

2-16-2016

Fortin v. State Appellant's Reply Brief Dckt. 43334

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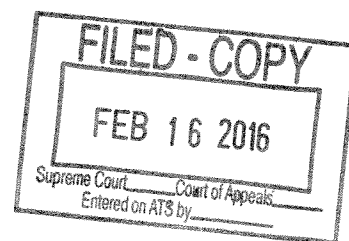
IN THE SUPREME COURT OF THE STATE OF IDAHO

CODY JAMES FORTIN,)	
)	
Petitioner/Appellant,)	Supreme Court No. 43334-2015
)	
vs.)	Ada County District Court
)	Case No. CV-PC-2013-08285
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

REPLY BRIEF OF APPELLANT

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



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I. TABLE OF AUTHORITIES

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II. ARGUMENT IN REPLY

A. The District Court violated its mandatory duty to take judicial notice under IRE 201(d)

Mr. Fortin argued in his Opening Brief that the District Court erred in violating its mandatory duty under IRE 201(d) to take judicial notice following his request for notice of the entire underlying record in Case No. CR-FE-2009-19383 and Idaho Court of Appeals Docket No. 38069, as well as the companion case CR-2009-0019475 including all appendices, exhibits, and attachments thereto and following the State's request for specific documents from the underlying case.

The State does not dispute that the Court had a mandatory duty to take judicial notice of the items it requested. Respondent's Brief p. 6-10.

With regard to Mr. Fortin's request for notice, the State argues that the mandatory duty did not apply because Mr. Fortin did not identify the specific documents or items for which notice was requested or proffer and serve copies of the documents. The State cites *Taylor v. McNichols*, 149 Idaho 826, 835-836, 243 P.3d 642, 651-652 (2010), for the proposition that if a party does not identify specific items it is improper for the court to take judicial notice. Respondent's Brief p. 6-7.

However, *Taylor* is not controlling. In *Taylor*, counsel requested judicial notice as follows:

Also, your Honor, I would – I would ask the Court because we obviously – we have talked about a lot of information in the past in this case and in the other cases and, you know, a lot of the information in the other cases kind of has an impact on this case. So *I would ask the Court to take judicial notice of everything that's been followed, argued in those previous cases – or in the other matter, the underlying*

matter we might call it . .

149 Idaho at 833-34, 243 P.3d at 649-650 (emphasis original).

The *Taylor* Court held that this request was not sufficient to allow judicial notice to be taken pursuant to IRE 201(d). 149 Idaho at 835, 243 P.3d at 651. In other words, a request that a court take judicial notice of “everything that’s been followed, argued in those previous cases” or in another unidentified matter is not sufficient to invoke a mandatory duty under IRE 201(d). But, the opinion says nothing about a request such as Mr. Fortin’s where he did specifically identify the items he was seeking notice for:

the entire underlying district and appellate record in District Court Criminal Case No. CR-FE-2009-19383 and Idaho Court of Appeals Docket No. 38069, as well as the companion case CR-2009-0019475, including all appendices, exhibits, and attachments thereto for the purpose of these proceedings.

R 26.

This request identifies the specific documents and items sought and thus invokes the mandatory duty of IRE 201(d).

Moreover, as noted above, the State makes no argument that its request for notice was not specific enough to invoke the District Court’s mandatory duty.

Mr. Fortin asks this Court to reject the State’s argument that his request was not specific enough to require the District Court to take judicial notice.

He also asks this Court to note that the State has not argued that if there was a violation of a mandatory duty that the violation was harmless. *State v. Almaraz*, 154 Idaho 584, 598, 301 P.3d 242, 256 (2013), and *State v. Smith*, ____

Idaho ___, ___ P.3d ___, 2016 WL 455979 (Ct. App. 2016), holding that when the State does not argue an error was harmless, it cannot be said to have met its burden of proving the error harmless beyond a reasonable doubt. On this basis, he requests that this Court vacate the order of summary dismissal and remand for further proceedings.

B. The District Court denied Mr. Fortin his state and federal constitutional rights to meaningful access to the courts.

Mr. Fortin has argued that the failure to grant his or the State's requests for judicial notice denied him a record on appeal that is sufficient for adequate appellate review thus violating the state and federal constitutional rights of access to the courts. Opening Brief pages 11-12. The State has responded that Mr. Fortin has not shown fundamental error per *State v. Perry*, 150 Idaho 209, 245 P.3d 961 (2010). Respondent's Brief p. 8-10.

The State's argument is that there was no mandatory duty to take judicial notice of the proceedings underlying the post-conviction petition and thus failure to take judicial notice could not violate the constitutional right to access to the courts. This is a *non sequitur*. Whether or not the District Court had a mandatory duty to take judicial notice, its failure to take notice has denied Mr. Fortin the record required for appeal in this case.

Mr. Fortin has shown a constitutional violation - the District Court has denied him the record required to adequate appellate review. *State v. Brandt*, 135 Idaho 205, 207, 16 P.3d 302, 304 (Ct. App. 2000); *Procunier v. Martinez*, 416 U.S.

394, 94 S.Ct. 1800, 1814 (1974); *Draper v. Washington*, 372 U.S. 487, 83 S.Ct. 774 (1963); *Lane v. Brown*, 372 U.S. 477, 83 S.Ct. 768 (1963).

Mr. Fortin has also shown that the violation was clear and obvious without need for additional information not contained in the appellate record. The failure to take notice is clear and obvious on the face of the record.

And, Mr. Fortin has demonstrated that prejudice has resulted because he has lost his right to a meaningful appeal. *See Ricca v. State*, 124 Idaho 894, 898, 865 P.2d 985, 989 (Ct. App. 1993), holding that the loss of the opportunity to appeal is itself sufficient prejudice to support a claim of ineffective assistance of counsel without a showing of what issues would have been raised on appeal.

Mr. Fortin has met the *Perry* requirements to show constitutional error in failing to take judicial notice and on this basis also he asks this Court to vacate the order of summary dismissal.

C. Mr. Fortin did raise a genuine issue of material fact as to his claim of ineffective assistance in failing to properly advise him of the consequences of rejecting the State's plea offer.

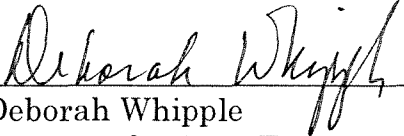
Mr. Fortin relies upon his Opening Brief to support this issue on appeal.

III. CONCLUSION

Mr. Fortin respectfully requests that this Court vacate the order of summary dismissal and remand with instruction to take judicial notice of the records, transcripts, and exhibits of the underlying and related criminal cases. He further requests that on remand this Court instruct the District Court to hold an evidentiary hearing on any claims for which the judicially noticed items support a

genuine issue of material fact as to whether he was denied his state and federal constitutional rights, to include, but not be limited to his claim that counsel was ineffective in failing to advise him of the potential consequences of refusing the plea agreement.

Submitted this 16th day of February, 2016.



Deborah Whipple
Attorney for Cody Fortin

CERTIFICATE OF SERVICE

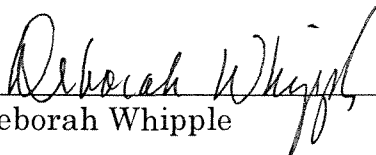
I CERTIFY that on February 16, 2016, I caused two true and correct copies of the foregoing document to be:

mailed

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