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# Devan v. State Appellant's Reply Brief Dckt. 43508

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

EVIN CHRISTOPHER DEVAN,	)	
	)	NO. 43508
Petitioner-Appellant,	)	
v.	)	CANYON COUNTY NO. CV 2015-1285
	)	
STATE OF IDAHO,	)	APPELLANT'S
	)	REPLY BRIEF
Respondent.	)	
_____	)	

**REPLY BRIEF OF APPELLANT**

**APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF CANYON**

**HONORABLE CHRIS S. NYE**  
District Judge

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## STATEMENT OF THE CASE

### Nature of the Case

After being convicted of conspiracy to commit burglary, burglary, and misdemeanor trespass in a separate criminal case, Evin Christopher Devan filed a petition for post-conviction relief. Mr. Devan was appointed counsel, but counsel did not file a response to the State's motion for summary dismissal or an amended petition. As a result, the district court summarily dismissed Mr. Devan's petition. Mr. Devan filed a Notice of Appeal timely from the order dismissing his petition and subsequently filed an I.R.C.P. 60(b) motion. The district court later denied that motion.

On appeal, Mr. Devan challenges the denial of his Rule 60(b) motion. He submits that the district court abused its discretion when it denied the motion because there was a complete absence of meaningful representation by his post-conviction counsel, and the district court denied the motion based on an improper analysis.

This reply brief is necessary to respond to the State's arguments that there was meaningful representation by Mr. Devan's post-conviction counsel, Mr. Nelson, and that Mr. Devan failed to raise a genuine issue of material fact. With respect to the first argument, the State relies on the fact that there was some communication between Mr. Devan and Mr. Nelson, but it fails to prove how that communication made Mr. Nelson's representation meaningful. It also alleges facts that are not supported by the record. With respect to the second argument, the State asserts that the district court's weighing of the facts alleged in the affidavit filed in support of the Rule 60(b) motion against some of the evidence from the trial was a proper analysis. This argument fails because the facts supporting the Rule 60(b) motion raised a genuine

issue of material fact and therefore an evidentiary hearing was the proper place for any comparison of those facts to the conflicting evidence from the trial.

Statement of the Facts and Course of Proceedings

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

ISSUE

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

## ARGUMENT

### The District Court Abused Its Discretion When It Denied Mr. Devan's Rule 60(b) Motion

#### A. The State Has Failed To Show That Mr. Devan's Post-Conviction Counsel Provided Meaningful Representation

In the Appellant's Brief, Mr. Devan argued that there were unique and compelling circumstances that supported granting the Rule 60(b) motion because there was a complete lack of meaningful representation by Mr. Devan's post-conviction counsel—Mr. Nelson. (App. Br., pp.9-15.) In response, the State relies on the district court's finding that there was some communication between Mr. Devan and Mr. Nelson. (Resp. Br., pp.7-9.) The district court made this finding based on Mr. Devan's affidavit filed in support of his motion. (Augmentation, p.49.) In that affidavit, Mr. Devan stated that he met with Mr. Nelson and his paralegal on June 18, 2015. (Augmentation, p.28.) He said only that he "showed" Mr. Nelson the Jones affidavit and expressed concern that the State would be filing a motion for summary dismissal. (Augmentation, p.28.) Based on this statement and the fact that—at hearing on the motion for summary dismissal—Mr. Nelson said he had met with Mr. Devan who said that he wanted Mr. Nelson to file an amended petition if there were meritorious issues, the district court said that "counsel considered [the affidavit] and determined that there was no meritorious claim." (Augmentation, p.49.) Therefore, it found that there was "communication regarding the potential alibi." (Augmentation, p.49.)

The State's reliance on the district court's finding about communication between Mr. Devan and Mr. Nelson is problematic for several reasons. First, as argued in the Appellant's Brief, the fact that there was some communication between Mr. Devan and



Mr. Nelson is not the issue. The issue is whether Mr. Nelson's representation was meaningful. (App. Br., pp.10-12.) The communication that took place here did not support a finding that Mr. Nelson provided meaningful representation. Indeed, the only thing Mr. Devan said about the Jones affidavit was that he "showed" it to Mr. Nelson. (Augmentation, p.28.) This does not indicate that there was any sort of a dialogue or ongoing conversation about it. And it certainly does not indicate that Mr. Nelson analyzed how he might use the Jones affidavit in an amended petition and thus made a strategic decision about it. In fact, there is no indication that Mr. Nelson ever even read the Jones affidavit.

Second, the State argues that it did not matter that Mr. Nelson failed to keep Mr. Devan informed about the status of his case because "[o]nce 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. Even if 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." (Resp. Br., pp.8-9 (emphasis added).) These alleged facts are not in the record.

There is no indication from Mr. Devan's affidavit that Mr. Nelson ever told Mr. Devan that he was not going to use the Jones affidavit to support an amended petition. Mr. Devan said he showed the Jones affidavit to Mr. Nelson at their meeting on June 18, 2015. (Augmentation, p.28.) He also told Mr. Nelson that he anticipated the State would move for summary dismissal, but Mr. Nelson failed to tell him that the State had already done so almost four months earlier. (Augmentation, p.28.) There is no evidence Mr. Nelson ever told Mr. Devan he was not going to use the Jones affidavit,

or that he was not going to file an amended petition. As such, Mr. Devan “discovered a hearing was held,” and his case was dismissed, three weeks after the date of the hearing on the motion for summary dismissal. (Augmentation., p.28; R., p.42.)

Therefore, on the day that Mr. Nelson met with Mr. Devan in June, it is evident that Mr. Devan left that meeting thinking that Mr. Nelson was going to evaluate and analyze whether the Jones affidavit could be used to support an amended petition if the State ultimately filed a motion for summary dismissal. (Augmentation, p.28.) Unbeknownst to Mr. Devan, that motion had already been filed—in February. (R., p.31.) The fact that Mr. Devan sent Mr. Nelson a copy of the Jones affidavit a few days after their meeting also supports this assessment of the situation. (Augmentation, p.28.) If Mr. Nelson had told Mr. Devan that he was not going to use the affidavit, Mr. Devan would have had no reason to send him a copy of it.

Furthermore, it was likely too late for Mr. Devan to take any action on his own even if he had been informed at that point that the State had filed the motion for summary dismissal because the hearing took place on July 10, 2015. (R., p.42.) The State asserts that “[t]he 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.” (Resp. Br., p.8.) However, not only is this assumption not supported by the record, as there is no way to know whether Mr. Nelson actually read the affidavit to determine if it raised a meritorious defense, but there is nothing in the record to show Mr. Nelson ever communicated that “crucial information” to Mr. Devan. Thus, the State’s argument fails.

In denying the Rule 60(b) motion, the district court found that there was “communication regarding the potential alibi” simply because Mr. Devan’s affidavit indicated that he *showed* the Jones affidavit to Mr. Nelson at the meeting, but that is not the standard. (Augmentation, p.49.) The standard is whether Mr. Nelson’s representation was meaningful. *Eby v. State*, 148 Idaho 731, 736-37 (2010). Mr. Nelson’s representation was not meaningful because he failed to do anything with the Jones affidavit and kept Mr. Devan in the dark about his case. As argued in the Appellant’s Brief, this ensured that Mr. Devan could take no steps on his own behalf even if he disagreed with Mr. Nelson’s assessments. (App. Br., pp.10, 14.)

Had there been meaningful representation, Mr. Nelson would have used the affidavit and clarified the claims, first and foremost. Alternatively, he would have told Mr. Devan—long before the hearing on the motion for summary dismissal—that the State had filed that motion, and he was not going to use the Jones affidavit to support an amended petition. This would have allowed Mr. Devan to elect to proceed pro se and file his own amended petition if he wanted to. But he never had that opportunity because Mr. Nelson failed to keep him informed.<sup>1</sup> This was not simply a “disagreement between Devan and Mr. Nelson whether the Jones affidavit would constitute a meritorious defense” as the State claims. (Resp. Br., p.8.) There could be no “disagreement” if Mr. Nelson never told Mr. Devan what he thought. This was a

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<sup>1</sup> Mr. Devan stated in his affidavit that he asked to be “informed of all movements” in the case. (App. Br., p.3.) But Mr. Nelson never took any steps to comply with this request. Mr. Nelson had a duty to “promptly comply with reasonable requests for information . . . .” I.R.P.C. 1.4(a)(4). He also had duties to “reasonably consult with [Mr. Devan] about the means by which [Mr. Devan’s] objectives” were to be accomplished, and to keep Mr. Devan “reasonably informed about the status of the matter.” I.R.P.C. 1.4(a)(2)(3). The record shows that Mr. Nelson neglected these duties.

complete lack of meaningful representation, as it ensured that Mr. Devan did not get an opportunity to raise his post-conviction claims.

Finally, relying on its unsupported allegations that Mr. Nelson told Mr. Devan that he was not going to use the Jones affidavit, the State ultimately asserts that “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.” (Resp. Br., p.9.) This argument is meritless because there is no evidence Mr. Nelson ever had such an opinion or that, if he did, Mr. Devan was ever made aware that opinion. These are unique and compelling circumstances that support the fact that there was indeed a complete lack of meaningful representation.

B. The Jones Affidavit Raised A Genuine Issue Of Material Fact, And The State Fails To Show That The District Court's Analysis Of The Credibility Of The Affidavit Was Appropriate

In response to the argument that the district court abused its discretion when it held that Mr. Devan did not demonstrate a genuine issue of material fact, the State justifies the district court's analysis of the credibility of the Jones affidavit by arguing that the district court was determining whether Mr. Devan had been prejudiced by his trial counsel's deficient performance. (Resp. Br., pp.9-12.) This ignores the fact that this analysis was improper because the district court analyzed whether the facts alleged in the Jones affidavit would suffice to exonerate Mr. Devan and, as discussed below, only compared the facts in the Jones affidavit with evidence that supported its position that the jury would not be persuaded by the Jones affidavit. It is also not supported by the record because the district court never directly analyzed whether Mr. Devan was prejudiced by his trial counsel's performance. (Augmentation, pp.49-51.) It held that, in

light of other evidence from the trial, the Jones affidavit “was not reasonably likely to alter the decision of the jury.” (Augmentation, p.51.) Finally, the State ignores the fact that Mr. Devan based his application for post-conviction relief not only on ineffective assistance of trial counsel but also on the fact that there was new evidence in the case, which justified a new trial. (R., pp.5-6.) The Jones affidavit was new evidence, *and* it supported the ineffective assistance claims, but Mr. Devan never had the opportunity to clarify and develop those claims due to Mr. Nelson’s inaction.

In order to meet the second requirement of Rule 60(b), the party seeking relief must only allege facts showing a meritorious claim in the form of a genuine issue of material fact. “A party seeking relief from judgment under rule 60(b) must meet the requirements of the rule and also “show, plead or present evidence of facts which, if established, would constitute a meritorious defense to the action.” *Ponderosa Paint Mfg., Inc. v. Yack*, 125 Idaho 310, 317 (Ct. App. 1994). The court in *Ponderosa Paint* went on to state, “This policy recognizes that it would be an idle exercise and a waste of judicial resources for a court to set aside a judgment if, in fact there is no genuine justiciable controversy.” *Id.* (citing *Reeves v. Wisenor*, 102 Idaho 271, 272 (1981); *Hearst Corp. v. Keller*, 100 Idaho 10, 12 (1979).) Finally it wrote, “It would be pointless to vacate a summary judgment and reopen the proceeding if the party seeking relief has not shown that it can raise genuine factual issues sufficient to defeat the summary judgment motion.” *Id.* at 317-18.

The United States Supreme Court has defined the standard for whether a genuine issue of material fact exists as whether “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*,

477 U.S. 242, 248 (1986). “The inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved in favor of either party.” *Id.* at 250. In the post-conviction context, if a genuine factual issue is presented, “an evidentiary hearing must be conducted.” *State v. Yakovac*, 145 Idaho 437, 444 (2007) (citation omitted). The underlying facts alleged by the petitioner “must be regarded as true” for purposes of summary dismissal. *Rhoades v. State*, 148 Idaho 247, 250 (2009) (citation omitted). Any disputed facts are construed in favor of the non-moving party, and “all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party.” *Vavold v. State*, 148 Idaho 44, 45 (2009) (citation omitted).

In *Ponderosa Paint*, the court noted that it would “treat the Rule 60(b) motion as essentially a reconsideration of the summary judgment motion” and “liberally view the evidence and all reasonable inferences drawn therefrom in the light most favorable to” the party bringing the motion as that party would have been the non-moving party originally. 125 Idaho at 318.

The district court in this case, however, did not construe the disputed facts in favor of Mr. Devan. It looked at only *some* of the evidence from the trial and from that alone determined that the facts alleged in the Jones affidavit would not be reasonably likely to alter the decision of the jury. (Augmentation, pp.50-51.) It ignored the fact that there was other evidence, which supported the idea that someone other than Mr. Devan was present when the crimes were committed. Once it was evident that there was some evidence of this nature, the district court should have held that the Jones affidavit established a genuine issue of material fact, and Mr. Devan had satisfied the second

requirement of Rule 60(b). Thus, the district court abused its discretion by failing to act within the boundaries of its discretion and consistent with applicable standards. See *Dawson v. Cheyovich Family Trust*, 149 Idaho 375, 380 (2010).

In response to Mr. Devan's argument that the district court went too far when it analyzed the credibility of the affidavit, the State argues that, "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." (Resp. Br., pp.9-10.) It asserts that, "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." (Resp. Br., p.11.)

However, "credibility" means "[t]he quality that makes something (as a witness or evidence) worthy of belief." *Black's Law Dictionary*, 423 (9th ed. 2009). Thus, when the district court compared the affidavit with the evidence from the trial, it analyzed "whether it would suffice to exonerate Mr. Devan on the burglary charge" by delving into certain evidence from the trial and comparing that evidence to the affidavit. (Augmentation, pp.50-51; App. Br., p.16.) Thus it held that the facts in the Jones affidavit were not "worthy of belief" when compared to some of the trial testimony and other evidence. (Augmentation, pp.49-51.) Therefore, the district court did evaluate the credibility of the affidavit; it determined that, in light of *some* of the evidence from the trial, the jury would not have believed the contents of the affidavit.

But in fact, as discussed below, there was a great deal of evidence from the trial—which the district court failed to consider—that actually *supported* the facts alleged in the Jones affidavit. In its analysis of whether the affidavit established a genuine issue of material fact, the district court implicitly took judicial notice of the trial transcript. (Augmentation, pp.50-51.) And the State argues that this analysis was appropriate. (Resp. Br., p.11.) As such, a motion to augment the record on appeal with the trial transcript from the underlying case has been filed contemporaneously with this brief. A brief review of that transcript shows that, contrary to the district court’s conclusion that the Jones affidavit “was not reasonably likely to alter the outcome of the trial,” there was evidence that supported the facts alleged in the Jones affidavit.<sup>2</sup> Indeed, such a review shows that the district court chose only evidence that supported its finding and ignored evidence that did not.

In its order denying Mr. Devan’s Rule 60(b) motion, the district court relied on the fact that the victim in the case, Karl Riebe, identified a Ford Expedition at the scene of the crime that was later located at a motel where Mr. Devan was staying. (Augmentation, p.50.) The district court also noted that an investigating officer discovered that the address on the registration of the Expedition matched the address on Mr. Devan’s identification. (Augmentation, p.50.)

However, the district court ignored the fact that Mr. Devan testified that he had allowed another man, Dana Harris, to drive that Expedition on the night of the burglary and on previous occasions. (Trial Tr., p.515, L.24 – p.516, L.8.) The district court also

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<sup>2</sup> This is not an exhaustive list. However, it does show that there was evidence supporting a different holding by the district court. It also shows that there was enough conflicting and disputed evidence that an evidentiary hearing was necessary so that the evidence could have been thoroughly reviewed and *both parties* could have argued.



ignored the fact that Gina White, a woman who worked at the motel where the Expedition was found, testified that, although she had seen Mr. Devan drive the Expedition, she had seen that vehicle being driven more frequently by Dana Harris. (Trial Tr., p.485, L.9 – p.488, L.8.) Additionally, Ms. White testified that, on the day of the alleged burglary, she had seen Mr. Harris driving the Expedition with another individual, and Mr. Devan was not in the vehicle with them. (Trial Tr., p.488, Ls.14-20.)

The district court referenced the fact that, “[d]uring the investigation, Officers found a recognizable shoe print in the area of the burglary where the Expedition had been parked, and the same or similar shoe prints in the large storage shed which had been broken into.” (Augmentation, p.50.) The district court noted that the print was “similar to that on the shoes Petitioner was wearing when he was detained.” (Augmentation, p.50.) But the district court ignored the fact that Mr. Devan testified that the soles on the Nike shoes he was wearing were used on multiple types of Nike shoes, and he had given Dana Harris some of his shoes in the past. (Trial Tr., p.518, L.12 – p.521, L.1.) The district court also ignored the fact that the police never determined if the shoe print matched the size of Mr. Devan’s shoe. (Trial Tr., p.344, L.17 – p.345, L.14.)

Finally, the district court referenced the testimony of two other people implicated in the crimes, Darrin Boren and Tiffany Jones, and said that they both identified Mr. Devan and testified that he was present for the crimes. (Augmentation, pp.50-51.) The district court went on to say, “The one thing that was absent from testimony of either Tiffany Jones or Darrin Boren, or that of the investigating officers was any implication that there was more than one ‘Evin’ present during the events in question.”

(Augmentation, p.51.) It is true that neither one of them testified that more than one Evin was present, but Mr. Jones's affidavit stated that he rode in the Expedition "with Dana with a Mexican that was named Evin or Devin." (Augmentation, p.34.) He wrote that this person was "bald and had no facial hair" and looked different than Mr. Devan. (Augmentation, p.34.)

And the district court ignored the fact that when Jenny Osborn testified for the State, she admitted that she could not identify Mr. Devan in a line-up, and she said she thought he was "a Mexican kid" with no facial hair. (Trial Tr., p.264, L.18 – p.265, L.6, p.270, Ls.16-25.) In discussing the accuracy of Ms. Osborn's description, Mr. Devan's counsel pointed out that "she described him as a bald, clean-shaven . . . without facial hair, Hispanic male." (Trial Tr., p.288, Ls.4-7.) His counsel went on to argue that the photo taken of Mr. Devan after he was arrested showed he was "clearly not that. He is not a Hispanic male, he is not bald, and he's not clean-shaven." (Trial Tr., p.288, Ls.7-11.)

The district court also ignored the fact Mr. Boren's testimony was suspect for several reasons. On cross-examination, Mr. Boren acknowledged that he was unable to give police Mr. Devan's name at the time of being questioned upon his arrest. (Trial Tr., p.367, L.15 – p.368, L.20.) Mr. Boren was also unable to recall if he had been provided any photographic lineup in order to identify Mr. Devan, and further was uncertain as to whether he was able to make a visual identification if that lineup was provided. (Trial Tr., p.372, L.11 – p.373, L.21.) He also admitted that he was high on methamphetamine on the night of the alleged burglary. (Trial Tr., p.370, Ls.10-18.)

All of this shows that there was a great deal of conflicting evidence, some of which supported the facts alleged in the Jones affidavit. Therefore, there was a reasonable probability that the affidavit could have changed the outcome of the trial because a reasonable jury could have found Mr. Devan not guilty. As such, there was a genuine issue of material fact, and an evidentiary hearing was necessary. It also shows that the district court analyzed the credibility of the affidavit and did not construe all reasonable inferences from the trial in Mr. Devan's favor. Whether the Jones affidavit could be supported or disproved with other evidence from the trial, and whether that would in turn prove or disprove Mr. Devan's post-conviction claims was a complex analysis that, in light of all the conflicting trial testimony, should have been undertaken at an evidentiary hearing.

#### CONCLUSION

Mr. Devan respectfully requests that this Court vacate the district court's order denying his Rule 60(b) motion and remand the case for further proceedings.

DATED this 9<sup>th</sup> day of March, 2017.

\_\_\_\_\_/s/\_\_\_\_\_  
REED P. ANDERSON  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 9<sup>th</sup> day of March, 2017, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

EVIN CHRISTOPHER DEVAN  
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CHRIS S NYE  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

KENNETH K JORGENSEN  
DEPUTY ATTORNEY GENERAL  
CRIMINAL DIVISION  
E-MAILED BRIEF

\_\_\_\_\_/s/\_\_\_\_\_  
EVAN A. SMITH  
Administrative Assistant

RPA/eas