

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37328

WILLIAM ELLIS,	)	2011 Unpublished Opinion No. 536
	)	
Petitioner-Appellant,	)	Filed: June 27, 2011
	)	
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STATE OF IDAHO,	)	THIS IS AN UNPUBLISHED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 Fifth Judicial District, State of Idaho, Twin Falls County. Hon. Randy J. Stoker, District Judge.

District court’s order summarily dismissing petition for post-conviction relief, affirmed.

Greg S. Silvey, Kuna, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Rebekah A. Cudé, Deputy Attorney General, Boise, for respondent.

LANSING, Judge

William Ellis appeals from the summary dismissal of his successive petition for post-conviction relief. We affirm.

I.

BACKGROUND

Ellis was charged with two counts of lewd and lascivious conduct in his underlying criminal case after having had repeated sexual contact with his nine-year-old stepdaughter, which continued for a period of about two years. Ellis pleaded guilty to one count of lewd and lascivious conduct pursuant to a plea agreement wherein the State agreed to dismiss the other count. The district court imposed a unified life sentence with fifteen years determinate. His conviction and sentence were affirmed on direct appeal. *State v. Ellis*, Docket No. 33633 (Ct. App. June 14, 2007) (unpublished).

Ellis thereafter filed a petition for post-conviction relief. Post-conviction counsel abandoned three of Ellis's post-conviction claims, and the district court dismissed the others. The district court's dismissal was affirmed by this Court. *Ellis v. State*, Docket No. 35461 (Ct. App. Sept. 16, 2009) (unpublished). Ellis then filed, pro se, the successive<sup>1</sup> petition for post-conviction relief at issue. The district court appointed counsel, who filed an amended petition raising the three claims in Ellis's initial petition that his initial post-conviction counsel had abandoned. The State moved for summary dismissal, which the district court granted without an evidentiary hearing but after oral argument on the motion.

Ellis now appeals that summary dismissal. Of the three post-conviction claims raised below, he appeals the dismissal only of the claim that he received ineffective assistance of counsel at sentencing when trial counsel failed to object to an allegedly inaccurate statement by the sentencing court that Ellis had had "full blown intercourse" with the victim. He argues that the sentencing court's statement was not supported by the record, which Ellis asserts only indicated sexual interaction short of intercourse. He also alleges that his consistent assertions that he never had intercourse with the victim and a medical examination of the victim suggesting lack of penetration shows--at least sufficiently to survive summary dismissal--that the district court's statement was inaccurate. Ellis argues that the sentencing court's reliance on the false assumption that Ellis had engaged in intercourse with the victim adversely affected the severity of his sentence because "it is beyond dispute that courts impose harsher sentences for worse criminal behavior."

## II. ANALYSIS

A petition for post-conviction relief initiates a civil proceeding. *Wilson v. State*, 133 Idaho 874, 877, 993 P.2d 1205, 1208 (Ct. App. 2000); *Hassett v. State*, 127 Idaho 313, 315, 900 P.2d 221, 223 (Ct. App. 1995). Summary dismissal by the district court is the procedural equivalent of summary judgment under Idaho Rule of Civil Procedure 56. *Hassett*, 127 Idaho at 315, 900 P.2d at 223. 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

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<sup>1</sup> The district court found that the successive petition was properly brought and the State does not challenge that determination on appeal.

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). Legal conclusions are reviewed *de novo*. *Owen v. State*, 130 Idaho 715, 716, 947 P.2d 388, 389 (1997); *Wilson*, 133 Idaho at 878, 993 P.2d at 1209.

To prevail on an ineffective assistance of counsel claim in a post-conviction action, 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 (1984); *Hassett*, 127 Idaho at 316, 900 P.2d at 224. 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); *Suits v. State*, 143 Idaho 160, 162, 139 P.3d 762, 764 (Ct. App. 2006). To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the proceeding would have been different. *Suits*, 143 Idaho at 162, 139 P.3d at 764. Bare assertions and speculation, unsupported by specific facts, do not make out a prima facie case for ineffective assistance of counsel. *Roman v. State*, 125 Idaho 644, 649, 873 P.2d 898, 903 (Ct. App. 1994).

An officer's affidavit in support of a complaint and arrest warrant, attached to the presentence investigation report (PSI), reflects that the victim stated in an interview that she was sexually abused. Although a transcript of the interview itself was not attached to the PSI, the officer's affidavit quoted excerpts of that interview. It appears from those quotes that Ellis engaged in many types of ongoing sexual contact with the victim--including fellatio, cunnilingus, masturbating the victim, and forcing the victim to masturbate Ellis--for approximately two years when the victim was nine until she was eleven. Though not entirely clear, a portion of the victim's statements could be interpreted as describing sexual intercourse. For example, the victim stated that one time Ellis commanded her to take her clothes off, get on top of him while he was lying down, and then "he put his in there, not in there but like that (gestured in with marker towards her genitals)." The victim also stated that her mother called this act "f\*\*\*ing," indicating sexual intercourse. Further support that the activity referred to was sexual intercourse was the victim's statement that Ellis forced her to take a pregnancy test.

The PSI indicates that Ellis's sexual contact with the victim was forced and violent, as shown by the victim's statements that Ellis would put a "pillow over [her] face some of the time but [she] learned to shut up so [she] didn't get hurt" and that if she tried to jerk away he would get mad and pull her hair or hit her. The PSI also showed that Ellis blamed the victim for his abuse of her, stating that the victim was the initiator of the sexual contact and that he only allowed her to have such contact with him in an effort to curb her alleged experimentation with her siblings and neighbor children. He also justified his actions by saying that because his wife, the victim's mother, would not allow him to engage in sexual activity with her, he turned to the victim. The court was aware at sentencing that Ellis denied that he had sexual intercourse with the victim.

The sentencing court had information before it from which it could conclude that Ellis had engaged in sexual intercourse with the victim even though Ellis denied such conduct. The victim's own statements, contrary to Ellis's assertion, can reasonably be interpreted to support the district court's conclusion. Given this support, and the fact that Ellis's contrary assertion was also before the court in the materials that it considered at sentencing, it was not deficient or unreasonable for Ellis's attorney not to object to the sentencing court's expression of its disbelief of Ellis's version and its conclusion that sexual intercourse had occurred. Though Ellis attempts to support his argument by reference to a medical examination done on the victim that suggests no intercourse took place, Ellis does not contend that his attorney was ineffective for failing to put this information before the sentencing court, nor that his attorney should have objected to any of the information that was relied upon. Thus, the medical report is irrelevant to whether Ellis's attorney was ineffective for failing to object to the district court's factual finding of the circumstances surrounding the offense based on the materials the district court had before it at that time.

Not only has Ellis failed to show deficient performance, he has failed to show prejudice in the sense that his sentence would have been different if the attorney had objected. Because, as stated above, there was some support in the PSI for the sentencing court's conclusion, it is doubtful that any objection would have been successful, and therefore the court still would have considered the fact of sexual intercourse in its sentencing decision.

Furthermore, it is apparent that the court's belief that Ellis had sexual intercourse with his victim was not a major factor in the sentencing decision--the court relied on a number of other

factors to support the length of its sentence. As stated by the court at sentencing, it based its decision on the following:

First of all, the nature of this offense. And when I say, this offense, I recognize that you have admitted to the polygrapher that there were no less than 50 different times that you perpetrated sexual acts upon this minor child. She claims numerous events over two and a half years, from 9 to 11 and a half, I believe the state referred to three years today. So when I speak of this offense, I clearly recognize and I think I'm allowed to recognize that this was a long-time, long-term series of conduct with a minor child. But be that as it may, the nature of the crime is one, as your own counsel frankly recognized, that it's very serious, serious enough so that our legislature has provided a life sentence as the maximum potential sentence for the crime. The court recognizes that the mere conviction for this offense, in particular, the nature of the offense before this court, is significant.

Beyond that, however, is the nature of the individual offenses that were committed upon the child, who I would refer to by initials of HW. She indicates to the court that these events has [sic], and I'm quoting now, changed her emotionally, physically, mentally and in her behavior. She is always thinking about what happened. It's hard to focus on anything else. She has nightmares all the time. At night it is very hard for her to get to sleep because of the pictures of the abuse keep flashing in her mind all night long. . . . Even our own appellate courts have noted that a sexual assault is one of the most distressing experiences a person could have and that lewd and lascivious conduct with a minor under 16 is a serious crime . . . that psychological damage to the victims of sexual molestation may be long-lasting and irreversible, and our legislature's authorization of life imprisonment as a maximum sentence for lewd conduct with a minor under the age of 16 reflects a societal conviction that such conduct warrants severe punishment. . . . [P]unishment, and a severe punishment, is warranted in these types of cases, simply for punishment's sake and also to recognize the societal repugnance to this type of behavior and the long-lasting effects that are likely for the victim and the family in this case.

I also have a problem trivializing the types of behavior before me, Mr. Ellis, in this case as bad judgment or poor choices. The file is replete with evidence of long-standing repetitive abuse, as I've already alluded to, including incidences of violence in order to keep the victim in line. As you told her yourself, Mr. Ellis, I'm quoting from the presentence report: Fear me, don't respect me.

. . . .

. . . My point is that this behavior and the undercurrent of violence and fear and the myriad of sexual abuses perpetrated on HW cast a wide shadow. . . . I would again reiterate the fear and violence that accompanied the abuse. The use of a gun, the pillow over the victim's face, the hand over her mouth, throwing her CD player against the wall to show complete intimidation, the length of time and the number of incidences that went on for the extended period I've already

alluded to. These incidences include a full-blown intercourse, repeatedly, with a 9-year-old girl, along with other depravities contained in the presentence report.

Additionally, Dr. Horton's evaluation indicating that while you're not in denial of the sexual abuse, you have, quote, all kinds of justifications and excuses for your behavior, typically blaming the victim for the problems and the difficulties you encountered during the period of time that you were abusing the victim, end of quote.

Dr. Horton also notes and opines that you are an extreme risk to the victim and a risk that there may be other victims. Again, the letters of the inmate's on this point are somewhat disturbing. You've objected to those, but the letters from each inmate carry a similar tone and theme. Their descriptions are similar to the conduct that you have admitted to. The alleged threats to the family are not far removed from the veiled and direct threats imposed upon HW throughout your course of abuse.

Even though you've been unable to complete a polygraph, your test scores otherwise to Dr. Horton show that you have attributes and behaviors highly similar to those of known sex offenders and that the condition of sexual deviance may be a component of your personality makeup.

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Lastly, Dr. Horton recommends treatment in a confined setting at the penitentiary, again based upon your mental and personality factors and the violent streak in your nature.

....

I certainly feel that in this case a fixed life sentence without ever having a possibility for parole is unwarranted. I do find that there are potentials for rehabilitation in the future and that those potentials should be allowed and be based on the discretion of others, particularly the parole board and not this court.

The state has recommended a 20 to 35-year sentence in this case. I do not find that this recommendation is utterly out of line, in particular regarding the violence issues that I have previously referenced and the nature of the conduct and length of time that it went on. Nevertheless, I feel, based upon the nature of this offense and the future for rehabilitation, that it's more appropriately, and I will order, an indeterminate life sentence in this case, ordering you to serve 15 years before the possibility of parole.

As the foregoing quote illustrates, the sentencing court considered a myriad of factors in fashioning its sentence, devoting particular focus and time to the effect of sexual abuse on the victim and the repetitive, long-term, and violent manner in which Ellis perpetrated the abuse. In fact, there was only one short reference to the fact that the nature of Ellis's conduct included sexual intercourse. Ellis's contention that the sentencing court was more repulsed by the notion of intercourse than by Ellis's other conduct, including forced fellatio and cunnilingus, and acts of physical violence to force the child's submission, bears no support in logic or in the record.

Ellis's abuse of the victim was chronic, long-term, violent, and severe even without the allegation of sexual intercourse. We find no error in the district court's holding that Ellis failed to make a prima facie showing that absent the court's belief that intercourse occurred, Ellis would have received a lesser sentence.

Ellis has not shown genuine issues of material fact concerning the deficiency or prejudice prong of his ineffective assistance of counsel claim. Therefore, the district court's summary dismissal of Ellis's successive post-conviction petition is affirmed.

Judge GUTIERREZ and Judge MELANSON **CONCUR.**