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IN THE SUPREME COURT OF THE STATE OF IDAHO

ADAM DEACON FOSTER,)	
)	NO. 48422-2020
Petitioner-Appellant,)	
v.)	BONNER COUNTY NO. CV09-20-784
)	
STATE OF IDAHO,)	APPELLANT'S
)	REPLY BRIEF
Respondent.)	
_____)	

REPLY BRIEF OF APPELLANT

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

HONORABLE BARBARA BUCHANAN
District Judge

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STATEMENT OF THE CASE

Nature of the Case

In his Appellant's Brief, Adam Deacon Foster asserted that the district court, when it summarily dismissed his petition for post-conviction relief, abused its discretion by sua sponte taking judicial notice of the entire case file from the underlying case.

In its Respondent's Brief, the State argues that, because Mr. Foster has not challenged the district court's determination that he did not present evidence to show a valid claim, the district court's judgment must be upheld on the unchallenged basis. (*See* Resp. Br., pp.3-5.) Alternatively, the State argues that, even if dismissal were considered on the merits, the Court should affirm because Mr. Foster did not present a viable claim of post-conviction relief. (*See* Resp. Br., pp.3, 5-6.) The State also contends that Mr. Foster has not shown that the district court abused its discretion when it took judicial notice of the underlying criminal record, because his assertion on appeal is not preserved, the district court complied with the rules governing judicial notice, and any error is harmless. (*See* Resp. Br., pp.3, 7-11.)

This Reply Brief is necessary in light of the Idaho Supreme Court's recent decision in *State v. Neimeyer*, No. 48572, 2021 Ida. LEXIS 119 (Idaho June 29, 2021), which held that a judicial notice issue was not preserved for appeal where the issue and the appellant's position regarding that issue were not raised before the district court. Mr. Foster concedes that *Neimeyer* would control on whether his issue has been preserved for appeal.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Foster's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Did the district court abuse its discretion by taking judicial notice of the entire case file from Mr. Foster's underlying case, in contravention of the specificity requirement of Idaho Rule of Evidence 201(c)?

ARGUMENT

The *Neimeyer* Decision Would Control On Whether Mr. Foster's Issue Has Been Preserved For Appeal

Mr. Foster asserted that the district court abused its discretion by taking judicial notice of the entire case file from the underlying case. (*See* App. Br., pp.11-23.)

On issue preservation, Mr. Foster asserted that “the issue of whether the district court abused its discretion by sua sponte taking judicial notice of the entire case file from the underlying case is preserved for appellate review, even though Mr. Foster did not expressly object to the district court’s judicial notice.” (App. Br., p.14.) He asserted that “the district court actually decided the question of judicial notice,” and thus, “the issue of whether the district court abused its discretion by taking judicial notice is preserved under the exception identified by the Court in [*State v. Jeske*, 164 Idaho 862 (2019)] and [*State v. DuVal*t, 131 Idaho 550 (1998)].” (App. Br., p.18 (citing *Jeske*, 164 Idaho at 868; *DuVal*t, 131 Idaho at 553).)

The State argues that, while “decisions actually made by the district court are reviewable on appeal the decision made by the district court was to take judicial notice; it did not decide whether it had properly identified the specific documents of which it had taken judicial notice.” (Resp. Br., p.7.) The State argues, “Lacking a decision on the adequacy of the identification of specific documents, the record does not show a reviewable decision by the court on that issue.” (Resp. Br., p.7.)

The general rule for issue preservation is that “both the issue and the party’s position on the issue must be raised before the trial court for it to be properly preserved for appeal.” *State v. Gonzalez*, 165 Idaho 95, 99 (2019). However, the Court has applied an exception to the general rule “when the issue was argued to or decided by the trial court.” *DuVal*t, 131 Idaho at 553. The Court “recognizes a distinction between issues not formally raised below and issues that never

‘surfaced’ below.” *Jeske*, 164 Idaho at 868 (quoting *Kolar v. Cassia Cnty., Idaho*, 142 Idaho 346, 354 (2005)).

After the filing of the Appellant’s Brief and the Respondent’s Brief in this case, the Idaho Supreme Court’s decision in *State v. Neimeyer*, No. 48572, 2021 Ida. LEXIS 119 (Idaho June 29, 2021), became final. The appellant in *Neimeyer* asserted on appeal that the State did not prove the existence of a municipal ordinance used to establish probable cause to help justify a warrantless search, and that the district court was precluded from taking judicial notice of a municipal ordinance. *See* 2021 Ida. LEXIS 119 at *8. However, the appellant did not raise those arguments before the district court. *See id.* One of the *Neimeyer* appellant’s arguments was that “the issue was preserved because the trial court *decided* the issue.” *See id.* at *9.

The *Neimeyer* Court disagreed, “because this issue and Neimeyer’s position on the issue were not raised below.” *Id.* at *12. The Court wrote, “the district court did not have an opportunity to address Neimeyer’s contention that a district court may not take judicial notice of a municipal ordinance.” *Id.* According to the *Neimeyer* Court, “the issue was not ‘decided by’ the district court,” because the appellant did not object when the State referenced the municipal ordinance, “nor did she object when the district court relied on the ordinance in its decision.” *Id.* at *13. “Consequently, the district court never *decided* the issue of whether a trial court may take judicial notice of a municipal ordinance or the procedure to be used.” *Id.* The Court held, “because the district court never had an opportunity to address Neimeyer’s argument below, the issue was not preserved for appeal.” *Id.* (citing *State v. Gonzalez*, 165 Idaho at 99).

Mr. Foster concedes that *Neimeyer* would control on whether his issue has been preserved for appeal. Here, Mr. Foster did not expressly object to the district court’s judicial

notice. Thus, based on *Neimeyer*, the district court did not actually decide whether it had properly taken judicial notice. *See Neimeyer*, 2021 Ida. LEXIS 119 at *12-13.

CONCLUSION

For the reasons contained in the Appellant's Brief, and mindful of the Court's subsequent decision in *Neimeyer*, Mr. Foster respectfully requests that this Court vacate the judgment dismissing his post-conviction petition, and the district court's memorandum decision and order granting the State's motion for summary disposition, and remand the matter to the district court for further proceedings.

DATED this 12th day of August, 2021.

/s/ Ben P. McGreevy
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of August, 2021, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

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/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

BPM/eas