

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

JAMES DOUGLAS KELLY,)
)
)
 Petitioner,)
)
 vs.)
)
 STATE OF IDAHO,)
)
 Respondent.)

Case No. **CV 2015 4455**
**MEMORANDUM DECISION AND
ORDER DENYING SUMMARY
DISMISSAL**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

On October 20, 2015, this Court entered its “Memorandum Decision and Order Denying Summary Dismissal at Present, and Notice of Court’s Intent to Dismiss Petition for Post-Conviction Relief.” In that Order, the Court gave James Douglas Kelly (Kelly) *pro se* until November 15, 2015, to “file a reply showing some arguable basis for relief based upon admissible evidence.” Memorandum Decision and Order Denying Summary Dismissal at Present, and Notice of Court’s Intent to Dismiss Petition for Post-Conviction Relief, p. 10.

One of the deficiencies in Kelly’s *pro se* Petition for Post Conviction Relief was that while Kelly alleged his attorney did not timely file and appeal, Kelly did not allege that Kelly had ever directed Lynn Nelson, his attorney at the time, to file an appeal with the Idaho Supreme Court/Idaho Court of Appeals. *Id.*, pp. 8-10.

On the morning of November 16, 2015, Kelly’s “Affidavit of Rebutal [sic] of Courts [sic] Notice of Intent to Dismiss Request for Post Conviction Relief” (which contained an affidavit) was filed as well as “Motion Requesting Evidentiary Hearing & Motion to Transport Offender to

Hearing for Evidentiary [sic] Hearing on Post Conviction.” In his affidavit, Kelly corrects the defect noted by this Court by stating, “I did talk to and ask my attorney to file an appeal in person & over the phone directly after sentencing in July of 2013.” Affidavit of Rebutal [sic], p. 2. While Kelly’s Affidavit of Rebutal [sic] and Motion Requesting Evidentiary Hearing were filed a day late per this Court’s October 20, 2015, Order, due to the fact that those documents were filed in the morning indicates that those documents were received by the Clerk of the Court at some point the day before, on November 15, 2015, and were thus, in all likelihood, timely.

In Kelly’s Affidavit of Rebutal [sic], Kelly also alleges, “Had he filed this in time as I asked my appeal would not have had to get dismissed. So outcome would have been different.” Affidavit of Rebutal [sic], p. 2.

II. STANDARDS FOR POST-CONVICTION SUMMARY DISPOSITION.

The civil nature of post-conviction proceedings and the differences between the pleading and summary judgment standards in ordinary civil actions and post-conviction proceedings are delineated in *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995), where in the Idaho Court of Appeals stated in part:

Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached or the application 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.

...

Summary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact which, if resolved in the applicant's favor, would entitle the petitioner to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. (Citations omitted). Summary dismissal of a petition for post-conviction relief may be appropriate, however, even where the state does not controvert the applicant's evidence, for 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. (Citations omitted).

Unless admissible evidence is presented or accompanies an application for post-conviction relief, the application is subject to dismissal. *Hassett*, 127 Idaho at 316, 900 P.2d at 224. A short and

plain statement of the claim while adequate in a normal civil proceeding is not, by itself sufficient in an application for post-conviction relief. *Id.* For example, the assertion of “prosecutorial misconduct” in the Petition for Post-Conviction Relief amounts to a conclusory statement, unsupported by admissible evidence and, therefore, is subject to summary dismissal.

In *Brown v. State*, 137 Idaho 529, 50 P.3d 1024 (Ct. App. 2002), the Idaho Court of Appeals noted that an application for post-conviction relief was an appropriate method to present a claim of ineffective assistance of counsel. The court then described the nature of a claim of ineffective assistance of counsel, stating;

In order to prevail on such a claim, an applicant must demonstrate both that his attorney's performance was deficient and that the applicant was prejudiced by the deficient representation. To show deficient performance, an applicant must overcome the strong presumption that counsel's performance was adequate by demonstrating that counsel's representation did not meet objective standards of reasonableness. If a defendant succeeds in establishing that counsel's performance was deficient, he must also prove the prejudice element by showing a reasonable probability that, but for the attorney's defective performance, the outcome of the criminal case would have been different.

Brown, 137 Idaho at 532, 50 P.3d at 1028 (citations omitted). “A reasonable probability does not mean ‘more likely than not’; it means a probability sufficient to undermine confidence in the outcome.” *Esquivel v. State*, 149 Idaho 255, 258. 233 P.3d 186, 189 (Ct. App. 2010), (citing *Strickland v. Washington*, 466 U.S. 668, 693-94 (1984)).

III. ANALYSIS.

A. Motion for Summary Dismissal Must be Denied.

Now that Kelly has asserted in his Affidavit for Rebutal [sic], that Kelly requested his attorney Lynn Nelson to file an appeal, there would exist a genuine issue of material fact which would require an evidentiary hearing. *Flores v. State*, 104 Idaho 191, 657 P.2d 488 (Ct. App. 1983). Kelly must also allege that, “the outcome of the criminal case would have been different.” *Brown*, 137 Idaho 529, 532, 50 P.3d 1-024, 1028 (Ct. App. 2002). Kelly has now made that allegation. While the allegation, “So outcome would have been different” (Affidavit of Rebutal

[sic], p. 2), is certainly conclusory, it is sufficient at this time for Kelly to avoid summary dismissal.

The Idaho Court of Appeals has held:

A defendant's right to representation by counsel extends to all critical stages of his trial, including appeal. * * * This right to counsel includes the right to effective assistance of counsel. * * * Where a criminal defendant advises his or her attorney of a desire to appeal, and the attorney fails to take the necessary steps to file an appeal, such a defendant has been denied his or her constitutional right to the effective assistance of counsel at a critical stage of the proceedings. (citations omitted).

* * *

A defendant denied an appeal because his lawyer did not file an appeal as requested should not be given an additional hurdle to clear just because his rights were violated at some earlier stage in the proceedings. *See Rodriguez [v. United States]*, *supra*, 295 U.S. [327]at 330, 89 S.Ct. [1715] at 1717. On post-conviction then, 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.

* * *

Since *Penson*, every court that has squarely confronted the question with regard to the need to prove prejudice has held that failure to take an appeal, despite the defendant's request, is ineffective assistance without regard to the probability of success on appeal. (citations omitted).

Adopting this reasoning, we adhere, therefore to our recent opinion in *Mata v. State*, 124 Idaho 588, 861 P.2d 1253 (Ct. App. 1993), where we stated that the prejudice suffered by Mata, who claimed that his counsel did not file an appeal as requested, was the loss of the opportunity to appeal. That loss is itself sufficient prejudice to support a claim of ineffective assistance of counsel based on a failure to appeal as requested by a criminal defendant. *Ricca v. State*, 124 Idaho 894, 898, 865 P.2de 985, 989 (Ct. App. 1993). Having determined that Beasley's counsel either neglected or refused to file an appeal despite Beasley's request, we conclude that ineffective assistance of counsel deprived Beasley of his opportunity to appeal and that prejudice is presumed from this deficient performance.

Beasley v. State, 126 Idaho 356, 359-362, 883 P.2d 714, 717-720 (Ct. App. 1994).

B. Motion for Transport.

In his "Motion Requesting Evidentiary Hearing & Motion to Transport Offender to Hearing for Evidentiary [sic] Hearing on Post Conviction", Kelly *pro se* requests "...to be able to be present at a [sic] evidentiary hearing so that I can testify on my behalf..." (*Id.*, p. 1) and that "I also ask the court to do a transport order so I can be present during evidentiary hearing as is my right." *Id.*, p. 2. Kelly has no such "right". Idaho Code § 19-4907(b) states:

The applicant should be produced at the hearing on a motion attacking a sentence where there are substantial issues of fact as to the evidence in which he participated. The *sentencing court has discretion to ascertain whether the claim is substantial* before granting a full evidentiary hearing and requiring the applicant to be present.

I.C. § 19-4907(b). (italics added). At present, it is unknown whether the defendant even disputes that Kelly made a timely request to appeal. The State is entitled to determine whether Lynn Nelson corroborates that claim, or not. If the claim is corroborated, there should be a resolution of this post-conviction relief case that is short of an evidentiary hearing. If the claim is not corroborated, a dispute of material fact exists and a hearing will need to be scheduled. In any event, Kelly's request for transportation is premature. Accordingly, the motion to transport is denied at the present time.

C. If Kelly Has Made a Motion for Appointment of Counsel, it is Denied.

Kelly claims:

I feel that the public defenders [sic] office is under staffed & overworked. Has not had the time to represent me adequately. So unless the court hires me a paid attorney I will not have adequate representation. I have not been able to have 100% effort on my case do [sic] to my indigent status & lack of legal knowledge. I have been denied the right to a proper legal defence [sic] because I am uneducated and that I have no money and am a minority.

Motion Requesting Evidentiary Hearing & Motion to Transport Offender to Hearing for Evidentiary [sic] Hearing on Post Conviction, pp. 2-3. It is at best unclear if Kelly is making a motion for appointment of an attorney. Thus, due to that lack of clarity, any such motion at the present time is denied.

IV. ORDER.

IT IS HERBY ORDERED, the defendant's motion for summary dismissal (contained in the brief of the same name) is DENIED.

IT IS FURTHER ORDERED plaintiff Kelly's Motion to Transport is DENIED.

IT IS FURTHER ORDERED any motion made by plaintiff Kelly for appointment of an attorney is DENIED.

IT IS FURTHER ORDERED a scheduling conference will be held on January 19, 2016, 2015, at 2:00 p.m. Pacific Standard Time (3:00 Mountain Time), and James Kelly can make arrangements to participate telephonically in that conference by calling the Court's Deputy Clerk of Court at 208 446-1103, any time between now and one week prior to that scheduling conference.

DATED this 24th day of November, 2015.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of November, 2015 a true and correct copy of the foregoing was mailed, postage prepaid, or sent by interoffice mail or facsimile to:

James D. Kelly
IDOC # 59979
IMSI, P. O. Box 51
Boise, ID 83707

Kootenai County Prosecuting Attorney,
Bryant Bushling, Deputy

**CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY**

By: _____ Deputy

