

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Matthew Roger Swearingen,)
)
 Defendant/Appellant,)
)
 vs.)
)
 State of North Dakota,)
)
 Respondent/Appellee.)

Supreme Court No. 20130063

APPEAL FROM ORDER DENYING POST-CONVICTION RELIEF

BRIEF OF APPELLEE

Lonnie W. Olson (#04526)
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STATEMENT OF THE CASE

¶1 This matter is the appeal from a trial on a post-conviction relief action in Ramsey County District Court. To understand the nature of this matter, it is necessary to review the underlying facts of the convictions. On February 18, 2013 the Defendant filed a notice of appeal for the post-conviction relief.

STATEMENT OF FACTS

¶2 In the case at hand, the Defendant had been charged with Gross Sexual Imposition, a Class B Felony. The Defendant waived his right to a jury trial, and consented to a Bench Trial. The Defendant, along with his attorney and the prosecution, all signed the stipulation, which was filed with the Court. Appendix at Page A-27 and A-28. At the pretrial conference on January 25, 2011, the defense stated on the record their reasoning behind the waiver of a jury trial, and the strategy of trying the case to the Court. App at page A-31. The Defendant was present in the Courtroom during his counsel's statement to the Court regarding the Defense's reasoning. At no time did the Defendant say anything contrary to this attorney's explanation. (Pretrial hearing transcript, page 1).

¶3 At the trial held on March 8, 2011, the victim took the stand and explained the events in which the Defendant was charged with the crime of Gross Sexual Imposition. The trial strategy of defense was to not attack the victim, but to argue to the Court that the alleged contact of the Defendant's erect penis onto the victim's back was merely incidental to them lying together in bed, and not for the purpose of satisfying his sexual or aggressive desires. The Court found him guilty. The Defendant appealed, and this Court affirmed the conviction in a per curiam opinion, at State v. Swearingen, 2012 ND 6. Soon thereafter, the Defendant filed a motion for Post Conviction Relief, alleging Ineffective Assistance of Counsel.

¶4 A trial was held on the Post Conviction Relief matter on January 4, 2013. At that time, the Defendant testified about his contacts with his trial attorney. No testimony was given as to how a jury would have found him not guilty, in contrast to the Court finding him guilty by a bench trial. The Defendant did not present any affidavits or testimony from anyone about any potential witnesses that the trial counsel could have called but did not.

¶5 Trial counsel for the Defendant did testify at the Post Conviction Relief trial. He explained how often he would meet with the Defendant, in the jail and at the courthouse, and that he explained the evidence that the State had to present

1 against the defense. He further explained the strategy taken
2 at the trial, and tactically why he felt it would be a better
3 tactic to waive the jury trial and try the case to the Court.
4 Specifically, the Defendant had a prior conviction
5 approximately 10 years prior for Corruption or Solicitation of
6 a Minor, with very similar facts, and he could not have been
7 able tactically to allow the Defendant to take the stand.
8 Trial counsel explained the tactical difficulty of trying to
9 defend this type of case without the defendant's testimony.
10 Based upon the trial attorney's experience and training, he
11 felt it was a better strategy to waive the jury trial. He
12 testified that he explained it to the defendant, who then agreed
13 and signed the waiver of the jury trial.
14

15 ¶6 Trial Counsel explained how the Defendant would call him
16 from the jail many times, sometimes several times a day.
17 Counsel explained that as an indigent defense attorney, it is
18 very common to be out of the office for several days at a
19 time, and that when the Defendant would call he would contact
20 him when he got back or when Counsel had some news for the
21 Defendant.
22

23 ¶7 Trial counsel explained how the Defendant did not give
24 him any names of any valid witnesses to call. In fact, the
25 only potential witnesses would have been siblings of the
26 victim who were in the other room, and would have actually
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28

corroborated the victim.

¶18 At the close of the trial on the Defendant's Motion for Post Conviction Relief, the Trial Court ordered post trial briefs to be filed, and on January 24, 2013, the Court issued its Order Denying Petition For Post Conviction Relief. App. At page A-37.

LAW AND ARGUMENT

¶19 The issue of ineffective assistance of counsel on appeal is designed as a two part analysis. Strickland v. Washington, 466 U.S. 668, 694 (1984). The two questions arise as to whether counsel's performance was deficient and but for the unprofessional conduct, a different result would have occurred. The North Dakota Supreme Court has held that a defendant claiming ineffective assistance of counsel must establish two elements; (1) counsel's performance was deficient and (2) counsel's deficient performance prejudiced the defendant. State v. Roberson, 502 N.W.2d 249, 251. Specifically, the defendant must establish a reasonable probability that but for the lawyers unprofessional conduct, the result of the proceedings would have been different. DeCoteau v. State, 1998 N.D. 199, 586 N.W.2d 156 (1998). The Defendant must further point out with specificity how and where the trial counsel was incompetent and that the probable result would have been different. Id.

1
2 ¶10 The Defendant is essentially arguing that it is
3 automatically ineffective assistance of counsel to waive a
4 jury trial in a criminal matter. The tactical decision to
5 waive a jury trial and try the case to the Court is a valid
6 trial strategy, based upon these facts. Second guessing
7 matters of trial strategy is not a valid issue for the Court
8 to assess in dealing with ineffective assistance of counsel.
9 State v Austin, 2007 ND 30, at paragraph 32, 727 NW2d 790,
10 Rummer v State, 2006 ND 216, at paragraph 12, 722 NW2d 528.


11 ¶11 Defendant makes a passing argument that witnesses
12 favorable to the Defendant were not subpoenaed to testify.
13 The fact of the matter is that there were no such witnesses.
14 The only witnesses possible would have corroborated the
15 victim.
16

17 ¶12 The Defendant has failed to meet its burden of showing
18 that trial counsel had unprofessional conduct and that but for
19 the unprofessional conduct, there would have been a different
20 result.
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CONCLUSION

¶13 Based upon the foregoing, the State asks that the trial court decision affirmed.

Dated this 29th day of April, 2013.



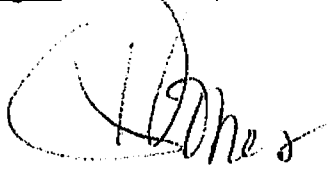
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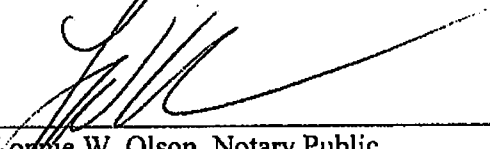
**AFFIDAVIT OF SERVICE BY
ELECTRONIC MEANS**

Connie Jones, being first duly sworn, deposes and says that on the 29th day of April, 2013, she served the attached copy of Appeal from Order Denying Post-Conviction Relief regarding the above reference matter upon Thomas J. Glass at tjglass@midconetwork.com from crjones@nd.gov, Devils Lake, North Dakota. I emailed 10 pages including this page.



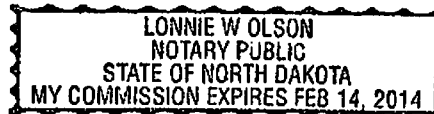
Connie Jones

Subscribed and sworn to before me this 29th day of October, 2008.



Lonnie W. Olson, Notary Public
Ramsey County, North Dakota

(SEAL)



IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Matthew Swearingen,

Appellant,

vs.

State of North Dakota,

Appellee.

Supreme Ct. No. 20130063

**AFFIDAVIT OF SERVICE BY
ELECTRONIC MEANS**

Connie Jones, being first duly sworn, deposes and says that on the 17th day of

May, 2013, she served the attached copy of 1. Brief of Appellee and
2. Certificate of Non-compliance

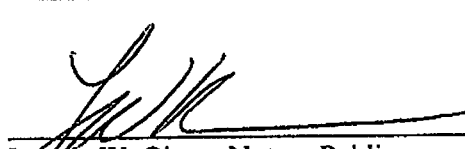
regarding the above reference matter upon Thomas J. Glass at

tlglaw@midconetwork.com from crjones@nd.gov, Devils Lake, North Dakota. I

emailed 11 pages including this page.


Connie Jones

Subscribed and sworn to before me this 17th day of May, 2013.


Lonnie W. Olson, Notary Public
Ramsey County, North Dakota

(SEAL)

