

IN THE SUPREME COURT OF THE STATE OF IDAHO

TIMOTHY C. DURETTE,)
) **No. 46997-2019**
 Petitioner-Appellant,)
) **Boundary County Case No.**
 v.) **CV-2018-3**
)
 STATE OF IDAHO,)
)
 Defendant-Respondent.)
 _____)

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BOUNDARY**

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STATEMENT OF THE CASE

Nature Of The Case

Timothy C. Durette appeals from the judgment of the district court denying his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

Durette's wife contacted a sheriff's deputy directly because she was in fear for her life. (R., p.236; 3/25/19 Tr., p.61, Ls.9-12; p.94, Ls.13-25.) She described Durette's behavior "as unpredictable and scary for her and her children." (R., p.236; 3/25/19 Tr., p.61, Ls.13-18.) She informed the deputy that Durette was "gone for a couple of days at a time," and when he was at the house he was "always going out to shoot his guns." (R., p. 236; 3/25/19 Tr., p.61, Ls.16-20.) The deputy confirmed that Durette was a convicted felon. (R., p.236; 3/25/19 Tr., p.61, L.21 – p.62, L.3.) Durette's wife gave the deputy permission to go onto their property to investigate. (3/25/19 Tr., p.62, Ls.4-12.)

The following day, the deputy heard shooting on the Durrettes' property, so he drove up their driveway and parked on their property. (R., pp.236-37; 3/25/19 Tr., p.62, L.13 – p.63, L.11.) The deputy got out of his patrol car and saw Durette coming towards him wearing a bulletproof vest, a shoulder holster with a weapon, and carrying a long rifle. (R., p.237; 3/25/19 Tr., p.63, L.12 – p.64, L.5.) The deputy stated that Durette was a convicted felon and was not supposed to be in possession of firearms. (R., p.237; 3/25/19 Tr., p.64, Ls.6-18.) In response, Durette told him that he was trespassing and needed to leave. (R., p.237; 3/25/19 Tr., p.64, Ls.19-21.) The deputy told Durette that he was not leaving and then ordered Durette to put the weapons on the ground and step back. (R., p.237; 3/25/19 Tr., p.64, Ls.21-22.) Durette disregarded the order, grabbed the rifle, and went into the house. (R., p.237; 3/25/19 Tr., p.64, Ls.22-24.) The officer then left the

Durettes' property. (R., p.237; 3/25/19 Tr., p.64, L.25 – p.65, L.3.) Durette was arrested later that day at a local restaurant. (R., p.237.)

A few days after Durette's arrest the deputy returned to the Durettes' house accompanied by Durette's wife. (R., p.237; 3/25/19 Tr., p.65, Ls.4-12.) Durette's wife gave the deputy access to the home and permission to go inside. (R., pp.51-52; 3/25/19 Tr., p.65, Ls.13-14.) The deputy conducted a warrantless search of the residence to find the weapons he had previously observed Durette carrying. (R., p.237.) Durette's wife opened the safe where Durette stored his firearms. (R., pp.47-51, 237; 3/25/19 Tr., p.65, Ls.11-19; p.88, Ls.8-16.) Durette's wife also stored her firearm and some paperwork in the safe. (R., p.237; 3/25/19 Tr., p.88, Ls.20-25; p.90, Ls.7-9.)

The state charged Durette with unlawful possession of a firearm. (R., p.232.) During the preliminary hearing, the magistrate repeatedly admonished Durette to be quiet following an expletive-laced rant that he directed at the judge and his court-appointed attorney. (R., pp.40-44, 233.) Durette disregarded the court's admonitions, and consequently he was removed from the courtroom. (R., pp.43-44, 233.) Durette's attorney remained in the courtroom throughout the preliminary hearing and cross-examined the state's sole witness, Durette's wife. (R., pp.44-53, 233.) The magistrate found that the state had met its burden to prove probable cause and bound Durette over to district court. (R., pp.53, 233.)

Durette pled guilty. (R., p.233.) The court imposed a total unified sentence of five years, with two years fixed. (R., p.233.) Durette appealed from the judgment of conviction. (R., p.233.) The only issue on appeal was whether the court abused its discretion by imposing an excessive sentence. (R., pp.233-34.) The Idaho Court of Appeals affirmed the judgment and sentence. (R., p.234; see also State v. Durette, Docket No. 44918 (Ct. App. Sept. 22, 2017) (unpublished).)

Durette timely filed a pro se petition and affidavit for post-conviction relief, followed by an amended petition and affidavit for post-conviction relief. (R., pp.9-39, 130-60.¹) Relevant to this appeal, he argued: (1) the magistrate abused its discretion by “removing [him] from the courtroom and denying [him] the ability to confront and cross-examine witnesses” and by “forcing [him] to be defended by an ineffective attorney,” (R., pp.133-34); (2) the district court abused its discretion when it “failed to perform a proper . . . inquiry” into the breakdown in communication between him and his trial counsel, denied his motion for a new preliminary hearing, and by “forcing” him “to move forward in the proceeding with an attorney whom [sic] had been ineffective,” (R., pp.135-36); (3) his Fourth Amendment rights were violated because the sheriff’s deputy trespassed onto his property and searched the locked safe without a warrant, (R., p.137); (4) his trial counsel rendered ineffective assistance because she refused to file a motion to suppress, (R., pp.140-46); and (5) his appellate counsel rendered ineffective assistance by failing to raise various issues on appeal (R., pp.147-50).

The district court held an evidentiary hearing. (R., p.235; see 3/25/19 Tr., pp.1-115.) The court heard testimony from Durette’s mother, his ex-wife, his trial counsel, and the sheriff’s deputy. (R., p.236; 3/25/19 Tr., p.21, L.1 – p.100, L.7; p.106, L.12 – p.112, L.4.)

Based upon the oral testimony presented at the evidentiary hearing and the affidavit submitted by Durette, the court issued its findings of facts and conclusions of law in a

¹ Durette moved for the appointment of post-conviction counsel, (R., pp.86-89), and the district court granted the motion (R., p.234). Notwithstanding the fact that counsel had been appointed, Durette continued to file documents pro se. (R., pp.97-106, 118-60.) Eventually, Durette’s post-conviction counsel moved to withdraw because Durette continued to act “as his own counsel” by preparing and filing various pro se legal documents without her knowledge and because he “refused to sign and return” the amended petition for post-conviction relief that she had prepared for him. (R., pp.125-26; see 8/23/18 Tr., p.5, L.3 – p.14, L.19.) Following a hearing on counsel’s motion, the court granted her request to withdraw. (R., pp.161-62; see 8/23/18 Tr., pp.5-14.)

memorandum decision and order denying Durette's amended petition for post-conviction relief. (R., pp.232-251.) The court concluded that with the exception of his ineffective assistance of counsel claims, the claims in Durette's petition were forfeit because he could have raised them on direct appeal from the judgment of conviction, but had not. (R., pp.238-41.) With respect to his ineffective assistance of counsel claims, the district court concluded that he had failed to prove that his trial counsel and his appellate counsel rendered ineffective assistance of counsel. (R., pp.241-50.)

The district court subsequently entered judgment denying Durette's amended petition for post-conviction relief. (R., pp.252-53.) Durette timely appealed. (R., pp.254-59.)

ISSUE

Durette failed to comply with Idaho Appellate Rule 35, which requires the appellant to list the issues presented on appeal. (See Appellant's brief, pp.1-7.)

The issue on appeal is:

Has Durette failed to show that the district court erred when it dismissed his petition for post-conviction relief following an evidentiary hearing?

ARGUMENT

Durette Has Failed To Show That The District Court Erred When It Denied His Petition For Post-Conviction Relief

A. Introduction

On appeal, Durette asserts: (1) his trial counsel provided ineffective assistance by refusing to file a motion to suppress; (2) the “appellate public defenders [sic] had provided the ineffective assistance of counsel by failing to raise all substantial [sic] claims;” (3) his Fourth Amendment rights were violated; (4) the magistrate court erred when it “forced [him] to proceed with an ineffective attorney” and when it removed him from the preliminary hearing thereby denying his right “to be present” and his right “to confront and cross-examine witnesses against him;” and (5) the district court erred by failing “to perform a proper inquiry into” the breakdown in communication between him and his trial counsel, by forcing him “to utilize [sic] an ineffective attorney,” and by denying his request for “a new preliminary hearing.” (Appellant’s brief, pp.3-6.)

With respect to these five assertions, Durette has failed to assign error to the district court’s rulings. He has merely restated the claims in his petition for post-conviction relief. Therefore, this Court can affirm the district court’s unchallenged rulings on these claims. To the extent these assertions can be construed as arguments that the district court erred, Durette has failed to show clear error.

Durette also argues that the district court erred by “stating . . . [that the deputy] did not trespass,” and by concluding that the deputy “had the right to open a locked safe without clearing any ambiguity over whom had control.” (Appellant’s brief, pp.5-6.) Durette failed to provide any cogent argument or authority supporting these claims. Thus, they are waived on appeal.

B. Standard Of Review

In order to prevail in a post-conviction proceeding, the petitioner must prove by a preponderance of the evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; Stuart v. State, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990); Baxter v. State, 149 Idaho 859, 861, 243 P.3d 675, 677 (Ct. App. 2010). When reviewing a decision denying post-conviction relief after an evidentiary hearing, an appellate court will not disturb the lower court's factual findings unless they are clearly erroneous. I.R.C.P. 52(a); Dunlap v. State, 141 Idaho 50, 56, 106 P.3d 376, 382 (2004); Russell v. State, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. Dunlap, 141 Idaho at 56, 106 P.3d at 382; Larkin v. State, 115 Idaho 72, 73, 764 P.2d 439, 440 (Ct. App. 1988). The Court exercises free review of the district court's application of the relevant law to the facts. Baxter, 149 Idaho at 862, 243 P.3d at 678.

C. Durette Failed To Show That The District Court Clearly Erred When It Denied The Claims In His Petition For Post-Conviction Relief

Durette has failed to assign error to the district court's substantive rulings. The court concluded that Durette failed to prove by a preponderance of evidence that his trial counsel and appellate counsel rendered ineffective assistance. (R., pp.241-50.) The district court also concluded that claims that Durette's Fourth Amendment rights were violated, that the magistrate court erred, and that the district court erred were forfeit in post-conviction proceedings because they could have been raised on direct appeal but were not. (R., pp.238-41.)

Rather than assign error to the district court's rulings, Durette merely reasserts that trial and appellate counsel rendered ineffective assistance; that his Fourth Amendment rights were violated; that the magistrate court erred when it removed him from the preliminary hearing thereby

denying his right “to be present” and his right “to confront and cross-examine witnesses against him” and when it “forced [him] to proceed with an ineffective attorney;” and that the district court erred by failing “to perform a proper inquiry into” the breakdown in communication between him and his trial counsel, by forcing him “to utilize [sic] an ineffective attorney,” and by denying his request for “a new preliminary hearing.” (Appellant’s brief, pp.3-6.) Durette simply regurgitated these five claims in his opening brief (see R., pp. 133-37, 138-51), without addressing the district court’s findings of fact and conclusions of law, much less assign error to the court’s rulings.

Durette failed to assert how the district court erred when it concluded that he had failed to meet his burden to prove the ineffective assistance of counsel claims or when it determined that his other claims were forfeit in post-conviction proceedings. Rather than challenging the contents of the district court’s findings and conclusions to demonstrate a basis for error, Durette merely asks this Court to reevaluate the record and reach its own conclusions regarding the claims in his post-conviction petition. Such an analysis falls well outside the Court’s standard of review and would be “an improper exercise for [the] Court.” See Bach v. Bagley, 148 Idaho 784, 796, 229 P.3d 1146, 1158 (2010).

Because Durette has not assigned error to the district court’s findings of facts or conclusions of law, it is impossible for the Court to determine whether there is clear error notwithstanding the district court’s well-reasoned analysis of Durette’s claims. Accordingly, the Court should affirm the district court’s denial of these five claims on the basis of the court’s unchallenged rulings. State v. Goodwin, 131 Idaho 364, 366-67, 956 P.2d 1311, 1313-14 (Ct. App. 1998) (holding that the appellate court may affirm on an unchallenged basis).²

² It is well-established that “[p]ro se litigants are not entitled to special consideration or leniency because they represent themselves.” State v. McDay, 164 Idaho 526, 528, 432 P.3d 643, 645 (2018) (citation omitted). To the contrary, “[p]ro se litigants are held to the same standards and

To the extent the Court construes these five claims as arguments that the district court erred, Durette has failed to show clear error. The scope of post-conviction relief is limited. Knutsen v. State, 144 Idaho 433, 438, 163 P.3d 222, 227 (Ct. App. 2007). A petition for post-conviction relief is not a substitute for an appeal. I.C. § 19-4901(b). A claim or issue that was or could have been raised on direct appeal may not be considered in post-conviction proceedings. Id.; Mendiola v. State, 150 Idaho 345, 348-49, 247 P.3d 210, 213-14 (Ct. App. 2010).

Here, the district court correctly concluded that Durette's claims that his Fourth Amendment rights were violated, that the magistrate court erred, and that the district court erred were forfeit in post-conviction proceedings because they could have raised on appeal in the underlying criminal case, but were not. (R., pp.238-41.) The only issue Durette raised on direct appeal from the judgment of conviction was whether the district court had abused its sentencing discretion by imposing an excessive sentence. He did not assert that his Fourth Amendment rights were violated, that the magistrate court erred, or that the district court erred (apart from the claim that the court abused its sentencing discretion). Such claims could have been raised on direct appeal. But they were not. Moreover, Durette made no argument much less a substantial factual showing, in either his amended petition and affidavit for post-conviction relief or by the testimony of witnesses at the evidentiary hearing, that raised a substantial doubt about the reliability of the finding of guilt and could not, in the exercise of due diligence, have been presented earlier. See

rules as those represented by an attorney.” Michalk v. Michalk, 148 Idaho 224, 229, 220 P.3d 580, 585 (2009) (quoting Suits v. Nix, 141 Idaho 706, 709, 117 P.3d 120, 123 (2005)). Thus, “courts will apply the same standards and rules whether or not a party is represented by an attorney . . . including the rules of procedure.” McDay, 164 Idaho at 528, 432 P.3d at 645 (citations omitted). Accordingly, the same standards and rules apply to Durette on appeal as apply to those appellants represented by an attorney.

I.C. § 19-4901(b). Thus, he has failed to show that the district court clearly erred when it determined these claims were forfeit in post-conviction proceedings.

Furthermore, the district court correctly concluded that Durette failed to prove both ineffective assistance of counsel claims by a preponderance of the evidence. A claim of ineffective assistance of counsel may properly be brought under the Uniform Post-Conviction Procedure Act. Barcella v. State, 148 Idaho 469, 477, 224 P.3d 536, 544 (Ct. App. 2009). To prevail on an ineffective assistance of counsel claim, the petitioner must show that the attorney's performance was deficient and that the petitioner was prejudiced by the deficiency. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Self v. State, 145 Idaho 578, 580, 181 P.3d 504, 506 (Ct. App. 2007). To establish a deficiency, the petitioner has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. Aragon v. State, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). Where, as here, the petitioner was convicted upon a guilty plea, to satisfy the prejudice element, the petitioner must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pled guilty and would have insisted on going to trial. Plant v. State, 143 Idaho 758, 762, 152 P.3d 629, 633 (Ct. App. 2006).

In a post-conviction proceeding challenging an attorney's failure to pursue a motion in the underlying criminal action, the district court may consider the probability of success of the motion in question in determining whether the attorney's inactivity constituted ineffective assistance. Lint v. State, 145 Idaho 472, 477, 180 P.3d 511, 516 (Ct. App. 2008). Where 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. Lint, 145 Idaho at 477-78, 180 P.3d at 516-17.

In this case, the district court concluded that Durette failed to prove ineffective assistance of trial counsel by a preponderance of evidence. The court correctly determined that a motion to suppress, if pursued in the criminal case, would have been denied by the court. (R., pp.241-45.) “A third party may consent to a search, thereby relieving the government of the warrant requirement, as long as such person possessed authority—either actual or apparent—to consent.” State v. Robinson, 152 Idaho 961, 965, 277 P.3d 408, 412 (Ct. App. 2012) (citations omitted). “Actual authority to consent exists if the third party shares with the defendant common authority over or other sufficient relationship to the premises or effects sought to be inspected.” Id. (citations omitted).

In this case, Durette’s wife had common authority over both the residence and the gun safe. The property was titled in her and her grandmother’s names (R., p.46), and she shared the residence with Durette (R., p.245). She also shared the gun safe with Durette and used it to store her own paperwork and firearm. (R., pp.237, 244). Accordingly, Durette’s wife had actual authority to consent to the deputy’s search of the property and the gun safe thereby relieving the state of the warrant requirement. Because his wife consented to the officer’s warrantless entry onto the property and subsequent search of the gun safe, with actual authority to do so, the deputy was relieved of the warrant requirement, and any assertion that Durette’s Fourth Amendment rights were violated by the warrantless entry and search is meritless.

The basis of Durette’s ineffective assistance of trial counsel claim was the alleged deficiency in trial counsel’s failure to file a motion to suppress. Durette’s trial counsel informed the court that she did not file the motion to suppress as requested because she correctly believed it had no legal merit. (R., p.64.) Durette failed to prove otherwise by a preponderance of the evidence during post-conviction proceedings, and has failed to present any cogent legal argument

on appeal as to why the motion to suppress would have been granted. Accordingly, he has failed to show error in the district court's determination that a motion to suppress, if pursued, would have been denied, a conclusion that is determinative of both prongs of the Strickland test.

The district court also correctly concluded that Durette failed to prove his claim of ineffective assistance of appellate counsel by a preponderance of the evidence. Far from supporting this claim with evidence that appellate counsel was ineffective, the record reveals that Durette provided nothing to the court in support of this claim. He did not call the State Appellate Public Defender (SAPD) to testify at the evidentiary hearing nor did he submit an affidavit from the SAPD to the court. In the absence of any evidence supporting this claim in the record, Durette has failed to show that the district court clearly erred when it denied this claim.

Accordingly, Durette has failed to show that the district court clearly erred when it denied the reasserted claims in his post-conviction petition.

D. Durette Failed To Show That The District Court Erred By Stating That The Deputy “Did Not Trespass” And By Concluding The Deputy Had The Right To Open The Locked Safe “Without Clearing Any Ambiguity”

On appeal, Durette argues that the district court erred by “stating . . . [that the deputy] did not trespass on August 18” and by concluding that the deputy “had the right to open a locked safe without clearing any ambiguity over whom had control.” (Appellant’s brief, pp.5-6.³) Durette did not support these bare assertions with any argument or authority, nor could he. No legal authority supports Durette’s claim that the investigating officer was required to “clear any ambiguity” over who had control of the safe after Durette’s wife, who had actual authority to consent, consented to

³ The district court never stated that the deputy “had the right to open a locked safe without clearing any ambiguity over whom had control.” (See R., pp.232-51.) The state interprets this claim as a challenge to the district court’s determination that Durette failed to prove his ineffective assistance of trial counsel claim by a preponderance of the evidence because his Fourth Amendment rights were not violated by the search of the safe. (R., pp.241-49.)

the search of the gun safe. Furthermore, the deputy did not trespass on the property because Durette's wife consented to his presence on the property before he ever entered their property to investigate. (3/25/19 Tr., p.62, Ls.4-12.) A party waives an issue on appeal if either authority or argument is lacking. State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996). Accordingly, Durette has waived these claims on appeal.

In sum, because Durette failed to assign error to the district court's rulings on five of his claims, this Court should affirm the district court on the unchallenged bases of its rulings. To the extent the Court construes Durette's five reasserted claims as arguments that the district court erred, Durette has failed to show error. Finally, Durette waived his claims that the district court erred by "stating . . . [that the deputy] did not trespass on August 18" and by concluding that the deputy "had the right to open a locked safe without clearing any ambiguity over whom had control" because he did not support these claims with argument or authority. Therefore, Durette has failed to show that the district court clearly erred when it denied his petition for post-conviction relief.

CONCLUSION

The state respectfully requests the Court affirm the judgment of the district court denying Durette's petition for post-conviction relief.

DATED this 14th day of May, 2020.

/s/ Justin R. Porter
JUSTIN R. PORTER
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 14th day of May, 2020, served a true and correct paper copy of the foregoing BRIEF OF RESPONDENT by placing the copy in the United States mail, postage prepaid, addressed to:

TIMOTHY C. DURETTE
IDOC #122506
I.C.I.O. – GIVENS HALL A-17
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/s/ Justin R. Porter
JUSTIN R. PORTER
Deputy Attorney General

JRP/dd