

IN THE SUPREME COURT OF THE STATE OF IDAHO

BRIAN GREGORY FIORI,)
) **No. 46173-2018**
 Petitioner-Appellant,)
) **Kootenai County Case No.**
 v.) **CV-2018-1153**
)
 STATE OF IDAHO,)
)
 Defendant-Respondent.)
 _____)

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF KOOTENAI**

HONORABLE SCOTT L. WAYMAN
District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Brian Gregory Fiori appeals from the summary dismissal of his petition for post-conviction relief and the denial of his motion for appointment of counsel.

Statement Of The Facts And Course Of The Proceedings

Brian Gregory Fiori filed a petition for post-conviction relief challenging his conviction for felony DUI. (R., pp. 5-13.) He raised claims of ineffective assistance of counsel, prosecutorial misconduct, juror misconduct, and judicial error. (R., p. 6.) He also submitted his own affidavits. (Aug. R., pp. 6-9, 325-34.) Fiori filed a motion for appointment of counsel. (Aug. R., pp. 319-22.)

The district court denied the motion for counsel, finding the petition frivolous. (Aug. R., p. 342.) The district court also provided notice of intent to dismiss. (Aug. R., pp. 340-49.) The district court concluded: “Based on the pleadings filed by the petitioner, there is no genuine issue of material fact that would entitle him to relief if resolved in his favor.” (R., p. 348.) Rather, the petition is based on “unsubstantiated claims of wrongdoing” and Fiori did not submit evidence of prejudice. (Id.)

In response to the notice, Fiori presented what appear to be legal arguments, but did not present any evidence. (Aug. R., pp. 351-57.) The district court then entered an order denying appointment of counsel and dismissing the petition. (R., pp. 14-15.) Fiori timely appealed from the entry of judgment. (R., pp. 17-26.)

ISSUES

Fiori states the issues on appeal as:

1. Did the district court err by summarily dismissing Mr. Fiori's post-conviction relief petition without first addressing the merits or substance of each of his claims?
2. Did the Kootenai County district court err by failing to grant Mr. Fiori post-conviction counsel to properly allege the necessary and supporting facts in his non-frivolous post-conviction relief petition?

(Appellant's brief, p. 2.)

The state rephrases the issue as:

Has Fiori failed to show error in the district court's determination that his petition is frivolous, and therefore failed to show error in either its summary dismissal or denial of the motion for appointment of counsel?

ARGUMENT

Fiori Has Failed To Show Error In The District Court's Determination That His Petition Is Frivolous

A. Introduction

The district court determined that Fiori's petition was frivolous, and thus both summarily dismissed the petition and denied the motion for appointment of counsel. (Aug. R., pp. 342-49.) Fiori argues on appeal that his petition was not frivolous. (Appellant's brief, pp. 2-9.) The record supports the district court's analysis and conclusion.

B. Standard Of Review

"The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court." Green v. State, 160 Idaho 657, 658, 377 P.3d 1120, 1121 (Ct. App. 2016). "Although the appointment of counsel is discretionary, counsel 'should' be appointed when there is the possibility of a valid claim; failure to do so is an abuse of discretion." Andrus v. State, 164 Idaho 565, ___, 433 P.3d 665, 669 (Ct. App. 2019).

C. The Law And The Record Support The Denial Of Counsel

"The standard for determining whether to appoint counsel for an indigent petitioner in a post-conviction proceeding is whether the petition alleges facts showing the possibility of a valid claim." Shackelford v. State, 160 Idaho 317, 325, 372 P.3d 372, 380 (2016) (quoting Murphy v. State, 156 Idaho 389, 393, 327 P.3d 365, 369 (2014)). "In determining whether the appointment of counsel would be appropriate, every inference must run in the petitioner's favor where the petitioner is unrepresented at that time and cannot be expected to know how to properly allege the necessary facts." Id. (quoting Melton v. State, 148 Idaho 339, 223 P.3d 281, 284 (2009)). "The petitioner is not entitled

to have counsel appointed in order to search the record for possible nonfrivolous claims; however, he should be provided with a meaningful opportunity to supplement the record and to renew his request for court-appointed counsel prior to the dismissal of his petition where he has alleged facts supporting some elements of a valid claim.” Nelson v. State, 157 Idaho 847, 854, 340 P.3d 1163, 1170 (Ct. App. 2014).

Because “the threshold showing that is necessary in order to gain appointment of counsel [is] considerably lower than that which is necessary to avoid summary dismissal of a petition,” Judd v. State, 148 Idaho 22, 24, 218 P.3d 1, 3 (Ct. App. 2009), if the district court properly concluded Fiori’s claims did not merit appointment of counsel, they were properly dismissed. Conversely, the state concedes that if Fiori was entitled to be represented by appointed counsel, he is entitled to that representation prior to summary dismissal of his claims. However, application of relevant standards to Fiori’s pleadings shows no error by the district court because Fiori’s claims are frivolous.

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). 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, 245 (Ct. App. 1999).

Fiori alleged trial counsel was ineffective for failing to (1) remove a biased juror; (2) withdraw; (3) investigate, prepare a defense, compel witnesses, or effectively cross-examine; (4) argue that Fiori was not on private property open to the public; (5) challenge probable cause; (6) challenge implied consent; (7) challenge actual physical control; (8) "challenge 6th Amendment Right to Counsel"; (9) challenge blood draw; (10) call expert witnesses; (11) "continuously represent client until completion of the case"; (12) call Fiori to testify; (13) object; (14) "for sentencing"; and (15) "at Rule 35 hearing." (R., pp. 7-9 (some capitalization altered)). Fiori's affidavit states he called and sent "kites" to his counsel, but counsel "refused to meet in a meaningful way to prepare for trial, would not file any motions I requested or challenge any issues I put forth," such as motions to challenge the blood test and whether he had actual physical control of the car. (Aug. R., pp. 6-7.) Counsel also "almost never objected to the prosecution." (Aug. R., p. 7.) Fiori also asserted counsel "did not even cross-examine all witnesses" and "failed to call expert witnesses." (Aug. R., p. 7.) These arguments were, apparently, premised on Fiori's claims that the government did not have sufficient evidence that he was driving, that the car was on private property, and that the police used excessive force in extracting blood pursuant to a search warrant. (Aug. R., p. 327-33.¹)

¹ Fiori makes no allegations in support of his claims of prosecutorial misconduct, judicial error, or jury misconduct. (Aug. R., pp. 6-7, 327-34.)

This record does not contain the possibility of a valid claim of ineffective assistance of counsel. Simply stated, Fiori's claims are entirely conclusory without any supporting evidence. For example (taking the "best" supported claim), Fiori claims counsel should have argued he was not driving and that the government lacked evidence that he was, yet he acknowledges that the government secured a search warrant for his blood, demonstrated probable cause to charge him, and ultimately proved him guilty beyond a reasonable doubt. There is nothing in the pleadings or the factual allegations that would raise even the possibility of a valid claim that counsel's performance was deficient and that Fiori was therefore prejudiced by counsel's handling of the driving element of the DUI conviction.

On appeal Fiori argues he presented documents to the district court, such as a table of contents, and that his claims were dismissed for mere technical reasons. (Appellant's brief, pp. 2-9.) Still absent from Fiori's arguments is any indication that he submitted evidence in any way tending to show that counsel's performance was deficient and that he was thereby prejudiced. In short, he has still failed to show the possibility of a valid claim.

CONCLUSION

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

DATED this 7th day of May, 2019.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 7th day of May, 2019, served two true and correct paper copies of the foregoing BRIEF OF RESPONDENT by placing the copies in the United States mail, postage prepaid, addressed to:

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