

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37594

CHRISTOPHER CHARLES IMOTO,	)	2011 Unpublished Opinion No. 539
	)	
Petitioner-Appellant,	)	Filed: July 1, 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STATE OF IDAHO,	)	THIS IS AN UNPUBLISHED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 Fourth Judicial District, State of Idaho, Elmore County. Hon. Michael E. Wetherell, District Judge.

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

Molly J. Huskey, State Appellate Public Defender; Diane M. Walker, Deputy Appellate Public Defender, Boise, for appellant. Diane M. Walker argued.

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

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LANSING, Judge

Christopher Charles Imoto appeals from the summary dismissal of his petition for post-conviction relief. He argues that the district court erred in summarily dismissing his claims because he raised genuine issues of material fact as to whether his defense counsel in his underlying criminal case was ineffective for not adequately advising him concerning the terms and consequences of his plea agreement, and whether his appellate counsel was ineffective for not arguing on appeal that the State breached the plea agreement. We affirm.

I.

BACKGROUND

Imoto was charged with two counts of lewd conduct with a minor in his underlying criminal case. Imoto and the State entered into a plea agreement whereby Imoto agreed to plead guilty to one count of lewd conduct in exchange for the State dismissing the other count. The State agreed to recommend a unified sentence of ten years, with two years fixed. The plea agreement stated that the “State will seek imposition unless PSI [presentence investigation

report] recommends less and if the Defendant is not a high risk to re-offend.” Imoto was free to argue for a lesser sentence.

After Imoto pled guilty pursuant to the plea agreement, a PSI was prepared and a psychosexual evaluation was performed. Imoto received and reviewed copies of both before his sentencing hearing. The PSI did not include a recommendation concerning imposition of Imoto’s sentence because the investigator had not received a copy of the psychosexual evaluation and would not make a recommendation without first reviewing that report. The psychosexual evaluation classified Imoto as a low risk to reoffend.

At the sentencing hearing, the State recommended imposition of a unified sentence of ten years, with two years fixed. Imoto’s counsel objected, and the following exchange took place:

[Imoto’s Counsel]: Well, Judge, I am going to have to object to the State’s recommendation because that’s not the deal they made with the Court or made with the defendant. Their statement says the State will seek imposition unless the PSI recommends less and if the defendant is not a high risk to reoffend.

At page seven of the doctor’s report, he says that Mr. Imoto is a low risk category relative to other adult males. And that’s under risk and treatment amenability. So that’s a breach of the plea agreement by the State’s recommendation. The pre-sentence investigation made no recommendation.

So, I am not sure if we need to take a recess and discuss this with the State or what the issue is at that point, Judge, but that was the agreement that we made.

[Prosecutor]: Your Honor, the agreement was the State would ask for imposition unless there was an alternate recommendation in the PSI and he was not a high risk to reoffend. I don’t see there was any breach. I can present the Court with a written copy of our plea agreement.

.....

[The Court]: Well, the Court will find that the clear language of agreement is that it states: “The State will seek imposition unless the PSI recommends less and if the defendant is not a high risk to reoffend.”

There is no recommendation in the PSI. Both factors are not present. The Court finds that the State is free to ask for the imposition of the sentence. Both of those criteria were not met with regard to the State’s seeking imposition.

Imoto’s counsel then recommended probation or retained jurisdiction. The Court imposed a twenty-five-year unified sentence with ten years fixed. Imoto filed a direct appeal, arguing only that his sentence was excessive, and this Court affirmed. *State v. Imoto*, Docket No. 34999 (Ct. App. Sept. 29, 2008) (unpublished).

Imoto brought the instant petition for post-conviction relief arguing that his trial counsel was ineffective for not advising him that the presentence investigator could refuse to make a

recommendation and that, as a consequence, the State could argue for incarceration, and for advising him to accept the plea agreement regardless of this possibility. Imoto also argued that his appellate counsel had been ineffective for not asserting on appeal that the State breached the plea agreement. The district court issued a notice of its intent to summarily dismiss Imoto's petition, to which Imoto did not respond. The district court thereafter entered an order dismissing the petition. Imoto timely appeals.

## II.

### DISCUSSION

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 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.

#### A. Ineffective Assistance of Trial Counsel

Imoto argued below that he was prejudiced by counsel's deficiency because there is a reasonable probability that he would have received a different sentence had the State not been allowed to argue for imposition of his sentence where the PSI made no recommendation. Imoto requested relief in the form of specific performance of the plea agreement--that he be resentenced and the State be required to recommend something less than imposition--or alternatively, that he be allowed to withdraw his guilty plea.

On appeal, Imoto argues that his trial attorney's failure to properly advise him concerning the plea agreement renders his plea not knowingly, intelligently, or voluntarily given. Imoto

asserts that his counsel acted deficiently because counsel knew there was a possibility that the PSI would not include a recommendation and failed to inform Imoto of this possibility; counsel misunderstood the terms of the plea agreement to mean that if the PSI did not include a recommendation the State could not argue for imposition, thereby foreclosing any meeting of the minds on the plea agreement contract; and counsel could not properly advise the defendant concerning whether to accept the plea because counsel misunderstood the terms himself. Imoto argues that because he requested relief in his post-conviction petition in the form of permission to withdraw his guilty plea, he has shown that he would not have pled guilty absent counsel's deficiency.

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. *Id.* Where, as here, the applicant was convicted upon a guilty plea, to satisfy the prejudice element, the applicant seeking relief from the conviction generally must show a reasonable probability that, but for counsel's errors, he or she would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Plant v. State*, 143 Idaho 758, 762, 152 P.3d 629, 633 (Ct. App. 2006). This requires a showing that a decision to not accept a plea agreement and plead guilty would have been rational under the circumstances. *Padilla v. Kentucky*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 1473, 1485 (2010). 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).

Thus, to obtain relief from his guilty plea, Imoto was required to show that he would not have pleaded guilty had he been adequately informed of the terms and consequences of his plea agreement. However, Imoto presented no evidence that he would not have pleaded guilty had he been so informed. Imoto did not assert below that there was a defense available to him or some

misunderstanding of law such that it would have been rational for him to have taken his case to trial on its merits rather than accept the proffered plea agreement. Imoto's request for relief in his post-conviction petition, asking that he be allowed to withdraw his guilty plea as an alternative to "specific performance," was not sufficient to allege, let alone show a reasonable probability, that he would have taken his case to trial and that such a decision would have been rational under the circumstances.

In the proceedings below, Imoto argued that his sentence would have been different had the State been required to abstain from recommending incarceration (rather than probation) when the PSI investigator made no recommendation. This argument, and Imoto's request for relief in the form of "specific performance"; i.e., that a new sentencing hearing be held and the State be required to argue for something other than incarceration, contains a faulty assumption. It assumes that Imoto's attorney could have forced the State to enter into a different plea agreement with the term he is requesting that we specifically enforce on appeal. That is, he assumes that his attorney could have negotiated a plea agreement requiring the State to abstain from recommending incarceration in the absence of a recommendation by the PSI investigator. He asks this Court for specific performance of a plea agreement that was never made by the parties, without proof that such an agreement could have been secured by his attorney. Had Imoto been informed and understood the full extent of the actual plea agreement, his only options would have been to plead guilty pursuant to it or reject it. He has not presented evidence that the prosecutor would have agreed to any other alternative. As Imoto has not shown prejudice, he has not stated a claim for ineffective assistance of his defense counsel, and the district court did not err in summarily dismissing this claim.

**B. Ineffective Assistance of Appellate Counsel**

Imoto also argues that his appellate attorney in his direct appeal should have asserted that the State breached the plea agreement. This, he contends, was a stronger issue than the excessive sentence claim actually pursued by appellate counsel. He argues that if the issue had been raised there is a reasonable probability that Imoto would have prevailed because the language of the plea agreement is ambiguous concerning whether the State was permitted to argue for imposition of the sentence in the absence of a recommendation in the PSI. This ambiguity, he reasons, should have been resolved in his favor, so the State would have been deemed to be in breach of the plea agreement.

Appellate counsel for a criminal defendant is not required to raise every conceivable nonfrivolous issue, but must review the appellate record and submit a brief in support of the best arguments. *Aragon*, 114 Idaho at 765, 760 P.2d at 1181; *LaBelle v. State*, 130 Idaho 115, 119, 937 P.2d 427, 431 (Ct. App. 1997). To establish prejudice from an appellate attorney's errors, an applicant for post-conviction relief must show a reasonable possibility that, but for counsel's errors, the applicant would have prevailed on appeal. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). See also *Baxter v. State*, 149 Idaho 859, 864, 243 P.3d 675, 680 (Ct. App. 2010).

We conclude that Imoto's appellate counsel was not deficient in failing to argue the breach issue on appeal, and that Imoto was not prejudiced thereby, because Imoto would have been unable to show that the State breached the plain terms of the plea agreement. In determining whether the State has breached a plea agreement, a court first examines the language of the agreement. *State v. Peterson*, 148 Idaho 593, 595, 226 P.3d 535, 537 (2010); *State v. Schultz*, 150 Idaho 97, 99, 244 P.3d 241, 243 (Ct. App. 2010). If the language is ambiguous, the ambiguities will be resolved in favor of the defendant. *Id.* Whether the language is ambiguous is a question of law. *Id.* Contractual terms that are implied by the plea agreement, as well as those expressly provided, must be considered by the court. *State v. Doe*, 138 Idaho 409, 410-11, 64 P.3d 335, 336-37 (Ct. App. 2003).

The written plea agreement at issue here stated that the "State will seek imposition unless PSI recommends less and if the Defendant is not a high risk to re-offend." This language is not subject to multiple interpretations. The language plainly states that the State may ask for imposition of the sentence unless two conditions happen: (1) the PSI recommends something other than imposition, and (2) the Defendant is not a high risk to re-offend. The PSI did not recommend something other than imposition; the PSI did not make any recommendation at all. Because both of the conditions prohibiting the State from seeking imposition were not satisfied, Imoto could not have succeeded with an appellate argument that the State breached the agreement. There is no implied condition that the PSI make some recommendation. As Imoto himself points out in his brief, it is not mandatory that any recommendation be made at all pursuant to I.C.R. 32(c). Thus, neither the language of the plea agreement nor any applicable statute or rule operates to imply the term Imoto suggests. As such, because this claim would not have been successful on appeal, we hold that counsel was not deficient in failing to argue it and Imoto cannot show prejudice.

**III.**  
**CONCLUSION**

Because Imoto has failed to make a prima facie showing of ineffective assistance of trial or appellate counsel, the district court's order summarily dismissing Imoto's post-conviction petition is affirmed.

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