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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

James Bjarko, Petitioner-Appellant, vs. State of North Dakota, Respondent-Appellee.) Sup. Crt. Nos.: 20100070-71) Dist. Crt. Nos.: 53-98-K-0957, 53-99-K-0919

BRIEF OF APPELLEE
STATE OF NORTH DAKOTA

APPEAL FROM THE JANUARY 7, 2010 OPINION OF THE DISTRICT COURT FOR WILLIAMS COUNTY DENYING PETITIONER'S APPLICATION FOR POST-CONVICTION RELIEF, THE HONORABLE WILLIAM MCCLEES PRESIDING

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Full name	Abbreviation
Post-conviction hearing transcript ……..	PC.T.
Probation revocation hearing transcript …….....	RH.T.
Affidavit in support of post-conviction application ……	A.S.
Original application for post-conviction relief ……...	O.A.
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Statement of the Issues

[¶1] 1. THE DISTRICT COURT DID NOT ERR IN DENYING BJARKO'S APPLICATION FOR POST CONVICTION RELIEF.

Statement of the Facts/ Statement of the Case

Attorney Anseth's representation

[¶2] Bjarko's original conviction for Gross Sexual Imposition dates back to December 10, 1999. This was the matter in which Attorney LeRoy Anseth provided representation for Bjarko. Approximately ten (10) years after this conviction date, Bjarko filed the underlying post-conviction relief application in which he made numerous claims regarding Attorney Anseth's supposedly deficient performance. Bjarko also claimed that his original guilty plea was not knowingly, voluntarily, or intelligently made.

[¶3] At the post-conviction relief hearing, Attorney Anseth testified that he met approximately one-hundred times in some fashion with Bjarko during the course of his representation. (PC.T. 52:3-19). Bjarko testified that there were multiple meetings between Attorney Anseth and himself during the course of the representation. (PC.T. 103-140; 131:17-20).

Entry of plea.

[¶4] In Bjarko's affidavit supporting the application for post-conviction relief, dated March 22, 2008, he states:

> The Atny's[sic] secratary[sic] was running to the state's atny's[sic] office and back telling Anseth there was a proposed plea for 6 years on all charged and counts. Anseth kept pressuing me to take the deal. He told me i[sic] would get 10 Yr[sic] in prison if i[sic] did not take a deal. After all this i[sic] broke down and began to cry. Anseth keep pressuring me. When the secratary[sic] came back and told Anseth that the state[sic] said 5 years on all charges and counts i[sic]] finally broke and agreed to

> plead guilty. I felt like i[sic[was coerced into doing so. I was never told I could get over 5 years by Anseth. If he would have told me prior to pleading guilty, i[sic] would not have plead guilty… .(A.S. ¶4).

[¶5] Bjarko was aware of the terms of the State's plea offer before the October, 2009 hearing. (PC.T. 104-109). After the State's plea offer was presented to Bjarko, he and Attorney Anseth engaged in negotiations with the State at the request of Bjarko. (PC.T. 109-110).

Attorney Nehring's representation.

Appeal.

[¶6] On direct examination, Bjarko stated that he has never asked Attorney Nehring to file an appeal on his behalf after the revocation of probation hearing. (PC.T. 118:13-25; 122-123; 124:10-12). At the post-conviction relief hearing, Bjarko admitted on both direct and cross that he had never requested Attorney Nehring file an appeal from his probation revocation hearing, despite his arguments and assertions otherwise. (PC.T. 118:13-25(direct);133-135). Barko included these false claims as sworn statements in his affidavit in support of his application for post-conviction relief. (A.S. ¶1). In addition to forming the foundation of several allegations in Bjarko's post-conviction relief proceedings, these false claims have returned in Bjarko's Statement of Facts. (Appellant's brief ¶21). The District Court noted regarding this admission:

> With respect to attorney Nehring, Bjarko made what the Court feels is a particularly damaging admission, at the October 20, 2009 hearing, that he (i.e., Bjarko), did *not* ask Nehring to file an appeal from Judge Nelson's decision in the probation revocation proceeding - - - which is contrary to what Bjarko prominently alleged in his Application for Post-Conviction Relief. Obviously, an attorney cannot be taken to task for not pursuing an appeal when the attorney's client does not request that an appeal be taken. (PC.O. 14)(emphasis in original).

Divorce.

[¶7] Prior to Attorney Nehring's representation of Bjarko, Attorney Nehring represented Bjarko's ex-wife, Diane Sailer, in a divorce action. This action was completely finished before Bjarko's post-conviction relief proceedings were initiated by the State. Further, Ms. Sailer was never called as a witness in the revocation action and was not a party to the revocation action. See. (RH.T. 2)(table of witnesses); (PC.T. 28:6-19); (PC.O. 16). Ms. Sailer also did not benefit from the revocation proceedings.

[¶8] The final entry of judgment in Bjarko's divorce action, case number 53-99-C-371-1, occurred on February 9, 2004.

[¶9] At no point did Attorney Nehring represent Bjarko in a suit against his ex-wife, Diane Sailer. (PC.T. 28:20-22).

[¶10] Bjarko specifically requested that Attorney Nehring represent him in the probation revocation proceedings. Additionally, the law firm of Peterson & Nehring, of which Attorney Nehring was a partner, represented Bjarko in a Sexually Dangerous Individual Commitment ("SDI") proceeding between the divorce matter and the probation revocation matter. (PC.T. 44-45). The law firm of Peterson & Nehring was successful in defending the SDI proceeding. (PC.T. 44-45). Neither Bjarko, nor his current counsel, have filed any complaints regarding Attorney Nehring's work in the SDI case. (PC.T. 45:2-7, 149); (PC.O. 16).

Documentary evidence.

-Burleigh County Order.

[¶11] In his post-conviction relief application, Bjarko complained that Attorney Nehring had failed to present a court order from Buleigh County regarding his pending

trespassing case in that county. Bjarko's revocation of probation hearing was held December, 2006. The court order dismissing the criminal trespass charge, was dated April 30, 2007. As such, the order was generated approximately 4-5 months after Bjarko's revocation hearing. (PC.T. 36-37)

[¶12] This fatal flaw was noted by the District Court when Judge McClees stated: "Bjarko's assertion that Nehring was remiss in not offering the April 30, 2007, Order dismissing the Burleigh County criminal trespass charge at the probation revocation hearing is off the mark for one very obvious reason: This dismissal Order was issued approximately four (4) months *after* the probation revocation hearing." (PC.O. 15)(italics in original).

-Petition to amend terms of probation.

[¶13] This document was both signed and set before the District Court for Williams County by Bjarko. (R.O.A. #51). The document also contains a waiver of counsel. Id. After the post-conviction hearing, the Court noted: "… Bjarko's criticism of Nehring's failure to challenge the validity of certain amended conditions of probation to be unwarranted, as it was Bjarko himself who *agreed* to having the amended conditions put in place." (PC.O. 15)(italics in original).

Witnesses.

-Landlord/Apartment manager

[¶14] Bjarko had been working as a handyman/painter at an apartment complex in Burleigh County. At the end of the revocation hearing, Judge David Nelson found that Bjarko had committed trespass when he went inside the Carter's apartment. (RH.T. 99:1-8). This was based upon Bjarko exceeding the scope of his license to be in the apartment.

Id. Specifically, Judge Nelson noted that Bjarko had entered the apartment to deliver stuffed animals, and not to engage in handyman or painting activities. Id.

[¶15] The Court accepted that Bjarko did work as a handyman/painter at the complex, which is the reason Bjarko claimed the apartment manager should have been called. (RH.T. 98-99); (PC.O. 14).

-Mrs. Carter

[¶16] The State sought to introduce Mrs. Carter's testimony in written form at the revocation hearing. Attorney Nehring challenged this, and drafted a motion to keep the written statements out, claiming that the written statements violated the Confrontation Clause. (PC.T. 32-34). Attorney Nehring was ultimately successful, as Mrs. Carter's written statement was not introduced at the revocation hearing. Mrs. Carter's written statement was highly unfavorable to Bjarko. (PC.T. 33-34). Attorney Nehring considered Mrs. Carter to be a hostile witness, with nothing favorable to add for Bjarko. Id. Ms. Carter was called by neither party to the revocation action. (RH.T. 2)(table of witnesses).

Montana witness.

[¶17] Bjarko claims ineffective assistance through failure to call an unnamed person from Montana or to present some type of documents from Montana saying that he had permission to be there to visit his granddaughter. However, the District Court found that he may have believed that he had permission to be there, and thus did not put "too much weight" on it. (RH.T. 98:18-23); (PC.O. 15). Further, there were six (6) other violations of probation conditions.

Other matters.

[¶18] Bjarko also made numerous other allegations of ineffective assistance relating to Attorney Nehring. These included: failure to argue "insufficient time to comply" regarding possession of pornographic material, numerous pictures of children, and stuffed animals.

[¶19] At the probation revocation hearing, Bjarko testified that he had watched parts of the pornographic video, kept it overnight, then played portions of it the next morning to see if it was his thing. (RH.T. 72). Specifically Bjarko stated:

> It got later in the evening, so I stuck this tape in the machine. This is the day before I got arrested. I stuck the tape in the machine, and right away I seen it was pornographic. I watched it for about four or five seconds. That's all. I shut the thing down. I took the tape out. I laid it on the floor. And the next morning I took and put the tape back in the machine, and watched it again for a few seconds. And I realized it wasn't my thing anymore. So, I took it out. Okay. (RH.T. 72: 11-20).

[¶20] During the probation revocation hearing, Bjarko testified that he had kept the pictures of children (his grandchildren), leaving them on top of his television set, and preparing to place them in albums. (RH.T. 61-62). Specifically, Bjarko stated: "I have albums that had hundreds of pictures in, and I was gonna[sic] put them in the album." (RH.T. 62:23-24).

[¶21] Also at the revocation hearing, Bjarko testified that instead of immediately disposing of the stuffed animals that his relatives had dropped off, he offered the animals to the Carters and then he delivered one or more of them to the Carter's apartment. (RH.T. 65:9-13; 68-71).

-Leg bracelet GPS.

[¶22] At the conclusion of the probation revocation hearing, the District Court found that Bjarko was at the Burleigh County apartment complex, the same location Bjarko claimed to have been at. Further, Bjarko himself repeatedly testified during the revocation hearing that he was at the Carter's apartment. (RH.T. 67-68)(moving furniture);(RH.T. 68-70)(delivering stuffed animals); (RH.T. 70-71)(dealing with painting issues).

Attorney Johnson's representation.

[¶23] Attorney Johnson testified that he had discussed the direct appeal with Bjarko, and had recommended a post-conviction relief approach instead. (PC.T. 87:7-25; 97-98). Attorney Johnson had noted that the issue Bjarko sought appellate review of was a frivolous credit for time served matter. Id. Additionally, Attorney Johnson testified that he moved to dismiss the appeal after Bjarko agreed that the appeal should be dismissed due to potential adverse effects on post-conviction relief filings. Id.

[¶24] The basis of this concern was the potential *res judicata* effect of an unsuccessful appeal on future proceedings. (PC.T. 97-98). The other concern was misuse of process issues on a subsequent post-conviction relief application following an unsuccessful appeal for essentially the same reasons. (PC.T. 98: 2-17).

Standard of review

[¶25] The State has been unable to find a statement of the standard of review in Bjarko's brief contrary to the requirements of N.D.R.App.P. 28(b)(7)(B). As such, the State includes a statement of the standard of review as provided for in N.D.R.App.P. 28(c)(5).

[¶26] Ineffective assistance of counsel claims are fully reviewable on appeal as mixed questions of fact and law. However, in post-conviction proceedings, findings of facts will not be disturbed unless clearly erroneous. Rummer v. State, 2006 ND 216, ¶9, 722 N.W.2d 528.

Law and Argument

1. THE DISTRICT COURT PROPERLY DENIED BJARKO'S APPLICATION FOR POST-CONVICTION RELIEF.

[¶27] A post-conviction applicant bears the burden of establishing a basis for relief. State v. Steen, 2004 ND 228, ¶9, 690 N.W.2d 239; Klose v. State, 2005 ND 192, 705 N.W.2d 809.

The ineffective assistance standard

[¶28] Defendants bringing ineffective assistance of counsel claims bear the heavy burden of showing that counsel's performance fell below an objective standard of reasonableness and that the defective performance prejudiced them. Steen, 2004 ND 228, ¶9, 690 N.W.2d 239; Klose, 2005 ND 192, 705 N.W.2d 809; Clark v. State, 2008 ND 234, 758 N.W.2d 900; Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Robertson, 502 N.W.2d 249, 251 (N.D. 1993).

[¶29] The objective standard of reasonableness includes the prevailing professional norms." Steen, 2004 ND 228, ¶9, 690 N.W.2d 239 (internal citations omitted). Trial counsel's performance is presumed to be reasonable and courts must consciously limit the distorting effects of hindsight. Id. at ¶10 (internal citations omitted). Analysis of counsel's performance requires consideration of all circumstances, and a determination as to "whether there were errors so serious that defendant was not accorded

that 'counsel' guaranteed by the Sixth Amendment." Klose, 2005 ND 192, ¶10, 705 N.W.2d 809 (internal citations omitted).

[¶30] When a defendant, such as Bjarko, clearly fails to meet his burden on one of the prongs, this Court need not address the remaining prong. Id. at ¶10.

[¶31] To show ineffective assistance of counsel, a defendant must "demonstrate with specificity how and where trial counsel was incompetent, and it is probable a different result would have been obtained had trial counsel not performed incompetently." Klose, 2005 ND 192, ¶10, 705 N.W.2d 809 citing State v. Burke, 2000 ND 25, ¶36, 606 N.W.2d 108

[¶32] The State notes that this is a classic case of an unsuccessful post-conviction relief applicant asking this Court to reweigh the evidence presented and come to a different conclusion than the District Court. This Court has previously noted: "The task of weighing the evidence and judging the credibility of witnesses belongs exclusively to the trier of fact, and we do not reweigh credibility or resolve conflicts in the evidence." Odom v. State, 2010 ND 65, ¶12 (after four attorneys testified for Odom).

[¶33] Here, the District Court was presented with the testimony of three attorneys, and Bjarko… an applicant who admitted he had never requested Attorney Nehring ever file an appeal, yet claimed in both his application and affidavit in support that Attorney Nehring had failed to file requested appeals. Despite being admittedly false, these claims still appear in Bjarko's appeal brief, where Bjarko once again claims that Attorney Nehring failed to file an appeal at his request. (Bjarko appeal brief ¶21); See. N.D.R.Prof.Conduct 3.1, 3.3; N.D.R.Civ.P. 11(b)(3).

[¶34] During the post-conviction relief proceedings, Bjarko had extreme difficulty maintaining the same story. Bjarko told internally inconsistent and conflicting stories on direct, on cross, on questioning by the Court, and in his affidavit in support of the application.

Anseth's representation.

[¶35] These claims began life, in part, as an argument that after approximately ten (10) years had passed, Bjarko's original guilty plea was not knowingly, intelligently, or voluntarily made. See. Johnson v. State, 2006 ND 122, 714 N.W.2d 832 (application of laches defense after eight and one-half year delay in challenging guilty plea). These claims then evolved into contentions of Attorney Anseth failing to communicate with Bjarko, and ultimately into claims of violations of the Rules of Professional Conduct.

[¶36] The State notes that Bjarko set forth no reasons as to why he waited approximately 10 years to file this attack on Attorney Anseth's representation despite the intervening legal proceedings. Johnson, 2006 ND 122, ¶23, 714 N.W.2d 832. It is worth noting that Bjarko never asked Attorney Anseth to appeal from his original conviction. (PC.T. 111:1-19).

N.D.R.Crim.P. 16 discovery request.

[¶37] Discovery issues involving N.D.R.Crim.P. 16 can be, and have been, raised on direct appeal in other cases. E.g. State v. Charette, 2004 ND 187, 687 N.W.2d 484. However, Bjarko inexplicably waited approximately ten years to raise this issue for the first time. See. Johnson, 2006 ND 122, 714 N.W.2d 832.

[¶38] Contrary to Bjarko's claims, Ramstad does not support his position. Ramstad dealt entirely with the duty of prosecutors to comply with N.D.R.Crim.P. 16 requests. City of Grand Forks v. Ramstad, 2003 ND 41, 658 N.W.2d 731.

[¶39] Bjarko has set forth nothing which shows a reasonably probable different outcome with regard to his N.D.R.Crim.P. 16 claims. Compare. Ramstad, 2003 ND 41, 658 N.W.2d 731(items material to defense). When, as in this case, it is easier to dispose of an ineffective assistance of counsel claim for lack of prejudice that course should be followed. Noorlun v. State, 2007 ND 118, ¶41, 736 N.W.2d 477.

Plea negotiation claims.

[¶40] Here, Bjarko repeatedly claims lack of communication between Attorney Anseth and himself, contending that October 20, 2009 was the first time he saw the paper plea offer. (Bjarko appeal brief ¶16).

[¶41] However, the record shows that Bjarko knew of the proposed terms of any plea agreement well before the October, 2009 post-conviction relief hearing. On page 1 of the "affidavit" in support of his post-conviction relief, dated March 22, 2008, Bjarko states that he had discussed the State's offer with Anseth. (A.S. 1). Also on page 1 of the affidavit, Bjarko stated essentially that Attorney Anseth told him to take the offer or he would be looking at ten (10), or more, years. Id.

[¶ 42]At the post-conviction relief hearing, Bjarko testified that:

> (Direct) **Q:** Okay. But if you wanted to go to trial, why did you change your plea -- or offer an Alford plea -- can you explain to the Court why? **A:** Well, I started crying and balling and I told 'em, I said, it -- I just don't want to plead guilty to something I'm not guilty of and so then he stated to me that I could get -- if I went to trial and -- and the victim got on the stand and started balling[sic] that I would get 10-30 years. **Q:** Okay. Who told you that -- you said he said that. **A:** LeRoy. **Q:** Mr. Anseth. **A:** Yes. …

(PC.T. 107:1-12). (parenthetical annotations, bolding, and case name underlining added).

(Direct) [Discussion of failure to take depositions]. **Q:** Okay. **A:** And just never did happen [,] so then he called me up one day and he says come on down and then that's when I went down and -- and the -- his secretary come with the 10 year off -- plea agreement offer and -- then I start -- I just -- it just hit me that I wasn't prepared for it and so then I -- so then I said well, I'll go for five and she went back and came from the State's Attorney and said okay. **Q:** Okay. So that would've been in March then of 1999, is that right? **A:** No, no -- it was later on in the year, because I went to prison in December of '99. [Questions about time line of plea negotiation with State]. **Q:** Exhibit eight, I think is in August, does that sound about right? Exhibit Nine was the one that pre-dated that exhibit by five months, the letter that was dated March. **A:** Well[,] that sounds about right. (PC.T. 109-110)(parenthetical annotation and bolding added).

(Cross) **Q:** You testified here today that you had discussed plea agreements with Attorney Anseth, am I not correct? **A:** I don't recall ever -- other than the day we -- that the plea agreement was completed. Before that, I hear him say on the stand that we talked about what could happen, or pleas and all that -- never, ever, ever did I recall ever talking to him about any pleas or what it's all about. **Q:** However, didn't you testify today that after you got a plea agreement for 10 years, that you told him you'd take five and he sent his secretary over to the State's Attorney's office[sic]. **A:** There was nothing ever mentioned about any 10 years or anything. It was six years that the -- that the State's Attorney came with six years and then I said I'd go for five. That's all that was ever talked about any -- any sentencing -- sent -- or any --…" (PC.T. 131-132)(parenthetical annotation and bolding added).

(Court) **Q:** Okay. Now you're saying you feel that Mr. Anseth, quote unquote forced you to plead guilty. You'll have to explain that to me a little bit more. **A:** Well, he just kept telling me if -- if we -- if I went to trial that witness would cry on the stand and I'd be sunk. I'd -- I'd do 10 to 30 years. (PC.T. 155:1-6)(parenthetical annotation and bolding added).

(Court): **Q:** Okay. And you're -- you're sure you only talked about this agreement the one time or --- **A:** Well, like today he testified that we had a lot of discussions about plea bargains and what could happen and about this -- all the sentencing that I could get if I went

> to court and all that. We never talked about any of that, ever… .(PC.T. 156:8-14).
>
> (Court) **Q:** [Discussing proposed plea offer dated March 2, 1999] Do you recall, was that about when the agreement was presented for your consideration. **A:** This piece of paper that you have there is the first time I ever seen it in my life was today. **Q:** Well, that may well be, but I'm just asking was that when the agreement was presented to you. **A:** No.(PC.T. 158-159)(parenthetical annotation and bolding added).

[¶43] The State asserts that that Bjarko's complete and utter lack of credibility is aptly demonstrated by his continuously conflicting claims. Clearly, Bjarko cannot credibly claim that he never heard Attorney Anseth discuss ten (10) years, yet then claim that specifically because Attorney Anseth said he could get ten (10) years or even thirty (30) years, he involuntarily pleaded guilty.

[¶44] During the course of Bjarko's testimony at the post-conviction hearing, the District Court heard Bjarko claim: 1) That he was told by Attorney Anseth that he could get 10-30 years; 2) That Attorney Anseth never told him he could get 10 years; 3) That Bjarko made the Alford plea because he was scared of the 10-30 years; 4) That there were no sentencing discussions; and 5) That after receiving the State's offer of six (6) years to serve, he said he would take five (5) years. In his "affidavit" in support, Bjarko states: "He told me i[sic] would be 10 Yr[sic] in prison if I did not take a deal." (A.S. ¶4). These conflicting and inconsistent claims are in stark contrast to Attorney Anseth's testimony that he would always discuss minimum and maximum penalties. (PC.T. 67-68).

[¶45] Further, Bjarko claims to have never engaged in any plea negotiations. (PC.T. 132: 2-6). Yet, Bjarko then testifies that in response to the State's offer of six (6) years to serve, he would go for five (5). (PC.T. 132:12-15). Additionally, his "affidavit"

shows that he engaged in plea negotiations. (A.S. ¶4). Bjarko later admitted that he had accepted the plea agreement after considering the alternatives. (PC.T. 155-156).

[¶46] While Bjarko complained that he did not discuss the matters directly with the State's Attorney, communication between the State's Attorney and Bjarko was prohibited because Bjarko was represented by an attorney. N.D.R.Prof.Conduct 4.2. The State asserts the above-referenced communications demonstrate that Bjarko did engage in plea negotiations, and that he was successful in getting what he wanted in five years to serve.

[¶47] Even more tellingly, Bjarko claims in paragraph three of his affidavit that his attorney (which one is not clear) told him that he was not going to prison. (A.S. ¶3). Bjarko then cites to this paragraph when claiming Attorney Anseth pressured him into pleading guilty. (O.A. 4). The State notes the obvious contradiction between Bjarko's claims of being afraid of Anseth's statements that he could serve 10-30 years, and his sworn statement that his attorney, in this case Anseth by reference, told him he would not go to prison. Once again, the District Court was faced with conflicting claims by Bjarko, which demonstrate his complete lack of credibility.

[¶48] In essence, Bjarko could not tell the same story at any time regarding Attorney Anseth's representation, or other pre-trial matters. The State also notes with regard to pre-trial matters, that Bjarko claimed to not remember ever appearing before the Court for a change of plea proceeding on the felonies. (PC.T. 161-163). Despite these claims, Bjarko was able to correct the Court that it was Judge Rustad and not Judge Nelson. (PC.T. 163:4-10). However, once the questioning returned to whether any

sentencing information was presented by the Court, Bjarko returned to not being able to remember anything. (PC.T. 163:11-18).

[¶49] Bjarko's comments that plea negotiations took place in December, 2009 is not an accurate representation of when the negotiations took place. First, there was a pre-sentence investigation, which Bjarko notes in his appeal brief. (Bjarko appeal brief ¶8). Bjarko could not inform the Court of when the negotiation occurred; December, November, August, and March, 1999 were all discussed. (PC.T. 110).

[¶50] Later, Bjarko claimed that the change of plea had to occur late in the year and shortly before December, 1999. (PC.T. 113:8-17). Then, Bjarko claimed that the plea negotiations were about one month before he was sentenced. (PC.T. 159: 6-7). The District Court docket sheets clearly show that this statement is incorrect, and the formal entry of a guilty plea occurred in August, 1999. (R.O.A. ##27, 28).

[¶51] In this widespread collection of dates, Bjarko has set forth no explanation as to why the date of signing or filing the final written plea agreement should be considered the date of negotiations. Such a final written plea agreement would, by necessity, come after any plea negotiations.

[¶52] Attorney Anseth testified that there would have been negotiations between the defense and state after the initial plea offer and before the final agreement. (PC.T. 56-57). Attorney Anseth also testified that there would have been several meetings in an ongoing process regarding the proposed plea agreement, and that plea agreements are not something done the day before entering a plea. (PC.T. 59:5-14). Additionally, Attorney Anseth testified that he always discussed plea agreements with his clients in criminal

matters, and that he would have discussed the agreement in detail with Bjarko. (PC.T. 64-65).

[¶53] However, Bjarko is now asking this Court to randomly pick a date between approximately August, 1999 and October 20, 2009. (Bjarko appeal brief ¶42). The State notes that the burden of proof in post-conviction relief proceedings alleging ineffective assistance of counsel is on the applicant to show with specificity where and how counsel's performance was deficient. Noorlun, 2007 ND 118, ¶41, 736 N.W.2d 477.

[¶54] The outer limit of these claims is clearly inaccurate. Bjarko's testimony at the post-conviction relief hearing and the information contained in his application demonstrate knowledge of the State's offer well before October 20, 2009. (PC.T.158-159) (A.S. ¶4). The August, 1999 date is also infirm, because that is merely the filing date for the final written plea agreement.

[¶55] The State asserts that Bjarko's request that this Court select a random date for the date of plea negotiations does not meet the requirement that he show with specificity where and how Attorney Anseth was ineffective. Noorlun, 2007 ND 118, ¶41, 736 N.W.2d 477.

[¶56] On the subject of plea negotiations, the District Court was faced with the perpetually inconsistent and conflicting testimony of Bjarko and the testimony of Attorney Anseth.

[¶57] The District Court is in the best position to gauge the credibility of witnesses, as it sees them live and in person, and does not operate from a "cold" record. This position is reiterated in numerous 2010 cases including: State v. Wanner, 2010 ND

121, ¶9; City of Mandan v. Gerhardt, 2010 ND 112, ¶7; State v. Dahl, 2010 ND 108, ¶¶8-9; Odom 2010 ND 65, ¶12 (credibility of witnesses in post-conviction proceedings).

[¶58] Here, Bjarko's testimony varied, encompassing claims of: 1) Never discussing sentencing; 2) Never discussing ten (10) years; 3) Being told he could serve ten years; 4) Being told he could be facing 10-30 years; 5) Requesting five years to serve instead of six; and 6) according to his affidavit having his attorney tell him he would not go to prison. The District Court noted that Bjarko's testimony of asking for five years and not six, and receiving the five year figure undermined his credibility. (Post-conviction order 13).

[¶59] In contrast, the District Court noted that Attorney Anseth has a wealth of knowledge, and is experienced in criminal law. Id. at 13-14.

[¶60] Therefore, the State asserts that the District Court was correct in determining that Attorney Anseth did discuss the proposed plea agreement with Bjarko, and that Attorney Anseth provided Bjarko with effective assistance.

[¶61] As such, the State asserts that Bjarko has failed to even meet the first prong of specifically showing objectively unreasonable conduct. When considering the prejudice prong, the State notes that Bjarko received the five years to serve he requested, and has thus failed to show prejudice. See. Noorlun, 2007 ND 118, ¶41, 736 N.W.2d 477.

Claims regarding N.D.R.Prof.Conduct 1.3 and 1.4.

[¶62] These claims were added in the post-hearing brief after Bjarko's post-conviction hearing, and have in large portion been copied and pasted into Bjarko's appeal brief. This appears to be an attempt by Bjarko to find some possible claim of attorney malpractice on which to hang his ineffective assistance argument.

[¶63] Bjarko attempts to convert the above claim into a violation of N.D.R.Prof.Conduct 1.3 and 1.4. Both Bjarko and Attorney Anseth testified that there were numerous meetings regarding Bjarko's pending matters. The only difference in testimony about the number of meetings relates to the plea negotiations, something in which Bjarko would have an inherent self-interest. The State asserts that this is consistent with the changing testimony of Bjarko, which would vary with the topics involved, such as claiming to never have appeared in court for his change of plea, yet being able to tell the Court which judge he appeared in front of.

[¶64] The State notes that these claims are based entirely upon the unreliable, ever changing, and at times patently false statements of Bjarko. As noted above, at the hearing, Bjarko could not tell the court which month plea negotiations occurred in 1999.

[¶65] Regarding the remainder of the Rules of Professional Conduct allegations, the State refers to the above section on plea negotiation.

[¶66] As with the other negotiation of plea agreement claims, the State asserts that Bjarko has failed to specifically show objectively unreasonable conduct, let alone any prejudice, as he obtained the five years to serve he asked for.

Attorney Nehring's representation.

The N.D.R.Prof.Conduct 1.7 claims.

[¶67] The State asserts that N.D.R.Prof.Conduct 1.7 simply does not apply to this situation. Attorney Nehring, of the firm Peterson & Nehring, represented Bjarko's ex-wife at the conclusion of the divorce action. The divorce action, initiated by Bjarko, was concluded well before the revocation action was ever filed. (PC.T. 144-145). After the divorce action was concluded, but before the revocation action began, Bjarko retained the

services of Peterson & Nehring to defend him in an SDI proceeding. (PC.T. 148-150). This defense was successful, and no claims of ineffective assistance or conflict of interest have ever arisen from that representation. (PC.T. 45:2-7, 149); (PC.O. 16). Attorney Nehring was subsequently retained at Bjarko's request to represent him at the revocation hearing. Following a loss at the revocation proceeding, Bjarko is now claiming conflict of interest.

[¶68] At the post-conviction hearing, the testimony was quite clear that Bjarko's ex-wife took no part in the revocation action. She was not a party and she was not a witness.

[¶69] This is not a situation where Attorney Nehring represented party "A" in a suit against party "B", and then turned around and filed a suit for party "B" against party "A." See. Continental Resources, Inc. v. Schmalenberger, 2003 ND 26, 656 N.W.2d 730. Indeed, no lawsuit was ever filed by Attorney Nehring on behalf of Bjarko against his ex-wife. There was no secret or confidential information that Attorney Nehring received during the divorce proceeding that would affect his ability to represent Bjarko in the revocation hearing.

[¶70] Further, the District Court found that Attorney Nehring reasonably believed that there was no conflict of interest between representing Bjarko in the revocation action after representing his ex-wife in the divorce action. (PC.O. 16-17).

[¶71] Additionally, as Bjarko's ex-wife was a former client, duties to her fall under N.D.R.Prof.Conduct 1.9. The State notes that a divorce action and a revocation action are completely unrelated matters. The parties are different, the elements are different, and the necessary proof is different.

[¶72] In contrast, Bjarko claims that even if an attorney reasonably believed no conflict existed, written consent must be obtained from both current and former clients. The State asserts this is incorrect. The Explanatory Note [4] does not require all four steps if there is no conflict. However, Bjarko is attempting to claim a disciplinary violation where none occurred.

[¶73] If an attorney, after identifying the clients, learns that there is no conflict, the process ends. For example, if an attorney discovers that A. Smith is Arnold Smith, and not Alan Smith, a current client, there would be no reason to continue down the checklist in Note 4 to file a suit against "A."(Arnold) Smith.

[¶74] If an attorney reasonably believes that there is no adverse effect, the analysis would end at step 2. This is clearly demonstrated by the language in step 3, which reads: "[D]ecide whether the representation may be undertaken despite the material limitation, i.e., whether the conflict is consentable." The State asserts that this language plainly applies only when there is a material limitation. Here, Attorney Nehring's testimony demonstrated that he reasonably believed that no conflict existed.

[¶75] In short, this is another attempt by Bjarko to claim *per se* ineffective assistance by alleging violations of the Rules of Professional Conduct. The State asserts that under both N.D.R.Prof.Conduct 1.7 and 1.9, Bjarko's claims fail. As Bjarko has failed to establish either objective unreasonable conduct or sufficient prejudice, the State requests this Court affirm the District Court's decision.

Attorney Johnson's representation.

[¶76] Attorney Johnson testified that he had consulted with Bjarko regarding the appeal in question, and regarding it's potential effects on future actions by Bjarko. As

noted above, Attorney Johnson testified that he had concerns about potential *res judicata* and/or abuse of process effects from a credit for time served appeal which had absolutely no merit. Both *res judicata* and misuse of process are affirmative defenses in post-conviction relief matters. N.D.C.C. §29-32.1-12.

[¶77] Attorney Johnson then testified that the appeal was withdrawn with the consent of Bjarko, after discussing available options. Judge McClees agreed with Attorney Johnson's testimony over Bjarko's, and found that Bjarko made an informed decision to withdraw the appeal. (PC.O. 17).

[¶78] For the sake of brevity, the State refers this Court to the conflicting, inconsistent, and at times patently false claims of Bjarko at all stages of the proceeding, as outlined in part above.

[¶79] The District Court was presented with testimony from Attorney Johnson and from Bjarko, who consistently could not tell the same story twice. This Court has traditionally held that the District Court is in the best position to analyze the character, veracity, etc. of witnesses. E.g. Odom, 2010 ND 65, ¶12. The District Court's Order demonstrates that the Court accepted Attorney Johnson's testimony and rejected Bjarko's.

[¶80] Therefore, the State asserts that the District Court did not err in determining that Attorney Johnson withdrew the appeal after consulting with Bjarko, and with Bjarko's permission.

Conclusion

[¶81] Bjarko claims that all three attorneys provided him with ineffective assistance of counsel. In support of these claims, Bjarko offered only conflicting,

inconsistent, and at times clearly false statements. Bjarko made false statements in his affidavit in support of the application for post-conviction relief, and in the application itself. At the hearing, Bjarko's testimony was completely inconsistent and internally conflicting, including claims that plea negotiations never occurred, but then admitting that he had counteroffered on the proposed plea agreement, and that his counter was accepted. The District Court was presented with the testimony of three attorneys and Bjarko, who was inconsistent and internally conflicting in his testimony. The District Court accepted the testimony of the three attorneys and rejected the testimony of Bjarko. The State asserts this was not clear error.

[¶82] As no error was committed by the District Court, the State requests this Court affirm the District Court's decision in this matter.

Dated this 28th day of July, 2010.

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Certificate of Service by Electronic Mail

I, Nathan Kirke Madden, hereby certify that on July 28, 2010, a true and accurate copy of The State of North Dakota's Appellee's Brief was served on Attorney Robert Martin, Counsel for Bjarko at his last known email address of: rwmartin@nd.gov.

Dated this 28th day of July, 2010.

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