

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37407

THEODORE E. MUSGROVE,)	2011 Unpublished Opinion No. 476
)	
Petitioner-Appellant,)	Filed: May 16, 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STATE OF IDAHO,)	THIS IS AN UNPUBLISHED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. Cheri C. Copsey, District Judge.

Order summarily dismissing application for post-conviction relief, affirmed; order denying motion to alter or amend, affirmed.

Greg S. Silvey, Kuna, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Mark W. Olson, Deputy Attorney General, Boise, for respondent.

MELANSON, Judge

Theodore E. Musgrove appeals from the district court’s order summarily dismissing his application for post-conviction relief and the order denying his motion to alter or amend. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

Musgrove filed an application for post-conviction relief, asserting ineffective assistance of counsel. Musgrove also filed a motion for appointment of post-conviction counsel, which the district court granted. The state answered Musgrove’s application and filed a motion for summary dismissal.

Months later, Musgrove filed an amended pro se application for post-conviction relief. The state also answered the amended application and filed a motion for summary dismissal. After a hearing on the state’s motion, the district court issued a notice of intent to dismiss

Musgrove's amended application.¹ In the notice, the district court provided the parties with twenty days to respond to the notice and ordered Musgrove to refrain from filing additional documents pro se because he was represented by counsel. After the issuance of the district court's notice of intent to dismiss, Musgrove continued to file additional documents pro se. The district court returned some of the documents to Musgrove and informed him by letter that he should refrain from filing future documents pro se.

Musgrove then filed a waiver of appointment of counsel. At a hearing on the waiver of counsel, the district court granted Musgrove's request for waiver of counsel, dismissed his appointed attorney, and allowed Musgrove to appear in the matter pro se. The district court also informed Musgrove that it intended to summarily dismiss his claims for post-conviction relief and offered Musgrove twenty days to respond to the prior notice of intent to dismiss. Musgrove declined, indicating that he did not intend to file any further documents. The district court stated that, as a result, it would consider Musgrove's pro se reply to the state's brief in support of its motion for summary dismissal as Musgrove's response to the district court's notice of intent to dismiss. Musgrove raised no objection and again indicated that he did not wish to file any further documents.

The district court considered Musgrove's reply and summarily dismissed his application for post-conviction relief. Musgrove filed a motion to alter or amend pursuant to I.R.C.P. 59(e), asserting that the district court did not provide him with proper notice of its intent to dismiss his application. The district court denied the motion. Musgrove appeals.

II.

STANDARD OF REVIEW

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).

¹ This document is included in the record and is entitled "Order Conditionally Dismissing Petition." However, this opinion will refer to it as the district court's notice of intent to dismiss.

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).

III. ANALYSIS

Musgrove argues that the district court erred by summarily dismissing his application for post-conviction relief because he was not given proper notice of the court's intent to dismiss his application under I.C. § 19-4906. Musgrove also contends that the district court abused its discretion by denying his motion to alter or amend.

A. Summary Dismissal

Idaho Code Section 19-4906(b)-(c) provides that notice must be given to an applicant prior to summary dismissal of an application for post-conviction relief. The notice procedures contained in I.C. § 19-4906(b)-(c) provide an applicant an opportunity to respond to a motion for summary dismissal 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). Pursuant to I.C. § 19-4906(b), the district court may sua sponte dismiss an applicant's post-conviction claims if the court provides the applicant with notice of its intent to do so, the ground or grounds upon which the claim is to be dismissed, and twenty days for the applicant to respond. Pursuant to I.C. § 19-4906(c), the district court may dismiss an applicant's post-conviction claims on the motion of either party. If the state files and serves a properly supported motion to dismiss, further notice from the court is ordinarily unnecessary. *Martinez v. State*, 126 Idaho 813, 817, 892 P.2d 488, 492 (Ct. App. 1995). The reason that subsection (b), but not subsection (c), requires a twenty-day notice by the court of intent to dismiss is that, under subsection (c), the "motion itself serves as notice that summary dismissal is being sought." *Saykhamchone v. State*, 127 Idaho 319, 322, 900 P.2d 795, 798 (1995).

Musgrove argues that the district court issued its notice of intent to dismiss on different grounds than those listed in the state's motion to dismiss. As a result, he argues, the district court dismissed Musgrove's amended application sua sponte and without proper notice of its intent to do so under I.C. § 19-4906(b).² We will assume, without deciding, that the district

² It should be noted that Musgrove does not specify whether the district court violated subsection (b) or subsection (c) of I.C. § 19-4906. Due to Musgrove's contention that the district

court dismissed Musgrove's claims sua sponte and we will address the issue of proper notice under I.C. § 19-4906, which is dispositive.

In its notice of intent to dismiss, filed on November 17, 2009, the district court stated:

The Court further finds there is no dispute of *material* fact and no purpose would be served by any further proceedings. Therefore, by this order, the Court is indicating its intention to dismiss Musgrove's Amended Petition.

Musgrove, *through counsel only*, and the State may reply to the Court's notice of the proposed dismissal within 20 days. In light of his reply, if any, or any failure to reply, the Court may order the Amended Petition dismissed, grant leave to file an amended application or, direct that the proceedings otherwise continue. Musgrove shall not file anything *pro se*. He is represented by counsel. In addition, any pleadings filed must follow the civil rules. No amended petition may be filed without leave of the court.

Three days later, Musgrove filed a motion for appointment of substitute counsel. The district court held a hearing on December 16, 2009, to discuss this motion and other documents that Musgrove continued to send to the court pro se, including a waiver of appointment of counsel, an objection for failure of service, and a reply to the state's brief in support of its motion for summary dismissal.

At the hearing, the district court granted Musgrove's motion to waive counsel and the following exchange occurred:

THE COURT: Mr. Musgrove, at this time I have conditionally dismissed your petition. I know that you have a copy of it.

Now I'm going to explain to you that you may respond and I'm going to give you an additional 20 days from this date to respond, however, you are not to file any amended petitions without leave of court.

Now, you are representing yourself. You are still required to follow all of the rules. You are going to be treated just like you're an attorney. Do you understand that?

[MUSGROVE]: Yes.

THE COURT: You cannot file--you understand that you cannot file another amended petition? Do you understand that?

[MUSGROVE]: Yeah, the last one was just a reply. It wasn't an amended petition.

court dismissed his ineffective assistance of counsel claims sua sponte, we determine that Musgrove asserts a violation of I.C. § 19-4906(b).

THE COURT: Is that all you wish to file at this time?
[MUSGROVE]: Yes.
THE COURT: All right. Then I will take this matter under advisement as of today. I will consider your reply.
[MUSGROVE]: I appreciate that, Your Honor.
THE COURT: Then you are not to file anything further, do you understand that, without leave of the Court?
[MUSGROVE]: Yes. This is my last document to be filed in this.
. . . .
THE COURT: There's an objection for failure to serve, but there's--he attached a copy of the reply to the respondent's brief. I will consider that at this point as your reply to the Court's notice of intent to dismiss. Do you understand that now, Mr. Musgrove?
[MUSGROVE]: Yes.
THE COURT: I will issue a final decision. Okay?
[MUSGROVE]: All right.
THE COURT: So nothing more is going to be filed at this point.

The hearing occurred thirty days after the district court issued its notice of intent to dismiss Musgrove's application for post-conviction relief, which expressly provided Musgrove with twenty days to respond. As illustrated by the exchange above, the district court offered to allow Musgrove an additional twenty days to respond to the court's notice of intent. Musgrove declined, indicating that his reply would be the final document filed in the matter. The district court issued its order summarily dismissing Musgrove's application thirty-five days after the court's issuance of its notice of intent to dismiss. Therefore, the district court provided Musgrove with the statutory twenty days to respond, and Musgrove filed a pro se response within that time.

Musgrove further argues that the district court did not provide proper notice of its intent to dismiss Musgrove's claims because it failed to properly serve him with the notice of intent. Musgrove was represented by counsel at the time that the district court issued the notice. Attached to the notice is a certified statement of the district court clerk that the notice was mailed to both the state and Musgrove's appointed post-conviction counsel on the date that the notice was issued, November 17, 2009. Musgrove does not contend that the district court failed to properly serve his counsel at the time the notice was issued, nor did Musgrove request a copy of the notice during the hearing once the district court granted his request to proceed pro se. Therefore, this argument is without merit.

Finally, Musgrove contends that, because he did not understand at the hearing that the district court was going to dismiss his application on different grounds than those listed in the state's motion to dismiss, he was unaware that he needed to file an additional response. This argument is belied by the record. Musgrove was aware of the existence of district court's notice of intent to dismiss prior to the hearing, as evidenced by statements made in Musgrove's objection for failure of service dated December 2, 2009. That pro se filing specifically quoted from the district court's November 17 notice. At the hearing, Musgrove declined the district court's offer for an additional twenty days to respond and did not request a copy of the notice of intent at that time. As such, any assumption that Musgrove made about the contents of the district court's notice of intent to dismiss shall not be attributed to the district court as error. Musgrove asserts that, as a pro se incarcerated petitioner who was appearing by telephone, he was unable to fully understand the court's statements at the hearing. Pro se litigants are held to the same standards as those litigants represented by counsel and are not excused from abiding by procedural rules simply because they are appearing pro se and may not be aware of the applicable rules. *Golay v. Loomis*, 118 Idaho 387, 392, 797 P.2d 95, 100 (1990).

Therefore, Musgrove has failed to demonstrate that the district court provided improper notice of its intent to dismiss Musgrove's application under I.C. § 19-4906(b). The district court provided Musgrove with twenty days to respond to its notice of intent to dismiss in accordance with the statute. Thus, the district court's dismissal of Musgrove's application for post-conviction relief was not in error.

B. Motion to Alter or Amend

Musgrove asserts that the district court erred by denying his motion to alter or amend when it incorrectly interpreted an exchange between Musgrove and the district court during the December 16, 2009, hearing. Rule 59(e) provides a trial court with a mechanism to correct legal and factual errors occurring in the proceedings before it. *Slaathaug v. Allstate Ins. Co.*, 132 Idaho 705, 707, 979 P.2d 107, 109 (1999). For instance, a Rule 59(e) motion may be utilized to give trial courts the opportunity to correct procedural errors, such as a court's failure to provide a post-conviction applicant proper notice prior to dismissal of his or her claims. *Isaak v. State*, 132 Idaho 369, 370 n.2, 972 P.2d 1097, 1098 n.2 (Ct. App. 1999). *See also State v. Ochieng*, 147 Idaho 621, 625, 213 P.3d 406, 410 (Ct. App. 2009). An order denying a motion to alter or amend judgment is reviewed for an abuse of discretion. *Slaathaug*, 132 Idaho at 707, 979 P.2d

at 109. So long as the trial court recognizes the matter as discretionary, acts within the outer boundaries of its discretion, and reaches its conclusion through an exercise of reason, this Court will not disturb the decision on appeal. *Sun Valley Shopping Center, Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

In his motion to alter or amend, Musgrove argued that he was not given proper notice under I.C. § 19-4906 because the district court failed to serve him with a copy of its notice of intent to dismiss. In response to this argument, the district court concluded that it provided a copy of the notice to Musgrove's appointed attorney as required and gave Musgrove twenty days to respond. The district court also noted that Musgrove admitted at the hearing to possessing a copy of the notice. Musgrove asserts on appeal that the district court abused its discretion by relying upon an incorrect interpretation of the exchange between the district court and Musgrove at the hearing to determine that he possessed a copy of the notice. We disagree. The district court considered the circumstances surrounding the hearing and reached its conclusion that it provided proper notice of its intent to dismiss through an exercise of reason. Therefore, Musgrove has failed to show that the district court abused its discretion by denying Musgrove's motion to alter or amend.

IV.

CONCLUSION

Musgrove has failed to demonstrate that the district court erred by providing improper notice of the court's intent to dismiss Musgrove's application for post-conviction relief. In addition, Musgrove failed to show that the district court abused its discretion by denying Musgrove's motion to alter or amend. Accordingly, the district court's order summarily dismissing Musgrove's application for post-conviction relief and the order denying his motion to alter or amend are affirmed. No costs or attorney fees are awarded on appeal.

Judge LANSING and Judge GUTIERREZ, **CONCUR.**