

OPINION SUMMARY

MISSOURI COURT OF APPEALS EASTERN DISTRICT

CARLOS FISHER,)	No. ED98273
)	
Appellant,)	Appeal from the Circuit Court
)	of the City of St. Louis
vs.)	
)	Honorable Rex M. Burlison
STATE OF MISSOURI,)	
)	
Respondent.)	FILED: May 21, 2013

Carlos Fisher (“Fisher”) appeals from the denial of his motion for post-conviction relief under, Mo. R. Civ. P. 29.15 (2011). Fisher was found guilty after a jury trial of possession of a controlled substance under Section 195.202, RSMo. Cum. Supp. (2008) and sentenced as a prior and persistent drug offender to 10-years imprisonment. This Court affirmed his conviction in State v. Fisher, 325 S.W.3d 530 (Mo. App. E.D. 2010). Fisher filed a motion for post-conviction relief, subsequently filed an amended motion for post-conviction relief, and later filed a supplemental motion asserting a new claim that he was entitled to post-conviction relief on the ground that the State prosecuted Fisher and a witness at his trial using materially inconsistent theories. Second, Fisher asserted that defense counsel were ineffective in not calling a juror to testify as a witness during a hearing on his motion for new trial. The motion court denied Fisher’s first point without an evidentiary hearing, and denied his second point after conducting an evidentiary hearing.

AFFIRMED IN PART, VACATED AND REMANDED WITH INSTRUCTIONS TO DISMISS IN PART.

Division Four holds: Fisher’s first point on appeal was not timely filed and was not properly before the motion court. Accordingly, we vacate the motion court’s judgment as to Point One and remand with instructions that the motion court dismiss Fisher’s first point. Because the motion court’s judgment denying Fisher’s second point was not clearly erroneous, we affirm the motion court’s judgment as to Fisher’s second point.

Opinion by: Kurt S. Odenwald, J., Lawrence E. Mooney, P.J., and Patricia L. Cohen, J., Concur.

Attorney for Appellant: Gwenda R. Robinson

Attorney for Respondent: Chris Koster and Evan J. Buchheim

THIS SUMMARY IS NOT PART OF THE OPINION OF THE COURT. IT HAS BEEN PREPARED FOR THE CONVENIENCE OF THE READER AND SHOULD NOT BE QUOTED OR CITED.