ORIGINAL

In the
NORTH DAKOTA SUPREME COURT

20160120

Supreme Court No. 20160120
McKenzie County No. 27-2014-CR-00533

State of North Dakota,
~~Plaintiff~~/Appellee,
Respondent

Roger Lee Davies,
~~Respondent~~/Appellant.
Petitioner

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAY 16 2016
STATE OF NORTH DAKOTA

APPELLANT'S BRIEF

Appeal from the District Court's Order Denying Petition to Set Aside Conviction and Set for Trial, dated December 22, 2015, the Honorable Robin Schmidt presiding.

Roger Lee Davies, Inmate No. 40931
James River Correction Center
2521 Circle Drive
Jamestown, ND 58401

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[¶1] STATEMENT OF ISSUES

[¶2] **Issue 1:** Whether the district court erred in denying Petitioner-Appellant's (herein after referred to as Appellant) Petition to Set Aside Conviction; Request to Set for Trial.

[¶3] **Issue 2:** Whether the district court erred in not holding requested evidentiary hearing for the taking of testimony on Appellant's Petition to Set Aside Conviction; Request to Set for Trial.

[¶4] **Issue 3:** Whether the district court erred by issuing its Order Denying Petition to Set Aside Conviction and Granting Motion for Summary Disposition prior to the expiration of the 30 day period provided by law, rule, and the state's Notice of Motion and Motion for Summary Disposition of Petition to Set Aside Conviction and Set for Trial.

[¶5] **Issue 4:** Whether the district court erred in converting Appellant's Petition to Set Aside Conviction; Request to Set for Trial to a post-conviction proceeding when it was not filed and served as such.

[¶6] **Issue 5:** Whether the district court erred in not ordering a psychiatric review of the Appellant before allowing Appellant to plead-out, which issue Appellant would have brought up at the requested evidentiary hearing.

[¶7] **Issue 6:** Appellant further requests this court to decide the issues and merits pursuant to;

A) Federal law as follows:

United States Constitution Article III, Section 2, Paragraph 3.

United States Constitution, Amendments VI and XIV

B) North Dakota law as follows:

North Dakota Constitution, Article I, Section 12

North Dakota Constitution, Article I, Section 13

North Dakota Rules for Civil Procedure 12(b)(6)

[¶8]STATEMENT OF THE CASE

[¶9] On April 8, 2014 Appellant was charged out by the McKenzie County State's Attorney by Criminal Complaint (App., p. 1, Doc. Index #1) for the offense of Continuous Sexual Abuse of a Child. On April 9, 2014 Appellant was arraigned in the Williams County Court, the Honorable Joshua B. Rustad presiding, with bail set at $100,000. (App. P. 1, at Doc. Index #3-4). On April

21, 2014 Misty Nehring (herein after, "counsel") was appointed at public expense to represent Appellant (App. p. 1 at Doc. Index #8) for the underlying criminal offense in this appeal.

[¶10] On November 7, 2014, Counsel and Jacob T. Rodenbiker, McKenzie County State's Attorney, negotiated a plea-agreement to cap the sentence at fifteen (15) years. (App. p. 3 at Doc. Index #23-24). On November7, 2014, on advice of counsel Appellant plead-out to the offense of Continuous Sexual Abuse of a Child and on February 13, 2015, Appellant was sentenced by the Honorable Robin Schmidt, Judge of the District Court (App. p. 4 at Doc. Index #36-37).

[¶11] On June 19, 2015, a letter from Appellant requesting reduction of sentence was sent to the District Court in Watford City, ND. (App. p. 4, Doc, Index #42). On June 23, 2015, the Honorable Robin Schmidt, sent Order denying Rule 35 Reduction of sentence. (App. p. 5, Doc. Index #45).

[¶12] On November 12, 2015, Appellant sent Petition to Set Aside Conviction; Request to Set for Trial. (App. p. 9). On December 1, 2015, State's Attorney sent Answer to Petition to Set Aside Conviction; Request to Set for Trial. (App. p. 16). On December 22, 2015 the Honorable Robin Schmidt sent Order Denying Petition to Set Aside Conviction and Set for Trial. (App. p. 20). On January 22, 2016 Appellant sent Response to Order Denying Petition to Set Aside Conviction and Set for Trial. (App. p. 21).

[¶13] On March 28, 2016, Appellant filed Notice of Appeal. (App. p. 23). On April 11, 2016 the State filed Motion to Dismiss Appeal. On April 11, 2016, the North Dakota Supreme Court sent

Appellant Request for Response to Motion. (App. p. 26). On April 12, 2016 the North Dakota Supreme Court sent a letter advising Appellant that an extension of time to file Notice of Appeal may be requested. (App. p. 27). On April 15, 2016 Appellant sent Request for Extension of Time. (App. p. 29). On April 21, 2016 North Dakota Supreme Court sent a letter requesting Good Cause for extension of time. (App. p. 31). On April 26, 2016 Appellant sent Amended Request for Extension of Time. (App. p. 32). On April 29, 2016, the North Dakota Supreme Court granted Appellant's motion for extension of time to file notice of appeal. (App. p. 34).

[¶14] STATEMENT OF FACTS

[¶15] There was never a post-conviction relief proceeding requested, nor was there any manifest injustice claimed.

[¶16] The District Court did not allow Appellant to present Appellant's case to the court face to face.

[¶17] The state's Notice of Motion and Motion for Summary Disposition of Petition to Set Aside Conviction and Set for Trial dated December 1, 2015 was received by Appellant on December 3, 2015. (App. p. 15)

[¶18] Judge Schmidt's Order Denying Petition to Set Aside Conviction and Set for Trial dated December 22, 2015 was received by Appellant on December 27, 2015.

[¶19] Appellant's Response to : Order Denying Petition to Set Aside Conviction and Set for Trial. Dated January 24, 2016. Appellant appeals from this order.

[¶20] JURISDICTION

[¶21] North Dakota Supreme Court has the power to hear an appeal from any judgment or order entered by a district court judge. North Dakota Century Code 28-27-2(4);

> **28-27-2(4) WHAT ORDERS REVIEWABLE.** The following orders when made by the court may be carried to the supreme court:
> **(4)** An order which grants or refuses a new trial or which sustains a demurrer.

[¶22] LAW ARGUMENTS

[¶23] **Issue 1;** The district court erred in denying Petitioner-Appellant's (herein after referred to as Appellant) Petition to Set Aside Conviction; Request to Set for Trial. Appellant argues that the Plea Bargain Scheme is unconstitutional per the North Dakota Constitution Article I, Section 12, and Article I, Section 13, United States Constitution Amendment VI, and United States Constitution Article III, Section 2, Paragraph 3. In particular United States Constitution Article III, Section 2, Paragraph 3 states in part: "The Trial of **ALL** crimes,..., **SHALL** be by **JURY**;..." (emphasis added). Paragraph 3 is direct, clear, unambiguous, and without any qualification. The United States Supreme Court has held in; Duncan v. Louisiana, 391 U.S. 145, 149 (1968), which states in part,

> "In Defendant's trial,..., or imprisonment for not more than 2 years, or both-Defendant's demand for a jury trial was denied by the court...the Supreme Court of Louisiana denied review.
>
> "Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right to jury

trial in criminal cases which – were they tried in a federal court – would come within the Sixth Amendment's guarantee."

The Fourteenth Amendment provides in pertinent part that,

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[¶24] **Issue 2**; The district court erred in not holding requested evidentiary hearing for the taking of testimony on Appellant's Petition to Set Aside Conviction; Request to Set for Trial. No opportunity was allowed to the Appellant for a "Meeting of the Minds" and discussion as to why the Plea Bargain Scheme is unconstitutional.

[¶25] **Issue 3**; The district court erred by issuing its Order Denying Petition to Set Aside Conviction and Granting Motion for Summary Disposition prior to the expiration of the 30 day period provided by law, rule, and the state's Notice of Motion and Motion for Summary Disposition of Petition to Set Aside Conviction and Set for Trial. Judge Schmidt's Order dated December 22, 2015 said in part, "No response has been received...", 21 days after Notice of Motion dated December 1, 2015, well within the 30 days allowed by law and the state's Notice of Motion. Judge Schmidt was out of order to summarily dismiss Appellant's Request to Set for Trial under the guise of converting Appellant's request to a request for post-conviction relief, allegedly pursuant to N.D.R. Crim. P. 11(d) as cited in State v. Gress, 2011, ND 233, ¶ 6, 807 N.W. 2d 567. State v. Williams, 85 Wn. 2d 29, 530 P2d 225 January 1975) states in part, "The court has no authority to abrogate by rule a right guaranteed by the Constitution."

[¶26] Issue 4; The district court erred in converting Appellant's Petition to Set Aside Conviction; Request to Set for Trial to a post-conviction proceeding when it was not filed and served as such. The district court did not convert the case number from criminal to civil. Appellant argues that the lack of conversion shows that Appellant Petition to Set Aside Conviction; Set for Trial was not a request for post-conviction relief.

[¶26] Issue 5 The district court erred in not ordering a psychiatric review of the Appellant before allowing Appellant to plead-out, which issue Appellant would have brought up at the requested evidentiary hearing. A psychiatric review is vital in determining if Appellant is capable of and in the right frame of mind to make a decision of such magnitude as in this case.

> North Dakota Rules for Criminal Procedure VI Trial, Rule 23, Trial by jury or court. Annotations.
>
> --Express act of defendant.
>
> "Defendant was denied his right to a jury trial where he was tried by court and record did not reveal that defendant expressly and intelligently consented to waiver of his right to a jury trial;..."

[¶27] Issue 6: Appellant further requests this court to decide the issues and merits pursuant to;

A) Federal law as follows:

(1) United States Constitution Article III, Section 2, Paragraph 3. "The Trial of **ALL** crimes,...**SHALL** be by **JURY**;..." (emphasis added)

(2) United States Constitution, Amendments VI and XIV

(a) "[i]n all criminal prosecutions, the accused shall have the right to a speedy and public trial..."

(b) "No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(B) North Dakota law as follows:

(1) North Dakota Constitution, Article I, Section 12

(a) "In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial;..."

(2) North Dakota Constitution, Article I, Section 13

(a) "The right to trial by jury shall be secured to all, and remain inviolate...."

(3) North Dakota Rules for Civil Procedure 12 (b)(6)

(a) "Rule 12. Defenses and Objections: When and How; Motion for judgment on the pleadings; consolidation and waiving defense; pretrial hearing.

(b) How to present defenses.

Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But, a party may assert the following defenses by motion:

(6) Failure to state a claim upon which relief can be granted.

If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion."

(3) North Dakota Supreme Court case; Harris v. Harris

Harris v. Harris 2010 ND 45::Harris v. Harris::March 16, 2010

"Appellant's-Husband's due process rights were violated when a full evidentiary hearing was not conducted before the issuance of a disorderly conduct restraining order N.D.C.C. 12.1-31.2-01(5)d).

Outcome: The district court's order was affirmed, but he magistrate's order was reversed. the case was remanded for a new hearing."

[¶29] CONCLUSION

[¶30] Appellant is requesting the North Dakota Supreme Court to compel the district court to provide Appellant's time before the district court Judge to argue Appellant's case.

[¶31] When a criminal defendant files an Application for post-conviction relief the Clerk of District Court first issues a new civil case number. In the present case there was no new civil case number assigned to the action, and the action proceeded through the district court under the original criminal case number. Clearly this matter was not a post-conviction action and summary dismissal was not appropriate.

[¶32] Respectfully submitted this 13th day of May, 2016.

5-13-16

Roger Lee Davies, Inmate #40931
James River Correctional Center
2521 Circle Drive
Jamestown, ND 58401

DENISE KRENZ
Notary Public
State of North Dakota
My Commission Expires August 3, 2021

5-13-16

Notary Public

ORIGINAL

In the
NORTH DAKOTA SUPREME COURT

Supreme Court No. 20160120
McKenzie County No. 27-2014-CR-00533

State of North Dakota,
Plaintiff/Appellee,

Roger Lee Davies,
Respondent/Appellant.

AFFIDAVIT OF SERVICE

[¶1] I hereby depose and say, under sworn oath, that I served true and accurate copies, by United States mail (James River Correctional Center, Institution's Internal Mail System, with Inmate Transfer Voucher, attached) of the following documents:

*Appellant's Brief,

*Appellant's Appendix,

*Certificate of Non-compliance,

*Certificate of Service, and

*Letter to: Office of the Clerk, North Dakota Supreme Court, dated May 13, 2016.

upon the following parties:

Office of the Clerk **(one original, seven copies)**
North Dakota Supreme Court
600 East Boulevard Ave.
Bismarck, ND 58505-0530

McKenzie County State's Attorney's Office
201 5th St. NW, Ste 550
Watford City, ND 58854

[¶2] Dated this 13th day of May, 2016.

5-13-16

Roger Lee Davies, Inmate No. 40931
James River Correction Center
2521 Circle Drive
Jamestown, ND 58401

State of North Dakota)
) ss
County of Stutsman)

[¶3] On the 13th day of May, 2016, before me, a Notary Public, in and for the county and state, personally approved Roger Lee Davies, Inmate #40931, known to me to be the person who placed the postage prepaid, sealed envelopes containing the above-outlined documents in the James River Correctional Center's Institution's Internal Mail System, with Inmate Transfer Vouchers attached for the prepaid postage.

DENISE KRENZ
Notary Public
State of North Dakota
My Commission Expires August 3, 2021

5-13-16

Notary Public

ORIGINAL

20160120

In the
NORTH DAKOTA SUPREME COURT

Supreme Court No. 20160120
McKenzie County No. 27-2014-CR-00533

State of North Dakota,
Plaintiff/Appellee,

Roger Lee Davies,
Respondent/Appellant.

AFFIDAVIT OF NON-COMPLIANCE

[¶1] I hereby depose and say, that I am unable to file the following documents:

Appellant's Brief
Appellant's Appendix

by electronic means, as I am incarcerated at the James River Correctional Center, and such Correctional Center does not allow inmates to electronically file documents or papers

[¶2] Dated this 13th day of May, 2016.

Roger Lee Davies, Inmate No. 40931
James River Correction Center
2521 Circle Drive
Jamestown, ND 58401

5-13-16

State of North Dakota)
) ss
County of Stutsman)

[¶3] Subscribed and sworn before me this 13th day of May, 2016.

DENISE KRENZ
Notary Public
State of North Dakota
My Commission Expires August 3, 2021

Denise Krenz 5-13-16
Notary Public