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Dixon v. State Respondent's Brief Dckt. 39745

IN THE SUPREME COURT OF THE STATE OF IDAHO

DANIEL LEE DIXON, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent.	)	Nos. 39745, 40761 Kootenai Co. Case Nos. CV-2008-5912, CV-2012-773

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE FRED M. GIBLER
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

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

MARK W. OLSON
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR
RESPONDENT

ROBYN FYFFE
Nevin, Benjamin, McKay & Bartlett
303 W. Bannock
Boise, Idaho 83701
(208) 343-1000

ATTORNEY FOR
PETITIONER-APPELLANT

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Nature of the Case

Daniel Lee Dixon appeals from the district court's denial of his petition for post-conviction relief, and from its denial of his I.R.C.P. 60(b) motion for relief from the post-conviction relief dismissal order.

Statement of Facts and Course of Proceedings

Twenty-four-year-old Dixon entered a Coeur d'Alene bar on a summer day in 2005. (Trial Tr., p.277, L.25 – p.279, L.20.[1]) There, Dixon asked bar staff if they "saw the 12-year-olds downtown in their bikinis and how good they looked." (Trial Tr., p.280, Ls.5-18.) Dixon also mentioned to staff that he had consumed several potent alcoholic beverages earlier in the day. (Trial Tr., p.281, L.13 – p.282, L.20.) After consuming several more alcoholic beverages (Trial Tr., p.283, Ls.3-8), Dixon left and stated, "I'm going to go get myself a 12-year-old" (Trial Tr., p.284, Ls.15-25).

Later that day, K.G., a 12-year-old girl who was wearing a two-piece swimsuit, was playing by the water when Dixon grabbed her by the arm and began dragging her towards a dock on the beach behind some bushes. (Trial Tr., p.39, Ls.21-23; p.42, L.12 – p.46, L.12; p.47, Ls.8-14.) Dixon told K.G. that he had something to show her, and that he would pay her $100 if he could tell her what it was. (Trial Tr., p.45, Ls.4-9.) K.G. asked Dixon several times to let her go, but Dixon would not do so. (Trial Tr., p.52, Ls.3-11.) After they reached the

[1] The Idaho Supreme Court granted Dixon's motion to take judicial notice of the reporter's transcripts from Case No. 33384, Dixon's direct appeal of the underlying convictions. (11/13/13 Order.)

edge of the water, Dixon pulled K.G. onto his lap, reached into her swimsuit, and touched her vagina with his fingers. (Trial Tr., p.46, L.17 – p.47, L.21.) K.G. struggled and screamed for help until she broke free. (Trial Tr., p.47, L.17 – p.48, L.24.) Dixon then walked away. (Trial Tr., p.48, Ls.21-24.) K.G. ran to her mother and told her of the attack. (Trial Tr., p.54, Ls.7-14.)

Two bystanders observed some of the interaction between Dixon and K.G., including K.G. sitting in Dixon's lap, struggling to get free, and screaming for help. (Trial Tr., p.96, L.13 – p.105, L.2; p.119, L.4 – p.123, L.9.) One of the bystanders then followed Dixon and watched him approach and interact with other young girls. (Trial Tr., p.123, L.10 – p.136, L.1.) Meanwhile, K.G. and her mother notified police, and K.G. identified Dixon as the perpetrator. (Trial Tr., p.56, L.18 – p.57, L.8; p.60, Ls.9-14; p.201, L.18 – p.203, L.16.) K.G.'s mother confronted Dixon, and Dixon replied, "It's not my fault your 12-year-old daughter was staring at me." (Trial Tr., p.83, L.25 – p.84, L.10.) After he was arrested and placed in a patrol car, Dixon kicked out the rear left window of the vehicle. (Trial Tr., p.216, L.25 – p.219, L.12.) Later at the jail, an officer found a marijuana pipe on Dixon's person. (Trial Tr., p.262, L.6 – p.267, L.18.)

The state charged Dixon with first-degree kidnapping, lewd conduct with a child under 16, misdemeanor possession of drug paraphernalia, and misdemeanor injury to property. See State v. Dixon, 2007 Unpublished Opinion No. 494, Docket No. 33384 (Idaho App., June 26, 2007). After a trial, at which K.G. and the two bystanders testified and identified Dixon as the attacker (Trial Tr., p.57, Ls.9-12; p.102, L.19 – p.103, L.5; p.120, Ls.13-21), a jury found Dixon

guilty of all charges (Trial Tr., p.398, L.12 – p.399, L.2). The district court imposed concurrent sentences of 25 years, with 10 years fixed, for the lewd conduct and kidnapping charges, and concurrent six-month sentences for each of the two misdemeanors. (Trial Tr., p.463, Ls.2-8.) On direct appeal, Dixon alleged only that his sentences were excessive. Dixon, 2007 Unpublished Opinion No. 494. The Idaho Court of Appeals affirmed the district court's sentences. Id.

Dixon then filed a petition for post-conviction relief, alleging that his trial counsel was ineffective in numerous respects, including for failing to object to the jury trial being held in the courtroom at the Kootenai County Public Safety Building (a building which also contains the county jail), and for failing to present physical evidence and/or expert testimony regarding an injury to Dixon's arm - an injury which, Dixon asserts, rendered him incapable of committing kidnapping and lewd conduct in the manner alleged by the state. (#39745 R., pp.1-5, 47-50; 2/11/11 "Post Trial Briefing in Support of [Dixon's] Claim Of Post-Conviction Relief" (augmentation[2]).) After an evidentiary hearing, the district court denied Dixon's petition. (#39745 R., pp.103-112; 12/10/10 Tr.) Dixon filed an untimely notice of appeal from the district court's denial of his post-conviction petition, and the Idaho Supreme Court dismissed his appeal. (#39745 R., pp.117-121.)

Dixon then filed an I.R.C.P. 60(b) motion for relief from the district court's order denying post-conviction relief. (10/5/11 motion (augmentation).) The

[2] The Idaho Supreme Court granted Dixon's motion to augment the appellate record with his post-evidentiary hearing briefing, his I.R.C.P. 60(b) motion, and an affidavit submitted in support of that motion. (11/14/13 Order.)

motion was supported by an affidavit from a physical therapist who reviewed Dixon's medical records and opined that at the time of his arrest, Dixon "could not physically have lifted anything moderate/medium weight with his left upper extremity." (1/17/12 Affidavit (augmentation).) The district court denied Dixon's motion. (#40761 R., p.15.) Dixon timely appealed. (#40761 R., pp.17-21.)

Dixon next filed a successive petition for post-conviction relief, in which he asserted that his post-conviction counsel was ineffective for failing to file a timely notice of appeal from the district court's denial of his petition. (See #40761 R., pp.25-26, 48.) The district court granted relief and re-entered its judgment denying Dixon's post-conviction petition, which allowed Dixon to file a timely appeal. (#40761 R., p.49, 71-72.)

The Idaho Supreme Court consolidated Case No. 39745, in which Dixon appealed the district court's denial of his post-conviction petition, with Case No. 40761, in which Dixon appealed the district court's denial of his I.R.C.P. 60(b) motion. (9/23/13 Order.) The clerks' records from both cases are part of the consolidated appellate record.

ISSUES

Dixon states the issues on appeal as:

1. Did the district court err in denying Mr. Dixon's petition for post-conviction relief because he established that he received ineffective assistance of counsel?

2. Did the district court abuse its discretion in denying Mr. Dixon's motion for relief from judgment?

(Appellant's brief, p.5)

The state rephrases the issues on appeal as:

1. Has Dixon failed to show that the district court erred in denying, after an evidentiary hearing, his post-conviction claim that his trial counsel was ineffective for failing to object to the location of the jury trial?

2. Has Dixon failed to show that the district court erred in denying, after an evidentiary hearing, his post-conviction claim that his trial counsel was ineffective for failing to present physical evidence and/or expert testimony regarding an injury to Dixon's arm?

3. Has Dixon failed to show that the district court abused its discretion in denying Dixon's I.R.C.P. 60(b) motion?

ARGUMENT

I.
Dixon Has Failed To Show That The District Court Erred In Denying, After An Evidentiary Hearing, His Post-Conviction Claim That His Trial Counsel Was Ineffective For Failing To Object To The Location Of The Jury Trial

A. Introduction

Dixon contends that the district court erred in denying his post-conviction claim that his trial counsel was ineffective for failing to object to the jury trial being held in a courtroom at the Kootenai County Public Safety Building, a building in which there is also a county jail. (Appellant's brief, pp.7-17.) Dixon has failed to show that his trial counsel was ineffective for failing to challenge the constitutionality of a commonly-utilized trial venue, where no controlling Idaho authority had rendered such a venue unconstitutional, and where authorities in other jurisdictions have split on the question whether such a venue is constitutionally permissible.

B. Standard Of Review

A petitioner for post-conviction relief has the burden of proving, by a preponderance of the evidence, the allegations on which his claim is based. I.C.R. 57(c); Estes v. State, 111 Idaho 430, 436, 725 P.2d 135, 141 (1986). A trial court's decision that the petitioner has not met his burden of proof is entitled to great weight. Sanders v. State, 117 Idaho 939, 940, 792 P.2d 964, 965 (Ct. App. 1990). Where the district court conducts a hearing and enters findings of fact and conclusions of law, an appellate court will disturb the findings of fact only if they are clearly erroneous, but will freely review the conclusions of law drawn by

the district court from those facts. Mitchell v. State, 132 Idaho 274, 276-77, 971 P.2d 727, 729-730 (1998). The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. Peterson v. State, 139 Idaho 95, 97, 73 P.3d 108, 110 (Ct. App. 2003).

C. Dixon Failed To Meet His Burden Of Proving Ineffective Assistance Of Counsel

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). "[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." Baldwin v. State, 145 Idaho 148, 153-54, 177 P.3d 362, 367-68 (2008).

To establish prejudice, a defendant 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). Bare assertions and speculation, unsupported by specific facts, do not make out a *prima facie* case for ineffective assistance of counsel. Roman v. State, 125 Idaho 644, 649, 873 P.2d 898, 903 (Ct. App. 1994).

In a post-conviction proceeding challenging an attorney's failure to pursue a motion in the underlying criminal action, the district court may consider the probability of success of the motion in question in determining whether the attorney's inactivity constituted incompetent performance. Boman v. State, 129 Idaho 520, 526, 927 P.2d 910, 916 (Ct. App. 1996). Where the alleged deficiency 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. Id.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a...public trial, by an impartial jury." The presumption of innocence is a basic component of a fair trial. Estelle v. Williams, 425 U.S. 501, 503 (1976). Practices such as shackling a defendant or requiring him wear prison garb during a jury trial have been held to pose such a threat to the "fairness of the factfinding process" that they must be subjected to "close judicial scrutiny." See id.; Holbrook v. Flynn, 475 U.S. 560, 568-569 (1986).

A few appellate courts have expanded upon these concepts and held that that a trial in a courtroom inside of a jail or prison is inherently prejudicial, and

generally violative of a defendant's constitutional due process rights. [3] Washington v. Jaime, 233 P.3d 554 (Wash. 2010) (jury trial conducted "in a courtroom located in the county jail across the street from the county courthouse" was inherently prejudicial); see also State v. Lane, 397 N.E.2d 1338 (Ohio 1979) (defendant's constitutional right to a fair trial violated where jury trial conducted in an improvised courtroom within a prison); State v. Cavan, 98 P.3d 381 (Or. 2004) (jury trial conducted within a prison was inherently prejudicial). However, other jurisdictions have held that jury trials conducted in buildings that also contain jails or prisons are not categorically prejudicial or unconstitutional. State v. Kell, 61 P.3d 1019, 1026-1027 (Utah 2002) (jury trial conducted within a prison is not inherently prejudicial, and instead, a case-by-case analysis is required); Howard v. Commonwealth, 367 S.E.2d 527, 532 (Va. Ct. App. 1988) (jury trial conducted in an administration building adjacent to prison, as opposed to prison itself, "was not inherently prejudicial"); see also People v. England, 100 Cal.Rptr.2d 63 (Cal. Ct. App. 2000) (jury trial conducted on prison grounds, but outside actual prison

[3] Other authorities have analyzed the question of whether a trial held within a correctional facility violates a defendant's right to a *public* trial. See Bright v. State, 875 P.2d 100, 109 (Alaska App. 1994); Vescusco v. Commonwealth, 360 S.E.2d 547 (Va. App. 1987). While Dixon references this right to a public trial, and cites these cases in his Appellant's brief, he did not raise this issue before the district court in the course of the post-conviction proceedings. (See #39745 R., pp.47-50; "Post Trial Briefing in Support [of Dixon's] Claim of Post-Conviction Relief (augmentation).) This Court should therefore not consider this argument because Dixon failed to preserve it. State v. Fodge, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992) ("The longstanding rule of this Court is that we will not consider issues that are presented for the first time on appeal.") In any event, the record indicates that Dixon's jury trial was open to the public. (See 12/10/10 Tr., p.53, Ls.18-25.)

wires in facility to which jurors could drive directly, did not violate defendant's right to a fair trial).

Dixon's jury trial was held in a courtroom in the Kootenai County Public Safety Building, a building which also houses the Kootenai County Jail. (#39745 R., p.88.) There have been numerous trials conducted in this courtroom, and as far as the district court was aware, there has never been an objection made to a trial being held there. (#39745 R., p.90.) Aside from the unsworn statements from Dixon's post-evidentiary briefing, the record does not contain significant information regarding the organization and layout of the Kootenai County Public Safety Building, and the courtroom and jail contained within. Therefore, there was no basis by which the court could conclude that the location of Dixon's trial contained the same hallmarks of prejudice that were evident in Jaime, Lane, and Cavan, and that the Kootenai County Public Safety Building courtroom was not instead more similar to the constitutionally permissible jury trial venues of Kell, Howard, and England.[4]

At the time of Dixon's trial, as is still the case currently, there was no controlling Idaho authority concerning the constitutionality of criminal jury trials being held in buildings which also contain jails or prisons. As discussed above, even though there is support for the proposition that a jury trial conducted in a courtroom inside of a jail or prison may violate due process rights, Dixon has

[4] Of course, it is likely the district court was personally familiar with the Kootenai County Public Safety Building courtroom, having presided over numerous jury trials there. (#39745 R., p.90.)

failed to show that trials within public buildings that contain both jails and courtrooms necessarily violate the constitution.

In denying Dixon's post-conviction petition, the district court properly concluded that in light of the unclear state of the law on this issue, Dixon failed to demonstrate that his attorney's decision not to challenge the trial venue constituted performance that fell below an objective standard of reasonableness. (#39745 R., pp.88-92.) The Sixth Amendment did not require Dixon's attorney to blaze new trails and pursue a motion on a novel issue that had not been decided by the Idaho appellate courts, particularly where the issue involved a trial venue that had been utilized with some regularity, without objection, in Kootenai County. If Dixon's counsel was constitutionally ineffective for failing to raise an objection, then every other defense attorney who represented a client in that courtroom was ineffective as well. Further, Washington v. Jaime, the only case cited by Dixon in his briefing below with regard to this issue, could not have been known to Dixon's attorney because it was published four years after Dixon's trial.

Additionally, Dixon has failed to demonstrate prejudice that resulted from any deficiency. As the district court concluded, any motion to change the jury trial venue would have been denied. (#39745 R., pp.105-106.) In making this determination, the district court was persuaded by two dissenting opinions in Washington v. Jaime. (Id.) In that case, one of the dissenting opinions reasoned:

> According to the majority, James Frank Jaime's due process right to the presumption of innocence was violated when his trial was held in a permanent courtroom in the county jail building (jail building courtroom). I cannot agree. I would hold that the practice of

> conducting trials in a jail building courtroom is not inherently prejudicial, and I would uphold Jaime's conviction for second degree murder.
>
> To reach today's holding, the majority first relies on cases involving shackles and prison garb. While there is no doubt that it is inherently prejudicial to shackle a defendant during trial, or force a defendant to wear prison garb during trial, conducting a trial in a permanent courtroom in the jail building does not raise the same constitutional concerns. Shackling can be of such a physical restraint as to deprive a defendant of the right to appear and defend himself or herself. Shackling is also a very visible restraint that indicates to the jury the defendant is so dangerous as to not be trusted even by the judge. Similarly, a defendant who is forced to wear prison garb is distinctly marked as a dangerous or guilty person.
>
> But Jaime's entitlement "to the physical indicia of innocence" is limited; it confers the "right of the defendant to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man," not to choose a particular courtroom. A courtroom is a location, not an accoutrement. Because a courtroom does not serve as an identifier, it does not possess the inherently prejudicial power of a shackle or a prison uniform. While some aspects of a court setting may cause prejudice in certain cases, there simply is no basis to conclude that the practice of conducting trials in a jail building courtroom is always and inherently prejudicial.

Jaime, 233 P.3d at 872-876 (Fairhurst J., dissenting) (footnotes and citations omitted); see also id. at 877-880 (Johnson J., dissenting) ("The majority contradicts the presumption of juror responsibility, intelligence, and honesty when it summarily concludes that 'the average juror would draw a[n] [improper] inference' about a defendant's guilt from the fact that trial was held in a jail courtroom."). Even had Dixon's counsel objected to the jury trial venue, such a motion would have been unsuccessful.

Dixon has failed to show either that his trial counsel was deficient for failing to object to the trial venue, or that he was prejudiced by the lack of such

an objection. This Court should therefore affirm the district court's denial of this claim.

II.
Dixon Has Failed To Show That The District Court Erred In Denying, After An Evidentiary Hearing, His Post-Conviction Claim That His Trial Counsel Was Ineffective For Failing To Present Physical Evidence And/Or Expert Testimony Regarding An Injury To Dixon's Arm

A. Introduction

Dixon contends that the district court erred in denying his post-conviction claim that his trial counsel was ineffective for failing to present physical evidence and/or expert testimony regarding an injury to Dixon's arm. (Appellant's brief, pp.18-21.) Dixon contends that this injury made it impossible for him to commit the charged conduct in the manner alleged by the state. (Id.) However, a review of the record reveals that in the course of the post-conviction proceedings, Dixon failed to present either any physical evidence, or any evidence regarding what any potential expert might have testified to regarding his injury. Because his claim is thus entirely speculative, Dixon has failed to demonstrate either that his counsel was deficient, or that he was prejudiced by any such deficiency.

B. Standard Of Review

A petitioner for post-conviction relief has the burden of proving, by a preponderance of the evidence, the allegations on which his claim is based. I.C.R. 57(c); Estes, 111 Idaho at, 436, 725 P.2d at 141. A trial court's decision that the petitioner has not met his burden of proof is entitled to great weight. Sanders, 117 Idaho at 940, 792 P.2d at 965. Where the district court conducts a

hearing and enters findings of fact and conclusions of law, an appellate court will disturb the findings of fact only if they are clearly erroneous, but will freely review the conclusions of law drawn by the district court from those facts. Mitchell, 132 Idaho at 276-77, 971 P.2d at 729-730. The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. Peterson, 139 Idaho at 97, 73 P.3d at 110.

C. Dixon Failed To Meet His Burden Of Proving Ineffective Assistance Of Counsel

As discussed above, 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, 110 Idaho at 634, 718 P.2d at 286; Davis, 116 Idaho at 406, 775 P.2d at 1248. "[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." Baldwin, 145 Idaho at 153-54, 177 P.3d at 367-68. Trial counsel need not pursue all potential assistance from experts. Harrington v. Richter, ___ U.S. at ___, 131 S.Ct. at 770, 787-90 (2011) (counsel not ineffective for failing to procure forensic blood experts for trial).

In this case, Dixon presented extensive trial testimony about his injury, how he suffered it, and how it impacted him. (Trial Tr., p.294, L.22 – p.300, L.17.) Dixon described, in detail, how he suffered a severe laceration to his left forearm

when some sheet metal fell on him at work. (Trial Tr., p.295, L.5 – p.296, L.8.) He described his rehabilitative efforts and how, by the time of his arrest, his strength had improved and he had begun lifting light weights and playing basketball. (Trial Tr., p.296, L.25 – p.299, L.16.) He also showed his scar to the jury. (Trial Tr., p.299, L.17 – p.300, L.17.)

In the course of the post-conviction proceedings, however, Dixon failed to submit evidence to support his claim that his trial counsel was ineffective for failing to supplement his testimony about his injury with physical and/or expert testimony. At the post-conviction evidentiary hearing, Dixon utilized only three witnesses: himself, his trial attorney, and another attorney who critiqued his trial counsel's performance. (See generally 12/10/10 Tr.) Dixon presented no physical evidence or expert testimony that his counsel supposedly should have introduced at trial. (See generally 12/10/10 Tr.; #39745 R., pp.47-85.) Dixon thus failed to substantiate his claim. See Thomas v. State, 145 Idaho 765, 770-711, 185 P.3d 921, 926-927 (Ct. App. 2008) (holding that where a post-conviction petitioner alleges his trial counsel was ineffective for failing to investigate and call certain witnesses, "[i]t is not enough to allege that a witness would have testified to certain events, or would have rebutted certain statements made at trial, without providing through affidavit, nonhearsay evidence of the substance of the witnesses' testimony" (citation omitted)). Dixon has failed to show that the district court erred by denying his entirely speculative claim of attorney deficiency.

Further, at the evidentiary hearing, Dixon's trial counsel indicated that it was Dixon's decision not to seek the assistance of expert witnesses. Dixon's trial

counsel testified that when she was retained to represent him, Dixon wanted to go to trial as soon as possible. (12/10/10 Tr., p.102, Ls.4-16, p.104, Ls.1-3.) Dixon's counsel testified that she explained to Dixon that it would take time to find and retain expert witnesses, but that Dixon "didn't want to wait." (Id.)

Dixon has also failed to establish that he was prejudiced by any alleged deficiency. Because of the speculative nature of his claim, Dixon failed to demonstrate that his injury was so severe as to disprove the state's allegations. Dixon's own testimony indicated that his condition had significantly improved by the time of his arrest. (Trial Tr., p.294, L.22 – p.300, L.17.) K.G. testified that she weighed only 80 pounds at the time of the incident. (Trial Tr., p.66, L.23 – p.67, L.2.) Further, a firefighter/EMT who actually examined Dixon's left wrist at the scene testified that he did not observe any type of deformity or discoloration that would indicate "some sort of trauma." (Trial Tr., p.251, L.18 – p.252, L.7.)

Additionally, Dixon cannot establish that he was prejudiced by any deficiency in light of the overwhelming evidence of his guilt presented at trial. Dixon was observed to be heavily intoxicated prior to the attack, and was heard expressing his plan to "go get [himself] a 12-year-old." (Trial Tr., p.280, L.5 - p.284, L.25.) K.G. identified Dixon as the attacker, both at the scene immediately after the incident and at trial. (Trial Tr., p.56, L.18 – p.57, L.12; p.60, Ls.9-14; p.201, L.18 – p.203, L.16.) Two bystanders, while not in a position to be able to see the lewd conduct act itself, corroborated much of K.G.'s account of the interaction with Dixon, and were able to identify him. (Trial Tr., p.96, L.14 – p.105, L.2; p.119, L.4 – p.123, L.9.)

Dixon has failed to show either that his trial counsel was deficient for with regard to presenting evidence of his arm injury, or that he was prejudiced by any such deficiency. This Court should therefore affirm the district court's denial of this claim.

III.
Dixon Has Failed To Show That The District Court Abused Its Discretion In Denying Dixon's I.R.C.P. 60(b) Motion

A. Introduction

Dixon contends that the district court abused its discretion by denying his I.R.C.P. 60(b) motion for relief from the court's denial of his post-conviction petition. (Appellant's brief, pp.21-24.) Specifically, Dixon contends that the court erred by not vacating the dismissal order in light of a newly-submitted affidavit from a physical therapist who reviewed Dixon's medical records. (Id.) Dixon's contention fails because his attempt to utilize I.R.C.P. 60(b) to re-assert ineffective assistance of counsel claims that were previously rejected in post-conviction proceedings did not constitute "unique and compelling" circumstances justifying relief.

B. Standard Of Review

"The decision to deny or grant relief pursuant to a Rule 60(b) motion is reviewed on appeal under the abuse of discretion standard." Kirkland v. State, 143 Idaho 544, 547, 149 P.3d 819, 822 (2006) (citing Win of Michigan, Inc. v. Yreka United, Inc., 137 Idaho 747, 753, 53 P.3d 330, 336 (2002)).

C. The District Court Acted Well Within Its Discretion In Denying Dixon's I.R.C.P. 60(b) Motion

Rule 60(b)(6)[5] of the Idaho Rules of Civil Procedure provides for relief "from a final judgment, order, or proceeding" for "any...reason justifying relief from the operating of the judgment." While the language of I.R.C.P. 60(b)(6) is broad, the rule has clearly defined limits. See Hoopes v. Bagley, 117 Idaho 1091, 793 P.2d 1263 (Ct. App. 1990). The party making an I.R.C.P. 60(b)(6) motion must demonstrate "unique and compelling" circumstances justifying relief. Id.; see also Eby v. State, 148 Idaho 731, 736, 228 P.3d 998, 1003 (2010). An I.R.C.P. 60(b)(6) motion cannot be a disguised substitute for a timely appeal. Puphal v. Puphal, 105 Idaho 302, 669 P.2d 191 (1983).

Dixon testified at his I.R.C.P. 60(b)(6) hearing and repeated much of his trial testimony regarding the cause and nature of his arm injury. (#40761 R., pp.12-13.[6]) He also submitted an affidavit from a physical therapist who did not actually examine Dixon, but reviewed his medical records and concluded that at the time of the attack, Dixon "could not physically have lifted anything moderate/medium weight with his left upper extremity." (#40761 R., p.13; 1/17/12 Affidavit (agumentation).) Dixon argued that his trial attorney "dropped the ball" by not presenting such medical evidence at the trial. (#40761 R., p.13.)

[5] Dixon also brought his motion pursuant to I.R.C.P. 60(b)(1) and (2). (10/5/11 Motion (augmentation).) However, Dixon has pursued only the I.R.C.P. 60(b)(6) component of his motion on appeal. (See Appellant's brief, pp.21-24.)

[6] The appellate record appears to contain the minutes (#40761 R., pp.2-14), but not a transcript, of the hearing on Dixon's I.R.C.P. 60(b)(6) motion. Missing portions of the record must be presumed to support the action of the trial court. State v. Mowery, 128 Idaho 804, 805, 919 P.2d 333 (1996); State v. Beck, 128 Idaho 416, 422, 913 P.2d 1186 (Ct. App. 1996).

Thus, in making his I.R.C.P. 60(b)(6) motion, Dixon simply provided additional argument and evidence for the claim made in his petition for post-conviction relief regarding his trial counsel's alleged ineffectiveness. Dixon's attempt to re-assert his ineffective assistance of counsel claim does not constitute "unique and compelling" circumstances justifying relief. If Dixon believes that his post-conviction counsel inadequately raised his ineffective assistance of trial counsel claims, he should have attempted to re-assert the claim in another successive petition. See I.C. § 19-4908 (providing that a district court may permit an individual to raise a claim in a successive post-conviction petition if the claim was "inadequately raised" in a prior petition).

On appeal, Dixon relies on Eby v. State, in which the Idaho Supreme Court held that a series of attorneys' collective failure to advance a petitioner's post-conviction proceeding over the course of several years, ultimately resulting in the court's dismissal of the petition, may constitute "unique and compelling" circumstances warranting relief from the dismissal pursuant to I.R.C.P. 60(b)(6). Eby, 148 Idaho at 736-738, 228 P.3d at 1003-1005. However, Eby has no application to the present case. Unlike Eby, Dixon had the opportunity, through counsel, to present his post-conviction claims to the district court. Eby did not transform I.R.C.P. 60(b)(6) into an avenue for individuals to pursue ordinary ineffective assistance of trial counsel claims that have already been rejected in post-conviction proceedings.

Dixon also appears to assert, for the first time on appeal, that the district court should have granted his I.R.C.P. 60(b)(6) motion on the ground that his

post-conviction counsel was ineffective. (Appellant's brief, pp.21-24.) However, Dixon did not make this argument to the district court in the course of pursuing I.R.C.P. 60(b)(6) relief. (See #40761 R., p.12-14; 10/5/11 Motion (augmentation).) This Court should not consider this argument because Dixon failed to preserve it. Fodge, 121 Idaho at 195, 824 P.2d at 126. ("The longstanding rule of this Court is that we will not consider issues that are presented for the first time on appeal."). In any event, the state asserts that assertions that post-conviction counsel inadequately raised a claim cannot generally constitute "unique and compelling" circumstances warranting I.R.C.P. 60(b)(6) relief.

Because he presented no "unique and compelling" circumstances to the district court which necessitated I.R.C.P. 60(b)(6) relief, Dixon has failed to show that the district court abused its discretion in denying his I.R.C.P. 60(b)(6) motion. This Court should therefore affirm the district court's decision.

CONCLUSION

The state respectfully requests that this Court affirm the district court's denial of Dixon's petition for post-conviction relief, and its denial of his I.R.C.P. 60(b)(6) motion.

DATED this 4th day of February, 2014

MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this the 4th day of February, 2014, I served a true and correct copy of the attached RESPONDENT'S BRIEF by causing a copy to be mailed to:

Robyn Fyfe
NEVIN, BENJAMIN, McKAY & BARTLETT
303 West Bannock
P.O. Box 2772
Boise, ID 83701

MARK W. OLSON
Deputy Attorney General

MWO/pm