

IN THE SUPREME COURT OF THE STATE OF IDAHO

PETER FRANKLIN GOULLETTE,)
) **No. 47576-2019**
 Petitioner-Appellant,)
) **Bonner County Case No.**
 v.) **CV09-19-934**
)
 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 BONNER**

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STATEMENT OF THE CASE

Nature of the Case

Peter Franklin Goulette appeals from the district court's order summarily dismissing his post-conviction petition.

Statement of Facts and Course of Proceedings

In April 2017, the state charged Goulette with felony vehicular manslaughter and reckless driving. (See R., p.40.¹) In a plea agreement that encompassed that case and other pending cases, Goulette entered an *Aflord*² plea to those two charges. (See R., pp.41-42, 55.) On June 13, 2018, the district court imposed a fixed 10-year sentence for felony vehicular manslaughter. (See R., p.43, 55-56.) Goulette did not file a direct appeal. (See R., pp.43, 56.) In March 2019, after his appointed counsel had withdrawn from the case, Goulette filed an unsuccessful *pro se* I.C.R. 35 motion. (See *id.*)

In June 2019, Goulette filed a *pro se* post-conviction petition. (R., pp.4-10.) Relevant to this appeal, Goulette asserted that this trial counsel was ineffective for failing to appeal from his judgment of conviction. (R., pp.6, 10.) Goulette also asserted that his trial counsel was ineffective for: failing to file an I.C.R. 35 motion, advising him to plead guilty to felony vehicular manslaughter when Goulette now asserts his conduct only amounted to misdemeanor vehicular manslaughter, and failing to argue for a lesser sentence. (R, pp.6, 9-10.) The district

¹ The underlying criminal case file is not in the appellate record in this case, however, the district court took judicial notice of it pursuant to I.R.E. 201. (R., p.55 n.1.)

² North Carolina v. Alford, 400 U.S. 25 (1970).

court granted Goulette’s motion for appointment of counsel. (R., pp.31-32) Appointed counsel filed a “synopsis” of Goulette’s claims (R., pp.40-45), but not an amended post-conviction petition.

The state moved for the summary dismissal of Goulette’s post-conviction petition. (R., pp.46-52.) In addition to other asserted grounds for dismissal, the state argued that Goulette failed “to allege sufficient grounds to determine ineffective assistance [of] counsel by trial counsel.” (R., p.50.) Goulette did not respond to the state’s motion, which the district court then granted. (R., pp.55-64.) With respect to Goulette’s claim that his trial counsel was ineffective for failing to file an I.C.R. 35 motion or an appeal from his judgment of conviction, the court concluded that Goulette failed to allege facts demonstrating either Strickland³ deficient performance or prejudice. (R., pp.59-61.) Goulette timely appealed. (R., pp.65-67.)

³ Strickland v. Washington, 466 U.S. 668 (1984).

ISSUE

Goulette states the issue on appeal as:

Did the district court err in summarily dismissing Mr. Goulette's petition for post-conviction relief?

(Appellant's brief, p.3.)

The state rephrases the issue as:

Has Goulette failed to demonstrate that the district court erred by summarily dismissing his claim that his trial counsel was ineffective for failing to file an appeal from his judgment of conviction?

ARGUMENT

Goulette Has Failed To Demonstrate That The District Court Erred By Summarily Dismissing His Claim That His Trial Counsel Was Ineffective For Failing To File An Appeal From His Judgment Of Conviction

A. Introduction

Goulette contends that the district court erred by summarily dismissing his post-conviction petition. (Appellant’s brief, pp.4-5.) Specifically, Goulette assigns error to the court’s dismissal of his claim that his trial counsel was ineffective for failing to appeal from his judgment of conviction despite Goulette asking him to do so. (Id.) Goulette has failed to demonstrate that the district court erred because he failed to allege sufficient facts demonstrating he is entitled to relief.

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 Correctly Concluded That Goulette Failed To Make A *Prima Facie* Showing For Post-Conviction Relief With Respect To The Challenged Ineffective Assistance Of Trial Counsel Claim

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).

If a district court seeks to dismiss a petition for post-conviction relief on its own initiative, it must first give the petitioner notice of "its reasons for so doing" and "an opportunity to reply within 20 days to the proposed dismissal." I.C. § 19-4906(b). But if the state files a motion for summary dismissal and "the dismissal is based upon the grounds offered by the State, additional notice is unnecessary." Kelly v. State, 149 Idaho 517, 523, 236 P.3d 1277, 1283

(2010). To provide sufficient notice, the state's motion for summary disposition need only "state with particularity the grounds therefor." DeRushé v. State, 146 Idaho 599, 601, 200 P.3d 1148, 1150 (2009) (citing I.R.C.P. 7(b)(1)). "It does not require explaining what further evidence is necessary, particularly since it may not exist." Id. at 602, 200 P.3d at 1151. Furthermore, the state's motion to dismiss satisfies the notice requirement even if the district court summarily dismisses the petition based only *in part* on the State's arguments. See Kelly, 149 Idaho at 523, 236 P.3d at 1283.

A post-conviction petitioner alleging ineffective assistance of counsel must demonstrate both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-688 (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).

To establish an objective Strickland deficiency in the context of a claim that trial counsel was ineffective for failing to file a notice of appeal, the petitioner must show either that: (1) the attorney failed to follow express instruction for him to file an appeal; or (2) the attorney failed to consult with him and (a) a rational defendant would want to appeal (based on nonfrivolous grounds), or (b) this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 477-480 (2000). To establish Strickland prejudice in such a claim, a petitioner must demonstrate that, but for counsel's deficient conduct, he would have appealed. Id. at 486. Where "counsel disregards a direct request to file an appeal, the defendant should not be required to identify the meritorious issues that would have been raised, but should be restored to the status enjoyed immediately following the judgment of conviction when the defendant was entitled to a direct appeal." Loveland v. State, 141 Idaho 933, 936 n.2, 120 P.3d 751, 754 n.2 (Ct. App. 2005) (citing Beasley v. State, 126 Idaho 356, 360, 883 P.2d 714, 718 (Ct. App. 1994).)

In this case, Goulette challenges only the district court's summary dismissal of his claim that his trial counsel was ineffective for failing to file a notice of appeal from his judgment of conviction.⁴ (Appellant's brief, pp.4-5.) With respect to this claim, Goulette made the factual assertion in his post-conviction affidavit that, "[a]fter sentencing I found out I did not meet the guidelines for a felony so I asked my attorney to file both an appeal and Rule 35 and he failed to do so on my behalf." (R., p.10.) However, other than asserting that it occurred "after

⁴ Because Goulette challenges the district court's summary dismissal of only one of his post-conviction claims, this Court should affirm the court's dismissal order with respect to his other claims regardless of its determination regarding the challenged claim.

sentencing,” Goulette did not assert *when* he allegedly instructed his trial counsel to file a notice of appeal, and specifically, whether he made such a request within 42 days of the entry of the judgment of conviction as required by I.A.R. 14(a). (See id.)

This factual omission rendered Goulette’s claim deficient. To withstand summary dismissal of a claim that counsel was ineffective for failing to follow instructions to file a notice of appeal, a post-conviction petitioner must allege facts that, if true, show the request was made within the requisite time for filing a notice of appeal. Hoffman v. State, 153 Idaho 898, 907-908, 277 P.3d 1050, 1059-1060 (Ct. App. 2012) (affirming district court’s summary dismissal of a claim that counsel was ineffective for failing to file notice of appeal as directed by petitioner where none of the evidence presented by Hoffman demonstrated that he requested that his attorney “file an appeal within the requisite time period”).

Not only did Goulette fail to allege this necessary fact, the record indicates that he did not, in fact, direct his counsel to file a notice of appeal with 42 days of the entry of the judgment of conviction following his guilty plea. At the hearing on the state’s motion for summary dismissal, Goulette represented to the district court that after he came to a new understanding of the facts of the case that he believed demonstrated his counsel’s ineffective assistance, he “tried to get ahold [sic] of [trial counsel], and he wouldn’t talk to me anymore, he was my attorney, it was already too late to file an appeal. So that’s why I went with this [post-conviction

proceeding], because it's the only option that I had.” (Tr., p.11, Ls.3-11.⁵) Goulette then stated that, “[a]fter I got sentenced that day, I asked [trial counsel], I said, ‘what can I do now?’ And he didn’t say anything about my appeal. He said, ‘Do a Rule 35.’” (Tr., p.11, Ls.12-15.) Further, Goulette’s I.C.R. 35 motion and post-conviction petition, in which he collectively first raised his claim regarding the vehicular manslaughter statute and the degree of his criminal culpability, were not filed until March and June 2019, respectively, 9-12 months after his June 2018 conviction. (See R, pp.4, 56.) It is thus apparent that by the time Goulette attempted to contact his counsel to request that a direct appeal be filed to challenge the nature of the charge he pled guilty to, the time for appeal had already expired. Trial counsel could not have provided ineffective assistance with respect to Goulette’s request by that point. Hoffman, 153 Idaho at 907-908, 277 P.3d at 1059-1060.

The state acknowledges that neither the state’s motion for summary dismissal, nor the court’s dismissal order, cited Hoffman or otherwise identified this specific flaw in Goulette’s post-conviction petition. However, the state moved for dismissal on grounds including that Goulette “fail[ed] to allege sufficient grounds to determine ineffective assistance [of] counsel by trial counsel.” (R., p.50.) Nothing in the relevant post-conviction statutes or the cases interpreting them entitle a post-conviction petitioner to pre-dismissal notice of the *types* of evidence which may have supported a post-conviction claim, but were not submitted by the petitioner. See DeRushé, 146 Idaho at 602, 200 P.3d at 1151 (adequate notice for summary

⁵ Citations to page numbers of the transcript refer to the page number of the transcript contained in the upper-right hand corner of the page, not the page number of the electronic transcript file located in the bottom-center of the page.

dismissal in a post-conviction proceeding “does not require explaining what further evidence is necessary”). In other words, the state was not required to direct Goulette on *how* to construct and support a post-conviction claim in order for the state’s motion for summary dismissal to constitute adequate notice.

Here, Goulette received adequate notice for the district court’s dismissal of his claim when the state moved for summary dismissal, without an evidentiary hearing, on the ground that Goulette failed adequately support his claim, and that he therefore failed to allege facts which, if true, demonstrated he was entitled to relief. The state engaged in the “preferable practice” identified by the Idaho Supreme Court to file a motion specifically identified as a motion for summary disposition (as opposed to a motion to dismiss), to use the language of I.C. 19-4906(c) and cite that specific statutory provision in support of the motion for summary disposition, and thus make it “absolutely clear to a defendant that the State is not just responding to a petition but is seeking summary disposition.” Workman, 144 Idaho at 524, 164 P.3d at 804. Goulette has therefore failed to show that the district court erred by dismissing this claim.

The state also acknowledges that the district court’s reasoning with respect to both Strickland prongs was flawed. With respect to the Strickland deficiency prong, the court concluded that in light of the lack of evidence presented by Goulette, trial counsel’s decision not to file a notice of appeal “can be considered strategic and tactical.” (R., p.60.) With respect to the Strickland prejudice prong, the court concluded that Goulette “presented no evidence that raises a triable issue as to whether but for his counsel’s errors, he would not have pled guilty and would have insisted on going to trial.” (R., p.61.) However, as noted above, such a claim as

raised by Goulette requires a consideration of whether the petitioner has established that the attorney failed to follow an express and timely instruction to file an appeal; and whether the petitioner has established that, but for counsel's deficient conduct in failing to file an appeal, he would have appealed. However, the district court's conclusion was ultimately correct because, for the reasons discussed above, Goulette failed to allege a valid claim. Icanovic v. State, 159 Idaho 524, 528, 363 P.3d 365, 369 (2015) (An appellate court exercises free review of the district court's application of the relevant law to the facts; and if a district court reaches a correct result by an erroneous theory, the appellate court will affirm the order upon the correct theory); see also Ridgley v. State, 148 Idaho 671, 676, 227 P.3d 925, 930 (2010) (“[b]ecause this Court employs the same standards on appellate review that the trial court applies in considering summary dismissal of a petition for post-conviction relief, if Ridgley failed to provide admissible evidence supporting these claims, they were properly dismissed.”) Because the state's motion to dismiss provided notice of the grounds for dismissal, and the district court utilized these grounds – albeit through flawed reasoning – this Court should affirm the district court's dismissal order.

Goulette has failed to demonstrate that the district court erred in concluding that he failed to present a *prima facie* claim that his trial counsel was ineffective for failing to file a notice of appeal from his judgment of conviction. This Court should therefore affirm the district court's summary dismissal of Goulette's post-conviction petition.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order summarily dismissing Goulette's petition for post-conviction relief.

DATED this 29th day of October, 2020.

/s/ Mark W. Olson
MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this 29th day of October, 2020, 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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