

IN THE SUPREME COURT STATE OF NORTH DAKOTA

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STATE OF NORTH DAKOTA

Supreme Court No. 20090291

JESSICA DELVO,

Petitioner/Appellant,

v.

STATE OF NORTH DAKOTA,

Respondent/Appellee.

ON APPEAL FROM POST-CONVICTION
FROM THE DISTRICT COURT OF NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT

BRIEF FOR PETITIONER/APPELLANT

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STATEMENT OF THE ISSUE

1. WHETHER THE TRIAL COURT ERRED IN SUMMARILY
DISMISSING JESSICA DELVO'S APPLICATION FOR POST-
CONVICTION RELIEF?

STATEMENT OF THE CASE

[¶1] Jessica Delvo has petitioned this court on appeal to review the Order denying post-conviction relief dated September 18, 2009. Ms. Delvo's judgment of conviction was entered on March 27, 2009, with the Honorable Sonna Anderson presiding. The crimes convicted and sentences imposed were entered upon a plea of guilty and were as follows:

1. 05-K-405: Count 1: Possession of Marijuana with Intent to Deliver; and Count 2: Possession of Drug Paraphernalia. On Count 1, Ms. Delvo was sentenced to five (5) years with the North Dakota Department of Corrections and Rehabilitation. Credit for fifty-four (54) days in custody was given.

[¶2] Ms. Delvo filed with the Court two (2) Motions pursuant to Rule 35 of the North Dakota Rules of Criminal Procedure. That motion was denied. Subsequently Ms. Delvo filed an Application for Post-Conviction Relief on the grounds of ineffective assistance of counsel; the conviction on the plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequence of the plea; and the conviction was obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant on June 26, 2009. The District Court, County of Burleigh, South Central Judicial District Judge, and the Honorable Sonna Anderson denied the application for post-conviction without a hearing. This appeal follows.

STATEMENT OF THE FACTS

[¶3] A hearing was not held on the application for post-conviction relief.

Judge Anderson relied on the information from the application and summarily dismissed the post-conviction application. This matter was denied without argument or testimony.

[¶4] The Appellant reasserts the allegations in the petition in as far as it may be considered without having been developed through testimony.

ARGUMENT

[¶5] This Court has indicated that an appeal from the summary dismissal of an application for post-conviction relief will be reviewed in a manner similar to the review of an appeal from a summary judgment motion. DeCoteau v. State, 1998 ND 199, ¶4, 586 N.W.2d 156. Accordingly, “[t]he party opposing the motion for summary disposition is entitled to all reasonable inferences at the preliminary stages of post-conviction proceeding, and is entitled to an evidentiary hearing if a reasonable inference raises a genuine issue of material fact. Id. (citing Owens v. State, 1998 ND 106, ¶13, 578 N.W.2d 542).

[¶6] Also, the Supreme Court “applies the “clearly erroneous” standard set forth in Rule 52(a), N.D.R.Civ.P., when reviewing a trial court’s findings of fact on an appeal from a final judgment or order under the Uniform Post-Conviction Procedure Act.” State v. Foster, 1997 ND 8, ¶18, 560 N.W.2d 194. 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.

Clark v. State, 2008 ND 234, ¶11, 2008 WL 5246330. The decision of the district court to summarily dismiss the post-conviction application without development of the record was clearly erroneous as it is not supported by case law. Further, Ms. Delvo raised a material issue of fact and should have been allowed to present the testimony at a hearing.

I. THE DISTRICT COURT FOR THE SOUTH CENTRAL JUDICIAL DISTRICT ERRED IN SUMMARILY DISMISSING THE APPLICATION FOR POST-CONVICTION RELIEF.

A. Applicants are not required to include all supporting evidentiary matter in their original post-conviction application.

[¶7] The State of North Dakota has adopted the Uniform Post-Conviction Procedure Act to control this matter. N.D.C.C. §29-32.1-04 states the rules to follow regarding post-conviction applications:

1. The application must identify the proceedings in which the applicant was convicted and sentenced, give the date of the judgment and sentence complained of, set forth a concise statement of each ground for relief, and specify the relief requested. Argument, citations, and discussion of authorities are unnecessary.
2. The application must identify all proceedings for direct review of the judgment of conviction or sentence and all previous post-conviction proceedings taken by the applicant to secure relief from the conviction or sentence, the grounds asserted therein, and the orders or judgments entered. The application must refer to the portions of the record of prior proceedings pertinent to the alleged grounds for relief. If the cited record is not in the files of the court, the applicant shall attach that record or portions thereof to the application or state why it is not attached. Affidavits or other material supporting the application may be attached, but are unnecessary.

“The statute does not require the applicant to include in the original application all supporting evidentiary matter necessary.” State v. Bender, 1998 ND 72, ¶19, 576 N.W.2d 210. Ms. Delvo “must set forth a concise statement for each ground of relief and specify the relief requested.” Eagleman v. State, 2004 ND 6, ¶11, 673 N.W.2d 241. Ms. Delvo set forth a concise statement for each ground of relief and specified the relief requested in her application.

[¶8] However, when considering the post-conviction application, the District Court relied strictly on the materials set out in Ms. Delvo's application.

It would be blatantly unfair to subject a defendant's post-conviction application to summary dismissal for failure to provide evidentiary support not available in the record of prior proceedings, when the statute explicitly provides such additional evidentiary support is 'unnecessary' in the original application.

Wilson v. State, 1999 ND 222, ¶15, 603 N.W.2d 47 (Citing Bender, at ¶20). Ms.

Delvo was prepared to fully present any and all evidence in support of her application at a hearing. However, Ms. Delvo was not allowed to testify or present testimony on the matter to further develop a record to consider effectiveness of counsel and post-conviction was denied on the record.

B. The purpose of the Uniform Post-Conviction Procedure Act is to furnish a method to develop a complete record to challenge a criminal conviction.

[¶9] A post-conviction proceeding affords an opportunity to establish a record for review on appeal. "The express purpose of the Uniform Post-Conviction Procedure Act, as codified in N.D.C.C. Ch. 29-32.1, is to furnish a method to develop a complete record to challenge a criminal conviction." Bender, at ¶20 (Citing State v. Wilson, 466 N.W.2d 101, 103 (N.D. 1991)). The post-conviction hearing allows the parties to "fully develop a record on the issue of counsel's performance and its impact on the defendant's case and to challenge a criminal conviction and sentence." DeCoteau v. State, 1998 ND 199, ¶7, 586 N.W.2d 156. The District Court rendered its decision based upon the record of the

sentencing and the assertions made by counsel in pleadings not allowing other evidence to be presented. Therefore, under the tenets of Bender and its progeny, testimony should have been taken to establish a record where the record was void.

Ms. Delvo was fully prepared to establish a complete record before the District Court. However, Ms. Delvo was not allowed to present testimony or to testify at a hearing.

C. The District Court improperly relied solely upon records of previous proceedings and bare assertions necessary in post-conviction application petition to deny relief.

[¶10] North Dakota statute provides what evidence may be heard at a post-conviction hearing.

1. Evidence must be presented in open court, recorded, and preserved as part of the record of the proceedings.
2. **A certified record of previous proceedings may be used as evidence of facts and occurrences established therein, but use of that record does not preclude either party from offering additional evidence as to those facts and occurrences.**
3. The deposition of a witness may be received in evidence, without regard to the availability of the witness, if written notice of intention to use the deposition was given in advance of the hearing and the deposition was taken subject to the right of cross-examination.

N.D.C.C. §29-32.1-10 (emphasis added). Ms. Delvo was not given the opportunity to present her evidence in open court or to proffer information needed to create an adequate record. The District Court did refer to prior proceedings in its Order summarily dismissing Ms. Delvo's post-conviction, citing that her admissions at the November 26, 2008, revocation of probation were voluntarily

made and were not coerced. However, this record does not show occurrences that happen outside of the courtroom nor did it allow Ms. Delvo to expand the points cited in her application for post-conviction.

[¶11] Ms. Delvo properly made assertions that Counsel's performance in entering into the guilty plea was deficient in her application for post-conviction relief. However, the District Court failed to allow her to develop those arguments. N.D.C.C. §29-32.1-10(2) allows either party to develop additional facts as to the occurrences that appear in the record. The District Court failed to allow for this development of potential ineffectiveness in representation. To do so was contrary to statute, and an erroneous view of the law given this court has held that there may be ineffective assistance of counsel in a guilty plea. (See generally Sambursky v. State, 2006 ND 223, 723 N.W.2d 524 (holding that misinformation portrayed to a defendant leading to a guilty plea may be grounds for a claim of ineffective assistance of counsel)).

A different procedural environment exists to explore the question of effectiveness of counsel in a post-conviction proceeding. Without confinement to the transcript, post-conviction procedures allow development of additional evidence to evaluate claims.

Bender, at ¶ 21. This applies in particular when, as in Delvo's case, "the defendant's allegations of ineffective assistance involve incidents which did not occur in open court and require additional evidence and development of a record for review." Id (citing State v. Robertson, 502 N.W.2d 249, 251 n.1 (N.D. 1993)). When confinement to a transcript to decide an application for post-conviction

occurs, like in this case, “the post-conviction procedure becomes no better than direct review on appeal.” State v. Wilson, 466 N.W.2d at 103. Ms. Delvo was not allowed to present additional evidence for the record. Therefore, the District Court erred in strictly relying on prior proceedings and Ms. Delvo’s application, necessitating a remand to the District Court for development of such assertions.

II. MS. DELVO WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

[¶12] Ms. Delvo reasserts her claim of ineffective assistance of counsel as contained in her pleadings. The court may, when the issue has not been developed, consider the entire record to determine if counsel’s representation was defective. State v. Denney, 417 N.W.2d at 183. However, it is not discernable from the record in this case given the allegations purport to ineffective assistance in representation matters outside of the courtroom. Therefore, as post-conviction was denied without development, the only natural result would be a remand to develop the issue.

CONCLUSION

[¶13] For the aforementioned reasons, the Appellant Ms. Jessica Delvo's application for post-conviction was erroneously summarily dismissed by the District Court. The Court erred in not taking oral argument from counsel and relying on Ms. Delvo's application, which is contrary to N.D.C.C. §29-32.1-04, 10. Therefore, Ms. Delvo prays the Court reverse the lower court's decision and remand this matter for a post-conviction hearing.

Dated this 30th day of December, 2009.

Respectfully submitted:

/s/

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