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IN THE SUPREME COURT OF THE STATE OF IDAHO

LAWRENCE SCOTT ANDRUS,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

SUPREME COURT NO. 45297

TWIN FALLS COUNTY NO.
CV42-16-720

BRIEF OF APPELLANT LAWRENCE SCOTT ANDRUS

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

HONORABLE JOHN K. BUTLER
District Judge

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II. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from the district court's order denying Appellant Lawrence Scott Andrus' motion for relief from the judgment dismissing his petition for post-conviction relief, filed pursuant to Idaho Rule of Civil Procedure 60(b).

B. General Course of Proceedings

1. Facts relevant to underlying criminal proceedings

On March 15, 2014, Mr. Andrus spoke with his bishop by phone and expressed he was deeply depressed and intended to end his life. Transcript, Docket 42878 ("Tr."),¹ p. 236, ln. 11 - p. 237, ln. 22. The bishop called 911 and police dispatched to a local bridge historically used for suicide. *Id.* at p. 189, ln. 13 - p. 190, ln. 8. Officers found Mr. Andrus walking on the bridge and took him to a local hospital where he showed signs of intoxication. *See id.* at p. 131-163. No one witnessed Mr. Andrus drinking or driving and no one knew when he drove to the bridge in relation to when he consumed alcohol. *See Tr.* p. 269, ln. 22 - p. 270, ln. 5. Police arrested Mr. Andrus for driving under the influence (DUI), which was alleged as a felony based on prior convictions.

At trial, Mr. Andrus testified that he began drinking vodka after arriving at the bridge and both parties presented competing expert testimony. *See Tr.* p.

¹ The transcript from Mr. Andrus' direct appeal is an exhibit in this appeal.

283-339; p. 355-551. Ultimately, the jury found Mr. Andrus guilty of DUI. The district court sentenced Mr. Andrus to a unified term of ten years with a minimum period of confinement of two years.

2. Post-conviction relief proceedings

On March 2, 2016, Mr. Andrus filed a pro se petition for post-conviction relief and requested counsel. R. 13-50. The district court granted Mr. Andrus' request for counsel and assigned a special conflict attorney on April 21, 2016. R. 55, 73. The state answered the pro se petition on June 15, 2016 and the district court issued a notice of intent to dismiss on July 11, 2016, providing Mr. Andrus with twenty-days to respond. R. 75-97

On July 26, 2016, post-conviction counsel moved to extend the time to respond to the district court's notice of intent to dismiss, indicating he had not been able to meet with Mr. Andrus and obtain additional information. R. 100. Post-conviction counsel explained: "The Petitioners [sic] schedule has not allowed him sufficient time to allow him to respond. Counselor request [sic] an additional 30 days." R. 100. The district court granted the motion. R. 102.

Post-conviction counsel failed to respond to the Notice of Intent to Dismiss, amend the petition or file any documents in the case. On September 26, 2016, the district court dismissed the post-conviction petition for the reasons set forth in the notice. R. 104-105. About a month later, Mr. Andrus notified the district court that

he had repeatedly attempted to communicate with post-conviction counsel and that the only reply was a letter of introduction dated July 26, 2016. R. 109. Mr. Andrus explained that post-conviction counsel had not responded to his inquiries regarding the case's status and indicated he reserved all rights in the action. R. 109. Mr. Andrus requested a copy of the Register of Actions and explained he was unsure if post-conviction counsel represented him. R. 109. Presumably upon discovering the case had already been dismissed, Mr. Andrus then filed a notice of appeal. R. 171.

While the appeal remained pending, Mr. Andrus filed a pro se motion for relief from judgment pursuant to I.R.C.P. 60(b)(6). R. 153. Mr. Andrus explained that post-conviction counsel's only communication was to notify him that counsel filed a motion seeking additional time to respond to the Notice of Intent to Dismiss. R. 154. Mr. Andrus indicated that he had written post-conviction counsel on two occasions requesting communication, investigation into facts to support his claims, that he initiate discovery and advance constitutional challenges to his conviction. R. 154.

Post-conviction counsel nevertheless filed no motions, amendments or other documents on Mr. Andrus' behalf. R. 154. Mr. Andrus relied on post-conviction counsel to amend the petition and that detrimental reliance resulted in the action's dismissal after post-conviction counsel completely failed to provide any meaningful representation. Mr. Andrus alleged that he unsuccessfully attempted to secure the

district court's intervention with uncommunicative counsel. Mr. Andrus also noted that counsel's abandonment no longer justified a successive petition for post-conviction relief, leaving relief under Rule 60(b)(6) as his only opportunity to pursue his post-conviction relief claims.

The district court found that it had dismissed the pro se petition on its merits and, thus, post-conviction counsel's abandonment did not present a unique and compelling circumstance. R. 163. The district court also found that failed to make a proper showing for relief pursuant to I.R.C.P. 60(b)(6) because he did not submit affidavits, an amended petition or otherwise that appointed counsel could have presented to prevent summary dismissal. R. 163-64. The district court thus denied the motion.

Meanwhile, the attorney appointed to represent Mr. Andrus on the appeal from the summary dismissal of his petition for post-conviction relief was compelled to withdraw he could not argue that the pro se petition and attachments were sufficient to survive summary dismissal. *See* R. 167-170. Mr. Andrus then appealed the district court's denial of his Rule 60(b)(6) motion. Mr. Andrus continued pro se on the appeal from the judgment dismissing his petition and, on January 24, 2018, the Court of Appeals affirmed the district court's order summarily dismissing petition for post-conviction relief. *Andrus v. State*, Docket No. 44686 (Ct. App. 2018) (*unpublished opinion*).

III. ISSUE PRESENTED ON APPEAL

1. Did the district court abuse its discretion in denying Mr. Andrus' motion for relief from judgment pursuant to I.R.C.P. 60(b)(6)?

IV. THE DISTRICT COURT ABUSED ITS DISCRETION BY FAILING TO RECOGNIZE THAT COUNSEL'S ABANDONMENT DEPRIVED MR. ANDRUS OF HIS ONLY OPPORTUNITY TO DEVELOP AND SUPPORT HIS POST-CONVICTION CLAIMS AND PRESENTED A UNIQUE AND COMPELLING CIRCUMSTANCE JUSTIFYING RELIEF

A court may relieve a party from a final judgment pursuant to I.R.C.P. 60(b)(6) upon a showing of "unique and compelling circumstances" justifying relief. *Eby v. State*, 148 Idaho 731, 736, 228 P.3d 998, 1003 (2010); *Bias v. State*, 159 Idaho 696, 706, 365 P.3d 1050, 1060 (Ct. App. 2015). The decision will be upheld if it appears that the trial court (1) correctly perceived the issue as discretionary, (2) acted within the boundaries of its discretion and consistent with the applicable legal standards, and (3) reached its determination through an exercise of reason. *Id.* If the trial court applies, The trial court acts within its discretion by keeping in mind the policy favoring relief in doubtful cases and applying the facts in a logical manner to the criteria set forth in Rule 60(b). *Eby*, 148 Idaho at 734, 228 P.3d at 1001 (2010); *Waller v. State, Dep't of Health & Welfare*, 146 Idaho 234, 238, 192 P.3d 1058, 1062 (2008).

Post-conviction proceedings are the exclusive means for challenging the validity of a conviction or sentence other than by direct appeal. *Eby*, 148 Idaho at 737, 228 P.3d at 1004; *Devan v. State*, 162 Idaho 520, 399 P.3d 847, 850 (Ct. App. 2017), review denied (Aug. 23, 2017). In light of this unique status, the complete absence of meaningful representation during post-conviction relief proceedings can present the “unique and compelling circumstances” in which Rule 60(b)(6) relief is warranted. *Berg v. Kendall*, 147 Idaho 571, 578, 212 P.3d 1001, 1008 (2009); *Devan*, 162 Idaho at 523, 399 P.3d at 850.

Here, the district court concluded that post-conviction counsel’s abandonment did not present “unique and compelling circumstances” for two reasons. First, the district court found that it dismissed the petition “on its merits or lack of merit,” “with or without appointed counsel’s participation” and that the dismissal was “presently the subject of a pending appeal.” R. 163. Second, the district court found that Mr. Andrus did not make the “proper showing for relief pursuant to I.R.C.P. 60(b)(6)” because his motion did not attach affidavits or proposed amendments to the post-conviction relief petition that established he could survive summary dismissal.

However, the district court’s summary dismissal of Mr. Andrus’ pro se petition — after appointed counsel failed to even meet with Mr. Andrus — did not equate full consideration of the merits of Mr. Andrus’ claims. Nor could Mr. Andrus,

without the assistance of legal counsel, be expected to produce facts and legal authority sufficient to survive summary dismissal. The district court failed to reach its decision that Mr. Andrus' circumstances were neither unique nor compelling through an exercise of reason or consistently with applicable legal standards.

Accordingly, this Court should reverse and remand with instruction to grant Mr.

Andrus relief from the final judgment dismissing his post-conviction relief petition.

A. Counsel's Failure to Provide Any Meaningful Representation Deprived Mr. Andrus of the Opportunity to Meaningfully Respond to the District Court's Notice of Intent To Dismiss and Presents a Unique and Compelling Circumstance Justifying Relief

On April 21, 2016, the district court assigned a special conflict attorney to represent Mr. Andrus. R. 55, 73. The district court's procedural order instructed post-conviction counsel to consult with Mr. Andrus about amending the post-conviction petition and to file an amended petition, if necessary, within sixty days. R. 57-63. However, post-conviction counsel had yet to even communicate with Mr. Andrus when the district court issued its notice of intent to dismiss approximately eighty days later.

Post-conviction counsel finally sent a letter of introduction on July 26, 2016 along with the motion seeking an additional thirty days to respond to the district court's notice. Post-conviction counsel then failed to respond to the Notice of Intent to Dismiss, communicate with Mr. Andrus, amend the petition or take any action on

Mr. Andrus' behalf. Post-conviction counsel completely failed to provide any meaningful representation. *Cf Devan*, 162 Idaho at 523, 399 P.3d at 850 (no a complete lack of meaningful representation where post-conviction counsel communicated with client about claims and determined they had was merit); *Bias*, 159 Idaho at 707, 365 P.3d at 1061 (petitioner did not experience a “complete absence of meaningful representation” where post-conviction counsel responded to state’s motion for summary dismissal with a responsive brief and supporting affidavits).

Despite the complete absence of meaningful representation, the district court distinguished this case from *Eby* because in that case the district court dismissed the post-conviction action for inactivity whereas the district court here reviewed the “merits” of Mr. Andrus’ pro se petition. R. 162-63. The district court also distinguished this case from *Berg*, where the Court held that courts may grant relief under Rule 60(b)(6) when the representative of a person lacking capacity completely fails to prosecute a meritorious claim that results in the claim being dismissed with prejudice. R. 163; *Berg*, 147 Idaho at 579, 212 P.3d at 1009.

The district court’s conclusion that it considered the “merits” of Mr. Andrus’ claims ignores the importance of legal representation in post-conviction relief. “An indigent defendant who is incarcerated in the penitentiary would almost certainly be unable to conduct an investigation into facts not already contained in the court

record.” *Swader v. State*, 143 Idaho 651, 654, 152 P.3d 12, 15 (2007). Likewise, pro se petitioners often require legal counsel to present sufficient facts to show deficient performance and prejudice. *Id.* Thus, the pro se materials do not allow the district court to fully evaluate the merit of post-conviction claims.

Even though a post-conviction petitioner is not entitled to the effective assistance of post-conviction counsel, such does not relieve post-conviction counsel of his or her obligations in representing his or her client. *Devan*, 162 Idaho at 524, 399 P.3d at 851. Here, the district court appointed counsel and ordered counsel to consult with Mr. Andrus and assist him in developing any valid claims. Instead, post-conviction counsel took no action for four months before filing one motion for an extension and sending a single letter to Mr. Andrus.

In a footnote, the district court speculated that “perhaps appointed counsel felt there was no meritorious response he could file in response to avoid dismissal” in which case the failure to communicate would be harmless. R. 162. However, post-conviction counsel could not independently determine that *none* of the petition’s claims had *any* merit without consulting with his client, investigating facts and reviewing the criminal record. Nor did Mr. Andrus’ opportunity to appeal the district court’s decision assure full consideration of his claims. Of course, appellate counsel could not remedy the deficiencies in the pro se petition or credibly argue that those materials were sufficient to survive summary dismissal.

Appointing post-conviction counsel when a petitioner presents the possibility of a valid claim ensures that the challenges facing pro se petitioners who are indigent and incarcerated do not deprive them of a meaningful opportunity to present their post-conviction relief claims. The district court failed to reach its conclusion that considering the pro se petition and the subsequent appeal remedied counsel's abandonment through an exercise of reason or consistently with the law applicable to the appointment of counsel in post-conviction cases. Post-conviction counsel's abandonment of Mr. Andrus and lack of opportunity to work with post-conviction counsel in attempt to survive summary dismissal presents unique and compelling circumstances justifying relief from judgment.

B. Mr. Andrus Was Not Required To Establish He Could Overcome Summary Dismissal In His Pro Se Rule 60(B)(6) Motion And The District Court Should Have Provided Relief Because The Petition Presented The Possibility Of Valid Claims

The district court denied Mr. Andrus' motion for relief from judgment because his motion did not attach affidavits or proposed amendments to the post-conviction relief petition that established he could survive summary dismissal. However, Mr. Andrus was pro se, indigent and incarcerated. As discussed above, he lacked the practical ability and legal training necessary to conduct a meaningful investigation and to cogently respond to the Notice of Intent to Dismiss. Rather, the district court should have only required that Mr. Andrus present the possibility of a valid claim.

Mr. Andrus raised a number of ineffective assistance of counsel claims, including not moving to suppress the breath results because Mr. Andrus was not monitored properly for 15 minutes, failing to call witnesses to refute the officer's testimony and failing to object to prosecutorial misconduct. The record offers support for these claims. The officer's testimony regarding the fifteen minute period shows it was deficient. Tr. 263-265. And while an expert testified regarding the breath testing machine, his primary explanation as to why there must not have been any mouth alcohol present when Mr. Andrus blew was because the machine worked. Tr. 299, ln. 23 - p. 302, ln. 21. *See State v. Healy*, 151 Idaho 734, 737, 264 P.3d 75, 78 (Ct. App. 2011) (breath test results can be allowed into evidence despite lack of strict compliance with the administrative procedures where State presents expert testimony that explains why procedural defects did not affect the reliability of test results in the particular case at issue).

In closing, the prosecutor argued that Mr. Andrus "manipulated" the people at the hospital, the sheriff's deputies and dispatch:

and now he's trying to manipulate you. He's good at it. One of the best I've ever seen. He knows how to speak. He knows how to present, and he's so good he's won an Emmy. He also told you that what he really wanted that day was human contact, a friend. He wouldn't tell his friends where he was. He was manipulating them; now he's trying to manipulate you. Don't be manipulated. Please find the defendant guilty. Thank you.

Tr. p. 590, ln. 20 - p. 591, ln. 6 (emphasis added). The prosecutor committed misconduct by expressing her personal opinion that Mr. Andrus was the "best"

manipulator she had ever seen and inflaming the jury by suggesting that they would be “manipulated” if they believed Mr. Andrus. *State v. Phillips*, 144 Idaho 82, 86-87, 156 P.3d 583, 587-88 (Ct. App. 2007) (closing argument should neither include counsel's personal opinions about the credibility of a witness or the accused’s guilt nor appeal to the jury’s emotion, passion or prejudice through use of inflammatory tactics).

As noted in the district court’s notice of intent to dismiss, the pro se petition’s claims are conclusory and incomplete. However, Mr. Andrus presented the possibility of valid claims and he should be allowed to work with counsel to see if those claims can be developed sufficient to survive summary dismissal. Post-conviction counsel’s abandonment of Mr. Andrus deprived him of that opportunity through no fault of his own. These circumstances are unique and compelling and the district court abused its discretion in declining to grant Mr. Andrus relief from the final judgment dismissing his post-conviction relief petition.

IV. CONCLUSION

The district court abused its discretion in failing to recognize that post-conviction counsel’s abandonment presented unique and compelling circumstances justifying relieving Mr. Andrus from the final judgment dismissing his petition for post-conviction relief. Mr. Andrus therefore asks the Court to reverse the district court’s order denying his motion for relief from judgment and remand with

instruction to grant the motion and appoint counsel to assist Mr. Andrus in responding to the district court's Notice of Intent to Dismiss.

Respectfully submitted this 7th day of February 2018

FYFFE LAW

/s/ Robyn Fyffe

ROBYN FYFFE

Attorney for Lawrence Scott Andrus

CERTIFICATE OF SERVICE

The undersigned hereby certifies that an electronic copy was served on Criminal Law Division of the Idaho Attorney General at ecf@ag.idaho.gov on February 7, 2018.

FYFFE LAW

/s/ Robyn Fyffe

ROBYN FYFFE