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Nelson v. State Respondent's Brief Dckt. 41525

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

WESTON KENNETH NELSON,)
)
 Petitioner-Appellant,)
)
 vs.)
)
 STATE OF IDAHO,)
)
 Respondent.)

No. 41525
Bingham Co. Case No.
CV-2013-1542

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BINGHAM**

HONORABLE WILLIAM H. WOODLAND
District Judge

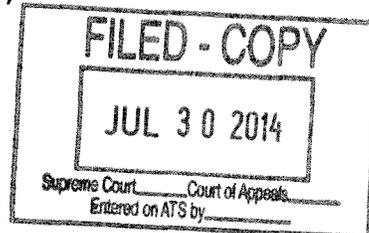
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STATEMENT OF THE CASE

Nature of the Case

Weston Kenneth Nelson appeals from the summary dismissal of his petition for post-conviction relief.

Statement of the Facts and Course of the Proceedings

Nelson pled guilty to burglary and the court sentenced him to a unified 10-year sentence with the first six years determinate. State v. Nelson, 2012 Unpublished Opinion No. 598, Docket No. 39429 (August 21, 2012). Nelson filed a motion for reduction of his sentence pursuant to Rule 35, which the district court denied. Id. The Court of Appeals affirmed the district court's denial of Nelson's Rule 35 motion. Id.

Nelson filed a petition for post-conviction relief, asserting four claims of ineffective assistance of trial counsel, an involuntary guilty plea, and a "disproportionate" sentence. (R., pp.14-17.) Nelson's requested relief was a reduction of his sentence to a six-year fixed term. (R., p.16.) The state answered the petition and moved to dismiss it. (R., pp.33-36.) At hearing on the state's motion, Nelson's counsel conceded all but one of Nelson's ineffective assistance of counsel claims. (Tr., p.3, L.25 – p.5, L.21.) At the conclusion of the hearing, the district court granted the state's motion and dismissed Nelson's petition. (R., pp.55-56.) Nelson filed a timely notice of appeal. (R., pp.57-60, 65, 66-7.)

ISSUES

Nelson states the issue on appeal as:

Did the District Court err in granting the State's motion for summary dismissal of Mr. Nelson's claim that his trial counsel was ineffective, and his plea was not knowingly, intelligently, and voluntarily entered into, based upon counsel falsely advising Mr. Nelson that he was eligible for a problem-solving court, while knowing that he was not?

(Appellant's brief, p.4.)

The state rephrases the issues on appeal as:

1. Must this Court decline to consider Nelson's appellate claim because defense counsel below waived the issue as to all but one claim not addressed on appeal?
2. Alternatively, has Nelson failed to show error in the summary dismissal of his claim of ineffective assistance of trial counsel in relation to his guilty plea?

ARGUMENTS

I.

The Issue Of Whether The District Court Erred When Summarily Dismissing Nelson's Claim Of Ineffective Assistance Of Counsel For Providing "Faulty Advice" Regarding His Change Of Plea Is Not Properly Before This Court

Because it was waived by counsel's concessions during a hearing on the state's motion to dismiss, the issue of whether the district court erred in summarily dismissing Nelson's ineffective assistance of counsel claim for providing "faulty advice" in relation to his guilty plea is not properly before this Court on appeal.

At the outset of the hearing on the state's motion for summary dismissal, Nelson's attorney addressed the claims in Nelson's petition. Specifically, he addressed the claim of ineffective assistance of counsel as it related to Nelson's guilty plea:

So he has four counts of ineffective assistance of counsel by allowing him to plead guilty to burglary.

In my review of the change of plea hearing and the sentencing hearing, I believe the transcripts of those proceedings does [sic] not support his allegation in 1(A).

In 1(B), he indicates "She advised me to plead guilty with the intent of entering a problem-solving court." He did apply for the problem-solving courts, and he was turned down from Drug Court. He was turned down from Wood Pilot Court. And he was also turned down for Mental Health Court. So I don't see that his ineffective assistance of counsel claim is supported in (B) either.

(Tr., p.4, Ls.2-16.)

The district court likewise believed this issue was no longer before the court and only addressed a separate issue regarding the plea negotiations in its comments:

In reviewing both the plea agreement and the prior record, recognizing that the sentencing judge was not bound by the plea agreement in the first place, nor was the prosecuting attorney bound to limit his recommendation of incarceration by the plea agreement, I'm going to deny the motion in this particular matter – or deny the petition, I should say, in this particular matter.

I will also comment that there had been an appeal to the Supreme Court of Idaho in this particular matter. And many issues, as you pointed out in your brief, Mr. Cornelison [attorney representing the state], were raised, but none of them were raised that were raised in the petition and could have been raised in this particular matter. And, therefore, on that basis, I'm going to deny the petition for post-conviction relief. The order will reflect that ruling at this point.

(Tr., p.9, Ls.8-24.)

As evidenced above, the only question left for the district court's determination at the motion for summary dismissal of Nelson's petition for post-conviction relief was a question of whether or not the state violated the plea agreement. As such, the issue presented by Nelson in his opening brief has been waived through the concession of his post-conviction relief counsel and is not properly before this Court. State v. Perry, 150 Idaho 209, 224, 245 P.3d 961, 976 (2010) (claims not preserved for appellate review will not be considered).

II.

Alternatively, The District Court Properly Dismissed Nelson's Claim Of Ineffective Assistance Of Counsel In Relation To The Guilty Plea

A. Introduction

Nelson pled guilty to burglary and the court sentenced him to a unified 10-year sentence with the first six years determinate. State v. Nelson, 2012 Unpublished Opinion No. 598, *1 (August 21, 2012). In post-conviction Nelson asserted he entered his guilty plea based upon the "faulty advice" of counsel.

(R., p. 11.) Specifically, Nelson alleged his trial counsel advised him to plead guilty “with the intent of entered a problem solving court” and told him that he “met the qualifications” for such court even though she knew he did not. (Id.) On appeal, Nelson argues the trial court erred in summarily dismissing this claim. (Appellant’s brief, pp.7-9.) For the reasons set forth in Section I., supra, this Court should decline to consider Nelson’s appellate claims. Even assuming the Court addresses Nelson’s arguments, they fail. A review of the record and the applicable law shows Nelson failed to present a genuine issue of material fact entitling him to an evidentiary hearing on his claim of ineffective assistance of counsel.

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). However, 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. Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001).

C. Applicable Legal Standards

Idaho Code § 19-4906(c) authorizes a district court to summarily dismiss a post-conviction petition upon motion by a party if it appears there is "no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." In order to survive summary dismissal, a post-conviction petitioner must present evidence in support of his petition sufficient to make "a prima facie case as to each essential element of the claims upon which the applicant bears the burden of proof." Berg v. State, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998). 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). 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. Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001); Roman v. State, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994). In other words, bare or conclusory allegations, unsubstantiated by any fact, are inadequate to entitle a petitioner to an evidentiary hearing. Roman, 125 Idaho at 647, 873 P.2d at 901; Baruth v. Gardner, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986); Stone v. State, 108 Idaho 822, 826, 702 P.2d 860, 864 (Ct. App. 1985).

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

Nelson pled guilty to burglary in exchange for the state's agreement to concur with the presentence investigator's sentencing recommendation. (39429 Tr.¹, p.9, L.4 – p.12, L.5.) Nelson asserted in his petition for post-conviction relief that his counsel was ineffective for giving him faulty advice regarding his potential drug court eligibility. (R., pp.15-16.) In his sworn affidavit in support of his post-conviction petition, Nelson asserted:

Ms. Campbell advised me to plead guilty as charged with the intent of entering a problem solving court. (Drug-court or Wood pilot). Ms. Campbell was a member of the board that approves or denies applicants and she told me that I met the qualifications. On her advice, I plead [sic] guilty and applied to the problem-solving courts and was immediatly [sic] denied because I am a resident of Utah and "have no local ties and support to do the programs." This is information Ms. Campbell had prior to giving me the faulty advice.

(R., p.11.) The state moved to dismiss this allegation, in part, on Nelson's bare and conclusory allegations (R., p.49), which are insufficient to establish either the deficient performance of counsel or any correlating prejudice. Nelson has failed to allege an actionable deficiency in his counsel's advice to plead guilty. There is no allegation Nelson was promised he would get into a problem solving court. Although Nelson advised the court of his desire to apply for a problem-solving court when he pled guilty, the record shows Nelson was aware of the possibility

¹ The transcript cited is of the 6/27/11 change of plea hearing in Nelson's underlying criminal case.

that he could instead receive a prison sentence. (See generally 39429 Tr., pp.6-10.)

In the context of claims of ineffective assistance of counsel, the Idaho Supreme Court has articulated the applicable standards as follows:

For an application for post-conviction relief based on a claim of ineffective assistance of counsel to survive a 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 applicant's case.

To establish deficient assistance, the burden is on the petitioner 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. Thus, the claimant has the burden of showing that his attorney's performance fell below the wide range of reasonable professional assistance.

To establish prejudice, the claimant must show a reasonable probability that but for his attorney's deficient performance the outcome of the proceeding would have been different. Trial counsel's strategic 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.

Baldwin v. State, 145 Idaho 148, 153-154, 177 P.3d 362, 367-368 (2008)

(internal citations omitted).

Even assuming, for purposes of summary dismissal, that counsel misled Nelson regarding his chances of getting into drug court, Nelson failed to present any claim or evidence of prejudice. At a change of plea hearing, Nelson advised the court that although he had experienced "drug problems" "in the past," he was not addicted to drugs or alcohol. (39429 Tr., p.6, Ls.9-13.) Nevertheless, Nelson's counsel requested the court order a substance abuse evaluation

because it was Nelson's intent "to **apply** to Wood Court." (39429 Tr., p.6, Ls.22-24 (emphasis added).) During his lengthy plea colloquy, Nelson told the court, under oath, that he understood the charges to which he was pleading, the rights he was waiving by doing so, and that he was pleading guilty freely and voluntarily. (See generally 39429 Tr., pp.5-15.)

The record shows Nelson understood the nature of the charges against him and had not been coerced into pleading guilty. (See 39429 Tr., p.8, L.10 – p.9, L.3.) Nelson was advised of and understood he gave up his right to a jury trial by pleading guilty. (39429 Tr., p.11, Ls.19-24.) Although he claims on appeal that he pled guilty to burglary based on faulty advice that he qualified for drug court (Appellant's brief, pp.7-8), the record established Nelson was aware of the consequences of his plea and understood the ultimate sentence he could receive was at the discretion of the court:

THE COURT: That presentence report will make a recommendation of either probation, retained jurisdiction, or prison. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And so if they recommend prison, the [the prosecutor] can come here at sentencing and make that recommendation and still be in compliance with the plea agreement. You understand that?

THE DEFENDANT: Yes, I understand.

THE COURT: Now, if it recommends probation, [the state is] bound to recommend that. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: All right. You understand that even though the plea agreement provides for certain recommendations from the

state and that your attorney will make recommendations, do you understand I'm not bound to follow either of those recommendations?

THE DEFENDANT: Yes.

THE COURT: And do you understand I'm not bound to follow the recommendation in the presentence report?

THE DEFENDANT: Yes.

THE COURT: Do you understand, if I don't follow the recommendations, you can't on that basis alone come back in and seek to withdraw your guilty plea?

THE DEFENDANT: I understand.

THE COURT: Are you pleading guilty freely and voluntarily?

THE DEFENDANT: Yes.

THE COURT: Is anyone forcing or pressuring you to plead guilty?

THE DEFENDANT: No.

THE COURT: Has anyone promised you that I would be easy on you if you pled guilty?

THE DEFENDANT: No.

THE COURT: Has anyone promised or suggested that I'd place you on probation if you pled guilty?

THE DEFENDANT: No.

(39429 Tr., p.9, L.10 – p.10, L.24.)

Nelson fails to even address the prejudice prong of his ineffective assistance of counsel claim. To establish prejudice in relation to his ineffective assistance of counsel claim, Nelson was required to show a reasonable probability that, had counsel not advised him that he was eligible to participate in

a problem solving court, Nelson would not have pled guilty and would have insisted on going to trial. Nelson made no such allegation in his post-conviction petition, nor does he on appeal. Rather, he alleged only that he pled guilty “based on this false advice.” (Appellant’s brief, p.7.). There is no evidence that Nelson would in fact have made the choice to forgo the plea agreement wherein the state agreed not to file additional charges and not to file a persistent violator sentencing enhancement (39429 R., p.54 (Nelson’s guilty plea questionnaire)) and instead insist on his previously waived right to a trial.

That Nelson may have hoped for a sentence different from the one he received was not sufficient to raise a viable ineffective assistance of counsel claim; the record shows that he discussed the promises that were actually made regarding his plea agreement and was aware that the court alone would decide an appropriate sentence. In short, Nelson’s allegations were not sufficient to raise a valid claim of ineffective assistance of counsel because he at no time claimed or presented evidence he would have reasonably insisted on going to trial but for counsel’s statement regarding his eligibility for drug court.

E. Nelson Has Failed To Show Any Basis For Reversal Based On His Claim That The District Court Applied An Incorrect Legal Standard

Finally, on appeal Nelson claims the district applied an incorrect legal standard in summarily dismissing his petition for post-conviction relief. (Appellant’s brief, pp. 8-9.) Specifically, he argues that because the “district court appear[ed] to have agreed with [the state’s] proposition” below that Nelson’s claim of ineffective assistance of counsel should have been raised on direct

appeal, the denial of such claim was erroneous. (Id. at pp.9.8-9.) Nelson's claim fails for two reasons.

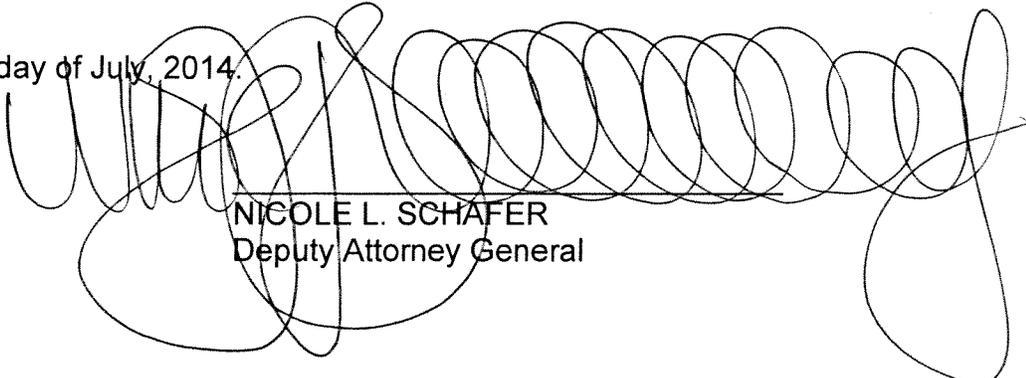
First, it is not apparent the district court actually applied an incorrect legal standard to the claim of ineffective assistance of counsel challenged on appeal. Nelson's counsel conceded the issue, so it was not before the when it ruled upon the state's motion for summary dismissal. When discussing the standard of review, the court was addressing the non-waived claims in Nelson's petition (such as his sentencing claim).

Second, even if the district court applied an incorrect legal standard, the error was harmless. I.R.C.P. 61. The state moved for summary dismissal on several grounds, one of which was that Nelson's claim was conclusory and there was no issue of fact as to either deficient performance or prejudice. For the reasons set forth above, Nelson's petition would have been properly dismissed on this basis.

CONCLUSION

The state respectfully requests this Court to affirm the summary dismissal of Nelson's petition for post-conviction relief.

DATED this 30th day of July, 2014.



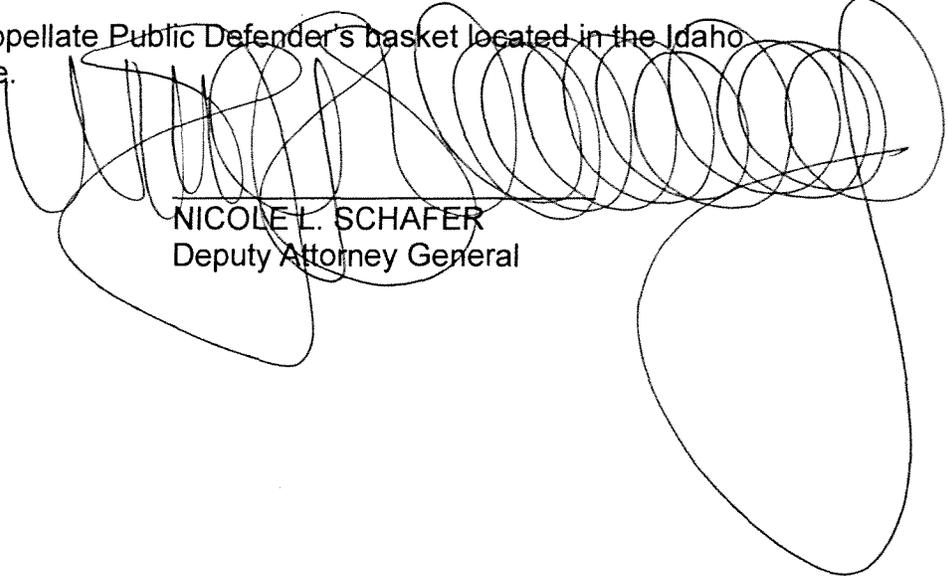
NICOLE L. SCHAFER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 30th day of July 2014, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

JASON C. PINTLER
STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



NICOLE L. SCHAFER
Deputy Attorney General

NLS/pm