

Robert W. Gard appeals the trial court's grant of the State's motion for relief from order, which set aside its previous order granting his motion to suppress. He raises the following restated issue for our review: whether the trial court abused its discretion when it granted the State's motion for relief from order pursuant to Indiana Trial Rule 60(B) because he contends that this was not a remedy available to the State, and even if it was, the State failed to establish excusable neglect and a meritorious claim or defense as required under the rule.

We reverse.

FACTS AND PROCEDURAL HISTORY

On December 9, 2008, Gard was operating a vehicle in Bristol, Indiana. A police officer stopped Gard, who was subsequently arrested as a result of the stop. On December 15, 2008, the State charged Gard with operating a vehicle while intoxicated as a Class A misdemeanor and operating a vehicle with a blood alcohol content of at least .15 as a Class A misdemeanor. On April 8, 2009, Gard filed a motion to suppress, which was set for hearing on May 4, 2009. Notice of the hearing date was sent to Deputy Prosecutor Ashley Ulbricht ("DPA Ulbricht") and Prosecuting Attorney Curtis Hill, Jr., among others in the prosecutor's office. On May 4, 2009, the State did not appear for the hearing, and the trial court conducted the hearing, in the State's absence. After Gard presented evidence, the trial court granted his motion to suppress.

On June 2, 2009, the State filed a motion for relief from judgment or order pursuant to Indiana Trial Rule 60(B), which was heard on June 15, 2009. At the hearing, DPA Ulbricht apologized to the trial court for not appearing at the hearing on Gard's

motion to suppress and explained that the State had been absent because of an inadvertent oversight of the hearing and because she had agreed to cover a different court for another DPA. *MFR Tr.* at 4.¹ The trial court took the matter under advisement. On October 30, 2009, the trial court granted the State's motion for relief from order and vacated its previous grant of Gard's motion to suppress. In its order, the trial court found that, although DPA Ulbricht did "not identif[y] any specific breakdown in communication which subsequently resulted in [her] failure to appear at the [suppression] hearing," the trial court found that DPA Ulbricht was not entirely at fault. *Appellant's App.* at 99-100. The trial court also found that the State sufficiently demonstrated excusable neglect, stated a meritorious defense, and met the burden for relief under Indiana Trial Rule 60(B). *Id.* at 100.

On November 30, 2009, Gard filed a motion to correct error, which the trial court denied. In its order denying Gard's motion, the trial court found that the State properly sought relief pursuant to Indiana Trial Rule 60(B) under the circumstances. *Id.* at 60. The trial court also found that the State did demonstrate a *prima facie* showing of a meritorious defense based on the probable cause affidavit previously filed with the court. *Id.* at 60-61. It further found that the State had sufficiently showed excusable neglect through the breakdown in communication that resulted in the State failing to appear at the suppression hearing. Gard now appeals.

¹ We note that there are three separately-bound transcripts in the record for this case, the May 4, 2009 motion to suppress hearing transcript, the June 15, 2009 motion for relief from order hearing transcript, and the January 11, 2010 motion to correct error hearing transcript. Because we only have cause to cite to the transcript from the motion for relief from order hearing, we shall refer to such as MFR Tr.

DISCUSSION AND DECISION

Gard argues that the trial court abused its discretion when it granted the State's motion for relief from order. The grant or denial of a motion for relief from judgment or order under Indiana Trial Rule 60(B) is reviewed for an abuse of discretion. *Kindred v. State*, 771 N.E.2d 760, 762 (Ind. Ct. App. 2002), *disapproved of on other grounds*, *Robinson v. State*, 805 N.E.2d 783 (2004). An abuse of discretion occurs when the grant or denial of the motion by the trial court was clearly against the logic and effect of the facts and circumstances before the court. *Id.*

Gard initially contends that the trial court was in error when it determined that Trial Rule 60(B) was the correct procedural remedy for the State to seek because he asserts that remedy was not available in a criminal proceeding. We disagree. The Indiana Rules of Trial Procedure generally apply to criminal proceedings in the absence of a conflicting criminal rule. *In re WTHR-TV*, 693 N.E.2d 1, 5 (Ind. 1998); Ind. Crim. Rule 21. "An attack on the legal merits of the judgment can be made only as provided in Trial Rule 59." *Blichert v. Brososky*, 436 N.E.2d 1165, 1167 (Ind. Ct. App. 1982). All other attacks on a final judgment are brought under Trial Rule 60. *Id.* Trial Rule 60 motions only address the procedural, equitable grounds justifying relief and do not address the substantive, legal merits of the judgment as Trial Rule 59 motions do. *Id.*

Here, when it filed its motion for relief from order, the State was not attacking the merits of the trial court's decision to grant Gard's motion to suppress. Rather, the State was seeking to set aside on the basis of excusable neglect what was in essence a default judgment entered against it. Therefore, the trial court correctly found that the State's use

of a motion under Trial Rule 60(B) was procedurally appropriate under the circumstances of this case.

Gard claims that the State's proper remedy was to appeal the trial court's adverse ruling granting his motion to suppress under Indiana Code section 35-38-4-2. This statute provides that the State may seek an appeal to "the supreme court or to the court of appeals . . . [f]rom an order granting a motion to suppress evidence, if the ultimate effect of the order is to preclude further prosecution." Ind. Code § 35-38-4-2(5). Gard argues that this statute is a conflicting criminal rule, and thus, the State could not seek relief under Trial Rule 60(B); however, he is misguided, as the State is not required to appeal under Indiana Code section 35-38-4-2. We conclude that Trial Rule 60(B) does apply in criminal proceedings, and that the State properly sought relief thereunder.

Gard further alleges the State's motion should not have been granted because no evidence was presented at the hearing to support the alleged excusable neglect or show a meritorious defense as required under Trial Rule 60(B). He specifically contends that, although the State made argument and representations at the hearing on its Trial Rule 60(B) motion, the State failed to present any admissible evidence, such as affidavits or sworn testimony, to support its claims of excusable neglect or meritorious defense.

Indiana Trial Rule 60(B) provides in pertinent part:

On motion and upon such terms as are just the court may relieve a party . . . from a judgment, including a judgment by default, for the following reasons:

(1) mistake, surprise, or excusable neglect;

....

The motion shall be filed . . . not more than one year after the judgment, order or proceeding was entered or taken for reasons (1) A movant filing a motion for reasons (1) . . . must allege a meritorious claim or defense.

Section (D) of the rule further states that, in passing on a Trial Rule 60(B) motion, the trial court shall “hear any pertinent evidence, allow new parties to be served with summons, allow discovery, grant relief as provided under Rule 59 or otherwise as permitted by subdivision (B)” Ind. Trial Rule 60(D). “When deciding whether or not a default judgment may be set aside because of excusable neglect, the trial court must consider the unique factual background of each case because ‘no fixed rules or standards have been established as the circumstances of no two cases are alike.’” *Coslett v. Weddle Bros. Constr. Co.*, 798 N.E.2d 859, 860-61 (Ind. 2003) (citations omitted). A trial court will not be found to have abused its discretion so long as there exists even slight evidence of excusable neglect. *Id.* at 861. In order to show a meritorious defense, the movant must make a *prima facie* showing that a different result would be reached if the case were tried on the merits. *Doyle v. Barnett*, 658 N.E.2d 107, 110 (Ind. Ct. App. 1995), *trans. denied* (1996). Some admissible evidence, which may be in the form of an affidavit, testimony of witnesses, or other evidence obtained through discovery, must be presented to the trial court to make such a *prima facie* showing. *Bennett v. Andry*, 647 N.E.2d 28, 35 (Ind. Ct. App. 1995).

In the present case, the State alleged in its motion for relief from order that it inadvertently had failed to appear at the suppression hearing due to excusable neglect because DPA Ulbricht had agreed to appear in a different court for another DPA. The

State further alleged that it had a meritorious defense to the granting of the motion to suppress in that the officer had reasonable suspicion to effectuate a traffic stop on Gard. At the hearing on the Trial Rule 60(B) motion, the State apologized to the trial court for not appearing at the hearing on Gard's motion to suppress and further explained that DPA Ulbricht had been absent from the hearing because of an inadvertent oversight and because she had agreed to cover a different court for another DPA. *MFR Tr.* at 4. No further evidence was presented to support the State's motion.

Assuming without deciding that the State demonstrated excusable neglect in its absence from the suppression hearing, we still conclude that the State failed to present any showing of a meritorious defense to Gard's motion to suppress. At the hearing on its motion from relief from order, the State did not present any evidence to support such a showing. Initially, at the hearing, the State advised that, "the motion pretty much states my position." *MFR Tr.* at 4. As previously stated, the motion merely contained the blanket statement that the warrantless search of Gard's vehicle was justified because the officer had reasonable suspicion to conduct a traffic stop with no further explanation or details. *Appellant's App.* at 104. The State also later made a statement that, it "obviously never subpoenaed anybody because this was . . . a mistake . . . that's why there wasn't an officer here." *MFR Tr.* at 9.

The movant must make a *prima facie* showing that a different result would be reached if the case were tried on the merits in order to prove a meritorious defense. *Doyle*, 658 N.E.2d at 110. To do so, some admissible evidence, which may be in the form of an affidavit, testimony of witnesses, or other evidence obtained through

discovery, must be presented to the trial court. *Bennett*, 647 N.E.2d at 35. Here, the State failed to present any admissible evidence to support a showing of a meritorious defense. We conclude that the trial court abused its discretion when it granted the State's motion for relief from order.

Reversed.

CRONE, J., and BRADFORD, J., concur.