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IN THE SUPREME COURT OF THE STATE OF IDAHO

CURTIS EDWARD JACKSON,)
) No. 44908
 Petitioner-Appellant,)
) Bonner County Case No.
 v.) CV-2014-1795
)
 STATE OF IDAHO,)
)
 Defendant-Respondent.)
 _____)

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BONNER**

HONORABLE JEFF M. BRUDIE
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

LORI A. FLEMING
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR
DEFENDANT-RESPONDENT

CURTIS EDWARD JACKSON
IDOC #100774
I.C.I.O. Unit B-2
381 W. Hospital Dr.
Orofino, Idaho 83544

PRO SE
PETITIONER-APPELLANT

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STATEMENT OF THE CASE

Nature Of The Case

Curtis Edward Jackson appeals from the judgment and order summarily dismissing his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

The district court set forth the relevant factual and procedural background of Jackson's underlying criminal case, as follows:

Curtis Jackson was charged with three counts of Lewd Conduct with a minor under 16 on September 29, 2009. A trial was conducted from October 1-14, 2010, ending in a mistrial. A second trial was then conducted on May 9-11, 2011, which resulted in a finding of guilt on all counts. Jackson was sentenced to a term of incarceration for fifteen years to life on all counts on August 16, 2011. On September 8, 2011, Jackson filed an appeal asserting the district court erred by (1) failing to excuse a juror for cause; and (2) denying Jackson appointment of counsel to assist with a Rule 35 motion. The Idaho Court of Appeals issued its decision affirming the district court on December 10, 2013.

(R., pp.83-84 (footnotes omitted).)

Jackson filed a *pro se* post-conviction petition in October 2014. (R., pp.4-22.) The district court appointed counsel (R., pp.40-41), who thereafter filed an amended petition alleging three ineffective assistance of counsel claims (R., pp.47-50). Specifically, the amended petition alleged that Jackson's trial counsel: (1) "failed to conduct an adequate pretrial investigation"; (2) "failed to request a change of venue"; and (3) "was ineffective during voir dire." (R., p.48; see also R., pp.51-52 (Amended Affidavit of Curtis Edward Jackson in Support of Amended Petition for Post Conviction Relief).) The state answered the amended petition and moved for summary disposition on the basis that the claims in the petition were bare and conclusory and failed to make

out a *prima facie* case of ineffective assistance of counsel. (R., pp.53-54, 57-80.) The district court granted the state's motion and summarily dismissed the amended petition, concluding that Jackson failed to allege facts that, if true, demonstrated he was entitled to relief on any of his claims. (R., pp.83-90.)

Jackson timely appealed from the judgment. (R., pp.91-92, 93-95.) Although the district court appointed counsel to represent Jackson on appeal (5/12/17 Order for Appointment of State Appellate Public Defender), the Idaho Supreme Court later granted appointed counsel's motion to withdraw (10/4/17 Order Granting Motion for Leave to Withdraw). Jackson proceeds *pro se*.

ISSUE

Jackson's issue statement is set forth at pages 2-3 of his Appellant's brief and, due to its length, is not reproduced here.

The state rephrases the issue as:

Has Jackson failed to show the district court erred in summarily dismissing his post-conviction petition?

ARGUMENT

Jackson Has Failed To Show The District Court Erred In Summarily Dismissing His Petition For Post-Conviction Relief

A. Introduction

Jackson challenges the district court's order summarily dismissing his amended post-conviction petition, claiming he "provided sufficient factual information in support of [his] claims of ineffective assistance of trial counsel" to entitle him to an evidentiary hearing on those claims. (Appellant's brief, pp.14-19.) Jackson's argument fails. The district court thoroughly evaluated all of Jackson's claims and supporting evidence and correctly determined, based upon the applicable legal standards, that Jackson's petition failed to raise a genuine issue of material fact entitling him to an evidentiary hearing on any of his ineffective assistance of counsel claims.

B. Standard Of Review

On appeal from the summary dismissal of a post-conviction petition, the appellate court "will determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file and will liberally construe the facts and reasonable inferences in favor of the non-moving party." Kelly v. State, 149 Idaho 517, 521, 236 P.3d 1277, 1281 (2010).

C. The District Court Correctly Concluded Jackson Failed To Present A Genuine Issue Of Material Fact Entitling Him To An Evidentiary Hearing On Any Of His Ineffective Assistance Of Counsel Claims

A petition for post-conviction relief initiates a new and independent civil proceeding and the petitioner bears the burden of establishing, by a preponderance of the

evidence, that he is entitled to relief. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007); State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983). However, a petition for post-conviction relief differs from a complaint in an ordinary civil action. A petition must contain more than “a short and plain statement of the claim” that would suffice for a complaint. Workman, 144 Idaho at 522, 164 P.3d at 802 (referencing I.R.C.P. 8). The petitioner must submit verified facts within his personal knowledge and produce admissible evidence to support his allegations. Id. (citing I.C. § 19-4903). Furthermore, the factual showing in a post-conviction relief application must be in the form of evidence that would be admissible at an evidentiary hearing. Drapeau v. State, 103 Idaho 612, 617, 651 P.2d 546, 551 (1982); Cowger v. State, 132 Idaho 681, 684, 978 P.2d 241, 244 (Ct. App. 1999).

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief in response to a party’s motion or on the court’s own initiative. “To withstand summary dismissal, a post-conviction applicant must present evidence establishing a prima facie case as to each element of the claims upon which the applicant bears the burden of proof.” State v. Lovelace, 140 Idaho 53, 72, 90 P.3d 278, 297 (2003) (citing Pratt v. State, 134 Idaho 581, 583, 6 P.3d 831, 833 (2000)). Thus, a claim for post-conviction relief is subject to summary dismissal pursuant to I.C. § 19-4906 “if the applicant’s evidence raises no genuine issue of material fact” as to each element of petitioner’s claims. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing I.C. § 19-4906(b), (c)); Lovelace, 140 Idaho at 72, 90 P.3d at 297.

While a court must accept a petitioner’s un rebutted allegations as true, 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. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001)). If the alleged facts, even if true, would not entitle the petitioner to relief, the district court is not required to conduct an evidentiary hearing prior to dismissing the petition. Id. (citing Stuart v. State, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990)).

In order to establish a claim of ineffective assistance of counsel, a post-conviction petitioner must demonstrate both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989). With respect to the deficient performance prong, the United States Supreme Court has articulated the defendant's burden under Strickland as follows:

To establish deficient performance, a person challenging a conviction must show that counsel's representation fell below an objective standard of reasonableness. A court considering a claim of ineffective assistance must apply a strong presumption that counsel's representation was within the wide range of reasonable professional assistance. The challenger's burden is to show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.

Harrington v. Richter, 562 U.S. 86, 104 (2011) (citations and quotations omitted). To establish prejudice, a defendant must show a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Richter, 562 U.S. at 104.

"Thus, in order to survive a motion for summary dismissal, post-conviction relief claims based upon ineffective assistance of counsel must establish the existence of material issues of fact as to both *Strickland* prongs." Id.

In dismissing Jackson's post-conviction petition, the district court thoroughly evaluated all of Jackson's claims and supporting evidence and correctly determined, based upon the applicable legal standards and underlying criminal record, that Jackson failed to set forth adequate facts to raise a genuine issue of material fact entitling him to an evidentiary hearing on any of his ineffective assistance of counsel claims. (See R., pp.83-90.) The state adopts as its argument on appeal the district court's analysis, as set forth in its January 31, 2017 Opinion and Order on Motion for Summary Disposition. (R., pp.83-90.) For this Court's convenience, a copy of the district court's opinion is appended to this brief. (See Appendix A.)

CONCLUSION

The state respectfully requests that this Court affirm the judgment and the district court's order summarily dismissing Jackson's petition for post-conviction relief.

DATED this 14th day of February, 2018.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 14th day of February, 2018, served two true and correct paper copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

CURTIS EDWARD JACKSON
IDOC #100774
I.C.I.O. UNIT B-2
381 W. HOSPITAL DR.
OROFINO, ID 83544

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

LAF/dd

APPENDIX A

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BY: [Signature]

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

CURTIS EDWARD JACKSON,)
)
 Petitioner,)
)
 v.)
)
 STATE OF IDAHO,)
)
 Respondent.)

CASE NO. CV14-01795
OPINION AND ORDER
ON MOTION FOR SUMMARY
DISPOSITION

This matter is before the Court on the State's motion for summary disposition of Jackson's petition for post-conviction relief. The parties elected to proceed without a hearing. Curtis Jackson is represented by Bruce Greene. The State is represented by Bonner County Prosecuting Attorney Louis Marshall. The Court, having read the petition, affidavit, motion and briefs of the parties, having taken judicial notice of the record in the underlying criminal case,¹ and being fully advised in the matter, hereby renders its decision.

PROCEDURAL HISTORY

Curtis Jackson was charged with three counts of Lewd Conduct with a minor under 16 on September 29, 2009. A trial was conducted from October 12-14, 2010, ending in a mistrial. A second trial was then conducted on May 9-11, 2011, which resulted in a finding of guilt on all counts. Jackson was sentenced to a term of incarceration for fifteen years to life on all counts on August 16, 2011. On September 8, 2011, Jackson filed an appeal asserting the district court

¹ State v. Jackson, Bonner Co. Case number CR09-6579.

erred by (1) failing to excuse a juror for cause; and (2) denying Jackson appointment of counsel to assist with a Rule 35 motion. The Idaho Court of Appeals issued its decision affirming the district court on December 10, 2013.² Jackson filed a petition for post-conviction relief on October 31, 2014 and then a subsequent amended petition on May 15, 2015.

POST-CONVICTION RELIEF STANDARD

Under the Uniform Post-Conviction Procedure Act, a person sentenced for a crime may seek relief upon making one of the following claims:

- (1) That the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state;
- (2) That the court was without jurisdiction to impose sentence;
- (3) That the sentence exceeds the maximum authorized by law;
- (4) 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;
- (5) That his sentence has expired, his probation, or conditional release was unlawfully revoked by the court in which he was convicted, or that he is otherwise unlawfully held in custody or other restraint;
- (6) Subject to the provisions of section 19-4902(b) through (f), Idaho Code, that the petitioner is innocent of the offense; or
- (7) That the conviction or sentence is otherwise subject to collateral attack upon any ground or alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy.

I.C. § 19-4901(a).

Petitions for post-conviction relief are a special proceeding distinct from the criminal action that led to the petitioner's conviction. *Sanchez v. State*, 127 Idaho 709, 711, 905 P.2d 642, 644 (Ct. App. 1995). "A post-conviction relief petition initiates a civil, rather than criminal, proceeding." *State v. Yakovac*, 145 Idaho 437, 443, 180 P.3d 476, 482 (2008). Like plaintiffs in other civil actions, a petitioner "must prove his or her allegations by a preponderance of evidence." *Hauschulz v. State*, 144 Idaho 834, 838, 172 P.3d 1109, 1113 (2007).

² *State v. Jackson*, No. 39234, 2013 WL 6506169 (Idaho Ct. App. December 10, 2013).

However, unlike an ordinary civil action that requires only a short and plain statement of the claim, an application for post-conviction relief “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 petition.” *Fenstermaker v. State*, 128 Idaho 285, 287, 912 P.2d 653, 655 (Ct. App. 1995); I.C. § 19-4903. “The application must be supported by a statement that specifically set[s] forth the grounds upon which the application is based.” *Ridgley v. State*, 148 Idaho 671, 675, 227 P.3d 925, 929 (2010). If the application does not provide admissible evidence supporting its allegations, the application will be subject to dismissal. *State v. Payne*, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008). “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.” *Ridgley*, at 675, 227 P.3d at 929.

A petition for post-conviction relief “may be filed at any time within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal, whichever is later.” I.C. § 19-4902(a). Under I.C. § 19-4906, summary disposition of a petition for post-conviction relief may occur upon motion of a party or upon the court’s own initiative. “Summary disposition of a petition for post-conviction relief is appropriate if the [petitioner]'s evidence raises no genuine issue of material fact.” *Kelly v. State*, 149 Idaho 517, 521 236 P. 3d 1277, 1281 (2010) (internal citations omitted).

[S]ummary dismissal of a claim for post-conviction relief is appropriate when the court can conclude, as a matter of law; the petitioner is not entitled to relief even with all disputed facts construed in the petitioner's favor. For this reason, summary dismissal of a post-conviction petition may be appropriate even when the State does not controvert the petitioner's evidence.

Stevens v. State, 156 Idaho 396, 405, 327 P.3d 372, 381 (Ct. App. 2013).

ANALYSIS

In his petition, Jackson asserts that his trial counsel was ineffective by: 1) failing to conduct adequate pretrial investigation; 2) failing to request a change of venue; and 3) conducting ineffective voir dire.³ In order to prove a claim of ineffective assistance of counsel a petitioner must prove: 1) that counsel's performance was deficient; and 2) that this deficient performance prejudiced his or her case. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

Concerning the deficiency of performance component, there is a strong presumption that counsel's performance falls within the wide range of professional assistance. Accordingly, the defendant bears the burden of proof to show that counsel's representation fell below an objective standard of reasonableness. The effectiveness of counsel's performance must be evaluated from counsel's perspective at the time of the alleged error, not with hindsight.

In regard to the second element, the Supreme Court has defined prejudice as a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Prejudice is presumed in some instances, for example, where the defendant is denied counsel altogether, or where counsel represents conflicting interests. Generally, however, the defendant must affirmatively prove prejudice.

Aragon v. State, 114 Idaho 758, 760-61, 760 P.2d 1174, 1176-77 (1988) (internal citations omitted).

Strategic and tactical decisions will not be second guessed or serve as a basis for post-conviction relief under a claim of ineffective assistance of counsel unless the decision is shown to have resulted from inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review.

Dunlap v. State, 159 Idaho 280, 296, 360 P.3d 289, 305 (2015) (internal citations omitted).

[A]n applicant alleging ineffective assistance of counsel during a petition for post-conviction relief must still overcome a strong presumption that trial counsel was competent and that trial tactics were based on sound legal strategy.

Crawford v. State, 160 Idaho 586, 377 P.3d 400, 406 (2016).

³ *Amended Petition for Post-Conviction Relief*, at 2.

1. Inadequate investigation

Jackson asserts that his trial counsel did not conduct an adequate investigation. Specifically Jackson contends that a statement he made to counsel was misunderstood as a threat resulting in his counsel becoming negative or unresponsive to his inquiries. Jackson further asserts that counsel failed to adequately investigate the interview of J.R.,⁴ thereby failing to determine the investigator had used leading or coercive questions in order to coerce statements from J.R.⁵

First, assuming *arguendo* that Jackson's counsel failed to communicate with him, Jackson fails to meet his burden under *Strickland*. While an attorney's refusal to communicate with a client would demonstrate deficient performance, Jackson has not demonstrated how any alleged breakdown in communication prejudiced his case.

Further, Jackson's assertion that his counsel failed to adequately review the interview of J.R. fails to meet his burden under *Strickland*.

The duty to investigate requires only that counsel conduct a reasonable investigation. In assessing the reasonableness of counsel's investigation, we consider not only the quantum of evidence known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.

Stevens v. State, 156 Idaho 396, 412–13, 327 P.3d 372, 388–89 (Ct. App. 2013).

The record before this Court is devoid of anything which would support finding Jackson's counsel did not conduct a reasonable investigation. Jackson's conclusory allegation to the contrary is not enough to overcome the strong presumption of competency afforded to his trial counsel. Jackson has failed to raise a genuine issue of material fact, therefore the State's motion for summary disposition shall be granted as to this claim.

⁴ J.R. was the victim in this case.

⁵ *Amended Affidavit of Curtis Edward Jackson*, at 1-2.

2. Failure to request a change of venue

Jackson contends that his trial counsel should have filed a motion for a change of venue as he believes that the publicity he had received in the media would likely have prejudiced the jury. Jackson asserts that counsel was aware of his desire to request a change of venue but failed to do so.⁶

The issue of whether a change of venue should be requested is a matter of trial strategy and tactical choice, not subject to review as a claim of ineffective assistance of counsel in the absence of proof of inadequate preparation or ignorance on counsel's part.

Grant v. State, 156 Idaho 598, 606, 329 P.3d 380, 388 (Ct. App. 2014).

"Pretrial publicity alone does not result in a denial of a defendant's constitutional rights unless the publicity results in a trial that is fundamentally unfair." *Mitchell v. State*, 132 Idaho 274, 279, 971 P.2d 727, 732 (1998).

To support his claim Jackson provides only his conclusory accusation that counsel ignored his request to change venue. Even accepting this allegation as true, Jackson fails to meet his burden to show that counsel's performance was deficient as he does not argue the decision not to file not to file the change of venue was due to inadequate preparation or ignorance. Further, Jackson's assertion that the jury pool was likely exposed to pre-trial publicity is conclusory and does not meet his burden to show prejudice. As Jackson cannot meet his burden under *Strickland*, no genuine issue of material fact exists and the motion for summary disposition shall be granted as to this claim.

3. Failure to conduct effective voir dire

During voir dire Jackson's counsel moved to dismiss Juror 34 for cause. The district court denied the motion resulting in counsel using a peremptory challenge to dismiss the juror. Jackson asserts that his counsel was ineffective for failing to object to the judge denying the motion.

⁶ *Amended Affidavit*, at 2.

On appeal, Jackson was unsuccessful in convincing the Idaho Court of Appeals that the district court erred in denying the motion. In affirming the district court, The Court of Appeals held that Jackson was unable to show he was prejudiced by the district court's refusal to dismiss Juror 34 for cause.⁷ As the Court of Appeals had already found no prejudice resulting from this issue, Jackson cannot meet his burden under *Strickland* and the motion for summary disposition shall be granted as to this claim.

ORDER

IT IS HEREBY ORDERED that the State's motion for summary disposition shall be GRANTED. State of Idaho is to prepare an appropriate judgment.

Dated this 31 day of January 2017.



JEFF M. BRUDIE, District Judge

⁷ *State v. Jackson*, No. 39234, 2013 WL 6506169, at *4 (Idaho Ct. App. December 10, 2013).

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing OPINION & ORDER was:

hand delivered via court basket, or *faxed*

mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 31st day of January, 2017:

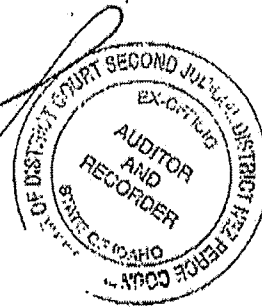
Louis E. Marshall
Bonner County Prosecuting Attorney
(FAX: 208-263-6726)

Bruce H. Greene
Attorney at Law
(FAX: 208- 265-2451)

Clerk of the Court (FAX: 888-960-4885)

PATTY O. WEEKS, CLERK

By: *[Signature]*
Deputy



STATE OF IDAHO

County of Bonner

I, Michael W. [Signature], Clerk of the District Court of the First Judicial District, do hereby certify that the foregoing instrument is a true and correct copy of the original thereof as the same appears on the records of said law. Witness my hand and the seal of said court on the 31st day of March 2017.

BONNER COUNTY CLERK

8 By: *[Signature]*

