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IN THE SUPREME COURT OF THE STATE OF IDAHO

ELAWNEE MICHAELINE)	
PAHVITSE,)	NO. 47016-2019
)	
Petitioner-Appellant,)	
v.)	BANNOCK COUNTY
)	NO. CV-2018-3160
STATE OF IDAHO,)	
)	APPELLANT'S BRIEF
Respondent.)	

BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BANNOCK**

HONORABLE ROBERT C. NAFTZ
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Elawnee M. Pahvitse appeals from the district court's judgment and order summarily dismissing her pro se petition for post-conviction relief. She argues that the district court erred by denying her request for appointment of counsel. She contends that the district court should have ruled on her request for counsel before it dismissed her petition, and she maintains that she raised possibly valid claims to justify the appointment of counsel. Due to the district court's error, Ms. Pahvitse respectfully requests that this Court vacate the district court's judgment and order and remand her case for the appointment of counsel.

Statement of Facts and Course of Proceedings

On March 2, 2015, the district court entered a judgment of conviction that sentenced Ms. Pahvitse to five years, with two years fixed, for driving under the influence, a felony. (R., p.81.) The district court suspended execution of the sentence and placed Ms. Pahvitse on probation for four years. (R., p.81.) Eventually, on November 1, 2017, the district court revoked Ms. Pahvitse's probation and executed imposition of her sentence. (R., p.82.) Although the district court stated that she did not file an appeal, Ms. Pahvitse did in fact appeal from the district court's order revoking her probation. In Supreme Court Docket No. 45568, the Idaho Court of Appeals issued an opinion affirming the district court's order revoking probation on June 5, 2018. Unpublished Opinion,¹ *State v. Pahvitse*, No. 45568 (Ct. App. June 5, 2018). The Court issued a remittitur on June 15, 2018. Remittitur, *State v. Pahvitse*, No. 45568-2017 (June 15, 2018).

¹ Contemporaneously with this brief's filing, Ms. Pahvitse moved for this Court to take judicial notice of the Court of Appeals' opinion and remittitur in her underlying criminal case.

On August 16, 2018, Ms. Pahvitse filed a pro se petition for post-conviction relief. (R., pp.5–9.) She indicated that she had previously appealed “from the judgment of conviction or the imposition of sentence,” and she cited the docket number “45568-2017.” (R., p.6.) Ms. Pahvitse alleged three ineffective assistance of counsel claims: (1) not looking into an “Action Plan State” in the probation violation report and not including it in her file; (2) not offering any other options due to her probation violation and “not looking into detail of case,” such as a “secondary court, sanction, or discretionary time”; and (3) “[d]id not receive paperwork or served warrants while incarcerated.” (R., pp.6–7.) She also alleged a claim for “probation officer not present during sentencing.” (R., p.6.) For relief, she requested “[a]nother chance at probation, upon immediate release.” (R., p.8.) In an affidavit in support, she wrote:

During my appearance in court Ms. Guiberson was not present. Ms. Haines did not come to the jail to talk to me about, but the I only received was copies of warrants. I was not aware of this Action Plan until I filed an appeal and received a copy of my case. The Action Plan that was not given to me neither did I sign. I don't find my sentence appropriate in this matter. I also was not offered secondary court or a sanction throughout my case. While incarcerated in April 2017 I was not served warrants nor was I at a court hearing involving a no bond bench warrant. Got sentenced 30 day served 16 in Bonneville County. Was told by public defender after sentencing I did not qualify for DUI Court pending PV, there was not pending PV.

(R., p.10 (sic).) Ms. Pahvitse also moved for the appointment of counsel. (R., pp.21–23.)

On September 20, 2018, the State answered and moved for summary dismissal. (R., pp.25–26, 75–76.) In its motion, the State argued that Ms. Pahvitse’s petition “fails to raise a genuine issue of material fact and is time barred.” (R., p.75.) The State also asserted that her claims were “bare and conclusory, unsubstantiated by fact, procedurally defaulted, or clearly disproved by the record.” (R., p.75.) In its brief in support of summary dismissal, the State noted that Ms. Pahvitse appealed from the district court’s order revoking probation, but not the initial judgment of conviction. (R., pp.29–30.) In its brief, the State argued: (1) Ms. Pahvitse’s claims

were time-barred because she did not file her petition within one year of the time to file an appeal from the initial judgment of conviction; (2) her claims should have been raised on direct appeal; (3) any claims related to probation revocation were also time-barred because she did not appeal from the district court's order revoking probation;² and (4) "Petitioner's claim that other options to prison were not offered is disproven by the record as evidenced by the multiple chances given to complete probation without success." (R., pp.35–36.) The State also objected to Ms. Pahvitse's request for counsel. (R., pp.77–78.) The State argued that her claims were time-barred because she did not file her petition within one year of the time to file an appeal from the judgment of conviction. (R., p.78.)

About six months later, on March 25, 2019, the district court issued an order denying post-conviction relief. (R., pp.80–102.) In the procedural history section, the district court stated that Ms. Pahvitse did not appeal from the district court's order revoking probation. (R., p.82.) Next, district court ruled that Ms. Pahvitse was not entitled to the appointment of counsel. (R., p.86.) The district court further reasoned that her petition was untimely and her ineffective assistance of counsel claims failed on the merits. (R., pp.96–102.) On her ineffective assistance of counsel claims, the district court determined that Ms. Pahvitse's petition "did not raise verifiable facts sufficient to justify an evidentiary hearing" and her allegations were "bare and conclusory." (R., p.98; *see also* R., pp.99–100.) Beyond the lack of evidence, the district court determined that her petition did not meet its burden to show the two-part standard for ineffective assistance of counsel. (R., pp.101–02.) On the same day, the district court entered a

² Again, Ms. Pahvitse did appeal from the district court's revocation order, as acknowledged by the State earlier in its brief in support of summary dismissal. (*See* R., p.30.)

judgment dismissing Ms. Pahvitse's petition with prejudice. (R., p.104.) Ms. Pahvitse timely appealed. (R., pp.106–09.)

ISSUE

Did the district court err by dismissing Ms. Pahvitse's pro se petition for post-conviction relief before providing notice of its denial of her request for counsel?

ARGUMENT

The District Court Erred By Dismissing Ms. Pahvitse's Pro Se Petition For Post-Conviction Relief Before Providing Notice Of Its Denial Of Her Request For Counsel

A. Introduction

Ms. Pahvitse submits three related arguments with respect to the district court's denial of her request for counsel. First, she argues that the district court erred by denying both her request for counsel and her petition for post-conviction relief at the same time. Second, she argues that this error is not harmless because she alleged facts to raise the possibility of a valid claim. Third, she argues that the district court erred by ruling her petition was untimely.

B. Standard Of Review And Post-Conviction Jurisprudence

A petition for post-conviction relief is civil in nature. *State v. Dunlap*, 155 Idaho 345, 361 (2013).

Like a plaintiff in a civil action, the applicant for post-conviction relief must prove by a preponderance of evidence the allegations upon which the application for post-conviction relief is based. *Grube v. State*, 134 Idaho 24 (2000). Unlike the complaint in an ordinary civil action, however, an application for post-conviction relief must contain more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant. I.C. § 19-4903. The application must include affidavits, records, or other evidence supporting its allegations, or must state why such supporting evidence is not included. *Id.*

Charboneau v. State, 144 Idaho 900, 903 (2007).

The district court can summarily dismiss or grant a petition for post-conviction relief if "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." I.C. § 19-4906(b), (c). "In considering summary dismissal of an application for post-conviction relief, the trial court must accept as true verified allegations of fact in the

application or in supporting affidavits, no matter how incredible they may appear, unless they have been disproved by other evidence in the record.” *Dunlap v. State*, 126 Idaho 901, 909 (Ct. App. 1995). The district court is “required to accept the petitioner’s un rebutted allegations as true, but need not accept the petitioner’s conclusions.” *Charboneau*, 144 Idaho at 903. Any disputed facts are construed in favor of the non-moving party, and “all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party.” *Vavold v. State*, 148 Idaho 44, 45 (2009). A petition for post-conviction relief based on a claim of ineffective assistance of counsel will “survive a motion for summary dismissal if the petitioner establishes: (1) a material issue of fact exists as to whether counsel’s performance was deficient; and (2) a material issue of fact exists as to whether the deficiency prejudiced petitioner’s case.” *Pratt v. State*, 134 Idaho 581, 583 (2000). If a genuine issue of material fact is presented, an evidentiary hearing must be conducted to resolve the factual issues. *Goodwin v. State*, 138 Idaho 269, 272 (Ct. App. 2002).

On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this 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.

Charboneau, 144 Idaho at 903. Because the evaluation of a motion for summary disposition does not involve the finding of contested facts by the district court, it necessarily involves only determinations of law. Accordingly, an appellate court reviews a district court’s summary dismissal order de novo. *Muchow v. State*, 142 Idaho 401, 402–03 (2006).

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. CONST. amend. VI. “[T]he right to counsel is the right to the effective assistance of counsel.” *Strickland v.*

Washington, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). To succeed on an ineffective assistance of counsel claim, the petitioner must generally show that (1) his attorney’s performance did not meet “an objective standard of reasonableness,” and (2) his attorney’s deficient performance prejudiced him. *Id.* at 687–88. “When a claimant alleges ineffective assistance of counsel based on counsel’s failure to file a motion, a “critical inquiry is whether the motion, if filed, should have been granted. . . .” *Wurdemann v. State*, 161 Idaho 713, 717 (2017) (alteration in original) (quoting *Dunlap*, 155 Idaho at 385). If the Court determines “the motion, had it been filed, should have been granted, the petitioner is still required to overcome the presumption that the decision not to file the motion ‘was within the wide range of permissible discretion and trial strategy.’” *Id.* at 718 (emphasis omitted) (quoting *Estrada v. State*, 143 Idaho 558, 561 (2006)).

Lastly, the Court uses a four-part test for discretionary decisions. *Lunneborg v. My Fun Life*, 163 Idaho 856, 863 (2018). The Court considers “[w]hether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason.” *Id.*

C. The District Court Should Have Ruled On, And Granted, Ms. Pahvitse’s Request For Counsel Before Dismissing Her Petition For Post-Conviction Relief

Ms. Pahvitse maintains that the district court erred by denying her request for counsel because the district court did not rule the motion before it decided the merits of her petition for post-conviction relief. She also argues that this error necessitates reversal because her petition alleged facts raising the possibility of a valid claim of ineffective assistance of counsel during the probation revocation proceedings. Lastly, she argues that the district court erred by ruling her

petition was untimely because she filed her petition within the time limitations to raise claims challenging the probation revocation proceedings.

1. *The district court abused its discretion by denying Ms. Pahvitse's request for counsel and dismissing her petition for post-conviction relief at the same time*

It is well established that the district court may appoint counsel at public expense for a petitioner unable to pay for legal representation. I.C. § 19-4904. The district court's decision to appoint counsel is discretionary. *Charboneau v. State*, 140 Idaho 789, 792 (2004). The district court must appoint counsel "if the petition qualifies financially and 'alleges facts to raise the possibility of a valid claim.'" *Judd v. State*, 148 Idaho 22, 24 (Ct. App. 2009) (quoting *Charboneau*, 140 Idaho at 793). Conversely, if the claims are frivolous, the district court may deny a request for counsel. *Id.* "If the court decides that the claims in the petition are frivolous, it should provide sufficient notice regarding the basis for its ruling to enable the petitioner to provide additional facts, if they exist, to demonstrate the existence of a non-frivolous claim." *Id.* (citing *Swader v. State*, 143 Idaho 651, 653–54 (2007); *Charboneau*, 140 Idaho at 793).

Because the standard for the appointment of counsel is much lower than the standard to avoid summary dismissal, the district court must address the petitioner's request for counsel "before ruling on the substantive issues in the case and errs if it denies a petition on the merits before ruling on the applicant's request for counsel." *Id.* For example, in *Charboneau*, the Court held that the district court erred by summarily dismissing the defendant's petition for post-conviction relief before ruling on his motion for counsel. 140 Idaho at 792–94. There, the defendant filed a successive pro se petition for post-conviction relief and a motion for counsel. *Id.* at 791. The State moved for summary dismissal. *Id.* The district court granted the State's motion and dismissed the petition, but the district court never ruled on the defendant's motion for

counsel. *Id.* The Court reasoned that the district court must first rule on a motion for counsel so the defendant has the opportunity to amend his petition or file additional evidence in response:

It is essential that the petitioner be given adequate notice of the claimed defects so he has an opportunity to respond and to give the trial court an adequate basis for deciding the need for counsel based upon the merits of the claims. If the court decides that the claims in the petition are frivolous, the court should provide sufficient information regarding the basis for its ruling to enable the petitioner to supplement the request with the necessary additional facts, if they exist. Although the petitioner is not entitled to have counsel appointed in order to search the record for possible nonfrivolous claims, 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, as here, he has alleged facts supporting some elements of a valid claim.

Id. at 793 (quoting *Brown v. State*, 135 Idaho 676, 679 (2001)). Because the district court did “not specifically address[] the appointment of counsel issue before dealing with the substantive issues of Charboneau’s Petition, the district court abused its discretion.” *Id.* at 793. Accordingly, the Court vacated the district court’s order of summary dismissal and remanded the case for the district court to determine whether to appoint counsel to assist the defendant. *Id.* at 794. Along the same lines, in *Judd*, the Court of Appeals held that the district court erred by summarily dismissing a petition for post-conviction relief at the same time as its denial of a request for counsel. 148 Idaho at 24–25. In *Judd*, the defendant filed a pro se petition for post-conviction relief and a motion for counsel. *Id.* at 23. The district court notified the defendant of its intent to dismiss the petition as untimely.³ *Id.* The defendant responded, but did not address the timeliness issue. *Id.* The defendant also filed another motion for counsel. *Id.* The district court denied the defendant’s petition and, in the same order, denied the motion for counsel. *Id.* at 23–24. On

³ Prior to the district court’s notice, the district court had dismissed the defendant’s petition without notice of its intent to dismiss. *Judd*, 148 Idaho at 23. The defendant appealed, and the Court remanded the case for the district court to give proper notice. *Id.*

appeal, the Court of Appeals held that “the district court committed error by failing to rule on his request for counsel before dismissing his petition.” *Id.* at 24–25.

As in *Charboneau* and *Judd*, the district court here did not apply the correct legal standards and thus abused its discretion by failing to rule on Ms. Pahvitse’s request for counsel before dismissing her petition. It was “essential” for Ms. Pahvitse to have notice of the defects in her petition so she could “supplement the request [for counsel] with the necessary additional facts, if they exist.” *Charboneau*, 140 Idaho at 793 (quoting *Brown*, 135 Idaho at 679). Ms. Pahvitse should have been “provided with a meaningful opportunity to supplement the record” and “renew” her request for counsel before the dismissal of her petition. *Id.* (quoting *Brown*, 135 Idaho at 679). By ruling on her motion for counsel and dismissing her petition in the same order, the district court did not apply the correct legal standards. Therefore, Ms. Pahvitse asserts that the district court’s denial of her motion for counsel was an abuse of discretion.

2. *The district court’s error in denying Ms. Pahvitse’s request for counsel requires reversal because she alleged facts raising the possibility of a valid claim*

Even though Ms. Pahvitse has shown error in the district court’s denial of her request for counsel, the Idaho appellate courts will uphold “an order that simultaneously dismisses a post-conviction action and denies a motion for appointed counsel” if two conditions are satisfied. *Judd*, 148 Idaho at 25. The petitioner must have “received notice of the fatal deficiencies of the petition and if, when the standard governing a motion for appointment of counsel is correctly applied, the request for counsel would properly be denied—that is, when the petitioner did not allege facts raising even the possibility of a valid claim.” *Id.* (citing *Workman v. State*, 144 Idaho 518, 529 (2007); *Swader*, 143 Idaho at 653–55; *Plant v. State*, 143 Idaho 758, 760–63 (Ct. App. 2006); *Newman v. State*, 140 Idaho 491, 493–94 (Ct. App. 2004)). Although Ms. Pahvitse does

not assert a lack of notice (because the State moved for summary dismissal), she nonetheless argues that the district court applied the incorrect standard to determine whether appointment of counsel was warranted. She further argues that, using the correct standard, the district court should have granted her request for counsel.

First, the district court did not apply the correct standard when denying Ms. Pahvitse's request for counsel in its order dismissing her petition. While the district court cited the "possibility of a valid claim" standard, (R., pp.84–86), the district court did not apply this standard. Instead, the district court referenced its analysis on the merits of Ms. Pahvitse's claims for summary dismissal purposes as the basis for its denial of her motion for counsel. (R., p.86 ("Based on the analysis to follow, the allegations do no justify the appointed of counsel.")) That analysis applied the much more stringent standards to survive summary dismissal. (R., pp.87–94.) The district court considered whether Ms. Pahvitse's claims of ineffective assistance of counsel were timely, whether she presented admissible evidence, and whether she showed deficient performance and prejudice. (R., pp.94–102.) None of the district court's discussion used the "possibility of a valid claim" standard. (*See* R., pp.87–102.) This was in error. "[T]he standard that a post-conviction petition must meet in order to call for appointment of counsel is considerably lower than the standard to avoid summary dismissal." *Plant*, 143 Idaho at 761. The district court did not act consistently with the applicable legal standards by using the harsher standard on summary dismissal to determine whether Ms. Pahvitse should be appointed counsel. Therefore, the district court abused its discretion "by failing to apply the correct standard governing the request for appointed counsel." *Judd*, 148 Idaho at 25.

Second, if the correct standard is applied, Ms. Pahvitse established the possibility of a valid claim to warrant the appointment of counsel. When determining whether the petitioner

raised the possibility of a valid claim, “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.” *Charboneau*, 140 Idaho at 794.

[T]he trial court should keep in mind that petitions and affidavits filed by a pro se petitioner will often be conclusory and incomplete. Although facts sufficient to state a claim may not be alleged because they do not exist, they also may not be alleged because the pro se petitioner simply does not know what are the essential elements of a claim.

Id. at 792 (quoting *Brown*, 135 Idaho at 679). Here, Ms. Pahvitse’s allegations in her petition and affidavit were sparse, but she raised the possibility of valid claims of ineffective assistance of counsel during the probation revocation proceedings. Construing all inferences in her favor, Ms. Pahvitse alleged that her trial counsel was ineffective for failing to present an action plan, failing to call her probation officer to be present or testify, and failing to argue for other options (such as a secondary court or additional jail time) at the probation revocation hearing. (R., pp.6, 7, 10.) Ineffective assistance of counsel during probation revocation proceedings is a cognizable claim for post-conviction relief. *See, e.g., Knutsen v. State*, 144 Idaho 433, 442–44 (Ct. App. 2007) (failing to challenge alleged probation violations and failing to investigate and present evidence at revocation hearing); *Munster v. State*, 129 Idaho 65, 68 (Ct. App. 1996) (failure to object to condition of probation); *Fox v. State*, 125 Idaho 672, 675 (Ct. App. 1994) (failure to prepare adequately for probation violation hearing); *Lake v. State*, 126 Idaho 333, 335–36 (Ct. App. 1994) (failure to investigate and research probation violations). In light of Ms. Pahvitse’s pro se status at the time of her filings, her petition and affidavit raised the possibility of valid claims of ineffective assistance of counsel during the probation revocation proceedings. The district court should have granted her motion for counsel to investigate and develop these claims.

3. *The district court erred by ruling Ms. Pahvitse's petition was untimely*

Finally, Ms. Pahvitse maintains that the district court, and the State, incorrectly determined that Ms. Pahvitse's petition was not filed within the time limitations set forth in I.C. § 19-4902. (*See R.*, pp.35–36, 94–98.) This statute provides:

A proceeding is commenced by filing an application verified by the applicant with the clerk of the district court in which the conviction took place. An application 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). Here, Ms. Pahvitse filed her petition within one year from the determination of her appeal of the district court's order revoking probation. On June 5, 2018, the Idaho Court of Appeals issued an opinion affirming the district court's order revoking Ms. Pahvitse's probation. Unpublished Opinion, *State v. Pahvitse*, No. 45568. On June 15, 2018, the Court issued the remittitur. Remittitur, *State v. Pahvitse*, No. 45568-2017. Ms. Pahvitse filed her pro se petition on August 16, 2018, sixty-two days after the remittitur. (*R.*, pp.5–9.) As such, Ms. Pahvitse's petition was filed within the year deadline from the determination of the appeal. Any ineffective assistance of counsel claims that pertained to the district court's revocation of Ms. Pahvitse's probation, such as the failure to present action plan and to argue other options, were timely.⁴ *See, e.g., Gonzalez v. State*, 139 Idaho 384, 385–86 (Ct. App. 2003) (holding that the defendant's post-conviction petition, filed within one year of her appeal from the district court's order revoking her probation, was timely "only to challenge the probation revocation proceedings," but not the judgment of conviction or sentence). Therefore, the district court erred by ruling Ms. Pahvitse's petition was barred by the statute of limitations in I.C. § 19-4902.

⁴ To the extent that any of Ms. Pahvitse's ineffective assistance of counsel claims relate to her original sentencing (*e.g.*, "I don't find my sentence appropriate in this matter," (*R.*, p.10)), Ms. Pahvitse does not pursue those claims on appeal because they are untimely.

CONCLUSION

Ms. Pahvitse respectfully requests that this Court vacate the district court's judgment and its order denying post-conviction relief and remand this case to the district court for an order to appoint counsel.

DATED this 15th day of August, 2019.

/s/ Jenny C. Swinford
JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of August, 2019, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

JCS/eas