IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 42054

HEATH T. CLYNE,	)	**2015 Unpublished Opinion No. 404**
	)	
Petitioner-Appellant,	)	**Filed: March 11, 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STATE OF IDAHO,	)	**THIS IS AN UNPUBLISHED**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. Melissa Moody, District Judge.

Judgment 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; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

GRATTON, Judge

Heath T. Clyne appeals from the judgment dismissing his petition for post-conviction relief. He argues the district court erred in denying his motion to amend the petition and in summarily dismissing his petition. We affirm.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Clyne stole sunglasses and a Bible case from vehicles. Pursuant to a plea agreement, Clyne pled guilty to burglary. The State agreed to recommend a unified term of five years with one year determinate. The State would also recommend that the sentence be suspended with four years of probation imposed. The district court ordered a mental health evaluation be done in conjunction with the presentence investigation report. The mental health report did not indicate any signs of mental health issues. At the sentencing hearing, the district court, as well as the prosecutor and defense counsel, noted that the mental health evaluation was deficient because it

failed to address evidence of Clyne's previous mental health problems.[1] Despite the deficiency in the mental health evaluation, defense counsel asked that sentencing proceed. Defense counsel then recommended the district court commute Clyne's sentence. Defense counsel argued, in the alternative, that Clyne should be placed on probation for two years. However, defense counsel also made several statements that Clyne would struggle if put on probation. The district court imposed a unified term of five years with one year determinate. The court retained jurisdiction.

Subsequently, Clyne filed a motion to obtain a mental health evaluation. However, because Clyne indicated to his attorney that he refused to participate in the evaluation, the motion was withdrawn. Without holding a hearing, the district court relinquished jurisdiction. Clyne filed an Idaho Criminal Rule 35 motion for a reduction of sentence, which the district court denied. Clyne appealed the denial of the motion. This Court affirmed in an unpublished decision.

While Clyne's appeal was pending, he filed a pro se petition for post-conviction relief asserting a number of claims. Relevant to this appeal, Clyne alleged his trial attorney's argument during sentencing amounted to ineffective assistance of counsel. The district court appointed counsel to represent Clyne. The State moved to summarily dismiss Clyne's petition, and the district court entered notice of its intent to dismiss. Clyne moved to amend the petition, but the district court denied Clyne's motion. Clyne filed an objection to the summary dismissal, also arguing that the district court should have granted the motion to amend. The district court summarily dismissed Clyne's petition for post-conviction relief. Clyne timely appeals.

II.
ANALYSIS

A. Motion to Amend

Clyne argues that the district court erred by denying his motion to amend his petition for post-conviction relief. Post-conviction proceedings are civil in nature, and therefore are governed by the Idaho Rules of Civil Procedure. *McKinney v. State*, 133 Idaho 695, 699-700, 992 P.2d 144, 148-49 (1999). Pursuant to I.R.C.P. 15(a), "a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Motions to amend pleadings are to be liberally granted under I.R.C.P. 15(a).

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[1] The presentence investigator noted that there was evidence Clyne may suffer from bipolar disorder and schizophrenia.

Estate of Becker v. Callahan, 140 Idaho 522, 528, 96 P.3d 623, 629 (2004). However, the decision to grant or deny a motion to amend is left to the sound discretion of the trial court. *Jones v. Watson*, 98 Idaho 606, 610, 570 P.2d 284, 288 (1977). A proposed amendment which would not entitle the party to the relief claimed is properly refused. *Bissett v. State*, 111 Idaho 865, 869, 727 P.2d 1293, 1297 (Ct. App. 1986). Clyne's motion to amend alleged ineffective assistance of counsel by failing to investigate for mitigating information at sentencing, and ineffective assistance by arguing against his interests at the sentencing hearing.[2]

A claim of ineffective assistance of counsel may properly be brought under the Uniform Post-Conviction Procedure Act. *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). To establish prejudice, the petitioner must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Aragon*, 114 Idaho at 761, 760 P.2d at 1177; *Knutsen*, 144 Idaho at 442, 163 P.3d at 231. 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. *Gonzales v. State*, 151 Idaho 168, 172, 254 P.3d 69, 73 (Ct. App. 2011).

Clyne argues the district court erred in denying his request to add the claim that his counsel failed to find mitigating evidence. Specifically, Clyne argues that his trial attorney should have obtained a new mental health evaluation. However, Clyne has failed to present any evidence of what a new mental health evaluation would disclose that would show a different

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[2] The amended petition also alleged a deprivation of due process based on the lack of an adequate mental health evaluation at sentencing, but Clyne does not appeal from the denial to amend this claim.

result was probable.[3] Further, the only indication in the record was that Clyne did not want a mental health evaluation. When an evaluation was requested by counsel after Clyne had been sentenced, the motion was withdrawn because Clyne refused to participate in a mental health evaluation. Though there was evidence that Clyne suffered from bipolar disorder and schizophrenia, the district court was not required to speculate that Clyne would have agreed to cooperate if his attorney requested an evaluation, or speculate that the resulting report would mitigate Clyne's criminal conduct to the degree that a different sentence would have been imposed. Even assuming counsel's performance was deficient for failing to request a new mental health evaluation, Clyne failed to present any evidence to establish prejudice. Therefore, the district court did not err in denying the amendment to the petition to add this claim.

Clyne also asserts that the district court erred in denying the request to amend his claim that his trial counsel argued against his interests at sentencing. The district court denied this amendment concluding the original pro se petition adequately pled the issue. Clyne contends that the basis to dismiss the original petition was that it was conclusory and his amended petition asserted additional factual assertions of ineffective argument by his attorney. Specifically, he asserts that trial counsel represented at sentencing that Clyne was not fit for probation and failed to present a plan for treatment if he was released into the community. The original petition generally alleged that trial counsel inadequately represented his interests at sentencing. We cannot say the district court abused its discretion in allowing the more general allegation of ineffective representation to go forward as opposed to the more specific amended petition. Amendment was unnecessary when Clyne could support the claim with evidence and argument in opposition to dismissal. Both alleged trial counsel failed to represent Clyne's interest at sentencing and both petitions relied on the sentencing transcript to establish the claim. Therefore, we hold that the district court acted within its discretion in denying Clyne's motion to amend his petition for post-conviction relief.

Finally, Clyne generally argues that the failure to allow him to amend the petition deprived him of his ability to respond to the district court's notice to dismiss his petition.

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[3] The deficiency noted in the mental health evaluation ordered for sentencing was that it did not mention mental health difficulties already known to exist. Defense counsel pointed the court to the evaluations already existing. Clyne has provided nothing but speculation as to what another evaluation could show.

However, nothing precluded Clyne from responding to the notice after the denial of his motion. Upon denying Clyne's motion to amend, the district court noted that Clyne could provide any material necessary to support his contention that counsel was ineffective by arguing against his interests. Clyne did respond to the notice of intent to dismiss; however, he failed to provide any additional argument or evidence to support this claim. Once the court determined that the claim was raised, Clyne did not need to amend the petition, but instead needed to provide evidence and argument in support of the claim. Nothing prevented him from doing so.

B. Summary Dismissal

A petition for post-conviction relief initiates a civil, rather than criminal, proceeding governed by the Idaho Rules of Civil Procedure. I.C. § 19-4907; *State v. Yakovac*, 145 Idaho 437, 443, 180 P.3d 476, 482 (2008). *See also Pizzuto v. State*, 146 Idaho 720, 724, 202 P.3d 642, 646 (2008). Like plaintiffs in other civil actions, the petitioner must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. *Stuart v. State*, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990); *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, however, in that it must contain more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). *State v. Payne*, 146 Idaho 548, 560, 199 P.3d 123, 135 (2008); *Goodwin*, 138 Idaho at 271, 61 P.3d at 628. The petition 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. I.C. § 19-4903. In other words, the petition must present or be accompanied by admissible evidence supporting its allegations or it will be subject to dismissal. *Wolf v. State*, 152 Idaho 64, 67, 266 P.3d 1169, 1172 (Ct. App. 2011); *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994).

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." I.C. § 19-4906(c). 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. *Payne*, 146 Idaho at 561, 199 P.3d at 136; *Roman*, 125 Idaho at 647, 873 P.2d at 901. Moreover, because the district court rather than a jury will be the trier of fact in the event of an evidentiary hearing, the district court is not constrained to draw inferences in the petitioner's favor, but is free to arrive at the most probable inferences to be drawn from the evidence. *Yakovac*, 145 Idaho at 444, 180 P.3d at 483; *Wolf*, 152 Idaho at 67, 266 P.3d at 1172; *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. *Chavez v. Barrus*, 146 Idaho 212, 218, 192 P.3d 1036, 1042 (2008); *Hayes*, 146 Idaho at 355, 195 P.2d at 714; *Farnsworth v. Dairymen's Creamery Ass'n*, 125 Idaho 866, 868, 876 P.2d 148, 150 (Ct. App. 1994).

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); *McKay v. State*, 148 Idaho 567, 570, 225 P.3d 700, 703 (2010); *DeRushé v. State*, 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009); *Charboneau v. State*, 144 Idaho 900, 903, 174 P.3d 870, 873 (2007); *Berg v. State*, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998); *Murphy v. State*, 143 Idaho 139, 145, 139 P.3d 741, 747 (Ct. App. 2006); *Cootz v. State*, 129 Idaho 360, 368, 924 P.2d 622, 630 (Ct. App. 1996). 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 Payne*, 146 Idaho at 561, 199 P.3d at 136; *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); *Berg*, 131 Idaho at 519, 960 P.2d at 740; *Stuart v. State*, 118 Idaho 932, 934, 801 P.2d 1283, 1285 (1990); *Sheahan v. State*, 146 Idaho 101, 104, 190 P.3d 920, 923 (Ct. App. 2008); *Roman*, 125 Idaho at 647, 873 P.2d at 901. If a genuine issue of material fact is presented, an evidentiary

hearing must be conducted to resolve the factual issues. *Kelly*, 149 Idaho at 521, 236 P.3d at 1281; *Payne*, 146 Idaho at 561, 199 P.3d at 136; *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); *Berg*, 131 Idaho at 519, 960 P.2d at 740; *Sheahan*, 146 Idaho at 104, 190 P.3d at 923; *Roman*, 125 Idaho at 647, 873 P.2d at 901. Over questions of law, we exercise free review. *Rhoades v. State*, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009); *Downing v. State*, 136 Idaho 367, 370, 33 P.3d 841, 844 (Ct. App. 2001); *Martinez v. State*, 130 Idaho 530, 532, 944 P.2d 127, 129 (Ct. App. 1997).

Clyne's petition alleged his trial counsel was ineffective for arguing against his interests at sentencing. To establish a claim of ineffective assistance of counsel, a petitioner must show that the attorney's performance was deficient and that the petitioner was prejudiced by the deficiency. *Strickland*, 466 U.S. at 687-88. As noted above, upon denying Clyne's motion to amend, the district court invited Clyne to respond to the notice of intent to dismiss for the surviving claim of ineffective assistance. Instead, Clyne's objection to the notice of dismissal included argument solely relating to his claim that counsel was deficient for failing to secure a mental health evaluation. Therefore, this Court need only address the claims of deficiency made in the petition and supporting materials presented to the district court.

In his supporting affidavit filed with his pro se petition, Clyne argued that counsel was deficient for failing to include sufficient rebuttal and failing to allow more testimony. He also challenged his attorney's failure to emphasize the low value of the items taken and the nature of the offense. He further alleged that his trial counsel failed to present the district court with a plan for probation or treatment. However, Clyne failed to support his claims with any argument as to how the result might have been different. First, Clyne failed to identify what additional argument or testimony would have benefitted him at sentencing. Second, Clyne's trial counsel specifically argued that the nature of the offense was de minimus and that the recommended sentence from the State was excessive in light of the circumstances. Finally, trial counsel informed the district court that Clyne had been accepted into a treatment program. Counsel also commented that though Clyne was reluctant to obtain a mental health evaluation, or take medication, if the court imposed these as conditions of probation Clyne likely would comply.

More importantly, Clyne did not identify what plan should have been presented, or how offering a different plan would have changed the result. Therefore, the district court did not err in summarily dismissing Clyne's petition for post-conviction relief.

On appeal, Clyne alleges his trial counsel was deficient for arguing he was not suitable for probation. Even assuming Clyne had made this argument to the district court in response to the notice to dismiss, he failed to show his counsel was deficient.[4] At the sentencing hearing, the State recommended that Clyne be sentenced to a unified term of five years with one year determinate. The State recommended the sentence be suspended and Clyne be placed on probation. However, the State's recommendation included a condition that Clyne serve one year in jail.[5] Clyne's trial counsel began by noting he would present two alternatives for the court to consider, each being less than the prosecutor's recommendation. The first recommendation was for the district court to commute Clyne's sentence. *See* I.C. § 19-2601(1) (providing that a district court may "[c]ommute the sentence and confine the defendant in the county jail . . . ."). Had the district court accepted this recommendation, Clyne would not have been subject to a term in the penitentiary but would have served his time in the county jail. As an alternative to commuting the sentence, defense counsel asked for a more lenient sentence and shorter probationary term. Defense counsel recommended that the district court impose two years of probation with an underlying sentence of two years with one determinate.[6]

In an attempt to show his attorney's performance was deficient, Clyne focuses his argument on several statements defense counsel made relating to Clyne not being a good candidate for probation. At the sentencing hearing, defense counsel noted Clyne had previously struggled on probation and parole and likely would again. In concluding the recommendation,

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[4] 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).

[5] If the district court would have granted the State's recommendation, and had Clyne's probation been revoked, he would not have been given credit for the time served in jail as a condition of probation. *See State v. Dana*, 137 Idaho 6, 8, 43 P.3d 765, 767 (2002).

[6] The clear import of counsel's argument was that Clyne would be better off, given his risk of violating probation, serving a sentence in county jail (no longer than the State recommended as a condition of probation) and be done with it. If not, then shorten the term of probation and length of sentence so that he would be subject to less time in which to violate, and less time if he did violate.

defense counsel also indicated that it was likely that whatever sentence the district court imposed, Clyne would serve it in its entirety due to his history of parole violations. We first note that the district court was well aware of Clyne's previous probation and parole violations. Clyne's trial counsel, pointing this out, added little beyond what the district court already knew. Instead, Clyne's attorney tried to address this negative information by attempting to convince the district court to impose a more lenient sentence. Defense counsel explained that the circumstances of the offense were de minimus, arguing Clyne only had taken sunglasses and a Bible case from vehicles. Defense counsel contrasted the low value of the items taken to the potential five years of time that Clyne may face if the court accepted the State's recommendation.

Clyne demonstrated no deficiency in defense counsel's strategy. Clyne had a low chance of being placed on probation given his previous difficulties while on probation and parole. Though the State recommended probation, it did so only in conjunction with a condition that Clyne serve a year in jail prior to being released. Finally, Clyne also failed to cooperate with the presentence investigation, ultimately leading to a deficient mental health evaluation. The presentence investigator noted that Clyne had not been truthful during the mental health evaluation and was not straightforward with the investigator. Defense counsel mentioning that Clyne likely would struggle on probation, as part of an attempt to secure a more lenient sentence, does not fall below an objective standard of reasonableness.

III.

CONCLUSION

The district court did not err in denying Clyne's motion to amend or in summarily dismissing Clyne's petition for post-conviction relief. Therefore, the judgment dismissing Clyne's petition for post-conviction relief is affirmed.

Chief Judge MELANSON and Judge GUTIERREZ **CONCUR.**