

STATE OF NORTH DAKOTA

IN THE SUPREME COURT

Billy Owens,)
)
Petitioner-Appellant,)
) Sup. Ct. No.: 20160214
vs.)
) Dist. Ct. No.: 53-2015-CV-01008
State of North Dakota,)
)
Respondent-Appellee,)
)

**BRIEF OF THE STATE OF NORTH DAKOTA,
APPELLEE**

Appeal from the Judgment Denying Post-conviction relief
entered May 18, 2016, Northwest Judicial District,
The Honorable David W. Nelson, presiding

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Table of Contents

<i><u>Item</u></i>	<i><u>Page(s)/Paragraph(s)</u></i>
Table of Contents	i
Table of Authorities	ii-iii
Statement of the Issues	1
Statement of the Case	2 – 4
Statement of the Facts	5 – 10
Law and Argument	11 – 66
Conclusion	67

Table of Authorities

<i><u>North Dakota cases</u></i>	<i><u>Paragraph(s)</u></i>
<u>Clark v. State</u> , 1999 ND 78, 593 N.W.2d 329	23
<u>DeCoteau v. State</u> , 2000 ND 44, 608 N.W.2d 240	26
<u>Everett v. State</u> , 2008 ND 199, 757 N.W.2d 530	58
<u>Flanagan v. State</u> , 2006 ND 76, 712 N.W.2d 602	34
<u>Heckelsmiller v. State</u> , 2004 ND 191, 687 N.W.2d 454	14
<u>Hopfauf v. State</u> , 1998 ND 30, 575 N.W.2d 646	33, 35
<u>Matthews v. State</u> , 2005 ND 202, 706 N.W.2d 74	32
<u>Mertz v. State</u> , 535 N.W.2d 834 (N.D. 1995)	28
<u>Smestad v. State</u> , 2011 ND 163, 801 N.W.2d 691	21
<u>State v. Dahl</u> , 2009 ND 204, 776 N.W.2d 37	51, 53
<u>State v. Demarais</u> , 2009 ND 143, 770 N.W.2d 246	53
<u>State v. Haibeck</u> , 2004 ND 163, 685 N.W.2d 512	65
<u>State v. Holbach</u> , 2014 ND 14, 842 N.W.2d 328	47
<u>State v. Kardor</u> , 2015 ND 196, 867 N.W.2d 686	15, 17
<u>State v. Loughead</u> , 2007 ND 16, 726 N.W.2d 859	60
<u>State v. Owens</u> , 2015 ND 68, 860 N.W.2d 817	1, 11, 19, 24
<u>State v. Randall</u> , 2002 ND 16, 639 N.W.2d 439	45, 50
<u>State v. Wilson</u> , 2004 ND 51, 676 N.W.2d 98	53
<u>State v. Witzke</u> , 2009 ND 169, 776 N.W.2d 232	57
<u>Steinbach v. State</u> , 2003 ND 46, 658 N.W.2d 355	16

<u>North Dakota Century Code</u>	<u>Paragraph(s)</u>
N.D.C.C. §29-32.1-12	22

<u>North Dakota Rules of Evidence</u>	<u>Paragraph(s)</u>
N.D.R.Evid. 609	45

Statement of the Issues

[¶1] I. The District Court correctly dismissed Owens' post-conviction applications.

Statement of the Case

[¶2] The Defendant's case was tried to a jury beginning on October 7, 2013, and concluding with guilty verdicts on the charges of leading a criminal organization and criminal conspiracy. During trial, the defense called Paul Huckstep and Owens as its witnesses.

[¶3] On March 25, 2014, the Court held an in chambers meeting with the State, Attorney Foster, and Owens to address any potential issues Owens had with Attorney Foster's representation. There was a sentencing hearing later that day.

[¶4] On April 8, 2014, Owens filed an appeal with this Court in what became State v. Owens, 2015 ND 68, 860 N.W.2d 817 (Owens I). The issues presented in that appeal were the delay in getting the wire transfer receipts to Owens, purported speedy trial violations, and other types of prosecutorial misconduct. This Court affirmed the convictions.

Statement of the Facts

[¶5] Owens had originally been charged with attempted murder in conjunction with the shooting of Kenneth Moore off of East Highland Drive in Williston, Williams County, North Dakota. Ultimately, Owens was charged with conspiracy to commit aggravated assault and leading a criminal organization.

[¶6] On October 2, 2013, the State received scanned copies of wire transfer receipts from Dallas Wellard's attorney. They were transmitted to Attorney Foster within approximately two hours of being received by the State.

[¶7] At trial, the jury heard that Owens supplied Moore and Huckstep with methamphetamine for sale, and that there was a structured compensation plan based on how much methamphetamine a person sold per unit time. The jury heard that a dispute over this compensation plan resulted in Moore breaking into Owens' camper and stealing various items from it. The jury heard that Owens was angry at Moore for having broken into his camper and taken the items.

[¶8] Dallas Wellard told the jury that he operated as the money side of the operation, and would transfer proceeds to Owens and others at Owens' direction. He also told the jury that Owens had offered money to have Moore's teeth kicked in and to bring back verification. Wellard testified that he and Paul Huckstep traveled to Moore's location, and that Huckstep exited Wellard's vehicle with a bola-like object and a pistol. Wellard testified that he heard multiple sounds that sounded like gunshots. Wellard testified that both he and Huckstep were communicating with cellular devices while they were traveling. Detective David Peterson testified as to the cellphone locational data for Wellard's phone.

[¶9] During trial, Attorney Foster called Paul Huckstep, who claimed to have not sold drugs for Owens, among other things. In closing, Attorney Foster attempted a two-step approach to handling Huckstep. The first was to claim that the State had been afraid to call Huckstep because the undersigned knew that Huckstep would testify that he did not sell drugs for Owens. The second was to paint Huckstep as an out-of-control

individual who would not listen to anyone, including the judge. Attorney Foster also attempted to portray Huckstep and Wellard as having acted on their own. It is during this portrayal that she references Huckstep shooting Moore.

[¶10] Attorney Foster also attempted to portray Wellard's information as a product of having time to think about having driven Huckstep to the location where Moore was shot. She attempted to style his testimony as an attempt to avoid being prosecuted for being an accomplice to attempted murder. (A.T. 603-604). It is during this portrayal that she references Huckstep as having shot Moore.

Law and Argument

[¶11] Owen's post-conviction documents presented a collection of various claims ranging from prosecutorial misconduct claims previously addressed in Owens I, to Brady style contentions, and finally to ineffective assistance of counsel claims against Attorney Foster. Some of these claims are fully antagonistic toward each other. Owens claims that the State concealed evidence favorable to him in a Brady style claim, but then claims that Attorney Foster was ineffective for not investigating the evidence that the State purportedly hid from him. Similarly, Owens continues to claim that the State committed discovery violations with regard to the wire transfer receipts at issue in Owens I, where he had previously claimed the information came in too late to work with, but then claims that Attorney Foster was ineffective for not investigating those receipts.

[¶12] The State filed a motion to dismiss Owens' post-conviction filings after the amended application was filed. In response, Owens filed a brief in opposition to the motion to dismiss which largely parroted back the claims made in the previous post-conviction applications. There were no affidavits filed by Owens, or any information

from jurors indicating that they were swayed by any of the actions or inactions which Owens claims affected credibility or impeachment. Some of the material in the original post-conviction application was not included in the brief, and is not included in this appeal. The State submits that Owens has abandoned that material for purposes of appeal.

[¶13] Owens' response brief made some references to the record. The ones with regard to wire transfers between Owens and Wellard do not show that the State was in possession of the particular receipts that Wellard was talking about, or in possession of any of the receipts. The ones referencing Attorney Foster talking about how Huckstep shot Moore were taken out of context, and when put into context show the purpose behind the statements. The ones referencing Huckstep's testimony fail to include the fact that Huckstep was a recently convicted felon, who provided false information as to the charges he pled to, and who would not even listen to the judge's instructions. Such data was omitted from Owens' brief. The ones referencing Owens' testimony are premised on the jury having to believe what Owens said; a premise that is not the law.

[¶14] In order to survive a motion for summary dismissal on the post-conviction ineffective assistance of counsel claims, Owens needed to present competent evidence showing incompetence on the part of Attorney Foster and a reasonably probable different outcome that would have occurred but for the incompetence. Heckelsmiller v. State, 2004 ND 191, 687 N.W.2d 454. In order to survive a motion for summary dismissal on the other post-conviction claims, Owens needed to present competent evidence to create a genuine issue of material fact with regard to the validity of the claims.

I. The District Court correctly dismissed Owens' post-conviction applications.

Owen's Brady-style claims were properly rejected by the District Court.

[¶15] While never fully set forth as such, either below or here, Owens' post-conviction application hints at accusations of Brady violations, in that somehow the State hid exculpatory evidence from Owens. Brady violations can be raised on direct appeal such as in State v. Kardor, 2015 ND 196, 867 N.W.2d 686, but were not in this case.

[¶16] This Court does not require the party moving for summary dismissal to "prove the negative," and Owens' position would make it impossible for summary dismissal on the basis of misuse of process. See. Steinbach v. State, 2003 ND 46, 658 N.W.2d 355. His only excuse for not misusing process appears to be that Attorney Foster was ineffective. However, she was not the attorney of record on appeal.

[¶17] Even if this Court were to look beyond the misuse of process issue, Owens presented no evidence to show that Ms. Linseth's testimony, the receipts, or any of the other material would have been exculpatory. Therefore, he failed to show a Brady violation. Kardor, 2015 ND 196, 867 N.W.2d 686. Further, Owens failed to show how he could not have communicated with his girlfriend about the receipts or found some other way to be diligent, and therefore failed to show any Brady violation. Id. Additionally, Owens failed to show that the State was in possession of the various materials, with the exception of the name Josie Linseth, and therefore failed to show any Brady violation. Id.

[¶18] The Brady violation claims are juxtaposed against the ineffective assistance of counsel claims. On the one hand, Owens is claiming that the State concealed all of this information from the defense. On the other, Owens is claiming that Attorney Foster was incompetent for not investigating all of this supposedly withheld information. This

is very similar to the paradoxical arguments discussed below where Owens claimed discovery violations, then later claimed ineffective assistance for not investigating the material that was supposedly received too late to review.

Owens' receipts claim has been finally and fully adjudicated.

[¶19] This was one of the major components of Owens contentions in Owens I, 2015 ND 68, 860 N.W.2d 817. The fact that the receipts were in the possession of a co-defendant who was represented was already litigated, as was the fact that the State received the copies and transmitted them to the defense within approximately two hours of receipt. Id. The purported delay in obtaining the receipts was also fully litigated with Owens claiming “Whatever the reason for the State’s delay in providing the receipts to the defense, Owens was greatly prejudiced by the lateness of its discovery.” (Owens I Appellant’s Brief at ¶53).

[¶20] The record below included a copy of the email from Dallas Wellards’ counsel, Daniel Borgen, along with the scanned copies of the receipts and a copy of the email to Attorney Foster along with the scanned receipts. The email from Atty. Borgen was received at 2:41 P.M. on October 2, 2013. (53-2012-CR-01520 Doc. No. 110). The email to Atty. Foster was sent at 4:43 P.M. on October 2, 2013. (53-2012-CR-01520 Doc. No. 111). This exact same information was presented to this Court in Owens I, in which this Court found no discovery violation. (Owens I Appellee’s Brief at ¶18).

[¶21] At best, the current claims are simply variations on the prior claim. Because this matter has already been finally and fully adjudicated, it and its variants are barred by *res judicata*. E.g. Smestad v. State, 2011 ND 163, 801 N.W.2d 691.

[¶22] Further, the State also submits that misuse of process operates to bar the new variations as well. The misuse of process provisions of N.D.C.C. §29-32.1-12(2)(a) prevent the bringing of claims which the petitioner inexcusably failed to bring in prior proceedings. Here, a transcript of the probable cause hearing was created on or about August 30, 2012. (53-2012-CR-01520 Doc. No. 14). At that time, Attorney Foster was not the attorney of record, Kerry Rosenquist was. (53-2012-CR-01520 Doc. No. 12). On appeal, Attorney Foster was not the attorney of record, Attorney Grossman was.

[¶23] The record before both the District Court and this Court shows that Owens had access to the material at the time of Owens I, and had two other attorneys besides Attorney Foster who had access to that information. Despite this, Owens did not raise the claims presented in the underlying post-conviction applications on direct appeal. When the issue of misuse of process was raised by the State, Owens' response was to claim that he presented "evidence" as to why his failure to raise issues should be excused. However, Owens' presented no competent evidence as to why, despite having two other attorneys and over a year to review the transcript (R.O.A. Doc. No. 40 at ¶26 and Appellant's Brief at ¶23 both listing the date of the transcript as 08/30/2012), he could not have included that information in the direct appeal. The record definitively shows that Owens and/or his counsel, both before and after Attorney Foster, would have had access to this material since August 30, 2012. (53-2012-CR-01520). Therefore, misuse of process also operates to bar these additional contentions raised in the post-conviction filings. E.g. Clark v. State, 1999 ND 78, 593 N.W.2d 329.

Owens' claims regarding ineffective assistance of counsel and the receipts were properly rejected by the District Court.

[¶24] This collection of contentions arose after Owens lost his appeal in Owens I. In that matter, Owens attacked the timing of the State's transmission of wire transfer receipts. He contended:

Whatever the reason for the State's delay in providing the receipts to the defense, Owens was greatly prejudiced by the lateness of its discovery. There was no time for Owens to prepare or investigate the veracity of the receipts. The purpose of the receipts were[sic] unknown at the time of the State's introduction. (Owens I Appellant's Brief at ¶35).

[¶25] Having lost on that claim, Owens next launched a spread of attacks on Attorney Foster, claiming that she was ineffective for not doing what he previously claimed was impossible to do. Essentially, this new wave of attacks represents an effective reversal of the previous position.

Failure to subpoena documents

[¶26] Among those claims was that she failed to subpoena unspecified numbers of wire transfer receipts (R.O.A. Doc. No. 40 at ¶10). Instead of not having enough time to know what the receipts were, Attorney Foster is now supposed to have known that they were critical pieces of the State's case. At best, this is the type of hindsight claim that this Court has warned against. E.g. DeCoteau v. State, 2000 ND 44, 608 N.W.2d 240.

[¶27] When put to his proof, Owens presented no evidence showing either that it was objectively unreasonable to not subpoena this unspecified number of receipts or that there would have been an reasonably probable different outcome even if the receipts had been subpoenaed. Owens did not even attach a copy of one of the receipts that Attorney Foster should have subpoenaed, to demonstrate that it shows its "innocent nature." There was no evidence provided of any reasonably probable different outcome.

[¶28] The State submits that this contention is similar to the broad-based failure to subpoena and call witnesses claims; when a defendant is put to his/her proof, the defendant needs to present competent evidence to survive a summary dismissal motion. See. Mertz v. State, 535 N.W.2d 834 (N.D. 1995). Owens failed to provide the District Court, or this Court, with any specific data which shows ineffective assistance of counsel.

[¶29] Further, even if Attorney Foster, or even the State, had subpoenaed all of the financial documents relating to money transfers between Owens, Wellard, and Owens' designees, there would have still been no way of knowing which one(s) Wellard still had in his possession.

[¶30] The State notes that Owens himself provided testimony regarding the purported reason for the money transfers that the State introduced. (A.T. 490). It is unclear how he was prejudiced, as he provided a purported explanation as to the documents.

Failure to call, investigate, or subpoena witnesses.

[¶31] Owens claims that Attorney Foster was ineffective for failing to call, investigate, or subpoena a variety of witnesses to testify as to the "innocent nature" of the money transfers. When put to his proof, his response was a brief which made the same arguments. There was no evidence as to what these persons would have said. In the case of the claim containing the language "including but not limited to Owens' girlfriend at the time, Sara Meyers," there was even a lack of identification as to who these witnesses were.

[¶32] This Court noted in Matthews: "conclusory allegations that [trial] counsel failed to call certain witnesses without indicating what the testimony would have been,

how it might have affected the outcome of the trial, or what prejudice may have resulted from the failure to call them, do not support a claim of ineffective assistance of counsel.”

Matthews v. State, 2005 ND 202, ¶12, 706 N.W.2d 74.

[¶33] In order to succeed on an ineffective assistance of counsel claim for failing to call witnesses, a defendant, when put to his/her proof, must provide evidence as to witness(es) purported testimony. As this Court has noted: “this court requires more than a mere representation of what testimony would be; we require some proof.” Hopfauf v. State, 1998 ND 30, 575 N.W.2d 646.

[¶34] With regard to the unnamed witnesses, Owens could not even tell the District Court who these persons were, let alone provide evidence as to what they would have testified to. With regard to the named witnesses, such as Ms. Meyers, Owens presented no evidence as to what those witnesses would have said. No affidavit from Ms. Meyers was attached. As such, both the unnamed and named witness claims were properly dismissed by the District Court. Flanagan v. State, 2006 ND 76, 712 N.W.2d 602.

The District Court correctly rejected Owens’ ineffective assistance claims regarding Josie Linseth.

[¶35] As noted above, this Court requires a post-convictioning defendant to provide proof of what a proposed witness’ testimony would be in order to survive a motion to dismiss. Hopfauf, 1998 ND 30, 575 N.W.2d 646. In response to the State’s motion to dismiss, Owens stated: “Attorney Foster failed to investigate, interview, and subpoena Huckstep’s alibi witness, Josie Linseth.” (R.O.A. Doc. No. 40 at ¶13). The State submits that such material is not sufficient to survive the motion, as there is no

evidence as to what Ms. Linseth would have said. There is self-serving speculation, but no competent evidence as required. No affidavit from Ms. Linseth was attached.

[¶36] Additionally, the District Court was presented with two mutually exclusive claims: that the State committed a Brady violation and hid this exculpatory information in such a way that Owens could not find it with reasonable diligence, and that Attorney Foster was incompetent for not researching this information that was supposedly concealed by the State. If the information was made available to Attorney Foster such that she should have investigated it, then there was no Brady violation.

The District Court correctly rejected Owens' ineffective assistance claims regarding failure to "properly impeach" Kenneth Moore.

[¶37] Owens presented no objective standard for what "proper impeachment" of a witness is. Even when put to his proof, he merely stated: "Attorney Foster failed to properly impeach Kenneth Moore as to his inconsistent statements, including but not limited to his claim that Owens shot him, which everyone now concedes was never true." (R.O.A. Doc. No. 40 at ¶14). There was also no material presented showing what "proper impeachment" of Moore would have looked like.

[¶38] There was no presentation of any material about a reasonably probable different outcome had "proper impeachment" occurred. Moore's testimony was supported by other evidence. Owens failed to present any affidavits from jurors indicating that their minds would have been different had Moore been differently handled. As such, Owens presented no evidence of any reasonably probable different outcome.

[¶39] The claim of “including but not limited to” fails the specificity test, and it is unclear what Attorney Foster should or should not have done. This lack of specificity made it impossible for Owens to meet the first requirement, which is showing specifically where and how his counsel was incompetent. The lack of specificity also made it impossible for Owens to show any reasonably probable different outcome as there is no start point for the analysis. The State submits that this is the same type of generic argument which is rejected for ineffective assistance claims.

The District Court correctly rejected Owens’ incorrect statement claim.

[¶40] While the undersigned was incorrect in paragraph 27 of the State’s Brief in Owens I about direct cellphone data, that does not represent ineffective assistance of counsel on the part of Attorney Foster because she was not the attorney of record. Owens had claimed that the incorrect statement was an intentional misrepresentation to this Court, but presented no evidence to support that claim. As the State noted in its motion to dismiss, the error was apparently missed by appeal counsel as no reply brief was filed addressing the matter.

[¶41] The jury did hear from Wellard that Huckstep was a passenger in his car. (A.T. 390). The jury heard from Wellard that both Wellard and Huckstep were communicating on their cellular phones while they were traveling. (A.T. 391-392). The jury heard about positional data with regard to Wellard’s phone. While not data directly from Huckstep’s phone, a jury could rationally believe that the passenger in a motor vehicle is in the same general location as the vehicle’s driver. As such, when put to his proof, Owens failed to present any evidence showing any prejudice for Attorney Foster’s purported failing.

The District Court correctly rejected Owens' ineffective assistance of counsel claim regarding the destruction of Huckstep's credibility.

[¶42] Below, Owens contended that Huckstep's credibility as destroyed by Attorney Foster telling the jury that Huckstep shot Kenneth Moore. The State noted in its motion to dismiss that this Court has recognized that felons are less likely to be deterred from giving false information than non-felons, and that parts of Huckstep's testimony had been demonstrated false by the charging document introduced into evidence.

[¶43] When put to his proof, Owens presented no evidence showing that Huckstep's credibility was "destroyed" by this. Instead, he pointed to two places in the record where Attorney Foster mentions Huckstep shooting Moore, and without any evidentiary support, makes the naked subjective assertion that this "destroyed" Huckstep's credibility. There was no information from jurors indicating that this had "destroyed" Huckstep's credibility as opposed to being a difficult to control recent felon, who provided false information about his conviction(s).

[¶44] The trial transcript demonstrated that Huckstep was brought in as a witness to show the jury what an uncontrollable person he was, and that Owens could not possibly have controlled him, and therefore was not running a criminal organization. (A.T. 608).

[¶45] Notwithstanding that strategy, Huckstep had no credibility to start with. He was a recently convicted felon, who arrived in court with multiple officers. This Court has recognized that felons are simply less likely to be deterred from lying than non-felons. State v. Randall, 2002 ND 16, 639 N.W.2d 439. This has also the common sense

approach found in N.D.R.Evid. 609, which allows for the use of felony convictions to impeach witnesses.

[¶46] The jury also learned that Huckstep had given false testimony on the stand, when he claimed to have been convicted of terrorizing for threatening Moore with his fists. (A.T. 459:17-22). The State introduced Exhibit #21, the original terrorizing Information differing from the amended one only in not having the armed offender statute in it, which showed the testimony to be false, and Huckstep had used a firearm.

[¶47] The jury was also able to observe Huckstep's attitude, approach to questions, and general behavior. This is additional material that the jury can use to evaluate the credibility of witnesses, and something not available to this Court. E.g. State v. Holbach, 2014 ND 14, 842 N.W.2d 328. The behavioral problems of Huckstep can found in Attorney Foster's description on page 608 of the transcript. Attorney Foster worked at playing up Huckstep's peculiarities as a means of showing how difficult he was to control, with Attorney Foster even comparing the size of the two.

[¶48] Further, the context in which Attorney Foster made that statement at one point has been completely omitted; she was trying to create the impression that Wellard's testimony was a fabrication after he had about two months to think about things. (A.T. 603-604). When one continues to page 604, one finds that Attorney Foster was attempting to portray Wellard's testimony as being a product of "Seven weeks to make up a story so that he is not convicted of being an accomplice to attempted murder." (A.T. 603-604).

[¶49] Similarly, the comment found on page 609 of the transcript was directed at making Huckstep appear to be a lone wolf of sorts, who acted on his own behalf and/or

conspired with Wellard. (A.T. 609). Again, this was another attempt at showing how difficult Huckstep would be to control.

[¶50] Owens never presented any evidence showing any type of reasonably probable different outcome if Attorney Foster had not made the comment. Owens presented no affidavits from jurors stating that, despite his status as a recent felon, the false information from him, and his general behavior and demeanor, the juror(s) believed Huckstep right up until Attorney Foster made those statements. The State submits that if, pursuant to Randall, a jury can properly disbelieve the testimony of a convicted felon, a jury can properly disbelieve the testimony of a recently convicted felon who gave false information about at least one of his crimes, and who exhibited little interest in complying with rules. This behavior is completely in keeping with Randall's common sense assertion that felons are more likely to violate societal norms, and are therefore less credible than non-felons.

[¶51] The State also notes that, as with Owens' claims regarding his own testimony, the jury is not required to believe what a witness says. State v. Dahl, 2009 ND 204, ¶9, 776 N.W.2d 37. Owens presented no evidence showing that, even if Huckstep lacked any prior convictions, had not provided false information about his convictions, and had not refused to follow directions, the jury would have believed his testimony. Owen's claims regarding his own testimony are meritless.

[¶52] Owens claims that because he testified that he did not do these things, never made a plan with anyone to hurt Moore, that he got the money because he needed room and board, and similar, that he would have been acquitted if not for the ineffective assistance of Attorney Foster or the misconduct of the State. (Appellant's Brief at ¶22).

[¶53] This claim would require the jury to believe anything said by a defendant regardless of any other information. Essentially, Owen's position would make the criminal trial process a mockery because all that a defendant need do is take the stand and say "I did not do it" and he/she would be automatically acquitted. That is not the law. Dahl, 2009 ND 204, ¶9, 776 N.W.2d 37; State v. Demarais, 2009 ND 143, 770 M.W.2d 246; State v. Wilson, 2004 ND 51, 676 N.W.2d 98.

Owens presented no evidence as to why his failure to raise other new issues should be excused or the repeated filing of meritless claims should be excused.

[¶54] It appears that Owens' contention is that Attorney Foster was so incompetent that it prohibited him from acting on information in his possession, or acting on his own internal knowledge when other attorneys represented him when faced with being put to his proof on the subject of misuse of process. Owens contends on appeal: "Owens has opposed the State's motion by showing evidence of why his failure to raise the disputed issues was excusable." (Appellant's Brief at ¶54). This is the same statement he made in his response to the State's motion to dismiss. Attorney argument is not evidence.

[¶55] However, a reading of the non-evidentiary brief in response to the State's motion, there is no evidence showing why Owens failed to raise issues on appeal, despite having an attorney other than Foster representing him. There is no explanation as to why he did not raise the Miranda claim on appeal, despite having personal knowledge of it, and having sat through trial and having listened to it and the officer's testimony. (A.T. 314, 324, 325, 326, 489-490). There is no explanation as to why he did not raise the purported Confrontation Clause argument on direct appeal, despite having personal

knowledge of who was called at trial and, despite the fact that the underlying criminal record has had a transcript of the probable cause hearing since approximately August 30, 2012, which would have made it available in time for his direct appeal. (R.O.A. Doc. No. 40 at ¶26). There is no explanation as to why, after the matter was adjudicated, that the receipts issue is not the form of misuse of process involving repeatedly raising meritless claims.

The District Court properly rejected Owens' generic prosecutorial misconduct claims.

[¶56] Besides the previously litigated wire transfer receipt issue, Owens made a generic claim of “prosecutorial misconduct” in the non-evidentiary brief filed in response to the motion to dismiss. The generic nature of the claim made it impossible to tell what supposed acts of prosecutorial misconduct were at issue.

[¶57] Judges are not ferrets. State v. Witzke, 2009 ND 169, 776 N.W.2d 232.

The State submits that it is neither the District Court's nor this Court's nor the State's job to determine what specific allegations are meant by the statement: “Owens alleges prosecutorial misconduct.” At best, the generic claim could be viewed as relating to the various perjury claims and other matters in Owens' original application.

[¶58] Further, prosecutorial misconduct should have been argued on direct appeal. Everett v. State, 2008 ND 199, 757 N.W.2d 530. In Everett, the Court was faced with a similar situation as here, a defendant claiming additional incidents of prosecutorial misconduct after having raised claims of prosecutorial misconduct on appeal. The Court noted:

In Everett's direct appeal, he argued prosecutorial misconduct relating to the prosecutor's comments during its closing argument. Everett's claims of prosecutorial misconduct relating to the prosecutor intentionally lying, misleading the court and jury, and

suborning perjury also could have been raised in his direct appeal. Everett has not provided any reason why he did not raise them then. We therefore conclude Everett's present attempt to raise claims of prosecutorial misconduct, after failing to pursue these claims in his direct appeal, constitutes misuse of process. Id. at ¶17.

[¶59] Here, Owens presented no evidence as to why this material was not presented on direct appeal. Attorney Foster was not Owens' appellate counsel, and therefore could not have been ineffective. Owen's own Brief shows that the material from the probable cause hearing was available as of August 30, 2012. (Appellant's Brief at ¶23). Owens sat through trial and heard about the information presented at trial. The probable cause hearing transcript was available for over a year before Owens I was filed. Owens had Attorney Grossman on appeal, therefore attacking the performance of Attorney Foster does not provide evidence to support an excuse for the delay. The instant case is virtually identical to Everett, and the State submits that in addition to the dismissal being proper for lack of evidentiary support that the dismissal was also proper for misuse of process.

Owens abandoned the remaining issues from his pro se post-conviction application.

[¶60] There were several issues in his original post-conviction application that Owens failed to address on appeal. The State submits that this matters are abandoned for purposes of the appeal. State v. Loughhead, 2007 ND 16, ¶10, 726 N.W.2d 859 (issues not briefed are not considered).

[¶61] Owens claimed on page 3 of his original application that "Paul's charges were dismissed." This statement is not supported by the record as Huckstep pled guilty to charges related to the shooting of Kenneth Moore. Huckstep testified that he pled guilty to a terrorizing charge. (A.T. 459:17-22).

[¶62] Owens claimed Confrontation Clause violations and/or ineffective assistance of counsel claims on pages 4 and 10 of the original application. This Confrontation Clause argument stems from an assertion that “Brian Stevens was never called to trial to affirm or refute any of this.” When put to his proof, Owens never provided any evidence showing what Brian Stevens would have testified to, let alone whether there would have been a reasonably probable different outcome. Further, Owens presented no evidence as to why the Confrontation Clause matter was not raised on direct appeal.

[¶63] Owens claimed that Attorney Foster’s 2015 disciplinary proceedings showed that she was ineffective in representing him. The State pointed out the significant gap in time between Owens’ conviction, October of 2013, the sentencing in March of 2014, and the string of complaints against Attorney Foster starting in February of 2015, which led to the disciplinary action. Owens provided no competent evidence to show that the incidents in February of 2015 did not occur after all aspects of Attorney Foster’s representation were completed in his case.

[¶64] Owens claimed on page 8 of his original application, that Attorney Foster was ineffective for not presenting material regarding the previously dismissed attempted murder charge that had been filed against him. When put to his proof, Owens presented no evidence showing objectively unreasonable performance or any reasonably probable different outcome. The only support for this was found in his original application, where he made the self-serving claim: “These conflicting statements could have created reasonable doubt in the eyes of the jury and thus, brought a different verdict.” The State

notes that Attorney Foster did raise the issue of his dismissed attempted murder charge. (A.T. 491:8-24).

[¶65] Owens claimed Miranda violations on page 9 of the original application. The purported Miranda violation occurred during his own recorded interview with law enforcement. When put to his proof as to why he failed to raise the Miranda claims on direct appeal, Owens provided no evidence to show an excuse. When put to his proof as to the fact that Miranda does not cover spontaneous statements that are not products of police questioning per State v. Haibeck, 2004 ND 163, 685 N.W.2d 512, Owens presented no evidence to address the State's motion.

[¶66] Owens claimed that the state had somehow suborned perjury through information presented in various court proceedings. When put to his proof on the matter, Owens presented no evidence showing how the State supposedly suborned perjury. His comments regarding Wellard on page 6 of the application were not supported by the record as shown by the email from Wellard's counsel which is part of the record in the underlying criminal cases.

Conclusion

[¶67] For the above reasons, the State respectfully requests that this Court affirm the decision below.

Dated this 6th day of September, 2016.

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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

Billy Owens,)
) **CERTIFICATE OF SERVICE**
Petitioner-Appellant,)
) Sup. Ct. No.: 20160214
vs.)
) Dist. Ct. No.: 53-2015-CV-01008
State of North Dakota,)
)
Respondent-Appellee,)
)

[¶1] I, Nathan Kirke Madden, hereby certify that on September 6, 2016, a true and accurate copy of the State's Brief was served on Attorney Mertz via email.

Dated this 6th day of September, 2016.

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