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Elcock v. State Respondent's Brief Dckt. 41195

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

KENNETH EDWARD ELCOCK,)	
)	No. 41195
Petitioner-Appellant,)	
)	Ada Co. Case No.
vs.)	CV-2011-19840
)	
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

HONORABLE DEBORAH A. BAIL
District Judge

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FILED - COPY

APR - 8 2014

Supreme Court _____ Court of Appeals _____
Entered on ATS by _____

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	4
ARGUMENT	5
Elcock Has Failed To Carry His Appellate Burden Of Showing Error In The Summary Dismissal Of His Successive Post-Conviction Petition	5
A. Introduction	5
B. Elcock Has Waived Appellate Consideration Of His Challenge To The District Court's Order Of Summary Dismissal	5
CONCLUSION	6
CERTIFICATE OF MAILING	7

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>State v. Elcock</u> , Docket No. 33861, 2008 Unpublished Opinion No. 379 (Idaho App., Feb. 28, 2008).....	2
<u>State v. Elcock</u> , Docket No. 37932, 2011 Unpublished Opinion No. 655 (Idaho App., Oct. 12, 2011)	2
<u>State v. Elcock</u> , Docket No. 38177, 2011 Unpublished Opinion No. 422 (Idaho App., Apr. 5, 2011)	2
<u>State v. Hoisington</u> , 104 Idaho 153, 159, 657 P.2d 17, 23 (1983)	5
<u>State v. Zichko</u> , 129 Idaho 259, 923 P.2d 966 (1996).....	5

STATEMENT OF THE CASE

Nature of the Case

Kenneth Edward Elcock appeals, *pro se*, from the summary dismissal of his successive petition for post-conviction relief.

Statement of Facts and Course of the Proceedings

The relevant facts of Elcock's underlying crime were outlined by the district court in its notice of intent to dismiss Elcock's successive petition for post-conviction relief, as follows:

In the early morning hours of April 15, 2006, the Petitioner and his two friends arrived at the Whispering Pine apartment complex where they knew a man who was throwing a party at his apartment. After arriving at the apartment complex the petitioner approached the man, raised his gun to the man's face, and pulled the trigger. The gun misfired and the man ran for cover in his apartment. After cocking the gun, the petitioner pointed the gun at the plate glass window in the apartment and opened fire. The bullets went through the window, seriously wounding three of the people inside including a fourteen year old girl, [A.B.], who died as a result of her wounds.

The petitioner was charged with one count of First Degree Murder, three counts of Aggravated Battery, one count of Unlawful Discharge of a Firearm at a Dwelling House, one count of Aggravated Assault and a sentencing enhancement based on the use of a firearm in the commission of a crime. Pursuant to a valid plea agreement entered into with the State, the State agreed to amend the First Degree Murder charge to Murder in the Second Degree, and to dismiss the Unlawful Discharge of a Firearm at a Dwelling House and firearm enhancement; in exchange for the his [sic] guilty pleas to Murder in the Second Degree, three counts of Aggravated Battery and one count of Aggravated Assault.

(R., pp.213-214.)

The trial court sentenced Elcock to indeterminate life with the first 40 years fixed on the murder charge, concurrent sentences of 15 years fixed on each

aggravated battery charge, and a “concurrent sentence of five years” for the aggravated assault. (R., pp.215-216.) Elcock filed a motion for reduction of his sentence pursuant to Rule 35. (R., p.216.) The trial court denied the motion and the Court of Appeals upheld Elcock’s sentence in an unpublished opinion. See State v. Elcock, Docket No. 33861, 2008 Unpublished Opinion No. 379 (Idaho App., Feb. 28, 2008).

Elcock filed his first petition for post-conviction relief in 2007. (R., p.216.) After multiple amendments to his petition and three filed notices of intent to dismiss by the court, the district court ultimately dismissed Elcock’s petition because his claims were not supported by the record. (Id.) This decision was ultimately upheld on appeal. See State v. Elcock, Docket No. 37932, 2011 Unpublished Opinion No. 655 (Idaho App., Oct. 12, 2011).

Elcock later filed a motion to withdraw his guilty plea which was also denied by the district court. (R., p.216.) The order denying his motion to withdraw his guilty plea was affirmed by the Court of Appeals in an unpublished opinion, State v. Elcock, Docket No. 38177, 2011 Unpublished Opinion No. 422 (Idaho App., Apr. 5, 2011).

At issue in the instant appeal, Elcock filed a *pro se* successive petition for post-conviction relief on October 14, 2011 asserting the reason for the filing of a successive petition was based on “the only recently [sic] receipt of discovery material.” (R., p.4) The state filed an answer and motion for summary dismissal, asserting there had “been no showing by the petitioner that any of [his] claims could not have been raised in his first petition” or that Elcock was “entitled as a

matter of law to this successive petition.” (R., p.43.) Thereafter, the district court filed a notice of intent to dismiss Elcock’s petition for post-conviction relief and provided him with the statutory 20 days to respond. (R., pp.212-223.) The court thereafter entered a final order dismissing Elcock’s petition, concluding Elcock had “not asserted any new evidence, but merely rehash[ed] previously made arguments made in both this case and his previously adjudicated first petition for post-conviction relief.” (R., p.248.) “Most importantly,” the district court found Elcock had “failed to allege any new facts to justify a ‘sufficient reason’ why the claims were not raised or were adequately raised in the first petition.” (Id.)

Elcock timely appealed. (R., pp.251, 270-273.)

ISSUE

Elcock's Appellant's brief does not contain a cogent statement of the issue(s) on appeal. The state phrases the issue as:

Has Elcock failed to carry his appellate burden of showing error in the summary dismissal of his successive post-conviction petition?

ARGUMENT

Elcock Has Failed To Carry His Appellate Burden Of Showing Error In The Summary Dismissal Of His Successive Post-Conviction Petition

A. Introduction

The district court summarily dismissed Elcock's successive post-conviction petition, concluding that not only was the petition without merit, but Elcock failed to establish a "sufficient reason" for the filing of a successive petition for post-conviction relief. (R., pp.248-249.) On appeal, Elcock appears to challenge the summary dismissal of his petition, but he has failed to identify any specific error by the district court and has otherwise failed to present any cogent argument or legal authority to support his appellate claims.

B. Elcock Has Waived Appellate Consideration Of His Challenge To The District Court's Order Of Summary Dismissal

It is well settled that a party waives an issue on appeal if either authority or argument is lacking. State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996). It is also well settled that the appellate court will not review actions of the district court for which no error has been assigned and will not otherwise search the record for errors. State v. Hoisington, 104 Idaho 153, 159, 657 P.2d 17, 23 (1983).

On appeal, Elcock appears to raise the same issues he raised in both his original and successive petitions for post-conviction relief. (See generally Appellant's brief.) Elcock does not argue, however, that the district court erred in determining there were no issues of material fact or that Elcock failed to allege

Elcock supported his appellate claims with any legal authority. Elcock has therefore not offered any argument, cogent or otherwise, to challenge the district court's rulings. (See generally Appellant's brief.)

Because Elcock has failed on appeal to identify any viable claim of error in the district court's actions and has otherwise failed to cite any relevant legal authority or make any cogent argument to support any claim of error, he has waived appellate review of any such claim and has thereby failed to show any error in the summary dismissal of his successive post-conviction petition.

CONCLUSION

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

DATED this 8th day of April, 2014.

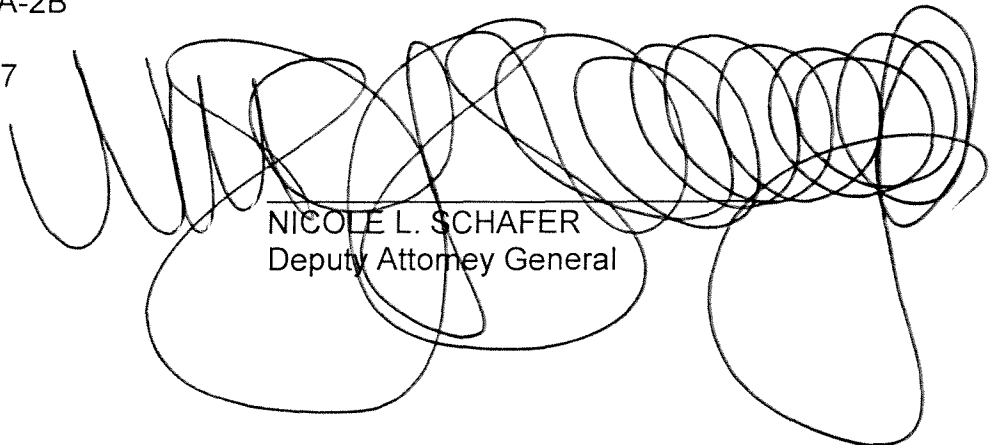


NICOLE L. SCHAFER
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 8th day of April, 2014, 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:

KENNETH EDWARD ELCOCK,
IDOC #83841
ISCI Unit 15A-2B
PO Box 14
Boise, ID 83707

A large, complex handwritten signature in black ink, consisting of many overlapping loops and swirls, covering the signature line and extending above and below it.

NICOLE L. SCHAFER
Deputy Attorney General

NLS/pm