

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 36637

MICHAEL T. HAYES,)	2011 Unpublished Opinion No. 450
)	
Petitioner-Appellant,)	Filed: April 22, 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STATE OF IDAHO,)	THIS IS AN UNPUBLISHED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 First Judicial District, State of Idaho, Shoshone County. Hon. Fred M. Gibler, District Judge.

Order denying application for post-conviction relief, affirmed.

Nevin, Benjamin, McKay & Bartlett, LLP, Boise, for appellant. Robyn A. Fyffe argued.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent. Jessica M. Lorello argued.

MELANSON, Judge

Michael T. Hayes appeals from the district court’s order denying his application for post-conviction relief. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

In 2003, Hayes was charged in Shoshone County with one count of lewd conduct with a minor under the age of sixteen, two counts of providing alcohol to a minor, and one count of providing tobacco to a minor. Hayes was also charged with four counts of lewd conduct with a minor in Kootenai County. The two cases were joined for trial. A jury found Hayes guilty of all the Shoshone County charges. Of the four Kootenai County charges, the jury found Hayes guilty of only one count of lewd conduct. Hayes was sentenced to concurrent unified forty-year terms, with minimum periods of confinement of twenty years. Hayes was sentenced to concurrent unified terms of six months for two counts of dispensing alcohol to a person under the age of twenty-one years and one count of distribution of tobacco to a minor. In 2006, Hayes filed

appeals of his judgments of conviction, which this Court affirmed in an unpublished opinion. *State v. Hayes*, Docket Nos. 30574 and 30591 (Ct. App. Jan. 19, 2006).

Subsequently, Hayes filed a motion for new trial in the Kootenai County case based on newly discovered evidence. The district court denied Hayes's motion and he appealed. This Court reversed the district court and held that, based on the newly discovered evidence, Hayes was entitled to a new trial. *State v. Hayes*, 144 Idaho 574, 165 P.3d 288 (Ct. App. 2007). A new trial was not conducted, however, and eventually the Kootenai County case was dismissed. Prior to the ruling on his motion for new trial, Hayes filed an application for post-conviction relief in the Kootenai County case. His application was denied based on the dismissal of the underlying case.

Hayes also filed a motion for new trial in the Shoshone County case based on newly discovered evidence. The district court denied Hayes's motion and he appealed. This Court, in an unpublished opinion, affirmed the district court's denial of Hayes's motion for new trial in the Shoshone County case. *State v. Hayes*, Docket No. 35482 (Ct. App. Feb. 17, 2010). Prior to the determination of his motion for new trial, Hayes filed a pro se application for post-conviction relief in the Shoshone County case. The matter was stayed pending the outcome of Hayes's motions for new trial in the Kootenai and Shoshone County cases. After the Kootenai County case was dismissed and Hayes's motion for new trial in the Shoshone County case was denied, the district court appointed post-conviction counsel who amended Hayes's application. Following the appointment of counsel, however, Hayes continued to file pro se motions including a motion to disqualify the presiding district judge for cause pursuant to I.R.C.P. 40(d)(2). The district court did not rule on Hayes's motion to disqualify prior to conducting an evidentiary hearing on Hayes's application for post-conviction relief. After a hearing, the district court denied Hayes's application for post-conviction relief. Hayes filed a motion to amend and reconsider the district court's order denying his application for post-conviction relief. The district court did not rule on the motion to reconsider. Hayes appeals the district court's denial of his application for post-conviction relief.

II. ANALYSIS

Hayes makes several arguments on appeal. First, Hayes argues that the district court erred in denying his application for post-conviction relief because the district court failed to first rule on Hayes's pro se motion to disqualify. Second, Hayes argues that the district court erred in

denying his application for post-conviction relief because he demonstrated that his trial counsel was ineffective. Third, Hayes argues that the district court erred in denying his application for post-conviction relief because he demonstrated that he was effectively deprived of counsel in the Shoshone County case. Fourth, Hayes argues that the district court erred in failing to rule on his motion to reconsider. Finally, Hayes argues that the district court erred in failing to find that the combination of errors and irregularities in his trial cumulatively entitled him to post-conviction relief.

An application for post-conviction relief initiates a proceeding that is civil in nature. *Rhoades v. State*, 148 Idaho 247, 249, 220 P.3d 1066, 1068 (2009); *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). Like a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Goodwin v. State*, 138 Idaho 269, 271, 61 P.3d 626, 628 (Ct. App. 2002). An application 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).

To prevail in a post-conviction proceeding, the applicant must prove the allegations by a preponderance of the evidence. I.C. § 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. I.R.C.P. 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. Motion to Disqualify

Hayes argues that the district court erred in failing to grant or deny his motion to disqualify the district judge for cause. A party may move to disqualify a judge from presiding on the grounds of bias. I.R.C.P. 40(d)(2)(A)(4). An affidavit "stating distinctly the grounds upon which disqualification is based and the facts relied upon in support of the motion" must accompany the motion. I.R.C.P. 40(d)(2)(B). Whatever the source of the bias or prejudice, it must be so extreme as to display clear inability to render fair judgment. *Bach v. Bagley*, 148

Idaho 784, 791-92, 229 P.3d 1146, 1153-54 (2010). Unless there is a demonstration of pervasive bias derived from either an extrajudicial source or facts and events occurring at trial, there is no basis for judicial recusal. *Id.* at 792, 229 P.3d at 1154. The standard for recusal of a judge, based simply on information that the judge has learned in the course of judicial proceedings, is extremely high. *Id.*

If a motion for disqualification for cause is made, the presiding judge “shall grant or deny the motion for disqualification upon notice and hearing in the manner prescribed by these rules for motions.” I.R.C.P. 40(d)(2)(B). Idaho Rule of Civil Procedure 40(d)(5) provides that, “upon the filing of a motion for disqualification, the presiding judge shall be without authority to act in such action except to grant or deny such motion for disqualification.” All orders that follow the filing of a motion to disqualify, but prior to a ruling on that motion, are improper, void, and of no effect. *Pizzuto v. State*, 127 Idaho 469, 470, 903 P.2d 58, 59 (1995).

1. Notice and hearing

Idaho Rule of Civil Procedure 40(d)(2)(B) provides that the judge who the movant is seeking to disqualify must grant or deny the motion for disqualification upon “notice and hearing in the manner prescribed by these rules.” Idaho Rule of Civil Procedure 7(b)(3)(A) requires that a “written motion . . . and notice of the hearing thereon shall be filed with the court, and served so that it is received by the parties no later than fourteen (14) days before the time specified for the hearing.” The record demonstrates that, while Hayes filed a pro se motion for disqualification, he did not file a notice of hearing and did not serve notice of the hearing in compliance with the requirements of I.R.C.P. 40(d)(2)(B) and I.R.C.P. 7(b)(3)(A).

2. Invited error

The doctrine of invited error applies to estop a party from asserting an error when his or her own conduct induces the commission of the error. *Thompson v. Olsen*, 147 Idaho 99, 106, 205 P.3d 1235, 1242 (2009). One may not complain of errors one has consented to or acquiesced in. *Id.* In short, invited errors are not reversible. *Id.*

Here, Hayes filed his motion to disqualify in September 2007. In February 2008, a status conference was held in which pending motions in Hayes’s Shoshone County case were discussed. Neither Hayes nor his attorney mentioned the motion to disqualify at this hearing. In April 2008, another motion hearing was held. At the hearing, after dealing with several other issues, the district court stated to Hayes and his attorney that he did not believe there were any additional motions pending in the Shoshone County case. In response to this statement, the state’s attorney

brought to the court's attention a motion for summary dismissal and notice of hearing which had been filed by Hayes pro se. At no time during the discussion of his pending pro se motion for summary judgment did Hayes or his attorney mention the motion to disqualify. Yet another motion hearing was held in August 2008. Neither Hayes nor his attorney brought the pending motion to disqualify to the judge's attention. In November 2008, another motion hearing was held in the Shoshone County case, but Hayes and his attorney still failed to bring the motion to disqualify to light. Eventually, Hayes proceeded to trial. Hayes did not bring the motion to disqualify to the attention of the district court at his trial. Thus, the record demonstrates that Hayes acquiesced in the district court's failure to rule on the motion to disqualify and abandoned the motion.

3. Grounds for disqualification

Hayes's motion to disqualify alleged, under I.R.C.P. 40(d)(2)(A)(4), that the district judge should be disqualified because he was biased or prejudiced against Hayes. In his motion to disqualify, Hayes alleged that the district judge was biased and prejudiced against Hayes because the judge allowed witnesses in Hayes's trial to commit perjury. Hayes also asserted that the district judge demonstrated bias in denying Hayes's motion for new trial. These allegations do not support any actual prejudice directed against Hayes on the part of the district court. The allegations do not assert a pervasive bias remotely approaching the standard set forth in *Bach*, 148 Idaho 784, 229 P.3d 1146.

Therefore, we hold that the district court did not err in failing to rule on Hayes's motion to disqualify because he failed to comply with the Idaho Rules of Civil Procedure in filing his motion to disqualify, he invited the district court's error or abandoned the motion, and the claims alleged in his motion to disqualify were frivolous. Although Hayes is correct in his assertion that a judge must rule on a motion to disqualify before proceeding further in the case, we hold, under the circumstances of this case, that the district court did not err in failing to rule on Hayes's motion for disqualification.

B. Ineffective Assistance of Counsel

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray*, 121 Idaho at 924-25, 828 P.2d at 1329-30. 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). Hayes argues that the district court erred in dismissing four of the ineffective assistance of counsel claims alleged in his application for post-conviction relief.

1. Failure to present additional evidence

Hayes argues that the district court erred in dismissing his claim that his trial counsel was ineffective for failing to present additional evidence. Specifically, Hayes argues that his trial counsel was ineffective for failing to present evidence showing he did not have Hepatitis C. At trial, evidence was presented that the minor, with whom Hayes was alleged to have had a sexual relationship, had Hepatitis C. Hayes asserts that, if it had been made clear to the jury that he was Hepatitis C negative and his victim was Hepatitis C positive, the jury would have exonerated him from allegations that he had a sexual relationship with the victim. A lab report showing Hayes tested negative for Hepatitis C was admitted at trial. The police detective who ordered the test testified that, while the lab report indicated Hayes was negative for Hepatitis C, it also indicated he should be retested. A physician, who was called as an expert witness, testified that the victim told her that she contracted Hepatitis C because her boyfriend held her down and injected her with drugs. The physician also testified that it was unlikely that a male who had had sexual intercourse with a female approximately a dozen times would have contracted Hepatitis C from the encounters because Hepatitis C is rarely transmitted through sexual contact.

At the hearing on Hayes's application for post-conviction relief, trial counsel testified that the decision not to present additional evidence on the Hepatitis C issue was a strategic one. The attorney indicated that the argument Hayes was urging--that the fact Hayes was negative for Hepatitis C demonstrated that he and the victim did not engage in a sexual relationship--might backfire. The attorney stated that his research showed that an expert would testify only that Hepatitis C is very rarely transmitted through sexual intercourse. The attorney noted that such

testimony would not be helpful. Hayes's attorney also testified that he and Hayes discussed the Hepatitis C issue and that Hayes agreed, as a matter of strategy, that pursuing the issue would be fruitless.

The district court weighed the testimony of Hayes's attorney and determined that the decision of counsel not to further pursue the Hepatitis C issue was strategic and tactical. This Court will not second guess tactical or strategic decisions of trial counsel. A reasonably competent attorney would not have pursued additional evidence regarding Hayes's Hepatitis C status when it would not have helped to prove that Hayes did not have a sexual relationship with the victim. Therefore, we hold that the district court did not err in dismissing Hayes's claim that his counsel was ineffective for failing to submit additional evidence at trial showing that Hayes was not Hepatitis C positive because the decision was strategic and Hayes failed to demonstrate that his attorney's performance was deficient.

2. Motion to sever

Hayes argues that his Shoshone County trial counsel was ineffective for failing to file a motion to sever his misdemeanor and felony charges. 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.*

In denying Hayes's post-conviction claim that his counsel was ineffective for failing to file a motion to sever the misdemeanor charges from the felony charges, the district court noted that the motion to sever would have likely been unsuccessful. A defendant does not suffer actual prejudice from the denial of his or her motion to sever if evidence regarding each separate count would be admissible to prove the other counts because such evidence is probative of a general plan to exploit and sexually abuse an identifiable group of young victims. *See State v. Longoria*, 133 Idaho 819, 824, 992 P.2d 1219, 1224 (Ct. App, 1999). Hayes's misdemeanor charges of providing alcohol and tobacco to minors were connected with his alleged sexual relationship with the victim. As noted by the district court, there was a sufficient nexus between the charges to support joinder of the charges. As such, it is likely that the district court would have denied a motion to sever the misdemeanor and felony charges in the Shoshone County case. Therefore,

we hold that the district court did not err in dismissing Hayes's claim that his trial counsel was ineffective for failing to file a motion to sever.

3. Failure to call witness

Hayes argues that his Shoshone County trial counsel was ineffective for failing to call his mother as a witness. Hayes asserts that her testimony could have been used by his trial counsel to impeach the credibility of the victim's mother. Hayes argues that the testimony of his mother would have revealed that the victim's mother was lying about being married, would have shown the victim's mother was fraudulently collecting money from the State of Idaho for providing healthcare to her spouse, and would have undermined her credibility.

During cross-examination, Hayes's attorney impeached the victim's mother in order to attack her credibility. Testimony of the victim's mother during cross-examination revealed that her earlier testimony about not being married to the victim's father was untruthful. The testimony also showed that the victim's mother was accepting payments from the state to which she was not entitled. The decision not to call an additional witness--whose only purpose was to testify that the victim's mother was married to the victim's father and was fraudulently accepting payments from the state--was a reasonable tactical decision because the victim's mother had already admitted to these facts during cross-examination. 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. In addition, Hayes failed to demonstrate that he was prejudiced by his attorney's failure to call the additional witness. Therefore, we hold that the district court did not err when it dismissed Hayes's claim that his trial counsel was deficient for failing to call his mother as a witness.

4. Prosecutorial misconduct

Hayes argues that his Shoshone County counsel was ineffective for failing to object to prosecutorial misconduct which prejudiced him. Specifically, Hayes argues that his trial counsel should have objected to the prosecutor's closing argument which relied on false testimony and misstated the evidence. Although Hayes's application for post-conviction relief alleged substantive claims of prosecutorial misconduct, the application did not contain a claim that his counsel was ineffective for failing to object to the alleged misconduct. Generally, issues not raised below may not be considered for the first time on appeal. *Sanchez v. Arave*, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991). Accordingly, we will not address this claim.

C. Denial of Counsel

Hayes argues that the district court erred in denying his application for post-conviction relief because he was effectively denied assistance of counsel in his Shoshone County case. Specifically, Hayes asserts that there was a complete breakdown of the attorney-client relationship with his Shoshone County counsel prior to and during his trial. Hayes argues that, because there was a complete breakdown of the attorney-client relationship, he is not required to show that he was prejudiced by his attorney's deficient performance.

Prejudice will be presumed from deficient performance of trial counsel only in a narrow set of circumstances. *State v. Hayes*, 146 Idaho 353, 356, 195 P.3d 712, 715 (Ct. App. 2008); *see also United States v. Cronin*, 466 U.S. 648, 658 (1984). Whether prejudice will be presumed depends on the magnitude of the deprivation of the right to effective assistance of counsel. *Mintun v. State*, 144 Idaho 656, 660, 168 P.3d 40, 44 (Ct. App. 2007). There are three situations where courts should presume that the defendant was prejudiced by the absence or deficiency of counsel: (1) where the presence of counsel is denied altogether at a critical stage; (2) where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; and (3) where counsel is called upon to render assistance under circumstances where competent counsel could not render effective assistance. If a defendant fails to demonstrate he or she is entitled to a presumption of prejudice, then the Court must apply *Strickland*. *See Workman v. State*, 144 Idaho 518, 526, 164 P.3d 798, 806 (2007).

None of these situations occurred here. There was not a complete denial of counsel because Hayes was represented by counsel in the Shoshone County case. Shoshone County counsel, working in conjunction with Kootenai County counsel, participated in Hayes's trial by examining and cross-examining witnesses, making arguments on evidentiary issues, and making a closing statement. Hayes's Shoshone County attorney also did not fail entirely to subject the prosecution's case to meaningful adversarial testing. As noted, Hayes's attorney participated fully in the trial and opposed the prosecution throughout the proceeding. Finally, Hayes's Shoshone County attorney was not called upon to render assistance to Hayes under circumstances where competent counsel could not render effective assistance. Hayes's Shoshone County counsel found it difficult to get along with Hayes and attempted to withdraw from the case. When his motion to withdraw was denied, however, the Shoshone County attorney proceeded to participate fully and actively in Hayes's trial. Continuing to represent a client after the denial of a motion to withdraw is not a circumstance under which a competent attorney would be unable to

render effective assistance. Therefore, because Hayes has failed to demonstrate that his case falls under one of the circumstances listed in *Cronic*, we hold that the district court did not err in dismissing Hayes's claim that he was denied effective assistance of counsel.

D. Motion to Reconsider

Hayes argues that the district court erred in failing to address his motion for reconsideration of the denial of his application for post-conviction relief. This Court will not review a trial court's alleged error on appeal unless the record discloses an adverse ruling which forms the basis for the assignment of error. *De Los Santos v. J.R. Simplot Co., Inc.*, 126 Idaho 963, 969, 895 P.2d 564, 570 (1995). Accordingly, we will not address this claim.

E. Cumulative Error

Hayes argues that the cumulative errors in his trial provide a ground for post-conviction relief. Hayes contends that irregularities and errors in his trial, combined with his attorney's failure to call a material witness in the Shoshone County case, amount to reversible error. Hayes filed a motion for new trial in the Shoshone County case based on newly discovered evidence. The newly discovered evidence was a material witness who could provide first-hand testimony concerning the events surrounding Hayes's conviction. The material witness was not called at the time of trial because, despite reasonable efforts by Hayes's trial counsel, he could not be located. The district court denied Hayes's motion for new trial based on the new witness. This Court, in an unpublished opinion, affirmed the district court's denial of Hayes's motion for new trial in the Shoshone County case holding that the newly discovered testimony of the material witness would not have changed the outcome of the Shoshone County case. *State v. Hayes*, Docket No. 35482 (Ct. App. Feb. 17, 2010).

During the post-conviction hearing, Hayes acknowledged that, because the failure to call the material witness was not the result of lack of due diligence, he could not show that the failure to call the witness arose from his counsel's deficient performance. Hayes seems to argue, however, that when the content of the material witness's testimony is considered in conjunction with other deficiencies in his trial he has demonstrated that he did not receive a constitutionally fair trial. This Court has recognized the doctrine of cumulative error may apply in post-conviction cases. *Boman*, 129 Idaho at 527, 927 P.2d at 917; *Reynolds v. State*, 126 Idaho 24, 32, 878 P.2d 198, 206 (Ct. App. 1994). A necessary predicate to application of the doctrine, however, is a finding of error in the first instance. *Boman*, 129 at 527, 927 P.2d at 917. We have determined above that the district court did not err in dismissing Hayes's other post-conviction

claims. We also previously determined that Hayes was not prejudiced by the absence of the testimony of the newly discovered material witness. Therefore, we conclude that Hayes has failed to make a sufficient showing of prejudice regarding any cumulative effect of his counsel's conduct. Therefore, the doctrine of cumulative error has no applicability in this case.

III.

CONCLUSION

We hold that the district court did not err in denying Hayes's application for post-conviction relief. The district court did not err in failing to rule on Hayes's motion to disqualify because he failed to comply with the Idaho Rules of Civil Procedure, he invited the error or abandoned the motion and his grounds for disqualification were frivolous. The district court did not err in denying Hayes's ineffective assistance of counsel claims because trial counsel was not deficient when he did not present additional evidence, did not move to sever the felony and misdemeanor charges, and did not call Hayes's mother as a witness. The district court also did not err in dismissing Hayes's denial of counsel claim. We will not consider Hayes's claim of ineffective assistance of counsel for failing to object to alleged prosecutorial misconduct or his claim the district court erred in failing to rule on Hayes's motion to reconsider. Hayes has failed to demonstrate error, much less cumulative error. Accordingly, the district court's order denying Hayes's application for post-conviction relief is affirmed. No costs or attorney fees are awarded on appeal.

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