

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Ibrahim P. Kardor,	)	
	)	Supreme Court No. 20160140
Petitioner/Appellant,	)	
	)	
vs.	)	
	)	Cass Co. No. 09-2015-CV-02938
State of North Dakota,	)	
	)	
Respondent/Appellee.)	)	

APPEAL FROM THE MEMORANDUM OPINION AND ORDER ENTERED BY THE  
 DISTRICT COURT FOR THE EAST CENTRAL JUDICIAL DISTRICT THE  
 HONORABLE STEVEN L. MARQUART PRESIDING ON MARCH 24, 2016.

BRIEF OF THE APPELLANT

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### NORTH DAKOTA STATUTES

N.D.C.C. § 29-32.1-03. . . . . ¶ 8

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N.D.R.App.P. 24 . . . . . ¶¶ 16, 17, 21, 23

### **Statement of Issue Presented for Review**

- I. Whether the Court Erred in Finding Kardor Did Not Receive Ineffective Assistance of Counsel.

### **Nature of the Case and Procedural History**

¶1 This appeal is taken from a Memorandum Opinion and Order entered March 24, 2016, by Judge Steven L. Marquart, Judge of the District Court for the East Central Judicial District, wherein Appellant Ibrahim P. Kardor's Application for Post-Conviction Relief, was denied. [Docket 34, 42; App. 24-28].

¶2 On November 13, 2015, Kardor filed an Application for Post Conviction Relief. [Docket 1; App. 12-15]. On November 27, 2015 the State filed a Motion to Dismiss the Application for Post-Conviction Relief. [Docket 4-7; App. 16-19]. That same day the State also filed a response opposing Kardor's petition for Post-Conviction Relief. [Docket 8; App.22-23]. On January 5, 2016 the Court entered an Order Granting Partial Motion to Dismiss, dismissing grounds 1, 3, 4, 5, and 6 of the Application for Post-Conviction Relief. [Docket 16; App. 20]. On January 7, 2016, Kardor filed a Response to the Motion to Dismiss. [Docket 20; App. 23]. On January 12, 2016, the Court issued an Order Vacating the Order to Dismiss. [Docket 23; App. 24].

¶3 An evidentiary hearing was held on March 18, 2016. See Transcript of Proceeding. On March 24, 2016, the District Court entered an Order denying Kardor's Application for Post-Conviction Relief on Ineffective Assistance of Counsel Claim, concluding that Kardor failed to meet his burden in proving that his Appellate attorney's representation fell below an objective standard of reasonableness. [Docket 34; App. 25-29].

¶4 A Notice of Appeal was filed on April 20, 2016. [Docket 35; App. 30].

### **Statement of Facts**

¶5 On November 10, 2014, Kardor was sentenced on the charge of Delivery Within 1,000 feet of a School to 10 years with the North Dakota Department of Corrections. [App. 8-9].

¶6 Kardor's District Court attorney, Jay Greenwood, represented Kardor on his appeal. [Tr. 16-17]. Kardor's attorney did not discuss appealable issues with Kardor prior to filing the brief and unilaterally decided to appeal the case on an issue regarding a Brady violation. [Tr. 17, 20].

¶7 After the brief had been filed, Kardor spoke to his attorney and told his attorney there was other issues he wanted included in his appeal. [Tr. 56]. His attorney never advised him that under N.D.R.App.P. 24 he had the right to submit a supplemental brief raising all other issues Kardor wanted raised. [Tr. 19, 56]. Had Kardor known that he was able, he would have filed a supplemental brief. [Tr. 57].

### **Jurisdictional Statement**

¶8 The District Court had jurisdiction under N.D. Const. art. VI, § 8, and N.D.C.C. § 29-32.1-03. Kardor's appeal is timely under N.D.R.App.P. 4(d). His notice of appeal was filed within sixty days after the district court's order denying his application for post-conviction relief was entered. This Court has jurisdiction under N.D. Const. art. VI, §§ 2 and 6, and N.D.C.C. § 29-32.1-14.

### **Law and Argument**

¶9 On appeal, Kardor argues the District Court erred in denying his application for post-conviction relief. Kardor's appellate attorney provided ineffective assistance of counsel in that his representation fell below an objective standard of reasonableness and that the outcome of the appeal would have been different.

¶10 Standard of Review:

¶11 A post-conviction applicant carries the burden to establish a basis for relief. Ellis v. State, 2003 ND 72, ¶ 5, 660 N.W.2d 603. A District Court's denial of an application for post-conviction relief is subject to review pursuant to N.D.C.C. §29-32.1-14. Questions of law are fully reviewable on appeal of a post-conviction proceeding. Peltier v. State, 2003 ND 27, ¶ 6, 657 N.W.2d 238. Findings of fact will not be disturbed unless they are clearly erroneous under N.D.R.Civ.P. 52(a). Cue v. State, 2003 ND 97, ¶ 10, 663 N.W.2d 637. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by the evidence, or if, although there is some evidence to support it, a reviewing court is left with a definite and firm conviction that a mistake has been made. DeCoteau v. State, 2000 ND 44, ¶ 10, 608 N.W.2d 240.

¶12 The Sixth Amendment to the United States Constitution guarantees criminal defendants effective assistance of counsel, applied to the states through the Fourteenth Amendment, and N.D.Const. Art. I, §12. Id. at ¶6. In accordance with the two prong test established by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a defendant must satisfy both a performance prong and a prejudiced prong. Stoppeworth v. State, 501 N.W.2d 325, 327 (N.D.1993).



¶13 Kardor satisfied the performance prong of the Strickland framework by showing that his appellate attorney's representation fell below the objective standard of reasonable.

¶14 A defendant claiming ineffective assistance of counsel has a heavy burden of proving that the representation received fell below the objective standard of reasonableness, and that the defendant was prejudiced by the deficient performance. Id. Within in this first performance prong, there is a strong presumption that the conduct of counsel fell within a wide range of reasonable professional assistance.

¶15 It is required that the petitioner overcome a strong presumption that the attorney's performance fell within the "wide range" of reasonable professional assistance prompting the attorney's performance to fall below an objective standard of reasonableness. Johnson v. State, 2006 ND 122 ¶ 20, 714 N.W.2d 832, 841.

¶16 Kardor's attorney's performance fell below the objective standard of reasonableness. Rule 24(a)(1) provides that, "Statement Permitted. In a criminal case in which counsel representing an indigent defendant has submitted a brief, the indigent defendant may file a statement of additional grounds for review to identify and discuss matters that the indigent defendant believes were not adequately addressed in the brief filed by counsel."

¶17 After reviewing Appellant's Brief, Kardor told his attorney that there were additional issues he wanted raised on appeal. Under N.D.R.App.P. 24, Kardor had a right to submit his own supplemental brief. Kardor's attorney did not advise him that he had a right to file a supplemental brief addressing any additional issues Kardor wanted to raise. This clearly shows Kardor's representation fell below the line of reasonableness.

¶18 Failure to properly explain this procedural right shows that counsel's performance fell below an objective standard of reasonableness, which meets the first prong of the Strickland test.

¶19 To establish the second prong of the Strickland test, the defendant must establish a reasonable probability that, but for the unprofessional errors of counsel, the result of the proceeding would have been different, and the defendant must demonstrate with specificity how and where counsel was incompetent and the probable different result. State v. Burke, 2000 ND 24, ¶36, 606 N.W.2d 108. In determining whether counsel's performance was deficient, the court must consider all circumstances and decide whether there were errors so serious that the defendant was not accorded the counsel guaranteed by the Sixth Amendment. Lang v. State, 522 N.W.2d 179, 181 (N.D. 1994).

¶20 The petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. Johnson v. State, 2006 ND 122 ¶ 20, 714 N.W.2d 832, 841.

¶21 N.D.R.App.P. 24 provides a way for an indigent defendant to bring all issues not addressed in their attorney's brief to be brought before this Court. Kardor had a right to submit a supplemental brief addressing any issues Kardor wanted to bring before this Court. Kardor was denied his right to submit a supplemental brief when he told his attorney he wanted more issues raised and his attorney failed to advise him of N.D.R.App.P. 24. Many of the issues Kardor raised in his post-conviction proceedings

would have been more appropriately raised in a statement of additional grounds for review duringt the appellate process.

¶22 Because Kardor was not adequately advised of Rule 24, he was denied the right to fully raise all issues he wanted on appeal. Therefore, Kardor missed the opportunity for those issues to be determined on appeal, by this Court. N.D.R.App.P. 24(b)(1) states Kardor must file his statement of additional grounds for review within 30 days of his attorney's brief being filed. The consequences of Kardor's counsel failing to advise Kardor of Rule 24, was that Kardor was denied due process in the appellate proceeding. As a result, the second prong of the Strickland test has been met.

¶23 Kardor's right to assistance of counsel would include the expectation of legal advice on applicable rules at eac h state of the proceeding. Kardor has demonstrated additional grounds he would have raised on appeal but missed due to being unaware of N.D.R.App.P. 24 in time to effectively assert his position. The missed opportunity caused by ineffective assistance of counsel prejudiced Kardor in asserting his appellate rights.

### **CONCLUSION**

¶24 Based upon the submission, pleadings, testimony, argument and authority contained herein, the Appellant, Mr. Kardor respectfully requests that this Court find that he received Ineffective Assistance of Counsel when his Appellate attorney failed to advise him that he was able to submit a supplemental brief under N.D.R.App.P. 24 and that the outcome of the appeal would have been different.

¶25 It is respectfully requested that this Court reverse and remand this case with instructions for the District Court to grant his post-conviction application.

Dated this 29<sup>th</sup> day of July, 2016.

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AFFIDAVIT OF SERVICE

Supreme Court No. 20160140  
Cass Co. No. 09-2015-CV-02938

The undersigned, being of legal age, being first duly sworn deposes and says that on the 29<sup>th</sup> day of July, 2016, she served true copies of the following documents:

Appellant's Brief  
Appellant's Appendix

And that said copies were served upon:

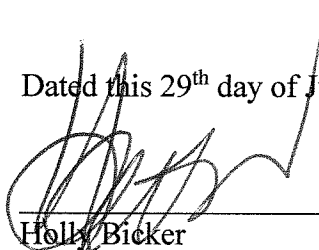
Tristan J. Van de Streek  
Cass County Assistant State's Attorney  
Email: [sa-defense-notices@casscountynd.gov](mailto:sa-defense-notices@casscountynd.gov)

and:

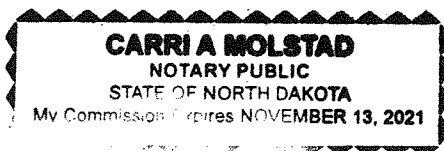
Ibrahim Kardor  
c/o North Dakota State Penitentiary  
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Bismarck, ND 58506-5521

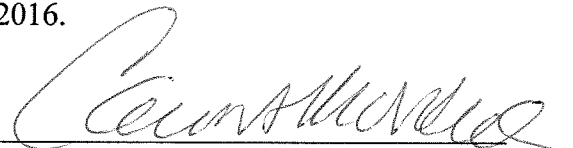
by mail.

Dated this 29<sup>th</sup> day of July, 2016.

  
Holly Bicker

Subscribe and sworn to before me this 29<sup>th</sup> day of July, 2016.



  
Notary Public  
State of North Dakota  
County of Grand Forks