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

MICHAEL R. OSBORN,	)	
	)	**No. 46504-2018**
Petitioner-Appellant,	)	
	)	**Ada County Case No.**
v.	)	**CV01-2017-17250**
	)	
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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STATEMENT OF THE CASE

Nature Of The Case

Michael R. Osborn appeals from the district court's judgment dismissing his petition for post-conviction relief. Osborn argues the district court erred when it dismissed his petition without holding an evidentiary hearing.

Statement Of The Facts And Course Of The Proceedings

In August 2016, the state charged Michael R. Osborn with six felonies and a misdemeanor. (R., p.151.) As part of a plea agreement, Osborn agreed to plead guilty to aggravated assault on a law enforcement officer, unlawful possession of a firearm by a felon, two counts of intimidating a witness, burglary, and petit theft. (R., p.79.) He also agreed to plead guilty to grand theft and burglary in a separate criminal case. (R., p.79.)

Osborn filled out a guilty plea advisory form. (R., pp.71-78.) The form instructed Osborn to "Please Circle One" answer on each of a series of questions. (R., p.72.) He confirmed that he was "pleading guilty freely and voluntarily" and that he was "satisfied with [his] attorney." (R., pp.77-78.) The form also asked whether "*any* person (including a law enforcement officer or police office[r]) threatened you or [did] anything to make you enter this plea against your will." (R., p.78 (emphasis in original).) "While a mark appears over the 'yes' answer . . ., 'no' is clearly circled." (R., p.390.)

At the change of plea hearing, Osborn confirmed, under oath, that he circled the answers in the guilty plea advisory form and that "all of the information [was] true and correct." (R., p.88.) He also had the following exchange with the district court:

THE COURT: Is that plea agreement acceptable to you?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you understand you're not required to accept a plea agreement?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you understand you're not required to enter a guilty plea at all?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you want to enter a guilty plea today?

THE DEFENDANT: Yes, ma'am.

(R., p.87.) Based on its conversation with Osborn, the district court found that Osborn "underst[ood] . . . the consequences of entering guilty pleas" and "that his guilty pleas [were] freely and voluntarily made." (R., p.90.) The district court accepted Osborn's guilty pleas. (R., p.90.)

In September 2017, Osborn filed a petition for post-conviction relief, which he amended in May 2018. (R., pp.7-10, 58-68.) Osborn claimed that his counsel provided ineffective assistance with respect to his plea by threatening to withdraw as counsel if Osborn refused to accept the plea.[1] (R., pp.8, 64.)

The state filed a motion for summary dismissal of Osborn's petition. (R., pp.141-42.) The state asserted two arguments: (1) "an attorney's impatience or indication that he will withdraw if a plea bargain is not accepted is not enough to constitute coercion" and (2) "Osborn's claim that he was coerced by his attorney's threat is disproven by the record." (R., p.164 (internal citation omitted).) Osborn filed a response to the state's motion in which he pointed out that, in response to the question on the guilty plea advisory form

[1] Osborn also asserted many other claims (R., pp.61-68, 157), but "Mr. Osborn does not challenge the district court's order granting summary dismissal of these claims on appeal" (Appellant's brief, p.2 n.2).

about whether anyone had threatened Osborn, Osborn "made a mark over the yes answer but he circled the no answer." (R., p.219.)

The district court summarily dismissed Osborn's petition. (R., pp.378-402.) The district court rejected Osborn's claim that his counsel provided ineffective assistance by threatening to withdraw on the basis that Osborn's "claim [was] disproven by the record." (R., p.389.) Citing Osborn's guilty plea advisory form and the transcript of the change of plea hearing, the district court found Osborn's "contention that his trial counsel threatened him to plead guilty is disproven by [Osborn]'s written and oral statements under oath to this Court." (R., p.389.)

Osborn timely appealed from the judgment. (R., pp.402, 406-08.)

ISSUE

Osborn states the issue on appeal as:

> Did the district court err in summarily dismissing Mr. Osborn's claim that his guilty plea was involuntary as it was the product of his trial counsel's threat to withdraw?

(Appellant's brief, p.5.)

The state rephrases the issue as:

Has Osborn failed to show that the district court erred when it summarily dismissed his petition for post-conviction relief?

ARGUMENT

The District Court Properly Dismissed Osborn's Petition For Post-Conviction Relief

A. Introduction

Osborn's petition for post-conviction relief was subject to summary dismissal for two reasons: First, the record disproved his allegation that he pled guilty only because his attorney threatened to withdraw. Osborn confirmed in his guilty plea advisory form and at the change of plea hearing that he did not plead guilty as the result of a threat. Second, even if true, Osborn's allegation does not justify relief. To prove ineffective assistance, Osborn had to prove that his counsel performed deficiently. But the Idaho Supreme Court has held that trial counsel's "threat to withdraw does not fall outside of the range of competence demanded of attorneys in criminal cases." Hollon v. State, 132 Idaho 573, 577, 976 P.2d 927, 931 (1999).

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 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." Charboneau v. State, 144 Idaho 900, 903, 174 P.3d 870, 873 (2007).

C. Summary Dismissal Was Proper Because The Record Disproved Osborn's Claim And Osborn's Claim Did Not Justify Relief

The district court properly dismissed Osborn's petition for post-conviction relief. An "applicant for post-conviction relief must prove by a preponderance of evidence the allegations upon which the application for post-conviction relief is based." Charboneau,

144 Idaho at 903, 174 P.3d at 873. "The application must include affidavits, records, or other evidence supporting its allegations, or must state why such supporting evidence is not included." I.C. § 19-4903.

"Summary disposition of a petition for post-conviction relief is appropriate if the applicant's evidence raises no genuine issue of material fact." Id.; see I.C. § 19-4906(b), (c). "A court is required to accept the petitioner's unrebutted allegations as true, but need not accept the petitioner's conclusions." Charboneau, 144 Idaho at 903, 174 P.3d at 873. The district court may dismiss an application for post-conviction relief without holding an evidentiary hearing where the allegations "are clearly disproved by the record of the original proceeding" or "do not justify relief as a matter of law." Id. Both reasons supported the summary dismissal of Osborn's petition.

First, Osborn's claim that he only pled guilty because his trial counsel threatened to withdraw was "clearly disproved by the record of the original proceeding." Id. The record clearly disproves a petitioner's claim when he supports his claim with only his own statements and those statements contradict statements he made incident to the guilty plea. See Campos v. State, 165 Idaho 90, ___, 438 P.3d 787, 791 (Ct. App. 2019). In Campos, Campos claimed that his plea was not knowing, intelligent, and voluntary because his "counsel told him that his sentence would be concurrent" when such an agreement did not actually exist. Id. at ___, 438 P.3d at 790. The Idaho Court of Appeals held that Campos's allegations "were disproved by the record" because "Campos made numerous assurances that he understood the terms of his plea agreement in the guilty plea advisory form" and at the change of plea hearing. Id. at ___, 438 P.3d at 790-91.

This case is the same as Campos in every meaningful way. Both Campos and Osborn supported their post-conviction claims with only their own statements. And, in both cases, the statements made in support of the post-conviction claim were contradicted by statements made incident to the guilty plea. Here, Osborn claims that he only pled guilty because his attorney threatened him. (R., p.64.) But Osborn stated in his guilty plea advisory form that he did *not* enter the plea as a result of a threat and that he was "pleading guilty freely and voluntarily." (R., pp.77-78.) He also confirmed to the district court, under oath, that he marked those answers on the guilty plea advisory form, that the answers were correct at the time he marked them, and that they were still correct at the time the district court accepted his plea. (R., p.88.) Because Osborn's claim was clearly disproved by the record, the district court acted properly when it summarily dismissed his claim.

On appeal, Osborn concedes that "the statements he made through his guilty plea advisory form and during the entry of plea hearing indicate that his plea was voluntarily entered into." (Appellant's brief, p.6.) Yet he argues that the conflict between those statements made incident to his guilty plea and the statements he now makes in support of his petition required the district court to hold an evidentiary hearing. (Appellant's brief, pp.8-9.)

Osborn's argument is indistinguishable from the argument the Idaho Court of Appeals expressly rejected in Campos:

> Campos contends that the district court is required to conduct an evidentiary hearing when, as here, the statements he makes in post-conviction are contrary to the statements he made incident to the guilty plea. However, this is exactly the situation where the appellate courts have held that the post-conviction claims are belied by the record and subject to summary dismissal. Without more, the district court is not, contrary to Campos' assertion, required to conduct an evidentiary hearing to determine which of Campos' contrary statements is more credible.

165 Idaho at ___, 438 P.3d at 791 (citations and footnote omitted). And, as the court indicated, the holding in Campos is hardly new. See, e.g., Eddington v. State, 162 Idaho 812, 820, 405 P.3d 597, 605 (Ct. App. 2017) (affirming summary dismissal of petitioner's claim that trial counsel "failed to properly advise [the petitioner] on the plea agreement consequences" because the petitioner indicated he understood the consequences of the plea in his guilty plea advisory form and at the change of plea hearing); Grant v. State, 156 Idaho 598, 607, 329 P.3d 380, 389 (Ct. App. 2014) (affirming summary dismissal of post-conviction claim that counsel provided ineffective assistance by "assuring [the petitioner] that his sentences would run concurrently" because the petitioner acknowledged in his guilty plea forms that "the sentences could run concurrently or consecutively").

Second, Osborn's claim has a more fundamental (yet equally fatal) problem: his allegations "do not justify relief as a matter of law." Charboneau, 144 Idaho at 903, 174 P.3d at 873. "To demonstrate ineffective assistance of counsel, [a petitioner] must show that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense." Hollon v. State, 132 Idaho 573, 577, 976 P.2d 927, 931 (1999). And the Idaho Supreme Court has held that trial counsel's "threat to withdraw does not fall outside of the range of competence demanded of attorneys in criminal cases." Hollon, 132 Idaho at 577, 976 P.2d at 931.

In Hollon, the petitioner asserted that his counsel provided ineffective assistance when he "threatened to withdraw, therefore coercing his guilty plea and rendering it invalid." Id. at 576, 976 P.2d at 930. The Idaho Supreme Court acknowledged that "[t]he record clearly indicates that [the petitioner]'s counsel told him he would withdraw if [the petitioner] went to trial." Id. Nevertheless, the court held that the petitioner's counsel did

not perform deficiently because his counsel "gave him ample opportunity to find substitute counsel" and "the district judge gave [the petitioner] the opportunity to state that he felt coerced" at the change of plea hearing. Id. at 577-58, 976 P.2d at 931-32.

In light of Hollon, Osborn failed to allege a claim of ineffective assistance even accepting all of his allegations as true. Osborn's claim is based on the allegations that he expressed reservations about the plea agreement and his "[t]rial [c]ounsel responded by threatening to withdraw as counsel of record if [Osborn] did not go along with the plea agreement." (R., p.64.) Based on Osborn's own affidavit, he would have had time to obtain a new attorney: he acknowledged that his attorney's withdrawal "would've caused [him] to have a public defender." (R., p.12.) And, like in Hollon, the district court gave Osborn the opportunity to state that he felt coerced. Specifically, the district court confirmed that the plea was acceptable to Osborn, that Osborn understood he was "not required to accept a plea agreement," and that Osborn understood he was not "required to enter a guilty plea at all." (R., p.87.) Osborn's claim was thus subject to summary dismissal for stating only allegations that "do not justify relief as a matter of law." Charboneau, 144 Idaho at 903, 174 P.3d at 873.

Osborn argues that Hollon does not apply because the petitioner in Hollon received an evidentiary hearing. (Appellant's brief, p.9 n.5.) That misses the point. If Osborn wanted an evidentiary hearing, he had to allege facts in his petition that, if true, would warrant relief. See I.C. §§ 19-4903, 19-4906; see also Charboneau, 144 Idaho at 903, 174 P.3d at 873 ("When the alleged facts, even if true, would not entitle the applicant to relief, the trial court may dismiss the application without holding an evidentiary hearing."). At best, Osborn's allegations give him exactly what the petitioner in Hollon had after the

evidentiary hearing: a "record [that] clearly indicates that [his] counsel told him he would withdraw if [he] went to trial." 132 Idaho at 576, 976 P.2d at 930. But the Idaho Supreme Court held, as a matter of law, that is insufficient to show ineffective assistance of counsel. See id. at 577-78, 976 P.2d at 931-32. Because Osborn's allegations do not justify relief as a matter of law, the district court could have dismissed the claim on that basis. See Charboneau, 144 Idaho at 903, 174 P.3d at 873.

Osborn also argues that the state did not move for summary dismissal on this basis and thus, in Osborn's view, the state waived this theory and he did not receive adequate notice of the purported basis for summary dismissal. (Appellant's brief, p.9 n.5.) His argument rests on a faulty premise.

The state argued this theory in its brief in support of its motion for summary disposition. (R., pp.163-64.) The state pointed out that "Osborn does not allege that he was coerced by a state agent, but rather his privately hired attorney." (R., p.164.) The state then argued "that an attorney's impatience or indication that he will withdraw if a plea bargain is not accepted is not enough to constitute coercion." (R., p.164.) The state supported its argument with a citation to Uresti v. Lynaugh, 821 F.2d 1099, 1102 (5th Cir. 1987), and explained that, in Uresti, the Fifth Circuit held "that a plea was not rendered involuntary due to trial counsel indicating that he would ask to withdraw if the defendant did not accept the plea bargain." (R., p.164.) The state's argument and reliance on Uresti preserved this theory for appeal and satisfied the notice requirement for dismissing a post-conviction petition.[2] See State v. Garcia-Rodriguez, 162 Idaho 271, 275, 396 P.3d 700,

[2] Notably, in Hollon, the Idaho Supreme Court quoted extensively from Uresti to support its decision. See Hollon, 132 Idaho at 577, 976 P.2d at 931.

704 (2017) (indicating that a party preserves an argument by presenting it to the district court below); Kelly v. State, 149 Idaho 517, 523, 236 P.3d 1277, 1283 (2010) ("Where the dismissal is based upon the grounds offered by the State, additional notice is unnecessary.").

Finally, Osborn notes that the district court did not dismiss his petition on this basis. (Appellant's brief, p.9 n.5.) While the district court did not expressly rely on this theory, this Court can affirm the district court on any theory supported by the record and preserved in the district court. See Garcia-Rodriguez, 162 Idaho at 275, 396 P.3d at 704 ("It is true that where an order of the district court is correct but based upon an erroneous legal theory, this Court will affirm upon the correct theory." (internal quotations omitted)). Thus, Osborn's failure to allege facts that justify relief serves as a second reason for this Court to affirm the summary dismissal of Osborn's petition.

CONCLUSION

The state respectfully requests this Court affirm the district court's judgment dismissing Osborn's petition for post-conviction relief.

DATED this 13th day of August, 2019.

/s/ Jeff Nye
JEFF NYE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 13th day of August, 2019, 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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/s/ Jeff Nye
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