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IN THE SUPREME COURT OF THE STATE OF IDAHO

JOSHUA JAMES FINCH,)	
)	No. 45198
Petitioner-Appellant,)	
)	Ada County Case No.
v.)	CV-PC-2016-9865
)	
STATE OF IDAHO,)	
)	
Defendant-Respondent.)	
<hr/>		

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 JONATHAN MEDEMA
District Judge**

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STATEMENT OF THE CASE

Nature of the Case

Joshua James Finch appeals from the district court's order summarily dismissing his post-conviction petition.

Statement of Facts and Course of Proceedings

In November 2013, in the course of executing a search warrant at Finch's residence, officers recovered various hazardous materials from which one could build explosive devices. (R., pp.23-47.) Finch ultimately pled guilty to aggravated assault, unlawful possession of bombs or destructive devices, unlawful possession of firearms, and two counts of felony injury to a child. See State v. Finch, 2015 WL 2329260 * 1 (Idaho App. 2015) (unpublished). The district court imposed an aggregate unified 25-year sentence with 13 years fixed. See id. On appeal, Finch asserted that his sentences were excessive, but the Idaho Court of Appeals affirmed the sentencing determinations of the district court. Id.

Finch filed a *pro se* post-conviction petition in May 2016. (R., pp.5-18.) The district court granted Finch's motion for appointment of counsel to represent him in the proceeding. (R., pp.66-68.) The district court ultimately construed Finch's post-conviction petition, which appointed counsel chose not to amend, as raising the following claims: (1)(a) trial counsel was ineffective for failing to file a motion to suppress certain statements Finch made to police after he invoked his right to remain silent; (1)(b) trial counsel was ineffective for failing to prevent the statements Finch made to police from being considered by the district court at sentencing; (2)(a)

trial counsel was ineffective for failing to submit, for the court's consideration at sentencing, an evaluation authored by Dr. Derrick May; (2)(b) trial counsel was ineffective for failing to submit, for the court's consideration at sentencing, testimony from Finch's girlfriend; (3)(a) the state violated Finch's constitutional rights by destroying some of the samples of materials recovered from under Finch's residence and/or by withholding that they had done so in violation of Brady v. Maryland, 373 U.S. 83 (1963); (3)(b) trial counsel was ineffective for failing to raise Finch's destruction of evidence/Brady claim in the course of the underlying criminal case; (4)(a) trial counsel was ineffective for failing to obtain a copy of the mental health evaluation from Dr. May; (4)(b) trial counsel was ineffective for failing to "challenge government investigate" [sic]; (4)(c) trial counsel was ineffective for failing to prevent the police from destroying the evidence recovered from beneath his residence; (4)(d) trial counsel was ineffective for failing to present an "adversarial process" and for refusing to go to trial and/or failing to adequately prepare for trial; (4)(e) trial counsel was ineffective for failing to object to the district court's consideration, at sentencing, of a psychological evaluation prepared by Dr. Arnold; and (5) appellate counsel was ineffective for failing to challenge the district court's denial of Finch's motion to suppress. (R., pp.133-152.) The state filed a motion for the summary dismissal of all of Finch's claims. (R., pp.78-90.)

After a hearing (1/17/17 Tr.), the district court entered a memorandum decision and order (R., pp.130-156). The court first noted the lack of clarity in Finch's post-conviction claims and its difficulty in construing them. (R., pp.130-131, 134-135.) The court then construed the claims as noted above. (R., pp.133-152.) The court granted the state's motion for summary dismissal

with respect to claims 2(a), 2(b), 3(b), 4(a), 4(b), and 5. (Id.) The court denied the state's motion for summary dismissal with respect to claims 1(a), 1(b), and 3(a), but set forth alternative grounds for the dismissal of those claims and gave Finch 20 days to respond. (Id.) In its motion for summary dismissal, the state did not construe Finch's petition as containing claims 4(c), 4(d), 4(e), and did not specifically move for the dismissal of these claims, so the court provided Finch 20 days to respond to its notice of intent to dismiss these claims as well. (R., pp.151-152.) The court next noted that the state had additionally responded to claims which the court did not construe Finch's post-conviction petition as actually containing. (R., pp.153-154.) The court chose not to address these theoretical claims, but provided that Finch could, within 20 days, clarify or amend his post-conviction petition if he disagreed with the manner in which the court construed his post-conviction petition. (Id.) With respect to all of the claims it addressed, the district court concluded that Finch failed to allege facts which, if true, demonstrated he was entitled to relief, and/or that the claims were conclusory. (R., pp.133-153.) Finch did not attempt to amend his post-conviction petition or otherwise cure any of the petition's defects in the subsequent 20-day period. (See 5/11/17 Tr., p.5, L.13 – p.7, L.3.) Instead, Finch and his appointed counsel informed the district court that Finch did not want counsel to amend his petition. (5/11/17 Tr., p.6, L.24 – p.7, L.17.) The district court verbally dismissed the petition and indicated that it would subsequently prepare a written judgment. (5/11/17 Tr., p.7, L.20 – p.8, L.20.)

Finch filed a notice of appeal prior to the entry of a written judgment. (R., pp.176-179.) The Idaho Supreme Court conditionally dismissed the appeal due to the lack of an appealable

judgment (7/13/17 Order), but reinstated the appeal after a judgment was entered (8/2/17 Order). The district court appointed counsel to represent Finch in the post-conviction appeal. (R., p.180.) However, the Idaho Supreme Court granted counsel's motion to withdraw from the case. (3/27/18 Order.) Finch proceeds *pro se*.

ISSUES

Finch states the issues on appeal as:

- 1.) Did trial counsel (criminal) violate Appellant's constitutional right(s) to a MENTAL HEALTH EVALUATION?
- 2.) Did the District Court violate Appellant's constitutional rights after the court ordered a Mental Health Evaluation and said evaluation was never conducted?
- 3.) Did post-conviction counsel violate not only clearly established law(s) contained in the state's RULES OF PROFESSIONAL CONDUCT and her client's lawful and constitutional right(s) during the course of the hearing where she informed that "her client" [waived] his right(s) to amend his application...when in fact, her client never stipulated any such conduct?
- 4.) Did the state violated Appellant's constitutional rights to present a complete defense when it [destroyed] all pertinent material evidence regardless of the fact that Court GRANTED the opportunity for the defendant to subject the state's evidence to Forensic Testing(s)?
- 5.) Did Post-Conviction counsel commit "Subordinate Perjury" when she stood before the Court and provided false and misleading testimony?
- 6.) Was Appellant subjected to "cumulative error" in the totality of both the Court's and Counsel's conduct?

(Appellant's brief, pp.6-7 (verbatim).)

The state rephrases the issue on appeal as:

Has Finch failed to demonstrate that the district court erred by summarily dismissing his post-conviction petition?

ARGUMENT

Finch Has Failed To Demonstrate That The District Court Erred In Summarily Dismissing His Post-Conviction Petition

A. Introduction

Finch contends that the district court erred by summarily dismissing his post-conviction petition. (See generally Appellant’s brief.) Finch has failed to demonstrate that the district court erred. A review of the record and Finch’s appellate brief reveals that Finch has failed to assign any specific error to the district court, has failed to adequately support his assertions with argument or authority, and has attempted to raise unpreserved issues on appeal. In any event, the district court correctly dismissed Finch’s petition.

B. Standard Of Review

“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).

C. The District Court Correctly Concluded That Finch Failed To Make A *Prima Facie* Showing For Post-Conviction Relief With Respect To Any Of His Claims

Post-conviction proceedings are governed by the Uniform Post-Conviction Procedure Act. I.C. § 19-4901, *et seq.* A petition for post-conviction relief initiates a new and independent civil proceeding in which the petitioner bears the burden of establishing that he is entitled to

relief. Workman, 144 Idaho at 522, 164 P.3d at 802; State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983).

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, if the applicant "has not presented evidence making 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). Until controverted by the state, allegations in a verified post-conviction application are, for purposes of determining whether to hold an evidentiary hearing, deemed true. Cooper v. State, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975). 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); Roman v. State, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994).

Where the district court summarily dismisses a post-conviction petition on its own initiative, a petitioner is entitled to notice of the basis for the dismissal, and 20 days to respond. I.C. § 19-4906(b). However, where the district court grants a party's motion for summary dismissal pursuant to I.C. § 19-4906(c), the motion itself serves as the notice, and no additional notice from the court of the dismissal is necessary. Workman, 144 Idaho at 523-524, 164 P.3d at 803-804 (citing Saykhamchone v. State, 127 Idaho 319, 322, 900 P.2d 795, 798 (1995)); see also Buss v. State, 147 Idaho 514, 517, 211 P.3d 123, 126 (Ct. App. 2009). In such a scenario, a petitioner is instead entitled to 20 days' notice from the state's motion for summary dismissal

before his petition can be dismissed by the court. See Saykhamchone, 127 Idaho at 322, 900 P.2d at 798 (citing State v. Christensen, 102 Idaho 487, 488, 632 P.2d 676, 677 (1981)).

It is a well-settled tenet of appellate review that the “party alleging error has the burden of showing it in the record.” Akers v. D.L. White Const., Inc., 156 Idaho 37, 320 P.3d 428 (2014) (citation omitted). It is equally 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 unspecified errors. State v. Hoisington, 104 Idaho 153, 159, 657 P.2d 17, 23 (1983). Moreover, “[a] party waives an issue on appeal if either authority or argument are lacking.” State v. Freitas, 157 Idaho 257, 267, 335 P.3d 597, 607 (Ct. App. 2014) (citing State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996)). Finally, Idaho’s appellate courts “will not consider issues not raised in the court below.” State v. Mosqueda, 150 Idaho 830, 833, 252 P.3d 563, 566 (Ct. App. 2011) (citing State v. Wheaton, 121 Idaho 404, 407, 825 P.2d 501, 504 (1992)).

On appeal, Finch primarily takes issue with the assistance provided by his appointed post-conviction counsel in the underlying proceeding in this case. (See generally Appellant’s brief.) Specifically, Finch asserts that his counsel failed to adequately communicate with him, violated the Idaho Professional Rules of Conduct in numerous respects, and failed to respond to the district court’s notice of intent to dismiss. (See generally *id.*) This claim is not properly before this Court. There is no constitutional right to the effective assistance of post-conviction counsel. Pennsylvania v. Finley, 481 U.S. 551 (1987). Nor is ineffective assistance of post-conviction counsel a cognizable claim for post-conviction relief. See I.C. § 19-4901, *et seq.*; Lee

v. State, 122 Idaho 196, 832 P.2d 1131 (1992); Wolfe v. State, 113 Idaho 337, 743 P.2d 990 (Ct. App. 1987). Even if it were, such a claim would be waived in this case because it was never raised to or adjudicated by the district court. “Because none of these complaints were alleged in [petitioner’s] successive petition or adjudicated by the district court, they are not properly before this Court on appeal.” Kelly v. State, 149 Idaho 517, 523–524, 236 P.3d 1277, 1283–1284 (2010) (quotation and citations omitted). Therefore, Finch’s complaints about his post-conviction counsel are not properly before this Court and should not be considered.¹

The only claim from his post-conviction petition that Finch addressed in any specific manner in his Appellant’s brief is Claim (3)(a) – that the state violated Finch’s constitutional rights by destroying some of the samples of materials recovered from under Finch’s residence and/or by withholding that they had done so in violation of Brady. (Appellant’s brief, pp.14-15.) In addressing this claim, the district court cited the standard applicable to Brady claims in which the defendant pleads guilty, and concluded that Finch failed to submit sufficient admissible evidence to establish that there was a reasonable probability that, but for the state’s destruction of the materials found under the residence, Finch would not have pled guilty. (R., pp.145-149 (citing Roeder v. State, 144 Idaho 415, 162 P.3d 794 (Ct. App. 2007).) Specifically, the district

¹ In his Appellant’s brief, Finch references the standard applicable to a district court’s consideration of a motion for appointment of counsel in a post-conviction proceeding. (Appellant’s brief, pp.13-14); see also Swader v. State, 143 Idaho 651, 654-655, 152 P.3d 12, 15-16 (2007) (“[w]hen considering a motion for appointment of counsel, the trial court must do more than determine whether the petition alleges a valid claim. The court must also consider whether circumstances prevent the petitioner from making a more thorough investigation into the facts.”). This standard has no applicability to the present case, where the district court *did* appoint counsel to represent Finch.

court noted: (1) Finch relied on information contained in police reports to support his claim, but failed to argue or demonstrate that he did not have access to these reports prior to the entry of his guilty plea; (2) the police reports he relied upon clearly show that not all of the materials recovered from underneath the residence were destroyed, and that the police took and preserved samples of the bags that had been opened for testing. This, the court concluded, refuted Finch's claim that the destruction of the evidence precluded him from testing the materials himself and challenging the state's assertion that the materials could be used to make bombs; and (3) Finch failed to present any evidence that, had the destroyed evidence been preserved for testing, this would have changed his decision to plead guilty. (R., pp.148-149.) While Finch references this claim in his Appellant's brief, he does not argue that the district court applied an incorrect standard or otherwise erred in reaching its conclusion. (See Appellant's brief, pp.14-15.) Instead, he only argues that the trial court granted his motion to conduct forensic testing, but that no materials were available to test. (Id.) This is not responsive to the grounds and reasoning for dismissal as set forth by the district court. Finch's assertions regarding this claim are therefore waived because he has failed to assign any specific district court error, Hoisington, 104 Idaho at 159, 657 P.2d at 23, and because he has failed to support his claim with authority or argument, Zichko, 129 Idaho at 263, 923 P.2d at 970.

Finch also appears to contend that the district court violated his constitutional rights by failing to mail him a copy of its notice of intent to dismiss, which, Finch asserts, deprived him of the opportunity to respond. (Appellant's brief, pp.15-16.) This claim is not appropriately before this court because it was not adjudicated below. In any event, I.R.C.P. 2.3(b) requires court

orders to be served upon the attorney of record for each party. The certificate of mailing associated with the district court's memorandum decision and order and notice of intent to dismiss indicates that this was done. (R., p.156.)

Finally, Finch asserts cumulative error. (Appellant's brief, pp.16-17.) Once again, this claim is not preserved because Finch failed to assert cumulative error in his post-conviction petition. (See R., pp.5-14.) To the extent this Court chooses to reach the merits of this claim (or any claim that may be construed from Finch's Appellant's brief), the state adopts the reasoning set forth by the district court in its memorandum decision and order (R., pp.130-156), for the proposition that Finch failed to allege facts which, if true, demonstrated he was entitled to relief on any of his claims, let alone that he demonstrated multiple errors to cumulate.

Finch has failed to adequately present any issue for appellate review and/or has failed to adequately support any issue with argument and authority or assign specific error to the district court. In any event, Finch has also failed to demonstrate that the district court erred in summarily dismissing his post-conviction petition. This Court should therefore affirm the district court's summary dismissal of Finch's post-conviction petition.

CONCLUSION

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

DATED this 18th day of June, 2018.

/s/ Mark W. Olson
MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 18th day of June, 2018, served two true and correct paper copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

JOSHUA JAMES FINCH
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/s/ Mark W. Olson
MARK W. OLSON
Deputy Attorney General

MWO/dd