

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37124

DAVID SANTISTEVAN,)	2011 Unpublished Opinion No. 511
)	
Petitioner-Appellant,)	Filed: June 7, 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STATE OF IDAHO,)	THIS IS AN UNPUBLISHED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 Fifth Judicial District, State of Idaho, Blaine County. Hon. Robert J. Elgee, District Judge.

Order dismissing petition for post-conviction relief, affirmed.

David Santistevan, Boise, pro se appellant.

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

LANSING, Judge

David Santistevan appeals, pro se, from the district court’s summary dismissal of his petition for post-conviction relief.

I.

BACKGROUND

Santistevan was found guilty by a jury of two counts of attempted second degree murder, with a sentence enhancement for the use of a firearm. His convictions arose from an altercation between Santistevan and two young men in an alleyway behind a bar, which culminated in Santistevan shooting the other two. Santistevan testified at his trial that he was acting in self-defense. He filed a direct appeal, and his judgment of conviction was affirmed by this Court. *State v. Santistevan*, 143 Idaho 527, 148 P.3d 1273 (Ct. App. 2006). Santistevan thereafter filed this petition for post-conviction relief pro se. He filed a motion to disqualify the presiding judge for bias, which was denied. Santistevan filed with the Idaho Supreme Court a petition for

permission to appeal from that denial. The State thereafter moved to dismiss Santistevan's petition for post-conviction relief. However, the district court appointed an attorney for Santistevan, and the attorney filed an amended post-conviction petition. During this time period, the district court determined that there was no appeal pending that prevented it from continuing the proceedings in Santistevan's post-conviction action. The State again moved to dismiss Santistevan's petition. After a hearing, the court granted the State's motion and summarily dismissed Santistevan's post-conviction petition.

Santistevan now appeals. He argues that the district court erred by dismissing his petition without giving a twenty-day notice pursuant to Idaho Code Section 19-4906 and by denying his ineffective assistance of counsel claims without an evidentiary hearing. Additionally, Santistevan contends that the district court deprived him of his constitutional right to testify at the hearing on the State's motion to dismiss and that the district court was without jurisdiction to dismiss his case because the appeal of the court's decision on Santistevan's motion to disqualify the judge was then pending.

II.

ANALYSIS

A petition for post-conviction relief initiates a civil proceeding. *Wilson v. State*, 133 Idaho 874, 877, 993 P.2d 1205, 1208 (Ct. App. 2000); *Hassett v. State*, 127 Idaho 313, 315, 900 P.2d 221, 223 (Ct. App. 1995). Summary dismissal by the district court is the procedural equivalent of summary judgment under Idaho Rule of Civil Procedure 56. *Hassett*, 127 Idaho at 315, 900 P.2d at 223. 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 v. State*, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009); *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). Legal conclusions are reviewed *de novo*. *Owen v. State*, 130 Idaho 715, 716, 947 P.2d 388, 389 (1997); *Wilson*, 133 Idaho at 878, 993 P.2d at 1209.

A. Notice of Dismissal

Although the court dismissed Santistevan's petition upon motion of the State, Santistevan, citing I.C. § 19-4906(b), argues that a court must give a post-conviction petitioner twenty days written notice before dismissing a petition for post-conviction relief. Santistevan asserts that he received "no notice" of dismissal and therefore the court's order should be vacated and the case remanded.

Idaho Code Section 19-4906(b) addresses sua sponte dismissals and states that a court may "indicate to the parties its intention to dismiss the application," but must give the post-conviction petitioner an "opportunity to reply within 20 days to the proposed dismissal." In this case, however, the court below did not dismiss Santistevan's petition sua sponte, but rather granted the State's motion to dismiss, as authorized by I.C. § 19-4906(c). If the State files and serves a properly supported motion to dismiss pursuant to I.C. § 19-4906(c), further notice from the court is ordinarily unnecessary. *Franck-Teel v. State*, 143 Idaho 664, 668, 152 P.3d 25, 29 (Ct. App. 2006); *Martinez v. State*, 126 Idaho 813, 817, 892 P.2d 488, 492 (Ct. App. 1995). Santistevan does not argue on appeal that the State's notice was not properly supported or deficient. Thus, the district court did not err by granting the State's motion to dismiss without first issuing a notice of dismissal because the State's motion itself was notice to Santistevan that his petition was in jeopardy of being dismissed. This is confirmed by the fact that Santistevan filed an objection to the State's motion and argued against the dismissal at a hearing. As Santistevan was given all the notice required pursuant to Idaho Code, this claim of error fails.

B. Ineffective Assistance of Counsel Claims

Santistevan argues generally that the district court erred in summarily dismissing his ineffective assistance of counsel claims because he made a prima facie case through "admissible evidence," but as to most of his claims he points this Court to no evidence in particular that would have created a genuine issue of material fact precluding summary dismissal. We will not address any of Santistevan's claims for which he has presented no more specific argument, for a party waives an issue on appeal if either authority or argument is lacking. *See State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996); *Sparks v. State*, 140 Idaho 292, 298, 92 P.3d 542, 548 (Ct. App. 2004).

Santistevan does, however, make arguments on four of his claims which we shall address. First, he argues that his trial counsel was deficient in conceding in front of the jury,

after it returned guilty verdicts on the two attempted second-degree murder charges, that Santistevan used a weapon during the commission of those crimes--thus making him subject to a sentence enhancement. He next argues that “letters to his attorney and medical evidence attached to his post-conviction relief application present material issues of fact and these particular issues and the claims which they relate to specifically must be resolved in an evidentiary hearing.” After reviewing Santistevan’s amended petition and the record, this Court concludes that this vague assertion refers to three of Santistevan’s underlying ineffective assistance of counsel claims. The letters to his attorneys are referenced in Santistevan’s claims that counsel was deficient in not petitioning the Idaho Supreme Court to review this Court’s decisions affirming his judgment of conviction and affirming the denial of his I.C.R. 35 motion. The “medical evidence” relates to Santistevan’s claim that counsel was deficient by not submitting into evidence at trial a medical report and the testimony of the doctor that authored it.

To prevail on an ineffective assistance of counsel claim, in a post-conviction action, the petitioner must show that the attorney’s performance was deficient, and that the petitioner was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Hassett*, 127 Idaho at 316, 900 P.2d at 224. To establish a deficiency, the petitioner 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); *Suits v. State*, 143 Idaho 160, 162, 139 P.3d 762, 764 (Ct. App. 2006). To establish prejudice, the petitioner must show a reasonable probability that, but for the attorney’s deficient performance, the outcome of the trial would have been different. *Id.* Bare assertions and speculation, unsupported by specific facts, do not make out a prima facie case for ineffective assistance of counsel. *Roman v. State*, 125 Idaho 644, 649, 873 P.2d 898, 903 (Ct. App. 1994).

1. Concession on enhancement charge

At Santistevan’s trial, after the jury returned with the guilty verdict for both counts of attempted second-degree murder, defense counsel told the district court in the jury’s presence that Santistevan would admit to the weapons enhancement since he had already testified that he used a firearm during the encounter. Santistevan had indeed admitted in his trial testimony that he used a firearm during the incident. He stated:

And [during the altercation] I reached in my car and I pulled my pistol from the passenger side, and I told them that I have a pistol . . . I fired a shot in the air and I said, ‘Stay away from me.’ And I fired another one in the ground, I said, ‘Stay

away.’ . . . I fired another shot in the ground, and he just kept coming and he was right on me, and I fired to stop him. And I saw the other guy and I fired at the other guy.

Ultimately, however, the enhancement charge was submitted to the jury, which returned a guilty verdict. Santistevan alleges that counsel was deficient in making this concession, because it was clear from the record that Santistevan was not willing to admit to the weapons enhancement, and that the jury was tainted before their deliberations by counsel’s admission.

The district court did not err in summarily dismissing this claim because, even if this concession by counsel could be viewed as deficient, Santistevan has not shown that he was prejudiced. Santistevan himself had already admitted under oath that he used a firearm to shoot at the victims during the altercation. As the district court stated below, “[i]t is clear Santistevan used a firearm and arguing to the jury otherwise in the face of his testimony would have been futile.” Thus, Santistevan has shown no possibility that but for counsel’s actions the result on the enhancement allegation would have been different.

2. Failure to petition for review of Court of Appeals’ decisions

Santistevan next asserts that his attorney was deficient for failing to file a petition for review from the Court of Appeals’ decisions that affirmed Santistevan’s judgment of conviction and the denial of his I.C.R. 35 motion for reduction of his sentence.

Whether to grant a petition for review of a Court of Appeals’ decision is discretionary with the Idaho Supreme Court. Idaho Appellate Rule 118(b). There is no constitutional right to counsel to seek such discretionary review of an appellate decision. *Ross v. Moffitt*, 417 U.S. 600, 617 (1974); *Jakoski v. State*, 136 Idaho 280, 286, 32 P.3d 672, 678 (Ct. App. 2001); *Hernandez v. State*, 127 Idaho 690, 691-92, 905 P.2d 91, 92-93 (Ct. App. 1995). Although there is a statutory right in Idaho to effective assistance of counsel at all appellate levels, neither this Court nor a trial court can “vacate its previously issued opinion and allow [a post-conviction petitioner] to reinstate his appeal” as a remedy for a failure of appellate counsel to file a petition for review of an Idaho Court of Appeals’ decision. *Hernandez*, 127 Idaho at 692, 905 P.2d at 93. *Accord Jakoski*, 136 Idaho at 286, 32 P.3d at 678. In *Hernandez*, we stated:

Idaho Appellate Rule 118 provides that a petition for review must be filed within twenty-one days of the Court of Appeals’ opinion. . . . For [the post-conviction petitioner] to be granted leave to file a late petition would necessitate not that his conviction be reentered, but that the Supreme Court waive the time limit for filing the petition. Neither the district court nor this Court is empowered

to disturb our previous opinion on appeal which was made final by the issuance of a remittitur. The relief requested . . . can only be accorded by the Supreme Court and, in spite of the assignment of this appeal to the Court of Appeals, this Court cannot waive the time constraints of I.A.R. 118 on behalf of the Supreme Court.

Hernandez, 127 Idaho at 692, 905 P.2d at 93. We concluded that the relief for not filing a discretionary appeal from this Court to the Idaho Supreme Court is not available through a post-conviction proceeding and therefore affirmed the district court's denial of relief. *Id.* See also *Jakoski*, 136 Idaho at 287, 32 P.3d at 679.

Like the petitioner in *Hernandez*, Santistevan attempts to bring ineffective assistance of counsel claims for failure to file discretionary appeals from this Court to the Supreme Court. As we stated in that case and *Jakoski*, the relief Santistevan seeks was not within the district court's power to grant, nor within this Court's power to grant, as it is not available through a post-conviction proceeding. Therefore, the district court correctly dismissed this claim.

3. Failure to introduce medical report and testimony at trial

Santistevan testified at trial that he had been beaten by several people before his encounter with the two victims (who were not among his attackers), and that the beating resulted in physical marks on his body. Santistevan testified that at the time of his encounter with the victims, he was in an alleyway behind a bar where he had been previously beaten, writing down the license plate numbers of those who attacked him. A police officer testified at trial for the State that Santistevan reported this prior beating to him, but he did not investigate because Santistevan showed no physical signs or marks of such an attack and, after the officer pointed this out to Santistevan, Santistevan admitted the beating was more "psychological."

Santistevan attached to his post-conviction petition a medical report of an examination of Santistevan conducted by Dr. Kathy Haisley. The report supported his contention that he had been beaten in this prior incident, resulting in physical marks to his body. Santistevan asserted that counsel refused to present this evidence or call Dr. Haisley to testify. He argued below that it was error for defense counsel to not introduce the report and Dr. Haisley's testimony because they were "critical" to his self-defense claim in that they corroborated his testimony "as to the reason he was in the alley." He also argued that it would have discredited the officer who testified that he did not further investigate because there were no physical marks on Santistevan.

Decisions about what witnesses to call and what evidence to introduce at trial are generally matters of trial tactics or strategy. *State v. Payne*, 146 Idaho 548, 563, 199 P.3d 123,

138 (2008); *Bagshaw v. State*, 142 Idaho 34, 38, 121 P.3d 965, 969 (Ct. App. 2005); *Drapeau v. State*, 103 Idaho 612, 616, 651 P.2d 546, 550 (Ct. App. 1982). Such tactical or strategic decisions of trial counsel will not be second-guessed unless they were based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. *Baxter v. State*, 149 Idaho 859, 863, 243 P.3d 675, 679 (Ct. App. 2010); *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994). A post-conviction petitioner must overcome a strong presumption that counsel's performance fell within the wide range of acceptable professional assistance. *Payne*, 146 Idaho at 561, 199 P.3d at 136; *State v. Hairston*, 133 Idaho 496, 511, 988 P.2d 1170, 1185 (1999).

The decision of Santistevan's attorney to not present medical evidence of some marks on his body is a tactical decision of the sort that will not be deemed deficient performance absent a showing that it was based upon inadequate preparation, ignorance of the law, or other objectively identifiable shortcomings. Santistevan has made no such showing to create a genuine issue as to whether his counsel was deficient. Rather, Santistevan attached the report to his petition and stated in a conclusory manner that the evidence was "vital" to his self-defense claim. However, his argument on appeal and below show that the evidence was actually quite tangential to the self-defense issue. It would have corroborated only a portion of his story that had nothing to do with self-defense but, as stated by Santistevan, merely explained why he was in the alleyway where the altercation started. The State's witness that he contends this evidence would have discredited did not testify on a topic relevant to Santistevan's self-defense claim, but rather on the topic of this alleged prior beating and the reasons why the officer did not pursue charges or investigate. Even if the evidence would have discredited the officer's veracity in a general way, counsel would have had to weigh the usefulness of that potential and make a tactical decision whether it would materially advance the defense. Because Santistevan has shown no reason to believe that this tactical decision was objectively unreasonable or based on ignorance of law or lack of preparation, this claim was properly dismissed.

C. Denial of Opportunity to Testify at the Hearing on the State's Motion to Dismiss

Santistevan has not provided as part of the record on appeal a transcript of the hearing on the State's motion to dismiss. We have only minutes reflecting that at one point while his attorney was arguing, Santistevan asked to speak directly to the court himself. The State responded that it did not feel that was appropriate, and the court determined that it would allow a

recess so that Santistevan could discuss with his counsel any issues he wanted counsel to bring to the court's attention. Such a recess was held, after which Santistevan's counsel asked the court to review evidence attached to Santistevan's petition concerning one of his claims. Santistevan argues that this process denied him the opportunity to testify on his own behalf at the hearing after a specific request to do so, which violates his state and federal rights to due process.

Santistevan's claim is meritless. It is not supported by the record because the minutes do not reflect that he requested the opportunity to testify. Rather, it appears that he was asking for an opportunity to augment his attorney's argument on the motion to dismiss. After he had a discussion with his counsel, counsel directed the court to some specific evidence in support of a claim. There is nothing in the minutes concerning a desire of Santistevan to testify. It is the responsibility of the appellant to provide a sufficient record on appeal and in the absence of an adequate record, we will not presume error. *Lint v. State*, 145 Idaho 472, 481 n.4, 180 P.3d 511, 520 n.4 (Ct. App. 2008); *Wilson*, 133 Idaho at 878, 993 P.2d at 1209.

D. Lack of Jurisdiction

After the district judge denied Santistevan's motion to disqualify him for bias, Santistevan petitioned the Idaho Supreme Court for permission to file an interlocutory appeal from that decision. Santistevan received a "Notice of Petition Filing" from the Supreme Court stating that Santistevan's petition for an interlocutory appeal was filed in December of 2008 and that the case would be retained by the Supreme Court instead of being considered for assignment to this Court. Santistevan thereafter asked the district court to stay all proceedings in his case until after the Supreme Court resolved his petition to permit an interlocutory appeal. The district court denied Santistevan's request on the basis that the appeal was not yet valid and effective because it had not been accepted as appealable and the Supreme Court had not granted leave to Santistevan to file a notice of appeal. Santistevan now argues that the district court lost jurisdiction to conduct further proceedings in his case because Santistevan's appeal from the denial of his motion to disqualify the judge was still pending.

The filing of a motion for permission to bring an interlocutory appeal does not automatically stay the underlying action, proceeding, or enforcement of the interlocutory judgment, order, or decree. I.A.R. 13(f)(1). An automatic stay will occur only if the Supreme Court grants the motion for permission to appeal. I.A.R. 13(f)(2). In this case, the district court did not lose jurisdiction to hear Santistevan's post-conviction petition because his motion for

permission to appeal was never granted. As the district court pointed out, Santistevan did not show any Supreme Court order granting him leave to proceed with an interlocutory appeal. Therefore, Santistevan has not shown that the post-conviction proceedings were automatically stayed or that the district court lost jurisdiction by virtue of a pending appeal.

III.

CONCLUSION

Because Santistevan has shown no error in the district court's determinations, the order summarily dismissing his petition for post-conviction relief is affirmed.

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