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Devan v. State Respondent's Brief Dckt. 43508

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IN THE SUPREME COURT OF THE STATE OF IDAHO

EVIN CHRISTOPHER DEVAN,)	
)	No. 43508
Petitioner-Appellant,)	
)	Canyon County Case No.
v.)	CV-2015-1285
)	
STATE OF IDAHO,)	
)	
Defendant-Respondent.)	
<hr/>		

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**

**TED S. TOLLEFSON
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534**

**ATTORNEYS FOR
DEFENDANT-RESPONDENT**

**REED P. ANDERSON
Deputy State Appellate
Public Defender
322 E. Front St., Ste. 570
Boise, Idaho 83702
(208) 334-2712**

**ATTORNEY FOR
PETITIONER-APPELLANT**

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STATEMENT OF THE CASE

Nature of the Case

Evin Christopher Devan appeals from the district court's summary dismissal of his post-conviction petition. On appeal, Devan argues the district court abused its discretion when it denied his motion for relief from the post-conviction judgment pursuant to Idaho Rule of Civil Procedure 60(b).

Statement of Facts and Course of Proceedings

A jury found Devan guilty of conspiracy to commit burglary, burglary and misdemeanor trespass. (R., p. 41.) Devan appealed and the Court of Appeals affirmed his conviction (Id.; see also Appellant's brief, p. 1.) Devan filed a Petition and Affidavit for Post Conviction Relief alleging he was entitled to post-conviction relief due to "Ineffective Assistance of Council [sic]" and "New Evidence." (R., pp. 4-8.) The district court appointed counsel to represent Devan. (R., pp. 20-22.) The state filed an Answer and a Motion for Summary Dismissal. (R., pp. 25-28, 31-35.)

The district court held a status conference at which Devan was represented by Mr. Grove. (R., p. 38.) Mr. Grove indicated he may have a conflict, but needed to speak with Devan regarding the issue. (Id.) Mr. Nelson was subsequently appointed as conflict counsel. (R., p. 39.) At the next status conference Devan was represented by Ms. Scarlett, who was filling in for Mr. Nelson. (Id.)

The district court held a hearing on the state's Motion for Summary Dismissal. (R., p. 40.) Mr. Nelson represented Devan at the hearing. (Id.) The

state did not make argument and stood on the pleadings. (Id.) Mr. Nelson, “indicated he met with [Devan], and that [Devan] was in favor of filing an amended petition if, upon review, counsel was able to find any meritorious claims.” (Aug. R., p. 49.) However, Mr. Nelson stated that after reviewing the record, “he was unable to find any meritorious claims and therefore submitted to the discretion of the court on the motion.” (Id.)

The district court entered an Order Granting the State’s Motion and Dismissing the Petition for Post-Conviction Relief. (R., pp. 41-45.) The district court found that “Petitioner has alleged no facts to support his petition, nor has he established any prejudice.” (R., pp. 43-44.) The district court entered final judgment and Devan filed a timely Notice of Appeal. (R., pp. 46-51.)

Approximately five months later, Devan filed a pro se Motion and Memorandum for Relief From Judgment or Order. (Aug. R., pp. 1-37.) Devan claimed that he was entitled to relief from the post-conviction judgment under Idaho Rule of Civil Procedure 60(b) because his post-conviction counsel, Mr. Nelson, failed to submit evidence that would have withstood summary dismissal. (See Aug. R., pp. 1-7.) Devan claimed that Mr. Nelson failed to submit an affidavit by Lauren Jones that Devan believed established an alibi for the underlying convictions. (See Aug. R., pp. 1-37.) Devan’s motion was based upon the holding of Eby v. State, 148 Idaho 731, 228 P.3d 998 (2010). (See Aug. R., pp. 1-7, 41-45.) In Eby, the Idaho Supreme Court held that relief in a post-conviction action may be granted under Rule 60(b) in unique and compelling circumstances where there has been a “complete absence of

meaningful representation.” See Eby, 148 Idaho at 737, 228 P.3d at 1004. The state objected. (Aug. R., pp. 38-40.)

The district court denied Devan’s Rule 60(b) motion. (Aug. R., pp. 46-52.) The district court recognized that the decision to grant or deny a 60(b) motion was within its discretion. (Aug. R., p. 49.) The district court distinguished Eby because Devan admitted to “multiple contacts” with his counsel “wherein the affidavit of Mr. Jones, the alibi witness advanced by Petitioner, was discussed.” (Id.) Further, the district court noted that on the hearing on the motion for summary dismissal, Mr. Nelson indicated that he met with Devan, but Mr. Nelson was unable to find any meritorious claims. (Id.) The district court found “that there was sufficient communication between the parties and consideration of the issue by counsel that there was not a complete lack of meaningful representation.” (Id.)

The district court also recognized that, even if there was a reason to set aside the judgment, the petitioner must set forth facts which, if established, would constitute a meritorious claim. (Aug. R., pp. 49-50 (citing Ponderosa Paint Mfg., Inc. v. Yack, 125 Idaho 310, 317, 870 P.2d 663, 670 (Ct. App. 1994).) The district court found that Devan had not set forth facts that would establish a meritorious claim. (Aug. R., pp. 49-51.) The appellate record was augmented to include the pleadings related to Devan’s Rule 60(b) motion. (Aug. R., pp. 53-54.)

ISSUE

Devan states the issue on appeal as:

Did the district court abuse its discretion when it denied Mr. Devan's I.R.C.P. 60(b) motion?

(Appellant's brief, p. 7.)

The state rephrases the issue as:

Has Devan failed to show the district court abused its discretion when it denied his Motion for Relief from the Judgment pursuant to Idaho Rule of Civil Procedure 60(b)?

ARGUMENT

The District Court Did Not Abuse Its Discretion When It Denied Devan's Motion For Relief From The Judgment Under Idaho Rule Of Civil Procedure 60(b)

A. Introduction

The district court summarily dismissed Devan's petition for post-conviction relief. (R., pp. 41-47.) Devan filed a Rule 60(b) Motion and argued he was entitled to relief from the judgment because his post-conviction counsel, Mr. Nelson, provided a "complete lack of meaningful representation." (See Aug. R., pp. 1-37, 41-45.) The district court denied Devan's 60(b) motion. (Aug. R., pp. 46-52.) The district court found that there were multiple contacts between Devan and Mr. Nelson. (See id.) Further, the district court found that Mr. Nelson and Devan discussed the Jones affidavit and Mr. Nelson indicated, that if he was able to find a meritorious claim, he would file an amended petition. (See Aug. R., pp. 49-51.) The district court did not abuse its discretion when it denied Devan's Rule 60(b) motion.

B. Standard Of Review

The district court has the discretion to grant or deny a motion under Idaho Rule of Civil Procedure 60(b). Eby v. State, 148 Idaho 731, 734, 228 P.3d 998, 1001 (2010) (citing Pullin v. City of Kimberly, 100 Idaho 34, 36, 592 P.2d 849, 851 (1979)).

C. Devan Has Failed To Establish The District Court Abused Its Discretion When It Denied Devan's Motion For Relief From The Judgment Under Idaho Rule Of Civil Procedure 60(b)

The district court entered judgment and dismissed Devan's post-conviction petition. (R., pp. 41-47.) Devan filed a motion for relief from this final judgment pursuant to Idaho Rule of Civil Procedure 60(b)(6). (See Aug. R., pp. 1-7, 47.) Idaho Rule of Civil Procedure 60(b)(6) states:

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

...

(6) any other reason that justifies relief.

I.R.C.P. 60(b)(6). Devan alleged he was entitled to relief from the judgment of dismissal because his post-conviction counsel, Mr. Nelson, failed to submit evidence that would have withstood summary dismissal. (See Aug. R., pp. 1-7.) Devan argued there were "unique and compelling circumstances justifying relief, specifically, the failure to file any pleadings related to Lauren Jones, a potential alibi witness, reflecting a complete lack of meaningful representation as outlined in *Eby v. State*, 148 Idaho 731, 228 P.3d 998 (2010)." (Aug. R., p. 47.)

The district court rejected this argument and found that there was not a complete lack of meaningful representation. (See Aug. R., p. 49.) The district court explained:

The decision to grant or deny a 60(b) motion is discretionary. *Dixon v. State*, 157 Idaho 582, 587-88, 338 P.3d 561, 566-67 (Ct. App. 2014), *review denied* (Dec. 12, 2014). In the case at hand, as in *Eby*, there was nothing filed by defense counsel, including any response to the State's Motion for Summary Dismissal. However,

this case is distinguishable from *Eby* in that the Affidavit of Petitioner filed on December 22, 2015, describes multiple contacts between Petitioner and counsel wherein the affidavit of Mr. Jones, the alibi witness advanced by Petitioner, was discussed. A review of the July 10, 2015 hearing on the motion for summary dismissal further reflects that Mr. Nelson indicated he met with Petitioner, and that Petitioner was in favor of filing an amended petition if, upon review, counsel was able to find any meritorious claims. However, counsel stated that upon review of the record, he was unable to find any meritorious claims and therefore submitted to the discretion of the court on the motion.

Given these facts, the Court finds that there was communication between counsel and Petitioner, specifically there was communication regarding the potential alibi, and that counsel considered this information and determined that there was no meritorious claim. Although the lack of filings can be indicative of a lack of meaningful representation, it does not necessitate such a finding. The fact that counsel disagreed with Petitioner about the validity of various arguments or the value of evidence and declined to proceed with the claims requested does not mean there was no meaningful representation. As such, this Court finds that there was sufficient communication between the parties and consideration of the issue by counsel that there was not a complete lack of meaningful representation.

(Aug. R., p. 49.)

On appeal, Devan argues the district court misapplied Eby and abused its discretion when it found that Devan “had not met the requirement of showing unique and compelling circumstances in the form of an absence of meaningful representation.” (Appellant’s brief, p. 9.) Devan argues there were unique and compelling circumstances because he alleged in his Rule 60(b) motion that his post-conviction counsel, Mr. Nelson, did not inform him that the state had filed a motion for summary dismissal. (See Appellant’s brief, pp. 14-15.) Devan argues that, had he been informed of the state’s motion, he could have filed an

amended petition and submitted the Jones affidavit. (See Appellant's brief, p. 9.) Devan's argument on appeal fails.

The record refutes Devan's argument regarding the Jones affidavit. The district court found Devan's counsel, Mr. Nelson, was aware of the Jones affidavit and discussed it with Devan. (See Aug. R., p. 49.) In addition, at the July 10, 2015 hearing on the motion for summary dismissal, Mr. Nelson told the court he met with Devan and he would file an amended petition if he were able to find "any meritorious claims." (Id.) This is not a "complete lack of meaningful representation"; it is a disagreement between Devan and Mr. Nelson whether the Jones affidavit would constitute a meritorious defense. It does not matter whether Mr. Nelson told Devan of the state's motion for summary dismissal because they already discussed the potential defense, the Jones affidavit, and Mr. Nelson apparently determined that it did not raise a meritorious defense.

Devan argues that, had he only known that the state actually moved to dismiss his petition, he could have attempted to get new counsel or attempted to file the amended petition and Jones affidavit himself. (See Appellant's brief, p. 14.) The logic of this argument fails. The crucial information was not that the state actually moved to dismiss his petition, but that Mr. Nelson determined the Jones affidavit did not raise a meritorious defense. Once Devan knew Mr. Nelson was not going to file the Jones affidavit it was irrelevant whether he also knew the state had filed a motion for summary dismissal.¹ Even if

¹ Devan was aware the state would request dismissal. The state's Answer informed Devan that the state was requesting "Petitioner's claims for Post-conviction Relief be denied and/or dismissed[.]" (R., p. 27.)

Mr. Nelson had told Devan of the motion for summary dismissal, Devan already knew that Mr. Nelson was not going to present the Jones affidavit in response. Devan has merely alleged a difference of opinion with his post-conviction counsel and disagreement with counsel is not a complete lack of meaningful representation. The district court did not abuse its discretion in denying Devan's Rule 60(b) motion on this basis.

D. The District Court Did Not Abuse Its Discretion When It Determined That Devan Was Also Not Entitled To Rule 60(b) Relief Because He Failed To Plead Facts That Would Constitute A Meritorious Claim

The district court also found that, even if there had been a lack of meaningful representation, Devan was still not entitled to Rule 60(b) relief, because Devan failed to plead facts, that if established, would constitute a meritorious claim. (See Aug. R., pp. 49-51 (citing Ponderosa Paint Mfg., Inc. v. Yack, 125 Idaho 310, 317, 870 P.2d 663, 670 (Ct. App. 1994).) The district court found that, even if the Jones affidavit had been presented in response to the state's motion, it would not have raised a genuine issue of material fact such that it would defeat the summary dismissal. (Id.)

Devan argues the district court abused its discretion because, he claims, the presence of the affidavit is alone sufficient to defeat summary judgment and the district court should not have analyzed the credibility of the affidavit. (Appellant's brief, p. 16 ("The district court abused its discretion when, instead of relying on the presence of the affidavit, it analyzed the *credibility* of the statements made in the affidavit.")) Devan's argument fails because a review of the record shows the court did not evaluate the credibility of the affidavit or

otherwise abuse its discretion when it determined that the Jones affidavit would not have presented a genuine issue of material fact such that it would defeat the state's motion for summary dismissal. (See Aug. R., pp. 49-51.) The standard for whether a summary disposition is appropriate is well established.

Summary disposition of a petition for post-conviction relief is appropriate if the applicant's evidence raises no genuine issue of material fact. On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file and will liberally construe the facts and reasonable inferences in favor of the non-moving party. A court is required to accept the petitioner's un rebutted allegations as true, but need not accept the petitioner's conclusions. When the alleged facts, even if true, would not entitle the applicant to relief, the trial court may dismiss the application without holding an evidentiary hearing. Allegations contained in the application are insufficient for the granting of relief when (1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law.

Charboneau v. State, 144 Idaho 900, 903, 174 P.3d 870, 873 (2007) (internal citations omitted). Where there is a claim of ineffective assistance of counsel, the petitioner must make a prima facie showing of deficient performance and prejudice. See Adams v. State, 158 Idaho 530, 536, 348 P.3d 145, 151 (2015) (citing Kelly v. State, 149 Idaho 517, 522, 236 P.3d 1277, 1282 (2010); Strickland v. Washington, 466 U.S. 668, 687 (1984)).

The prejudice prong requires a defendant to "show that the deficient conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Id. (citing Ivey v. State, 123 Idaho 77, 80, 844 P.2d 706, 709 (1992); Strickland, 466 U.S. at 687.) The Idaho Supreme Court has recognized the prejudice prong is a "weighty

burden” for a defendant to carry. Id. (citing Aragon v. State, 114 Idaho 758, 764, 760 P.2d 1174, 1180 (1988).) A defendant must show a reasonable probability that the trial’s outcome would have been be different but for counsel’s deficient performance. Id. (citing State v. Row, 131 Idaho 303, 312, 955 P.2d 1082, 1091 (1998).) “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. (citing Strickland, 466 U.S. at 694.)

Here, the district court reviewed the allegations contained within the Jones affidavit and determined that those allegations, even if true, were not sufficient to create a genuine issue of material fact regarding the prejudice prong. (See Aug. R., pp. 49-51.) Specifically, the district court found that the Jones affidavit contradicted the testimony presented at trial and that, “[g]iven the amount and weight of the evidence,” the claims in the affidavit even if presented to the jury, were “not reasonably likely to alter the decision of the jury.” (Aug., R. p. 51.) That the court evaluated the claims in the Jones affidavit to determine whether Devan was *prejudiced* by trial counsel’s failure to present the evidence at trial does not show the court failed to accept the statements in the Jones affidavit as true for the purposes of summary disposition. To the contrary, the court accepted the allegations as true and applied the correct legal standard in concluding the allegations, even if presented to the jury, would not reasonably have altered the outcome of the trial.

The district court did not abuse its discretion when it denied Devan’s Rule 60(b) motion based, in part, on its determination that the Jones affidavit did not

raise a genuine issue of material fact that would have entitled Devan to an evidentiary hearing on his ineffective assistance of counsel claim.

CONCLUSION

The state respectfully requests this Court affirm the district court's denial of Devan's Idaho Rule of Civil Procedure 60(b) Motion.

DATED this 3rd day of January, 2017.

/s/ Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 3rd day of January, 2017, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

REED P. ANDERSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

TST/dd