

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37542

LOUIS EUGENE CUNNINGHAM,)	2011 Unpublished Opinion No. 508
)	
Petitioner-Appellant,)	Filed: June 6, 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STATE OF IDAHO,)	THIS IS AN UNPUBLISHED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 Fifth Judicial District, State of Idaho, Blaine County. Hon. Robert J. Elgee, District Judge.

Order summarily dismissing successive application for post-conviction relief, affirmed.

Louis Eugene Cunningham, Boise, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; Elizabeth A. Koeckeritz, Deputy Attorney General, Boise, for respondent.

MELANSON, Judge

Louis Eugene Cunningham appeals from the district court’s order summarily dismissing his successive application for post-conviction relief. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

In 2002, Cunningham pleaded guilty to delivery of marijuana with a sentencing enhancement for a second or subsequent offense and failure to affix an illegal drug tax stamp. Cunningham was sentenced to a unified term of five years, with a minimum period of confinement of three years, enhanced by two years determinate, for delivery of marijuana and a concurrent unified two-year term for the failure to affix an illegal drug tax stamp. Cunningham filed an I.C.R. 35 motion for reduction of his sentences, which the district court denied. While in custody on these offenses, Cunningham was charged with solicitation of first degree murder. Cunningham pleaded guilty and was sentenced to a unified term of five years, with a minimum

period of confinement of three years, to run consecutive to the sentences imposed for delivery of marijuana and failure to affix an illegal drug tax stamp. Cunningham filed a Rule 35 motion for reduction of this sentence, which the district court also denied. In an unpublished opinion, this Court affirmed the district court's denial of Cunningham's motions for reduction of his sentences. *See State v. Cunningham*, Docket Nos. 28918 and 28919 (Ct. App. July 16, 2003).

On October 22, 2004, Cunningham filed a pro se application for post-conviction relief, alleging only that, under the Sixth Amendment to the United States Constitution, he was entitled to have a jury decide his sentences. The district court dismissed the application on November 3, 2004, because Cunningham failed to file his application as a civil case or pay a filing fee. Cunningham again filed his application on March 17, 2005, which the district court summarily dismissed. Cunningham appealed, and this Court affirmed in an unpublished decision. *See Cunningham v. State*, Docket No. 32675 (Ct. App. Feb. 13, 2007).

On April 21, 2008, Cunningham filed a pro se successive application for post-conviction relief. In the application, Cunningham alleged that a hearing held during his solicitation for murder case on his trial counsel's motion to withdraw was improperly held outside of his presence. Cunningham requested an evidentiary hearing and attached a number of documents to his application, including a copy of his attorney's motion to withdraw. The state filed an answer and a motion to summarily dismiss Cunningham's successive application, arguing that he failed to assert any basis upon which the district court could grant relief. The district court appointed counsel for Cunningham, who filed a memorandum opposing the state's motion for summary dismissal. In the memorandum, Cunningham asserted that trial counsel provided ineffective assistance, which was evidenced by trial counsel being disbarred after Cunningham entered his guilty pleas.

After filing the memorandum and motion opposing the state's motion for summary dismissal, Cunningham's successive post-conviction counsel withdrew. Cunningham was appointed substitute counsel, who filed a second memorandum in opposition to summary dismissal. In the second memorandum, Cunningham argued that he received ineffective assistance of counsel and that his guilty plea to solicitation of murder was involuntary. Cunningham then filed a motion to dismiss his substitute counsel, which the district court granted. The district court assigned Cunningham a second substitute counsel, who presented argument during the hearing on the state's motion for summary dismissal.

After the hearing, the district court granted the state's motion and summarily dismissed Cunningham's successive application. In its memorandum decision, the district court listed ten claims raised by Cunningham, including that he was illegally extradited from California to Idaho in his drug case, that a closed hearing on his trial counsel's motion to withdraw in his solicitation of murder case should not have occurred outside of his presence, and that his guilty plea to solicitation of murder was involuntary due to his absence from the motion to withdraw hearing. The district court held that the matter of Cunningham's extradition was addressed in the order dismissing Cunningham's initial application for post-conviction relief, which was affirmed by this Court. The district court also determined that Cunningham failed to demonstrate prejudice due to his absence from the hearing on his attorney's motion to withdraw. Finally, the district court concluded that Cunningham failed to provide any substantial evidence that the hearing held outside his presence interfered with his guilty plea to solicitation of murder. Cunningham appeals.

II.

STANDARD OF REVIEW

On review of a dismissal of a post-conviction relief application without an evidentiary hearing, we determine whether a genuine issue of fact exists based on the pleadings, depositions, and admissions together with any affidavits on file. *Rhoades v. State*, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009); *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993). In post-conviction actions, 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). If an initial post-conviction action was timely filed and has been concluded, an inmate may file a subsequent application outside of the one-year limitation period if 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. I.C. § 19-4908. *Charboneau v. State*, 144 Idaho 900, 904, 174 P.3d 870, 874 (2007).

III.

ANALYSIS

Idaho Appellate Rule 35(a)(4) states that an appellant's brief shall contain:

A list of the issues presented on appeal, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the issues should be short and concise, and should not be repetitious. The issues shall fairly state the issues presented for review. The statement of issues presented will be deemed to include every subsidiary issue fairly comprised therein.

Cunningham lists five issues in his appellant's brief. Two of the issues deal with his absence from a hearing on his trial counsel's motion to withdraw during proceedings on his solicitation charge. Cunningham's remaining issues are that his initial post-conviction action was wrongfully dismissed, that he was denied fair access to a criminal appeal, and that he should be granted a fair post-conviction "adjudication." These three remaining issues involve previous proceedings that are not properly at issue before this Court. Therefore, we will not address them further on appeal.¹

Nowhere in Cunningham's statement of issues or in his appellant's brief does he assert a particular error by the district court in summarily dismissing his successive application for post-conviction relief. Cunningham's briefs do not identify any erroneous findings of fact, statements of law, or application of law in the district court's decision. Rather, Cunningham argues that this Court should recognize a need for substance over form and ignore the rules governing review of the district court's dismissal of his successive application. Specifically, Cunningham asks this Court to review his previous appeal from his judgment of conviction and his initial application for post-conviction relief. Cunningham's only mention of the proceedings on the successive application is an alleged statement by his former appellate counsel that Cunningham's initial application for post-conviction relief "created barriers" for a successful appeal of the dismissal of the successive application. In light of this statement, Cunningham asks for extraordinary review of his previous cases before this Court. When an appellant does not assert specific error on the part of the district court in accordance with I.A.R. 35(a), we decline to address the appellant's

¹ In his reply brief, Cunningham also argues that his extradition from California to Idaho prior to pleading guilty in his drug case was illegal. While Cunningham raised this issue in his successive application, he did not address it in his appellant's brief. We will not address issues that are raised for the first time in the reply brief. *Suitts v. Nix*, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005). A reviewing court looks only to the appellant's initial brief for the issues presented because those are the arguments and authority to which the respondent has an opportunity to respond in the respondent's brief. *Id.*

arguments on appeal. *See Drake v. Craven*, 105 Idaho 734, 736, 672 P.2d 1064, 1066 (Ct. App. 1983).

Even if we were to interpret Cunningham's first two issues as asserting some type of error by the district court, Cunningham has failed to demonstrate a sufficient reason why those claims were not included in his initial application for post-conviction relief. Cunningham asserts on appeal that he did not discover until 2004 that the hearing on his attorney's motion to withdraw took place without him. During the proceedings below, Cunningham did not provide any evidence or argument to establish that he was unaware of the hearing on his attorney's motion prior to filing his initial post-conviction application in 2005. Therefore, Cunningham has failed to provide any argument or authority to explain how his absence from the hearing, discovered in 2004, could not have been raised in his 2005 application.

Cunningham was obligated by I.C. § 19-4908 to show sufficient reason why his successive claims were not raised or, if they were raised, why they were inadequately raised in his initial application. He has failed to do so. He does not allege ineffective assistance of his first post-conviction counsel. Cunningham simply continues to argue that his underlying claims have merit. Accordingly, Cunningham has failed to show error in the district court's dismissal of his successive application for post-conviction relief.

IV. CONCLUSION

Cunningham has failed to assert specific error on the part of the district court. Even if we were to interpret Cunningham's statements on appeal as allegations of error, he has failed to establish a sufficient reason why his claims were not included in his initial application for post-conviction relief. Accordingly, the district court's order summarily dismissing Cunningham's successive application for post-conviction relief is affirmed. Costs, but not attorney fees, are awarded to the respondent on appeal.

Chief Judge GRATTON and Judge GUTIERREZ, **CONCUR.**