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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

ROBERT T. EBERLEY)	
)	No. 39944
Petitioner-Appellant,)	
)	Ada Co. Case No.
vs.)	CV-2011-2568
)	
STATE OF IDAHO,)	
)	
Respondent.)	
)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

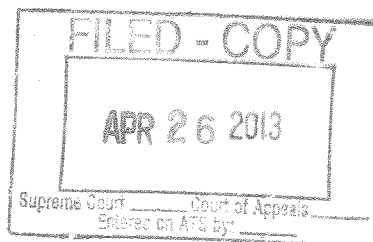
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STATEMENT OF THE CASE

Nature Of The Case

Robert T. Eberley appeals from a judgment re-entered pursuant to a I.R.C.P. 60(b)(6) motion he filed after his previous post-conviction appeal was dismissed as untimely.

Statement Of Facts And Course Of The Proceedings

The state charged Eberley with four counts of robbery after he and two others robbed four teenage boys at Kuna Caves. (R., pp.20-25,128-34.) Pursuant to a plea agreement, Eberley pled guilty to one count of robbery, the state dismissed the three remaining counts, and the court imposed a life sentence with 20 years fixed. (R., pp.122, 141.) In imposing sentence, the court considered the statements of Eberley's co-defendants about the circumstances of the robbery, which statements were contained in their respective presentence investigation reports ("PSI").¹ (R., p.103.) After imposing sentence, the court realized Eberley had not had a chance to review his co-defendants' statements prior to sentencing. (R., p.104.) Upon realizing this, the court made the co-defendants' statements to their respective presentence investigators part of Eberley's PSI and gave him an opportunity to review those statements and respond to them. (R., p.104.) At that time, counsel for Eberley lodged a general objection to the court considering the statements at all because they were not

¹ Eberley and his co-defendants appeared in court for sentencing at the same time. (R., p.96.)

originally part of Eberley's PSI. (R., pp.104-05.) The court overruled the objection. (R., p.105.)

After Eberley reviewed the statements, he advised the court that the actions his co-defendants attributed to him were, in reality, their own actions. (R., p.105 ("everything that happened in them [sic] statements is what they did, but, yet, they're saying I did it, and that's crazy, man".)) The court considered Eberley's comments regarding his co-defendants' statements, and "confirm[ed]" its sentence, noting the victims' statements regarding what happened were consistent with the co-defendants' version of events. (R., pp.105-06.) Eberley filed a Rule 35 motion, which was denied. (R., p.141.) His conviction and sentence were affirmed on appeal. (R., p.141.)

Eberley subsequently filed a *pro se* petition for post-conviction relief alleging: (1) the court erred in not allowing him to read his co-defendants' presentence investigation reports until after he was sentenced; (2) ineffective assistance of counsel; and (3) he did not receive a particular police report until he got his PSI. (R., pp.5-12.) Eberley also filed a motion for appointment of counsel, which the court granted, and Theresa Martin appeared on behalf of Eberley. (R., pp.34-36, 39, 42.)

The state filed an answer and motion for summary dismissal. (R., pp.44-47, 76-88.) The court granted the state's motion in a decision filed May 16, 2011. (R., pp.141-148.) The court entered a separate "Order of Summay [sic] Dismissal" that same day, dismissing Eberley's petition. (R., p.149.) Eberley filed an unsigned, undated notice of appeal on July 29, 2011. (R., pp.150-153.)

The Idaho Supreme Court entered an Order Conditionally Dismissing Appeal on August 5, 2011, because Eberley's notice of appeal was untimely. (Order Conditionally Dismissing Appeal, Docket No. 39028-2011.²) Eberley filed a response to the conditional dismissal acknowledging his appeal was untimely but claiming the notice "evinces [his] intent to appeal." (Response to Conditional Dismissal, Docket No. 39028-2011.) The Court dismissed Eberley's appeal in an order dated September 21, 2011. (Order Dismissing Appeal, Docket No. 39028-2011.)

On January 23, 2012, eight months after the district court dismissed his petition, Eberley filed a "Verified Motion for Relief from Judgment or Order" in his post-conviction case, seeking relief pursuant to I.R.C.P. 60(b)(6) (hereafter "Motion"). (R., pp.167-172.) In his Motion, Eberley asserted Martin never mailed him a copy of the court's order dismissing his petition and that "the complete lack of legal representation within his case" was an "extraordinary circumstance" entitling him to relief under Rule 60(b)(6). (R., p.168 n. 1, pp.170-172.) Eberley requested counsel to assist him in pursuing his Motion, which the court granted. (R., pp.180-182.) Paul Taber filed a notice of appearance and a motion to unseal PSI "to explore allegations made in the Petition for Post Conviction Relief," which the court granted. (R., pp.183, 185, 187-88.)

At a subsequent status conference, Taber stated that the prosecutor spoke with Martin who "confirmed that Mr. Eberley did ask her to appeal and she

² Contemporaneous with this brief, the state has filed a Motion to Take Judicial Notice of the Order Conditionally Dismissing Appeal, the Response to Conditional Dismissal, and the Order Dismissing Appeal in Eberley v. State,

did not appeal.” (4/19/2012 Tr., p.1, L.20 – p.2, L.1.) Taber asked the court “just to re-date the judgment” so Eberley could appeal. (4/19/2012 Tr., p.2, Ls.1-3.) The state consented to the requested relief (4/19/2012 Tr., p.2, Ls.5-6), and the court re-entered an Order of Summary Dismissal and a Judgment on April 23, 2012 (4/19/2012 Tr., p.4, Ls.18-24; R., pp.193-94). Eberley filed a timely notice of appeal from the re-entered Order of Summary Dismissal and the Judgment. (R., pp.196-198.)

ISSUES

Eberley states the issue on appeal as:

Whether the district court erred when it summarily denied the post conviction relief petition.

(Appellant's Brief, p.3.)

The state rephrases the issues on appeal as:

1. The Idaho Supreme Court has already dismissed Eberley's appeal from the denial of post-conviction relief because the appeal was untimely. Should this appeal likewise be dismissed because the district court lacked jurisdiction to reinstate Eberley's appellate rights from the May 16, 2011 order summarily dismissing his post-conviction petition?

2. Even if the Court concludes Eberley may proceed in this appeal, has Eberley failed to show error in the summary dismissal of his post-conviction petition given his failure to allege a genuine issue of material fact to warrant an evidentiary hearing or otherwise establish he is entitled to relief on any of his claims?

ARGUMENT

I.

The District Court Did Not Have Authority To Consider Eberley's Untimely Rule 60(b) Motion Nor Is Re-Entry Of An Order For Purposes Of Reinstating Appellate Rights A Proper Ground For Relief Under Rule 60(b)

A. Introduction

On May 16, 2011, the district court entered an order summarily dismissing Eberley's post-conviction petition. (R., p.149.) Because Eberley filed an untimely notice of appeal from the court's dismissal order, his appeal was dismissed. (Order Dismissing Appeal, Docket No. 39028-2011.) Eight months after the court dismissed his petition, and four months after his appeal was dismissed, Eberley filed an untimely Rule 60(b) motion claiming ineffective assistance of post-conviction counsel. (R., pp.167-172.) As relief, Eberley asked the court to re-enter judgment so that his appeal rights could be reinstated; the state agreed to this form of relief and the court granted Eberley's request. (4/19/2012 Tr., p.2, Ls.5-6, p.4, Ls.18-24; R., pp.193-94.) Because the district court lacked jurisdiction to reinstate Eberley's appeal, this appeal should be dismissed.

B. The District Court Did Not Have Jurisdiction To Consider Eberley's Untimely Rule 60(b) Motion Or Grant Him Any Relief In Relation Thereto

Rule 60(b), I.R.C.P. reads, in relevant part:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or

other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), (3) and (6) not more than six (6) months after the judgment, order, or proceeding was entered or taken.

“[T]he time requirement set forth in Rule 60(b) is jurisdictional and may not be extended ‘except to the extent and under the conditions stated’ in the Rule itself.” Miller v. Haller, 129 Idaho 345, 348, 924 P.2d 607 (1996). The term “made,” as used in the rule, requires that the motion be “filed prior to the six month time limit or is served within that time period and then filed ‘within a reasonable time thereafter.’” Id. (quoting I.R.C.P. 5(d)(1)).

Eberley’s Motion sought relief pursuant to section (6). (R., p.167.) As such, he was required to file the Motion within six months of the court’s summary dismissal order. Eberley failed to do so. Rather, Eberley waited more than eight months before filing his Motion. The Motion was, therefore, untimely and the district court lacked jurisdiction to consider Eberley’s request for relief.³

In addition to being untimely, Eberley’s Motion was not a proper request for relief under Rule 60(b). Rule 60(b) authorizes relief “from a final judgment, order, or proceeding” for the reasons enumerated in the rule. Eberley did not, however, seek relief from the order of summary dismissal, he sought

³ Although the prosecutor agreed to the relief Eberley requested, it is well-established that parties cannot consent to jurisdiction. Johnston v. Pascoe, 100 Idaho 414, 423, 599 P.2d 985, 994 (1979) (“as we all know, parties cannot stipulate a court into jurisdiction which it does not have”).

reinstatement of his appellate rights from that order. Rule 60(b) does not authorize this type of relief. If Eberley wanted to reinstate his appellate rights due to the alleged ineffective assistance of post-conviction counsel, he should have filed a successive petition under I.C. § 19-4908; Eberley failed to do so.

Eberley cannot defeat the Supreme Court's prior order dismissing his appeal for lack of appellate jurisdiction by filing an untimely and otherwise improper motion under Rule 60(b)(6). The Court should, therefore, dismiss this appeal.

II.

Even If This Court Allows Eberley To Proceed In This Appeal, Eberley Has Failed To Show Error In The Summary Dismissal Of His Petition

A. Introduction

The district court summarily dismissed Eberley's post-conviction petition in its entirety. (R., pp.141-49.) Eberley claims the court erred in a variety of ways; however, a review of the record and the applicable legal standards shows Eberley failed to carry his burden of demonstrating he was entitled to an evidentiary hearing or otherwise entitled to post-conviction relief.

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).

C. Eberley Has Failed To Show Error In The Summary Dismissal Of 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 (2007) (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.

1. Eberley Is Not Entitled To Relief On His Claim That The Court Erred In Considering His Co-Defendants' Statements When It Imposed Sentence Or His Claim That Counsel Should Have Moved To Withdraw His Guilty Plea When The Court Did So

In his petition, Eberley alleged counsel was ineffective for failing to file a motion to withdraw his guilty plea. (R., pp.9-10.) Eberley contended he wanted to withdraw his plea so he could "confront the lies in his co-defendnts [sic] PSI statements and to prove [he] did not hit anyone in the back of the head!" (R., pp.8-10.) The court dismissed this claim, concluding Eberley failed to raise a genuine issue of material fact that such a motion would have been granted. (R., pp.147-48.) Eberley contends summary dismissal of this claim was improper, arguing "the post conviction claim does not actually require that the motion to withdraw guilty plea be granted, because if it was merely made, it would have at least prevented the court from sentencing [him] based on undisclosed statements which blamed him." (Appellant's Brief, p.15.)

Eberley's arguments lack merit. To overcome summary dismissal of his ineffective assistance of counsel claim, Eberley was required to demonstrate that "(1) a material issue of fact exist[ed] as to whether counsel's performance was deficient, and (2) a material issue of fact exist[ed] as to whether the deficiency prejudiced [Eberley's] case." Baldwin v. State, 145 Idaho 148, 153-54, 177 P.3d 362, 367-68 (2008) (internal citations omitted); see also Strickland v. Washington, 466 U.S. 668, 687-88 (1984) (a petitioner alleging ineffective assistance of counsel must show both deficient performance and resulting prejudice). To establish deficient performance, the burden was on Eberley "to show that his attorney's conduct fell below an objective standard of

reasonableness. This objective standard embraces a strong presumption that trial counsel was competent and diligent.” Id. “[S]trategic or tactical decisions will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation.” Id. To establish prejudice, Eberley was required to show “a reasonable probability that but for his attorney’s deficient performance the outcome of the proceeding would have been different.” Id.

Eberley’s argument that it is irrelevant whether the motion would be granted is erroneous. It is well-established that when a defendant claims his counsel was ineffective for failing to file a motion, “the district court may consider the probability of success of the motion in question in determining whether the attorney’s inactivity constituted incompetent performance.” Wolf v. State, 152 Idaho 64, 67, 266 P.3d 1169, 1172 (Ct. App. 2011) (citing Boman v. State, 129 Idaho 520, 526, 927 P.2d 910, 916 (Ct. App.1996)). “Where the alleged deficiency is counsel’s failure to file a motion, a conclusion that the motion, if pursued, would not have been granted by the trial court, is generally determinative of both prongs of the *Strickland* test.” Id. at 67-68, 266 P.3d at 1172-73.

Moreover, Eberley’s argument assumes counsel was deficient for failing to file the motion; he was not. Rather, it was well within counsel’s decision-making authority to do exactly what he did – object to the court’s consideration of the co-defendants’ statements and ask the court for permission to retain the statements “for purposes of preparation of a Rule 35 motion.” (R., p.104; see

also p.106 (defense counsel puts the court and state “on notice” that he is “confident” he will “be filing a Rule 35 motion and following up with an appeal as well”).)

Eberley’s argument also erroneously assumes that the mere act of filing a motion to withdraw his guilty plea would have “prevented the court from sentencing [him] based on” his co-defendants’ statements, yet he fails to explain why this is so. Indeed, Eberley cites no legal authority to support the proposition that had counsel moved to withdraw Eberley’s plea the moment the court mentioned it was considering the “undisclosed” statements of the co-defendants the court would have been required to stop the sentencing, much less grant the motion or not consider information it deemed relevant to its decision. Nor was counsel’s failure to do so deficient. The normal course of action when a court indicates it is considering information the defendant believes it cannot consider is to object; it is not to orally move to withdraw the guilty plea. Further, while counsel in this case did not interrupt the court’s pronouncement of sentence with an objection, the issue was subsequently addressed the same day⁴ at which time counsel objected. (R., p.104.)

Counsel’s decision not to file a motion to withdraw Eberley’s guilty plea was particularly appropriate under the circumstances since the court’s

⁴ The record does not reveal how much time elapsed between the court’s pronouncement of sentence and the subsequent proceedings wherein Eberley was given the opportunity to read the co-defendants’ statements. However, it appears the discussion may have occurred at the conclusion, or in the midst of, the co-defendants’ sentencing hearings since the record does reflect that Eberley was sentenced first and the court received the co-defendants’ permission to include their statements in Eberley’s PSI. (R., pp.96, 104.)

consideration of certain information at sentencing in no way rendered Eberley's guilty plea invalid. Motions to withdraw a guilty plea are governed by I.C.R. 33(c), which provides:

(c) Withdrawal of plea of guilty. A motion to withdraw a plea of guilty may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw defendant's plea.

Pursuant Rule 33(c), a motion to withdraw made before sentencing may be liberally granted, but must be granted only if the defendant proves either that the plea was not knowingly, intelligently and voluntarily made or that there is another just reason for withdrawal of the guilty plea. State v. Hanslovan, 147 Idaho 530, 535-36, 211 P.3d 775, 780-81 (Ct. App. 2008) (citing State v. Rodriguez, 118 Idaho 957, 959, 801 P.2d 1308, 1310 (Ct. App. 1990)). A motion to withdraw a guilty plea after sentencing should be granted only to "correct manifest injustice." I.C.R. 33(c).

Even applying the more lenient pre-sentencing standard, Eberley failed to establish his motion would have been granted at any time, much less in the middle of his sentencing hearing. Eberley claims otherwise, noting the following circumstances he apparently believes would have qualified as just reasons to withdraw his plea: (1) the prosecutor requested a sentence nowhere "near the five year sentence that his attorney was requesting" and the request was "based in part" on the assertion that Eberley hit one of the victims with a rock, which was contradicted by the police report wherein the officer indicated he could not see

any physical evidence of such⁵; (2) he “learned” at sentencing that the prosecutor “request[ed] such a significant sentence because of the allegations that he had threatened to rape” one of the victims; and (3) the court concluded, based on the co-defendants statements, that “he was the most culpable.” (Appellant’s Brief, pp.13-14.) None of these would have qualified as “just reasons” to allow Eberley to withdraw his plea. Eberley implicitly acknowledges as much, noting it “may not have changed whether or not [he] was guilty of robbery,” but the reasons “were certainly relevant to the sentence that would be imposed for it.” (Appellant’s Brief, p.14.) From this Eberley concludes, “a desire to be able to challenge the statements at trial (that he was unable to meaningfully challenge at sentencing) in an effort to receive a shorter sentence is a legitimate reason to go to trial and a just reason to allow withdrawal of the guilty plea.” (Appellant’s Brief, p.14.) This argument is illogical. Exactly why Eberley believes a court would have considered different information at sentencing if he had gone to trial versus pleading guilty is unclear. While he claims he could have challenged the statements had he gone to trial, he could also challenge them at sentencing and he, in fact, did just that. Eberley repeatedly denied hitting one of the victims with a rock and claimed he only threatened to rape the victim as a joke. (R., p.102.) Eberley failed to provide

⁵ In his petition, Eberley raised a separate claim relating to the timing of the disclosure of the police report, which he did not receive until after he pled guilty. (R., p.6.) On appeal, Eberley does not pursue this as a separate claim, but contends it “is inextricably intertwined with the claim regarding the motion to withdraw [his] guilty plea.” (Appellant’s Brief, p.17.) The state will, therefore, only address it in this context as well.

any evidence in support of his petition that he could have used at trial or sentencing to challenge the victims' and co-defendants' claims about his actions. Nor does he identify on appeal what that evidence might be. Instead, Eberley asserts "[h]ad the motion simply been made then appropriate argument could have been made and perhaps evidence produced (the sister) before sentence was imposed." (Appellant's Brief, p.15.) However, nothing prevented Eberley from presenting evidence from his sister at the time of sentencing or in the form of an affidavit in support of his petition. In fact, the record reflects that Eberley's sister was at his sentencing hearing and available to address the court in addition to the letter she already submitted.⁶ (R., pp.101-02.)

Eberley's argument is also ironic given that the one mitigating factor found by the court, and that Eberley emphasized at sentencing, was that he accepted responsibility. (R., pp.101-102 (argument and allocution highlighting acceptance of responsibility), Because of this, the court did not follow the state's recommendation for 25 years fixed, but instead imposed a fixed 20-year term. (R., p.103 ("They requested 25 years to life imprisonment. Because you have accepted responsibility, I am going to go with 20 years, 20 years fixed with indeterminate life.")). That he now claims he would have preferred to go to trial in order to challenge the co-defendants' and victims' statements is inconsistent with his position at the time of sentencing.

⁶ Although the record does not reflect whether she was still present after the court allowed Eberley to review the co-defendants' statements, the substance of those statements was part of the original sentencing at which she was present and Eberley invoked her name at that time.

Contrary to Eberley's statement, whether a motion to withdraw his guilty plea would have been granted is relevant and both the record and the law support the district court's determination that such a motion would have been denied.

In a related claim, Eberley contends the court erred in summarily dismissing his claim that the court erred in considering the co-defendants' PSI statements when it imposed sentence. (Appellant's Brief, pp.16-17.) According to Eberley, such reliance was improper because, although the court allowed him the opportunity to review the statements, its failure to do so prior to sentencing was improper because by that time the court "had made up its mind" and after he was sentenced "he did not have his witness available." (Appellant's Brief, p.16.) Eberley also complains "the procedure used with the PSI does not give any sort of assurance of reliability or fairness" because although the victims' statements about what happened were consistent with Eberley's co-defendants' statements, this does not make their statements "true." (Appellant's Brief, pp.16-17.) According to Eberley, this flaw in his sentencing proceedings entitled him to withdraw his plea. (Appellant's Brief, p.15.) For the reasons already stated, Eberley is incorrect that any perceived flaw in the information the court considered for sentencing would provide a basis to withdraw his plea. Moreover, any objection to the court's conduct at sentencing could, and should, have been raised on direct appeal. See I.C. § 19-4908. Eberley is essentially asking this Court to grant the same relief he could have and should have requested on direct appeal but did not. This Court should decline to do so.

2. Eberley Failed To Allege A Genuine Issue Of Material Fact Entitling Him To An Evidentiary Hearing On His Claim That Counsel Was Ineffective For Failing To Provide Him With Transcripts Of His Jail Calls

In his petition, Eberley alleged counsel was ineffective for failing to provide him with transcripts of his jail calls. (R., p.10.) The court dismissed this claim, noting “[t]here is no evidence that such transcripts exist” and, in any event, Eberley “would have personal knowledge of his own phone conversations.” (R., p.147.) The court also noted Eberley’s failure to demonstrate resulting prejudice. (R., p.147.)

On appeal, Eberley contends the district court “misses the point” because, although he acknowledged in his affidavit that his attorney told him no such transcripts exist (R., p.9), he did not “want them to learn what was in them” (Appellant’s Brief, p.17). It is Eberley who misses the point. It was his burden to allege a genuine issue of material fact to support his claim that counsel was deficient for not preparing transcripts of his jail calls for some unstated purpose and that he was prejudiced as a result of counsel’s failure to submit to his demands in this regard. Having failed to meet this burden, Eberley cannot show error in the summary dismissal of this claim.⁷

⁷ It is also worth noting that, in his guilty plea questionnaire, Eberley answered “no” to the question, “Is there anything you have requested your attorney to do that has not been done?” (R., p.112.)

3. Eberley Failed To Show Error In The Summary Dismissal Of His Claim That Counsel Was Ineffective For Failing To Provide Him With Paperwork Showing The Dismissal Of A Misdemeanor The State Ultimately Did Not Pursue

Eberley's petition also contains an allegation that counsel was ineffective for failing to provide him proof that a misdemeanor possession of a controlled substance charge was dismissed as part of his plea agreement. (R., p.9.) The court dismissed this claim because Eberley "was never charged with this crime." (R., p.147.) Eberley contends otherwise, citing the unsigned Amended Complaint attached to his petition as Exhibit 1. (Appellant's Brief, p.18 (citing R., p.18).) While the state initially filed a complaint against Eberley that included a charge for misdemeanor possession of a controlled substance,⁸ that complaint was superseded by an Indictment that did not include the misdemeanor charge but instead alleged four counts of robbery. As such, the district court was ultimately correct in its conclusion that Eberley was not charged with a misdemeanor possession crime.

In any event, Eberley's post-conviction claim was that counsel was ineffective for failing to provide him with the paperwork showing the misdemeanor was dismissed. On appeal, Eberley has failed to provide any argument or authority to support remand for further consideration of this claim. (Appellant's Brief, pp.17-18.) Counsel could not provide a non-existent dismissal order and Eberley undoubtedly can obtain a copy of the Indictment and Amended Information, which the state attached to its motion for summary

⁸ A signed, file-stamped copy of the complaint is attached as Appendix D to the state's motion to take judicial filed contemporaneously herewith.

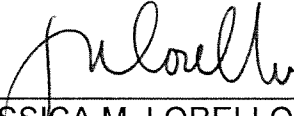
dismissal. (R., pp.128-134.) Exactly what relief he expects this Court to provide in relation to this claim is a mystery. Summary dismissal of this claim was appropriate.

Because the court lacked jurisdiction to reinstate Eberley's appellate rights in his post-conviction case, this appeal should be dismissed. Even if the Court declines to dismiss this appeal, because Eberley failed to allege a genuine issue of material fact to warrant an evidentiary hearing on any of his claims or otherwise show he was entitled to post-conviction relief, Eberley has failed to establish the district court erred in summarily dismissing his petition.

CONCLUSION

The state respectfully requests that this Court dismiss this appeal or, alternatively, affirm the district court's order summarily dismissing Eberley's petition for post-conviction relief.

DATED this 26th day of April 2013.




JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 26th day of April 2013, 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:

GREG S. SILVEY
ATTORNEY AT LAW
P.O. BOX 565
STAR, ID 83669



JESSICA M. LORELLO
Deputy Attorney General