

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

Tate Allister Pederson,

Petitioner/Appellant,

vs.

State of North Dakota,

Respondent/Appellee.

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Supreme Court No.
 20140343

Cass County District No.
 09-2014-CV-01294

ON APPEAL FROM ORDER DISMISSING PETITION
 FOR POST-CONVICTION RELIEF
 FROM THE DISTRICT COURT
 FOR THE EAST CENTRAL JUDICIAL DISTRICT
 CASS COUNTY, NORTH DAKOTA
 THE HONORABLE DOUGLAS R. HERMAN, PRESIDING

BRIEF OF APPELLANT

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[¶ 1] STATEMENT OF THE ISSUES

[¶ 2] I. Pederson argues the district court abused its discretion when the court dismissed with prejudice Pederson's petition for post-conviction relief.

[¶ 3] STATEMENT OF THE CASE

[¶ 4] This is an appeal arising from two actions by the district court in Cass County District Court, (1) an order dismissing Petitioner's application for post-conviction relief dated August 6, 2014, and (2) an order denying Petitioner's motion of objection to court proceedings, dated September 5, 2014. These two orders collectively dismissed Petitioner's application for post-conviction relief with prejudice.

[¶ 5] On October 13, 2008, Tate Pederson was charged by criminal information in Cass County district court with gross sexual imposition and sexual assault (Cass County district court file no. 09-08-K-04015). The charge of gross sexual imposition alleged that Pederson engaged in sexual acts with a minor child on July 1, 2006 and December 25, 2007 while the minor child was under the age of fifteen and Pederson was over the age of twenty-two. The charge of sexual assault alleged that Pederson engaged in sexual contact with the same minor child on December 26, 2007 and July 19, 2008 while the minor child was fifteen years old or older and Pederson was over the age of twenty-two. The criminal information was amended January 21, 2010 to clarify that the dates alleged were not specific offenses, but date ranges. Appendix of Appellant, 14-15. Pederson maintained not guilty pleas on both charges and the matter was set for jury trial.

[¶ 6] Pederson initially retained Steve Light to represent him on the criminal charges. One day before trial, on January 25, 2010, Pederson fired Mr. Light and hired

Alan Sheppard to represent him at trial. A jury trial was held for January 26, 2010 through February 1, 2010. Pederson was found guilty on both counts.

[¶ 7] Pederson filed a motion for a new trial on May 3, 2010. Appendix, 16-17. The trial court denied Pederson's motion. Appendix, 18-20.

[¶ 8] Pederson was sentenced on June 15, 2010. On the conviction for gross sexual imposition (count 1), Pederson was sentenced to twenty-three years with the North Dakota Department of Corrections and Rehabilitation (ND DOCR), to serve eighteen years imprison and the balance of five years suspended. Appendix, 21-23. On the conviction for sexual assault (count 2), Pederson was sentenced to five years with the ND DOCR, with all five years suspended, concurrent to Count 1. Id.

[¶ 9] Pederson appealed the guilty verdict, criminal judgment, and order dismissing his motion for new trial. The Supreme Court summarily affirmed the trial court findings. State v. Pederson, 2011 ND 17, 798 N.W.2d 878; Appendix, 24-25.

[¶ 10] Pederson filed his first petition for post-conviction relief on July 11, 2011 (Cass County file no. 09-2011-CV-02224). Pederson alleged ineffective assistance of trial counsel, cruel and unusual punishment, and prosecutorial misconduct. After an evidentiary hearing on August 1, 2012, the district court denied Pederson's petition. Pederson appealed the trial court's order dismissing the petition for post-conviction relief. The Supreme Court summarily affirmed the trial court's order. Pederson v. State, 2013 ND 7, 828 N.W.2d 546; Appendix, 26.

[¶ 11] Pederson filed a second petition for post-conviction relief on May 8, 2014. Appendix, 27-29. Pederson alleged ineffective assistance of counsel, evidentiary violations, and judicial misconduct. An amended application for post-conviction relief

was filed on July 3, 2014 by Monty Mertz, Pederson's attorney appointed to represent him on the second petition. Appendix, 30-36. Pederson alleged newly discovered evidence that was not presented or heard at trial. Specifically, Pederson alleged (1) the victim from the underlying criminal case admitted to family members that she lied when she testified at the jury trial; (2) Pederson's ex-wife had sabotaged Pederson's defense at trial; (3) Pederson's trial attorney was now married to Pederson's ex-wife; and (4) judicial misconduct involving Wickham Corwin, the judge of Pederson's criminal trial. Id.

[¶ 12] The district court scheduled a post-conviction hearing for August 6, 2014. At the beginning of the hearing, Mr. Mertz stated the previous day he received information from the prosecutor that negated Pederson's claims. Appendix, 39; Transcript of Post-Conviction Hearing, August 6, 2014, 3:8 to 3:16. Mr. Mertz made a request to dismiss the second petition. Appendix, 39; Transcript, 3:17 to 3:20. The court inquired with Pederson whether it was Pederson's desire to dismiss the second petition, to which Pederson agreed. Appendix, 40; Transcript, 4:12 to 4:15. After further discussion on the record, the court dismissed with prejudice Pederson's second petition for post-conviction relief. Appendix, 41; Transcript, 5:1 to 5:4; Appendix, 43-44.

[¶ 13] On August 18, 2014 Pederson filed a motion objecting to the court's decision to dismiss the second petition with prejudice, claiming that he did not consent to a dismissal with prejudice. Appendix, 45. The State filed its response on August 29, 2014. Appendix, 46-48. The court denied Pederson's motion on September 5, 2014. Appendix, 49-51.

[¶ 14] After the court's order, the clerk of court received Pederson's response to the State's response and docketed the file on September 8, 2014. Appendix, 52; Pederson v. State, 09-2014-CV-01294, Doc ID# 52. In Pederson's response, dated September 4, 2014, he stated that he was under duress on August 6 at the post-conviction hearing and requested reinstatement of his second petition for post-conviction relief. Appendix, 52.

[¶ 15] Pederson timely filed a notice of appeal on October 3, 2014. Appendix, 53-55. Pederson now appeals the district court's orders dismissing with prejudice his second petition for post-conviction relief. Pederson argues he did not consent to dismissal with prejudice.

[¶ 16] STATEMENT OF THE FACTS

[¶ 17] The underlying facts of this case have been set forth in two previous appeals and briefs filed within. See, State v. Pederson, 2011 ND 17, 798 N.W.2d 878, Appellant's Brief; Pederson v. State, 2013 ND 7, 828 N.W.2d 546, Appellant's Brief.

[¶ 18] Relevant to this case, Tate Pederson filed a second application for post-conviction relief on May 8, 2014. Appendix, 27-29. An amended application for post-conviction relief was filed on July 3, 2014. Appendix, 30-36. The district court scheduled an evidentiary hearing on the application and amendments for August 6, 2014.

[¶ 19] At the beginning of the August 6 hearing, the court indicated it was ready for a "full-blown post-conviction hearing." Appendix, 38; Transcript of Post-Conviction Hearing, August 6, 2014, 2:14 to 2:15. Before the court took any testimony or evidence, Pederson's counsel, Monty Mertz, addressed the court about information he had received from the prosecutor. Mr. Mertz stated that he had reviewed the information in great detail and the materials provided by the prosecutor "categorically negate the factual basis

for my theory for this hearing, and it puts me in a position of being unable to proceed.” Appendix, 39; Transcript, 3:14 to 3:16.

[¶ 20] Mr. Mertz indicated that he requested Pederson to dismiss with prejudice the second petition. Appendix, 39; Transcript, 3:17 to 3:20. The court reiterated that it was prepared to take up a “full-blown hearing” at that time. Appendix, 40; Transcript, 4:6 to 4:10. The court asked if Pederson was requesting to dismiss the petition with prejudice and Pederson confirmed. Appendix, 40; Transcript, 4:12 to 4:15. The court explained that a dismissal with prejudice would almost certainly prevent Pederson from raising the issues of the second petition again. Appendix, 40; Transcript, 4:16 to 4:21. Pederson confirmed that he understood. Appendix, 40; Transcript, 4:22. The district court then dismissed Pederson’s petition. Appendix, 41; Transcript, 5:1 to 5:4.

[¶ 21] JURISDICTION

[¶ 22] Appeals are allowed from lower district courts to the Supreme Court as provided by law. N.D. Const. art. VI, § 6. A final judgment entered in a post-conviction relief petition may be reviewed by the Supreme Court. N.D.C.C. § 29-32.1-14.

[¶ 23] STANDARD OF REVIEW

[¶ 24] Proceedings on applications of post-conviction relief are civil in nature and governed by the North Dakota Rules of Civil Procedure. Wilson v. State, 2013 ND 124, ¶ 9, 833 N.W.2d 492. The burden of proof is on the petitioner to establish grounds for relief. Tweed v. State, 2010 ND 38, ¶ 15, 779 N.W.2d 667. A district court’s findings of fact in post-conviction proceedings will be overturned if those findings are clearly erroneous under N.D.R.Civ.P. 52(a). Id. Questions of law in post-conviction proceedings are fully reviewable on appeal. Id.

[¶ 25] A district court's dismissal with prejudice is reviewed for an abuse of discretion. State v. Tweeten, 2004 ND 90, ¶ 7, 679 N.W.2d 287. A trial court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner. Id.

[¶ 26] ARGUMENT

[¶ 27] I. Pederson argues the district court abused its discretion when the court dismissed with prejudice Pederson's petition for post-conviction relief.

[¶ 28] Pederson argues that he did not consent to dismissal with prejudice of the second petition for post-conviction relief. Pederson did not seek to have the claims in his second petition forever barred from being raised again. "Dismissal with prejudice is a remedy that should only be used in extreme circumstances." State v. Tweeten, 2004 ND 90, ¶ 16, 679 N.W.2d 287 (citing State v. Bolen, 13 P.3d 1270 (Kan. 2000)). A district court's decision to dismiss a matter with prejudice is reviewed for abuse of discretion. Tweeten, 2004 ND 90, ¶ 7, 679 N.W.2d 287. A trial court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner. Id.

[¶ 29] Pederson argues that the district court should have dismissed his petition without prejudice, allowing Pederson the opportunity to refile his second petition for post-conviction relief. The district court abused its discretion when it dismissed with prejudice, as opposed to dismissing without prejudice. "[I]n dismissing [] with prejudice, the court allows its interest in the orderly administration of justice to override the interests of victims and the public interest in the enforcement of the criminal law." Tweeten, 2004 ND 90, ¶ 26, 679 N.W.2d 287 (Sandstrom, J., concurring (citing United States v. Goodson, 204 F.3d 508, 514 (4th Cir. 2000))).

[¶ 30] Here the district court abused its discretion because Pederson had initially claimed newly discovered evidence, including evidence directly related to the victim's testimony. "[The victim] recanted her accusations against Pederson in the presence of several people at the home of her grandfather, admitting she lied so she could move in with her mother, and that she was put up to her lies by Kris." Appendix, 32. Pederson's newly discovered evidence, as alleged in the petition, was substantial to negating his guilt.

[¶ 31] A court error that seriously affects the fairness of judicial proceedings, particularly where the defendant is actually innocent, should be reversed. United States v. Elmardoudi, 501 F.3d 935, 944 (8th Cir. 2007). "[T]he law holds, it is better that ten guilty persons escape, than that one innocent suffer." United States v. Clotida, 892 F.2d 1098, 1105 (1st Cir. 1989) (citing 4 W. Blackstone, Commentaries 352).

[¶ 32] The order to dismiss with prejudice effectively eliminated Pederson's ability to bring forth this newly discovered evidence. "A court may deny an application for post-conviction relief on the ground of res judicata if the claim has been fully and finally determined in a previous proceeding." Smestad v. State, 2011 ND 163, ¶ 6, 801 N.W.2d 691 (citing N.D.C.C. § 29-32.1-12(1)). A petitioner is effectively barred from bringing a variation of previous allegations if those allegations were rejected by the trial court in a prior proceeding. Flanagan v. State, 2006 ND 76, ¶ 7, 712 N.W.2d 602. Petitioners are not allowed to bring several requests for relief that raise the same or similar issues as previous requests. Steen v. State, 2007 ND 123, ¶ 13, 736 N.W.2d 457.

[¶ 33] Despite the record of the hearing, Pederson contends he did not understand the difference between dismissing with prejudice and dismissing without prejudice. The

evidence presented by the State was at the eleventh hour. Pederson was rushed into a decision to dismiss the petition, not fully understanding the consequences of agreeing to dismiss with prejudice his second petition for post-conviction relief.

[¶ 34] CONCLUSION

[¶ 35] Pederson argues that the district court abused its discretion when the court dismissed with prejudice Pederson's petition for post-conviction relief. The district court's decision effectively barred Pederson from ever raising the issues of newly discovered evidence, even though the district court never made a factual determination on the evidence. Pederson requests that the Supreme Court reverse the district court's order dismissing with prejudice the petition for post-conviction relief, and remand with instructions that Pederson is allowed to bring the allegations in his second petition to an evidentiary hearing.

[¶ 36] The Appellant respectfully prays that the Court grant the relief requested.

Dated this 19th day of November, 2014.

Respectfully submitted,

/s/ Lee M. Grossman

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)	
Tate Allister Pederson,)	
)	Supreme Court No.
Petitioner/Appellant,)	20140343
)	
vs.)	
)	Cass County District No.
State of North Dakota,)	09-2014-CV-01294
)	
Respondent/Appellee.)	CERTIFICATE OF SERVICE

1. Appellant's Appendix (PDF to Opposing Counsel and Supreme Court)
2. Appellant's Brief (PDF to Opposing Counsel and Word to Supreme Court)

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Dated this 19th day of November, 2014.

1. Appellant's Appendix
2. Appellant's Brief

The copies of the foregoing were securely enclosed in an envelope and addressed as follows:

Tate Pederson

NDDOC #36137 James River Correctional Center 2521 Circle Drive
Jamestown, ND 58401

To the best of my knowledge, information, and belief, such address was the last known post office address of the party intended to be so served. These above-referenced documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure, Rule 5.

/S/Lee M. Grossman

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