

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

GARY NICHOLAS BALL, )  
 ) No. 45525  
 Petitioner-Appellant, )  
 ) Ada County Case No.  
 v. ) CV01-2017-1490  
 )  
 STATE OF IDAHO, )  
 )  
 )  
 Defendant-Respondent. )  
 )  
 )  
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**BRIEF OF RESPONDENT**  
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**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ADA**

\_\_\_\_\_  
**HONORABLE NANCY A. BASKIN**  
**District Judge**  
\_\_\_\_\_

**LAWRENCE G. WASDEN**  
Attorney General  
State of Idaho

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

**KALE D. GANS**  
Deputy Attorney General  
Criminal Law Division  
P. O. Box 83720  
Boise, Idaho 83720-0010  
(208) 334-4534  
E-mail: [ecf@ag.idaho.gov](mailto:ecf@ag.idaho.gov)

**ATTORNEYS FOR  
DEFENDANT-RESPONDENT**

**GARY NICHOLAS BALL**  
IDOC #56475  
Eagle Pass Correctional Facility  
P. O. Box 849  
410 S. Bibb Ave.  
Eagle Pass, Texas 78853

**PRO SE  
PETITIONER-APPELLANT**

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## STATEMENT OF THE CASE

### Nature Of The Case

Gary Nicholas Ball appeals from the district court's order summarily dismissing his petition for post-conviction relief.

### Statement Of The Facts And Course Of The Proceedings

Ball pleaded guilty to one count of heroin trafficking in the underlying criminal case. (R., p.115.) The facts of that case, as found by the district court, are as follows:

Petitioner Gary Nicholas Ball sold heroin to a confidential police informant on September 9, 2014, and again on October 16, 2014. On October 22, 2014, the informant learned that Ball planned to transport heroin from Salt Lake City, Utah to Boise. That same day, the informant's supervising officer discovered that Ball was staying at a hotel in Boise. Another detective observed Ball leave his hotel room, walk to a McDonald's next door, briefly speak to the occupants of a car in the parking lot, and then return to his hotel room. Approximately 40 minutes later, the detective observed Ball leave the hotel room again and return to the McDonald's. The arresting officer, who also directed the confidential informant's purchases from Ball, visually identified Ball from his driver's license photo, and arrested him for making the two prior sales to the informant.

The officer found heroin, marijuana, and an assortment of prescription drugs in Ball's pockets, and also seized a large amount of cash. Ball gave consent for the officers to search his hotel room, in which the officers found heroin, scales, packaging materials, drug paraphernalia, and a handgun.

Ball was arrested and charged with one count of trafficking heroin under Idaho Code section 37-2732B(a)(6)(B), two counts of delivery of a controlled substance under Idaho Code section 37-2732(a), and unlawful possession of a firearm under Idaho Code section 18-3316. *State v. Ball*, CR-FE-2014-15558. After Ball pled guilty to one charge of trafficking heroin, the State dismissed the remaining charges. *Id.* On June 17, 2015, this Court sentenced Ball to a fixed ten-year period of imprisonment followed by an indeterminate ten-year sentence. *Id.*

(R., pp.114-15.)

Ball appealed from the judgment of conviction in the underlying criminal case. (R., p.115.) The Idaho Court of Appeals affirmed in an unpublished opinion. State v. Ball, Docket No. 43387, 2016 Unpublished Opinion No. 310 (filed January 7, 2016). Ball subsequently filed a Rule 35 motion for reconsideration of his sentence, which the district court denied. (R., p.115.)

Ball then filed his pro se<sup>1</sup> post-conviction petition. (R., pp.5-23.) The petition alleged Ball's trial counsel and appellate counsel gave ineffective assistance of counsel in the underlying criminal case, for a variety of reasons. (R., pp.6-8, 10-11.) Regarding trial counsel, Ball alleged his attorney was ineffective for 1) failing to file a motion to suppress evidence; 2) failing to "challenge the submission of false claims in the Affidavit of Probable Cause," and failing to "show that there in fact was no probable cause"; and 3) refusing "to present an [adversarial] defense for the petitioner, file motions, [or] to proceed to trial or do anything except demand the petitioner plead guilty." (R., p.7.) As for appellate counsel, Ball claimed his attorney "failed to present a factual account on appeal," "[f]ailed to present a Fourth Amendment claim via ineffective assistance of counsel," and "[f]ailed to raise any issues that the petitioner asked [for], other than [the] sentencing claim." (R., p.7.)

The state filed an answer (R., pp.53-55) and a motion for summary dismissal with supporting exhibits (R., pp.56-100), alleging the claims in the petition were waived due to

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<sup>1</sup> The district court eventually appointed post-conviction counsel, who initially moved for an enlargement of time "to file an amended petition or additional motions." (R., p.47.) However, Ball's counsel ultimately notified the court that he intended "to proceed on the original pro se petition" because after investigation he was "unable to file any amended pleading." (R., p.51.)

Ball's "voluntary and intelligent" guilty plea (R., pp.62-67); were "contrary to the record" (R., p.67); failed to show deficient performance (R., p.68); and were "bare and conclusory" (R., p.69), among other things.

The district court held a hearing on the state's motion. (9/19/17 Tr.) Ball, who was now represented by counsel, reiterated his claims that trial counsel and appellate counsel gave ineffective assistance for the reasons found in his petition. (9/19/17 Tr., p.8, L.6 – p.15, L.6.) However, Ball's counsel<sup>2</sup> also conceded that, regarding the claim about the probable cause affidavit, the prosecutor was "correct that the law does not require that an [offense] be committed in the officer's presence." (9/19/17 Tr., p.19, Ls. 9-12.)

The district court granted the state's motion and summarily dismissed Ball's petition. (R., pp. 114-25.) Ball timely appealed from the judgment of dismissal. (R., pp.126-49, 154-60.)

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<sup>2</sup> The transcript denotes that it is the prosecutor speaking here but this is a clear typographical error. (See 9/19/17 Tr., p.13, L.18; p.15, L.9; p.18, L.8.) The misnamed speaker is undoubtedly defense counsel, insofar as he responds to "Mr. Ellsworth" (the name of Ball's attorney in the criminal case), refers to the prosecutor in the third person, and explains and defends Ball's argument. (9/19/17 Tr., p.18, L.7 – p.19, L.16.) Moreover, the district court's written findings affirm that it was Ball's own counsel who "conceded at the hearing that under Idaho law, an officer need not be 'present' at the commission of a crime for an officer to arrest a person for a felony." (R., pp.119-120.)

## ISSUES

Ball states the issues on appeal as:

- A. The District Court erred in granting summary dismissal of Mr. Ball's claims of Ineffective Assistance of Counsel cited in his Petition for Post-Conviction Relief.
- B. The District Court abused its discretion in failing to grant an evidentiary hearing on the claims cited in Mr. Ball's Petition for Post-Conviction Relief.

(Appellant's brief, p.1.)

The state rephrases the issue as:

Has Ball failed to show the district court erred in summarily dismissing his petition for post-conviction relief?

## ARGUMENT

### Ball Fails To Show The District Court Erred In Summarily Dismissing His Petition For Post-Conviction Relief

#### A. Introduction

Ball argues on appeal that the district court erred when it summarily dismissed his claims of ineffective assistance of trial counsel.<sup>3</sup> He argues that trial counsel gave ineffective assistance for two essential reasons: by failing to file or otherwise investigate a motion to suppress based on a purportedly deficient probable cause affidavit; and by allegedly “pressur[ing] and coerc[ing] Mr. Ball into accepting the state’s unfavorable plea deal.”<sup>4</sup> (Appellant’s brief, pp.3-13.) Ball also argues, as a separate issue, that the district court “abused its discretion in failing to grant an evidentiary hearing.” (Appellant’s brief, pp.1, 14.)

These arguments fail. The district court correctly concluded that the ineffective assistance claims should be summarily dismissed, as explained below. Ball was

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<sup>3</sup> On appeal Ball has abandoned his claims that appellate counsel gave ineffective assistance of counsel. He does not claim in his opening brief that appellate counsel’s performance was deficient or prejudicial. (See generally Appellant’s brief.) Because parties must “identify legal issues and provide authorities supporting the arguments in the opening brief” to be considered by this Court, Patterson v. State, Dep’t of Health & Welfare, 151 Idaho 310, 321, 256 P.3d 718, 729 (2011), and because 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), any claims against appellate counsel have been waived. Alternatively, those claims fail on the merits as set forth in the district court’s summary dismissal order (R., pp.121-22), which the state incorporates herein, should this Court reach those merits.

<sup>4</sup> To the extent Ball raised additional claims against trial counsel below, that have not been raised on appeal, those claims have been waived. Alternatively, should this Court reach the merits of any unpreserved claims, they fail for the reasons articulated in the district court’s summary dismissal order, which the state incorporates herein. (R., pp.114-25.)

accordingly not entitled to a hearing on the merits, much less to relief on his claims. At any rate Ball fails to show any error on appeal.

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.

C. The District Court Correctly Dismissed The Claim That Counsel Should Have Moved To Suppress Based On The Probable Cause Affidavit

A criminal defendant has a constitutional right to counsel and to counsel's "reasonably effective assistance." U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 687 (1984). To prove that counsel was ineffective, 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, 466 U.S. at 687-96; State v. Elison, 135 Idaho 546, 551, 21 P.3d 483, 488 (2001).

When a defendant claims counsel was deficient for "failure to file or pursue certain motions, a conclusion that the motion, if pursued, would not have been granted, is generally determinative of both prongs of the *Strickland* test." State v. Hairston, 133

Idaho 496, 512, 988 P.2d 1170, 1186 (1999). If such a motion would have been meritless and denied, “counsel ordinarily would not be deficient for failing to pursue it, and, concomitantly, the petitioner could not have been prejudiced” by counsel not pursuing it. See Huck v. State, 124 Idaho 155, 158-59, 857 P.2d 634, 637-38 (Ct. App. 1993).

Trial counsel did not give ineffective assistance by not filing a motion to suppress—because any such motion would have been denied. Ball’s premise below was that his arrest was illegal “because the [arresting] officer’s affidavit ‘clearly states that there was no controlled buy of any narcotics on the day in question.’” (R., p.119 (quoting R., p.10).) Ball argued in his petition that, consequently, “[t]here was no crime committed in the officer’s presence to give him probable cause.” (R., p.10.)

The district court denied this claim for a variety of reasons:

The officer’s affidavit does not state that Ball committed a crime in his presence on the date of his arrest. Rather, the officer wrote that a confidential informant, acting under his direction, purchased heroin from Ball twice in the preceding two months, and that the officer personally supervised the informant and participated in NIK testing the heroin after the transactions. On October 22, 2014, the confidential informant learned that Ball planned to transport heroin from Salt Lake City to Boise. The arresting officer discovered that Ball was renting a hotel room, and another officer confirmed Ball’s presence there. Approximately 40 minutes later, the arresting officer visually identified Ball from his driver’s license photo and arrested him “for the two charges of delivery of heroin.” *Thus, the officer’s affidavit is clear that probable cause was not based on any sale that occurred on October 22, 2014, but on the two sales made to the confidential informant, working under the arresting officer’s discretion.* Accordingly, the record does not support [Ball’s] claim that the arresting officer falsely stated that a crime occurred in his presence on October 22, 2014. Further, *counsel for [Ball] conceded at the hearing that under Idaho law, an officer need not be “present” at the commission of a crime for an officer to arrest a person for a felony.*

(R., pp.119-20 (emphasis added).)

The district court therefore correctly concluded that “the officer’s reliance on the actions and reporting of the informant he had directed could support a probable cause finding that a felony had been committed by Ball.” (R., p.120.) And as a result, trial counsel’s “decision not to file a motion to suppress” was an “exercise[] of reasonable professional judgment and within the range of professionally competent assistance.” (R., pp.121-22.)

On appeal Ball fails to show any error. He reiterates his claim that “[t]he detective [did] not articulate any probable cause tied to the evening of the arrest,” and “did not [delineate] any probable cause separate and distinct from the probable cause relating to the events on September 9 and October 16.”<sup>5</sup> (Appellant’s brief, p.6.) This argument fails because, as the district court correctly perceived, an officer need not be present at the commission of a crime to effect a felony arrest based on probable cause. I.C. § 19-603 (making clear that “[a] peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person ... [w]hen a person arrested has committed a felony, *although not in his presence*”) (emphasis added).

Moreover, Ball’s argument that there needs to be an “adequate independent basis” tying the arrest to criminal activity that occurred on “the evening of the arrest” runs

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<sup>5</sup> Ball also mentions the exclusionary rule, the search incident to the arrest, and Miranda v. Arizona, 384 U.S. 436 (1966), the latter of which he now alleges is at the “heart of this argument.” (Appellant’s brief, pp.8-9.) But even assuming these issues are relevant, it appears neither party raised them below—much less did the district court rule on them. (See generally R.; see also 9/19/17 Tr.) They are therefore not preserved, even assuming they have any relevance to this appeal. State v. Garcia-Rodriguez, 162 Idaho 271, 275, 396 P.3d 700, 704 (2017) (“Issues not raised below will not be considered by this court on appeal, and the parties will be held to the theory upon which the case was presented to the lower court.”).

counter to his concession to the opposite below. Below, Ball's counsel sensibly conceded the correct law: that "[t]he law does not require than an [offense] be committed in an officer's presence for him to conduct an arrest for a felony." (9/19/17 Tr., p.18, Ls.14-16.) Applying that concession to these facts, it would have been entirely proper for the officer to arrest Ball based on the *prior* buys, which is exactly what the district court concluded: "that probable cause *was not based on any sale that occurred on October 22, 2014, but on the two sales*" made in the two months prior. (R., p.119 (emphasis added).) On appeal parties are "bound by the legal concessions [they] made in the district court," State v. Islas, No. 45174, 2018 WL 6332537, at \*9 (Idaho Ct. App. Dec. 5, 2018), which means that Ball's "adequate independent basis" theory—both legally wrong and directly contrary to his prior concession—cannot survive.

Furthermore, as the state argued in its briefing below, Ball pleaded guilty to the trafficking charge. (R., p.62.) This "waive[d] all non-jurisdictional defects and defenses, whether constitutional or statutory, in prior proceedings." State v. Al-Kotrani, 141 Idaho 66, 69, 106 P.3d 392, 395 (2005). The guilty-plea waiver foreclosed a challenge to the probable cause affidavit, which only heightens the strong presumption that trial counsel's choices were within the wide range of reasonable professional assistance. In sum, because any suppression motion would have inevitably failed, and because Ball pleaded guilty to the charge, waiving his non-jurisdictional defenses, it was not deficient performance for trial counsel not to pursue such a motion. See Huck, 124 Idaho at 158-59, 857 P.2d at 637-38.

Ball argues on appeal that "[t]he State, in its request for summary dismissal, submitted no evidence in support of their position," such as sworn testimony from trial

counsel regarding her “legal strategy,” or an affidavit “indicating that [trial counsel] researched Petitioner’s claims supporting a motion to suppress and found it unsupportable.” (Appellant’s brief, p.13.) But this erroneously inverts the legal standard, which requires the *petitioner* show that “counsel’s representation fell *below* an objective standard of reasonableness”—it does not require the *state* to show that counsel performed *above* the standard. See Strickland, 466 U.S. at 687-96.

And this attempt to shift the burdens leaves out all the operative presumptions. For starters, a court’s “scrutiny of counsel’s performance must be highly deferential” on review; therefore, a reviewing court “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” Strickland, 466 U.S. 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).

Moreover, “[i]n any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” Strickland, 466 U.S. at 691. Appellate courts defer to counsel’s judgment because counsel only “has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” Id. In other words, “the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste.” Rompilla v. Beard, 545 U.S. 374, 383 (2005). In light of these standards—and

the futility of filing a suppression motion—Ball falls far short of overcoming the presumption that his counsel acted reasonably.

Finally, even if Ball has managed to raise a question of material fact regarding deficient performance, he fails to show prejudice. The district court correctly noted that “[a] petitioner who has pled guilty and alleges that his counsel provided ineffective assistance ‘must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.’” (R., p.122 (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985).) Ball only made conclusory statements regarding prejudice below, which the district court rejected. (R., pp.122-124.) Ball renews his conclusory arguments on appeal (Appellant’s brief, pp.10-11), but he fails to point to any facts showing that “but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” Hill, 474 U.S. at 59. Because Ball fails to show it was deficient performance for counsel not to file a futile motion to suppress, and in any event fails to show prejudice, he fails to show any error on appeal.

D. The District Court Correctly Concluded That Ball’s Guilty Plea Was Knowing And Voluntary

Ball contends that “[i]nstead of protecting her client’s rights, [trial counsel] pressured and coerced [him] into accepting the State’s unfavorable plea deal.” (Appellant’s brief, p.12.) Ball alleges he “was deprived of effective assistance of counsel

because [his] plea was based on incompetent advice and coercive pressure from his attorney.”<sup>6</sup> (See Appellant’s brief, pp.11-13 (capitalization altered).)

This claim fails because Ball’s guilty plea was plainly knowing and voluntary. “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)).

The district court concluded that Ball “made no allegation that his guilty plea was involuntary or based upon incompetent advice provided by his attorney.” (R., p.123.) To the contrary, the record revealed that,

...based on Ball’s answers on the Guilty Plea Advisory Form and during the plea hearing with the Court, Petitioner was not forced to enter a plea of guilty. On the Guilty Plea Advisory Form, Petitioner answered that he freely and voluntarily entered his plea, he knew no one could “force” him to enter a plea, and there was nothing he had requested his attorney to do that had not been done. Judge Hansen also made a finding that the plea was freely and voluntarily entered after placing Ball under oath and having him answer questions regarding his plea.

(R., p.123.) Based on all of this the district court found that “the record supports that the entry of a guilty plea was knowing[ly], voluntar[ily] and intelligently made by Ball.” (R., p.123.)

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<sup>6</sup> This claim is alleged as an ineffective assistance claim (Appellant’s brief, pp.11-13); however, it would also fail if construed as a direct attack on Ball’s plea, for the reasons set forth below.

A review of Ball’s guilty plea colloquy shows the district court’s perceptions were entirely correct. The trial court was exacting and thorough in determining Ball’s state of mind and knowledge of the proceedings. (See R., pp.79-81.) The guilty plea advisory form, as well as Ball’s own statements at the hearing, showed he understood what was taking place, and that he was knowingly, intelligently, and voluntarily pleading guilty. (R., pp.74-93.) Ball—an adult with a college degree—indicated that his attorney “answered any questions to [his] satisfaction”; he had no “trouble understanding the proceedings”; he and counsel had “plenty of time” to visit; and he “admit[ted] the truth of” the trafficking charge. (R., pp.79-80.) Ball made no noises whatsoever that he had reservations about pleading guilty—much less that he was being “pressured” or “coerced” to do so, as he now belatedly claims. (See R., pp.78-81.) Because Ball’s plea was self-evidently knowing, intelligent, and voluntary, his post-hoc challenge to his plea—whether construed as a direct challenge to the plea or an attack on his attorney’s performance—fails. Ball therefore fails to show the district court erred.

E. Because Ball’s Claims Were Correctly Summarily Dismissed He Is Not Entitled To An Evidentiary Hearing

Ball claims the second issue on appeal is whether “[t]he District Court abused its discretion in failing to grant an evidentiary hearing on the claims cited” in his petition. (Appellant’s brief, p.1.) But Ball has failed to allege a claim that could even survive summary dismissal—so he necessarily fails to show that he was entitled to an evidentiary hearing. Because the district court correctly dismissed Ball’s claims it correctly declined to hold a hearing.

CONCLUSION

The state respectfully requests this Court affirm the summary dismissal of Ball's post-conviction petition.

DATED this 15th day of February, 2019.

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

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 15th day of February, 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:

GARY NICHOLAS BALL  
IDOC #56475  
EAGLE PASS CORRECTIONAL FACILITY  
P. O. BOX 849  
410 S. BIBB AVE.  
EAGLE PASS, TX 78853

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

KDG/dd