IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 42001

THOMAS EDWARD PETERSON,	)	**2015 Unpublished Opinion No. 425**
	)	
Petitioner-Appellant,	)	**Filed: March 19, 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STATE OF IDAHO,	)	**THIS IS AN UNPUBLISHED**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. Michael E. Wetherell, District Judge.

District court's order denying appointment of counsel and judgment summarily dismissing post-conviction action, 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.

LANSING, Judge

In three separate cases, Thomas Edward Peterson was convicted of numerous counts of violating a no-contact order. This appeal arises from Peterson's successive post-conviction action wherein he asserts, among other things, that his defense attorney in the most recent criminal case was ineffective for failing to discover that an exhibit introduced at the preliminary hearing had gone missing. This post-conviction case was summarily dismissed by the district court, and Peterson appeals.

I.
BACKGROUND

In 2007, Peterson was convicted of domestic assault and three counts of violating a no-contact order. While on probation in that case, he again contacted the protected party, eventually

resulting in a felony conviction for violation of the no-contact order. In 2009, once again, Peterson violated the no-contact order, resulting in a probation violation and the issuance of another no-contact order. In 2010, Peterson pleaded guilty to another felony charge of violating a no-contact order and the court issued yet another no-contact order, this time prohibiting all contact, even contact by telephone. Nonetheless, Peterson continued to contact the protected party:

> In December 2010, the victim reported to police officers that Peterson had repeatedly called her and repeatedly sent her text messages. Pursuant to a search warrant, officers obtained Peterson's telephone records and discovered that Peterson called the victim 1,368 times and sent her 1,899 text messages in the period subsequent to June 2010. The State charged Peterson . . . with felony violation of a no contact order. Pursuant to a plea agreement, Peterson pled guilty to the no contact order violation and admitted to having violated his probation.

State v. Peterson, Docket No. 39146 (Ct. App. Mar. 19, 2013) (unpublished).

In 2012, Peterson appealed from the order revoking his probation without a reduction of sentence. At that time, Peterson filed a motion requesting that an exhibit containing telephone records be included in the appellate record. The Idaho Supreme Court denied the motion, because it had "been advised by the district court that there are no records of the defendant's telephone and texting communications." *Id*. This Court held that the absence of the records on appeal did not amount to a due process violation and that the district courts involved in the various proceedings did not abuse their discretion by revoking Peterson's probation or declining to reduce his sentence upon revocation.

While the direct appeal was pending, Peterson filed his original petition for post-conviction relief. There, Peterson raised several claims regarding his sentences and the adequacy of counsel's advice. The district court summarily dismissed these claims. Peterson filed a notice of appeal, but his appeal was dismissed because he failed to file a brief.

Next, Peterson filed the successive petition that is at issue in this appeal. There, he alleged, as relevant to this appeal, that his defense attorney in the most recent criminal case provided ineffective assistance by failing to acquire a transcript of the preliminary hearing. Peterson also requested the appointment of counsel.

The district court denied the request for counsel, holding that Peterson's allegations did not raise the possibility of a valid claim. The court held that the decision to not order a transcript, standing alone, did not show deficient performance or prejudice. In the same

document, the court provided its notice of intent to dismiss. Citing the reasons that it denied the motion requesting the appointment of counsel, it held that the post-conviction petition was subject to summary dismissal. The court also provided a guide to help Peterson respond to the notice, using a fill-in-the-blank model. The court explained that it might reconsider the issues if Peterson submitted a supplemental affidavit.

Peterson responded with a second affidavit, principally explaining his belief that he was prejudiced by his counsel's failure to obtain the preliminary hearing transcript. First, Peterson asserted that at the preliminary hearing, evidence showed that the person protected by the no-contact order "initiated the contact, then proceeded to bribe and manipulate" Peterson to induce further contact. Peterson argued this amounted to a defense and that his attorney did not properly pursue it. Second, Peterson argued that his attorney's failure to request the transcript of the preliminary hearing resulted in the attorney's failure to discover that an exhibit used at the hearing (Peterson's phone records) had gone missing. If his attorney had requested the transcript, Peterson alleged, he would not have pleaded guilty without asking to see the exhibit. Then, he reasoned, when he discovered that the exhibit had been lost, he would have taken his case to trial, knowing that the State no longer had the evidence showing his guilt.

The district court summarily dismissed all of Peterson's claims, setting out two alternative grounds for dismissal. First, the court noted that the petition was successive and procedurally barred by Idaho Code § 19-4908 because Peterson had shown no sufficient reason why his current claims were not included in his initial post-conviction petition. Second, the court also dismissed Peterson's claims on the merits. As to the claim that Peterson continues to pursue on appeal, the missing record claim, the court first held that the issue had already been addressed on Peterson's appeal from the conviction. The court also pointed out that Peterson had not shown that the record was missing at a relevant time--Peterson showed that the record could not be found on appeal, but not that the State had lost the evidence before Peterson pleaded guilty. Accordingly, the court held it was not deficient performance for counsel to fail to acquire the transcript on the bare hope that evidence *might* have gone missing.

To our understanding, Peterson raises two claims of error on appeal, each addressing one of the district court's alternative grounds for dismissal. First, as to the procedural limits on successive petitions, Peterson argues that the district court dismissed his successive petition for post-conviction relief without providing the notice required by I.C. § 19-4906(b). Second, as to

the determination that Peterson failed to create a genuine issue of material fact and the State was entitled to judgment as a matter of law, Peterson argues that the district court erred by failing to determine, for a second time, whether he was entitled to counsel.

II.

ANALYSIS

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. 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 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). 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. *State v. Payne*, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008); *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. *State v. Yakovac*, 145 Idaho 437, 444, 180 P.3d 476, 483 (2008); *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).

A. Lack of Notice That the Petition Was Barred as a Successive Petition

As stated above, Idaho Code section 19-4906(b) authorizes the court to initiate summary dismissal proceedings, but requires that the court provide notice of its grounds for dismissal and give the petitioner twenty days to respond. Here, the district court's notice of intent to dismiss did not notify Peterson that his successive petition was barred by I.C. § 19-4908. Accordingly, we will not affirm the dismissal on this basis.[1]

B. Refusal to Appoint Counsel

Peterson concedes that the district court considered whether counsel should be appointed on his behalf in its original order, but contends that he was entitled to a second determination after he filed his supplemental affidavit. Peterson relies on language in the court's order stating that it would, under certain conditions, reconsider the motion, and also relies on the general rule requiring resolution of a motion requesting the appointment of counsel before summary dismissal. He argues that this procedural failure warrants reversal because Peterson, at a minimum, demonstrated the possibility of a valid claim.

We conclude that the district court did not commit reversible error by not expressly reconsidering Peterson's request for counsel. Generally, the district court is authorized to appoint counsel in post-conviction proceedings. I.C. § 19-4904. The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court. *Charboneau*, 140 Idaho at 792, 102 P.3d at 1111. When presented with a request for appointed counsel, the

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[1] The State argues that *Murphy v. State*, 156 Idaho 389, 327 P.3d 365 (2014) stands for the proposition that we may disregard the section 19-4906(b) notice requirement when a petitioner's claims are barred by the limits on successive petitions imposed by Idaho Code § 19-4908. We disagree. First, nothing in *Murphy* purports to limit the notice requirement imposed by the plain language of section 19-4906(b) or to overrule the cases interpreting the notice requirement. Second, the opinion tends to indicate that Murphy was on notice of the general basis upon which her claim was dismissed. Certainly, the Idaho Supreme Court profoundly changed the scope of permissible successive petitions, but the district court had informed Murphy that the dismissal was based upon her failure to show that she was entitled to bring a successive post-conviction action. Therefore, absent a more specific holding from the Idaho Supreme Court, we will decline to interpret *Murphy* as eliminating the notice requirement of I.C. § 19-4906(b) when a successive petition may be subject to dismissal under I.C. § 19-4908. If the Idaho Supreme Court or this Court has erred in any case by affirming a dismissal on a ground for which the petitioner did not receive notice, the petitioner could have brought that error to the Court's attention by a petition for rehearing. The proper remedy is not to compound such error, if any, by perpetuating it in additional cases.

court must address this request before ruling on the substantive issues in the case. *Id.* The district court abuses its discretion where it fails to determine whether a petitioner is entitled to court-appointed counsel before denying a post-conviction petition on the merits. *See id*. at 793, 102 P.3d at 1112.

In determining whether to appoint counsel pursuant to section 19-4904, the district court should determine whether the petitioner is able to afford counsel and whether the petitioner's allegations are such that counsel should be appointed to assist the petitioner. *Charboneau*, 140 Idaho at 793, 102 P.3d at 1112. In its analysis, the district court should consider that petitions filed by a pro se petitioner may be conclusory and incomplete, and facts sufficient to state a claim may not be alleged because they do not exist or because the pro se petitioner does not know the essential elements of a claim. *Id.* at 792, 102 P.3d at 1111. Some claims are so patently frivolous, however, that they could not be developed into viable claims even with the assistance of counsel. *Newman v. State*, 140 Idaho 491, 493, 95 P.3d 642, 644 (Ct. App. 2004). However, if a petitioner alleges facts that raise the possibility of a valid claim, the district court should appoint counsel in order to give the petitioner an opportunity to properly allege the necessary supporting facts. *Charboneau*, 140 Idaho at 793, 102 P.3d at 1112.

As stated above, Peterson does not argue that the district court erred, in the first instance, by denying his request for counsel. Rather, he claims that the court was required to perform the same analysis, a second time, after he submitted a supplemental affidavit. Even assuming this is true, we find no reversible error because Peterson failed to allege facts that raise even the possibility of a valid claim.

On appeal, Peterson discusses the substance of his claims of ineffective assistance of counsel. Each of the claims advanced on appeal shares a common factual nexus: (1) Peterson wanted his attorney to get a copy of the transcript of grand jury testimony, (2) his attorney did not do so, and (3) an exhibit used at that hearing could not be located when requested in a subsequent appeal. He argues that these facts show that his attorney failed to adequately investigate his case and that Peterson would not have pleaded guilty if he had known the exhibit was missing.

These allegations do not show the possibility of a valid claim. First, Peterson presents no support in logic or argument for the proposition that defense counsel is ineffective when he or she fails to request court documents based upon the mere hope that those documents might have

disappeared. Second, even if the attorney had requested a copy of the transcript, doing so would not have alerted him to the fact that an exhibit was missing because a request for transcripts does not cause court personnel to audit the file to determine whether all exhibits are still there.[2] Third, Peterson's claim implicitly relies upon the purely speculative contention that the documents were, in fact, lost before he pleaded guilty. Showing that documents could not be found when requested for an appeal is not a persuasive showing that documents were unavailable at an earlier time. Finally, Peterson's claims depend upon the entirely unsubstantiated assumption that the State did not possess and could not have obtained other copies of the lost court records if Peterson had gone to trial. For all of these reasons, we hold that Peterson's contentions do not show that there might exist a valid claim. Because he has not alleged facts that suggest the possibility of a valid claim, Peterson cannot show that any procedural defect in the disposition of his request for the appointment of counsel in his successive post-conviction action amounts to reversible error. The same analysis demonstrates that Peterson's petition was properly dismissed on the merits.

III

CONCLUSION

We conclude that there was no reversible error in the denial of Peterson's request for appointed counsel, or in the summary dismissal of his claims, because the facts he alleged do not suggest the possibility of a valid claim. Therefore, the district court's order denying counsel and its judgment of dismissal are affirmed.

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

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[2] Although it is not a basis for our decision, we note that Peterson's assertion that he would have demanded to see the exhibit strains credulity. He contends that after he saw the transcript, he would have demanded to see the phone records exhibit. There is no indication that Peterson was absent from the preliminary hearing. Therefore, it seems very likely that Peterson was in court when the exhibit was introduced into evidence. Accordingly, it is not at all apparent that viewing the transcript would have induced an interest in the exhibit--the transcript would not contain any information that Peterson had not already learned by sitting through the hearing.