

IN THE SUPREME COURT OF THE STATE OF IDAHO

EZEQUIEL ADAN CAMPOS,)
) No. 45591
 Petitioner-Appellant,)
) Ada County Case No.
 v.) CV01-2017-5435
)
 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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STATEMENT OF THE CASE

Nature of the Case

Ezequiel Adan Campos appeals from the district court's order summarily dismissing his post-conviction petition.

Statement of Facts and Course of Proceedings

Campos, a convicted felon, pulled a gun on an individual who honked his car horn at him while Campos was stopped at a stop sign. (See R., pp.138-139.) Campos fired a shot from the gun when the victim attempted to follow him to view his license plate. (See id.) The state charged Campos with aggravated assault, unlawful possession of a weapon, and sentencing enhancements for use of a deadly weapon in commission of a crime and for being a persistent violator. (See Mycourts.idaho.gov portal, Campos v. State, Ada County District Court Case No. CR-FE-2015-3547; R., p.105.) Pursuant to a plea agreement with the state, Campos pled guilty to the weapon possession charge. (R., pp.133-136.¹) The state agreed to dismiss the other charge and the sentencing enhancements. (R., p.133.) Sentencing was left "open to argument." (Id.) Prior to this resolution of the Ada County case, Campos had pled guilty and was sentenced for drug trafficking and possession charges in Canyon County. (See R., pp.133, 138.)

At the sentencing hearing in the Ada County case, the state recommended that the district court impose Campos' sentence for unlawful possession of a weapon consecutive to Campos' Canyon County sentences. (R., p.138.) The district court imposed a unified five-year sentence with four years fixed and ran the sentence consecutive as recommended by the state. (R., p.139.)

¹ The transcript from Campos' change of plea hearing, which was submitted as an exhibit in the post-conviction proceeding, had several pages missing. (See R., pp.99-103; Tr., p.22, L.3 – p.24, L.10.) The state submitted a replacement exhibit with all pages the next day. (R., pp.133-137.)

The court denied Campos' subsequent I.C.R. 35 motion. (See R., p.114.) Campos did not file a direct appeal. (See R., pp.76, 114-115.)

In March 2017, Campos filed a *pro se* post-conviction petition raising numerous ineffective assistance of trial counsel claims. (R., pp.5-26.) Relevant to this appeal, Campos appeared to assert that his trial counsel led him to believe that he would receive a concurrently-imposed sentence, and advised him to simply answer in the affirmative in his responses to the district court's questions during the plea colloquy. (R., pp.10-24.) The district court appointed counsel to represent Campos in the post-conviction proceeding. (R., p.63.) However, appointed counsel chose not to amend the petition. (See R., p.76.)

The state moved for summary dismissal of the petition. (R., pp.75-88.) The state argued that Campos' claim related to the consecutively-imposed sentence was disproven by the record. (R., pp.81-83.) Specifically, the state noted that the plea advisory form, change of plea hearing transcript, and sentencing hearing transcript indicated that the plea agreement did not include any provisions regarding the sentence, and that Campos understood that the district court could impose any lawful sentence, including a consecutively-imposed sentence. (R., pp.81-83.) After a hearing on the state's motion, the district court summarily dismissed Campos' petition on the same grounds as set forth by the state. (R., pp.143-144; Tr., p.24, L.18 – p.29, L.15.) Campos timely appealed. (R., pp.148-151.)

ISSUE

Campos states the issue on appeal as:

Did the district court err in summarily dismissing Mr. Campos' claim that his guilty plea was coerced by his attorney's misrepresentation of the plea agreement and false promises to correct errors in the terms of the argument [sic] at a later date because the claim presents a genuine issue of material fact?

(Appellant's brief, p. 7.)

The state rephrases the issue as:

Has Campos failed to demonstrate that the district court erred by summarily dismissing his ineffective assistance of trial counsel claim related to his consecutively-imposed sentence?

ARGUMENT

Campos Has Failed To Demonstrate That The District Court Erred By Summarily Dismissing His Ineffective Assistance Of Trial Counsel Claim Related To His Consecutively-Imposed Sentence

A. Introduction

Campos contends that the district court erred by summarily dismissing his post-conviction petition. (Appellant’s brief, pp.8-13.) Specifically, Campos assigns error to the court’s dismissal of his claim that his trial counsel was ineffective for providing inaccurate advice regarding his sentence and/or lying to or misleading him about the plea agreement and/or failing to object to the court’s imposition of the consecutively-imposed sentence. (Id.) Campos has failed to demonstrate that the district court erred because his relevant factual allegations are disproven by his previous sworn statements made at his change of plea hearing, and by other evidence in the record.

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 Campos Failed To Make A *Prima Facie* Showing For Post-Conviction Relief With Respect To His Ineffective Assistance Of Trial Counsel Claim Regarding The Consecutively-Imposed Sentence

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).

The claim in Campos' post-conviction petition related to the consecutively-imposed sentence is somewhat difficult to decipher. The petition does not specify enumerated claims, but instead consists primarily of a lengthy narrative. (R., pp.7-25.) In the petition, it is clear that Campos asserts: (1) that he believed he would receive a concurrently imposed sentence; and (2) that his trial counsel advised him to answer in the affirmative in his responses to the district court's questions during the plea colloquy. (Id.) However, it is unclear whether Campos asserted that his counsel was ineffective for: failing to object to the imposition of the consecutive sentence on the ground that the plea agreement bound the district court to impose a concurrent sentence; lying to or misleading Campos about what terms the plea agreement contained or did not contain; lying to or misleading Campos about his intention to challenge the sentencing issue in a subsequent I.C.R. 35 motion; and/or inaccurately advising Campos that the district court would impose a concurrent sentence. (See id.) Further, while Campos asserted in his subsequent memorandum that there was a reasonable probability that he would have rejected the plea agreement had he realized that there was a possibility that his sentence would be imposed consecutively (R., p.125), he did not make any specific factual assertions to this effect in his petition (see R., pp.10-24).

In its brief in support of its motion for summary dismissal, the state construed Campos' claim as asserting that trial counsel was ineffective for failing to "correct an omission on the guilty plea advisory form at the sentencing hearing" by "advis[ing] the court...at the sentencing hearing that he was expecting a sentence concurrent to his Canyon County case." (R., pp.81-83.) The state argued that this claim should be summarily dismissed because Campos failed to present admissible facts that the plea agreement between himself and the state included a term that the sentence was to run concurrently (or that either party was required to make a recommendation to that effect). (Id.) To the extent that this Court construes the claim as the state did, the state adopts the argument as presented below. As discussed in greater detail below, the guilty plea advisory form signed by Campos, the discussion between the parties and court at the change of plea hearing, and Campos' sworn statements made during the plea colloquy affirmatively demonstrate that the plea agreement did not include any provision related to the court's sentencing determinations. (R., pp.92, 133-134.) Campos did not present any evidence to the contrary.

At the hearing on the state's motion for summary dismissal, the district court expressed some confusion about the nature of the claim. (Tr., p.10, p.1 – p.14, L.4.) Campos' post-conviction counsel attempted to clarify the claim and informed the court that Campos was asserting that trial counsel lied to him in some unspecified manner about the plea agreement, and that this rendered Campos' plea involuntary. (Id.) The court appeared to accept this clarification and to construe the claim in a manner consistent with this representation. (Tr., p.14, Ls.2-14.) Campos' counsel acknowledged that these assertions were contrary to statements Campos made during the change of plea and sentencing hearings. (Tr., p.14, Ls.7-20.) The court ultimately concluded that Campos' factual allegations were both conclusory and contrary to Campos' sworn

statements from the change of plea hearing; and that a post-conviction petitioner does not create an issue of material fact simply by contradicting his own prior sworn statements. (Tr., p.24, L.18 – p.25, L.11; p.27, Ls.1-8; p.27, L.22 – p.29, L.15.) The court was correct.

Like any other civil litigant attempting to avoid an adverse summary judgment ruling, a post-conviction petitioner does not raise a genuine issue of fact by merely contradicting in an affidavit what he told the court, under oath, in a plea hearing. See Frazier v. J.R. Simplot Co., 136 Idaho 100, 103, 29 P.3d 936, 939 (2001) (citation omitted) (impermissible to attempt to prevent an adverse summary judgment ruling by creating factual issues in an affidavit which contradict prior sworn deposition statements); Matter of Estate of Keeven, 126 Idaho 290, 298, 882 P.2d 427, 435 (Ct. App. 1994) (a “sham” affidavit that directly contradicts previous testimony may be disregarded on a summary judgment motion). Because the allegations in Campos’ post-conviction petition were affirmatively disproved by his prior sworn statements at the change of plea hearing, they did not create a genuine issue of material fact entitling him to an evidentiary hearing. Workman, 144 Idaho at 522, 164 P.3d at 802 (post-conviction allegations insufficient for granting of relief when they are clearly disproved by the record); Cootz v. State, 129 Idaho 360, 368, 924 P.2d 622, 630 (Ct. App. 1996) (same); see also Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262, 266 (9th Cir. 1991) (recognizing that allowing parties to raise issues of fact simply by submitting an affidavit contradicting prior testimony would greatly diminish the utility of summary judgment proceedings).

In the guilty plea advisory form signed by Campos, Campos wrote that he understood the terms of the plea agreement to include “open sentencing.” (R., p.92.) He also initialed the section indicating that he understood that the court was not bound by the plea agreement and could impose any sentence authorized by law. (Id.) At the change of plea hearing, Campos’

counsel informed the court that, under the terms of the plea agreement, “[s]entencing is open to argument.” (R., p.133.) After he was placed under oath, Campos indicated that: (1) he had the opportunity to go over the agreement with his attorney; (2) his attorney answered his questions and explained matters to his satisfaction; (3) he was satisfied with his attorney’s representation; (4) he had no remaining questions about the agreement; (5) nobody made any promises to him regarding what the district court’s sentence would be; (6) he understood that the district court could impose any sentence up to the maximum for unlawful possession of a firearm; and (7) he understood that the district court could impose the sentence consecutive to the sentence imposed in Campos’ Canyon County case. (R., pp.133-136.) At the sentencing hearing, the court again reiterated that the plea agreement did not bind the parties’ sentencing recommendations. (R., p.137.) Consistent with this agreement, and without objection from Campos’ counsel, the state recommended that the district court impose its sentence consecutive to Campos’ Canyon County sentence. (R., p.138.)

As the district court properly concluded in this case, Campos’ sworn statements at the change of plea hearing disproved the relevant factual allegations in his post-conviction petition. Campos’ sworn statements disproved both his allegation that he believed that the district court was required to impose a concurrent sentence, and any implied allegation that his trial counsel misled or lied to him about the existence of a plea agreement containing a provision that would bind the court to impose a concurrent sentence. Without any corroboration, the district court was not required to accept these assertions.

Finally, even assuming: (1) the truth of Campos’ allegation that his trial counsel advised him to answer in the affirmative in his responses to the district court’s questions during the plea colloquy; (2) that this allegation was not disproven by the record; and (3) that counsel’s advice

constituted Strickland deficient performance, Campos has still failed to allege facts demonstrating Strickland prejudice. As noted above, the record reflects that the district court clearly and accurately informed Campos of the scope of its sentencing discretion in this case, and that Campos understood the court's authority in this respect. The court expressly informed Campos that it could impose a consecutive sentence. (R., p.135.) Campos still chose to plead guilty. Therefore, Campos has failed to allege facts demonstrating that there would have been a different outcome (i.e., that he would have chosen not to take the state's plea offer), if not for any counsel advice regarding Campos' answers to the court's questions.

Campos has failed to demonstrate that the district court erred in concluding that he failed to present a *prima facie* ineffective assistance of trial counsel claim related to the consecutively-imposed sentence. This Court should therefore affirm the district court's summary dismissal of Campos' post-conviction petition.

CONCLUSION

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

DATED this 6th day of November, 2018.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 6th 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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