

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket Nos. 36294/36295

KATHLEEN ANN BLANC,)	2011 Unpublished Opinion No. 437
)	
Petitioner-Appellant,)	Filed: April 12, 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STATE OF IDAHO,)	THIS IS AN UNPUBLISHED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, Jerome County. Hon. John K. Butler, District Judge.

Order summarily dismissing application for post-conviction relief, affirmed.

Kathleen Ann Blanc, Pocatello, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent.

GRATTON, Chief Judge

Kathleen Ann Blanc appeals from the district court’s order summarily dismissing her application for post-conviction relief. We affirm.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Blanc pled guilty, pursuant to a plea agreement, to injury to a child, Idaho Code § 18-1501(1), and was sentenced on February 10, 2004, to a unified ten-year term with two years determinate. Blanc did not appeal from the judgment of conviction and sentence. The court suspended the sentence and retained jurisdiction. Following the period of retained jurisdiction, the district court again suspended sentence and retained jurisdiction. At the conclusion of the second period of retained jurisdiction, on January 25, 2005, the district court suspended Blanc’s sentence and placed her on probation for a period of five years. Thereafter, the district court determined that Blanc had violated the terms of her probation and, consequently, on December 20, 2006, ordered execution of her underlying sentence. Blanc’s counsel at the

probation revocation proceedings (“probation revocation counsel”) was not the same counsel as had represented her in prior proceedings (“trial counsel”). Blanc timely appealed from the order revoking probation, which this Court affirmed. *State v. Blanc*, Docket No. 33879 (Ct. App. 2008). The Idaho Supreme Court granted the State’s petition for review in which the State asserted that the district court was without authority to place Blanc on consecutive periods of retained jurisdiction and had, therefore, lost jurisdiction. The Supreme Court denied Blanc’s petition for review and her motion for voluntary dismissal of her appeal. However, on September 9, 2008, the Supreme Court granted Blanc’s motion to dismiss the appeal as moot and, in so doing, ordered withdrawal of this Court’s prior opinion.

On April 10, 2007, while the appeal discussed above was pending, Blanc filed a pro se application for post-conviction relief and request for counsel. In the application, Blanc asserted that her trial counsel had rendered ineffective assistance. The district court determined that the application was untimely because it was filed outside the one-year period under I.C. § 19-4902 and, therefore, denied counsel and provided twenty days notice of its intent to dismiss. In the notice, the court stated: “The petitioner is advised that if she intends to assert that her appointed counsel was ineffective in her probation revocation proceedings she will need to amend her petition to assert such a claim.” The court further noted that such a claim may be premature due to the pending appeal of the probation revocation.

Rather than file a direct amendment to the application, Blanc filed a purported second application for post-conviction relief on April 18, 2007, in which, among other things, she asserted that her probation revocation counsel was ineffective. The district court dismissed the initial application which had asserted ineffective assistance of trial counsel as untimely. Blanc appealed that order. The district court then stayed the second purported application, since the appeal regarding the probation revocation remained pending. Thereafter, pursuant to stipulation, this Court stayed the appeal and remanded to the district court to determine whether the second application should instead be treated as an amendment to the initial application to add claims of ineffective assistance of probation revocation counsel. Upon remand, on August 29, 2008, the district court agreed that the purported second application should be treated as an amendment to the initial application and consolidated the application files. In addition, the district court indicated that it deemed its prior dismissal of the claims of ineffective assistance of trial counsel a partial dismissal of the consolidated case. As to the claims raised in the amendment regarding

ineffective assistance of probation revocation counsel, the district court stayed the post-conviction proceeding while the direct appeal of the revocation order was pending. As noted above, the Idaho Supreme Court dismissed the direct appeal regarding the probation revocation on September 9, 2008. Thereafter, pursuant to stipulation, this Court dismissed the appeal as to the dismissal of the post-conviction claims of ineffective assistance of trial counsel and remanded to the district court to vacate its stay and proceed with the consolidated post-conviction action and motion for appointment of counsel.

Upon remand, the district court lifted the stay, again noted its prior dismissal of the claims relative to trial counsel, appointed counsel to assist Blanc regarding the amended claim of ineffective assistance of probation revocation counsel, and provided notice of intent to dismiss that remaining claim. After responses to the notice of intent to dismiss were filed both by Blanc and her counsel, the district court summarily dismissed the remaining claims directed at probation revocation counsel. Blanc appeals the summary dismissal of the consolidated application for post-conviction relief and also contends that the district court erred in denying a motion for disqualification.

II.

ANALYSIS

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 differs from a complaint in an ordinary civil action[.]” *Dunlap v. State*, 141 Idaho 50, 56, 106 P.3d 376, 382 (2004) (quoting *Goodwin*, 138 Idaho at 271, 61 P.3d at 628). The 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). *State v. Payne*, 146 Idaho 548, 560, 199 P.3d 123, 135 (2008); *Goodwin*, 138 Idaho at 271, 61 P.3d at 628. The application 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 § 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. "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) (quoting *Berg v. State*, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998)). 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. *Payne*, 146 Idaho at 561, 199 P.3d at 136; *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).

"When 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 review of dismissal of a post-conviction relief application without an evidentiary hearing, we determine whether a genuine issue of material fact exists based on the pleadings, depositions, and admissions together with any affidavits on file. *Rhoades v. State*, 148 Idaho 247, 220 P.3d 1066 (2009); *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993). However, "while the underlying facts must be regarded as true, the petitioner's conclusions need not be so accepted." *Rhoades*, 148 Idaho at 250, 220 P.3d at 1069 (quoting *Phillips v. State*, 108 Idaho 405, 407, 700 P.2d 27, 29 (1985)); *see also Hayes v. State*, 146 Idaho 353, 355, 195 P.3d 712, 714 (Ct. App. 2008). As the trial court rather than a jury will be the trier of fact in the event of an evidentiary hearing, summary dismissal is appropriate where the evidentiary facts are not disputed, despite the possibility of

conflicting inferences to be drawn from the facts, for the court alone will be responsible for resolving the conflict between those inferences. *Yakovac*, 145 Idaho at 444, 180 P.3d at 483; *Hayes*, 146 Idaho at 355, 195 P.3d at 714. That is, the judge in a post-conviction action is not constrained to draw inferences in favor of the party opposing the motion for summary disposition, but rather is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Id.*

A claim of ineffective assistance of counsel may properly be brought under the Uniform Post-Conviction Procedure Act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). To prevail on an ineffective assistance of counsel claim, 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, 687-88 (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). Where the defendant was convicted upon a guilty plea, to satisfy the prejudice element, the claimant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pled guilty and would have insisted on going to trial. *Plant v. State*, 143 Idaho 758, 762, 152 P.3d 629, 633 (Ct. App. 2006). To establish prejudice where the defendant has been found guilty, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Aragon*, 114 Idaho at 761, 760 P.2d at 1177. 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. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

A. Ineffective Assistance of Trial Counsel

As noted, Blanc was sentenced on February 10, 2004, and, after the consecutive periods of retained jurisdiction, the sentence was suspended and she was placed on probation on January 25, 2005. Blanc did not appeal. In the application, as initially filed on April 10, 2007, Blanc claimed that trial counsel provided ineffective assistance: (1) by failing to correct the presentence investigation report (PSI) at sentencing; (2) by refusing to file an appeal; (3) by abandoning her; (4) because her guilty plea was coerced by the Department of Health and

Welfare; and (5) because her sentence was disproportionate to and a departure from the plea agreement.

The district court dismissed these claims as untimely under I.C. § 19-4902(a). Our review of the district court's construction and application of the limitation statute is a matter of free review. *Freeman v. State*, 122 Idaho 627, 628, 836 P.2d 1088, 1089 (Ct. App. 1992). The statute of limitation for post-conviction actions provides that an application for post-conviction relief may be filed at any time within one year from the expiration of the time for appeal or from the determination of appeal or from the determination of a proceeding following an appeal, whichever is later. I.C. § 19-4902(a). The appeal referenced in that section means the appeal in the underlying criminal case. *Freeman*, 122 Idaho at 628, 836 P.2d at 1089. The failure to file a timely application, absent grounds for tolling, is a basis for dismissal of the application. *Sayas v. State*, 139 Idaho 957, 959, 88 P.3d 776, 778 (Ct. App. 2003). In this case, the application was filed more than one year (plus forty-two days for the time for appeal) after the judgment of conviction and sentence, and even from the date the court ordered probation after the consecutive retained jurisdiction periods. Thus, unless tolling is appropriate, the claims were untimely filed.

In *Rhoades*, the Idaho Supreme Court noted that in *Charboneau v. State*, 144 Idaho 900, 174 P.3d 870 (2007), the Court “recognized that rigid application of I.C. § 19-4902 would preclude courts from considering ‘claims which simply are not known to the defendant within the time limit, yet raise important due process issues.’ *Id.* at 904, 174 P.3d at 874.” *Rhoades*, 148 at 250, 220 P.3d at 1069. The Court stated:

The Idaho Court of Appeals has recognized instances of equitable tolling “(1) where the petitioner was incarcerated in an out-of-state facility on an in-state conviction without legal representation or access to Idaho legal materials; (2) and where mental disease and/or psychotropic medication renders a petitioner incompetent and prevents petitioner from earlier pursuing challenges to his conviction.” *Sayas v. State*, 139 Idaho 957, 960, 88 P.3d 776, 779 (Ct. App. 2003). This Court has never explicitly addressed when a case would raise an important due process issue. However, the serious due process concerns enunciated in *Charboneau* encompass cases involving access to courts claims. *Martinez v. State*, 130 Idaho 530, 535-36, 944 P.2d 127, 132-33 (Ct. App. 1997). It would similarly cover claims of incompetency. *Chico-Rodriguez*, 141 Idaho at 582-83, 114 P.3d at 140-41. We therefore reaffirm the standard expressed in *Charboneau* in order to determine whether equitable tolling is appropriate.

Id. at 251, 220 P.3d at 1070. The *Rhoades* Court additionally determined that *Brady*¹ violation claims would support tolling. *Id.* However, the Court determined that ineffective assistance of counsel claims were an insufficient basis for tolling:

We have repeatedly held that ineffective assistance of counsel claims can or should be known after trial. In addressing one of Rhoades' previous appeals, we squarely addressed this issue. "Ineffective assistance of counsel is one of those claims that should be reasonably known immediately upon the completion of the trial and can be raised in a post-conviction petition." *Rhoades*, 120 Idaho at 807, 820 P.2d at 677. The 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. at 253, 220 P.3d at 1072.

The State contends that Blanc has failed to allege facts establishing a basis for tolling. Blanc's pro se brief on appeal includes a host of claims and assertions not directly related to the issue of the timeliness of her application regarding trial counsel's performance. However, she does mention the phrase "equitable tolling." Moreover, in her application, she expressly recognized that the application was untimely, but stated that she did not discover that she had not seen inaccurate portions of her PSI until receiving information at the prison in February 2007, that she believed that she was to be back in court to resolve additional evidentiary and factual issues, and that she had been jailed.

The allegations in the application that appear directed toward tolling do not raise due process issues that support tolling. Regarding the allegations associated with the PSI, there is no general discovery exception in I.C. § 19-4902. *Evensiosky v. State*, 136 Idaho 189, 30 P.3d 967 (2001).² Blanc's allegations of ineffective assistance of trial counsel, whether or not additional proceedings in the court were contemplated, were or should have been known upon completion of the proceedings in the trial court. Even if further proceedings were contemplated in the district court after Blanc was placed on probation and before her probation was revoked, which cannot be identified from the record, she was not thereby prevented from filing an application asserting ineffective assistance of counsel in the prior proceedings. *See Rhoades*, 148 Idaho at

¹ *Brady v. Maryland*, 373 U.S. 83 (1963).

² While, in her appellate briefing, Blanc cites to *Brady*, she has neither pled nor asserted any facts relating to the State having any involvement in her claim that she was unaware of portions of the PSI.

253, 220 P.3d at 1072 (ineffective assistance of counsel claims should be reasonably known immediately upon the completion of the trial proceedings and can be raised in a timely post-conviction application). While Blanc was incarcerated during the retained jurisdiction periods, she has asserted no inability to access the courts during that time or lack of access to legal materials. Blanc does not allege, and nothing in the record indicates, that she was incarcerated between the time she was placed on probation in January 2005 and the probation revocation proceeding in October 2006. She claimed a lack of access to legal materials in the Jerome County Jail, which appears related to her probation revocation issues in October 2006. While a denial of access to the courts may support tolling, *Id.* at 251, 220 P.3d at 1070, that claim is not supported on these facts. Moreover, even if Blanc was incarcerated for a portion of the one-year period within which to file her application, she has not alleged or shown that she was prevented from filing a claim of ineffective assistance of trial counsel. *See Evensiosky*, 136 Idaho at 191, 30 P.3d at 969. Blanc did not timely file her application for post-conviction relief regarding her claims of ineffective assistance of trial counsel and, as tolling principles are inapplicable in this case, the district court correctly dismissed these claims.

B. Ineffective Assistance of Probation Revocation Counsel

In her amended application, Blanc alleged claims of ineffective assistance of probation revocation counsel. The district court determined that the application asserted fifteen ineffective assistance contentions regarding Blanc's probation revocation counsel, including: (1) failure to introduce letters and documents; (2) failure to call witnesses; (3) failure to cross-examine Health and Welfare witnesses; (4) failure to obtain Health and Welfare and Probation and Parole records; (5) allowing judge to tell Blanc that if she pled guilty to breaking no-contact order that she would not go to prison and if she asked for a hearing she would go to prison; (6) failure to raise issue of incorrect PSI and prior counsel; (7) failure to address and submit evidence of illegal sex offender document; (8) failure to introduce letters to prior counsel; (9) failure to address false positive UAs and false lab report; (10) failure to address merits of underlying conviction due to abandonment by prior counsel; (11) failure to raise issues regarding plea agreement, withdrawal of plea, and failure of prior counsel to appeal; (12) failure to raise issues regarding disqualification; (13) failure to call particular witness and cross-examine another; (14) failure to raise dramatic departure of sentence from plea agreement; and (15) failure to raise conflict of interest between probation officer and prior counsel. The district court appointed

counsel and issued a notice of intent to dismiss. The grounds stated in the notice were that counsel could not have been ineffective because the trial court did not have authority to order consecutive retained jurisdiction periods causing loss of jurisdiction and, alternatively, that each of the allegations were insufficient or unsupported. After receiving responses by counsel and Blanc, the court dismissed the amended application on each of the alternative grounds. We need only address the issue of jurisdiction.

The district court was correct that the trial court was without authority to order a second consecutive period of retained jurisdiction. In *State v. Urrabazo*, 150 Idaho 158, 244 P.3d 1244 (2010), the Idaho Supreme Court held that I.C. § 19-2601(4) unconditionally requires an intervening period of probation prior to ordering a second period of retained jurisdiction. When the district court failed to place Urrabazo on probation at the conclusion of the first period of retained jurisdiction, the district court lost jurisdiction and Urrabazo's sentence was executed. Consequently, the district court's subsequent orders were void. *Id.* at 163, 244 P.3d at 1249. Thus, in this case, the trial court lost jurisdiction when it ordered the second period of retained jurisdiction instead of placing Blanc on probation, effectively executing Blanc's sentence, and, its subsequent orders are void. Because the court had no jurisdiction when it purported to revoke Blanc's probation, any ineffective assistance of counsel incident to the probation revocation proceedings was without effect. Whether counsel was or was not effective in representing Blanc in the probation revocation proceedings did not affect the trial court's jurisdiction. Blanc suffered no prejudice by any ineffective assistance, because the trial court had no jurisdiction at the time. The district court correctly dismissed the amended application relative to these claims.

C. Motion for Disqualification

On April 4, 2008, Blanc filed a motion to disqualify Judge Butler from six separate cases, including the instant matter. Blanc asserted that Judge Butler had a conflict of interest because someone in his former law office acted as a guardian ad litem for her children, he had disqualified himself in the past, had presided over proceedings involving her former husband, and had ruled adversely to her in the pending cases. On April 14, 2008, the district court entered an order denying the motion for disqualification. The district court analyzed the motion under Idaho Rule of Civil Procedure 40(d)(2)(A) and Idaho Code of Judicial Conduct Cannon 3E. The decision to grant or deny the motion rests in the sound discretion of the district court. *Pizzuto v. State*, 127 Idaho 469, 470, 903 P.2d 58, 59 (1995). When a trial court's discretionary decision is

reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989).

In his order, Judge Butler explained that he was aware, at the time he became a district judge, that an associate in his former law firm, in 2003, had represented the guardian ad litem, for the limited purpose of securing appointment, in relation to Blanc's children, although Judge Butler had no involvement or familiarity with the matter. Because of that fact and continued financial interests relative to the former firm, Judge Butler had requested and received reassignment of the case to another judge. He did not disqualify himself, only requested reassignment. After all financial matters between Judge Butler and his former firm were concluded, the matter was reassigned to Judge Butler. He stated that neither he nor any member of his former firm had been an attorney in any pending matters involving Blanc, he had no personal bias or prejudice, or any personal knowledge of any extrajudicial facts. Regarding Judge Butler's participation in matters involving Blanc's former husband, he noted that nothing from that participation related to any basis for disqualification in the instant matter. As stated in *Roselle v. Heirs and Devisees of Grover*, 117 Idaho 530, 534, 789 P.2d 526, 530 (Ct. App. 1990): "Merely because a judge has participated in prior legal proceedings involving related parties or issues does not provide grounds for the judge to recuse himself."

Finally, in regard to the assertion of bias and prejudice because of adverse rulings, recently in *Bach v. Bagley*, 148 Idaho 784, 229 P.3d 1146 (2010), the Idaho Supreme Court held that whatever the source of the bias or prejudice, it must be "so extreme as to display clear inability to render fair judgment," that "unless there is a demonstration of 'pervasive bias' derived either from an extrajudicial source or facts and events occurring at trial, there is no basis for judicial recusal." *Id.* at 791-92, 229 P.3d at 1153-54. The Court stated that "the standard for recusal of a judge, based simply on information that he has learned in the course of judicial proceedings, is extremely high." *Id.* at 792, 229 P.3d at 1154. Blanc presented no facts to demonstrate any bias or prejudice, let alone satisfy the standard for disqualification. The district court did not abuse its discretion in denying the motion for disqualification.

III.
CONCLUSION

Blanc's application for post-conviction relief relating to ineffective assistance of trial counsel was untimely. At the time of the probation revocation hearing, the trial court was without jurisdiction and, therefore, any ineffective assistance of her counsel relative to the proceeding was without any effect or prejudice. The district court's order summarily dismissing Blanc's amended and consolidated applications for post-conviction relief is affirmed. No costs or attorney fees on appeal.

Judge GUTIERREZ and Judge MELANSON **CONCUR.**