

IN THE SUPREME COURT
 OF THE STATE OF NORTH DAKOTA

Dennis James Gaede,)	
)	Supreme Court No. 20150026
Petitioner/Appellant,)	
)	Cass Co. No. 09-2014-CV-01350
)	
State of North Dakota,)	
)	
Respondent/Appellee,)	

APPEAL FROM THE JUDGMENT OF THE COURT FILED DECEMBER 1, 2014
 SUMMARILY DISMISSING PETITIONER'S APPLICATION FOR POST-
 CONVICTION RELIEF BY THE DISTRICT COURT FOR THE EAST CENTRAL
 JUDICIAL DISTRICT, THE HONORABLE STEVEN E. MCCULLOUGH,
 PRESIDING

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES

[¶1] Did the Trial Court err in denying Dennis James Gaede's Application for Post-Conviction Relief?

STATEMENT OF THE CASE

[¶2] This is an appeal from the Cass County Judgment summarily dismissing Dennis James Gaede's ("Gaede") application for post-conviction relief, entered by the Honorable Steven E. McCullough, November 26, 2014 (Appendix ("A") 2, Docket ("D") 41, A. 75).

[¶3] Gaede was charged for the 2001 murder of Timothy Wicks ("Wicks"). In April 7, 2006, a jury found Gaede guilty of crime charged and Gaede was sentenced to serve a term of imprisonment for life without the possibility of parole. Gaede appealed his conviction to the North Dakota Supreme Court and the conviction was affirmed. State of North Dakota v. Gaede, 2007 ND 127, 736 N.W.2d 418.

[¶4] Gaede filed an application for Post-Conviction Relief on October 16, 2008. On February 20, 2009, the trial court filed a summary dismissal of five of the issues filed in the application. An evidentiary hearing was held on May 27, 2009 and February 18, 2010. On August 18, 2010, the trial court entered its Order on Application for Post-Conviction Relief denying Gaede's application. Gaede appealed the trial court's Order and the North Dakota Supreme Court affirmed the trial court's Order. Gaede v. State of North Dakota, 2011 ND 162, 801 N.W.2d 707.

[¶5] On January 30, 2012, Gaede filed a second application for post-conviction relief. The trial court denied the application on June 21, 2012, and Gaede appealed the denial to the North Dakota Supreme Court on August 16, 2012. The Supreme Court affirmed the order denying Gaede's post-conviction relief application on April 4, 2013. Gaede v.

State of North Dakota, 2013 ND 41, 832 N.W.2d 334.

[¶6] In 2013, Gaede filed a petition for habeas corpus with the United States District Court, North Dakota Southwestern Division. Gaede v. Schmalenberger, No. 1:10-CV-068 (D.N.D. 2013),. The federal court denied the petition, and later dismissed it upon Gaede’s request for reconsideration. Gaede then filed a notice of appeal to the Eight Circuit Court of appeals, which is currently pending.

[¶7] On May 14, 2014, Gaede filed this third application for post-conviction relief. (A. 1, D. 1, A. 3). The State filed a response opposing Gaede’s application on June 13, 2014. (A. 1, D. 17, A. 46). On July 22, 2014, Gaede filed an amended application for post-conviction relief (A. 2, D. 28, A. 24).

[¶8] An evidentiary hearing on the Application was held on October 27, 2014. (See Transcript (“T”). The Court’s Order Summarily Dismissing Petitioner’s Application for Post-Conviction relief was filed November 26, 2014. (A. 3, D. 37, A. 70).

[¶9] Gaede timely file a Notice of Appeal. (A. 3, D. 44, A. 76). Gaede then filed an Amended Notice of Appeal. (A. 3 D, 55, A. 77).

STATEMENT OF FACTS

[¶10] Gaede was charged for the 2001 murder of Timothy Wicks (“Wicks”). In April 7, 2006, a jury found Gaede guilty of crime charged and Gaede was sentenced to serve a term of imprisonment for life without the possibility of parole. Gaede appealed his conviction to the North Dakota Supreme Court and the conviction was affirmed. State of North Dakota v. Gaede, 2007 ND 127, 736 N.W.2d 418.

[¶11] On May 14, 2014, Gaede filed an application for post-conviction relief. Ground I of his application asserts “Newly discovered evidence”. Supporting facts alleged by

Gaede were that, “[O]n or about November 18, 2013, Gaede was diagnosed with a Generalized Anxiety Disorder (NOS) by N,D,S,P, psychiatrist Dr. Madeline Free Evidence in this petition shows that this condition is present and was present on the alleged date of the crime and at the time of Gaede’s trial for murder and qualifies as a defense of lack of criminal responsibility under N,D.,C,C, §12.1-04.1-01(1) and any other further alleged actions committed by Gaede under the condition of duress noted in N,D,C,C, ¶12.1-05-10(1).”

[¶12] The State filed a Motion to Dismiss, and alternatively a Motion for Summary Disposition, however neither motion was noticed pursuant to N.D.R.Ct. 3.2. On July 7, 2014, the trial judge entered an Order for Evidentiary Hearing. The trial court ruled that the evidentiary hearing was scheduled for the limited purpose of allowing Gaede an opportunity to present evidence that his Petition does in fact contain newly discovered evidence in accordance with N.,D. Cent. Code §29-32.1-01(3). On July 22, 2014, Gaede file his Amended Application for Post-Conviction Relief, which also asserted the claim of newly discovered evidence. Gaede’s application and amended application provided supporting information regarding generalized anxiety (NOS) and documentation.

LAW AND ARGUMENT

[¶13] Jurisdiction. Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provisions, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06, N.D.C.C., which provides as follows:

“An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03. An appeal may be taken by the defendant from:

1. A verdict of guilty;
2. A final judgment of conviction;
3. An order refusing a motion in arrest of judgment;
4. An order denying a motion for new trial; or
5. An order made after judgment affecting any substantial right of the party.”

N.D.C.C. § 29-28-06.

[¶14] ISSUE: Did the Trial Court err in denying Dennis Gaede’s Application for Post-Conviction Relief?

[¶15] The North Dakota Supreme Court “applies the ‘clearly erroneous’ standard set forth in Rule 52(a), N.D.R.Civ.P., when reviewing a trial court’s findings of fact on an appeal from a final judgment or order under the Uniform Post-Conviction Procedure Act.” State v. Foster, 1997 ND 8, ¶18, 560 N.W.2d 194. The District Court’s findings of fact will not be disturbed on appeal unless clearly erroneous. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by any evidence, or if, although there is some evidence to support the finding, a reviewing court is left with a definite and firm conviction a mistake has been made. Clark v. State, 2008 ND 234, ¶11, 758 N.W.2d 900.

[¶16] North Dakota law provides that “[a] person who has been convicted of and sentenced for a crime may institute a proceeding applying for relief” under Chapter 29-32.1 of the North Dakota Century Code (Uniform Post-Conviction Procedure Act) upon 8 enumerated grounds. N.D.C.C. 29-32.1-01(1). A post-conviction proceeding “is not a substitute for and does not affect any remedy incident to the prosecution in the trial court or direct review of the judgment of conviction or sentence in an appellate court.” N.D.C.C. 29-32.1-01(2). North Dakota law provides that a “court may grant a motion...for summary disposition if the application, pleadings, any previous proceeding,

discovery, or other matters of record show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” N.D.C.C. 29-32.1-09(1). “If an evidentiary hearing is necessary, the court may determine which issues of material fact are in controversy and appropriately restrict the hearing.” N.D.C.C. 29-32.1-09(2).

[¶17] Additionally, North Dakota law states “[a]n application for post-conviction relief may be denied on the ground that the same claim or claims were fully and finally determined in a previous proceeding.” N.D.C.C. 29-32.1-12(1). “A court may deny relief on the ground of misuse of process. Process is misused when the applicant [p]resents a claim for relief which the applicant inexcusably failed to raise either in a proceeding leading to judgment of conviction and sentence or in a previous post-conviction proceeding.” N.D.C.C. 29-32.1-12(2)(a). The North Dakota Supreme Court has held that a misuse of process occurs in the following situations:

- “1. if the defendant has inexcusably failed to raise an issue in a proceeding leading to judgment of conviction and now seeks review in a first application for post-conviction relief;
2. if the defendant inexcusably fails to pursue an issue on appeal which was raised and litigated in the original trial court proceedings, and finally[;]
3. if a defendant inexcusably fails to raise an issue in an initial post-conviction application.”

Bell v. State, 2001 ND 188, ¶7, 636 N.W.2d 438. “[W]hen claims have been raised previously on direct appeal...they cannot be raised again in a subsequent post-conviction application.” Heyen v. State, 2001 ND 126, ¶9, 630 N.W.2d 56. Further, the North Dakota Supreme Court has held that it is a misuse of process when issues appropriate for review on direct appeal are not raised on direct appeal and no reason is given to the Court

in the post-conviction relief application as to why those issues were not raised in the direct appeal. Syvertson v. State, 2000 ND 185, ¶17, 620 N.W.2d 362.

[¶18] Applicants for post-conviction relief are not required to include all supporting evidentiary matter in their original post-conviction application. The State of North Dakota has adopted the Uniform Post-Conviction Procedure Act to control this matter. N.D.C.C. §29-32.1-04 provides the rules to follow regarding post-conviction applications:

“1. The application must identify the proceedings in which the applicant was convicted and sentenced, give the date of the judgment and sentence complained of, set forth a concise statement of each ground for relief, and specify the relief requested. Argument, citations, and discussion of authorities are unnecessary.

2. The application must identify all proceedings for direct review of the judgment of conviction or sentence and all previous post-conviction proceedings taken by the applicant to secure relief from the conviction or sentence, the grounds asserted therein, and the orders or judgments entered. The application must refer to the portions of the record of prior proceedings pertinent to the alleged grounds for relief. If the cited record is not in the files of the court, the applicant shall attach that record or portions thereof to the application or state why it is not attached. Affidavits or other material supporting the application may be attached, but are unnecessary.”

N.D.C.C. §29-32.1-04.

“The statute does not require the applicant to include in the original application all supporting evidentiary matter necessary.” State v. Bender, 1998 ND 72, ¶19, 576 N.W.2d 210.

[¶19] A post-conviction proceeding affords an opportunity to establish a record for review on appeal. “The express purpose of the Uniform Post-Conviction Procedure Act, as codified in N.D.C.C. 29-32.1, is to furnish a method to develop a complete record to challenge a criminal conviction.” Bender, at ¶20 (citing State v. Wilson, 466 N.W.2d 101, 103 (N.D. 1991)). The post-conviction hearing allows the parties to fully develop a

record on the issue of counsel's performance and its impact on the defendant's case and to challenge a criminal conviction and sentence.

[¶20] N.D.C.C. §29-32.1-10 sets forth what evidence may be heard at a post-conviction hearing. N.D.C.C. §29-32.1-10 provides:

- “1. Evidence must be presented in open court, recorded, and preserved as part of the record of the proceedings.
2. A certified record of previous proceedings may be used as evidence of facts and occurrences established therein, but use of that record does not preclude either party from offering additional evidence as to those facts and occurrences.
3. The deposition of a witness may be received in evidence, without regard to the availability of the witness, if written notice of intention to use the deposition was given in advance of the hearing and the deposition was taken subject to the right of cross-examination.”

N.D.C.C. §29-32.1-10.

[¶21] Pursuant to N.D.C.C. § 29-32.1-01(1)(e), “a district court may grant post-conviction relief when evidence, not previously presented and heard exists requiring vacation of the conviction or sentence in the interest of justice,. This statutory ground for post-conviction relief is similar to a request for new trial based on newly discovered evidence under N.D.R.Crim. P. 33” Davis v. State of North Dakota, 2013 ND 34, ¶19, 827 N.W.2d 08.

[¶22] In Tweed v. State of North Dakota, 2010 ND 38 ¶16, 779 N.W.2d 667, the North Dakota Supreme Court held that “in order for a defendant to prevail on a motion for a new trial based on the assertion of newly discovered evidence the defendant must show:

1. the evidence was discovered after trial,
2. the failure to learn about the evidence at the time of trial was not the result of the defendant's lack of diligence,

3. the newly discovered evidence is material to the issues at trial, and
4. the weight and quality of the newly discovered evidence would likely result in an acquittal.

[¶23] If the newly discovered evidence is not likely to be believed by a jury or change the result of the original trial, the defendant has failed to meet the burden of proof.

Syverson v. State of North Dakota, 2006 ND 223, ¶13, 723 N.W.2d 524.

[¶24] At the evidentiary hearing, Gaede testified that at the prior post-conviction hearing, the evidence presented was that “they suspected anxiety disorder NOS”. (T. p. 5, l. 5-10). Gaede testified that “previously the anxiety disorder was considered but it was not definitive”. (T. p. 5, l. 22-24). For his current post-conviction application, Gaede filed Exhibit 1 which relates to the newly discovered evidence. (T. p. 5, l. 15-19). Gaede’s testimony was that he had the anxiety order at the time of the murder but it was not fully diagnosed. (T. p. 7, l. 3-7). In support of that argument, Gaede pointed out the fact that his ex-wife’s, Diane Fruge, statement to the police and FBI “was that I was having a panic attack at the time” of the murder. (T. p. 6, l. 19-23). That [Fruge] said it happened at the time of the murder. (T. p. 10, l. 3-6).

[¶25] In further support of his allegation that this was newly discovered evidence, which although was considered but not diagnosed, Gaede testified that these [medical] records are protected records and [Gaede] was not be provided them prior to the recent application for post-conviction relief. These medical records which show that Gaede was diagnosed with anxiety disorder NOS have finally been provided to Gaede and therefore are newly discovered. (T. p. 10, l. 22 – p. 11, l. 10). Gaede’s testimony is that these medical records are now a part of the court file (T. p. 11, l. 19-24), and that they had not

been available before.

[¶26] Gaede argues that if the records showing that he was diagnosed with anxiety disorder NOS, were available for trial, it would have, or could have, affected the outcome of the trial or how he proceeded with the trial issues. Gaede argues that it would have shown “No. 1, there was a diminished capacity; No. 2, there was no premeditation of anything because [Gaede] didn’t commit a murder; and it shows that how my reaction was a clear – it was a clear response to a feared – to a feared situation”. Fear of his wife who had committed the murder along with anxiety of seeing the gentlemen’s body on the floor and the blood, etc. (T. p. 13, l. 15 – p. 14, l. 12).

[¶27] The trial court judge concluded that “Gaede had knowledge of his anxiety disorder diagnosis prior to this third post-conviction relief application. This conclusion was made after review of Gaede’s second post-conviction relief application and subsequent filings therein, Within that file is an affidavit of Gaede, dated February 23, 2012, in which Gaede admits he was prescribed medication to aid in the relief of his anxiety symptoms. Also within the file are psychiatric records from the Wisconsin Department of Corrections that Gaede provided which show the history of psychological disorders. Moreover, testimony taken of Gaede at the October 27, 2014, post-conviction hearing established that Gaede had accessed the WDOC documents and their contents at the time of his second post-conviction relief application.” The trial judge concluded that the diagnosis of Anxiety Disorder, NOS by Dr. Madeline Free on November 18, 2013, was not newly discovered evidence and that Gaede had prior knowledge that he had been diagnosed with symptoms of anxiety, as well as anxiety disorder. The trial judge denied Gaede’s application for post-conviction relief.

[¶28] In the case at hand, Gaede provided sufficient information in his application for post-conviction relief, the accompanying documents filed in support of that application, and through his testimony to show that the evidence was discovered after trial, that the failure to learn of the about the evidence at the time of trial was not the result of the defendant's lack of diligence, the newly discovered evidence is material to the issues at trial, and the weight and quality of the newly discovered evidence would likely result in an acquittal. Additionally, the newly discovered evidence would likely to be believed by a jury or change the result of the original trial, and therefore, Gaede has met his burden of proof.

CONCLUSION

[¶29] Therefore, Gaede prays this Court reverse the lower court's decision and remand this matter with instructions that the District Court enter an Order granting Gaede's application for post-conviction relief, to order a complete psychological evaluation and a new trial. (T. p. 14, l. 17-22).

Respectfully submitted this 22nd of April, 2015.



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)	Cass Co. No. 09-2014-CV-01350
)	
State of North Dakota,)	CERTIFICATE OF SERVICE
)	
Respondent/Appellee,)	

I, Mark T. Blumer, do hereby certify that on 22nd day of April, 2015, I served the following documents:

1. Appellant Brief
2. Appellant Appendix
5. Certificate of Service

Mr. Birch Burdick	Mr. Dennis Gaede
Cass Co. State's Attorney	PO Box 5521
Cass County Courthouse	Bismarck, ND 58506
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to Mr. Burdick at the electronic mail address shown above and to Mr. Gaede by First Class U.S. Mail, postage paid, by depositing the same at the US Post Office, Fargo, ND, to the address shown above..

Dated this 22nd day of April, 2015.



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)	
State of North Dakota,)	CERTIFICATE OF SERVICE
)	
Respondent/Appellee,)	

I, Mark T. Blumer, do hereby certify that on 28th day of April, 2015, I served the following documents:

1. Appellant Brief (with corrections)

Mr. Birch Burdick	Mr. Dennis Gaede
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to Mr. Burdick at the electronic mail address shown above and to Mr. Gaede by First Class U.S. Mail, postage paid, by depositing the same at the US Post Office, Fargo, ND, to the address shown above..

Dated this 28th day of April, 2015.



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