IN THE SUPREME COURT OF NORTH DAKOTA

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STATE OF NORTH DAKOTA

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Lorry Van Chase, Petitioner/Appellant	Supreme Court No: 20200315
VS.	District Court No: 40-2016-CV-00148
State of North Dakota, Respondent/Appellee	

Appeal from Findings of Facts, Conclusions Of Law, and Order denying Post-Conviction Relief, Northeast Judicial District, Rolla, North Dakota the Honorable Michael Hurly Presiding.

Brief of Appellant

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JURISDICTION

[¶1] The Petitioner/Appellant, Lorry Van Chase (Chase), timely appealed the final Judgement arising out of the Rolette County District Court. The North Dakota Supreme Court has Jurisdiction over the appeal of this matter under N.D. Const. art. VI Section 6, and N.D.C.C. Sections 29-28-06 (1)(2)(4) and (5) and 29-28-03. Final Judgement was entered on September 28, 2020

STATEMENT OF THE ISSUES

[¶2] I. Did the Court err by Summarily denying Chase's Application for Post-Conviction Relief?

II Did the Court err by failing to take any action on Chase's allegation of Jury tampering and receipt by the Jury of extraneous prejudicial information?

STATEMENT OF THE CASE

I. NATURE OF THE CASE

[¶3] This is a civil matter on appeal from Northeast Judicial District, Rolette County appealing Findings of Facts, Conclusions of Law, and Order Denying Post-Conviction Relief.

II. DISPOSITION BELOW

[¶4] Subsequent to extensive civil litigation in this matter, including a Post-Conviction relief application, remand following appeal, denial, and a second appeal, Chase filed a N.D.R.C.iv.P 60(b) Motion for Relief from Judgement. This Motion was filed with the District Court on November 13, 2018 and alleged that Post-Conviction Counsel: (1) Provided ineffective assistance of counsel; (2) Coached and instructed Mr. Chase to lie at an evidentiary hearing; (3) violated ethics rules; (4) violated the rules of appellate procedure; (5) attempted to cover up his errors by advising Chase not to file a Federal habeas corpus petition; and (6) attempted to convince Chase to lie in a N.D.R.Crim.P 35 Motion. The District Court

denied relief and the matter was appealed to the North Dakota Supreme Court. On August 22, 2019 the Supreme Court affirmed in Part, reversed in Part, and remanded the matter back to District Court for further proceedings holding that "Chase was not put on notice his application would be Summarily dismissed when the district court provided no notice." Chase v. State, 2019 ND 214, 932 N.W. 2d. 529.

[¶5] Subsequent to remand, Chase, through Counsel, filed an Application for Post-Conviction Relief on March 26, 2020. The State responded with an Answer and Brief on April 24, 2020. On April 28, 2020 the Court scheduled Oral argument, and issued a Notice to Appear. The hearing was held via teleconference on September 2, 2020. The district court issued an order denying the application on September 28, 2020. On November 19, 2020 Chase filed a timely Notice of Appeal.

STATEMENT OF FACTS

[¶6] In the underlying Criminal Conviction Chase was convicted of (1) Count AA Felony Gross Sexual Imposition for allegedly engaging in a violent rape of an adult female in a remote area near his home. The alleged victim, M.L. did not report the crime for many years

[¶7] Approximately 40 days after the alleged incident M.L. told Dr. Adam Smith that she had been raped and wished to be tested for Sexually transmitted infections She did not reveal the name of the alleged attacker and no Physical Signs of an attack were noted.

[¶8] Subsequent to filing the Motion under N.D.R.Civ.P. 60(b) Chase discovered what he believed to be Newly Discovered Evidence, a medical record of M.L.'s visit to a Physician eight (8) days after the alleged attack. No Physical Signs of a violent rape were noted and M.L. did not disclose any assault Chase filed this claim in his Application for Post Conviction Relief. App. P. 18 ¶18

[¶9] Additionally, Subsequent to filing the Motion under N.D.R.Civ.P. 60(b), Chase received information that "... Potential Prejudicial and inappropriate comments by a member of the Rolette County Sheriff's Department to Jury Members may have tampered the Jury as the Comments unduly influenced the ultimate decision of the Jury during the course of the trial." Application for Post Conviction Relief, APP. P. 18 ¶18. Following established Precedent, Chase did not further investigate the information but rather notified the District Court in his Application.

LAW AND ARGUMENT

I. Did the Court err by Summarily denying Chase's Application for Post-Conviction Relief?

[¶10] "Post-Conviction relief Proceedings are Civil in nature and governed by the North Dakota Rules of Civil Procedure" Wacht v State, 2015 ND 154, ¶ 6, 864 N.W.2d 740

This Court reviews an appeal from summary dismisal of Postconviction relief as it would review an appeal from a Summary Judgement. Wacht, at ¶6.

[¶11] While Chase believes that in the instant case he was not given proper notice of the State's intent to seek Summary disposition, he wishes to first argue to urge this Court to require the State to file an actual motion to dismiss as is a requirement in every other civil action. In Chisholm v State Justice Crothers Concurring Specially wrote "Both before and since Delvo, the State's failure in Post-Conviction relief Proceedings to Serve and file a Seperate motion has caused Considerable extra work for the litigants, the district Courts and this Court... That extra work would be greatly reduced if not eliminated by requiring the State, Consistent with all other civil Proceedings, to file a motion and brief identifying the grounds for relief and citing support for that relief." Chisholm v State, 2020 ND 19, 937 N.W.2d 520, 524 ¶25

[¶12] At issue in the instant case is Chase's ground for relief of Newly Discovered Evidence. Namely a medical report from a visit M.L. had with a Physician eight (8) days after the alleged violent sexual assault. The State responded to Chase's Application for Post-Conviction Relief by filing an Answer and a Brief. At the end of its answer the State included the following "The State requests the following relief: (a) Summary dismissal of the Claim; the State is asking this Answer Serve as notice of this request;" Answer App. P. 32 ¶2. This type of response is not Provided for by Statute or rule, and in fact runs contrary to both the Post-conviction Statute and the Rules of Civil Procedure. The State is permitted to respond to an application by an answer or by a motion to dismiss. N.D.C.C. § 29-32.1-06. Rather than follow the Statute, the State chose to, as has become common, Create its own hybrid response and include a request for summary dismissal in its answer.

[¶13] The legislature has specified

When an application can be Summarily dismissed: "The Court may grant a motion by either party for Summary disposition if the application, pleadings, any previous proceeding, discovery, or other matters of record show that there is no genuine issue as to any material fact and the moving party is entitled to a judgement as a matter of law." N.D.C.C. 29-32.1-09(1) This Court has repeatedly held that Post-Conviction proceedings are civil in nature Thus N.D.R. Civ. P. 7(b)(1) must apply: "An application to the Court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought." N.D.R.Civ.P. 7(b)(1). Here the State did not file and serve a Motion for Summary Dismissal, but instead made a two line request in its answer, which the Court treated as a motion. "In that Separate answer to Chase's third application for post-Conviction relief, the State Specifically

gave written notice to Chase that it was seeking summary disposition of the application" Order Denying Relief App. P.41 ¶11. Further the Court stated that Chase's claim of newly discovered evidence "... must be dismissed... for failing to do anything more than make a Conclusory allegation." Id ¶13.

[¶14] The Court's order here, and the general practice of treating a statement in an answer as a Motion, has the effect of requiring a Petitioner to respond to a motion that does not exist. There exists no legal avenue for a Petitioner to respond to an answer with additional evidence. Chase believes that the continued reliance Statewide on burying a request for Summary disposition in an answer is not done out of ignorance or convinience, but rather as a way for the State to gain a tactical advantage. These hybrid responses allow the State to simultaneously argue the merits of an Application, while also claiming that it should be Summarily

dismissed. This process is not allowed under statute or court rule.

[¶15] Further, Chase argues that treating a request for summary disposition in an answer as a Motion in Post-Conviction Proceedings, while not doing so in other civil proceedings, is a violation of his rights under both the North Dakota and United States Constitutions. The Constitution of North Dakota provides that "All laws of a general nature shall have uniform operation" N.D. Const. Art. I, Section 22. The United States Constitution provides that the States shall not "... deny any person within its jurisdiction the equal protection of the laws." Fourteenth Ammendment, U.S. Const.

[¶16] Even if this Court continues the practice of evaluating if a Petitioner was aware that the States Answer would be treated as a Motion, Chase believes that he was not given notice and was not put to his proof.

[¶ 17] The State filed its Answer and Brief in this matter on April 24, 2020. Four days later the Court scheduled oral Arguments and issued a Notice to Appear. This hearing was noticed as "Oral argument regarding Petitioner's Petition for Post-Conviction Relief (This is not an evidentiary hearing.)" App. P. 39 The purpose of this hearing was not explained further, nor was there any indication that the Court planned to treat the States' Answer as a Motion. In fact, the scheduling of the hearing immediately after receipt of the State's Answer, without first waiting for Petitioner to respond with supporting evidence, would indicate that the Court did not intend to treat the State's Answer as a Motion. Further, the Notice to Appear specifically stated that it was not an evidentiary hearing, thus Chase was not expected to introduce evidence.

[¶ 18] In its order denying Chase's Post-Conviction Relief Application the Court Stated "At oral argument, Chase, through

his attorney, acknowledged the State's intention for summary disposition was known to them through the State's written response to Chase's third application." App. p. 41 ¶10 This tone and level of certainty differs from what occured at oral arguments. At oral argument the Court never stated that it intended to treat the State's Answer as a Motion, never asked Chase to produce evidence to support his Application, and in fact cast doubt on the practice of treating an Answer as a Motion

[¶19] The exchange at oral arguments that the Court refers to is as follows:

"THE COURT: Okay. And, so, you understand that Mr. Grosinger is filing notice with the Court, he's asking this Court grant Summary dismissal of this matter.

MS. FLAGSTAD: Yes, and -- and actually, I did not file any type of response to that because I saw that the Court had only

filed this notice as an oral argument. So, I did not put forth any type of motion to the Court with our response to that, just based upon that I knew at this point was not determined to be an evidentiary hearing." Transcript on Appeal APP. P. 40 Lns. 5-13

Here Chase's counsel merely acknowledges that the State's Answer contained a request for Summary dismissal. Her complete response indicates that she was not aware that the Court intended to treat the State's Answer as a motion and thus saw no need to respond to the Answer.

[¶20] Rather than follow up, State that it intended to treat the answer as a Motion, or ask Chase to produce evidence, the Court instead muddied the waters by casting doubt on the practice of treating an Answer as a Motion.

" THE COURT: Yes, it was. This is just an or -- this is done at my request,

Just to have oral argument, on the briefs and the motion itself. And it's kind of a unique animal where it's a civil matter but it's involving a criminal matter, so I think that there's still some learning. 'Cause I'm looking at -- I looked at the State vs. Chisholm case and specifically, I looked at Justice Crothers' dissent about what his -- what he believes should be done by the State. But with that -- okay, so, I just want to cover that." Transcript on Appeal APP. P. 40 Lns 14-22 This Statement does not clarify matters as it appears that the Court is unsure of the proper procedure and the status of the State's request. Again, this contradicts the certainty within the Court's final order denying the Application A reasonable attorney viewing the progression of this case would not be able to come to the conclusion, even after the hearing, that the Court intended to treat the State's Answer as a Motion. Thus Chase could not be expected to have known that the Court would dismiss his Application. Further, this Court,

prior to remand, stated in Chase v State "Chase was not put on notice his application would be summarily dismissed when the district Court provided no notice." Chase v State, 2019 ND 214, ¶ 9, 932 N.W.2d 529.

[¶21] The State failed to follow the Statute and Court rules and did not put their request for summary disposition in a Proper noticed Motion. Further, the District Court gave no indication it would treat the State's Answer as a Motion but its actions indicated the opposite. Chase was not put to his Proof and Summary disposition was not appropriate.

II. Did the Court err by failing to take any action on Chase's allegation of Jury tampering and receipt by the Jury of extraneous Prejudicial information?

[¶22] Subsequent to his Motion under N.D.R.C.i.v.P. 60(b), and subsequent to remand by this Court, Chase received information that the Jury in his Criminal trial had been

tampered by the Rolette County Sheriff's Department. Chase did not investigate this information, but rather brought it to the District Court's attention through the only vehicle available to him, which was the Post-Conviction application. Chase stated in his Application "Furthermore, it has been relayed that Potential Prejudicial and inappropriate comments by a member of the Rolette County Sheriff's Department to Jury members may have tampered the Jury as the comments unduly influenced the Ultimate decision of the Jury during the Course of the trial." Application for Post-Conviction Relief App. P. 18 ¶18. The State made no mention of this claim in their answer, and did not deny it. The Court failed to address the claim in it's order denying relief.

[¶23] Chase could not have been expected to provide Proof of this Claim in the early stages of the Process even if it is determined that he was Put

to his proof on the other claims. The proper procedure in jury tampering cases is for the defendant/petitioner to notify the District Court, which Chase did. "If a party discovers evidence that possible extraneous prejudicial information was brought to the jury's attention, the proper procedure is to cease investigation and notify the district court." State v. Kovalevich, 2014 ND 91, ¶ 21, 858 N.W.2d. 644 (quoting State v. Hidanovic, 2008 ND 66, ¶ 15, 747 N.W.2d 463)

[¶ 24] In the instant case, Chase followed established precedent and notified the District Court so proper questioning could be conducted. The State did not deny the claim, nor did they mention it in their answer or brief. The Court did not mention this claim in it's order. This claim is not appropriate for summary disposition and required further action to investigate by the Court. "If the court determines from testimony or affidavits that extraneous prejudicial information improperly reached the jury, the court must

apply an objective standard and decide whether there is a reasonable possibility the verdict of a hypothetical average juror would be affected." Id. The District Court erred by failing to consider Chase's claim of jury tampering.

Conclusion

[¶25] Chase requests the following relief: That the Court reverse and remand this matter back to District Court with an order to schedule an evidentiary hearing, and that this Court order the District Court to conduct an appropriate investigation of Chase's claim of jury tampering.

Dated this the 2nd day of March 2021

Lorry Van Chase

Lorry van Chase #40685
Petitioner/Appellant
In Propria Persona

CERTIFICATE OF COMPLIANCE

[¶1] In accordance with N.D.R. APP. P. 32(e) Petitioner/Appellant Lorry van Chase does hereby certify that the forgoing Appellant's Brief contains twenty-one (21) handwritten Pages and complies with the Page number requirements of this Court

Lorry Van Chase

Lorry van Chase
Petitioner/ Appellant
In Propria Persona

IN THE SUPREME COURT OF NORTH DAKOTA

Lorry Van Chase Petitioner/Appellant	Supreme Court No: 20200315
VS.	District Court, No. 40-2016-CV-00148
State of North Dakota Respondent/Appellee	

Unsworn Declaration of Service

[¶1] Lorry Van Chase States that he is of legal age and that on 2nd day of March 2021 he Served Appellants Brief and Appellants Appendix in the above matter by Placing true and correct copies of the same in envelopes addressed as follows:

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Rolla, ND 58367

Supreme Court of North Dakota
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Bismarck, ND 58505-0530

and depositing the same, with postage prepaid, in the United States Mail at the North Dakota State Penitentiary in Bismarck, North Dakota.

I declare under penalty of perjury under the laws of North Dakota, that the foregoing is true and correct. Signed on 2nd day of march, 2021

Larry Van Chase

Larry Van Chase
Appellant
In Propria Persona