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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**Nos. 44849-2017 & 44850-2017**
Plaintiff-Respondent,	)	
	)	**Boise County Case Nos.**
v.	)	**CR-2014-312 & CR-2014-2027**
	)	
MICHAEL S. DAUBER,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BOISE

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STATEMENT OF THE CASE

Nature Of The Case

Michael S. Dauber appeals pro se from his judgment of conviction for second-degree murder in case CR-14-312, and from his judgment of conviction for second-degree murder in case CR-14-2027. Dauber claims the Alford[1] guilty pleas he entered in those cases, now consolidated on appeal, were coerced.

Dauber additionally appeals from the district court's order denying his motion to withdraw his guilty plea in case CR-14-312, claiming the court abused its discretion.

Statement Of The Facts And Course Of The Proceedings

In March of 2014, a grand jury indicted Dauber for the first-degree murder of Steven Kalogerakos. (R. vol. I, pp.33-35[2].) Dauber was also indicted for failure to report a death to law enforcement and for use of a deadly weapon in the commission of a crime. (R. vol. I, pp.33-35.) Dauber entered a not-guilty plea and the case, CR-14-312, was set for trial. (R. vol. I, p.64.)

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[1] North Carolina v. Alford, 400 U.S. 25 (1970).

[2] The state will use the following citations in this brief: "R. vol. I" refers to the 354-page volume that contains the clerk's record in CR-14-312. "R. vol. II" refers to the 213-page volume that contains exhibits and other pleadings relating to CR-14-312. "R. vol. III" refers to the 368-page volume that contains the clerk's record in CR-14-2027. "R. vol. IV" refers to the 405-page volume that contains exhibits and other pleadings relating to CR-14-2027. "2/20/15 Tr." refers to the 76-page transcript of the preliminary hearing that was held in CR-14-2027. "6/14/14 Tr." refers the plea hearing and "10/28/16 Tr." refers to the sentencing hearing, both of which can be found in the 72-page transcript. "PSI vol. IV" refers to the 107-page fourth volume of the presentence investigation. Finally, "10/25/16 Tr." and "10/27/16 Tr." respectively refer to the two hearings on Dauber's motion to withdraw his plea, both of which are found in the 40-page transcript.

Thereafter, in December of 2014, the state filed an information charging Dauber with the first-degree murder of Joshua Reddington. (R. vol. III, pp.98-100.) The state also charged Dauber with use of a deadly weapon in the commission of a crime. (R. vol. III, pp.98-100.) In this new case, CR-14-2027, the state filed a notice of intent to seek the death penalty. (R. vol. III, pp.49-52.) Following a preliminary hearing (R. vol. III, pp.105-22) Dauber was bound over to district court (R. vol. III, pp.94-97, 123). He pleaded not guilty and the case was set for tria. (R. vol. III, p.145.)

In January of 2016, the district court referred the cases to another district court judge "for criminal mediation pursuant to [Idaho] Criminal Rule 18.1." (10/27/16 Tr., p.22, Ls.19-22.) That mediation, which was attended by the state, Dauber, his attorneys from both cases, and the mediating judge, took place "on June 2nd and June 3rd." (10/27/16 Tr., p.22, L.25.)

The mediation was initially unsuccessful. "Judge Ryan advised [the district court] that while the parties had mediated in good faith, they were unable to conclude a successful mediation; however, [Judge Ryan] was hopeful that the parties would keep an open mind and perhaps be open to reopening the mediation." (10/27/16 Tr., p.23, Ls.2-6.) And that was what eventually occurred; the mediation "reengaged" and was ultimately "successful." (10/27/16 Tr., p.23, Ls.7-9.)

The parties entered into a binding Rule 11 plea agreement stating, among other things, that the state would "file an Amended Information charging the Defendant with one count of second degree murder in each case"; Dauber would enter Alford guilty pleas in both cases; both parties would "stipulate that there is factual basis for the plea and ask the Court to take judicial notice of the preliminary hearing and grand jury transcripts as

providing a factual plea"; and "[t]he Court and all parties agree, and ask the Court to agree to bind itself, pursuant to [Idaho Criminal Rule] 11, to run the sentences on the two charges concurrent, which shall have the effect of imposing the maximum possible sentence to seventeen (17) years of confinement fixed and life indeterminate in the penitentiary." (R. vol. I, pp.226-27.)

The district court subsequently informed the parties in chambers "that while agreeing to a binding Rule 11 plea agreement is not the standard or practice of this Court," it "would agree to be bound by the negotiation that had been concluded by the parties." (10/27/16 Tr., p.23, Ls.12-18.) The district court accordingly signed and agreed to the Rule 11 agreement, as did the mediating judge, and the parties. (R. vol. I, p.228; 10/27/16 Tr., p.23, Ls.19-22.)

That same day, Dauber filled out a guilty plea advisory form. (R. vol. I, pp.229-37; R. vol. III, pp.245-52.) In the section asking if "any other promises" had been made to influence his decision to plead guilty, Dauber wrote that "st will not pursue fraud charges associated w/ [Dauber's ex-wife[3]] receiving Δ's VA. benefits." (R. vol. I, p.233; R. vol. III, p.249.) In response to the questions asking "[d]o you understand that no one, including you attorney, can force you to plead guilty in this case," and "[a]re you entering your plea freely and voluntarily," Dauber circled "YES." (R. vol. I, p.237; R. vol. III, p.252.) The form additionally stated "I have answered the questions on pages 1-7 of this Guilty Plea Advisory form truthfully, understand all of the questions and answers herein,

[3] The record alternatively refers to the same individual as Dauber's "ex-wife" and his "wife." For consistency the state will simply refer to Dauber's "ex-wife." Additionally, quotations from Dauber's handwritten pleadings below, and briefing on appeal, will be reproduced with corrected capitalization.

have discussed each question and answer with my attorney, … have completed this form freely and voluntarily," and that "no one has threatened me to do so." (R. vol. I, p.237; R. vol. III, p.252.) Dauber signed and dated the guilty plea advisory form. (R. vol. I, p.237; R. vol. III, p.252.)

Pursuant to the plea agreement, the state filed an amended information in each case, charging Dauber with one count of second-degree murder in each case. (R. vol. I., pp.222-23; R. vol. III, pp.257-59.) The district court and Dauber had a lengthy, comprehensive colloquy in which Dauber affirmed, among other things, that no one "threatened [him] or anyone close to [him]" to secure the plea. (6/14/16 Tr., p.14, Ls.8-10.) The district court accepted Dauber's guilty pleas in both cases, which it found "were made freely and voluntarily," and set the matter for sentencing on October 28, 2016. (6/14/16 Tr., p.21, L.25 – p.23, L.19; R. vol. I, p.241.)

On October 11, 2016, the district court's clerk received a letter from Dauber. (R. vol. I, p.242; R. vol. II[4], p.204; R. vol. III, p.263; 10/27/16 Tr., p.24, L.25 – p.25, L.3.) The district court did not read it at that time, "was not informed of its contents," and returned the original letter and copies to counsel. (10/27/16 Tr., p.25, Ls.4-19; R. vol. I, p.242; R. vol. III, p.263.) That same day, Dauber's counsel met with the district court, to

[4] Volumes II and IV of the clerk's record, as well as the transcripts of the 10/25/16 and 10/27/16 hearings on the plea withdrawal motion, were originally filed under seal with this Court pursuant to the district court's order. (See 10/27/16 Tr., p.39, Ls.7-23.) Dauber, through prior appellate counsel, requested that these items be unsealed "in order for him to pursue the issue he intends to raise on appeal." See Mot. to Unseal Sealed Records and Transcripts and Statement in Support Thereof, p.1. On December 19, 2018, this Court granted that motion.

advise it that "there was some concern that Mr. Dauber wanted to file a motion for leave to withdraw his guilty plea." (10/25/16 Tr., p.2, Ls.6-18.)

On October 13, 2016, Dauber mailed a handwritten "motion to withdraw[] guilty plea" in the CR-14-2027 case. (10/25/16 Tr., p.2, Ls. 19-21; see R. vol. II, pp.205-06.) Because the district court would not "receive motions unless they're filed by counsel," the "motion" was returned to Dauber. (10/25/16 Tr., p.2, Ls.21-23.) Consequently, no motion to withdraw the plea was ever filed in the CR-14-2027 case. (See R. vol. III; 10/27/16 Tr., p.38, Ls.15-17.)

On October 17, 2016, Dauber's counsel filed a motion to withdraw Dauber's guilty plea in case CR-14-312. (R. vol. II, pp.78-80.) Dauber's counsel thereafter filed a memorandum of support (R. vol. II, pp.81-85) and a supplemental memorandum of support (R. vol. II, pp.126-29), which included three attachments: Exhibit A, which was the handwritten letter previously sent to the court on October 11 (R. vol. II, p.204); Exhibit B, which was the "motion" Dauber attempted to file in case CR-14-2027, but which the district court did not accept (R. vol. II, pp.205-06); and Exhibit C, which was "a copy of a … handwritten letter that Mr. Dauber wrote … dated August 21st, 2016 to [counsel in the CR-14-2027 case] regarding his desire to withdraw his guilty plea and the reasons stated in the letter" (10/25/16 Tr., p.4, L.23 – p.5, L.2; R. vol. II, p.207). Finally, Dauber submitted an initially unsigned affidavit, which the court later accepted at the hearing in a "signed and notarized" form with handwritten interlineations. (10/25/16 Tr., p.5, Ls.5-10; R. vol. II, pp.202-03.) Dauber's motion and the supporting materials generally argued, among other things, that his plea had been coerced and that he was innocent. (See R. vol. II, pp.202-04, 205-06.)

The district court held a hearing on Dauber's motion to withdraw his plea. (10/25/16 Tr.) Dauber's counsel argued that Dauber was coerced into pleading guilty due to "being misled about the prosecution of [Dauber's ex-wife] for fraud." (10/25/16 Tr., p.9, Ls.21-23.) According to counsel, it was Dauber's "perception at the mediation that the FBI said that [Dauber's ex-wife] would be prosecuted for fraud if the defendant did not accept the [sentence of] 17 to life." (10/25/16 Tr., p.9, L.25 – p.10, L.3.) Counsel noted that Dauber "does not feel that he was coerced by any of his attorneys, including the attorneys in [case number CR-14-2027], in taking this plea bargain." (10/25/16 Tr., p.10, Ls.8-10.) Rather, "the coercion emanated from the misunderstanding about his ex-wife being prosecuted for fraud by taking military benefits." (10/25/16 Tr., p.10, Ls.11-13.) According to Dauber, "he researched it afterwards, and he determined that [the state] could not prove the fraud charges against his wife." (10/25/16 Tr., p.11, Ls.2-4.)

The hearing on the motion to withdraw was continued to a later date. (10/27/16 Tr.) At the next hearing, the district court noted that it "reviewed the plea colloquy and the guilty plea advisory"; that it found "that Mr. Dauber's pleas were entered knowingly and intelligently and voluntary"; and that Dauber "knew the nature of the charges" and "was not coerced." (10/27/16 Tr., p.29, Ls.8-13.) His plea was therefore "constitutionally valid." (10/27/16 Tr., p.30, Ls.1-3.)

The district court then considered whether Dauber had shown a "just reason" for withdrawing the constitutionally valid plea. (10/27/16 Tr., pp.30-37.) The court first pointed out that, because the district court agreed to impose the predetermined Rule 11 sentence, Dauber "knew what the sentence would be." (10/27/16 Tr., p.31, Ls.3-9.) As

such this was a case where the court could "temper its liberality by weighing the defendant's apparent motive" in filing the motion. (10/27/16 Tr., p.31, Ls.3-14.)

The district court concluded that Dauber failed to show a just reason for withdrawing his plea. As for Dauber's claims of innocence, the district court found that it was "settled that a denial of factual guilt is not a just reason for the later withdrawal of a plea in cases where there is some basis in the record of factual guilt." (10/27/16 Tr., p.31, Ls.21-24.) And the court concluded there was such a factual basis here, which Dauber himself admitted to. (10/27/16 Tr., p.32, L.2 – p.33, L.10 (citing (6/14/16 Tr., p.15, L.17 – p.16, L.2).)

Turning to the alleged coercion, the district court concluded that the "agreement not to charge" Dauber's ex-wife "did not describe coercive circumstances" but was "simply the normal consequences of a negotiation in a criminal process." (10/27/16 Tr., p.34, Ls.4-7.) The court pointed out that the "discussions about charging the wife occurred during plea negotiations" where defense counsel "would have been present," and where Dauber "was free to accept or reject the offers" made by the state. (10/27/16 Tr., p.34, L.19 – p.35, L.2.) The district court found it had "every confidence that proper plea negotiation procedures were used because they were being managed by Judge Ryan in a judicially authorized criminal mediation." (10/27/16 Tr., p.36, Ls.8-11.) The court additionally concluded that none of the miscellaneous justifications Dauber asserted for withdrawing his plea rose "to the level of just reason" to withdraw the plea. (10/27/16 Tr., p.36, L.15 – p.37, L.21.)

Finally, the district court made the following finding:

> I've also considered the defendant's motive. And I conclude that I am persuaded that the significant delay between the entry of the guilty plea on June 14th and the first filing of the motion, which could be either October 11th or October 13th, or the earlier letter to counsel of August 11th, that that delay suggests that there is an aspect of this that is simply Mr. Dauber's realization that the day of reckoning is coming soon, and it may be a much more sobering thought than he had thought when he entered his guilty plea.

(10/27/16 Tr., p.37, L.25 – p.38, L.9.)

Because Dauber failed to show his plea was constitutionally invalid, and because he failed to show a just reason to withdraw the plea, the district court accordingly denied "the motion to withdraw the guilty plea in the 312 case." (10/27/16 Tr., p.38, Ls.10-16.) The court also noted that "[n]o such motion was put forward in the 2027 case." (10/27/16 Tr., p.38, L.17.)

Dauber was sentenced according to the Rule 11 plea agreement. (10/28/16 Tr., p.70, L.15 – p.71, L.19.) He received concurrent life sentences with 17 years fixed in both cases. (10/28/16 Tr., p.70, L.15 – p.71, L.19; R. vol. I, pp.248-52; R. vol. III, pp.268-72.) Dauber timely appealed[5] from the judgments of conviction. (R. vol. I, pp.264-68; R. vol. III, pp.284-88, 309, 311-17.)

[5] The two cases have since been consolidated on appeal under no. 44849. (R. vol. III, p.310.)

ISSUES

Dauber states the issues on appeal as:

1. Did the district court abuse its discretion by denying [Dauber's] plea withdrawal?

2. Was [Dauber's] plea voluntary or coerced?

3. Counsel was ineffective[.]

(Appellant's brief, p.5.)

The state rephrases the issues as:

I. Has Dauber failed to show his knowing, intelligent, and voluntary guilty plea was coerced?

II. Has Dauber failed to show the district court abused its discretion by denying the motion to withdraw his guilty plea in case CR-14-312?

III. Has Dauber failed to state a claim of ineffective assistance of counsel, or even if he has, is such a claim not properly before this Court on direct appeal?

ARGUMENT

I.
Dauber Fails To Show That His Knowing, Voluntary, And Intelligent Guilty Plea Was Coerced

A. Introduction

Dauber contends his guilty plea was coerced by the "false threat to prosecute" his ex-wife. (Appellant's brief, p.8.) According to Dauber this purported threat was "unsupported by fact, truth and/or probable cause," and he was deprived of due process insofar as a "complete lie" was "used to coerce an un-willing plea." (Appellant's brief, p.9.)

Dauber fails to show any constitutional error. As for the plea in CR-14-2027, Dauber failed to challenge the plea below and has failed to preserve a fundamental error claim on appeal. Alternatively, any such claim would fail on the merits.

Turning to case CR-14-312, the district court correctly concluded that Dauber's plea was knowing, voluntary, and intelligent. Moreover, the district court correctly found that the agreement not to prosecute Dauber's ex-wife was not unconstitutional coercion.

Alternatively, even if the district court erred by applying the incorrect legal standard to assess coercion, the remedy here would not be outright reversal. Rather, this case should be remanded to the district court for the limited purpose of determining whether the state had probable cause to prosecute Dauber's ex-wife.

B. Standard Of Review

Idaho's appellate courts "conduct an independent review of the record" when an appellant challenges the "voluntariness of a guilty plea on appeal." State v. Spry, 127

Idaho 107, 110, 897 P.2d 1002, 1005 (Ct. App. 1995) (State v. Ayala, 118 Idaho 94, 95, 794 P.2d 1150, 1151 (Ct. App. 1990)). This Court will therefore "consider the totality of the circumstances in determining the voluntariness of a plea."

C. Dauber Has Failed To Preserve A Fundamental Error Challenge To The Plea In Case CR-14-2027

Dauber does not appear to limit his constitutional claim to either of the two cases consolidated on appeal. (See Appellant's brief.) However, Dauber only successfully raised a challenge to the plea in *one* of his cases below—CR-14-312. (R. vol. II, pp.78-80.) The district court did not accept Dauber's handwritten "motion" to withdraw the plea in CR-14-2027 because the district court would not "receive motions unless they're filed by counsel." (10/25/16 Tr., p.2, Ls.21-23.) As such, Dauber did not successfully raise a challenge to the plea in CR-14-2027 below. (See R. vol. III; 10/27/16 Tr., p.38, Ls.14-17.)

Dauber would therefore need to argue fundamental error to attack the constitutionality of the plea in CR-14-2027 for the first time on appeal. State v. Perry, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010). Dauber has not done so. (See Appellant's brief.) Because appellants must raise issues in their opening briefing to preserve issues for appeal, Patterson v. State, Dep't of Health & Welfare, 151 Idaho 310, 321, 256 P.3d 718, 729 (2011), any claim of fundamental error challenging the plea in CR-14-2027 has not been preserved.

Alternatively, to the extent a fundamental error challenge has been preserved, Dauber plainly fails to meet any of Perry's prongs. 150 Idaho at 228, 245 P.3d at 980. Dauber fails to show the CR-14-2027 plea entry was unconstitutional for the same

reasons he fails to show the CR-14-312 plea entry was unconstitutional, as explained below. Moreover, Dauber fails to meet his burden to show that the record "contain[s] evidence as to whether or not trial counsel made a tactical decision" by never moving to withdraw the plea in CR-14-2027. State v. Miller, No. 46517, slip op. at 3 (Idaho March 15, 2019). Finally, because the district court correctly denied the motion challenging the plea in CR-14-312 (as explained below), any failure to file a similar motion in CR-14-2027 was necessarily harmless.

D. The Plea Agreement and Plea Colloquy Show That Dauber's Plea Was Knowing, Voluntary, And Intelligent

To pass constitutional muster a plea must be "entered knowingly, intelligently and voluntarily. State v. Mauro, 121 Idaho 178, 180, 824 P.2d 109, 111 (1991). "Whether a plea is voluntary and understood entails inquiry into three areas: (1) whether the defendant's plea was voluntary in the sense that he understood the nature of the charges and was not coerced; (2) whether the defendant knowingly and intelligently waived his rights to a jury trial, to confront his accusers, and to refrain from incriminating himself; and (3) whether the defendant understood the consequences of pleading guilty." State v. Umphenour, 160 Idaho 503, 507, 376 P.3d 707, 711 (2016) (quoting State v. Colyer, 98 Idaho 32, 34, 557 P.2d 626, 628 (1976)).

After reviewing the guilty plea agreement and plea colloquy the district court concluded that "Mr. Dauber's pleas were entered knowingly and intelligently and voluntarily." (10/27/17 Tr., p.29, Ls.8-10.) This was undoubtedly correct. In the portions of the plea agreement asking "[d]o you understand that no one, including your

attorney, can force you to plead guilty in this case," and "[a]re you entering your plea freely and voluntarily," Dauber circled "YES." (R. vol. I, p.237; R. vol. III, p.252.)

Furthermore, the trial court undertook an exacting and comprehensive plea colloquy to assess Dauber's state of mind and knowledge of the proceedings. (See 6/14/16 Tr., p.5, L.12 – p.23, L.1.) The colloquy shows that Dauber was lucid, understood the proceedings that were taking place, and that he was knowingly, intelligently, and voluntarily pleading guilty. (See 6/14/16 Tr., p.5, L.12 – p.23, L.1.)

Dauber readily affirmed he had "sufficient time to think" about his plea and discuss it with his attorneys. (6/14/16 Tr., p.18, Ls.6-11.) He affirmed that he was "satisfied that pleading guilty under the circumstances" was in his "best interest" (6/14/16 Tr., p.19, Ls.1-4.) And he affirmed that he had a "full opportunity" to review the transcripts of the grand jury proceeding and the preliminary hearing testimony that formed the factual bases for his plea. (6/14/16 Tr., p.15, Ls.2-10.) Dauber also affirmed that, from his "review of the evidence, specifically with respect" to those transcripts, he was "satisfied that if evidence of that character was presented to a jury in this case and the jury found that evidence was credible, there would be a sufficient basis in that evidence for the jury to conclude unanimously that [he was] guilty of second degree murder" in both cases. (6/14/16 Tr., p.15, L.17 – p.16, L.2.)

The district court even spent additional time on the issue of potential coercion:

Q: Has anyone threatened you or anyone close to you to get you to plead guilty in this case?

A: No, your honor.

Q: Did you seem to hesitate about that?

A: No, your honor.

(6/14/16 Tr., p.14, Ls.8-12.)

Based on the entirety of the plea agreement and plea colloquy the district court had an ample factual basis to conclude that "Mr. Dauber's pleas were entered knowingly and intelligently and voluntarily." (10/27/16 Tr., p.29, Ls.8-10.) Dauber accordingly fails to show that his plea in CR-14-312 was unconstitutional, and fails to show error.

E. The Agreement Not To Charge Dauber's Ex-Wife Was Not Coercive

Dauber's only constitutional claim on appeal is that his plea was coerced by the agreement not to prosecute his ex-wife. (See Appellant's brief, pp.8-9.) Idaho precedent makes clear that "[a] plea of guilty is deemed coerced *only* where it is improperly induced by ignorance, fear or fraud." State v. Hanslovan, 147 Idaho 530, 537, 211 P.3d 775, 782 (Ct. App. 2008) (emphasis added) (citing Spry, 127 Idaho at 110, 897 P.2d at 1005 (Ct. App. 1995)). Where plea negotiations include state promises about not prosecuting loved ones, such negotiations are not coercive in a constitutional sense if the state acts in good faith. Id. at 538, 211 P.3d at 783 (citing Mata v. State, 124 Idaho 588, 594-95, 861 P.2d 1253, 1259-60 (Ct. App. 1993)). The prosecutor acts in good faith when the state declines to prosecute a family member as part of a plea negotiation if that prosecution would have been supported by probable cause. Id., at 538 n.8, 211 P.3d at 783 n.8; Mata, 124 Idaho at 595, 861 P.2d at 1260.

The district court concluded the agreement not to prosecute Dauber's ex-wife was not an improper threat in large part due to the unusually reliable circumstances in which the agreement came together. (10/27/16 Tr., p.34, L.19 – p.36, L.11.) This was a correct

application of Idaho precedent, which holds that a "prosecutor's negotiations with the defendant are not per se coercive and will not constitute grounds for challenging the validity of a guilty plea where proper plea negotiation procedures are used." Spry, 127 Idaho at 111, 897 P.2d at 1006 (citing State v. Fortin, 124 Idaho 323, 859 P.2d 359 (Ct. App. 1993)).

And here the "plea negotiation procedures" could not have been more proper. As Dauber himself explained it, the state's offer was conveyed by a presiding judge[6] in the midst of a criminal mediation:

> When Judge Ryan came back in, he told me that if I did not take the deal, my wife would be prosecuted for fraud.
>
> I had no means to find out if that was true or not. And afterwards when I did go find out that she didn't—because I had her go down to the Vet center and ask, that she didn't do anything that constitutes fraud.

(10/25/16 Tr., p.18, Ls.19-25.)

One takeaway from Dauber's own recollection, as the district court pointed out, was if the mediating judge was relaying the state's offer, then Dauber would have had counsel present. (See 10/27/16 Tr., p.34, Ls.19-22.) And the offer would have been presented in a procedurally proper way, insofar as the court found it had "every confidence that proper plea negotiation procedures were used because they were being managed by Judge Ryan in a judicially authorized criminal mediation under our rules."

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[6] Dauber and his attorneys presented differing accounts of who actually conveyed the state's offer; at times it was implied that the FBI, the state, and/or the mediating judge all did so. (Compare 10/25/16 Tr., p.10, Ls.1-2 with p.11, L.12 and p.18, Ls.20-21.) But regardless of *who* ultimately relayed the state's offer, Dauber has never shown that the district court erred in its finding of *where* the offer was conveyed—in the reliable and proper confines of mediation.

(10/27/16 Tr., p.36, Ls.8-11.) Finally, the district court concluded any potentially coercive pressures were additionally diminished by the fact that Dauber could exit the mediation at any juncture. (10/27/16 Tr., p.34, L.23 – p.35, L.2.) And this is exactly what happened at one point; as Dauber himself admitted in his affidavit, the first mediation session ended because he "ended the proceedings and stated [he] preferred to go to trial." (R. vol. II, p.203.)

Thus, the district court correctly perceived that the offer not to prosecute Dauber's ex-wife was not a "coercive circumstance[] but simply the normal consequences of a negotiation in a criminal process." (10/27/16 Tr., p.34, Ls.4-7.) That process was even more reliable here—insofar as it was mediated by a district court judge, with Dauber's counsel present, with Dauber retaining (and in fact exercising) his ability to walk away at any time. (10/27/16 Tr., p.34, L.19 – p.36, L.11.) The district court thus correctly concluded that the "record does establish that [Dauber] was not coerced." (10/27/16 Tr., p.29, Ls.8-19.) Dauber fails to show otherwise on appeal.

F. Alternatively, Even If The District Court Applied The Incorrect Legal Standard In Assessing Whether There Was Coercion, The Proper Relief Would Be A Limited Remand To Determine Probable Cause

The district court correctly concluded there was no coercion. (10/27/16 Tr., p.29, Ls.8-19.) But the state acknowledges that, while the district court cited the correct case law in its discussion of the agreement not to prosecute Dauber's ex-wife, it did not make a specific factual finding that the state had probable cause for prosecuting Dauber's ex-wife. (See 10/27/16 Tr., pp.35-36 (citing, among other things, Mata, 124 Idaho 588, 861

P.2d 1253).) On appeal, Dauber argues that the state did not have probable cause to charge his ex-wife. (See Appellant's brief, p.9.)

The state submits that if this Court concludes the district court did not apply the correct legal standard the proper remedy would not be an outright reversal. Rather, the state respectfully suggests that if this Court determines the district court erred, this case should be remanded for the limited purpose of determining whether the state had probable cause (or some other objective good-faith basis) for prosecuting Dauber's ex-wife. See Hanslovan, 147 Idaho at 538 n.8, 211 P.3d at 783 n.8; Mata, 124 Idaho at 595, 861 P.2d at 1260.

Dauber's own briefing alludes that this would be the proper outcome. He cites to United States v. Wright, where the Court of Appeals for the 10th Circuit found that:

> At the evidentiary hearing, appellant offered evidence plausibly showing that the prosecution never had the requisite probable cause. In response, the government merely averred that the prosecution had acted in good faith. *On this record, there is no evidence from which to conclude that the prosecution had probable cause to indict those persons it allegedly threatened to indict.* If the prosecution actually made the alleged threats, the threats caused appellant to plead guilty, and the threats were not supported by probable cause, the prosecution violated appellant's right to due process. We therefore remand to the district court for these factual findings.

43 F.3d 491, 499-500 (10th Cir. 1994) (emphasis added).

Unlike the appellant in Wright, Dauber has never adduced any "evidence plausibly showing that the prosecution never had the requisite probable cause." (See Appellant's brief; see R. vol. II, pp.202-07.) Instead, he appears to rely only on double hearsay, purportedly relayed from VA employees to his ex-wife to himself, and his own

armchair legal conclusions that a case against his ex-wife "could not be successful." (See, e.g., R. vol. II, pp.202-03; 10/25/16 Tr., p.18, Ls.22-25.)

In any event, should this Court conclude a probable cause determination must be made, then the state respectfully requests this case be remanded to the district court for the limited purpose of making such a finding.

II.
Dauber Fails To Show The District Court Abused Its Discretion By Denying The Motion To Withdraw His Guilty Plea In Case CR-14-312

A. Introduction

Dauber alleges on appeal that the district court abused its discretion by denying his motion to withdraw his guilty plea. (Appellant's brief, pp.6-8.) He appears to again rely on his claim that he was coerced, and additionally claims the district court's finding about his motivation was in error. (Appellant's brief, pp.6-8.)

Dauber fails to show any abuse of discretion. After correctly concluding that Dauber's plea was constitutionally sound, the district court went on to find that Dauber failed to show a "just reason" for withdrawing his plea. (10/27/16 Tr., p.30, L.1 – p.38, L.16.) This conclusion was correct.

Moreover, Dauber only filed a motion to withdraw his plea in *one* of the consolidated cases on appeal—CR-14-312. (R. vol. II, pp.78-80.) No such motion was filed in case CR-14-2027. (See R. vol. III; 10/27/16 Tr., p.38, Ls.14-17.) Thus, even if Dauber can show the district court abused its discretion by denying the motion to withdraw the plea in CR-14-312, any such error would have no effect on the plea he entered in CR-14-2027.

B. Standard Of Review

The granting or denial of a motion to withdraw a guilty plea is within the discretion of the trial court. Hanslovan, 147 Idaho at 535, 211 P.3d at 780.

C. The Court Correctly Determined That Dauber Did Not Show A Just Reason To Withdraw His Plea In Case CR-14-312

Defendants may move to withdraw a guilty plea prior to sentencing. I.C. 33(c). But the presentence withdrawal of a guilty plea is not an automatic right. State v. Carrasco, 117 Idaho 295, 298, 787 P.2d 281, 284 (1990); Hanslovan, 147 Idaho at 535, 211 P.3d at 780. The defendant bears the burden of proving, in district court, that the plea should be withdrawn. Id.; Griffith v. State, 121 Idaho 371, 374-75, 825 P.2d 94, 97-98 (Ct. App. 1992).

In ruling on a motion to withdraw a guilty plea, the district court must determine, as a threshold matter, whether the plea was entered knowingly, intelligently and voluntarily. Mauro, 121 Idaho at 180, 824 P.2d at 111 (1991); Hanslovan, 147 Idaho at 536, 211 P.3d at 781; State v. Rodriguez, 118 Idaho 957, 959, 801 P.2d 1308, 1310 (Ct. App. 1990). If the plea was constitutionally valid, then the court must determine whether other reasons exist to allow the defendant to withdraw the plea. Mauro, 121 Idaho at 180, 824 P.2d at 111.

When such a motion is made prior to sentencing the defendant must present a just reason for withdrawing the plea. Hanslovan, 147 Idaho at 535, 211 P.3d at 780. "[T]he good faith, credibility, and weight of the defendant's assertions in support of his motion to withdraw his plea are matters for the trial court to decide." Id. at 537, 211 P.3d at 782. Moreover, where the defendant moves to withdraw his guilty plea before sentencing but

after he has read his presentence report or received other information about his probable sentence, the court is to exercise broad discretion, but may temper its liberality by weighing the defendant's apparent motive. State v. Arthur, 145 Idaho 219, 222, 177 P.3d 966, 969 (2008). Ultimately, the decision to grant or deny a motion to withdraw a guilty plea lies in the discretion of the district court. Hanslovan, 147 Idaho at 535, 211 P.3d at 780.

The district examined all of Dauber's purported "just reasons" for withdrawing his plea, including his primary contention that the plea was unlawfully coerced. (10/27/16 Tr., p.30, L.1 – p.38, L.16.) It correctly rejected those claims and the state adopts all of its reasoning for doing so on appeal. (10/27/16 Tr., p.30, L.1 – p.38, L.16.)

On appeal, Dauber appears to have abandoned[7] the myriad reasons for withdrawal he raised in his affidavit and exhibits below, save for the two grounds he now appears to explicitly raise: 1) Dauber again cites the state's agreement not to prosecute his ex-wife as a "lie made up by the state," and an unlawful "tactic used to coerce a plea"; and 2) Dauber

[7] To preserve arguments on appeal parties must raise issues in their opening briefs. Patterson, 151 Idaho at 321, 256 P.3d at 729. Even if Dauber has preserved any additional claims that the district court abused its discretion in denying his motion to withdraw his plea, the state adopts all the district court's correct conclusions from its denial of Dauber's motion to withdraw his plea. (See 10/27/16 Tr., p.30, L.1 – p.38, L.16.) This includes the district court's conclusions that "an assertion of innocence in itself is not … a just reason to permit the withdrawal of a guilty plea," and that here, "a factual basis was admitted by Mr. Dauber and independently found" by the district court before it accepted his plea. (10/27/16 Tr., p.33, Ls.5-10.) That factual basis, set forth in the preliminary hearing transcript (2/20/15 Tr.) and grand jury transcripts (PSI vol. IV, pp.29-91), clearly supported the district court's finding and Dauber's agreement that he was "satisfied that if evidence of that character was presented to a jury in this case and the jury found that evidence was credible, there would be a sufficient basis in that evidence for the jury to conclude unanimously that [he was] guilty of second degree murder" in both cases (6/14/16 Tr., p.15, L.17 – p.16, L.2).

argues that the district court wrongly assessed Dauber's motive for seeking to withdraw his plea. (Appellant's brief, pp.6-8.)

As for Dauber's first claim it fails for the reasons already discussed above. The agreement not to prosecute Dauber's ex-wife was not coercive in a constitutional sense, and for those same reasons, it did not "rise[] to the level of just reason" to withdraw the plea. (10/27/16 Tr., p.36, Ls.12-14.)

Second, regarding the court's conclusions about Dauber's motives, the court correctly identified that because Dauber "knew what the sentence would be" the court could "temper its liberality by weighing the defendant's apparent motive" in filing the motion. (10/27/16 Tr., p.31, Ls.3-14.)

"[T]he good faith, credibility, and weight of the defendant's assertions in support of his motion to withdraw his plea are matters for the trial court to decide." Hanslovan, 147 Idaho at 537, 211 P.3d at 782. And here, the district court correctly assessed that the delay between the plea and the motion to withdraw "suggest[ed] that there is an aspect of this that is simply Mr. Dauber's realization that the day of reckoning is coming soon, and it may be a much more sobering thought than he had thought when he entered his guilty plea." (10/27/16 Tr., p.38, Ls.1-9.)

On appeal Dauber fails to show error. He maligns the court's logic as "reaching at best," because, as he apparently sees it, concerns about improper motivation would only apply where a defendant "learn[s] of something" in the PSI or elsewhere "that would cause the court to give a harsher sentence." (Appellant's brief, p.6.)

This fails to address the point. The lengthy delay between the plea and the sentencing suggested that the motivation for the motion was not coercion (which, one

imagines, would have been brought to the district court's attention soon after such a plea had been unlawfully extracted). Instead, the months-long delay, culminating in the filing of a motion to withdraw some 11 days before the sentencing hearing (see R. vol. II, p.78), tended to imply that Dauber had simply developed a case of buyer's remorse. Because the district court was entitled to assess Dauber's all-too-apparent motive with tempered liberality, its common-sense conclusion Dauber was motivated by his looming "day of reckoning" was proper. (10/27/16 Tr., p.37, L.25 – p.38, L.9.) Dauber accordingly fails to show the district court abused its discretion when it denied his motion to withdraw his plea in light of his motivations.

D. Irrespective Of The Court's Decision On The Motion To Withdraw The Plea, Dauber Fails To Show An Abuse Of Discretion In Case CR-14-2027 Because Dauber Never Filed A Motion To Withdraw His Plea In That Case

The district court specifically pointed out that it was denying Dauber's motion to withdraw his plea in case CR-14-314, but with respect to case CR-14-2027, Dauber never filed such a motion:

> But I don't find that that apparent motive would be a sufficient reason to determine any of the things that have been proffered are just reasons to permit the withdrawal of the guilty plea.
>
> In any event, I have considered these matters and I have exercised my discretion, and I deny the motion to withdraw *in the 312 case.*
>
> *No such motion was put forward in the 2027 case.*

(10/27/16 Tr., p.38, Ls.10-17 (emphasis added).)

And while Dauber sent a letter to the district court purporting to be a motion to withdraw his plea in case CR-14-2027 (see R. vol. II, pp.205-06), the district court did not accept it as a filing because it would not "receive motions unless they're filed by

counsel" (10/27/16 Tr., p.2, Ls.21-23). The letter itself was eventually attached as an exhibit to the motion in case CR-14-31. (R. vol. II, pp.205-06.) But it was never *itself* filed in case CR-14-2027—nor was any other motion to withdraw a plea ever filed in case CR-14-2027. (See R. vol. III; 10/27/16 Tr., p.38, Ls.15-17.)

Thus, even if this court concludes the district court erred by denying the motion to withdraw Dauber's plea that would not affect the plea in case CR-14-2027. Because Dauber never moved to withdraw his plea in case CR-14-2027, Dauber necessarily fails to show the district court abused its discretion with respect to that case.

III.
Dauber Has Failed To State A Claim Of Ineffective Assistance Of Counsel; And Even Assuming He Has Sufficiently Articulated Such A Claim It Is Not Properly Before This Court On Direct Appeal

Parties must "identify legal issues and provide authorities supporting the arguments in the opening brief" to be considered by this Court, Patterson, 151 Idaho at 321, 256 P.3d at 729; see also State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) (holding that a party waives an issue on appeal if argument or authority is lacking). Pro se litigants "are held to the same standards and rules as those represented by an attorney." Twin Falls Cty. v. Coates, 139 Idaho 442, 445, 80 P.3d 1043, 1046 (2003).

Dauber has failed to state a viable claim of ineffective assistance of counsel. He simply states that "counsel was ineffective" because they "failed to litigate the falsified 3rd party threat against" his ex-wife. (Appellant's brief, p.9.) But he does not say what exactly counsel should have done, why their purported failure was deficient, or how or why it prejudiced him. (See Appellant's brief, p.9.)

Nor does Dauber's lone, unexplained citation to Kimmelman v. Morrison, 477 U.S. 365 (1986), shed any light on this claim. In Kimmelman, trial counsel failed to file a suppression motion in time, "not due to strategic considerations," but because he was unaware there was a search. Id. at 385. Trial counsel was unaware of the search "because he had conducted no pretrial discovery"; moreover, he failed to conduct discovery not because he forgot to do so, but because he "belie[ved] that the State was obliged to take the initiative and turn over all of its inculpatory evidence to the defense and that the victim's preferences would determine whether the State proceeded to trial after an indictment had been returned." Id.

There, counsel's performance—which amounted to a "total failure to conduct pre-trial discovery, and one as to which counsel offered only implausible explanations"—was obviously deficient performance. Id. at 386. Kimmelman is inapplicable here because Dauber has not explained what "litigation" he expected counsel to pursue, why it was deficient for them not to do so, or what difference it would have made. (See Appellant's brief, p.9.) Thus, Dauber has failed to state a claim of ineffective assistance of counsel.

And even if Dauber has assembled a prima facie claim of ineffective assistance of counsel he is unable to press that claim on direct appeal. "By attempting to bring this claim on direct appeal without first properly presenting the issue to the district court," Dauber has "failed to make a necessary evidentiary record and deprived the State of any opportunity to develop an evidentiary record on this issue." State v. Gomez, 127 Idaho 327, 329, 900 P.2d 803, 805 (Ct. App. 1995). This is precisely why Idaho's appellate courts "have frequently declined to consider claims of ineffective assistance of counsel on direct appeal." Id. at 329-30, 900 P.2d at 805-06. "Because of [the] inability to resolve

such claims on the record of the criminal proceedings," Idaho's appellate courts have instead "suggested that such claims be pursued by application for post-conviction relief." Id.; see also State v. Mitchell, 124 Idaho 374, 376, 859 P.2d 972, 974 (Ct. App. 1993); State v. Marks, 119 Idaho 64, 66, 803 P.2d 565, 567 (Ct. App. 1991); State v. Steele, 118 Idaho 793, 795, 800 P.2d 680, 682 (Ct. App. 1990); State v. Munoz, 118 Idaho 742, 745, 800 P.2d 138, 141 (Ct. App. 1990); State v. Darbin, 109 Idaho 516, 523, 708 P.2d 921, 928 (Ct. App. 1985).

In light of the applicable standards Dauber failed to state a claim of ineffective assistance of counsel. Moreover, because such a claim is not properly before this Court on direct appeal in any event, this claim should likewise be dismissed.

CONCLUSION

The state respectfully requests this Court affirm the judgments of conviction and affirm the district court's order denying Dauber's motion to withdraw his plea. Alternatively, should this Court conclude the district court erred in its analysis of the constitutionality of the pleas, the state respectfully requests this Court remand these cases for the limited purpose of determining probable cause.

DATED this 23rd day of April, 2019.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 23rd day of April, 2019, 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:

MICHAEL S. DAUBER
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/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

KDG/dd