

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 36960

OLIVER FRANCES CARPENTIER,)	2011 Unpublished Opinion No. 543
)	
Petitioner-Appellant,)	Filed: July 13, 2011
)	
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STATE OF IDAHO,)	THIS IS AN UNPUBLISHED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, Elmore County. Hon. Michael E. Wetherell, District Judge.

Order denying application for post-conviction relief, affirmed.

Molly J. Huskey, State Appellate Public Defender; Diane M. Walker, Deputy Appellate Public Defender, Boise, for appellant. Diane M. Walker argued.

Hon. Lawrence G. Wasden, Attorney General; Nicole L. Schafer, Deputy Attorney General, Boise, for respondent. Nicole L. Schafer argued.

GRATTON, Chief Judge

Following an evidentiary hearing, the district court denied Oliver Francis Carpentier’s application for post-conviction relief. Carpentier appeals contending that his trial counsel was ineffective for failing to remove a juror who was biased against him.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Carpentier was charged with giving false or misleading information while registering as a sex offender. A jury convicted him and he was sentenced to a unified term of ten years with five years determinate. Carpentier filed an application for post-conviction relief asserting a number of claims. The district court summarily dismissed all but two claims: (1) ineffective assistance of counsel for failing to reopen voir dire and strike Juror 126; and (2) infringing on his right to testify.

At the evidentiary hearing, Carpentier and his trial counsel testified. Carpentier testified that he knew Juror 126 through her son, Nick. Approximately fifteen years before the trial, Nick was accidentally shot in the eye with a BB gun, while in the company of Carpentier and four other friends. Juror 126 then prohibited her son and Carpentier from associating with each other. Carpentier asserted that he told his trial counsel about this association during jury selection and was worried that the juror would be biased against him. Carpentier's counsel did not inquire of or strike Juror 126 from the jury. Trial counsel testified he learned about Carpentier's acquaintance with Juror 126 after the jury had been sworn. On August 11, 2009, the district court denied Carpentier's application. Carpentier appeals the district court's decision regarding Juror 126, but does not appeal its decision on his right to testify.

II. DISCUSSION

In order to prevail in a post-conviction proceeding, the applicant must prove the allegations by a preponderance of the evidence. Idaho Code § 19-4907; *Stuart v. State*, 118 Idaho 865, 801 P.2d 1216 (1990). When reviewing a decision denying post-conviction relief after an evidentiary hearing, an appellate court will not disturb the lower court's factual findings unless they are clearly erroneous. Idaho Rule of Civil Procedure 52(a); *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence, are all matters solely within the province of the district court. *Larkin v. State*, 115 Idaho 72, 73, 764 P.2d 439, 440 (Ct. App. 1988). We exercise free review of the district court's application of the relevant law to the facts. *Nellsch v. State*, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992).

A. **Factual Determination as to When Carpentier Disclosed he Knew the Juror**

Carpentier argues that the district court's factual finding that trial counsel, Ratliff, learned about the relationship between Juror 126 and Carpentier after the jury had been sworn was clearly erroneous. At the evidentiary hearing, Carpentier testified he at first did not recognize Juror 126, but realized who she was when he read her name as Ratliff was checking jurors' names off a list. He asserts he told Ratliff that he knew Juror 126 and how he knew her before the jury was sworn. Ratliff told him that he had no more challenges. Carpentier asked if there was anything else that could be done, and Ratliff said there was nothing that could be done.

Carpentier felt that having Juror 126 on the jury would prejudice his case because of what happened to her son.

Ratliff testified that Carpentier told him about Juror 126 after the jury had been sworn and he did not raise a challenge because the jury had been sworn. Ratliff said “my recollection is he said that after the jury was sworn, and I think I probably--I think I told him it was too late.” Ratliff explained his understanding that he could have raised a challenge based on actual bias, even if he had used his preemptory challenges. Ratliff also asserted that if Carpentier had raised this issue with Juror 126 before the jury had been impaneled, he would have made a note on his jury selection list, but there are no notes regarding Juror 126, which confirmed his recollection. Ratliff stated that if Carpentier had brought up the issue as the attorneys were working with the list of struck jurors, Ratliff could have done something about it at that time.

The district court recognized that Carpentier and Ratliff gave conflicting testimony regarding when Carpentier notified Ratliff that he knew Juror 126. The district court determined that Ratliff was more credible and made the factual finding that Carpentier told Ratliff about Juror 126 after the jury had been impaneled.

Carpentier acknowledges that he must demonstrate the district court’s finding was clearly erroneous, but contends he has done so by pointing out his testimony was more specific than trial counsel’s recollection. This Court will not substitute its judgment for that of the fact finder with regard to credibility determinations. Carpentier has failed to demonstrate the district court’s factual determination was clearly erroneous.

B. Post-Conviction Court’s Discretion to Grant or Deny a Subpoena of a Juror

Carpentier argues the district court erred when it failed to grant a subpoena for Juror 126. When questioning the validity of a verdict, Idaho Rule of Evidence 606(b) prohibits jurors from testifying about anything occurring during the jury’s deliberations or anything influencing the jury in the deliberations. The rule permits a juror to testify about: (1) whether extraneous prejudicial information was improperly brought to the jury’s attention; (2) whether any outside influence was improperly brought to bear upon any juror; and (3) whether the jury determined any issue by resorting to chance. I.R.E. 606(b). The rule does not prohibit inquiry into juror dishonesty during voir dire. *Levinger v. Mercy Medical Center, Nampa*, 139 Idaho 192, 197, 75 P.3d 1202, 1207 (2003).

In *Hall v. State*, __ Idaho __, __ P.3d __ (2011), the district court prohibited the applicant from contacting a juror from the underlying criminal case in discovery. In reviewing the district court's prohibition, the Court set out its standard of review:

The decision to authorize discovery during post-conviction relief is a matter left to the sound discretion of the district court. Unless discovery is necessary to protect an applicant's substantial rights, the district court is not required to order discovery. *Baldwin v. State*, 145 Idaho 148, 157, 177 P.3d 362, 371 (2008) (internal citation omitted). *See also* I.C.R. 57(b). In order to be granted discovery, a post-conviction applicant must identify the specific subject matter where discovery is requested and why discovery as to those matters is necessary to his or her application. *State v. LePage*, 138 Idaho 803, 810, 69 P.3d 1064, 1071 (Ct. App. 2003). As this Court stated in *Henderson v. Henderson Investment Properties, L.L.C.*:

To determine whether there is an abuse of discretion this Court considers whether (1) the court correctly perceived the issue as one of discretion; (2) the court acted within the boundaries of such discretion and consistently with legal standards applicable to specific choices; and (3) the court reached its decision by an exercise of reason.

148 Idaho 638, 639–40, 227 P.3d 568, 569–70 (2010) (internal quotation omitted).

The *Hall* Court evaluated a number of cases from other jurisdictions that limited counsel's contact with jurors after the case had been decided. In summarizing those cases, the Court stated:

As noted above, courts have consistently upheld orders and rules restricting attorneys from post-verdict contact with jurors absent a showing of good cause, despite the limited attorney First Amendment interests at stake. However, where there is a showing of good cause, suggesting that juror misconduct occurred, questioning the jury may lead to admissible evidence even where the jurors themselves may not testify.

Hall, __ Idaho at __, __ P.3d __. The Court further stated: "The goal in limiting contact with the jury is not to unduly restrict the discovery of evidence suggesting juror misconduct, but rather to protect jurors from unwanted contact and potential harassment. A court must, therefore, balance its legitimate goal of juror protection with the court's primary duty of ensuring that justice is done and that defendants receive fair trials." *Id.* at __, __ P.3d at __. The Court reiterated that the test for determining whether a trial court should have permitted juror contact in discovery is whether the party "had shown that there was good cause to believe that juror misconduct had occurred." *Id.* at __, __ P.3d at __. If good cause is shown, then juror contact is permitted on the subject of misconduct.

In this case, the district court did not prohibit all juror contact, but denied a request to subpoena a previous juror and compel testimony at the evidentiary hearing. Carpentier was required, at a minimum, to demonstrate “good cause” for the issuance of a subpoena, based upon juror misconduct or juror bias. Prior to the evidentiary hearing, Carpentier advised the district court that, through his counsel, he made a number of unsuccessful attempts to contact Juror 126. Carpentier requested the district court to order a subpoena for Juror 126 to testify at the evidentiary hearing, but he acknowledged that he could not cite to any case law authorizing a subpoena under the circumstances. The exchange with counsel explained the district court’s ruling:

Court: I know, [Carpentier’s counsel], as I’m sure you’re aware, that the system is very protective of being able to go after jurors after a trial in terms of something unless there is an issue with regard to juror misconduct, and then there has to be something that raises it to the level of more than mere speculation.

[Carpentier’s counsel]: Correct.

Court: Another juror has to say juror misconduct occurred or there has to be something more. The concern I have here is if I recall correctly the defendant in this case is saying, well, because I had a disagreement that involved that juror’s child some time ago that there was “actual bias” because of that difficulty that was had several years ago, and that’s pretty speculative.

Unless somebody can find me some authority that says based upon that thin of a statement that a juror can be called in and questioned as to the issue of actual bias, I’m going to be very reluctant to subpoena a juror on something that is in the past when both these folks were juveniles, and the one juror was the mother, particularly when we had numerous questions asked of the jury panel, both by the court and counsel, if there is any reason they feel that they cannot be fair and impartial. . . .

The district court clearly stated it would not issue a subpoena based upon the “thin” statement about the juror regarding events occurring “in the past” involving juveniles and one juvenile’s mother. While the district court did not use the phrase “good cause,” the substance of the court’s analysis is more important than its use of precise terminology. *See Hall*, ___ Idaho at __, ___ P.3d at __. The district court properly determined that Carpentier’s assertions failed to rise to the

level of good cause and, recognizing the policy concerns behind limiting juror contact, refused the subpoena in exercise of its discretion.

C. Ineffective Assistance of Trial Counsel

Carpentier argues the district court erred by denying his claim that his counsel was ineffective in failing to inquire of and strike Juror 126. A claim of ineffective assistance of counsel may properly be brought under the Uniform Post-Conviction Procedure Act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant 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 applicant 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). To establish prejudice, the applicant 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. 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).

In a post-conviction proceeding, challenging an attorney's failure to pursue a motion in the underlying criminal action, the district court may consider the probability of success of the motion in question in determining whether the attorney's inactivity constituted incompetent performance. *Boman v. State*, 129 Idaho 520, 526, 927 P.2d 910, 916 (Ct. App. 1996). Where the alleged deficiency is counsel's failure to file a motion, a conclusion that the motion, if pursued, would not have been granted by the trial court, is generally determinative of both prongs of the *Strickland* test. *Id.*

Carpentier argues trial counsel had three options for challenging the juror, even though he learned of the issue after the jury had been sworn. First, Carpentier asserts his counsel could have demonstrated good cause to question Juror 126 to prove the juror was biased. Second, Carpentier contends his trial counsel could have asserted juror misconduct and the trial could have continued after removing the juror, as there was one alternate juror. Third, he argues that a

motion for new trial could have been made after the jury returned its verdict. Carpentier's claim that his counsel should have requested a new trial is based upon the allegation of juror misconduct, and an adverse finding on the juror misconduct claim forecloses the new trial claim. Therefore, we turn to Carpentier's claims of juror bias and juror misconduct.

We will assume that a challenge for cause could be raised after the jury was sworn. Jurors are precluded from serving if they have an actual or implied bias. I.C. § 19-2019. Implied bias is limited to specific causes, I.C. § 19-2020, and Idaho courts cannot expand implied bias beyond those explicitly identified in the statute. *State v. Santana*, 135 Idaho 58, 63, 14 P.3d 378, 383 (Ct. App. 2000). Carpentier presented no evidence that Juror 126 was a party adverse to him or expressed an opinion that he was guilty of the offense charged, the only two grounds he identified under his claim of implied bias. Thus, Carpentier's claim that Juror 126 was impliedly biased fails. Actual bias exists when the state of mind of a juror, in regard to a party, leads to an inference that the juror will not act with entire impartiality. I.C. § 19-2019(2). For actual bias "it must be alleged that the juror is biased against the party challenged." I.C. § 19-2022. In regard to juror misconduct, based upon a voir dire response, the defendant must show: (1) that the juror did not give an honest response to a question during voir dire (as opposed to a response that was simply mistaken); and (2) that an accurate response would have provided a basis for a challenge for cause. *State v. Reutzel*, 130 Idaho 88, 96, 936 P.2d 1330, 1338 (Ct. App. 1997). In *Reutzel*, a juror failed to disclose in voir dire that six years prior to trial he had dated a witness's sister. The juror also failed to disclose that the witness had dated the juror's friend in high school, about eight years earlier. Evidently, the witness's relationship with the juror's friend had ended badly and the witness stated that the juror probably would dislike her because of the past conflict. The district court denied Reutzel's motion for a new trial and concluded the juror's undisclosed prior relationship did not demonstrate juror misconduct. *Id.* This Court affirmed, stating that the district court could have properly concluded that the juror had not given a dishonest response; he could have been merely mistaken or not recognized the witness. *Id.* at 97, 936 P.2d at 1339.

Carpentier was twenty-nine years old at the time of trial. The incident involving the son of Juror 126 occurred approximately fifteen years earlier. Carpentier testified that he had not recognized Juror 126 until the end of an approximately hour-and-a-half voir dire, and he acknowledged that he did not observe any reaction from Juror 126 that indicated she recognized him. The district court concluded that Carpentier had failed to provide sufficient evidence that

his trial counsel was deficient for failing to challenge Juror 126 as biased, or that Juror 126 committed misconduct. Further, the court noted that the evidence was overwhelming against Carpentier and he failed to demonstrate prejudice by any failure of his trial counsel.

Carpentier failed to establish either juror misconduct or actual bias. As in *Reutzel*, considering the remoteness in time of the prior events, the district court could properly conclude that Juror 126 did not give a dishonest answer as to whether she knew Carpentier from a social relationship. Nothing suggests she recognized Carpentier at all and even Carpentier--assisting his counsel in jury selection--did not recognize Juror 126 for an hour and a half. Carpentier's assertions do not rise above speculation as to any bias or inability to act with impartiality. The record does not support a claim that Juror 126 was biased against Carpentier or even recognized him at the time of trial--fifteen years after the accident. Because Carpentier failed to demonstrate a motion, if pursued, would have been successful, he has not shown ineffective assistance of counsel.

III. CONCLUSION

Carpentier did not show that the district court abused its discretion in denying his request to subpoena the juror. Carpentier failed to demonstrate that the district court erred in denying his application for post-conviction relief. The district court's order denying Carpentier's application for post-conviction relief is affirmed.

Judge LANSING and Judge GUTIERREZ **CONCUR.**