IN THE SUPREME COURT OF IOWA

MARTIN SHANE MOON, Applicant–Appellant, STATE OF IOWA, Respondent–Appellee.	Supreme Court No.: 15-1815 Clarke County Case No. PCCV011631

ORAL ARGUMENT REQUESTED

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY

Honorable Gary Kimes

APPELLANT'S REPLY BRIEF

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ARGUMENT

The State's arguments are addressed in turn.

I. THE DISTRICT COURT ERRED IN CONCLUDING MOON'S APPLICATION WAS TIME-BARRED

The State argues Moon's postconviction application was time-barred under Iowa Code section 822.3. (State's Br. at 5-7.) In support, the state errantly argues Moon was or should have been aware of the new evidence through reasonable diligence, and that Moon did not exercise due diligence to discover the evidence now asserted. (State's Br. at 7-9.) Specifically, the State argues that Moon's duty of diligence to seek out evidence is continuing and does not end with the jury's verdict, and that filings in Moon's original criminal case indicate that Moon should have been aware that investigation prior to 2011 was needed into Boone's statements to police. (State's Br. at 10-12.)

When analyzing whether due diligence was exercised by a postconviction applicant, only reasonable efforts of investigation by counsel are required. *Zaabel v. State*, No. 03-2056, 2004 WL 1899837, at *6 (Iowa Ct. App. 2004 (citing *State v. Compiano*, 154 N.W.2d 845, 850 (Iowa 1967)). Here, although court pleadings indicate Moon may have been aware about issues with Boone testifying at trial, the

pleadings do not indicate awareness that Boone recanted. In fact, Moon's counsel moved to have Boone's testimony excluded form trial. (Appx. at 18.) In addition, Moon's affidavit provides he received no information regarding Boone's recantation statements to law enforcement. (Appx. at 67.) Reasonable efforts by Moon and his counsel did not reveal the recantation. Therefore, Moon should not now be precluded from bringing claims.

The Stat cites *Cornell v. State*, 529 N.W.2d 606, 611 (Iowa 1994) which is inapposite to the present case. In *Cornell*, a defendant discovered evidence of witness recantation after the criminal trial, and during postconviction and habeas proceedings in State and Federal court. *Id.* at 608. Following discovery of recantation evidence, the defendant waited more than three years to file a postconviction application based on that recantation. *Id.* The Court concluded that, because the PCR applicant waited more than three years after discovery of recantation evidence, he was not been reasonably diligent and his claim was time-barred under section 822.3. *Id.*

Unlike *Cornell*, the recanting witness in this matter was not a trial witness. The recanting statements were not disclosed to Moon prior to, during, or after trial. At the most extreme, there was a question regarding what Boone would say, but all parties assumed Boone to be a State's witness at the time of trial. (Appx. at 18.) Many years later, when Brodsack no longer exerted influence on Boone, Boone

revealed that he had withheld the truth. The information in the Boone affidavit could not have been found previously in the exercise of due diligence.

Moon filed for postconviction relief within three years of discovering Boone's statements. Therefore, Moon was diligent in working to discover this evidence and in timely filing for postconviction relief. *Zaabel*, 2004 WL 1899837, at *6 (citing *State v. Compiano*, 154 N.W.2d 845, 850 (Iowa 1967)).

II. BOONE'S AFFIDAVIT STATEMENTS QUALIFY AS NEWLY DISCOVERED EVIDENCE

The State next argues that Brandon Boone's affidavit statements do not qualify as newly discovered evidence. (State's Br. at 12.) The State argues that the evidence was known to Moon before the judgment in the criminal trial, that Moon failed to exercise due diligence in uncovering the evidence, that the evidence is merely impeaching, and that the evidence would probably not change the outcome of the trial. (State's Br. at 12-13.)

First, the State argues that Moon was "at least partially" aware "that there were potential problems with Boone's intended testimony" and that Moon failed to diligently follow up on these problems. (State's Br. at 13-14.) The State argues that Moon had a duty of diligence that continued past the date of his conviction; however, cites no case law to support this assertion. However, as discussed above,

Boone was not a trial witness and his recantation statements (which were provided to law enforcement) were not disclosed to Moon prior to, during, or after trial. (Appx. at 69.) From Moon's perspective, there was some question regarding what Boone may say if he testified at trial. Given Boone's lack of cooperation and the belief by all parties that Boone was a State's witness, however, the record does not indicate Moon was aware or should have been aware of Boone's recantations to law enforcement. (Appx. at 18.) Many years later, when Brodsack no longer exerted influence on Boone, Boone provided recantations to Moon. (Appx. at 67.) The information in the Boone affidavit could not have been found previously in the exercise of due diligence.

Next, the State argues that Boone's affidavit is only impeachment evidence against the State's witness Casey Brodsack. (States Br. at 14.) In *Harrington v. State*, 659 N.W.2d 509 (Iowa 2003), the Iowa Supreme Court concluded that police reports and evidence of witness recantations were not merely impeaching, but qualified as newly discovered evidence. *Harrington*, 659 N.W.2d at 520-21.

The State's citation to *Summage v. State*, 579 N.W.2d 821, 822 (Iowa 1998) does not lead to a different conclusion. *Summage*, only recites the four elements of a newly discovered claim, but does not analyze those elements in any way that is applicable to this matter. *Id.* at 822-23.

Finally, the State argues that the evidence in the Boone affidavit would not have changed the trial outcome, given the "overwhelming" evidence against Moon. (State's Br. at 14-15.) First, the evidence against Moon was not "overwhelming". Court of Appeals Judge Huitink, presided over appellate arguments, and dissented in the direct appeal decision specifically on the "overwhelming" evidence finding. *State v. Moon*, No. 00-1128, 2002 WL 663486, at *7 (Iowa Ct. App. 2002) (Huitink, J., dissenting). Three other judges joined in this dissent, making the decision a 5-4 *en banc* decision. *Id.* This is far from the "overwhelming" evidence that the State attempts to conjure up against Moon.

This "overwhelming" evidence against Moon was based upon the testimony of Casey Brodsack and individuals associated with Brodsack. *Id.* at *1. The new evidence from Boone regarding Brodsack's coercion of statements and testimony would cast Brodsack's trial testimony and other witness's trial testimony in a different light. (Appx. at 69.) This new evidence would likely have changed the outcome of the trial, given that the evidence against Moon was primarily based on testimony against him by Brodsack and by witnesses associated with Brodsack. *Id.* at *1.

Moon emphasizes that he ***did not have the burden of proof in the hearing before the district court***. All inferences were to be taken in Moon's favor. *See* Iowa Code § 822.6; *Castro*, 795 N.W.2d at 792; *State v. Manning*, 654 N.W.2d

555, 559 (Iowa 2002). The affidavits submitted by Moon are more than sufficient to create a fact question and overcome the State's motion for summary dismissal. The district court erred when in concluded otherwise. This court should reverse and remand for additional proceedings. *Castro,* 795 N.W.2d at 792.

III. BOONE'S AFFIDAVIT QUALIFIES AS *BRADY* MATERIAL

The State argues that the Boone affidavit does not qualify as *Brady* material. As a preliminary matter, the court should not address the argument by the State regarding whether the Boone affidavit provide *Brady* material as "a party who has successfully moved for summary judgment may not raise different grounds on appeal to support summary judgment that those raised before the district court." *Castro v. State,* 795 N.W.2d 789, 794 (Iowa 2011). As the State did not argue the *Brady* issue before the district court, the State is now precluded from arguing that the Boone affidavit fails to quality as *Brady* material on appeal. *Id.*

If this court does consider the State's arguments regarding the *Brady* violation, the court should still reverse and remand. Regarding the *Brady* evidence, the State argues that the evidence from Boone's affidavit was not suppressed, as Moon's counsel was aware that, at least, there may be issues with Boone's testimony in the criminal case. (State's Br. at 16.)

However, the Iowa Supreme Court requires that, in order to find awareness of the *Brady* evidence and a lack of diligence, a defendant must have both knowledge of the potentially exculpatory evidence, and also know the "essential facts" such that he or she "fully understand[s] the implications" of that evidence. *DeSimone v. State*, 803 N.W.2d 97, 103 (Iowa 2011) (citing *Harrington v. State*, 659 N.W.2d 509, 522 (Iowa 2003) for the proposition that "although the defendant had knowledge of the existence of the police reports, the defendant "did not have the essential facts of the police reports so as to allow the defense to wholly take advantage of this evidence [and] only access to the documents themselves would have provided the range and detail of information necessary to fully understand the implications of the police investigation." (internal quotations omitted)).

Moon, at most, was aware of a possible issue with Boone testifying. He was provided no information regarding Boone's recantation of earlier statements, and could not have discovered this evidence. (Appx. at 67, 69.) The State cannot show that Moon knew the essential facts of the suppressed evidence, or that he "full[y] understood the implications" of those essential facts. *DeSimone*, 803 N.W.2d at 103. Taking all inferences in the light favorable to Moon, he has created a fact question regarding the first element of a *Brady* claim.

The State next argues that the only parts of the affidavit that potentially qualify as *Brady* material are the recantations by Boone to police, and that the parts

regarding the witness tampering by Brodsack are not *Brady* material as there is no indication that police or the State were aware of the recantations. (State's Br. at 17.) Boone's affidavit, however, states that he informed law enforcement that Casey Brodsack was influencing Boone to lie and to implicate Moon. (Appx. at 69.) Moon never received this information. (Appx. at 67.) This sworn testimony, taken in the light most favorable to Moon as the non-moving party, is sufficient evidence to create a fact question regarding the first element for a newly discovered evidence claim. *Castro*, 795 N.W.2d at 792.

The State next faults Moon for "be[ing] unable to come up with any additional evidence that the police or the State were actually aware that Boone had recanted . . ." (State's Br. at 18-19.) While this statement is technically accurate, it is a wholly simplistic view of Moon's case. As the State is aware, Moon's postconviction case languished in the district court for over three years after being filed (potentially due to errors of counsel). Moon's counsels did not request investigation fees or depositions, which would have been Moon's only avenue of discovering this evidence. Further, Moon is in maximum security prison at Fort Madison, and has limited access to items necessary to make filings or communicate in a manner necessary to investigate a case on his own. Finally, once current PCR counsel was appointed and requested depositions and investigation fees, the district court would not rule on these motions until the hearing on

summary dismissal. (Appx. at 80.) The State's attempt to blame Moon for delay by his prior counsel, and for the district court's refusal to grant requested discovery tools is not an accurate portrayal of the record.

Finally, the State argues that any potential *Brady* evidence is not material or beneficial to Moon's case, and would likely have not changed to outcome. (State's Br. at 19-20.) As discussed in Moon's original brief, taking this evidence in the light most favorable to Moon, this evidence satisfies the second element of a *Brady* violation claim. *DeSimone*, N.W.2d at 105. The suppressed information was also material to the issue of Moon's guilt. The suppressed evidence from Boone weighs toward the guilt of Casey Brodsack for the murder, and could have been used to impeach testimony Brodsack provided at trial. (Appx. at 69.) Evidence that Brodsack influenced a witness to lie and that Brodsack attempted to inculpate Moon may also affect the credibility of any witness associated with Brodsack. *See DeSimone*, N.W.2d at 105. This information could have influenced the decision by the State to call Brodsack as a witness, to call witnesses associated by Brodsack, and could have led to a different investigation and trial strategy by Moon as Moon may have called witnesses who may inculpate Brodsack. Taken in the light most favorable to Moon, this evidence was material to the issue of guilt, and the district court erred in concluding otherwise. *See DeSimone*, N.W.2d at 105.

CONCLUSION

The district court erred in failing to take the evidence submitted in the light most favorable to Moon, and in dismissing Moon's newly discovered evidence claim, and in dismissing Moon's due process *Brady* violation claim. The district court's order should be reversed and this matter should be remanded for further proceedings on the merits of Moon's claims.

CERTIFICATE OF PRODUCTION COSTS

I certify that my total printing cost for this Proof Brief is $3.20

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