

ORIGINAL

No. 20070163, 0164 + 0165

20070163

IN THE SUPREME COURT OF NORTH DAKOTA

20070164

20070165

LeRoy K. Wheeler,

Appellant/Petitioner,

vs.

State of North Dakota,

Appellee/Respondent.

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

JUL 12 2007

STATE OF NORTH DAKOTA

APPEAL FROM THE DISMISSAL OF APPLICATION FOR
POST CONVICTION RELIEF RENDERED DOWN BY THE DISTRICT
COURT, NORTHEAST CENTRAL JUDICIAL DISTRICT, AND APPEALS
TO THE SUPREME COURT OF NORTH DAKOTA

BRIEF FOR APPELLANT

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STATEMENT OF THE ISSUES —

1). The trial court erred in denying an evidentiary hearing

When Wheeler raised a reasonable inference to a genuine issue of material fact of juror partiality, where said juror made false statement about her knowledge of Wheeler during voir-dire and an evidentiary hearing is warranted to establish a record for appellate review.

2). The trial court erred in neglecting to issue subpoena's

for Wheeler to support his claim of juror misconduct because the material is not part of the record after Wheeler showed the trial court that the needed material must be subpoena'ed to show the juror lied on voir-dire examination.

STATEMENT OF THE CASE

Wheeler filed his Application for Post Conviction Relief pursuant to NDCC 29-32.1, based on JUROR MISCONDUCT, accompanied by subpoena requests for the appearance of witnesses and the business records of juror, Kristine Schantz, on February 28, 2007. (Docket # 408). The state responded with a motion to Dismiss the Petitioner's Application for Post Conviction Relief on April 2, 2007. (docket # 415). Wheeler then filed a REPLY BRIEF in opposition to the states motion to dismiss dated April 17, 2007. (Docket # 416). The trial court granted the states motion to dismiss the post-conviction motion on April 25, 2007. (Docket # 417). Wheeler then filed a PETITION FOR REHEARING on May 2, 2007. (DOcket # 420). The state responded in opposition on May 23, 2007. (Docket # 422). The trial court entered it's Order denying the Rehearing dated June 1, 2007. (Docket # 423). Occompanied by an Order denying a REQUEST FOR SUPERVISORY ORDER, requested by Wheeler to obtain an affidavit from defense witness James McLeod, to support his claim of juror misconduct. Notice of appeal was then filed on June 6, 2007. (Docket # 427). (Notice all Docket #'s used herein under case number 01645, Appendix page 24).

STATEMENT OF THE FACTS

Wheeler was arrested on June 16, 2004, and charged with one count of gross sexual imposition, and one count of encouraging the deprivation of a minor and two counts of contributing to the delinquency of a minor. After the arrest Wheeler had no further contact with the McLeod family, with whom he lived. By the end of June 2004, the McLeod family was evicted from their home of 3 1/2 years because they had a registered sex offender living there, named LeRoy Wheeler. Wheeler's trial was held on May 3-6, 2005, and in voir-dire examination of the jurors, Wheeler asked juror Schantz if she knew anything about Wheeler or his case. She replied no. (Appendix page 74). The trial continued and James McLeod, a defense witness, testified that Wheeler was evicted by his mother, but did not indicate the whole family was evicted. (App. p. 75). If Schantz would have indicated that she knew of the defendant, a challenge for cause would have been requested, because she indicated that she was a supervisor over other people, she might have not been the one with knowledge of Wheeler. James McLeod also testified that there was no contact between him and Wheeler to prepare for trial so the information of the McLeod family being evicted was completely unknown to Wheeler.

James McLeod was also sentenced to North Dakota State Penitentiary (NDSP) on an unrelated charge and when Wheeler and McLeod met in NDSP, McLeod told Wheeler of the eviction, after Wheeler asked him why his parents would not answer his

letters. This was after the time of Wheeler's direct appeal was already under initiated, so the ground could not be raised until post-coviction, because the trial court has not heard and ruled on the issue.

Wheeler requested of the trial court to subpoena the business records of juror Schantz concerning the eviction of the McLeod family and the Notice of the eviction proceedings. (App. p. 61, 69 & 80). This was for the purpose of supporting his claim. This was erroneously denied. (App. p. 83 & 86), without an opportunity to obtain discovery not already in the court files. This appeal then follows.

LAW AND ARGUMENT

!). The trial court erred in denying an evidentiary hearing when Wheeler raised a reasonable inference to a genuine issue of material fact of juror petiality, where said juror made false statement about her knowledge of Wheeler during voir dire and a evidentiary hearing is warranted to establish a record for appellate review.

Standard of Review: The standard of review for a summary denial of post-conviction relief is like the review of an appeal from a summary judgment. The Uniform Post Conviction Procedure Act authorises summary disposition only if " there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." NDCC 29-32.1-09 (1). This summary judgment standard requires that all reasonable inferences favor the defendant at all preliminary stages of a post-conviction proceeding. If a resonable inference raises a genuine issue of material fact, the defendant is entitled to an evidentiary hearing. NDCC 29-32.1-09 (2). Hoffarth V. State 515 N.W.@d 146,148 (ND 1994).

Wheeler filed his post-conviction application in the District Court, Grandforks County, claiming juror misconduct. (App. p. 58). Wheeler explained that the juror, Kristine Schantz, lied on voir dire examination when she was asked about her knowledge of the defendant, LeRoy K. Wheeler. (App. p. 74). Wheeler's application claims that this juror Schantz was the manager of the apartments where he lived with his Aunt, Uncle and two cousins, but Wheeler himself was not on their lease. He was

only temporarily living there.

Three days after the alleged sexual assault, Wheeler was arrested and had no further contact with the McLeod family until trial, held on May 3-6, 2005, where one of his cousins, James McLeod, was a defense witness. After the arrest it was said that the McLeod family was evicted from their apartment where they lived for 3 1/2 years on the ground that they had a registered sex offender living there. If that is true then juror Schantz would have had knowledge of Wheeler's criminal history. Murphy v. Florida 421 U.S. 794, 799 (1975), said;" juror exposure to information about a state defendants prior convictions ... presumptively derives the defendant of due process." 14th Amendment, USC. This would have contributed to the eviction, and conviction, but during voir dire she denied knowledge of Wheeler. (App. p. 74).

In Sathren v. Behm Propanr Inc. 444 N.W.2d 696, 698 (ND 1989), said;" We hold that to obtain a new trial in such a situation, a party must demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect the juror's impartiality can truly be said to affect the fairness of a trial. We do agree with the U.S. Supreme Court's reasoning that only those incorrect answers which might affect a jurors impartiality can provide a basis for a new trial. McDonough Power Equipment Inc. v. Greenwood 464 U.S. 548, 553-556 (1984), (said- Blackmun J.,

Stevens J. and O'Connor J. concurred; I also agree that, in most cases, the honesty or dishonesty of a juror's response is the best initial indicator of whether the juror was impartial)."

If juror Schantz had evicted the McLeod family because they had a registered sex offender living there and then later denied knowledge of Wheeler at voir dire, then the first prong in Sathren is satisfied because she failed to answer honestly, and the second prong is satisfied because a challenge for cause would be appropriate for two reasons: 1). because pursuant to NDCC 29-17-36, Implied bias, section 2, because she was the landlord, and 2). because juror Schantz had knowledge of extraneous prejudicial information about Wheeler's prior history which would not have been permissible in court. State v. Brooks 520 N.W.2d 796, 801-802 (ND1994), said;" because the issue of predisposition is irrelevant under the objective test, prejudicial evidence concerning Brooks background to establish predisposition would not be admissible in court."

In Wheeler's REPLY BRIEF he cited Williams v. Taylor 529 U.S. 420 (2000). Wheeler showed the trial court that in Williams he was entitled to an evidentiary hearing to establish a record and to prove the ground of juror misconduct, because that juror, Stinnett, deceived the court and the parties by remaining silent when asked questions about relation to the states witnesses. Id. 529 U.S. at 441. In Williams it was understood why the defendant did not previously have developed the ground of juror bias because when Stinnett remained silent on the

questions of her relations with the state attorney and witness that there was no basis for an investigation into Stinnett's marriage history. Id. 529 U.S. at 443.

In Wheeler's case juror Schantz denied knowledge of Wheeler and his case so there was no need to pursue that line of questioning into her knowledge of Wheeler, and if Wheeler did pursue it the state would have objected because there was no indication by her answer that the issue needed to be probed. (App. p. 74).

In the trial court's Order, (App. p. 83), the court simply adopted the states point of view and erroneously granted the states motion to dismiss petitioner's application for post conviction relief. (See Docket # 415). The trial erroneously said that," defendant is simply alleging a variation of a theme he previously asserted in his direct appeal." Wheeler's direct appeal ground consisted of the denial of impartial jury based on being forced to use his peremptory challenges on juror's that should have been excused for cause due to the close relationships between the jurors and states attorney's and state witnesses (testifying Police Officers). The ground Wheeler now brings is juror misconduct due to providing false answers on voir dire of her knowledge of Wheeler. Although they are both under the right to an impartial jury, the facts involved are completely different, and Wheeler did not have knowledge of the McLeod family being evicted or why they were evicted. Therefore the trial court's adoption of the states position is erroneous and not supported by law. The trial court

in her Order acknowledged that the juror said," she did not know the defendant, nor had she read or heard anything about the defendant or his case. (App. p. 84). This is an undisputed fact. In Johnson v. State 2005 ND 188, ¶23, 705 N.W.2d 830, this court said;

" Johnson had not previously raised this issue in an application for post conviction relief. Thus, the trial court is incorrect when it states," Defendant's Application is simply to attempt to raise issue which could have been raised on appeal." Further, the trial court incorrectly states, " Defendant fails to point to any portion of the record which would justify the relief he is seeking."

Thus, in Wheeler's case, the trial court incorrectly states, " Defendant has already had the opportunity to raise the issue that his right to an impartial jury was violated. Defendant is simply alleging a variation of a theme he previously asserted in his direct appeal." Further, the trial court incorrectly states," Defendants application for Post Conviction Relief must also be denied because his application is a misuse of process in that his claim of juror misconduct lacks factual support." Herein Wheeler shows why the trial courts ruling is erroneous.

Due to the dismissal of Wheeler's Application, he filed a Petition for Rehearing for the trial court to reconsider the dismissal. (App. p. 77). In Wheeler's Petition he explained the difference between the grounds as stated above and cited Wilson v. State 1999 ND 222, ¶12, 603 N.W.2d 47.

Although Wilson's case was based on ineffective counsel, there were different issues under the same ground as in the case at bar, and Wheeler attempted to explain the differences and the need for the business records of juror Schantz for factual support of Wheeler's claim and that the documents requested would be admissible in court as evidence under N.D.R. Ev. 803 (6). Wheeler also explained that under Wilson his ground had not been previously presented to the court and heard and therefore could not be an abuse of process because the information had not been known to Wheeler until he arrived at NDSP and spoke with his cousin James McLeod as to why his parents would not respond to Wheeler's letters. So it is newly discovered evidence, and has not been fully and finally determined.

Pursuant to the Supremacy Clause of the U.S. constitution, Art. VI cl.2, state court judges are bound to enforce federal law, and in Estelle v. Gamble 429 U.S. 97, 106 (1976), that court said; " a pro-se complaint " however inartfully pleaded" must be held to "less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner 404 U.S. 519 (1972), and should be liberally construed.

Wheeler's pleadings in the trial court have been completely ignored, not liberally construed, because the trial court simply adopted the states position and not using law to support the court's decision contrary to N.D.R.Civ.P. 52 (a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and

state separately its conclusions of law thereon and direct the entry of the appropriate judgment: Wheelers pleadings substantially complied with N.D.R.Civ.P. 56 (e) & (f). The trial court's summary dismissal of Wheeler's Application was an erroneous ruling because in Rule 56 (e), says the applicant may not rest upon mere allegations or denials of the adverse parties pleadings, but the adverse parties response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgement, if appropriate, must be entered against the adverse party.

In the trial court's ruling the judge did say that the defendant cannot just rely on mere allegations for factual support of his claims, (see App. p. 83), but seemed to ignore the rest of the subsection where it said, " but the adverse parties response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue." Wheeler's response went beyond that, (App. p. 63), and showed the court that the evidence needed to be subpoena'ed, complying with NDCC 29-32.1-04 (2), which states that it " requires the applicant to attach the record of the criminal proceedings or parts of it to the application or state why it is not attached only " if the cited record is not in the files of the court. Owens v. State 1998 ND 106, ¶40, 578 N.W.2d 542, citing NDCC 29-32.1-04 (2).

Wheeler's Application had a page entitled REASONS FOR SUPPORTING DOCUMENTS NOT ATTACHED, and explained they were not

part of the record and needed to be subpoenaed and that subpoena requests accompanied his Application. All of the above mentioned facts that the juror was biased, provided false information on voir dire denying Wheeler the basis for a challenge for cause and that he had no knowledge of the eviction of his family until he arrived in NDSP during direct appeal was creating enough of an inference of a material factual issue to grant Wheeler's request to subpoena the documents and hold an evidentiary hearing.

The trial court also overlooked the words of Rule 56 (e) that said; " if the adverse party does not so respond, summary judgment, if appropriate, must be entered against the adverse party." As shown above Wheeler did so respond, and ruled contrary to subsection (f). Section (f) states;" When Affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the parties opposition, the court may refuse the application for judgment, or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

Wheeler told the trial court that witnesses and documents that would support his claim needed to be subpoenaed in his Application for Post Conviction Relief, (App. p. 61), and in his REPLY BRIEF, (App. p. 69). Wheeler also requested discovery pursuant to NDCC 29-32.1-08, (App. p. 91), and in addition he requested a Supervisory Order to obtain the ability

to get an affidavit from the defense witness, James Mcleod, because he is in another Correctional Institution. All of these documents was sufficient to bring to the courts attention that the needed material was not part of the record and to deny Wheeler the ability to obtain the discovery is the denial of the due process of law. 14th Amendment, USC. And if Wheeler's claim is true, but could not be proven without the requested material would be a denial of Wheeler's right to a fair trial with an impartial jury. 6th Amendment, USC. This court said in State v. Wilson 466 N.W.2d 101, 104 (ND 1991), " When necessary evidentiary materials are not available to resist a motion for summary judgment, " the court may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just, Rule 56 (f).

Wheeler's request for the Supervisory Order was also erroneously denied because the judge did not provide an opportunity to use the grievance procedure as the trial court alleged Wheeler needed to do as his alternative, but could not utilize it in sufficient time before the courts ruling. The trial court did not rule in a fassion where Wheeler could use the grievance procedure and then return to the trial court with either the witnesses affidavit or other documents explaining why he could not provide the affidavit. Wheeler did request of NDSP to contact him but was refused. The trial court simply forced Wheeler to appeal to this court.

In Perizek v. State 2006 ND 61, ¶6, 711 N.W.2d 178, said;

" a genuine issue of material fact exists if reasonable minds could draw different inferences and reach different conclusions from the undisputed facts."

In the case at bar, the trial court and the state agree that the juror denied knowledge of Wheeler, an undisputed fact, and also agree that the McLeod family was evicted, another undisputed fact. Reasonable minds could draw different inferences on the fact that the McLeod family was evicted by the end of June 2004, and the fact that Wheeler's alleged crimes were alleged to have occurred on or between June 12-13, 2004, along with the fact that NDCC 33-06-02, requires the Notice to be given between 3 to 15 days prior to the beginning of the eviction proceedings. The state erroneously alleges the McLeod family somehow was evicted but has nothing to do with Wheeler's case, but did not bear his burden to show there is no dispute as to the material facts or the inferences to be drawn from undisputed facts or show any other reason why the McLeod family was evicted, and does not rebut Wheelers claim that they were evicted because they had a registered sex offender living there, named LeRoy Wheeler. Thus, Wheeler showed different inferences to be drawn from the undisputed facts. The McLeod family lived in that apartment for over 3 1/2 years and did not desire to move, and now refuse to communicate with their nephew because they blame him for their eviction since the day of his arrest on June 16, 2004. Thus, Wheeler raised a genuine issue of material fact.

2). The trial court erred in neglecting to issue subpoenas for Wheeler to support his claim of juror misconduct because the material is not part of the record after Wheeler showed the trial court that the needed material must be subpoenaed to show the juror lied on voir dire examination.

Standard of Review: Whether District Court's refusal to issue a subpoena violates the 6th and 14th Amendments, of the U.S. Constitution is a question of law, and our standard of review for a claimed violation of a Constitutional right is De Novo. State v. Treis 1999 ND 136, ¶11, 597 N.W.2d 664.

Wheeler filed his application for post-conviction relief on juror misconduct, (App. p. 58), and also added a page stating why material needed to support his claims was not attached, in compliance with NDCC 29-32.1-04 (2), which requires the applicant to attach the record of the criminal proceedings or parts of it to the application or state why it is not attached only " if the cited record is not in the files of the court." Owens supra.

Wheeler stated the material needed to support his claim of juror misconduct had to be subpoenaed because it is not part of the record.

Wheeler provided subpoena requests to the court to have the witnesses and documents subpoenaed to support his claim, (see Addendum p. 25), that the juror, Kristine Schantz, was the manager of the apartments where he lived with his Aunt, Uncle and 2 cousins, but Wheeler himself was not on their lease. After Wheeler's arrest the entire McLeod family was evicted

from thier home of 3 1/2 years on the ground that they had a registered sex offender living there. Wheeler had no further contact with the McLeod family after his arrest, even up to date, because they blame him for their eviction. The subpoena's were necessary because there is a genuine issue of material fact that juror Schantz was partial in having preconceived ideas about Wheeler's guilt because she had knowledge of Wheeler's prior history of being a registered sex offender, but lied on voir dire denying him a fair trial with an impartial jury. 6th Amendment, USC. State v. McLain 301 N.W.2d 616,622 (ND 1981), citing State v. Olson 274 N.W.2d 190 (ND 1978), said; " the right to a jury trial accorded to an accused guarantees to the accused the right to a fair trial by impartial juror's. 6th & 14th Amendments, USC."

Wheeler told the trial court that the business records of juror Schantz would prove that she evicted the McLeod family because of her knowledge of Wheeler, and her voir dire testimony was to the contrary, see (App. p. 74). Thus shows an appearance of bias that if she would have been biased against Wheeler enough to evict the McLeod family because he lived there, then she no doubt would have poisoned the entire jury in deliberations, violating the 6th & 14th Amendment, USC. Mcilwain v. United States 464 U.S. 972, 976 (1983), said; " even if there is no showing of actual bias in the tribunal, this court has held that due process is denied by circumstances that create the likelihood or the appearance of bias."

The trial court erred in saying that " defendant's application

for Post Conviction Relief must also be denied because his application is a misuse of process in that his claim of juror misconduct lacks factual support." Wheeler specifically stated in his application that the business records were needed to be subpoenaed because that is the proof that the juror lied on voir dire and would also be the factual support of his claim. The fact of the eviction alone is an inference substantial enough to raise a genuine issue of material fact and warrant a subpoena for the business records of the apartments and to grant an evidentiary hearing to give Wheeler the opportunity to prove his case and to establish a record on the issue. Johnson v. State 2005 ND 188, ¶22, 705 N.W.2d 830, said; " Ordinarily, a claim of ineffective counsel claim should be resolved in a post-conviction relief proceeding so the parties can fully develop a record on the issue of counsel's performance and it's impact on the defendant's case."

Though Wheeler's case is not ineffective counsel claim, it's a denial of impartial jury, there still is nothing in the record on this issue and an evidentiary hearing would be necessary to fully develop a record with the requested material that must be subpoenaed.

Wheeler also requested to subpoena the witnesses necessary to prove his case at the evidentiary hearing. He brought it to the trial courts attention in his application that he could not get affidavits from the witnesses because James McLeod was in another Correctional Institution, and his parents were upset

with Wheeler because they were evicted because of him and refused to answer his letters. (App. p. 75). Wheeler also requested Supervisory Order to obtain an affidavit from James McLeod at James River Correctional Center (JRCC), but was erroneously denied. (App. p. 88), when the trial court wanted factual support of his claim. (App, p. 83).

The testimony would have been favorable and material to Wheeler's case because they would have testified that the McLeod family was in fact evicted because they had a registered sex offender living there. in State v. Hilgers 2004 ND 160, ¶ 25, 685 N.W.2d 109, said; " under the 6th Amendment to the U.S. Constitution, a criminal defendant " shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor." However, we have stated that this is not an absolute right and " the defendant must show the testimony would have been both favorable and material to his defense."

That testimony would prove that the juror, Kristine Schantz, did in fact have knowledge of Wheeler's prior history proving she lied in voir dire, State v. Brooks 520 N.W.2d 796, 802 (ND 1994), Meschke J. concurring said; " where the comments indicate that the juror had preconceived notions of liability or guilt or personal knowledge about the facts in issue, the statements may be admissible not because they are not prohibited by Rule 606 (b), but as tending to prove the juror lied on voir dire, a separate question from that of impeachment of verdicts." And that Impermissible evidence was taken into jury deliberations, which was brought to the trial courts

attention in Wheeler's REPLY BRIEF, (App. p. 63), citing Miller v. Breidenbach 520 N.W.2d 869, 871 (ND 1994).

Wheeler requested to have Schantz's business records subpoenaed prior to the hearing for the parties to prepare for the hearing pursuant to N.D.R.Crim.P. 17 (c)(1). (See Addendum page 24, App. p. 58 & p. 63). Authorized by NDCC 29-32.1-08 & 29-32.1-10, see also Addendum p. 25 for subpoena requests. Wheeler's requests follows the necessary guidelines intended by N.D.R.Civ.P. Rule 56 (e), Explanatory Note, that the applicant draw the courts attention to document containing the complete admissible evidence raising a material factual issue, or from which the trier of fact may draw an inference creating a material factual issue. citing First National Bank v. Clark 332 N.W.2d 264 (ND 1983).

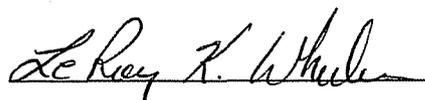
The evictoin of Wheeler's family creates an inference of a material factual issue and to deny subpoenaing the proof is an abuse of discretion. 14th Amendment, USC. A denial of the due process of law.

Wheeler also specifically requested the business records by request for leave to allow collection od discovery material, (App. p. 91), pursuant to N.D.R.crim.P. 16 & NDCC 29-32.1-08, because the material was not subpoenaed and was not part of the record. The state also acknowledges it is not part of the record in his responce to the motion. (See Addendum p. 23). The trial court erroneously ignored this request for leave.

CONCLUSION

The relief Wheeler is requesting is to reverse the trial courts dismissal of his Application for Post Conviction Relief and remand for further proceedings and to order the discovery Wheeler requested to be subpoenaed and order a evidentiary hearing to be held for Wheeler to have an opportunity to prove his case and to fully develop a record on his claim of JUROR MISCONDUCT.

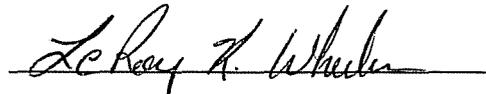
Dated July 12, 2007.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF FOR APPELLANT has been furnished by mail on Mark Jason McCarthy, assistant state attorney, P.O. Box 5607 Grandforks, N.D. 58206, on this 12th day of July, 2007.



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