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IN THE SUPREME COURT OF THE STATE OF IDAHO

MAJID KOLESTANI AKA)	
NASTARAN KOLESTANI,)	
)	
Petitioner-Appellant,)	NO. 45522
)	
v.)	TWIN FALLS COUNTY
)	NO. CR 2015-1134
STATE OF IDAHO,)	REPLY BRIEF
)	
Respondent.)	
_____)	

REPLY BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF TWIN FALLS**

HONORABLE G. RICHARD BEVAN
District Judge

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STATEMENT OF THE CASE

Nature of the Case

In her verified amended petition for post-conviction relief, Majid Kolestani aka Nastaran Kolestani asserted she pleaded guilty in the underlying criminal case after her trial counsel told her that, if she did not plead guilty, she would be immediately deported to a country where she would be executed for being a transgender woman. Thus, Ms. Kolestani asserted she did not enter into the plea agreement knowingly, voluntarily or intelligently, because her guilty plea had been coerced. She also asserted that her trial counsel gave her deeply erroneous advice on deportation law. The district court granted the State's motion for summary disposition with respect to the above claims.

Ms. Kolestani subsequently filed a motion for reconsideration, requesting the district court reconsider the erroneous advice claim in light of a report from an immigration attorney that she faced the real possibility of remaining in detention indefinitely. Ms. Kolestani asserted she was never told about that possibility, and trial counsel's legal advice on immigration consequences was therefore erroneous. The district court denied the motion without comment.

Ms. Kolestani appealed, asserting the district court erred when it summarily dismissed her coerced guilty plea and erroneous advice claims, and the district court abused its discretion when it denied the motion for reconsideration without comment.

In its Respondent's Brief, the State argues Ms. Kolestani has not shown the district court erred in summarily dismissing her involuntary guilty plea and erroneous deportation advice claims, and she has not shown any basis for reversal of the district court's order denying her motion for reconsideration. (*See* Resp. Br., pp.6-27.) This Reply Brief is necessary to address the State's arguments.

Statement of the Facts and Course of Proceedings

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

ISSUES

- I. Did the district court err in summarily dismissing Ms. Kolestani's coerced guilty plea claim, because she raised a genuine issue of material fact on whether her plea was not knowing, intelligent, and voluntary?
- II. Did the district court err in summarily dismissing Ms. Kolestani's erroneous advice claim, because she raised a genuine issue of material fact on whether trial counsel gave her deeply erroneous advice on deportation consequences?
- III. Did the district court abuse its discretion when it denied Ms. Kolestani's motion for reconsideration without comment, because the district court did not act consistently with the applicable legal standards or reach its decision by an exercise of reason?

ARGUMENT

I.

The District Court Erred In Summarily Dismissing Ms. Kolestani's Coerced Guilty Plea Claim, Because She Raised A Genuine Issue Of Material Fact On Whether Her Plea Was Not Knowing, Intelligent, And Voluntary

A. Introduction

Ms. Kolestani asserts the district court erred in summarily dismissing her coerced guilty plea claim, because she raised a genuine issue of material fact on whether her plea was not knowing, intelligent, and voluntary. The district court determined the record disproved Ms. Kolestani's claim, and she entered her plea knowingly, voluntarily, and intelligently. (R., p.308.) However, Ms. Kolestani actually presented a genuine issue of material fact as to whether her plea was involuntary because it was coerced through ignorance or fear. *See Charboneau v. State*, 144 Idaho 900, 903 (2007); *Mata v. State*, 124 Idaho 588, 593-594 (Ct. App. 1993).

B. Ms. Kolestani Presented A Genuine Issue Of Material Fact As To Whether Her Guilty Plea Was Involuntary Because It Was Coerced Through Ignorance Or Fear

Ms. Kolestani asserts she presented a genuine issue of material fact as to whether her guilty plea was involuntary because it was coerced through ignorance or fear. She raised a genuine issue of material fact as to whether her guilty plea was improperly obtained through ignorance, because she asserted that, based on her trial counsel's erroneous advice, she believed that unless she signed the plea agreement, she would be immediately deported from the United States. (*See R.*, pp.142, 145.) Ms. Kolestani also raised a genuine issue of material fact as to whether her guilty plea was improperly obtained through fear, because she believed that if she were deported to Afghanistan or Pakistan, she would be immediately executed. (*See R.*, p.143.)

Accepting Ms. Kolestani's assertions as true, an innocent person would have felt compelled to plead guilty in like circumstances. *See Mata*, 124 Idaho at 594. Ms. Kolestani therefore raised a genuine issue of material fact as to whether her guilty plea was coerced by being improperly obtained through ignorance or fear.

The State argues, “[a]s found by the district court . . . [Ms.] Kolestani’s allegations did not present a *prima facie* claim that her guilty plea was involuntary because her claims of ignorance and coercion are affirmatively disproved by the underlying criminal record.” (Resp. Br., p.9.) The State contends that Ms. Kolestani’s “answers to the questions asked of her on the guilty plea questionnaire, coupled with her representations during the plea colloquy, directly contradict her post-conviction claims that her plea was involuntary.” (Resp. Br., p.11.) While acknowledging the plea agreement was silent on deportation consequences, and the trial court never asked Ms. Kolestani about her understanding of what would happen if she did not plead guilty, the State argues those facts are irrelevant. (*See* Resp. Br., p.12.) According to the State, “other portions of the underlying criminal record, including the guilty plea advisory form and the transcript of the plea colloquy, show [Ms.] Kolestani was aware she could be deported *if she pled guilty*,” and she also “expressly disavowed having been ‘pressured’ or ‘threatened’ or ‘coerced’ ‘in any way’ to enter her plea and claimed to have disclosed all matters that affected her decision to plead guilty.” (Resp. Br., p.12 (emphasis in original).)

Ms. Kolestani’s awareness that she could be deported, based on the trial court’s queries and her responses during the plea colloquy, was an awareness that she could be deported after she pleaded guilty and served her sentence. (*See* R., p.264.) Further, Ms. Kolestani answered in the negative when the district court asked during the plea colloquy whether “anyone pressured you or threatened you or coerced you in any way to enter this guilty plea today.” (*See* R., p.266.)

However, the advisory form and trial court did not ask Ms. Kolestani whether she was aware of the deportation consequences if she did *not* plead guilty. (*See R.*, pp.254, 264.) Put otherwise, they did not disabuse Ms. Kolestani of her understanding that she would be immediately deported if she failed to plead guilty. (*See R.*, pp.142-43.) Thus, Ms. Kolestani's assertions were not affirmatively disproven by the record from the underlying criminal case. Despite the State's arguments, Ms. Kolestani raised a genuine issue of material fact as to whether her guilty plea was coerced by being improperly obtained through ignorance or fear. *See Mata*, 124 Idaho at 593-594.

II.

The District Court Erred In Summarily Dismissing Ms. Kolestani's Erroneous Advice Claim, Because She Raised A Genuine Issue Of Material Fact On Whether Trial Counsel Gave Her Deeply Erroneous Advice On Deportation Consequences

A. Introduction

Ms. Kolestani asserts the district court erred in summarily dismissing her erroneous advice claim of ineffective assistance of counsel, because she raised a genuine issue of material fact on whether trial counsel gave her deeply erroneous advice on deportation consequences. The district court determined the record disproved Ms. Kolestani's assertion that trial counsel was deficient, and her claim was not supported by the record or the district court's inferences. (*R.*, pp.311-12.) However, Ms. Kolestani presented a genuine issue of material fact as to whether trial counsel's representation, namely the erroneous advice that Ms. Kolestani would be immediately deported if she did not plead guilty, was deficient because it fell below an objective standard of reasonableness. *See Padilla v. Kentucky*, 559 U.S. 356, 369 (2010); *Aragon v. State*, 114 Idaho 758, 760 (1988). Further, Ms. Kolestani will be able to demonstrate there is a genuine

issue of material fact as to whether she was prejudiced by trial counsel's deficient performance. *See Keserovic v. State*, 158 Idaho 234, 235 (Ct. App. 2015).

B. Ms. Kolestani Presented A Genuine Issue Of Material Fact As To Whether Trial Counsel's Representation Was Deficient, Because Trial Counsel's Erroneous Advice On Deportation Consequences Fell Below An Objective Standard Of Reasonableness

Ms. Kolestani asserts she presented a genuine issue of material fact as to whether trial counsel's representation was deficient. Construing the facts in Ms. Kolestani's favor, trial counsel's erroneous advice that Ms. Kolestani would be immediately deported if she did not plead guilty was deficient because it fell below an objective standard of reasonableness. Ms. Kolestani sufficiently alleged constitutional deficiency by trial counsel, through trial counsel's erroneous advice on deportation consequences, to satisfy the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984). *See Padilla*, 559 U.S. at 369. The district court erred when it determined trial counsel's representation was not deficient; the district court's inference that Ms. Kolestani would have brought trial counsel's deeply erroneous advice to the attention of the trial court was inappropriate under the applicable standard, because the district court drew that inference from facts in dispute. *See Adams v. State*, 158 Idaho 530 (2015).

The State argues, "although the district court was not permitted at the summary dismissal stage of the proceedings to weigh conflicting evidence, it was also not required to accept as true any allegations in [Ms.] Kolestani's post-conviction petition that were affirmatively disproved by the record of the underlying criminal case." (Resp. Br., p.17.) The State also contends, "contrary to [Ms.] Kolestani's assertions, there was no conflicting evidence for the court to weigh." (Resp. Br., p.17.)

The State argues that it disputed the allegation that trial counsel gave the above erroneous advice, but not through submitting "any conflicting evidence. Instead, the State argued the

allegations in the petition were conclusory and disproved by the underlying criminal record.” (See Resp. Br., pp.17-18.) The State argues the district court ultimately agreed with the latter proposition. (Resp. Br., p.18.) Further, according to the State, Ms. Kolestani’s statements during the guilty plea proceedings supported the district court’s inference that Ms. Kolestani would have informed the district court during those proceedings of the erroneous advice, had it been given, and her statements affirmatively disproved the erroneous advice claim. (See Resp. Br., p.18.)

The State essentially argues that for evidentiary facts to be disputed, both parties must submit conflicting evidence. (See Resp. Br., p.18.) However, that is not the standard. As discussed in the Appellant’s Brief (App. Br., p.24), the Idaho Supreme Court in *Adams* held that “[w]here the evidentiary facts are *not disputed* and the trial court rather than a jury will be the trier of fact, summary judgment is appropriate, despite the possibility of conflicting inferences because the court alone will be responsible for resolving the conflict between those inferences.” *Adams*, 158 Idaho at 536 (emphasis added) (internal quotation marks omitted). The *Adams* Court also held “the trial judge is not constrained to draw inferences in favor of the party opposing a summary judgment motion. Instead, the trial judge is free to arrive at the most probable inferences to be drawn from *uncontroverted* evidentiary facts.” *Id.* (emphasis added) (internal quotation marks omitted). The *Adams* Court did not require a party to submit conflicting evidence to dispute an evidentiary fact.

Here, the State disputed whether trial counsel had ever advised Ms. Kolestani she would be immediately deported if she did not plead guilty. (See R., pp.185, 242; Tr. 04/10/17 p.7, Ls.11-18, p.9, Ls.4-11.) Because the State disputed whether trial counsel had advised Ms. Kolestani she would be immediately deported if she did not plead guilty, it was

inappropriate for the district court to make its inference. Under the standard from *Adams*, the district court did not have “uncontroverted evidentiary facts” from which to draw its inference based on trial counsel’s erroneous advice. *See Adams*, 158 Idaho at 536. Instead, the district court should have “liberally construe[d] the facts and reasonable inferences in favor of the non-moving party.” *See Charboneau*, 144 Idaho at 903. In sum, the record did not affirmatively disprove Ms. Kolestani’s erroneous advice claim, and the district court erred when it determined trial counsel’s representation was not deficient.

C. Ms. Kolestani Will Be Able To Demonstrate There Is A Genuine Issue Of Material Fact As To Whether She Was Prejudiced By Trial Counsel’s Deficient Performance

Ms. Kolestani asserts that, on remand, she will be able to demonstrate there is a genuine issue of material fact as to whether she was prejudiced by trial counsel’s deficient performance. Under these circumstances, it cannot be said it would be irrational for someone in Ms. Kolestani’s position to reject the plea. *See Lee v. United States*, 137 S. Ct. 1958, 1969 (2017). There is a reasonable probability that, but for trial counsel’s error, she would not have pled guilty and would have insisted on going to trial. *See Keserovic*, 158 Idaho at 235.

With respect to the prejudice prong, the State argues, “[b]ecause the underlying criminal record affirmatively disproves the allegation that trial counsel advised [Ms.] Kolestani she would be immediately deported if she did not plead guilty, [Ms.] Kolestani’s petition necessarily failed to raise a genuine issue of fact as to either the deficient performance or prejudice prongs of her erroneous deportation advice claim.” (Resp. Br., p.18.) As shown above, the record did not affirmatively disprove the allegation that trial counsel gave Ms. Kolestani erroneous advice.

Ms. Kolestani will be able to demonstrate there is a genuine issue of material fact as to whether she was prejudiced by trial counsel's deficient performance.¹

III.

The District Court Abused Its Discretion When It Denied Ms. Kolestani's Motion for Reconsideration Without Comment, Because The District Court Did Not Act Consistently With The Applicable Legal Standards Or Reach Its Decision By An Exercise Of Reason

A. Introduction

Ms. Kolestani asserts the district court abused its discretion when it denied her motion for reconsideration without comment, because the district court did not act consistently with the applicable legal standards or reach its decision by an exercise of reason. The motion for reconsideration is an Idaho Rule of Civil Procedure 60(b) motion. The district court denied the motion for reconsideration without explaining why Ms. Kolestani's case did not meet the circumstances of Rule 60(b). (*See R.*, p.433.) Thus, the district court's silence was an abuse of discretion.

¹ The State writes that the district court declined to summarily dismiss Ms. Kolestani's petition for being untimely, because the district court found "the allegations in the petition raised a genuine issue of material fact as to whether [Ms.] Kolestani was entitled to equitable tolling." (Resp. Br., p.19.) The State notes, "because the court ultimately dismissed the claims in the petition on their merits, the court never conducted an evidentiary hearing on the statute of limitations issue." (Resp. Br., p.19.) The State argues that, in the event the Court "finds [Ms.] Kolestani presented a genuine issue of material fact as to one or both of those claims [on appeal], the state submits the proper remedy is remand to the district court for an evidentiary hearing on the statute of limitations issue, as well as on the substantive claim(s)." (Resp. Br., p.19 (citing *Hutchins v. State*, 100 Idaho 661, 665 (1979).)

B. The District Court Abused Its Discretion When It Denied The Motion For Reconsideration Without Comment

Ms. Kolestani asserts the district court abused its discretion when it denied the motion for reconsideration without comment. The Idaho Supreme Court has held, “[w]hen a district court fails to explain why a case does not meet I.R.C.P. 60(b)’s circumstances, the court abuses its discretion.” *Agrisource, Inc. v. Johnson*, 156 Idaho 903, 914 (2014) (citing *Printcraft Press, Inc., v. Sunnyside Park Utilities, Inc.*, 153 Idaho 440, 450 (2012)).

The State argues, “[a]ssuming, without conceding, that the district court should have treated the motion as a Rule 60(b)(1) motion, any error arising from its failure to do so or to explain its reasons for denying the motion is harmless because the allegations in the motion are insufficient, as a matter of law, to entitle [Ms.] Kolestani to relief under the rule.” (Resp. Br., p.20 (footnote omitted).) In other words, the State basically contends that, even though the district court did not explain its denial of the motion for reconsideration, any such abuse of discretion was harmless because the motion was without merit. (*See* Resp. Br., pp.25-27.) However, the district court’s abuse of discretion was not harmless, because the motion for reconsideration was actually meritorious.

The State argues that, while post-conviction counsel explained to the district court at the status conference that he erroneously believed the immigration report was part of the court file at the time the district court entered its summary dismissal order, “[c]ounsel did not make any similar representations in the motion to reconsider . . . and thus failed in the motion to allege, much less demonstrate, that his failure to timely submit the immigration report was the result of excusable neglect.” (*See* Resp. Br., p.23.) However, “[i]n determining whether a party’s conduct constitutes excusable neglect, the courts must consider each case in light of its unique facts.” *Baldwin v. Baldwin*, 114 Idaho 525, 527 (Ct. App. 1988). Further, in a case where a

district court's grant of a Rule 60(b)(1) motion was on appeal, but the district court did not specify on what ground it had granted the motion and made no written findings, the Idaho Court of Appeals stated, "[o]ur decision rests on the record as it exists before us." *See Washington Fed. Sav. & Loan Ass'n v. Transamerica Premier Ins. Co.*, 124 Idaho 913, 915-17 (Ct. App. 1993).² Thus, this Court may consider post-conviction counsel's representations at the status conference, part of the "unique facts" of this case, when deciding whether counsel's conduct constituted excusable neglect.

The State also contends Ms. Kolestani has not shown any excusable neglect, because "[p]ost-conviction counsel's conduct in merely assuming the immigration report 'had become part of the court file' before the court ruled on the state's motion for summary dismissal, when it was [Ms.] Kolestani's burden to present admissible evidence supporting her post-conviction claims, was not that of a reasonably prudent person under the same circumstances." (*See* Resp. Br., pp.23-24.) But post-conviction counsel had explained that he thought the immigration report had become part of the court file, and only later realized the report had been sent just to Ms. Kolestani and the State. (*See* Tr. 09/11/17, p.4, Ls.11-15.) A reasonably prudent person under the same circumstances might have made the same assumption.

Further, the State argues that even if Ms. Kolestani could show excusable neglect, the allegations in the motion for reconsideration were insufficient for relief under Rule 60(b)(1) because she had not shown, pleaded or presented evidence of facts which, if established, would constitute a meritorious defense to the action. (*See* Resp. Br., p.24 (quoting *Ponderosa Paint Mfg., Inc. v. Yack*, 125 Idaho 310, 317 (Ct. App. 1994).) The State is correct in stating that "[i]t

² Undersigned counsel inadvertently cited *Washington Federal* in the Appellant's Brief as if it were an Idaho Supreme Court case (*see* App. Br., p.32), and apologizes for the mistake.

is incumbent upon a party seeking relief from a judgment not only to meet the requirements of I.R.C.P. 60(b), but also to show, plead or present evidence of facts which, if established, would constitute a meritorious defense to the action.” *See Maynard v. Nguyen*, 152 Idaho 724, 726 (2011) (quoting *Ponderosa Paint*, 125 Idaho at 317). The party seeking relief must also demonstrate unique and compelling circumstances which justify relief. *Id.*

The State argues, “[b]ecause [Ms.] Kolestani never alleged in her post-conviction petition that her trial counsel was ineffective for giving her *any* immigration advice, the claim in her motion for reconsideration that the immigration report showed counsel’s unspecified advice was ‘wrong’ was not a claim that, if established, would constitute a meritorious defense to the court’s order dismissing [Ms.] Kolestani’s post-conviction claims.” (*See* Resp. Br., pp.24-25.) The State contends the denial of the motion for reconsideration should be affirmed on that basis. (*See* Resp. Br., p.25.)

However, while the erroneous advice claim in Ms. Kolestani’s petition centered on the allegation that trial counsel advised Ms. Kolestani that she would be immediately deported if she did not plead guilty, it also contained more general language on trial counsel’s erroneous advice on deportation consequences. (*See* R., pp.144-45.) For example, the petition declared: “Petitioner first states that counsel was deeply erroneous in deportation law.” (R., p.144.) The petition also asserted, “counsel did not give correct advice as required by *Padilla*.” (R., p.145.) Additionally, the petition asserted, “[i]t was not reasonable for counsel to give immigration advice to Petitioner that was not actually correct.” (R., p.145.)

The motion for reconsideration asserted, based on the immigration report, that Ms. Kolestani faced the real possibility of being detained indefinitely after her sentence, and trial counsel never disclosed that to her. (*See* R., p.384.) Thus, the motion for reconsideration

asserted trial counsel had provided bad advice. (*See R.*, p.384.) Ms. Kolestani therefore submits that, to the extent her petition asserted trial counsel was ineffective because her advice on deportation consequences in general was erroneous, the motion for reconsideration presented evidence of facts (namely, from the immigration report), which, if established, would constitute a meritorious defense to the summary dismissal of the erroneous advice claim. *See Maynard*, 152 Idaho at 726. Considering the severe consequence of indefinite detention, and trial counsel's failure to discuss that possibility with Ms. Kolestani, this case also displays the requisite "unique and compelling circumstances" which justify relief under Rule 60(b). *See id.* The motion for reconsideration was meritorious.

The district court abused its discretion when it denied Ms. Kolestani's motion for reconsideration without comment, because the district court did not act consistently with the applicable legal standards or reach its decision by an exercise of reason. Ms. Kolestani has shown the district court's abuse of discretion was not harmless, because the motion for reconsideration was meritorious.

CONCLUSION

For the above reasons, as well as the reasons contained in the Appellant's Brief, Ms. Kolestani respectfully requests that this Court vacate the district court's summary disposition order as to her coerced guilty plea claim, and remand the matter to the district court for an evidentiary hearing.

Ms. Kolestani also respectfully requests that this Court vacate the district court's summary disposition order as to her erroneous advice ineffective assistance of counsel claim, and remand the matter to the district court for an evidentiary hearing, or alternatively remand the matter to the district court for further proceedings to determine if Ms. Kolestani raised a genuine issue of material fact as to whether trial counsel's deficient performance prejudiced her case.

Further, Ms. Kolestani respectfully requests that this Court vacate the district court's order denying the motion for reconsideration, and remand the matter to the district court for further proceedings on the motion.

DATED this 14th day of September, 2018.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of September, 2018, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith

EVAN A. SMITH
Administrative Assistant

BPM/eas