20160101
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JULY 13, 2016
STATE OF NORTH DAKOTA

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

Carl Aubry Harmon, III.,	
Petitioner-Appellant,	Sup. Crt. No.: 20160101
vs.	
	Dist. Crt. No.: 53-2014-CV-00413
State of North Dakota,	
Respondent-Appellee,	

APPEAL FROM A MARCH 5, 2015 ORDER DISMISSING
POST-CONVICTION RELIEF APPLICATION,
THE HONORABLE PAUL W. JACOBSON, PRESIDING

Brief of the Appellee, State of North Dakota

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Statement of the Issues

[¶1] I. The District Court's dismissal of Harmon's 2014-2015 post-conviction filings was appropriate.

Statement of the Case / Statement of the Facts

[¶2] On or about October 8, 1996, Harmon filed a thirteen page post-conviction relief application. (53-95-K-00619 Doc. No. 62). In this filing, Harmon alleged, among other things: 1) trial counsel was related to the victim and a juror; 2) lack of a fair trial; 3) concern about representation; 4) failure to appoint substitute counsel; 5) disciplinary complaint against Attorney Anseth; 6) incompetency to proceed *pro se*; 7) failure to waive right to counsel; 8) confusion about stand-by counsel; 9) prosecutorial misconduct by referencing serial killers; and 10) insufficient evidence. This application was rejected by the District Court in an Order by the District Court on January 10, 1997. A timely appeal was never brought on this matter. State v. Harmon, 1997 ND 233, 575 N.W.2d 635.

[¶3] Harmon filed a direct appeal from the judgments following his criminal convictions in what became Harmon, 1997 ND 233, 575 N.W.2d 635. This appeal alleged: 1) abuse of discretion for not appointing substitute counsel; 2) non-waiver of right to counsel; 3) ineffective assistance of counsel and derogatory statements by counsel about him; 4) prosecutorial misconduct regarding referencing Dahmer and Manson; and 5) the relationship between trial counsel and a juror. Harmon, 1997 ND 233, 575 N.W.2d 635. These contentions were rejected by this Court.

[¶4] On or about April 9, 1998, Harmon filed what appears to be notice of a federal *habeas* petition with the District Court. (53-95-K-00619 Doc. No. 22). This

application alleged, among other things: 1) no waiver of right to counsel; 2) abuse of discretion in not appointing substitute counsel; 3) relationship of counsel to victim and juror; 4) references by prosecutor to Dahmer and Manson; 5) trial counsel's ethics complaint; 6) inability to raise a defense; and 7) that defense evidence was excluded. This application was eventually rejected on appeal by the Eighth Circuit Court of Appeals.

[¶5] On or about December 14, 2010, Harmon filed a Motion to Correct Sentence under N.D.R.Civ.P. 60. (53-95-K-00619 Doc. No. 1). Harmon asserted: 1) ineffective assistance of trial counsel; 2) denial of his right to call witnesses; and 3) judicial bias. Harmon also attached an affidavit claiming: 1) his name which is incorrectly spelled; 2) he was denied the ability to call witnesses; 3) the judge was prejudice[sic] at him during trial; 4) his trial counsel was ineffective and he suffered prejudice; 5) his trial counsel was related to the victim and a juror; 6) that he is not guilty; 7) that he was denied procedural and substantive due process; and 8) he was prevented from testifying.

[¶6] The State moved to dismiss, and Harmon filed a response on or about January 12, 2011 claiming the following: 1) lack of subject matter jurisdiction and 2) that the act of alleging material in an unsworn filing is sufficient to survive a motion to dismiss.

[¶7] Appointed counsel filed a subsequent post-conviction relief application. (53-95-K-00619 Doc. No. 254). This document brought a newly raised Carpenter claim as well as making the following allegations: 1) ineffective assistance of counsel "in all prior post-trial proceedings"; 2) the failure of the post-trial attorney to "raise and argument numerous errors and issues which deprived Harmon of a fair trial"; 3) the failure of the

post-trial attorney to "raise substantial issues which should have been raised" and therefore Harmon "was denied effective assistance of counsel in all previous post trial proceedings"; 4) the cases were improperly joined; 5) the judge was biased against Harmon based on later comments to the parole board; 6) the sentences imposed were illegal; 7) he was prevented from calling "credibility" witnesses; 8) he was deprived of his right to testify; 9) the prosecutor made improper comments; 10) the atmosphere was too hostile to allow Harmon to defend himself; and 11) that he should be able to amend or add claims.

[¶8] The State moved to dismiss, and the District Court granted the motion. After Harmon's 2010/2011 series of filings was rejected by the District Court, Harmon appealed in what became Harmon v. State, 2012 ND 83, 816 N.W.2d 812. Harmon's *pro se* brief in that case alleged: 1) unfair trial; 2) ineffective assistance of counsel; 3) denial of the ability to present a defense; 4) statements to the jury; 5) judicial bias; and 6) double jeopardy issues. This Court issued a *per curiam* opinion rejecting Harmon's claims. Id.

[¶9] On or about March 28, 2014, Harmon filed the original *pro se* post-conviction relief application in the series of filings that gave rise to the instant appeal. (53-2014-CV-00413 Doc. No. 1). This twenty-six page document raised the following claims, among others: 1) conviction violated the law; 2) the court lacked jurisdiction; 3) the sentence was not authorized by law; 4) there was newly discovered evidence; 5) Harmon was unlawfully in custody; 6) ineffective assistance of counsel; 7) failure to hire an investigator; 8) failure to depose witnesses; 9) failure to have Harmon undergo a competency evaluation; 10) failure to apply Georgia law on "taint"; 11) failure to appeal a change of venue ruling; 12) failure to develop trial strategy, communicate, etc.; 6)

prosecutorial misconduct regarding reference to Dahmer and Manson; 7) relationship between counsel and juror; 8) failure to locate and bring forward unspecified "highly relevant evidence"; 9) unspecified acts of malfeasance or omissions; and 10) inapplicability of the statute of limitations on post-conviction filings.

[¶10] On or about January 2, 2015, Harmon filed an amended application which alleged, among other things: 1) ineffective assistance including not hiring investigators, not deposing witnesses, not checking for competence, failure to investigate "taint," failure to remove a related juror, failure to appeal the change of venue motion, failure to develop a strategy, failure to challenge charges/amendments, etc.; 2) prosecutorial misconduct; and 3) failure of the court to appoint new counsel.

Law and Argument

[¶11] I. The District Court's dismissal of Harmon's 2014-2015 post-conviction filings was appropriate.

Harmon's N.D.R.Civ.P. 60 claim is newly raised on appeal.

[¶12] Harmon's reliance on Palmer is misplaced. Unlike Palmer, there was no N.D.R.Civ.P. 60 motion filed in this case. Compare. Palmer v. State, 2012 ND 98, 816 N.W.2d 807. Harmon is asking this Court to interpret his series of letters to the Court as some form of N.D.R.Civ.P. 60 motion. This argument has several fatal flaws including running afoul of State v. Gasser, 306 N.W.2d 205 (N.D. 1981) which indicates that *pro se* criminal defendants do not receive special treatment for proceeding without counsel.

[¶13] One of these flaws is the fact that the record conclusively shows that Harmon knew how to file motions, including N.D.R.Civ.P. 60 motions. As noted above, Harmon made such a filing in 2010. Therefore, if he wished to make an N.D.R.Civ.P. 60

filing, he could have done so. Instead, he elected to write letters to the court complaining about his attorney.

[¶14] Another flaw is that there was never any notice of motion attached to these letters. Interestingly, Harmon references the undersigned's missing of the Notice of Entry of Judgment, and attempts to use it in support of his argument. The notice claim works against Harmon on the issue of the letters.

[¶15] Without notice or even a caption, it is impossible to tell what the letters are supposed to represent beyond that correspondence courts typically receive from unhappy clients. "While justice demands that rules apply equally to all parties, so too it demands that all individuals be given notice and a fair opportunity to be heard." First Western Bank v. Wickman, 464 N.W.2d 195 (N.D. 1990). Here, Harmon's omission of such notice a deprived the State of the opportunity to respond to the letters as motions and deprived the District Court of the ability to treat them as such.

[¶16] These letters did not contain any date as to when the purported abandonment occurred. There was even a request for the entire case file, which alleged that his attorney had not provided him with any documents. (R.O.A. Doc. No. 38). The request for a complete copy of the file encompassed documents that Harmon himself created and filed, documents which he himself would be to blame for not keeping copies them.

[¶17] Harmon has presented nothing showing how a district court is to determine which of the many *pro se* letters it receives per year from defendants complaining about various aspects of their case(s) are actually supposed to be motions despite lacking notices or even appropriate captions.

[¶18] More troubling is that Harmon's position leaves decisions open to attack by simply filing a *pro se* letter complaining about a party's attorney, and then arguing to this Court that the letter was meant to be a motion to the district court. Which of Harmon's letters and other documents is purportedly the N.D.R.Civ.P. 60 motion? The State submits that an appeal addresses what was done/filed in the case and not what was wished had been done. See. State v. Mulske, 2007 ND 43, 719 N.W.2d 129 (waiting until after conviction at trial and then claiming a wish to testify constitutes waiver of the right to testify).

[¶19] The N.D.R.Civ.P. 60 issue was never before the District Court, and therefore should be barred on appeal as a newly raised claim. See. Berlin v. State, 2000 ND 206, 619 N.W.2d 623. This appeal is essentially claiming error on the part of the District Court for something that the District Court was never able to rule on. *Additional grounds, raised by the State below, support affirmance of the District Court's decision.*

[¶20] Alternatively, there are several other grounds for affirming the District Court's decision, which were raised in the State's filings. *Res judicata* operates to bar the application with regard to previously adjudicated claims and variations thereof. E.g. Steen v. State, 2007 ND 123, 736 N.W.2d 457. Despite Harmon's contentions, the core of this post-conviction application has been adjudicated multiple times. Each subsequent filing reads much like the one(s) that came before it.

[¶21] Attorney Anseth's performance was scrutinized by the state courts in 1997 and 2012, and by the federal courts in Harmon's 1998 *habeas* action. The relationship between Attorney Anseth and the victim and the juror was similarly scrutinized.

Attorney Byers' comments regarding Manson and Dahmer have been similarly evaluated. Judge McClees' failure to appoint substitute counsel has been similarly adjudicated. Harmon's claims of double jeopardy, illegality of sentences, and similar contentions have been reviewed in at least the 2010 – 2012 series of filings. Attorney McKechnie's performance was adjudicated in the 2010-2012 series of filings wherein Harmon made shotgun style attacks against all aspects of his attorney's performance in all aspects of all proceedings.

[¶22] Harmon's application contained a very generic ineffective assistance of counsel claim which did not indicate which attorney or attorneys it was directed at. Most of what the claim contained appeared to be directed toward the performance of Attorney Anseth, who had been appointed to represent Harmon at trial, though Harmon attempted to couch it in terms of failures of post-conviction attorneys.

[¶23] This claim referenced failure to hire investigators, failure to have a competency evaluation performed on Harmon, failure to check for victim "taint" under Georgia law, failure to appeal the change of venue loss, failure to develop trial strategy plus other pre-trial failures, failure to challenge charging documents, and failure to properly attack prosecutorial misconduct. (R.O.A. Doc. No. 1 pgs. 6-14). The claim specifically references such issues as "Failure of Counsel to locate and bring highly relevant evidence and testimony before the Jury and Original Court prejudice Petitioner and was ineffective assistance." Id. at 14.

[¶24] Despite Harmon's statement about bringing successive ineffective assistance claims against post-conviction counsel, the substance of his claim is directed against Attorney Anseth whose performance was scrutinized by state and federal courts.

It is noteworthy that this Court found that Harmon had refused to work with Attorney Anseth and to fully communicate with Attorney Anseth. Harmon, 1997 ND 233, ¶2, 575 N.W.2d 635. Other documents which are part of the record in 53-95-K-00619 indicated that Harmon failed to give Attorney Anseth information to investigate. Further, as a matter of law, Attorney Anseth's performance as standby counsel cannot be ineffective. State v. Curtis, 2009 ND 34, 753 N.W.2d 443.

[¶25] This contention was simply yet another attack on Attorney Anseth's performance. Harmon never presented any competent evidence as to why *res judicata* did not operate to bar this claim. The State submits that the dismissal of Harmon's claim is appropriate as *res judicata* operates to bar the attacks against Attorney Anseth.

[¶26] The 2014-2015 claims that Attorney Anseth failed to develop trial strategy and/or failed to communicate and/or failed to communicate strategy were made in the 1990's post-conviction filings. (53-95-K-00619 Doc. No. 22 pg. 5). The 2014-2015 claims that Harmon was incompetent to proceed in a *pro se* fashion were addressed in Harmon, 1997 ND 233, 575 N.W.2d 635, and in (53-95-K-00619 Doc. No. 62 pgs. 7-9). The 2014-2015 claims about "jury taint" were addressed in 53-95-K-00619 Doc. Nos. 22& 62. The 2014-2015 joinder and/or double jeopardy claims were addressed in 53-95-K-00619 Doc. No. 254 and Harmon, 2012 ND 83, 816 N.W.2d 812. The 2014-2015 claims about "credibility" witnesses and other contentions covered by North Dakota's rape shield law, were addressed in the 2010-2011 filings and Harmon, 2012 ND 83, 816 N.W.2d 812.

[¶27] Harmon's application contained several paragraphs dedicated to an attack on Attorney Byers' statements concerning known serial killers. (R.O.A. Doc. No. 1 pgs.

18-20). In his 1996 post-conviction filing, Harmon alleged: "During closing arguments the State's Attorney referred to Mr. Harmon as a 'Jeffery Dahmer' and a 'Charles Manson.' There is no indication at this time as to whether or not Mr. Harmon's defense counsel made a timely objection or whether a curative instruction was given by the judge." In his August 31, 2011 post-conviction filing Harmon asserted: "The trial court's conduct of the proceedings, especially allowing the prosecutor to make numerous inappropriate comments both in the presence of the jury and otherwise, created such a hostile and intimidating atmosphere for Harmon that his ability to defend himself was functionally eliminated." The prosecutorial misconduct claim, along with the inability to defend himself claim, and related variations thereof have been adjudicated in the various prior proceedings.

[¶28] Harmon's application also references the relationship between Attorney Anseth and a juror and/or the victim in the case. In his 1996 post-conviction filing, Harmon alleged: "During Mr. Anseth's representation of Mr. Harmon, it came to Mr. Harmon's attention that Mr. Anseth was related to both the victim and a juror." (53-95-K-00619 Doc. No. 62 pg. 2). In his 2014 application, Harmon argues that his attorney was ineffective in failing to "Determine, whether there was a conflict of interest as one of the Jury members was a 1st cousin." In his amended 2015 petition, Harmon alleged "Counsel failed to represent Mr. Harmon in compliance with the N.D.R.Prof.Conduct, including failing to use a preemptory challenge to remove a juror who was a first cousin." Simply stated, these matters were fully and finally adjudicated more than nineteen years ago in the January, 1997 ruling by the District Court.

[¶29] Harmon's 2014 application launches an attack on his first post-conviction relief counsel, Attorney McKechnie. (R.O.A. Doc. No. 1 pg. 15). This claim has already been addressed in Harmon's 2010-2012 series of filings wherein he alleged that Attorney McKechnie was ineffective in all things and at all times. (53-95-K-00619 Doc. No. 254). In this filing, Harmon alleged:

> Harmon asserts that he is entitled to relief because he received ineffective assistance of counsel in all prior post-trial proceedings; the same attorney filed his direct appeal, his first application for post conviction relief and his federal habeas action. That attorney was ineffective because he failed to raise and argue numerous errors and issues which deprived Harmon of a fair trial. That attorney argued the same issues in all prior post-trial proceedings, the issues as to an impartial jury, the right to a substitute defense counsel, and improper argument by the prosecutor. That attorney inexcusably neglected to raise substantial issues which should have been raised, and as a result Harmon was denied effective assistance of counsel in all previous post trial proceedings. Id. at ¶7.

[¶30] In the 2014 *pro se* application, wherein Harmon was the sole determiner of what was put into the document, Harmon alleged:

> In this case the claim of ineffective assistance is based on matters occurring both in the courtroom and outside the court record or transcript, and therefore the record and transcripts are not adequate to decide the claims and an evidentiary hearing was required to consider other evidence beyond the record. Henke. The fact that the jury heard from the Prosecutor that Petitioner was similar to "Charlie Manson and the gentleman who ate his victims" during closing summation and the trial court's failure to give any limiting instruction to the Jury concernting[sic] these statements was highly prejudicial. Therefore, the result of his first Post-Conviction proceeding would have been different if post-conviction counsel had raised all the proper issues and the Court would have allowed Petitioner the evidentiary hearing he was entitled to. Clearly petitioner was denied his right to effective assistance under the "Reasonable basis" test… (R.O.A. Doc. No. 1 pg. 12).

[¶31] The State notes that Attorney McKechnie was supposedly incompetent for raising the prosecutorial statements based on the 2010-2012 series, and is now apparently incompetent for not raising those same statements based on the 2014-2016 series of filings. The complete reversal of arguments notwithstanding, Attorney McKechnie's performance was already addressed with the 2010-2012 claims that Attorney McKechnie was incompetent in all things.

[¶32] Harmon's child "taint" claim is barred by misuse of process. This claim was newly introduced in the 2014-2016 series of filings despite tying into a 1992 Georgia case, Holden v. State, 202 Ga. App. 558, 414 S.E.2d 910 (G.A. 1992). There has been no indication by Harmon as to why misuse of process should not bar this claim raised more than twenty years after the Georgia decision. Even if this Court were to look beyond the bar of misuse of process, as the State noted in its filings, the statute involved, Ga. Code Ann. §24-3-16 (1992) relates to minor victims younger than the victim in this case. The statute specifically addressed victims under the age of fourteen years; the victim in this case was older than 14. Whether viewed as barred by misuse of process, or even considered beyond that bar, Harmon could never have survived summary judgment on this claim because the law does not apply to the victim in this case.

[¶33] The 2014 application also contained vague claims about the failure to present undescribed yet "highly relevant" evidence and testimony, purported improper appellate practice by one or more unspecified attorneys, claims that he has never received his right to appeal, and other broad based generic claims which have been consistently rejected by this Court.

[¶34] Harmon's 2014 application also claimed that his post-conviction filing could not be dismissed because it would be an improper *ex post facto* application of the changes to the North Dakota Century Code. N.D.C.C. §29-32.1-09, was amended in 2013. Harmon's application was filed in 2014. There was simply no *ex post facto* application of the changed statute to Harmon's filing as the document was created after the statute was changed.

[¶35] Harmon's 2014-2015 claims that Attorney Anseth failed to challenge the lack of semen and other biological materials are barred by *res judicata* and/or misuse of process based on Harmon's previous filings. Further the State submits that the record definitively shows that Harmon admitted to having sexual intercourse with the victim. (Appeal Transcript 552:18-20). Simply stated, the admission establishes one or more penetrative acts regardless of whether or not semen was present. The District Court correctly recognized that Harmon could not create any genuine issue of material fact sufficient to survive summary dismissal. See. Delvo v. State, 2010 ND 78, 782 N.W.2d 72.

[¶36] Harmon's 2014 claim that Attorney Anseth failed to challenge the knife color was properly dismissed by the District Court. Attorney Anseth did raise this issue. (Appeal Transcript 1139:6-18). As the record conclusively shows that Attorney Anseth attacked that issue, there was no genuine issue of material fact. Delvo, 2010 ND 78, 782 N.W.2d 72.

[¶37] Harmon's 2014-2015 claim that Attorney Anseth failed to challenge the lack of rope in evidence was properly dismissed by the District Court. Attorney Anseth did raise this issue. (Appeal Transcript 1139:19-24). As the record conclusively shows

that Attorney Anseth attacked that issue, there was no genuine issue of material fact. Delvo, 2010 ND 78, 782 N.W.2d 72.

[¶38] Harmon's 2014-2015 claim that Attorney Anseth failed to challenge the lack of a gun was property dismissed by the District Court. Attorney Anseth did raise this issue. (Appeal Transcript 1138-1139). As the record conclusively shows that Attorney Anseth attacked that issue, there was no genuine issue of material fact. Delvo, 2010 ND 78, 782 N.W.2d 72.

Conclusion

[¶39] Harmon knew how to file N.D.R.Civ.P. 60 motions, as shown by his previous filings. In this case, he elected to not make such a filing but instead elected to attack his attorney. As such, the State submits that his request to the Court is improper because it is a newly raised issue. Alternatively, the District Court's decision was correct as the claims presented in this most recent round of filings are barred by either *res judicata* or misuse of process, or are incorrect as a matter of law. Therefore, the State respectfully requests that this Court affirm the District Court's dismissal of the post-conviction filing.

Dated this 13th day of July, 2016.

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

Carl Aubry Harmon, III.,	)	**CERTIFICATE OF SERVICE**
	)	
Petitioner-Appellant,	)	Sup. Crt. No.: 20160101
	)	
vs.	)	
	)	Dist. Crt. No.: 53-2014-CV-00413
State of North Dakota,	)	
	)	
Respondent-Appellee,	)	
	)	

[¶1] I, Nathan Kirke Madden, hereby certify that on July 13, 2016, a true and accurate copy of the State's Brief was served on Atty. Myhre via email.

Dated this 13th day of July, 2016.

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