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SUPREME COURT **OCT 15 2007**

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

**20060140**

State of North Dakota, )  
 )  
 Plaintiff/Appellee, )  
 )  
 vs. )  
 )  
 Paul A. Fischer, )  
 )  
 Defendant/Appellant. )  
 )

) Supreme Court No. 20060140  
)  
) Morton County No. 04-K-1344  
)  
)  
)

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**OCT 15 2007**

STATE OF NORTH DAKOTA

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REPLY BRIEF OF APPELLANT FISCHER

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APPEAL FROM JUDGMENT OF CONVICTION

APPEAL FROM THE DISTRICT COURT  
MORTON COUNTY, MANDAN, NORTH DAKOTA  
SOUTH CENTRAL JUDICIAL DISTRICT  
THE HONORABLE ROBERT O. WEFALD, PRESIDING

Paul A. Fischer, pro se  
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20060140

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## LAW AND ARGUMENT

The State argues that the first three issues argued by the Defendant are all related to each other and based on the contention that there was ineffective assistance of counsel. Fischer argues and insists that all of the issues, related or not, must be addressed or held meritorious.

The state, in its argument of page 5 of Appellee's Brief dismisses the Defendant's claim that he had received ineffective assistance of counsel at trial, but acknowledges Fischer's claim that he was subjected to ineffective assistance of counsel pretrial. In doing so, the State dismisses his opportunity to address the trial assistance portion of Appellant's Brief on page 18 at Title III (b) "Whether appointment of standby counsel fell short of acceptable access.", and the ensuing argument that standby counsel fell short of its intended purpose, "to insure a fair adversarial system..."

Within Appellant's Brief on page 20 and 21, Fischer points out that the Supreme Court outlined the scope of trial participation by standby counsel. [T]o relieve a judge of the need to explain and enforce basic rules of courtroom protocol or to assist the Defendant in overcoming routine obstacles that stand in the way of the Defendant's achievement of his own clearly indicated goals. Participation by counsel to steer a Defendant through the basic procedures of trial is permissible even in the unlikely event that it somewhat undermines the pro se Defendant's appearance of control over his own defense.

McKaskle v. Wiggins, 465 U.S. 168, 184, 104 S.Ct. 944, 954 (1984). In this case at point, the trial court explains that standby counsel's role is to advise Fischer. See (App.p.40, li.4-11) See also (Appeal Tr. of Hearing on Defendant's Representation . . . Sep. 2, 2005, p.8, li.21-23).

Fischer points to further record of the absence of any established protocol as defined in Wiggins describing the purpose for "legal advisor" or "standby counsel" to show ineffective assistance at trial as well as pretrial. See (Appeal Tr. of Hearing Defendant's Motion To Suppress Evidence of Oct.18, 2005 at p.14, li.3-7, p.35, li.2-3, p.62, li.14-15, p.64, li.8-9); See also (Appeal Tr. of Jury Trial of Feb. 22, 2006 at p.42, li.16-22, p.43, li.14-23, p.68, li.19-20, p.73, li.9-10, p.77, li.10-11, p.79, li.14-17, p.81, li.24-25, p.82, li.1-2, p.97, li.14-15, p.209, li.10-11, and p.214, li.9); See also (Trial Tr. In Judges Chambers Discussion p.107-113 of the courts instruction to defendant regarding trial strategy). All of this reference to the record comes (1) at the trial courts discretion and initiative (2) without first objection from the State and (3) in the absence of any involvement from standby counsel.

The State makes claim that the record does not show ineffective assistance of counsel. With the exception of the Motion in Limine to keep the defendants past criminal history out of trial, See (Trial Tr.p.15, li.14-25), and explanation to the judge as to Fischer's wife, See (Trial Tr.p.7, li.13-17) and Glass's interuption while Fischer attempted to challenge for

cause, See (App.p.64, li.15-24), the participation and/or input of co-counsel as well as advice or legal assistance is non-existent--even after requested, See (Trial Tr.p.103, li.10-11).

The very lack of record the State relies on for its claim that Fischer cannot show ineffective assistance, shows that very deficient legal assistance Fischer argues making clear the prejudice of an appointed shadow counsel to aid or assist in lieu of access to legal material as described in Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491 (1977). "Thus, legal research was deemed to be integral aprt of a defendants trial preparation and a prerequisite to meaningful court access." Id. The key to constitutional sufficiency is not which of the alternatives is used, but whether the one chosen is "adequate." State v. Simon, 297 N.W.2d 206, 209 (Iowa 1980) (quoting Bounds, 430 U.S. at 828, 97 S.Ct. 1491).

In Fischer, the trial court never once addresses the written and verbal requests of Fischer to access legal materials so that he could study and research. His concerns early on were merely to avoid thwarting cases or wasting the courts time by messy practice or delay. See (App.p.12, Defendant's Petition RE: Representation at items #2 & 4 and conclusion). See also (App. p.15-16, Motion to Terminate Counsel for Defense at conclusion).

In-as-much, the Supreme Court may determine that appointed standby counsel fell short of its intended purpose, but the trial court picked up the slack. However, the record shows ineffective or lack of assistance as defined by precedence and prejudice must be presumed outside of the record in assistance by one trained in

matters of law. Thus showing the prejudice to the defendant justifying relief in his favor.

The State argues that the attorneys were competent and the record does not show otherwise. Court appointed competence is not an argument of this brief. Fischer's argument has been and remains, the attorney's lack of diligence in reviewing the discovery and reluctance to take his cases to the triers of fact at the opinion of the State on the strength of their cases.

The only reference to attorneys competence can be attributed to the trial court in trying to persuade Fischer to maintain his court appointed attorney, Thomas Glass. See (App.p.38, li.10-25). It was Mr. Glass who made oral motion, to the court, ex parte and outside of the presence of the defendant prior to the Defense Representation Hearing of Sep. 2, 2005. See (App.p.39, li.4-5). The court referred to Fischer's motions of Dec. 2004 and Jan. 2005 concerning Robert Bolinske, Jr. See (App.p.12-17). Those being the only motions Fischer made regarding removal of counsel or self representation.

Fischer asked only of Glass, that he show some fruits of his labors after 5 months of pretending to prepare for trial. See (App.p.37, li.1-25, p.38, li.1-3). This was done in violation of of North Dakota Rules of Court, Rule 11.2(a) Notice of Withdrawl and (b) Motion to Withdraw. Fischer points to the precedent case Robb, "Termination of Representation." Attorney's attempt to withdraw from representation of client in criminal matter by making an ex parte communication with the court warranted 60 day suspension from pactice of law. Disciplinary

Board of the Supreme Court v. Robb, 1999 ND 161, 598 N.W.2d 808; See also Disciplinary Board v. Raymond, 1997 ND 237, 571 N.W.2d 153.

Unlike the States reference to State v. Loughead, 2007 ND 16, 726 N.W.2d 153, Fischer has presented the record and/or lack thereof in its entirety and a post-conviction hearing would accomplish no more. Fischer has also shown prejudice by his being forced to choose between poor counsel and self representation with the empty assurance of assistance. See (App.p36, li.20-21). The statements of the State at page 6 of Appellee's Brief regarding defendant receiving advice he did not like or want to hear are unwarranted, unprofessional and indicative to the policy and tactics portrayed throughout the prosecution of this case.

Therefore, the two prong Strickland test has been met. Fischer has established prejudice supported by the record, to prove lack of diligence, inattention to not only detail, as Fischer himself took the first case forward and was acquitted by a jury of 12, See (App.p.33, li.2-15) but also the unprofessional conduct of attorney Glass and the State. The trial court recognizes prejudice as well in the transcript of sentencing hearing. See (App.p.33, li.18-23). This all, in support of granting Fischer the relief he seeks, justified.

The State makes another personal attack on the Defendant regarding his memory in connection with Fischer's attempt to be fully knowledgeable of all aspects of the fight for his freedom. He makes reference to notation of Suppression Hearing

of Oct. 18, 2005 at page 43. The record clearly shows the inquest in whole context and Pretrial Hearing Transcript of the Nov. 3, 2005 trial shows why Fischer would inquire such, discussing the Rule 11(a)(2) Conditional Plea of N.D.R.Crim.P. that was ultimately never pursued. See (App.p.47, li.9-25).

The State addresses self representation using State v. Dvorak, 2006 ND 6, ¶10, 604 N.W.2d 445 describing eyes open choice and colloquy. The choice was not of his own making if Fischer was to get his evidence to the jury in full. Win or lose at trial, the preceeding relationship between Glass and the two cases was without question, NON-EXISTENT, as was the colloquy in the record before you.

Addressing the issue regarding pretrial delay, the government uses the number of attorneys appointed as excuse and puts the blame on Fischer at the same time. Fischer will again point out that the time under self representation was very short with no legal resource or assistance. This contrary to the Sixth Amendment to the U.S. Constitution and Art. I §12 of the N.D. Constitution. From Nov. 30, 2004 to Sep. 2, 2005 Fischer was incarcerated at the control of the government and in violation of the Fifth Amendment to the U.S. Constitution. Fischer never filed for speedy trial because the court's register of actions will show scheduling was done within reason. It was the constant and unsolicited rescheduling that violated Fischer's rights. After obtaining self representation the docket was moved along quite swiftly, crippling Fischer's research and preparation time. Fischer's two motions for continuance, one

on Suppression Hearing and one on trial 04-K-1160, 19 days later were both denied because of the expanded calendar. Thus, Fischer's Motion For Dismissal, Rule 48(b) N.D.R.Crim.P.

The State has incorrectly accused Fischer of requesting and causing these delays. This is a tactic falling below professional standards of his position, yet consistent with his previous strategy and improper closing argument. The issue of bond is clearly argued in Appellant's Brief at page 23 & 24. The State again misses its mark on the initial damage of \$50,000 cash bond and the devastation of losing his business.

The preceding 3 paragraphs show the push and pull hardship placed upon the Defendant by the government that is obviously prejudicial and justifies relief sought.

As to the issue regarding jury selection, the State makes claim of statutory authority not being binding in North Dakota. However, under N.D.C.C. 29-17-35, a challenge for cause in a criminal case may be based upon actual or implied bias. State v. McLain, 301 N.W.2d 616 (N.D. 1981). As well, under rule governing challenges for cause, judges must excuse a juror if grounds exist for challenge for cause, such as juror partiality. N.D.R.Crim.P., Rule 24(b)(2). See State v. Entzi, 2000 ND 148, 615 N.W.2d 145; same State v. Smaage, 547 N.W.2d 916 (N.D. 1996).

The State argues City of Bismarck v. Holden, 522 N.W.2d 471 (N.D. 1994). Again, Fischer is not arguing the sitting of one or two jurors, and his brief is very clear, but the totality of the pool of veniremen. As to employment of the State or County, Fischer addresses at page 30, Kusek v. Burlington Northern

Railroad Company, 552 N.W.2d 778 (Neb.App. 1996). Fischer also addresses "distinctive group" at page 32, State v. Robles, 535 N.W.2d 729 (N.D. 1995) and his fear of "opinion advantage" by not only employment to the government, but association with the prosecutors office by employment, family ties with law enforcement, and simply the overwhelming number of veniremen that were acquainted with multiple others. Jurors' bias may sometimes be implied without regard to whether that person is actually biased.

Fischer attempted to, but failed to object to preserve for the record, yet the Nebraska Court held "It is the duty of trial court to see that defendants in criminal cases are tried by jury such that not even suspicion of bias or prejudice can attach to any members thereof." State v. Eggers, 120 N.W.2d 541 (Neb. 1963). The information as to venire on its own should be enough to hold to obvious error. Add to that, prosecutorial misconduct in closing argument and the courts tight, but one sided scrutiny of control over defendants testifying and/or witnessing (referenced in this reply) on an influenceable jury group and there exists grounds for reversal.

Cannon 3<sup>B</sup>(~~A~~)(5), N.D. Code of Judicial Conduct, states "[a] judge shall perform judicial duties without bias or prejudice. A judge shall not in the performance of judicial duties, by words or conduct manifest bias or prejudice. . ." For the court to so closely and so frequently reprimand the pro se defendant and to let pass what the defendant had no idea was unethical in the State's closing is error, plain and simple. The State tells the jury "he's hoping for a pass" "there is no reasonable doubt here."

See (Trial Tr.p.198, li.20-25 & p.199, li.1-9). Fischer showed by the State's own expert witness and defense witness alibi that he could not possibly have been the guilty actor. The State embellishes testimony of its own speculation of unproven possibilities and sways jury from evidence regarding reasonable doubt. See (Trial Tr.p.222, li.18-25).

As to statements, the State tells jury evidence is what witness answers, not what question is, See (Trial Tr.p.223, li. 19-20) and "He wasn't liking the answers he was getting" defendant asking for a pass, See (Trial Tr.p.223, li.22-25) finally, "the defendant is guilty, and there is no doubt about that. Keep your eye on the ball. Find the defendant guilty." See (Trial Trlp.224, li.3-4). These closing statements are improper because they are excessively disparaging. They are opinion testimony by the State and in violation of Rule 3.4(e) of the N.D. Rules of Professional Conduct.

This with an already questionable jury is supported by State v. Schimmel, 409 N.W.2d 335, 342-43 (N.D. 1987), when a prosecutor makes improper comment, the fundamental guarantee of a fair trial is distorted by placing the great weight and presence of the government on the side of the prosecution. Schimmel, 409 N.W.2d at 343. and, an instruction by the court could not remove prejudice, People v. Humphreys, 180 N.W.2d 328 (Mich.App. 1970).

CONCLUSION

In conclusion, Fischer prays that this Honorable Court, recognize the evidence presented and the argument establish as grounds for relief, seperately and by totality and to reverse this conviction or to remand for new trial.

Respectfully submitted.

Dated this 11 day of October 2007.

A handwritten signature in cursive script that reads "Paul A. Fischer". The signature is written in black ink and is positioned above a horizontal line.

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CERTIFICATE OF NONCOMPLIANCE  
FOR NOT PROVIDING AN ELECTRONIC COPY

---

I, Paul A. Fischer (Appellant) in the above action do hereby certify that there is no electronic copy of the REPLY BRIEF OF APPELLANT FISCHER in the above entitled matter because Appellant hand typed, on a typewriter, the Reply Brief. This certificate on noncompliance is personally handed to:

Penny Miller,  
Clerk of the Supreme Court  
600 East Boulevard Ave. Dept.180  
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Dated this 11 day of  
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AFFIDAVIT OF SERVICE

---

I, Paul A. Fischer, (Appellant) in the above action do hereby certify that I had my mother, Polly Fischer deliver by hand a true and correct copy of the REPLY BRIEF OF APPELLANT FISCHER in the above entitled matter to the following:

Brian D. Grossinger,  
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To the best of affiant's knowledge, information and belief, such address as given above was the actual post office address of the party intended to be so served.

Dated this 15 day of  
October 2007.



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