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TABLE OF CONTENTS

Page No.

Table of Authorities	i
Statement of the Issues.....	1
Statement of the Case.....	2
Statement of the Facts	3
Argument	10
Conclusion	17

TABLE OF AUTHORITIES

Cases

Page No.

Chisholm v. State

2014 ND 125, 2014 WL 2866997..... 10

Johnson v. State

2006 ND 122, 714 N.W.2d 832 12

Osier v. State

2014 ND 41, 843 N.W.2d 277..... 10

State v. Norman

507 N.W.2d 522 (N.D. 1993) 12

State v. Thompson

359 N.W.2d 374 (N.D. 1985) 10

Strickland v. Washington

466 U.S. 668 (1984)..... 10, 11, 13, 15

Statutes

N.D.C.C. § 29-32.1-01 10

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STATEMENT OF THE CASE

The State concurs with the Appellant's recitation of the proceedings below.

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STATEMENT OF THE FACTS

On August 8, 2011, Rustin Dale Bentz (hereinafter "Bentz") was charged by criminal complaint with Criminal Trespass and two counts of Terrorizing, each a class C felony. Appendix at 3-4 (hereinafter "App. at 3-4."). A change of plea hearing was held on December 1, 2011, at which Bentz pleaded guilty to the two charges of Terrorizing and was given a three year probation sentence. App. at 7-11. To that effect, the State filed an Amended Information on December 7, 2011, dropping the Criminal Trespass charge. App. at 5.

Bentz retained attorney Chad McCabe (hereinafter "McCabe") to represent him on the terrorizing charges. At the beginning of the hearing, the judge briefly discussed the purpose of the proceeding with the attorneys and asked Bentz, "[D]o you understand what's going on here so far today?" Change of Plea Hearing Transcript page 4, lines 20-21 (hereinafter COP Tr. 4:20-21"). Bentz replied, "Yes, your Honor." COP Tr. 4:22. Then McCabe informed the court that a mental health evaluation had been done and said that he would summarize the results because the court had not yet read the evaluation. COP Tr. 4:23-5:2.

The court informed Bentz of the minimum and maximum penalties that may apply if he chose to plead guilty or proceed to trial on the charges. COP Tr. 5:9-6:4. The court then informed Bentz of his rights should he choose to take the matter to trial, informed him that pleading guilty means

1 waiving those rights, asked Bentz if he intended to plead guilty, and made
2 sure that Bentz's plea was voluntary. COP Tr. 5:9-7:22. Each time the judge
3 informed Bentz of a right and that he would be waiving that right, Bentz gave
4 an affirmative response, indicating that he understood and agreed to the
5 proceedings. COP Tr. 5:9-7:22.
6

7 When it was time to summarize the mental health evaluation, McCabe
8 stated,
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10 He's had a lot of hallucinations, and that's what the State
11 hospital recognizes. He does have hallucinations. Even when
12 he was being interview [sic] he'd stare off into space and
would say things that didn't make a whole lot of sense at times.
Nonetheless, they did find him competent in most respects.

13 And, you know, I was a little disappointed with the
14 ultimate conclusion because what they basically concluded was
15 he does have mental illness issues. He has hallucinations even
16 when sober. But nonetheless, because of methamphetamine use
17 on this particular occasion, they blamed any lack of criminal
18 responsibility that he may have on the use of
methamphetamine rather than perhaps the natural
hallucinations he has when he is sober. I thought that was sort
of a leap to make that conclusion. But we have to live with that
evaluation.

19 COP Tr. 15:1-16.

20 The court then asked Bentz if he would like to say anything on his own
21 behalf and Bentz replied, "Sorry about everything." COP Tr. 17:12-14. After
22 that, the court informed Bentz, "I must tell you, even if the Court accepts the
23 recommendation here, that if you violate your conditions of probation, you
24 could actually be resentenced all the way up to the maximum on the charges
25 against you. Do you understand that?" COP Tr. 17:17-21. Bentz responded
26 that he did understand. COP Tr. 17:22.
27

1 On March 27, 2012, Bentz's probation was revoked and he was
2 sentenced to the custody of the Department of Corrections and Rehabilitation
3 for a period of five (5) years, with credit for one hundred fifty-seven (157)
4 days. App. at 12-13.

5
6 On November 6, 2012, Bentz filed an application for post-conviction
7 relief. App. at 14-32. The State answered, moving for summary disposition
8 and putting Bentz on his proof. App. at 33-34. Bentz retained attorney Phyllis
9 Ratcliffe and filed a response to the State's motion. App. at 35-38. The district
10 court held a hearing on the post-conviction relief application on April 2, 2014.
11

12 While on the stand, McCabe testified,

13 MS. HUMMERT: My understanding of your testimony is that
14 at the time, you really didn't have any indication that he didn't
understand?

15 MCCABE: No. I mean, again, I knew about the possible
16 evaluation. Of course, they said he was competent, and I hoped
17 he was fine. You know, I mean, I knew he was having troubles;
18 but I truly at the time thought he knew what was going on and
19 what the plea as. I just - - my concern is looking back now
upon his complaints that he says he didn't know. I can only
base it on what I knew at the time.

20 MS. HUMMERT: So your concerns have arisen since you've
21 heard about his complaints in this case?

22 MCCABE: Yes. I mean, if you would have asked me before I
23 heard about this complaint, I would have said, yeah, I think he
24 knew what was going on. But now that he's saying he didn't, I
25 have no way to dispute that because he was suffering from
hallucinations and whatnot at various times. So I don't want to
discredit what he's saying because it may be very true. I just
didn't know about it.

26 MS. HUMMERT: But you - - at that time you did have the
27 results of the evaluation?

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MCCABE: Yes.

MS. HUMMERT: And he wasn't expressing anything that he didn't understand or anything at the time of sentencing for you to know that there was a problem?

MCCABE: No. I thought he knew at the time.

MS. HUMMERT: -- you said the phrase, our goal was probation. Does that indicate that you had conversations with him about what the desired outcome of the sentencing would be?

MCCABE: Yes. We were trying to negotiate a deal where he could be released and be put on probation.

MS. HUMMERT: So he was able to participate and let you know what his goals were and where he wanted to be?

MCCABE: Yes.

MS. HUMMERT: And then he was informed at sentencing that he could be resentenced back to the maximum on all charges?

MCCABE: Yes. I just - - you know, when Ms. Ratcliffe and I talked about that over at my office, I don't remember ever having a discussion on concurrent versus consecutive, other than I may have told Rustin that these are run concurrent for you now when you're getting sentenced. You know, since he was put on probation, it was sort of a moot point, at least I thought at the time. Obviously it mattered when he got resentenced.

COP Tr. 20:24-21:24; 22:1-18. When asked about Bentz's mental issues, McCabe testified,

MS. RATCLIFFE: Mr. McCabe, in any of your discussions with the defendant, did he indicate that he was hearing voices or anything like that?

MCCABE: Oh, yeah. He talked about it numerous times.

MS. RATCLIFFE: Okay. And - -

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MCCABE: That's why I sent him to the State Hospital.
COP Tr. 32:23 – 33:3.

While on the stand, Bentz testified,

MS. RATCLIFFE: Okay. Do you recall that the Court told you that you could get the maximum five years on each count?

BENTZ: Yeah.

MS. RATCLIFFE: Okay. Did anybody ever explain to you that that could be one 5-year term right after the other 5-year term, so it could be a total of ten years?

BENTZ: Well, like I said before, I said yes during there. But then, you know, talking with the people around here, the other inmates and - - they explain to you each count and that it could be ten years. That was after the fact.

MS. RATCLIFFE: All right. My question, then, is at the time of sentencing, did you understand that if you violated your probation that you could get a total of ten years?

BENTZ: No.

MS. HUMMERT: And right above where you signed it says, the above conditions of probation have been read and explained to me; and I fully understand each one, shall follow the conditions that the Court has listed or checked, and I understand that failure to follow any more - - any one or more of these conditions may result in a revocation of probation and that the Court may resentence me to any sentence that was available to the Court at the time of the initial sentencing. Do you recall seeing that document?

BENTZ: Yeah. I remember seeing it.

MS. RATCLIFFE: Do you remember discussing the plea agreement with Mr. McCabe?

BENTZ: Over the phone.

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MS. RATCLIFFE: Over the phone. Okay.

BENTZ: Yeah.

MS. RATCLIFFE: And did you understand the agreement?

BENTZ: Yes.

Post-Conviction Relief Hearing Transcript page 39, lines 2-15; page 41, lines 8-17; page 51, lines 5-11 (hereinafter "PCR Tr. 39:2-15; 41:8-17; 51:5-11").
The district court judge examined Bentz as well. That exchange proceeded as follows:

THE COURT: So how come you plead? How come you just didn't go to trial?

BENTZ: There was a couple reasons. Like, it was a good deal.

BENTZ: And it was brought up that this is probably his only deal.

THE COURT: Uh-huh. Otherwise you go to trial, and who knows what could happen?

BENTZ: Yeah.

THE COURT: And so you decided you'd rather take this deal?

BENTZ: Yeah. Yes.

THE COURT: Okay. So you knew what was involved in the deal; is that right?

BENTZ: Yes.

THE COURT: Okay. So you had discussed the terms of it?

BENTZ: Yes.

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THE COURT: Well, I'm sure it's a pretty stressful situation. But what I'm trying to understand is what is it you're saying that Mr. McCabe didn't do? What should he have done that he didn't do? And, I guess, that's where I'm kind of at a loss.

BENTZ: So am I.

PCR Tr. 45:20-23; 46:24-47:10; 48:17-21.

Based on the testimony, the district court denied Bentz's application for post-conviction relief. App. at 39; PCR Tr. 60:15-64:5. Bentz now brings this appeal, arguing the district court erred in denying him relief.

1
2 **ARGUMENT**

3 The district court did not err in denying Bentz post-conviction relief
4 because he failed meet his burden of showing that he was provided ineffective
5 assistance of counsel by Mr. McCabe at the proceedings prior to and through
6 the change of plea and sentencing hearing.

7 Chapter 29-32.1 of the North Dakota Century Code allows “[a] person
8 who has been convicted of and sentenced for a crime [to] institute a
9 proceeding applying for relief under this chapter. . . .” N.D.C.C. § 29-32.1-01.
10 “An applicant has the burden of establishing grounds for post-conviction
11 relief.” Chisholm v. State, 2014 ND 125, ¶ 8, 2014 WL 2866997. “When an
12 applicant for post-conviction relief claims ineffective assistance of counsel, he
13 must establish both prongs of the Strickland test” Osier v. State, 2014
14 ND 41, ¶ 10, 843 N.W.2d 277.

15
16 In order to prove ineffective assistance of counsel,

17
18 First, the defendant must show that counsel’s performance was
19 deficient. This requires a showing that counsel made errors so
20 serious that counsel was not functioning as the ‘counsel’
21 guaranteed the defendant by the Sixth Amendment. Second, the
22 defendant must show that the deficient performance prejudiced
the defense. This requires showing that counsel’s errors were
so serious as to deprive the defendant of a fair trial, a trial
whose result is reliable.

23 State v. Thompson, 359 N.W.2d 374, 376 (N.D. 1985); Strickland v.
24 Washington, 466 U.S. 668, 687 (1984). There is no mechanical formulation
25 for what constitutes ineffective assistance, thus “the ultimate focus of inquiry
26
27

1 must be on the fundamental fairness of the proceeding whose result is being
2 challenged.” Strickland, 466 U.S. at 696.

4 The United States Supreme Court has limited an appellate court’s
5 review of counsel’s performance:

6 Judicial scrutiny of counsel’s performance must be highly
7 deferential. It is all too tempting for a defendant to second-
8 guess counsel’s assistance after conviction or adverse sentence,
9 and it is all too easy for a court, examining counsel’s defense
10 after it has proved unsuccessful, to conclude that a particular
11 act or omission of counsel was unreasonable. A fair assessment
12 of attorney performance requires that every effort be made to
13 eliminate the distorting effects of hindsight, to reconstruct the
14 circumstances of counsel’s challenged conduct, and to evaluate
15 the conduct from counsel’s perspective at the time.

16 Id. at 689. “[A] court must indulge a strong presumption that counsel’s
17 conduct falls within the wide range of reasonable professional assistance . . .
18 .” Id. Moreover, “[t]he reasonableness of counsel’s actions may be determined
19 or substantially influenced by the defendant’s own statements or actions.
20 Counsel’s actions are usually based, quite properly, on informed strategic
21 choices made by the defendant and on information supplied by the defendant.”
22 Id. at 691.

23 **A. Counsel’s Actions Were Reasonable Based on the Circumstances**
24 **at the Time of the Change of Plea and Sentencing Hearing.**

25 In order to prove ineffective assistance of counsel, Bentz needed to prove
26 that his “counsel’s representation fell below an objective standard of
27 reasonableness.” Strickland, 466 U.S. at 688. There is a presumption that
counsel’s actions were reasonable. Id. at 689. The reasonableness of counsel’s
actions is to be determined based on the circumstances at the time the decision

1 was made. Id. McCabe did act reasonably under the circumstances at the time
2 of the change of plea hearing.
3

4 Upon becoming aware of possible mental health issues with Bentz,
5 McCabe sent Bentz to the State Hospital to undergo an evaluation. PCR Tr.
6 32:23 – 33:3. When the district court indicated that it had not read the
7 evaluation, McCabe gave the court the results, highlighting the facts that
8 Bentz had been having hallucinations, that the evaluators blamed those
9 hallucinations on methamphetamine use, and that he was disappointed that
10 they determined he was competent to stand trial and capable of accepting
11 responsibility for his actions. COP Tr. 15:1-16.
12

13 It was not unreasonable for McCabe to forego a second evaluation because
14 criminal defendants are entitled to one competent evaluation, which may be
15 provided at public expense. Johnson v. State, 2006 ND 122, ¶ 22, 714 N.W.2d
16 832. Defendants are not free to “shop around” until they find “a favorable
17 conclusion.” Id. at ¶ 21. There are few situations in which defendants have
18 tried to make these arguments in favor of their ineffective assistance of
19 counsel claims, but they have not been successful. See State v. Norman, 507
20 N.W.2d 522, 524 (N.D. 1993); Johnson, 2006 ND 122, ¶ 22, 714 N.W.2d 832.
21

22 Additionally, it was reasonable for McCabe to rely on Bentz’s statements
23 at the change of plea hearing, indicating that he understood the proceedings.
24 The district court asked Bentz about his understanding of the proceedings
25 several times throughout the proceedings. COP Tr. 4:20-22; 5:9-19; 5:20-7:22.
26 Bentz particularly indicated that he understood that he could be sentenced
27

1 “from the very minimum all the way up to the maximum on each charge.”
2
3 COP Tr. 7:2-4. He also confirmed that his plea was voluntary. COP Tr. 7:20-
4 22. When the court asked Bentz if there was anything he wanted to say on his
5 own behalf, Bentz replied, “Sorry about everything.” COP Tr. 17:12-14.
6 Before he was sentenced, the judge made sure that Bentz understood violation
7 of any of the conditions of probation could mean being resentenced up to the
8 maximum on the charges against him. COP Tr. 17:17-21. Bentz stated that he
9 did understand that. COP Tr. 17:22.
10

11 Based on Bentz’s responses to the judge’s questions, McCabe “truly at the
12 time thought he knew what was going on and what the plea was.” PCR Tr.
13 21:5-6. Bentz did not indicate to McCabe that he was having difficulty
14 understanding at the proceedings at the change of plea and sentencing hearing.
15 PCR Tr. 21:21-24. Bentz and McCabe worked together in obtaining a
16 probationary sentence. PCR Tr. 22:1-8. Ultimately, McCabe’s concerns did
17 not arise until hearing Bentz’s complaints made after the change of plea and
18 sentencing proceeding. PCR Tr. 21:9-11.
19

20 The reasonableness of McCabe’s actions must be evaluated based on the
21 circumstances at the time those actions transpired. Strickland, 466 U.S. at 689.
22 It was reasonable for McCabe to rely on Bentz’s statements at the time he was
23 representing him. See id. at 691 (“Counsel’s actions are usually based, quite
24 properly, on informed strategic choices made by the defendant and on
25 information supplied by the defendant.”). It may have even been reasonable to
26 change his mind after he learned of Bentz’s complaints at the post-conviction
27

1 relief hearing and after his representation of Bentz had terminated. But it is the
2 former that this analysis turns upon, and based upon the former, Bentz's
3 outcome was not tainted by ineffective assistance of counsel.
4

5 One could certainly argue that it was unreasonable for McCabe to not
6 explicitly inform Bentz that he could be sentenced to consecutive terms of
7 incarceration if he was revoked. However, Bentz was informed that "if you
8 violate your conditions of probation, you could actually be resentenced all the
9 way up to the maximum on the charges against you." COP Tr. 17:18-20.
10 Bentz stated that he understood this. COP Tr. 17:20-22. Furthermore, McCabe
11 was not concerned with whether terms of incarceration would be running
12 concurrently or consecutively because Bentz was released from custody and
13 put on probation. Based on those circumstances, McCabe believed that
14 incarceration had become a "moot point." PCR Tr. 22:15-18. It was not
15 unreasonable for him to so believe and act in accordance with his perceptions
16 of the situation at the time.
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19 The district court judge heard testimony from both McCabe and Bentz at
20 the post-conviction relief hearing. She finally asked Bentz, "But what I'm
21 trying to understand is what is it you're saying that Mr. McCabe didn't do?
22 What should he have done that he didn't do? And, I guess, that's where I'm
23 kind of at a loss." PCR Tr. 48:17-20. Bentz replied, "So am I." PCR Tr. 48:21.
24 Given the testimony from both McCabe and Bentz, and the presumption of
25 reasonableness, it was not clearly erroneous for the district court to deny
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1 Bentz post-conviction relief for he had not and still has not proven that
2 McCabe's actions were unreasonable.
3

4 **B. Counsel's Actions Did Not Prejudice the Outcome of the**
5 **Proceeding.**

6 Even if this Court determines that it was unreasonable for McCabe to
7 not inform Bentz that he could be resentenced to consecutive terms of
8 incarceration upon revocation, it did not prejudice the outcome of the change
9 of plea proceeding. In order to satisfy this prong, Bentz needed to prove "there
10 is a reasonable probability that, but for counsel's unprofessional errors, the
11 result of the proceeding would have been different." Strickland, 466 U.S. at
12 694. "A reasonable probability is a probability sufficient to undermine
13 confidence in the outcome." Id.
14

15 At the post-conviction relief hearing, Bentz claimed he did not know
16 that upon revocation he could have been sentenced up to ten years, with the
17 maximum of five years sentences for each charge to run consecutively. PCR
18 Tr. 39:5-15. He now argues that he would not have pleaded guilty had he
19 known that information. Yet the transcript of the post-conviction relief
20 hearing suggests otherwise.
21

22 Bentz acknowledged that the court told him that he could get the
23 maximum of five years on each count at the change of plea and sentencing
24 hearing. PCR Tr. 39:2-4. He also signed the conditions of his probation, which
25 provided that if he violated any of the conditions the court could resentence
26 him to any sentence available at the time of the initial sentencing. App. at 11;
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1 PCR Tr. 41:8-17. This indicates that Bentz was or should have been aware of
2 what the court was allowed to do upon revocation.
3

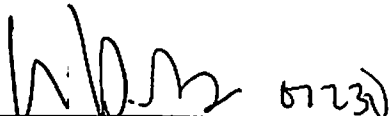
4 Furthermore, the district court judge inquired into Bentz's reasons for
5 pleading guilty. PCR Tr. 45:20-21. Bentz replied that "it was a good deal" and
6 probably the only deal that would have been available to him. PCR Tr. 45:22-
7 23; 46:24-25. He remembered discussing the deal with McCabe over the
8 phone and said that he had understood the plea agreement. PCR Tr. 51: 5-11.
9 Bentz had balanced the risk of going to trial and the State's offer and decided,
10 with the assistance of McCabe, to plead guilty and take the probationary
11 sentence offered by the State. PCR Tr. 47:1-10.
12

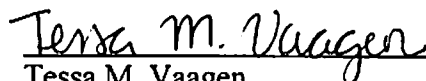
13 Ultimately, the plea agreement offered Bentz the exact sentence he
14 wanted – to be released from custody and put on probation. PCR Tr. 22:1-8.
15 There is no reasonable probability that what could happen at an unforeseeable
16 revocation hearing in the future would have affected Bentz's voluntary choice
17 to plead guilty and be placed on probation that day. Therefore, Bentz did not
18 prove his ineffective assistance of counsel claim and the district court did not
19 err in denying Bentz post-conviction relief.
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1
2 **CONCLUSION**

3 Based upon the foregoing, the State requests that the district court's
4 denial of post-conviction relief be affirmed.

5 Dated this 5 day of August, 2014.

6
7 
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1
2 IN THE SUPREME COURT
3 STATE OF NORTH DAKOTA

4 Rustin Dale Bentz,)
5)
6 Petitioner-Appellant,)
7)
8 -vs-)
9)
10 State of North Dakota,) Supreme Ct. No. 20140138
11)
12 Respondent-Appellee,) District Ct. No. 08-2013-CV-02464
13) SA File No. F601-11-08
14
15 STATE OF NORTH DAKOTA)
16) ss
17 COUNTY OF BURLEIGH)
18)

19 Katie A. Wangler, being first duly sworn, depose and say that I am a
20 United States citizen over 21 years old, and on the 5th day of August, 2014,
21 I deposited in a sealed envelope a true copy of the attached:

- 22 1. Brief of Respondent-Appellee
23 2. Affidavit of Mailing

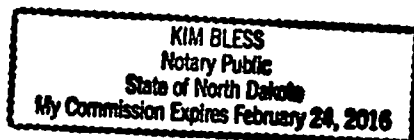
24 in the United States mail at Bismarck, North Dakota, postage prepaid,
25 addressed to:

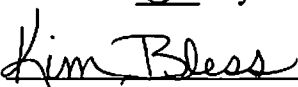
26 **MARK TAYLOR BLUMER**
27 **ATTORNEY AT LAW**
PO BOX 7340
FARGO, ND 58106

which address is the last known address of the addressee.

28 
29 Katie A. Wangler

30 Subscribed and sworn to before me this 5th day of August, 2014.



38 
39 Notary Public
40 Burleigh County, North Dakota