

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Jonathan Horvath,

Petitioner/Appellant

-vs-

Supreme Court No. 20170329

State of North Dakota,

Respondant/Appellee

District Court No. 53-2016-CV-00876

APPELLANT'S BRIEF

APPEAL FROM ORDER SUMMARILY DISMISSING
APPLICATION FOR POST-CONVICTION RELIEF

MCKENZIE COUNTY DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT
HONORABLE ROBIN SCHMIDT, PRESIDING

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STATEMENT OF THE ISSUES

[¶1] I. Whether the District Court erred in summarily dismissing Petitioner/Appellant's application for post-conviction relief without an evidentiary hearing.

STATEMENT OF THE CASE

[¶2] This is an appeal from the District Court's order summarily dismissing an Application for Post-conviction Relief filed by the Petitioner/Appellant, Jonathan Horvath ("Mr. Horvath"). Following a jury trial ending July 16, 2014, Mr. Horvath was convicted in file number 53-2013-CR-00607 of two counts of Terrorizing; in file number 53-2013-CR-00607 of one count of Reckless Endangerment and one count of Murder; and in file number 53-2013-CR-00669 of one count of Possession of a Firearm by a Convicted Felon. Mr. Horvath filed an Application for Post-conviction Relief, pro se, on June 28, 2016. Present counsel was appointed to represent Mr. Horvath on December 22, 2016. Through counsel, Mr. Horvath filed a request for permission to amend his Application for Post-conviction Relief. A Status Conference was held on March 29, in which the District Court granted permission to amend the Application and scheduled a "Civil Hearing" for July 14, 2017. Mr. Horvath filed an Amended Application for Post-conviction Relief on April 12, 2017, claiming, as grounds for relief 1) Ineffective Assistance of Counsel, and 2) Evidence, not previously presented and heard, exists requiring vacation of the conviction or sentence in the interest of justice. The State filed a motion to dismiss the amended application on May 10, 2017. Mr. Horvath filed his response to the State's motion on June 9, 2017. On June 27, 2017, the District Court summarily dismissed Mr. Horvath's Amended Application, and the "Civil Hearing" scheduled for July 14, 2017 was cancelled. Mr. Horvath filed timely Notice of Appeal of the Order dismissing his Application. This appeal ensued.

STATEMENT OF THE FACTS

[¶3] Mr. Horvath moved to Alexander, North Dakota in March, 2013 in search of employment. On the night of March 15, 2013, Mr. Horvath traveled to Williston, North Dakota with a few acquaintances and co-workers, including Rich Donahoe, Don Rohrenbeck, Kevin Kallio, and Brittney Montee, where they went to an area known locally as “South Main,” and patronized the bars located in that area. Mr. Horvath entered Whispers, a bar. While in Whispers, Mr. Horvath spoke with an unidentified man who showed him a handgun and made reference to drug trafficking activity, which put Mr. Horvath “extremely on edge.” (Tr. At 465-466)

[¶4] When Mr. Horvath left Whispers, he saw Don Rohrenbeck, one of the individuals with whom he had arrived, engaged in an “argument and confrontation” with Derrick Spiegel (“Mr. Spiegel”). (Tr. At 466) Mr. Horvath broke up the confrontation between Mr. Rohrenbeck and Mr. Spiegel by pushing Mr. Rohrenbeck away and attempting to verbally persuade him to leave. (Tr. At 466, ln 17 21) Mr. Horvath and most of the group with which he had arrived then met at the pickup truck in which they had arrived. One individual with whom the group had arrived, Brittney Montee (“Ms. Montee”), was missing. Because the other members of the group had just been in a confrontation with individuals still on the sidewalk, it was decided that Mr. Horvath would return to look for Ms. Montee. (Tr. At 467, ln. 19 23). Mr. Horvath went back to the sidewalk, where he was confronted by an individual named Amanda Baker. (Tr. At 468, ln. 7, 8). Ms. Baker told Mr. Horvath that if an altercation were to ensue, it “was gonna be all of them.” (Tr. At 468, ln. 11 12). Mr. Horvath went back to the truck, where he retrieved a pistol for

his protection. (Tr. At 468, ln. 15 16). Mr. Horvath then returned to the sidewalk area to look for Ms. Montee. (Tr. At 469, ln. 1 3). A verbal confrontation then ensued between Mr. Spiegel and Mr. Horvath. (Tr. At 469, ln. 1 15). Feeling threatened and believing that physical violence was imminent, Mr. Horvath removed his pistol from his pocket and pointed it toward Mr. Spiegel. (Tr. At 469, ln. 17 18). A struggle ensued between Mr. Horvath, Mr. Spiegel, and Amanda Baker, in which Mr. Spiegel and Ms. Baker grabbed Mr. Horvath's arms. (Tr. At 471, ln. 21 24). The pistol was discharged three times during the ensuing struggle, and the third discharge struck Mr. Spiegel in the head (Tr. At 471, ln. 21 24), ultimately resulting in his death (Tr. At 225, ln. 11 13). A video camera from Heartbreakers, the bar adjoining the sidewalk where the altercation took place, captured video of the altercation. (Tr. At 73, ln. 6 9, Tr. At 74, ln. 20; Tr. At 77, ln. 9 10, 24 25; Tr. At 105, ln. 11 12; Tr. At 78, ln. 15 17).

[¶5] Mr. Horvath then returned to the pickup truck in which he had arrived (Tr. 472, ln. 1). Bruce Sesseman, a Heartbreakers security guard, pursued Mr. Horvath to the pickup truck. Mr. Sesseman struggled with Mr. Horvath inside the vehicle. (Tr. At 198, ln. 12, 200). Mr. Horvath exited the pickup truck and ran north on foot, pursued by Mr. Sesseman and two other individuals for about three blocks. (Tr. At 200, ln. 23; 201, ln. 4). The arrival of Mr. Horvath at the vehicle, the struggle with Mr. Sesseman, and the departure from the vehicle were recorded by a video surveillance camera located in the alley north of No Place Bar, a bar adjoining Heartbreakers. *Portions* of this video were introduced at trial as State's Exhibit 24. (Tr. At 152, 12 22).

[¶6] Ms. Montee was in the vehicle when Mr. Horvath returned to it. Ms. Montee testified at trial that Mr. Horvath pointed his pistol at her and threatened to kill her. (Tr. At 177, ln. 10-24). Ms. Montee also testified that the only two individuals in the vehicle at the time were Mr. Horvath and herself. Mr. Sesseman also testified that the only individuals inside the vehicle were Ms. Montee and Mr. Horvath. (Tr. At 198, ln. 7-11). However, a portion of the No Place Bar surveillance video *not* shown to the jury show an individual, identified by Mr. Horvath as Kevin Kallio, exit the vehicle shortly after the events that led to charges being filed. This video segment, *not* shown to the jury, is corroborative of Mr. Horvath's statements that Kevin Kallio was inside the vehicle. (Tr. At 472, ln. 5-6, 496 ln. 24-25 : 497 ln. 1-19.) At trial, the State strongly emphasized Mr. Kallio's alleged absence from the vehicle to impeach Mr. Horvath's testimony. A disc containing the No Place Bar's surveillance recording spanning the entire time in question was made available to Mr. Horvath's counsel.

LAW AND ARGUMENT

[¶7] Standard of Review

The Standard of Review of a summary denial of an Application for Post-conviction relief is

...like the review of an appeal from a summary judgment. See Hoffarth v. State, 515 N.W.2d 146, 148 (N.D.1994). The party opposing the motion for summary disposition is entitled to all reasonable inferences at the preliminary stages of a post-conviction proceeding, and is entitled to an evidentiary hearing if a reasonable inference raises a genuine issue of material fact.

Owens v. State, 1998 ND 106, 578 N.W.2d 542, (1998) at ¶ 13. However,

...once the moving party has initially shown there is no genuine issue of material fact, the burden shifts to the opposing party to demonstrate there is a genuine issue of material fact. See Kummer v. City of Fargo, 516 N.W.2d 294, 296-297 (N.D.1994). The party opposing the motion may not merely rely upon the pleadings or upon unsupported, conclusory allegations, but must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact.

Id. In this case, the State timely moved for Dismissal of Mr. Horvath's Amended Application for post-conviction relief, and explicitly put Mr. Horvath and counsel to the proof. Mr. Horvath responded, conceding that his claim for Newly Discovered Evidence

was without merit, but restating his claim that a video segment not presented to the jury supported his claim for Ineffective Assistance of Counsel.

[¶8] The District Court, citing Owens, stated “Once the State made its motion for summary disposition, Horvath was required to come forward with some minimal evidence which would allow his petition to go forward. Although the burden is minimal, Horvath must present a supporting affidavit, made on personal knowledge.” Mr. Horvath now concedes that he did not “present competent admissible evidence by affidavit or other comparable means” to support his claims and establish an issue of material fact.

[¶9] However, the present case is distinguishable from Owens and the cases relying upon it in which the Court has affirmed a District Court’s summary dismissal of an Application for Post-conviction relief. In Owens itself, the Appellant’s Application was denied on res judicata grounds, following a previous Application in which he failed to request an evidentiary hearing. In nearly every case relying on Owens that counsel for the Appellant has been able to find in which the Appellant’s Application for Post-conviction relief was summarily dismissed for failure to present “evidence by affidavit or other comparable means” as required by Owens, the evidence sought to be presented at the requested evidentiary hearing is testimonial rather than physical, and could reasonably be expected to be supportable by an affidavit. The one exception that present counsel could discover was *Burke v. State*, 820 N.W.2d 349, 2012 ND 169, (N.D. 2012). However, in *Burke*, the Appellant’s Application for Post-conviction relief had been dismissed because the district court determined that the DNA test requested by the Petitioner/Appellant was not “materially relevant” to the defendant’s claim of actual

innocence. Mr. Horvath's claim, Innefective Assistance of Counsel, is radically different from the facts and legal issues in Burke.

[¶10] In *State v. Bender*, 1998 ND 72, 576 N.W.2d 210, (1998), the Court stated that a post-conviction relief proceeding is typically the appropriate channel in which to raise a claim for Ineffective Assistance of Counsel. Claims of Ineffective Assistance of Counsel “are ordinarily unsuited to summary disposition without an evidentiary hearing.” *Bender* at ¶ 21. In the present case, the evidence Mr. Horvath wishes to present, and for which he has requested an evidentiary hearing, consists of a video recording. This evidence is not well suited for support via affidavit, as the only persons who could reasonably be expected to present such an affidavit are Mr. Horvath, his trial counsel (who Mr. Horvath claims provided ineffective assistance), the State, Mr. Horvath's appellant counsel, or Mr. Horvath's present counsel. It would seem more efficient to simply allow the desired evidence to be presented at an open hearing. This request is not a “fishing expedition,” but a request for a fair hearing “designed to resolve genuine factual disputes which might affect the validity of the conviction.” *Mertz v. State*, 535 N.W.2d 834, (1995)

CONCLUSION

[¶11] Because Mr. Horvath has filed an Application for Post-conviction relief, has identified a genuine issue of material fact in relation to his claim of Ineffective Assistance of Counsel, has requested an opportunity to present evidence in support of his claim at an evidentiary hearing, and because this evidence is not well-suited to support via affidavit,

Mr. Horvath requests that the Court reverse the District Court's order granting the State's Motion for Summary Dismissal and remand for further proceedings.

/s/ Steven J. Fischer

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CERTIFICATE OF SERVICE

[¶1] I hereby certify that I made service of the forgoing Appellant's Brief, Appendix of Appellant, and Certificate of Service upon Nathan Madden, Attorney for the Appellee, by mailing a disc containing a true and correct copy of the same by certified mail to:

Nathan Kirke Madden
Williams County State's Attorney's Office
P.O. Box 2047
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This 12th day of October, 2017



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