorney General
State of Idaho

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Chief, Criminal Law Division

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**ATTORNEYS FOR
RESPONDENT**

**PRO SE
PETITIONER-APPELLANT**

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Nature Of The Case	1
Statement Of Facts And Course Of The Proceedings	1
ISSUE	2
ARGUMENT	3
Hansen Has Waived His Claims On Appeal By Failing To Support The Claims With Argument And Authority; Even If Not Waived, Hansen Has Failed To Show Error In The Summary Dismissal Of His Post-Conviction Petition	3
A. Introduction	3
B. Standard Of Review	3
C. The Court Should Decline To Consider Any Of Hansen's Claims Because They Are Unsupported By Argument And Authority	3
D. Even If This Court Considers The Merits Of Hansen's Claims, He Has Failed To Establish The District Court Erred In Summarily Dismissing His Petition	4
CONCLUSION	6
CERTIFICATE OF SERVICE	6
APPENDICES A-C	

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Ferrier v. State</u> , 135 Idaho 797, 25 P.3d 110 (2001).....	4
<u>Gilpin-Grubb v. State</u> , 138 Idaho 76, 57 P.3d 787 (2002)	3
<u>Pratt v. State</u> , 134 Idaho 581, 6 P.3d 831 (2000).....	4
<u>State v. Hansen</u> , Docket No. 37325, 2011 Unpublished Opinion No. 352 (Idaho App. February 10, 2011).....	1
<u>State v. Lovelace</u> , 140 Idaho 53, 90 P.3d 278 (2003)	4
<u>State v. Zichko</u> , 129 Idaho 259, 923 P.2d 966 (1996).....	3
<u>Stuart v. State</u> , 118 Idaho 865, 801 P.2d 1216 (1990).....	5
<u>Workman v. State</u> , 144 Idaho 518, 164 P.3d 798 (2007)	3, 4
 <u>STATUTES</u>	
I.C. § 19-4906	4

STATEMENT OF THE CASE

Nature Of The Case

Beau Hansen appeals from the district court's order summarily dismissing his petition for post-conviction relief.

Statement Of Facts And Course Of The Proceedings

Hansen pled guilty to one count of aggravated battery and the court imposed a unified five-year sentence with two years fixed. (R., p.33.) Hansen appealed his sentence and the Court of Appeals affirmed. State v. Hansen, Docket No. 37325, 2011 Unpublished Opinion No. 352 (Idaho App. February 10, 2011) (Appendix A).¹

On October 30, 2011, Hansen filed a *pro se* petition for post-conviction relief alleging (1) the state breached the plea agreement; (2) ineffective assistance of trial counsel; and (3) a speedy trial violation. (R., pp.1-6.) Hansen also filed a motion for the appointment of counsel. (R., pp.8-11.) The state filed an answer (R., pp.21-26), and the district court denied Hansen's request for counsel and issued a notice of intent to dismiss (R., pp.27-40). Hansen filed a response to the court's notice (R., pp.43-52) after which the court entered an Order of Dismissal, dismissing Hansen's petition (R., pp.55-62). Hansen timely appealed.² (R., pp.66-69.)

¹ The district court took judicial notice of the Court of Appeals' opinion issued in Beau's direct appeal. (R., p.60 n.12.)

² Although Hansen's notice of appeal was not filed within the 42-day time limit, in response to an order conditionally dismissing his appeal as untimely, Hansen filed an affidavit along with a prison mail log indicating he placed his notice of

ISSUE

Hansen states the issue on appeal as:

Did the court look into all the issues with the information provided in the petition for post conviction relief filed October 30, 2011? Would like the court to appoint counsel.

(Appellant's Brief, p.5.)

The state phrases the issue on appeal as:

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

appeal "in the prison legal mail system on the 28th day of February, 2012," which was the deadline for filing his notice of appeal. (Affidavit of Beau E. Hansen (file folder).) The Court therefore reinstated Hansen's appeal, concluding the "appeal appear[ed] to be timely." (Order Reinstating Appellate Proceedings, dated June 5, 2012.)

ARGUMENT

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

A. Introduction

In the argument section of his Appellant's Brief, Hansen notes he "asked for relief becaus [sic] of 3 issues" and he lists the three issues as breach of the plea agreement, ineffective assistance of counsel, and a speedy trial violation, which are the same claims alleged in his post-conviction petition. (Appellant's Brief, p.6.) This is the entirety of Hansen's argument on appeal. As such, this Court should decline to consider any of Hansen's claims because he has failed to support them with argument and authority. Alternatively, Hansen 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 Any Of Hansen'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 Hansen has recited the nature of

his claims on appeal, he has offered no argument in support of his claims. (Appellant's Brief, p.6.) Further, the only authority cited by Hansen appears in his table of authorities and he has failed to apply that authority to any of his claims. Given the lack of any meaningful citation to authority and the complete absence of any supporting argument, this Court should decline to consider the merits of any of Hansen's claims.

D. Even If This Court Considers The Merits Of Hansen'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 un rebutted 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.

The only issue Hansen presents on appeal is whether the court “look[ed] into all the issues with the information provided in the petition for post conviction relief.”³ (Appellant’s Brief, p.5.) That the district court, in fact, “look[ed] into” Hansen’s claims is reflected in both the court’s notice of intent to dismiss and its order of dismissal. (R., pp.27-40, 55-62.) In both its order of conditional dismissal notifying Hansen of its intent to dismiss and its final order dismissing Hansen’s petition, the district court articulates the applicable legal standards and sets forth, in detail, the reasons Hansen is not entitled to post-conviction relief. The state adopts the district court’s notice of intent to dismiss and order of dismissal as its argument on appeal, copies of which are attached hereto as Appendices B and C. Hansen does not specifically 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.

³ In his issue statement, Hansen also asserts he “would like the court to appoint counsel.” (Appellant’s Brief, p.5.) To the extent this is a claim of error related to the district court’s denial of Hansen’s motion to appoint counsel, the district court correctly concluded that Hansen was not entitled to counsel because he failed to raise the possibility of a valid claim. (R., pp.27-32.)

CONCLUSION

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

DATED this 25th day of September, 2012.



JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of September, 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:

BEAU HANSEN, #62222
I.C.C.
P.O. BOX 70010
BOISE, ID 83707



JESSICA M. LORELLO
Deputy Attorney General

APPENDIX A

RECEIVED
FEB 10 2011
OFFICE OF THE ATTORNEY GENERAL
CRIMINAL DIVISION

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37325

STATE OF IDAHO,)	2011 Unpublished Opinion No. 352
)	
Plaintiff-Respondent,)	Filed: February 10, 2011
)	
v.)	Stephen W. Kenyon, Clerk
)	
BEAU E. HANSEN,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY

SCANNED

Appeal from the District Court of the Sixth Judicial District, State of Idaho, Bannock County. Hon. David C. Nye, District Judge.

Judgment of conviction and unified sentence of five years, with a minimum period of confinement of two years, for aggravated battery, affirmed.

Molly J. Huskey, State Appellate Public Defender; Justin M. Curtis, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

Before GRATTON, Chief Judge; LANSING, Judge;
and GUTIERREZ, Judge

PER CURIAM

Beau E. Hansen pled guilty to aggravated battery. Idaho Code §§ 18-903, 18-907(1)(a). The district court sentenced Hansen to a unified term of five years, with a minimum period of confinement of two years. Hansen appeals asserting that the district court abused its discretion by imposing an excessive sentence.

Sentencing is a matter for the trial court's discretion. Both our standard of review and the factors to be considered in evaluating the reasonableness of the sentence are well established and need not be repeated here. *See State v. Hernandez*, 121 Idaho 114, 117-18, 822 P.2d 1011, 1014-15 (Ct. App. 1991); *State v. Lopez*, 106 Idaho 447, 449-51, 680 P.2d 869, 871-73 (Ct. App. 1984); *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). When reviewing



the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007). Applying these standards, and having reviewed the record in this case, we cannot say that the district court abused its discretion.

Therefore, Hansen's judgment of conviction and sentence are affirmed.

h

APPENDIX B

2011 DEC 13 AM 9:02

BY [Signature]
DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT,
STATE OF IDAHO, BANNOCK COUNTY

BEAU HANSEN,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

Case No.: CV-2011-4546-PC

NOTICE OF INTENT TO DISMISS

Hon. David C. Nye

INTRODUCTION

On October 30, 2011, Petitioner Beau Hansen filed a *pro se* Petition and Affidavit for Post Conviction Relief. The State submitted its answer on November 17, 2011, asking that the Petition be dismissed. The Court recently denied Hansen's request for appointment of counsel on December 8, 2011. The Court now issues its Notice of Intent to Dismiss the Petition as provided in Idaho Code § 19-4906(b).

BACKGROUND

In Hansen's underlying Bannock County criminal case, #CR-2009-2377-FE, he pled guilty to one felony count of aggravated battery. On December 7, 2009, he received a prison sentence of two years fixed, plus three years indeterminate. Hansen filed a notice of appeal on January 19, 2010. The Court of Appeals of Idaho issued an unpublished decision in Hansen's appeal on February 17,

2011, affirming the judgment of conviction and sentence.

STANDARD OF REVIEW

Idaho's Uniform Post-Conviction Procedure Act ("UPCPA"), contained in Idaho Code § 19-4901 to 19-4911, governs petitions for post-conviction relief. These petitions initiate civil proceedings.¹ Under Idaho Code § 19-4901(a), a person who is convicted of or sentenced for a crime may institute a proceeding to secure relief based on a claim that the conviction was in violation of the state or federal constitutions or the laws of Idaho, or that "there exists evidence of material facts, not previously presented and heard, that requires the vacation of the conviction or sentence in the interests of justice," among other grounds.

The UPCPA provides that a court may dismiss the action if the court is satisfied, based on the record, that the petitioner is not entitled to relief, there is no material issue of fact, and no purpose would be served by any further proceedings.² Summary dismissal is the procedural equivalent to summary judgment under Rule 56 of the Idaho Rules of Civil Procedure.³ Thus, in determining whether to dismiss the petition, a court must view the facts in a light most favorable to the petitioner and determine if those facts would entitle the petitioner to relief if accepted as true.⁴ If the court finds that the accepted facts entitle the petitioner to relief, the court must conduct an evidentiary hearing.⁵

Summary dismissal of a petition may be appropriate, even if the State does not controvert

¹ *State v. Gilpin-Grubb*, 138 Idaho 76, 79, 57 P.3d 787, 790 (2002).

² Idaho Code §19-4906(b).

³ *Ramirez v. State*, 113 Idaho 87, 89, 741 P.2d 374, 376 (Ct. App. 1987).

⁴ *Ferrier v. State*, 135 Idaho 797, 798, 25 P.3d 110, 111 (2001).

⁵ *State v. LePage*, 138 Idaho 803, 806-7, 69 P.3d 1064, 1067-68 (Ct. App. 2003).

the petitioner's facts, because "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."⁶

A petition is "subject to summary dismissal if the petitioner has not presented evidence establishing a prima facie case as to each element of the claims upon which the applicant bears the burden of proof."⁷

DISCUSSION

In his Petition, Hansen asserts the following grounds for relief:

- a) "My constitutional rights were violated by the State going against the agreements made between us on the Rule 11 plea agreement;"
- b) Ineffective assistance of counsel; and
- c) "My right to speedy trial was abused – 02/09/09 case filed 09/03/09 – trial date."

The Court will address each of these grounds in turn.

A. Breach of Rule 11 Plea Agreement

Under the UPCPA, a petition for post-conviction relief is not a substitute for a direct appeal.⁸ When a petition follows an appeal, "[a]ny issue which could have been raised on direct appeal, but was not, is forfeited and may not be considered in post-conviction proceedings"⁹

Hansen did file an appeal in his underlying case, but he only challenged his sentence, arguing solely that the district court judge abused his discretion. The Idaho Court of Appeals affirmed his sentence and judgment of conviction. In his appeal, Hansen could have asserted his

⁶ *Id.* at 807, 69 P.3d at 1068.

⁷ *Raudebaugh v. State*, 135 Idaho 602, 604, 21 P.2d 924, 926 (2001).

⁸ I.C. § 19-4901(b).

⁹ *Id.* (the exception included in this provision is inapplicable here).

claim that the prosecution breached the Rule 11 plea agreement, but he did not. Therefore, Hansen has forfeited that claim, and it fails as a matter of law.

Alternatively, the Rule 11 plea agreement was not a binding agreement on the court. It was an agreement between Hansen and the State. Under the terms of that agreement, the State agreed to dismiss the charge of Attempted Strangulation and Hansen agreed to plead guilty to the charge of Aggravated Battery. Additionally, the parties agreed to jointly request a substance abuse evaluation and a mental health evaluation under I.C. § 19-2604. Finally, the State agreed to seek no more than a sentence of three years fixed and four years indeterminate with the Court retaining jurisdiction for 180 days. Hansen was free to seek probation.

The Court ordered both evaluations under I.C. § 19-2604, and at sentencing imposed a sentence of two years fixed and three years indeterminate. The Court did not retain jurisdiction and did not place Hansen on probation. The State did not seek a sentence in excess of the Agreement. However, the Court in its discretion did not retain jurisdiction. Thus, not only has Hansen forfeited this claim by not addressing it on appeal, he also cannot win this claim on its merits.

B. Ineffective Assistance of Counsel

A petitioner may bring a claim for ineffective assistance of counsel in a petition for post-conviction relief.¹⁰ According to the well-established standard, “[t]o prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney’s performance was

¹⁰ *Baxter v. State*, 149 Idaho 859, 862, 243 P.3d 675, 678 (Ct. App. 2010).

deficient and that the defendant was prejudiced by the deficiency.”¹¹ In order for a claim of ineffective assistance of counsel in a petition for post-conviction to avoid summary dismissal, “the petitioner must establish that: (1) a material issue of fact exists as to whether counsel’s performance was deficient; and (2) a material issue of fact exists as to whether the deficiency prejudiced the claimant’s case.”¹² The petitioner has the burden of showing that the attorney’s representation fell below an objective standard of reasonableness.¹³ To establish prejudice, the petitioner must show a reasonable probability that, but for the attorney’s deficient performance, the outcome would have been different.¹⁴ In order to establish the prejudice prong when the defendant has pled guilty, “a petitioner is required to show that as a result of counsel’s deficient performance ‘there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.’”¹⁵ Also, there is a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance”¹⁶

Hansen claims that his counsel was ineffective because he failed to call Hansen as a witness to testify at the preliminary hearing to provide his side of the story. However, the Court of Appeals of Idaho has stated:

As to defense counsel’s choice of witnesses, his manner of conducting cross-examination, and his lack of objection to the so-called damaging testimony, these points fall within “trial tactics” or “strategy choices” that are the exclusive domain of trial counsel. “This is an area where we will not second guess counsel without

¹¹ *Booth v. State*, 262 P.3d 255, 260 (Idaho 2011).

¹² *Schoger v. State*, 148 Idaho 622, 624, 226 P.3d 1269, 1271 (2010).

¹³ *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988).

¹⁴ *Id.* at 761, 760 P.2d at 1177.

¹⁵ *Ridgley v. State*, 148 Idaho 671, 676, 227 P.3d 925, 930 (2010)(quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

¹⁶ *Ray v. State*, 133 Idaho 96, 101, 982 P.2d 931, 936 (1999)(quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)).

evidence of inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation.”¹⁷

In this case, counsel’s choice to not call Hansen as a witness at the preliminary hearing falls within “trial tactics” or “strategy choices,” and will not be second-guessed because Hansen has not provided any evidence of his counsel’s “inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation.” Hansen’s claim that his counsel’s failure to call Hansen as a witness at the preliminary hearing constitutes ineffective assistance of counsel fails as a matter of law.

Hansen also argues that his counsel was ineffective because he failed to explain to Hansen or to the Court that the victim’s medical report contained information about prior injuries to the maxillary sinus. However, Hansen has not demonstrated how this conduct qualifies as deficient, nor has Hansen shown how this alleged deficiency prejudiced him.

Hansen also claims that the third attorney that took on Hansen’s case did not have sufficient time to prepare for trial, which led to persistent recommendations to accept the plea bargain offered by the State. Additionally, Hansen claims that his attorney led Hansen to believe that the Rule 11 plea agreement bound the State and Hansen to the same terms, and that his attorney failed to object when the State asked for restitution to be imposed. Hansen has not shown that these actions or any of the other allegations constitute deficient performance by Hansen’s attorney. Furthermore, Hansen has also not shown how these alleged deficiencies prejudiced him. Therefore, Hansen’s claim of ineffective assistance of counsel fails as a matter

¹⁷ *State v. Chapman*, 120 Idaho 466, 469, 816 P.2d 1023, 1026 (Ct. App. 1991)(quoting *State v. Larkin*, 102 Idaho 231, 234, 628 P.2d 1065, 1068 (1981)).

of law.

C. Speedy Trial

Hansen claims that his right to a speedy trial was violated, because more than six months elapsed from the time of his arraignment to the time of his trial date. However, it is well-settled law in Idaho that a valid guilty plea waives the defense of a speedy trial violation.¹⁸ Since Hansen did enter a valid guilty plea in his case, his speedy trial rights were waived. Therefore, Hansen's claim in his petition that his speedy trial rights were violated fails as a matter of law.


Alternatively, the delays in this case were caused by Hansen. Trial was set to begin and on the morning of trial, Hansen informed the Court that he wanted new counsel to represent him. His request caused the trial to be vacated. The State did not violate Hansen's speedy trial rights.

CONCLUSION

The grounds for relief Hansen asserts in his Petition for Post Conviction Relief all fail as a matter of law. Therefore, Hansen's Petition is subject to summary dismissal. The Court hereby gives Hansen notice of its intent to dismiss his Petition in 20 days from the date of this order unless he can produce additional evidence sufficient to prevent the dismissal of his claims.

IT IS SO ORDERED.

DATED December 13, 2011.


DAVID C. NYE
District Judge

¹⁸ *State v. Garcia*, 126 Idaho 836, 837, 892 P.2d 903, 904 (Ct. App. 1995).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of December, 2011, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

Beau Hansen
IDOC # 62222
ICC D-2 216A
P.O. Box 70010
Boise, ID 83707

- U.S. Mail
- Hand Deliver
- Fax:
- Email:

Bannock County Prosecuting Attorney

- U.S. Mail
- Hand Deliver - *courthouse box*
- Fax:
- Email:

Amy J. Beers
Deputy Clerk

APPENDIX C

FILED
BANNOCK COUNTY
CLERK OF THE COURT

2012 JAN 17 PM 2:03

BY [Signature]
DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT,
STATE OF IDAHO, BANNOCK COUNTY

BEAU E HANSEN,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

Case No.: CV-2011-4546-PC

ORDER OF DISMISSAL

Hon. David C. Nye

INTRODUCTION

On October 30, 2011, Petitioner Beau Hansen filed a *pro se* Petition and Affidavit for Post Conviction Relief. The State submitted its answer on November 17, 2011, asking that the Petition be dismissed. The Court denied Hansen's request for appointment of counsel on December 8, 2011. The Court also issued a Notice of Intent to Dismiss the Petition on December 13, 2011, as provided in Idaho Code § 19-4906(b), and gave Hansen 20 days to respond with additional evidence or argument sufficient to prevent summary dismissal of his Petition. On January 4, 2012, Hansen responded by filing his Objection to the Notice of Intent to Dismiss. After having reviewed Hansen's Objection, the Court now issues its Order of Dismissal of Hansen's Petition.

BACKGROUND

In Hansen's underlying Bannock County criminal case, #CR-2009-2377-FE, he pled guilty

to one felony count of aggravated battery. On December 7, 2009, he received a prison sentence of two years fixed, plus three years indeterminate. Hansen filed a notice of appeal on January 19, 2010. The Court of Appeals of Idaho issued an unpublished decision in Hansen's appeal on February 17, 2011, affirming the judgment of conviction and sentence.

STANDARD OF REVIEW

Idaho's Uniform Post-Conviction Procedure Act ("UPCPA"), contained in Idaho Code § 19-4901 to 19-4911, governs petitions for post-conviction relief. These petitions initiate civil proceedings.¹ Under Idaho Code § 19-4901(a), a person who is convicted of or sentenced for a crime may institute a proceeding to secure relief based on a claim that the conviction was in violation of the state or federal constitutions or the laws of Idaho, or that "there exists evidence of material facts, not previously presented and heard, that requires the vacation of the conviction or sentence in the interests of justice," among other grounds.

The UPCPA provides that a court may dismiss the action if the court is satisfied, based on the record, that the petitioner is not entitled to relief, there is no material issue of fact, and no purpose would be served by any further proceedings.² Summary dismissal is the procedural equivalent to summary judgment under Rule 56 of the Idaho Rules of Civil Procedure.³ Thus, in determining whether to dismiss the petition, a court must view the facts in a light most favorable to the petitioner and determine if those facts would entitle the petitioner to relief if accepted as true.⁴ If the court finds that the accepted facts entitle the petitioner to relief, the court must conduct an

¹ *State v. Gilpin-Grubb*, 138 Idaho 76, 79, 57 P.3d 787, 790 (2002).

² I.C. § 19-4906(b).

³ *Ramirez v. State*, 113 Idaho 87, 89, 741 P.2d 374, 376 (Ct. App. 1987).

⁴ *Ferrier v. State*, 135 Idaho 797, 798, 25 P.3d 110, 111 (2001).

evidentiary hearing.⁵

Summary dismissal of a petition may be appropriate, even if the State does not controvert the petitioner's facts, because "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."⁶ A petition is "subject to summary dismissal if the petitioner has not presented evidence establishing a prima facie case as to each element of the claims upon which the applicant bears the burden of proof."⁷

DISCUSSION

In his original Petition, Hansen asserts the following grounds for relief:

- a) "My constitutional rights were violated by the State going against the agreements made between us on the Rule 11 plea agreement;"
- b) Ineffective assistance of counsel; and
- c) "My right to speedy trial was abused – 02/09/09 case filed 09/03/09 – trial date."

In his Objection to the Notice of Intent to Dismiss, Hansen provides additional argument and some additional allegations. Hansen's underlying claims have remained the same, and the Court will again address each of them in turn.

A. Breach of the Nonbinding Rule 11 Plea Agreement

In its first Notice of Intent to Dismiss, the Court dismissed, on two alternative grounds, Hansen's claim that the State breached the nonbinding Rule 11 plea agreement. First, the Court

⁵ *State v. LePage*, 138 Idaho 803, 806-7, 69 P.3d 1064, 1067-68 (Ct. App. 2003).

⁶ *Id.* at 807, 69 P.3d at 1068.

⁷ *Raudebaugh v. State*, 135 Idaho 602, 604, 21 P.2d 924, 926 (2001).

found that because Hansen failed to raise this claim in his direct appeal, he forfeited it and cannot assert it now in a petition for post-conviction relief. Alternatively, the Court also found that Hansen's claim could not succeed on its merits because although the Court imposed a harsher sentence than the State recommended, the State did not recommend a harsher sentence than it had agreed to in the Rule 11 plea agreement. The Court notes again that the plea agreement in this case bound the State, but not the Court.

In his Objection, Hansen claims that the failure to raise this breach of the plea agreement claim on appeal was due to Hansen's appellate counsel's failure to follow Hansen's wishes. Hansen claims that he told his appellate counsel to raise the issue of the plea agreement breach on appeal, but it was not done. Hansen claims that his appellate attorney agreed to raise the breach claim on appeal, and had never advised Hansen against raising such a claim.

Hansen's new allegations seem to amount to an additional claim of ineffective assistance of appellate counsel. Hansen did not raise such a claim in his original petition. Assuming, without deciding, that Hansen should be allowed to do such at this stage, the Court finds Hansen's claim that the State breached the nonbinding Rule 11 plea agreement fails on its merits and should be dismissed because Hansen has not presented evidence establishing a *prima facie* case to support his claim. Hansen claims that the State made argument at the sentencing hearing that violated the plea agreement. The Rule 11 plea agreement⁸ provides that "[t]he State will seek no greater punishment of Defendant than an underlying sentence of three (3) years fixed and four years indeterminate with jurisdiction to be retained by the Court for a period of 180 days."

⁸ As provided in L.R.E. 201(c), the Court takes judicial notice of the document entitled "Non Binding Plea Agreement," filed on October 6, 2009 in Hansen's underlying criminal case #: CR-2009-2377-FE.

Hansen has not alleged that the State actually asked the Court to impose a sentence not in accordance with the plea agreement; he merely takes issue with the manner in which the State argued at the sentencing hearing. But, the State may choose to support its sentencing recommendations with any argument it chooses, and since Hansen has not alleged that the State actually sought a harsher sentence than it agreed to, this part of his claim fails.

Additionally, Hansen claims that the State violated the plea agreement by asking for restitution to be imposed, which was not mentioned in the written plea agreement. The Court agrees with Hansen that the matter of restitution was not addressed in the written plea agreement filed with the Court. However, the State never submitted to the Court an official, written request for restitution. The Court always requires the State's requests for restitution to be filed in writing with the Court, and the State has never filed such a request in Hansen's case. Therefore, his claim that the State breached the plea agreement by asking for restitution fails. No restitution was properly sought and no restitution was ever awarded.

Hansen also claims that the plea agreement was breached because the Court mistakenly caused him to have both crimes he was originally charged with entered as convictions on his record when one was supposed to be dismissed. The Court filed a Minute Entry & Order on October 6, 2009,⁹ which mistakenly indicated that Hansen had pled guilty to the attempted strangulation charge rather than the aggravated battery charge. The Court filed a different Minute Entry & Order on December 8, 2009—after sentencing—which contained the same mistake.

⁹ The Court takes judicial notice of this document from the underlying criminal case.

However, the Court filed an Amended Minute Entry & Order on December 22, 2009,¹⁰ which indicated that Hansen had pled guilty to the aggravated battery charge and that the other count in the information was dismissed by the State. The only two counts contained in the original information were: Count 1—aggravated battery, and Count 2—attempted strangulation.¹¹ Hansen argues that since the Amended Minute Entry & Order did not indicate that the prior Order was mistaken or dismissed, he has been harmed by having both convictions on his record. However, the Court of Appeals of Idaho acknowledged in its unpublished decision¹² on Hansen’s appeal that Hansen had pled guilty to the crime of aggravated battery—there was no mention of attempted strangulation. This indicates that Hansen’s official criminal record is correct—he has only been convicted of aggravated battery in this case, not attempted strangulation. Whether or not the Idaho Department of Corrections has mistakenly treated Hansen as if he has been convicted of attempted strangulation in addition to aggravated battery is not an issue for this Court to address. Hansen’s official conviction record is correct. Hansen’s claim that the plea agreement was breached because he was convicted of both crimes is simply false, and fails on its merits. None of the arguments or allegations Hansen has presented in his Objection or in his original Petition prevent the Court from dismissing his claim of breach of the Rule 11 plea agreement. The Court finds that, based on the record, that Hansen is not entitled to relief on this claim, there is no material issue of fact, and no purpose would be served by any further

¹⁰ The Court also takes judicial notice of this document.

¹¹ The Court takes judicial notice of the original information entitled “Complaint – Criminal,” filed February 9, 2009 in Hansen’s underlying criminal case.

¹² The Court takes judicial notice of this unpublished decision, a copy of which was filed in Hansen’s underlying criminal case on February 17, 2011.

proceedings in relation to this claim.

B. Ineffective Assistance of Counsel

In its first Notice of Intent to Dismiss, the Court dismissed Hansen's claim of ineffective assistance of counsel because he had not alleged sufficient facts to satisfy either of the required elements such a claim. In his Objection, Hansen has not still not alleged sufficient facts that would "establish that: (1) a material issue of fact exists as to whether counsel's performance was deficient; and (2) a material issue of fact exists as to whether the deficiency prejudiced the claimant's case."¹³ Hansen's additional allegations concerning his appellate counsel's alleged failure to raise certain claims on appeal fail on their merits as addressed above. Hansen has not been able to produce any additional evidence or argument sufficient to create a viable claim of ineffective assistance of counsel. Therefore, the Court finds that Hansen's claim is subject to summary dismissal, and there is no purpose in addressing the ineffective-assistance claim any further.

C. Speedy Trial

The Court previously held that Hansen's speedy trial claim fails on two alternative grounds: Hansen's valid guilty plea waived any speedy trial claim, and any delays were caused by Hansen, not the State. Hansen has not produced any additional allegations or argument in his Objection sufficient to change the Court's prior ruling on his speedy trial claim. The Court still finds that Hansen's speedy trial claim is subject to summary dismissal.


¹³ *Schoger v. State*, 148 Idaho 622, 624, 226 P.3d 1269, 1271 (2010).

CONCLUSION

The grounds for relief Hansen asserts in his Petition for Post Conviction Relief and in his Objection to the Notice of Intent to Dismiss all fail. Hansen has failed to present evidence establishing a prima facie case for any of his claims. Having failed to produce anything additional sufficient to revive his claims in the 20 days previously allowed by the Court, Hansen's Petition is subject to summary dismissal. There are no issues of material fact and no purpose would be served by allowing Hansen's Petition to proceed any further. The Court hereby enters this Order dismissing Hansen's Petition for Post-Conviction Relief in its entirety.

IT IS SO ORDERED.

DATED January 17, 2012.


DAVID C. NYE
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of January, 2012, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

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Amy J. Beers
Deputy Clerk