ORIGINAL

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME COURT NO. 20040080

20040080

Jonathon Willard Greywind,

Plaintiff - Appellant,

vs.

State of North Dakota,

Defendant - Appellee.

APPELLEE'S BRIEF

APPEAL FROM JUDGMENT DENYING POST-CONVICTION RELIEF
DATED FEBRUARY 9, 2004
EAST CENTRAL JUDICIAL DISTRICT
DISTRICT COURT NO. 09-03-C-02296
THE HONORABLE FRANK L. RACEK, JUDGE

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ISSUES PRESENTED

I. Whether Defendant has a claim for ineffective assistance of counsel.

II. Whether Defendant's pleas were voluntary.

III. Whether there is newly discovered evidence that warrants a new trial.

STATEMENT OF THE CASE

Appellant Jonathon Greywind shall hereinafter be referred to as "Greywind". Appellee State of North Dakota shall hereinafter be referred to as "State".

The State concurs with Greywind's Statement of the Case, as far as it goes, with one correction: Greywind filed his Notice of Appeal on March 26, 2004, not February 3, 2004. App. at A2, A49-50.

Greywind's Statement of the Case does not reflect that there were two criminal cases progressing in tandem against him (Court File Nos. CR-99-2970 and CR-99-2279). In addition to the case referred to in Greywind's Statement, the other case contained five counts including burglary, terrorizing and three counts of theft. This other case is important not only because it played a part in the Plea Agreement and sentence at the heart of this matter, but it occurred earlier in time and the State alleged it was a precipitating reason for the case Greywind did address, that of the conspiracy to commit murder and accomplice to tampering with witnesses. It was also addressed by the Court in its related Findings of Fact, Conclusions of Law and Order for Judgment in this post-conviction matter. App. at A40-48.

The Honorable Frank L. Racek accepted Greywind's plea for the underlying criminal charges, sentenced Greywind and presided over the post-conviction case.

STATEMENT OF THE FACTS

The key facts of this case are provided in the District Court's Findings of Fact, Conclusions of Law and Order for Judgment dated February, 2004. App. at A40-48. In addition, the State refers the Court to the written Rule 11 Plea Agreement, dated February 17, 2000. App. at A9-19.

ARGUMENT

Greywind alleges ineffective assistance of trial counsel in a post-conviction relief context. He also argues newly discovered evidence should warrant withdrawing his guilty pleas and granting a new trial. Accordingly the State structures the following argument first to address the general burdens and standards for post-conviction relief and ineffective assistance of counsel, and then addresses Greywind's allegations within that context. Finally, the State addresses the "newly discovered evidence" claim and Greywind's waivers of appeal and post-conviction relief.

I. Post-Conviction Relief - Burden of Proof.

The petitioner carries the burden of establishing a basis for post-conviction relief. Abdi v. State, 2000 ND 64, ¶8, 608 N.W.2d 292. A district court may dismiss an application for post-conviction relief if the petitioner is not entitled to relief and no purpose would be served by further proceedings. N.D.C.C. §29-32.1-06. A district court may also summarily dispose of an application for post-conviction relief if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. N.D.C.C. §29-32.1-09(1); St. Claire v. State, 2002 ND 10, ¶11, 368 N.W.2d 39.

The District Court provided Greywind an evidentiary hearing on his application. On January 22 and 26, 2004, the Court heard testimony, accepted exhibits and heard counsels' arguments. The District Court denied Greywind post-conviction relief and dismissed his application in an Order dated February 9, 2004.

II. Post-Conviction Relief - Standard of Review.

In Garcia v. State, 2004 ND 81, ¶ 6, 678 N.W.2d 568, the Court recognized the standard of review in post-conviction relief cases. Post-conviction relief proceedings are civil in nature and are governed by the North Dakota Rules of Civil Procedure. Id. (*citing* Varnson v. Satran, 368 N.W.2d 533, 536 (N.D. 1985)). "The issue of ineffective assistance of counsel is a mixed question of law and fact which is fully reviewable by this court. However, a trial court's findings of fact in actions for post-conviction relief will not be disturbed unless clearly erroneous, pursuant to N.D.R.Civ.P. 52(a)." Id., *citing* Breding v. State, 1998 ND 170, ¶4, 584 N.W.2d 493 (citing Falcon v. State, 1997 ND 200, c 21 570 N.W.2d 719, and Frey v. State, 509 N.W.2d 261, 263 (N.D. 1993)).

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. DeCoteau v. State, 2000 ND 44, ¶¶ 10-11, 608 N.W.2d 240.

III. Assistance of Counsel - Generally.

Greywind claims ineffective assistance of counsel and involuntary pleas coerced by his allegedly ineffective counsel. A criminal defendant is entitled to reasonably effective assistance of counsel. State v. Strutz, 2002 ND 22, ¶25, 606 N.W.2d 886; State v. Woehlhoff, 487 N.W.2d 16, 17 (ND 1992). In order to prove a claim for ineffective assistance of counsel, the defendant must establish two elements: (1) counsel's performance was deficient, and (2) his defense was

prejudiced by that deficiency. Id. (quoting Stoppelworth v. State, 501 N.W.2d 325 (ND 1993). The defendant has the burden to prove both elements, and failure to do so is fatal to the claim. State v. McLain, 403 N.W.2d 165, 17 (ND 1987). This is a "heavy burden". Abdi, 2000 ND at ¶31.

The first element (deficient performance) requires consideration of all circumstances to determine whether there were errors *so serious the defendant was not accorded that counsel guaranteed by the 6th Amendment.* McLain, 403 N.W.2d at 17 (emphasis added). Courts presume counsel's conduct to be reasonable and consciously attempt to limit the distorting effect of hindsight. State v. DeCouteau, 1998 ND 199, ¶6, 586 N.W.2d 156.

The second element (prejudice), requires defendant to establish "but for" counsel's unprofessional errors the result of the proceedings would have been different. Abdi, 2000 ND at ¶29. The defendant must present proof of actual prejudice. McLain, 403 N.W.2d at 18. In a criminal case the question becomes whether or not there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt of the accused's guilt. Id. The term "reasonable probability" in this context has been defined as a probability "sufficient to undermine confidence in the outcome". Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052 (1984).

IV. Counsel Provided Effective Assistance.

Greywind has shown neither of the two elements (deficient performance and "but for" prejudice) required to support a claim of ineffective assistance of counsel and this claim should fail.

Greywind vaguely argues there were some kind of evidentiary issues that his counsel failed to address, but himself failed to define them to the District Court and then raises them on appeal again without defining them. The State asserts this claim is without legal or factual foundation or merit.

Greywind further argues his counsel should have interviewed other witnesses, implying that such investigation would vindicate him. It appears his focus is on the conspiracy case. Greywind pled guilty several weeks before that case was scheduled for trial. There were a number of police reports and videotapes addressing the statements made by Huyhn and Berns implicating Greywind in the conspiracy case. Attorney Nordeng had reviewed the discovery but had not yet conducted complementary interviews - the trial was still weeks away. PCR Tr., p.77, ln.14 - p.78, ln.9. In any case, there were significant facts implicating Greywind in the murder conspiracy aside from the statements of co-conspirators Huyhn and Berns including, among others, that he drove Huyhn and Berns to the crime scene, he was arrested with both Huyhn and Berns shortly after the crime, the physical evidence at the scene, the victim's description of Huyhn and Berns, neither Huyhn nor Berns knew the victim much less had any motive to kill her, the victim was the principal witness in the terrorizing/burglary/theft case for which Greywind was scheduled to appear the following day, and various information regarding Greywind's whereabouts surrounding the time of the crime. Add to that underlying information that Greywind admitted within the written Rule 11 Plea Agreement that he participated in the conspiracy, verbally acknowledged his involvement in the

crimes to the Court during his plea both by acknowledging the factual basis provided by the State and in his other statements to the Court. He again admitted his guilt at the time he submitted his Rule 35 motion seeking leniency.

Greywind's attorneys had multiple contacts with him over a course of months. They communicated with him by telephone and in person, each indicating they spent approximately 40 or more hours on the case, including joint meetings with Greywind. PCR Tr., p.75, ln.7-18; p.78, ln.23 - p.79, ln.8, p.116, ln.3 - p.118, ln.8. Greywind understood the terms of his plea. PCR Tr., p.82, ln. 25 - p.86, ln.5; p.117, ln.3 - p.118, ln.8. At his January 10, 2000, hearing it was apparent Greywind was unhappy about his attorneys' assessments of his chances at trial. January 10, 2000 Tr., p.6, ln.2-14. However, the State asserts that is reflective of effective representation, realistically discussing with him his likelihood of success at trial and discussing with him his sentencing options.

Greywind later indicated within paragraph 15 of the Plea Agreement that he was satisfied with the representation of his counsel. App. at A16. The State specifically mentioned that provision in its recitation of important provisions at the time of the plea. Sentencing Tr., p.11, ln.7-10. Greywind acknowledged he went through the Agreement with his attorneys. Sentencing Tr., p.12, ln.16 - p.13, ln.4. The Court gave Greywind an opportunity to make any comments that he wished during his plea. He provided no comments about his counsel, nor was there anything else he stated or that otherwise occurred coincident with the plea to lead the Court to reasonably believe Greywind did not understand the rights available to him, the charges he faced, the potential sentences that could be

imposed, the terms of the plea, or the factual basis upon which his plea was based. Greywind was clear that his sentence would be a maximum of 20 years. PCR Tr., p.99, ln.15 - p.101, ln.11. That was the sentence the Court imposed.

V. Greywind's Pleas Were Voluntary.

A. The Law

It is well established that a plea of guilty must be free and voluntary. State v. Storbakken, 246 N.W.2d 78 (ND 1976); N.D.R.Crim.P., Rule 11. The Court must evaluate the circumstances surrounding guilty pleas in order to determine whether they were entered as the result of threats or coercion. Id. When a defendant asserts his guilty plea was "coerced" by ineffective counsel, he is required to present evidence supporting his claim. *See* State v. Sayler, 443 N.W.2d 915, 918 - 19 (ND 1989). When there is a contradiction between the record and the unsupported assertion of the accused, this Court is compelled to accept the record. Id.

B. Greywind Acknowledges Voluntariness of Plea at Plea

Greywind claims his plea was involuntary and "coerced" by his allegedly ineffective counsel. He argues he had no knowledge of the ramifications of his plea. However, a review of the hearing history in these cases, together with a review of the plea/sentencing transcript, leaves an entirely different impression. To begin with, Greywind is hardly a neophyte within the criminal justice system. He has, among other things, prior convictions for false information to law enforcement, simple assaults (multiple), drug paraphernalia (multiple), drug possession and theft. Sentencing Tr., p.28, ln.3-12. He had already made

multiple court appearances on his pending cases. He understood the criminal justice process.

Furthermore, the resolution in this case was hardly reached on the spur of the moment. Greywind had ample opportunity to consider his situation and decision in the months preceding his eventual plea. He was originally scheduled to plead guilty on December 29, 1999. He backed out of that plea. He scheduled another guilty plea for January 10, 2000. He backed out of that plea as well. He was well-versed in persisting with a non-guilty plea if that is what he wished. However, he signed a Plea Agreement on February 17, 2000, five days before his trial where the victim of the subsequent murder conspiracy was going to testify against him for terrorizing, burglary and theft. The State asserts the nearness of that trial, together with the understanding of the potential outcome of the two trials, honed Greywind's decision-making process.

Greywind's plea appears founded upon his own weighing of his options, including the potential of life in prison and consecutive sentences had he gone to trial and been found guilty. His defense attorneys made him aware of those options and supported his decision to plead guilty. Sentencing Tr., p.12, ln.16 - p.15, ln.11. The "threat" of life in prison without parole was not something his attorneys created to "coerce" Greywind. They made him aware he may face that sentence - relating to Greywind his realistic chances of success at trial and the relative benefits of securing a written Rule 11 plea agreement as opposed to the upward exposure posed by the State's post-trial sentencing recommendation. This is a signpost of effective legal representation, not ineffective representation.

At his plea, Greywind indicated he met with and discussed the plea agreement with both of his attorneys before signing it. Id. The written agreement expressly indicates Greywind voluntarily entered into it.

Greywind also had an opportunity to express to the Court his feelings that his pleas were unknowing and involuntary at the sentencing hearing. Instead, he acknowledged verbally to the Court his plea was voluntary. Id. Attorney Nordeng verbally indicated the choice to accept the Agreement was Greywind's, not Nordeng's. Sentencing Tr., p.37, ln.2-9. The Court conducted a lengthy review of Greywind's rights at the time of his plea and sentencing. Id. at p.4, ln.10 - p.7, ln.13; p.12, ln.2-7. The Court confirmed, among other things, that Greywind discussed the Agreement with both of his counsel, he understood the Agreement, he knew he could be sentenced to 20 years under the Agreement and understood he was waiving his appeal and post-conviction rights. Id.; Id. at p.13, ln.23 - p.14, ln.1. Greywind also personally acknowledged the factual bases outlined by the State. Id., p.15, ln. 14 - p. 28, ln. 2. The Court made specific findings that Greywind's plea, and his waiver of appeal and post-conviction remedies, were knowingly, freely and voluntarily made. Id. at p.38, ln.6-12.

C. Greywind Acknowledges Voluntariness of Plea in Rule 35 Motion

Greywind also submitted a Rule 35 motion for reduction of sentence, dated May 30, 2000. App. at A23-24. Within that motion, which was signed by Greywind, is the admission he "of his own freewill and accord pleaded guilty" in these cases. Id. He further stated he "excepted [sic] responsibility for his

actions and realizes that my behavior was nothing to be proud of." Id. Greywind was willing to admit the free and voluntary nature of his plea at the time of his plea, when it got him the bargained-for sentence. He was willing to, and did, admit it again in his Rule 35 motion when he thought it would help him with a reduction of his sentence. Later, however, when he had exhausted the benefits of those admissions, was likely tired of his incarceration and otherwise had nothing to lose, he reversed his course and claimed his plea was coerced.

Greywind cites Jackson in support of his claim. People v. Jackson, 203 Mich. App. 607, 513 N.W.2d 206 (1994). However, Jackson dealt with a defendant who wished to withdraw his guilty plea before sentencing. Id. In that case the defendant was allowed to withdraw his plea because it was induced by inaccurate legal advice and he did not agree with the factual basis to substantiate the charge. Id. Furthermore, the defendant in Jackson had no criminal record and requested to withdraw his plea within days of entering it. Id. The Jackson court acknowledged defense counsel must explain to the defendant the range and consequences of the available choices in sufficient detail to enable a defendant to make an intelligent and informed choice on whether to plead guilty. Id. However, the court acknowledged that defense counsel can only provide information and cannot possibly insure comprehension. Id. at 209. Jackson further speaks about ineffective assistance of counsel, in combination with the existence of a meritorious defense. Id. at 213. Greywind has offered no plausible meritorious defense. Jackson simply does not offer Greywind any assistance in his claims.

D. Greywind Understood the Criminal Justice Process

As earlier addressed herein, Greywind has an extensive criminal record. He knows how the system works. He had ample time to consider the consequences of his actions. His guilty plea allowed him to avoid consecutive sentences and/or the possibility of life in prison. He agreed with the factual basis. He did not attempt to withdraw his guilty plea before sentencing or for a considerable time thereafter. It was only after his Rule 35 motion was denied that he decided to claim his plea was involuntary. The records show his defense counsel sufficiently explained to him the possible consequences of both pleading and going to trial. The record reflects he understood the Agreement. Even if, for the sake of argument, he did not understand every word of the written Agreement, even fourth grade students understand there is a difference between serving a maximum of 20 years and serving life in prison without parole (Greywind claimed a fourth grade education). The State asserts Greywind understood all the essential parts of the Agreement and he knowingly and voluntarily entered his guilty plea.

The Court also stated Greywind understood the process, came to the conclusion the Rule 11 Plea Agreement was the best he could do, and voluntarily pled guilty. App. at A46. He received the sentence contemplated by the Agreement. Greywind was given the opportunity of an evidentiary hearing but did not meet his burden for proving his plea was involuntary.

VI. Newly Discovered Evidence Does Not Warrant a New Trial.

N.D.C.C. §29-32.1-01(1)(e) provides for vacating a conviction if there

exists evidence not previously presented or heard such that the interests of justice require vacation. This claim is similar to a request for a new trial under Rule 33, N.D.R.Crim.P., and requires the same showing. Breding v. State, 1998 ND 170, ¶ 19, 584 N.W.2d 493. In a request for a new trial, the court must consider the evidence in light of the entire record and its decision falls within the court's discretion. State v. Heglund, 355 N.W.2d 803, 805 (ND 1984). North Dakota courts have not addressed whether a new trial can be granted if the defendant pleads guilty. However, in Alexander the Iowa Supreme Court held the remedy of a new trial is only available to defendants who have already had a trial. State v. Alexander, 463 N.W.2d 421, 422 (IA 1990). Common sense would suggest that the concept of a *new* trial should have as its predicate the existence of a *former* trial. Id. Notions of newly discovered evidence simply have no bearing on a knowing and voluntary admission of guilt. Id. at 423.

In Garcia v. State, the Court utilized a four-prong test to determine whether a new trial should be granted on the ground of newly discovered evidence. 462 N.W.2d 123 (ND 1990). A new trial will be granted only if all of the following conditions are met: (1) the evidence must have been discovered since the trial, (2) the failure to learn of the evidence at the time of trial was not the result of the defendant's lack of diligence, (3) the newly discovered evidence is material to the issues at trial, and (4) the evidence is of such a nature that it would probably produce an acquittal at a retrial. Id.

If newly discovered evidence is not likely to be believed by a jury, denial of re-trial is not an abuse of discretion. Breding, 584 N.W.2d 493 (prong (4)).

Courts look upon recantation with suspicion and disfavor. Id. Recanting testimony is scrutinized with extreme care because courts are mindful of promoting stability and security of verdicts. Id. The general rule is that courts should not grant a new trial unless it is reasonably certain the recantation is genuine. Id.; State v. Ford, 377 N.W.2d 125, 127 (ND 1985).

In Hegland, a material witness testified against the defendant at trial but later submitted an affidavit stating he had lied on the stand because of undue influence from police officers. 355 N.W.2d 803 (ND 1984). The affidavit did not constitute newly discovered evidence because it could have been discovered at trial. Id. Moreover, the defendant's claim that he was unaware of the falsity of the witness's testimony until after the trial was inconsistent with his claim of innocence. Id. at 806.

Greywind's claim that newly discovered evidence warrants a new trial should fail because Greywind pled guilty rather than going to trial. He acknowledged to the Court his pleas were knowing and voluntary. App. at A41. His Rule 35 Motion stated that Greywind "of his own free will and accord pled guilty". App. at A23. The Defendant "excepted [sic] responsibility for his actions and realizes that my behavior was nothing to be proud of." Id. Because Greywind pled guilty to receive the benefits of the Plea Agreement rather than going to trial, the remedy of a new trial should not be available to him.

Nonetheless, Greywind claims his "newly discovered evidence" warrants a new trial. His application for post-conviction relief included affidavits from co-conspirators Huynh and Berns. App. at A35-37. The affidavits denied Greywind

had been involved in a conspiracy to commit homicide. The affidavits directly contradicted the statements of both men to the police at the time of their arrests. *See generally*, App. at A51-65; PCR Tr. at p.7-40, p.47-61; PCR Exhibits 14-16. They claimed they had been coerced by the police into admitting Greywind was part of the conspiracy. Greywind alleges this "newly discovered evidence" should allow him a new trial.

The affidavits would not appear to constitute newly discovered evidence sufficient for post-conviction relief purposes. Although Greywind did not have a trial, the statements of Huyhn and Berns were available to him before he pled guilty. His claim he was unaware of the falsity of these statements to the police contradicts his claim of innocence. Because the evidence was available to Greywind before his plea, the first prong of the Garcia test has not been met.

In addition to the above, the affidavits from Huynh and Berns are not credible evidence likely to be believed by a jury and should not be granted credibility by the Court. As suggested in Breding, recantations are looked at with suspicion and disfavor (albeit these are not recantations of testimony, but rather recantations of police debriefings). Neither Huynh or Berns alleged in their affidavits they did not commit the offenses for which they were convicted. They allege they lied about Greywind's involvement. App. at A35-37. However, that allegation crumbles under the weight of the slightest scrutiny. For example, both Huynh and Berns admit that neither knew their victim nor had any prior contact with her. PCR Tr., p.54, ln.5-16, p.27, ln.2 - p.28, ln.8. Neither one had a motive to harm the victim. Id. However, Greywind did have such a motive because the

victim was the key eye-witness in a case pending against him. Huyhn claimed he hardly knew Greywind. Id. at p.49, ln.4-7. However, when Greywind was arrested for the charge of conspiracy to commit murder, hours after the incident, he was in the company of both Huynh and Berns. Id. at p.61, ln.7-9, p.16, ln.24 - p.17, ln.4. Furthermore, Huyhn previously claimed Greywind had threatened the lives of both Huyhn and Berns if they did not murder the witness/victim in Greywind's criminal case. Id. at p.57, ln.1 - p.59, ln.19, PCR Tr. Exhibit 11. Both Huyhn and Berns have been convicted and are incarcerated and serving their time. At this point they may well perceive they have little to lose and everything to gain by abandoning the facts and fabricating a new version of events.

Both Huyhn and Berns testified at the post-conviction hearing. *See*, PCR Tr., p.7-40, p.47-61. Both men stated they lied to the police because of undue influence from police officers. Both men had convictions for tampering with witnesses. PCR Exhibit 2 or 3, and Exhibit 9, 10 or 12. According to the District Court's Findings of Fact, neither witness gave credible testimony concerning the level of their impairment on October 27, 1999. App. at A43. Neither witness was credible concerning their present recollection of, or ability to recollect, the events of October 26 and October 27, 1999. Id. The Court was present to observe the witnesses give their testimony and did not believe the recantations were genuine. The fourth prong of the Garcia test has not been met.

The interests of justice do not require a vacation of Greywind's conviction or sentence.

VII. Greywind Waived Post-Conviction and Appeal Remedies

Criminal defendants are vested with a variety of rights including, among others, the right to post-conviction relief. That right is statutory. N.D.C.C. Chapter 29-32.1. Defendants are well-served if they have an opportunity to choose between exercising that right or exchanging it for something they value more highly, such as a recommendation for a more lenient sentence. U.S. v. Michelson, 141 F.3d 867, 873 (8th Cir. 1998). The "chief virtues" of a plea agreement are speed, economy and finality. U.S. v. DeRoo, 223 F.3d 919, 923 (8th Cir. 2000). Those virtues are promoted by waivers of post-conviction remedies. Id. Waivers are strongly supported by public policy. Michelson, 141 F.3d at 873. However, to preserve their value, such waivers "must be accorded their proper effect." Id. To permit a defendant to attack the bargained-for finality would be to eliminate one of the primary incentives the government has for negotiating plea agreements. Id. Promises made in a plea agreements not only apply to the government, but with equal force against the defendant, and should be specifically enforced. U.S. v. His Law, 85 F.3d 379 (8th Cir. 1996); U.S. v. Williams, 160 F.3d 450 (8th Cir. 1998).

However, a waiver of post-conviction remedies must be the result of a knowing and voluntary decision. Williams, 160 F.3d 450; DeRoo, 223 F.3d at 923-24. A waiver is not absolute, and does not foreclose bringing an argument of ineffective assistance of counsel, where the waiver is the result of the alleged ineffectiveness. DeRoo, 223 F.3d at 924.

Within paragraph 15 of the Plea Agreement, Greywind acknowledged he

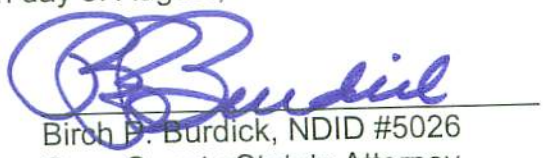
knowingly and voluntarily waived any right to appeal and post-conviction relief and that any such efforts should be summarily dismissed. App. at 16 - 17. He further acknowledged that waiver to the Court in his sentencing hearing. Sentencing Tr. at p.13, ln.23 - p.14, ln.1. Waivers of post-conviction remedies are hardly a novel concept. While they may not have been commonly used in North Dakota state courts prior to 1999, they had been commonplace in federal court proceedings. See, e.g., U.S. v. His Law, 85 F.3d 379 (8th Cir. 1996). That waiver provision is now commonplace in Cass County's written plea agreements. As discussed earlier in this Brief, there is no reason to believe Greywind's counsel was in any way ineffective in their representation of Greywind or that he otherwise was unclear about waiving these remedies.

The District Court did not rely upon the waiver provision in denying Greywind relief. However, the State asserts that it could have done so. Greywind was ably represented by counsel. He got the benefit of his bargain. He was sentenced in accord with the Agreement. The State should be allowed their benefit of finality as well. The waiver provisions can and should be specifically enforced against Greywind.

CONCLUSION

For the reasons stated above, Greywind has not carried his "heavy burden" and is not legally entitled to post-conviction relief. The State respectfully requests this Honorable Court affirm the District Court's denial of Greywind's requested relief.

Respectfully submitted this 30th day of August, 2004.



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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

AUG 30 2004

STATE OF NORTH DAKOTA

Jonathon Willard Greywind,

Plaintiff,

vs.

State of North Dakota,

Defendant.

AFFIDAVIT OF SERVICE BY MAIL
Supreme Court # 20040080
Cass County District Ct # 09-03-C-02296

STATE OF NORTH DAKOTA)
) SS.
COUNTY OF CASS)

Liza Jo Sayler, being first duly sworn on oath, deposes and states that she is of legal age and that on this date she deposited in the United States Mails at Fargo, North Dakota, a true and correct copy of the following documents and a 3½ inch computer disk in the above-entitled action:

APPELLEE'S BRIEF

The copies of the foregoing were securely enclosed in an envelope with postage duly prepaid and addressed as follows:

Jonathon Willard Greywind
ND State Penitentiary
PO Box 5521
Bismarck ND 58506-05521

Dated this 30th day of August, 2004.

Liza Jo Sayler

Subscribed and sworn to before me this 30th day of August , 2004.

HEIDI BIEGLEMAN
Notary Public
State of North Dakota
My Commission Expires May 2, 2006

Notary Public