

IN THE SUPREME COURT OF THE STATE OF IDAHO

ZACKERY DOUGLAS ADAMS,)
) **No. 45843**
) **Petitioner-Appellant,**)
) **Ada County Case No.**
v.) **CV01-2017-10890**
)
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**

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District Judge

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE.....	1
Nature Of The Case	1
Statement Of The Facts And Course Of The Proceedings	1
ISSUES	3
ARGUMENT	4
I. This Court Should Decline To Address Adams’ Appellate Argument That His Petition Was Verified Because It Was Not Raised To The Trial Court	4
II. Adams Has Failed To Show Error In The District Court’s Conclusion That His Claims Of Ineffective Assistance Of Counsel Are Not Viable	5
A. Introduction.....	5
B. Standard Of Review	5
C. The District Court Properly Dismissed Adams’ Unviable Claims Of Ineffective Assistance Of Counsel	5
1. Ineffective Assistance Of Counsel Related To Double Jeopardy.....	7
2. Ineffective Assistance Of Counsel Based On Discussion Of Intent Element	8
CONCLUSION.....	12
CERTIFICATE OF SERVICE	12

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Aragon v. State</u> , 114 Idaho 758, 760 P.2d 1174 (1988).....	7
<u>Berg v. State</u> , 131 Idaho 517, 960 P.2d 738 (1998).....	6
<u>Charboneau v. State</u> , 144 Idaho 900, 174 P.3d 870 (2007)	6
<u>Cooper v. State</u> , 96 Idaho 542, 531 P.2d 1187 (1975).....	6
<u>Cosio-Nava v. State</u> , 161 Idaho 44, 383 P.3d 1214 (2016)	9
<u>Cowger v. State</u> , 132 Idaho 681, 978 P.2d 241 (Ct. App. 1999)	7
<u>Davis v. State</u> , 116 Idaho 401, 775 P.2d 1243 (Ct. App. 1989).....	7
<u>Ferrier v. State</u> , 135 Idaho 797, 25 P.3d 110 (2001).....	6
<u>Gibson v. State</u> , 110 Idaho 631, 718 P.2d 283 (1986)	6
<u>Grant v. State</u> , 156 Idaho 598, 329 P.3d 380 (Ct. App. 2014).....	8
<u>Hill v. Lockhart</u> , 474 U.S. 52 (1985)	9
<u>Murray v. State</u> , 156 Idaho 159, 321 P.3d 709 (2014).....	8
<u>Nevarez v. State</u> , 145 Idaho 878, 187 P.3d 1253 (Ct. App. 2008).....	8
<u>Roman v. State</u> , 125 Idaho 644, 873 P.2d 898 (Ct. App. 1994)	6
<u>Sanchez v. Arave</u> , 120 Idaho 321, 815 P.2d 1061 (1991)	4
<u>State v. Abdullah</u> , 158 Idaho 386, 348 P.3d 1 (2015).....	7
<u>State v. Adams</u> , 2017 Unpublished Opinion No. 416, Docket No. 44216 (Idaho App., March 27, 2017)	1
<u>State v. Bearshield</u> , 104 Idaho 676, 662 P.2d 548 (1983)	5
<u>State v. Charboneau</u> , 116 Idaho 129, 774 P.2d 299 (1989)	6
<u>State v. Fodge</u> , 121 Idaho 192, 824 P.2d 123 (1992).....	4
<u>State v. Goodwin</u> , 131 Idaho 364, 956 P.2d 1311 (Ct. App. 1998).....	9

Strickland v. Washington, 466 U.S. 668 (1984)..... 6

Workman v. State, 144 Idaho 518, 164 P.3d 798 (2007)..... 5, 6

STATUTES

I.C. § 19-4901 5

I.C. § 19-4902(a)..... 4

I.C. § 19-4903 4

I.C. § 19-4906 6

STATEMENT OF THE CASE

Nature Of The Case

Zackery Douglas Adams appeals from the summary dismissal of his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

Adams pled guilty to grand theft and unlawful possession of a firearm, and his sentences were affirmed on appeal. State v. Adams, 2017 Unpublished Opinion No. 416, Docket No. 44216 (Idaho App., March 27, 2017). He filed a petition for post-conviction relief. (R., pp. 5-7.) Among his claims he alleged counsel was ineffective for not asserting his consecutive sentences violated double jeopardy and inadequately explaining the intent element of the crimes. (R., pp. 6-7.) He also filed an affidavit generally asserting that he has problems with mental illness and that his attorneys would not raise any issue based on his claim that he did not recollect committing the crimes because of his mental illness. (R., pp. 8-9.) The district court appointed counsel to represent him. (R., p. 13.)

The state filed a motion for summary dismissal of the petition. (R., pp. 53-54.) The state included in its grounds for dismissal the lack of verification of the petition (R., pp. 40-41), that Adams had failed to plead or support a claim that trial counsel was ineffective in relation to explaining the intent element of the crimes Adams pled guilty to (R., pp. 44-46), and that the claim trial counsel was ineffective for failing to raise a double jeopardy claim failed because the claim had no merit (R., pp. 48-49).

The district court granted the state's motion and dismissed. (R., pp. 87-104.) The district court concluded the petition was unverified, and struck the petition. (R., pp. 91-93.) The district court also dismissed the claim counsel was ineffective for failing to assert

a double jeopardy claim because such a claim would have been without merit. (R., pp. 97-98.) The district court dismissed the claim counsel was ineffective for failing to adequately explain the intent element of the crime because it was disproved by the record and Adams alleged no prejudice. (R., p. 99.)

The district court entered judgment and Adams appealed. (R., pp. 106-09, 115-19.)

ISSUES

Adams states the issue on appeal as:

1. Did the district court err in summarily dismissing the petition?

(Appellant's brief, p. 4.)

The state rephrases the issues as:

1. Should this Court decline to address Adams' appellate argument that the certification on the affidavit served to verify the petition because the affidavit should be considered to be part of the petition because the argument was not raised to the trial court?
2. Has Adams failed to show error in the district court's conclusion that he failed to present viable claims of ineffective assistance of counsel regarding double jeopardy and the intent element of the crimes?

ARGUMENT

I.

This Court Should Decline To Address Adams' Appellate Argument That His Petition Was Verified Because It Was Not Raised To The Trial Court

A post-conviction proceeding “is commenced by filing an application verified by the applicant.” I.C. § 19-4902(a). “Facts within the personal knowledge of the applicant shall be set forth separately from other allegations of facts and shall be verified as provided in section 19-4902.” I.C. § 19-4903. Any supporting affidavits “shall be attached” to the petition. *Id.*

The district court dismissed the petition because it was not verified. (R., pp. 91-92.) This holding is supported by the above-cited law and the record. (R., p. 7.) On appeal, for the first time, Adams argues that his affidavit should be considered part of his petition and, because the affidavit bears a certification, the petition was thus verified. (Appellant’s brief, pp. 6-7.) This argument should not be considered because it was not raised to the district court. State v. Fodge, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992) (“The longstanding rule of this Court is that we will not consider issues that are presented for the first time on appeal.” (quoting Sanchez v. Arave, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991))).

Even if considered, the argument is without merit. The statutory framework clearly provides for both verification of the petition and for affidavits to be “attached.” Adams has failed to show why the attached affidavit should be considered part of the petition itself.

II.

Adams Has Failed To Show Error In The District Court's Conclusion That His Claims Of Ineffective Assistance Of Counsel Are Not Viable

A. Introduction

Adams claims the district court erred when it dismissed two of his claims of ineffective assistance of counsel: that counsel was ineffective for not raising a double jeopardy claim and for giving inadequate advice on the intent element of the crimes. (Appellant's brief, pp. 8-13.) The district court dismissed the former claim because such a claim would have been without merit. (R., pp. 97-98.) The district court dismissed the latter claim because the record disproved any claim of prejudice and Adams alleged no prejudice. (R., p. 99.) Review of the record under applicable law shows no error by the district court.

B. Standard Of Review

"On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of material fact exists based on the pleadings, depositions and admissions together with any affidavits on file." Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007).

C. The District Court Properly Dismissed Adams' Unviable Claims Of Ineffective Assistance Of Counsel

Post-conviction proceedings are governed by the Uniform Post-Conviction Procedure Act. I.C. § 19-4901, *et seq.* A petition for post-conviction relief initiates a new and independent civil proceeding in which the petitioner bears the burden of establishing that he is entitled to relief. Workman, 144 Idaho at 522, 164 P.3d at 802; State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983).

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief, in response to a party's motion or on the court's own initiative, if the applicant "has not presented evidence making a prima facie case as to each essential element of the claims upon which the applicant bears the burden of proof." Berg v. State, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998). Until controverted by the state, allegations in a verified post-conviction application are, for purposes of determining whether to hold an evidentiary hearing, deemed true. Cooper v. State, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975). However, the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001); Roman v. State, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994). Further, allegations contained in a post-conviction petition are insufficient for granting relief when they are clearly disproved by the record of the original proceeding or do not justify relief as a matter of law. Workman, 144 Idaho at 522, 164 P.3d at 802; Charboneau v. State, 144 Idaho 900, 903, 174 P.3d 870, 873 (2007).

A post-conviction petitioner alleging ineffective assistance of counsel must demonstrate both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989). Bare assertions and speculation, unsupported by specific facts, do not make out a *prima facie* case for ineffective assistance of counsel. Roman, 125 Idaho at 649, 873 P.2d at 903. An attorney's performance is not constitutionally deficient unless it falls below an objective standard of reasonableness, and there is a strong presumption that counsel's conduct is within the wide range of reasonable professional assistance. Gibson v. State,

110 Idaho 631, 634, 718 P.2d 283, 286 (1986); Davis v. State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989). To establish prejudice, a defendant must show a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988); Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 245 (Ct. App. 1999). Application of these standards shows no error by the district court.

1. Ineffective Assistance Of Counsel Related To Double Jeopardy

“[W]here the alleged deficiency is counsel's failure to file a motion, a conclusion that the motion, if pursued, would not have been granted by the trial court, is generally determinative of both prongs of the *Strickland* test.” State v. Abdullah, 158 Idaho 386, 487, 348 P.3d 1, 102 (2015) (quotations and brackets omitted). The district court rejected Adams' claim of ineffective assistance of counsel for not filing a motion based on double jeopardy because the double jeopardy claim was without merit. (R., pp. 97-98 (“Felony Possession (of a firearm) is not a lesser included offence of Grand Theft (of a firearm).”).

On appeal Adams claims that under the “pleading theory” his crimes were included offenses because they were both possessory crimes. (Appellant's brief, pp. 10-11.) Nowhere, however, did Adams allege that he was charged with theft of the firearms by possession. (See R., pp. 5-6.) To the contrary, the record establishes that the charge was that Adams “did wrongfully *take* firearms from the owner.” (R., p. 71 (Tr., p. 19, L. 25 – p. 20, L. 9) (emphasis added); see also R., p. 72 (Tr., p. 24, Ls. 5-22 (setting forth the factual basis for the charge of theft by taking firearms from a home during the course of a burglary).) Even if there were some underlying merit (there is not) to the claim that double jeopardy would disallow both charges under the pleading theory if the pleadings based both

charges on possession, Adams' argument is specious under the facts of this case because the grand theft was based on taking, not possession.

2. Ineffective Assistance Of Counsel Based On Discussion Of Intent Element

Adams alleged his counsel was ineffective for failing to "explain ... that the State of Idaho would still have had to prove that the Petitioner had the mental element of 'intent' to commit the crime of Grand Theft." (R., p. 6.) The district court rejected this claim for lack of prejudice. First, the record established that the court properly advised Adams of the intent element before he entered his plea. (R., p. 99.) Second, Adams did not allege that he would not have entered the plea, but instead would have gone to trial, had he been adequately advised. (Id.)

The district court's ruling that Adams failed to establish a *prima facie* claim of prejudice is supported by applicable law. First, the law establishes that where the record demonstrates a knowing and voluntary relinquishment of a right, counsel's deficient explanation of that right preceding the waiver does not result in prejudice. In Murray v. State, 156 Idaho 159, 167-68, 321 P.3d 709, 717-18 (2014), the Idaho Supreme Court held that the alleged deficiency of counsel in explaining the defendant's rights was not prejudicial where the "record conclusively establishes" that that the petitioner "understood his rights" at the time of his waiver. See also Grant v. State, 156 Idaho 598, 605, 329 P.3d 380, 387 (Ct. App. 2014). Likewise, in Nevarez v. State, 145 Idaho 878, 885, 187 P.3d 1253, 1260 (Ct. App. 2008), the court stated that allegedly "erroneous advice" about the terms of the plea agreement "was cured by the trial court's clear statements that the mandatory minimum sentence for trafficking would apply." Because the element of intent

and the state's burden relative thereto was explained to Adams before he entered his plea, Adams' claim of prejudice was disproved by the record.

Second, Adams did not allege that but for his attorney's alleged deficiency the result of the proceedings would have been different. "To show prejudice" from counsel's deficient performance in relation to a negotiated plea agreement "a petitioner must demonstrate a reasonable probability that 'but for counsel's errors, [the petitioner] would not have pleaded guilty and would have insisted on going to trial.'" Cosio-Nava v. State, 161 Idaho 44, 48, 383 P.3d 1214, 1218 (2016) (brackets original, quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)). Because Adams never claimed that he would not have accepted the state's offer and pled guilty pursuant to the plea agreement, but would instead have insisted on forgoing the offer and going to trial, he failed to allege prejudice from counsel's alleged deficiency in explaining the intent element.

On appeal Adams challenges only the first finding of no prejudice, that the voluntary waiver on the record cured any deficient explanation, by arguing he was specifically relying on counsel's representation that there was no insanity defense. (Appellant's brief, pp. 11-13.) Thus, even if Adams' argument had merit, the district court must still be affirmed on the unchallenged theory articulated by the district court. State v. Goodwin, 131 Idaho 364, 366, 956 P.2d 1311, 1313 (Ct. App. 1998) (where appellant does not challenge "an independent, alternative basis" for the holding, the holding will be affirmed on the unchallenged basis).

Even if Adams' argument that the record did not disprove prejudice by showing a knowing and voluntary waiver of any defense based on mental illness is addressed on the merits Adams has shown no error because his argument does not withstand analysis.

Adams alleged that counsel “did not explain” that the state had to prove intent; “informed” him that “because there was no type of ‘insanity defense’ in the State of Idaho, that the State did not have to prove ‘intent’ to commit a crime”; and “informed” him “that he had no defense to the crimes charged,” and therefore he “should plead guilty.” (R., pp. 6-7.) The record of the underlying criminal case, however, shows that the district court secured a knowing and voluntary waiver of any defense based on the claim that Adams’ mental health issues disproved his intent.

During the plea colloquy, before taking the plea, the district court asked Adams if he understood that “the State would have to prove” that he “did wrongfully take firearms from the owner ... with the intent to appropriate to [himself] that property.” (R., p. 71 (Tr., p. 19, L. 25 – p. 20, L. 8).) Adams answered, “Yes, Your Honor.” (R., p. 71 (Tr., p. 20, L. 9).) He explained that he did not recall taking the firearm because he was under the influence of drugs. (R., p. 72 (Tr., p. 21, L. 22 – p. 23, L. 25).) The judge then explained that his “significant mental health issues” and “impairment issues” were “not a defense to a criminal offense” but “could be potentially used as evidence that [he] lacked a specific intent necessary for the commission of an offense.” (R., p. 73 (Tr., p. 26, L. 15 – p. 27, L. 6).) This led to the following exchange:

[The Court:] Do you understand, sir, that when you plead guilty you’re waiving any defense that you would have based on either impairment that would address whether you could form the specific intent to permanently intend to permanently deprive somebody of their property or mental health issue that would prevent or have something to do with your ability to form the intent necessary to have the specific intent for either the firearms charge or the — or the grand theft charge?

THE DEFENDANT: Yes, Your Honor.

(R., p. 73 (Tr., p. 27, Ls. 7-16).) The court told Adams that it would be “fine” if he wanted to go to trial and offered him a continuance if he wished to get a mental health evaluation. (R., p. 73 (Tr., p. 27, Ls. 17-25).) Adams rejected that, stating he was guilty, and again reiterated that he was voluntarily waiving potential defenses to the charges. (R., p. 73 (Tr., p. 28, Ls. 1-21).)

This record demonstrates that Adams did know that his mental health and substance abuse impairments could be used as evidence at a trial to show lack of intent to permanently deprive the owner of the guns he took, and that Adams affirmatively waived that potential defense. Adams has failed to show that the record does not establish a knowing and voluntary waiver of any defense related to his mental health impairments. Because the record does establish such a waiver, Adams was not prejudiced by the alleged deficiencies of counsel in explaining that potential defense.

The district court properly found that the record showed a knowing and intelligent waiver of any defenses presented by mental health issues, and thus Adams was not prejudiced by any alleged failure by his counsel to explain such a defense. The district court also properly found that Adams did not allege that but for counsel’s deficient advice he would have rejected the plea agreement and insisted on going to trial, a finding that Adams does not challenge on appeal. Adams has failed to show error in the summary dismissal of his claims.

CONCLUSION

The state respectfully requests this Court to affirm the district court's summary dismissal of Adams' petition for post-conviction relief.

DATED this 29th day of November, 2018.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 29th day of November, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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