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IN THE SUPREME COURT OF THE STATE OF IDAHO

JIMMIE O'NEAL,)
) **No. 46239**
 Petitioner-Appellant,)
) **Gooding County Case No.**
 v.) **CV24-2018-216**
)
 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 GOODING**

HONORABLE ERIC J. WILDMAN
District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Jimmie O'Neal appeals from the summary dismissal of his petition for post-conviction relief. On appeal he challenges both the dismissal and the denial of counsel.

Statement Of The Facts And Course Of The Proceedings

O'Neal shot his son-in-law to death in the course of a family dispute. (#45172 PSI, pp. 4-8.) He pled guilty to manslaughter, the district court imposed a sentence of 12 years with six years determinate, and the Idaho Court of Appeals affirmed the sentence on appeal. (R., pp. 82-83.) O'Neal initiated the present case by filing a petition for post-conviction relief. (R., pp. 5-15.) In his petition he alleged trial counsel did not inform him "that he did not have to speak with the PSI Investigator" and that he was not "allowed a MRI or told he could obtain one at the Countys Expense to see if his Heart Attack had any effect on the way he processed thought and actions, let alone Gray Matter Ostruction." (R., p. 12 (verbatim).) He also stated he was moving for a "confidential neuropsychological examination at public expense." (R., p. 13 (capitalization and underlining omitted).) O'Neal also requested appointment of counsel. (R., pp. 19-21.)

The district court filed a notice of intent to dismiss the petition and denial of appointment of counsel. (R., pp. 82-88.) O'Neal responded. (R., pp. 90-98.) In his response he asserted that it would be in the best interests of all for him to have an MRI to determine "how much if any brain damage was done from the result of a prior major heart attack." (R., p. 91 (capitalization omitted).) The district court thereafter dismissed the petition. (R., pp. 100, 102.) O'Neal appealed. (R., pp. 104-07.)

ISSUES

O'Neal states the issues on appeal as:

- I. Did the district court err in denying Mr. O'Neal's motion for appointment of post-conviction counsel?
- II. Did the district court err in summarily dismissing Mr. O'Neal's Petition for Post-Conviction Relief?

(Appellant's brief, p. 5.)

The state rephrases the issue as:

Has O'Neal failed to show error in the denial of his motion for counsel and summary dismissal of his petition because his pleadings did not show the possibility of a valid claim?

ARGUMENT

O’Neal Has Failed To Show Error In The Denial Of His Motion For Counsel And Summary Dismissal Of His Petition Because His Pleadings Did Not Show The Possibility Of A Valid Claim

A. Introduction

The district court, in denying the motion for appointment of counsel and summarily dismissing the petition, concluded that O’Neal’s claims were frivolous. (R., pp. 86-88.) The district court stated that O’Neal did not allege how “the outcome of proceeding would have been different” if the Court had ordered an MRI or neuropsychological examination, did not allege “that he has a mental condition” other than what was addressed at sentencing, and “merely asserts that the Court failed to order an evaluation to determine whether or not he had a mental condition that would affect his behavior.” (R., p. 86.) On appeal O’Neal argues not only that his claims were not frivolous, but that he established *prima facie* claims meriting an evidentiary hearing. (Appellant’s brief, pp. 6-25.¹) Review of the record and application of the relevant legal standards, however, shows that O’Neal’s claims are frivolous, and therefore the district court erred neither by denying the motion for appointment of counsel nor by summarily dismissing the petition.

B. Standard Of Review

“The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court.” Green v. State, 160 Idaho 657, 658, 377 P.3d 1120, 1121 (Ct. App. 2016). “Although the appointment of counsel is discretionary, counsel ‘should’

¹ Because O’Neal addresses only the claims related to the requested MRI and neuropsychological evaluation in his brief (Appellant’s brief, pp. 6-25), the state will likewise address those two claims.

be appointed when there is the possibility of a valid claim; failure to do so is an abuse of discretion.” Andrus v. State, ___ Idaho ___, 433 P.3d 665, 669 (Ct. App. 2019).

C. O’Neal’s Claims Regarding An MRI And Neuropsychological Evaluation Are Frivolous Because He Was Not Entitled To Such Evaluations At State Expense Merely Because He Suspects His Heart Attack Damaged His Brain

“The standard for determining whether to appoint counsel for an indigent petitioner in a post-conviction proceeding is whether the petition alleges facts showing the possibility of a valid claim.” Shackelford v. State, 160 Idaho 317, 325, 372 P.3d 372, 380 (2016) (quoting Murphy v. State, 156 Idaho 389, 393, 327 P.3d 365, 369 (2014)). “In determining whether the appointment of counsel would be appropriate, every inference must run in the petitioner’s favor where the petitioner is unrepresented at that time and cannot be expected to know how to properly allege the necessary facts.” Id. (quoting Melton v. State, 148 Idaho 339, 223 P.3d 281, 284 (2009)). “The petitioner is not entitled to have counsel appointed in order to search the record for possible nonfrivolous claims; however, he should be provided with a meaningful opportunity to supplement the record and to renew his request for court-appointed counsel prior to the dismissal of his petition where he has alleged facts supporting some elements of a valid claim.” Nelson v. State, 157 Idaho 847, 854, 340 P.3d 1163, 1170 (Ct. App. 2014).

Because “the threshold showing that is necessary in order to gain appointment of counsel [is] considerably lower than that which is necessary to avoid summary dismissal of a petition,” Judd v. State, 148 Idaho 22, 24, 218 P.3d 1, 3 (Ct. App. 2009), if the district court properly concluded O’Neal’s claims did not merit appointment of counsel, they were properly dismissed. Conversely, the state concedes that if O’Neal was entitled to be represented by appointed counsel, he is entitled to that representation prior to summary

dismissal of his claims. However, application of relevant standards to O’Neal’s pleadings shows no error by the district court because O’Neal’s claims are frivolous.

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 v. State, 125 Idaho 644, 649, 873 P.2d 898, 903 (Ct. App. 1994). 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).

Whether to request an MRI or other tests in relation to sentencing is a tactical choice that will not be second-guessed absent evidence of an objective shortcoming by counsel. State v. Payne, 146 Idaho 548, 578, 199 P.3d 123, 153 (2008). “Where the alleged deficiency is counsel’s failure to file a motion, a conclusion that the motion, if pursued, would not have been granted by the trial court, is generally determinative of both prongs of the test.” Medrano v. State, 127 Idaho 639, 643, 903 P.2d 1336, 1340 (Ct. App. 1995).

The district court found that O’Neal was seeking evaluations “to determine whether or not he had a mental condition that would affect his behavior.” (R., p. 86.) This finding is supported by the record, because O’Neal alleged he wanted the evaluations to “see if his Heart Attack had any effect on the way he processed thought and actions, let alone Gray Matter Ostruction.” (R., p. 12 (verbatim).) O’Neal’s claim is too speculative to be considered anything other than frivolous. There was no possibility of a valid claim because counsel was not deficient in not bringing an entirely speculative motion for an MRI and neuropsychological examination; there is no reason to believe such a speculative motion would have been granted; even if granted, it is sheer speculation to believe the evaluations would have shown brain damage; and even if the evaluations would have shown brain damage the argument that such evidence—that O’Neal is violent *because of permanent brain damage*—is mitigating and would have resulted in a lesser sentence is itself frivolous.

O’Neal argues that his “heart attack just one year prior to the incident and his ongoing dizziness and fainting, combined with the fact that Mr. O’Neal could not articulate how [the victim] was shot, should have alerted defense counsel of the need to further investigate whether his medical condition had caused Mr. O’Neal cognitive difficulties.” (Appellant’s brief, pp. 15-16 (internal citation to the record omitted).) This argument does not show that, with the assistance of an attorney, there was a possibility of a valid claim that the decision to not move for an MRI and neuropsychological evaluation was premised upon an objective shortcoming of counsel.

O’Neal also argues that because he alleged that the MRI and neuropsychological evaluation would have shown cognitive impairment and such evidence of cognitive

impairment would have affected the outcome of his sentencing he showed a viable claim of prejudice. (Appellant’s brief, pp. 20-24.) O’Neal argues the district court concluded his claims of prejudice were frivolous only because of his failure to use “the correct legal buzzwords.” (Id.) It was not O’Neal’s word choice, however, that the district court relied on. Rather, it was that O’Neal wanted to engage in a fishing trip. (R., p. 86 (“Petitioner merely asserts that the Court failed to order an evaluation to determine whether or not he had a mental condition that would affect his behavior.”).) Nothing in this record shows that O’Neal’s speculation could have been developed into a viable claim of prejudice.

O’Neal posited that his heart attack had damaged his brain, which would be confirmed by an MRI and neuropsychological examination which would, in turn, have resulted in a lesser sentence. His speculative claim was frivolous because there is no reason to believe post-conviction counsel could have developed O’Neal’s allegations into a viable claim that trial counsel made an objectively unreasonable decision to not move for such evaluations; that the motion would have been granted; that the evaluations would in fact have shown brain damage; or that such would have been considered mitigating and resulted in a lower sentence. O’Neal has failed to show error in the district court’s denial of the motion for appointment of counsel and order of summary dismissal.

CONCLUSION

The state respectfully requests this Court to affirm the judgment of the district court.

DATED this 18th day of March, 2019.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 18th day of March, 2019, 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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/s/ Kenneth K. Jorgensen
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KKJ/dd