

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37923

DANNY C. GILLETTE,)	2011 Unpublished Opinion No. 598
)	
Petitioner-Appellant,)	Filed: August 29, 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STATE OF IDAHO,)	THIS IS AN UNPUBLISHED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 Sixth Judicial District, State of Idaho, Bannock County. Hon. David C. Nye, District Judge.

Judgment dismissing petition for post-conviction relief, affirmed.

Danny C. Gillette, St. Anthony, pro se appellant.

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

LANSING, Judge

Danny C. Gillette appeals from the district court’s dismissal of his successive petition for post-conviction relief. Gillette asserts: (1) the district court erred by summarily dismissing his petition when a genuine issue of material fact existed, (2) the court erred by not ruling on Gillette’s motions to appoint counsel, and (3) the State should be barred from arguing on appeal.

I.

BACKGROUND

In 1991, Gillette pled guilty to robbery and was sentenced to life imprisonment with a determinate term of seven years. In 1992, Gillette unsuccessfully appealed the sentence and the denial of an Idaho Criminal Rule 35 motion requesting leniency. *State v. Gillette*, 121 Idaho 629, 630, 826 P.2d 1341, 1342 (Ct. App. 1992). Gillette then filed his first petition for post-conviction relief on May 27, 1993, claiming that his counsel and the prosecutor withheld exculpatory evidence, that he had received ineffective assistance of counsel, and that his

sentence was incorrectly based on the court's understanding that he had committed seven previous felonies when, in fact, he had committed only one. According to the State's brief in this appeal, the district court granted Gillette relief, reducing the determinate portion of his sentence from seven years to four years, after the court recognized that he in fact had only one previous felony.¹

In 1996, Gillette filed a second petition for post-conviction relief, repeating many of his claims. Although his petition was not entirely clear, he apparently argued that exculpatory evidence was withheld, that fabricated evidence was presented to the court, that his counsel was ineffective, that the court erred by partially basing his sentence on seven previous felonies instead of one, and that he should be given leniency. The court dismissed Gillette's petition, stating:

The Applicant admits in his Petition that this is his second Petition. The Applicant further admits that the first Petition was even amended before being considered by the Court. The Court finds no sufficient reason this relief was not asserted in the first Petition. The Court also finds that some of the grounds for the relief alleged in this Petition were raised in the prior Petition. Accordingly, the Court finds this Petition barred by [Idaho Code § 19-4908].

Gillette filed a third petition for post-conviction relief in 2008, alleging that his appointed counsel was ineffective, that he was denied representation when an attorney other than his counsel of record represented him at sentencing and at his Rule 35 hearing, that his counsel withheld information, that his counsel had a conflict of interest, and that his sentence was incorrectly based on seven previous felonies when he had only one. The court dismissed the petition, determining that all issues raised by Gillette were either meritless or unsupported by any sufficient reason as to why they were not raised in the original petition.

In 2010, Gillette filed yet another subsequent petition for post-conviction relief, his fourth, which initiated the present action. Like his previous petitions, it is not a model of clarity, but it appears to raise some of the same issues that were previously raised and addressed in his three prior petitions. The petition alleges ineffective assistance of counsel, a denial of counsel when an attorney other than counsel of record represented him at sentencing and at his Rule 35 hearing, and that his counsel had a conflict of interest. Gillette presented new evidence (a letter)

¹ In his second petition for post-conviction relief, Gillette also acknowledges that he was granted relief during his 1993 petition.

to support one of his claims, and requested counsel to assist him with his petition. The district court dismissed this fourth petition, concluding that it failed to raise any claim not already adjudicated. Gillette argues that the court erred by summarily dismissing his action because material issues had been presented. Additionally, Gillette argues that the court erred in not ruling on his motion to appoint counsel, and that the State should be barred from arguing on appeal.

II. ANALYSIS

A. Sufficient Reason for a Successive Petition

A petition for post-conviction relief under the Uniform Post Conviction Procedure Act (UPCPA) is civil in nature. *Charboneau v. State*, 144 Idaho 900, 903, 174 P.3d 870, 873 (2007). The petitioner must prove the claims upon which the petition is based by a preponderance of the evidence. *Id.* Summary disposition of a petition for post-conviction relief is appropriate if the applicant's evidence raises no genuine issue of material fact. I.C. § 19-4906(b), (c); *Charboneau*, 144 Idaho at 903, 174 P.3d at 873. When the alleged facts, even if true, would not entitle the applicant to relief, the trial court may dismiss the application without holding an evidentiary hearing. *Charboneau*, 144 Idaho at 903, 174 P.3d at 873; *Stuart v. State*, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990); *Cooper v. State*, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975). 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 pleading, deposition, 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).

All claims for post-conviction relief must be raised in an original, supplemental, or amended application. I.C. § 19-4908. The application must be filed within one year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal, whichever is later. I.C. § 19-4902. Successive petitions are impermissible “unless 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. While Section 19-4908 sets forth no fixed time within which successive petitions may be filed, the “sufficient reason” language in the statute necessarily provides “a reasonable time within which such claims [may be] asserted in a

successive post-conviction petition, once those claims are known.” *Charboneau*, 144 Idaho at 905, 174 P.3d at 875. The determination of what is a reasonable time is considered on a case-by-case basis. *Id.*

Gillette supported his fourth petition with a letter which he characterizes as “undisputable proof” of the validity of his claims. New evidence may provide sufficient reason for a subsequent petition when it unearths “claims which simply [were] not known to the defendant within the [one-year] time limit, yet raise important due process issues.” *Id.* at 904, 174 P.3d at 874. *See also Stuart v. State*, 118 Idaho 932, 934, 801 P.2d 1283, 1285 (1990). The letter which Gillette references merely supports an argument that the attorney representing Gillette at sentencing and at the Rule 35 motion was not his counsel of record, but was “stand-in” counsel. We agree with the district court’s assessment that “[t]he letter itself may be a new document but it does not raise any newly discovered evidence or address an issue that has not previously been decided with this court.” Gillette knew at the time of his original petition, and the State does not dispute, that Gillette was briefly represented by an attorney other than his appointed counsel of record. New evidence of an undisputed fact does not provide a sufficient reason to permit a subsequent petition, especially when it is used to support a claim that was known to the petitioner at the time of the original petition. *See Stuart*, 118 Idaho at 933-34, 801 P.2d at 1284-85 (“Any grounds for relief not raised are permanently waived if the grounds were known or should have been known at the time of the first petition.”). The letter does not give rise to any claim not known by Gillette at the time of his original petition, and the issue for which it is presented has already been adjudicated. It provides no “sufficient reason” to resurrect previously litigated claims.²

Gillette provides no sufficient reason to support a subsequent petition for post-conviction relief based on his attorney’s failure to introduce mitigating evidence, or failure to assert that Gillette had only one previous felony, not seven. In an apparent effort to explain why these claims are being raised in his fourth petition, Gillette claims the attorney who helped him prepare his original petition removed claims of ineffective assistance of counsel from the petition.

² For Gillette’s edification, this Court notes that it is a common practice for an attorney of record (whether appointed or privately retained) to request another attorney to cover a court appearance for which the attorney of record is unavailable, and such practice is not prohibited, nor does it result in the client being unrepresented or denied the right to counsel.

However, Gillette fails to raise any new claims that have not already been addressed multiple times in his previous petitions.

We conclude that no material issues of fact were presented by Gillette's petition, that the claims were not unknown at the time Gillette filed his original petition, and that the claims have already been fully adjudicated. Thus, the claims are barred by Idaho Code Section 19-4908. Accordingly, we affirm the dismissal of Gillette's petition for post-conviction relief.

B. Request for Counsel

Gillette argues that the district court erred by not appointing counsel to represent him in this action. Idaho Code Section 19-4904 gives courts discretion to appoint an attorney to post-conviction petitioners who are unable to pay for the expenses of representation. *Hust v. State*, 147 Idaho 682, 683, 214 P.3d 668, 669 (Ct. App. 2009); *Fox v. State*, 129 Idaho 881, 885, 934 P.2d 947, 951 (Ct. App. 1997). Counsel should be appointed if the petitioner qualifies financially and alleges facts to raise the possibility of a valid claim, and a request for counsel may be denied only if all the alleged claims raised in the petition are frivolous. *Hust*, 147 Idaho at 684, 214 P.3d at 670; *Charboneau v. State*, 140 Idaho 789, 793, 102 P.3d 1108, 1112 (2004). “[A]ny time a district court dismisses a petition for post-conviction relief on either substantive or procedural grounds without first addressing the petitioner’s request for post-conviction counsel (assuming the petitioner made such a request), the court commits an abuse of discretion.” *Hust*, 147 Idaho at 685, 214 P.3d at 671; *accord Fox*, 129 Idaho at 885, 934 P.2d at 951; *Swisher v. State*, 129 Idaho 467, 469, 926 P.2d 1314, 1316 (Ct. App. 1996). However, such an abuse of discretion constitutes reversible error only if a petitioner “presents any colorably meritorious claim, the presentation of which might have been enhanced by the assistance of counsel.” *Swisher*, 129 Idaho at 469, 926 P.2d at 1316) (holding that failure to address request for counsel on claims unquestionably barred by the statute of limitation is harmless error).

The district court committed an abuse of discretion by dismissing Gillette's claim before ruling on his request for counsel. However, the claims presented by Gillette's petition consisted entirely of previously adjudicated claims unsupported by any sufficient reason to explain why or how they were not adequately raised in previous petitions, and were therefore not even colorably meritorious. If the district court had timely addressed the request for counsel, the only appropriate response would have been to deny it. Accordingly, the error was harmless.

C. State's Participation in Appeal

Gillette argues that the State should be barred from responding to his appeal because it did not respond to his petition for post-conviction relief with the district court. Gillette cites several cases to support his argument, including *Frasier v. Carter*, 92 Idaho 79, 437 P.2d 32 (1968) (holding that a court will not consider issues on appeal that were not raised at trial), but none of these are applicable to the present circumstance. Gillette's argument is without merit because the State is not raising issues. Instead, the State is responding to issues raised by Gillette. We know of no other authority that would support Gillette's proposition, and therefore reject his argument. Moreover, it would make no difference to the outcome of this appeal if this Court declined to consider the State's appellate brief, for Gillette's claims are patently frivolous.

III.

CONCLUSION

Gillette has failed to present any sufficient reason to justify the filing of a successive petition for post-conviction relief, much less to justify filing a successive petition more than eighteen years after the conclusion of his appeal. The district court's judgment dismissing Gillette's petition is therefore affirmed. Costs on appeal to the respondent. Because the State did not request attorney fees, none are awarded.

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