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IN THE SUPREME COURT OF THE STATE OF IDAHO

LAWRENCE SCOTT ANDRUS,)	
)	No. 45297
Petitioner-Appellant,)	
)	Twin Falls County Case No.
v.)	CV42-2016-720
)	
STATE OF IDAHO,)	
)	
Defendant-Respondent.)	
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BRIEF OF RESPONDENT

**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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STATEMENT OF THE CASE

Nature Of The Case

Lawrence Scott Andrus appeals from the district court's order denying his Rule 60(b) motion for relief from the summary dismissal of his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

In Andrus's previous appeal, the Court of Appeals summarized this case's procedural history and factual background as follows:

In the underlying criminal case, Andrus was charged with felony driving under the influence of alcohol. At trial, the jury returned a guilty verdict. Andrus filed an Idaho Criminal Rule 35 motion, which was denied by the district court. Andrus appealed and this Court affirmed the judgment of conviction and the sentence. Thereafter, Andrus filed a petition for post-conviction relief. In response, the district court filed a notice of intent to dismiss, pursuant to Idaho Code § 19-4906(b). The district court granted a motion for extension of time, but Andrus failed to reply within the thirty-day extension. The district court dismissed Andrus's petition for post-conviction relief with prejudice....

Andrus v. State, Docket No. 44686, Unpublished Op. No. 335, pp.1-2 (Idaho App., January 24, 2018). Andrus timely appealed, id. at 2, and the Court of Appeals affirmed the district court's summary dismissal of Andrus's petition for post-conviction relief, id. at 4.

While his appeal was pending, Andrus also filed a motion for relief from judgment pursuant to Idaho Rule of Civil Procedure 60(b). (R., pp.153-55.) The district court denied the motion. (R., pp.160-64.) Andrus filed a timely notice of appeal. (R., pp.171-75.)

ISSUE

Andrus states the issue on appeal as:

I. 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)?

(Appellant's brief, p.5.)

The state rephrases the issue as:

Has Andrus failed to show that the district court abused its discretion when it denied his Rule 60(b) motion?

ARGUMENT

Andrus Has Failed To Show That The District Court Abused Its Discretion When It Denied His Rule 60(b) Motion

A. Introduction

Andrus asserts that the district court abused its discretion when it denied his motion for relief from judgment, pursuant to Idaho Rule of Civil Procedure 60(b). (Appellant’s brief, pp.5-13.) Application of the correct legal standards to the facts of this case shows no abuse of the district court’s discretion. The district court’s order denying relief should be affirmed.

B. Standard Of Review

A trial court’s dismissal of motions brought under Rule 60(b) is reviewed for an abuse of discretion. Berg v. Kendall, 147 Idaho 571, 578, 212 P.3d 1001, 1008 (2009).

C. The District Court Properly Exercised Its Discretion When It Denied Andrus’ Rule 60(b) Motion For Relief From Judgment

Idaho Rule of Civil Procedure 60(b) allows a court to relieve a party from a final judgment or order for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

I.R.C.P. 60(b). “Although the district court has broad discretion in deciding a Rule 60(b) motion, the motion may be granted only upon a showing of unique and compelling circumstances.” Palmer v. Spain, 138 Idaho 798, 802, 69 P.3d 1059, 1063 (2003) (citing Miller

v. Haller, 129 Idaho 345, 348, 924 P.2d 607, 610 (1996)). Moreover, the party seeking relief must 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, 870 P.2d 663, 670 (Ct. App. 1994).

Below (and on appeal) Andrus claimed that his post-conviction counsel offered a complete absence of meaningful representation when he failed to file an amended petition or to respond to the district court’s notice of intent to dismiss Andrus’s petition, and that this constituted unique and compelling circumstances. (R., pp.153-55; Appellant’s brief, pp.7-10.) The district court reviewed the record and relevant case law, and determined that Andrus had not demonstrated unique or compelling circumstances. (R., pp.162-64.) As the district court recognized, in both Eby v. State, 148 Idaho 731, 228 P.3d 998 (2010), and Berg, *supra*, counsels’ lack of meaningful representation resulted in the respective petitioner’s complaints being dismissed without consideration of the merits of their respective claims. (R., pp.162-63.) In contrast, the claims Andrus raised in his petition for post-conviction relief were not dismissed due to counsel’s failure to prosecute the petition, or even because they were merely bare and conclusory. (Id.) Rather, even assuming counsel’s alleged lack of participation, Andrus’s claims were still considered and dismissed on their merits. (Id.; see also R., pp.86-97.)

The district court noted that counsel had a duty to communicate with Andrus, but also recognized that unless communication could have avoided dismissal on the merits, a failure to communicate would be harmless. (R., p.162, n.2.) Andrus failed to present any evidence, or make an argument, that there were additional facts or legal authority that might have prevented summary dismissal of his petition on its merits. (R., pp.163-64.) Therefore, Andrus failed to show any unique or compelling circumstances justifying relief under Rule 60(b). See Ponderosa

Paint Mfg., Inc., 125 Idaho at 317-18, 870 P.2d at 670-71 (“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.”).

On appeal, Andrus asserts that his undeveloped claims of ineffective assistance of counsel might have been better developed with more diligent representation in post-conviction proceedings, and that this constitutes unique and compelling circumstances. (Appellant’s brief, pp.10-12.) Andrus’s argument fails.

Andrus asserts that he had a meritorious claim that his attorney was ineffective for failing to suppress Andrus’s breath test results. (Appellant’s brief, p.11.) After taking judicial notice of the underlying proceedings (R., pp.83-84), the district court directly and fully addressed the merits of this contention in its notice of intent to dismiss Andrus’s post-conviction petition (R., pp.90-91). As the district court noted, where the petitioner alleges that trial counsel was ineffective for failing to file a motion, a conclusion that the motion would not have been granted by the trial court is dispositive of the issue. (R., p.91 (citing Lint v. State, 145 Idaho 472, 477, 180 P.3d 511, 516 (Ct. App. 2008).) The district court correctly determined that a motion to suppress would have been denied based on the Court of Appeals’ holding in State v. Stump, 146 Idaho 857, 860, 203 P.3d 1256, 1259 (Ct. App. 2009), that an officer is not required to “stare fixedly” at the subject during the 15-minute waiting period, but may rely on his or her other senses, which the officer was in a position to do in Andrus’s underlying case. (R., p.91.) Thus, Andrus’s claim was correctly dismissed on its merits, and Andrus failed in his Rule 60(b) motion to allege any facts demonstrating that counsel—whether active or not—would have had any impact on that outcome.

Andrus also argues that his claim, that the prosecutor committed misconduct during her closing arguments when she noted that Andrus was manipulative, was meritorious. (Appellant's brief, pp.11-12.) It was not. First, "[a]n application for post-conviction relief is not a substitute for an appeal." Rodgers v. State, 129 Idaho 720, 725, 932 P.2d 348, 353 (1997). Prosecutorial misconduct, even if not objected to, is an issue that may be (and routinely is) raised on direct appeal, and any "issue which could have been raised on direct appeal, but was not, is forfeited and may not be considered in post-conviction proceedings." I.C. § 19-4901(b). Second, the district court, after quoting from the transcript of the proceedings below and applying the correct legal standards, fully addressed this issue on its merits as well. (R., p.95.) Andrus failed to show in his Rule 60(b) motion that additional filings from counsel would have had any impact on the ultimate outcome of this claim.¹

The district court properly exercised its discretion when it denied Andrus's motion for relief under Rule 60(b) because, contrary to his assertions on appeal, Andrus failed to show unique and compelling circumstances supporting his motion. Andrus has failed to show an abuse of the district court's discretion. The district court's order denying Andrus's Rule 60(b) motion should be affirmed.

¹ Andrus also asserts that his claim that his trial counsel was ineffective for failing to call witnesses to rebut the officer's testimony was supported by the record, but he does not develop this argument. (See Appellant's brief, pp.11-12.) Regardless, the district court correctly addressed and dismissed this claim on its merits as well. (R., pp.92-93.)

CONCLUSION

The state respectfully requests that this Court affirm the district court's order denying Andrus's Rule 60(b) motion for relief from the summary dismissal of his petition for post-conviction relief.

DATED this 26th day of April, 2018.

/s/ Russell J. Spencer
RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 26th day of April, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

ROBYN FYFFE
FYFFE LAW

at the following email addresses: robyn@fyffelaw.com and robynfyffe@icloud.com.

/s/ Russell J. Spencer
RUSSELL J. SPENCER
Deputy Attorney General

RJS/dd