20130066
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JULY 10, 2013
STATE OF NORTH DAKOTA

In THE SUPREME COURT
STATE of NORTH DAKOTA

Nicholas BAATZ,
Petitioner and Appellant,
vs.
STATE of NORTH DAKOTA
Respondant and Appellee

Supreme Court No. 20130066
District Court No. 19-2012-CV-00037

Statement of Additional Grounds under Rule 24 (supplemental Brief of Indigent Defendant.)

Appeal from the District Court ORDER Denying Second Post-Conviction Relief Request, dated FEBRUARY 13, 2013, in and for the County of GRANT, STATE of NORTH DAKOTA, South Central Judicial District. Honorable BRUCE A. ROMANICK, Judge of The District Court, Presiding.

Submitted this 9 day of July, 2013.

Nicholas Baatz
JRCC, #35324
2521 Circle Drive
Jamestown, North Dakota 58401

SUPPLEMENTAL GROUNDS

#1. whether the lower court erred in its determination that the issue of denial of counsel at critical stages of the proceeding in the underlying criminal action was "Res judicata", in light of this Courts holding in the case of STATE VS. BAATZ, 2011, ND 195, 806 N.W. 2d 438, which specifically granted the Appellant the Right to raise such claims through the Post Conviction Relief proceeding, and whether any court had finally and fully determined this issue in a previous proceeding.

#2. Whether the lower court erred in its determination that the issue of ineffective assistance of counsel

in the underlying criminal action were rendered res judicata, in light of this Courts holding in the case of STATE vs. BAATZ, 2011 ND 195, 806 N.W. 2d 438, which specifically granted the Appellant the right to raise such claims through the post-Conviction process, and whether the lower court had ever ruled on ineffective assistance of counsel outside the contexts of failing to file an appeal.

SUPPORTING FACTS of Supplemental Ground #1.

(#3.) On the 28th day of September, 2010, Appellant, Pro se, filed an Application for Post-Conviction Relief. ("First Application") SEE Grant County Case Summary, Case number - 19-08-K-00021 ("Summary") (Doc. #82). In this first application Appellant raised the following two Grounds:

(A.) Ground one: Denial of Effective Assistance of Counsel, to-wit:

Had no Attorney appointed to help with motions before the trial even though I could not afford one.

(B) Ground Two: Denial of Right of Appeal, to-wit: I asked my Attorney, that was appointed at the last minute to file an Appeal to the NORTH DAKOTA SUPREME COURT, And he never did it.

(¶4.) On the 3rd day of February, 2011, Honorable Bruce A. Romanick, Judge of the District Court issued his Order on Motion for Post-Conviction Relief. SEE Summary, (Doc #97). In this order the lower Court Ruled that Appellants trial Attorney; namely: Kent A. Morrow was ineffective in the context of the failure to file the Requested Appeal. SEE Summary, (Doc. #97, p.5, ln. 15-21; p. 6, ln. 1-4). And the lower Court allowed Appellant the Ability to file an untimely Appeal. SEE Summary, (Doc #97, P.6 ln 6,7).

The lower Court used the following Case's as it's underlying support of it's decision in this order:

Whiteman v. State, 2002 ND 77, 643 N.W.2d

DeCoteau v. State, 1998 ND 199, ¶ 11, 586

Roe v. Flores-Ortega, 528 U.S. 470 (2000)

Strickland v. Washington, 466 U.S. 688, 694 (1984)

Each of the afore mentioned cases are all supporting ineffective assistance of Counsel. And are quoted in the context of the failure to file a Requested Appeal. See Summary, (Doc #97).

¶ 5. The lower court failed to address appellants claim of [Denial] of effective assistance of Counsel, [emphasis added], which was ground one of appellant's first application in it's order on Motion for Post-Conviction Relief. See Summary, (Doc #97), even though appellant had testified and made an evidentiary showing regarding this claim of Denial of Effective Assistance of Counsel.

At the First Application Post-Conviction Relief Hearing, Before the Honorable Bruce A. Romanick, at the Burleigh County Courthouse. on Friday, January 7, 2011, during Direct Examination by Scott Sandness, Appellant testified that:

"Q okay, now, you had filed this Application for Post-Conviction Relief, You listed ground one was denial of the effective assistance of Counsel Can you please indicate why you believe you had - you were denied effective assistance of counsel."

"A I was going to preliminary hearings without a lawyer, and I felt that was grounds for that." <u>SEE</u> transcripts of "First Application" Post Conviction Relief hearing p.7, ln. 3-9.

Further during Cross-Examination by Jonathan Byers, Appellant testified that:

"Q ... one ground was that you did not.. had no Attorney Appointed before the trial, even though I Could not afford one?"

"A Right", see Transcripts of "first Application" Post Conviction Relief hearing, p. 15, ln. 19-22.

These questions and subsequent testimony being a Clear evidentiary Showing Requarding the Claim of Denial of Effective Assistance of Counsel.

46. Appellant then filed his direct Appeal, before the North Dakota Supreme Court. <u>see</u> <u>State v. Baatz</u>, 2011 ND 195, 806 N.W. 2d 438, Appellants Court Appointed Counsel; namely Joel L. Larson, filed the Appellant's Brief and Appendix.

but failed to order and file the Requested transcripts from appellants Arraignment, Preliminary Hearings and Appellants pretrial Confrence. As a Result of the failure of Joel L. Larson here these transcripts were unavailable for the courts examination and investigation during the direct appeal process.

¶7. Appellant filed a timely Rule 24 Brief, and raised the issues of 1.) whether Nicholas Baatz was denied effective assistance of counsel prior to appointment of Counsel; and, 2.) whether Nicholas Baatz was denied effective assistance of counsel, after appointment of counsel; namely Kent Morrow. But, without the Requested transcripts there was no Record for this Court to base a decision, therefore, this Court Affirmed" without prejudice to Baatz Right to raise denial of his Constitutional Right to Counsel

And ineffective assistance of counsel in Post Conviction proceedings".
SEE STATE V. BAATZ, 2011 ND 195, 806 N.W.2d 438.

¶8. Clearly the claim of denial of Effective Assistance of counsel here has never been fully or finally determinded in any previous court proceeding in the STATE of NORTH DAKOTA.

This claim has been presented and Argued, but never fully and finally Ruled, determinded or decided upon as Required by OWENS V. STATE, 1998 N.D 106 and MURCHISON V. STATE, 1998 ND 96. Therefore, the lower Court here can not bar or Dismiss this issue because of RES JUDICATA.

SUPPORTING FACTS of Supplemental Ground ¶2

¶9. On the 3rd day of February, 2011 Honorable Bruce A. Romanick, Judge of the District Court Issued

his order on motion for Post Conviction Relief. SEE Summary (Doc#97). In this order the lower court Ruled that appellants trial Attorney; namely: Kent M. Morrow was ineffective in the context of the failure to file the Requested Appeal. SEE Summary, (Doc#97, p.5, ln 15-21; p.6, ln. 1-4) and the lower court allowed appellant the Ability to file an untimely appeal. SEE Summary (Doc#97, p.6 ln. 6,7). The lower court used the following cases as its underlying support of it's decision in this order:

Whiteman v. State 2002 ND 77, 643 N.W. 2d
Decoteau v. State 1998 ND 199, ¶ 11, 586, NW.2d
Roe v. Flores-Ortega 528 US 470 (2000)
Strickland v. Washington. 466 US. 688, 694 (1984)

Each of the afore mentioned cases All supporting ineffective assistance of Counsel, And are quoted and used in the context of the failure to file a Requested Appeal. SEE Summary, (Doc #97).

(H10.) the lower court does not address whether appellant's trial attorney was ineffective in it's order on motion for post-conviction relief. see summary (Doc#97), nor had appellant requested the lower court to address whether appellant's trial attorney was ineffective, see application for post conviction relief, summary, (Doc#82). this failure to bring this issue was due to the ineffectiveness of appellant's first applications apointed counsel, for failing to inform appellant that appelant was incorrect in wanting to bring this issue of trial attorney's ineffectiveness to this court on direct appeal. Appellant did bring bring this issue to this court on direct appeal, pursuant to a Rule 24, N.D.R. App. P., supplemental brief, and this court affirmed "without prejudice to Baatz right to raise... ineffective assistance of counsel in

Post-Conviction proceedings" SEE State v. Baatz, 2011 ND 195, 806 N.W. 2d 438.

(¶11.) Here ineffective assistance of trial counsel was only ruled on in the context of a failure to file an appeal, and not in the overall ineffectiveness. Appellant was prejudiced by trial counsel's lack of preparation, failure to investigate, hire an expert to inspect the forensic interviewers questioning techniques, and the statement by the alleged victims.

(¶12.) Appellants criminal judgement here should be vacated and remanded to the lower court for a new trial.

(¶13.) Nicholas Baatz
JRCC - 35324
2521 Circle Drive
Jamestown, North Dakota 58401

Certificate of Service.

I hereby certify that I have served true and correct copies of the foregoing document by United States Mail on the day of July, 2013 upon the following.

Mr. Jonathon R. Byers, Esq. (1 copy)
Attorney at Law
Office of the Attorney General
600 East Boulevard Ave.
Bismarck, North Dakota 58505-0040

Ms. Penny L. Miller, Esq. (1 original, 7 copies)
Clerk of the Supreme Court
Judicial Wing, 1st floor
600 East Boulevard Ave. Dept. 180
Bismarck, North Dakota
58505-0530

Robert W. Martin, ESA
Attorney for Appellant
N.D. Public Defenders Office - Minot
11 First Avenue SW.
Minot, North Dakota 58701

Dated this day of July, 2013

Nicholas Baatz

Subscribed and sworn to befor me on this Date of 9th, July, 2013 in Stutsman County, ND

Notary Public

JULIE MUNKEBY
Notary Public
State of North Dakota
My Commission Expires June 11, 2015

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Nicholas Baatz,	)	
	)	
Petitioner/Appellant,	)	SUPREME COURT NO. 20130066
-vs-	)	
	)	
	)	District Court No. 19-2012-CV-00037
	)	
	)	
State of North Dakota,	)	
	)	
Respondent/Appellee,	)	

AFFIDAVIT OF SERVICE

Jenean G. Maroney, being first duly sworn, deposes and says:

That she is a citizen of the United States of America; over the age of twenty-one years, and is not a party to nor interested in the above-entitled action; that on the 15th day of July, 2013, this Affiant emailed a true and correct copy of the following documents in the above-entitled action.

1. Statement of Additional Grounds Under Rule 24 (Supplemental Brief of Defendant).

That said email was sent to the following person to his current address as follows:

Jonathan R. Byers ND Bar I.D. #04583
Attorney at Law
Office of Attorney General
600 E. Boulevard Ave.
Bismarck, ND 58505-0040
jbyers@nd.gov
701-328-2210

Ms. Penny L. Miller, Esq.
Clerk of the Supreme Court
Supreme Court
Judicial Wing, 1st Floor
600 E. Boulevard Ave., Dept. 180
Bismarck, ND 58505-0530
supclerkofcourt@ndcourts.gov

Dated this 15th day of July, 2013.

Jenean Maroney

Subscribed and sworn to before me this 15th day of March, 2013.

DEBORA A WESTBY
Notary Public
State of North Dakota
My commission expires Mar 31, 2014

Notary Public
My commission expires: 03/31/2014