8-26-2014

Brummett v. State Respondent's Brief Dckt. 41127

IN THE SUPREME COURT OF THE STATE OF IDAHO

DAVID BRUMMETT,	)	
	)	No. 41127
Petitioner-Appellant,	)	
	)	Ada Co. Case No.
vs.	)	CV-2011-19332
	)	
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

David Brummett, *pro se*[1], appeals from the district court's order summarily dismissing his petition for post-conviction relief.

Statement of Facts and Course of Underlying Proceedings

The state charged Brummett with burglary, petit theft, and with being a persistent violator. State v. Brummett, 150 Idaho 339, 341, 247 P.3d 204, 206 (Ct. App. 2010). A jury convicted Brummett of burglary and petit theft and the trial court found Brummett was a persistent violator. Id. The court sentenced Brummett to a unified term of 15 years with the first five years fixed. Id. Brummett appealed his conviction, asserting the trial court erred in permitting evidence of prior bad acts at trial. Id., at 341-345, 247 P.3d at 206-210. The Court of Appeals affirmed Brummett's judgment of conviction. Id. at 345, 247 P.3d at 210.

Brummett filed a *pro se* petition for post-conviction relief alleging a violation of his rights based on collusion between his attorney and the state, a

[1] Although counsel was originally appointed to represent Brummett in this appeal, the Court granted appellate counsel's motion to withdraw. (2/4/14 Order Granting Motion to Withdraw as Counsel of Record and Allow Appellant to Proceed *Pro Se*.) Counsel's request to withdraw as counsel was made following a review of "all materials in the record" with a conclusion that a brief could not be filed in compliance with IAR 11.2(a) [requiring an appeal to be "well grounded in fact and [ ] warranted by existing law]." (12/31/13 Affidavit in Support of Motion to Withdraw as Counsel of Record and to Allow Appellant to Proceed *Pro Se*, p.1.)

speedy trial right violation, error in the admission of 404(b) evidence at trial, and multiple claims of ineffective assistance of trial counsel. (R., pp.4-74.)

The court appointed Brummett counsel and stayed the matter to allow counsel to file an amended petition; no such amended petition was filed. (R., pp.82, 87, 92.) The state filed an answer to Brummett's petition, requesting the court dismiss Brummett's claims for post-conviction relief. (R. pp.94-97.) The court issued a notice of its intent to dismiss Brummett's claims, providing him with 20 days to respond to the notice and "an opportunity to establish a genuine issue of material fact." (R., pp.103-115.) Although Brummett filed a *pro se* reply to the court's notice of intent which was considered by the court (R., pp.118-129; 133), no additional documents were filed by counsel. The court denied Brummett's subsequently filed motion to proceed *pro se* (R., pp.116-117, 133) and ultimately dismissed Brummett's petition for post-conviction relief, finding no genuine issue of material fact (R., p.136). Brummett timely appeals. (R., pp.152-154.)

ISSUE

Given the length of the issues listed in Brummett's opening brief, they are not reprinted here.

The state rephrases the issue as:

Has Brummett failed to establish the district court erred in summarily dismissing his petition for post-conviction relief?

ARGUMENT

Brummett Has Failed To Show Error In The Summary Dismissal Of His Petition For Post-Conviction Relief

A. Introduction

The district court provided Brummett with the opportunity to respond to its notice of intent to dismiss and ultimately denied Brummett's petition for post-conviction relief on the basis that "Brummett failed to establish a genuine issue of material fact." (R., p.136.) The district court further found Brummett's reply to its notice of intent to dismiss unresponsive:

> The Petitioner's Reply is not verified and does not constitute admissible evidence. Further, the Court notes that the Petitioner's Reply largely consists of attempts to re-litigate the factual issue of whether Petitioner had the intent required to sustain a conviction for Burglary, Felony, and a re-hash of the allegations made in the Amended Petition. In light of the Petitioner's reply, this Court cannot determine that there is any new evidence or any fact previously overlooked by the Court in its determination to dismiss this case.

(R., pp.135-136.)

On appeal, it appears Brummett reasserts his original claims that were addressed on direct appeal as well as the numerous claims of ineffective assistance of counsel. (Appellant's brief, pp.4-6.) Brummett also forwards a number of new claims on appeal alleging the ineffective assistance of post-conviction counsel. (Appellant's brief, p.6.) Brummett's arguments on appeal fail. He has not shown that the district court erred in summarily dismissing his post-conviction relief petition.

B. Standard Of Review

The appellate court exercises free review over the district court's application of the Uniform Post Conviction Procedure Act. Evensiosky v. State, 136 Idaho 189, 190, 30 P.3d 967, 968 (2001). On appeal from summary dismissal of a post-conviction petition, the appellate court reviews the record to determine if a genuine issue of material fact exists, which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. Matthews v. State, 122 Idaho 801, 807, 839 P.2d 1215, 1221 (1992); Aeschliman v. State, 132 Idaho 397, 403, 973 P.2d 749, 755 (Ct. App. 1999). Appellate courts freely review whether a genuine issue of material fact exists. Edwards v. Conchemco, Inc., 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986).

C. General Legal Standards Governing Post-Conviction Proceedings

A petition for post-conviction relief initiates a new and independent civil proceeding and the petitioner bears the burden of establishing, by a preponderance of the evidence, that he is entitled to relief. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007); State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983). However, a petition for post-conviction relief differs from a complaint in an ordinary civil action. A petition must contain more than "a short and plain statement of the claim" that would suffice for a complaint. Workman, 144 Idaho at 522, 164 P.3d at 522 (referencing I.R.C.P. 8). The petitioner must submit verified facts within his personal knowledge and produce admissible evidence to support his allegations. Id. (citing I.C. § 19-4903). Furthermore, the factual showing in a post-conviction relief application

must be in the form of evidence that would be admissible at an evidentiary hearing. Drapeau v. State, 103 Idaho 612, 617, 651 P.2d 546, 551 (1982); Cowger v. State, 132 Idaho 681, 684, 978 P.2d 241, 244 (Ct. App. 1999).

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.

D. Brummett's Claim That Post-Conviction Counsel Was Ineffective Is Not Properly Before This Court

Brummett claims post-conviction counsel was ineffective. (Appellant's Brief, p.6.) These claims are not properly before this Court for consideration.

It is well-established that this Court, as a general rule, does not consider ineffective assistance of counsel claims raised for the first time on appeal. State v. Mitchell, 124 Idaho 374, 375-376, 859 P.2d 972, 973-974 (Ct. App. 1993) ("it is generally inappropriate to raise a claim of ineffective assistance of counsel on direct appeal from the judgment of conviction"). If Brummett wished to address the issue of ineffectiveness of his post-conviction counsel, the proper course would have been to seek relief from the order of dismissal pursuant to I.R.C.P. 60(b). Rule 60(b)(6) permits a district court "relieve a party or his legal representative from a final judgment, order, or proceeding for ... any other reason [not already specified in subsections (b)(1)-(5)] justifying relief from the operation of the judgment," provided there is a "'showing of 'unique and compelling circumstances' justifying relief.'" Eby v. State, 148 Idaho 731, 736, 228 P.3d 998, 1003 (2010) (citation omitted).

Because Brummett's claims of ineffective assistance of post-conviction counsel are not properly before this Court for consideration for the first time on appeal, the Court must decline to consider them.

E. Brummett Has Failed To Establish That The District Court Erred In Summarily Dismissing His Petition For Post-Conviction Relief

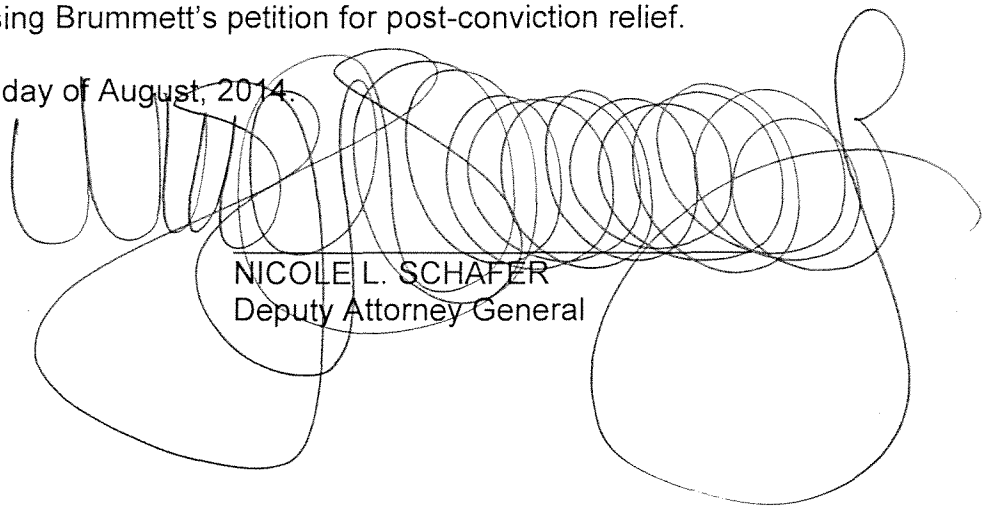
Brummett has failed to establish the district court erred in summarily dismissing his petition for post-conviction relief. In both its notice of intent to dismiss and its order dismissing Brummett's petition for post-conviction relief, the district court articulates the applicable legal standards and sets forth, in detail, the reasons Brummett failed to establish a genuine issue of material fact on any of his claims. The state adopts the district court's written opinions as its argument on appeal, a copy of which is attached hereto as Appendix A. Brummett does not specifically challenge any of the court's findings or legal conclusions (see generally Appellant's Brief), and he has otherwise failed to establish the district court erred in dismissing his petition.

Because Brummett has failed to establish any basis for reversing the district court's dismissal of his post-conviction petition or any other basis for relief, the district court's order should be affirmed.

CONCLUSION

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

DATED this 26th day of August, 2014.

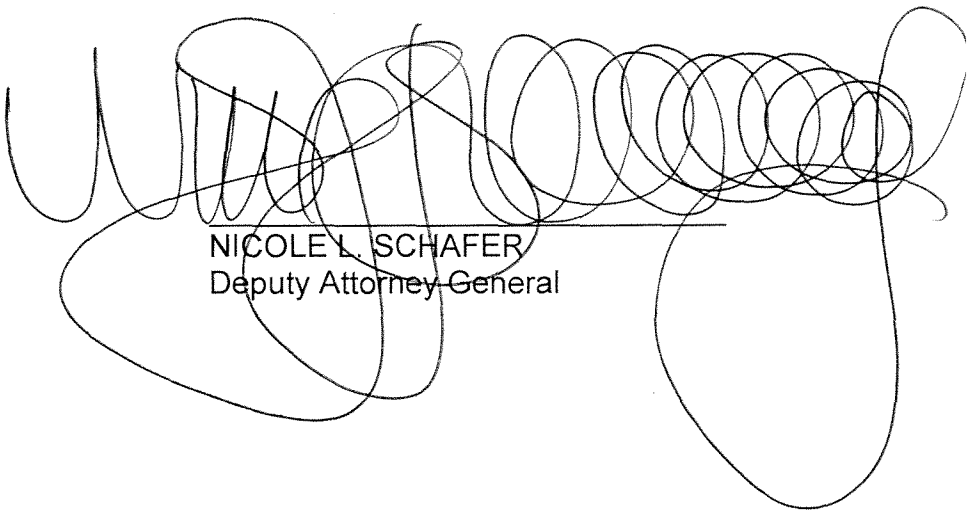


NICOLE L. SCHAFER
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 26th day of August, 2014, I caused two true and correct copies of the foregoing REPLY BRIEF to be placed in the United States mail, postage prepaid, addressed to:

DAVID BRUMMETT
Inmate # 41949
ICC Unit, SMU #8
P.O. Box 70010
Boise, ID 83707



NICOLE L. SCHAFER
Deputy Attorney General

NLS/pm

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

DAVID W. BRUMMETT,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

Case No. CV-PC-2011-19332

MEMORANDUM DECISION
AND NOTICE OF INTENT TO DISMISS

INTRODUCTION

This Court hereby notifies the above parties of its intention to dismiss the application for post-conviction relief in the above-captioned case. Pursuant to Idaho Code Section 19-4906(b), the Court having considered Petitioner's Application, the State's Answer, and the record, is satisfied that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings. The Petitioner is given twenty (20) days to respond to the proposed dismissal.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner is currently incarcerated at the Idaho Correctional Center after he was found guilty of the crimes of Burglary, Felony, and Petit Theft, Misdemeanor, following a jury trial in Ada County Case No. CR-FE-2007-0000887. The Petitioner waived a jury for trial of the Information Part II, and the Court found the defendant guilty of being a Persistent Violator. Pursuant to the Judgment of Conviction and Sentence filed November 4, 2008, the Petitioner was sentenced to a unified term of fifteen (15) years, with a minimum term of confinement of five (5) years for Count I., Burglary, Felony. The Petitioner was sentenced to three hundred sixty-five (365) days in the Ada County Jail for Count II., Petit Theft, Misdemeanor, to run

concurrently with Count I. The Petitioner filed an appeal in his case. The Judgment of Conviction was affirmed by the Idaho Court of Appeals. *State v. Brummett*, 150 Idaho 339, 247 P.3d 204 (Ct. App. 2010).

On September 21, 2007, the parties filed their Stipulation to Remand to Magistrate Court for Preliminary Hearing. A preliminary hearing had been previously conducted, but the parties had been advised that the audio recording system had malfunctioned and, as a result, no transcript of the original preliminary hearing could be prepared. The Court filed its Order Remanding Case for Preliminary Hearing on September 25, 2007, and subsequently, a new preliminary hearing was held. A new Commitment was filed on October 11, 2007, and a new Information was filed on October 15, 2007. Also on October 15, 2007, the Petitioner filed a Motion for Disqualification of Public Defender. However, that motion was withdrawn by the Defendant in open court on the record on October 29, 2007.

The Defendant waived his right to a speedy trial in open court on January 28, 2008. On June 25, 2008, the Defendant filed his Motion to Dismiss, on the ground that the Defendant's constitutional right to a speedy trial had been violated. On September 11, 2008, the Court filed its Order Denying Defendant's Motion to Dismiss, incorporating by reference the findings of fact and conclusions of law articulated orally by the Court on the record on September 3, 2008.

Petitioner filed this Petition and Affidavit for Post-Conviction Relief on October 6, 2011. On October 21, 2011, the Court appointed the Ada County Public Defender's Office to represent the Petitioner in these post-conviction proceedings. On October 24, 2011, the Petitioner filed his Amended Petition and Affidavit for Post-Conviction Relief. On November 10, 2011, the Ada County Public Defender's Office, on behalf of the Petitioner, filed a Motion for Stay of Proceedings and for Leave to Amend Petition. The Court's Order

Granting Stay of Proceedings and for Leave to Amend Petition was filed on December 8, 2011, granting the Petitioner a stay of sixty (60) days from the filing of the Order, to file an amended petition. No such amended petition was filed, and on May 10, 2012, the State filed its Answer to Petition for Post-Conviction Relief. In its prayer for relief, the State requests that the Petitioner's claims for post-conviction relief be dismissed, which request the Court construes as a Motion to Dismiss.

STANDARD FOR REVIEW

The Uniform Post-Conviction Procedure Act, Idaho Code Sections 19-4901 through 19-4911, provides a mechanism by which a person convicted of a crime may show that his conviction was in violation of the Constitution, that the conviction should be vacated in the interests of justice, or that the conviction is otherwise subject to collateral attack. Idaho Code Ann. § 19-4901(a). However, post-conviction relief proceedings are not a substitute for proceedings in the trial court, or for an appeal from the sentence or conviction. Idaho Code Ann. § 19-4901(b). "An application may be filed at any time within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal, whichever is later." Idaho Code Ann. § 19-4902(a). An appeal of the criminal case must be made within forty-two days from the date on any judgment, order, or decree of the district court. Idaho App. R. 14.

A petition for post-conviction relief is a special proceeding that is civil in nature; it is a proceeding entirely new and independent from the criminal action which led to the conviction. *Peltier v. State*, 119 Idaho 454, 808 P.2d 373 (1991); *Matthews v. State*, 130 Idaho 39, 936 P.2d 682 (Ct. App. 1997). The applicant in a post-conviction case has the burden of proving, by a preponderance of the evidence, the allegations which the applicant contends entitle the applicant to relief. Idaho Crim. R. 57(c); *Stuart v. State*, 118 Idaho 865, 801 P.2d 1216 (1990). An application

for post-conviction relief differs from a complaint in an ordinary civil action because it must contain more than a "short and plain statement of the claim" that would suffice for a complaint under Rule 8(a)(1) of the Idaho Rules of Civil Procedure. Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant and affidavits, records or other evidence supporting its application must be attached, or the application must state why such supporting evidence is not included with the application. Idaho Code Ann. § 19-4903; *LaBelle v. State*, 130 Idaho 115, 117, 937 P.2d 427, 429 (Ct. App. 1997). In other words, the application must present or be accompanied by admissible evidence supporting its allegations or the application will be subject to dismissal. *Id.* Bare and conclusory allegations, unsubstantiated by any facts, are inadequate to entitle an applicant to an evidentiary hearing. *Id.* at 121, 937 P.2d at 433; *Nguyen v. State*, 126 Idaho 494, 887 P.2d 39 (Ct. App. 1994).

Summary disposition under Idaho Code Section 19-4906(c) is the procedural equivalent of summary judgment under Idaho Rule of Civil Procedure 56. *Ramirez v. State*, 113 Idaho 87, 741 P.2d 374 (Ct. App. 1987). A trial court may grant a motion by either party for summary disposition of an application for post-conviction relief where it appears from the pleadings, together with any depositions, answers to interrogatories, admissions, agreements of fact, and affidavits submitted, that no genuine issue of fact exists. Idaho Code Ann. § 19-4906(c). However, where issues of material fact exist, an evidentiary hearing must be held. *Parrott v. State*, 117 Idaho 272, 787 P.2d 258 (1990).

DISCUSSION

In his document entitled Memorandum of Points and Law, filed October 6, 2011, and which is incorporated by reference into his Amended Petition, the Petitioner sets forth a number of claims. In addition to alleging claims for ineffective assistance of counsel, the Petitioner alleges that his public defender was "working with the prosecution to violate [Petitioner's] rights..." However, the

Petitioner submits no evidence to support his claim that his attorney was working with the prosecution in an effort to violate his rights. Accordingly, such bare allegations, unsubstantiated by any evidence, must be dismissed. *LaBelle v. State*, 130 Idaho 115, 117, 937 P.2d 427, 429 (Ct. App. 1997). In addition, the Petitioner's claim that his counsel was laboring under a conflict of interest is not supported by any evidence, and must be dismissed. *Id.*

The Petitioner makes several claims regarding I.R.E. 404(b) evidence admitted at trial. That issue was the subject of his appeal. An application for post-conviction relief is not a substitute for an appeal. I.C. § 19–4901(b). A claim or issue which was or could have been raised on appeal may not be considered in post-conviction proceedings. *Id.*; *Whitehawk v. State*, 116 Idaho 831, 832–33, 780 P.2d 153, 154–55 (Ct. App.1989).

The Petitioner's claim that "counsel failed to assert Mr. Brummett's right [to a speedy trial]" is not based in fact. As discussed earlier, the Petitioner filed a Motion to Dismiss based upon an alleged speedy trial violation. The Court denied that motion, and whether the Court erred in that decision was an issue which could have been raised on appeal and may not, therefore, be considered on post-conviction. *Id.*

It appears that the Petitioner's remaining claims are as follows: (1) It was ineffective assistance of counsel for his attorney to "talk[] him into withdrawing" his motion to disqualify public defender; (2) the joinder of his misdemeanor petit theft charge with his felony burglary charge was unconstitutional; (3) it was ineffective assistance of counsel for his attorney to stipulate to remand to the Magistrate for another preliminary hearing instead of filing a motion to dismiss; (4) that the misdemeanor should not have been bound over to the district court as the Magistrate found no probable cause on that charge; (5) it was ineffective assistance of counsel for the Petitioner's counsel not to object to the testimony of Officer Sunada; (6) it was prosecutorial misconduct for the prosecutor to allow Officer Sunada's false testimony regarding the amount of money the Petitioner

had in his pocket to stand without correction; (7) it was ineffective assistance of counsel to withdraw the Petitioner's Rule 29 Motion; (8) it was ineffective assistance of counsel not to object to certain "questions of incrimination" asked of the defendant by the State at trial; (9) it was ineffective assistance of counsel not to object to the introduction of the knife as evidence at trial; (10) it was ineffective assistance of counsel not to object "to no physical evidence being brought into evidence;" (11) it was ineffective assistance of counsel not to argue the Petitioner was entrapped; and (12) that the persistent violator sentencing enhancement is unconstitutional. The Court shall analyze each of these claims in turn.

In evaluating an ineffective assistance of counsel claim, there is a strong presumption that counsel's performance was within the wide range of professional assistance as "sound trial strategy." *Campbell v. State*, 130 Idaho 546, 548, 944 P.2d 143, 145 (Ct. App. 1997). Strategic or tactical decisions made by trial counsel will not be second-guessed on review, unless those decisions were made upon a basis of inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation. *Id.* In order for a defendant in a criminal proceeding to establish that his constitutional right to effective assistance of counsel has been violated, the defendant must show that his counsel's performance was deficient *and* that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Petitioner claims that it was ineffective assistance of counsel for his attorney to "talk[] him into withdrawing" his motion to disqualify public defender because a defendant has the right to choose or change counsel. However, after listening to his attorney, and after considering the advice given by his attorney, the Petitioner voluntarily chose to withdraw the motion. Thus, the Petitioner did make a choice regarding counsel. Moreover, the Petitioner has not met his burden to show that

but for his attorney's advice to withdraw his motion, the result of the trial would have been different.

The Petitioner argues that he was denied a due process right "to have his misdemeanor offense processed in the magistrate division." The Petitioner has cited to no legal authority in support of this proposition, and Idaho Criminal Rule 13 would have allowed the two separate charges to be tried together, had they been filed separately. Thus, the Petitioner's misdemeanor charge was not improperly joined to his felony charge. However, even if it were, "[i]mproper joinder does not, in itself, violate the Constitution. Rather, misjoinder would rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial." *U.S. v. Lane*, 474 U.S. 438, 446, n. 8 (1986). The Petitioner asserts that he should have been tried by a jury of six, rather than by a jury of twelve. However, the fact that the Petitioner was found guilty by double the number of jurors he argues he was entitled to is not evidence that the Petitioner's trial was unfair.

With regard to the Petitioner's claim that it was ineffective assistance of counsel for his attorney to stipulate to remand to the Magistrate for another preliminary hearing instead of filing a motion to dismiss, the Court notes that whether to file a motion to dismiss is a tactical or strategic which will not be second-guessed unless those decisions are based on inadequate preparation, ignorance of relevant law or other shortcomings capable of objective evaluation. *Sanchez v. State*, 127 Idaho 709, 715, 905 P.2d 642, 648 (Ct. App. 1995). The Petitioner's bare allegation that his attorney should have filed a motion to dismiss, without more, is not enough to sustain this claim. In addition, the Petitioner's claim that "the district court should have dismissed without a motion, on its own" is an issue which could have been raised on appeal and is therefore not the proper subject of a post-conviction claim.

Next, the Petitioner argues that his misdemeanor petit theft charge should not have been bound over to district court, but should have been dismissed after the Magistrate found that the State had not shown probable cause on that offense. However, the Idaho criminal rules specifically entitle a felony defendant the right to a contested probable cause (preliminary) hearing, but provide no such right to a misdemeanor defendant. I.C.R. 5.1; *State v. Hogan*, 132 Idaho 412, 415, 973 P.2d 764, 767 (Ct. App. 1999). Further, when a defendant has been convicted of an offense following a fair trial, the sufficiency of the evidence at the preliminary hearing is not reviewable. *See State v. Maylett*, 108 Idaho 671, 672, 701 P.2d 291, 292 (Ct. App. 1985).

Next, the Petitioner claims that it was ineffective assistance of counsel for the Petitioner's counsel not to object to the testimony of Officer Sunada that the Petitioner was arrested with approximately two dollars on his person, when the Petitioner was arrested with approximately eight dollars on his person. However, the Petitioner testified to that issue at trial, and thus, the jury was aware of that information and the Petitioner has not shown prejudice.

With regard to the testimony of Officer Sunada, the Petitioner next argues that it was prosecutorial misconduct for the prosecutor to allow Officer Sunada's false testimony regarding the amount of money the Petitioner had in his pocket to stand without correction. The State cannot convict a person with testimony known to be false or allow the testimony to go uncorrected. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). A defendant establishes a *Napue* violation upon showing: (1) the testimony was false; (2) the prosecutor knew or should have known it was false; and (3) the testimony was material. *State v. Wheeler*, 149 Idaho 364, 368, 233 P.3d 1286, 1290 (Ct. App. 2010) (*citing Hovey v. Ayers*, 458 F.3d 892, 916 (9th Cir. 2006)). To determine materiality with respect to an alleged violation, a court must determine whether there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Hayes v. Brown*, 399 F.3d 972, 985 (9th Cir. 2005) (en banc).

At trial, Officer Sunada testified that the Petitioner was arrested with approximately two dollars on his person. The Petitioner has submitted as evidence a booking sheet, showing that when he was arrested, he was in possession of $8.50. Assuming for purposes of this motion only that Officer Sunada testified falsely and the prosecutor should have known that testimony was false, the Court finds that Officer Sunada's testimony was not material. The prosecutor used Officer Sunada's testimony regarding the small amount of money on the person of the Petitioner to argue that the Petitioner did not intend to shop at the store, but rather, he intended to commit theft. The six dollar and fifty-cent difference between the two amounts is *de minimis*, and neither amount was sufficient to have purchased the items stolen by the Petitioner.

At trial, the Petitioner's attorney made a motion to dismiss the burglary charges, as to the element of intent. After this Court stated that "[t]here are a fair number of circumstances, in this case, from which the jury may, if they choose to believe the evidence, infer that the defendant had an intent to steal when he entered the Shopko," trial counsel withdrew the motion. Tr., pp. 325-27. However, trial counsel did not withdraw the motion until this Court began to rule on the motion in a manner which was obviously not favorable to the Petitioner. After the motion was withdrawn, this Court stated "Well, I was prepared to deny it, but if you're going to withdraw it, I'll—I'll let you do that. Motion's been withdrawn." Tr., p. 327. The record reflects that trial counsel's strategic decision to withdraw the motion to dismiss was not prejudicial to the Petitioner, as the motion would have been denied.

Petitioner alleges that it was ineffective assistance of counsel not to object to certain "questions of incrimination" asked of the defendant by the State at trial. However, as noted by the Idaho Court of Appeals when deciding the Petitioner's appeal, "[w]here a defendant voluntarily testifies on his or her own behalf, the defendant waives the constitutional privilege against self-

incrimination with respect to questions related to the subject matter of his or her testimony." *State v. Brummett*, 150 Idaho 339, 344, 247 P.3d 204, 209 (Ct. App. 2010).

Next, the Petitioner argues that counsel was ineffective for failing to object to the knife which he used to open packaging in the store, being admitted into evidence. The Petitioner argues that "it is common for most Americans to carry a pocket knife of sorts." However, Petitioner's argument goes only to the weight of the evidence, and not the admissibility of such evidence. The Court finds that trial counsel's choice not to object to the introduction of admissible evidence was not objectively unreasonable.

The Petitioner's claim that it was ineffective assistance of counsel not to object "to no physical evidence being brought into evidence" is based upon the Magistrate's finding that the State had not introduced evidence to show probable cause with regard to the misdemeanor petit theft at the preliminary hearing. However, the Petitioner has cited to no legal authority which stands for the proposition that the State was subsequently barred from proving the petit theft charge at trial. Trial counsel was not objectively unreasonable for choosing not to make the objection now urged by the Petitioner.

The Petitioner's claim that it was ineffective assistance of counsel not to argue the Petitioner was entrapped is based upon an apparent misunderstanding of the definition of entrapment. The Petitioner argues that it was entrapment for the loss prevention officers to follow him through the store, waiting for him to steal from the store when "loss prevention officers could have, and should have, intercepted Mr. Brummett." The Petitioner argues that "They had to entrap him by allowing him to commit the offenses and exit; locking in the keystone element of theft." However, that is not entrapment.

"Entrapment occurs when 'an otherwise innocent person, not inclined to commit a criminal offense, is induced to do so by a State agent who, desiring grounds for prosecution, originates the

criminal design and implants in the mind of the innocent person the disposition to commit the alleged offense.' " *State v. Koller*, 122 Idaho 409, 411, 835 P.2d 644, 646 (1992) (*quoting State v. Hansen*, 105 Idaho 816, 817 n. 1, 673 P.2d 416, 417 n. 1 (1983)). In this case, the Shopko loss prevention officers were not State agents, nor did the loss prevention officers originate the criminal design. Rather, the loss prevention officers merely observed the Petitioner as he committed theft. Because the facts of the Petitioner's criminal offense did not support an entrapment defense, trial counsel was not objectively unreasonable in choosing not to argue that the Petitioner was entrapped.

Finally, the Petitioner argues that the persistent violator sentencing enhancement constitutes double jeopardy for the same offense, and is unconstitutional. However, such argument is contrary to long-established Idaho and federal law.

> Our persistent violator statute, I.C. § 19-2514, does not create a new or separate offense, rather it makes possible an enhancement of punishment for a particular crime when one has previously been convicted of two felonies. Thus, when a twice-convicted felon is convicted of a third felony he assumes a status which renders him susceptible to more severe punishment for the offense charged. *State v. Dunn*, 91 Idaho 870, 434 P.2d 88 (1967). The constitutionality of such a persistent violator statute in the face of a double jeopardy challenge has been consistently upheld. *Spencer v. Texas*, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967); *Gryger v. Burke*, 334 U.S. 728, 68 S.Ct. 1256, 92 L.Ed. 1683 (1948); *Moore v. Missouri*, 159 U.S. 673, 16 S.Ct. 179, 40 L.Ed. 301 (1895).

State v. Salazar, 95 Idaho 650, 651, 516 P.2d 707, 708 (1973).

CONCLUSION

On the basis of the petition for post-conviction relief and the present record, this Court is satisfied that Petitioner is not entitled to post-conviction relief and that no purpose would be served by any further proceedings. The Court finds there is no genuine issue of material fact and that the State is entitled to dismissal as a matter of law. Therefore, this Court hereby intends to GRANT the State's Motion for Summary Dismissal. The Petitioner is given twenty (20) days from the date of

filing of this decision in which to respond, to afford an opportunity to establish a genuine issue of material fact. Otherwise, this matter will be dismissed in its entirety. AND IT IS SO ORDERED.

Dated this 26th day of April, 2013.

Thomas F. Neville
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 1ST day of MAY, 2013, I mailed (served) a true and correct copy of the within instrument to:

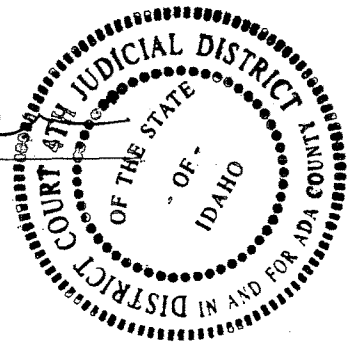
DAVID BRUMMETT
#41949
I.C.C. Unit C-221
PO Box 70010
Boise, ID 83707

KIMBERLY J. SIMMONS
ADA COUNTY PUBLIC DEFENDER
INTER DEPT MAIL

JOSHUA P. HAWS
ADA COUNTY PROSECUTOR
INTER DEPT MAIL

CHRISTOPHER S. RICH
Clerk of the District Court
Ada County, Idaho

Deputy Clerk



IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DAVID BRUMMETT,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

Case No. CV-PC-2011-19332

MEMORANDUM DECISION AND ORDER OF DISMISSAL OF PETITION FOR POST-CONVICTION RELIEF

INTRODUCTION

This action under the Uniform Post Conviction Procedure Act, Idaho Code Sections 19-4901 through 19-4911, is presently before the Court on David Brummett's Amended Petition and Affidavit for Post-Conviction Relief filed October 24, 2011. This Court's Notice of Intent to Dismiss filed May 1, 2013, allowed the Petitioner twenty (20) days in which to respond. On May 8, 2013, Petitioner filed his Motion to Proceed *Pro Se*. Petitioner's motion to proceed *pro se* is DENIED as the motion was filed only after a notice of intent to dismiss was filed, and is therefore untimely. On May 13, 2013, the Petitioner filed a document entitled Reply Pursuant [to] 19-4906(b) which this Court has considered.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner is currently incarcerated at the Idaho Correctional Center after he was found guilty of the crimes of Burglary, Felony, and Petit Theft, Misdemeanor, following a jury trial in Ada County Case No. CR-FE-2007-0000887. The Petitioner waived a jury for trial of the Information Part II, and the Court found the defendant guilty of being a Persistent Violator. Pursuant to the

Judgment of Conviction and Sentence filed November 4, 2008, the Petitioner was sentenced to a unified term of fifteen (15) years, with a minimum term of confinement of five (5) years for Count I., Burglary, Felony. The Petitioner was sentenced to three hundred sixty-five (365) days in the Ada County Jail for Count II., Petit Theft, Misdemeanor, to run concurrently with Count I. The Petitioner filed an appeal in his case. The Judgment of Conviction was affirmed by the Idaho Court of Appeals. *State v. Brummett*, 150 Idaho 339, 247 P.3d 204 (Ct. App. 2010).

Petitioner filed this Petition and Affidavit for Post-Conviction Relief on October 6, 2011. On October 21, 2011, the Court appointed the Ada County Public Defender's Office to represent the Petitioner in these post-conviction proceedings. On October 24, 2011, the Petitioner filed his Amended Petition and Affidavit for Post-Conviction Relief. On November 10, 2011, the Ada County Public Defender's Office, on behalf of the Petitioner, filed a Motion for Stay of Proceedings and for Leave to Amend Petition. The Court's Order Granting Stay of Proceedings and for Leave to Amend Petition was filed on December 8, 2011, granting the Petitioner a stay of sixty (60) days from the filing of the Order, to file an amended petition. No such amended petition was filed, and on May 10, 2012, the State filed its Answer to Petition for Post-Conviction Relief. In its prayer for relief, the State requests that the Petitioner's claims for post-conviction relief be dismissed, which request the Court construes as a Motion to Dismiss. This Court filed its Memorandum Decision and Notice of Intent to Dismiss on May 1, 2013, which is hereby incorporated by reference as if fully set forth herein. Petitioner's Reply was filed on May 13, 2013.

DISCUSSION

A petition for post-conviction relief is a special proceeding that is civil in nature; it is a proceeding entirely new and independent from the criminal action which led to the conviction. *Peltier v. State*, 119 Idaho 454, 808 P.2d 373 (1991); *Matthews v. State*, 130 Idaho 39, 936 P.2d 682

(Ct. App. 1997). The applicant in a post-conviction case has the burden of proving, by a preponderance of the evidence, the allegations which the applicant contends entitle the applicant to relief. Idaho Crim. R. 57(c); *Stuart v. State,* 118 Idaho 865, 801 P.2d 1216 (1990). An application for post-conviction relief differs from a complaint in an ordinary civil action because it must contain more than a "short and plain statement of the claim" that would suffice for a complaint under Rule 8(a)(1) of the Idaho Rules of Civil Procedure. Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant and affidavits, records or other evidence supporting its application must be attached, or the application must state why such supporting evidence is not included with the application. Idaho Code Ann. § 19-4903; *LaBelle v. State*, 130 Idaho 115, 117, 937 P.2d 427, 429 (Ct. App. 1997). In other words, the application must present or be accompanied by admissible evidence supporting its allegations or the application will be subject to dismissal. *Id.* Bare and conclusory allegations, unsubstantiated by any facts, are inadequate to entitle an applicant to an evidentiary hearing. *Id.* at 121, 937 P.2d at 433; *Nguyen v. State*, 126 Idaho 494, 887 P.2d 39 (Ct. App. 1994).

Idaho Code Section 19-4906 states:

> 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 further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for so doing. The applicant shall be given an opportunity to reply within 20 days to the proposed dismissal. In light of the reply, or on default thereof, the court may order the application dismissed or grant leave to file an amended application or, direct that the proceedings otherwise continue. Disposition on the pleadings and record is not proper if there exists a material issue of fact.

Idaho Code § 19-4906(b). In its Memorandum Decision and Notice of Intent to Dismiss filed May 1, 2013, this Court set forth the grounds on which each of the Petitioner's twelve claims was to be dismissed. The Court has reviewed the Petitioner's Reply dated May 13, 2013, and finds it to be unresponsive to the Court's Notice of Intent to Dismiss. The Petitioner's Reply is not verified and

does not constitute admissible evidence. Further, the Court notes that the Petitioner's Reply largely consists of attempts to re-litigate the factual issue of whether the Petitioner had the intent required to sustain a conviction for Burglary, Felony, and a re-hash of the allegations made in the Amended Petition. In light of the Petitioner's Reply, this Court cannot determine that there is any new evidence or any fact previously overlooked by this Court in its determination to dismiss this case. Pursuant to section 19-4906(b), this Court shall use its discretion to dismiss Petitioner's Petition for Post-Conviction Relief.

CONCLUSION

Petitioner's motion to proceed *pro se* is DENIED. On the basis of the Petition for Post-Conviction Relief and the present record, this Court is satisfied that Petitioner is not entitled to post-conviction relief and that no purpose would be served by any further proceedings. The Court finds there is no genuine issue of material fact and that the State is entitled to dismissal as a matter of law. The Petition for Post-Conviction Relief is DISMISSED with prejudice. Counsel for Respondent shall submit a proposed, separate Order of Dismissal With Prejudice, consistent with this decision and order, and also consistent with Idaho Rule of Civil Procedure 54(a). AND IT IS SO ORDERED.

Dated this 3rd day of June, 2013.

Thomas F. Neville
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 4 day of June, 2013, I mailed (served) a true and correct copy of the within instrument to:

KIMBERLY SIMMONS
ADA COUNTY PUBLIC DEFENDER
INTER DEPT MAIL

JOSHUA P. HAWS
ADA COUNTY PROSECUTOR
INTER DEPT MAIL

DAVID BRUMMETT
#41949
I.C.C. Unit C-221
PO Box 70010
Boise, ID 83707

CHRISTOPHER D. RICH
Clerk of the District Court
Ada County, Idaho

Deputy Clerk