IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33782

LEE A. RIDGLEY,	)	
	)	**2008 Opinion No. 78**
Petitioner-Appellant,	)	
	)	**Filed: August 6, 2008**
v.	)	
	)	**Stephen W. Kenyon, Clerk**
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

Appeal from the District Court of the First Judicial District, State of Idaho, Boundary County. Hon. Charles W. Hosack, District Judge.

Order summarily dismissing petition for post-conviction relief, affirmed in part and reversed in part.

Molly J. Huskey, State Appellate Public Defender; Justin M. Curtis, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Daniel W. Bower, Deputy Attorney General, Boise, for respondent.

LANSING, Judge

Lee A. Ridgley appeals from the district court's summary dismissal of his petition for post-conviction relief after he was convicted on a guilty plea of lewd and lascivious conduct with a minor. We affirm in part and reverse in part.

I.

FACTS AND PROCEDURE

On February 10, 2002, Ridgley's wife died. Within two days, Ridgley was arrested on charges that he committed lewd conduct with a minor under sixteen, Idaho Code § 18-1508, the alleged victim being his twelve-year-old stepdaughter. On February 26, while represented by appointed counsel, Ridgley pleaded guilty. Before sentencing, he filed a motion to withdraw his plea on grounds that he had not been adequately represented and advised by appointed counsel prior to entry of the guilty plea. The district court denied the motion. On direct appeal, this

Court affirmed the denial of Ridgley's motion and his sentence. *State v. Ridgley*, Docket No. 29320 (Ct. App. April 6, 2004) (unpublished).

Thereafter, Ridgley filed the present action for post-conviction relief asserting claims of ineffective assistance of counsel. Ridgley's petition alleged that his defense counsel's performance was deficient because counsel had met with Ridgley for less than one hour before Ridgley pleaded guilty, failed to provide Ridgley with a copy of the police report, failed to contact potential witnesses, failed to watch or listen to tapes of interviews of the victim, failed to advise Ridgley of potential defenses, and that counsel failed to take steps to determine whether Ridgley's severe grief and depression rendered him incompetent or unable to make a rational decision about pleading guilty. The State filed an "answer and response to petition for post-conviction relief and motion for summary dismissal."[1] The district court thereafter filed a notice of intent to dismiss and allowed Ridgley time to respond. Following the receipt of Ridgley's responsive materials, the district court entered an order summarily dismissing the petition. Ridgley appeals.

II.
ANALYSIS

A petitioner for post-conviction relief must prove by a preponderance of evidence the allegations upon which the request is based. I.C. § 19-4907; *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). This proof must begin with the petition itself. The petition for post-conviction relief must be verified with respect to facts within the personal knowledge of the petitioner, and affidavits, records or other evidence supporting its allegations must be attached, or the petition must state why such supporting evidence is not included. I.C. § 19-4903. In other words, the petition must present or be accompanied by admissible evidence supporting its allegations, or it will be subject to dismissal.

A district court may summarily dismiss a post-conviction petition if it fails to frame a genuine issue of material fact which, if resolved in the petitioner's favor, would entitle the

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[1] The Idaho Supreme Court recently reiterated that, rather than combining an answer with a motion to dismiss a post-conviction petition, it is preferable for the State to file a motion separate from the answer and to identify it as a motion for summary disposition. *Workman v. State*, 144 Idaho 518, 524, 164 P.3d 798, 804 (2007). Combining the answer and motion does not appear to have caused any problem in this case, however.

petitioner to the requested relief. I.C. 19-4906(b); *Griffith v. State*, 121 Idaho 371, 373, 825 P.2d 94, 96 (Ct. App. 1992). If such a factual issue is presented, an evidentiary hearing must be conducted. *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991); *Hoover v. State*, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct. App. 1988); *Ramirez v. State*, 113 Idaho 87, 88, 741 P.2d 374, 375 (Ct. App. 1987). Summary dismissal of a petition may be appropriate even where the State does not controvert the petitioner's evidence because the court is not required to accept either the petitioner's mere conclusory allegations, unsupported by admissible evidence, or the petitioner's conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986).

On review of a summary dismissal order, this Court will determine whether a genuine issue of fact exists based on the pleadings, depositions, and admissions together with any affidavits on file. We liberally construe the facts, together with all reasonable inferences to be drawn from the evidence, in favor of the petitioner. *Charboneau v. State*, 140 Idaho 789, 793, 102 P.3d 1108, 1112 (2004); *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993).

In order to prevail on an ineffective assistance of counsel claim, a petitioner must demonstrate both that his attorney's performance was deficient, and that he was prejudiced thereby. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995); *Davis v. State*, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989). To show deficient performance, a petitioner must overcome the strong presumption that counsel's performance was adequate by demonstrating "that counsel's representation did not meet objective standards of competence." *Roman*, 125 Idaho at 648-49, 873 P.2d at 902-03. If a petitioner succeeds in establishing that counsel's performance was deficient, he must also prove the prejudice element by showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." *Roman*, 125 Idaho at 649, 873 P.2d at 903.

The standards articulated above, although more frequently applied to conduct at trial, have equal applicability to the entry of a guilty plea. "Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the

voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." *Griffith*, 121 Idaho at 373, 825 P.2d at 96. *See also Hill v. Lockhart*, 474 U.S. 52, 58 (1985); *State v. Soto*, 121 Idaho 53, 55, 822 P.2d 572, 574 (Ct. App. 1991).

A. Claim that Counsel Allowed Ridgley to Plead Guilty without Regard to His Mental State

Ridgley's verified petition averred that at the time of his guilty plea, he was emotionally distraught, suffering from severe depression and grief over his wife's death, and in a state of emotional shut-down and confusion. According to Ridgley's allegations, "I was in such a state of shock and disbelief of the rush of what was going on, the complete devastation of losing my wife and my family and within a three (3) week period of time entering a guilty plea to this charge, I had expressed complete breakdown to my attorney and I expressed that I was not mentally well." The gist of Ridgley's complaint appears to be that his defense attorney should have either recognized that he was in such a state of depression and emotional shut-down that he was not in a condition to make a rational decision whether to plead guilty at that time, or that the attorney should have requested a mental evaluation to determine Ridgley's fitness to proceed. In response to the district court's notice of intent to dismiss, Ridgley responded with his own affidavit and affidavits of his counsel, one of which attached a report of psychologist Jonelle Timlin on the results of her psychological examination of Ridgley that was conducted for sentencing purposes. The district court held that Ridgley's materials filed in opposition to the notice of intent to dismiss failed to raise a genuine issue of material fact and that Ridgley's averments concerning his mental competency were insufficient because they were conclusory and self-serving.

We conclude that the district court erred, for Ridgley's evidence is sufficient to raise a genuine issue of fact regarding his emotional state and the competence of the lawyer's representation of Ridgley in light of the alleged emotional state. Although it might well be said that nearly any criminal defendant will be somewhat depressed at facing the possibility of conviction of a serious crime, there is evidence here from which it could be found that Ridgley's level of depression was far more consequential than the typical emotional distress at facing prosecution. First, there are the facts of the surrounding circumstances at the time of his guilty plea. Ridgley was arrested on the lewd conduct charge within two days after his wife died in his presence. His guilty plea was entered only sixteen days after her death, lending credence to his

assertion that he was in a deep state of grief. Moreover, the evidence indicates that Ridgley was at that time a suspect in her death and facing the prospect of prosecution for murder.[2] Child protection proceedings were also underway to place Ridgley's children in state custody.

Dr. Timlin's evaluation also provides substantial corroboration for Ridgley's claims of debilitating depression. Although we recognize that this evaluation was conducted some nine months after Ridgley's guilty plea, it must also be acknowledged that no petitioner in Ridgley's position can retroactively show exactly what a psychological evaluation would have yielded had it been conducted months or years earlier. Dr. Timlin's report gives some credence to Ridgley's contention that he was in a state of debilitating depression when he pleaded guilty. It states that tests administered to Ridgley showed elevation of the scales for depression and dysthymia, and the report includes the following:

> He expresses strong emotions of unresolved grief related to the sudden death of his wife. He was quite emotionally overwhelmed when discussing the events related to her actual death in the home and the resultant loss of his wife, family, home and his life and sense of future. He reports that he was severely depressed at the time that he was incarcerated just a couple of days after his wife's death and much of that initial time is a "blur" and that he was in a "fog." He describes his emotional state at that time as indicative of a severe depressive episode. Significant levels of depression are evident at the time of this testing and in his clinical interview.
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> He does meet the diagnostic criterion for Axis I Major Depression, Anxiety Disorder and features of Post-traumatic Stress Disorder. While Mr. Ridgley is "oriented to person, place and time" he is currently so emotionally overwhelmed that it interferes with his ability to function in a way that would seem consistent with his life prior to the death of his wife and his incarceration.
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> There is no indication that Mr. Ridgley was attempting to cleverly manipulate the testing data throughout these tests in such a way as to present a false façade of psychological adjustment. In fact, it seems that his level of functioning is too depressed to be able to successfully manipulate in any such manner at this time.

On this record, Ridgley has raised a genuine factual issue as to whether he was sufficiently depressed and emotionally overwrought that his defense attorney should have recognized that Ridgley may have been incapable of making a rational decision whether to plead

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[2] Information in the record indicates that Ridgley was at some point charged with his wife's murder, but the charge was dismissed by a magistrate at the preliminary hearing for lack of probable cause.

guilty and should have taken steps to avoid a rush to a guilty plea. The evidence also is sufficient to support an inference that but for this deficiency of counsel, Ridgley would not have pleaded guilty. Therefore, we reverse the summary dismissal of Ridgley's petition insofar as he alleges ineffective assistance of counsel for failing to request a mental evaluation or otherwise ensure that Ridgley's decision to plead guilty was not the product of severe depression or emotional breakdown.

B. Other Claims of Ineffective Assistance

With respect to the remaining claims, Ridgley asserts that the district court erred by dismissing his petition on a ground that was not identified by the court in its notice of intent to dismiss. The district court's notice stated its intent to dismiss on the grounds that Ridgley had presented no evidence supporting his claims of deficient performance nor evidence establishing an objective basis from which to conclude that but for counsel's alleged deficiencies Ridgley would not have pleaded guilty but would have insisted on going to trial. The final dismissal order, however, dismissed these claims on the ground that many of the factual assertions made in the petition had been raised by and decided against Ridgley on his motion to withdraw his plea in the criminal case and could not be relitigated in this post-conviction action. This ground for dismissal was not stated in the district court's notice of intent to dismiss.

It is well established that a petitioner is entitled to notice of contemplated grounds for dismissal and an opportunity to respond before a petition for post-conviction relief is dismissed. I.C. § 19-4906(b); *Saykhamchone v. State*, 127 Idaho 319, 321, 900 P.2d 795, 797 (1995); *State v. Christensen*, 102 Idaho 487, 488-89, 632 P.2d 676, 677-78 (1981); *Martinez v. State*, 126 Idaho 813, 892 P.2d 488 (Ct. App. 1995). In the post-conviction arena, the State's motion for summary dismissal under I.C. § 19-4906(c) and a district court's notice of intent to dismiss under I.C. § 19-4906(b) are alternative ways to accomplish the same ends, that being notice of the particularized bases for summary dismissal and opportunity for the petitioner to respond to those proposed grounds for dismissal. *See Franck-Teel v. State*, 143 Idaho 664, 668, 152 P.3d 25, 29 (Ct. App. 2006). A district court need not provide the applicant with notice of the court's dismissal if it is in response to a sufficiently specific motion from the State. *Saykhamchone*, 127 Idaho at 321-22, 900 P.2d at 797-98; *Baruth*, 110 Idaho at 159, 715 P.2d at 372.

Here, although the district court dismissed Ridgley's petition on grounds different from those stated in its notice of intent to dismiss, the State argues that the dismissal of Ridgley's

claims on *res judicata* grounds was proper, because the State's motion for summary dismissal raised that defense and adequately notified Ridgley that he must respond. We cannot agree, for the district court's subsequent notice of intent to dismiss did not incorporate the grounds set forth in the State's motion for summary dismissal. In *Crabtree v. State*, 144 Idaho 489, 494-95, 163 P.3d 1201, 1206-07 (Ct. App. 2006), this Court rejected an argument like that now urged by the State:

> The statutory duty to specify the reasons for the proposed dismissal under I.C. 19-4906(b) rests solely with the district court and it is the district court alone who is responsible for drafting the notice of intent to dismiss. *Downing v. State*, 132 Idaho 861, 864, 979 P.2d 1219, 1222 (Ct. App. 1999). The state's motion to dismiss cannot now be invoked by the state to cure any deficiencies in the district court's notice of intent issued pursuant to I.C. 19-4906(b). Therefore, Crabtree was required to rely only on the notice of intent to dismiss to be informed of the deficiencies in his application, and it is only the notice of intent that we consider on appeal here.
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> The state alternatively asserts that the district court somehow adopted the arguments in the state's motion to dismiss, which should have then been referred to by Crabtree in conjunction with the district court's notice. The state asserts that this intention to adopt the arguments of the state was implied by the district court when in the notice the district court stated that it had been "fully advised as to the [state's] motion."
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> We agree that a district court is free to adopt into a notice of intent to dismiss the arguments set forth by the state's answer to an application for post-conviction relief or motion for summary dismissal of the same. However, the district court must do so explicitly within the context of the notice of intent to dismiss. A district court would best accomplish this by a verbatim reproduction of the state's arguments in the notice. At a minimum, a district court must include in the notice an unambiguous statement that the district court is adopting said arguments and instructs the applicant to refer to the state's answer or motion to dismiss. A passing or ambiguous reference to the state's answer or motion for dismissal does not meet the requirements of specificity and particularity necessary for a sufficient notice of intent to dismiss. *See* [*Griffin v. State*, 142 Idaho 438, 441, 128 P.3d 975, 978 (Ct. App. 2006)]; [*Newman v. State*, 140 Idaho 491, 493, 95 P.3d 642, 644 (Ct. App. 2004)]. We caution however that, if a district court has properly adopted the arguments of the state and the adopted arguments also lack specificity and particularity, then the notice of intent would remain insufficient.

Crabtree is indistinguishable from the present case. We therefore hold that the district court erred in dismissing Ridgley's claims on *res judicata* grounds.

This determination does not necessarily require reversal, however, for if an order of the trial court is incorrect on a particular theory, but is sustainable on an alternative legal theory that

has been raised before the trial court, we will uphold the trial court's decision. *Abbott v. State*, 129 Idaho 381, 385, 924 P.2d 1225, 1229 (Ct. App. 1996). 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, *see Murphy v. State*, 143 Idaho 139, 145, 139 P.3d 741, 747 (Ct. App. 2006), if Ridgley failed to provide admissible evidence supporting his remaining claims, they have been properly dismissed.

The claims in question were that Ridgley's defense attorney's performance was deficient in that the attorney met with Ridgley for less than one hour before he pleaded guilty, did not provide Ridgley a copy of the police report, did not contact potential witnesses, did not watch or listen to tapes of interviews of the victim, and failed to advise Ridgley of potential defenses. These allegations may, in certain circumstances, constitute deficient performance. *See Murphy*, 143 Idaho at 146, 139 P.3d at 748. To prevail, however, Ridgley must establish prejudice through the presentation of evidence showing that if counsel had done any of these things, there is a reasonable probability Ridgley would not have pleaded guilty but would have insisted on going to trial. When applying the prejudice prong to a case involving the entry of a guilty plea, the petitioner must show that counsel's deficient performance "affected the outcome of the plea process." That is, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59. That is, a defendant must show that the subject matter of the mistake constituted "an important part of his decision to plead guilty." *McKeeth v. State*, 140 Idaho 847, 851, 103 P.3d 460, 464 (2004); *Hayes v. State*, 143 Idaho 88, 93, 137 P.3d 475, 480 (Ct. App. 2006). A petitioner's mere self-serving assertion that he would not have pleaded guilty absent the mistake need not be accepted by the trial court sitting as a fact finder. *Id.*

In an affidavit filed in response to the district court's notice of intent to dismiss, Ridgley averred that if deficient performance were found, he would not again plead guilty but would insist on going to trial because he is innocent. This assertion by Ridgley is insufficient, however, because it makes no link between the alleged deficiencies of the attorney and Ridgley's decision to plead guilty. In other words, the deficient performance and prejudice prongs of an ineffective assistance of counsel claim do not pass in space; the second must be causally related to the first. So far as revealed by the record, Ridgley did not provide the district court a copy of the police report or describe its content and thus failed to establish that its content would have given him

some reason to go to trial. He likewise did not submit to the district court copies of the victim interview tapes or otherwise show that their content would have caused him to decide against pleading guilty. He did not identify any potential witnesses or produce admissible evidence of their potential testimony and he did not identify any potential defense to the charge against him that his defense attorney should have considered. Although Ridgley did show that had defense counsel met with him for a total of less than one hour before the guilty plea, he has not shown a reasonable probability that a longer period of consultation would have caused Ridgley to decide against pleading guilty and to instead go to trial. As presented, Ridgley's claims are nothing more than bald allegations of deficient performance alleging that counsel should have done more, with no evidence of the likely effect of that performance on his plea decision. The district court's summary dismissal of these claims is therefore affirmed.[3]

III.

CONCLUSION

The summary dismissal of Ridgley's claim of ineffective assistance for counsel's failure to address Ridgley's claimed severe depression before entry of the guilty plea is reversed and the case remanded for further proceedings on that claim. The summary dismissal order is otherwise affirmed.

Chief Judge GUTIERREZ **CONCURS**. Judge PERRY **DISSENTS WITHOUT OPINION IN PART II(A) AND CONCURS IN PART II(B)**.

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[3] Although we affirm the dismissal of Ridgley's claims of ineffective assistance that are based solely upon these alleged deficiencies, our decision does not preclude the possibility that evidence of some of this conduct of counsel may be relevant to Ridgley's remaining claim that is based upon his state of depression. For example, the amount of time that the defense attorney spent interacting with Ridgley could be relevant to the extent of the attorney's knowledge of Ridgley's mental state and whether the attorney took appropriate responsive action.