

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 36907

ROBERT J. McCORMACK,)	2011 Unpublished Opinion No. 491
)	
Petitioner-Appellant,)	Filed: May 23, 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STATE OF IDAHO,)	THIS IS AN UNPUBLISHED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 Second Judicial District, State of Idaho, Nez Perce County. Hon. Jeff M. Brudie, District Judge.

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

Robert J. McCormack, Boise, pro se appellant.

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

LANSING, Judge

Robert J. McCormack appeals from the district court’s order summarily dismissing his successive petition for post-conviction relief. For the reasons set forth below, we affirm the district court’s decision.

**I.
BACKGROUND**

McCormack was convicted on a guilty plea of two counts of delivery of a controlled substance, I.C. § 37-2732(a)(1)(A). McCormack appealed, and this Court affirmed his conviction and sentence.

On November 7, 2007, McCormack filed a pro se petition for post-conviction relief. Paragraph 7 of the petition expressed his claims as follows:

- (a) Ineffective Assistance of Counsel - Failed to discover or raise issues at the appropriate time.

(b) Change of Venue - Judge Jeff Brudie was a public defender to Petitioner on other charges a few years back.

(c) The police or prosecutor withheld favorable information from defense.

(d) A conflict of interest.

In paragraph 9 he detailed the bases for his ineffective assistance of counsel claim as follows:

(a) Suppress evidence on confidential informant. Illegal search and seizure.

(b) To change venue on Judge Jeff Brudie. Judge should of withdrawn from case.

(c) Ineffective for failing to discover or raise issues at appropriate time.

The district court appointed counsel to represent McCormack. The State filed a motion for summary dismissal and a supporting brief. More than three months later, the district court granted the State's motion, summarily dismissing McCormack's post-conviction claims. McCormack appealed and the State Appellate Public Defender was appointed to represent him in that appeal.

In his first post-conviction appeal, McCormack challenged the dismissal of only his "change of venue" and "conflict of interest" claims pleaded in paragraphs 7(b) and (d). He asserted that as to the venue claim, the State's motion for summary dismissal gave him no notice or inadequate notice of the claimed grounds for dismissal and that the district court dismissed on a basis different from that expressed in the State's motion. As to the conflict of interest claim, he argued that the State's motion gave insufficient notice of the ground for dismissal. In an unpublished opinion, this Court affirmed. *McCormack v. State*, Docket No. 35229 (Ct. App. June 2, 2009).

While that previous post-conviction appeal was pending, on March 4, 2009, McCormack filed the instant successive post-conviction petition. Paragraph 7 of the successive petition expressed his claims as follows:

(a) Ineffective Assistance of Counsel - Failed to discover or raise issues at the appropriate time, or suppress evidence.

(b) The police or prosecutor withheld favorable information from defense.

(c) Credibility of witness - Counsel failed to raise following issues in the preliminary hearing and defendants issued position.

In paragraph 9 he detailed the bases for his ineffective assistance of counsel claim as follows:

(a) Where counsel fails to represent clients interest of his defense failing to argue supporting points of law dismissing information.

(b) Credibility of states witness - To get charges dropped and or withheld judgment on C.I.s charges.

(c) The record shows the state witness lied on the stand and Lewiston Police supplement, C.I. claims to have been threatened.

The district court appointed counsel to represent McCormack on his successive petition. The State filed a motion for summary dismissal. The State contended that the successive petition was barred under I.C. § 19-4908 because McCormack had failed to establish sufficient reasons as to why any grounds for relief in the successive petition were not asserted or were inadequately asserted in the original petition. The State also asserted that the successive petition was subject to summary dismissal because the allegations therein were conclusory in nature and unsupported by admissible evidence.

McCormack responded with a document setting forth his “sufficient reasons.” He asserted that his counsel in his first petition was ineffective for failing to object to the inadequacy of the State’s grounds for summary dismissal in that proceeding. The district court granted the State’s motion, summarily dismissing McCormack’s successive post-conviction petition. The court concluded that McCormack’s reason for reasserting his claims failed because the State’s grounds for summary dismissal in the first post-conviction petition were stated with sufficient particularity and, therefore, an objection would have been to no avail. McCormack, appearing pro se, appeals.

II.

ANALYSIS

A. Legal Standards

A petition for post-conviction relief initiates a proceeding that is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); *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 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. Summary dismissal of a petition pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. Summary dismissal is permissible when the petitioner's evidence has raised no genuine issue of material fact that, if resolved in the petitioner's favor, would entitle the applicant to the requested relief. *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991); *Hoover v. State*, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct. App. 1988); *Ramirez v. State*, 113 Idaho 87, 89, 741 P.2d 374, 376 (Ct. App. 1987).

Idaho Code Section 19-4906 authorizes summary dismissal of a petition for post-conviction relief either upon motion of a party or upon the court's own initiative. In either situation, the State's motion or the court's notice of intent to dismiss must state the proposed grounds with sufficient particularity, and the applicant must be given twenty days to make a response. *Saykhamchone v. State*, 127 Idaho 319, 321-22, 900 P.2d 795, 797-98 (1995); *State v. Christensen*; 102 Idaho 487, 488-89, 632 P.2d 676, 677-78 (1981). The notice procedure required by I.C. § 19-4906 is necessary to afford the applicant an opportunity to respond and to establish a material issue of fact if one exists. *Flores v. State*, 128 Idaho 476, 478, 915 P.2d 38, 40 (Ct. App. 1996).

A defendant pursuing a successive petition for post-conviction relief must overcome an additional legal hurdle in order to obtain relief. If an initial post-conviction action was timely filed and has been concluded, an inmate may file a subsequent application outside of the one-year limitation period if the court finds "a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application." I.C. § 19-4908. *Charboneau v. State*, 144 Idaho 900, 904, 174 P.3d 870, 874 (2007). A petitioner bears the burden of stating and establishing a "sufficient reason." *Hooper v. State*, 127 Idaho 945, 948, 908 P.2d 1252, 1255 (Ct. App. 1995). There is no constitutionally-protected right to the effective assistance of counsel in post-conviction relief proceedings and such an allegation, in and of itself, is not among the permissible grounds for post-conviction relief. See *Follinus v. State*, 127 Idaho 897, 902, 908 P.2d 590, 595 (Ct. App. 1995); *Wolfe v. State*, 113 Idaho 337, 339, 743 P.2d 990, 992 (Ct. App. 1987). Ineffective assistance of prior post-conviction counsel may, however, provide "sufficient reason" for permitting newly-asserted allegations or allegations inadequately raised in the initial application to be raised in a subsequent post-conviction application. *Schwartz v. State*, 145 Idaho 186, 189, 177 P.3d 400,

403 (Ct. App. 2008). *See also Palmer v. Dermitt*, 102 Idaho 591, 596, 635 P.2d 955, 960 (1981); *Hernandez v. State*, 133 Idaho 794, 798, 992 P.2d 789, 793 (Ct. App. 1999).

Most of McCormack's briefs on appeal argue the merits of his post-conviction claims. These arguments are irrelevant on appeal because they do not address the ground upon which the district court dismissed McCormack's successive petition. However, McCormack also asserts on appeal that:

The district court erred in summarily dismissing claims, sua sponte, because neither State nor the district court provided Mr. McCormack with prior notice as to the reasons for which the claim was ultimately dismissed, and denied him the opportunity to cure any alleged defects in his petition.

McCormack does not specify whether he is referring to the sufficiency of the notice regarding the summary dismissal of his instant successive petition for post-conviction relief or regarding the summary dismissal of his original petition for post-conviction relief. It does not matter, for in either instance his claim of error fails.

In *DeRushé v. State*, 146 Idaho 599, 200 P.3d 1148 (2009), the Idaho Supreme Court addressed the notice requirement of I.C. § 19-4906. The Court held that "if the State did not state the grounds of its motion with sufficient particularity, then DeRushé should have raised that issue below. He cannot raise the alleged lack of specificity for the first time on appeal." *DeRushé*, 146 Idaho at 602, 200 P.3d at 1151 (citations omitted). Here, the State filed a motion for summary dismissal of the successive petition contending, in part, that the successive petition was barred under I.C. § 19-4908 because McCormack had failed to set forth sufficient reasons as to why any grounds for relief in the successive petition were not asserted or were inadequately asserted in the original petition. Because McCormack did not object to the sufficiency of this notice below, he may not claim for the first time on appeal that this notice lacked sufficient particularity. Moreover, under the *DeRushé* standards regarding that which constitutes sufficient notice under the statute, as discussed below, the State's notice was not objectionable--it presented the requisite specificity.

When considered alongside McCormack's stated reason for his pursuit of the successive petition, his appellate argument is more likely aimed at an alleged lack of sufficient notice with regard to the dismissal of his claims contained in his original post-conviction petition. Citing *DeRushé*, McCormack responded to the State's motion to dismiss the present case by arguing:

The brief filed by the State of Idaho in support of its motion for summary disposition in the prior proceeding did not state the grounds for the relief sought by the State with sufficient particularity so that the Petitioner could adequately respond to the State's motion. By failing to raise this issue in the previous post-conviction relief proceeding filed by the Petitioner and to require the State of Idaho to provide sufficient particularity regarding the grounds for its motion for summary disposition filed in that previous proceeding, the Petitioner's counsel has engaged in ineffective assistance of counsel.

In dismissing the successive petition, the district court here disagreed, holding that McCormack's counsel on his first petition was not ineffective for failing to object on the basis of inadequate notice, and thus McCormack had failed to establish a sufficient reason, because the notice provided by the State on the first petition was not objectionable under the standards established by the Supreme Court in *DeRushé*.

In this light, the *DeRushé* Court gave a number of examples of what would constitute sufficient and unobjectionable notice for summary dismissal, holding:

Because a post-conviction relief proceeding is governed by the Idaho Rules of Civil Procedure, *Stuart v. State*, 127 Idaho 806, 813, 907 P.2d 783, 790 (1995); I.C. § 19-4907(a), a motion for summary disposition must "state with particularity the grounds therefor." *Saykhamchone v. State*, 127 Idaho 319, 322, 900 P.2d 795, 798 (1995); I.R.C.P. 7(b)(1). *DeRushé* contends that for the notice to state its grounds with particularity, "The notice must identify with particularity why an applicant's evidence or legal theories are considered deficient. The notice must provide any deficiency in the applicant's evidence or any legal analysis that needs to be addressed in order to avoid dismissal of the petition."

The particularity requirement of Rule 7(b)(1) does not mandate that level of detail. The Rule only requires reasonable particularity. *Patton v. Patton*, 88 Idaho 288, 292, 399 P.2d 262, 264-65 (1965). If the notice is sufficient that the other party cannot assert surprise or prejudice, the requirement is met. *Id.* at 292, 399 P.2d at 265.

....

The applicant for post-conviction relief is required to make a prima facie case by presenting admissible evidence on each essential element of his or her claims. *Berg v. State*, 131 Idaho 517, 518-19, 960 P.2d 738, 739-40 (1998); I.C. § 19-4903. If the ground for summary disposition is that assertions by the applicant are not admissible evidence, stating the ground with reasonable particularity requires no more than the level of particularity required to object to the admissibility of that evidence, such as that it is conclusory, hearsay, or lacking foundation. It is rarely necessary to further explain those objections. If the ground for summary disposition is that there is no admissible evidence on an essential element of a claim, reasonable particularity only requires pointing that out. For example, claims of ineffective assistance of defense counsel or of prosecutorial misconduct in withholding evidence favorable to the accused both

require prejudice to the defendant. *State v. Yakovac*, 145 Idaho 437, 444, 180 P.3d 476, 483 (2008) (a claim for ineffective assistance of counsel requires a showing “there is a reasonable probability that, but for counsel’s errors, the result would have been different”); *Dunlap v. State*, 141 Idaho 50, 64, 106 P.3d 376, 390 (2004) (an essential element of a *Brady* violation is that “prejudice must have ensued”). Reasonable particularity only requires pointing out that there is a lack of evidence showing prejudice. It does not require explaining what further evidence is necessary, particularly since it may not exist.

DeRushé, 146 Idaho at 601-602, 200 P.3d at 1150-51.

Here, the State’s brief in support of its motion for summary dismissal of McCormack’s original petition clearly stated that to establish claims of ineffective assistance a petition must set forth facts establishing both deficient performance and prejudice, that the verified petition must include or be accompanied by admissible evidence, and that conclusory allegations are insufficient. The State’s brief provided additional detail regarding its grounds for dismissal, stating:

McCormack claims that his trial counsel’s performance was deficient because he failed to suppress evidence on a confidential informant and an illegal search and seizure. Regarding the confidential informant, McCormack writes in his affidavit that he asked his trial attorney to “suppress evidence on the informant on his prior convictions and ones he was still going to court on.” However, McCormack fails to explain how suppressing evidence of a confidential informant’s prior convictions and current charges would bolster his own case. *If* the confidential informant’s legal issues were as McCormack states, it would be logical that not only would his trial attorney not want to suppress those issues, but might want to bring them out as a way to discredit the confidential informant.

McCormack also writes that he told his trial counsel about the “warrantless search of my apartment and seizure of my automobiles, warrantless wire tapping and video.” McCormack fails to inform when these incidents occurred, who or what agency executed the search or seizures, or any other relevant information to allow this Court to determine whether there might have been any legal grounds for a motion to suppress evidence. More important, McCormack fails to state which evidence he believes was seized in violation of his rights.

McCormack next claims that his trial counsel was ineffective by failing to request a change of venue. McCormack states that the trial judge previously represented him on other charges prior to becoming a judge, thus creating a conflict of interest. However, McCormack does not specify how this created a conflict of interest. He also does not state that this prior representation created any actual prejudice to his case. Finally, a change of venue would not have solved this perceived conflict of interest since the trial judge remains the same even if a change of venue is granted.

McCormack claims his trial counsel was ineffective because he failed to discover or raise issues at the appropriate time. Neither in his petition or affidavit does McCormack state what these issues might be. It would be pure speculation as to how these issues would have affected the outcome of McCormack's case.

As to all of the allegations above, McCormack does not show that his trial counsel's performance was deficient nor that there is a reasonable probability that his case would have turned out different. McCormack also does not provide evidence to support his claims, or explain why such evidence is not attached.

....

In his petition, McCormack also alleges that the police or prosecutor withheld favorable information from the defense. McCormack does not provide any further information about this claim such as what information was withheld or why he believes that this is true. Again, this is simply a conclusory allegation with no supporting evidence.

In light of the notice provided, the district court here concluded that McCormack's reason for reasserting his claims failed because the State's grounds for summary dismissal in the first post-conviction petition were stated with sufficient particularity and, therefore, an objection by his post-conviction counsel would have been to no avail. The district court's analysis was correct.

For these reasons, the summary dismissal of McCormack's successive petition for post-conviction relief is affirmed.

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