

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket Nos. 35310/36838

|                            |   |                                  |
|----------------------------|---|----------------------------------|
| ALBERT PETE VEENSTRA, III, | ) | 2011 Unpublished Opinion No. 424 |
|                            | ) |                                  |
| Petitioner-Appellant,      | ) | Filed: April 4, 2011             |
|                            | ) |                                  |
| v.                         | ) | Stephen W. Kenyon, Clerk         |
|                            | ) |                                  |
| STATE OF IDAHO,            | ) | <b>THIS IS AN UNPUBLISHED</b>    |
|                            | ) | <b>OPINION AND SHALL NOT</b>     |
| Respondent.                | ) | <b>BE CITED AS AUTHORITY</b>     |
|                            | ) |                                  |

---

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Gooding County. Hon. Robert J. Elgee, District Judge.

Orders of summary dismissal of initial and successive post-conviction petitions, affirmed.

Nevin, Benjamin, McKay & Bartlett, LLP, Boise, for appellant. Robyn A. Fyffe argued.

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

SCHWARTZMAN, Judge Pro Tem

Albert Pete Veenstra, III appeals from the summary dismissal of his initial post-conviction action in case number 35310. He also appeals the summary dismissal of his successive post-conviction petition, which he filed while the appeal on the initial post-conviction action was pending, in case number 36858. These cases have been consolidated for appellate purposes.

I.

**BACKGROUND**

The facts of Veenstra’s underlying criminal case giving rise to these post-conviction actions are as follows:

In 1999, Veenstra was on probation for a prior felony judgment of conviction. During Veenstra’s probation, he was investigated for multiple violations of his probation conditions, including allegations of sexual contact with

his minor daughter [Y.V.] and his daughter's minor friend [M.B.]. During the investigation of those crimes, Veenstra submitted to a polygraph test conducted by the police. The results of the test indicated Veenstra was being truthful when he denied having sexual contact with the two victims. Veenstra was not charged with lewd and lascivious conduct with a minor at that time, but was charged with violating his probation. Prior to the evidentiary hearing on the probation violation charges, Veenstra was released from custody. Upon release, Veenstra fled the country. Veenstra lived in Mexico until he was arrested in 2004 and extradited to the United States. Veenstra was then charged with two counts of lewd and lascivious conduct with a minor under sixteen. I.C. § 18-1508.

Prior to the start of trial, Veenstra, through a motion in limine, sought to admit into evidence the results of his polygraph examination. Veenstra argued that the results of the examination should be admitted for the limited purpose of rebutting any assertion made at trial by the state that Veenstra fled the country because he had a guilty conscience over committing the sexual molestations and was afraid of being prosecuted. Essentially, Veenstra suggested that, because he was not charged at that time and the polygraph indicated he was not guilty, he would not flee in fear of those allegations. The district court denied the motion based on the rule that polygraph results are not admissible as evidence.

At trial, the prosecutor argued that Veenstra fled out of fear of prosecution for the instant crimes. After trial, a jury found Veenstra guilty of both charges. Veenstra was sentenced to concurrent unified terms of thirty years, with minimum periods of confinement of fourteen years.

*State v. Veenstra*, Docket No. 32658 (Ct. App. March 13, 2007) (unpublished). Veenstra appealed his convictions to this Court, arguing that the district court erred in not admitting into evidence at trial the results of his polygraph. *Id.* The only purpose for admission that Veenstra argued on appeal was to rebut the state's inference that he had fled the country out of fear of prosecution. *Id.* Veenstra did not argue that the polygraph should have been admitted for substantive evidence of innocence or credibility. *Id.* This Court did not determine whether the district court erred because we held that any error was harmless. A polygraph admitted for the sole purpose argued on appeal would not have demonstrated innocence or damaged the credibility of the victims and, given the overwhelming nature of the evidence, the result of the trial would have been the same. *Id.*

Veenstra then filed his first post-conviction petition pro se alleging ineffective assistance of trial and appellate counsel. Veenstra alleged that trial counsel was ineffective because he

failed to move for a mistrial after the probation officer, Pat Touchette, referenced a polygraph<sup>1</sup> and failed to object to Sheriff Gough's testimony that purported to be an expert opinion regarding delayed disclosure occurring in child sexual abuse victims. Additionally, Veenstra asserted that his appellate counsel was ineffective in failing to raise "substantive issues" on appeal. Both Veenstra, still pro se, and the state moved for summary disposition.

Veenstra then requested, and was granted, counsel. After consulting with Veenstra, counsel filed a brief in support of Veenstra's motion for summary disposition and in opposition to the state's summary disposition motion. Counsel indicated that the brief was intended to supplement rather than modify Veenstra's earlier pro se pleadings and focused on Veenstra's claim that counsel should have moved for a mistrial following the probation officer's reference to that polygraph examination. At oral argument, counsel reiterated that he was not waiving any issues raised in Veenstra's pro se pleadings but would not address all the issues at oral argument. The district granted the state's motion for summary disposition, which Veenstra now appeals in case number 35310.

While this first appeal was pending, Veenstra filed a successive post-conviction petition pro se with the district court. He alleged that deficient representation of his initial post-conviction counsel was a sufficient reason justifying a successive petition. Veenstra then argued that his trial counsel had been ineffective for failing to move *in limine* to preclude any mention of his prior conviction for sexual acts against his minor niece, refusing to allow Veenstra to testify, and failing to advise him of his privilege against self-incrimination before submitting to a psychosexual evaluation. Veenstra later requested counsel. The district court issued a notice of its intent to dismiss this petition on the basis that the claims are barred as they were not raised in the initial petition and because Veenstra's assertion that his initial post-conviction counsel was deficient is unsupported by the record. Veenstra responded to the notice and requested the district court rule on his request for counsel. The district court denied Veenstra's counsel request because he failed to raise a claim not barred as a matter of law and dismissed the petition.

---

<sup>1</sup> Veenstra had taken two polygraph examinations at the time of trial. The first polygraph was taken while he was on probation, but before the lewd and lascivious allegations in the instant case, and will hereinafter be referred to as the "Touchette" polygraph. This polygraph gave rise to information that Veenstra had been selling prescription drugs. The second polygraph was taken right after the allegations of lewd and lascivious conduct and involved questions relating to those allegations. This polygraph will hereinafter be referred to as the "Kurz" polygraph.

Veenstra now appeals this second dismissal in case number 36838. His cases have been consolidated for appellate purposes.

Veenstra argues on appeal that because his trial counsel failed to request a mistrial or otherwise object to the probation officer's reference to a polygraph and failed to object when the sheriff testified as a child sexual abuse expert, he received ineffective assistance of counsel at trial and the district court therefore erred in summarily dismissing this claim. Veenstra also asserts that because his appellate counsel failed to argue that it was error to not let Veenstra introduce the "Kurz" polygraph as substantive evidence of innocence, especially in light of the probation officer's reference to a polygraph, he received ineffective assistance of appellate counsel and the district court therefore erred in summarily dismissing his claim. In his appeal from the dismissal of his successive petition, Veenstra argues that the district court erred because he has shown deficient representation of post-conviction counsel in failing to raise in the initial petition the claims asserted in his successive petition. Therefore, Veenstra argues, as ineffective assistance of post-conviction counsel is a sufficient reason for raising claims in a successive petition that ought to have been raised in the initial petition, he was not barred from bringing his successive petition and the district court erred in holding otherwise.

## II.

### DISCUSSION

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).

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. Even where the state does not controvert the applicant's evidence, 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, this Court determines 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).

To prevail on an ineffective assistance of counsel claim, in a post-conviction action 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 (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); *Suits v. State*, 143 Idaho 160, 162, 139 P.3d 762, 764 (Ct. App. 2006). 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.* 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. *Barcella v. State*, 148 Idaho 469, 477, 224 P.3d 536, 544 (Ct. App. 2009); *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994). Bare assertions and speculation, unsupported by specific facts, do not

make out a prima facie case for ineffective assistance of counsel. *Roman*, 125 Idaho at 649, 873 P.2d at 903.

**A. Ineffective Assistance of Trial Counsel--Reference to Polygraph and Sheriff's Expert Testimony**

**1. Reference to polygraph**

At trial, Veenstra's probation officer, Touchette, gave testimony that Veenstra had allegedly violated probation by selling prescription drugs. After defense counsel questioned the probation officer about the process of violating a probationer, such as the timing of the creation of a violation report, taking the defendant into custody, and the resulting evidentiary hearing at which the state must prove the basis for a violation, the following discussion took place:

[Defense Counsel] Now, you have probationers in your supervision that you have knowledge of that they have violated their probation in some way, but you don't advise the court; right?

[Probation Officer] Yes. A lot of it depends on how serious--there's a little leeway we have on how serious the violation is.

[Defense Counsel] And in this particular violation, that's what you referenced on the second page of that report of violation, that as concerns sharing prescription drugs with another probationer, you weren't going to violate him for that; right?

[Probation Officer] Yes, I was going to violate him. *That came--that actual information came up as a result of a polygraph* and--actually, I probably shouldn't say what it was because I don't recall right now. But I know I got the information well after the fact on it.

[Defense Counsel] Okay. Let's just look at the second page of your report of violation. Isn't it true that it says, "On January 21st, 1999, he," Albert Veenstra, "admitted that he had sold prescription drugs to Byron Lyons. Pete said that they were his prescriptions that he had obtained from Dr. Nofziger. The drugs he sold were Halcion, Darvocet, Vicodin. At the time of the violation, a letter was sent to Dr. Nofziger informing him of Pete's activities. Pete was told no violation report would be filed at this time. Pete was also told that this could be used in a violation at a later date if he ever violated his probation again."

[Probation Officer] Right.

[Defense Counsel] So that's what I mean where you have probationers that do something that probably is a violation of their probation, but based upon the nature of it, you may not report it to the Court?

[Probation Officer] Right.

(emphasis added). Defense counsel then went on to clarify that because the probation officer subsequently received reports of the lewd and lascivious allegations, he decided to file a violation report which also included the prior selling of prescription drugs.

Veenstra argues that had his trial counsel requested a mistrial or otherwise objected to the probation officer's reference to a polygraph the result of the trial would have been different. He contends the reference to a polygraph allowed the jury to infer that he failed a polygraph examination concerning the lewd and lascivious conduct charges.

In a post-conviction proceeding challenging an attorney's failure to pursue a motion in the underlying criminal action, the district court may consider the probability of success of the motion in question in determining whether the attorney's inactivity constituted incompetent performance. *Boman v. State*, 129 Idaho 520, 526, 927 P.2d 910, 916 (Ct. App. 1996). Where the alleged deficiency is counsel's failure to file a motion, a conclusion that the motion, if pursued, would not have been granted by the trial court, is generally determinative of both prongs of the *Strickland* test. *Id.*

In this case, Veenstra's counsel was not ineffective for failing to object to the probation officer's passing reference to a polygraph or in failing to move for a mistrial based on this reference. First, the lack of objection is a valid tactical decision. The jury was unaware of the polygraph Veenstra took with regard to the conduct at issue in this case and had no reason to infer that the polygraph referred to was even taken by Veenstra.<sup>2</sup> Additionally, even if the jury were to infer that it was Veenstra who took a polygraph, it is an extraordinary leap to infer that because the test indicated he had sold prescription drugs at some point during his probation, that he also took a polygraph on the conduct at issue in this case and failed it. This is especially true as the reference to a polygraph was a fleeting one that arose in the context of discussing why Veenstra had not been violated at an earlier date for selling prescription medications. Raising an objection in front of the jury to such a benign reference to some polygraph taken at one point while Veenstra was on probation would have unnecessarily drawn attention to a polygraph issue. Therefore, counsel's failure to object can be seen as a tactical choice and not incompetent performance.

---

<sup>2</sup> The probation officer never stated that it was Veenstra who initially incriminated himself in the selling of prescription drugs.

For the same reasons, we conclude that any motion for a mistrial based on this reference would not have been successful. Indeed, the district court *specifically* noted that had a motion for mistrial been made it would not have been granted. Therefore, as stated in *Boman*, Veenstra has failed to prove either prong of the *Strickland* ineffective assistance of counsel test for failure to pursue the motion.

## **2. Sheriff's testimony**

Sheriff Gough, the officer who initially interviewed the victims, testified next. He stated that he had been involved in the investigation of a couple dozen sexual misconduct allegations and had been trained to deal with sex crimes at the Peace Officer's Standards and Training Academy (POST). Subsequently, the following exchange took place between the prosecutor and Sheriff Gough:

[Prosecutor] Now, with respect to investigating--or your training and experience investigating sexual crimes or allegations by children, is it unusual for a child to delay in reporting an abuse?

[Sheriff Gough] It would be unusual for a child to report it right away quick. Most children--I've investigated sex crimes. It's taken victims 10 to 12 years to come forward.

....

[Prosecutor] Is it unusual to see [the three-month delay in this case] before a disclosure by a child?

[Sheriff Gough] Not at all.

The prosecutor also questioned Sheriff Gough about the differences in the girls' initial disclosures and their testimony at trial:

[Prosecutor] Is it unusual in your training and your experience for that type of piecemeal disclosure to occur?

[Sheriff Gough] Not at all.

[Prosecutor] Do you understand what I mean by that?

[Sheriff Gough] Yes, I do. It typically happens like that. You have to--when you have a victim that's that young, you have to interview several times to get the whole thing out, because they try to block it out.

[Prosecutor] So, in other words, it's not unusual for the initial contact they'll say one thing happened, and then if you contact them again, you'll find that there were more events?

[Sheriff Gough] Correct.

Veenstra argues that had his trial counsel objected when the sheriff testified as a child sexual abuse expert, the result of the trial would have been different. This is so because the sheriff's improper testimony bolstered the victims' testimony. Veenstra contends that the sheriff was insufficiently qualified to testify regarding the common behaviors among victims of sexual abuse and, therefore, if counsel had objected to the testimony the objection would have been sustained.

The admissibility of expert testimony is governed by Idaho Rule of Evidence 702 which states that if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." This Court has found that the progression and various phases of child sexual abuse are subjects that are beyond the common sense, experience, and education of the average juror and is a proper subject of testimony by a qualified expert. *State v. Ransom*, 124 Idaho 703, 710, 864 P.2d 149, 156 (1993); *State v. Dutt*, 139 Idaho 99, 105, 73 P.3d 112, 118 (Ct. App. 2003).

Veenstra has not shown that trial counsel's performance was objectively unreasonable by failing to challenge the sheriff's qualifications to give testimony concerning the general reporting patterns for child sexual abuse victims. The sheriff had been involved in the investigation of a couple dozen sexual misconduct allegations, and although there was no indication of how many of those allegations were by child victims, the sheriff additionally had POST training dealing with sex crimes, where such piecemeal and delayed disclosure is common knowledge among persons associated with law enforcement. As such, Veenstra has failed to show that any objection to the sheriff's qualifications would have been successful and would have done no more than call greater attention to the issue. Accordingly, failing to object to this brief line of questioning cannot be seen as ineffective assistance of trial counsel, much less prejudicial error.

### **3. Notice**

Veenstra also contends that the district court erred in summarily dismissing his claim regarding the sheriff's improper expert testimony because the state did not address it in its motion for summary dismissal and the district court did not give notice of its intent to dismiss this claim.

The Idaho Supreme Court addressed the notice required by I.C. § 19-4906(c) in *DeRushé*, 146 Idaho 599, 200 P.3d 1148. The Court there noted that the notice requirement is met if “the notice is sufficient that the other party cannot assert surprise or prejudice.” *Id.* at 601, 200 P.3d at 1150. The Idaho Rules of Civil Procedure require only “reasonable particularity.” *Id.* The Court went on to conclude that reasonable particularity “does not require explaining what further evidence is necessary” to substantiate an applicant’s claim. *Id.* at 602, 200 P.3d at 1151. The ultimate holding of the Court was that an applicant for post-conviction relief cannot challenge on appeal the sufficiency of the grounds contained in the state’s motion for summary disposition unless the applicant first challenged the sufficiency of the notice in the trial court. *Id.* See also *Kelly v. State*, 149 Idaho 517, 522, 236 P.3d 1277, 1282 (2010) (“This Court will not engage in a sufficiency-of-the-notice analysis under the guise of considering whether an appellant was provided with any notice at all.”).

Veenstra did not challenge the sufficiency of the state’s notice in the court below. Therefore, to the extent that Veenstra is claiming he was given insufficient notice, this Court declines to address it pursuant to *DeRushé*. To the extent that Veenstra asserts the state entirely failed to give notice of its grounds for dismissal concerning Sheriff Gough’s testimony the assertion fails for lack of factual support. The state’s motion lists all of Veenstra’s claims in his petition, including the claim concerning Sheriff Gough’s testimony, and then states that the entire petition should be summarily dismissed because Veenstra fails to establish a genuine issue of material fact and the claims fail as a matter of law. The state argued that none of the claims raised by Veenstra established deficient performance by trial counsel or otherwise were so serious as to deprive Veenstra of a fair trial. Thus, the state did in fact give notice of multiple grounds for dismissing all of Veenstra’s claims, including Veenstra’s challenge to Gough’s testimony. Furthermore, although the court did not address the reasons for denying this claim specifically, the only valid basis on which the court could have denied the claim, without giving its own notice, is that asserted by the state in its motion for summary dismissal.<sup>3</sup> *Saykhamchone v. State*, 127 Idaho 319, 322, 900 P.2d 795, 798 (1995); *Buss v. State*, 147 Idaho 514, 517, 211 P.3d 123, 126 (Ct. App. 2009). Nothing in I.R.C.P. 56(c) requires a court to state its grounds for

---

<sup>3</sup> We note that at the hearing on summary disposition this particular claim of ineffective assistance was not addressed by counsel.

granting a motion for summary dismissal. Consequently, this Court can reasonably conclude the lower court adopted the state's grounds for dismissal and Veenstra was not deprived of notice.

**B. Trial Court Error and Ineffective Assistance of Appellate Counsel--Failure to Admit Polygraph Evidence**

Veenstra appealed his convictions to this Court, arguing only that the district court erred in not admitting the results of the "Kurz" polygraph for the limited purpose of rebutting the state's inference that Veenstra fled the country out of fear of prosecution and a guilty conscience. *Veenstra, supra*. Veenstra now claims that appellate counsel was deficient in failing to argue that it was error to not let Veenstra introduce the polygraph as substantive evidence of innocence and credibility, especially in light of the probation officer's reference to another polygraph and the sheriff's expert testimony "vouching" for the credibility of the victims' stories. He contends that we did not reach this issue on his direct appeal because of our limited harmless error analysis brought about by counsel's ineffective assistance.

Regardless, his claim is without merit. As the Idaho Supreme Court said in *State v. Perry*, 139 Idaho 520, 525, 81 P.3d 1230, 1235 (2003), polygraph evidence used only to bolster a defendant's credibility is inadmissible because it invades the province of the jury. It is the jury's function to assess the demeanor of the witnesses and make a determination of credibility. *Id.* Polygraph evidence admitted for purposes of credibility does not help the jury to find facts or understand the evidence. *Id.* This is so irrespective of whether a valid exception to the hearsay exclusion applies. Therefore, the failure to admit the polygraph evidence as substantive proof in this case was not error by the trial court and Veenstra's appellate counsel was not ineffective for failing to argue for its substantive admission on appeal. *See also Schoger v. State*, 148 Idaho 622, 630, 226 P.3d 1269, 1277 (2010) (failure of appellate counsel to advance a novel theory or raise a claim that courts have repeatedly rejected will not result in ineffective assistance of counsel).

**C. Successive Post-Conviction Petition and Refusal to Appoint Veenstra Counsel**

In the initial post-conviction action, Veenstra filed a motion for summary disposition in his favor and responded to the state's motion for summary dismissal of his petition before he asked for counsel. Counsel was belatedly appointed and the court gave counsel additional time to prepare for the hearing set on the state's motion for summary dismissal and to file any amended pleadings or briefs. Veenstra sent a letter to counsel describing four issues he wanted addressed at the hearing. Veenstra alleges that when he spoke with counsel he also requested

that counsel “look over the record to see if there was anything” Veenstra may have missed. This was the last time, Veenstra states, that he was able to contact his counsel. Counsel never filed an amended application, but did file a brief supplementing Veenstra’s prior argument that trial counsel should have sought a mistrial after the probation officer referenced a polygraph examination. Counsel made clear in his brief that it was only intended to be supplemental:

Obviously, Petitioner has, on his own, filed numerous documents in support of his original Petition. Rather than attempting to restate, modify, and/or correct any statements or law offered by Petitioner pro se, by this Memorandum we simply supplement what has already been stated, and intend to argue all matters presented at the hearing . . .

Counsel also made clear at the hearing that his intent was to supplement what Veenstra had already filed with the court:

Mr. Veenstra has represented himself for some time with his post-conviction petition and he filed his own petition, as a matter of fact, and several affidavits and documents, and those are in the court file. He has asked me to submit what he has already submitted himself and to not redesign that in any way, and I’m going to honor that request.

Veenstra argued in his successive petition that his trial counsel had been ineffective for failing to move *in limine* to preclude--pursuant to I.R.E. 404(b)--any mention of his prior conviction for sexual acts against his minor niece, refusing to allow Veenstra to testify, and failing to advise him of his privilege against self-incrimination before submitting to a psychosexual evaluation. In giving Veenstra notice of its intent to dismiss his successive petition, the district court stated that Veenstra could not claim ineffective assistance of post-conviction counsel for failure to raise additional claims when Veenstra specifically asked counsel to submit his preexisting claims without change. This was especially true, the district court noted, as Veenstra waited until well into the proceedings to even request counsel. Veenstra responded to the court’s notice and argued that he had, in fact, asked counsel to review the record for any additional claims because Veenstra is untrained in the law and argued that counsel had an affirmative duty to research the record to discover all potential claims that could be raised. Veenstra also requested counsel. Regardless, the district court subsequently denied Veenstra’s request for counsel, as Veenstra failed to allege facts that raised the possibility of a claim, and dismissed Veenstra’s successive petition for the reasons stated in its notice.

Veenstra argues on appeal that the district court should have appointed him counsel before summarily dismissing his petition. Veenstra further argues that his petition should not have been dismissed on the basis that it was an improper successive petition because Veenstra alleged facts sufficient to show that his initial post-conviction counsel was deficient in failing to raise Veenstra's new claims in the initial petition. Veenstra asserts that his counsel had an obligation to search the record for any claims that Veenstra may have missed in his pro se petition and that, had initial post-conviction counsel conducted such a review of the record, counsel would have discovered the additional claims asserted in his successive petition except for one. The alleged error of trial counsel in refusing to allow Veenstra to testify, although not apparent on the face of the record before initial post-conviction counsel, would have become apparent, Veenstra contends, if counsel had acted reasonably and consulted with Veenstra instead of refusing to communicate with him.

This Court reviews a denial of a request for court-appointed counsel for an abuse of discretion. *Hust v. State*, 147 Idaho 682, 683, 214 P.3d 668, 669 (Ct. App. 2009); *Judd v. State*, 148 Idaho 22, 24, 218 P.3d 1, 3 (Ct. App. 2009). However, counsel should be appointed if petitioner alleges facts to raise the possibility of a valid claim. *Id.*

Pursuant to Idaho Code § 19-4908, an applicant must raise all grounds for relief available to him in his original application for post-conviction relief or he waives it. *Baker v. State*, 142 Idaho 411, 420, 128 P.3d 948, 957 (Ct. App. 2005). However, if a court finds a sufficient reason for not asserting or inadequately raising a ground for relief, the ground may be asserted in a subsequent application. I.C. § 19-4908; *Stuart v. State*, 118 Idaho 932, 933-34, 801 P.2d 1283, 1284-85 (1990); *Nguyen v. State*, 126 Idaho 494, 496, 887 P.2d 39, 41 (Ct. App. 1994). If, as a result of deficient representation in the initial application, the applicant was unable to fully present his grounds for post-conviction relief, a successive post-conviction petition may be brought with the ultimate focus of the second proceeding being "whether the second application has raised not merely a question of counsel's performance but substantive grounds for relief from the conviction and sentence." *Nguyen*, 126 Idaho at 496, 887 P.2d at 41 (quoting *Wolfe v. State*, 113 Idaho 337, 339, 743 P.2d 990, 992 (Ct. App. 1987)).

Veenstra contends that his request to post-conviction counsel to not waive any of the issues already raised in his original petition is not necessarily inconsistent with a request to review the record for additional claims. The record does not show, as the district court

contended, that Veenstra asked counsel to raise only those issues brought in his initial petition. The record shows only that Veenstra asked counsel to not waive or change any of his previously brought issues. However, if a lower court's decision is based upon an incorrect reasoning, this Court may affirm upon the proper legal theory. *State v. Pierce*, 107 Idaho 96, 102, 685 P.2d 837, 843 (Ct. App. 1984); *see also Baker*, 142 Idaho at 420, 128 P.3d at 957.

There is no constitutional or statutory right to counsel in a post-conviction action. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Freeman v. State*, 131 Idaho 722, 724, 963 P.2d 1159, 1161 (1998). However, a court has discretion to appoint counsel in a post-conviction action and should do so if an applicant alleges facts that raise the possibility of a valid claim, 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). In the context of discussing statute of limitations bars to bringing a post-conviction action, our Supreme Court has recently reaffirmed that ineffective assistance of counsel is one of those claims that should be reasonably known to a defendant at the conclusion of trial. *Rhoades*, 148 Idaho at 253, 220 P.3d at 1072. The Court stated in *Rhoades*, “[t]he facts of the case, being particularly within the knowledge of the defendant should be sufficient to alert a defendant to the presence of ineffective assistance of counsel.” *Id.*

As the pro se post-conviction petitioner has no right to appointed counsel's representation absent the raising of the possibility of a valid claim, it follows that appointed counsel's duty once appointed extends no further than those claims so raised. This is especially true in light of the *Rhoades* conclusion that a petitioner is charged with knowledge of ineffective assistance of counsel claims no later than the conclusion of trial, which reinforces the statutory policy that the pro se post-conviction petitioner must raise such claims in his initial petition or otherwise inform subsequently appointed counsel of the existence of the facts underlying such claims. Therefore, Veenstra's argument that his post-conviction counsel had a duty once appointed to explore the entire record for any and all potential claims is not well taken. Neither does a post-conviction applicant's general request that post-conviction counsel so explore the record somehow raise this non-existent duty. *See Aragon*, 114 Idaho at 765, 760 P.2d at 1181 (constitutional guarantees do not insure that defense counsel will recognize and raise every conceivable claim; counsel does not have a constitutional duty to raise every non-frivolous issue requested by a defendant).

Veenstra does not contend that he alerted counsel to any other matters that he felt could possibly give rise to additional post-conviction claims. As counsel did not have a duty to explore the entire criminal case record for every conceivable claim, Veenstra's argument that counsel was ineffective by failing to do so cannot stand as "sufficient reason" for failing to bring his new claims in his initial petition. Moreover, Veenstra has shown that he was capable of discovering and raising these claims himself as evidenced by his *pro se* verified successive petition, brief and memorandum of law. Therein, he acknowledged that he had not at that time filed a motion for appointment of counsel.

Accordingly, the district court did not err in failing to appoint counsel and in summarily dismissing Veenstra's successive post-conviction petition.

### **III.**

#### **CONCLUSION**

We affirm the summary dismissals of Veenstra's initial and successive post-conviction petitions.

Judge LANSING and Judge MELANSON **CONCUR.**