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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

JAN 26 2006

STATE OF NORTH DAKOTA

Robert L. Johnson,)	
)	
Petitioner/Appellant.)	
)	Supreme Court No. 20060010
vs.)	
)	Stutsman Co. No. 96-K-481
State of North Dakota,)	
)	
Respondent/Appellee.)	

BRIEF OF APPELLANT

Appeal from the Stutsman County District Court
Order Denying Post-Conviction Relief on December 28, 2005
The Honorable John T. Paulson, Presiding District Judge

Robert L. Johnson
Petitioner/Appellant, *pro se*
#17841
James River Correctional Center
2521 Circle Drive
Jamestown, ND 58401

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STATEMENT OF THE ISSUES

- I. Whether the District Court erred in denying Johnson's motion to amend his Application for Post-Conviction Relief.
 - a. Judge Paulson erroneously found Johnson's claim of ineffective assistance of counsel to be a new issue.
 - b. The rule of laches does not apply in this proceeding to bar Johnson's proposed amendment to argue that his guilty plea was not knowingly, intelligently, and voluntarily entered due to his mental illness.

- II. Whether the District Court erred in summarily dismissing Johnson's Application for Post-Conviction Relief without making sufficient findings.
 - a. Johnson received ineffective assistance of counsel.
 - b. Johnson's guilty plea was not knowingly, intelligently and voluntarily entered.

STATEMENT OF THE CASE

On December 10, 1996, Robert L. Johnson was convicted of Endangering by Fire, in violation of N.D.C.C. §§ 12.1-21-02(1)(b) and 12.1-21-01(1)(c). Johnson was sentenced to a term of five years imprisonment, to be served consecutively to another sentence imposed in an unrelated matter.

Johnson later filed for post-conviction relief, which the District Court summarily dismissed. An appeal was taken to the North Dakota Supreme Court and, on November 9, 2005, the order of the District Court was reversed in part, affirmed in part, and remanded.

After the matter was remanded to the District Court, Johnson moved to amend his post-conviction relief application, and the State moved to amend its answer.

On December 6, 2005, Judge Paulson entered an order granting the State leave to amend its answer.

On December 28, 2005, Judge Paulson entered an order denying Johnson's petition for post-conviction relief, motion to amend petition for post-conviction relief and for appointment of counsel.

Johnson's Notice of Appeal was on January 4, 2006.

STATEMENT OF THE FACTS

On December 10, 1996, Robert Lee Johnson entered a guilty plea and was sentenced for the offense of Endangering by Fire, in violation of N.D.C.C. §§ 12.1-21-02(1)(b) and 12.1-21-01(1)(c). The Honorable James A. Wright sentenced Johnson to a term of five years imprisonment, to be served

consecutively to another sentence imposed in an unrelated matter. No direct appeal was taken.

On March 10, 2005, Johnson submitted an application for post-conviction relief which, for reasons unknown, did not get officially filed until June 24, 2005. In that petition, Johnson raised various issues including ineffective assistance of counsel. Johnson also requested appointment of counsel.

The State filed a response to Johnson's application for post-conviction relief and requested summary dismissal. The Honorable John T. Paulson thereafter dismissed the action without first allowing Johnson adequate time to respond to the State's motion for summary dismissal. Johnson appealed that decision to the North Dakota Supreme Court which, on November 9, 2005, reversed in part, affirmed in part, and remanded for further proceedings.

After this matter was remanded to the District Court, Johnson filed a motion for leave to amend his petition in order to clarify the issues he wishes to raise. Johnson also renewed his request for appointment of counsel. The State thereafter requested leave to amend its answer to include the defense of laches.

On December 6, 2005, Judge Paulson entered an order allowing the State to amend its answer to include the defense of laches.

On December 28, 2005, Judge Paulson entered an order denying the petition, as well as denying leave to amend and appointment of counsel. No evidentiary was ever held on any of Johnson's claims.

Johnson now appeals from the order of the District Court.

ARGUMENT

I. **Whether the District Court erred in denying Johnson's motion to amend his Application for Post-Conviction Relief.**

This case was previously remanded to the District Court for further proceedings, after an initial summary dismissal by Judge Paulson. See Johnson v. State, 2005 ND 188, ____ N.W. 2d _____. Once remanded, Johnson moved for leave to amend his petition to withdraw certain issues that were without merit and add an additional issue arguing that his guilty plea was not knowingly, intelligently, and voluntarily entered. The State objected and moved to amend its answer to assert the defense of laches. The Court denied Johnson leave to amend his petition but granted the State leave to amend its answer. Johnson submits the Court abused its discretion in denying his motion to amend.

Proceedings for post-conviction relief are civil in nature. Bell v. State, 1998 ND 35, ¶ 10, 575 N.W.2d 211. In a civil case, leave to amend "shall be freely given when justice so requires." See N.D.R.Civ. P. 15(a). However, the Supreme Court will not reverse an order denying a motion to amend absent an abuse of discretion. Hellman v. Thiele, 413 N.W. 2d 321, 323 (N.D. 1987). "A trial court abuses its discretion when it acts arbitrarily, unconscionably, or unreasonably, or when its decision is not the product of a rational mental process leading to a reasoned determination." Narum v. Faxx Foods, Inc., 1999 ND 45, ¶ 29, 550 N.W. 2d 454, 462.

In this case, Johnson sought leave to amend his petition to remove the issues which were clearly without merit and incorporate a single new issue that

squarely questions the constitutional validity of his guilty plea. Judge Paulson should have allowed Johnson to amend his petition in the interests of justice.

a. Judge Paulson erroneously found Johnson's claim of ineffective assistance of counsel to be a new issue.

In the order denying leave to amend, the Court appears to have been operating under a mistaken belief that Johnson's claim of ineffective assistance of counsel was a new issue he wished to raise through amendment of his original petition. This is incorrect. Johnson had argued in his original petition that his trial attorney was ineffective because he did not secure a second psychiatric evaluation of Johnson before he pled guilty. Therefore, the issue was still properly before the Court. Judge Paulson erred by dismissing it purportedly because Johnson was too late in attempting to raise it through amendment to his original petition.

b. The rule of laches does not apply in this proceeding to bar Johnson's proposed amendment to argue that his guilty plea was not knowingly, intelligently, and voluntarily entered due to his mental illness.

Johnson asked the Court to allow him to amend his petition to include a new claim that his guilty plea was not knowingly, intelligently, and voluntarily entered due to his mental illness. Judge Paulson refused to allow this amendment yet allowed the State to amend its answer to assert the defense of laches. Without further analysis, Judge Paulson appears to have simply adopted the State's argument that the rule of laches applied to bar Johnson's proposed

amendment. However, such a determination is inappropriate under existing precedent in North Dakota.

This Court has never adopted the theory of laches in the context of a post-conviction relief proceeding. In fact, Justice Sand pointed out in his dissenting opinion in State v. Lueder, 252 N.W.2d 861 (N.D. 1977) that North Dakota's Post-Conviction Relief Act allowed filing of an application at any time. Id. at 871. Earlier, in State v. O'Neill, 117 N.W.2d 857 (N.D. 1962), this Court noted that laches does not bar an attack upon a judgment of conviction as being void on constitutional grounds. Id. at 863. Accordingly, the District Court erred in adopting the State's defense of laches in this case.

II. Whether the District Court erred in summarily dismissing Johnson's Application for Post-Conviction Relief without making sufficient findings.

The Court summarily dismissed Johnson's petition without making proper findings of fact in its order. Johnson submits that he was entitled to an evidentiary hearing to adequately develop the record concerning the claims he attempted to advance in his petition. Furthermore, N.D.C.C. § 29-32.1-11(1) requires a court to make findings on material questions of fact and state its conclusions of law when entering an order dismissing a post-conviction relief application. See State v. Raulston, 2005 ND 212, ¶ 19, ____ N.W.2d _____. Thus, even if no evidentiary hearing was warranted, the Court committed reversible error by not issuing a more detailed order for dismissal.

The order of dismissal should be reversed and this matter remanded back to the District Court for an evidentiary hearing or, at a minimum, more detailed findings on material questions of fact and conclusions of law.¹

a. Johnson received ineffective assistance of counsel.

Johnson claims that he received ineffective assistance of counsel because his trial attorney failed to seek a second psychiatric evaluation prior to his guilty plea. Again, it is suggested that an evidentiary hearing is necessary to fully develop the record for proper review of this issue. However, should this Court determine that the record is adequately developed as it now stands, Johnson believes the facts support a finding in his favor.

In short, the relevant facts developed thus far indicate that Johnson suffers from mental illness; that he was evaluated by a State psychiatrist prior to entering his guilty plea; and that he was found competent by the State psychiatrist. Johnson would further argue that the evidence suggests that some of his behavior while in custody awaiting trial demonstrated he should have been evaluated a second time. Moreover, the second evaluation should have been conducted by an independent psychiatrist, since the first one was done by one employed by the State.

It appears that trial counsel did move for a second evaluation, but this was not done until after Johnson pled guilty and attempted to withdraw his plea. By then, it was too late, and the damage was done. Counsel's performance fell

¹ Johnson would further argue that if this case is remanded for what will be the second time, it should be assigned to a different District Court Judge for further proceedings. It is suggested that Judge Paulson's rulings in this case demonstrate a pattern of hostility and bias toward Johnson and in favor of the State.

below an objective standard of reasonableness, and Johnson was prejudiced by his deficient performance. This entitles Johnson to relief under Strickland v. Washington, 466 U.S. 668 (1984).

Because Johnson was denied effective assistance of counsel, the order dismissing his post-conviction relief application should be reversed and the matter remanded to the District Court with instructions to grant relief on this ground or, in the alternative, to conduct evidentiary hearing on this issue.

b. Johnson's guilty plea was not knowingly, intelligently and voluntarily entered.

Johnson moved for leave to amend his application for post-conviction relief to include the claim that his guilty plea was not knowingly, intelligently, and voluntarily entered. This claim is based on the argument that Johnson was mentally ill at the time and did not understand the true nature and consequences of his plea.

Guilty pleas must be knowingly, intelligently, and voluntarily entered to be valid. Boykin v. Alabama, 395 U.S. 238, 242 (1969); *see also* N.D.R.Crim.P. 11. Johnson's claim that he was mentally ill at the time of his guilty plea and did not understand the true nature and consequences of his plea, if true, clearly raises serious constitutional implications.

The District Court abused its discretion in not allowing Johnson to amend his petition to add this issue. An evidentiary hearing should have been conducted to resolve any questions of fact that may be in dispute concerning the validity of Johnson's guilty plea. In the United States, we must ensure that the constitutional

rights of all criminal defendants are respected – especially those with mental illnesses. However, in the present case there was no second psychiatric evaluation to ensure that this defendant was competent to enter his guilty plea.

The order of the District Court should be reversed, with instructions to vacate Johnson's guilty plea or, alternatively, to conduct an evidentiary hearing on this issue.

CONCLUSION

For the foregoing reasons, the order of the District Court should be reversed and the matter remanded for further proceedings before a different judge.

Dated this 20th day of January, 2006.



Robert L. Johnson
Petitioner/Appellant, *pro se*
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State of North Dakota,)	
)	
Respondent/Appellee.)	

AFFIDAVIT OF SERVICE

State of North Dakota)
) SS:
 County of Stutsman)

I, the undersigned, being first duly sworn upon oath, hereby certify that a true and complete copy of the **BRIEF OF APPELLANT** and **APPENDIX OF APPELLANT** filed in the above-entitled appeal have been duly served upon:

Fritz R. Fremgen
Stutsman Co. State's Attorney
511 2nd Avenue S.E.
Jamestown, ND 58401

by depositing same in the United States mail, first-class postage prepaid, at the James River Correctional Center, on January 20th, 2006.

Robert L. Johnson

Robert L. Johnson

Subscribed and sworn to before me this 20 day of January, 2006.

Jason Komrosky

Notary Public
Stutsman County N.D.

JASON KOMROSKY
Notary Public, STATE OF NORTH DAKOTA
My Commission Expires JULY 5, 2007