

IN THE SUPREME COURT OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

JUN 6 2011

REGINALD E. TWEED,)
)
 Appellate Petitioner,)
)
 V.)
)
 STATE OF NORTH DAKOTA,)
)
 Appellee Respondent.)
)
)
)

STATE OF NORTH DAKOTA
Supreme Court No. 20110089
Cass County No. 09-2010-CV-04415

APPELLATE'S REPLY BRIEF

**APPEAL FROM THE JUDGEMENT TO SUMMARILY DISMISS
 APPLICATION FOR POST CONVICTION RELIEF ENTERED IN THE
 DISTRICT COURT OF THE EAST CENTRAL JUDICIAL DISTRICT,
 THE HONORABLE FRANK L. RACEK, PRESIDING ON FEBRUARY 28, 2010**

**Reginald E. Tweed
 Petitioner-Appellant
 P.O. Box 5521
 Bismarck, ND 58506-5521**

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ARGUMENT

1. On page 8 of the 'Appellee's Brief', it is important to note the State quotes Tweed's April 13th, 1991 written statement, the State included the phrases "We left Terry was still alive.", " He was still breathing." which was included in Tweed's actual statement. That is significant because the State has admitted that Tweed's statement and testimony were truthful, unfairly enough only after they convicted Tweed. Therefore, the phrases "We left Terry was still alive.", " He was still breathing." are now exonerating and exculpatory to Tweed, as Tweed has claimed in his Application for Post conviction Relief.

The State is always trying to have it both ways, they say Tweed's statement is truthful, and then say he cannot prove he did not kill Dorff. The State's argument is incorrect because they have stated that Tweed's statement and testimony was truthful, and Tweed's testimony included (See Original 1991 Tr. Trans. Page 355 Lines 6-13) "Q: When you left Terry Dorff, did you think he was alive or do you think he was dead? A: I know he was alive. I know he was. Q: You know he was alive? A: Yeah. Q: How do you know he was alive? A: Because I took the gag out of his mouth and he was still breathing." Therefore, the State's argument that Tweed cannot prove he did not kill Dorff is a moot point, as the State has previously stated that they believe Tweed.

Unfortunately, the State is only telling the Courts half, or part of the story and it is a deplorable tactic they repeatedly use to try and uphold Tweed's conviction, and they should be ashamed of it, and reprimanded for it. If the Appellee is to quote or cite a case, he has to use the entire quote, in order that it will not be taken out of context. The same

can be said that the Appellee is not allowed to misdirect a jury, or fool any Court with 'half truths' in order to win a case, and yet this is what is happening in this case. They are purposely omitting key parts of a story to gain an unfair advantage over Tweed.

Tweed is entitled to relief as a matter of law, and justice, and to restore confidence in the judiciary process.

2. On page 12 the State is using a 'catch all' statement to skirt the issues they can not or will not argue against. They did this by stating that they would only address issues that were not incoherent, irrelevant, or meritless. If the State or this Court is unclear about any of Tweed's issues or claims, he will surely aid them in any way to clarify things if they ask. And Tweed is certainly not asking the court be required to act as a 'ferret', or a 'psychic' as the State has indicated. Tweed has already apologized to this court that he is pro se and is doing the best that he can, but admittedly is in over his head, and feels he is at a disadvantage. Tweed would have like very much to have an attorney but was denied one.

3. On page 13 of the 'Appellee's Brief', the state has conceded that the 'shirt spattered with blood' was never an issue at any level of Tweed's trial, appeal, or post convictions, as Tweed has claimed all along.

Tweed is now entitled to as a matter of law, to have his conviction overturned by this court, or alternatively a new trial must be granted so a jury can properly weigh the evidence, as only they can, or at minimum have this case remanded back to district court to be heard at an evidentiary hearing.

The State's argument is incorrect, because the State is now unfairly and illegally putting words in the District Court's mouth by claiming the 'shirt spattered with blood' is barred by misuse of process. The judge never dismissed the issue due to misuse of process. On page 5 of Judge Racek's Order dated February 28th, 2011 he dismissed the 'shirt spattered with blood' due to res judicata, and not due to misuse of process as the State has stated on page 13 paragraph 30 of the 'Appellee Brief'.

Tweed is actually appealing Judge Racek's **order** (emphasis added) dated February 28th, 2011 wherein he dismissed the issue due to res judicata, Tweed is not appealing the State's **opinion** (emphasis added) as to how the 'shirt spattered with blood' should have been dismissed by the lower court due to misuse of process. The State has clearly overstepped their bounds by presuming they have that power, or authority. Therefore, their argument is moot.

It appears that a conspiracy between the district court judge and the prosecutors to uphold a conviction of an innocent man resulted in a miscarriage of justice. Tweed was correct when he stated that Judge Racek arbitrarily denied his 'Motion to Reconsider' dated March 11, 2011. Tweed has now proved to this court by this example of the 'shirt spattered with blood', that he has never been taken seriously in the lower court because Tweed's arguments were never investigated by the prosecutors or by the lower court. It is only now that Tweed is arguing before the Supreme Court that Mr. Boening thought he better look into Tweed's claim, and then discovering Tweed has been correct all along. Had they at least did a minimal investigation previously, we all may have saved a trip to the Supreme Court.

Tweed pleaded with the judge to reconsider his order, but it is now painfully clear that the Judge nor the State were interested in the truth, or justice. They are only interested in the conviction. The Judge and the State are obligated to seek justice, they are not obligated, nor should they be allowed to ignore, or arbitrarily dismiss cases. A man has been wrongfully convicted 20 years ago, and when he is seeking help and fairness, he is met with disdain, unfairness, corruption, bias, prejudice, malfeasance, and impropriety. It is a dereliction of duty for the Judge to show bias toward Tweed and has prejudiced his case because by denying it, he knows it is very difficult for Tweed to overcome this Court's presumption of the lower court judge's 'alleged' correctness.

Prejudice and selective prosecution also ensued due to the class of people that Tweed belongs to, specifically he is a man, and he did not come from an influential family. Had Tweed been a woman from an influential family, the focus of the trial would have been the sexual assault and he probably would likely have been charged with a lesser crime than 'AA' murder. In fact, Mr. Goff in his closing arguments stated (See Original 1991 Tr. Trans. Page 421 Lines 1-6) "I submit that you don't find him guilty of Class 'A' felony murder. Don't find him guilty of that. That's not what happened here. Maybe—maybe had the police came after a few punches in the face and the scenario that he portrays is true, maybe that's justified. I don't know."

The State has in fact changed their mind, and believe Tweed's scenario, therefore, Tweed was wrongfully convicted of 'AA' murder.

Tweed is entitled to relief. The Supreme Court should vacate his conviction, or alternatively grant him a new trial.

4. Helmuth Wegner is new evidence. Tweed argued it wrong in his Brief, but the fact is that Helmuth Wegner's testimony corroborates the State's claim and Tweed's claim that Tweed's statement and testimony were truthful and that Sumner killed Dorff after Tweed left. Therefore, the state's argument is incorrect and Helmuth Wegner actually is new evidence that is exculpatory and exonerating to Tweed that never existed before, or at the time of Tweed's 1991 trial, and has never been heard by a jury and requires an immediate vacation of Tweed's conviction. This is a material fact and justice would be best served on granting Tweed a new trial.

5. On page 16 paragraph 38 the state concedes that the two new witnesses discovered in February 2010 are newly discovered evidence. But again tries to have it both ways. They say that the two witnesses cannot prove Tweed did not commit Dorff's murder, but do not mention the fact that they believe that Tweed's statement and testimony are truthful. Tweed's statement says that Dorff was alive when he left, and other witness' testimony says that David Sumner murdered Terry Dorff after Tweed had left.

If Tweed was granted a new trial at least 4 people will testify that David Sumner admitted that he killed Terry Dorff, and no one will testify that Tweed killed anyone. Tweed will be the 5th witness to testify that Sumner killed him.

Tweed is clearly innocent and is need of relief. Tweed's conviction was a travesty of justice and needs to be remedied.

6. On page 14 the State claims that Tweed made no excuse as to why he did not raise the issues earlier, when in fact he has provided the lower court and this court with many reasons, particularly due to ineffective assistance of counsel, and their misleading him and lying to him about the issues. Tweed has promised in a sworn affidavit to subpoena Mark Beauchene, Brian Nelson, and Chad McCabe in order to provide their words as evidence as to why they were ineffective as counsel. Tweed is innocent of 'AA' Murder and deserves an opportunity to prove it. Loopholes for the State do not equate to justice, and justice and truth are what the judiciary process is supposed to be all about.

Also, the two new witnesses discovered in 2010 can not be barred by any misuse of process or res judicata. Tweed has never had the opportunity to present them until now. Tweed's conviction was a miscarriage justice.

Tweed is entitled to relief. The Supreme Court should vacate his conviction, or alternatively grant him a new trial.

7. On page 15 paragraph 36 of the 'Appellee's Brief' the State argues that "The prosecution's belief do not provide exculpatory evidence that Tweed did not also commit the murder."

The State's argument is incorrect because the State has only told half of the story, in yet another attempt trick, mislead, and fool this Court by painting the wrong picture of Tweed to this court. The State's statement that they believe Sumner is guilty was the only half they are admitting to this court. The second half is that they have also stated that Tweed's statement and testimony were truthful. Tweed's statement included the

phrases “We left Terry was still alive.”, “ He was still breathing.” (see page 8 paragraph 18 of the ‘Appellee’s Brief’) Which in tandem with the State’s belief that Sumner is guilty, Helmuth Wegner’s testimony, plus the two new witnesses that surfaced in early 2010 will certainly convince a new jury that Tweed did not commit ‘AA’ Murder, and Tweed will certainly be acquitted.

The state has said they believe that Tweed’s 1991 trial testimony was truthful which also included the facts:

1. (See Original 1991 Tr. Trans. Page 347 Lines 3-8, Page 372 Lines 13-21, Page 430 Lines 22-24) Tweed was sexually assaulted by Terry Dorff.
2. (See Original 1991 Tr. Trans. Page 354 Lines 2-17, Page 355 Lines 6-13) Tweed testified that he did not kill Terry Dorff.
3. (See Original 1991 Tr. Trans. Page 351 Lines 2-22, Page 353 Line 12-Page 354 Line1, Page 375 Lines 3-11, Page 392 Lines 5-10) Tweed witnessed two hits with a rock to Dorff’s head.
4. (See Original 1991 Tr. Trans. Page 352 Lines 3-12, Page 355 Lines 11-13, Page 391 Lines 10-11, Page 396 Lines 1-2) Tweed took the gag out of Dorff’s mouth.
- 5.) (See Original 1991 Tr. Trans. Page 355 Lines 6-13, Page 391 Lines 5-17) Dorff was alive when Tweed left.
- 6.) (See Original 1991 Tr. Trans. Page 392 Lines 19-24, Page 395 Lines12-23, Page 397 Lines 8-21) Blood was not splattered everywhere.
- 7.) (See Original 1991 Tr. Trans. Page 363 Lines 23-25, Page 364 Lines 1-3, Page 368 Line 21-Page 369 Line 1) There was no pillow on Dorff’s head.

David Sumner has since then bragged to many people that he killed someone. David Sumner's actions are that of a cold blooded murderer. While Tweed's role was that of a sexual assault victim defending himself and getting away. Even the State now believes that is what happened, but unfortunately, they are only interested in upholding a conviction.

The changes that Sumner did to that room were horrendous. New witnesses and Tweed's truthful testimony prove that after Tweed left, David Sumner hit Dorff with a rock three more times, spattered blood everywhere, put the gag back in his mouth, and put a pillow on his head.

Tweed is entitled to relief. The Supreme Court should vacate his conviction, or alternatively grant him a new trial.

8. On page 18 paragraph 46 the State's argument is incorrect, Tweed actually did raise genuine issues of material fact.

9. On page 18 paragraph 46 the State's argument is incorrect, Tweed actually did show that, if it was not for all the counsel's errors, the results of his trial, appeal, post convictions, and post conviction appeal would have been different.

CONCLUSION

Tweed's case is way too important to dismiss because of some legal loophole. The bottom line is that he has never received a fair trial, and he will certainly be acquitted in a new trial. The preponderance of evidence is entirely in Tweed's favor, and the State has no evidence or witnesses that would secure a conviction of Tweed.

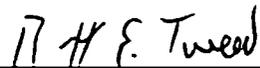
The State has admitted previously that summary dismissal is not appropriate and would be error. Tweed agrees. Therefore, there is no dispute on that issue between the two.

There is no confidence in the conviction of Reginald Tweed for 'AA' Murder, and the State has not denied that they lied more than 17 times during closing arguments to ensure a wrongful conviction. The entire case has been lain out before this Court, including all of the prosecutor's fallacies, improper conducts and methods, as well as Tweed's ineffective counsel. Had Tweed received a fair trial with adequate counsel, and free from prosecutorial misconducts the result would have been different, especially in light of new witnesses that only became known, or did not exist until after Tweed's 1991 trial.

Tweed is innocent and needs to be set free as a matter of law, as a matter of justice, and as a matter of admissions by the prosecutors.

This Court can in good conscience vacate his conviction, or alternatively grant a new trial where he will most certainly be acquitted.

Dated this 6 day of June, 2011.



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