

**20090340**

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT  
January 28, 2010  
STATE OF NORTH DAKOTA

Kenneth Jacob, Jr., )  
 )  
Petitioner-Appellant, )  
 )  
vs. ) SUPREME COURT NO. 20090340  
 )  
State of North Dakota, )  
 )  
Respondent-Appellee. )

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**APPELLANT'S BRIEF**

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APPEAL FROM THE OCTOBER 26, 2009 JUDGMENT  
THE CASS COUNTY COURT IN FARGO, NORTH DAKOTA  
THE HONORABLE STEVEN E. McCULLOUGH PRESIDING

ATTORNEY FOR APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... i

STATEMENT OF THE ISSUE PRESENTED ..... 1

STATEMENT OF THE CASE ..... 1

STATEMENT OF THE FACTS ..... 3

ARGUMENT

I. There is a reasonable probability that the jury trial result would have been different if a trucking expert had testified. .... 6

CONCLUSION ..... 11

TABLE OF AUTHORITIES

TABLE OF CASES

Johnson v. State, 2006 ND 122, 714 N.W.2d 832 .... 6-7  
Klose v. State, 2005 ND 192, 705 N.W.2d 809 ..... 7  
State v. Jacob, 2006 ND 246, 724 N.W.2d 118 .... in passim

NORTH DAKOTA CENTURY CODE

§ 29-32.1-03 ..... 2  
§ 39-08-04..... 1,9

UNITED STATES CONSTITUTION

U.S. Const. amend VI ..... 2,6

NORTH DAKOTA RULES OF EVIDENCE

Rule 702 ..... 7

STATEMENT OF THE ISSUE PRESENTED

- I. Whether there is a reasonable probability the jury trial result would have been different if a trucking expert had testified?

STATEMENT OF THE CASE

Petitioner-Appellant Kenneth Jacob, Jr., appeals from the October 26, 2009 Judgment. Petitioner seeks review of Judge Steven E. McCullough's Memorandum Opinion and Order denying his Petition for Post Conviction Relief.

Petitioner was originally charged via Information with murder and leaving the scene of an accident involving death. (Information, docket sheet for 09-05-K-2160, docket No. 1) The jury found Petitioner not guilty of murder and not guilty of the lesser included negligent homicide. However, the jury found Petitioner guilty of leaving the scene of an accident involving death in violation of N.D.C.C. § 39-08-04. (Verdict, docket sheet for 09-05-K-2160, docket No. 72) The Criminal Judgment and Sentence was entered on March 24, 2006. An appeal was filed.

In State v. Jacob, 2006 ND 246, ¶ 1, 724 N.W.2d 118, the North Dakota Supreme Court held that it is legally and factually possible for the jury to find Petitioner not guilty of negligent homicide, but guilty of leaving the scene of an accident involving death. The Supreme Court affirmed the criminal judgment.

Pursuant to N.D.C.C. § 29-32.1-03 and the Sixth Amendment of the United States Constitution, on July 15, 2009, Petitioner served and filed his Petition for Post Conviction Relief along with the Affidavit of John Lammers and the Affidavit of Gordon Bolstad.<sup>1</sup> (A-13)<sup>2</sup> On August 10, 2009, the State filed its Answer. The State opposed the petition, but conceded that Petitioner was entitled to an evidentiary hearing. (Answer, docket sheet No. 7) On September 9, 2009, an evidentiary hearing was held. Gordon Bolstad, an trucking expert, and Petitioner testified on behalf of Petitioner. Steven Mottinger, Petitioner's trial attorney, testified for the State.

On October 5, 2009, in the Memorandum Opinion and Order, Judge McCullough denied Petitioner's Petition for Post Conviction Relief. "Considering the weight of the evidence supporting the jury's verdict, this Court cannot say that introducing expert testimony from the proposed witnesses would create a reasonable probability of a different result." (A-21, Memorandum Opinion and Order, docket No. 15, p. 5) Subsequently, on October 26, 2009, the Judgment was entered. (A-22, Judgment, docket No. 17) Thereafter, on November 4, 2009, Petitioner filed his Notice of Appeal. (A-23)

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<sup>1</sup> The petition erroneously refers to the Fifth Amendment. However, the petition was amended to accurately reflect the Sixth Amendment. Page five of the Hearing Transcript.

<sup>2</sup> Appendix

The witnesses testified that after Petitioner pulled away, they saw a man, later identified as Stephen Nelson, lying in the parking lot where the truck had been parked. An autopsy revealed that Nelson died from multiple blunt force injuries due to the accident. Nelson had a blood-alcohol content of 0.42 percent. Another witness testified he saw the truck speeding away from the area without its lights on. Petitioner testified that he had been having electrical problems with his truck and that when his headlights completely failed, he stopped at an abandoned truck stop to spend the night. Petitioner testified the next day he arrived at his place of employment and pressure-washed his truck as company policy required. Id. at ¶ 2.

At the post conviction hearing, Gordon Bolstad testified that he was an experienced truck driver with over 15 years of experience, having driven approximately 2 million miles. (HT 10)<sup>4</sup> Bolstad explained the difference between a single axle vehicle and a dual axle vehicle. (HT 11) Bolstad opined that due to the weight of the truck and its dual axle nature, Petitioner would not have been put on notice that he was involved in an accident or that he had run over a person. Therefore, he was not negligent in leaving the scene. (HT 12) John Lammers, another experienced truck driver, opined in his affidavit that Petitioner did not act negligently. "A reasonable truck driver would not be put on notice that the "rocking" was an accident. Instead, as Kenneth testified a

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4 September 9, 2009 hearing transcript

reasonable, prudent truck driver would believe they hit a hole or bump in the road." (Affidavit of John Lammers, docket sheet No. 2)

Petitioner testified he discussed with Mr. Mottinger his desire to have an expert in the trucking industry testify at trial. (HT 26) Mr. Mottinger corroborated Petitioner's testimony. Mr. Mottinger testified that on two to three occasions, he discussed with Petitioner the possibility of hiring a trucking expert. (HT 34) Ultimately, based on trial strategy, Mr. Mottinger decided not to hire an expert. (HT 35)

## ARGUMENT

- I. There is a reasonable probability that the jury trial result would have been different if a trucking expert had testified.

Petitioner's Sixth Amendment right to counsel was violated because his trial attorney provided him with ineffective assistance of counsel which prejudiced him. In particular, Petitioner's attorney fell below an objective standard of reasonableness because he did not call a trucking expert to testify that Petitioner did not act negligently in leaving the scene of the accident.

In Johnson v. State, 2006 ND 122, 714 N.W.2d 832, the North Dakota Supreme Court stated the ineffective assistance of counsel standard:

"To succeed on a claim for ineffective assistance of counsel, a petitioner must prove counsel's performance fell below an objective standard of reasonableness and the deficient performance prejudiced him. For the first element, counsel's representation is objectively measured by prevailing professional norms. The petitioner has a heavy burden to meet because counsel's performance is presumed to be reasonable, and courts attempt to avoid the effects of hindsight. To meet the second element of prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Id. at ¶ 20 (internal citations and quotations omitted).

Whether a petitioner received ineffective assistance of counsel is a mixed question of law and fact and is fully reviewable on appeal. Klose v. State, 2005 ND 192, ¶ 10, 705 N.W.2d 809. Here, Judge McCullough did not address the first element, but only the second element.

Judge McCullough committed reversible error when he ruled Petitioner did not satisfy the second element.

"[A]t trial, Jacob testified that he felt a bump both when reversing his truck and when pulling forward. Since this fact was not in dispute, testimony regarding the difficulty in feeling a bump would not assist the jury in determining whether Jacob was negligent." (A-20) Judge McCullough failed to acknowledge the crucial role an expert witness plays in a jury trial. Rule 702 of the Rules of Evidence provides:

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Here, an trucking expert would have assisted the jury

in understanding and interpreting the bump Petitioner felt upon driving over Mr. Nelson. There was no testimony presented at trial, explaining to the jury the difference between a single axle vehicle and a dual axle vehicle.

Bolstad testified:

"Dual axle oscillates where the one set of axles goes over an object and there's a set on the surface and then the second one goes over and then the front one is on the surface. So it's oscillating and giving less action than a single axle to any object."

[Evidentiary Hearing transcript p. 11]

This fundamental difference between a semi truck and an automobile was never explained to the jury! Based on the jurors' experience with driving single axle vehicles they were left with the false impression that Petitioner was alerted to an accident upon feeling the bump. Even this court relied heavily on this fact: when Petitioner's truck rocked "[t]he jury could have rationally inferred that Jacob was alerted to the likelihood of an accident at that moment." Jacob at 12. However, Gordon Bolstad opined that due to the weight of the truck and its dual axle nature, Petitioner would not have been put on notice that he was involved in an accident or that he had run over a person. (HT 12) As such, Petitioner would not have negligent in leaving the scene.

Moreover, the record is clear that the jury was confused

about whether Petitioner negligently left the scene of an accident involving death based on their questions. (A-16) A professional truck driver having specialized knowledge would have assisted the jury and alleviated the jury's confusion.

Although Judge McCullough did not address the first element of the ineffective assistance of counsel standard, it is clear that counsel's performance fell below an objective standard of reasonableness. The entire defense at trial was based on a misinterpretation of North Dakota law.

The evidence at trial was undisputed that Petitioner killed Mr. Nelson when he ran over him. Mr. Mottinger conceded that there was very little evidence that Petitioner knowingly or intentionally killed Mr. Nelson. (HT 33) Therefore, the main issues at the jury trial were whether Petitioner negligently caused the death of another person and whether he negligently left the scene of an accident involving death. In fact, Petitioner was convicted under N.D.C.C. § 39-08-04 for negligently failing to comply with the statute requirements.

Therefore, it is inconceivable why Mr. Mottinger would not call an expert to testify that Petitioner did not breach the standard of care in his profession. Evidence from an unbiased, neutral expert witness is not cumulative evidence. Mr. Mottinger claims this it was part of his trial strategy.

The entire defense at trial was that Petitioner was not guilty because he did not "know" he hit Mr. Nelson. (T 22-24, 252) Mr. Mottinger stated that the "theory of the case was that there was no accident and that Mr. Jacob did not realize the individual was back there, felt nothing of the unusual, and that he drove away." [HT 31] At the evidentiary hearing, Mr. Mottinger reiterated the theory of the case was that Petitioner had not knowingly ran over Mr. Nelson:

"After we went through the material Mr. Rolshoven put together and after we went though the discovery again, it was decided that our theory of the case was that there was no accident, there was no reason for Mr. Jacob to believe that he had run anybody over. If there was no accident, obviously he could not have negligently left the scene of the accident.

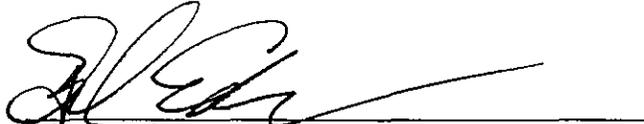
[Evidentiary Hearing transcript p. 35]

This theory of the case is a misapplication of North Dakota law. This Court held that knowingly involved in an accident is not the proper culpability standard in the statute. Jacob at ¶ 7. A flawed theory of the case which is contrary to North Dakota law and the plain reading of the statute falls below an objective standard of reasonableness.

**CONCLUSION**

WHEREFORE, the reasons stated herein, Petitioner respectfully requests that this Honorable Court reverse the October 26, 2009 Judgment, vacate his conviction and Judgment in State of North Dakota v. Kenneth Jacob, Jr., #09-05-K-2160 and grant a new trial.

Dated this 28th day of January, 2010.



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