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IN THE SUPREME COURT OF THE STATE OF IDAHO

TOMMY D. COLE,)
) No. 44952
 Petitioner-Appellant,)
) Idaho County Case No.
 v.) CV-2016-44589
)
 STATE OF IDAHO,)
)
 Defendant-Respondent.)
 _____)

BRIEF OF RESPONDENT

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

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STATEMENT OF THE CASE

Nature Of The Case

Tommy D. Cole appeals from the judgment entered upon the district court's order summarily dismissing his petition for post-conviction relief.

Statement Of Facts And Course Of The Underlying Criminal Proceedings

According to the Idaho Court of Appeals' unpublished opinion in Cole's direct appeal, the facts underlying his criminal convictions are as follows:

The state charged Cole with two counts of aggravated assault and one count of operating a vehicle without the owner's consent following a confrontation between Cole, his ex-wife, and another male outside of a bar. Evidence at trial showed that Cole observed his ex-wife and the male inside a bar. When the male and female exited the bar and as the female was getting into her vehicle, Cole emerged from the backseat of the vehicle, confronted the female with a firearm, and threatened to kill both the female and the male. The female retreated back into the bar. Cole followed her, continued to threaten her, and pointed the firearm at her. Subsequently, the male came to the front door of the bar and got Cole's attention. Cole chased the male back outside and pointed the firearm at him. The female hid inside the bar with the bartender and contacted the police. Before the police arrived, Cole left the scene in the female's vehicle, which was later found abandoned. Cole was arrested three days later.

Prior to trial, the state filed notice of its intent to introduce certain evidence at trial. Specifically, the State gave notice that it intended to offer statements allegedly made by Cole to the female over the telephone the day following the incident at the bar. Cole objected, arguing that the admission of the alleged statements was impermissible pursuant to Idaho Rule of Evidence 404(b). After a hearing, the district court ruled that the state could offer the phone statements into evidence. At trial, the female offered testimony concerning these phone statements. A jury found Cole guilty of the two counts of aggravated assault, I.C. §§ 18-901(b) and 18-905(a), and operating a motor vehicle without the owner's consent, I.C. § 49-227.

State v. Cole, 2016 WL 455803 *1 (Idaho App., Feb. 2, 2016).

Cole appealed, challenging the admission of Cole's phone statements. The Idaho Court of Appeals held that the admission of those statements constituted harmless error, and explained:

In this case, both the male and female testified that Cole hid inside the female's vehicle. As the female was getting into the vehicle, Cole emerged from the backseat, pointed a firearm at her, and threatened to kill both she and the male. Both victims and the bartender testified that Cole pursued the female as she retreated to the bar and continued to threaten her with the firearm pointed at her. Further, all three witnesses testified that Cole, upon seeing the male in the doorway, turned and pursued the male outside. Both victims testified that Cole pointed the firearm and repeatedly threatened the male. The bartender testified that she too saw Cole pointing something at the male. After locking the door to bar [sic], both the female and the bartender hid inside and the female contacted the police. The female testified that later, upon emerging from a hiding place inside the bar, she found her vehicle missing. The male testified that Cole had taken the vehicle and had driven it away. The female testified that she had not given Cole permission to take her vehicle.

Additionally, the testimony from both victims, the bartender and the responding officer, as well as the 911 recording, all support that both victims were scared and frightened during and after the incident. Finally, testimony was offered from a third party who, two weeks prior to the incident, traded a .22 semi-automatic pistol with a black handle and a stainless silver barrel to Cole in exchange for mechanical work. The same firearm description was used by each of the victims and the bartender when testifying about the description of the firearm Cole used the night of the incident.

Consequently, based on the evidence before the jury, there was extensive and convincing evidence presented at trial to demonstrate that Cole utilized a firearm and intentionally threatened by word or act to do violence to both victims, thereby causing them to imminently fear that violence. See I.C. §§ 18-901(b) and 18-905(a).

Id. at *5.

Statement Of Facts And Course Of The Post-Conviction Proceedings

Cole filed a timely petition for post-conviction relief (R., pp.5-11), alleging that his various trial counsel were "ineffective at all stages of the proceedings" in the following ways:

- (1) No in court ID = possible mistaken ID on certain relevant facts material to necessary [sic] requisite [sic].
- (2) Evidence in support of N.T. + Rule 35 was evidence the attorney should've discovered prior to trial[.]
- (3) Jon Hally interviewed witness's [sic] that could have backed up my story and undermined plaintiffs [sic] integrity and didnt [sic] call them to trial.

(R., p.7 (verbatim except numbering and capitalization modified).) In his supporting affidavit, Cole presented a fourth claim – that one of his trial attorneys failed to stay in contact with him, rarely returned his calls, and “prejudiced [his] case by disclosing information to the prosecution.” (R., p.10.)

After the district court granted Cole’s request for appointed counsel (R., pp.12-14, 21-22), his counsel filed four exhibits (R., pp.38, 41, 43, 44-46) and two “additional affidavits” (R., pp.52-54). The state filed an answer to Cole’s petition and moved to summarily dismiss it, arguing that the claims therein were bare and conclusory and not supported by specific facts or evidence sufficient to raise a genuine issue of material fact. (R., pp.16-20.) After a hearing, the court entered a written opinion granting the state’s motion for summary dismissal. (R., pp.69-73; see generally 1/30/17 Tr.) The court entered its final judgment of dismissal on February 8, 2017. (R., pp.74-75.) Cole timely appealed. (R., pp.76-79.)

ISSUE

Cole's Appellant's Brief does not state an issue on appeal.

The state phrases the issue on appeal as:

Has Cole failed to show error in the summary dismissal of his ineffective assistance of counsel claims?

ARGUMENT

Cole Has Failed To Show Error In The Summary Dismissal Of His Ineffective Assistance Of Counsel Claims

A. Introduction

The district court dismissed Cole’s post-conviction petition because, under Strickland v. Washington, 466 U.S. 668 (1984), he “presented no admissible evidence that shows that his counsels’ performance prejudiced the outcome of his trial.” (R., pp.71-72.) Cole challenges the summary dismissal of his petition, arguing that while the court addressed “some of the evidence in support of the petition, it simply ignore[d] other evidence with Petitioner’s opposition to the state’s motion for summary dismissal and follow-up affidavits.” (Appellant’s Brief, p.7.)

Cole’s argument fails. He has failed to show error in either the scope of the district court’s review of the relevant evidence or its application of the law to the facts in concluding that Cole failed to carry his burden of presenting a genuine issue of material fact to overcome the summary dismissal of his ineffective assistance of counsel claims.

B. Standard Of Review

In reviewing the summary dismissal of a post-conviction application, the appellate court reviews the record to determine if a genuine issue of material fact exists which, if resolved in petitioner’s favor, would require relief to be granted. Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007); Nellsch v. State, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992).

C. Cole Has Failed To Show Any Ground For Reversal Based On His Contention That The District Court Failed To Consider Evidence Relevant To His Claims

Cole argues that “since the court erroneously disregarded some of the evidence provided by [him] and did not even consider additional evidence, the court erred by summarily dismissing

the petition.” (Appellant’s Brief, pp.9-10.) Cole asserts that the court totally failed to address (1) the disparity between Nicole Lowe’s statement, “I’m not afraid,” in her request to modify the no contact order (R., p.38) and her trial testimony that she was “still scared” (R., p.41); and (2) Mandy Doherty’s unsigned typed statement that Sean Reid and Nicole Lowe tormented Cole “whenever he came to town or drove past the bar” and that she “witnessed an incident when Sean pointed a gun at Mr. Cole and pretended to shoot him” (Appellant’s Brief, p.8; see R., pp.38, 41, 44).

In essence, Cole contends the district court must have considered only the information it specifically addressed in its written decision granting the state’s motion for summary dismissal. Cole has failed to cite to any authority supporting such an assumption. See State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) (“When issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered.”). Moreover, the court’s ruling that Cole “presented no admissible evidence which shows how he was prejudiced by his counsel not calling witnesses in his defense” (R., p.72) indicates that the court did consider all the statements presented by Cole regardless of whether they were mentioned in the court’s summary dismissal order.

Even assuming the district court did not consider the information Cole cites, he has failed to show that such lack of consideration would, by itself, constitute any basis for reversal. “On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of material fact exists based on the pleadings, depositions and admissions together with any affidavits on file.” Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007) (citing Gilpin-Grubb v. State, 138 Idaho 76, 80, 57 P.3d 787, 791 (2002)). Because this Court conducts an independent review of the record to determine

whether summary dismissal is appropriate, whether the district court actually considered the information Cole claims was ignored is legally irrelevant.

D. Cole Has Failed To Show Error In The District Court’s Determination That He Failed To Present A Genuine Issue Of Material Fact Entitling Him To An Evidentiary Hearing On Any Of His Ineffective Assistance Of Counsel Claims

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 v. State, 144 Idaho 518, 522, 164 P.3d 798, 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.

Cole's post-conviction petition and supporting affidavit alleged his various trial counsel were ineffective for (1) not obtaining an in-court identification of Cole "on certain relevant facts," (2) failing to discover, prior to trial, evidence supporting his motion for a new trial and his Rule 35 motion, (3) failing to call witnesses at trial who could have supported Cole's "story and undermined [the prosecution's] integrity[.]" and (4) disclosing information to the prosecution. (R., pp.7, 10.)

To overcome summary dismissal of these claims, Cole 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 [Cole's] case." Baldwin v. State, 145 Idaho 148, 153-54, 177 P.3d 362, 367-68 (2008) (internal citations omitted); see also Strickland, 466 U.S. at 687-88 (a petitioner alleging ineffective assistance of counsel must show both deficient performance and resulting prejudice). To establish deficient performance, the burden was on Cole "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, Cole 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.

Application of the foregoing legal standards to the facts of this case supports the district court's order of summary dismissal; Cole failed to demonstrate from his pleadings and evidence that a genuine issue of material fact existed as to the prejudice prong of his ineffective assistance of counsel claims.

1. Claim 1

Cole failed to present any admissible evidence to sufficiently support any of his claims. The district court properly dismissed Cole's first claim (Claim 1) that his trial counsel was ineffective for not having witnesses identify him at trial, ruling, "[h]e provides no evidence or elaboration on that claim so that the Court can even determine what he is referring to. This Claim will not be considered." (R., p.72.) Cole does not challenge the summary dismissal of that claim on appeal; therefore, it is not subject to review. (See Appellant's Brief, pp.7-10.) Even if considered, the record shows Cole did not support his claim with admissible evidence, nor did he explain which witnesses should have been asked by trial counsel to identify Cole during trial or how such identification would have resulted in a different outcome at trial. (See R., pp.7, 10-11; 38, 43-46, 52-54.) The court did not err in summarily dismissing Claim 1 based on Cole's failure to present admissible evidence showing his trial counsel's conduct prejudiced him. (See R., p.72.)

2. Claims 2 And 4

Cole also appears to not challenge the summary dismissal of Claims 2 and 4. (See Appellant's Brief, pp.7-10.) Regardless, the district court properly dismissed those two claims.¹ In Claim 2, Cole alleged that his trial counsel was ineffective for failing to discover evidence that

¹ It is axiomatic that the appellant bears the burden of providing a sufficient record to substantiate his or her appellate claims. State v. Beason, 119 Idaho 103, 105, 803 P.2d 1009, 1011 (Ct. App. 1991). The post-conviction record on appeal does not automatically include the record of the underlying criminal case. Esquivel v. State, 149 Idaho 255, 259, n.3, 233 P.3d 186, 190, n.3 (Ct. App. 2010). Because the record of the underlying criminal proceeding was not made a part of the post-conviction record or the record on appeal, there is no record of what evidence was presented in the two motions. "In the absence of an adequate record on appeal to support the appellant's claims, [the appellate court] will not presume error." State v. Richmond, 137 Idaho 35, 38, 43 P.3d 794, 797 (Ct. App. 2002) (citing Beason, 119 Idaho at 105, 803 P.2d at 1011). To the contrary, any missing portions of the record are presumed to support the actions of the court below. State v. Repici, 122 Idaho 538, 541, 835 P.2d 1349, 1352 (Ct. App. 1992).

was subsequently presented in his motion for a new trial and Rule 35 motion. (R., p.7.) However, in his petition and supporting documents, Cole failed to explain what evidence his trial counsel did not discover before trial, or how the discovery of such evidence would have probably resulted in a different verdict, as required by Strickland. (See R., pp.7, 10-11; 38, 43-46, 52-54.) In regard to Claim 4, Cole failed to allege what information his attorney disclosed to the prosecution, or how such disclosure may have prejudiced him at trial. (See id.) In short, Cole has not shown any error in the district court's summary dismissal of Claims 2 and 4 on the ground that "Cole has presented no admissible evidence that shows that his counsels' performance prejudiced the outcome of his trial." (R., p.72.)

3. Claim 3

In Claim 3, Cole alleged that his trial counsel was ineffective for failing to call witnesses at trial that could have supported his "story and undermined [the prosecution's] integrity[.]" (R., p.7.) The district court explained that Cole presented several affidavits contending "that although this matter was self-defense, his attorney did not offer that as a defense." (R., p.72.) The court initially determined, "Cole offers no proof that he believed he was in imminent danger of death or bodily [sic] or that he believed his assault of his ex-wife and friend were necessary to save him from the danger presented[.]" and that the Court was "not required to accept conclusory allegations unsupported by admissible evidence or the petitioner's conclusions of law." (R., p.71 (citing State v. Payne, 146 Idaho 548, 560, 199 P.3d 123, 135 (2008).) The court also explained that Cole "refers to a list of witnesses that he believes would have been useful to prove his innocence if they had been called, but does not elaborate on how their testimony would have changed the outcome

of the trial.” (R., p.71) In support of Claim 3, Cole filed five relevant documents, which are described, then discussed, in turn.²

(a) Differing Statements By Nicole Lowe About Being Fearful Of Cole

1. “Request to Modify or Dismiss No Contact Order,” file-stamped January 25, 2013. The document is allegedly signed by Nicole L. Lowe, and states in relevant part, “Enough time has passed – We’ve moved on – I’m not afraid [last letter(s) unclear].” (R., p.38.)
2. Part of the transcribed trial testimony of Nicole Lowe in which she testified that she was “still scared” of Cole. (R., p.41 (Tr., p.178, L.24).)

The district court concluded that Cole failed to present any admissible evidence to show that he was prejudiced by his trial counsels’ performance. (R., p.72.) On appeal, Cole has not advanced any argument that contradicts the district court’s ruling. (See Appellant’s Brief, pp.7-10.) Moreover, because the written statement, “I’m not afraid,” on the Request to Modify or Dismiss No Contact Order was not notarized or otherwise authenticated as having been written by Nicole Lowe, the statement was not presented in the form of admissible evidence, and should be rejected on that basis. Even if Nicole Lowe had acknowledged at trial that she wrote the statement on January 25, 2013, her lack of fear for Cole on that (2013) date would not be relevant to whether she feared him when he assaulted her with a gun on October 18, 2012. Similarly, the fact that Lowe testified at the February 2014 trial that she was still scared of Cole does next to nothing to

² Cole filed the same statement of Barbara O’Nash twice. The first statement was typed and unsigned (R., p.43), and the second statement bore a signature of “Barbara O’Nash” and a notary public’s stamp and apparent signature, but lacked any statement verifying that the person who signed the document was Barbara O’Nash (R., p.54).

Also, Cole filed an Idaho County Sheriff’s Office Statement Form filled out by Nicole Lowe, dated 10/19/12, describing Cole’s actions at the Silver Dollar Bar the night of the incident. (R., pp.45-46.) On appeal, Cole says Lowe’s statement “confirmed Bessie was there” (Appellant’s Brief, p.8), in reference to Barbara O’Nash’s statement about Bessie’s comments to her, which will be discussed later in this brief. Lowe’s written police statement needs no further mention.

impeach her credibility. Ms. Lowe could have had a valid explanation based on more recent events for why she was scared of Cole. Rather than prejudicing him, Cole may have benefitted by the fact that his trial counsel did not risk opening the door for Ms. Lowe to testify about recent conduct by Cole that may have caused her to be scared of him. Any impeachment value in the disparity of Ms. Lowe's two statements, which were 13 months apart, would have had no demonstrated impact on the jury. Cole has failed to show any error in the district court's summary dismissal of Claim 3 based on a lack of prejudice, as required under Strickland.

(b) Barbara O'Nash's Statement

3. Barbara O'Nash's typed statement that, although she was not in the bar the evening of the incident, her daughter-in-law ("Bessie") "saw the whole thing and told [her] what happened," which was that Cole did not aim the gun at the victims, nor did he "threaten their lives with it, he held it to his side." (R., pp.43, 54 (see n.2, supra.) Bessie "was in the back room gambling on the machines and didn't even know [Cole] was there with a gun. She couldn't tell the truth because then her boss would know she wasn't doing her job." (Id.) Nicole Lowe told Ms. O'Nash one day that she did not want to testify against Cole, but Sean had threatened to leave her if she did not. Also, the night that Cole's home and shop burned down, "someone was seen sitting in Nicole's truck at the top of the hill, just across the river, watching it burn." (Id.)

The district court correctly ruled that Barbara O'Nash's statement about what her daughter-in-law (Bessie) and Nicole Lowe told her was hearsay and not admissible. (R., p.72; see I.R.E. 801, 802.) On appeal, Cole has not argued otherwise; therefore he has failed to show any error in the district court's summary dismissal of Claim 3 in regard to the concededly hearsay statement of Barbara O'Nash. (See Appellant's Brief, pp.7-8 ("[The court] did address the hearsay statement of Barbara O'Nash . . .").)

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). Barbara O’Nash’s statement, although ostensibly signed by her, was not notarized in any way that verified, under oath, that she signed the statement in the presence of the notary. (See R., p.54.) Because O’Nash’s statement was not a valid affidavit – it was not sworn to or affirmed by O’Nash, or made under oath – it was not in the form of admissible evidence, and could not have been properly considered in support of Claim 3. See Workman, 144 Idaho at 522, 164 P.3d at 802 (citing Ferrier, 135 Idaho at 799, 25 P.3d at 112); State v. McClure, 159 Idaho 758, ___, 367 P.3d 153, 155 (2016) (“The Idaho Notary Public Act does define ‘affidavit’: ‘As used in this chapter: ... (5) ‘Affidavit’ means a declaration in writing, under oath, and sworn to or affirmed by the declarant before a person authorized to administer oaths.’ I.C. § 51–102.”); I.C. §19-4902(a) (“the authenticity of all documents and exhibits included in or attached to the application must be sworn to affirmatively as true and correct”).

The district court correctly ruled that because Barbara O’Nash’s statement was inadmissible hearsay, Cole failed to present any admissible evidence to demonstrate prejudice under Strickland. Cole has failed to show that the district court erred in summarily dismissing Claim 3 in regard to Barbara O’Nash’s statement.

(c) Mandy Doherty’s Statement

4. Mandy Doherty’s typed and unsigned statement states that Nicole Lowe and Sean Reid “continually torment[ed] Tom Cole every time he came to town or drove past the bar.” (R., p.44.) The statement recalled one incident when Sean Reid was playing with his revolver inside the bar, and when Cole drove past the bar, Sean pointed the gun at Cole and pretended to shoot him. (R., p.44.)

As noted, 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, 103 Idaho at 617, 651 P.2d

at 551; Cowger, 132 Idaho at 684, 978 P.2d at 244. Although the district court did not specifically discuss Mandy Doherty’s “statement” in its Memorandum Opinion, it was clearly not in the form of admissible evidence because it was neither notarized nor signed by anyone. (R., pp.44, 69-73); see I.C. §19-4902(a); Workman, 144 Idaho at 522, 164 P.3d at 802 (the court is not required to accept a petitioner’s conclusory allegations, unsupported by admissible evidence) (citing Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001)).

Because Mandy Doherty’s statement was inadmissible, the district court’s all-encompassing conclusion that Cole “presented no admissible evidence that shows that his counsels’ performance prejudiced the outcome of his trial” (R., p.72), correctly applies to her statement. Cole has shown no error in the district court’s summary dismissal of Claim 3 relative to Mandy Doherty’s statement.

(d) Delbert Wadsworth’s Affidavit

5. Delbert Wadsworth’s affidavit states that (a) Cole had stopped by his house “one day” and Sean Reid drove up and threw a beer can at Cole yelling, “I’m going to fucking kill you[,]” and (b) on “another occasion” Cole told him that Ian Reid “had just rammed into his car while driving across the bridge,” and Cole “seemed to be in pain [and] said he had suffered whiplash. After that, Ian went into hiding, only coming out after dark.” (R., pp.52-53.)

The district court rejected Delbert Wadsworth’s affidavit on relevance grounds, stating:

The affidavit of Delbert Wadsworth appears to have been made in support of Cole’s civil matter with the Reids, not his criminal conviction. It makes no reference to the criminal incident. The statements both discuss incidents involving the victims and Cole other than the one charged in this matter and would have been inadmissible as not being relevant.

(R., p.72.)

On appeal, Cole argues that “evidence of the victim threatening to shoot Mr. Cole . . . would be relevant to Mr. Cole’s beliefs that he was in imminent danger and thus admissible. The

same is true of a relative of the victim ramming Mr. Cole's car (for the purposes of summary dismissal this statement appearing in Delbert Wadsworth's affidavit could be considered an excited utterance)." (Appellant's Brief, p.9.)

The district court correctly concluded that Wadsworth's affidavit discusses incidents "other than the one charged" and were irrelevant. (R., p.72.) Wadsworth's first statement, that "one day" Sean Reid threw a beer can at Cole and threatened to kill him, does not explain when that incident occurred in relation to Cole's underlying crimes. Therefore, the court properly concluded that Cole "offers no proof that he believed he was in *imminent* danger of death or bodily [sic] or that he believed his assault of his ex-wife and friend were necessary to save him from the danger presented." (R., p.71 (emphasis added).)

Moreover, while a post-conviction petitioner is entitled to notice prior to the summary dismissal of his post-conviction claims from either the court or from the state's motion to dismiss, I.C. § 19-4906; Kelly v. State, 149 Idaho 517, 522-523, 236 P.3d 1277, 1282-1283 (2010), an order of summary dismissal may be affirmed on appeal on the grounds asserted in the state's motion to dismiss if no material issue of fact on those grounds is contained in the record. See Ridgley v. State, 148 Idaho 671, 676, 227 P.3d 925, 930 (2010); Baxter v. State, 149 Idaho 859, 864-865, 243 P.3d 675, 680-681 (Ct. App. 2010). In this case, the summary dismissal of Cole's claim should also be affirmed on the alternate ground that he failed to meet the "deficient performance" requirement of Strickland. (See R., p.19 ("The allegations of the petition . . . are bare and conclusory, and are not supported by specific facts or evidence sufficient to raise a genuine issue of material fact.")) Cole has made no specific allegation that his trial counsel knew, or should have known, about Wadsworth's potential trial testimony; therefore, he could not have been

deficient in failing to call Wadsworth to testify at trial.³ For the above-stated reasons, the district court's summary dismissal of Claim 3, in relation to the first incident described in Wadsworth's affidavit, should be affirmed on the alternative ground that Cole has failed to demonstrate that his trial counsel's conduct was deficient under Strickland.

Even assuming Wadsworth could have testified at trial about the first incident described in his affidavit to show that Sean Reid had an aggressive character trait, see I.R.E. 404(a)(2), Cole has not cited any trial testimony showing that, on or near the day of the incident, Sean Reid or Nicole Lowe did anything warranting Cole, in self-defense, to threaten them and point a gun at them. See State v. Cole, 2016 WL 455803 *5 (summary of the facts of the case). Given the overwhelming evidence presented at trial showing Cole's unjustified conduct, see id., any impugning of Sean Reid's character by Wadsworth's testimony would have been inconsequential. Cole has failed to present any cogent argument that shows error in the district court's determination that he failed to demonstrate how, even if Wadsworth had testified about Reid's alleged threat, the outcome of his trial would have been different. (R., p.72.)

The second incident Wadsworth's affidavit described was also irrelevant. (R., p.72.) Wadsworth's affidavit stated that "on another occasion" Cole came into the Silver Dollar [Bar] and told him that "Ian Reid had just rammed into his car while driving across the bridge." (R., p.53.) However, that Ian Reid (who, it seems to be implied, may have been related to Sean Reid) had an auto accident with Cole's car says nothing about Sean Reid and Nicole Lowe, or the incident

³ Cole's third post-conviction claim alleged that his trial counsel "interviewed witness's [sic] that could have backed up [his] story and undermined plaintiffs [sic] integrity and didnt [sic] call them to trial." (R., p.7.) Cole's supporting affidavit alleges that his trial counsel "was given a list of 30 witness's [sic] seven of whom were sherriffs [sic] officers. They would of [sic] undermined the integrity of the plaintiffs." (R., p.10.) Nowhere does Cole mention that Delbert Wadsworth was on the list of 30 potential witnesses or that his trial counsel otherwise knew about his potential testimony.

in which Cole threatened them with a gun. The apparent insinuation that Ian Reid did Sean Reid's bidding by ramming his car into Cole's car is completely baseless.

Cole has failed to show any error in the district court's determination that this second statement of Wadsworth's affidavit was irrelevant, and that Cole "presented no admissible evidence which shows how he was prejudiced by his counsel not calling witnesses in his defense or that he actually had a self-defense claim." (R., p.72.)

CONCLUSION

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

DATED this 5th day of December, 2017.

/s/ John C. McKinney _____
JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 5th day of December, 2017, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

GREG S. SILVEY
SILVEY LAW OFFICE, LTD.

at the following email address: greg@idahoappeals.com.

/s/ John C. McKinney _____
JOHN C. McKINNEY
Deputy Attorney General

JCM/dd