

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 41677

RICHARD JOSEPH WAGNER,)	2015 Unpublished Opinion No. 391
)	
Petitioner-Appellant,)	Filed: March 4, 2015
)	
v.)	Stephen W. Kenyon, Clerk
)	
STATE OF IDAHO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Deborah A. Bail, District Judge.

Judgment of the district court summarily dismissing petition for post-conviction relief, affirmed.

Sara B. Thomas, State Appellate Public Defender; Brian R. Dickson, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Theodore S. Tollefson, Deputy Attorney General, Boise, for respondent.

GUTIERREZ, Judge

Richard Joseph Wagner appeals from the judgment of the district court summarily dismissing his petition for post-conviction relief. For the reasons that follow, we affirm.

I.

FACTS AND PROCEDURE

In the underlying criminal case, a grand jury indicted Wagner for three counts of lewd conduct with a minor child under sixteen. In pretrial proceedings, the State filed a motion to introduce evidence of a prior act, subject to Idaho Rule of Evidence 404(b).¹ Subsequently, the

¹ Specifically, the State sought to introduce evidence of a prior act involving an unrelated, out-of-state victim that resulted in an out-of-state conviction for two counts of indecent liberties with children more than a decade before the lewd conduct at issue. The State claimed the evidence was relevant and was admissible under Idaho Rule of Evidence 404(b) because the evidence demonstrated a common scheme or plan.

State and Wagner reached a plea agreement in which Wagner agreed to plead guilty to one count of lewd conduct with a minor child under sixteen, and the State agreed to dismiss the other counts and dismiss a persistent violator allegation.² The State also agreed to recommend a unified sentence of thirty years, with ten years determinate. Wagner entered a guilty plea, and the State later recommended a sentence consistent with its agreement. The district court sentenced Wagner to a unified sentence of thirty years, with eight years determinate.

Wagner then filed a pro se petition for post-conviction relief, the subject of this appeal. In that petition, Wagner generally asserted four ineffective assistance of counsel claims alleging that defense counsel failed to file an appeal, “failed to argue to keep prior record out of court records,” did not require the prosecutor to show evidence that a crime took place, and did not file an Idaho Criminal Rule 35 motion. After the State moved for summary dismissal, Wagner was appointed counsel. Through counsel, Wagner filed a memorandum in opposition to the motion for summary dismissal. Following a hearing, the district court issued a notice of intent to dismiss the petition.

In response to the notice of intent to dismiss, Wagner filed an affidavit (the post-notice affidavit) in which he asserted that (a) defense counsel told him that his prior record would cause him to lose at a jury trial; (b) he only pleaded guilty because defense counsel told him he would lose at a jury trial; (c) he believed that the victim would have recanted her story at trial; (d) he would have asked to go to trial, but defense counsel informed him he would lose because of his prior record; (e) defense counsel did not advise him to lie at his entry of plea, but defense counsel told him the court would not accept his plea if the questions were not answered properly; and (f) he was “factually innocent.” The district court summarily dismissed the petition, relying on the reasoning asserted in the notice of intent to dismiss and explaining that the post-notice affidavit contained bare and conclusory statements. Wagner appeals.

II.

STANDARD OF REVIEW

A petition for post-conviction relief initiates a proceeding that is civil in nature. Idaho Code § 19-4907; *Rhoades v. State*, 148 Idaho 247, 249, 220 P.3d 1066, 1068 (2009); *State v.*

² The State moved the trial court for leave to file an information with a persistent violator allegation. Although the State agreed to drop the allegation as part of a plea agreement, it is not apparent from the trial court record that the trial court ever entered an order granting the State leave to file an information with a persistent violator allegation.

Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). Like a plaintiff in a civil action, the petitioner must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. *Goodwin v. State*, 138 Idaho 269, 271, 61 P.3d 626, 628 (Ct. App. 2002). A petition for post-conviction relief differs from a complaint in an ordinary civil action. *Dunlap v. State*, 141 Idaho 50, 56, 106 P.3d 376, 382 (2004). A petition must contain much more than a short and plain statement of the claim that would suffice for a complaint under I.R.C.P. 8(a)(1). Rather, a petition for post-conviction relief must be verified with respect to facts within the personal knowledge of the petitioner, and affidavits, records, or other evidence supporting its 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 petition must present or be accompanied by admissible evidence supporting its allegations or the petition 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, either pursuant to a motion by a party or upon the court's own initiative, if 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. When considering summary dismissal, the district court must construe disputed facts in the petitioner's favor, 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. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986). Moreover, the district court, as the trier of fact, is not constrained to draw inferences in favor of the party opposing the motion for summary disposition; rather, the district court is free to arrive at the most probable inferences to be drawn from uncontroverted evidence. *Hayes v. State*, 146 Idaho 353, 355, 195 P.3d 712, 714 (Ct. App. 2008). Such inferences will not be disturbed on appeal if the uncontroverted evidence is sufficient to justify them. *Id.*

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. *Kelly v. State*, 149 Idaho 517, 521, 236 P.3d 1277, 1281

(2010); *DeRushé v. State*, 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009). Thus, summary dismissal of a claim for post-conviction relief is appropriate when the court can conclude, as a matter of law, that the petitioner is not entitled to relief even with all disputed facts construed in the petitioner's favor. For this reason, summary dismissal of a post-conviction petition may be appropriate even when the State does not controvert the petitioner's evidence. *See Roman*, 125 Idaho at 647, 873 P.2d at 901.

Conversely, if the petition, affidavits, and other evidence supporting the petition allege facts that, if true, would entitle the petitioner to relief, the post-conviction claim may not be summarily dismissed. *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004); *Sheahan v. State*, 146 Idaho 101, 104, 190 P.3d 920, 923 (Ct. App. 2008). If a genuine issue of material fact is presented, an evidentiary hearing must be conducted to resolve the factual issues. *Goodwin*, 138 Idaho at 272, 61 P.3d at 629.

On appeal from an order of summary dismissal, we apply the same standards utilized by the trial courts and examine whether the petitioner's admissible evidence asserts facts which, if true, would entitle the petitioner to relief. *Ridgley v. State*, 148 Idaho 671, 675, 227 P.3d 925, 929 (2010); *Sheahan*, 146 Idaho at 104, 190 P.3d at 923. Over questions of law, we exercise free review. *Rhoades*, 148 Idaho at 250, 220 P.3d at 1069; *Downing v. State*, 136 Idaho 367, 370, 33 P.3d 841, 844 (Ct. App. 2001).

Because this appeal involves ineffective assistance of counsel claims, we note that a claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray*, 121 Idaho at 924-25, 828 P.2d at 1329-30. 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); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). 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). 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 or she would not have pled guilty and would have insisted on going to trial. *Plant v. State*, 143 Idaho 758, 762, 152 P.3d 629, 633 (Ct. App. 2006). This Court has long adhered to the proposition that tactical or strategic decisions of trial counsel

will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

III. ANALYSIS

On appeal, Wagner argues that the district court erred by summarily dismissing his petition for post-conviction relief. Specifically, Wagner “contends that his plea was not knowing, intelligent, and voluntary because [defense] counsel provided him with erroneous information during the plea bargaining process.”³ Wagner also alleges that he was not adequately informed of the potential punishments during the consideration of whether to accept the plea. For both of these claims, Wagner asserts he demonstrated *Strickland* prejudice because he would have demanded a jury trial if it had not been for counsel’s deficient performance.

For Wagner’s claim about counsel’s alleged deficient performance during plea negotiations, the State contends that Wagner waived the claim below, failed to support the claim with sufficient evidence, and did not establish deficient performance.⁴ As to Wagner’s claim that defense counsel inadequately informed him of the potential punishments, the State argues that Wagner failed to support the claim with sufficient evidence and that defense counsel was correct to be concerned with the potential of a life sentence for Wagner. Additionally, the State argues that Wagner did not demonstrate prejudice for either claim.

We start our analysis with the prejudice prong for both ineffective assistance of counsel claims on appeal. *See Ridgley*, 148 Idaho at 676, 227 P.3d at 930 (addressing the prejudice prong without considering whether counsel was deficient). In order to make a prima facie case

³ Although Wagner starts his argument by asserting that his plea was constitutionally defective, the claim argued below and the discussion in Wagner’s appellate brief focuses on defense counsel’s alleged deficient performance. Whether the plea was defective or whether counsel provided ineffective assistance of counsel in relation to the guilty plea are separate post-conviction claims. *See Martinez v. State*, 143 Idaho 789, 152 P.3d 1237 (Ct. App. 2007) (analyzing Martinez’s claim that his plea was involuntary because he was not aware of the intent element of the crime and then analyzing Martinez’s claim that defense counsel was ineffective for not informing him of the intent element).

⁴ It is not apparent from the record that Wagner actually waived the ineffective assistance of counsel claim concerning the plea bargaining process. Moreover, the district court did not treat the claim as waived; it addressed the merits in its notice of intent to dismiss. Because our analysis of the merits of the claim is dispositive, we do not address the State’s waiver argument.

of *Strickland* prejudice, the post-conviction petitioner must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pled guilty and would have insisted on going to trial. *Plant*, 143 Idaho at 762, 152 P.2d at 633. The United States Supreme Court has clarified that the petitioner must "convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010).

The only evidence offered by Wagner in relation to prejudice is his statement in the post-notice affidavit that he would have "asked the case be tried to a jury" but for counsel's advice. However, evidence in this record and the underlying criminal case demonstrate that it would not have been rational under the circumstances to reject the plea bargain. Here, there is evidence that Wagner was guilty of the crime he pled guilty to. Wagner admitted in the guilty plea colloquy⁵ that between September 2008 and June 2009 he "did some things I probably--well, I know I regret doing, but I should not have done." Wagner acknowledged that he committed a lewd and lascivious act and that he committed manual-genital and genital-genital contact with a child. Moreover, at the guilty plea hearing, the State offered a factual basis for the charge, explaining that the child and Wagner went to four businesses, and while at two of the businesses, Wagner committed a lewd and lascivious act upon the child. In addition, Wagner explained his conduct in a response in the presentence report questionnaire in which he said, "I brought her to work with me. At the end of the night, I gave her a massage. I then began rubbing my penis on her but[t]. I got a conscience and stopped." Finally, the victim also testified before the grand jury to the acts that Wagner did to her.

The evidence also points to the fact that it would have been desirable to accept the State's plea offer in light of the potential sentences. Lewd conduct with a minor child under sixteen is punishable by up to a unified life sentence, I.C. § 18-1508, and Wagner was indicted for three counts of lewd conduct. Thus, if Wagner was found guilty of the three counts of lewd conduct,

⁵ In his reply brief, Wagner asserts that relying on his answers at the guilty plea colloquy ignores one of his assertions in the post-notice affidavit; specifically, Wagner remarks that "he contended [in the affidavit], as a matter of fact, that the answers in the plea colloquy were not reliable." But that is not what Wagner stated in his affidavit. Wagner merely said that counsel advised him that the court would not accept his plea if the questions were not answered properly. Wagner did not say that he gave untruthful answers in response to the questions in the plea colloquy, nor did he state that his attorney told him to lie; in fact, Wagner said the opposite, "Trial counsel did *not* advise me to lie at my entry of plea." (Emphasis added.)

he might have faced three consecutive life sentences. *See State v. Mead*, 145 Idaho 378, 382, 179 P.3d 341, 345 (Ct. App. 2008) (“When a defendant faces two or more convictions, the court, in its discretion, may impose sentences to be served concurrently or consecutively.”). Moreover, if the State had proved or Wagner acknowledged the persistent violator allegation, Wagner would have been subject to a minimum of five years in the custody of the state board of correction. *See* I.C. § 19-2514. In addition, Wagner’s prior record was a relevant consideration in the sentence imposed by the district court. *See State v. Pierce*, 107 Idaho 96, 108, 685 P.2d 837, 849 (Ct. App. 1984) (“Although such a term might not be justified solely by Pierce’s participation in the robbery, it is warranted by Pierce’s long prior record. Sentencing must take account of the offender’s background as well as the nature of the offense.”). Wagner’s prior record reveals convictions for several misdemeanors along with a few felonies, including assault in the third degree, burglary, and two counts of indecent liberties with children. According to Wagner’s defense counsel, the State’s first plea offer was to dismiss the persistent violator allegation and recommend a life sentence with ten years determinate, although it is not clear that the State would have dismissed any of the lewd conduct charges. In contrast, the ultimate plea offer that Wagner accepted dismissed two counts of lewd conduct and the persistent violator allegation, and the State agreed to recommend a unified sentence of thirty years, with ten years determinate.

Taking all of these facts into consideration and balancing them against the evidence presented by Wagner--Wagner’s contention that he would have asked to go to trial but for defense counsel’s deficient performance--we are *not* persuaded that rejecting the plea bargain he ultimately accepted would have been rational under the circumstances. Because Wagner did not make a prima facie showing of prejudice, and because there was no genuine issue of material fact, the State was entitled to judgment as a matter of law. Accordingly, we affirm the judgment of the district court summarily dismissing Wagner’s petition for post-conviction relief.

Judge LANSING and Judge GRATTON CONCUR.