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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Joshua Poitra, Petitioner and Appellant, vs. State of North Dakota, Respondent and Appellee	)	Supreme Court No. 20120283 Cass Co. No. 09-2011-CV-02718

RESPONDENT'S BRIEF

Appeal from the May 25, 2012, Memorandum Opinion and Order Denying
Petitioner's Request for Post-Conviction Relief
East Central Judicial District
the Honorable Lisa K. Fair McEvers, Presiding

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[¶3] **STATEMENT OF THE ISSUE**

[¶4] I. Whether Poitra failed to show that his attorneys' performances fell below an objective standard of reasonableness.

[¶5] **STATEMENT OF THE CASE**

[¶6] This is an appeal from the district court's order denying Joshua Poitra's (Poitra) application for post-conviction relief. The State agrees with Poitra's procedural history of the case as cited in his Statement of the Case. The State requests that this Court affirm the district court's denial of Poitra's application for post-conviction relief.

[¶7] **STATEMENT OF THE FACTS**

[¶8] The district court heard Poitra's application for post-conviction relief on April 30, 2012. Both Poitra's trial counsel, Mark Blumer, and Poitra's appellate counsel, Kent Morrow, testified at the hearing (T. at 4-32.)

[¶9] Mr. Blumer testified that he has been licensed to practice law since 1989 (T. at 24:10); that his primary practice has been criminal litigation (T. at 24:11-13); that he estimates he has done over 70 jury trials (T. at 24:18-20); that he was thoroughly prepared for Poitra's trial (T. at 24:24-25); that the photo lineup where the victim identified Poitra as her attacker could not have been effectively challenged (T. at 28:21-23); and that consulting with an eyewitness expert appeared useless because the victim was "pretty positive" about who had attacked her (T. at 6:9-12.)

[¶10] Mr. Blumer testified that he made "numerous, dozens, of phone calls and was given various leads" to locate several witnesses who may have testified on Poitra's behalf (T. at 8:6-8); that in his attempts to contact witness Eric

Delonais, he received "information from [Poitra] and [Poitra's] relatives that [Delonais] was on the reservation. And that's where I was trying to make contact with them. The numbers that I was given were on the reservation, and when I would call, I was not getting a response. [Delonais] was never there" (T. at 11:17-22); that he had been in contact with witness Heather Golden, who said she would appear and testify, but who did not show up for the trial, despite being subpoenaed by the State (T. at 15:5-9); and that he "would have loved" everyone involved in the incident to testify but that he could not locate them (T. at 16:16-23.)

[¶11] Mr. Blumer also testified that he was aware that Poitra was facing a twenty-year minimum mandatory sentence and that he "imagine[d]" he spoke with Poitra about the minimum mandatory (T. at 20:25); that if Poitra would have taken responsibility at sentencing it might have been helpful, but might have harmed Poitra's appeal (T. at 22:1-3); and that he did not recall whether he discussed with Poitra the possibility of accepting responsibility either at sentencing or a motion for sentence reduction under N.D.R.Crim.P. 35 (T. at 22:5-8.)

[¶12] Mr. Morrow testified that he was aware of N.D.R.Crim.P. 35 but that he did not discuss it with Poitra because it was his understanding that Poitra would have had to accept responsibility for the crime before he was sentenced for the court to consider reduction of a mandatory sentence (T. at 30:4-5.)

[¶13]On May 25, 2012, the district court issued its Memorandum Opinion and Order Denying Petitioner's Request for Post-Conviction Relief (A. at 9-31.)

The district court concluded that Poitra's arguments on ineffective assistance of counsel had no merit (A. at 21-30.) The district court determined that whether to consult with an eyewitness expert was a tactical decision and did not demonstrate objective ineffectiveness by Mr. Blumer (A. at 26); that Mr. Blumer's failure to locate witnesses was not objectively ineffective because Poitra failed to provide a factual showing that the testimony of the missing witnesses would have been material (A. at 24); that it is "mere speculation" whether testimony of the missing witnesses would have affected the jury's verdict (A. at 24); and that no support existed for the theory that Poitra should have been advised to take responsibility after his appeal was completed (A. at 27.) The court cited Custodio v. United States, 1990 WL 186238, to support the finding that because the right to counsel is a standard for ineffective assistance of counsel and Rule 35 motions are discretionary, Poitra had no right to counsel and thus could not succeed on an ineffective assistance claim for failure to be advised regarding Rule 35 (T. at 27-28.) The court stated that "the idea of a defendant 'taking responsibility' post trial and post appeal to get his sentence reduced seems rather disingenuous to this Court, and is unlikely to be a compelling argument for a reduction of sentence under Rule 35" (T. at 27.) The court found that Poitra failed to establish conduct of Mr. Blumer and Mr. Morrow was objectively ineffective by not advising Poitra to take responsibility or to file a Rule 35 motion, and Poitra had not shown any prejudice by either attorney's conduct (Tr. at 28 and 30.)

[¶ 14] The district court denied Poitra's application for post-conviction relief.

[¶15] **STANDARD OF REVIEW**

[¶16] "Whether a petitioner received ineffective assistance of counsel is a mixed question of law and fact and is fully reviewable on appeal." Wong v. State, 2011 ND 201, ¶ 15, 804 N.W.2d 382. The district court's findings of fact will not be overturned unless clearly erroneous. Id. This Court has described the "heavy burden" a petitioner bears to succeed on an ineffective assistance of counsel claim:

> [A] defendant claiming ineffective assistance of counsel has a heavy burden of proving (1) counsel's representation fell below an objective standard of reasonableness, and (2) the defendant was prejudiced by counsel's deficient performance. "Effectiveness of counsel is measured by an 'objective standard of reasonableness' considering 'prevailing professional norms.'" The defendant must first overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." "Trial counsel's conduct is presumed to be reasonable and courts consciously attempt to limit the distorting effect of hindsight."

Id. "The prejudice element requires a defendant to 'establish a reasonable probability that, but for his counsel's errors, the result of the proceeding would have been different.'" Noorlun v. State, 2007 ND 118, ¶ 11, 736 N.W.2d 477. The defendant must also "specify how and where counsel was incompetent and the probable different result." Id. "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Id. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Id.

[¶17] LAW AND ARGUMENT

[¶18] I. Poitra failed to show that his attorneys' performances fell below an objective standard of reasonableness; therefore, the district court properly denied his claims of ineffective assistance of counsel.

[¶19] Poitra argues his attorneys' performances were ineffective. He argues that his trial counsel, Mark Blumer, was ineffective because he did not consult with an eyewitness expert and he did not take necessary efforts to secure the presence of defense witnesses. Poitra also argues that both his trial counsel and his appellate counsel, Kent Morrow, did not advise Poitra of the possibility that taking responsibility for the crime, even after conviction by a jury, could be used by the district court to depart from the twenty-year minimum mandatory sentence. The district court found there was no evidence to support Poitra's ineffective assistance of counsel claims because counsels' performances did not fall below the objective standard of reasonableness (A. at 24, 26, 28, and 30).

[¶20] A. Trial counsel's decision to forgo use of an eyewitness expert was objectively reasonable.

[¶21] Poitra argues that his trial counsel, Mark Blumer, was ineffective because he did not call an eyewitness expert to testify. On appeal, this Court does not second guess matters of trial tactics, such as the decision to call certain witnesses. Noorlun, 2007 ND 118, ¶ 12, 736 N.W.2d 477. "Strategic choices by trial counsel 'made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable'." Id. "A defendant arguing he received ineffective representation because his trial counsel failed to call

additional witnesses must show how any additional witnesses would have aided the defense's claim." Matthews v. State, 2005 ND 202, ¶ 11, 706 N.W.2d 74. "[T]his court requires more than a mere representation of what the testimony would be; we require some form of proof, e.g., an affidavit by the proposed witness, or testimony in a post-conviction-relief proceeding." Id. Conclusory allegations unsupported by evidence that that the testimony would have changed the outcome of the trial are not sufficient to show ineffective assistance of counsel. Id. at ¶ 12-17.

[¶22] Whether to consult with an eyewitness expert was a tactical choice that Mr. Blumer made. Mr. Blumer testified that the victim was "pretty positive" about who had attacked her. Mr. Blumer testified that he believed that law enforcement's use of a photo lineup was done correctly. Mr. Blumer's decision was objectively reasonable and should not be second guessed. Moreover, Poitra has not established that he was prejudiced by his counsel's choice not to call an eyewitness expert to testify. Poitra did not present proof to the district court to support his claim that the eyewitness expert would have cast doubt on the victim's statements and would have changed the outcome of the trial.

[¶23] **B. Trial counsel's inability to secure presence of defense witnesses was objectively reasonable.**

[¶24] Poitra argues that his trial counsel, Mark Blumer, was ineffective because he failed to locate material witnesses or hire an investigator to locate such witnesses. "A defendant arguing he received ineffective representation because

his trial counsel failed to call additional witnesses must show how any additional witnesses would have aided the defense's claim." Matthews, 2005 ND 202, ¶ 11, 706 N.W.2d 74. "[T]his court requires more than a mere representation of what the testimony would be; we require some form of proof, e.g., an affidavit by the proposed witness, or testimony in a post-conviction-relief proceeding." Id. "Conclusory allegations that counsel failed to call certain witnesses without indicating what the testimony would have been, how it might have affected the outcome of the trial, or what prejudice may have resulted from the failure to call them, do not support a claim of ineffective assistance of counsel." State v. McLain, 403 N.W.2d 16, 19 (N.D. 1987).

[¶25] Mr. Blumer testified that he spent "numerous, dozens, of phone calls and was given various leads" to attempt to locate several witnesses who may have testified on Poitra's behalf. He understood that several witnesses were either on the reservation or out of state. The State attempted to locate several of the same witnesses and was unsuccessful in its search. Poitra did not produce any of the witnesses at his post-conviction hearing. He did not present affidavits to the court proving what the testimony of the witnesses would have been at trial. Poitra's assertions of what the witnesses' testimony would have been are not sufficient to establish what the witnesses' testimony would have been. The district court found that Mr. Blumer's failure to locate witnesses was not objectively ineffective because Poitra failed to provide a factual showing that the testimony of the

missing witnesses would have been material and that it is "mere speculation" whether testimony of the missing witnesses would have affected the jury's verdict. Mr. Blumer's performance was objectively reasonable.

[¶26] **C. Trial and appellate counsel were not ineffective for failing to advise Poitra to take responsibility for the crime in an attempt to reduce his minimum mandatory sentence.**

[¶27] Poitra argues that both his trial counsel and his appellate counsel should have advised him of the possibility of reducing his sentence by taking responsibility for the crime. Poitra was convicted of gross sexual imposition in violation of N.D.C.C. 12.1-20-03(1)(a). N.D.C.C. 12.1-20-03(3)(a) states:

> For any conviction of a class AA felony under subdivision a of subsection 1, the court shall impose a minimum sentence of twenty years' imprisonment, with probation supervision to follow the incarceration. The court may deviate from the mandatory sentence if the court finds that the sentence would impose a manifest injustice as defined in section 39-01-01 and the defendant has accepted responsibility for the crime or cooperated with law enforcement.

Poitra argues that his trial counsel should have advised him to take responsibility after the jury's conviction. He argues that his appellate counsel should have advised him to take responsibility for the crime after his appeal. He argues that both his trial counsel and his appellate counsel should have advised him of the option to file a motion to reduce his sentence under N.D.R.Crim.P. 35(b)(2). The Rule states:

> On a party's own motion or on its own, and with notice to the parties, the court may grant a sentence reduction…If the sentencing court grants a sentence reduction, it must state its reasons in writing.

[¶28] The Sixth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment, and Article I, § 12 of the North Dakota Constitution guarantee a criminal defendant effective assistance of counsel. Ernst v. State, 2004 ND 152, ¶ 8, 683 N.W.2d 891. A defendant has a fundamental right to counsel during all critical stages of the prosecution, under the Sixth Amendment. Id. Courts have found that a Rule 35 Motion for Reduction of Sentence is discretionary rather than a critical stage of the prosecution, so the right to effective assistance of counsel would not apply. See Custodio v. United States, 1990 WL 186238.

[¶29] The district court held taking responsibility either post trial or post appeal for the sole purpose of a sentence reduction was disingenuous and not a compelling argument. The district court could find no authority for Poitra's argument that he should have been advised to take responsibility after his appeal was completed. Poitra maintained his innocence throughout his trial and filed an appeal without accepting responsibility. Even Poitra's current appeal for post-conviction relief contains arguments that an eyewitness expert could have cast doubt on the victim's statements and additional witnesses would have changed the outcome of the trial. Poita's only motive in accepting responsibility is to reduce the amount of time he is incarcerated. It was not ineffective assistance of counsel for Poitra's trial and appellate counsel to not advise Poitra to take responsibility for the crime post trial or post appeal for the sole purpose of a sentence reduction.

[¶30] Moreover, this Court should hold that Poitra had no right to counsel. A motion for a reduction of sentence under N.D.R.Crim.P. 35(b)(2) is discretionary. Poitra had no right to counsel regarding a Rule 35 motion and thus cannot succeed on an ineffective assistance claim for failure to be advised regarding Rule 35.

[¶31] The district court appropriately denied Poitra's ineffective assistance of counsel claims.

[¶32] CONCLUSION

[¶33] Poitra failed to present any valid grounds for post-conviction relief due to ineffective assistance of counsel. The district court properly denied Poitra's application. The State respectfully requests that this Court affirm the district court's decision.

Respectfully submitted this 1st day of November, 2012.

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[¶34] **CERTIFICATE OF SERVICE**

[¶35] A true and correct copy of the foregoing document was sent by e-mail on the1st day of November, 2012, to: Dan Gast: Dan@redriverlaw.com.

Kimberlee J. Hegvik