20110343

State of North Dakota
North Dakota State Supreme Court

Carl Harmon

Petitioner/appellant,

VS

Case No. 20110343

State of North Dakota

Respondent/Appellate,

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

DEC 31 2011

STATE OF NORTH DAKOTA

APPELLANTS BRIEF

Brief on appeal from order denying petition for
Post-Conviction Relief by the Williams District Court

Carl Harmon III
JRCC #17791
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TABLE OF AUTHORITIES:

Rule 60 (b)

Gonzalez v. Florida: 545 US 524,162 L.ed 480 (2005)

NDCC 29-32.1

LEXIS US DIST. 95363 (2010)

Ferguson v. Cape:88 F. 3d 647 (8th Cir. 1996)

Holloway v. Pigman: 884 F. 2d. 365 (8th Cir. 1989)

NDCC 12.1 20-02(f); 12.1 20-01(f)02

I

Jurisdiction:

This Courts jurisdiction is invoked pursuant to The Constitution of the State of North Dakota. The appellant has made his timely notice of appeal with the trial court.

Issue Presented for Review:

Whether the appellant was entitled to an opportunity to present evidence to the trial court at oral hearing in-order to show disputed issues of material fact, and to establish factual assertions. Directly asserting the denial of such constitutes the denial of due process.

II

The United States Supreme Court in the Case {*Gonzalez*} held that:

"Like the rest of the rules of civil procedure, applied in habeas corpus proceedings, involving State prisoners only to the extent **Rule 60 (b)** was not inconsistent with applicable Federal statutory provisions and rules."

See **Gonzalez** v. Florida, 545 US 524,162 L. Ed. 2d 480, **125 S.Ct.(2005)**
N.D.R. Civ.P. Rule 60 Relief from Judgment or order {explanatory note}
"Rule 60 is derived from Fed.R.Civ.P.60, effective March 1st,2011."

The trial court had jurisdiction to grant relief:

pursuant to Rule 60(b)

STATEMENT OF THE FACTS:

On **May 14th,1996** the appellant Harmon was convicted of Gross Sexual Imposition, Felonious Restraint, and Terrorizing. The Court sentenced Harmon to thirty **(30)** years on count one (GSI) and ten **(10)** years for terrorizing, with ten **(10)** years for Felonious Restraint, consecutive with the thirty **(30)** years on count one. For a total of a forty **(40)** year sentence. With ten **(10)** years suspended of the thirty **(30)** years for five **(5)** years and a mandatory two **(2)** years without parole of the ten **(10)** year sentences, thereby leaving twenty-two **(22)** years to serve and ten years suspended, with eight **(8)** years on parole.

On **December 29th,2010** Harmon made his motion under **NDRC P. Rule 60(b)** to correct the sentence, and on **August 31st,2011** (through counsel) Harmon renewed his petition under **NDCC 29-32.1** wherein Harmon asserted several Constitutional errors for relief; that included but was not limited to:

1. **Denial of a fair trial/fairness of the trial**
2. **Ineffective assistance of counsel**
3. **Denial of right to present defense**
4. **Statements to the jury/jury instructions**
5. **Judicial bias of the trial Judge, Judicial abuse**
6. **Direct violations of his Double Jeopardy Rights**

These violations assert those rights guaranteed by the Fifth, Sixth, Eighth and the Fourteenth Amendments to the US Constitution. The State moved for Summary Judgment, the Court granted the motion. Therefore, this appeal is a direct result of that judgment.

Argument:

The appellant was denied fair hearing by the trial courts refusal to provide the appellant opportunity to develop facts in a hearing to support his claims and denied him due process guaranteed by the **14th** Amendment of the US Constitution. The appellant exercised his 1st Amendment right to petition the government to redress his grievances under **Rule 60.**

See: LEXIS US Dist. LEXIS 95363, 2010. FED.R. Civ. P. **Rule 60 (b)(6); NDCC 29-32.1**

Summary Judgment:

Summary Judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Russell v. Hennepin Co. 420 F3d 841,847 (8th Cir. 2005). The question before the court is whether the record, when viewed in light most favorable to the moving party, demonstrates that there is no genuine issue of material fact that the moving party is entitled to judgment as a matter of law. In **Ferguson v. Cape Girardeau County, 88 F.3d. 647 (8th Cir. 1996)**

In opposition to the summary judgment motion a party opposing said motion may not merely point to unsupported, self-serving allegations, but substantiate the allegations with sufficient probative evidence that would permit a finding in his favor; without resorting to speculation, conjecture, or fantasy. See: Reed 561 F.3d at 941. The requirement to view the facts in a light most favorable to the non-moving party, and existence of material factual dispute is sufficient to bar summary judgment. See: **Holloway v. Pigman, 884 F.2d. 365-366 (8th Cir. 1989).**

In the appellants responsive affidavit, he set forth disputed material facts sufficient to overcome summary judgment, which entitled him to a hearing to develop for the record, transcripts supporting those materially and disputed facts.

Harmon stated under oath of perjury:

1. **I was denied my Constitutional right to give testimony in my defense.**
2. **The judge in my case displayed prejudiced against me.**
3. **My counsel did not perform as counsel guaranteed by the 6th Amendment, and I suffered prejudice as a result.**
4. **I was denied substantive and procedural due process at my trial and I am entitled to a hearing on my Constitutional grounds.**
5. **If not for those Constitutional defects, I would have had a fair trial.**
6. **The outcome of my trial would have been different if I had been allowed to present a defense.**
7. **If I would have been allowed to testify, I would have stated that the relationship was consensual by both parties, and the outcome of the case would have been different.**
8. **I requested to testify, and was refused by my attorney.**

The appellant could have testified to the fact that the alleged victim could have been an adult and he reasonably believed she was an adult, and not a minor, as an affirmative defense under NDCC 12.1 20-07 (2). As the appellant in the case was older than twenty-two (22) and the alleged victim was sixteen (16) years old at time of the allegations. NDCC 12.1 20-07(1)(F): "A person who knowingly has sexual contact with another person, or who causes another person to have sexual contact with that person, is guilty of an offense if:

(F) The person is a minor fifteen (15) years of age or older and the actor is an adult.

(2) "The offense is a Class C Felony if the actors conduct violates subdivision b, c, d, or e of subsection 1, or subdivision F of subsection 1 if the adult is at least eighteen (18) years of age and not twenty-two (22) years of age or older, or a Class B Misdemeanor if the actors conduct violates subdivision a of subsection 1.

If it was true that the appellant believed the alleged victim to have been eighteen (18) years of age, and he was in fact twenty-two, there would have been no intentional criminal act, therefore no crime. If the appellant knew the victim was sixteen (16) years old at the time, the alleged offense would have constituted a Class C Felony under the law. Without the appellants testimony, the offense constitutes a Class A Felony. Therefore, the consent defense would have changed the outcome of the trial.

The Court abused its power, discretion, and authority by denying the appellant a defense and not allowing him to present his own testimony supporting his claim and defense of consent. Therefore, this Honorable Court should remand this case for evidentiary hearings.

Respectfully Submitted,

Carl Harmon III

Carl Harmon III

Dated this the 31 **day of** Dec ,**2011.**

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Certificate OF Service:

This document certifies that a true copy of the appellate brief was mailed this day to the address noted here.

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This action taken by the appellant:

Carl Harmon III

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Appellant, Pro-se

12-31-11

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