IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 41959

COREY SKII REID,	)	**2015 Unpublished Opinion No. 319**
	)	
Petitioner-Appellant,	)	**Filed: January 23, 2015**
	)	
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STATE OF IDAHO,	)	**THIS IS AN UNPUBLISHED**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 First Judicial District, State of Idaho, Shoshone County. Hon. Fred M. Gibler, District Judge.

Order of the district court dismissing petition for post-conviction relief, affirmed.

Nevin, Benjamin, McKay & Bartlett, LLP; Deborah A. Whipple, Boise, for appellant.

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

GUTIERREZ, Judge

Corey Skii Reid appeals from the district court's order granting the State's motion for summary dismissal of Reid's petition for post-conviction relief. Specifically, he contends the district court erred by granting summary dismissal as to his claims that the State failed to disclose exculpatory evidence and that there was newly discovered evidence requiring a new sentencing hearing. For the reasons set forth below, we affirm.

I.
FACTS AND PROCEDURE

Following a jury trial, Reid was convicted of two counts of aiding and abetting first degree murder. At sentencing, the State submitted a transcript of a conversation between a detective and Ronald Rollins, a prior cellmate of Reid's, in which Rollins described conversations with Reid about the murders. Rollins stated that Reid had described the details of

the murders in a cavalier manner, finding parts "hilarious," and that Reid did not show any remorse for his involvement. *State v. Reid*, 151 Idaho 80, 89, 253 P.3d 754, 763 (Ct. App. 2011). Prior to imposing the sentences, the district court discussed its assessment of Rollins' statements:

> [Defense counsel] quite properly has pointed out that we have nothing to judge the credibility of Mr. Rollins. He's not here. He's not subject to cross-examination. And I recognize that and recognize that, without live testimony and cross-examination, the statements should be taken with a grain of salt.
>
> But one thing that occurred to me, as I was looking through the statements, was that the statements were made prior to the trial or any real discussion of the facts of the case. And Mr. Rollins did have a good knowledge of the facts of the case based upon what he stated that Mr. Reid had told him while they were in jail together. And so, recognizing that he was not subject to cross-examination, there is some evidence just from the statements, themselves, that they do have an element of credibility because he has details that would not have been known to him except had they been given him by Mr. Reid as he stated. And I'm referring there to elements that--or details of the facts that came out during the trial.

Id. The district court imposed concurrent, unified life sentences, with thirty years determinate, on each count. Reid's convictions and sentences were affirmed on direct appeal. *Id.* at 90, 253 P.3d at 765.

Reid filed a petition for post-conviction relief, asserting several claims, including that there was newly discovered evidence regarding Rollins. In his accompanying affidavit, Reid stated that Rollins had "recanted" to Reid's mother and told her he was "bribed by the prosecutor into lying because he would be kept in jail if he didn't testify or talk"; that a private investigator discovered that the prosecutor gave Rollins "transcripts of other's written recorded testimonies" to read prior to Rollins' statements so that it would appear that Rollins knew facts regarding the crime that he could have only learned from Reid; and that Rollins' girlfriend told the person conducting the presentence investigation (PSI) in Rollins' criminal case that Rollins is a "pathological liar." Reid also contended that the prosecutor committed a due process violation by failing to disclose Rollins' girlfriend's statement. *See Brady v. Maryland*, 373 U.S. 83 (1963).

Reid was appointed counsel, who filed an amended post-conviction petition. The State filed an answer and moved for summary dismissal. The district court granted the motion, and Reid now appeals.

II.

ANALYSIS

Reid contends the district court erred by granting the State's motion for summary dismissal of his claims that the prosecutor committed a *Brady* violation by failing to disclose evidence relevant to Rollins' credibility and that there was new evidence discovered regarding Rollins' statements about Reid, such that he was entitled to a new sentencing hearing. A petition for post-conviction relief initiates a proceeding that is civil in nature. Idaho Code § 19-4907; *Rhoades v. State*, 148 Idaho 247, 249, 220 P.3d 1066, 1068 (2009); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). Like a plaintiff in a civil action, the petitioner must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. *Goodwin v. State*, 138 Idaho 269, 271, 61 P.3d 626, 628 (Ct. App. 2002).

Idaho Code Section 19-4906 authorizes summary dismissal of a petition for post-conviction relief, either pursuant to a motion by a party or upon the court's own initiative, if it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. When considering summary dismissal, the district court must construe disputed facts in the petitioner's favor, but the court is not required to accept either the petitioner's mere conclusory allegations, unsupported by admissible evidence, or the petitioner's conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994). Moreover, 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). Such inferences will not be disturbed on appeal if the uncontroverted evidence is sufficient to justify them. *Id.*

Claims may be summarily dismissed if the petitioner's allegations are clearly disproven by the record of the criminal proceedings, if the petitioner has not presented evidence making a prima facie case as to each essential element of the claims, or if the petitioner's allegations do not justify relief as a matter of law. *Kelly v. State*, 149 Idaho 517, 521, 236 P.3d 1277, 1281 (2010); *DeRushé v. State*, 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009). Thus, summary

dismissal of a claim for post-conviction relief is appropriate when the court can conclude, as a matter of law, that the petitioner is not entitled to relief even with all disputed facts construed in the petitioner's favor. Conversely, if the petition, affidavits, and other evidence supporting the petition allege facts that, if true, would entitle the petitioner to relief, the post-conviction claim may not be summarily dismissed. *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004); *Sheahan v. State*, 146 Idaho 101, 104, 190 P.3d 920, 923 (Ct. App. 2008). If a genuine issue of material fact is presented, an evidentiary hearing must be conducted to resolve the factual issues. *Goodwin*, 138 Idaho at 272, 61 P.3d at 629.

On appeal from an order of summary dismissal, we apply the same standards utilized by the trial courts and examine whether the petitioner's admissible evidence asserts facts which, if true, would entitle the petitioner to relief. *Ridgley v. State*, 148 Idaho 671, 675, 227 P.3d 925, 929 (2010); *Sheahan*, 146 Idaho at 104, 190 P.3d at 923. Over questions of law, we exercise free review. *Rhoades*, 148 Idaho at 250, 220 P.3d at 1069; *Downing v. State*, 136 Idaho 367, 370, 33 P.3d 841, 844 (Ct. App. 2001).

A. *Brady* Claim

Reid contends the district court erred by summarily dismissing his *Brady* claim that the prosecutor failed to disclose that Rollins' girlfriend told the PSI investigator in Rollins' case that Rollins was a pathological liar. Due process requires all material exculpatory evidence known to the State or in its possession be disclosed to the defendant. *Brady*, 373 U.S. at 87; *Dunlap v. State*, 141 Idaho 50, 64, 106 P.3d 376, 390 (2004). *See also* I.C.R. 16(a). The three essential components of such a claim are that the evidence in question was exculpatory, it was suppressed by the State, and the suppression was prejudicial. *Dunlap*, 141 Idaho at 64, 106 P.3d at 390. The duty of disclosure enunciated in *Brady* is an obligation of not just the individual prosecutor assigned to the case, but of all the government agents having a significant role in investigating and prosecuting the offense. *State v. Avelar*, 132 Idaho 775, 781, 979 P.2d 648, 654 (1999); *Queen v. State*, 146 Idaho 502, 504, 198 P.3d 731, 733 (Ct. App. 2008). However, a prosecutor is not required to disclose evidence the prosecutor does not possess or evidence of which the prosecutor could not reasonably be deemed to have imputed knowledge or control. *Avelar*, 132 Idaho at 781, 979 P.2d at 654; *Queen*, 146 Idaho at 504, 198 P.3d at 733.

In granting the State's motion for summary dismissal as to this claim, the district court determined that, among other things, the evidence "allegedly supposed to have [been] provided

was not even known by the State at the time of sentencing." On appeal, Reid acknowledges that the allegedly exculpatory evidence was contained in a PSI prepared for Rollins in a different case and county and almost six months after Reid's sentencing. However, he claims that the duty to disclose exculpatory evidence is ongoing, and therefore the State violated *Brady* protections by not disclosing the statement to Reid.

Reid's contention that *Brady* imposes a duty on prosecutors to disclose allegedly exculpatory evidence discovered only post-trial and post-sentencing is unsupported by current law. The United States Supreme Court made clear in *District Attorney's Office of the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009), that *Brady* protections do not extend to the post-conviction context. Reasoning that a "criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man" and therefore only a "limited interest in postconviction relief . . . *Brady* is the wrong framework" for such claims. *Id*. Accordingly, the district court did not err by determining Reid presented no issue of material fact as to this issue and granting the State's motion for summary dismissal.

B. Newly Discovered Evidence

Reid also argues the district court erred by granting the State's motion for summary dismissal of his claim that newly discovered evidence entitles him to a new sentencing hearing. Specifically, he points to evidence that Rollins recanted his statements used at Reid's sentencing, that Rollins had been allowed to review police reports regarding the incident prior to making his statements, and that Rollins' girlfriend stated that Rollins is a pathological liar.

As the State points out, the only reference to newly discovered evidence in Reid's amended post-conviction petition was in regard to "information contained in Rollins' PSI," which is apparently in reference to Reid's girlfriend's statement, since that is the only relevant information allegedly contained in the PSI. Because his assertions regarding Rollins' recanting and having read the police reports prior to making his statements were not included in the amended petition, they are waived and we do not consider them on appeal. *See Hollon v. State*, 132 Idaho 573, 576 n.1, 976 P.2d 927, 930 n.1 (1999) (noting that "where a complaint is amended, it takes the place of the original complaint," and therefore declining to address issues raised in the initial petition, but not in the amended petition).

Idaho Code § 19-4901(a)(4) provides for post-conviction relief where the petitioner demonstrates that there exists evidence of material facts, not previously presented and heard, that

requires vacation of the conviction or sentence in the interest of justice. In the context of sentencing proceedings, a petitioner must present evidence of facts that existed at the time of sentencing that would have been relevant to the sentencing process and that indicate the information available to the parties or the trial court at the time of sentencing was false, incomplete, or otherwise materially misleading. *Knutsen v. State*, 144 Idaho 433, 440, 163 P.3d 222, 229 (Ct. App. 2007); *Bure v. State*, 126 Idaho 253, 254-55, 880 P.2d 1241, 1242-43 (Ct. App. 1994).

As the State acknowledges, in granting the motion for summary dismissal, the district court did not specifically discuss the standard for newly discovered evidence, although it discussed Rollins' girlfriend's statement in the context of an alleged ineffective assistance of counsel claim and determined that the outcome of a new sentencing proceeding, even with the court being informed of the statement, would not have be different. Specifically, the court noted it had discussed its skepticism as to Rollins' statements at the time of sentencing and that it had based its sentences on "the evidence I'd heard in the trial, the other information presented in the presentence report, and . . . weighed against the goals of sentencing." In this regard, the opinion of a girlfriend that Rollins was not generally truthful does not raise a particularly new issue that called into doubt the information before the court at sentencing; Rollins' credibility was already clearly at issue before the district court and was considered by the court. *See Reid*, 151 Idaho at 90, 253 P.3d at 764 ("The district court recognized that Rollins' credibility and the reliability of his story was an issue. . . . [T]he district court expressed appropriate caution in the usefulness of the information."). We also note that the fact Rollins' girlfriend made the statement to the PSI investigator was not a fact that existed at the time of sentencing--as discussed above, this report was not prepared until after Reid was sentenced.[1] *See Knutsen*, 144 Idaho at 440, 163 P.3d at 229.[2]

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[1] To the extent Reid is alleging that the "fact" existing at sentencing was that Rollins was *actually* a pathological liar, the statement of the girlfriend, who is presumably not a clinician, amounts to scant, if any, evidence of a *fact*.

[2] Reid cites to *Bean v. State*, 124 Idaho 187, 190, 858 P.2d 327, 330 (Ct. App. 1993), as support for his contention that a new sentencing hearing is warranted in this case. In *Bean*, this Court granted a new sentencing hearing after it came to light that the district court had relied on a co-defendant's testimony at trial, which he later recanted under oath, to conclude that Bean's culpability in the murder was "great" while a co-defendant's culpability was "slight." *Id*. at 190,

III.

CONCLUSION

The district court did not err by granting the State's motion for summary dismissal of Reid's post-conviction claims that the prosecutor committed a *Brady* violation and there was new evidence warranting a resentencing. The district court's order dismissing Reid's petition for post-conviction relief is affirmed.

Judge LANSING and Judge GRATTON, **CONCUR**.

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858 P.2d at 330. We agree with the State that *Bean* does not dictate the result here. In *Bean*, the context was a sworn recantation by the party who gave the false testimony at trial, a fact that was central to this Court's analysis in determining that it constituted a "material fact" warranting resentencing. *Id*. The circumstances here--the opinion statement of a noninterested party to a PSI investigator in a different case regarding the credibility of a party whose statements were introduced via transcript at sentencing--does not require such an outcome.