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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

PHILLIP DUANE FLIEGER,)	
)	No. 40690
Petitioner-Appellant,)	
)	Twin Falls Co. Case No.
vs.)	CV-2012-3464
)	
STATE OF IDAHO,)	
)	
Respondent.)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

HONORABLE RANDY J. STOKER
District Judge

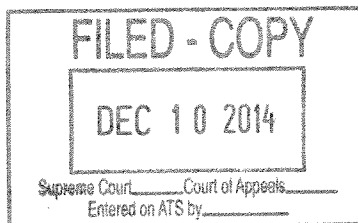
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STATEMENT OF THE CASE

Nature of the Case

Phillip Duane Flieger appeals from the district court's order summarily dismissing his post-conviction petition.

Statement of Facts and Course of Proceedings

The Idaho Court of Appeals described the facts and course of proceedings underlying Flieger's convictions as follows:

A pickup driven by Flieger was stopped by a police officer for a traffic violation. A drug detection dog and handler arrived to assist in the stop, and the dog alerted to Flieger's vehicle. After the dog alerted, Flieger consented to a search of his person and the officers found over five thousand dollars in cash and a motel key. The officers then conducted a search of the pickup and found pouches containing heroin, methamphetamine, cocaine, and drug paraphernalia. Flieger was arrested and charged with three counts of possession of a controlled substance with intent to deliver.

At the time of the stop, Flieger was on probation for possession of methamphetamine. Upon Flieger's arrest, his probation officer was informed that a motel key was found in Flieger's pocket. The probation officer went to the motel, conducted a search of the room, and found methamphetamine and drug paraphernalia. The probation officer also conducted a search of a vehicle parked at the motel, which belonged to Flieger's wife, but no drugs were found in the car. Flieger pled not guilty to the charges of possession of a controlled substance with intent to deliver. Flieger claimed that he had no knowledge of the drugs and that they had been left in his pickup by an individual who had borrowed it earlier in the day. Flieger claimed that he had a large amount of cash because he was going to buy a car for his wife. Flieger further asserted that he had rented the motel room because his house was being fumigated and because he and his wife needed to spend more time together away from their family.

Prior to trial, the state filed a notice of intent to introduce evidence of other acts pursuant to I.R.E. 404(b). Specifically, the state sought to admit evidence that: (1) Flieger had a prior conviction for possession of methamphetamine and was on

probation at the time of his arrest; (2) Flieger rented the motel room (on this occasion and numerous prior occasions) and that methamphetamine and paraphernalia were found therein on the day of his arrest; (3) Flieger tested positive for methamphetamine use on the day of his arrest; and (4) in Flieger's previous possession of methamphetamine case, he claimed he had a large amount of cash because he was going to buy a car for his daughter. After conducting an I.R.E. 404(b) hearing, the district court ruled that the state could present evidence of Flieger's prior conviction and probation status, his methamphetamine use, and that drugs and paraphernalia were found in the motel room. The district court ruled that evidence Flieger rented a motel room was not a bad act within the meaning of I.R.E. 404(b) and was admissible. The district court also ruled evidence showing that, in his prior case, Flieger claimed to have a large amount of cash to be used for buying a car for his daughter was inadmissible because it would be unfairly prejudicial.

At trial the state presented evidence of Flieger's prior conviction, his probation status, and that Flieger rented a motel room in which drugs and paraphernalia were found. The state also presented evidence that Flieger submitted to a urinalysis drug test on the day of his arrest, but did not present evidence of the results of the test. During trial, the prosecutor also elicited testimony regarding Flieger's post- *Miranda* silence.

State v. Flieger, 2011 Unpublished Opinion No. 514, Docket No. 36866, pp.1-2 (Idaho App., June 9, 2011).

The jury found Flieger guilty of three lesser included counts of possession of controlled substances. (R., pp.732-734, 1008.) Flieger then admitted prior convictions which subjected him to the persistent violator sentencing enhancement. (R., p.1010.) The district court sentenced Flieger to three concurrent unified life sentences, each with 10 years fixed. (R., pp.413-418, 1233.)

On direct appeal, Flieger argued: (1) the district court abused its discretion by admitting I.R.E. 404(b) evidence of his prior methamphetamine possession

conviction, his probation status, and the existence of drugs and paraphernalia found in the motel room; and (2) the prosecutor committed misconduct by eliciting testimony from a police officer about Flieger's post-*Miranda* silence. Flieger, 2011 Unpublished Opinion No. 514. The Idaho Court of Appeals held: (1) the district court did not abuse its discretion by admitting the I.R.E. 404(b) evidence; and (2) while the prosecutor's solicitation of testimony regarding Flieger's post-*Miranda* silence was improper, Flieger failed to establish fundamental error because he could not show that the testimony impacted the outcome of the trial in light of the overwhelming evidence of his guilt, and the passing and innocuous nature of the reference. Id.

Flieger then filed a *pro se* petition for post-conviction relief. (R., pp.13-17.) Flieger raised numerous allegations of ineffective assistance of trial and appellate counsel, and of violations of various other constitutional rights. (R., pp.13-159.) In support of the petition, Flieger submitted a brief, an affidavit, most of the records and transcripts associated with his underlying conviction, and letters between himself and his trial and appellate attorneys. (See generally R.) The district court appointed counsel to represent Flieger. (R., p.651.) Appointed counsel chose not to amend Flieger's *pro se* petition. (R., pp.668-669.)

After a hearing, the district court summarily dismissed Flieger's petition after concluding that Flieger failed to assert facts that would, if true, entitle him to relief as to any of his claims. (1/14/13 Tr., p.46, L.21 – p.50, L.21.) The court also concluded that Flieger waived his non-ineffective assistance of counsel claims by failing to raise them in his direct appeal. (1/14/13 Tr., p.49, Ls.10-12.)

The court chose not to prepare a written memorandum opinion, but instead adopted the arguments and reasoning set forth in the state's motion for summary dismissal. (1/14/13 Tr., p.48, Ls. 9-15; p.50, Ls.14-19.) Flieger timely appealed. (R., pp.1327-1331.)

ISSUE

Flieger's brief does not contain a statement of issues on appeal as required by I.A.R. 35(a)(4).

The state phrases the issue on appeal as:

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

ARGUMENT

Flieger Has Failed To Show That The District Court Erred In Summarily Dismissing His Post-Conviction Petition

A. Introduction

Flieger contends that the district court erred in summarily dismissing his post-conviction petition. (See generally Appellant's brief.) However, a review of the record reveals that Flieger failed to allege facts, which, if true, demonstrate he was entitled to relief as to any of 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 material 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).

C. Flieger Failed To Show He Was Entitled To Relief As To Any Of His Ineffective Assistance Of Counsel Claims

Post-conviction proceedings are governed by the Uniform Post-Conviction Procedure Act. I.C. § 19-4901, *et seq.* A petition for post-conviction relief initiates a new and independent civil proceeding in which the petitioner bears the burden of establishing 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).

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, if the applicant "has not presented evidence making a prima facie case as to each essential element of the claims upon which the applicant bears the burden of proof." Berg v. State, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998). Until controverted by the state, allegations in a verified post-conviction application are, for purposes of determining whether to hold an evidentiary hearing, deemed true. Cooper v. State, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975). However, 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. Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001); Roman v. State, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994).

Also, because the trial court rather than a jury will be the trier of fact in the event of an evidentiary hearing, summary disposition is permissible, despite the possibility of conflicting inferences to be drawn from the facts, for the court alone will be responsible for resolving the conflict between those inferences. State v. Yakovac, 145 Idaho 437, 444, 180 P.3d 476, 483 (2008). That is, the judge in a post-conviction action is not constrained to draw inferences in favor of the party opposing the motion for summary disposition but rather is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. Id.

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). 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).

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). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable" Strickland, 466 U.S. 668, 690 (1984). 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).

In this case, Flieger's petition, supporting affidavit, and appellant's brief are lengthy, repetitive, and difficult to decipher. Further, on appeal, Flieger does not assign any specific error to the district court,¹ but instead largely repeats,

¹ This Court may affirm the district court's summary dismissal of Flieger's petition on the alternative basis that he failed to assign specific error to the district court. It is well settled that the appellate court will not review actions of the district court for which no error has been assigned and will not otherwise search the record for errors. State v. Hoisington, 104 Idaho 153, 159, 657 P.2d 17, 23 (1983); see also State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) (a party waives an issue on appeal if either authority or argument is lacking).

often verbatim, sections of his brief in support of his petition submitted below. (Compare Appellant's brief with R., pp.72-159.) It is thus difficult both to identify the claims raised, and to thoroughly respond to each of them. Flieger references nearly every aspect of the underlying proceedings that did not go in his favor, and, in a conclusory fashion, assigns allegations of ineffective assistance of counsel, court error, and/or prosecutorial misconduct to each corresponding attorney determination and court ruling. (See generally Appellant's brief; R., pp.13-159.) Flieger has generally failed to provide admissible evidence or context to support these allegations.

In order to construe Flieger's petition, Appellant's brief, and the claims raised within, the state relies upon the motion for summary dismissal submitted by the state below. (See R., pp.1251-1280.) The district court did not prepare its own memorandum opinion in summarily dismissing Flieger's petition, but instead adopted the arguments and reasoning set forth in the state's motion. (1/14/13 Tr., p.48, Ls. 9-15; p.50, Ls.14-19.) On appeal, Flieger does not argue that the district court failed to address any of his claims in dismissing his petition, or that the state or the court mischaracterized any of his claims. (See generally Appellant's brief.) Thus, all of the claims potentially at issue before this Court are contained within the state's motion for summary dismissal submitted below.

Based upon the state's motion for summary dismissal, the state construes Flieger's appeal as challenging the district court's summary dismissal of the following ineffective assistance of counsel claims: (1) Ineffective assistance of counsel with regard to the motion to suppress; (2) Ineffective assistance of

pretrial counsel Williams;² (3) Ineffective assistance of pretrial counsel Bingham; (4) Ineffective assistance of trial counsel Brown; and (5) Ineffective assistance of appellate counsel Curtis. Flieger has failed to show error in the district court's dismissal of any of these claims.

1. Ineffective Assistance Of Counsel With Regard To The Motion To Suppress

Flieger asserts that his counsel was ineffective with respect to his motion to suppress in that counsel: failed to challenge the state's evidence, inadequately chose witnesses, inadequately cross-examined the state's witnesses, failed to point out false officer testimony, failed to adequately prepare, and failed to present an argument regarding the length of his detention during the stop. (See R., pp.1263-1265.)

Prior to trial, Flieger filed a motion to suppress, alleging that that the officer lacked reasonable suspicion to stop his vehicle. (See R., pp.1060-1116.) The district court denied the motion. (R., pp.1109-1114.) Specifically, the court found that the testifying officer was credible, and that the officer did observe Flieger run through a stop sign prior to initiating the traffic stop. (R., pp.1109-1112.) Further, the district court found that, based upon its review of the testimony and audio recordings of the stop, the officer did not unreasonably extend the duration of the traffic stop in order to summon a drug dog. (R., pp.1112-1114.) The drug dog,

² Williams, Flieger's original appointed attorney, was permitted to withdraw from the case after Flieger filed a motion for appointment of substitute counsel. (R., pp.298-299, 1147-1150, 1253-1254.) Bingham, Flieger's second appointed counsel was also permitted to withdraw upon Flieger's request. (R., pp.335-352, 1171-1173, 1178-1179.)

the district court found, arrived on scene while the officer was still processing Flieger's driving infraction. (Id.) Flieger did not challenge this determination on direct appeal. See Flieger, 2011 Unpublished Opinion No. 514.

Flieger's assertions regarding ineffective assistance of his counsel with regard to the motion to suppress are conclusory and not supported by admissible evidence. Flieger has also failed to attempt to show how any alleged deficiency actually prejudiced him. Further, a review of the transcript of the suppression hearing disproves several of Flieger's assertions. Flieger's counsel cross-examined the testifying officer and vigorously and thoroughly challenged his version of events in his argument to the court. (R., pp.1088, 1090-1104.) Flieger's counsel called both Flieger and Flieger's step-daughter to testify and thoroughly examined them both. (R., pp.1065-1073, 1090-1104.) Further, contrary to Flieger's contention, the transcript of the suppression hearing reveals that while his counsel apparently did not raise the issue of the duration of the traffic stop in the suppression motion itself, he did make such an argument during the hearing, and the district court considered this argument. (R., pp.1101-1104, 1112-1114.) Flieger's disagreements with his counsel's strategies in pursuing the motion (and ultimately, Flieger's disagreement with the district court's denial of the motion), do not demonstrate that his counsel was ineffective.

2. Ineffective Assistance Of Pretrial Counsel Williams

Flieger asserts pretrial counsel Tim Williams was ineffective for: being "in concert" with the state, waving Flieger's right to a speedy trial without his consent, failing to adequately interview witnesses and to prepare for trial, failing

to preserve evidence, and by withholding material evidence. (See R., pp.1275-1276.)

Flieger's assertions are conclusory and not supported by admissible evidence. Flieger has failed to provide context or specifics regarding these allegations. He has not attempted to argue how any of these alleged deficiencies ultimately prejudiced him, considering Williams withdrew from the case prior to Flieger's jury trial. Flieger's arguments about additional evidence Williams should have uncovered are not supported by admissible evidence that such evidence actually exists, or by any evidence or argument regarding what Williams could have done to obtain such evidence.

Further, evidence submitted by Flieger in the course of the post-conviction proceedings disproves several of his allegations. This evidence, including letters and court filings of the Williams Law Office (R., pp.296, 306-307, 361-362), demonstrate Williams' active participation in this case, including his communications with Flieger, his managing of the case, and his identification of potential witnesses.

The basis of Flieger's speedy trial argument in this case arose after a warrant was issued for Flieger's arrest on a probation violation in a separate case. (R., pp.303-307, 363-366.) The day before the scheduled trial on the charges in the present case, the warrant remained outstanding, and Flieger had still not been located by either his probation officer or his attorney. (Id.) The district court set a final deadline of 4:00 p.m. the afternoon before trial for Flieger to be located, and then vacated the trial setting after Flieger had still not made

contact with his attorney or probation officer by that time. (Id.) Flieger was not arrested on the warrant until approximately midnight the night before the originally scheduled trial date. (R., p.1136.) Later, Flieger moved for dismissal of the case on speedy trial grounds based upon this postponement, and raised the issue again during the jury trial. (R., pp.933-940, 1160-1162, 1185-1205.) Both times, the district court denied the motion, concluding that Flieger failed to demonstrate prejudice. (R., pp.940, 1206-1211.)

In a letter to the Idaho State Bar in response to a complaint initiated by Flieger, Williams represented that, contrary to Flieger's "belief," he never waived Flieger's speedy trial rights, and that it was not his decision to vacate the trial. (R., p.304.) Indeed, there is no indication in the record that the district court's vacating of the trial setting was based upon any speedy trial waiver, as opposed to Flieger's disappearance and the outstanding warrant. The court's minute entry and order depicting the events in question do not reference any speedy trial right waiver, but instead describe how the court vacated the trial setting upon reaching the 4:00 p.m. deadline for Flieger's appearance. (R., pp.1134-1137.) Further, Flieger has failed to present admissible evidence demonstrating that Williams, or any of his other appointed attorneys, inadequately raised the speedy trial issue. Finally, as discussed below, the record supports the district court's denials of these motions, and thus, Flieger cannot demonstrate prejudice from any deficiency.

3. Ineffective Assistance Of Pretrial Counsel Bingham

Flieger asserts pretrial counsel Loren Bingham was ineffective for: inadequately preparing for trial, refusing to go to trial, failing to obtain a bond reduction hearing, failing to file pretrial motions, and failing to obtain exculpatory evidence. (See R., p.1276.)

Flieger's assertions are conclusory and not supported by admissible evidence. Flieger has failed to provide context or specifics regarding these allegations. He has also not attempted to argue how any of these alleged deficiencies ultimately prejudiced him, considering Bingham withdrew from the case prior to Flieger's jury trial. Flieger's arguments about additional evidence Bingham should have uncovered are not supported by evidence that such evidence exists, and do not demonstrate what Bingham could have done to obtain it.

Further, Flieger's claims that Bingham failed to file pretrial motions or obtain a bond reduction hearing are disproven by the record. Bingham filed a motion to dismiss the charges against Flieger on speedy trial grounds on March 10, 2009. (R., pp.1160-1162.) Bingham also filed a motion for bond reduction, and a hearing on this motion was conducted in December 2008. (See R., pp.1153-1155, 1200.) Flieger has not attempted to present admissible evidence demonstrating that Bingham's performance was deficient as to either of these motions, or that any such deficiency resulted in prejudice.

Finally, even if Flieger's assertion that Bingham "refused to go to trial," was supported by admissible evidence, Flieger cannot show prejudice from any such deficiency where he did ultimately have a jury trial on his charges.

4. Ineffective Assistance Of Trial Counsel Brown

Flieger asserts trial counsel Daniel Brown was ineffective for: inadequately preparing for trial, failing to stop prosecutor misconduct, failing to stop the state's and district court's "intimidation" of a witness, failing to object to the admission of I.R.E. 404(b) evidence regarding methamphetamine found in his motel room the day of his arrest, and failing to object to the prosecutor's statements at sentencing which, he contends, led to a double jeopardy violation. (See generally R., pp.1262-1279.)

Again, Flieger's assertions are conclusory and not supported by evidence. As with his pretrial counsel, Flieger has failed to provide context or specifics regarding these allegations, and has not attempted to argue how any of these alleged deficiencies prejudiced him.

A review of the trial transcript reveals that Brown zealously and competently defended Flieger, and was well-prepared for trial. (See R., pp.802 – 1011.) Brown thoroughly cross-examined the state's most substantive witnesses, offered a cogent opening statement and closing argument, called and thoroughly questioned six defense witnesses, made appropriate objections, renewed Flieger's prior motion to dismiss the case on speedy trial grounds, and was actively engaged in various evidentiary disputes arising over the course of the trial. (Id.) A letter from Brown's law office sent to Flieger prior to the jury trial

further demonstrates Brown's ample trial preparation and active involvement in pursuing Flieger's defense. (R., pp.310-312.)

A recurring theme underlying several of Flieger's claims, including his ineffective assistance of trial counsel claim, concerns a potential defense witness identified only as "Juan" or "Booger," whom, Flieger asserts, was unable to testify because he had been deported by the time of Flieger's re-scheduled trial. (R., pp.933-940.) Flieger asserts that this witness, if called, would have claimed ownership of the drugs found in Flieger's vehicle. (Id.) However, Flieger has failed to concretely identify this witness, provide any specific admissible evidence about what this person would have actually testified to, whether he would have actually been willing to incriminate himself to exonerate Flieger, or that he was truly unavailable by the time of the re-scheduled trial date.³ Flieger's entirely speculative arguments regarding "Juan"/"Booger" are thus insufficient to demonstrate he is entitled to relief as to any of his claims in which he references this person.

Flieger's contention that his counsel was ineffective for failing to stop the state's and court's "intimidation" of witness Jason Berry is clearly disproven by the record. Berry himself testified that he did not feel pressured or compelled to either waive, or assert, his Fifth Amendment rights. (R., pp.910, 947.) Further, as discussed below, the district court's mere advisement to Berry regarding his Fifth Amendment rights did not constitute impermissible "intimidation." In any event, Flieger has failed to show that his trial counsel's performance regarding

³ The state argued that "Booger" was a fabrication of Flieger and did not exist. (R., p.935.)

Berry prejudiced him in light of the district court's exclusion of much of Berry's testimony on hearsay grounds. (R., pp.944-945.)

Flieger also has failed to show that he was prejudiced by his trial counsel's failure to object to the state's trial reference to his post-*Miranda* silence. As the Idaho Court of Appeals previously recognized, the remark was "passing", and "as a part of a narrative of events, was not of such a nature that the jury would necessarily construe the officer's remark as a comment on Flieger's exercise of his right to remain silent." See Flieger, 2011 Unpublished Opinion No. 514, p.5. Further, the Court recognized the evidence against Flieger was "overwhelming."⁴ Id. The Court was "convinced beyond a reasonable doubt that a jury would have found Flieger guilty of three counts of possession of a controlled substance even if the officer had not made the passing reference about Flieger's silence." Id. Flieger has not attempted to demonstrate why this conclusion was incorrect, or how exactly he was prejudiced by any deficient performance regarding trial counsel's handling of the trial reference to his post-*Miranda* silence.

Flieger also cannot show that his trial counsel was ineffective for failing to object to certain I.R.E. 404(b) evidence. In a pre-trial evidentiary ruling following a hearing, the district court specifically ruled that this evidence was admissible. (R., pp.1129-1133.) The Idaho Court of Appeals affirmed this determination on direct appeal. See Flieger, 2011 Unpublished Opinion No. 514, pp.2-4. Flieger's

⁴This overwhelming evidence of Flieger's guilt also defeats any prejudice argument with regard to Flieger's other ineffective assistance of pretrial and trial counsel claims and sub-claims.

counsel was not required to futilely attempt to renew Flieger's objections to the admission of this evidence at the trial itself. Further, Flieger has not attempted to show that his counsel's performance in opposing the admission of this evidence was deficient, or that any such deficiency resulted in prejudice. To the contrary, a review of the transcript of the I.R.E. 404(b) hearing demonstrates that Flieger's counsel vigorously opposed the admission of the evidence in question. (R., pp.1127-1133.)

Finally, Flieger cannot show that his trial counsel's failure to challenge the district court's sentencing determination on double jeopardy grounds constitutes deficient performance. As discussed in greater detail below, a district court's consideration of, or reference to, a defendant's conduct other than that for which he was convicted does not constitute punishment *for* that other conduct, and does not result in a double jeopardy violation. Flieger can therefore not show either deficiency or prejudice with regard to this claim.

5. Ineffective Assistance Of Appellate Counsel Curtis

Flieger asserts that Justin Curtis, his appellate counsel, was ineffective for: failing to raise certain issues on appeal, including the district court's denial of his motion to suppress and motion to dismiss the case on speedy trial grounds; failing to communicate with him; failing to correct errors in his Appellant's brief; and failing to supplement the argument on appeal. (See generally R., pp.1265-1279.)

The two-prong Strickland test for ineffective assistance of counsel discussed above applies to claims of ineffective assistance of appellate counsel.

Baxter v. State, 149 Idaho 859, 243 P.3d 675 (Ct. App. 2010) (citing Mintun v. State, 144 Idaho 656, 661, 168 P.3d 40, 45 (Ct. App. 2007)). In order to establish ineffective assistance of appellate counsel, a petitioner has the burden of proving that his counsel's representation on appeal was deficient and that the deficiency was prejudicial. Evitts v. Lucey, 469 U.S. 387 (1985); Mitchell v. State, 132 Idaho 274, 276, 971 P.2d 727, 730 (1998). Even if a defendant requests that certain issues be raised on appeal, appellate counsel has no constitutional obligation to raise every non-frivolous issue requested by the defendant. Jones v. Barnes, 463 U.S. 745, 751-53 (1983); Aragon v. State, 114 Idaho 758, 765, 760 P.2d 1174, 1181 (1988) (citing Jones, 463 U.S. at 751-754). The relevant inquiry is whether there is a reasonable probability that, but for counsel's errors, the defendant would have prevailed on appeal. Smith v. Robbins, 528 U.S. 259, 285 (2000); Schoger v. State, 148 Idaho 622, 629, 226 P.3d 1269, 1276 (2010) (citing State v. Payne, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008)).

A review of the record reveals that appellate counsel's decisions regarding which issues to raise on direct appeal were tactical and based upon a reasonable analysis of the merits of potential issues, and not upon ignorance of the law or some other deficiency. (See R., pp.613-615 (letter from Curtis to Flieger explaining why he declined to pursue certain claims proposed by Flieger).)

Further, a review of the Appellant's brief demonstrates that Curtis competently raised several issues and sub-issues (R., pp.429-456), each of which, the state submits, were more potentially meritorious than the claims

Flieger sought to raise on direct appeal, and subsequently attempted to raise for the first time in his post-conviction petition (See Sec. D, below).

Further, Flieger has failed to demonstrate that any of the claims he feels his appellate counsel should have raised had a reasonable probability of actually succeeding. To the contrary, as discussed below, several of these proposed claims clearly lack merit.

Finally, Flieger's claims that his appellate counsel failed to communicate with him, and failed to correct errors in the appellate briefing are both disproven by the record. Letters between Flieger and Curtis, and Flieger and another SAPD attorney, demonstrate Curtis' attempts not only to keep Flieger informed, but also to explain, in detail, his decision not to raise certain issues on appeal. (R., pp.605-606, 612-615, 618-619, 1247-1249; see also pp.647-650 (Idaho State Bar counsel discussing her finding that there was no clear or convincing evidence that Flieger's bar complaint against Curtis fell within the purview of the Idaho Rules of Professional Conduct)). The record also reflects that Curtis *did* send a letter to the Idaho Court of Appeals to correct a clerical error regarding the charges Flieger was ultimately convicted of. (R., p.1250.)

Flieger has failed to demonstrate facts, which, if true, entitle him to relief as to any of his ineffective assistance of counsel claims. This Court should therefore affirm the district court's order summarily dismissing his petition.

D. Flieger Has Failed To Show He Is Entitled To Relief As To Any Of His Non-Ineffective Assistance Of Counsel Claims

On appeal, Flieger states that each of the claims he raised in his post-conviction petition pertained to ineffective assistance of counsel. (Appellant's brief, p.1.) Further, each of the issue headings in the Appellant's brief reference ineffective assistance of counsel. (Appellant's brief, pp.9-41.) However, in the argument section of his brief, and in his brief in support of his petition for post-conviction relief submitted below, Flieger clearly alleges violations of other constitutional rights. (See Appellant's brief; R., pp.72-159.) The state responded to these claims in its motion for summary dismissal. (R., pp.1251-1280.)

Again, because the district court adopted the state's motion for summary dismissal in dismissing Flieger's post-conviction petition, the state relies on this same motion to construe Flieger's claims. Below, the state construed Flieger as asserting the following non-ineffective assistance of counsel claims: (1) various sub-claims relating to his motion to suppress; (2) prosecutorial misconduct; (3) speedy trial right violation; (4) judicial misconduct in questioning witness Berry; (5) violation of his double jeopardy rights at sentencing; and (6) abuse of sentencing discretion. (Id.)

Flieger has failed to show error in the district court's summary dismissal as to any of these claims. At the outset, Flieger waived each of these claims by failing to raise them previously. Post-conviction relief proceedings are not a substitute for proceedings in the trial court, or for an appeal from the sentence or conviction. Nellsch v. State, 122 Idaho 426, 430, 835 P.2d 661, 665 (Ct. App. 1992) (citing I.C. § 19-4901(b)). Aside from his claim of ineffective assistance of

appellate counsel, Flieger has made no attempt to argue why any of these non-ineffective assistance of counsel claims could not have been raised previously. Additionally, many of these claims are disproven by the record or clearly fail as a matter of law.

1. Claims Relating To The Motion To Suppress

With regard to his motion to suppress, Flieger asserts: the state submitted false affidavits, the state withheld exculpatory evidence, and the court erred in denying his motion to suppress. (See R., pp.1262-1263.) In addition to being waived, these claims are conclusory and unsupported by admissible evidence.

As discussed above, Flieger has failed to present any admissible evidence demonstrating his allegations that the state submitted false affidavits or engaged in any other type of misconduct with respect to the motion to suppress. The district court's conclusions in denying Flieger's motions were based upon credibility determinations made in favor of the testifying officer, and factual findings based on audio recordings of the stop. (R., pp.1109-1114.) Flieger has not attempted to show that the determinations were clearly erroneous. He can therefore not show that the district court erred in denying his motion to suppress.

2. Prosecutorial Misconduct

Flieger asserts that the prosecutor committed misconduct by: filing probation violations, intimidating witnesses, refusing to provide exculpatory evidence, intentionally delaying the trial, making false statements, withholding evidence from the state lab, deporting a witness, and referencing his post-

Miranda silence during the trial. (See R., pp.1262, 1269-1270, 1274-1275.)
Flieger has failed to present admissible evidence supporting any of these claims.

As discussed above, the Idaho Court of Appeals has already addressed the state's trial reference to his post-*Miranda* silence, and held that while these references were inappropriate, they were harmless. Flieger, 2011 Unpublished Opinion No. 514, p.5. The doctrine of *res judicata* precludes any re-litigation of this claim. See Schultz v. State, 153 Idaho 791, 797-798, 291 P.3d 474, 480-481 (2012) ("In post-conviction proceedings, Idaho appellate courts have applied the related principles of *res judicata* to bar an attempt to raise, in an application for post-conviction relief, the same issue previously decided in a direct appeal.").

Finally, Flieger's apparent allegations regarding lab misconduct at the Idaho State lab in Pocatello are also disproven by the record. The Idaho State Police disclosed that four lab analysts violated internal policies in the course of their employment at the Pocatello lab. (R., pp.379-409, 761-763.) The violations concerned the handling of controlled substances unrelated to any testing of drugs in any criminal case, and the incidents did not ultimately impact the lab's accreditation. (Id.) The drugs associated with Flieger's convictions were tested in the Meridian lab, not the Pocatello lab. (R., pp.683, 729-731.) None of the disclosed misconduct regarding the Pocatello lab implicated the Meridian lab, or occurred at the Meridian lab. (R., p.762.) Therefore, even if this claim had not been waived, Flieger has failed to allege facts demonstrating he is entitled to relief.

any admissible evidence establishing “Booger's” identity, or demonstrating what exactly he would have testified to. Further, the postponement of Flieger's trial was based entirely upon Flieger's own failure to communicate with his defense attorney or probation officer by the eve of trial following the issuance of a warrant for his arrest. (See R., pp.303-304; 363-366.)

4. “Judicial Misconduct” In Questioning Witness

Flieger asserts that the district court committed “misconduct” by improperly questioning defense witness Jason Berry. (See R., pp.1270-1272.) Even if this claim were not waived, Flieger has failed to demonstrate facts, which, if true, demonstrate he is entitled to relief.

During the trial, Flieger attempted to introduce hearsay testimony from Berry regarding statements allegedly made by “Booger”/“Juan,” the individual whom Flieger alleges left the drugs found in his vehicle. (R., pp.906-910.) Berry testified outside the presence of the jury. (R., pp.910-930.) Prior to this testimony, the district court advised Berry of his Fifth Amendment rights against self-incrimination. (R., p.910.) The court also asked Berry whether he felt any pressure or compulsion from anyone to either waive or assert his rights, whether he had adequate time to discuss the matter with his attorney, and other routine questions. (R., pp.910, 947.) Berry invoked his Fifth Amendment right against self-incrimination numerous times over the course of his testimony, and eventually made a blanket invocation cutting off all further questioning. (R., pp.910-930, 947.) Following Berry's testimony, the district court excluded Berry's

statements that constituted inadmissible hearsay (R., pp.944-945), but permitted Flieger to read a redacted version of the testimony to the jury. (R., pp.952-964).

Even if this claim had not been waived, Flieger has failed to demonstrate "judicial misconduct." A district court has the authority to ask questions of witnesses. I.R.E. 614(b). The court's inquiries regarding Flieger's Fifth Amendment rights were also entirely proper. In fact, when a witness invokes the Fifth Amendment in response to a question, the trial court *must* determine whether the refusal to answer is in fact justifiable under the privilege, and whether it is supported by more than a vague, subjective fear of prosecution. E.g. Whiteley v. State, 131 Idaho 323, 955 P.2d 1102 (1998). Flieger's apparent frustration that Berry was not willing to answer all of the questions posed to him does not render the court's Fifth Amendment advisement inappropriate. For these reasons, Flieger has failed to demonstrate he is entitled to relief on this claim.

5. Double Jeopardy Violation At Sentencing

Flieger asserts that the district court violated his double jeopardy rights by considering conduct other than that for which he was convicted in making its sentencing determination. (See R., pp.1272-1273.) Flieger's claim is conclusory, waived, and in any event, fails as a matter of law. A trial judge may consider a myriad of factors in imposing a sentence. See State v. Wickel, 126 Idaho 578, 580, 887 P.2d 1085, 1087 (Ct. App. 1994); I.C.R. 32. This broad spectrum includes a defendant's past criminal history and, with due caution, "the existence of [a] defendant's alleged criminal activity for which no charges have been filed,

or where charges have been dismissed.” Wickel, 126 Idaho at 581, 887 P.2d at 1088, (citing State v. Barnes, 121 Idaho 409, 825 P.2d 506 (Ct. App. 1992)); see also State v. Stewart, 122 Idaho 284, 286, 833 P.2d 917, 919 (Ct. App. 1992). The district court did not violate Flieger’s double jeopardy rights by considering Flieger’s other conduct in making its sentencing determination.

6. Cruel And Unusual Punishment/Abuse Of Sentencing Discretion

Finally, Flieger asserts that his three concurrent unified life sentences with 10 years fixed for possession of methamphetamine constituted cruel and unusual punishment in violation of his constitutional rights, and an abuse of the district court’s sentencing discretion. (See R., pp.1272-1273.) Flieger has failed to demonstrate he is entitled to relief.


Post-conviction relief proceedings are not the proper avenue for challenging a district court’s exercise of sentencing discretion. Ramirez v. State, 113 Idaho 87, 741 P.3d 374 (Ct. App. 1987). In any event, the district court’s sentence in this case was clearly reasonable in light of Flieger’s extensive criminal history and previous failed opportunities on community supervision. (See R., pp.1230-1233 (the district court discussing the rationale behind its sentencing determination at the sentencing hearing).)

Each of Flieger’s non-ineffective assistance counsel claims are waived because they were not previously raised. In any event, Flieger failed to assert facts, which, if true, demonstrated he was entitled to relief as to any of these claims. This Court should therefore affirm the district court’s summarily dismissal of Flieger’s post-conviction petition.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order summarily dismissing Flieger's petition for post-conviction relief.

DATED this 10th day of December, 2014




MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 10th day of December, 2014, 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:

Phillip Duane Flieger
IDOC #78503
Idaho State Correctional Center B-215-B
P.O. Box 70010
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MWO/pm