

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA
DISTRICT COURT NO. 04-K-01488
SUPREME COURT NO. 20050097**

State of North Dakota,)
)
 Plaintiff/Appellee,)
)
 v.)
)
 Philip Freeman,)
)
 Defendant/Appellant.)

**APPEAL FROM THE DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
BURLEIGH COUNTY, NORTH DAKOTA
THE HONORABLE BRUCE B. HASKELL**

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES

- ISSUES:**
- I Trial counsel was ineffective in both the pretrial and trial phases of these cases.**
 - II Freeman was entitled to a hearing on his Application for Post-Conviction Relief.**

STATEMENT OF THE CASE

1. Nature of the Case.

This is an appeal of the Criminal Judgment entered by the Honorable Bruce Haskell on February 8, 2005. (App. p. 6-7).

2. Course of Proceedings/Disposition of the Court Below.

On the 9th day of July, 2004, Philip Freeman ("Freeman") was charged by criminal complaint with Unlawful Entry into a Motor Vehicle, a Class C Felony, Count II Unlawful Entry into a Motor Vehicle, a Class C Felony, Count III Criminal Trespass, and Counts IV and V Theft of Property. (App. p. 10-11). On August 4, 2004, the criminal information charged out these same offenses, including the two felony charges Freeman now appeals. After a jury trial on December 2, 2004, Freeman was convicted of the two felony counts of unlawful entry into a motor vehicle.

On February 8, 2005, Freeman was sentenced to the North Dakota Department of Corrections and Rehabilitation for a period of three years on counts I and II; one year on count III; and thirty days on counts IV and V. This sentence on each count was to run concurrent with each other.

On March 10, 2005, Freeman filed his Notice of Appeal. On April 15, 2005, Freeman filed an Application for Post Conviction Relief. On June 15, 2005, the Court entered its order denying Freeman post conviction relief. (App. p. 15-16). Then on the 9th day of September, 2005, a Notice of Appeal was filed after the undersigned advised Mr. Freeman he had a right to appeal the denial of post conviction relief.

STATEMENT OF FACTS

The facts presented at the trial of this case are essentially as follows:

(1) On June 25, 2004, police responded to a call from CK Auto. (Tr. p. 12, lines 7-8). When police arrived they talked briefly with the owner Chris Krein and asked him what had happened. He indicated that he had caught Freeman trespassing in his fenced area of his business. (Tr. p. 13, lines 4-9). Freeman and his vehicle were then searched and items that Freeman was charged with taking were found. (Tr. p. 16, lines 13-21). The State then established through police officer Jason Stugelmeyer that there were two separate vehicles that were missing assemblies.

A Yes. About halfway through into looking at these vehicles, I noticed that there were two separated vehicles that were missing the assemblies.

Q And which vehicles were those specifically?

A One of them was a black 2000 Olds Alero and one of them was a black 2000 Mitsubishi Galant.

Q And how were you able to link these map light assemblies to these two vehicles?

A What I did is I had the part in my hand, I held it up to where the hole was in the headliner area and it was a perfect match. I also noted that the cord that plugged into the headlight assembly matched.

Q And which light went with which vehicle? I'm showing you once again State's Exhibit 1 and State's Exhibit 2. You indicated that there was a Mitsubishi Galant and an Olds Alero, which headlight assembly goes with which vehicle?

A This headlight assembly went to the Olds Alero and this one belonged to the Mitsubishi Galant – that would be State's Exhibit 2, the Galant, and exhibit 1 was the Alero. (TRP 18, lines 7-24).

(2) The State's Attorney then went through with Officer Stugelmeyer the fact that Freeman had prior to the trial pled guilty to the misdemeanor counts relating to this same incident:

Q In drawing your attention officer specifically to the criminal complaint in this matter, the criminal complaint does indicate that the defendant was charged with two counts of unlawful entry, correct?

A Correct.

Q It also charges two counts of theft of property, correct?

A Correct.

Q Could you please read from the criminal complaint as to the specifics as to what he was charged with in the theft of property?

A Which count would that be?

Q I believe those would be four and five.

A Okay. Count four states the defendant knowingly took or exercised unauthorized control over, or made an unauthorized transfer of an interest in, the property of another with intent to deprive the owner thereof; specifically, the defendant took property from a vehicle belonging to Chris Krein, with intent to deprive the owner thereof.

Q And the second count of theft of property is identical to that, correct?

A Correct.

Q And you also have a criminal judgment before you, is that correct?

A Correct.

Q And in those criminal judgments he did plead guilty to both counts of theft of property, correct?

A Correct.

Q Now drawing your attention to the transcript that you have before you, I would refer you to page four of that transcript and specifically to the highlighted area. Could you please indicate in response to the Court's inquiry as to explaining what happened on June 25th – the defendant's response?

A It has defendant is quoted as saying: "Yeah. I went into C & K Auto and took two dome lights and then as I was leaving, the owner like left with his truck and followed me and then he asked me if I had a cell phone and I said no and then he asked me to follow him back to – or lead the way back to his place and then he called the police on me then."

MS. SASSE RUSSELL: That's all the questions I have of this witness, Your Honor. (Tr. p. 20, line 25; Tr. p. 21, lines 1-25; Tr. p. 22, lines 1-9).

(3) On April 15, 2005, Freeman filed an Application for Post Conviction Relief. On April 26, 2005, Freeman submitted an Application for Appointed Defense Services. On April 28, 2005, court appointed attorney Tom Glass submitted a Notice of Appearance and Rule 16 Discovery Request. On May 2, 2005, the State answered the Application for Post Conviction Relief. In the Register of Actions it appears that no hearing was ever requested, and as a result no hearing was ever held in relation to Freeman's Application for Post Conviction Relief. An Order denying post conviction relief was entered on June 15, 2005. (App. p. 15-16).

LAW AND ARGUMENT

ISSUE I

Trial counsel was ineffective in both the pretrial and trial phase of these cases.

(4) It is Freeman's contention that trial counsel was ineffective by not strenuously objecting to statements made by Freeman contained in his Change of Plea and/or failing to advise against Freeman making these admissions at a change of plea hearing on the misdemeanor counts. As the Court knows, prior to the trial on these two felonies, Freeman had pled guilty to three misdemeanor counts. At that hearing Freeman gave a factual basis for his guilty pleas (App. p. 12-14 relevant part of transcript of pre-trial conference).

(5) Before the trial began in this case the issue of the admissions made by Freeman at the pretrial conference was brought up by Freeman's trial counsel:

MS. SCHMIDT: No. I guess my only concern I have is the State is intending to introduce the certified judgment of the other part of this case that Mr. Freeman admitted to, that he took the light assemblies. I have no objection to that and I'm also going to be referring to that. I just wanted to make sure the State was not introducing any other evidence of prior crimes other than the one involved in this case.

MS. SASSE RUSSELL: The State also intends on introducing the transcript of that change of plea where he does make some admissions as to what he did and I did want to address that this morning because – I guess the transcript does entail other things that are outlined in that and I don't know if the Court wants to specify which portions, but I would like to get in at least the first few pages of how he was given the right to plead guilty and the fact that he did indicate in the transcript that he did enter C & K Auto, that he did take two dome lights and essentially

did make those admissions throughout, knowing that those were voluntary admissions. I guess it is a certified public record at this point in time. It's been certified and it's been with the Court.

MS. SCHMIDT: I guess I wouldn't object to his actual statements. I would object to the rest of it, there's statements by attorneys that I don't think can be used against Mr. Freeman. I guess I don't know if there's statements by the Court that possibly could be used against him. His actual admissions –

THE COURT: All right. I kind of wish this would have been brought to my attention before so I could have reviewed this and actually know what you're talking about but what I'm going to do is during – while you guys are doing the jury selection, I'll review the transcript and if there's anything in there that I see that I think should be excluded, I will do that and I'll give you each an opportunity to address that before we actually start evidence. Again, without knowing exactly what was said, how it was said, it's pretty hard for me to make a decision on that. I have a transcript of it as well so I'll just review that and anything I see in there that the jury shouldn't be allowed to hear, then I will somehow figure out a way to redact that or whatever. (Tr. p. 1, lines 11-25; Tr. p. 2, lines 1-15).

(6) It is submitted that trial counsel was ineffective by not objecting and/or strenuously objecting to the admission of this very damaging testimony, i.e. admissions. *Rule 403* of the North Dakota Rules of Evidence allows for the exclusion of evidence “if its probative value is substantially outweighed by the danger of unfair prejudice...” It is submitted that NOTHING would be more prejudicial to Freeman than his own statements made at the pretrial conference, admitting where he was and what he did. Trial Counsel should have strenuously objected to this coming in.

(7) It is further submitted that trial counsel was ineffective by allowing and/or advising Mr. Freeman to plead guilty to the misdemeanor counts and/or give a factual basis relating to these counts when counsel knew or should have known that the felony counts (I & II) were going to be tried to a jury and that the State would likely seek to use Mr. Freeman's statements and admissions from the pretrial conference against him at the trial of the felony matters. This should have been very foreseeable to trial counsel that this would happen, and therefore other options should have been explained to Freeman, or an entirely different strategy implemented.

(8) *Rule 410* of the North Dakota Rules of Evidence (Offer to plead guilty; nolo contendere; withdrawn plea of guilty) provides in relevant part that "Evidence of a plea, later withdrawn, or a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with and relevant to any of the foregoing withdrawn pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer."

(9) A decision to enter into a plea agreement cannot be knowing and voluntary when the plea agreement itself is the result of advice outside "the range of competence demanded of attorneys in criminal cases." *De Roo U.S.*, 223 F.3d 919 (8th Cir.2000), citing *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S. Ct. 366, 88 L.Ed.2d 203 (1985).

(10) There is a two-part test for allegedly ineffective assistance of counsel. First, a defendant must show that counsel's representation fell below an objective standard of reasonableness. Second, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Woehlhoff v. State*, 487 N.W. 2d 16 (N.D. 1992). In the context of a guilty plea, the United States Supreme Court has held the second element of a claim of ineffective assistance of counsel, the "prejudice"

prong, requires the defendant to show there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. *Abdi v. State*, 608 N.W. 2d 292, 301, 2000 ND 64.

(11) It is submitted that the proper procedure would have been to advise Freeman to plead not guilty on ALL counts at this time and have them all set for trial, or to enter into an Alford plea, or plea of nolo contendere, whereby 1) he wouldn't have to give a factual basis which incriminated himself in the yet unresolved felony charges and 2) the plea, nor any statements made in connection therewith, would have been admissible at his trial on the felony charges.

ISSUE II

Freeman was entitled to a hearing on his application for post conviction relief.

(12) As previously indicated on April 15, 2005 Freeman filed an Application for Post Conviction Relief. On June 15, 2005, the Court entered an Order denying post conviction relief (App. p. 15-16). It appears that post conviction relief counsel did not request a hearing on Mr. Freeman's behalf, nor did the Court hold a hearing in this matter. Furthermore, because there was no hearing, Freeman did not testify regarding his claim of ineffective assistance of counsel, nor did post conviction relief counsel have the opportunity to question trial counsel relating to alleged errors which Freeman contends constituted ineffective assistance of counsel. It is apparent that the trial court could not determine exactly what Freeman was referring to that trial counsel did that was ineffective. In the Order denying Freeman's application for post conviction relief, the Court states the following:

(13) "As to the first ground, the defendant is correct that, if, in fact, a disposition of the case other than trial had been presented to counsel, that proposed disposition should have been communicated to the defendant. First, the defendant provides no proof the State made an offer.

More importantly, the defendant fails to establish how the outcome of the proceeding would have been different had counsel advised him of the “plea offer.” Before the trial of the instant charges, the defendant had pleaded guilty to several other offenses alleged in the same information. Further, the “plea offer” discussed in the defendant’s Application appears to be virtually identical to the sentence imposed. Therefore, the defendant fails to establish that the outcome of the proceeding would have been different had counsel communicated the “plea offer” to him. As to the second ground, the evidence presented at trial was overwhelming. Had counsel challenged the footprint evidence, it is unlikely the result would have been different.” (App. p. 16)

(14) In *Berlin v. State*, 698 N.W. 2d 266, 2005 ND 110, The North Dakota Supreme Court held that a genuine issue of material fact as to whether defendant received ineffective assistance of counsel precluded a summary disposition and that the defendant was entitled to a hearing on the merits of his claim. Judge Haskell in his Order summarily dismissing Freeman’s claims states among other things that it is “unlikely” that the result would have been different if trial counsel had done, or had not done, certain things. By making this statement the trial Judge admits that there was at very least a genuine issue of material fact, which entitled Freeman to a hearing.

(15) This Court had just recently held that “We review an appeal from a summary denial of post-conviction relief as we review an appeal from a summary judgment. *Whiteman v. State*, 2002 ND 77 sec. 7, 643 N.W. 2d 704. The party opposing the motion for summary disposition is entitled to all reasonable inferences at the preliminary stages of a post-conviction proceeding and is entitled to an evidentiary hearing if a reasonable inference raises a genuine issue of material fact. *Id.*

CONCLUSION

(16) Freeman should not have been advised to plead guilty. If, after this advice of counsel, he still wanted to plead guilty to three of the five counts, counsel should have arranged for an Alford Plea or plea of nolo contendere, so that Freeman's own statements couldn't be used to convict him in his pending felony cases. Secondly, Freeman was entitled to a hearing on his application for post-conviction relief. It appears that post-conviction relief counsel did not file a brief, or even request a hearing on Freeman's behalf. It appears that all he did was file a Rule 16 and a notice of appearance in the case. The trial judge then, without a hearing, summarily dismissed the application for post-conviction relief. Freeman is therefore entitled to a hearing on these issues.

WHEREFORE, the Appellant, Philip Freeman, by and through his attorney, Robert V. Bolinske, Jr., prays that this Court will reverse Freeman's conviction and remand for further proceedings.

Dated this 23rd day of October, 2005.

/s/

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