

9-14-2016

# Cardoza v. State Respondent's Brief Dckt. 43641

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

---

## Recommended Citation

"Cardoza v. State Respondent's Brief Dckt. 43641" (2016). *Not Reported*. 2856.  
[https://digitalcommons.law.uidaho.edu/not\\_reported/2856](https://digitalcommons.law.uidaho.edu/not_reported/2856)

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).

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

MARTIN CARDOZA,	)	
	)	No. 43641
Petitioner-Appellant,	)	
	)	Canyon Co. Case No.
vs.	)	CV-2014-11733
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
_____	)	

\_\_\_\_\_  
**BRIEF OF RESPONDENT**  
\_\_\_\_\_

**APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF CANYON**

\_\_\_\_\_  
**HONORABLE MOLLY J. HUSKEY, District Judge**  
\_\_\_\_\_

**LAWRENCE G. WASDEN**  
Attorney General  
State of Idaho

**PAUL R. PANTHER**  
Deputy Attorney General  
Chief, Criminal Law Division

**KENNETH K. JORGENSEN**  
Deputy Attorney General  
Criminal Law Division  
P.O. Box 83720  
Boise, Idaho 83720-0010  
(208) 334-4534

**ATTORNEYS FOR  
RESPONDENT**

**DENNIS BENJAMIN**  
Nevin, Benjamin, McKay  
& Bartlett LLP  
P.O. Box 2772  
Boise, Idaho 83701  
(208) 343-1000

**ATTORNEY FOR  
PETITIONER-APPELLANT**

**TABLE OF CONTENTS**

	<b><u>PAGE</u></b>
TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE CASE .....	1
Nature Of The Case .....	1
Statement Of The Facts And Course Of The Proceedings .....	1
ISSUE .....	3
ARGUMENT .....	4
Cardoza Has Failed To Show That He Supported His Motion With Necessary Allegations Or Evidence .....	4
A.    Introduction .....	4
B.    Standard Of Review .....	4
C.    The District Court Was Not Required To Search The Record For Evidence To Support Cardoza’s Motion .....	5
D.    Even If The District Court Were Required To Search The Record For Evidence, The Evidence In The Record Does Not Support A Finding That The Tape Exists Or Who Is In Possession Of It .....	6
CONCLUSION .....	7
CERTIFICATE OF SERVICE .....	7

## TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Fairchild v. State</u> , 128 Idaho 311, 912 P.2d 679 (Ct. App. 1996).....	4
<u>Quemada v. Arizmendez</u> , 153 Idaho 609, 288 P.3d 826 (2012) .....	5
<u>Raudebaugh v. State</u> , 135 Idaho 602, 21 P.3d 924 (2001).....	4
<u>State v. LePage</u> , 138 Idaho 803, 69 P.3d 1064 (Ct. App. 2003) .....	5
<u>Venable v. Internet Auto Rent &amp; Sales, Inc.</u> , 156 Idaho 574, 329 P.3d 356 (2014) .....	6
 <u>RULES</u>	
I.C.R. 57(b) .....	4
I.R.E. 801 .....	6
I.R.E. 802.....	6

## STATEMENT OF THE CASE

### Nature Of The Case

Martin Cardoza appeals from the summary dismissal of his petition for post-conviction relief. He challenges the district court's order denying discovery.

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

Cardoza filed a petition for post-conviction relief from his conviction for trafficking in methamphetamine. (R., pp. 5-8.) The claims asserted included claims of actual innocence and failure of counsel to secure evidence. (R., pp. 6-7.) Relevant to this appeal, Cardoza claimed trial counsel was ineffective for failing "to get the DVD security footage from the Karcher Mall security." (R., p. 19.) He alleged such footage existed because he "saw overhead cameras." (R., pp. 19-20.) He asserted that the recording would have shown that no drugs were removed from the truck as testified to by police. (R., p. 20.)

Cardoza filed a motion for discovery. (R., p. 133.) One of the things he wished to obtain through discovery were alleged "security tapes from Karture Mall from the date of my arrest, security tapes [video] from the parking lot that shows me getting arrested." (R., p. 134 (spelling verbatim, brackets original).) Cardoza asserted the videos would "show the police searching the truck I was driving, and will show that the police never found anything illegal in that truck at all, which will lead to the consion of my innocence." (R., pp. 134-35 (spelling verbatim).) The district court denied the motion for discovery. (R., pp. 139-145.) The district court stated Cardoza "does not allege that the tapes exist or who has possession of the tapes." (R., p. 144.) "Without knowing that the tapes exist, the

Court cannot order they be disclosed” and the request is merely a “fishing expedition.” (Id.)

After an evidentiary hearing the district court denied relief. (R., pp. 159-83.) Cardoza filed a timely notice of appeal under the “mailbox rule.” (R., pp. 185, 187, 192, 202.)

## ISSUE

Cardoza states the issue on appeal as:

Did the court abuse its discretion in denying the motion for discovery?

(Appellant's brief, p. 7.)

The state rephrases the issue as:

Has Cardoza failed to show error in the district court's denial of his motion to conduct discovery for failure to support the motion with necessary allegations or evidence?

## ARGUMENT

### Cardoza Has Failed To Show That He Supported His Motion With Necessary Allegations Or Evidence

#### A. Introduction

The district court denied Cardoza's motion to allow discovery because it was unsupported by allegations or evidence that "the tapes exist or who has possession of the tapes." (R., p. 144.) Review of the affidavit in support of the motion to conduct discovery shows that no such allegations or evidence were submitted in support of the motion. (R., pp. 134-36.) On appeal, Cardoza claims that the district court "ignores" the affidavit he filed with his initial petition. (Appellant's brief, p. 10.) This claim fails because at no time did Cardoza request that the district court consider the previously filed affidavit in relation to his motion to conduct discovery, and the district court was not required to search the record for evidence to support the motion. Even if considered, the cited portion of the affidavit did not present admissible evidence that the tape existed or was available.

#### B. Standard Of Review

Discovery during post-conviction relief proceedings is a matter left to the sound discretion of the district court. I.C.R. 57(b); Raudebaugh v. State, 135 Idaho 602, 605, 21 P.3d 924, 927 (2001) (citing Fairchild v. State, 128 Idaho 311, 319, 912 P.2d 679, 687 (Ct. App. 1996)).



C. The District Court Was Not Required To Search The Record For Evidence To Support Cardoza's Motion

“In order to be granted discovery, a post-conviction applicant must identify the specific subject matter where discovery is requested and why discovery as to those matters is necessary to his or her application.” State v. LePage, 138 Idaho 803, 810, 69 P.3d 1064, 1071 (Ct. App. 2003) (citations omitted). The affidavit in support of the motion for discovery states in relevant part:

\* That I request the security tapes from Karture Mall from the date of my arrest, security tapes [video] from the parking lot that shows me getting arrested.

[reason] The videos of me being arrested, will show the police searching the truck I was driving, and will show that the police never found anything illegal in that truck at all, which will lead to the consion of my innocence.

(R., pp. 134-35 (verbatim).) The district court correctly concluded that this showing was inadequate because it contained neither allegations nor evidence that “the tapes exist or who has possession of the tapes.” (R., p. 144.)

On appeal Cardoza does not assert that the affidavit he submitted with his motion was adequate. (See, generally, Appellant’s brief.) Rather, he claims that the district court erred by not considering the affidavit he submitted months earlier, with his petition. (Appellant’s brief, p. 10.) This argument, however, is contrary to the general principle that a court is not obligated to search a record for evidence to support a motion. See, e.g., Quemada v. Arizmendez, 153 Idaho 609, 616, 288 P.3d 826, 833 (2012) (“the trial court is not required to search the record looking for evidence that may create a genuine issue of material fact; the party opposing the summary judgment is required to bring that evidence to the

court's attention" (internal quotations omitted)); Venable v. Internet Auto Rent & Sales, Inc., 156 Idaho 574, 584, 329 P.3d 356, 366 (2014) ("We will not require [in relation to a motion to reconsider] the trial court to search the record to determine if there is any new information that might change the specification of facts deemed to be established."). Because Cardoza does not dispute that the evidence presented in support of his motion was inadequate to support granting of the motion, he has failed to show error.

D. Even If The District Court Were Required To Search The Record For Evidence, The Evidence In The Record Does Not Support A Finding That The Tape Exists Or Who Is In Possession Of It

Even if the district court should have searched the record for evidence supporting the motion, Cardoza's argument fails. The allegation in the earlier-filed affidavit was: "Cardoza has contacted the security at Karcher Mall, they have the DVD available, but need an Order from the Court in order to release it." (R., p. 20.) This claim, that Karcher Mall security created a recording of events in its parking lot and retained it for more than three and one-half years, is entirely based on hearsay. I.R.E. 801 (hearsay is out-of-court statement offered to prove truth of the matter asserted), 802 (hearsay generally inadmissible). Because Cardoza's claims are not based on personal experience, but on inadmissible hearsay, he has failed to show an abuse of discretion even if it were error for the district court to not search the record for evidence in support of the motion.

CONCLUSION

The state respectfully requests this Court to affirm the denial of post-conviction relief.

DATED this 14th day of September, 2016.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of September, 2016, I served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

DENNIS BENJAMIN  
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

at the following email addresses: [db@nbmlaw.com](mailto:db@nbmlaw.com) and [lm@nbmlaw.com](mailto:lm@nbmlaw.com).

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