

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 36888

SHAWN L. LAKE,)	2011 Unpublished Opinion No. 591
)	
Petitioner-Appellant,)	Filed: August 24, 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STATE OF IDAHO,)	THIS IS AN UNPUBLISHED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. Peter D. McDermott, District Judge.

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

Molly J. Huskey, State Appellate Public Defender; Eric D. Fredericksen, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jennifer E. Birken, Deputy Attorney General, Boise, for respondent.

PERRY, Judge Pro Tem

Shawn L. Lake appeals from the order of the district court summarily dismissing his application for post-conviction relief. We affirm.

In 2007, Lake was charged with five counts of lewd and lascivious conduct with a child under sixteen. Lake pled to one count and the state dismissed the remaining allegations. Lake was sentenced to a unified life term, with a minimum period of confinement of twenty-five years. No appeal was filed from his judgment of conviction; however, counsel filed an I.C.R. 35 motion for reduction of Lake’s sentence. The district court denied the Rule 35 motion. Lake filed an appeal from the denial of his Rule 35 motion, which was affirmed on appeal.

Lake also filed a pro se application for post-conviction relief and requested court-appointed counsel, which the district court granted. The state filed an answer and a motion for summary dismissal with a supporting brief and attached an affidavit of Lake’s trial counsel. Lake filed a pro se reply and affidavit. Lake’s counsel also filed a brief and affidavit opposing

the state's motion for summary dismissal. Following a hearing on the motion the district court entered a memorandum opinion and order summarily dismissing Lake's application. Lake 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 other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

Idaho Code Section 19-4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application pursuant to I.C. § 19-4906 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 applicant has not presented evidence making a prima facie case as to each essential element of the claims upon which the applicant bears the burden of proof. *DeRushé v. State*, 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009). Thus, summary dismissal is permissible when the applicant's evidence has raised no genuine issue of material fact that, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Goodwin*, 138 Idaho at 272, 61 P.3d at 629. Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the state does not controvert the applicant's evidence because the court is not required to accept either the applicant's mere conclusory allegations, unsupported

by admissible evidence, or the applicant's conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986).

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*, 148 Idaho at 250, 220 P.3d at 1069; *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).

An attorney who disregards specific instructions from a defendant to file a notice of appeal acts in a manner that is professionally unreasonable. *See Beasley v. State*, 126 Idaho 356, 360, 883 P.2d 714, 718 (Ct. App. 1994). On the other hand, a defendant who explicitly instructs counsel not to file an appeal cannot later complain that, by following the defendant's instructions, counsel performed deficiently. *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). Where the defendant has not conveyed his or her intent with respect to an appeal either way, the court must first determine whether trial counsel consulted with the defendant about an appeal. *Id.* at 478; *Pecone v. State*, 135 Idaho 865, 868, 26 P.3d 48, 51 (Ct. App. 2001). In this context, the term "consult" means advising the defendant about the advantages and disadvantages of taking an appeal and making a reasonable effort to discover the defendant's wishes. *Flores-Ortega*, 528 U.S. at 478. If counsel has consulted with the defendant, then counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with regard to an appeal. *Id.*

If counsel has not consulted with the defendant, then counsel's performance in failing to consult with the defendant is itself deficient if a rational defendant would want to appeal or the particular defendant reasonably demonstrated to counsel that he or she was interested in appealing. *Id.* at 480. In making these determinations, courts must take into account all the information counsel knew or should have known. *Id.*

Once counsel's performance has been shown to be deficient, the defendant must demonstrate actual prejudice by showing that there is a reasonable probability that, but for

counsel's deficient failure to consult with him or her about an appeal, the defendant would have timely appealed. *Id.* at 484. In ascertaining whether a defendant has made the requisite showing of prejudice, courts may consider whether there is evidence of nonfrivolous grounds for appeal or the defendant in question promptly expressed a desire to appeal. *Id.* at 485.

In Lake's verified application for post-conviction relief he averred that "no appeal was taken in this matter because counsel informed [Lake] that he had no issues to appeal." Later in the same document Lake concluded that he "was told by counsel that he had no issues to appeal, however, causes of action #1 and 2 of this Petition could have been pursued on appeal."

The state filed an answer to Lake's application, along with an affidavit of trial counsel. In his responding affidavit, trial counsel averred that he informed Lake that "the likelihood of success on appeal was low and that we would request Rule 35 relief." Counsel further averred that, because he was private counsel, he also informed Lake that if counsel "was going to file an appeal on Mr. Lake's behalf, that he was going to have to retain me for as such." According to counsel, he "received a letter back from Mr. Lake indicating that he could not afford my representation and that he would like a copy of my entire file with work product." Counsel "declined to provide him my work product, however, I did make a complete copy of the file and provide it to him." In its supporting brief for summary dismissal, the state noted that Lake's statements illustrated that counsel consulted with Lake about an appeal, informed him that there were no issues to appeal, and that the best course of action in his case was to pursue a Rule 35 motion. The state further noted that Lake had provided no admissible evidence to prove that he directed his attorney to file an appeal and that said direction was ignored.

Attached to the brief, the state provided the district court with communications between Lake and his trial counsel post-sentencing. Although most communications occurred after the district court's denial of Lake's Rule 35 motion, they generally corroborated the series of events as put forth by the state. No appeal was taken in the matter, and counsel pursued a Rule 35 motion on Lake's behalf. When Lake's Rule 35 was denied, counsel informed Lake of the district court's decision, explained Lake's option to appeal that decision, discussed counsel's fee to handle an appeal, and advised Lake to proceed pro se if he could not afford counsel. Finally counsel informed Lake that counsel wished to discuss the matter further and asked Lake to call him collect to do so.

In response, Lake wrote counsel, thanking him for his attempt to reduce his sentence. He also informed counsel that he could no longer afford his services and requested his case file in order to process an appeal pro se within the forty-two days allowed. Lake had questions concerning the denial of his Rule 35 but never inquired whether an appeal from the sentence was filed. Lake also did not indicate in any of this communication that a previous request to appeal earlier decisions had gone unheeded by counsel. Lake made no mention of any appeal other than the one he now sought concerning the denial of the Rule 35.

In reply to the state's request for summary dismissal, Lake filed an affidavit prepared by his post-conviction counsel. In that affidavit, Lake avers for the first time that he asked counsel to appeal the sentence imposed, to his knowledge no appeal was filed challenging the sentence, and counsel never disclosed why he did not file an appeal of the sentence. Other than challenging the sentence imposed, Lake did not specify his request or desire to appeal any of the matters he now alleges in this post-conviction case had merit in an appeal--suppression of evidence and participation in the psycho-sexual evaluation.

The district court determined that Lake's claims in his application confirmed the state's position that counsel had consulted with Lake about an appeal and that no appeal was taken because counsel informed Lake there were no issues to appeal. The district court then ruled that Lake had failed to meet his burden to show that counsel's performance fell below an objective standard of reasonableness. On appeal, Lake has not shown error in the district court's decision to summarily dismiss his application.

Lake's statements concerning whether counsel consulted him about an appeal, whether he asked counsel to appeal and whether counsel then failed to follow a directive to appeal are at best inconsistent. Lake's latter allegations are contradictory to those in his initial application. The record supports the state's position and also corroborates Lake's earlier version of events. Lake has not shown that the district court erred when it concluded after reviewing the record as a whole that Lake had failed in his burden of proof.

We affirm the order of the district court summarily dismissing Lake's application for post-conviction relief. No costs or attorney fees awarded on appeal.

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