

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37036

MITCHELL FREEMAN,)	2011 Unpublished Opinion No. 614
)	
Petitioner-Appellant,)	Filed: September 12, 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STATE OF IDAHO,)	THIS IS AN UNPUBLISHED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, Twin Falls County. Hon. G. Richard Bevan, District Judge.

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

Molly J. Huskey, State Appellate Public Defender; Sarah E. Tompkins, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; John C. McKinney, Deputy Attorney General, Boise, for respondent.

GUTIERREZ, Judge

Mitchell James Freeman appeals from the district court’s order summarily dismissing his successive petition for post-conviction relief. For the reasons set forth below, we affirm.

I.

BACKGROUND

The factual background and course of proceedings are set forth in *State v. Freeman*, Docket No. 33953/33961 (Ct. App. May 13, 2008) (unpublished):

In two cases that were consolidated below and on appeal, Freeman pleaded guilty to two charges of grand theft, Idaho Code §§ 18-2403(3), -2407(1)(b). District Judge John Hohnhorst imposed consecutive unified ten-year sentences with five-year determinate terms, but after a period of retained jurisdiction, suspended the sentences and placed Freeman on probation. Among the terms of his probation was that Freeman pay costs and a victim fee, reimburse the public defender, and pay restitution to the victims. He was to make monthly payments to satisfy these obligations. On July 14, 2006, the State filed a petition for a probation violation,

alleging that Freeman had not made sufficient payments. The State also submitted an addendum to the report of probation violation dated September 25, 2006, alleging that Freeman did not file a monthly report due in September 2006, failed to inform his probation officer that he had been fired from his job, and absconded from probation. Freeman admitted to all of these violations, but testified that his failure to make payments was due to his indigence. The district court, with Judge Daniel Meehl now presiding, revoked probation and ordered execution of the original sentences. Freeman then filed Idaho Criminal Rule 35 motions for reduction of the sentences which were denied.

This Court affirmed the district court's orders revoking probation and denying Freeman's Idaho Criminal Rule 35 motions. Freeman then filed a petition for review, which the Supreme Court denied.

Freeman later filed a pro se petition for post-conviction relief. In that petition he alleged, among other things, that he received ineffective assistance of counsel due to his defense counsel's failure to communicate with him or defend him at trial. The district court issued a notice of intent to dismiss Freeman's petition on the basis that the claims were untimely because they related to the original conviction and sentencing. Freeman filed a pro se response to the notice of intent to dismiss, alleging that his defense counsel was ineffective in relation to the probation revocation hearing and requesting leave to amend his petition to include this new claim of ineffective assistance of counsel. The district court granted Freeman leave to amend his petition and appointed him counsel for the post-conviction proceedings. However, an amended petition was never filed and the district court summarily dismissed Freeman's petition for post-conviction relief for the reasons stated in the notice of intent to dismiss.

Freeman then filed a successive pro se petition for post-conviction relief. The district court thereafter appointed Freeman counsel and granted him permission to file an amended successive petition for post-conviction relief. In his amended successive petition, Freeman alleged three related claims of ineffective assistance of counsel based on his defense counsel's failure to present mitigating evidence during Freeman's probation revocation and disposition hearing. The claims included his defense counsel's failure to: (1) present details surrounding the State's alleged offer to recommend one year of local jail time if Freeman paid \$5000 in restitution before the disposition hearing; (2) explain that the stolen horse's value was \$2000, not \$5000, and that the horse had been restored to the victim; and (3) inform the court more specifically about the restitution payments Freeman had made. The State filed a motion for

summary dismissal of Freeman's amended successive petition on the grounds that the claims had been waived or, alternatively, were without merit. After a hearing, the district court granted the State's motion and dismissed the petition in its entirety. Freeman appeals.

II.

DISCUSSION

A petition for post-conviction relief initiates a civil, rather than criminal, proceeding, governed by the Idaho Rules of Civil Procedure. *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 the plaintiff in a civil action, the petitioner must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *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). A petition for post-conviction relief “differs from a complaint in an ordinary civil action[.]” *Dunlap v. State*, 141 Idaho 50, 56, 106 P.3d 376, 382 (2004) (quoting *Goodwin*, 138 Idaho at 271, 61 P.3d at 628)). The petition must contain much more than “a short and plain statement of the claim” that would suffice for a complaint under I.R.C.P. 8(a)(1). *State v. Payne*, 146 Idaho 548, 560, 199 P.3d 123, 135 (2008); *Goodwin*, 138 Idaho at 271, 61 P.3d at 628. The petition 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.

Idaho Code § 19-4906 authorizes summary dismissal of a petition for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of a petition is the procedural equivalent of summary judgment under I.R.C.P. 56. “A claim for post-conviction relief will be subject to summary dismissal . . . if the petitioner has not presented evidence making a prima facie case as to each essential element of the claims upon which the petitioner bears the burden of proof.” *DeRushé v. State*, 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009) (quoting *Berg v. State*, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998)). Thus, summary dismissal is permissible when the petitioner's evidence has raised no genuine issue of material fact that, if resolved in the petitioner's favor, would entitle the petitioner to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted.

Payne, 146 Idaho at 561, 199 P.3d at 136; *Goodwin*, 138 Idaho at 272, 61 P.3d at 629. Summary dismissal of a petition for post-conviction relief may be appropriate, however, even where the State does not controvert the petitioner's evidence because 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. *Payne*, 146 Idaho at 561, 199 P.3d at 136; *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994).

“When reviewing a district court's order of summary dismissal in a post-conviction relief proceeding, we apply the same standard as that applied by the district court.” *Ridgley v. State*, 148 Idaho 671, 675, 227 P.3d 925, 929 (2010). On review of dismissal of a post-conviction relief petition without an evidentiary hearing, we determine whether a genuine issue of material fact exists based on the pleadings, depositions, and admissions together with any affidavits on file. *Rhoades v. State*, 148 Idaho 247, 220 P.3d 1066 (2009); *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993). However, “while the underlying facts must be regarded as true, the petitioner's conclusions need not be so accepted.” *Rhoades*, 148 Idaho at 250, 220 P.3d at 1069 (quoting *Phillips v. State*, 108 Idaho 405, 407, 700 P.2d 27, 29 (1985)); see also *Hayes v. State*, 146 Idaho 353, 355, 195 P.3d 712, 714 (Ct. App. 2008). As the trial court rather than a jury will be the trier of fact in the event of an evidentiary hearing, summary dismissal is appropriate where the evidentiary facts are not disputed, despite the possibility of conflicting inferences to be drawn from the facts, for the court alone will be responsible for resolving the conflict between those inferences. *Yakovac*, 145 Idaho at 444, 180 P.3d at 483; *Hayes*, 146 Idaho at 355, 195 P.3d at 714. That is, the judge in a post-conviction action is not constrained to draw inferences in favor of the party opposing the motion for summary disposition, but rather is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Id.*

Additionally, all available post-conviction grounds for relief must be raised in the initial post-conviction petition or they are deemed waived. I.C. § 19-4908; *Hooper v. State*, 127 Idaho 945, 947, 908 P.2d 1252, 1254 (Ct. App. 1995). However, an inmate may file a subsequent petition within a reasonable period of time outside of the one year limitation period only where the court finds “a sufficient reason” as to why an asserted ground for relief was not asserted or was inadequately raised in the original, supplemental, or amended petition. I.C. § 19-4908; *Charboneau v. State*, 144 Idaho 900, 904-905, 174 P.3d 870, 874-875 (2007). A petitioner bears

the burden of stating and establishing a “sufficient reason.” *Hooper*, 127 Idaho at 948, 908 P.2d at 1255. “Ineffective assistance of prior post-conviction counsel may provide sufficient reason for permitting newly asserted allegations or allegations inadequately raised in the initial [petition] to be raised in a subsequent post-conviction [petition].” *Schwartz v. State*, 145 Idaho 186, 189, 177 P.3d 400, 403 (Ct. App. 2008). Failure to timely amend an initial petition for post-conviction relief after a court gives notice of intent to dismiss and leave to amend may, if true, constitute both ineffective post-conviction counsel and a sufficient reason for the court to accept a successive petition for post-conviction relief. *See Griffin v. State*, 142 Idaho 438, 441, 128 P.3d 975, 978 (Ct. App. 2006).

Finally, Idaho Appellate Rule 35(a)(4) requires the appellant to list the issues it wants the Court to review in the appellant’s opening brief. If the appellant fails to do so or only does so in a reply brief, the failure eliminates the issue from consideration by the Court. *Rowley v. Fuhrman*, 133 Idaho 105, 108, 982 P.2d 940, 943 (1999); *State v. Raudebaugh*, 124 Idaho 758, 763, 864 P.2d 596, 601 (1993).

The district court summarily dismissed the successive amended petition upon the alternate grounds argued by the State. The State argued below that the claims presented in the amended successive petition were waived because Freeman was required to raise them in his original post-conviction action, but failed to do so. The State also argued that even if the claims were to be considered, they were without merit.

In his opening brief on appeal, Freeman makes no argument regarding ineffective assistance of counsel in the initial action for post-conviction relief to provide a sufficient reason as to why the ineffective counsel claims with respect to the probation revocation were not, or could not have been, raised in his original petition. Without a sufficient reason to raise these claims for relief outside the one-year limitation, the claims are permanently waived. Instead, Freeman only argues that the district court erred by finding there was no genuine issue of material fact as to those newly raised grounds for relief--that is, whether defense counsel’s failure to submit mitigating evidence at the disposition hearing on Freeman’s probation revocation constituted ineffective assistance of counsel. Though Freeman made the “sufficient reason” argument in his reply brief, the defect is not cured and the Court is restrained from finding whether such a reason existed in order to consider the underlying merits in the successive petition. “Where a lower court makes a ruling based on two alternative grounds and only one of

those grounds is challenged on appeal, the appellate court must affirm on the uncontested basis.” *State v. Grazian*, 144 Idaho 510, 517-518, 164 P.3d 790, 797-798 (2007) (citing *Goodwin*, 131 Idaho at 366, 956 P.2d at 1313)). Accordingly, Freeman has failed to show error in the district court’s dismissal of his successive petition for post-conviction relief.

III.

CONCLUSION

We affirm the district court’s order summarily dismissing Freeman’s successive petition for post-conviction relief.

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