

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 41620

DAVID DALRYMPLE, ) 2015 Unpublished Opinion No. 426  
 )  
 Petitioner-Appellant, ) Filed: March 20, 2015  
 )  
 v. ) Stephen W. Kenyon, Clerk  
 )  
 STATE OF IDAHO, ) THIS IS AN UNPUBLISHED  
 ) OPINION AND SHALL NOT  
 Respondent. ) BE CITED AS AUTHORITY  
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Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Melissa Moody, District Judge.

Judgment summarily dismissing post-conviction action, affirmed.

David Dalrymple, Burlington, Colorado, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

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LANSING, Judge

David Dalrymple was convicted of several sex offenses involving a child and the kidnapping of the child's mother. He has continuously argued that he is not guilty of the sex offenses, contending that the child's memory was altered by suggestions he made while the child was hypnotized. In this appeal, we consider Dalrymple's successive petition for post-conviction relief.

**I.**

**BACKGROUND**

The Idaho Supreme Court set forth the factual background of this case when it considered Dalrymple's prior appeal:

David Allen Dalrymple was convicted on felony counts of lewd conduct with a child, sexual abuse of a child, second-degree kidnapping, and several misdemeanors.

. . . On October 5, 2003, Dalrymple got into an argument with his girlfriend, Shelley, at her house where they both lived. The argument soon escalated into an altercation--Dalrymple handcuffed Shelley, pinched her breasts, and drug her into a bathroom in the house. When Shelley's daughter, K.B., tried to escape to get help, Dalrymple put her into a headlock, drug her through the house, and hit her head on the bathroom door. He would not allow either Shelley or K.B. to leave. Later on that evening, he pulled a telephone cord out of the wall after K.B. called 911.

Additional allegations soon arose. K.B. told her mother after the October 5 incident that she was "tired of hiding it." Beginning in the spring of 2000 through October 2003--while she was between 8 and 11 years old--K.B. alleged that Dalrymple would show her pornographic magazines and videos, would pose her in sexually suggestive positions, and would touch her over her body with his hands, tongue, and penis. At times, Dalrymple would also handcuff and tie up K.B. with rope, all while imploring her not to tell her mother.

*State v. Dalrymple*, 144 Idaho 628, 631-32, 167 P.3d 765, 768-99 (2007).

The case proceeded to trial and was nearly fully tried when a disagreement between Dalrymple and his counsel emerged. Dalrymple "wished to argue that he used hypnotherapy on K.B. to convince her that he had molested her, when in fact no molestation had occurred." *Id.* at 632, 167 P.3d at 769. Conversely, counsel "claimed to lack the proper foundation to raise this hypnosis defense, even after an investigation, and that it would be 'tantamount to just asking the jury to come back with a guilty verdict.'" *Id.* Dalrymple discharged his attorney and testified that he had hypnotized K.B. and had not sexually assaulted her.<sup>1</sup> This defense was not successful.

On appeal, the Idaho Supreme Court affirmed the judgment of conviction. It held that Dalrymple had been properly warned of the risks associated with pro se representation, had not been denied the right to counsel, had not been denied his rights to compulsory process or confrontation, and that the district court's comments were not prejudicial. *Id.* at 628, 167 P.3d at 765.

Dalrymple next filed a petition for post-conviction relief. Although we do not have a complete record of that proceeding, it appears that some of Dalrymple's claims survived

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<sup>1</sup> Dalrymple concedes that this defense "appeared to be irrational and self-destructive." Nonetheless, he continues to assert that he was entitled to present this defense, through counsel, and that various actions by courts and counsel frustrating his ability to put the issue more fully before a jury, violated his rights. In particular, he is upset that his attorney could not find an expert to show that the implantation of memories is possible.

summary dismissal, but were denied after an evidentiary hearing. In particular, it appears that Dalrymple was able to present additional evidence regarding his hypnosis claim before the court denied relief on all of Dalrymple's claims. He appealed, but later filed a motion to "dismiss/withdraw" his appeal and the motion was granted.

Nearly three years later, Dalrymple filed a successive petition for post-conviction relief, which is at issue in this appeal. He raised at least ten substantive claims for relief, including a reassertion of his hypnosis claim, claims asserting that he was denied the right to counsel at trial, and an Eighth Amendment claim. Procedurally, Dalrymple recognized that Idaho law generally disfavors successive petitions and argued that the ineffective assistance of post-conviction counsel was a sufficient reason to permit the filing of his successive petition. He contended that counsel "failed to bring all the issues to the court[']s attention and fail[e]d to bring evidence to support the issue he did bring."

The district court issued a notice of intent to dismiss Dalrymple's successive post-conviction petition, setting forth four separate grounds for dismissal: (1) some of Dalrymple's claims in his successive petition for post-conviction relief had been previously raised in his original petition, and "Dalrymple has not alleged or demonstrated sufficient reason why the claims were inadequately raised or presented in [the original] post-conviction action"; (2) the remainder of Dalrymple's claims were not raised in the original petition and Dalrymple failed to explain why these claims were not raised; (3) Dalrymple's successive petition was not timely; and (4) Dalrymple failed to show any ineffective assistance by post-conviction counsel amounted to a "sufficient reason" to permit Dalrymple to file a successive petition.

Dalrymple responded to some of the district court's contentions. He cited case law holding that ineffective assistance of post-conviction counsel may amount to a sufficient reason to allow a successive post-conviction action. He argued that his successive petition should be considered timely under the "relation-back" doctrine or because the deadline was tolled by a federal habeas corpus action. Dalrymple also argued that he was entitled to relief on the merits.

The district court reviewed Dalrymple's response and concluded that he had not effectively rebutted any of the grounds for dismissal set forth in the notice of intent to dismiss. It therefore dismissed the case on the grounds set forth in the notice. Dalrymple appeals.

## II. ANALYSIS

Like the district court, we conclude that we need not reach the merits of Dalrymple's petition because his claim is barred by the law governing successive petitions. A petition for post-conviction relief initiates a civil, rather than criminal, proceeding governed by the Idaho Rules of Civil Procedure. Idaho Code § 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 the 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). Idaho Code section 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).

Idaho Code § 19-4908 limits the availability of successive post-conviction actions:

All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Under prior decisions, the Idaho Supreme Court had held that an allegation of ineffective assistance of prior post-conviction counsel that resulted in the denial of a post-conviction claim could provide "sufficient reason" to allow the same claim to be asserted in a successive post-conviction petition under I.C. § 19-4908. *Palmer v. Dermitt*, 102 Idaho 591, 596, 635 P.2d 955, 960 (1981). During the pendency of the present appeal, however, the Idaho Supreme Court overruled that authority and held that "ineffective assistance of post-conviction counsel is not a sufficient reason under I.C. § 19-4908 for allowing a successive petition." *Murphy v. State*, 156 Idaho 389, 391, 327 P.3d 365, 367 (2014). The Court reasoned that because post-conviction claimants do not have a right to counsel under Idaho law, there can be no deprivation of effective

assistance of counsel in a post-conviction action which would justify the filing of a successive post-conviction action. *Id.* at 395, 327 P.3d at 371.

Below, the district court concluded that Dalrymple's claims of ineffective assistance were inadequate to create a "sufficient reason" to allow him to file this successive petition. We need not address the validity of the district court's analysis because *Murphy* holds that the ineffective assistance of post-conviction counsel cannot justify the filing of a successive petition. In the district court's notice of intent to dismiss, Dalrymple was informed that his claim could be dismissed pursuant to I.C. § 19-4908. At that time, he failed to set forth any "sufficient reason" other than deficient performance by his attorney in his first post-conviction action. Because Dalrymple's stated basis for filing a successive petition is legally meritless and because he has failed to set forth any other basis, his claims are barred by I.C. § 19-4908, and thus subject to summary dismissal. Accordingly, the judgment dismissing Dalrymple's successive petition is affirmed.

Chief Judge MELANSON and Judge GRATTON **CONCUR.**