Electronically Filed
11/7/2019 1:59 PM
Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

ELAWNEE MICHAELINE PAHVITSE,	)	
	)	**No. 47016-2019**
Petitioner-Appellant,	)	
	)	**Bannock County Case No.**
v.	)	**CV-2018-3160**
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF RESPONDENT

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

LAWRENCE G. WASDEN
Attorney General
State of Idaho

COLLEEN D. ZAHN
Deputy Attorney General
Chief, Criminal Law Division

JEFF NYE
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534
E-mail: ecf@ag.idaho.gov

ATTORNEYS FOR
DEFENDANT-RESPONDENT

JENNY C. SWINFORD
Deputy State Appellate Public Defender
322 E. Front St., Ste. 570
Boise, Idaho 83702
(208) 334-2712
E-mail: documents@sapd.state.id.us

ATTORNEY FOR
PETITIONER-APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

STATEMENT OF THE CASE

Nature Of The Case

Elawnee Michaeline Pahvitse appeals from the district court's judgment summarily dismissing her petition for post-conviction relief. Pahvitse argues that the district court erred by denying her request for appointment of counsel and summarily dismissing her petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

On January 20, 2015, Elawnee Michaeline Pahvitse pled guilty to driving under the influence. (R., p.49.) In March 2016, the district court imposed a sentence of two years fixed and three years indeterminate, suspended the sentence, and placed Pahvitse on probation for four years. (R., pp.49-50.)

In April 2016, the district court found that Pahvitse violated the terms and conditions of her probation. (R., p.60.) The district court revoked Pahvitse's probation, reinstated the original sentence imposed, and retained jurisdiction for one year. (R., pp.61-62.) In November 2016, the district court suspended the sentence and placed Pahvitse back on probation for four years. (R., pp.65-67.) In November 2017, the district court found that Pahvitse again violated the terms of probation, revoked her probation, and reinstated the original sentence. (R., pp.71-74.)

Pahvitse appealed from the district court's order revoking Pahvitse's probation for a second time. See State v. Pahvitse, No. 45568, 2018 WL 2676044, at *1 (Idaho Ct. App. June 5, 2018). The Idaho Court of Appeals affirmed the district court's revocation of Pahvitse's probation. See id. The remittitur issued on June 15, 2018. (Aug. R., p.3.)

On August 18, 2018, Pahvitse filed a pro se petition for post-conviction relief. (R., pp.5-9.) Pahvitse alleged that her attorney provided ineffective assistance by not looking into the

"Action Plan," not offering any "other options," and not giving Pahvitse her paperwork or warrants while Pahvitse was incarcerated. (R., p.7.) She also alleged that her probation officer was not present during sentencing. (R., p.6.) Pahvitse moved for the appointment of counsel. (R., pp.21-24.)

The state filed a motion to summarily dismiss Pahvitse's petition. (R., pp.28-76.) Among other things, the state argued that Pahvitse's claims were time barred and failed "to raise a genuine issue of material fact regarding both deficient performance and prejudice." (R., p.75.) The state also objected to Pahvitse's request for counsel. (R., pp.77-78.)

The district court denied Pahvitse's request for counsel. (R., pp.80-103.) The district court explained that counsel should only be appointed when the petitioner alleges facts raising the possibility of a valid claim and denied Pahvitse's request for counsel after finding she failed to do so. (R., pp.83-86.)

In the same order, the district court also summarily dismissed Pahvitse's petition for post-conviction relief. (R., pp.86-103.) The district court construed Pahvitse's petition as raising only ineffective assistance of counsel claims and dismissed her petition for three reasons: (1) the claims were untimely, (2) Pahvitse supported her claims with only conclusory allegations, and (3) Pahvitse failed to raise a genuine issue of material fact to show her counsel performed deficiently or that she was prejudiced by any deficient performance. (R., pp.86-102.)

Pahvitse timely appealed. (R., pp.104-09.)

ISSUE

Pahvitse states the issue on appeal as:

> 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?

(Appellant's brief, p.5.)

The state rephrases the issue as:

Has Pahvitse failed to show that the district court committed reversible error by denying her request for counsel and summarily dismissing her petition for post-conviction relief?

ARGUMENT

Pahvitse Has Failed To Show Reversible Error In The District Court's Decision To Deny Her Request For An Attorney And Summarily Dismiss Her Petition For Post-conviction Relief

A. Introduction

All roads in this case lead to Pahvitse's failure to allege facts sufficient to raise the possibility of a valid post-conviction claim. Pahvitse argues that she adequately alleged that her counsel provided ineffective assistance because she alleged that her counsel did not present an "Action Plan," her probation officer was not present at the probation revocation hearing, and her counsel did not argue for any "other options" such as secondary court. (R., pp.6-7.) But she alleged no information about the "Action Plan" or how it could have affected the proceedings, she alleged nothing with respect to how her probation officer's presence could have affected the proceedings, and there is no reasonable possibility that her counsel's mere argument for "other options" could have affected the proceedings.

Pahvitse's failure to allege facts sufficient to raise the possibility of a valid claim is fatal to all of her arguments on appeal. It means she was not entitled to appointed counsel. See Murphy v. State, 156 Idaho 389, 393, 327 P.3d 365, 369 (2014). It means any error in the district court's application of the appointed-counsel standard was harmless. See Judd v. State, 148 Idaho 22, 25-26, 218 P.3d 1, 4-5 (Ct. App. 2009). It means Pahvitse necessarily failed to satisfy the standard to avoid summary dismissal. See Melton v. State, 148 Idaho 339, 345, 223 P.3d 281, 287 (2009). And it means any error in the district court's decision to simultaneously deny counsel and summarily dismiss the petition was harmless. See Judd, 148 Idaho at 25-26, 218 P.3d at 4-5. Pahvitse has thus failed to show reversible 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 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 v. State, 144 Idaho 900, 903, 174 P.3d 870, 873 (2007).

C. The District Court Did Not Commit Reversible Error In Handling Pahvitse's Petition

Pahvitse has failed to show reversible error in the district court's handling of her petition for post-conviction relief. A district court can summarily dismiss a post-conviction petition on motion of the state "when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." I.C. § 19-4906(c). And while "a court-appointed attorney may be made available to the applicant in the preparation of the application," I.C. § 19-4904, the district court need not appoint counsel when the petitioner has alleged only frivolous claims, see Charboneau v. State, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004). The district court did not commit reversible error when it denied Pahvitse's request for counsel and summarily dismissed her petition for post-conviction relief.

1. The District Court Properly Denied Pahvitse's Request For A Post-conviction Attorney

Pahvitse has failed to show the district court erred when it denied her request for post-conviction counsel. "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." Murphy v. State, 156 Idaho 389, 393, 327 P.3d 365, 369 (2014). "In

deciding whether the *pro se* petition raises the possibility of a valid claim, the trial court should consider whether the facts alleged are such that a reasonable person with adequate means would be willing to retain counsel to conduct a further investigation into the claims." Id. (internal quotes omitted).

Pahvitse's petition did not raise the possibility of a valid claim of ineffective assistance of counsel. (R., pp.83-102.) A petitioner seeking post-conviction relief on the basis of ineffective assistance of counsel "must prove that counsel's performance was deficient and the deficiency prejudiced the case." Dunlap v. State, 141 Idaho 50, 59, 106 P.3d 376, 385 (2004). "To show a deficiency the [petitioner] must show the attorney's representation fell below an objective standard of reasonableness." Id. To prove prejudice, the petitioner must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694 (1984).

On appeal, Pahvitse concedes that any claim not related to the district court's second revocation order was untimely. (Appellant's brief, p.14 n.4.) Pahvitse claims, however, that she raised the possibility of a valid claim of ineffective assistance of counsel by alleging "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 secondary court or additional jail time) at the probation revocation hearing." (Appellant's brief, p.13.[1]) She is wrong.

[1] In her petition, Pahvitse also accused her counsel of ineffective assistance on the basis that she "[d]id not receive paper work or served warrants while incarcerated." (R., p.7.) She did not, however, make any argument as to that claim on appeal. (Appellant's brief, pp.6-14.) She has therefore waived the issue. see Bolognese v. Forte, 153 Idaho 857, 866, 292 P.3d 248, 257 (2012) ('We will not consider assignments of error not supported by argument and authority in the opening brief.').

First, all of Pahvitse's allegations related to the "Action Plan" are "vague," "bare," and "devoid of argument." (R., pp.98, 100.) Pahvitse makes no allegations as to the content of the "Action Plan" or why her attorney should have presented it. (See R., pp.6-7.) Her affidavit implies that she received a copy of the "Action Plan" after she filed her appeal, yet she did not attach it to her petition or even attempt to describe what the "Action Plan" is. (R., p.10.) In short, Pahvitse's mere reference to an unexplained document did not require the district court to appoint post-conviction counsel. See Grant v. State, 156 Idaho 598, 606, 329 P.3d 380, 388 (Ct. App. 2014) (holding "district court properly refused to appoint counsel" where petitioner alleged counsel should have presented mental health records but did "not point to any specific information within his mental health records that could have resulted in a more lenient sentence").

Second, Pahvitse failed to allege any facts to connect her probation officer's absence at the probation revocation hearing to her counsel's alleged ineffective assistance.[2] For example, she did not allege what potential information the probation officer had that would have changed the outcome of the probation revocation hearing. Indeed, it is difficult to imagine what possible information the probation officer could have had that would have changed the outcome of the probation revocation proceedings because the probation officer reported the violations—in great detail and under penalty of perjury—and Pahvitse confessed that she committed the violations. (R., pp.60, 69-70.) In short, Pahvitse's mere factual assertion that the probation officer was not present at the probation revocation proceedings did not require the district court to appoint post-conviction counsel.

[2] In fact, Pahvitse did not even allege an ineffective assistance claim with respect to her probation officer's absence. She omitted from the space in the petition reserved for claims of ineffective assistance any mention of the probation officer's absence. (R., p.7.) Instead, she simply stated the fact that her probation officer was absent in the space reserved for other post-conviction claims and in her affidavit. (R., pp.6, 10.)

Third, Pahvitse's allegations related to her counsel's failure to argue for "other options," such as secondary court, were untimely because they were not related to her second probation revocation. See I.C. § 19-4902(a) (setting one-year deadline for post-conviction claims "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"). Even drawing every reasonable inference in Pahvitse's favor, her post-conviction petition cannot be read to allege a claim of ineffective assistance of counsel for her counsel's failure to argue for "other options" during the second probation revocation proceedings. (See R., pp.5-11.) Pahvitse alleged in her petition that her counsel "[d]id not offer any other options, *due to PV* and not looking into detail of case." (R., p.7 (emphasis added).) She explained in her affidavit that she "was told by public defender after sentencing [that she] did not qualify for DUI court pending PV" even though "there was no pending P.V." (R., p.10 (emphasis added).) These allegations could not relate to the second probation revocation because at the time of the probation revocation proceedings there was, by definition, a pending probation violation. Pahvitse is entitled to reasonable inferences in her favor but not to rewrite her petition on appeal. Because Pahvitse expressly alleged that "there was no pending P.V." at the time she wanted her attorney to argue for "other options," the "other options" allegations could not have related to her second probation revocation, and those allegations were thus untimely. (See Appellant's brief, p.14 n.4); I.C. § 19-4902(a).

To the extent the "other options" allegations were directed toward the second probation revocation, those allegations still did not require the district court to appoint counsel because there is no reasonable possibility that Pahvitse's counsel's mere argument for "other options" would have changed the outcome of the proceeding. See Strickland, 466 U.S. at 694 (observing ineffective assistance claim requires a showing that "but for counsel's unprofessional errors, the

result of the proceeding would have been different"). Pahvitse absconded from probation on three different occasions and failed to complete her Rider Aftercare as required by the terms of her probation. (R., pp.69-70.) The district court revoked Pahvitse's probation for a second time after specifically finding that she "demonstrated an inability to conform her conduct to the requirements necessary to successfully complete the term of probation prescribed by the Court." (R., p.72.) In the face of Pahvitse's admitted probation violations and the district court's finding that Pahvitse was incapable of successfully completing probation, it strains credulity to suggest that the district court would have allowed Pahvitse to participate in a secondary court or remain on probation and serve only some discretionary jail time had her counsel simply argued for those options.

Pahvitse's argument that the district court applied the wrong standard to her request for an attorney is based on a misreading of the district court's order. (See Appellant's brief, p.12.) The district court articulated the correct standard for deciding whether to appoint counsel: "'counsel should be appointed if the petitioner qualifies financially and alleges facts to raise the possibility of a valid claim.'" (R., p.84 (quoting Judd v. State, 148 Idaho 22, 24, 218 P.3d 1, 3 (Ct. App. 2009).) It then found Pahvitse's "allegations [did] not justify the appointment of counsel." (R., p.86.) To support that finding, the district court relied on its analysis of whether it should summarily dismiss Pahvitse's post-conviction petition. (R., p.86.)

Pahvitse argues the district court erred by relying on its analysis of whether it should dismiss Pahvitse's post-conviction petition because the standard for appointing counsel and the standard for dismissing a post-conviction petition are different. (Appellant's brief, p.12.) The standards are different, but the difference is one of degree, not of kind. To avoid summary dismissal a petitioner must raise a genuine issue of material fact that, if resolved in the petitioner's favor, would entitle the applicant to the relief requested. See State v. Dunlap, 155 Idaho 345, 383,

313 P.3d 1, 39 (2013). To obtain appointed counsel, a petitioner need only allege facts to raise the possibility of a valid claim. Charboneau v. State, 140 Idaho 789, 793, 102 P.3d 1108, 1112 (2004). Both standards require the same kind of allegations (i.e., allegations that could lead to relief), the latter just sets a lower bar. Accordingly, a petitioner can fail to satisfy both standards for the exact same reasons. For example, if a petitioner's allegations lack any specificity, his petition is subject to dismissal *and* he is not entitled to appointed counsel. See Grant, 156 Idaho at 607, 329 P.3d at 389 (affirming denial of request for counsel and dismissal of petition because petitioner's "allegations here lack the specificity necessary to raise the possibility of a valid claim").

The most reasonable reading of the district court's order, then, is that the district court recognized that a lower, albeit similar in kind, standard applied to the appointment of counsel and found that Pahvitse failed to satisfy both standards for the same reasons. (R., pp.83-102.) For example, the district court found that Pahvitse failed to satisfy the higher standard because her claims were time barred. (R., pp.94-98.) And, by incorporating that analysis into its denial of Pahvitse's request for counsel, the district court was simply acknowledging that untimely claims were also insufficient to satisfy the lower standard.[3] (R., pp.83-86); see Hust v. State, 147 Idaho 682, 686, 214 P.3d 668, 672 (Ct. App. 2009) (holding a time-barred claim cannot "show[] even the possibility of a valid claim"). Similarly, the district court found that Pahvitse failed to "allege *any* resulting prejudice." (R., p.101 (emphasis added).) That too would show that Pahvitse failed to satisfy both the higher and the lower standard. See, e.g., Grant, 156 Idaho at 605, 329 P.3d at 387 (affirming denial of request for counsel and dismissal of petition where petitioner "failed to allege in what manner he was prejudiced").

[3] The state agrees with Pahvitse's assessment on appeal that the claims related to the second probation revocation—and *only* the claims related to the second probation revocation—were not untimely. (Appellant's brief, p.14 & n.4.)

In any event, even if the district court applied the incorrect standard to Pahvitse's request for an attorney, the error was harmless because, as explained above, Pahvitse did not allege facts sufficient to raise the possibility of a valid claim. See Melton v. State, 148 Idaho 339, 341-45, 223 P.3d 281, 283-87 (2009) (finding district court's error "in failing to consider [the petitioner's] motion for appointment of counsel" harmless because the petitioner had "not raised the possibility of a valid claim"); Judd, 148 Idaho at 25-26, 218 P.3d at 4-5 (finding district court's error in "failing to apply the correct standard governing the request for appointed counsel" harmless because the petitioner "presented no facts giving rise to even the possibility of a claim"). Because Pahvitse, in fact, failed to raise the possibility of a valid post-conviction claim, the district court's denial of her request for appointed counsel could not have constituted reversible error.

2. The District Court Did Not Commit Reversible Error By Summarily Dismissing Pahvitse's Petition For Post-conviction Relief

Pahvitse has failed to show that the district court committed reversible error when it dismissed her petition for post-conviction relief. "Summary disposition of a petition for post-conviction relief is appropriate if the applicant's evidence raises no genuine issue of material fact." Charboneau v. State, 144 Idaho 900, 903, 174 P.3d 870, 873 (2007); see I.C. § 19-4906(b), (c). "A court is required to accept the petitioner's unrebutted allegations as true, but need not accept the petitioner's conclusions." Charboneau, 144 Idaho at 903, 174 P.3d at 873. The district court may dismiss an application for post-conviction relief without holding an evidentiary hearing where the allegations "are clearly disproved by the record of the original proceeding" or "do not justify relief as a matter of law." Id.

Where a petitioner has failed to allege facts sufficient to merit the appointment of counsel, the petitioner has necessarily failed to allege facts sufficient to avoid summary dismissal. See Melton, 148 Idaho at 345, 223 P.3d at 287 ("Because the burden here is greater than 'possibility

of a valid claim' discussed above, we find that the district court did not err in summarily dismissing [the petitioner's] successive petition for post-conviction relief based upon the grounds laid out above."); Grant, 156 Idaho at 607, 329 P.3d at 389 ("Given our conclusion above, that Grant has failed to demonstrate even the possibility of a valid claim, it necessarily follows that Grant failed to meet the more demanding standard required to survive summary dismissal."). Because Pahvitse failed to allege facts sufficient to raise the possibility of a valid claim, see supra Part I.A.1., she necessarily failed to allege facts sufficient to avoid summary dismissal.

Pahvitse argues that the district court erred by dismissing her petition at the same time that it denied her request for new counsel. (Appellant's brief, pp.9-11.) But, as Pahvitse concedes, she received the requisite notice of the deficiencies in her petition, so the district court's simultaneous denial of her request for an attorney and dismissal of her petition could only constitute reversible error if Pahvitse alleged facts sufficient to raise the possibility of a valid claim. (Appellant's brief, pp.11-12.)

> Idaho appellate court decisions indicate that an order that simultaneously dismisses a post-conviction action and denies a motion for appointed counsel will be upheld on appeal if the petitioner 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.

Judd, 148 Idaho at 25, 218 P.3d at 4. Thus, because Pahvitse failed to allege facts sufficient to raise the possibility of a valid claim, see supra Part I.A.1., any error in the district court denying Pahvitse's request for counsel at the same time it dismissed her petition was harmless. See id., Melton, 148 Idaho at 341-45, 223 P.3d at 283-87 (holding district court's failure *to consider* the petitioner's request for counsel harmless because the petitioner failed to allege facts sufficient to raise the possibility of a valid claim); Judd, 148 Idaho at 25-26, 218 P.3d at 4-5 (finding district

court's decision to address request for counsel and summary dismissal in same order harmless because petitioner "presented no facts giving rise to even the possibility of a claim").

CONCLUSION

The state respectfully requests this Court affirm the district court's judgment dismissing Pahvitse's petition for post-conviction relief.

DATED this 7th day of November, 2019.

/s/ Jeff Nye
JEFF NYE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 7th day of November, 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:

JENNY C. SWINFORD
DEPUTY STATE APPELLATE PUBLIC DEFENDER
documents@sapd.state.id.us

/s/ Jeff Nye
JEFF NYE
Deputy Attorney General

JN/dd