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IN THE SUPREME COURT OF THE STATE OF IDAHO

BRANDON RITCHIE,)
) No. 45575
Petitioner-Appellant,)
) Ada County Case No.
v.) CV01-2017-7612
)
STATE OF IDAHO,)
)
Defendant-Respondent.)
_____)

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 SAMUEL A. HOAGLAND
District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Brandon Ritchie appeals, *pro se*, from the district court's order denying his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

The district court set forth the relevant factual and procedural background of this case, as follows:

[Ritchie's] Petition for Post-Conviction Relief relates to the sentences imposed in Ada County Case Numbers CR-FE-2015-15946 and CR-FE-2015-13886. In case -15946, Petitioner was charged with one count of grand theft (I.C. § 18-2403) and one count of criminal possession of a financial transaction card (I.C. § 18-3125). In case -13886, Petitioner was charged with two counts of burglary (I.C. § 18-1401) and two counts of petit theft (I.C. § 18-2403). On December 23, 2015, in case -15946, Petitioner pled guilty to one count of grand theft and the remaining charge was dismissed pursuant to plea bargain negotiations. On December 31, 2015, in case -13886, Petitioner pled guilty to one count of burglary and the remaining charges were dismissed pursuant to plea bargain negotiations. Petitioner signed written guilty plea advisory forms in both cases. Both cases were consolidated with this Court prior to sentencing.

On February 25, 2016, in case -15946, Petitioner was sentenced to 10 years with the first two years fixed and the remaining eight years indeterminate. Also on February 25, 2016, in case -13886, Petitioner was sentenced to 10 years with the first three years fixed and the remaining seven years indeterminate, set to run consecutive to the sentence imposed in case -15946. The Judgments of Conviction and Commitment were both filed on February 26, 2016. On April 6, 2016, Petitioner filed Rule 35 Motions for Reconsideration of Sentence in both cases. The Rule 35 Motions were denied on April 20, 2016. Petitioner did not file any appeals in either case.

Thereafter, Petitioner filed the instant Petition for Post-Conviction Relief on April 24, 2017, alleging ineffective assistance of counsel for not ensuring the Court sentenced Petitioner to concurrent sentences and for misinforming Petitioner that he could only pursue a Rule 35 Motion or a direct appeal, but not both.

(R., pp.27-28.) Contemporaneous with his petition (R., pp.4-10), Ritchie filed a motion for appointment of counsel (R., pp.19-20).

The district court denied Ritchie’s motion for the appointment of counsel, as it found Ritchie’s claims could not be “developed into viability even with the assistance of counsel.” (R., p.28.) The district court also issued its notice of intent to dismiss Ritchie’s petition, finding that Ritchie’s claims were frivolous, and that “as presently constituted, this Petition raises no genuine issues of material fact.” (R., p.28.) The court further found that because the petition was filed on April 24, 2017—more than a year after the expiration of time for appeals in the underlying cases—the petition was time-barred under Idaho Code § 19-4902(a). (R., p.28.) The district court accordingly gave Ritchie “20 days to supply a brief or further supporting affidavit reciting why he believes his Petition is not barred by the statute of limitations,” and warning that without such a response, “the Court will dismiss the Petition without further notice.” (R., pp.28-29 (emphasis in original).)

Ritchie responded with a “Brief in Opposition of Court’s Notice to Dismiss & Denial of Appointment of Counsel.” (R., pp.31-32.) Regarding the statute of limitations, Ritchie argued his petition was timely because “[o]n April 6, 2016, petitioner filed a ‘Rule 35 Motion’ on both cases asking the court to reconsider.” (R., p.31.) Ritchie appeared to argue the Rule 35 motions stayed or otherwise extended the statute of limitations, and his petition was therefore timely. (See R., p.31.) Regarding the substance of his claims, Ritchie contended that they were not frivolous because “[t]he facts which are supported by the petitioner[’]s affidavit, leave[] a question of fact that only a jury can decide.” (R., pp.31-32.) Ritchie further argued that “[t]he State of Idaho

also violated the post-conviction reform act, as they failed to respond [to the petition] within 20 days as required by law.” (R., p.32.)

The district court dismissed the petition. (R., pp.33-44.) It noted first that “[t]he Court of Appeals has specifically held that the limitations period for filing an application for post-conviction relief is not extended by the filing of a Rule 35 motion,” and therefore the petition was untimely irrespective of Ritchie’s Rule 35 motions. (R., p.38 (citing Hanks v. State, 121 Idaho 153, 155, 823 P.2d 187, 189 (Ct. App. 1992).) The district court went on to find that “[e]ven if the Petition were not untimely, Petitioner’s claims fail to raise a genuine issue of material fact that would entitle him to an evidentiary hearing.” (R., p.39.) The court noted Ritchie’s guilty plea, and found the petition “recited no factual allegations and supplied no evidence that the advice to plead guilty was in any way unsound or caused him any prejudice.” (R., p.40.) The court found that “[t]here are no genuine disputes of fact concerning (at a minimum) the prejudice prong of *Strickland v. Washington*¹,” all of which necessitated a dismissal. (R., p.40 (footnote added).)

Lastly, the district court noted that “[t]he law is well settled that the State’s failure to file an answer or otherwise respond to a Petitioner’s Petition does not automatically entitle the Petitioner to relief.” (R., p.41 (citing State v. Beorchia, 135 Idaho 875, 879, 26 P.3d 603, 607 (Ct. App. 2001).) The court found that because it “framed the factual and legal issues” in its notice “and gave the Petitioner the opportunity to respond ... the timeliness of the State’s response is rendered moot.” (R., p.41.) The court concluded

¹ Strickland v. Washington, 466 U.S. 668 (1984).

there were “no genuine issues of material fact” entitling Ritchie to post-conviction relief, and dismissed the petition with prejudice. (R., pp.41, 43.)

Ritchie filed a motion for reconsideration. (R., pp.45-56.) In it, he “propose[d] another excuse” for considering his petition timely: Ritchie averred that he filed a petition for a writ of habeas corpus on June 24, 2016; that “[t]he Court could have considered the Petition for Writ of Habeas Corpus as a Petition for Post-Conviction Relief but declined to do so”; and that, “[i]f the Court would’ve considered it as such, the Petition would’ve thereby been filed timely.” (R., pp.47-48.) Ritchie also renewed his claim that counsel was ineffective, and requested leave to amend his petition and “provide more concise details and physical evidence to support this claim.” (R., p.50.)

The district court entered an order denying Ritchie’s motion for reconsideration. (R., pp.57-61.) Regarding timeliness, and the alleged effect of a habeas corpus filing on this case, the district court pointed out that “[t]his Court did not preside over any habeas corpus proceeding.” (R., p.59.) Moreover, “[Ritchie’s] argument that the present Petition should be deemed timely filed by virtue of a habeas corpus proceeding fail[s] and ignorance of the law is no excuse for an untimely petition.” (R., p.59.)

The district court also found Ritchie’s petition continued to fail on the merits:

Petitioner next asserts that the Court should allow him the opportunity to amend [his] Petition to allege the following non-frivolous claims—his counsel was ineffective for failing to inform him of his constitutional due process rights, his counsel misinformed him as to his appeal options and as a result Petitioner was under the impression that a Rule 35 motion would stay proceedings, [and] his counsel should have filed a direct appeal.

Petitioner’s claims are bare and conclusory and are clearly contradicted by the record of the proceedings in the underlying matters. Even if the Petition were not untimely, Petitioner is not entitled to relief on any of his claims. Petitioner’s assertions are contradicted by the Guilty Plea

Advisory Forms he signed under oath. He was advised at length of his constitutional rights and he knowingly, voluntarily, and intelligently waived those rights when he pled guilty. Petitioner's complaints relate to the length of the sentence he received (consecutive as opposed to concurrent), rather than the conduct of his lawyer. Petitioner has recited no factual allegations and supplied no evidence that the advice to plead guilty was in any way unsound or caused him any prejudice, given the extensive benefits provided to him through the plea bargain balanced against the considerable risk of proceeding to trial. There are no genuine disputes of fact concerning (at a minimum) the prejudice prong of *Strickland v. Washington*. Accordingly, the Court did not err in dismissing his Petition. Therefore, Petitioner's Motion for Reconsideration is DENIED.

(R., pp.59-60.)

Ritchie timely appealed from the judgment dismissing his petition.² (R., pp.62-64.)

² At first glance, Ritchie's November 14, 2017 notice of appeal does not appear timely from the district court's August 28 order and judgment dismissing the petition. (R., p.3.) However, based on the mailbox rule, it appears that Ritchie's motion for reconsideration was mailed on August 22, within 14 days of the judgment (despite its file-stamp date of August 30) (R., pp.45, 55-56), which would have extended the time for Ritchie to file his notice of appeal. See *State v. Yeaton*, 121 Idaho 1018, 1019, 829 P.2d 1367, 1368 (Ct. App. 1992) ("Idaho Appellate Rule 14 provides that the time for appeal from a 'criminal judgment, order or sentence' can be extended by the filing of a motion within fourteen days of the judgment.")

ISSUE

Ritchie's opening brief does not contain a "short and concise" statement of the issues on appeal, as required by I.A.R. 35(a)(4). (See generally "Brief" (hereinafter "Appellant's brief").) The state phrases the issue on appeal as:

Has Ritchie failed to show the district court erred in denying his meritless, untimely motion for post-conviction relief?

ARGUMENT

Ritchie Fails To Show The District Court Erred By Dismissing His Untimely, Meritless Petition For Post-Conviction Relief

A. Introduction

Ritchie appeals from the district court's judgment dismissing his petition for post-conviction relief. As best can be gathered, he appears to raise three³ essential issues before this Court: 1) claims of ineffective assistance of counsel in relation to his guilty plea and his Rule 35 motion in the underlying criminal case; 2) a claim that the state violated his due process rights by not responding to his petition for post-conviction relief; and 3) a claim that his petition was timely filed. (See Appellant's brief, pp.1-2.)

Ritchie fails to show any error. The district court correctly dismissed Ritchie's petition for post-conviction relief because it was untimely, and in any event, meritless.

B. Standard Of Review

Summary dismissal is appropriate where the petitioner's evidence raises no genuine issue of material fact. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007). On review of a summary dismissal of a post-conviction petition, "this Court will determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file and will liberally construe the facts and reasonable inferences in favor of the non-moving party." Id. at 523, 164 P.3d at 803.

³ These claims are set forth as issues 1, 3, and 4 in the Appellant's brief, respectively. (See Appellant's brief, pp.1-2.) It is difficult to discern the precise claims in Ritchie's issue 2; however, it appears that issue 2 raises similar claims of ineffective assistance. This brief will therefore analyze Ritchie's issues 1 and 2 as encompassing his ineffective assistance of counsel claims on appeal.

C. Ritchie’s Petition For Post-Conviction Relief Was Plainly Untimely And Therefore Properly Dismissed

Petitions for post-conviction relief must be filed “within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal, whichever is later.” I.C. § 19-4902(a). Idaho Criminal Rule 35 motions—unless filed within fourteen days of the entry of judgment—do not stay or otherwise extend the time period for filing an application for post-conviction relief. See Hanks v. State, 121 Idaho 153, 154-55, 823 P.2d 187, 188-89 (Ct. App. 1992) (“It would be contrary to the legislative intent of I.C. § 19-4902 to set a definite time limit upon challenges to convictions and sentences were we to allow the limitation period to be extended by the filing of a Rule 35 motion, when the denial of a Rule 35 motion is not itself reviewable under the Uniform Post-conviction Procedure Act.” (footnote omitted)).

The district court correctly dismissed Ritchie’s petition for being untimely. (R., pp. 38-39, 59.) In Ritchie’s underlying case, the judgments of conviction were filed on February 26, 2016.⁴ (R., p.39.) Ritchie had 42 days—until April 8, 2016—to file an appeal from those judgments. I.A.R. 14(a). Thereafter, Ritchie had another year—until April 8, 2017—to file his petition for post-conviction relief. I.C. § 19-4902(a). Ritchie

⁴ It appears that Ritchie’s underlying criminal cases are not part of the record of this case on appeal. (See R., p.63 (requesting this Court include in the record or take notice of the Clerk’s Record in CV-HC-2016-11611, an apparent state habeas corpus case, but not making any such request regarding the underlying criminal cases).) However, the facts necessary to resolve the issues in this appeal—including the date of the entry of judgments—are set forth in the district court’s orders in this case. (See, e.g., R., pp.27-28.) Regarding the timeliness claim, Ritchie has not contested the district court’s dispositive factual findings: that the judgments were entered on February 26, 2016, and that he filed his petition on April 24, 2017. (R., p.34; see generally, Appellant’s brief.)

did not file his petition until April 24, 2017, 16 days past the statute of limitations. (R., p.4.) His petition was therefore clearly time-barred and subject to dismissal for that reason alone, as the district court correctly concluded.

To date, Ritchie has not overcome the statute of limitations that barred the filing of his petition. Below, he alleged that the filing of Rule 35 motions would stay or otherwise extend his deadline, but per Hanks, this is incorrect. 121 Idaho at 155, 823 P.2d at 189 (refusing “to allow the limitation period [for filing a petition for post-conviction relief] to be extended by the filing of a Rule 35 motion”). Ritchie’s other theory below—that “the Court could have considered the Petition for Writ of Habeas Corpus,” filed in a *separate* proceeding, as a stand-in for a timely petition in *this* proceeding—was unsupported by any legal authority and properly rejected. (R., pp.48, 59.)

On appeal, Ritchie contends that “the district court was in error by dismissing” the petition on timeliness grounds, but continues to fail to support this argument with any argument or authority. (Appellant’s brief, p.2.) This Court holds *pro se* litigants “to the same standards and rules as those represented by an attorney,” Golay v. Loomis, 118 Idaho 387, 392, 797 P.2d 95, 100 (1990), and those standards require appellants to support their claims with coherent argument and authority. State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996). Ritchie has not supported his timeliness claim with any authority, much less shown that the district court “was in error.” (Appellant’s brief, p.2.)

The district court was not in error. Ritchie’s petition was untimely. The district court properly dismissed it for that reason.

D. Even If Timely Filed, Ritchie’s Petition Failed To State A Viable Claim Of Ineffective Assistance Of Counsel

Idaho’s Uniform Post-Conviction Procedure Act authorizes summary dismissal of a petition for post-conviction relief, either pursuant to a motion by a party or upon the court’s own initiative, “when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” I.C. § 19-4906. A district court considering summary dismissal must construe disputed facts in the petitioner’s favor, but it is not required to accept conclusory allegations, unsupported by admissible evidence, or the petitioner’s conclusions of law. Roman v. State, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); Baruth v. Gardner, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986).

To show a valid claim of ineffective assistance of counsel, a defendant must satisfy a two-prong test and show both that 1) “counsel’s representation fell below an objective standard of reasonableness,” and 2) “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Strickland v. Washington, 466 U.S. 668, 687-95 (1984). A reviewing court’s “scrutiny of counsel’s performance must be highly deferential”; therefore, “a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” Id. at 689. Accordingly, counsel’s tactical and strategic 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.” Howard v. State, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

Ritchie’s petition alleged his counsel gave ineffective assistance of counsel in two essential ways: by “not holding the [sentencing] Court to the agreed plea agreement,” and by “lying to the petitioner” regarding the filing of a Rule 35 motion and/or appeal. (R., p.5.) The only alleged facts in the record to support these claims are found in Ritchie’s affidavit in support of his petition:

- 3) Ada County public defender, Charlene W. Davis lied to me as I plead [sic] guilty to all counts as I was promised they would be ran concurrent,
- 4) Charlene W. Davis, told me that I either could do a rule 35 or Appeal, but not both....

(R., p.9.)

Even if Ritchie’s petition had been timely, the district court correctly dismissed Ritchie’s claims for failing to raise a genuine issue of material fact showing ineffective assistance of counsel. (See R., pp.39-40, 60.) Construing disputed facts in Ritchie’s favor, Ritchie’s claims were nevertheless “bare and conclusory,” as the district court found. In particular, claims that Ritchie’s attorney “lied” to him simply assumed a conclusion—even granting the attorney made “promises” about sentencing outcomes, or gave advice about post-plea options, does not mean the attorney was *lying* about eventual outcomes or available procedures, as opposed to just being incorrect.

Moreover, the district court relied on ample findings that contradicted Ritchie’s claims of ineffective assistance surrounding the plea: it found that Ritchie “freely and voluntarily” completed the Guilty Plea Advisory form; that he “knowingly, voluntarily, and intelligently” waived certain constitutional rights “when he pled guilty”; and that

“Petitioner has recited no factual allegations and supplied no evidence that the advice to plead guilty was in any way unsound or caused him any prejudice, given the extensive benefits provided to him through the plea bargain balanced against the considerable risk of proceeding to trial.” (R., p.60.) As such, the district court found, “[t]here are no genuine disputes of fact concerning (at a minimum) the prejudice prong of *Strickland v. Washington*.” (R., pp.40, 60.)

On appeal, Ritchie fails to show the district court’s factual findings or legal conclusions were erroneous. He renews his conclusory claim that he “was led to believe that he was only allowed to put in a rule 35 OR an appeal when he was sentenced.” (Appellant’s brief, p.1.) However, Ritchie does not go on to allege, much less show, that his counsel’s representation fell below an objective standard of reasonableness, or that “there is a reasonable probability that, but for” the alleged errors, the result of the proceeding would have been different. (See generally, Appellant’s brief.) Nor does he overcome the “highly deferential” standard of review, which requires reviewing courts indulge a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” (See generally, Appellant’s brief.)

Similarly, while Ritchie claims that his “[defense] attorney allowed the district court to breach a written contract,” he does not state what the attorney did, or what the contract said, or what the breach, exactly, was. (See Appellant’s brief, p.1.) This claim therefore fails for lack of support. Zichko, 129 Idaho at 263, 923 P.2d at 970.

Finally, Ritchie claims that “[i]f the defendant would have had proper assistance of counsel, he would have filed the appeals that were legally allotted to him.” (Appellant’s brief, p.1.) Even construing this vague claim in a light most favorable to

Ritchie—as alleging that counsel ignored or otherwise thwarted an attempt to file an appeal—this claim nevertheless fails under the relevant legal standard set forth in Roe v. Flores-Ortega, 528 U.S. 470, 477-80 (2000) (holding counsel “has a constitutionally imposed duty to consult with the defendant about an appeal” where there was reason to think a defendant would want an appeal, or where the defendant indicated to counsel he was interested in appealing). Here, Ritchie has not alleged facts showing that he asked his attorney to file an appeal, or expressed an interest in appealing to his attorney, or that his attorney otherwise should have known that he wished to file an appeal. (See R., p.9.) Thus, even charitably construing this as a Flores-Ortega claim, Ritchie has failed to show a viable claim on the merits.

Reviewing the entirety of the record, the district court correctly concluded that Ritchie failed to show ineffective assistance of counsel. Ritchie fails to show any error on appeal.

E. Ritchie Fails To Show The State Violated His Due Process Rights By Not Responding To His Petition

With no citation to authority, Ritchie argues that the state “failed to respond to the defendant[’]s petition for post conviction [relief], which is a violation of the defendant’s due process rights.” (Appellant’s brief, p.2.)

This claim fails from the outset because Ritchie has not supported it with any propositions of law, authority, or argument. Zichko, 129 Idaho at 263, 923 P.2d at 970. It also fails because Ritchie makes no attempt to explain how the district’s court denial of this claim below (see R., p.41) was erroneous. Stewart v. Sun Valley Co., 140 Idaho 381, 384, 94 P.3d 686, 689 (2004) (“Error is never presumed on appeal and the burden of

showing it is on the party alleging it.” (quotations omitted)); Farrell v. Board of Com’rs, Lemhi County, 138 Idaho 378, 390, 64 P.3d 304, 316 (2002) (appellant carries burden of showing error on record and error never presumed). Lastly, this claim fails on the merits; the state is unaware of any controlling authority holding that the state’s failure to respond to a frivolous post-conviction petition—which was dismissed only *after* the court issued a notice of intent to dismiss—would violate the petitioner’s due process rights. The district court correctly denied this claim.

CONCLUSION

The state respectfully requests this Court affirm the district court’s dismissal of Ritchie’s petition for post-conviction relief.

DATED this 26th day of April, 2018.

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 26th day of April, 2018, served two true and correct paper copies of the foregoing BRIEF OF RESPONDENT by placing the copies in the United States mail, postage prepaid, addressed to:

BRANDON RITCHIE
IDOC #91229
I.S.C.C. – G BLOCK
P. O. BOX 70010
BOISE, ID 83707

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

KDG/dd