

DA 18-0404

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 124N

ROBERT S. PIERCE,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

APPEAL FROM: District Court of the Third Judicial District,
In and For the County of Anaconda-Deer Lodge, Cause No. DV-17-59
Honorable Brad Newman, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Robert S. Pierce, Self-Represented, Deer Lodge, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Mardell Ployhar, Assistant
Attorney General, Helena, Montana

Ben Krakowka, Anaconda-Deer Lodge County Attorney,
Anaconda, Montana

Daniel Guzynski, Mary Elizabeth Cochenour, Special Deputy County
Attorneys, Helena, Montana

Submitted on Briefs: March 27, 2019

Decided: May 28, 2019

Filed:


Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Robert S. Pierce appeals from an order of the Third Judicial District Court, Anaconda-Deer Lodge County, denying his petition for postconviction relief. We affirm.

¶3 On April 25, 2013, a jury convicted Pierce of sexual intercourse without consent and sexual assault involving his step-granddaughter, M.R., who was nine years old when the first offense occurred. Pierce was sentenced to forty years in prison, with fifteen years suspended for the rape, and twenty-five years in prison for the sexual assault, to run concurrently. On July 6, 2017, Pierce filed a pro se petition for postconviction relief, asserting twelve independent grounds for relief. The District Court denied Pierce's petition and request for appointment of counsel. Pierce appeals.

¶4 This Court reviews a district court's denial of a petition for postconviction relief to determine whether the court's findings of fact are clearly erroneous and whether its conclusions of law are correct. *Marble v. State*, 2015 MT 242, ¶ 13, 380 Mont. 366, 355 P.3d 742. Discretionary rulings in postconviction relief proceedings, including rulings related to whether to hold an evidentiary hearing, are reviewed for an abuse of discretion. *Marble*, ¶ 13. Claims of ineffective assistance of counsel constitute mixed questions of

law and fact that we review de novo. *Weaver v. State*, 2005 MT 158, ¶ 13, 327 Mont. 441, 114 P.3d 1039.

¶5 A person adjudged guilty of an offense who has no adequate remedy of appeal may petition the court for postconviction relief pursuant to § 46-21-101, MCA, alleging the sentence violates “the constitution or the laws of this state or the constitution of the United States.” A person seeking postconviction relief bears the burden to show, by a preponderance of the evidence, that the facts justify relief. *Griffin v. State*, 2003 MT 267, ¶ 10, 317 Mont. 457, 77 P.3d 545. A postconviction petition must identify all facts supporting the grounds for relief set forth in the petition and have attached affidavits, records, or other evidence establishing the existence of those facts. Section 46-21-104(1)(c), MCA. Mere conclusory allegations are insufficient to support a petition. *Marble*, ¶ 38.

¶6 The first issue raised on appeal is whether the District Court erred in denying Pierce’s claim of actual innocence based on Pierce’s failure to sufficiently plead the claim and provide evidentiary support. To prevail on a substantive actual innocence claim, the petitioner must first show by clear and convincing evidence that, but for a procedural error, no reasonable juror would have found him or her guilty of the offense. *Beach v. State*, 2009 MT 398, ¶ 44, 353 Mont. 411, 220 P.3d 667.¹

¹ Pierce contends that the *Marble* standard applies here and the District Court erred in applying the *Beach* standard. The *Marble* standard applies when the petitioner has asserted a claim under § 46-21-102(2), MCA. Pierce brought a freestanding actual innocence claim, not a statutory claim pursuant to § 46-21-102(2), MCA.

¶7 To support his claim of actual innocence, Pierce argues: (1) documents from his post-trial civil case demonstrate Pierce was wrongfully convicted; (2) a law enforcement officer, Bill Sather, impermissibly disclosed information to the media; (3) the victim's mother and Sather conspired to get Pierce convicted; (4) the transcripts of M.R.'s pretrial interviews were deemed inadmissible but then improperly considered by the therapist conducting the psychosexual offender evaluation; and (5) the therapist determined that Pierce did not have a sexual interest in children. The District Court did not err in finding that these claims lacked either merit or the requisite evidentiary support.

¶8 First, Pierce misconstrues the civil action. Following his conviction, Pierce sued M.R., her mother, Anaconda-Deer Lodge County, and several law enforcement officers. The federal court deciding the case dismissed Pierce's claims, it did not find that Pierce was wrongfully convicted. *Pierce v. Barkell*, 2016 U.S. Dist. LEXIS 117592 (D. Mont., August 31, 2016). Second, the therapist's use of the transcripts had no impact on the trial or verdict and therefore does not support postconviction relief. Third, the results of a psychosexual evaluation do not prove that Pierce did not commit the crime of which he was convicted. The remaining issues were properly denied by the District Court based on Pierce's failure to provide the requisite evidentiary or factual support. A postconviction petition must identify all facts supporting the ground for relief set forth in the petition and have attached affidavits, records, or other evidence establishing the existence of those facts. Section 46-21-104(1)(c), MCA. Although Pierce attached numerous documents to

his petition, none of the documents met the requirements of § 46-21-104(1)(c), MCA.² The District Court did not err when it denied Pierce's claim of actual innocence.

¶9 The next issue on appeal is whether the District Court erred in denying his claims of ineffective assistance of counsel. To bring a successful claim of ineffective assistance of counsel, the defendant must meet the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). *Rosling v. State*, 2012 MT 179, ¶ 23, 366 Mont. 50, 285 P.3d 486. Pursuant to *Strickland*, the defendant must show that counsel's performance was deficient and the deficient performance prejudiced the defense. *Rosling*, ¶ 23. "[C]ourts must accord great deference to defense counsel's exercise of judgment in determining appropriate defenses and trial strategy." *State v. Dethman*, 2010 MT 268, ¶ 19, 358 Mont. 384, 245 P.3d 30 (citation and internal quotation marks omitted). There is a strong presumption that counsel's conduct falls within the wide range of reasonably competent professional assistance contemplated by the Sixth Amendment. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065.

¶10 Pierce first asserts that he received ineffective assistance when his trial counsel failed to conduct pretrial interviews of M.R. and her mother. However, Pierce fails to establish that counsel's choice not to interview M.R. and her mother fell below an objective standard of reasonableness measured under prevailing professional norms. In fact, an attorney's deliberate choice not to conduct pretrial interviews can be recognized

² In his briefing, Pierce assumes that because the clerk of court declined to scan his voluminous exhibits into the court's electronic record, they were not considered by the court. This assumption is incorrect. Evidenced by a letter from the clerk to Pierce, the documents did not need to be scanned in order for the court to examine them.

as an acceptable trial strategy. *State v. Molder*, 2007 MT 41, ¶ 26, 336 Mont. 91, 152 P.3d 722. Further, the trial transcript reveals that Pierce’s counsel reviewed and was familiar with both witnesses’ pretrial interviews and used their statements during cross-examination. Pierce additionally contends that his attorney’s decision not to call an expert witness amounted to ineffective assistance of counsel. Pierce does not identify the relevance of the expert’s anticipated testimony or how it would have undermined the State’s case, but only speculates that an expert would have benefitted his defense. “Unsupported allegations and conclusions are not a basis for granting postconviction relief.” *McGarvey v. State*, 2014 MT 189, ¶ 20, 375 Mont. 495, 329 P.3d 576. Accordingly, the District Court’s decision was not erroneous.³

¶11 Pierce also argues that his appellate counsel was ineffective for failing to pursue “confrontation clause issues” caused by the State’s decision not to introduce transcripts of M.R.’s pretrial interview into evidence. The criteria for establishing ineffective assistance of appellate counsel are the same as those used to establish ineffective assistance of trial counsel. *DuBray v. State*, 2008 MT 121, ¶ 31, 342 Mont. 520, 182 P.3d 753. Appellate “counsel has no constitutional obligation to raise every non-frivolous issue on appeal” and the “presumption of effective assistance of counsel will be overcome only when ignored issues are clearly stronger than those presented.”

³ Pierce further alleges that he received ineffective assistance of counsel because his trial counsel “was having personal issues, abandoned his client while the primary witness was on the stand and assist[ed] the prosecution in using transcripts that were classified as inadmissible and then did not use prior statements for the defense benefit.” Because he provides no further explanation, and cites no authority, we decline to address this issue. *Herman v. State*, 2006 MT 7, ¶ 22, 330 Mont. 267, 127 P.3d 422 (holding “[w]e do not consider unsupported arguments; nor do we have an obligation to formulate arguments or locate authorities for parties on appeal.”).

DuBray, ¶ 31. Pierce provides no evidence, other than conclusory statements, indicating the confrontation clause issues were stronger than those presented by counsel on appeal or that he was prejudiced by counsel's failure to pursue them.

¶12 Pierce also contends that appellate counsel was ineffective for failing to challenge the prosecution's "known use of false testimony." Specifically, Pierce asserts that M.R.'s trial testimony describing the abuse was false because M.R. stated in a pretrial interview: "[my mom] told me to say you know you touched me" and that her mother "kept telling [her] to say things." When read in isolation, as Pierce presents them, M.R.'s statements indicate that her accusations against Pierce were coached. However, when read in context, the statements support the opposite conclusion and are consistent with M.R.'s trial testimony. For these reasons, Pierce fails to establish that this issue was stronger than those presented by appellate counsel.

¶13 Pierce adds that because M.R.'s prior statements establish the falsity of her trial testimony, the State violated his right to due process in allowing M.R. to testify falsely. Again, the out of context statements Pierce relies upon here do not demonstrate that M.R.'s accusations were false. Pierce fails to establish that the prosecutors knowingly presented false testimony.

¶14 Finally, Pierce argues that the District Court erred in dismissing his petition without holding an evidentiary hearing. "If a district court finds that the allegations in a petition are without merit or would not otherwise entitle a petitioner to relief, a district court may deny an application for postconviction relief without holding an evidentiary hearing." *State v. Cobell*, 2004 MT 46, ¶ 12, 320 Mont. 122, 86 P.3d 20. The District

Court carefully examined each claim in Pierce’s petition before finding that Pierce was either not entitled to relief or failed to meet the procedural threshold requirements.

¶15 In sum, the District Court did not err when it denied Pierce’s petition for postconviction relief.

¶16 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent.

¶17 Affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ INGRID GUSTAFSON

/S/ BETH BAKER

/S/ DIRK M. SANDEFUR

/S/ JAMES JEREMIAH SHEA