1-25-2016

Fortin v. State Respondent's Brief Dckt. 43334

IN THE SUPREME COURT OF THE STATE OF IDAHO

CODY JAMES FORTIN,	)	
	)	**No. 43334**
Petitioner-Appellant,	)	
	)	**Ada Co. Case No.**
v.	)	**CV-2013-8285**
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE PATRICK H. OWEN
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

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

MARK W. OLSON
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR RESPONDENT

DEBORAH WHIPPLE
Nevin, Benjamin, McKay & Bartlett LLP
303 W. Bannock
P. O. Box 2772
Boise, Idaho 83701

ATTORNEY FOR PETITIONER-APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

Nature Of The Case 1

Statement Of Facts And Course Of Proceedings 1

ISSUES 4

ARGUMENT 5

I. Fortin Has Failed To Show That The District Court Abused Its Discretion In Denying His Blanket Request To Take Judicial Notice Of The Entire Underlying Criminal Record 5

A. Introduction 5

B. Standard Of Review 5

C. The District Court Acted Well Within Its Discretion In Denying Fortin's Blanket Request To Take Judicial Notice Of The Underlying Criminal File 6

II. Fortin Has Failed To Show Fundamental Constitutional Error In The District Court's Decision To Deny His Blanket Request To Take Judicial Notice Of The Underlying Criminal Record 7

A. Introduction 7

B. Standard Of Review 8

C. The District Court Did Not Commit Constitutional Error When It Denied Fortin's Blanket Request To Take Judicial Notice Of the Underlying Criminal File 8

III. Fortin Has Failed To Show That The District Court Erred In Summarily Dismissing His Post-Conviction Claim That His Trial Counsel Was Ineffective For Failing To Advise Him Of The Potential Consequences Of Not Accepting The State's Plea Offer 10

A. Introduction..... 10

B. Standard Of Review 10

C. Fortin Failed To Raise A Genuine Issue Of Material Fact With Respect To His Claim That His Trial Counsel Was Ineffective For Failing To Advise Him Of The Potential Consequences Of Not Accepting The State's Plea Offer.....11

CONCLUSION..... 16

CERTIFICATE OF SERVICE..... 17

TABLE OF AUTHORITIES

CASES **PAGE**

Aragon v. State, 114 Idaho 758, 760 P.2d 1174 (1988) 12

Baxter v. State, 149 Idaho 859, 243 P.3d 675 (Ct. App. 2010) 14

Berg v. State, 131 Idaho 517, 960 P.2d 738 (1998) 11

Cooper v. State, 96 Idaho 542, 531 P.2d 1187 (1975) 11, 14

Cowger v. State, 132 Idaho 681, 978 P.2d 241 (Ct. App. 1999) 12

Dachlet v. State, 136 Idaho 752, 40 P.3d 110 (2002) 5

Draper v. Washington, 372 U.S. 487 (1963) 8

Eskridge v. Washington State Bd. of Prison Terms and Paroles, 357 U.S. 214 (1958) 8

Ferrier v. State, 135 Idaho 797, 25 P.3d 110 (2001) 11

Griffin v. Illinois, 351 U.S. 12 (1956) 8

Kelly v. State, 149 Idaho 517, 236 P.3d 1277 (2010) 14

Lafler v. Cooper, 566 U.S. ___, 132 S.Ct. 1376 (2012) 12, 13

Lane v. Brown, 372 U.S. 477 (1963) 8

Missouri v. Frye, 566 U.S. ___, 132 S.Ct. 1399 (2012) 12, 13

Newman v. State, 149 Idaho 225, 233 P.3d 156 (Ct. App. 2010) 5

Procunier v. Martinez, 416 U.S. 396 (1974) 8

Ridgley v. State, 148 Idaho 671, 227 P.3d 925 (2010) 14

Roman v. State, 125 Idaho 644, 873 P.2d 898 (Ct. App. 1994) 11

State v. Bearshield, 104 Idaho 676, 662 P.2d 548 (1983) 11

State v. Charboneau, 116 Idaho 129, 774 P.2d 299 (1989) 11

State v. Fortin, Docket No. 38069, 2012 Unpublished Opinion No. 454 (Idaho App. April 30, 2012) 1

State v. Fortin, Docket No. 40602, 2013 Unpublished Opinion No. 748 (Idaho App. Nov. 8, 2013) 1

State v. Mowrey, 128 Idaho 804, 919 P.2d 333 (1996) 12

State v. Perry, 150 Idaho 209, 245 P.3d 961 (2010) 8, 9

State v. Strand, 137 Idaho 457, 50 P.3d 472 (2002) 8

State v. Weber, 140 Idaho 89, 90 P.3d 314 (2004) 5

Strickland v. Washington, 466 U.S. 668 (1984) 11, 12

Taylor v. McNichols, 149 Idaho 826, 243 P.3d 642 (2010) 6

Thornburgh v. Abbott, 490 U.S. 401 (1989) 8

Workman v. State, 144 Idaho 518, 164 P.3d 798 (2007) 10, 11

STATUTES

I.C. § 19-4901 11

I.C. § 19-4906 ..... 11, 14

RULES

I.R.E. 201(d) 5, 6, 7, 9

STATEMENT OF THE CASE

Nature Of The Case

Cody James Fortin appeals from the district court's order summarily dismissing his post-conviction petition.

Statement Of Facts And Course Of Proceedings

In 2009, Fortin stabbed another individual in the face and shoulder with a knife, causing significant injuries. See State v. Fortin, Docket No. 38069, 2012 Unpublished Opinion No. 454 at p.1 (Idaho App. April 30, 2012). The state charged Fortin with aggravated battery and the deadly weapon sentencing enhancement. See id. After a trial, the jury found Fortin guilty as charged. See id. at p.2. The district court imposed a unified 25-year sentence with 12 years fixed. See id. The Idaho Court of Appeals affirmed Fortin's conviction on direct appeal. Id.

In a separate case, Fortin pled guilty to aggravated battery on a law enforcement officer. See State v. Fortin, Docket No. 40602, 2013 Unpublished Opinion No. 748 (Idaho App. Nov. 8, 2013). The district court ran Fortin's sentence in that case consecutively to Fortin's sentence previously imposed in the aggravated battery case. See id.

In May 2013, Fortin filed a *pro se* petition for post-conviction relief. (R., pp.5-16.) Fortin alleged that his trial counsel was ineffective in numerous respects. (Id.) Relevant to this appeal, Fortin asserted that his trial counsel was ineffective for failing to advise him that, by rejecting the state's plea offer to resolve both cases, Fortin potentially faced the imposition of consecutive

sentences on his aggravated battery and aggravated battery on a law enforcement officer convictions. (R., pp.8-9, 15.)

Within the post-conviction petition itself (R., p.11), and in a separate motion (R., p.26), Fortin requested that the district court take judicial notice of the entire underlying criminal record in both the aggravated battery case and the aggravated battery of law enforcement officer case. Fortin also requested the appointment of counsel. (R., pp.11, 23-24.) The district court denied Fortin's "blanket request" to take judicial notice of the underlying criminal cases.[1] (R., pp.126-127). Fortin did not subsequently attempt to narrow his request, or to identify any specific documents from the underlying cases.[2] The district court granted Fortin's motion for appointment of counsel. (R., p.121.)

[1] In its order granting the state's motion for summary dismissal, the district court noted that it *had* "[taken] judicial notice of the underlying files that were made a part of the record in this case." (R., p.158.) Because the district court previously and expressly denied Fortin's "blanket request for judicial notice" (R., p.127), the state presumes that the district court granted the *state's* motion for judicial notice with respect to the documents that the state actually attached to its motion. (See R., pp.35-95.) These documents include: the parties' briefing in Fortin's direct appeal from his aggravated battery conviction, the Idaho Court of Appeals' unpublished opinion in Fortin's direct appeal from his aggravated battery conviction, the register of actions in both of Fortin's underlying criminal cases, and Fortin's initial and amended post-conviction petitions associated with his aggravated battery on a law enforcement officer conviction. (See R., pp.37-95.) Because the state attached these documents to its motion to take judicial notice, they are all a part of the appellate record in this case. (See id.)

[2] Stating that "it does not appear that the District Court took judicial notice of the underlying...case," the Idaho Supreme Court denied Fortin's subsequent request to augment the appellate record with the underlying criminal record associated with his direct appeal from his aggravated battery conviction, Docket No. 38069. (10/5/15 "Motion to Augment and Suspend Briefing Schedule"; 10/14/15 Order Denying Motion to Augment.)

The district court granted the state's motion for summary dismissal of the post-conviction petition, concluding that Fortin failed to allege facts, which, if true, would have entitled him to relief as to any of his claims. (R., pp.156-172.) Fortin timely appealed. (R., pp.173-175.)

ISSUES

Fortin states the issues on appeal as:

A. Did the District Court violate its mandatory duty to take judicial notice of the record of the underlying and related criminal cases and thereby prejudice Mr. Fortin?

B. In denying Mr. Fortin's motion for judicial notice did the District Court deny his state and federal constitutional rights to access the courts? Art. I, § 18; Fourteenth Amendment[?]

C. Did Mr. Fortin raise a genuine issue of material fact as to whether his trial counsel was ineffective in failing to advise him of the potential consequences of not accepting the State's plea offer?

(Appellant's brief, p.5.)

The state rephrases the issues on appeal as:

1. Has Fortin failed to show that the district court abused its discretion in denying his blanket request to take judicial notice of the entire underlying criminal record?

2. Has Fortin failed to show fundamental constitutional error in the district court's decision to deny his blanket request to take judicial notice of the underlying criminal record?

3. Has Fortin failed to show that the district court erred in summarily dismissing his post-conviction claim that his trial counsel was ineffective for failing to advise him of the potential consequences of not accepting the state's plea offer?

ARGUMENT

I.
Fortin Has Failed To Show That The District Court Abused Its Discretion In Denying His Blanket Request To Take Judicial Notice Of The Entire Underlying Criminal Record

A. Introduction

Fortin contends that the district court violated I.R.E. 201(d) by denying his blanket request to take judicial notice of the entire underlying criminal record relating to his aggravated battery conviction. (Appellant's brief, pp.5-11.) A review of the record reveals that the district court properly exercised its discretion to deny Fortin's request because Fortin did not comply with the requirements of I.R.E. 201(d).

B. Standard Of Review

A court's decision to take judicial notice of an adjudicative fact is a determination that is evidentiary in nature and is governed by the Idaho Rules of Evidence. Newman v. State, 149 Idaho 225, 233 P.3d 156 (Ct. App. 2010); I.R.E. 201. An appellate court reviews lower court decisions admitting or excluding evidence under the abuse of discretion standard. Dachlet v. State, 136 Idaho 752, 755, 40 P.3d 110, 113 (2002).

The interpretation of court rules presents a question of law over which appellate courts exercise free review. State v. Weber, 140 Idaho 89, 91-92, 90 P.3d 314, 316-317 (2004).

C. The District Court Acted Well Within Its Discretion In Denying Fortin's Blanket Request To Take Judicial Notice Of The Underlying Criminal File

Idaho Rule of Evidence 201(d) provides:

> When a party makes an oral or written request that a court take judicial notice of records, exhibits or transcripts from the court file in the same or a separate case, the party shall identify the specific documents or items for which the judicial notice is requested or shall proffer to the court and serve on all parties copies of such documents or items. A court shall take judicial notice if requested by a party and supplied with the necessary information.

Idaho Rule of Evidence 201(d) creates, by its plain language, a mandatory duty for a court to, upon the request of a party, take judicial notice of documents from a court file when certain requirements are met. Specifically, pursuant to this rule, a party "shall" either "identify the specific documents or items," or "proffer to the court and serve on all parties copies of such documents or items." I.R.E. 201(d). Where a party does not provide the court with this "necessary" information, the mandatory duty of I.R.E. 201(d) does not apply. To the contrary, where a party "does not meet this requirement it is improper for a court to take judicial notice under I.R.E. 201(d)." Taylor v. McNichols, 149 Idaho 826, 835-836, 243 P.3d 642, 651-652 (2010).

In this case, Fortin requested that the district court take judicial notice of the "entire underlying record(s)" in both his aggravated battery case and his separate aggravated battery on a law enforcement officer case. (R., pp.11, 26.) Fortin did not *specifically* identify any particular documents, nor did he provide copies of any documents to the court or to the state. (See id.) Fortin thus did not comply with the requirements of I.R.E. 201(d). Correspondingly, the court denied

Fortin's "blanket request" for judicial notice, stating that "the proper procedure is for the Court to take note of specific matters that are part of the files," and that it would "take judicial [notice] of those items in the underlying files that are made a part of this file." (R., pp.126-127.) Because Fortin did not subsequently make any documents from the underlying cases a part of the post-conviction case file, the district court never took judicial notice of these documents.

Because Fortin failed to comply with the requirements of I.R.E. 201(d), the district court had no mandatory duty to grant Fortin's blanket request that it take judicial notice of documents from the underlying criminal cases. Indeed, absent compliance with this rule, it would have been error for the district court to take judicial notice. Fortin has therefore failed to demonstrate that the district court abused its discretion in denying this request.

II.
Fortin Has Failed To Show Fundamental Constitutional Error In The District Court's Decision To Deny His Blanket Request To Take Judicial Notice Of The Underlying Criminal Record

A. Introduction

For the first time on appeal, Fortin contends that the district court violated his state and federal constitutional due process rights by denying his blanket request to take judicial notice of the entire underlying criminal record. (Appellant's brief, pp.11-12.) Fortin has failed to demonstrate fundamental error.

B. Standard of Review

The appellate courts of this state will only review unpreserved assertions of error under the fundamental error doctrine. State v. Perry, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010).

C. The District Court Did Not Commit Constitutional Error When It Denied Fortin's Blanket Request To Take Judicial Notice Of the Underlying Criminal File

Because Fortin failed to raise a constitutional challenge to the district court's denial of his motion for judicial notice, he must demonstrate fundamental error on appeal. Perry, 150 Idaho at 226, 245 P.3d at 978. To do so, Fortin must demonstrate: (1) a constitutional violation; (2) that the violation is clear and obvious without the need for additional information not contained in the appellate record; and (3) that prejudice resulted. Id. Fortin cannot make such a showing.

The constitutional guarantee of due process of law has as a corollary the requirement that "prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights." Procunier v. Martinez, 416 U.S. 396, 419 (1974), overruled on other grounds, Thornburgh v. Abbott, 490 U.S. 401, 413–414 (1989). Related to this right to access the courts, a defendant in a criminal case has a due process right to "a record on appeal that is sufficient for adequate appellate review of the errors alleged regarding the proceedings below." State v. Strand, 137 Idaho 457, 462, 50 P.3d 472, 477 (2002) (citing Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963); Eskridge v. Washington State Bd. of Prison Terms and Paroles, 357 U.S. 214 (1958); Griffin v. Illinois, 351 U.S. 12 (1956)).

As discussed in Sec. I, *supra*, I.R.E. 201(d) provides that a district court has the mandatory duty to grant a party's request to take judicial notice of documents from a court file *only* where the party either identifies the specific documents or items, or provides the requested documents to the court and serves them on the parties. Fortin's motion for judicial notice did not comply with this requirement and the district court denied his motion. (R., pp.11, 26, 126-127.) Fortin subsequently had the opportunity to file a new rule-conforming motion to request judicial notice, but declined to do so. Therefore, in order to show a constitutional violation, Fortin must demonstrate that the requirements of I.R.E. 201(d) are unconstitutional and that he was entitled to judicial notice notwithstanding these requirements. Fortin has not attempted to do so. (See Appellant's brief, pp.11-12.)

None of the authorities or general legal principles relied upon by Fortin stand for the proposition that a trial court has the constitutional duty to grant a blanket request to take judicial notice of an entire criminal record where the defendant has not identified specific documents or provided copes of any documents to the court or other parties. Further, I.R.E. 201(d) provides an individual the opportunity to develop a record "sufficient for adequate appellate review" by *requiring* a district court to take judicial notice of documents from court files that are specifically identified by the individual or provided by the individual to the court.

Fortin has failed to show constitutional error, let alone clear and obvious constitutional error that satisfies any of the prongs of the Perry fundamental error

test. This Court should therefore affirm the district court's summary dismissal of Fortin's post-conviction petition.

III.
Fortin Has Failed To Show That The District Court Erred In Summarily Dismissing His Post-Conviction Claim That His Trial Counsel Was Ineffective For Failing To Advise Him Of The Potential Consequences Of Not Accepting The State's Plea Offer

A. Introduction

Fortin contends that the district court erred in summarily dismissing his post-conviction petition. (Appellant's brief, pp.12-13.) Specifically, Fortin contends that he raised a genuine issue of material fact with respect to his claim that his trial counsel was ineffective for failing to advise him that, by rejecting the state's plea offer, he potentially faced the imposition of consecutive sentences.[3] (Id.)

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).

[3] On appeal, Fortin does not identify any specific consequences that his trial counsel allegedly failed to advise him about. (See Appellant's brief, pp.12-13.) The state will thus address the specific alleged consequence identified by the district court in its order granting the state's motion for summary dismissal – that trial counsel was allegedly ineffective for failing to advise Fortin that, if he went to trial and was found guilty, the district court could impose consecutive sentences. (See R., p.163.)

C. Fortin Failed To Raise A Genuine Issue Of Material Fact With Respect To His Claim That His Trial Counsel Was Ineffective For Failing To Advise Him Of The Potential Consequences Of Not Accepting The State's Plea Offer

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, 144 Idaho at 522, 164 P.3d at 802; 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).

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). 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). The Sixth Amendment right to effective assistance of counsel applies to advice given in the course of plea negotiations. See Missouri v. Frye, 566 U.S. ___, 132 S.Ct. 1399 (2012); Lafler v. Cooper, 566 U.S. ___, 132 S.Ct. 1376 (2012).

In this case, the state first notes that, due to Fortin's failure to file a rule-conforming motion to take judicial notice, the appellate record does not contain the clerk's record or transcripts associated with Fortin's underlying criminal cases. Missing portions of the record must be presumed to support the decision of the trial court. State v. Mowrey, 128 Idaho 804, 805, 919 P.2d 333, 334 (1996).

In his post-conviction petition, Fortin asserted that his trial counsel's advice to proceed to trial on the aggravated battery charge constituted "substandard performance" and that counsel failed to advise him that, by proceeding to trial, he potentially faced consecutively imposed sentences. (R., pp.8-9.) In an affidavit submitted in support of his petition, Fortin asserted that had he not been "convincingly counseled" by his trial counsel that he could prevail at a jury trial, he would have accepted the state's plea offer. (R., p.15.)

The district court summarily dismissed this claim. (R., p.163.) In making this determination, the district court relied upon the prejudice prong of Strickland. (Id.) The district court concluded that, even assuming that trial counsel's advice

regarding the state's plea offer was deficient, Fortin could not demonstrate prejudice because he could not "demonstrate that the Court would have accepted his plea as a binding plea agreement under I.C.R. 11." (Id.) The district court added that, "as a general practice," it does not accept binding plea agreements. (Id.) Fortin has failed to show error in this determination.

In Lafler, the parties stipulated that trial counsel provided deficient performance by failing to timely inform the defendant of the state's plea offer. Lafler, 566 U.S. at ___, 132 S.Ct. at 1383. In determining whether the defendant had demonstrated prejudice from the deficiency, the Supreme Court stated:

> In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), *that the court would have accepted its terms*, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

(Emphasis added).

The United States Supreme Court elaborated on this standard in Frye, stating:

> It can be assumed that in most jurisdictions prosecutors and judges are familiar with the boundaries of acceptable plea bargains and sentences. So in most instances it should not be difficult to make an objective assessment as to whether or not a particular fact or intervening circumstance would suffice, in the normal course, to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain. The determination that there is or is not a reasonable probability that the outcome of the proceeding would have been different absent counsel's errors can be conducted within that framework.

Frye, 566 U.S. at ___, 132 S.Ct. at 1410.

In this case, as the district court properly concluded, Fortin failed to present any evidence that the court would have been willing to be bound by an I.C.R. 11 plea agreement to impose concurrent sentences,[4] or that the court would follow such a recommendation in making a discretionary sentencing determination. Further, there is no indication in the available record that the district court would have imposed concurrent sentences. The district court was in an appropriate position to make an "objective assessment" as to whether it would have agreed to be bound by an I.C.R. 11 plea agreement, and concluded, "within that framework," that it does not accept such binding agreements as a general practice.

In the alternative, this Court may affirm the district court's summary dismissal of Fortin's post-conviction petition on any ground set forth by the state in its motion for summary dismissal. While a post-conviction petitioner is entitled to notice prior to the summary dismissal of his post-conviction claims from either the court or from the state's motion to dismiss, I.C. § 19-4906; Kelly v. State, 149 Idaho 517, 522-523, 236 P.3d 1277, 1282-1283 (2010), an order of summary dismissal may be affirmed on appeal on the grounds asserted in the state's motion to dismiss if no material issue of fact on those grounds in contained in the record. See Ridgley v. State, 148 Idaho 671, 676, 227 P.3d 925, 930 (2010); Baxter v. State, 149 Idaho 859, 864-865, 243 P.3d 675, 680-681 (Ct. App. 2010).

[4] The state disputed Fortin's contention that it offered to recommend concurrent sentences as part of its plea offer. (R., pp.30-31, 100-101.) However, for the purposes of its determination regarding the state's motion for summary dismissal, the district court was required to accept Fortin's contention as true. See Cooper, 96 Idaho at 545, 531 P.2d at 1190.

In this case, there was no nexus between Fortin's potential "exposure" to consecutive sentences and his factual assertions regarding his theoretical likelihood to accept the state's plea offer. Specifically, Fortin did not allege that he would have taken the plea offer if he had known that the district court could impose consecutive sentences. Instead, he alleged only that he would have accepted the state's plea offer had he not been "counseled convincingly" by his trial counsel that he would prevail at trial. (R., p.15.) As the state argued in its motion for summary dismissal, Fortin failed to allege facts demonstrating that his counsel's advice to reject the state's plea offer constituted deficient performance, and Fortin was instead essentially arguing that "the mere fact that counsel advised him to go to trial and he lost at trial is *per se* ineffective assistance." (R., p.105.) This Court may affirm the district court's summary dismissal order on this alternative ground.

Fortin has failed to demonstrate that the district court erred in summarily dismissing his claim that his trial counsel was ineffective for failing to advise him that, by rejecting the state's plea offer, he potentially faced the imposition of consecutive sentences. This Court should therefore affirm the district court's order summarily dismissing Fortin's post-conviction petition.

CONCLUSION

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

DATED this 25th day of January, 2016.

/s/ Mark W. Olson
MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 25th day of January, 2016, served a true and correct digital copy of the foregoing BRIEF OF RESPONDENT by emailing the brief to:

DEBORAH WHIPPLE
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
dwhipple@nbmlaw.com

/s/ Mark W. Olson_____
MARK W. OLSON
Deputy Attorney General

MWO/dd