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## Fisher v. State Respondent's Brief Dckt. 38505

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

**COPY**

LEO LEE FISHER,	)	
	)	
Petitioner-Appellant,	)	NO. 38505
	)	
vs.	)	
	)	
STATE OF IDAHO,	)	
	)	
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**

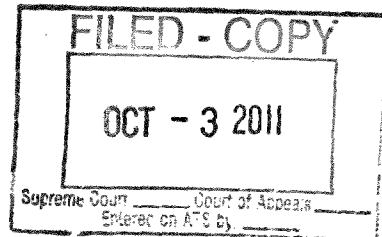
**HONORABLE STEPHEN S. DUNN**  
District Judge

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**PRO SE  
PETITIONER-APPELLANT**

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## STATEMENT OF THE CASE

### Nature Of The Case

Leo Lee Fisher appeals from the summary dismissal of his petition for post-conviction relief.

### Statement Of The Facts And Course Of The Proceedings

Fisher was convicted of felony DUI, and his conviction and sentence were affirmed on appeal. (R., p. 20.) He filed a petition for post-conviction relief. (R., p. 1.) His claims in the petition were that his counsel was ineffective for failing to object when “[t]he Government violated E.R. 404(b)” and failing to “move to suppress improperly obtained JURY Slections.” (R., p. 2 (capitalization and spelling original unless bracketed).) In his affidavit Fisher explained that the Rule 404(b) claim was for failure to seek suppression of evidence because the police officer “did not reveal” himself to be a police officer. (R., pp. 6, 8-9.) The affidavit also asserted problems with the ethnic make-up of the jury and that bias arose because several jurors stated in voir dire they knew someone in law enforcement. (R., pp. 7-8.) Fisher did not move for appointment of counsel. (See generally R.)

The district court provided notice of its intent to dismiss, based on a review of the pleadings, affidavit, and record of the underlying criminal case. (R., pp. 20-31.) The court reasoned that I.R.E. 404(b) had no application to evidence gathered by the police officer after the stop; that the facts asserted by Fisher would not establish any grounds for suppression of evidence; and that there was no showing that any other evidence subject to exclusion under I.R.E. 404(b) had

been presented at trial. (R., pp. 25-26.) The court further concluded that Fisher failed to state any cognizable claim of ineffective assistance of counsel in jury selection. (R., pp. 27-30.)

Fisher responded to the notice by mostly reiterating his claims as already asserted. (R., pp. 39-48.) The district court thereafter entered an order dismissing the petition. (R., pp. 49-50.) Fisher timely appealed. (R., pp. 52-57.)

## ISSUE

Fisher provides a lengthy statement of issues that will not be reproduced here. (Appellant's brief, pp. 6-8.) The state rephrases the issue as:

Has Fisher failed to show that the district court erred when it summarily dismissed his petition for post-conviction relief?

## ARGUMENT

### Fisher Has Failed To Show That The District Court Erred By Summarily Dismissing His Petition For Post-Conviction Relief

#### A. Introduction

The district court dismissed Fisher's petition because "Petitioner is not entitled to relief and no purpose would be served by any further proceedings." (R., p. 31.) On appeal Fisher asserts that he demonstrated ineffective assistance of counsel for failing to strike biased jurors. (Appellant's brief, pp. 9-13.) Fisher has failed to show error in the summary dismissal of his claim of ineffective assistance of counsel in jury selection.

#### B. Standard Of Review

On appeal from summary dismissal of a post-conviction petition, the appellate court reviews the record to determine if a genuine issue of material fact exists, which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. Matthews v. State, 122 Idaho 801, 807, 839 P.2d 1215, 1221 (1992); Aeschliman v. State, 132 Idaho 397, 403, 973 P.2d 749, 755 (Ct. App. 1999).

#### C. Fisher Has Failed To Show Any Evidence Of Juror Bias

A petition for post-conviction relief initiates a new and independent civil proceeding and the petitioner bears the burden of establishing, by a preponderance of the evidence, that he is entitled to relief. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007); State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983). A petition for post-conviction relief must



contain more than “a short and plain statement of the claim” that would suffice for a complaint. Workman, 144 Idaho at 522, 164 P.3d at 522 (referencing I.R.C.P. 8). Instead, the petitioner must submit verified facts within his personal knowledge and produce admissible evidence to support his allegations. Id. (citing I.C. § 19-4903). Furthermore, the factual showing in a post-conviction relief application must be in the form of evidence that would be admissible at an evidentiary hearing. Cowger v. State, 132 Idaho 681, 684, 978 P.2d 241, 244 (Ct. App. 1999); Drapeau v. State, 103 Idaho 612, 617, 651 P.2d 546, 551 (Ct. App. 1982).

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief in response to a party’s motion or on the court’s own initiative. “To withstand summary dismissal, a post-conviction applicant must present evidence establishing a prima facie case as to each element of the claims upon which the applicant bears the burden of proof.” State v. Lovelace, 140 Idaho 53, 72, 90 P.3d 278, 297 (2003) (citing Pratt v. State, 134 Idaho 581, 583, 6 P.3d 831, 833 (2000)). While a court must accept a petitioner’s un rebutted allegations as true, the court is not required to accept either the applicant’s mere conclusory allegations, unsupported by admissible evidence, or the applicant’s conclusions of law. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001)). “Allegations contained in the application are insufficient for the granting of relief when (1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law.” Id. at 523, 164 P.3d at 803.

To be entitled to relief on a claim of ineffective assistance of counsel, a post-conviction petitioner must demonstrate: 1) that counsel's performance fell below an objective standard of reasonableness, and 2) that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). A reviewing court evaluates counsel's performance at the time of the alleged error, not in hindsight, and presumes that "trial counsel was competent and that trial tactics were based on sound legal strategy." State v. Porter, 130 Idaho 772, 791-92, 948 P.2d 127, 146-47 (1997). Thus, the relevant question before this Court is whether Fisher presented admissible evidence to establish a prima facie showing that his counsel was both deficient as to jury selection and that such deficiency prejudiced him.

Fisher's appellate argument is merely a litany of claimed grounds for challenging jurors in the case. He argues that "Juror Number twelve" was acquainted with attorneys, "good friends with the familys [sic]," had an aunt in law enforcement, and, due to an internship in the courthouse, had "knowledge of the law." (Appellant's brief, p. 9.) "Juror Number Four," Fisher claims, "has an uncle [who] has had a few D.U.I's." (Appellant's brief, p. 10.) "Mr. K. O'Neil: has [a] great number of acquaintances, with D.U.I. offenders." (Appellant's brief, p. 11.) "Juror No. 5" is friends with an Idaho State Police Detective; "Juror No. 8" has attorneys and a judge in her family; "Juror No. 9 ... workes [sic] with Pocatello Police Department"; "Ms. Jones" is acquainted with officers and has a brother who is a prosecuting attorney. (Appellant's brief, p. 12.)

Fisher's argument fails. First, many of Fisher's factual claims are ultimately shown to be false by the evidence. (See, e.g., Appellant's brief, p. 12 (claiming "Juror No. 9" works with the Pocatello Police Department when in fact she stated in voir dire that she works at a school and has dealt with the resource officers there (#34769 5/22/07 Tr., p. 40, L. 3 – p. 41, L. 21); claiming that juror Jones has a brother that is a "prosecuting attorney" when in fact he is a "practicing attorney in Las Vegas, Nevada" (#34769 5/22/07 Tr., p. 45, Ls. 15-17)). More importantly, however, all of the allegations are merely that the jurors knew law enforcement officers, attorneys, or persons convicted of DUI. These allegations do not demonstrate either deficient performance or prejudice because the evidence does not show that these jurors were in fact biased.


When a post-conviction petitioner claims his counsel was ineffective for failing to file a motion in his underlying criminal case, the court "may consider the probability of success of the motion in question in determining whether the attorney's inactivity constituted incompetent performance." Sanchez v. State, 127 Idaho 709, 713, 905 P.2d 642, 646 (Ct. App. 1995). A petitioner must also overcome the presumption that trial counsel's decision not to file a particular motion was strategic or tactical. See State v. Chapman, 120 Idaho 466, 816 P.2d 1023 (Ct. App. 1991) (trial counsel's choice of witnesses, his manner of conducting cross-examination, and his lack of objection to testimony fall within the area of strategic or tactical decisions). Absent evidence of actual bias, counsel is not ineffective for failing to challenge a potential juror. Medrano v. State, 127 Idaho 639, 646, 903 P.2d 1336, 1343 (Ct. App. 1995). Here Fisher

has failed to show his counsel was ineffective for failing to move to strike any juror for bias because he has failed to present actual evidence of bias. He has therefore failed to make a prima facie showing of either deficient performance or prejudice. The district court properly dismissed the petition and Fisher has failed to show error.

CONCLUSION

The state respectfully requests this Court to affirm the summary dismissal of the petition for post-conviction relief.


DATED this 3rd day of October, 2011.

  
KENNETH K. JORGENSEN  
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 3rd day of October, 2011, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

LEO LEE FISHER  
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St. Anthony Work Center  
125 North 8th West  
St. Anthony, ID 83445

  
KENNETH K. JORGENSEN  
Deputy Attorney General

KKJ/pm