1-8-2018

Conley v. State Respondent's Brief Dckt. 44314

IN THE SUPREME COURT OF THE STATE OF IDAHO

SHAUN PATRICK CONLEY,	)	
	)	**No. 44314**
Petitioner-Appellant,	)	
	)	**Bannock County Case No.**
v.	)	**CV-2015-3937**
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

HONORABLE DAVID C. NYE
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

LORI A. FLEMING
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR
DEFENDANT-RESPONDENT

SHAUN PATRICK CONLEY
IDOC #177771
ISCC Unit B 3
P. O. Box 70010
Boise, Idaho 83707

PRO SE
PETITIONER-APPELLANT

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STATEMENT OF THE CASE

Nature Of The Case

Shaun Patrick Conley appeals, *pro se*, from the judgment entered upon the district court's orders denying his request for the appointment of counsel and summarily dismissing his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

The district court set forth the factual and procedural background of Conley's underlying criminal cases, as follows:

> On September 10, 2012, the Pocatello Police Department responded to a call in which an eight year old child reported that she had been molested by her mother's friend, Shaun Patrick Conley. On December 4, 2012, Conley was charged with lewd conduct with a child under sixteen in violation of Idaho Code § 18-1508 and being a persistent violator, Idaho Code § 19-2514 in Bannock Count[y] Case No. CR-12-19069-FE. On December 20, 2012, a preliminary hearing was held. Based upon discovery of certain information in that case, Conley was charged on January 22, 2013 with 14 counts of sexual exploitation of a child in violation of Idaho Code § 18-1507(2)(a) and being a persistent violator, Idaho Code § 19-2514, in Bannock County Case No. CR-13-1145-FE. The persistent violator charges were based on a 1993 conviction of a similar crime in California.
>
> On April 8, 2013 Conley entered into a plea agreement in both cases in which he agreed to plead guilty to the lewd and lascivious charge and three counts of the sexual exploitation of a child with the State dismissing the persistent violator charges and eleven counts of sexual exploitation. With the guilty plea being accepted by the Court, Conley filed [sic] out a Guilty Plea Questionnaire. The Court sentenced Conley to five years fixed and ten indeterminate on the 19069 case and five years with five indeterminate in the 1145 case, both sentences to run concurrent.
>
> Conley filed an appeal in both cases on August 28, 2013. The Idaho Supreme Court affirmed the District Court's sentence and filed a remittitur on November 24, 2014. On September 12, 2013, Conley filed a Rule 35 Motion requesting leniency of sentence which the Court denied on February 24, 2013. Lastly, on July 7, 2014 Conley filed a Motion for leave

to withdraw plea of guilty which the Court denied on September 5, 2014.
…

(R., pp.286-87.)

On November 17, 2015, Conley filed a *pro se* petition for post-conviction relief, alleging two ineffective assistance of counsel claims and a prosecutorial misconduct claim, and seeking relief from the judgments in both of his underlying criminal cases.[1] (R., pp.17-24; see also R., pp.35-171 (sworn affidavit and attachments).) He also filed a motion for the appointment of post-conviction counsel. (R., pp.13-16.) The state answered Conley's petition, objected to his motion for the appointment of counsel, and moved for summary dismissal. (R., pp.177-97.) After Conley responded to the state's filings (see R., pp.210-16, 226-72), the district court entered an order denying Conley's request for court appointed counsel, finding Conley's post-conviction petition did "not allege facts sufficient to raise a possibility of a valid claim" (R., pp.276-78). The court also entered an order granting the state's motion for summary dismissal, finding that Conley's two ineffective assistance of counsel claims were "wholly unsupported by facts" and that his prosecutorial misconduct claim had already been raised and decided in the underlying criminal case and was also disproved by the record. (R., pp.286-93.)

The court entered a final judgment (R., pp.313-14), from which Conley timely appealed (R., pp.294-97, 318-21). Conley also filed a motion for the appointment of appellate counsel (R., pp.304-07), which the district court denied (R., pp.310-12).

[1] The state questions the propriety of filing a single post-conviction petition to seek relief from the judgments entered in two separate criminal cases. See I.C. §§ 19-4901, -4902(a). However, neither the prosecutor nor the district court asserted this defect as a basis for dismissal below and, as such, the state does not pursue the issue on appeal.

ISSUES

Conley states the issues on appeal as:

a. Did the District Court abuse its descression in summarily dismissing the petition for post-conviction relief?

b. Was the petitioner denied effective assistance of counsel for failing to suppress overbroad and unlawful search warrants?

c. Did prosecutorial misconduct occur with governmental intrusion into Attorney-Client Relationship?

d. Was Petitioner-Appelant denied ineffective assistance of counsel for failing to conduct a meaningful pretrial investigation.

e. **Did** the District Court abuse its discretion in denying Petitioner's Motion to Take Judicial Notice of the underlying Criminal Records?

f. **Did** the District Court abuse its discretion in denying Petitioner's Motion for Appointment of Counsel on post-conviction relief, when the petition set forth cognizable non-frivolous claims?

g. **Should** the District Court be compelled to prepare the transcripts of 3/11/2013 hearing and 12/20/2012 **MORNING SESSION** necessary for the Appellant to prove his claims to the Appeals Court, that are part of the official record and are not exhibits in Supreme Court Dockets 41400 and 41399, or present in any filings the Appellant possesses?

(Appellant's brief, pp.1-2 (capitalization, spelling, punctuation, and bolding in original).)

The state rephrases the issues as follows:

1. Has Conley failed to establish that the district court erred by denying his request for counsel and summarily dismissing his post-conviction petition?

2. Has Conley failed to establish any basis for reversal based on the denial of his motion for judicial notice?

3. Has Conley failed to establish error in the denial of his requests for unnecessary transcripts?

ARGUMENT

I.
Conley Has Failed To Establish That The District Court Erred By Denying His Request For Counsel And Summarily Dismissing His Petition For Post-Conviction Relief

A. Introduction

The district court denied Conley's motion for the appointment of counsel and granted the state's motion for summary dismissal, finding Conley's post-conviction claims were "wholly unsupported by facts," procedurally barred, and/or disproved by the underlying criminal record and, as such, failed "to raise a possibility of a valid claim." (R., pp.276-77, 286-93.) Contrary to Conley's assertions on appeal, a review of the record and of the applicable law supports the district court's findings that the allegations in the petition failed to raise even the possibility of a valid claim, much less present an issue of material fact entitling Conley to an evidentiary hearing.[2]

B. Standard Of Review

The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court. Charboneau v. State, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004); Hust v. State, 147 Idaho 682, 683, 214 P.3d 668, 669 (Ct. App. 2009). In

[2] A post-conviction claim is properly dismissed if the petitioner fails to present evidence sufficient to show a material issue of fact on which relief can be granted. Workman v. State, 144 Idaho 518, 522-23, 164 P.3d 798, 802-03 (2007). Because this is a higher burden than demonstrating the possibility of a valid claim necessitating the appointment of counsel, Judd v. State, 148 Idaho 22, 24, 218 P.3d 1, 3 (Ct. App. 2009), Melton v. State, 148 Idaho 339, 345, 223 P.3d 281, 287 (Ct. App. 2009), the state will focus on the "possibility of a valid claim" standard on the assumption that if Conley did not show entitlement to counsel the dismissal of his claims is proper, but that if he did show entitlement to counsel then dismissal without the opportunity of counsel to appear was error.

reviewing the denial of a motion for appointment of counsel in post-conviction proceedings, "[t]his Court will not set aside the trial court's findings of fact unless they are clearly erroneous. As to questions of law, this Court exercises free review." Brown v. State, 135 Idaho 676, 678, 23 P.3d 138, 140 (2001), quoted in Charboneau, 140 Idaho at 792, 102 P.3d at 1111.

C. The District Court Correctly Denied Conley's Request For Counsel And Dismissed His Post-Conviction Petition Because The Allegations In The Petition Did Not Raise The Possibility Of A Valid Claim

A request for appointment of counsel in a post-conviction proceeding is governed by I.C. § 19-4904. Post-conviction counsel should be appointed if the petitioner qualifies financially and "alleges facts showing the possibility of a valid claim that would require further investigation on the defendant's behalf." Swader v. State, 143 Idaho 651, 654, 152 P.3d 12, 15 (2007); Charboneau, 140 Idaho at 793, 102 P.3d at 1112. When a motion for the appointment of counsel is presented, the abuse of discretion standard as applied to I.C. § 19-4904 "permits the trial court to determine whether the facts alleged are such that they justify the appointment of counsel; and, in determining whether to do so, every inference must run in the petitioner's favor where the petitioner is unrepresented at that time and cannot be expected to know how to properly allege the necessary facts." Charboneau, 140 Idaho at 793-94, 102 P.3d at 1112-13.

If, on the other hand, the claims in the petition are so patently frivolous that there appears no possibility that they could be developed into a viable claim even with the assistance of counsel and further investigation, the court may deny the request for counsel and proceed with the usual procedure for dismissing meritless post-conviction petitions.

Workman v. State, 144 Idaho 518, 529, 164 P.3d 798, 809 (2007); Hust v. State, 147 Idaho 682, 684, 214 P.3d 668, 670 (Ct. App. 2009).

In his *pro se* petition, Conley alleged the following three claims: (1) "Ineffective Assistance of Trial Counsel: Failure to Suppress Overbroad And Unlawful Search Warrants"; (2) "Prosecutorial Misconduct: Government Intrusion Into Attorney-Client Relationship"; and (3) "Ineffective Assistance of Trial Counsel: Failure to Conduct Meaningfull Pretrial Investigation." (R., pp.20-21 (bolding omitted, spelling original).) Contrary to Conley's assertions on appeal, application of the correct legal standards to the facts of this case supports the district court's decisions to deny Conley's motion for the appointment of counsel and, ultimately, to grant the state's motion for summary dismissal, because Conley failed in his petition and supporting affidavits to allege facts to show even the potential viability of any of his claims. See Judd v. State, 148 Idaho 22, 24, 218 P.3d 1, 3 (Ct. App. 2009) (citations omitted) ("Only if all of the claims alleged in the petition are frivolous may the court deny a request for counsel.").

1. Conley Failed In His Petition To Allege Facts Demonstrating The Potential Viability Of Either Of His Ineffective Assistance Of Counsel Claims

Conley alleged his trial counsel rendered ineffective assistance by not moving to suppress "two search warrants" on the basis that the "search warrants applications were overbroad." (R., p.20 ("CLAIM ONE" of the petition).) He also alleged trial counsel was "constitutionally ineffective for failing to make an adequate investigation into the two cases and explaination of trial strategy and coerced petitioners guilty pleas in order to conceal his unpreparedness for a trial." (R., p.21 (verbatim) ("CLAIM THREE" of the petition).) The district court denied Conley's request for counsel and summarily

dismissed these claims, finding the claims were "wholly unsupported by facts" and that "nothing [in Conley's affidavit] substantiates the assertions of ineffective assistance of counsel." (R., pp.276-77, 291.) Specifically, the court reasoned:

> Conley renders his opinion as to why the search warrants were overbroad, why the preliminary hearing should have gone differently, and numerous ways in which his attorney could have done a better job prior to sentencing, however, he does not present any objective evidence to support these conclusions. As previously stated, there is a strong presumption that counsel's performance is adequate and meets reasonable standards of competence, *unless* Petitioner can show otherwise. Looking back and offering "but what if's" does not overcome that presumption.

(R., p.291 (emphasis original).) Review of the record in light of the applicable law supports the district court's finding that Conley failed to allege facts to establish even the potential viability of either of his ineffective assistance of counsel claims.

A post-conviction petitioner alleging ineffective assistance of counsel must demonstrate both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989). An attorney's performance is not constitutionally deficient unless it falls below an objective standard of reasonableness, and there is a strong presumption that counsel's conduct is within the wide range of reasonable professional assistance. Gibson v. State, 110 Idaho 631, 634, 718 P.2d 283, 286 (1986); Davis v. State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989). To establish prejudice, the petitioner must show a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988); Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 244 (Ct. App. 1999).

In support of his claim that trial counsel was ineffective for not moving to suppress the "two search warrants" that were issued in his underlying criminal cases, Conley alleged: (1) his first trial attorney "strongly advised" him that he should challenge both search warrants and the applications on which they were based because, "in [trial counsel's] opinion, the warrant was no good" (R., pp.36-37, ¶6); (2) in his first meeting with his second trial attorney, Conley told trial counsel that he "wanted to have him challenge the search warrants and have them suppressed and asked him to schedule a hearing for that purpose" and that he "repeatedly insisted that [counsel] challenge and move to suppress the search warrants based upon the fact that they were ove[r]broad and violated the Fourth Amendment to the United States Constitution" (R., p.37, ¶8); (3) trial counsel failed to adequately interview witnesses, prepare a witness list or call witnesses at the preliminary hearing and, thus, "failed to establish a foundation of testimony that could have been utilized in the suppression proceedings to establish" the search warrant applications did not conform to the requirements of Ninth Circuit law (R., pp.38-39, ¶¶9-14); and (4) "[d]ue to counsel not making himself aware of" the Ninth Circuit case, "he was ineffective for failing to move to suppress the search of [Conley's] computer and computer storage devices" (R., p.39, ¶14). Conley also attached to his affidavit incomplete copies of the search warrant applications and search warrants at issue. (R., pp.58-73.) Contrary to Conley's assertions, however, none of these allegations or evidence raised even the possibility of a valid claim that counsel was ineffective for not filing a motion to suppress.

Where the basis of an ineffective assistance of counsel claim is "counsel's failure to file a motion, a conclusion that the motion, if pursued, would not have been granted by

the trial court, is generally determinative of both prongs of the *Strickland* test." State v. Payne, 146 Idaho 548, 562, 199 P.3d 123, 137 (2008) (internal quotes and brackets omitted). However, even where the petitioner demonstrates that "the motion, had it been filed, should have been granted, the petitioner is still required to overcome the presumption that the decision not to file the motion 'was within the wide range of permissible discretion and trial strategy.'" Wurdemann v. State, 161 Idaho 713, 718, 390 P.3d 439, 444 (2017) (quoting Estrada v. State, 143 Idaho 558, 561, 149 P.3d 833, 836 (2006)). Thus, to establish entitlement to counsel on his claim that trial counsel was ineffective for not moving to suppress the "search warrants," Conley was required to allege facts showing both the possibility that such motion, if filed, would have been granted *and* the possibility that counsel's failure to file the motion was not a strategic decision. Conley failed to meet this burden.

Conley's bare assertions that the search warrant applications were "overbroad" under Ninth Circuit precedent and that the evidence seized pursuant to the search warrants were therefore inadmissible were not sufficient to entitle him to counsel. Conley did not even attempt to explain why the search warrant applications were overbroad, much less make any effort to demonstrate why a motion to suppress, had one been made, would have been granted. He also failed to allege any facts to demonstrate why trial counsel's decision to not file a motion to suppress was anything other than sound trial strategy. Even after being put on notice by the state's motions that his claims were bare and conclusory (see R., pp.180-81, 185-97), Conley failed to allege any additional facts from which the district court could conclude that Conley's belief that a suppression motion should have been filed could be developed into a viable claim of

ineffective assistance of counsel (see R., pp.209-16, 229-72). Having failed to do so, Conley failed to show even the possibility of a valid claim entitling him to the appointment of counsel.

The allegations in Conley's petition and supporting affidavits also failed to raise the possibility of a valid claim in relation to Conley's claim that trial counsel was ineffective for "failing to make an adequate investigation" and allegedly coercing Conley's guilty pleas "in order to conceal his unpreparedness for a trial." (R., p.21.) As found by the district court, Conley's "lengthy affidavit" set forth numerous examples of how, in Conley's "opinion," his trial counsel "could have done a better job prior to sentencing," but he failed to support those opinions with any "objective evidence" to overcome the presumption that trial counsel's performance was reasonable. (R., p.291; compare R., pp.35-56.) Perhaps more importantly, and as argued by the state in its motion for summary dismissal, Conley's complaints about trial counsel's performance and his assertions that counsel coerced him into pleading guilty are affirmatively disproved by the underlying criminal record.

Before he pled guilty, Conley filled out a "Guilty Plea Questionnaire" wherein he specifically indicated he "had sufficient time to discuss the case with [his] attorney"; he "told [his] attorney everything [he] kn[ew] about the crime, including any witness [he] kn[ew] that would show [his] innocence"; he "fully discussed [most of] the facts and circumstances sourround[ing] the case with [his] attorney"; his attorney discussed with him the nature and elements of the charges" and "any possible defenses [he] may have to the charges"; he was "fully satisfied with the representation of [his] attorney"; and there was "nothing that matter[ed]" that he "requested [his] attorney to do that [had] not been

done, including filing any motions or other requests in this case." (#41399/41400 R., p.399.) Conley made similar representations at the guilty plea hearing, advising the court that the answers he gave in the Guilty Plea Questionnaire were "true and correct," that he had "been represented by an attorney at all stages of [the] proceedings," and that he was "satisfied with that representation." (4/8/13 Tr., p.12, Ls.11-15.)

Conley's answers to the questions asked of him on the guilty plea questionnaire, coupled with his representations during the plea colloquy, directly contradict his post-conviction claim that trial counsel failed to adequately investigate his case and coerced his guilty plea. Although the district court was required to accept Conley's unrebutted allegations as true and to construe all inferences in his favor, Charboneau, 140 Idaho at 793-94, 102 P.3d at 1112-13, it was not required to accept as true Conley's self-serving, after-the-fact statements that counsel did not conduct the investigation Conley would have liked and, as a result, his plea was involuntary. This is especially true since the record of the underlying criminal case also shows Conley's true motivation for pleading guilty was to take advantage of the plea bargain whereby, in exchange for Conley's pleas, the state dismissed numerous other charges and a persistent violator enhancement. (See 4/8/13 Tr., p.2, L.20 – p.4, L.18.) See Padilla v. Kentucky, 559 U.S. 356, 372 (2010) (a petitioner alleging ineffective assistance of counsel in relation to a guilty plea "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances"). In short, Conley has failed to show that his factual claims that merely contradict the underlying record create the possibility of a valid claim that could be developed by appointment of counsel in the present case.

Because Conley failed to allege facts to raise even the possible validity of either of his ineffective assistance of counsel claims, the district court did not err in dismissing those claims without appointing counsel.

2. Conley Failed In His Petition To Allege Facts Demonstrating The Potential Viability Of His Prosecutorial Misconduct Claim

In addition to alleging ineffective assistance of counsel, Conley's petition alleged a due process violation based upon prosecutorial misconduct. (R., pp.20-21 ("CLAIM TWO" of the petition).) Specifically, the petition alleged:

> Petitioner had an Attorney-Client Relationship with former Counsel Jeff Cronin, who was then assigned to prosecute both of petitioners criminal cases and utilized information which he had obtained in privileged attorney-client communications to prosecute both criminal cases at the sentencing hearing. As a result, this violated petitioners "right to counsel" and "due process of law" ….

(R., pp.20-21 (verbatim, citations omitted).) The state objected to Conley's request for counsel and moved to dismiss this claim, asserting, *inter alia*, it could have been raised on direct appeal and was therefore barred by I.C. § 19-4901(b). (R., pp.180-81, 193-95.) The district court denied counsel and dismissed the claim on a similar basis, finding, *inter alia*, the claim had been raised and decided in the underlying criminal case and that Conley's petition was "nothing more than another attempt to argue what has already been decided." (R., pp.276-77. 291-92.) Contrary to Conley's assertions on appeal, application of the law supports the district court's decision to dismiss his prosecutorial misconduct claim without appointing counsel.

"The scope of post-conviction relief is limited." Rodgers v. State, 129 Idaho 720, 725, 932 P.2d 348, 353 (1997). The remedy available under the Uniform Post-

Conviction Procedure Act "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of an appeal from the sentence or conviction." I.C. § 19-4901(b); accord Rodgers, 129 Idaho at 725, 932 P.2d at 353 ("An application for post-conviction relief is not a substitute for an appeal."). Thus, any "issue which could have been raised on direct appeal, but was not, is forfeited and may not be considered in post-conviction proceedings" except upon a "substantial factual showing" by admissible evidence "that the asserted basis for relief raises a substantial doubt about the reliability of the finding of guilt and could not, in the exercise of due diligence, have been presented earlier." I.C. § 19-4901(b).

By their nature, claims of prosecutorial misconduct occurring at trial are claims known to a defendant both at the time of trial and on direct appeal. Accordingly, Idaho's appellate courts have consistently applied the procedural bar of I.C. § 19-4901(b) and held that such claims, even if not raised in the trial court or on direct appeal, are not cognizable in post-conviction proceedings. See, e.g., Rodgers, 129 Idaho at 725, 932 P.2d at 353; Bias v. State, 159 Idaho 696, 702-03, 365 P.3d 1050, 1056-57 (Ct. App. 2015); Barcella v. State, 148 Idaho 469, 475, 224 P.3d 536, 542 (Ct. App. 2009).

In this case, Conley presented no evidence that he could not, with due diligence, have presented his prosecutorial misconduct claim earlier. In fact, the district court specifically found Conley had actually raised the claim in connection with his post-sentencing motion to withdraw his guilty plea. (R., pp.291-92.) Because Conley could have raised his prosecutorial misconduct claim on direct appeal, but did not, the claim was waived and presented no possibility of a legally viable claim for post-conviction

relief. The district court's orders denying counsel and summarily dismissing this claim should therefore be affirmed.

II.
Conley Has Failed To Establish Any Basis For Reversal Based Upon The Denial Of His Motion For Judicial Notice

In conjunction with his *pro se* post-conviction petition, Conley filed a motion requesting that the district court take judicial notice of the records in the underlying criminal proceedings. (R., pp.31-34.) The state filed a response indicating it had no objection to the request for judicial notice, except to the extent that Conley was requesting the preparation of transcripts at tax-payer expense. (R., pp.175-76.) On the same day it entered its orders denying the appointment of counsel and granting the state's motion for summary dismissal, the district court entered an order denying Conley's motion for judicial notice. (R., pp.283-85.) In doing so, the district court explained:

> The Court … did not rely on the underlying criminal record in its decision regarding Conley's post-conviction relief petition, rather utilizing all files, briefing, and material submitted in the civil file, and thus finds it unnecessary to take notice of such. That being said, any document specifically referenced by either party will be made part of the official record.

(R., pp.283-84.)

Conley now challenges the district court's order denying his request for judicial notice, contending that a review of the court's summary dismissal order shows it actually reviewed and relied on the underlying record, and that its failure to grant the motion for judicial notice shows "the dismissal itself was likely in error." (Appellant's brief, pp.36-37.) Conley's argument fails. While the state agrees it appears from the court's order of summary dismissal that it reviewed and relied on the entire record of the underlying

criminal case (see R., pp.286-87, 290-92), Conley has failed to show that the court's act of doing so, without formally taking judicial notice of all of the documents upon which it was relying, actually prejudiced Conley's substantial rights. See I.R.C.P. 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.").

Idaho Rule of Evidence 201(d) states that, when requested by a party, a district court "shall take judicial notice" of specifically identified "records, exhibits or transcripts from the court file in the same or a separate case." Although the district court in this case purported to deny Conley's request for judicial notice of the records in his underlying criminal case, it is clear that the court actually reviewed those records when ruling on Conley's request for counsel and the state's motion for summary dismissal. (See R., pp.286-87, 290-92.) It is equally clear that the conclusions drawn by the district court from its review of those underlying criminal records are capable of appellate review because the Idaho Supreme Court has taken judicial notice of those records in conjunction with this appeal. (See 12/5/16 Order Reinstating Appeal ("tak[ing] judicial notice of the Clerk's Record and Reporter's Transcripts filed in related appeal Nos. 41399 and 41400").) Because this Court may review the underlying criminal records and compare them to the district court's findings, and because, as explained in the preceding section, those records actually support the district court's conclusions that none of Conley's post-conviction claims are potentially viable, Conley cannot demonstrate any actual prejudice arising from the failure of the district court to have formally taken judicial notice before denying his request for counsel and granting the state's motion to dismiss. Any error was, at worst, harmless. See I.R.C.P. 61.

III.
Conley Has Failed To Establish Error In The Denial Of His Requests For Unnecessary Transcripts

Both before and after the appellate record was settled, Conley filed several objections and/or motions to augment the record with a number of items, including an as-yet prepared transcript of the morning session of his December 20, 2012 preliminary hearing. (See, e.g., 1/30/17 Appellant's Objection To Reporter's Transcript And Clerk's Record; 4/24/17 Appellant's Request To Suspend Briefing Schedule Pending Appellant's Objection To Reporter's Transcript And Clerk's Record; 5/25/17 Motion To Reconsider May 3, 2017 Order; 6/22/17 Appellant's Second Objection To Reporter's Transcript.) The Idaho Supreme Court denied Conley's motions to the extent they requested the preparation of transcripts, but entered orders ensuring Conley access to transcripts that already exist as part of the underlying criminal record. (5/3/17 Order; 6/5/17 Order Granting Motion; 6/28/17 Order Denying Second Objection.)

Conley now challenges the denial of his request for preparation of the December 20, 2012 transcript, arguing the transcript was "necessary to prove" the prosecutorial misconduct allegations alleged in Claim Two of his post-conviction petition. (R., pp.13-15.) Conley's claim of entitlement to the transcript fails for two reasons. First, the transcript was never prepared for or considered by the district court and, as such, cannot be considered by this Court on appeal. See, e.g., Nelson v. Nelson, 144 Idaho 710, 714, 170 P.3d 375, 379 (2007) (appellate court does not consider evidence that was neither presented to nor considered by the trial court). Second, the requested transcript is unnecessary for resolution of any issue on appeal because, for the reasons set forth in Section I.C.2., supra, Conley's prosecutorial misconduct claim does not allege a

cognizable claim for post-conviction relief. See, e.g., Draper v. Washington, 372 U.S. 487, 495 (1963) (state "will not be required to expend its funds unnecessarily" to provide transcripts that "will not be germane to consideration of the appeal"). Because he is not entitled to an unnecessary transcript, Conley has failed to show error.

CONCLUSION

The state respectfully requests that this Court affirm the judgment and the district court's orders denying the appointment of counsel and summarily dismissing Conley's petition for post-conviction relief.

DATED this 8th day of January, 2018.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 8th day of January, 2018, served two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

SHAUN PATRICK CONLEY
IDOC #177771
ISCC UNIT B 3
P. O. BOX 70010
BOISE, ID 83707

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

LAF/dd