

ORIGINAL

20080136

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

RECEIVED BY CLERK
SUPREME COURT

JAN 15 2009

State of North Dakota,)

Plaintiff-Appellee,)

-vs-)

Benjamin Newman,)

Defendant-Appellant,)

.....)

Supreme Ct. No. 20080136 STATE OF NORTH DAKOTA

District Ct. No. 08-05-K-1069

SA File No. F432-05-03

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

JAN 15 2009

BRIEF OF PLAINTIFF-APPELLEE

APPEAL ON ORDER DENYING POST-CONVICTION RELIEF

Burleigh County District Court
South Central Judicial District
The Honorable Sonna Anderson, Presiding

Cynthia M. Peland
Assistant, Burleigh County State's Attorney
Courthouse, 514 East Thayer Avenue
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Attorney for Plaintiff-Appellee

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STATEMENT OF THE ISSUES

- I. A defendant may not seek post conviction relief for claims that have been raised on direct appeal.**

- II. An ineffective assistance of counsel claim cannot be established absent a showing that counsel performance fell below an objective standard of reasonableness and actual prejudice**

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STATEMENT OF THE CASE

In May of 2005, the defendant, Benjamin Newman (hereinafter Newman) was charged with Murder, (Class AA Felony); Attempted Murder, (Class A Felony); Endangering by Fire, (Class B Felony), and Violation of a Domestic Violence Protection Order, (Class C Felony) by complaint and pled not guilty to the offenses.

On September 18-25, 2006, a jury trial was conducted with Newman being found guilty of all of the offenses.

Newman's convictions were affirmed following appeal. State v. Newman, 2007 ND 148, 738 N.W.2d 887. The relevant facts and procedural background of this case were developed in that appeal. Additional facts as they relate to each issue shall be brought out in the brief.

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ARGUMENT

I. A defendant may not seek post conviction relief for claims that have been raised on direct appeal.

An application for post-conviction relief may be denied under N.D.C.C. § 29-32.1-12 on grounds of res judicata or misuse of process. Relief may be denied as res judicata under N.D.C.C. § 29-32.1-12(1) if the same claim or claims were “fully and finally determined in a previous proceeding.” Under N.D.C.C. § 29-32.1-12(2), misuse of process occurs when a post-conviction relief applicant “[p]resents a claim for relief which the applicant inexcusably failed to raise either in a proceeding leading to judgment of conviction and sentence or in a previous post conviction proceeding,” or if the applicant “[f]iles multiple applications containing a claim so lacking in factual support or legal basis as to be frivolous.” See, e.g., Jensen v. State, 2004 ND 200, ¶ 9, 688 N.W.2d 374.

“Post-conviction proceedings are not intended to allow defendants multiple opportunities to raise the same or similar issues.” Id. citing Johnson v. State, 2004 ND 130, ¶ 13, 681 N.W.2d 769. This Court has explained that “[d]efendants are not entitled to post-conviction relief when their claims are merely variations of previous claims that have been rejected.” Id. citing Garcia v. State, 2004 ND 81, ¶ 22, 678 N.W.2d 568.

In his application, Newman presents grounds alleging error by the trial court in its handling of the use of a cell phone by a juror. This issue was raised and fully and finally determined on direct appeal. State v. Newman, 2007 ND 148, 738 N.W.2d 887. Newman’s current variations of that

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argument could have and should have been raised in Newman’s previous direct appeal. State v. Newman, 2007 ND 148, 738 N.W.2d 887.

In his direct appeal, Newman alleged that “[t]he lower court to excise the taint of the jury impaneled . . . caused by the juror’s use of her cell phone and text messaging during the course of the trial and did not preserve Newman’s right to and fair and impartial jury on his trial for homicide and related charges”. State v. Newman, 2007 ND 148. 738 N.W.2d 887. Here, Newman alleges misconduct by the trial court by failing to inquire as to the specific content of the messages, and his lack of attendance during questioning of the juror. These claims are merely variations of the allegations made in Newman’s direct appeal. Thus, they are barred by res judicata and misuse of process.

Newman also makes a number of allegations concerning a conflict of interest by the prosecutor, a prior fire in the apartment building across the street, statements made in trial by witnesses, and Newman’s being on medication at the time of his sentencing. All of these issues involve information known by Newman at the time of his direct appeal. Newman provides no explanation as to why he failed to raise these claims in his direct appeal. Therefore they are also barred as a misuse of process.

Even if post conviction were the proper venue for Newman’s allegations, he has failed to provide any proof in support of his claims. Newman’s allegations are nothing more than bald assertions. Newman provides no affidavits, depositions or other evidence in support of his assertions. Thus, Newman has not met his burden concerning these allegations.

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2 **II. An ineffective assistance of counsel claim cannot be established**
3 **absent a showing that counsel performance fell below an**
4 **objective standard of reasonableness and actual prejudice**

5 The balance of Newman’s assertions pertains to the alleged ineffective
6 assistance by his counsels. In a claim for ineffective assistance of counsel, it
7 is the defendant's burden to prove (1) that his counsel's representation fell
8 below an objective standard of reasonableness, and (2) that he was prejudiced
9 by counsel's deficient performance. Klose v. State, 2005 ND 192, ¶ 9, 705
10 N.W.2d 809; see also, Strickland v. Washington, 466 U.S. 668, 104 S.Ct.
11 2052, 80 L.Ed.2d 674 (1984). Establishing the first element requires a
12 defendant to overcome the strong presumption that counsel's conduct falls
13 within the wide range of reasonable professional assistance. Klose, at ¶ 9. To
14 establish the second element, the defendant must show that there is a
15 reasonable probability that, but for counsel's unprofessional errors, the result
16 of the proceeding would have been different. Id.

17 “The issue of ineffective assistance of counsel is a mixed question of law
18 and fact which is fully reviewable” upon appeal. State v. Steen, 2004 ND
19 228, ¶ 8, 690 N.W.2d 239. Assistance of counsel is plainly defective when
20 the record affirmatively shows ineffectiveness of a constitutional dimension.
21 Roth v. State, 2006 ND 106, ¶ 12, 713 N.W.2d 513.

22
23 Newman's conclusory claims of deficient performance are not
24 accompanied by any allegations of how the alleged deficient performances by
25 his defense attorneys prejudiced him. Because Newman did not allege or
26 show how, but for the attorney's errors, the results of the proceedings would
27

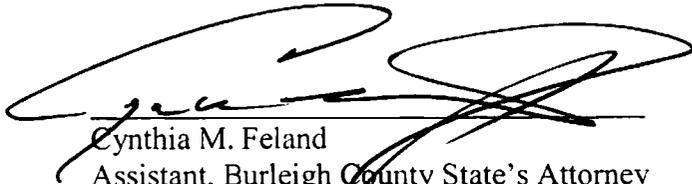
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have been different, the trial court did not err in dismissing Newman's ineffective assistance of counsel claims.

CONCLUSION

Based upon the foregoing, the State requests that the court's order dismissing Newman's application for post conviction relief be affirmed.

Dated this 15th day of January, 2009.



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) SA File No. F432-05-05
.....)
STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

Michelle Dresser-Ternes, being first duly sworn, depose and say that I am a United States citizen over 21 years old, and on the 15th day of January, 2009. I deposited in a sealed envelope a true copy of the attached:

- 1. Brief of Plaintiff-Appellee
- 2. Affidavit of Mailing

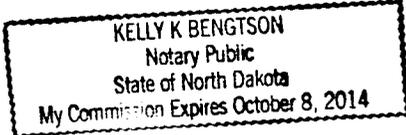
in the United States mail at Bismarck, North Dakota, postage prepaid, addressed to:

BENJAMIN NEWMAN
C/O ND STATE PENITENTIARY
PO BOX 5521
BISMARCK, ND 58506-5521

which address is the last known address of the addressee.

Michelle Dresser-Ternes
Michelle Dresser-Ternes

Subscribed and sworn to before me this 15th day of January, 2009.



Kelly K. Bengtson, Notary Public
Burleigh County, North Dakota
My Commission Expires: 10-8-2014.