

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35376

KIRK ANDREW LOFTIS,)	2011 Unpublished Opinion No. 518
)	
Petitioner-Appellant,)	Filed: June 13, 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STATE OF IDAHO,)	THIS IS AN UNPUBLISHED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 Fourth Judicial District, State of Idaho, Ada County. Hon. Michael E. Wetherell, District Judge.

Order denying application 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; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent. Jessica M. Lorello argued.

GUTIERREZ, Judge

Kirk Andrew Loftis appeals from the district court’s order denying his petition for post-conviction relief. For the reasons set forth below, we affirm.

I.

BACKGROUND

In the underlying criminal case, Loftis was convicted of felony domestic violence in the presence of a child. Idaho Code §§ 18-903, 18-918(4). Loftis appealed his conviction and sentence, and this Court affirmed. *State v. Loftis*, Docket No. 31003 (Ct. App. Feb. 9, 2007) (unpublished). On June 30, 2006, while his appeal was pending, Loftis filed a pro se petition for post-conviction relief and a motion for appointment of counsel. On July 19, 2006, the district court granted Loftis’ request for counsel and appointed an attorney to represent him in his post-conviction proceedings. Loftis’ attorney filed a motion to stay the proceedings for sixty days following the appellate decision on Loftis’ direct appeal in order to file an amended petition for

post-conviction relief. The district court granted the motion to stay. After the conclusion of the direct appeal, Loftis' attorney requested an additional sixty days to file additional motions because transcripts had not been prepared and it was difficult to communicate with Loftis since he was incarcerated out of state. The district court granted the additional sixty days.

On October 31, 2007, Loftis' attorney filed an unverified amended petition for post-conviction relief. On November 8, 2007, the district court filed a notice of intent to dismiss the violation of due process at sentencing claim raised in the amended petition because the claim was based on an alleged error at sentencing and could have been raised on direct appeal. Loftis had alleged that the district court improperly sentenced him on the basis that he was previously charged with two felony offenses of corporal injury to a spouse when the record actually reflected that they were misdemeanors. In response to the district court's notice of intent to dismiss, Loftis' attorney filed an affidavit stating that Loftis had not signed the amended petition, but instead had requested that his counsel assert additional grounds for relief. Loftis' attorney further stated that due to fundamental disagreements, he and Loftis had not been able to reach an understanding of the appropriate grounds for relief, and requested additional time to come to an agreement and respond to the court's notice of intent to dismiss. Loftis' attorney also indicated that if the two could not reach an agreement, he would have to file a motion to withdraw. The district court granted the additional time, in which Loftis filed a pro se affidavit acknowledging that he had not signed a verification form for the amended petition because he did not approve of it and included a list of additional claims he wanted his attorney to include in his amended petition. On January 9, 2008, after receiving no response on its notice of intent to dismiss, the district court dismissed the claim identified in its notice and scheduled an evidentiary hearing on the remaining claims. In the same order, the district court also noted that it had received Loftis' affidavit indicating his disapproval of the amended petition, and stated that it would no longer recognize any pleadings submitted pro se by Loftis.

Five days later, Loftis' attorney filed a motion for leave to withdraw and a supporting affidavit in which he stated that since working with Loftis starting in 2006, he filed an unverified petition that Loftis refused to sign, and drafted a second amended petition, but was unable to agree with Loftis on what grounds may be asserted for relief, and that he has no effective way of communicating with his client. Loftis' attorney requested a telephone conference call hearing because Loftis was incarcerated in Texas at the time. However, the district court entered an

order granting Loftis' attorney's motion to withdraw without first conducting a hearing. The district court determined that Loftis "apparently prefers to represent himself in this proceeding and he will be considered to be doing so, from this point forward," and held that Loftis would be representing himself at the evidentiary hearing on March 28, 2008. The district court further stated that Loftis would not be able to assert any claims that were procedurally barred.

On March 3, 2008, Loftis, now acting pro se, informed the district court that he would be filing an amended petition and he also filed a motion for appointment of counsel. The district court advised Loftis that it would not likely allow Loftis to file an amended petition because the matter had been pending for nearly two years, Loftis had plenty of time to file an amended petition, and any matters asserted in an amended petition that were not related to Loftis' ineffective assistance of trial counsel claims would likely be procedurally barred. The district court also entered an order denying Loftis' request for a new attorney. On March 19, 2008, Loftis filed a motion for leave to file an amended petition and supporting affidavit. The district court denied his motion for leave to amend and ultimately denied post-conviction relief on Loftis' ineffective assistance of counsel claims after the evidentiary hearing. Loftis filed a timely notice of appeal and moved for appointment of counsel. The district court granted his motion for appointment of counsel. After reviewing the record, the state filed a motion to remand the case to the district court for the purpose of conducting a hearing on post-conviction counsel's motion to withdraw. On remand, the district court determined that its previous decision to allow Loftis' post-conviction counsel to withdraw was appropriate. Following the hearing on remand, Loftis' appeal was resumed and Loftis filed a revised appellant's brief.

II.

DISCUSSION

A. Due Process

In Loftis' initial opening brief, he asserted, among other things, that his due process rights were violated when the district court granted his post-conviction counsel's motion to withdraw without giving Loftis notice or a meaningful opportunity to be heard. Subsequently, the state requested remand in light of the requirement that the court conduct a hearing on an attorney's motion to withdraw pursuant to Idaho Rule of Civil Procedure 11(b)(2). The state's request was granted and a hearing was conducted. Loftis was represented by counsel at the hearing and presented argument in opposition to his post-conviction counsel's motion to

withdraw. However, the district court affirmed its decision that withdrawal was appropriate. After the district court affirmed its decision on remand, Loftis filed a revised appellant's brief, in which he continues to assert that the district court denied him due process when it allowed his counsel to withdraw and failed to appoint substitute counsel without giving Loftis an opportunity to be heard.

Due process of law does not require a hearing in every conceivable case of government impairment of a private interest. *Stanley v. Illinois*, 405 U.S. 645, 650 (1972). Rather, procedural due process requires an opportunity to be heard. *Kramer v. Jenkins*, 806 F.2d 140, 141 (7th Cir. 1986); *Rios-Lopez v. State*, 144 Idaho 340, 343, 160 P.3d 1275, 1278 (Ct. App. 2007). Procedural due process is flexible and calls for such procedural protections as the situation demands. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Rios-Lopez*, 144 Idaho at 343, 160 P.3d at 1278. In *Rios-Lopez*, this Court held that it was not a violation of *Rios-Lopez's* procedural due process rights when the district court did not hold a formal hearing to give him the opportunity to present his grounds on his motion to replace substitute counsel. This Court concluded that *Rios-Lopez* sufficiently presented the facts and reasons for his request in his written motion and the district court adequately considered those reasons when it denied the motion. *Id.* at 343-44, 160 P.3d at 1278-79.

We conclude that Loftis was afforded a meaningful opportunity to be heard when the case was remanded and a hearing was conducted on post-conviction counsel's motion to withdraw. Accordingly, Loftis has failed to establish that his due process rights were violated.

B. Pro Se Motion to Amend

Loftis asserts that the district court erred in denying his pro se motion to amend his post-conviction petition. Post-conviction proceedings are civil in nature, and therefore are governed by the Idaho Rules of Civil Procedure. *McKinney v. State*, 133 Idaho 695, 699-700, 992 P.2d 144, 148-49 (1999). Pursuant to I.R.C.P. 15(a), "a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Motions to amend pleadings are to be liberally granted under I.R.C.P. 15(a). *Estate of Becker v. Callahan*, 140 Idaho 522, 528, 96 P.3d 623, 629 (2004). However, the decision to grant or deny a motion to amend is left to the sound discretion of the trial court. *Jones v. Watson*, 98 Idaho 606, 610, 570 P.2d 284, 288 (1977).

Loftis' post-conviction counsel filed an unverified amended petition before he withdrew which contained the following claims: (1) trial witnesses and evidence--trial counsel did not provide Loftis with discovery in advance of trial, trial counsel failed to subpoena witnesses for cohabitation element; (2) impeachment witness--trial counsel failed to call a witness to impeach the victim's credibility; (3) impeachment evidence--trial counsel failed to adequately cross-examine the victim at trial; (4) violation of due process at sentencing--the district court failed to consider Loftis' objection to the presentence report and improperly sentenced him on the basis that the record reflected that he was previously charged with two felony offenses of corporal injury to a spouse when the record actually reflects that they were misdemeanors.

After post-conviction counsel withdrew, Loftis sought leave to file an amended petition in which he alleged: (1) ineffective assistance of trial counsel for the failure to properly investigate the cohabitation issue, the failure to impeach the testimony of the victim, the failure to object to incomplete jury instructions, and for conceding guilt to the battery; (2) ineffective assistance of sentencing counsel for the failure to object to the failure of the district court to correct the PSI which misrepresented his criminal history by stating that he had two felonies on his record when they were actually misdemeanors; (3) ineffective assistance of appellate counsel for the failure to object to the failure of the district court to correct the PSI which misrepresented his criminal history by stating that he had two felonies on his record when they were actually misdemeanors; (4) violation of due process at sentencing when the district court did not consider his objection to the presentence report and improperly sentenced him based partially on two felony offenses that were actually misdemeanor offenses; (5) violations of due process and excessive bail when the prosecutor and district court relied on the hearsay testimony of the victim concerning Loftis' violation of a no contact order to revoke and increase his bond; (6) prosecutorial misconduct for withholding letters and police statement forms written by a witness and the victim, for failing to disclose a booking sheet during pre-trial discovery that stated Loftis' address was the same as the victim's home address, and for stating during closing argument that Loftis lived in the same residence as the victim at the time because Loftis himself believed that he lived there; and (7) cumulative error.

Loftis argues that the district court failed to act within the bounds of its discretion when it denied his motion to amend, it failed to recognize that amendments should be liberally granted, and it failed to recognize that his post-conviction counsel amended his petition without his

consent. Initially, we note that the fact that amendments should be liberally granted does not mean it is automatically an abuse of discretion when the district court does not allow an amendment. Furthermore, the district court's alleged failure to recognize that Loftis' counsel amended the petition without his consent is not relevant to the issue of whether the district court erred in denying Loftis' motion to amend after his post-conviction counsel withdrew.

After reviewing Loftis' pro se amended petition, we conclude that Loftis' proposed new claims are not viable. With regard to Loftis' claim involving violations of due process in his bail hearing and excessive bail, these issues have nothing to do with the legality of his conviction or sentence and are therefore not the proper subject of a post-conviction action. *See* I.C. 19-4901; *Stone v. State*, 108 Idaho 822, 824, 702 P.2d 860, 862 (Ct. App. 1985) (holding that where a defendant did not contend that allegedly excessive bail materially interfered with the right to counsel, impeded the defense, or that it affected the voluntariness of a guilty plea, but only asserted that bail was excessive, the Court of Appeals would not address the issue of excessive bail through a post-conviction petition). As for the prosecutorial misconduct claims, the record indicates that contrary to Loftis' assertion, disclosure of the letters, forms, and booking sheet were made available and addressed at either the bail, sentencing, or trial proceedings. In addition, Loftis' claim that it was misconduct for the prosecutor to state that Loftis was cohabitating with the victim at the time of the offense because Loftis himself believed that he lived there is belied by the record. There was trial evidence indicating that when Loftis surrendered himself to the police he gave the victim's address to the police as his own, so it was not unreasonable for the prosecutor to state that Loftis believed that was his address.

We also conclude that Loftis' claims regarding ineffective assistance of both sentencing counsel and appellate counsel for failing to object to the failure of the district court to correct the PSI would not entitle him to any relief because the district court made clear that even if this information were true, it would not have altered the sentence the court imposed. *See Charboneau v. State*, 144 Idaho 900, 903, 174 P.3d 870, 873 (2007) (holding when the alleged facts, even if true, would not entitle the petitioner to relief, the trial court may dismiss the petition without holding an evidentiary hearing).

After considering Loftis' proposed claims in his amended petition that were not addressed at the evidentiary hearing or summarily dismissed, we conclude that the district court did not abuse its discretion when it denied Loftis' motion to amend because the remaining claims

are without merit. A proposed amendment which would not entitle the party to the relief claimed is properly refused. *Bassett v. State*, 111 Idaho 865, 869, 727 P.2d 1293, 1297 (Ct. App. 1986).

C. Motion for Appointment of Substitute Counsel

Loftis asserts that the district court abused its discretion when it denied Loftis' motion for appointment of counsel after his post-conviction counsel was allowed to withdraw. Loftis based his request for substitute counsel on several factors, such as: the issues may be too complex for him to handle; he lacked the skill to represent himself at the evidentiary hearing; another inmate assisted him with preparing court documents; limited law library access; an explanation of what led up to the withdrawal of his post-conviction counsel; and a recognition that he would be unfairly disadvantaged.

1. Claims in proposed amended petition

Pursuant to I.C. § 19-4904, the district court *may*, rather than *shall*, order that an indigent applicant have a court-appointed attorney. If an applicant alleges facts that raise the possibility of a valid claim, the district court should appoint counsel in order to give the applicant an opportunity to work with counsel and properly allege the necessary supporting facts. *Charboneau v. State*, 140 Idaho 789, 793, 102 P.3d 1108, 1112 (2004).

Because the claims Loftis sought to add through his pro se amended petition were without merit, procedurally barred, or would not have affected the outcome of the case, he has failed to raise the possibility of a valid claim. *See Ridgley v. State*, 148 Idaho 671, 676, 227 P.3d 925, 930 (2010) (holding “[w]here the lower court reaches the correct result, albeit by reliance on an erroneous theory, this Court will affirm the order on the correct theory”). Accordingly, it was not error for the district court to deny appointment of counsel as to Loftis' proposed pro se amended petition.

2. Claims pursued at the evidentiary hearing

As is true with I.C. § 19-4904, the decision to grant or deny a request for substitute counsel is left to the discretion of the district court. *See* I.C. § 19-856 (stating “[a]t any stage, including appeal or other post-conviction proceeding, the court concerned *may for good cause* assign a substitute attorney”) (emphasis added).

As to the remaining claims, Loftis had been appointed counsel willing to pursue those claims. However, Loftis demanded that he was entitled to counsel who would pursue the non-meritorious claims. Loftis' affidavit in support of his motion to amend his petition for post-

conviction relief reflects the ongoing posture taken by Loftis in working with any counsel appointed:

I had already filed an affidavit with the court explaining that I did not want counsel to withdraw, I just wanted him to act as *my* attorney, to present *my* issues, and to present *my* evidence. . . . I believe that the right to have counsel is the right to have an attorney who will do just what I have said here, that is, he isn't supposed to present *his* issues, he is supposed to present *my* issues

(emphasis in original). The district court allowed counsel to withdraw on the ground that he would not pursue the non-meritorious claims. The district court refused to appoint substitute counsel in the face of Loftis' continued demand that appointed counsel pursue non-meritorious claims. This left Loftis to proceed pro se. The district court did not require Loftis to abandon claims, but, instead, made clear that if he wished to continue to pursue claims against the advice of counsel--which Loftis did--he would have to do so pro se. Under the circumstances, while the district court could have appointed, or reappointed, counsel only for the claims remaining for the evidentiary hearing, it was not required to do so. The good cause standard in I.C. § 19-856 is not satisfied simply because appointed counsel refuses to pursue unmeritorious claims. *See State v. Gamble*, 146 Idaho 331, 335-36, 193 P.3d 878, 882-83 (Ct. App. 2008) (stating that a "mere lack of confidence in otherwise competent counsel is not necessarily grounds for substitute counsel in the absence of extraordinary circumstances"); *see also Mintun v. State*, 144 Idaho 656, 661, 168 P.3d 40, 45 (Ct. App. 2007) (stating that "an indigent defendant does not have a constitutional right to compel appointed appellate counsel to press all nonfrivolous arguments that the defendant wishes to pursue."). Additionally, a court cannot be compelled to appoint substitute counsel based on a refusal to cooperate. *See State v. Priest*, 128 Idaho 6, 11, 909 P.2d 624, 629 (Ct. App. 1995). The record supports the district court's decision not to appoint substitute counsel. Accordingly, the district court acted within its discretion in declining to appoint substitute counsel when Loftis failed to show good cause for appointment of substitute counsel.

D. Ineffective Assistance of Trial Counsel

Among the several claims of ineffective assistance of counsel, Loftis only takes issue with the denial of his claim involving trial counsel's concession to guilt to a lesser included offense--battery--during closing argument. Loftis asserts that the district court erred when it denied his claim that he received ineffective assistance of counsel when his attorney conceded his guilt during closing argument. Loftis argues that his trial counsel did not allow him to choose

his own defense, trial counsel's defense was contrary to his objectives, trial counsel's defense and closing argument constituted a concession of guilt, and trial counsel's defense was unreasonable.

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). 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. *Id.* 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). 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); *Loveland v. State*, 141 Idaho 933, 936, 120 P.3d 751, 754 (Ct. App. 2005). This Court exercises free review of the district court's application of the relevant law to the facts. *Id.*

Loftis' trial counsel did concede that a battery had occurred and that there was overwhelming evidence that Loftis was guilty of simple battery. However, counsel challenged both the cohabitation element and the traumatic injury element required to find Loftis guilty of felony domestic violence. At the post-conviction evidentiary hearing, trial counsel testified that this was a tactical decision designed to be consistent with the evidence at trial and to present the case in the light most favorable to Loftis because it potentially could have meant the difference between going to the county jail for a misdemeanor or the penitentiary for a felony. The district court, in its memorandum decision and order, determined that this was strategic, stating:

A review of the trial transcript also shows that [trial counsel] was obviously aware of the essential issues in the case and that he prepared for trial and effectively

cross-examined the state's witnesses and conducted effective opening statement and closing arguments.

As noted by [trial counsel], there really was no question at trial that the victim had been battered and that the petitioner had committed the battery. The petitioner's only real hope was to convince the jury that he was not cohabitating with the victim at the time of the battery. This strategy, pursued by [trial counsel] at trial, and particularly in his closing argument, was reasonable and was simply undermined, in the court's view, by the petitioner's actions, which clearly demonstrated that he was cohabitating with the victim, at the time of the incident.

It is thus clear that [trial counsel] effectively argued the very point which the petitioner asserts was not effectively made.

Loftis argues that he wanted a defense, "whether that be self-defense or requiring the State to prove each and every element beyond a reasonable doubt standard." Loftis further argues that his trial counsel's choice of defense was inconsistent with his objectives. In *Florida v. Nixon*, 543 U.S. 175 (2004), the United States Supreme Court concluded that an attorney's decision to concede the defendant's commission of murder at the guilt phase of a capital trial was not ineffective assistance of counsel because the decision was made after the attorney consulted with the defendant, and the defendant refused to take any position on the strategy. *Id.* at 192. *Nixon* does not answer the question of whether counsel could have insisted upon a strategy if the client had opposed it. However, even assuming, without deciding, that Loftis' counsel was deficient for conceding Loftis' guilt to the battery, Loftis has failed to establish that he was prejudiced. Indeed, the evidence presented at trial that Loftis was guilty of a battery was overwhelming. At trial the victim testified as to her injuries:

I suffered bruising behind both ears. My ears were so bruised they were black. I had swollen--my jaw was swollen, especially on the left side. I had a black eye. Not like a major black eye, but bruising around my eye. Some bruises on my chin, I believe they're from him choking me. And I had a couple bruises, I think, on my arm, if I remember correctly.

In addition to the victim's testimony, pictures of the victim's injuries were submitted to the jury. Because of the overwhelming evidence presented at the trial, even if Loftis' counsel's performance was deficient for conceding to the battery, Loftis failed to establish he was prejudiced by his counsel's performance. Therefore, Loftis has failed to show that his counsel was ineffective with regard to this claim.

III.
CONCLUSION

The district court did not err in denying Loftis' petition for post-conviction relief. Loftis has failed to establish that his due process rights were violated when the district court appointed counsel and reheard the matter on remand. Loftis has failed to show that the district court abused its discretion when it denied his motion to amend his petition for post-conviction relief because the claims Loftis sought to add through his pro se amended petition were without merit, procedurally barred, or would not have affected the outcome of the case. Consequently, it was also not error for the district court to deny appointment of counsel with regard to claims raised in the proposed pro se amended petition under I.C. § 19-4904. Moreover, Loftis has failed to show that the district court abused its discretion under I.C. § 19-856 when it failed to appoint substitute counsel because there was not good cause to appoint a substitute attorney as to the remaining claims. Finally, Loftis failed to establish that the district court erred in denying his claim that he received ineffective assistance of counsel when his attorney conceded his guilt to a lesser included offense during closing argument because he failed to show prejudice as a result. Accordingly, we affirm.

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