

7-17-2013

## Fisher v. State Respondent's Brief Dckt. 40473

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/not\\_reported](https://digitalcommons.law.uidaho.edu/not_reported)

---

### Recommended Citation

"Fisher v. State Respondent's Brief Dckt. 40473" (2013). *Not Reported*. 1163.  
[https://digitalcommons.law.uidaho.edu/not\\_reported/1163](https://digitalcommons.law.uidaho.edu/not_reported/1163)

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIdaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).



**TABLE OF CONTENTS**

	<b><u>PAGE</u></b>
TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE CASE .....	1
Nature Of The Case .....	1
Statement Of Facts And Course Of Proceedings .....	1
ISSUE.....	3
ARGUMENT .....	4
Fisher Has Failed To Show That The District Court Erred In Summarily Dismissing His Petition For Post-Conviction Relief .....	4
A.    Introduction .....	4
B.    Standard Of Review .....	4
C.    Fisher Has Failed To Show Error In The Summary Dismissal Of His Post-Conviction Petition.....	4
1.    Ineffective Assistance Of Trial Counsel – Plea Agreement.....	5
2.    Ineffective Assistance of Counsel – Judge/Defense Attorney Relationship .....	8
3.    Deputy Prosecutors – Notice of Appearance.....	8
CONCLUSION.....	10
CERTIFICATE OF SERVICE .....	10

## TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Aragon v. State</u> , 114 Idaho 758, 760 P.2d 1174 (1988) .....	6
<u>Cowger v. State</u> , 132 Idaho 681, 978 P.2d 241 (Ct. App. 1999).....	6
<u>Davis v. State</u> , 116 Idaho 401, 775 P.2d 1243 (Ct. App. 1989) .....	6
<u>Ferrier v. State</u> , 135 Idaho 797, 25 P.3d 110 (2001) .....	5
<u>Gibson v. State</u> , 110 Idaho 631, 718 P.2d 283 (1986).....	6
<u>Gilpin-Grubb v. State</u> , 138 Idaho 76, 57 P.3d 787 (2002).....	4
<u>McKinney v. State</u> , 133 Idaho 695, 992 P.2d 144 (1999) .....	8
<u>Pratt v. State</u> , 134 Idaho 581, 6 P.3d 831 (2000) .....	4
<u>Roman v. State</u> , 125 Idaho 644, 873 P.2d 898 (Ct. App. 1994).....	6
<u>State v. Beason</u> , 119 Idaho 103, 105, 803 P.2d 1009 (Ct. App. 1991) .....	7
<u>State v. Beck</u> , 128 Idaho 416, 913 P.2d 1186 (Ct. App. 1996) .....	7
<u>State v. Charboneau</u> , 116 Idaho 129, 774 P.2d 299 (1989) .....	6
<u>State v. Fisher</u> , 2012 Unpublished Opinion No. 512, Docket Nos. 39097/39111/39112 (Idaho App., June 12, 2012) .....	1, 7
<u>State v. Jaramillo</u> , 113 Idaho 862, 749 P.2d 1 (Ct. App. 1987).....	9
<u>State v. Lovelace</u> , 140 Idaho 53, 90 P.3d 278 (2003).....	4, 5
<u>State v. Mowery</u> , 128 Idaho 804, 919 P.2d 333 (1996) .....	7
<u>State v. Murinko</u> , 108 Idaho 872, 873, 702 P.2d 910 (Ct. App. 1985) .....	7
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984).....	5
<u>Stuart v. State</u> , 118 Idaho 865, 801 P.2d 1216 (1990) .....	5
<u>Workman v. State</u> , 144 Idaho 518, 164 P.3d 798 (2007).....	4, 5

**STATUTES**

I.C. § 19-4901..... 9

I.C. § 19-4906..... 4, 5

I.C. § 31-2008..... 9

I.C. § 31-2604..... 9

## STATEMENT OF THE CASE

### Nature Of The Case

Stanley G. Fisher appeals from the district court's order summarily dismissing his petition for post-conviction relief.

### Statement Of Facts And Course Of Proceedings

Fisher pleaded guilty to felony driving under the influence. State v. Fisher, 2012 Unpublished Opinion No. 512, Docket Nos. 39097/39111/39112 (Idaho App., June 12, 2012). He also admitted violating his probation in two prior felony driving under the influence cases. Id. The district court imposed a unified ten-year sentence with four years fixed in the new case. Id. The court revoked Fisher's probation in the two prior cases and ordered execution of the original sentences. Id. The court ran all three sentences concurrently. Id.

All three cases were consolidated for appeal. Id. Fisher alleged that the district court abused its discretion in imposing an excessive sentence on the new felony DUI, and by revoking probation on the prior two DUIs. Id. In an unpublished opinion, the Idaho Court of Appeals affirmed the district court's sentencing determinations. Id.

Fisher filed a *pro se* petition for post conviction relief containing three claims. (R., pp.1-4.) He asserted: (1) his trial counsel was ineffective for allowing his I.C.R. 11 agreement to be breached; (2) his appointed counsel and the presiding judge were "on a first name basis," and their relationship "was more than professional"; and (3) there were several different state prosecutors who

participated in his case without filing notices of appearance. (Id.) The district court denied Fisher's motion for the appointment of counsel and summarily dismissed Fisher's petition, concluding that Fisher failed to raise a genuine issue of material fact that would entitle him to relief as a matter of law as to any of his claims. (R., pp.17-21, 34-40.) Fisher timely appealed. (R., pp.44-47.)

## ISSUE

Fisher states the issues on appeal as:

1. Ineffective assistance of counsel by his court appointed attorney not defending petitioner adequately. This is shown by a foiled Rule 11 [agreement], and in turn did not insist that the agreement should be withdrawn when the court choose not to abide with such agreement.
2. The Judge and the court appointed attorney were on [a] first name basis, and [the] relationship between counsel and judge was more than professional.
3. There were several different and continually changing assistance prosecuting attorneys, and none of them filed a Notice of Appearance.

(Appellant's brief, p.5.)

The state wishes to rephrase the issue on appeal as:

Has Fisher failed to show that the district court erred in summarily dismissing his petition for post-conviction relief?



## ARGUMENT

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

#### A. Introduction

Fisher contends that the district court erred in summarily dismissing his petition for post-conviction relief. (See generally, Appellant's brief.) However, the record reveals that Fisher failed to allege facts that would entitle him to relief as to any of his claims. In addition, he has failed to provide an adequate appellate record from which to evaluate his claims.

#### 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 ...." Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007) (citing Gilpin-Grubb v. State, 138 Idaho 76, 80, 57 P.3d 787, 791 (2002)).

#### C. Fisher Has Failed To Show Error In The Summary Dismissal Of His Post-Conviction Petition

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)). Thus, a claim for post-conviction relief is subject to summary dismissal “if the applicant’s evidence raises no genuine issue of material fact” as to each element of the petitioner’s claims. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007) (citing I.C. § 19-4906(b), (c)); Lovelace, 140 Idaho at 72, 90 P.3d at 297.

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)). The trial court is not required to conduct an evidentiary hearing prior to dismissing the petition when the alleged facts, even if true, would not entitle the petitioner to relief. Id. (citing Stuart v. State, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990)). “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.

Fisher failed to establish a *prima facie* case as to any of his post-conviction claims. He has therefore failed to show that the district court erred in summarily dismissing his petition for post-conviction relief.

1. Ineffective Assistance Of Trial Counsel – Plea Agreement

A post-conviction petitioner alleging ineffective assistance of counsel must demonstrate both deficient performance and resulting prejudice. Strickland v.

Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989). An attorney's performance is not constitutionally deficient unless it falls below an objective standard of reasonableness, and there is a strong presumption that counsel's conduct is within the wide range of reasonable professional assistance. Gibson v. State, 110 Idaho 631, 634, 718 P.2d 283, 286 (1986); Davis v. State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989). To establish prejudice, a defendant must show a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988); Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 244 (Ct. App. 1999). Bare assertions and speculation, unsupported by specific facts, do not make out a *prima facie* case for ineffective assistance of counsel. Roman v. State, 125 Idaho 644, 649, 873 P.2d 898, 903 (Ct. App. 1994).

In his first post-conviction claim, Fisher alleged that he received ineffective assistance of trial counsel. (R., p.2.) He asserted that this ineffectiveness was evidenced by the fact that the "Rule 11 agreement was violated and the terms of this agreement was breached," and that the "court chose not to abide with such agreement." (R., pp.2, 5.)

The district court summarily dismissed this claim because Fisher failed to allege any factual circumstances outlining the basis of how any plea agreement was breached. (R., pp.38-39.) Additionally, Fisher failed to identify any particular conduct of his trial counsel that caused any alleged breach. (See R., p.2.) According to the district court's review of the underlying case file, there was

no agreement in the underlying criminal proceedings regarding sentencing recommendations, let alone any agreement that was binding on the court. (Id.) The state agreed only to dismiss a persistent violator enhancement. (Id.); see also Fisher, Unpublished Opinion No. 512, Docket Nos. 39097/39111/39112, p. 2 (Ct. App. 2012). Fisher thus failed to allege facts which, if true, would have entitled him to relief, and the facts that he did allege were clearly disproven by the record.

Fisher also failed to augment the appellate record or move this court to take judicial notice of transcripts or the clerk's record from his underlying conviction. It is the appellant's responsibility to provide an adequate record to substantiate his claims on appeal. State v. Beason, 119 Idaho 103, 105, 803 P.2d 1009 (Ct. App. 1991); State v. Murinko, 108 Idaho 872, 873, 702 P.2d 910 (Ct. App. 1985). In the absence of an adequate record to support the appellant's claims, the court will not presume error. Beason, 119 Idaho at 105; Murinko, 108 Idaho at 873. Rather, the missing portions of the record must be presumed to support the action of the trial court. State v. Mowery, 128 Idaho 804, 805, 919 P.2d 333 (1996); State v. Beck, 128 Idaho 416, 422, 913 P.2d 1186 (Ct. App. 1996). Because Fisher has failed to provide an adequate appellate record, this Court cannot analyze the district court's review of the record, or reach Fisher's claim of error

Because Fisher failed to allege deficient attorney conduct or any other facts that would entitle him to relief, he has failed to show the district court erred in summarily dismissing his ineffective assistance of trial counsel claim. Further,

because he has failed to provide an adequate appellate record, this Court cannot review the district court's determinations which precluded relief in this case.

2. Ineffective Assistance of Counsel – Judge/Defense Attorney Relationship

In his second post-conviction claim, Fisher asserted that, “[t]he judge and the court appointed counsel were on [a] first name basis; [and] that the relationship between counsel and judge was more than professional.” (R., p.2.) Fisher has not identified the specific basis of his claim – *i.e.*, whether he asserts that the trial judge should have disqualified himself, or whether his trial counsel was ineffective for failing to seek such disqualification. Nor has he attempted to assert how any alleged friendly relationship between his counsel and the judge prejudiced him. He also failed to substantiate his allegations with any admissible evidence. The district court found no evidence to support Fisher’s allegations upon its own review of the underlying case file. (R., p.39.) “Unsubstantiated and conclusory allegations are insufficient to entitle a petitioner to an evidentiary hearing.” McKinney v. State, 133 Idaho 695, 700, 992 P.2d 144, 149 (1999). Further, Fisher’s failure to provide an adequate appellate record precludes this Court from attempting to reach this claim.

3. Deputy Prosecutors – Notice of Appearance

In his third post-conviction claim, Fisher asserted “there were several different and continually changing assistant prosecuting attorney[s], and that no

such NOTICE OF [APPEARANCE] was ever filed on any of them.” (R., p.2. (capitalization in original).)

The district court summarily dismissed this claim, correctly determining it failed to allege facts which, if true, would entitle Fisher to relief.<sup>1</sup> (R., pp.48-49.) A county prosecuting attorney has the authority, and duty, to prosecute criminal actions within his or her county. I.C. § 31-2604. That same power is conferred upon the county prosecutor’s deputies. State v. Jaramillo, 113 Idaho 862, 863, 749 P.2d 1, 2 (Ct. App. 1987); see also I.C. § 31-2008. Deputy prosecuting attorneys thus do not act in their individual capacities, but pursuant to the power granted to county prosecutors by state law. The Bannock County deputy prosecuting attorneys who participated in Fisher’s felony DUI proceedings all represented a single party, and thus were not required to file individual notices of appearance.

Because Fisher failed to allege facts that would entitle him to relief as to any of his claims, and because he has failed to provide an adequate appellate record from which any of his claims could be reviewed, he has failed to show that the district court erred in summarily dismissing his petition for post-conviction relief

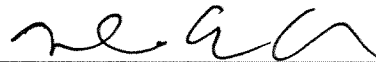
---

<sup>1</sup> The district court could have also found that Fisher forfeited this claim by not raising it on direct appeal. I.C. § 19-4901(b).

CONCLUSION

The state respectfully requests this Court affirm the district court's summary dismissal of Fisher's petition for post-conviction relief.


DATED this 17th day of July, 2013.

  
\_\_\_\_\_  
MARK W. OLSON  
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 17th day of July, 2013, I cause two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

Stanley G. Fisher  
IDOC No. 47544  
I.S.C.I.  
P.O. Box 14  
Boise, ID 83707

  
\_\_\_\_\_  
MARK W. OLSON  
Deputy Attorney General

MWO/pm