Supreme Court of North Dakota

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STATE OF NORTH DAKOTA

State of North Dakota,
Plaintiff - Appellee,

v.

Case No.

Dale Allen Gress,
Defendant-Appellant.

# Appellant's Brief

On Appeal from the Burleigh District Court
Honorable Bruce B. Haskell, District Judge

Dale Allen Gress
Dale Allen Gress, Appellant
2521 Circle Drive
Jamestown, ND 58401

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## Jurisdictional Statement

The appellant does hereby invoke this Court's original Jurisdiction in this Case and the fact the the appellant has filed a timely Notice of Appeal in the trial Court giving his Notice of Appeal to this Court ant 29-32.1 ON N.D.C.C.

## Statement of Issues Presented

I

Whether the State was entitled to Summary Judgment upon its limited motion?

II

Whether the elements of res judicata have been met in this Case?

III

Whether the appellant was denied his due process right to a hearing and to develope his evidence in the Case.

# Statement of the Case

In 2006, Gress pled guilty to two counts of aggravated assult, one count of burglary, two counts of violating a domestic violance protection order, and one count of simple assult. Gress, who could not read or write, was assisted by a friend and filed a post-conviction application pursuant to Chapter 29-32.1 and asserted that he was entitled to relief on the grounds that the conviction was obtained by 1) use of coerced confession; and 2) denial of right to effective assistance of counsel. See Appendix at 19. The trial "court did not specifically address the issue..." See Appendix p 33. Thereafter, Gress made a motion under NDR. Civ. P Rule 60(b)(vi) which this Court has construed as a second application for post-conviction relief, and reversed and remanded for further proceedings, and 30 day to answer and to present supporting documents. See State v. Gress, No. 20110047. p 3 Citing Wong v. State, 2010 ND 219 ¶12. Upon remand, Appellant requested Answers to interrogatories and production of documents. The State moved for a protective order and soon theafter moved the Court for Summary Judgment. See The district Court denied the motion where the State failed to include reference to nor copies of any pleadings, previous proceedings, discovery nor other matters of record. See Appendix at 35. The State moved to

Reconsider order denying State's motion for Summary Disposition. Appendix at 37. Stating the State did plead res judicata in its Answer. ON February 13, 2012, the trial Court granted the State's motion for Summary Disposition stating:

> " The Court directly addressed the issues raised by the defendant in his motion to suspend Sentence in its ruling on the initial Application for Post Conviction relief."

The motion to suspend issues were held to be res judicata.

This Appeal is directed to that judgment because

1) the state did not invoke res judicata in its motion for Summary disposition, and
2) the elements of res judicata have not been met by the State, and
3) Appellant was denied due process of Fourteenth Amendment.

# I

## Whether State was entitled to Summary Judgment upon its limited motion?

### Standard of Review

Summary Judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986). The burden is on the moving party to establish the basis for its motion. Donovan v. Harrah's Md. Heights Corp., 289 F.3d 527, 529 (8th Cir. 2002). It is axiomatic that evidence is viewed in a light most favorable to the nonmoving party, and the nonmoving party enjoys the benefit of all reasonable inferences to be drawn from the facts. Scott v. Harris, 550 U.S. 372, 378 (2007). Although Summary judgment may be an appropriate and useful tool to avoid useless and time-consuming trials, "[it] Should not be granted unless the moving party has established the right to a judgment with such clarity as to leave no room for controversy. Vacca v. Viacom, 875 F.2d 1337, 1339 (8th Cir. 1989). In this case, not only did the State not establish the basis for its motion, it also failed to show it was entitled to judgment as a matter of law.

The State's entire motion and supporting evidence consisted of the following:

"

Motion

Comes now the State of North Dakota, by and through Assistant State's Attorney Jacob T. Rodenbiker and moves for Summary dispositon of the Defendant's Application for Postconviction Relief pursuant to N.D.C.C. §§ 29-32.1-06 (2) and 29-32.1-09(1). The state moves for Summary disposition of the defendant's application on the ground "that it is evident from the application that he is not entitled to the relief requested and no purpose would be served by any further proceedings."

See Appendix at 30.

The State did not invoke res judicata in its motion nor did it provide the Court with any evidence showing that the State was entitled to Summary Judgment.

## Res Judicata

Res judicata is a law that encompases claim preclusion (sometimes reffered to as res judicata or "true" res judicata). See Gulf Island-IV, Inc. v. Blue Streak-Gulf Is. Ops, 24 F.3d 743, 746 (5th Cir. 1994). The doctrine serve to prevent re-dundant litigation. See Kasper Wire Works v. Leco Engrg & Mach, Inc., 575 F.2d 530, 535-536 (5th Cir. 1978). Claim preclusion bars a suit based on the Same Claim or Cause of Action as a prior suit. See In Re Southmark Corp., 163 F. 3d 925, 934 (5th Cir. 1999). Res Judicata or claim preclusion requires four elements: 1) the same claim or cause of action must be involved in both actions; 2) the judgment in the prior action must have been rendered by a Court of Competent jurisdiction; 3) the prior action must have resulted in a Final Judgment on the merits; and 4) the parties in both actions must be identical. See Southmark, 163 F. 3d at 934.

In this case, this Court Reversed and Remanded to the trial Court because the issues were found to be outside the pleadings and that gress was to be given an opportunity to "Submit evidence supporting his Claim."

The trial court erred in its failure to give Gress an opportunity to submit evidence to demonstrate there is genuine issues of material fact before his Application was dismissed. Appellant was in the process of gaining his evidence in the interrogatories and documents when the Court entered its judgment and Appellant was denied due process of law.

The State later based it Summary Application on res judicata. One of the main issues was "gress" could not read and write and this Court held that an "incompetent criminal defendant cannot enter a valid guilty plea..."

For purposes of res judicata, the Court did not consider gress's "incompetent" claim nor his Boykin Rights., and Showing all the elements of res judicata. In this case, elements #(1) the Same Claim does not fit because to this day, the trial Court has Not Considered Gress's competentcy to enter a guilty plea and No expert has come forewaard to establish this fact or deny it. Therefore, res judicata element No. 1 is lacking in merit, because, element #(3) requires a Final judgment on the merits,

Wherefore, the State did not meet its initial burden Showing it was entitled to relief. The Case must be remanded.

Certificate of Service

This is to certify a true and Correct copy of the appellants Brief and Appendix has this day been mailed by US Mail to:

Jacob T. Rodenbiker
514 E. Thayer Ave.
Bismarck, ND 58501

On this ___ of _____, 2012.

Dale Allen Gress
Dale Allen Gress