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IN THE SUPREME COURT OF THE STATE OF IDAHO

SABINA A. HALLAM,)
) No. 48137-2020
 Petitioner-Appellant,)
) Owyhee County Case No.
 v.) CV37-18-17
)
 STATE OF IDAHO,)
)
 Respondent.)
_____)

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF OWYHEE**

HONORABLE THOMAS W. WHITNEY
District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Sabina A. Hallam appeals from the district court's judgment summarily dismissing her petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

Hallam was charged with five counts of grand theft by unauthorized control. (R., p.192.) Pursuant to a plea agreement, she pled guilty to one count and the remaining counts were dismissed. (Id.) The district court imposed a unified sentence of five years, with three years fixed, and retained jurisdiction. (R., p. 137 (1/23/15 Tr., p.16, Ls.22-24).) The court also entered a restitution order in the amount of \$34,087. (R., p.185.) Hallam objected to the amount of restitution. (Id.) Upon successful completion of her rider, the court placed Hallam on probation for four years and held a contested restitution hearing. (R., pp.185, 193.) After considering the evidence presented during the hearing, the court entered a restitution order in the amount of \$30,787. (R., pp.77-83, 193.)

After unsuccessfully appealing the restitution order, Hallam filed a *pro se* petition for post-conviction relief. (R., pp.7-11, 69-76, 193.) Relevant to this appeal, Hallam asserted:

- (a) My agreement to a plea deal that was not honored and refusal of my attorney to state this in Court.
- (b) Original 5 charges are \$10,300 for restitution, 4 charges were dismissed, yet after plea deal restitution jumped to \$31,689 (plea agreement was \$1,700) court cost are on 4 dismissed cases.

(R., pp.7-8.) The state filed an answer and a separate motion for summary disposition. (R., pp.12-15, 52-53.)

The district court appointed post-conviction counsel to represent Hallam. (R., pp.24-25.) Hallam, through appointed counsel, filed a response to the state's motion for summary disposition.

(R., pp.54-59.) Hallam argued that her petition raised a genuine issue of material fact as to whether her trial attorney provided ineffective assistance of counsel because although she was notified of the possibility of restitution, trial counsel “failed to ‘mention [...] that the restitution was not what was agreed on’” in the plea agreement. (R., pp.54-58 (quoting R., p.9).)

The district court held a hearing on the motion for summary disposition. (R., pp.85-86; 1/24/20 Tr., pp.1-14.) After hearing the parties’ brief arguments, the district court determined that it could not yet rule on the motion for summary disposition because the parties had not adequately addressed “a central issue” in the case—namely, whether Hallam would not have pled guilty but would have insisted instead on going to trial but for trial counsel’s alleged deficient performance. (1/24/20 Tr., p.2, L.1 – p.9, L.15.)

Hallam subsequently filed a supplemental brief and an unnotorized declaration in support. (R., pp.89-90, 93-99.) In her declaration, Hallam averred that neither her lawyer, nor the prosecutor, nor the court advised her that she would have to pay more than \$1,500 in restitution; that her trial counsel told her she would only be liable for restitution on a single count; and that she “would not have pled guilty if [she] had known [she] would be held accountable for restitution on all of the dismissed counts.” (R., p.89.) In her brief, she argued that she would not have pled guilty had she known she would be ordered to pay restitution on the dismissed counts. (R., pp.93-95.¹)

The state filed a response. (R., pp.102-11.) The state asserted that Hallam’s counsel’s performance was not deficient because the record showed that Hallam was fully informed of the

¹ In the alternative, Hallam argued that prejudice could be presumed because her guilty plea was based on the inaccurate advice of trial counsel. (R., pp.95-97.) On appeal, she has seemingly abandoned the argument that prejudice can be presumed in her case. (See Appellant’s brief, pp.8-16.) Therefore, the issue is waived. State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) (holding that a party waives an issue on appeal if either authority or argument is lacking).

consequences of her plea, including being told repeatedly on the record that she would be responsible for restitution on the counts being dismissed. (R., pp.104-08.) The state also argued that even assuming deficient performance, the record in the underlying criminal case clearly disproved her claim that she would not have pled guilty had she known she would be accountable for restitution on the dismissed counts. (R., pp.109-11.)

The district court took judicial notice of the transcript of the change of plea hearing, the guilty plea advisory form, the transcript of the sentencing hearing, and the court's memorandum decision and order in response to Hallam's objection to restitution. (R., pp.148-91.) The court concluded that the state had not produced any evidence to controvert Hallam's allegations "that her trial counsel failed to alert the Court that her plea deal was not honored and that trial counsel affirmatively advised her that that [sic] she would only be liable for restitution on the single count to which she pled guilty." (R., pp.196-97.) Accepting those allegations as true, the court held that Hallam's petition raised a genuine issue of material fact worthy of an evidentiary hearing on the issue of whether trial counsel's performance was deficient. (R., pp.197-98.) However, the district court also held that Hallam's claim that she would not have pled guilty but for trial counsel's deficient performance was plainly disproven by the record, which showed that she knowingly and voluntarily entered a guilty plea after having been informed repeatedly by the court that she could be liable for restitution on all counts. (R., pp.198-99.) Accordingly, the district court summarily dismissed Hallam's petition. (R., pp.192-200.)

Hallam timely appealed. (R., pp.202-06.)

ISSUE

Hallam states the issue on appeal as:

Did the district court err when it summarily dismissed Ms. Hallam's petition for post-conviction relief?

(Appellant's brief, p.7.)

The state rephrases the issue as:

Has Hallam failed to show that the district court erred when it dismissed her petition for post-conviction relief?

ARGUMENT

Hallam Has Failed To Show That The District Court Erred When It Summarily Dismissed Her Petition For Post-Conviction Relief

A. Introduction

On appeal, Hallam asserts that the district court erred when it summarily dismissed her post-conviction petition because it “failed to examine” whether she was prejudiced by her trial counsel’s failure to “object when the trial court went beyond the plea agreement terms [sic] and ordered her to pay restitution for the dismissed charges.” (Appellant’s brief, p.8.) Hallam’s argument lacks merit. Even assuming Hallam’s allegations raised a genuine issue of material fact regarding trial counsel’s deficient performance, her sole claim of prejudice (that she would not have pled guilty had she known she would be accountable for restitution on the dismissed charges) is clearly disproven by the record in the underlying criminal case. The district court correctly so concluded. (R., pp.198-99.)

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) (citations omitted).

C. The District Court Properly Dismissed Hallam’s Petition For Post-Conviction Relief

A petition for post-conviction relief initiates a civil proceeding in which the petitioner must prove the allegations in the petition by a preponderance of evidence. I.C. § 19-4907; Thumm v. State, 165 Idaho 405, 412, 447 P.3d 853, 860 (2019). The petition must set forth verified facts

within the petitioner's personal knowledge, and affidavits, records, or other evidence supporting the petitioner's allegations must be attached or the petition must state why such supporting evidence is not included with the petition. I.C. § 19-4903. "In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal." Wolf v. State, 152 Idaho 64, 67, 266 P.3d 1169, 1172 (Ct. App. 2011).

Idaho Code § 19-4906 authorizes summary dismissal of a petition for post-conviction relief pursuant to a motion by either party "when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." I.C. § 19-4906. When considering summary dismissal, the district court must accept the petitioner's un rebutted allegations as true, but the court is not required to accept either the petitioner's mere conclusory allegations, unsupported by admissible evidence, or the petitioner's conclusions of law. Charboneau, 144 Idaho at 903, 174 P.3d at 873; Roberts v. State, 163 Idaho 660, 662, 417 P.3d 986, 988 (Ct. App. 2018). Claims may be summarily dismissed if the petitioner's allegations are clearly disproven by the record of the criminal proceedings, if the petitioner has not presented evidence making a *prima facie* case as to each essential element of the claims, or if the petitioner's allegations do not justify relief as a matter of law. Charboneau, 144 Idaho at 903, 174 P.3d at 873; DeRushé v. State, 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009).

A claim of ineffective assistance of counsel may properly be brought under the Uniform Post-Conviction Procedure Act (UPCPA). 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); Knutsen v. State, 144 Idaho 433, 442, 163 P.3d 222, 231 (Ct. App. 2007). "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 would not have pleaded guilty and would have insisted on going to trial.'" Plant v. State, 143 Idaho 758, 762, 152 P.3d 629, 633 (Ct. App. 2006) (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)). Application of the foregoing legal principles demonstrates that summary dismissal of Hallam's post-conviction petition was proper.

Even assuming Hallam's trial counsel rendered deficient performance, the record of the original proceeding clearly disproves Hallam's claim that but for counsel's alleged errors she would not have pled guilty but would have insisted instead on going to trial. The record clearly disproves a petitioner's post-conviction claim when the petitioner supports her claim with only her own statements and those statements contradict statements she made incident to the guilty plea. See Campos v. State, 165 Idaho 90, 94, 438 P.3d 787, 791 (Ct. App. 2019). In this case, Hallam's declarations made in support of her post-conviction claim are contradicted by statements she made incident to her guilty plea.

During post-conviction proceedings, Hallam supported her claim of prejudice only with her own declaration that she would not have pled guilty if she had known she would be "held accountable for restitution on all of the dismissed counts." (R., pp.89, 93-95.) But the transcript of the change of plea hearing in the underlying criminal proceedings shows that the district court asked Hallam if she understood that as a consequence of pleading guilty she could be liable for restitution "on everything." (R., p. 113 (11/26/14 Tr., p.2, Ls.13-17); see also R., pp.192-93.) She

responded, “Yes, sir.” ((R., p. 113 (11/26/14 Tr., p.2, L.18).) Later, the court unequivocally asked Hallam if she understood that “restitution could be awarded on all the cases, even the ones being dismissed?” (R., p. 115 (11/26/14 Tr., p.4, Ls.10-11); see also R., pp.193.) Again she responded, “Yes.” (R., p. 115 (11/26/14 Tr., p.4, L.12).) Following this exchange, Hallam knowingly and voluntarily waived her right to trial and pled guilty. ((R., pp. 116-18 (11/26/14 Tr., p.5, L.24 – p.7, L.24).) Thus, the record of the underlying criminal proceedings conclusively demonstrates that Hallam understood and acknowledged that she could be liable for restitution on all counts (including those counts dismissed as part of the plea agreement) before waiving her right to trial and entering a guilty plea. This evidence directly contradicts her statements made in support of her post-conviction claim of prejudice that she would not have pled guilty had she known she could be liable for restitution on all counts.

Even assuming Hallam’s trial counsel’s performance was in some way deficient in failing to inform Hallam that she would be liable for restitution on dismissed counts or failing to object, the underlying record establishes that the district court so informed her prior to her entry of plea. She acknowledged in open court that she understood she could be liable for restitution on the dismissed counts in addition to the count to which she would ultimately plead guilty. Because the record clearly disproves her claim of prejudice, the district court did not err in summarily dismissing her petition for post-conviction relief.

D. Hallam Has Failed To Show Error

Hallam argues that the district court correctly determined that her petition raised a genuine issue of material fact as to whether her trial counsel’s performance was deficient because he failed to “alert the Court that her plea deal was not honored” and because he “advised her that that [sic] she would only be liable for restitution on the single count to which she pled guilty.” (Appellant’s

brief, pp.10-13; R., pp.196-98.) The district court found these two allegations were “uncontroverted on the record,” particularly given the fact that no written plea agreement was before the court. (R., p.197.) The court concluded that these allegations created a question of fact worthy of an evidentiary hearing to determine whether trial counsel’s performance fell below an objective standard of reasonableness. (R., pp.197-98.) Both Hallam and the district court are incorrect.

The record shows that the plea agreement required Hallam to plead guilty to one count of grand theft and to pay restitution on all counts (including any dismissed counts) in exchange for a more lenient sentencing recommendation and the dismissal of four grand theft charges. During the sentencing hearing, the prosecutor stated, “[I]t should be clear that our negotiations were that irrespective of the fact that we have dismissed felony counts and that there was a basis to charge additional counts that restitution would be ordered ... on all matters whether charged or uncharged or dismissed otherwise.” (R., p. 128 (1/23/15 Tr., p.7, Ls. 12-19).) At the time, neither Hallam nor her counsel disputed that the plea agreement required Hallam to pay restitution on “all matters whether charged, uncharged or dismissed.” (See R., p. 128 (1/23/15 Tr., p.7, Ls.22-25).) Hallam simply disputed the *amount* of restitution being sought, arguing it was “somewhere near 3 or \$4,000” not “the 30,000 or 34,000 that the State is seeking.” (R., p. 135 (1/23/15 Tr., p.14, Ls.2-5).) Hallam never argued that the prosecutor breached the terms of the plea agreement or that the district court erred by imposing restitution on the dismissed counts. Rather, she simply maintained that the amount of restitution being sought was not supported by substantial evidence. (R., pp.69-76, 193.)

Moreover, when asked twice by the trial court at the change of plea hearing whether she understood that by pleading guilty to one count of grand theft she could still be liable for restitution

on the dismissed counts, Hallam unequivocally acknowledged that she understood. (R., p. 113 (11/26/14 Tr., p.2, Ls.13-18; p.4, Ls.10-12).) Additionally, in the trial court’s order dismissing the four remaining counts of grand theft, the district court noted that Hallam would be “responsible for all restitution attributable to [the] offenses” being dismissed. (R., p.140.) Hallam never objected. Thus, even without the written plea agreement, the record demonstrates that the agreement between the parties required Hallam to pay restitution on all charges, even the dismissed charges. Because Hallam’s allegations were in fact controverted by evidence in the record, it was error for the district court to accept them as true and conclude that they created a question of fact worthy of an evidentiary hearing. However, as shown above, even assuming deficient performance, Hallam failed to raise a genuine issue of material fact regarding prejudice.

Hallam argues to the contrary that she raised a genuine issue of material fact regarding prejudice and that the district court erred by not examining her claim of prejudice as it related to her trial counsel’s failure “to object to the breach of plea.” (Appellant’s brief, pp.13-15.) For the first time on appeal Hallam argues she was prejudiced because “but for her counsel’s inactivity in pursuing [sic] [an] objection [to the breach of the plea agreement], the trial court would not have ordered her to pay restitution for the dismissed counts.” (Appellant’s brief, pp.14-15.) Hallam’s argument fails for several reasons.

First, Hallam’s argument is not preserved. Generally, issues not raised below may not be considered for the first time on appeal. State v. Fodge, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). Appellate court review is limited to the evidence, theories, and arguments that were presented below. State v. Garcia-Rodriguez, 162 Idaho 271, 275, 396 P.3d 700, 704 (2017). Hallam never articulated the standard of prejudice below that she now asserts on appeal. (Compare Appellant’s brief, p.14 (citing Lint v. State, 145 Idaho 472, 180 P.3d 511 (Ct. App. 2008)) with

R., pp.89-90, 93-99; 1/24/20 Tr., p.1, L.24 – p.3, L.20.) Likewise, she did not argue before the district court that she was prejudiced because the trial court would not have ordered her to pay restitution on the dismissed counts had her trial counsel objected to the supposed “breach of the plea agreement.” (R., pp.7-11, 89-90, 93-99; 1/24/20 Tr., p.1, L.24 – p.3, L.20.) Instead, Hallam only asserted that she would not have pled guilty had she known she would be held accountable for restitution on all of the dismissed counts. (R., pp.89, 93-95.) Because this was her only argument regarding prejudice, it is the only prejudice argument considered by the district court in ruling on the state’s motion for summary disposition. (R., pp.198-99.) In other words, Hallam has raised a new argument under a new legal theory on appeal as to how she was prejudiced by counsel’s alleged deficient performance. Because this argument is raised for the first time on appeal, it is unpreserved and should not be considered by this Court.

Second, even if the Court considers Hallam’s new prejudice argument, she has argued prejudice under an inapplicable standard. According to Hallam, she was prejudiced by her trial counsel’s failure to object “to the breach of the plea agreement” because the trial court would not have ordered her to pay restitution for the dismissed counts if counsel had objected. (Appellant’s brief, pp.14-15.) That simply is not the relevant standard for determining whether she was prejudiced by counsel’s alleged deficient performance. “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 would not have pleaded guilty and would have insisted on going to trial.’” Plant, 143 Idaho at 762, 152 P.3d at 633 (quoting Hill, 474 U.S. at 59). On appeal, Hallam has seemingly abandoned the argument that she would not have pled guilty and proceeded to trial but for counsel’s deficient performance. (Appellant’s brief, pp.13-15.) Instead, she now argues that she was prejudiced because the court would not have

ordered her to pay restitution on the dismissed counts had counsel objected below. (Id.) Even accepting this argument as true, it does not show Strickland prejudice. Because Hallam entered a knowing and voluntary guilty plea, she must show that she would not have pled guilty but would have proceeded to trial but for counsel's failure to object to the court ordering her to pay restitution on the dismissed charges. She has failed to argue as much on appeal.

Finally, even assuming trial counsel's performance was deficient, the district court properly analyzed Hallam's claim of prejudice. As shown above, the court considered Hallam's argument that she would not have pled guilty had she known she would be accountable for restitution on the dismissed claims and correctly concluded that the record clearly disproved her claim. Thus, Hallam's petition raised no genuine issues of material fact as to prejudice. Hallam has failed to show otherwise.

CONCLUSION

The state respectfully requests this Court affirm the judgment of the district court summarily dismissing the petition for post-conviction relief.

DATED this 13th day of September, 2021.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 13th day of September, 2021, 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/ Justin R. Porter
JUSTIN R. PORTER
Deputy Attorney General

JRP/dd