

**IN THE SUPREME COURT
 STATE OF NORTH DAKOTA**

Ryan R. Corman,)	
)	
)	Supreme Court No. 20120309
)	District Court No. 18-09-K-02252
Petitioner and Appellant)	
)	
)	
vs.)	
)	
State of North Dakota,)	
)	
)	
Respondent and Appellee)	

ON APPEAL FROM THE DISTRICT COURT
 FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT
 GRAND FORKS COUNTY, NORTH DAKOTA
 THE HONORABLE SONJA CLAPP, PRESIDING.

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUES

- I. Whether the District Court erred when it determined that summary dismissal of the Petitioner's application for post-conviction relief was appropriate?**

STATEMENT OF THE CASE

[¶1] The Petitioner, Ryan Ray Corman (hereinafter “Corman”) appeals from an order summarily dismissing his application for post-conviction relief. (Appellant’s App. at 22.) Corman was charged with Failure to Register as a Sexual Offender, in violation of N.D.C.C. § 12.1-32-15, a Class C Felony, on October 1, 2009. (Appellee’s App. at 1.) Corman applied for Indigent Defense Services and was represented by Counsel. (Appellee’s App. at 2.) On January 5, 2010, an Order for Examination at the North Dakota State Hospital was issued by the court to determine the Petitioner’s fitness to proceed and lack of criminal responsibility. (Appellee’s App., 3-5.) The State Hospital examiner, Dr. Lincoln D. Coombs, recommended to the Court that Corman was fit to proceed. (Appellee’s App., 6-16.)

[¶2] Corman ultimately entered an open plea of guilty to the crime of failure to register as a sex offender on August 23, 2010. (Appellee’s App., 17-22.) His plea was not entered pursuant to a plea agreement. (Appellant’s App. at 15.) At the date of his change of plea, he acknowledged that his plea was entered freely and voluntarily, and that no threats or promises were made to induce his open plea of guilty. *Id.* He was sentenced on January 10, 2011. (Appellee’s App. at 17.) In addition to other provisions, Corman was sentenced to five years with the Department of Corrections with two years of the sentence suspended. (Appellee’s App. at 17.) Corman was also placed on supervised probation for a period of five years following release from incarceration or termination of his parole. (Appellee’s App., 17-22.)

[¶3] Corman filed an Application for Post Conviction Relief on February 22, 2012. (Appellant’s App., 4-11.) In its response, the State of North Dakota asked for

summary dismissal, or in the alternative denial of the motion based on the merits of the argument. (Appellant's App., 12-13.) Neither party requested a hearing on the application. (Appellant's App. at 14.) The District Court, the Honorable Sonja Clapp presiding, found that the Petitioner had failed to present anything other than assertions unsupported by any basis in fact. (Appellant's App., 91-21.) The Court granted summary dismissal based on Corman's failure to present a genuine issue of material fact. (Appellant's App. at 21.) Corman gave notice of appeal from that ruling on June 21, 2012. (Appellant's App. at 22.)

STATEMENT OF THE FACTS

[¶4] Ryan Corman was given a lifetime requirement to register as a sexual offender based on a 2006 North Dakota conviction for Contributing to the Delinquency of a Minor in District Court No. 18-07-K-1498, stemming from multiple encounters with a minor child where he provided pornographic materials to that minor child. (Appellee's App., 23-29.) Corman had previous criminal convictions in Indiana, including for child molestation. (Appellee's App., 30-39.)

[¶5] On September 29, 2009, Police attempted a welfare check on Corman and were unable to locate him. (Appellee's App., 40-41.) They contacted Corman's place of work, Applied Products, and found that he had been terminated from employment on September 11. Id. Corman's supervisor cited numerous problems with absenteeism and stated that Corman had not shown up for work between September 2 and September 10, which led to formal termination on September 11. Id. Corman had not reported the termination to his registering agency, the Grand Forks Police Department. Id.

[¶6] The requirements of Corman's registration were that he report any changes in employment within three days of the change. (Appellee's App. at 27.) Corman was charged with failure to register on October 1, 2009. (Appellee's App. at 1.) On August 23, 2010, Corman pled guilty and was sentenced to five years with the D.O.C.R. with two suspended and placed on supervised probation following release for a period of five years. (Appellee's App. at 17.)

LAW AND ARGUMENT

I. The District Court did not err when it determined that summary dismissal of the Petitioner's application for post-conviction relief was appropriate.

[¶7] Post-conviction relief is governed by N.D.C.C. Chapter 29-32.1. Post conviction relief proceedings are civil in nature and are governed by the North Dakota Rules of Civil Procedure. Wheeler v. State, 2008 ND 109, ¶ 5, 750 N.W.2d 446. The requirements for an application for post-conviction relief are set forth in N.D.C.C. § 29-32.1-04. Ude v. State, 2009 ND 71, ¶ 8, 764 N.W.2d 419. A trial court's findings of fact in a post-conviction proceeding will not be disturbed on appeal unless they are clearly erroneous under N.D.R.Civ.P. 52(a). Klose v. State, 2005 ND 192, ¶ 10, 705 N.W.2d 809. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support it, or if the reviewing court, on the entire evidence, is left with a definite and firm conviction a mistake has been made. Jelsing v. Peterson, 2007 ND 41, ¶ 11, 729 N.W.2d 157.

[¶8] The petitioner has the initial burden of establishing grounds for the post-conviction relief. Flanagan v. State, 2006 ND 76, ¶ 10, 712 N.W.2d 602. A petitioner must set forth a concise statement of each ground for relief and specify the relief requested, refer to the pertinent portions of the record of prior proceedings, and if those portions are not in the record, the petitioner must attach those portions to the application. Ude, 2009 ND 71, ¶ 8. A petitioner may attach affidavits or other supporting materials to the application, but they are unnecessary. Id.

[¶9] A petitioner is not required to provide evidentiary support for his petition until he has been given notice he is being put on his proof. Id. The petitioner is

effectively put on his proof if the State moves for summary disposition pointing out a lack of evidence, and a minimal burden shifts to the petitioner to provide some competent evidence to support his claim. Steinbach v. State, 2003 ND 46, ¶ 17, 658 N.W.2d 355. At that point the petitioner may not merely rely on the pleadings or on unsupported, conclusory allegations, but must present competent admissible evidence by affidavit or other comparable means which raise an issue of material fact. Flanagan, ¶ 10; Steinbach, ¶ 17.

A. The Petitioner failed to request an evidentiary hearing in District Court. The issue should not be heard for the first time on appeal.

[¶10] In his brief on appeal, Corman argues that he should have been allowed to proceed with his application and hold an evidentiary hearing in District Court. (Appellant's Brief, ¶ 22.) He argues that the District Court erred when it decided his application on written briefs. (Appellant's Brief, ¶ 23.) However, as the District Court noted in its memorandum opinion, Corman failed to respond to the State's motion for summary judgment or to request a hearing on the matter. (Appellant's App. at 14). It should be noted that Corman's counsel was appointed on March 21, 2012, and the District Court filed its order denying Corman's application on June 21, 2012. (Appellant's App., 1-3.) Corman claims that the District Court erred by failing to grant him a hearing when he failed to request any such hearing. (Appellant's Brief, ¶ 23.) This is the first time that Corman is arguing that he was unfairly denied a hearing.

[¶11] The Supreme Court does not address issues that are raised for the first time on appeal. State v. Blurton, 2009 ND 144, ¶ 770 N.W.2d 231. Only an "obvious error or defect that affects substantial rights may be considered even though it was not

brought to the court's attention." N.D.R.Crim.P. 52(b). "We exercise the power to notice obvious error cautiously and only in exceptional circumstances where the defendant has suffered serious injustice." State v Vondal, 2011 ND 186, ¶ 5, 803 N.W.2d 578. The error must be a clear deviation from an applicable legal rule under current law to constitute an obvious error. Blurton, ¶ 8. Here, none of Corman's issues rise to the level of obvious error. The issue of whether Corman was denied a hearing should not be heard for the first time on appeal.

B. The Petitioner was put on his proof to provide some competent evidence to support his claim when the State moved for summary judgment.

[¶12] Corman argues that the State's response to his application was insufficient to shift the burden back to him to provide competent evidence to support his claim. (Appellant's Brief at ¶¶19, 22.) He cites to Parizek v. State, 2006 ND 61, 711 N.W.2d 178 as an example of a case where the State failed to shift the burden to the petitioner to support his claim with competent evidence. (Appellant's Brief at ¶20.) In Parizek, the State filed an opposition to Parizek's motion for post-conviction relief, but did not move for summary dismissal. Id. at ¶ 8. The State did not contend that it was impossible for Parizek to prove a claim for which relief could be granted or that there was an absence of evidence supporting Parizek's case. Id. at ¶ 9. The district court summarily dismissed Parizek's application on its own motion. Id.

[¶13] On appeal, the Supreme Court found the State's response to Parizek's application was not sufficient to put Parizek on his proof, and therefore the burden did not shift to Parizek to produce competent evidence prior to an evidentiary hearing to support his claim. Id. The Court noted that for a court to summarily dismiss a post-

conviction relief application on its own motion, the Court must find that the application is facially invalid. Id. at 12.

[¶14] Facially invalid is not the standard of proof required to summarily dismiss Corman's case because in his case the State, rather than the court, moved for summary judgment. Although the State bore the initial burden of showing there was no genuine issue of material fact, that burden was effectively discharged when the State pointed out in its motion that there was a complete absence of evidence supporting Corman's case. (Appellant's App. At As the Supreme Court pointed out in Steinbach v. State, a petitioner is effectively put on his proof if the State moves for summary disposition pointing out a lack of evidence. Steinbach, ¶ 17. At that point, the petitioner may not merely rely on the pleadings or on unsupported, conclusory allegations, but must present competent admissible evidence by affidavit or other comparable means which raise an issue of material fact. Id.

[¶15] This effective shifting of the burden stands in distinct contrast to Parizek because the State did not request summary judgment in Parizek. Corman's case is more analogous to Steinbach, where summary judgment was requested and the burden therefore shifted to the petitioner to present competent evidence. Corman's argument on appeal is that the State must prove a negative: that there is no genuine issue of material fact in evidence which Corman has not provided.

[¶16] The North Dakota Supreme Court addressed the difficulty of proving a negative in similar proceedings in Black v. Abex Corp., 1999 ND 236, 603 N.W.2d 182. "If the record . . . contains no evidence to support an essential element of the plaintiff's claim, there is no "evidence" the defendant can point to in support of its assertion there is

no such evidence.” Id. at ¶ 19. “In such a case the rule allows the defendant to put the plaintiff to its proof . . . by merely “pointing out” to the trial court the absence of evidence to support the plaintiff’s case.” Id. (citing Celetex Corp. v. Catrett, 477 U.S. 317, 325 (1986)). “This rule serves the policy underpinning Rule 56, N.D.R.Civ.P., by allowing the defendant to put the plaintiff to its proof when the record contains to evidence on an essential element of the plaintiff’s claim.” Black, ¶ 20.

C. The Petitioner failed to present anything beyond unsupported conclusory allegations and provided no basis in fact for any of his grounds for relief.

[¶17] In his application, Corman failed to cite to any evidence in the record or to refer with particularity to any portion of the record. (Appellant’s App., 20-21.) He also failed to supplement his application with any form of evidence, competent or otherwise. Id. His application did make broad references to unethical criminal activity by officers of the District Court, including the subornation of perjury and fabrication of evidence by the States Attorney’s Office (Appellant App. 7) and denial of due process and equal protection by the District Court (Appellant App. 9), but fails to make any such statement with particularity to any single event. Corman does not cite to any specific evidence or to any portion of the record in support of these claims. (Appellant’s App., 20-21.)

[¶18] The current facts are substantially similar to those presented in State v. Steinbach. Steinbach filed an application for post-conviction relief under grounds including ineffective assistance of counsel. Steinbach, ¶ 1. Steinbach listed eighteen reasons why he felt his counsel was ineffective, but did not provide any evidentiary support or supplementary documentation to support his claim. Id. at ¶ 13. The State moved to dismiss the application. Id. at ¶ 14. In his response, Steinbach argued that he

was entitled to an evidentiary hearing, but still failed to make specific citation to evidence on the record or to supplement his application. Id.

[¶19] In its memorandum opinion, the trial court stated that:

[W]hen a motion for summary disposition has been made (as in the instant case), the applicant (Steinbach) is put to the proof of providing sufficient evidentiary support for his allegation of ineffective assistance of counsel.... Mr. Steinbach responded to the State's motion for summary disposition but did not provide any supplemental documents which have provided any further evidentiary support for his allegation of ineffective assistance of counsel.

Id.

[¶20] The trial court granted summary dismissal of Steinbach's ineffective counsel claim. Id. The North Dakota Supreme Court affirmed the summary disposition, noting:

Although we have stated claims of ineffective assistance of counsel are ordinarily unsuited to summary disposition without an evidentiary hearing, we have upheld summary denials of post-conviction relief when the applicants were put to their proof, and summary disposition occurred after the applicants then failed to provide some evidentiary support for their allegations.

Id. at ¶ 15.

[¶21] The Supreme Court held that Steinbach had failed to present any evidence to the trial court to show there was a genuine issue of material fact warranting an evidentiary hearing, stating:

Once the State moves for summary disposition pointing out the absence of supporting evidence, the defendant is put on notice of the issue and a minimal burden shifts to the defendant to provide some competent evidence to support his claim. If competent evidence is provided, the defendant is entitled to an evidentiary hearing. Id. at ¶ 17.... Once the burden was shifted to Steinbach, he cannot merely rely on

the pleadings or unsupported conclusory allegations, but must present some competent admissible evidence by affidavit or other comparable means.


Id. at ¶ 18.

[¶22] The substantive and procedural facts of Corman's case are striking similar to Steinbach's, and dismissal should be upheld for the same reasons.

CONCLUSION

[¶23] The State respectfully requests that this Court affirm the District Court's decision to grant summary dismissal of Corman's application for post-conviction relief.

Respectfully submitted this 20 day of September, 2012.



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COPY

Supreme Court No. 20120309
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vs.

Petitioner - Appellant

SA#111997

[¶1] The undersigned, being of legal age, being first duly sworn deposes and says that on the 20th day of September, 2012, she served via e-mail true copies of the following documents:

and that said email was served on the address of:
Benjamin C. Pulkrabek and said e-mail address is: Pulkrabek@lawyer.com

Blank

State's Attorney's Office

Subscribed and sworn to before me this 20 day of September, 2012.

Candace Hess
Notary Public

jlf

CANDACE D. HESS
Notary Public
State of North Dakota
My Commission Expires Dec. 29, 2015

