

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37458

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| DAVID J. KIRKLAND, |) | 2011 Unpublished Opinion No. 460 |
| |) | |
| Petitioner-Appellant, |) | Filed: May 6, 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| STATE OF IDAHO, |) | THIS IS AN UNPUBLISHED |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 Third Judicial District, State of Idaho, Canyon County. Hon. James C. Morfitt, District Judge.

Order denying application for post-conviction relief, affirmed.

David J. Kirkland, Mountain Home, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; Elizabeth A. Koeckeritz, Deputy Attorney General, Boise, for respondent.

MELANSON, Judge

David J. Kirkland appeals from the district court’s order denying his application for post-conviction relief. For the reasons set forth below, we affirm.

In 1999, Kirkland was convicted of aggravated battery. In 2002, Kirkland filed an application for post-conviction relief. The district court found that the application was not timely and summarily dismissed the application. Kirkland appealed the summary dismissal of his application to the Idaho Supreme Court which reversed and remanded. The Court held that, based on the documents that Kirkland filed, a material issue of fact existed regarding the timeliness of his application and Kirkland was entitled to a hearing on the issue of timeliness. *Kirkland v. State*, 143 Idaho 544, 547, 149 P.3d 819, 822 (2006). On remand, the state stipulated that Kirkland’s application was timely filed and an evidentiary hearing was held on Kirkland’s application for post-conviction relief. The district court denied Kirkland’s application. Kirkland appeals.

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). An application 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). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903.

In order 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).

On appeal, Kirkland does not present any argument or authority to support his assertion that the district court erred in denying his application for post-conviction relief. Kirkland’s brief simply rehashes the allegations contained in his post-conviction application and describes his version of the facts surrounding his underlying criminal conviction. A party waives an issue on appeal if either argument or authority is lacking. *Powell v. Sellers*, 130 Idaho 122, 128, 937 P.2d 434, 440 (Ct. App. 1997). In addition, Kirkland did not provide a transcript of the evidentiary hearing on his application for post-conviction relief. It is the responsibility of the appellant to provide a sufficient record to substantiate his or her claims on appeal. *Id.* at 127, 937 P.2d at

439. In the absence of an adequate record on appeal to support the appellant's claims, we will not presume error. *Id.*

We hold that the district court did not err in denying Kirkland's application for post-conviction relief because Kirkland failed to present adequate argument, authority, or record on appeal. Accordingly, the district court's order denying Kirkland's application for post-conviction relief is affirmed. Costs, but not attorney fees, are awarded to the respondent on appeal.

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