

**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 AT PRESENT, AND
NOTICE OF COURT'S INTENT TO
DISMISS PETITION FOR POST-
CONVICTION RELIEF**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

James Douglas Kelly (Kelly) *pro se* filed a Petition for Post-Conviction Relief on June 22, 2015. On September 30, 2014, this Court denied Kelly's I.C.R. 35 Motion, but granted in part his request for time served while in the State of Washington on his detainer. Kelly filed his Notice of Appeal on October 8, 2014. Kelly did not timely appeal his judgment of conviction and sentence imposed by this Court on July 1, 2014, but Kelly did timely appeal the denial of his I.C.R. 35 Motion, which was entered on September 30, 2014. On July 9, 2015, the Court of Appeals of the State of Idaho filed a Remittitur based on its June 4, 2015, Order dismissing Kelly's appeal. Thus, Kelly's Post-Conviction Relief case is timely filed under I.C. § 19-1402.

On July, 1, 2014, this Court imposed the five year fixed sentence followed by a ten year indeterminate sentence for the crime of Aggravated Battery, committed on May 16, 2004. That sentence was originally imposed on January 8, 2007, but suspended, and Kelly was placed on a period of retained jurisdiction on January 8, 2007.

Kelly pled guilty to that Aggravated Battery on July 29, 2004. The reason sentencing did

not occur for another two and a half years was because after Kelly pled guilty, he violated all the terms of his release by not submitting to random drug testing, failing to attend hearings, and failing to stay in contact with his court-appointed attorney. On September 16, 2004, a bench warrant was issued by the undersigned. More than two years later, on October 6, 2006, that warrant was served and Kelly was taken into custody in Idaho. Kelly was sentenced on January 8, 2007, and sent to prison on a retained jurisdiction. On June 5, 2007, following his period of retained jurisdiction, this Court placed Kelly on probation. A Report of Violation was issued on January 2, 2008, alleging possession of methamphetamine, paraphernalia and consumption of alcohol and use of methamphetamine. On March 20, 2008, Kelly admitted to those violations, and on April 24, 2008, this Court continued Kelly on probation. A Report of Violation was issued on April 24, 2012, alleging Kelly moved without permission, left the state without permission, used methamphetamine, used marijuana, consumed alcohol, failed to report to probation, and failed to participate in treatment. Kelly denied those allegations, and on August 22, 2012, at the beginning of his evidentiary hearing, Kelly admitted to those violations. On September 18, 2012, this Court continued Kelly on probation. A Report of Violation was issued on October 31, 2012, alleging Kelly was terminated from treatment. Kelly admitted that allegation and on January 2, 2013, this Court continued Kelly on probation. A Report of Violation was issued on February 15, 2013, alleging Kelly had absconded from probation. Kelly was taken into custody on April 12, 2013, and on April 17, 2013, this Court continued Kelly on probation. A Report of Violation was issued on August 27, 2013, alleging Kelly had committed a new crime, operation of a motor vehicle without the owner's consent. On July 1, 2014, Kelly admitted to that violation and pled guilty to the new charges. At that time this Court imposed Kelly's prison sentence on the 2004 Aggravated Battery.

In Kelly's *pro se* Petition for Post-Conviction Relief filed on June 22, 2015, Kelly did not request appointment of an attorney to represent him in his Post-conviction case. On July 7, 2015,

the Respondent, State of Idaho, filed “Respondent’s Answer to Petition for Post-Conviction Relief”. The certificate of mailing on that answer shows a copy was mailed to Kelly in prison. On September 16, 2015, the Respondent, State of Idaho, filed its “Brief in Support of Motion for Summary Dismissal.” The certificate of mailing on that Brief in Support of Motion for Summary Dismissal shows a copy was mailed to Kelly in prison. Curiously, Respondent has not filed a *motion* for summary dismissal.

To this date, Kelly has not responded to the Respondent’s “Brief in Support of Motion for Summary Dismissal.” “[A]n applicant ‘is entitled to twenty days to respond, so as to afford an opportunity to establish a material fact issue.’” *Isaak v. State*, 132 Idaho 369, 370, 972 P.2d 1097, 1098 (Ct. App. 1999), *citing Saykhamchone v. State*, 127 Idaho 319, 322, 900 P.2d 795, 798 (1995). For Kelly, that twenty-day period ran no later than October 7, 2015. However, as set forth below, because Respondent failed to file a *motion*, this Court finds that twenty-day period has arguably not yet begun to run on Kelly, and the better practice is for this Court to provide Kelly with a Notice of Intent to Dismiss.

In Kelly’s pro se Petition and Affidavit for Post Conviction Relief, Kelly states his grounds for post conviction relief as:

- (a) I was not able to appeal my revocation of probation because my attorney Lyn [sic] Nelson didn’t file it within 42 days
- (b) probation revocation was not filed until the middle of October 2014 & should have been filed by 42 days No later then [sic] 8-12-14.

Petition for Post Conviction Relief, p. 2, ¶ 7. Kelly then states his counsel failed to adequately represent him by:

- (a) Failed to prepare or put on a defense & have a fair revocation hearing
- (b) Failed to file papers with Court treatment, residence etc., befor [sic] hearing to revoke probation
- (c) Did not file probation revocation appeal in timely matter [sic] within 42 of sentence revoking [sic] probation

Id., p. 3. ¶ 9. Kelly states the relief he requests is:

I seek to be able to file a direct appeal of probation revocation which I had to dismiss because it was untimely. I either want probation reinstated or court [sic] to resent me

Id., p. 3, ¶ 12.

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. Failure of Respondent to File a *Motion* for Summary Dismissal.

On September 16, 2015, the Respondent, State of Idaho filed its “Brief in Support of Motion for Summary Dismissal.” At no time has the Respondent did not file a separate *motion* for summary dismissal.

A motion for summary disposition is contemplated by I.C. § 19-1906(b). Idaho Rule of Civil Procedure 7(b)(1) captioned “Motions and other papers” requires:

An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor including the number of the applicable civil rule, if any, under which it is filed, and shall set forth the relief or order sought.

This Court finds that all the requirements of a “motion” are found in Respondent’s “Brief in Support of Motion for Summary Dismissal.” In its brief Respondent does “set forth the relief or order sought”, as the Respondent clearly states, “For the reasons stated above, Respondent respectfully requests that the Court issue an order dismissing the Petition for Post Conviction

Relief.” Brief in Support of Motion for Summary Dismissal, p. 5. Respondent’s “Brief in Support of Motion for Summary Dismissal” references the word “motion” several times, and each time the Respondent also mentions the “grounds therefore”, which is “summary dismissal.” *Id.*, pp. 1-5. However, for the reasons set forth below, the Court will not treat Respondent’s memorandum as a *motion*.

This Court finds that simply using the word “motion” in a brief, does not create a *motion*. This Court also finds an actual *motion* is required in order to place Kelly on notice. Motions and briefs are discussed separately and respectively in the Idaho Civil Rules 7(b)(1) and 7(b)(3). This Court can find no specific prohibition of including a motion within a brief; and this Court can find no specific requirement that a motion and brief be separate. However, a separate motion and a brief is the procedure implied by the rules, and is certainly the practice among lawyers.

In *Saykhamchone v. State*, 127 Idaho 319, 322, 900 P.2d 795, 798 (1995), the State of Idaho Supreme Court discussed the situation where the Respondent, State of Idaho filed an “Answer” to a petition in a post-conviction relief case, asking the court to “dismiss the Petition for Post-Conviction Relief in the above entitled action without further hearing and pursuant to Idaho Code, §§ 19-1401 et. seq.”, and where “[t]he State filed no pleadings other than its Answer, and never filed or presented orally a motion for summary disposition of the application.” 127 Idaho 319, 321, 900 P.2d 795, 797. In *Saykhamchone*, the Idaho Supreme Court held:

Here, Saykhamchone’s application was dismissed without a twenty-day notice under subsection (b), or a proper motion for summary disposition under subsection (c). Accordingly, we vacate the order of dismissal.

127 Idaho 319, 322, 900 P.2d 795, 798.

While this Court finds that all the requirements of a “motion” are found in Respondent’s “Brief in Support of Motion for Summary Dismissal”, this Court determines that, in light of *Saykhamchone*, a lack of a separate “motion” might have placed Kelly in a situation where he

lacked the notice to which he is entitled. The lack of notice is manifested in many ways. First, had Kelly read I.R.C.P. 7(b)(1) and 7(b)(3), Kelly could have reasonably concluded that because the Respondent had not filed a “motion” there was nothing to which Kelly needed to respond. Second, this Court notes that even though Respondent’s “Brief in Support of Motion for Summary Dismissal” at several times mentions “summary dismissal”, at no time does it mention or cite to I.C. § 19-4906. Third, because Kelly was not presented with the citation to I.C. § 19-4906, Kelly might be uncertain as to whether he had twenty days to respond under I.C. § 19-1906(b), or whether he did not have twenty days with which to respond under I.C. § 19-4906(c).

In this case, Kelly’s Petition for Post-Conviction Relief alleges claims of ineffective assistance of counsel. Respondent’s “Brief in Support of Motion for Summary Dismissal” certainly highlights the deficiencies in Kelly’s claims. For reasons that will be set forth below, all of Kelly’s claims in his Petition for Post-Conviction Relief will be dismissed for failure to meet the two-prong standard established to prevail on a claim of ineffective assistance of counsel, unless Kelly can show an arguable basis for relief by filing no later than November 15, 2015, at 10:00 a.m. At this point Kelly has failed to establish that he even *asked* his attorney in a timely manner to file a notice of appeal regarding the probation violation disposition. Even if Kelly can prove that he timely asked his attorney, Kelly, at least at this point has failed to show why the outcome of the probation violation hearing would have been different had his attorney filed timely filed an appeal. At this point, Kelly has failed to show why the outcome of that hearing would have been different had his attorney filed any admissible evidence regarding his “treatment or residence”. At this point, Kelly has failed to present any evidence showing *how* his attorney failed to “put on a defense” and has failed to show why the outcome of that hearing would have been different had his attorney “put on a defense.” In addition to demonstrating deficient performance, Kelly, the petitioner, must also demonstrate prejudice, i.e., that counsel’s

conduct contributed to the conviction. The application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal. *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct.App. 1995). Unless there is something “...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...” (*Id.*), this claim will be dismissed for failure to establish that counsel’s performance was deficient and for failure to allege prejudice so as to deprive petitioner of his right to a fair trial. “In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal. *Id.*”

B. The Court is Satisfied that at Present, Kelly is not Entitled to Post-Conviction Relief, But Kelly is Entitled to be Notified that Kelly’s Post-Conviction Relief Claim Will be Dismissed if Kelly Does Not Reply or Does Not Adequately Reply.

Kelly’s Post-conviction relief claim is focused on his attorney’s failure to timely file an appeal of this Court’s judgment of conviction and sentence imposed on July 1, 2014. The flaw with that claim is that at no time in his “Petition and Affidavit for Post Conviction Relief” does Kelly ever claim that he asked (or told) his attorney Lynn Nelson to file an appeal. Thus, Kelly has not alleged a factual situation that could support his post-conviction relief claim. This deficiency was pointed out to Kelly by counsel for the Respondent State of Idaho (Brief in Support of Motion for Summary Dismissal, p. 3), but Kelly has failed to respond. Had Kelly asserted in his Petition for Post-Conviction Relief (or in a reply or affidavit in reply to the Respondent’s Motion for Summary Dismissal), 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 has at all times failed to make that allegation.

Even if Kelly alleged he had a discussion with Lynn Nelson where Kelly told Lynn Nelson

to file an appeal of this Court's July 1, 2014, sentencing decision, as mentioned above, in order for Kelly to survive summary disposition on Kelly's ineffective assistance of counsel claims, Kelly must also allege prejudice. That is, Kelly must allege that, "the outcome of the criminal case would have been different." *Brown*, 137 Idaho at 532, 50 P.3d at 1028. Kelly has failed to make that allegation. As pointed out by counsel for the Respondent:

In ascertaining whether a defendant has made the requisite showing of prejudice, courts may consider whether there is evidence of nonfrivolous grounds for appeal or the defendant in question promptly expressed a desire to appeal. *Flores-Ortega*, 528 U.S. 470 at 485; 120 S.Ct. 1029 at 1035; 145 L.Ed.2d 985 at 995. In this case, there is nothing presented that shows that Petitioner would have filed, and nothing presented that indicates that there are nonfrivolous [sic] grounds upon which to appeal.

Brief in Support of Motion for Summary Dismissal, p. 3. This Court agrees. Kelly has failed to claim, let alone offer any proof to support a claim that, "the outcome of the criminal case would have been different" had his attorney timely appealed.

Counsel for Respondent also points out that Kelly has not filed any admissible evidence regarding his claim of "treatment or residence" prior to the hearing to revoke probation. *Id.*, p. 3. Counsel for Respondent points out the same deficiency in Kelly's Petition for Post Conviction Relief, where Kelly alleges his attorney, "Failed to prepare or put on a defense" (Petition and Affidavit for Post Conviction Relief, p. 3. ¶ 9). *Id.*, p. 4. The Court agrees. Kelly has submitted no admissible evidence regarding any of the claims, let alone any admissible evidence that a reasonable probability exists on any of those claims that but for the attorney's defective performance the outcome of the trial would have been different. *Brown v. State* 137 Idaho 529, 532, 50 P.3d 1024, 1028 (Ct. App. 2002). Kelly was warned of all these deficiencies in the Respondent's "Brief in Support of Motion for Summary Dismissal", and yet, Kelly has failed to respond.

Because at the present time Kelly has failed to appropriately allege the requisite elements of

a claim of ineffective assistance of counsel, and because Kelly has failed to file a reply brief or affidavit correcting those deficiencies and showing some arguable basis for relief, his Petition for Post Conviction Relief should arguably be dismissed. However, because the Respondent has not filed a *motion* under I.C. § 19-4906(c), the Court will proceed under I.C. § 19-4906(b), and under that section, Kelly must be provided with a twenty-day notice of the Court's intent to dismiss his petition.

IT IS HERBY ORDERED, pursuant to I.C. § 19-4906(b), that Kelly's petition shall be dismissed on November 15, 2015, (allowing sufficient time for Kelly to receive this Memorandum Decision and Order by U.S Mail at his prison address) unless prior to 10:00 o'clock a.m. on said date Kelly shall file a reply showing some arguable basis for relief based upon admissible evidence.

DATED this 20th day of October, 2015.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of October, 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

