

IN THE SUPREME COURT OF NORTH DAKOTA

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Kevin Michael Hoff,	)	<b>Supreme Court File No.</b>
	)	<b>20210291</b>
	)	
Petitioner and Appellant,	)	<b>Stutsman County No.</b>
	)	<b>47-2020-CV-00252</b>
v.	)	
	)	
State of North Dakota,	)	<b>APPELLANT'S BRIEF</b>
	)	
Respondent and Appellee.	)	

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**Appeal from the Judgment entered September 24, 2021 in Stutsman  
County district court, Southeast judicial district, North Dakota, the  
Honorable Troy LeFevre presiding.**

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**APPELLANT'S BRIEF**  
**ORAL ARGUMENT REQUESTED**

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Oral Argument:

Oral argument has been requested to emphasize and clarify the Petitioner's written arguments on their merits.

Transcript References:

An evidentiary hearing was held on September 3, 2021. The transcript of that hearing is referred to as PCR in this brief.

At the evidentiary hearing in this matter the State submitted an exhibit of the transcript for the preliminary hearing and arraignment where Mr. Hoff changed his plea. The transcript of that hearing is referred to as CoP in this brief.

## **JURISDICTION**

[¶ 1] The district court had jurisdiction under N.D.C.C. § 29-32.1-01. The North Dakota Supreme Court has jurisdiction over the appeal of this matter pursuant to N.D.C.C. § 29-32.1-14 which provides that, “[a] final judgment entered under this chapter may be reviewed by the supreme court of this state upon appeal as provided by rule of the supreme court.” Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provision article VI § 6, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06, N.D.C.C., which provides as follows: “An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03. An appeal may be taken by the defendant from:

1. A verdict of guilty;
2. A final judgment of conviction;
3. An order refusing a motion in arrest of judgment;
4. An order denying a motion for new trial; or
5. An order made after judgment affecting any substantial right of the party.”

N.D.C.C. § 29-28-06.

## **STATEMENT OF THE ISSUES**

[¶ 2] I. The district court erred by denying Mr. Hoff’s post-conviction relief petition.

## STATEMENT OF CASE

[¶ 3] This is an appeal from the Stutsman County Judgment denying Mr. Hoff's application for post-conviction relief, signed September 24, 2021. He pleaded guilty in the underlying criminal matter, pursuant to N.D.Crim.P. Rule 11, to the charge of murder on November 6, 2018. *See State v. Hoff*, 47-2018-CR-00351 and *CV252 State's Exhibit 1 Transcript (CoP)*, Index 59. Upon his conviction, the district court ordered Mr. Hoff into the custody of ND DOCR for life without the possibility of parole.

[¶ 4] Mr. Hoff submitted an application for post-conviction relief on May 5, 2020 seeking reversal of his conviction based on ineffective assistance of counsel. He filed a motion to amend his petition on August 28, 2020 claiming he was not competent to change his plea. He further explained his attorney was ineffective by not seeking an independent evaluation and that an independent evaluation would support defenses at trial including lack of criminal responsibility and defense of others. An amended petition dated April 5, 2021 was filed alleging his conviction was obtained in violation of the Sixth Amendment, and that his counsel, Attorney Myhre, provided ineffective assistance of counsel. On October 12, 2020, the State answered Mr. Hoff's petition and his motion to amend. On May 4, 2021 the State responded by an answer alleging that Mr. Hoff's previous claims were abandoned and denying the claims in the amended application.

[¶ 5] On September 3, 2021 an evidentiary hearing was held on the petitioner's application. The district court in its order dated September 24, 2021, denied Mr. Hoff's post-conviction petition. A Judgment was filed that same day. Mr. Hoff timely appeals from that final Judgment.

### **STATEMENT OF FACTS**

[¶ 6] Mr. Hoff joined the army and was honorably discharged after four years of active duty. CoP p. 15. Mr. Hoff's trial attorney, Mr. Myhre, testified that there were concerns from his mother and his client that Mr. Hoff suffered from PTSD. PCR pp. 30, 32.

[¶ 7] Mr. Hoff met and then ultimately married the decedent in 2013. CoP p. 16. Mr. Hoff and his ex-wife had a contentious relationship. CoP p. 17. They had two children during their marriage. Custody was primarily given to his ex-wife. PCR p. 29. After their divorce and Mr. Hoff's severely limited custody, he was concerned that his ex-wife would be harmful to his children. CoP, p. 26; PCR. pp. 12-13; 28.

[¶ 8] On May 12, 2018 Mr. Hoff shot and killed his ex-wife in her car in Jamestown, ND. CoP pp. 18 - 19. He then unloaded the gun, got into his vehicle, placing the gun on the passenger floor, and called 911. CoP p. 20. He drove himself to the law enforcement center where he was arrested. CoP p. 22.

[¶ 9] Mr. Myhre was appointed to represent Mr. Hoff. Mr. Myhre testified that Mr. Hoff wanted to plead guilty to get out of Stutsman county

jail. PCR p. 16. Mr. Hoff testified that he had no other option than to plead guilty because Mr. Myhre explained he had no defenses. Mr. Hoff did not recall Mr. Myhre requesting he wait to plead guilty to develop any additional mitigating circumstances. PCR p. 48. Mr. Hoff testified he did not know at the time of his change of plea that he could argue at trial there were mitigating circumstances and that his attorney did not properly inform him of potential trial strategies. PCR pp. 48-49. Mr. Hoff testified had he known about the potential defenses he would not have changed his plea to guilty. PCR p. 49.

## **LAW AND ARGUMENT**

### **I. The district court erred by denying Mr. Hoff's post-conviction relief petition.**

#### **Standard of Review**

[¶ 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 (N.D. 2015). A guilty plea must be entered knowingly, intelligently, and voluntarily to be valid. *State v. Bates*, 2007 ND 15, ¶ 13, 726 N.W.2d 595. Rule 11, N.D.R.Crim.P., provides a framework for determining whether a plea is knowingly and voluntarily entered into. *Id.* at ¶ 15.

[¶ 11] This Court applies a 'clearly erroneous' standard found in N.D.R.Civ.P. Rule 52(a) when reviewing a district court's findings of fact on an appeal under the Uniform Post-Conviction Procedure Act. 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. *Roe v. State*, 2017 ND 65, ¶ 5, 891 N.W.2d 745 (N.D. 2017). However, questions of law are fully reviewable on appeal of a post-conviction proceeding. *Broadwell v. State*, 2014 ND 6, ¶ 5, 841 N.W.2d 750 (N.D. 2014).

[¶ 12] The district court in its findings of fact adopted the State's position that Mr. Hoff abandoned certain claims in his amended petition, however this is clearly erroneous. Mr. Hoff's claim was for ineffective assistance of counsel. His earlier petition added unnecessary supporting information, but his claim of ineffective assistance of counsel remained the same through the amendment. Nothing was abandoned, his amended claim removed superfluous information from the general claim of ineffective assistance of counsel. Additionally, the amended petition claimed that Mr. Hoff's conviction was in violation of the Sixth Amendment, an even broader claim of ineffective assistance and that encompassing his trial rights. Therefore none of his previous claims had been abandoned.

[¶ 13] Under the civil rules, a pleading is sufficient if it contains (1) a short, plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for the relief the pleader seeks. N.D.R.Civ.P. 8(a); *Kaler v. Kraemer*, 1998 ND 56, ¶ 7, 574 N.W.2d 588; *In re Estate of Hill*, 492

N.W.2d 288, 296 (N.D.1992). “All pleadings shall be so construed as to do substantial justice.” Rule 8(f), N.D.R.Civ.P. “Complaints are construed liberally so as to do substantial justice.” *Jablonsky v. Klemm*, 377 N.W.2d 560, 565 (N.D. 1985). “Under our liberal pleading rules, the plaintiffs were not required to allege every element of their claim.” *Id.* His application initially contained unnecessary factual assertions in support of his claim for ineffective assistance of counsel that could unfairly narrow his broad claim of ineffective assistance of counsel. Mr. Hoff’s attorney simply corrected that by amending the petition to state a more general claim for relief, keeping all factual allegations in support of that claim viable. The testimony, or factual evidence in support of his claim, was that Mr. Hoff was told that he had no viable defenses and had no other option than to plead guilty. PCR p. 48. Mr. Hoff did not recall Mr. Myhre telling him to wait to plead guilty to develop any additional mitigating circumstances. *Id.* Mr. Hoff felt he had no other option than to plea guilty. No independent evaluation was ever conducted. An independent evaluation at the time of the change of plea specifically addressing if he was making a voluntary, knowing decision would have been a reasonable course of action, especially considering Mr. Myhre said he recalled investigating whether a defendant has the right to plead guilty over counsel’s objection.

[¶ 14] “When a defendant applies for post-conviction relief seeking to withdraw a guilty plea, the application is treated as one made under

N.D.R.Crim.P. 11(d).” *Mackey v. State*, 2012 ND 159, ¶ 11, 819 N.W.2d 539.

The Court in *Mackey* explained:

When a court has accepted a plea and imposed sentence, the defendant cannot withdraw the plea unless withdrawal is necessary to correct a manifest injustice. The decision whether a manifest injustice exists...lies within the trial court’s discretion and will not be reversed on appeal except for an abuse of discretion. *Id.* A court abuses its discretion by not allowing a defendant to withdraw a guilty plea when the court erred by failing to establish a sufficient factual basis for the plea.

*Mackey v. State*, 2012 ND 159, ¶ 11, 819 N.W.2d 539. Ineffective assistance of counsel can result in a manifest injustice requiring the withdrawal of a guilty plea. “To succeed on a claim for ineffective assistance of counsel, a petitioner must prove counsel’s performance fell below an objective standard of reasonableness and the deficient performance prejudiced him.” *Garcia v. State*, 2004 ND 81, ¶ 5, 678 N.W.2d 568, (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

[¶ 15] The district court in paragraph 47 of its finding of facts and order denying the application determined that Mr. Myhre’s representation did not fall below an objectively reasonable standard. However, the testimony presented to the district court was that Mr. Hoff was given general advise about defenses to murder, some which blatantly did not apply to his case. Mr. Hoff testified that his wife was abusive to his children which Mr. Myhre did not pursue. CoP p. 26 ln 14. Mr. Hoff could not recall any conversation in which Mr. Myhre encouraged him to not plead guilty. Mr. Myhre did not engage a private investigator or have an independent evaluation conducted of

Mr. Hoff's mental state at the time of his change of plea. No witnesses gave testimony on behalf of Mr. Hoff at sentencing. These regular practices were not done in a AA felony murder case. Therefore Mr. Myhre's representation fell below an objective standard of reasonableness.

[¶ 16] Finally, Mr. Hoff testified if Mr. Myhre had discussed mitigation and possible tactics for a defense such as his ex-wife's abusive behavior to their children, then he would not have changed his plea. PCR pp. 48-49. Therefore, prong two of Strickland has also been met and the district court's denial of Mr. Hoff's post-conviction should be reversed.

### **CONCLUSION**

[¶ 17] WHEREFORE, Mr. Hoff respectfully requests that this Court reverse the district court's Judgment denying Mr. Hoff's post-conviction relief.

Dated this 29<sup>th</sup> day of December, 2021.

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	)	<b>47-2020-CV-00252</b>
v.	)	
	)	
State of North Dakota,	)	<b>CERTIFICATE OF</b>
	)	<b>COMPLIANCE</b>
Respondent and Appellee.	)	

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[¶ 1] This Appellant’s Brief complies with the page limit of 38 set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure.

Dated: December 29, 2021

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	)	<b>47-2020-CV-00252</b>
v.	)	
	)	
State of North Dakota,	)	<b>CERTIFICATE OF</b>
	)	<b>SERVICE</b>
Respondent and Appellee.	)	

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[¶ 1] The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Brief, Appendix, and Certificate of Compliance

And that said copies were served upon:

Frederick Fremgen, Stutsman County State's Attorney,  
attorney@stutsmancounty.gov

by electronically filing said documents through the court's electronic filing system and upon appellant at his last known address by placing a true and correct copy of said documents in a sealed envelope with USPS:

Kevin Hoff, #55014  
North Dakota State Penitentiary  
3100 E Railroad Ave  
Bismarck, ND58506

Dated: December 29, 2021

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