

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 36914

ISAAC POLANCO,	)	2011 Unpublished Opinion No. 540
	)	
<b>Petitioner-Appellant,</b>	)	<b>Filed: July 1, 2011</b>
	)	
v.	)	<b>Stephen W. Kenyon, Clerk</b>
	)	
STATE OF IDAHO,	)	<b>THIS IS AN UNPUBLISHED</b>
	)	<b>OPINION AND SHALL NOT</b>
<b>Respondent.</b>	)	<b>BE CITED AS AUTHORITY</b>
	)	

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Appeal from the District Court of the Fifth Judicial District, State of Idaho, Cassia County. Hon. Michael R. Crabtree, District Judge.

Order dismissing petition for post-conviction relief and order denying appointment of counsel, affirmed.

Isaac Polanco, Boise, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; Nicole L. Schafer, Deputy Attorney General, Boise, for respondent.

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LANSING, Judge

Isaac Polanco appeals from the district court's order summarily dismissing his petition for post-conviction relief and from the court's order denying his motion for appointment of counsel. We affirm.

**I.**  
**FACTS AND PROCEDURE**

Polanco pleaded guilty to conspiracy, burglary, robbery, and two sentence enhancements. The district court imposed concurrent sentences. He subsequently filed a pro se petition for post-conviction relief challenging his robbery conviction and requested appointment of counsel.<sup>1</sup> In

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<sup>1</sup> Polanco never filed an actual motion for appointment of counsel, but checked a box on the post-conviction petition form indicating that he desired appointed counsel. He also filed an affidavit in support of motion for appointment of counsel. The district court decided to treat the affidavit as the functional equivalent of a motion.

his petition, Polanco alleged that he was denied a speedy trial and that his sentence was unfair compared to his co-defendants' sentences. He also alleged ineffective assistance of counsel because his attorney did not attempt to get his bond reduced. The State filed a motion for summary dismissal, to which Polanco filed no response. The district court subsequently denied Polanco's motion for appointment of counsel and summarily dismissed his petition. Polanco appeals, asserting that the summary dismissal of his petition was erroneous and that the court abused its discretion in denying his motion for appointment of counsel.

## II.

### ANALYSIS

We first address Polanco's claim that summary dismissal was improper. An application for post-conviction relief initiates a civil, rather than criminal, proceeding, governed by the Idaho Rules of Civil Procedure. *State v. Yakovac*, 145 Idaho 437, 443, 180 P.3d 476, 482 (2008); *see also Pizzuto v. State*, 146 Idaho 720, 724, 202 P.3d 642, 646 (2008). Like the 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; *Stuart v. State*, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990); *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. 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.

The scope of post-conviction relief is limited. *Rodgers v. State*, 129 Idaho 720, 725, 932 P.2d 348, 353 (1997). An application for post-conviction relief is not a substitute for an appeal; therefore, a claim or issue that was or could have been raised on appeal may not be considered in post-conviction proceedings. I.C. § 19-4901(b); *Whitehawk v. State*, 116 Idaho 831, 832-33, 780 P.2d 153, 154-55 (Ct. App. 1989).

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 is the procedural equivalent of summary judgment under I.R.C.P. 56. 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. *DeRushé v. State*, 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009); *Berg v. State*, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998). If such a factual issue is presented, an evidentiary hearing must be conducted. *State v. Payne*, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008); *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. *Payne*, 146 Idaho at 561, 199 P.3d at 136; *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994). "[W]hen reviewing a district court's order of summary dismissal in a post-conviction relief proceeding, we apply the same standard as that applied by the district court." *Ridgley v. State*, 148 Idaho 671, 675, 227 P.3d 925, 929 (2010).

On appeal, Polanco contends that summary dismissal was inappropriate because he raised the following issues of material fact: (1) he received ineffective assistance of counsel because his attorney did not raise all possible issues; (2) his guilty plea was involuntary; and (3) his sentence was unfair because, among other things, it was disproportionate in comparison to his co-defendants' sentences. We have reviewed the record and we find that Polanco never raised the first two issues in his post-conviction petition. Generally, issues not raised below may not be raised for the first time on appeal. *Sanchez v. Arave*, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991). Therefore, it is unnecessary to determine whether the first two issues constitute issues of material fact and we shall discuss them no further.

With respect to Polanco's sentencing claim, a claim or issue that could have been raised on appeal may not be considered in post-conviction proceedings. I.C. § 19-4901(b); *Whitehawk*, 116 Idaho at 832-33, 780 P.2d at 154-55. Because Polanco could have challenged the fairness of his sentence for robbery on direct appeal, he may not do so in a post-conviction action. Moreover, a post-conviction action provides a vehicle to challenge only the legality of a sentence, not the reasonableness of a sentence. I.C. § 19-4901(a). Polanco challenges the reasonableness of his sentence rather than its legality, and his sentencing claim is therefore not cognizable in a post-conviction proceeding. Accordingly, Polanco has failed to present a viable argument that the district court erred in summarily dismissing his claim.

Polanco also argues that the district court abused its discretion when it denied his motion for appointment of counsel. In determining whether to appoint counsel pursuant to Section 19-4904, the district court should determine if the applicant is able to afford counsel and whether the situation is one in which counsel should be appointed to assist the applicant. *Id.* In its analysis, the district court should consider that applications filed by a pro se applicant may be conclusory and incomplete. *See Charboneau v. State*, 140 Idaho 489, 792-93, 102 P.3d 1108, 1111-12 (2004). Facts sufficient to state a claim may not be alleged because they do not exist or because the pro se applicant does not know the essential elements of a claim. *Id.* Some claims are so patently frivolous that they could not be developed into viable claims even with the assistance of counsel. *Newman v. State*, 140 Idaho 491, 493, 95 P.3d 642, 644 (Ct. App. 2004). Accordingly, a court may decline to appoint counsel if the petitioner's claims are frivolous. *Charboneau*, 140 Idaho at 792, 102 P.3d at 1111. A claim is frivolous if a reasonable person with adequate means would not be willing to bring a proceeding at his own expense. *Id.*

The district court found that Polanco's petition contained the following claims:

1. Abuse of discretion;<sup>2</sup>
2. Polanco received ineffective assistance of counsel because his attorney did not try to get his bond reduced;
3. Polanco's sentence was unfair compared to his co-defendants' sentences; and
4. Polanco was denied a speedy trial because he was in county jail for nearly two years before being sentenced.

The record indicates that Polanco provided no factual support for these claims beyond the conclusory allegations within his petition. The district court accordingly determined that Polanco's claims were frivolous and denied his request for appointment of counsel on that basis. On appeal Polanco offers no viable argument to the contrary. He attempts to defend his sentencing claim, but this claim is frivolous because, as discussed earlier, it has no potential merit in a post-conviction proceeding. Polanco does not argue that any of his other claims were not frivolous. Therefore, he has made no showing that the district court abused its discretion when it denied Polanco's motion for appointment of counsel.

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<sup>2</sup> Polanco's petition does not mention how the district court allegedly abused its discretion.

### **III.**

#### **CONCLUSION**

The order of the district court summarily dismissing Polanco's petition for post-conviction relief and the order of the district court denying appointment of counsel are affirmed.

Judge GUTIERREZ and Judge MELANSON **CONCUR.**