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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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Gerald Packineau,	)	
	)	Supreme Court No.
Petitioner-Appellant,	)	20030345
	)	
-vs-	)	District Court No.
	)	08-02-K-2453
State of North Dakota,	)	
	)	
Respondent-Appellee.	)	

BRIEF OF RESPONDENT-APPELLEE

Appeal from Order Denying Post-Conviction Relief
Dated October 6, 2003
Burleigh County District Court
South Central Judicial District
The Honorable Gail Hagerty, Presiding

Leann K. Bertsch
Assistant Burleigh County State's Attorney
Courthouse, 514 East Thayer Avenue
Bismarck, North Dakota 58501
Phone No: (701)222-6672
BAR ID. No: 04806

Attorney for Respondent-Appellee

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ISSUE PRESENTED

I. Whether the trial court erred in denying Packineau's Application for Post-conviction Relief?

STATEMENT OF THE CASE

This is an appeal from the Trial Court's Order and Amended Judgment denying the application of Gerald Packineau (hereinafter "Packineau"), for post-conviction relief. (Record at 70).

Packineau was convicted of Gross Sexual Imposition by jury verdict of guilty on February 19, 2003. (Record at 37). On May 5, 2003, Packineau was sentenced to ten years with the North Dakota Department of Corrections with five years suspended for five years of probation. (Record at 41 and 53). Packineau began this post-conviction relief proceeding on August 18, 2003 by filing his Petition for Post-Conviction Relief. (Record at 58). The State of North Dakota ("State") filed its "Answer to Petition for Post-Conviction Relief" on September 3, 2003. (Record at 61). On October 1, 2003, an evidentiary hearing was held on Packineau's Petition for Post-Conviction Relief.

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(Record at 59). On October 6, 2003, the trial court denied Packineau's request for post-conviction relief, but directed the State to prepare an amended judgment to correct a clerical error in the original judgment. (Record at 66). A Second Amended Judgment was filed on October 9, 2003 which corrected the level of the offense from an A Felony to a B Felony (Record at 67). This appeal followed. (Record at 70). Packineau then requested to Amend his Petition for Post-Conviction Relief. (Record at 82). The State resisted. (Record at 83). The trial court denied Packineau's request to amend his original petition. (Record at 87). This appeal continued.

STATEMENT OF FACTS

The State disputes many of the "facts" as set forth by Packineau. Packineau fails to provide citations to the record for most of these "facts". Therefore, the State submits its own Statement of Facts:

Packineau petitioned for post-conviction relief, asserting that his sentence was not authorized by law and that he had received ineffective assistance of counsel. (Record at

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58). In support of his application for post-conviction relief, Packineau submitted an affidavit. (Record at 57). Packineau based his claim of ineffective assistance of counsel on a number of allegations, which included 1) his attorney failed to address that error that the offense was charged as an A Felony rather that a B Felony; 2) his attorney failed to request a lessor included offense of sexual imposition; and 3) his attorney failed to hire and expert on DNA. (Record at 58). The State responded to Packineau's petition through its Answer. (Record at 61). An evidentiary hearing was held on the Petition on October 1, 2003. (Transcript of Proceedings, October 1, 2003). Packineau testified in his own behalf. (Tr. pp. 4- 15). Packineau first addressed that fact that the crime of Gross Sexual Imposition of which he was convicted was actually a B Felony rather than an A Felony. (Tr.pp. 4-5). Packineau then testified that the conditions of probation which were imposed upon him, specifically, the conditions which limit his contact with minor children, should not have been imposed as part of his sentence. Id. Finally, Packineau testified that his trial counsel was ineffective in his representation because he failed

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to obtain an expert witness on DNA to dispute the State's DNA evidence. (Tr.pp 6-9).

During cross-examination, Packineau acknowledged that his defense at trial was to offer an alternative explanation as to how the victim's DNA got on his fingertips other than during the sexual assault. (Tr. pp 11, 12). The State further cross-examined Packineau about his preparations of this defense with his trial counsel. (Tr. p. 14), Packineau confirmed that he agreed with the defense to be presented at trial. Id. Packineau admitted that he always maintained that he never had any type of sexual contact with the victim and therefore, never considered requesting a lesser included offense of sexual imposition. (Tr. pp. 14, 15).

The State next called Packineau's trial counsel, Kent Morrow (hereinafter "Morrow"), to testify. (Tr. P. 16). Morrow testified that he discussed trial strategy several times with Packineau prior to the trial and that Packineau maintained his position that he never had sexual contact with the victim. (Tr. pp. 16, 17). Morrow also testified as to why an expert witness on DNA was not retained for the defense. (Tr. pp. 17-

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19). Morrow explained that the defense strategy to explain that the victim's DNA got on Packineau's fingertips during a struggle and not during a sexual assault made the DNA evidence presented by the State irrelevant. (Tr. pp. 18, 19). Morrow also testified that a lesser included offense was not considered as Packineau's defense was that no acts occurred which would support a conviction on a lesser included offense any more than they would the greater offense. (Tr. p.19).

LAW AND ARGUMENT

I. The trial court properly denied Packineau's Petition for Post-Conviction Relief.

Packineau has the burden of establishing the basis for the requested post-conviction relief. McMorrow v. State, 2003 ND 134, ¶4, 667 N.W.2d 577 (citing Berlin v. State, 2000 ND 206, ¶7, 619 N.W.2d 623). A petitioner applying for post-conviction relief claiming ineffective assistance of counsel "has the 'heavy,' 'demanding' burden of proving counsel's assistance was ineffective, and a defendant claiming ineffective assistance of counsel 'must specify how and where trial

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counsel was incompetent and the probable different result." Id. at ¶10 (citations omitted).

The burden upon the petitioner to prove ineffective assistance of counsel is two-fold: he must prove (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that he was prejudiced by counsel's deficient performance. Mertz v. State, 535 N.W.2d 834 at 836 (N.D. 1995); Lange v. State, 522 N.W.2d 179 at 181 (N.D. 1994); State v.Dalman, 520 N.W.2d 860 at 863 (N.D. 1994); Hoffarth v. State, 515 N.W.2d 146 at 150 (N.D.1994); Houle v. State, 482 N.W.2d 24, 26 (N.D. 1992); Strickland v. Washington, 466 U.S. 668, 688, 694 (1984). The prejudice element requires that the defendant establish a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Sampson v. State. 506 N.W.2d 722, 726 (N.D. 1993). The defendant must point out with specificity or particularity how and where trial counsel was incompetent and the probable different result. State v. Lefthand, 523 N.W.2d 63, 70 (N.D. 1994). In State v. Lefthand, 523 N.W.2d at 69, this Court held that "[t]he heavy

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presumption is that counsel's conduct fell within the range of reasonableness, and we will not second guess defense strategy through hindsight." Utilizing the twofold test and the presumption of competency of counsel, Packineau did not come close to establishing his burden or even a claim of violation of rights. As stated in Lange, supra, at 182, "it is not the State's burden to prove counsel was effective." That burden was on Packineau and he needed more than simple assertions or allegations.

Packineau argues that his attorney was ineffective because of the offense level was erroneously listed as a class A felony rather than a class B felony. This argument was rejected by the trial court. (Record at 61). Packineau was charged by Information and Amended Information with Gross Sexual Imposition in violation of Section 12.1-20-03 of the North Dakota Century Code, alleging that he "engaged in a sexual act with another and he knew the victim was unaware that a sexual act was being committed upon her, specifically, he engaged in a sexual act with J.R.M.;". The language of the Information and Amended Information accurately alleged all necessary

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elements for the offense of Gross Sexual Imposition in violation of N.D.C.C. §12.1-20-03(1)(c), a class B felony. While the Amended Information incorrectly listed this offense as a class A felony, Packineau was sentenced in accordance with the maximum penalties available for a class B felony. Therefore, Packineau was sentenced within the limits authorized by law. The inclusion of the reference to class A felony within the Amended Information was merely a clerical error which did not affect the elements the State was required to prove beyond a reasonable doubt, nor did it affect the sentence imposed upon Packineau. Packineau was unable to demonstrate the clerical error had any effect upon the outcome of the jury trial held in this case. Packineau's trial counsel's failure to object to the reference to class A felony would not have produced a different result in the proceedings. The reference to class A felony was only a clerical error. There were not additional elements of the offense charged which needed to be alleged or proved, and Packineau was sentenced within the maximum sentence applicable to a class B felony.

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Packineau's next claims he is entitled to relief in that his trial counsel was ineffective for failing to hire a DNA expert to refute the State's DNA evidence. Packineau's trial counsel's decision not to hire a DNA expert was trial strategy which cannot and should not be subject to review. Further, Packineau cannot demonstrate that the hiring of a DNA expert would have changed the result of the proceedings. "An unsuccessful trial strategy does not make defense counsel's assistance defective, and we will not second-guess counsel's defense strategy through the distorting effects of hindsight." Garcia v. State, 2004 ND 81,¶8, 678 N.W.2d 568 (citing Breding v. State, 1998 ND 170, ¶9, 584 N.W.2d 493). Morrow testified that he discussed trial strategy several times with Packineau prior to the trial and that Packineau maintained his position that he never had sexual contact with the victim. (Tr. pp. 16, 17). Morrow testified than an expert witness on DNA was not retained for the defense because the defense strategy to explain that the victim's DNA got on Packineau's fingertips during a struggle and not during a sexual assault made the DNA evidence presented by the State irrelevant.

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(Tr. pp. 17-19). Packineau also acknowledged that his defense was to offer an alternative explanation as to how the victim's DNA got on his fingertips other than during the sexual assault. (Tr. pp 11, 12). There was ample evidence presented at trial concerning Packineau's guilt. Morrow was not ineffective in failing to hire an expert on DNA. Morrow's trial strategy was not to attack the DNA evidence, but to offer an innocent explanation as to how the victim's DNA was transferred to Packineau's fingertips, a trial strategy with which Packineau agreed. The jury simply did not believe Packineau.

Finally, Packineau identifies two additional issues regarding his trial counsel's performance for the first time on appeal: (a)"Conflict of Interest of working for the State and Representing the Client and Protecting My Right to a Fair Trial and Due Process of the Law by Councel" [sic]; and (b)"The Editing or Censorship of Trial & Post Convition [sic] Transcripts." Packineau did not raise these issues in his petition filed with the trial court. (Record at 58). North Dakota Century Code § 29-32.1-04 provides that "[t]he

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application must... set forth a concise statement of each ground for relief..." Should a petitioner omit some necessary ground for relief, he or she may move the Court to permit the defendant to amend the application. See NDCC §29-32.1-07 ("The court may make appropriate orders allowing amendment of the application...."). In this case, Packineau did not move to amend his petition until ***after*** the evidentiary hearing was completed and the trial court had issued its order. Therefore, the trial court had no opportunity to consider these issues and they have not been preserved for review on appeal. (Record at 82). Further, Packineau did not even raise these issues in his Motion to Amend Petition for Post-Conviction Relief. Id. Even is this Court were to somehow find that these issues were raised, no hearing on the issues would be required because they are patently frivolous allegations unsupported by any evidence within the record. See Whiteman v. State, 2002 ND 77, ¶19, 643 N.W.2d 704.

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II. CONCLUSION

The State did not err in denying Packineau's Petition for Post-Conviction Relief. The State of North Dakota respectfully requests that this Court AFFIRM the decision of the trial court.

Dated this 9th day of August, 2004.

Leann K. Bertsch, Assistant
Burleigh County State's Attorney
514 E. Thayer Avenue
Bismarck, ND 58501
(701) 222-6672
Bar I.D. # 04860
Attorney for Respondent-Appellee

BURLEIGH COUNTY
STATE'S ATTORNEY
BISMARCK, N. DAK.