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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

JEFFREY MARSALIS,	)	
	)	**No. 45583**
Petitioner-Appellant,	)	
	)	**Blaine County Case No.**
v.	)	**CV-2013-408**
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

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District Judge

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Nature Of The Case

Jeffrey Marsalis appeals from the summary dismissal of his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

A grand jury indicted Marsalis for raping K.G. when she was "unable to resist" due to being under the influence of either alcohol or a drug and/or when she was "unconscious of the nature of the act because she was unconscious and/or asleep and/or not aware, knowing, perceiving, or cognizant that the act occurred." (#36806 R., pp. 39-40.) A jury convicted following a trial, and his conviction was affirmed on appeal. State v. Marsalis, 151 Idaho 872, 264 P.3d 979 (Ct. App. 2011). Marsalis filed a petition for post-conviction relief, initiating the instant case. (R., pp. 18-29.) The petition was amended twice. (R., pp.193-209, 280-98.) The second amended petition included, relevant to this appeal, claims of ineffective assistance of counsel for failing to "challenge the [trial] testimony" of a state's expert regarding the blood alcohol content of the victim and Marsalis by either 1) objecting to its admissibility or 2) impeaching it with defense experts at trial (R., pp. 283-91); failing to call an allegedly favorable defense witness (R., pp. 291-93); and failing to discuss speedy trial rights under the Interstate Agreement on Detainers with Marsalis prior to Marsalis's speedy trial waiver (R., pp. 293-96).

The state filed an answer and motion to dismiss, with an accompanying memorandum and several exhibits. (R., pp. 327-91, 454-555.) Marsalis filed a response to the state's motion, with affidavits. (R., pp. 412-47, 556-73.) The district court granted

the motion for summary dismissal. (R., pp. 576-88.) Marsalis timely appealed. (R., pp. 589-92, 596.)

ISSUES

Marsalis states the issue on appeal as:

> Whether the court erred in summarily dismissing the petition for post-conviction relief based on ineffective assistance of counsel[.]

(Appellant's brief, p. 6 (capitalization altered).)

The state rephrases the issues as:

1. Has Marsalis failed to show error in the district court's summary dismissal of his claim that trial counsel was ineffective for not calling defense experts to rebut the methodology of the state's expert on the effects of intoxication?

2. Has Marsalis failed to show error in the summary dismissal of his claim that trial counsel was ineffective for failing to call a witness who stated he was not paying attention?

3. Has Marsalis failed to show error in the dismissal of his claim that trial counsel was ineffective for failing to explain his speedy trial rights under the Interstate Agreement on Detainers?

ARGUMENT

I.
Marsalis Has Failed To Show Error In The District Court's Summary Dismissal Of His Claim That Trial Counsel Was Ineffective For Not Calling Defense Experts To Rebut The Methodology Of The State's Expert On The Effects Of Intoxication

A. Introduction

Marc LeBeau, a forensic scientist with a Ph.D. in forensic toxicology and unit chief at the FBI laboratory in Quantico, Virginia, testified at trial on behalf of the prosecution. (Trial Tr., p. 634, L. 18 – p. 636, L. 13.) Trial counsel stipulated that Dr. LeBeau was an expert. (Trial Tr., p. 638, Ls. 1-9.) Dr. LeBeau testified about the general physiological effects of central nervous system depressants, including alcohol, and various scenarios of intoxication of both the victim, K.G., and Marsalis suggested by the evidence. (Trial Tr., p. 638, L. 10 – p. 676, L. 8.) Trial counsel cross-examined Dr. LeBeau about his testimony. (Trial Tr., p. 677, L. 1 – p. 706, L. 6.)

In post-conviction Marsalis alleged trial counsel was ineffective for failing to "challenge" the testimony of state's witness Dr. LeBeau. (R., pp. 283-86.) The district court found Dr. LeBeau's testimony admissible under I.R.E. 702 and 403, and therefore it was not ineffective assistance of counsel to fail to object on these bases. (R., pp. 580-82.) The district court also found counsel's performance was objectively reasonable. (R., pp. 582-83.)

On appeal Marsalis argues the district court erred, claiming that Dr. LeBeau's testimony was not admissible because the formulas used by Dr. LeBeau were not scientifically reliable under the facts of this case. (Appellant's brief, pp. 20-24.) He also argues that the proposed defense witnesses would have helped the defense, and thus the district court erred by dismissing the claim trial counsel was ineffective for not calling

defense experts. (R., pp. 24-27.) Applying the relevant law to the record shows that the claims were properly summarily dismissed because Marsalis failed to present a *prima facie* claim of ineffective assistance of counsel.

B. Standard Of Review

"On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of material fact exists based on the pleadings, depositions and admissions together with any affidavits on file." Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007).

C. Marsalis Has Shown No Error In The Summary Dismissal Of His Claim That Trial Counsel Was Ineffective In Relation To The Testimony Of Dr. LeBeau

Post-conviction proceedings are governed by the Uniform Post-Conviction Procedure Act. I.C. § 19-4901, *et seq*. A petition for post-conviction relief initiates a new and independent civil proceeding in which the petitioner bears the burden of establishing that he is entitled to relief. Workman, 144 Idaho at 522, 164 P.3d at 802; State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983).

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, 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." Berg v. State, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998). Until controverted by the state, allegations in a verified post-conviction application are, for purposes of determining whether to hold an evidentiary hearing, deemed true. Cooper v. State, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975). However, 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. Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001); Roman v. State, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994). Further, allegations contained in a post-conviction petition are insufficient for granting relief when they are clearly disproved by the record of the original proceeding or do not justify relief as a matter of law. Workman, 144 Idaho at 522, 164 P.3d at 802; Charboneau v. State, 144 Idaho 900, 903, 174 P.3d 870, 873 (2007).

A post-conviction petitioner alleging ineffective assistance of counsel 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). 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. An attorney's performance is not constitutionally deficient unless it falls below an objective standard of reasonableness, and there is a strong presumption that counsel's conduct is within the wide range of reasonable professional assistance. Gibson v. State, 110 Idaho 631, 634, 718 P.2d 283, 286 (1986); Davis v. State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989). 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. Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988); Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 245 (Ct. App. 1999).

Application of these principles to the record shows no material issue of fact related to trial counsel's actions in challenging the testimony of Dr. LeBeau. To the contrary,

Marsalis failed to present a *prima facie* claim that Dr. LeBeau's testimony was inadmissible, that counsel's performance was deficient for not finding and calling defense experts to testify about issues addressed by Dr. LeBeau's testimony, or that Marsalis was prejudiced by counsel's tactical decisions.[1]

1. Counsel Was Not Ineffective For Failing To Object To Dr. LeBeau's Testimony Because The Testimony Was Admissible

A claim that counsel should have made a particular motion is properly rejected on both prongs of the Strickland test if the motion would have been denied by the trial court. Sanchez v. State, 127 Idaho 709, 713, 905 P.2d 642, 646 (Ct. App. 1995). Expert testimony is admissible if it "assist[s] the trier of fact to understand the evidence or to determine a fact in issue." State v. Joslin, 145 Idaho 75, 81, 175 P.3d 764, 770 (2007) (quotations omitted); see also I.R.E. 702. "The function of the expert is to provide testimony on subjects that are beyond the common sense, experience and education of the average juror." State v. Arrasmith, 132 Idaho 33, 42, 966 P.2d 33, 42 (Ct. App. 1998) (citations omitted). A witness may be "qualified as an expert by knowledge, skill, experience, training, or education." I.R.E. 702. "The determination of whether expert testimony will assist the trier of fact lies within the broad discretion of the trial court." State v. Parton, 154 Idaho 558, 563, 300 P.3d 1046, 1051 (2013) (quoting Kuhn v. Coldwell Banker Landmark, Inc.,

[1] Despite finding that "the defendant would not have been in a materially different position had defense counsel presented another expert," the district court declined to "reach" the prejudice prong because of its ruling on the deficient performance prong. (R., pp. 582-833.) "Because this Court employs the same standards on appellate review that the trial court applies in considering summary dismissal of a petition for post-conviction relief," the Court may affirm summary dismissal of a petition for post-conviction relief on any basis presented to the lower court. Ridgley v. State, 148 Idaho 671, 676, 227 P.3d 925, 930 (2010). Thus, the state will argue on appeal that Marsalis's claim of ineffective assistance of counsel also fails on the prejudice prong.

150 Idaho 240, 252, 245 P.3d 992, 1004 (2010)). Marsalis has failed to show that the district court abused its discretion in holding that Dr. LeBeau's testimony was admissible expert opinion, and has therefore failed to show he presented a *prima facie* claim of ineffective assistance of counsel by not objecting to its admissibility.

The evidence at trial was that on the night in question Marsalis bought 10 Corona beers, 10 Bud Light beers, and four shots of liquor (Kamikazes), which he shared with K.G. (Trial Tr., p. 417, L. 13 – p. 427, L. 9.) Marsalis drank the Corona beers, K.G. drank the Bud light beers, and they each drank Kamikazes. (Trial Tr., p. 427, L. 1 – p. 428, L. 13.) K.G. also ordered some drinks on her own, which she paid cash for. (Trial Tr., p. 428, Ls. 1-4.)

Dr. LeBeau testified that with certain information it is possible to formulate an estimate of a person's blood alcohol concentration by using a Widmark calculation, which is a method accepted in the scientific community. (Trial Tr., p. 653, L. 10 – p. 655, L. 12.) Based on the estimate of blood alcohol concentration, it is possible to determine what effects the alcohol would have on an average person based on a scale developed in studies by Kurt Dubowski. (Trial Tr., p. 655, L. 22 – p. 666, L. 13.) Using the factors shown by the evidence (primarily K.G.'s height, weight, and sex, and her having drunk 11 Bud Lights and two Kamikaze shots over four hours) Dr. LeBeau did a Widmark calculation estimating K.G.'s blood alcohol concentration reached .28 percent (within a range based on experience with drinking). (Trial Tr., p. 669, L. 21 – p. 670, L. 21.) Based on the Dubowski scale the symptoms of such a blood alcohol concentration would have been "severe," such as inability to walk or stand on her own, vomiting, potential incontinence, and semi-consciousness or unconsciousness. (Trial Tr., p. 670, L. 22 – p. 671, L. 10.) Dr. LeBeau

did a similar analysis of Marsalis, and concluded he would have been less affected by the alcohol he drank. (Trial Tr., p. 671, L. 11 – p. 673, L. 11.[2]) Dr. LeBeau also testified how his analysis was consistent with witness observations of K.G.'s demeanor and behavior that night, as well as K.G.'s recollection (or lack thereof) of events. (Trial Tr., p. 673, L. 12 – p. 676, L. 6.)

Given this foundation, the district court did not err in concluding that Dr. LeBeau's testimony would not have been excluded under I.R.E. 702. Indeed, Marsalis does not argue that the foundation offered at trial was insufficient for admission of the testimony. Because the evidence presented at trial was sufficient foundation for admission, and Marsalis does not argue otherwise, the district court's determination that there was no showing of ineffective assistance of counsel for not objecting to the admission of Dr. LeBeau's testimony must be affirmed.

2. Trial Counsel Was Not Ineffective For Failing To Secure Defense Experts

As noted, Marsalis does not argue on appeal that counsel was ineffective for failing to object to Dr. LeBeau's trial testimony based on the foundation laid at trial. Rather, Marsalis argues that the opinions provided by potential defense experts in post-conviction demonstrate that Dr. LeBeau's testimony was too speculative to be admissible. (Appellant's brief, pp. 22-24.) Alternatively, he argues that the testimony of these experts

[2] Using this same technique Dr. LeBeau estimated Marsalis's BAC at about .16, which would put him in the "excitement" category characterized by "loss of critical judgment," "[e]motional instability" (unexplained crying or anger), "[i]mpairment of perception" and some memory, and "more severe" impairment of motor coordination. (Trial Tr., p. 663, L. 14 – p. 664, L. 9; p. 671, L. 12 – p. 672, L. 23.)

should have been presented at trial to undercut the testimony of Dr. LeBeau. (Appellant's brief, pp. 24-27.) Neither of these claims has merit.

The decision to call a witness falls within the category of trial counsel's strategic or tactical decisions and will generally not be second-guessed. Rodgers v. State, 129 Idaho 720, 724, 932 P.2d 348, 352 (1997). Thus, to prevail on a claim that trial counsel was ineffective in failing to call a specific witness, a petitioner is required to present facts, supported by admissible evidence, to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland v. Washington, 466 U.S. 668, 689 (1984) (citation omitted). "[I]n order to succeed on an ineffective assistance of counsel claim based on counsel's failure to procure an expert witness, the accused must assert *facts* that would have been discovered by additional investigation and should offer expert testimony that would have been produced" if the expert had been hired. Aeschliman v. State, 132 Idaho 397, 405, 973 P.2d 749, 757 (Ct. App. 1999) (emphasis in original, citation and quotation omitted). Additionally, the petitioner must show that the decision not to call a witness was the result of an objective shortcoming such as inadequate preparation. Campbell v. State, 130 Idaho 546, 548, 944 P.2d 143, 145 (Ct. App. 1997).

These standards were applied to a claim of ineffective assistance of counsel for not calling a defense expert on the fallibility of eyewitness identification testimony in State v. Payne, 146 Idaho 548, 563, 199 P.3d 123, 138 (2008). The Court pointed out that the "decision of what witnesses to call is an area where we will not second guess counsel without evidence of inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation." Id. (internal quotation and citation

omitted). Because Payne did not rebut the "presumption that counsel's performance fell within the acceptable range of professional assistance" with "evidence which suggests that this decision resulted from inadequate preparation, ignorance or other shortcomings" his allegation could not "lead to a successful post-conviction claim." Id.

As pointed out by the district court, trial counsel chose to address potential weaknesses in Dr. LeBeau's methodology through cross-examination. (R., p. 582.) He elicited testimony indicating that the victim's vomiting could have been the result of mixing beer and hard liquor rather than being drunk to the point of blacking out. (R., p. 582.) He further elicited testimony that "the Widmark formula and Dubowski chart are not exact measurements." (R., p. 582.) Moreover, "the defendant would not have been in a materially different position had defense counsel presented another expert." (R., p. 582.) Given these circumstances, the district court found Marsalis had failed to present a sufficient claim that trial counsel's "performance was objectively unreasonable." (R., p. 583.) Because the record does not show that counsel's choice to address Dr. LeBeau's testimony through cross-examination was the result of inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation, and because there is no evidence of prejudice, the district court correctly concluded that Marsalis had not presented a viable claim of ineffective assistance of counsel.

Marsalis's appellate counsel accuses the district court of failing to "actually address Petitioner's allegations" and "ignor[ing] the evidence produced by Petitioner." (Appellant's brief, p. 22.) It is counsel, however, who is ignoring the district court's ruling. The district court held there is no evidence of an objective shortcoming by trial counsel in his choice to address Dr. LeBeau's testimony through cross-examination rather than

competing experts. (R., p. 583.) Marsalis points to no such evidence in the record, such as evidence that counsel was unaware that he could have obtained experts, or that he inadequately prepared for cross-examination, or any other evidence of an objective shortcoming. He merely argues that because experts were available to the defense, trial counsel was ineffective for not obtaining and presenting their testimony both in moving to exclude Dr. LeBeau's testimony and at trial. (Appellant's brief, pp. 22-27.) As in Payne, Marsalis cannot show a *prima facie* claim of deficient performance merely by pointing out that favorable experts were available. 146 Idaho at 563, 199 P.3d at 138.

3. Marsalis Has Failed To Show Error In The District Court's Determination That He Failed To Show Prejudice

This Court may also affirm on the basis that Marsalis had failed to show a viable claim of prejudice.[3] First, had Marsalis called the proposed experts to support a motion *in limine* the motion would have failed.[4] Second, because the proposed defense experts would

[3] See footnote 1, *supra*.

[4] The standard for admission of expert testimony is as follows:

> The admissibility of expert testimony is governed by I.R.E. 702, which provides that an expert witness may testify and offer opinions regarding specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact in issue. To be admissible, the information, theory or methodology upon which the expert's opinion is based need not be commonly agreed upon by experts in the field, but it must have sufficient indicia of reliability to meet I.R.E. 702 requirements. Expert testimony which is speculative, conclusory, or unsubstantiated by facts in the record is of no assistance to the trier of fact and as such, is inadmissible. *However, the fact that a party disagrees with an opposing party's expert, or the means by which the expert reached his or her conclusion, does not necessarily mean that the expert's opinion is inadmissible.* Because expert testimony is introduced to assist the trier of fact, the task of weighing an expert's testimony is dedicated to the trier of fact.

Pocatello Hosp., LLC v. Quail Ridge Med. Inv'r, LLC, 156 Idaho 709, 715, 330 P.3d 1067, 1073 (2014) (internal quotations, citations and brackets omitted, emphasis added).

only have impeached Dr. LeBeau's methodology, but not his conclusions, and because his conclusions are otherwise supported by the evidence, Marsalis did not show a likelihood that presenting the proposed experts would have affected the outcome of the trial.

Dr. Anstine, a professor of chemistry, would have testified for the defense that the Widmark formula is "generally accepted in BAC estimations" and "gives very precise calculations" but "does not automatically lead to accurate values" because individuals are "unique" and there are "a multitude of physiological and biochemical variables" that could affect BAC. (R., p. 433.) Variables that could affect the result include body mass index, dehydration, altitude, body temperature, time of day, and regularity of alcohol consumption. (R., p. 435.) He stated that "extreme caution must be used when the subjective results of a hypothetical if not arbitrary range of values from a Widmark calculation are generated." (R., p. 435.) Related to the Widmark calculation, "good scientific practice" is to "look at multiple overlapping" techniques such as breath or blood testing. (R., p. 437.)

As to the Dubowski chart, Dr. Anstine would have testified that "[g]reat caution must be used in assessing a [sic] individuals [sic] 'stage of alcoholic influence,' as each individual is very [sic] unique and how different individuals are affected by alcohol has enormous ranges of influence." (R., p. 436.) He recommended using the chart in conjunction with "eye-witness accounts along with any available video or audio files of the individual." (R., p. 437.)

Dr. Anstine concluded that in the absence of BAC test results or video or audio evidence of the state of intoxication Dr. LeBeau's conclusions were "complete speculation" and that "[s]cientifically, there is no way to know either of their levels of

intoxication with any accuracy or certainty." (R., p. 438.) Dr. Anstine did not explain how, after stating that eyewitness accounts of a person's state of intoxication were appropriate to use in conjunction with the Dubowski chart, Dr. LeBeau's use of eyewitness accounts of K.G.'s intoxication was improper.

Dr. Fromme, a professor of clinical psychology, would have testified that K.G.'s description of events was "consistent with the experience of alcohol-induced blackouts." (R., pp. 439-41.) Such blackouts "involve primarily anterograde amnesia, meaning memory loss for events occurring after alcohol intake." (R., p. 442.) K.G. suffered from both "[f]ragmentary blackouts" and an "en bloc blackout." (R., pp. 442-43.) "While in a blackout, a person is able to engage in a range of complex activities, such as carrying on a conversation, driving, or having sexual intercourse, but they are simply not forming memories for those events" and "their actions may be seen as conscious and volitional to an observer." (R., p. 442.) She further stated that "there is no basis for the specific signs and symptoms associated with the BAC levels in the Dubowski chart" and "the BAC levels in each category are so large that they are not useful for any given person." (R., p. 444.) She concluded that "a complete scientific evaluation of the role of alcohol intoxication and alcohol-induced blackouts was not presented at the trial." (R., p. 444.)

The primary points made by the proposed defense experts were: the accuracy of the Widmark calculation is limited because of the many possible variables involved; the usefulness of the Dubowski chart is either limited or non-existent because of the many different ways alcohol may affect an individual; and because alcoholic blackout is anterograde amnesia, it does not necessarily indicate incapacity. Dr. LeBeau testified to

these limitations on the Widmark calculation and the Dubowski chart and about anterograde amnesia.

First, Dr. LeBeau testified that the Widmark calculation of BAC is an estimate, based on many variables. (Trial Tr., p. 653, L. 10 – p. 655, L. 12; p. 661, L. 11 – p. 662, L. 1; p. 666, L. 7 – p. 667, L. 7; p. 669, L. 21 – p. 670, L. 21; p. 677, L. 13 – p. 681, L. 25; p. 683, L. 17 – p. 686, L. 3; p. 688, L. 24 – p. 691, L. 2; p. 693, L. 2 – p. 697, L. 5; p. 706, Ls. 17-25.) Dr. LeBeau specifically testified the Widmark calculation was "an estimate," "not an absolute," and "[t]here's some error associated with it" (Trial Tr., p. 654, Ls. 20-22); that the many factors that affect BAC include physiological, the type of drink, the size of the drinks, dehydration and even altitude (Trial Tr., p. 661, L. 11 – p. 662, L. 1; see also p. 684, L. 3 – p. 685, L. 14); and that more accurate information would lead to a more accurate calculation (Trial Tr., p. 678, L. 25 – p. 679, L. 5; p. 685, L. 15 – p. 686, L. 3). In making the estimate for K.G. on the night in question the factors included height, weight, food consumption, and the type and amounts of drinks she had. (Trial Tr., p. 669, L. 21 – p. 671, L. 4.) The only significant difference between the state's expert and the proposed defense experts on the Widmark calculation is that the defense expert concluded that Dr. LeBeau "relied too heavily" on the Widmark formula because there was "no way to know" K.G.'s level of intoxication "with any accuracy or certainty." (R., p. 438.) Dr. Anstine did not otherwise dispute application of the Widmark formula, such as by claiming that K.G. would have had a lower BAC on the night in question. That Dr. Anstine believes the state relied too much on it does not show use of the Widmark formula inadmissible, nor does it meaningfully diminish the strength of the state's case.

Second, Dr. LeBeau testified about the Dubowski chart of symptoms associated with different BAC levels, which arose from controlled experiments correlating symptoms of intoxication to BAC levels. (Trial Tr., p. 655, L. 22 – p. 659, L. 24; p. 662, L. 14 – p. 666, L. 6; p. 670, L. 22 – p. 671, L. 10.) He testified that observations of witnesses who saw K.G. that night were consistent with those symptoms. (Trial Tr., p. 673, L. 18 – p. 676, L. 1. See also Trial Tr., p. 706, Ls. 17-25 (calculation was for a "general purpose" of determining what "the highest alcohol concentration that, potentially, could have been reached" and to help determine whether that BAC corresponds to the "symptoms" K.G. suffered that night). Dr. Anstine generally would have testified about the limitations of the Dubowski chart. (R., pp. 435-36.) His testimony is not inconsistent with Dr. LeBeau's. Dr. Fromme, the clinical psychology professor, would have testified not only to the limitations of the chart based on individual variability, but would have testified she was not "able to find any scientific basis for the signs and symptoms attributed to the categories of BAC in the Dubowski chart." (R., p. 444.) She does not explain why controlled experiments in correlating symptoms to BAC would lack a scientific basis. Again, the defense experts do not reach different conclusions about K.G.'s intoxication or capacity, but only attack whether her BAC and the symptoms of her intoxication may be accurately quantified. These differences do not make Dr., LeBeau's testimony inadmissible, nor do they meaningfully diminish the strength of the state's case.

The only proposed testimony that does not just attempt to impeach Dr. LeBeau, but arguably is relevant to the facts of the case, is Dr. Fromme's testimony about alcohol-induced blackouts. Specifically, she would have testified that K.G.'s statements were "consistent with the experience of alcohol-induced blackouts," which are "primarily

anterograde amnesia, meaning memory loss for events occurring after alcohol intake," and that having that loss of memory does not mean that "other cognitive abilities are necessarily impaired." (R., pp. 441-43.) Thus, the actions of a person in a blackout "may be seen as conscious and volitional to an observer." (R., p. 442.) This evidence, however, was entirely consistent with Dr. LeBeau's testimony. (Trial Tr., p. 642, L. 3 – p. 643, L. 22.) More importantly, the state presented evidence of eyewitnesses that K.G. was in fact semiconscious or unconscious immediately prior to the rape. (Trial Tr., p. 458, L. 21 – p. 479, L. 21.) Dr. Fromme's testimony that blackouts do not "necessarily" mean that a person has a loss of consciousness would ultimately not have assisted the defense.

4. Conclusion

Marsalis presented the affidavits of two experts willing to testify that, because of the wide number of variables, the state's expert's opinion based on formulating a BAC from evidence of the circumstances of the night, and then extrapolating symptoms related to that level of intoxication, was not reliable. The mere fact that such testimony was available did not show an objective shortcoming such as ignorance or lack of preparation by trial counsel. Moreover, the evidence merely impeached the state's expert by presenting different opinions on the scientific reliability of the expert's methodology, but did not actually undercut any of the evidence showing that K.G. was too intoxicated to consent to sexual intercourse. Marsalis failed to show a *prima facie* claim of either deficient performance or prejudice.

II.
Marsalis Has Shown No Error In The Summary Dismissal Of His Claim Trial Counsel Was Ineffective For Failing To Call A Witness Who Stated He Was Not Paying Attention

A. Introduction

Marsalis presented a transcript of an interview with John Hampton. (R., pp. 305-10.) Hampton stated that he did not observe Marsalis force K.G. into or out of the cab. (R., pp. 306-10.) He did not see Marsalis supporting K.G., but acknowledged he was not paying attention to that. (R., p. 308.) Marsalis alleged it was ineffective assistance of trial counsel to not call Hampton. (R., pp. 291-93.)

The district court found no deficient performance in the decision to not call a "witness who wasn't paying attention and had been drinking that night" and therefore Marsalis had presented "no issue of material fact" on the claim. (R., pp. 583-84.) On appeal Marsalis falsely claims the district court was making a "credibility determination," asserts that the court had to specifically reference the affidavit of his expert attorney, and rightly points out that the court could just as easily have found no prejudice. (Appellant's brief, pp. 30-31.) This "argument" is not cogent and must be rejected. Even though Marsalis makes no attempt to apply or to ask this Court to apply the correct legal standards, such application shows no error.

B. Standard Of Review

"On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of material fact exists based on the pleadings, depositions and admissions together with any affidavits on file." Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007).

C. It Was Not Ineffective Assistance Of Counsel To Decline To Call A Witness Who Admitted He Was Not Paying Attention

A claim of error is waived on appeal "if not supported by any cogent argument or authority in [the] opening brief." State v. Baxter, 163 Idaho 231, 235 n.4, 409 P.3d 811, 815 n.4 (2018) (quotations omitted). See also State v. Wharton, 162 Idaho 666, 671, 402 P.3d 1119, 1124 (Ct. App. 2017) ("A party waives an issue on appeal if either authority or argument is lacking."). Marsalis's "argument" has no known connection with the applicable law and is therefore not cogent. He has not shown from the record that the district court made any sort of credibility analysis that should have been reserved for an evidentiary hearing. He has cited no authority for the proposition that a court may not consider the potential credibility of a witness in evaluating the effectiveness of defense counsel in choosing to not call that witness. In short, Marsalis's claim of error is not supported by cogent argument.

If Marsalis's complete failure to present argument based on relevant law is overlooked, application of the correct legal standards shows no error. The decision to call a witness falls within the category of trial counsel's strategic or tactical decisions and will generally not be second-guessed. Rodgers v. State, 129 Idaho 720, 724, 932 P.2d 348, 352 (1997). To overcome the presumption that tactical decisions are reasonable, the petitioner must show that the decision not to call a witness was the result of an objective shortcoming such as inadequate preparation. Campbell v. State, 130 Idaho 546, 548, 944 P.2d 143, 145 (Ct. App. 1997). Here there is no evidence of inadequate preparation or any other objective shortcoming. As noted by the district court, it was reasonable to not call a witness who

would testify that, even though he did not see that K.G. needed help to stand, he had been drinking and was not paying attention.[5] Marsalis has failed to show error.

III.
Marsalis Has Shown No Material Issue Of Fact Related To His Claim Counsel Was Ineffective For Failing To Discuss The Speedy Trial Requirement Of The Interstate Agreement On Detainers

A. Introduction

Marsalis claimed that his counsel was ineffective for not discussing with him the 120-day speedy trial limitation applicable under the Interstate Agreement on Detainers ("IAD") prior to his waiver of speedy trial. (R., pp. 293-96.) The prosecutor argued that stipulations to continue the trial to address new DNA evidence and for a change of venue were the reason for the speedy trial waiver, and that the record in the underlying criminal case showed Marsalis concurred with delaying the trial for those reasons. (R., pp. 465-67, 522-55.) The district court concluded that trial counsel reasonably requested a continuance, and that the requested continuance was good cause to not try Marsalis within the speedy trial time even without the waiver. (R., pp. 584-87.)

On appeal Marsalis argues that he had no notice of the district court's basis for dismissing this claim. (Appellant's brief, pp. 38-40.) He also argues the district court erred on the merits. (R., pp. 41-42.) He also argues he was prejudiced. (R., pp. 42-45.) None of Marsalis's arguments withstands analysis.

[5] Appellate counsel argues Mr. Hampton might not have been paying attention because "there was nothing to pay attention to." (Appellant's brief, p. 30.) Counsel's evidence-free speculation falls far short of showing a material issue of fact.

B. Standard Of Review

"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. Over questions of law, we exercise free review." Roberts v. State, 163 Idaho 660, 662, 417 P.3d 986, 988 (Ct. App. 2018) (citations omitted).

C. Marsalis Has Failed To Show Error In The District Court's Summary Dismissal Of His Claim Counsel Was Ineffective For Failing To Discuss The Interstate Agreement On Detainer's Speedy Trial Statute With Him

"To survive summary dismissal of an ineffective assistance of counsel claim, [the petitioner] must show a material issue of fact exists with respect to both deficient performance and prejudice." State v. Hall, 163 Idaho 744, 815, 419 P.3d 1042, 1113 (2018). Here Marsalis showed no material issue of fact as to either.

The relevant speedy trial provision of the Interstate Agreement on Detainers ("IAD") provides that "trial shall be commenced within one hundred twenty (120) days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance." I.C. § 19-5001(d)(3). The record of the underlying criminal case shows that prior to the 120-day limitation period running, the parties stipulated to a change of venue and to continue the trial. (R., pp. 524-49.) In conjunction with this continuance Marsalis executed a speedy trial waiver of both his constitutional and statutory speedy trial rights. (R., p. 550.)

In rejecting Marsalis's claim that counsel was ineffective for allegedly failing to fully explain the IAD speedy trial rights, the district court reasoned that because

"[s]cheduling is not a fundamental right," and therefore scheduling decisions are left to the discretion of defense counsel and need not be knowingly waived, there was "no error" by counsel in requesting a continuance. (R., pp. 584-85.) "Moreover, even though 'good cause' did not need to be shown because of the agreement, there was good cause shown on the record. Therefore, defense counsel effectively, but properly, waived the plaintiff's right to trial within 120 days." (R., p. 585.) In addition, the court found no prejudice because the 120-day speedy trial right granted by the IAD was not intended to preserve the fairness of trial, the venue change and continuance were designed to enhance the fairness of the trial, and therefore there was no evidence that the outcome of the trial would have been different but for counsel's alleged deficiency. (R., pp. 585-87.)

The district court was correct on both prongs of the ineffective assistance of counsel standard. Marsalis has cited no law indicating that, even had he wanted to exercise his right to a trial within 120 days, the IAD gave him the right to override his counsel's tactical decision to seek a change of venue and a continuance to prepare to meet DNA evidence at trial. Moreover, his waiver was not required where, as the district court found here, there was good cause to continue the trial for a change of venue and to address new DNA evidence. Even accepting his allegation that counsel failed to inform him of speedy trial rights specifically granted by the IAD, such was insufficient to show either deficient performance or prejudice.

Marsalis first argues that the district court granted summary dismissal on a theory different than presented in the summary dismissal motion, and therefore he lacked notice. (Appellant's brief, pp. 38-40.) If a trial court dismisses a claim based upon grounds other than those offered by the State's motion for summary dismissal and accompanying

memoranda, "the defendant seeking post-conviction relief must be provided with a 20–day notice period." Kelly v. State, 149 Idaho 517, 523, 236 P.3d 1277, 1283 (2010). However, "[w]hen a trial court summarily dismisses an application for post-conviction relief based *in part* on the arguments presented by the State, this is sufficient to meet the notice requirements." Id. (emphasis original). "In determining whether the State provided adequate notice as to grounds upon which summary dismissal is sought or whether a genuine issue of material fact exists, the Court will not confine its review to discrete portions of relevant documents but will review all of the pleadings, depositions and admissions together with any affidavit on file." Takhsilov v. State, 161 Idaho 669, 673, 389 P.3d 955, 959 (2016) (internal quotations omitted). Review shows that the district court's dismissal was based on the state's arguments.

In support of its motion for summary dismissal the state argued that the record of the underlying criminal proceedings established "multiple reasons for the continuance which, in fact, were in the interests of the Petitioner." (R., p. 466.) Specifically, counsel stipulated to a continuance based on new DNA evidence and for a change of venue based on local media coverage before securing Marsalis's waiver of speedy trial rights. (R., pp. 465-66.) "Even if Petitioner was erroneously given information that speedy trial was 180 days versus 120 days from the time he was brought back to Idaho, Petitioner waived these rights to take advantage of receiving additional discovery materials including a DNA semen blood match and the favorable change of venue." (R., p. 467.) Thus there was no ineffective assistance of counsel. (R., p. 467.) Moreover, the defense "would have been at a disadvantage" by proceeding to trial within 120 days and without a change in venue. (R., p. 467.)

The state's argument was specifically based on the fact that trial counsel, prior to securing the speedy trial waiver, sought and obtained a stipulation for a change of venue and for a continuance. Although the state never specifically argued that counsel's decision to get a continuance and a change of venue rendered whether the waiver was knowing a nullity, such is implicit in both the state's argument and the district court's analysis.

Because neither the state nor the district court took the position that securing a waiver of IAD speedy trial rights without adequate explanation of those rights was not deficient performance, both addressed their analysis to the prejudice prong. The state argued that because the underlying reason for the waiver was to secure the tactical advantages of a change of venue and a continuance for trial preparation, the waiver would have been entered even if counsel had provided a more detailed or accurate explanation of the IAD speedy trial rights. This district court's analysis on this first argument is slightly, but not materially, different: rather than showing Marsalis would have waived anyway, counsel's decision to pursue a venue change and continuance showed that the waiver was unnecessary. The state also argued that trying the case within 120 days would have put the defense at a greater disadvantage. The court's analysis of this second argument, that a trial within 120 days without a change of venue was unlikely to produce a different result than the trial that in fact happened, is the same.

Marsalis was put on notice that counsel's actions in seeking a continuance and a change of venue disproved his claim of ineffective assistance of counsel. The slight variance between the state's analysis of that issue and the court's analysis of that issue did not deprive Marsalis of adequate notice. Furthermore, Marsalis was given adequate notice on the second ground for finding no prejudice—that a trial held within 120 days was not

more likely to produce a different outcome than the trial in fact held. Marsalis's argument that he lacked notice of the grounds for dismissal is without merit.

Moreover, the dismissal was proper under the state's theory even if differentiated from the court's analysis. The record shows that Marsalis waived all his constitutional and statutory speedy trial rights in order to secure a continuance and change of venue. The only legal difference between the constitutional, statutory, and IAD speedy trial rights is the time (120 days vs. 180 days, vs. an indefinite time of at least a year). Marsalis presented no evidence that had counsel in fact specifically addressed the IAD speedy trial rights with him he would have insisted on a trial within 120 days. Likewise, he presented no evidence of a reasonable probability that the outcome of a trial held within 120 days and without a change of venue would have been different than the results of the trial that in fact occurred.

The state argued, and the district court ultimately concluded, that counsel's alleged failure to specifically discuss the IAD speedy trial rights prejudiced Marsalis. Counsel elected to seek a continuance to respond to new DNA evidence and to change venue. That decision would have resulted in a continuance past the 120-day limitation period either because the waiver would still have been entered or because it would not ultimately have mattered. In addition, a trial within 120 days was not more likely to produce a different result than the one in fact held. Marsalis failed to allege a viable claim of prejudice from his allegation of deficient performance.

CONCLUSION

The state respectfully requests this Court to affirm the district court's summary dismissal of Marsalis's petition for post-conviction relief.

DATED this 3rd day of December, 2018.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 3rd day of December, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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KKJ/dd