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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20120119

State of North Dakota
~~Plaintiff~~, Respondent + Appellee

v.

Kyle Mackey,
~~Defendant~~ Petitioner + Appellant

Supreme Court No. 20120119

District Court No. 23-09-K-147

APPEAL OF DISTRICT COURT'S DENIAL AND SUMMARY DISMISSAL OF POST CONVICTION RELIEF UNDER N.D.C.C. §29-32.1

LAMOURE COUNTY DISTRICT COURT

THE HONORABLE RICHARD W. GROSZ, PRESIDING

BRIEF OF APPELLEE

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FACTS AND PROCEEDINGS

[¶1] The underlying facts of the case have been presented to this Court in State v. Mackey, 2011 ND 203, 805 N.W.2d 98. Kyle Mackey's statement of the facts regarding the underlying case is essentially correct, though it is the State's position that Mackey glosses over the course of some of the proceedings in the plea hearing, and they may be of some importance to this appeal. Mackey states that he did not waive his federal constitutional rights, however at the plea hearing the trial court directly addressed Mr. Mackey in a Rule 11 colloquy. After each question, the trial court asked the Mackey if he understood the rights he was giving up by pleading guilty, each time Mackey responded, "yes I do your honor" or similarly.

[¶2] Also of relevance is the record of activity since this Court issued its opinion in Mackey. In Mackey this honorable Court upheld the district court's denial of Mackey's motion to withdraw his guilty plea due to an error in the court's original sentence and affirmed the order amending the original sentence. On December 20, 2011, Mackey filed a petition for Post-Conviction Relief Under N.D.C.C. 29-32.1, seeking again to withdraw his plea, stating that he had not knowingly and voluntarily waived his rights. Appendix, 4. The district court issued a memorandum on December 21, 2011, App. 8, and the State filed an Answer to Mackey's Petition on January 5, 2012 requesting that the district court summarily dismiss the Mackey's petition under res judicata and misuse of process. Appendix, 13. A district court memorandum was issued the same day, stating that the request for summary disposition would be treated as a Rule 3.2 Motion to Dismiss and that Mackey had until the 9th of February, 2012 to respond to the State's motion. Appendix, 15. A response was filed by Mackey on the 10th of January which was not

included in the Appendix. An Order for Judgment and Judgment and Decree were entered on the same day, on pages 16 and 17 of the Appendix, respectively. In the Order for Judgment the court noted that "no justifiable excuse as to why the claims made in [the] petition were not brought before the North Dakota Supreme Court as part of [the original] Appeal...nor did petitioner submit [the] claims to [the district] Court as grounds for his prior Motion to Withdraw" thus dismissing the petition on misuse of process. Appendix, 16. Mackey filed a Motion to Reconsider on January 11th, now alleging ineffective assistance of counsel for the reason the claims were not presented earlier, and the Court issued a memorandum interpreting the Motion to Reconsider as an Amendment to the original petition. Appendix, 18-19 and 20, respectively. The State responded on February 2, 2012 with a substantially similar Answer as the Jan 5, 2012 Answer, but addressing the ineffective assistance claim, stating that Mackey had failed to allege any errors by his counsel and again requesting dismissal of the Amended Petition. Appendix, 28-31. That same day (2/2/12) the district court issued a Memorandum giving Mackey an opportunity to respond to the State's motion for Summary Judgment. Appendix, 32. Mackey filed a response on February 8, 2012 requesting an evidentiary hearing, which was not included in the Appendix, and an Affidavit alleging errors of by appellate counsel and prejudice as a result of the errors. Appendix 26. On February 10, 2012, the district court issued its Order for Amended Judgment and Amended Judgment holding, among other things, that "there are no disputes of material fact or inference from undisputed fact and only issues of law concerning Petitioner's claim of ineffective assistance of counsel and thus summary judgment is appropriate." Appendix, 36. Mackey's petition was thus dismissed and he now appeals.

ARGUMENT

I. STANDARD OF REVIEW

[¶3] The burden of establishing a basis for post-conviction relief rests upon the applicant. Frey v. State, 509 N.W.2d 261, 263 (N.D. 1993). Summary disposition is available if "the application, pleadings, and previous proceeding, discovery, or other matters of record show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." NDCC 29-32.1-09(1), Abdi v. State, 2000 ND 64, ¶8, 608 N.W.2d 292.

[¶4] An appeal from a summary denial of post-conviction relief is reviewed as an appeal summary judgment. Henke v. State, 2009 ND 117, ¶9, 767 N.W.2d 881, quoting Berlin v. State, 2005 ND 110, ¶6, 698 N.W.2d 266. The party opposing the motion for summary disposition is entitled to all reasonable inferences at the preliminary stages of a post conviction hearing if a reasonable inference raises a genuine issue of material fact. Berlin, ¶6. Claims of ineffective assistance of counsel are ordinarily unsuited to summary disposition without an evidentiary hearing though summary denials of post-conviction relief where the applicants were put to their proof and failed to provide evidentiary support of their allegations have been upheld. Steinbach v. State, 2003 ND 46, ¶15, 658 N.W.2d 335.

II. APPELLANT HAS NOT SHOWN HE DID NOT UNDERSTAND THE FACTS IN RELATION TO THE LAW WHEN HE ENTERED HIS PLEA OF GUILTY

[¶5] The determination of a defendant's knowledge of the rights being waived when he enters a plea of guilty rests on the whole record. Greywind v State, 2004 ND 213, ¶8, 689 N.W.2d 390, State v. Olson, 544 N.W.2d 144, 147 (N.D. 1996). Silence upon the record

does not constitute a waiver of his constitutional rights, rather "the record must show... whether a guilty plea was voluntarily made." Boykin v. Alabama, 395 U.S. 238, 242 (1969). Mackey cites a footnote from Boykin as the governing law, but this honorable Court has long held the determining factor is whether the whole record shows that the defendant knowingly and voluntarily entered the guilty plea. State v. Storbakken, 246 N.W.2d 78 (N.D. 1976); State v. Magnuson, 1997 ND 228, 571 N.W.2d 642; Olson; Abdi.

[¶6] In order to ensure the voluntariness of the plea, N.D.R.Crim.P. 11 must be substantially complied with. Abdi, ¶12. Before accepting a guilty plea, the trial court must advise the defendant of certain rights under Rule 11(b)(1). The Rule, which is similar to Rule 11 of the Federal Rules of Criminal Procedure, mandates the defendant understands, at the very least, the nature of the charge, mandatory minimum punishments, if any, as well as maximum punishments, the right to plead not guilty and persist in that plea, the waiver of the trial by jury and the right to confront adverse witnesses, and the right to an attorney at every stage of the proceeding. Id. at ¶11. Rule 11(b)(1) states that the defendant be "personally" addressed in "open court, informing the defendant of and determining that the defendant understands" the rights he is about to waive by virtue of his guilty plea. N.D.R. Crim. P. 11(b)(1). Rule 11(b)(3) states that a factual basis for the plea must be determined before accepting a guilty plea. Though Rule 11(b)(1) expressly states that the court must address the defendant must be personally addressed by the court and declare his understanding of the rights he is waiving, Rule 11(b)(3) does not state that the factual basis must be provided for by the defendant himself.

[7] In the matter at hand, the record clearly indicates Mackey knowingly and intelligently waived his constitutional rights, understanding what he was doing and satisfying both Rule 11(b)(1) of the North Dakota Rules of Criminal Procedure and Boykin and its progeny under North Dakota case law. The transcript of the plea hearing is replete with instances where the trial court directly addressed Mr. Mackey during its Rule 11 colloquy, beginning on page one, through page six . After each question, the trial court asked the Mackey if he understood the rights he was giving up by pleading guilty, each time Mackey responded, "yes I do your honor" or similarly. On page 14, the court directly asked Mackey how he pled to the charge. Mackey responded, "Guilty." (P.H. 14). The court then inquired as to any threats, force, coercion, pressure or impairment, all of which were denied by Mackey. The Court asked Mackey if he "fully understood what we are doing here this afternoon," to which Mackey replied, "Yes." (P.H. 14, lines 9-21). On page 15 of the same hearing transcript, the Court asked:

> And you understand that by pleading guilty to this charge, you're giving up your right to remain silent; your right to confront, cross examine and question under oath any witness at trial; you're waiving a trial by a jury or to the Court; and you're waiving your right to remain silent concerning this charge. Do you understand all that?
>
> MACKEY: "Yes I do your Honor." (P.H. 15, lines 3-10)

[¶8] The court then asked Mackey's counsel if there was a factual basis for the guilty plea, to which Mackey's counsel replied, "I would acknowledge and so stipulate your honor." P.H. 15, line 11-14. After this interaction, the trial court asked Mackey twice

more if he had any questions and Mackey replied both times, "No your Honor" (P.H. 16, lines 14-16; 17, lines 23-24).

[¶9] Under Boykin, and the long line of jurisprudence following that decision in this state, this honorable Court must look to the record to determine whether Mackey understood "what the plea connotes and of its consequences" Boykin, at 244. In light of the facts, as evidenced by the record of the plea hearing, it cannot be said the Mackey has shown that his federal Constitutional Rights were expressly waived by Counsel resulting in a deprivation of substantive due process. Rather, the record shows that the rights were expressly, knowingly and intelligently waived by Mackey himself. Thus Mackey entered a valid and voluntary plea of guilty.

[¶10] Mackey states that since his counsel stipulated to the factual basis for the plea, Mackey's plea was not voluntarily entered. There is no language in the law under Rule 11(b)(3) for determining the factual basis for a plea of guilty from the defendant himself and Mackey has not provided any legal authority stating that Rule 11(b)(3) demands the same.

III. MISUSE OF PROCESS BARS THE CLAIM OF AN UNKNOWINGLY AND UNITELLIGENTLY ENTERED GUILTY PLEA

[¶11] The North Dakota Century Code names Misuse of Process as an affirmative defense to an application for post-conviction relief when the applicant "presents a claim for relief which the applicant inexcusably failed to raise either in a proceeding leading to judgment of conviction and sentence or in a previous postconviction proceeding." N.D.C.C. 29-32.1-12(2)(a). This honorable Court has stated that issues that could have and should have been raised in prior proceedings, including previous direct appeal, but

were not, are barred as a misuse of process. Steen v. State, 2007 ND 123, ¶16, 736 N.W.2d 457. "Defendants who inexcusably fail to raise all of their claims in a single post-conviction proceeding misuse the post-conviction process by initiating a subsequent application raising issues that could have been raised in the earlier proceeding." Jensen v. State, 2004 ND 200, ¶9, 688 N.W.2d 374.

[¶12] In the matter at hand, Mackey had made a motion to withdraw which led to a prior Supreme Court appeal in this matter. Mackey, ¶4. Mackey made no mention at the time of the motion to withdraw that he did not enter the guilty plea knowingly and intelligently, nor did he upon appeal before the North Dakota Supreme Court. It may be noted, however, that at oral argument of the initial appeal, Mackey argued that he did not knowingly and intelligently enter the plea. This Court noted that the record implied that he understood the plea, but did not consider the matter any further since the issue was not raised in district court. Id., ¶16-17. Mackey's contention is that the failure to raise the issues earlier is due to ineffective assistance of counsel, which will be addressed later, but the claim should have been raised upon the original Motion to Withdraw and the subsequent appeal. Mackey has offered no excuse as to why prior counsel did not raise this issue, and thus has misused process by presenting a claim for relief which the applicant inexcusably failed to raise in prior hearings on this matter. The claims for which relief is sought were never raised, as they should have been, before in the initial Motion of Withdraw or before the Supreme Court of North Dakota upon appeal. Failure to raise these claims then and to do so now is a misuse of process.

IV. APPELLANT HAS FAILED TO RAISE A GENUINE ISSUE OF MATERIAL FACT REGARDING THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNCIL, THIS PERMITTING SUMMARY DISMISSAL OF THE CLAIM

[¶ 13] Ineffective assistance is of counsel is one ground for relief from a criminal conviction under N.D.C.C § 29-32.1-01(1)(a) . Greywind, ¶12.

> "A defendant claiming ineffective assistance must establish two elements: (1) counsel's performance was deficient, and (2) counsel's deficient performance prejudiced the defendant"
>
> State v. Bates, 2007 ND 15, ¶19, 726 N.W.2d 595 citing, State v. Palmer, 2002 ND 5, ¶11, 638 N.W.2d 18l; Wilson v. State, 1999 ND 222, ¶8, 603 N.W.2d 47.

[¶14] To demonstrate prejudice, the defendant must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different, and the defendant must specify how and where counsel was incompetent and the probable different result. Steen ¶ 19 (citations omitted). The United States Supreme Court states that absent these showings, "it cannot be said that the conviction...resulted from a breakdown in the adversary process." Strickland v. Washington, 466 U.S. 668, (1984).

[¶15] As stated above in Section I, a claim of ineffective assistance is typically unsuited to summary disposition without an evidentiary hearing. Sampson v. State, 506 N.W. 2d 722, 726 (N.D. 1993). However, the court may summarily dismiss the petition if the petitioner fails to raise a genuine issue of material fact. Mertz v. State, 535 N.W.2d 824, 838 (N.D. 1995); Whiteman v. State, 2002 ND 77, ¶7, 643 N.W.2d 704.

[¶16] The moving party bears the burden of showing there is no genuine issue of fact. In order to prove this negative, the Supreme Court of the United State has stated "that the

burden on the moving party may be discharged by 'showing' – that is point out to the district court- that there is an absence of evidence to support the nonmoving party's case." Celotex Corp v Catrett, 477 U.S. 317, 325 (1986); Steinbach v. State, 2003 ND 6, ¶12, 658 N.W.2d 355. See also Black v. Abex Corp, 1999 ND 236, ¶19, 603 N.W.2d 182. When a court determines that a motion for summary disposition has been made and "there is no genuine issue of fact, the burden shift to the nonmoving party to show a genuine issue of fact exists." Clark v. State, 1998 ND 78, ¶5, 593 N.W.2d 329. The nonmoving party must then present "competent, admissible evidence which [raises] a genuine issue of material fact." Mertz, at 837.

[¶17] In the case at hand, Mackey put forth this claim of ineffective assistance of counsel only after his first petition for post conviction relief was dismissed, by way of a motion to reconsider, which was treated by the district court as an amended petition. This could be viewed as a misuse of process in itself, as the claim should have been made in the initial Petition. The district court in this matter implied as much in its Order for Amended Judgment granting summary dismissal of Mackey's Petition, as the ineffective assistance claim could and should have been raised in the original Petition for Post-Conviction Relief. Thus, misuse of process warrants dismissal of Mackey's Amended Petition. As the discussion above in Section III states on the voluntary plea issue, Mackey similarly has not provided any justifiable excuse as to why he failed to raise the ineffective assistance of counsel claim in his original petition.

[¶18] Mackey asserts that the state did not file a motion to dismiss but only an answer to Mackey's petition for post conviction relief. This does not take into account the requests by the State in its Answers to "dismiss" Mackey's Petition and Amended Petition. In the

State's response it pointed to the fact that Mackey did not establish or even allege any errors by Counsel that fell below an objective standard of reasonableness, were prejudicial and the result would have been different but for counsel's errors, thus "showing" the absence of evidence under Steinbach. The burden thus shifted to Mackey and he was given an opportunity to respond. Mackey responded with request for an evidentiary hearing and an affidavit full of conclusory claims, declaring that he was prejudiced by appellate counsel's representation, but offering no evidence raising a genuine issue of material fact. "He apparently believes that he was entitled to an evidentiary hearing based on his conclusory assertions" that counsel was ineffective. Mertz, at 837. In light of Mackey's failure to raise any genuine issues of material fact, summary disposition was proper and the district court did no err in summarily dismissing the claim.

[¶19] Now, upon appeal, Mackey claims trial counsel was ineffective because a guilty plea was entered without understanding the facts and he has suffered prejudice because Mackey did not personally place the factual basis upon the record. In support of this claim, Mackey offers a footnote from Boykin though he has no legal authority to buttress the claim that he should have been asked if he personally possessed an understanding of the law in relation to the facts. Boykin and subsequent ND case law states that the whole record must be looked at to determine his understanding, and this has been addressed above. Mackey has raised no genuine issue of material fact as the record on this matter disputes Mackey's claim in regards to whether he understood the law in relation to the facts, as discussed above in Section II.

[¶20] Mackey's ineffective assistance of counsel claim fails as there are no genuine issues of material fact under neither the performance prong nor the prejudice prong of the application of the Strickland test as stated in Bates. Mackey has not produced any competent, admissible evidence to show how Counsel's performance fell below an objective standard of reasonableness nor how he was prejudiced by the performance of counsel as put forth in Mertz. Mackey has not established a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different, nor has he specified how and where counsel was incompetent or the probable different result. Steen. Thus summary disposition was proper in this matter.

CONCLUSION

[¶21] Mackey raised three issues upon this appeal. The first was regarding his understanding of the facts and whether he knowingly and intelligently entered a plea of guilty at the plea hearing. The record in this matter is clear that Mackey understood his rights, the facts and the consequences of his guilty plea and that the district court accepted the plea in accordance with the law.

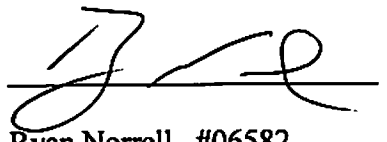
[¶22] The second issue was regarding failure to raise the first issue upon appeal. The district court determined the failure to do so was a misuse of process. Mackey has failed to provide for any justifiable excuse for this failure except ineffective assistance of counsel. Prior appellate counsel attempted to raise the issue of misunderstanding of the plea at oral argument in the prior appeal and this court noted the implicit understanding on the record in its opinion. Mackey also failed to raise the issue in his original motion to withdraw his plea, which led to the first appeal, these failures to raise the issues constitute a misuse of process warranting denial of Mackey's Petition for post-conviction relief.

[¶23] The last issue is the only one which Mackey seeks relief upon, requesting an evidentiary hearing to put forth evidence of ineffective assistance of counsel. This claim of ineffective assistance of counsel is implied in Mackey's presentation of the previous issues. Upon the State's motion for summary disposition, the district court gave Mackey an opportunity to locate and present competent, admissible evidence to show that his attorney(s)' performance fell below an objective standard of reasonableness and that he was prejudiced by the deficient performance, and that but for counsel's errors the result of the proceeding would have been different. Mackey failed to do so and as such did not raise a genuine issue of material fact, thus he is not entitled to a hearing or post-conviction relief because he has failed to raise a genuine issue of material fact. With no genuine issues of material fact, summary disposition was properly entered in this matter and the trial court did not abuse its discretion.

[¶24] The record is clear that there are no genuine issues of material fact and Mackey has put forth no competent, admissible evidence through available discovery procedures giving rise to a genuine issue of material fact. Thus the trial court was permitted to summarily dismiss Mackey's petition. The State of North Dakota respectfully requests that this honorable Court deny Appellant's requests to reverse and remand with instructions for an evidentiary hearing. The State of North Dakota also requests that this honorable Court affirms the district court's summary disposition in this matter.

Respectfully submitted this 19th day of April, 2012.

STATE OF NORTH DAKOTA



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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20120119

State of North Dakota,	)	
	)	
Appellee,	)	
	)	AFFIDAVIT OF SERVICE
vs.	)	BY MAIL
	)	
Kyle Mackey,	)	
	)	
Appellant.	)	

STATE OF NORTH DAKOTA)
) ss
COUNTY OF LAMOURE)

Ryan M. Norrell states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

2. I am of legal age and on the 19th day of April, 2012, I served the attached BRIEF OF APPELLEE upon Kyle Mackey by placing a true and correct copy thereof in an envelope addressed as follows:

Kyle Taft Mackey
Inmate #36446
James River Correctional Center
2521 Circle Drive
Jamestown, ND 58401-6904

and depositing the same, with postage prepaid, in the United States mail at LaMoure, North Dakota.

Ryan M. Norrell

Subscribed and sworn to before me
this 19th day of April, 2012.

NOTARY PUBLIC

LORI A PRITCHARD
Notary Public
State of North Dakota
My Commission Expires August 20, 2014