

**ORIGINAL**

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

**20040135**

Gregory Clifford Kaiser, )  
)  
)  
Petitioner/Appellant, )  
)  
-vs- )  
)  
State of North Dakota, )  
)  
Respondent/Appellee. )

Supreme Court No. 20040135

District Court No. 09-04-C-00358

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STATE OF NORTH DAKOTA

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**Brief of Petitioner/Appellant  
Gregory Clifford Kaiser**

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Appeal from Judgment  
entered on March 17, 2004,  
in District Court, County of Cass, State of North Dakota,  
The Honorable Michael O. McGuire

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MONTY G. MERTZ (#03778)  
Attorney at Law  
1308 23rd Street South  
P.O. Box 10396  
Fargo, ND 58106-0396  
Phone (701) 293-7788  
Fax (701) 293-7269  
Attorney for Petitioner/Appellant

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## STATEMENT OF THE CASE

This is an appeal from a Judgment which dismissed an application for post-conviction relief, and was entered on the 17th day of March, 2004, by the Court, the Honorable Michael O. McGuire, Judge of the District Court, presiding. The Court entered its Order Denying Motion for Withdrawal of Plea on March 12, 2004. (Docket No. 14). Procedurally, with respect to Mr. Kaiser's motion to withdraw his guilty plea as to the charge of burglary, it does not appear that the Notice of Appeal encompasses that Order. (Notice of Appeal; Docket No. 20 & App. 56).

Mr. Kaiser, filed his Petition for Post-Conviction Relief on February 6, 2004. (App. at 2)<sup>1</sup> (Docket No. 1). The State responded on March 8, 2004. (App. at 6; Docket No.13). No evidentiary hearing was held, and there were no oral arguments. On March 12, 2004, the Court entered its Order granting the State's motion to dismiss, in which the Court ordered the dismissal of Mr. Kaiser's claim for post-conviction relief. (App. at 51)(Docket No. 15). Judgment was entered on March 17, 2004. (App. at 53)(Docket No. 17). A Notice of Appeal was filed on May 14, 2004 (Docket No. 20 & App. 55).

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<sup>1</sup>The Appendix to Appellant's brief will be abbreviated "App."

## STATEMENT OF THE ISSUE

**Whether The Trial Court's Summary Dismissal of Mr. Kaiser's Petition for Post-Conviction Relief was Erroneous?**

## STATEMENT OF FACTS

There was no evidentiary hearing in this matter. In its response, the State submitted exhibits, including the Rule 11 Plea Agreement (App. 24), part of the Transcript of the plea and sentencing hearing on October 17, 2003 (App. 34), an affidavit of Steven D. Mottinger, (App. 46), and an affidavit of James R. Brothers (App. 49).

Mr. Kaiser was facing two criminal cases. In file number 09-02-K-01833 he was charged with burglary and theft. The victim was his estranged wife. He was represented by appointed counsel Steven D. Mottinger. In file number 09-02-K-01997 he was charged with attempted murder, burglary and criminal trespass. The victim in that case was also his estranged wife. He was at first represented by Mr. Mottinger as appointed counsel, and later privately hired Attorney James Brothers. Mr. Mottinger continued to represent him in the first file. Mr. Kaiser pleaded guilty on October 17, 2003, pursuant to a written Rule 11 plea agreement. (App. 24). Pursuant to the agreement, Mr. Kaiser pleaded guilty to one count of burglary and to the attempted murder, and the State agreed to dismiss the other three counts. The State agreed to a sentence of 20 years on attempted murder, first to serve 18 years, with the balance suspended for five years, concurrently with a 5 year sentence for the remaining count of burglary. The Court followed the plea agreement.

The was no direct appeal in either criminal file. Mr. Kaiser submitted a Motion for a Rule 35 reduction of sentence covering both files, dated February 5, 2004. He also submitted a Motion to Withdraw Plea, dated February 3, 2004, in file number 09-02-K-1833. (Docket No. 2). The Court denied all of these motions. (Docket No. 36, file 09-02-K-1833; Docket No. 14 herein).

Mr. Kaiser's Petition for Post-Judgment Relief was filed February 6, 2004. (App. 2). He claimed 1) ineffective assistance of counsel; 2) his plea was not voluntary or knowingly made; 3) his conviction was obtained through a coerced confession, and 4) the prosecution failed to disclose evidence favorable to him.

The State's response included the lengthy, detailed written Rule 11 Plea Agreement. (App. 24). The State also included part of the transcript of the sentencing hearing on October 17, 2003.(App. 34). The entire original transcript is on file with the Court herewith in the records of the two criminal cases. The State submitted an affidavit signed by Mr. Mottinger (App.46). In his affidavit, Mr. Mottinger responded to and contradicted each of Mr. Kaiser's factual claims. Finally, the State submitted the Affidavit of Mr. Brothers. (App. 49). Mr. Brothers also directly responded to and contradicted Mr. Kaiser's claims.

The Trial Court filed a Memorandum Opinion and Order. (App. 51). The Court did not address any of Mr. Kaiser's substantive or factual claims. Instead, the Court relied on the paragraph in the Rule 11 plea agreement wherein Mr. Kaiser waived his right to appeal or to contest his conviction in any post-conviction proceeding. This paragraph provides as follows:

15. Defendant is aware of the right to appeal under North Dakota law. Defendant hereby knowingly and voluntarily waives any right to appeal, including any right to appeal the court's entry of judgment against him and defendant waives any right to appeal the imposition of sentence upon him by the court. Defendant further knowingly and voluntarily waives all rights to contest the conviction or sentence in any post-conviction proceeding under North Dakota law. Therefore, defendant understands that any appeal or other post-conviction relief that he might seek should be summarily dismissed by the court in which it is filed.

(App. 27). The Trial Court specifically invoked and ruled that this paragraph "is active and in effect." (App. 53). The Court did also note that: "The record of the plea hearing held on October 17, 2003 shows Kaiser was advised of his right to a jury trial. He was advised of the minimum and maximum sentences. Kaiser was also informed that he could withdraw his guilty pleas if the court did not accept the plea agreement. Kaiser also stated during the hearing that he made his guilty plea knowingly and voluntarily. He also stated he was satisfied with the representation of his attorneys." (App. 27).

### **Argument**

#### **The Trial Court's Summary Dismissal of Mr. Kaiser's Petition for Post-Conviction Relief was Erroneous.**

The Trial Court was, of course, bound by **N.D.C.C. Chapter 29-32.1**, the Uniform Post-Conviction Procedure Act as enacted in North Dakota. The standard of review applicable in this matter is set forth by this Court in ***Peltier v. State*, 2003 ND 27, 657 N.W.2d 238**:

[¶6] A trial court's findings of fact in post-conviction relief proceedings will not be disturbed unless they are clearly erroneous. ***Hill v. State***,



2000 ND 143, ¶ 17, 615 N.W.2d 135. 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 it, a reviewing court is left with a definite and firm conviction that a mistake has been made. *DeCoteau v. State*, 2000 ND 44, ¶ 10, 608 N.W.2d 240. Questions of law are fully reviewable on appeal of a post-conviction proceeding. *Falcon v. State*, 1997 ND 200, ¶ 9, 570 N.W.2d 719.

Mr. Kaiser asserted specific facts in support of his claims. Mr. Kaiser based his petition for post-conviction relief upon NDCC Section 29-32.1-01(1)(a)(b) & (c). The sum and substance of his claims were that his convictions were contrary to the laws and constitutions of the United States and the State of North Dakota because he was not afforded his right to effective assistance of counsel.

The Sixth Amendment of the United States Constitution, through the Fourteenth Amendment, and Article I, §12, of the North Dakota Constitution guarantee defendants a right to effective assistance of counsel. *DeCoteau v. State*, 1998 ND 199, ¶ 6, 586 N.W.2d 156, 157. A defendant is denied his right to effective assistance of counsel if 1) his counsel's performance is deficient and 2) the deficient performance of counsel prejudices the defendant. *Wilson v. State*, 1999 ND 222, ¶ 8, 603 N.W.2d 47. Counsel's performance is deficient if it falls below an objective standard of reasonableness. *E.g.*, *DeCoteau v. State*, 1998 ND 199, ¶ 6, 586

**N.W.2d 156, 157.** A defendant proves the prejudice element if he shows with specificity how and where counsel's performance was deficient and that, but for counsel's errors, there is a reasonable probability that the trial result would have been different. *Id.*

In his petition, Mr. Kasier claimed that neither Mr. Mottinger nor Mr. Brothers did any investigative work. (App. 3-4). He claimed Mr. Mottinger did not seek a different judge. Because Judge McGuire had ruled on a restraining order obtained by Mr. Kaiser's wife, Mr. Kasier felt there was a "conflict of interest." He asserted that counsel failed to seek an amendment of the Information, and that they failed to work with him to obtain a more favorable plea agreement that would have fit the "elements of the offense." Mr. Kaiser stated that Mr. Brothers had promised him that the charge would be reduced to aggravated assault, a Class C felony, if he would enter into a plea agreement. He felt Mr. Mottinger had acted improperly by having him "confess" to the police, against his best interests. Finally, he felt that Mr. Burdick acted improperly by not charging him with a misdemeanor for violating a restraining order instead of felony burglary. As discussed above, the State filed matters in response to these claims with its motion for summary disposition of Mr. Kaiser's petition. However, Mr. Kaiser was not afforded any opportunity to respond to the State's filings, and was not afforded an evidentiary hearing.

Procedurally, the Trial Court's summary dismissal of Mr. Kaiser's petition is plainly in error. The procedure which governs is found in **Rule 56, N.D.R.Civ.P.**, as this Court recently stated in *Johnson v. State*, 2004 ND 130:

[¶5] Under N.D.C.C. § 29-32.1-09(1), a district court may summarily dismiss an application for post-conviction relief if there is no genuine issue of material fact and the party moving for dismissal is entitled to judgment as a matter of law. We ordinarily review an appeal from a summary denial of post-conviction relief in the same way that we review appeals from summary judgment. ***Murchison v. State*, 2003 ND 38, ¶8, 658 N.W.2d 320.** Once the party moving for summary disposition has established there is no genuine issue of fact, the burden shifts to the nonmoving party to show a genuine issue of fact exists, and the party resisting the motion may not rely on the pleadings or unsupported conclusory allegations, but must present competent admissible evidence by affidavit or other comparable means. ***Whiteman v. State*, 2002 ND 77, ¶21, 643 N.W.2d 704.**

[¶6] Here, Johnson's application for post-conviction relief was filed on April 15, 2003, and the State's brief in response to the application requesting summary disposition without a hearing was filed on June 17, 2003. The district court denied the second application on July 1, 2003, two weeks after the State requested summary disposition. Because post-conviction relief proceedings are civil in nature and all rules and statutes applicable in civil proceedings are available to the parties, ***see Vandenberg v. State*, 2003 ND 71, ¶5, 660 N.W.2d 568,** Johnson, under N.D.R.Civ.P. 56(c), should have been afforded 30 days after service of the State's brief within which to serve and file an answer brief and supporting papers in opposition to the request for summary disposition. ***See Alerus Fin. v. Lamb*, 2003 ND 158, ¶ 17, 670 N.W.2d 351.**

In this case, the State filed its response and motion for summary dismissal on March 8, 2003, and the Court entered its order on March 12, 2003, only 4 days later. Mr. Kaiser should have been afforded 30 days after service of the State's brief within which to serve and file an answer brief and supporting papers in opposition to the request for summary disposition. *Id.* The Trial Court's failure to afford Kaiser his procedural rights is reversal error.

This case brings before this Court an issue which appears to be of the first impression. The Trial Court relied virtually exclusively on Mr. Kaiser's waiver of his right to seek post-conviction relief. In its response, the State cited case law from the

United States Court of Appeals for the Eighth Circuit. *United States v. Michelson*, 141 F.3d 867, 873 (8<sup>th</sup> Cir. 1998); *United States v. DeRoo*, 223 F.3d 919, 923 (8<sup>th</sup> Cir. 2000); *United States v. His Law*, 85 F.3d 379 (8<sup>th</sup> Cir. 1996); *United States v. Williams*, 160 F.3d 450 (8<sup>th</sup> Cir. 1998). In these cases, waivers such as the waiver made by Mr. Kaiser in his Rule 11 plea agreement were approved, as long as such a waiver was made knowingly and voluntarily. These waivers are commonly found in plea agreements in the United District Court for the District of North Dakota. However, such waivers are not absolute, and do 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. In the present case, Mr. Kaiser's post-conviction relief petition was essentially a claim of ineffective assistance of counsel. A claim of ineffective assistance of counsel should be resolved in a proceeding that allows the parties to fully develop the record on the issue of counsel's performance. *Eaglemen v. State*, 2004 ND 6, ¶6, 673 N.W.2d 241. "If the evidence raises a reasonable inference of ineffective representation which creates a genuine fact issue, an evidentiary hearing on a post-conviction claim of ineffective assistance of counsel is required." *Whiteman v. State*, 2002 ND 77, ¶22, 643 N.W.2d 704 (citing *DeCoteau v. State*, 1998 ND, ¶11, 586 N.W.2d 156). In this case, there was no evidentiary hearing, given the Court's reliance upon Mr. Kaiser's waiver of his right to seek post-conviction relief. The Trial Court's actions denied Mr. Kaiser his right to due process, resulting in a denial of justice. *State v. Ehli*, 2003 ND 133, ¶10, 667 N.W.2d 635. This Court should adopt a clearly delineated rule concerning a waiver

such as was included in Mr. Kaiser's Rule 11 plea agreement, in the context of a claim of ineffective assistance of counsel. The waiver will have some meaning and bearing on the issue; however, summary denial is inappropriate without proper exploration and a hearing on the record as to the claim of ineffective assistance. Here the Trial Court improperly denied Mr. Kaiser's claims without allowing him to file a response to the State's submissions, and without an evidentiary hearing. The Court's Judgment must be reversed.

### CONCLUSION

WHEREFORE, Mr. Kaiser prays that this Court reverse the Trials Court's Judgment herein, and order that he be allowed to file a response to the State's submissions, and that the matter should be remanded to the District Court for appropriate proceedings, including an evidentiary hearing.

Respectfully submitted this 7th day of July, 2004.



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Monty G. Mertz  
ND Bar ID #03778  
1308 23<sup>rd</sup> Street South  
P.O. Box 2806  
Fargo, ND 58106-0396  
Tele. (701) 293-7788  
Fax (701) 293-7269  
Attorney for Petitioner  
and Appellant

RE: Gregory Clifford Kaiser, Petitioner/Appellant and State of North Dakota,  
Respondent/Appellee

Supreme Court No. 20040135

Cass County Case No. 09-04-C-00358

**CERTIFICATE OF SERVICE BY MAIL**

I, Monty G. Mertz, do hereby certify that, on the 7<sup>th</sup> day of July, 2004, I served the Brief of Petitioner/Appellant and the Appendix upon the following, by placing true and correct copies in envelopes addressed as follows:

Ms. Penny Miller  
Clerk of the Supreme Court  
Judicial Wing, 1st Floor  
600 East Boulevard Avenue  
Bismarck, ND 58505

Mr. Birch P. Burdick  
Cass County State's Attorney  
P.O. Box 2806  
Fargo, ND 58108-2806  
(701)241-5850  
Attorney for Respondent/Appellee

and depositing the same, with postage prepaid, in the United States Mails at Fargo, North Dakota.

Dated this 7<sup>th</sup> day of July, 2004.



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Monty G. Mertz  
Attorney for Petitioner/Appellant