

MICHAELSON PLAISIMOND,)	
)	
Petitioner / Appellee,)	Supreme Court No.
)	20210215
vs.)	
)	District Court No.
STATE OF NORTH DAKOTA,)	08-2021-CV-00436
)	
Respondent / Appellant.)	
)	

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Constitutional Provisions ¶ #

N.D. Const. art. VI, § 2 ¶ 5

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N.D. Const. art. VI, § 8 ¶ 13

Transcript References:

The jury trial for this matter was held on January 11-13, 2021. The transcript of that trial is referred to as Tr. in this brief.

[¶ 3] JURISDICTION

[¶ 4] “A final judgment entered under this chapter may be reviewed by the Supreme Court of this state up appeal as provided by rule of the Supreme Court.” N.D.C.C. § 29-32.1-14.

[¶ 5] “The Supreme Court shall be the highest court in the state. It shall have appellate jurisdiction....” N.D. Const. art. VI, § 2. “Appeals shall be allowed from the decisions of lower courts to the Supreme Court as may be provided by law.” N.D. Const. art. VI, § 6.

[¶ 6] STATEMENT OF THE ISSUES

[¶ 7] Whether the district court erred in denying the petitioner’s application for post-conviction relief.

[¶ 8] ORAL ARGUMENT JUSTIFICATION

[¶ 9] Oral argument has been requested to emphasize and clarify the Appellant’s written arguments on their merits.

[¶ 10] STATEMENT OF THE CASE

[¶ 11] The Appellant (hereinafter “Plaisimond”) filed an application for Post-Conviction Relief on March 4, 2021. A.A. at 3. Plaisimond alleged the following:

- A. Ground One: Denial of effective assistance of counsel. William Thomason
Supporting FACTS (state briefly without citing cases or law): Failed to maintain an objection against the admission (sp) or prior bad acts. Case #08-2019-CR-03579 can prove no Register of Action will show no motions on my behalf or subpoenas (sp) on that attorney.
- B. Ground Two: Conviction obtained by coerced confession
Supporting FACTS (state briefly without citing cases or law): Failure to inform my Miranda Rights and Failure to show Footage – Interviews of me and Recorded Interviews of The victims in the court for the jury trial.

A.A. at 12.

[¶ 12] The State filed their Answer to Plaisimond's application on April 6, 2021. A.A. at 3. A hearing was held by reliable electronic means on June 29, 2021. A.A. at 3. At the conclusion of the hearing, the State summarized their closing arguments on the record. Tr. 17-19. Plaisimond, through counsel, filed a closing argument brief on July 7, 2021.

[¶ 13] The district court issued an Order Denying Application for Post-Conviction Relief on July 29, 2021, with the final Judgment on August 3, 2021. A.A. at 22 & 29. On July 30, 2021, Plaisimond filed a timely Notice of Appeal pursuant to N.D.R.App.P. 4. A.A. at 29. The District Court had jurisdiction under N.D.C.C. § 29-32.1-02 and N.D. Const. art. VI, § 8.

[¶ 14] **STATEMENT OF THE FACTS**

[¶ 15] Plaisimond alleges that his trial attorney, for the underlying criminal conviction in case no. 08-2019-CR-03579, was ineffective due to the aforementioned reasons. Ibid. ¶ 11. At the post-conviction hearing, testimony was elicited that Plaisimond's trial counsel did not attempt to collect security camera footage from the scene of the criminal activity. Tr. 5. The security footage had the potential of exonerating Plaisimond by showing that he never entered a room where the criminal activity occurred.

[¶ 16] Post-conviction counsel attempted to elicit testimony regarding contact with potential alibi witnesses. However, the district court ruled that testimony was inadmissible as anything to do with such testimony was not alleged in the Plaisimond's application. Tr. 10. Finally, post-conviction counsel conducted an inquiry into the introduction of prior bad act evidence. Tr. 10-13.

[¶ 17] Per trial counsel, Plaisimond was the one that testified to the prior bad acts regarding the dealing and usage of illegal drugs. Tr. 10. Then, Plaisimond's trial counsel

testified that he did not advise Plaisimond about the admissibility rules and potential ramifications of prior bad act testimony. A.A. at 12; Tr. 12: 3-15. On cross examination the State elicited testimony once again that the prior bad act testimony was provided by Plaisimond himself. Tr. 14-15.

[¶ 18] STANDARD OF REVIEW

[¶ 19] This Court has clearly and numerous explained the standard of review for an ineffective assistance of counsel claim in a post-conviction proceeding:

Whether a petitioner received ineffective assistance of counsel is a mixed question of law and fact and is fully reviewable on appeal. Under N.D.R.Civ.P. 52(a), the district court's findings of fact will not be disturbed on appeal unless clearly erroneous. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by any evidence, or if, although there is some evidence to support the finding, a reviewing court is left with a definite and firm conviction a mistake has been made.

Kalmio v. State, 2018 ND 182, ¶ 13, 915 N.W.2d 655 (quoting Roe v. State, 2017 ND 65, ¶ 5, 891 N.W.2d 745 (citations and quotation marks omitted)).

[¶ 20] LAW AND ARGUMENT

[¶ 21] Additionally, this Court has created a well-established jurisprudence on the standard for ineffective assistance of counsel:

First, the defendant must show that his trial counsel's representation fell below an objective standard of reasonableness. In establishing this objective standard, the defendant must overcome the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Second, the defendant must establish that trial counsel's conduct was prejudicial to him[.] The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different

State v. Bowers, 426 N.W.2d 293 (N.D. 1988).

[¶ 22] Trial counsel in the case at bar admitted that he did not advise Plaisimond regarding the rules surrounding or the potential ramifications of prior bad acts.

Q. *Did you explain to him* that generally prior bad acts evidence isn't admissible and can be very harmful to a defendant?

A. *I don't believe we went into that specific aspect* of it if it wasn't a -- it wasn't an offense that was part of this case, that was a prior conviction to my knowledge. I'm not sure if they ever charged him with consuming marijuana with Mr. Rennie on that day. I know he had been charged with possession with intent, I believe, previously. I don't recall it being related to this. But the reason for that testimony was to explain what they did and approximately how long it took

Tr. 12 / A.A. at 21 (emphasis added).

[¶ 23] Through this testimony, it is clear that although it was Plaisimond himself who provided the prior bad act testimony, he did so unknowingly as to every aspect. This Court has held that a district court must conduct a three-step analysis before allowing such

evidence. (See generally State v. Micko, 393 N.W.2d 741, 744 (N.D. 1986); State v. Paul, 2009 ND 120, 769 N.W.2d 416; State v. Shaw, 2016 ND 171, 883 N.W.2d 889).

[¶ 24] If a district court must conduct an in-depth legal analysis before admitting such evidence, it should stand to reason that a defendant needs to at the very least be *advised* about prior bad act testimony before proceeding. Albeit the decision by trial counsel to allow Plaisimond to testify about prior bad acts could be perceived as “trial strategy.” A.A. at 26. The issue is whether Plaisimond was advised at all regarding the entry of prior bad act testimony.

[¶ 25] Therefore, by eliciting the testimony from Plaisimond regarding prior bad acts, without advising Plaisimond of the rules or ramifications, Plaisimond was in the dark about his own case and the direction counsel was going with it.

[¶ 26] Comparing this case to the lineage of cases regarding a defendant’s right to testify, where courts need not make a formal inquiry into a defendant’s election to waive their Constitution right to testify. See United States v. Blum, 65 F.3d 1436, 1444 (8th Cir. 1995); United States v. Bernloehr, 833 F.2d 749, 752 (8th Cir. 1987); State v. Antoine, 1997 ND 100, 564 N.W.2d 637; State v. Mulske, 2007 ND 43, 729 N.W.2d 129. It has been outlined that a district court “is entitled to presume the attorney and the client discussed the right, and the defendant voluntarily agreed upon the final decision.” Antoine, at ¶ 11 (internal citations omitted).

[¶ 27] Here however, we have a trial counsel who admittedly did not advise a client about prior bad act testimony. We do not need to “presume” any conversation between attorney and client, as the conversation was testified to in the hearing. Here, we have a defendant who took the stand in his own defense to provide such testimony about

prior bad acts. Understandably, the right to testify in one's own defense is a Constitutional right; it is also a Constitutional right to have effective assistance of counsel. Strickland v. Washington, 466 U.S. 688 (1984). Effective assistance of counsel to advise a defendant about all of his/her rights in order for the defendant to make informed and voluntary decisions. Id.

[¶ 28] CONCLUSION

[¶ 29] For the foregoing reasons Plaisimond respectfully requests this Court vacate the judgment from the court below and reverse and remand the case with instructions.

Respectfully submitted this Friday, October 1, 2021.

A handwritten signature in black ink, appearing to read 'Samuel A. Gereszek', with a long, sweeping horizontal line extending to the right.

Samuel A. Gereszek (ND Bar ID # 07040)
GERESZEK LAW OFFICE P.L.L.C.
3001 32nd Ave. S., Ste. 1A
Grand Forks, ND 58201
Phone: (701) 786-6068
Eservice: eserve@gereszek.law
ATTORNEY FOR THE APPELLANT

IN THE SUPREME COURT

FOR THE STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA,

Plaintiff,

vs.

MICHAELSON PLAISIMOND,

Defendant.

Supreme Court No.: 20210215

District Court No.:
08-2021-CV-00436

CERTIFICATE OF SERVICE

I, Samuel A. Gereszek, attorney for the Defendant, and officer of the court, hereby certify that a true and correct copy of the following:

1. *Corrected – Appellant’s Brief (.pdf and Word)*
2. *Corrected – Appellant’s Appendix*

was filed via **electronically through the Court Electronic Filing System** on Friday, October 1, 2021, and served upon:

Julie Lawyer
State of North Dakota
Attorney for Appellee
bc08@nd.gov

Michaelson Plaisimond, #58497
North Dakota State Penitentiary
P.O. Box 5521
Bismarck, ND 58506-5521

Dated this Friday, October 1, 2021



Samuel A. Gereszek (ND Bar ID # 07040)
GERESZEK LAW OFFICE P.L.L.C.
3001 32nd Ave. S., Ste. 1A
Grand Forks, ND 58201
Telephone: (701) 786-6068
Eservice: eserve@gereszek.law
ATTORNEY FOR THE APPELLANT