

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

James Burden,)	Supreme Court No. 20180353
)	
)	
Petitioner/Appellant,)	
)	District Court No. 18-2017-CV-02782
vs.)	
)	
State of North Dakota,)	
)	
Respondent/Appellee.)	

ON APPEAL FROM ORDER GRANTING SUMMARY DISMISSAL AND ORDER
 DENYING MOTION FOR RELIEF
 FROM THE DISTRICT COURT
 FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT
 GRAND FORKS COUNTY, NORTH DAKOTA
 THE HONORABLE JUDGE LOLITA G. HARTL ROMANICK, PRESIDING

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUES

- I. Whether the district court erred when granting the State's Motion for Summary Dismissal?**
- II. Whether the district court erred when denying Burden's Motion for Relief?**

STATEMENT OF THE FACTS

[¶1] On October 20, 2017, Burden filed a letter which the district court accepted as a Post-Conviction Relief Application. Post-Conviction Relief Application, October 20, 2017. A second Post-Conviction Relief Application was filed pro-se on November 6, 2017. Post-Conviction Relief Application, November 6, 2017. On November 15, 2017, counsel was appointed. A Scheduling Order was filed on November 20, 2017. Scheduling Order, November 20, 2017. The State filed an Answer to Burden's Application for Post-Conviction Relief on November 20, 2017. Answer to Application for Post-Conviction Relief, November 20, 2017. In the State's Answer, the State specifically denied each allegation, put Burden to his proof, and asserted the affirmative defense of misuse of process. Answer to Application for Post-Conviction Relief, November 20, 2017. On February 26, 2018, Burden filed an Amended Post-Conviction Relief Application. Amended Post-Conviction Relief Application, February 26, 2018. The State filed its Answer to the Amended Application on March 26, 2018. Answer to the Amended Application, March 26, 2018. Again, the State denied the allegations, and specifically placed Burden on his proof. Answer to the Amended Application, March 26, 2018. The State cited case law which set forth the evidence required for Burden to prevail on a claim of ineffective assistance of counsel, which was more than a "subjective, self-serving statement that, with competent advice he would not have pleaded guilty and would have insisted on going to trial." Answer to the Amended Application, March 26, 2018. The State asserted Burden would have to establish "substantial, not just conceivable likelihood of a different result", and "that a decision to reject the plea bargain would have been rational under the circumstances". Answer to the

Amended Application, March 26, 2018. The State specifically denied that the record supported a claim of ineffective assistance, or any other of Burden's claims, and specifically placed Burden on his proof. Answer to the Amended Application, March 26, 2018.

[¶2] Burden requested a hearing and one was scheduled for July 23, 2018.

However, on July 5, 2018, the State filed a Motion for Summary Dismissal of Petitioner's Petition for Post-Conviction Relief and Brief in Support alleging that Burden had been put to his proof and failed to file any competent admissible evidence by affidavit or other comparable means which raised an issue of material fact. Respondent's Motion for Summary Dismissal of Petitioner's Petition for Post-Conviction Relief, July 5, 2018. Between October 20, 2017 and July 23, 2018, Burden filed no evidence of his allegations in the form of competent admissible evidence by affidavit or other comparable means which raised an issue of material fact. On July 23, 2018, the court entered its Order for Summary Dismissal of Petitioner's Petition for Post-Conviction Relief. Order for Summary Dismissal of Petitioner's Petition for Post-Conviction Relief, July 23, 2018.

[¶3] On September 4, 2018 Burden filed a Motion for Relief from the July 23, 2018, Order. Motion for Relief from Order, September 4, 2018. Accompanying the motion, Burden filed an affidavit alleging factual assertions supporting the claim of ineffective assistance of counsel. Affidavit of James Ryan Burden, September 4, 2018.

[¶4] On September 21, 2018, Burden filed a Notice of Appeal. Notice of Appeal, September 21, 2018. On the same date, the State filed a Brief in Opposition to Burden's Motion for Relief from July 23, 2018 Order. Response Brief in Opposition to Petitioner's Motion for Relief from Order Pursuant to N.D.R.Civ.P. 60, September 21, 2018.

[¶5] On September 26, 2018, the North Dakota Supreme Court remanded this case due to the pending Motion for Relief. Order for Remand, September 26, 2018. On October 8, 2018, a hearing was held to address Burden's Motion for Relief. The court filed an Order Re: Petitioner's Motion For Relief From Order of Summary Dismissal denying Burden's motion. Order Re: Petitioner's Motion For Relief From Order of Summary Dismissal, October 10, 2018.

[¶6] Burden filed a second Notice of Appeal on October 15, 2018. The State resists and urges this Court to affirm the district court's orders Granting Summary Dismissal and Denying Burden's Motion for Relief.

LAW AND ARGUMENT

I. The district court did not err when granting the State's Motion for Summary Dismissal.

[¶7] A petitioner filing for post-conviction relief must set forth a concise statement of each ground for relief, and specify the relief requested. Ude v. State, 2009 ND 71 ¶ 8, 764 N.W.2d 419. N.D.C.C. §29-32.1-09(3) permits the court to grant a motion by either party for summary disposition if the application, pleadings, any previous proceeding, discovery, or other matters of record show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. N.D.C.C. §29-32.1-09(3). On appeal from a summary denial of post-conviction relief, the North Dakota Supreme Court reviews it as an appeal from summary judgment. Atkins v. State, 2017 ND 290, ¶ 5, 904 N.W.2d 738. The party opposing the motion for summary disposition is entitled to all reasonable inferences at the preliminary stages of post-conviction proceeding and is entitled to an evidentiary hearing if a reasonable inference raises a genuine issue of material fact. Id.

[¶8] In order to avoid summary dismissal of a claim of ineffective assistance of counsel, the post-conviction applicant must present some evidence that counsel's performance fell below an objective standard of reasonableness, and he must overcome the presumption that his counsel's performance was within the broad range of reasonableness. Id. Further, counsel must specify how and where counsel was incompetent and the probable different results. Id. Counsel's failure to show how, but for the attorneys' errors, the result of the proceeding would be different, justifies a district court's decision to summarily dismiss an allegation of ineffective assistance of counsel

on a post-conviction relief claim. Id.

[¶9] Further, an application for post-conviction relief is subject to summary dismissal when, after being put on his proof, an applicant fails to respond with any evidentiary support for his claims, but rather relies on pleadings and unsupported conclusory allegations. Steinbach v. State, 2003 ND 46, ¶ 15, 658 N.W.2d 355. Although the North Dakota Supreme Court has previously stated that claims of ineffective assistance of counsel are ordinarily unsuited to summary disposition without an evidentiary hearing, where an applicant fails to provide evidentiary support after being put to his proof, summary dismissal may be appropriate. Id.

[¶10] In Steinbach v. State, Steinbach was convicted of murder, as well as other offenses, and subsequently filed an application for post-conviction relief. Id. Steinbach alleged eight separate grounds for relief. Id. at ¶ 4. Seven of the allegations were dismissed due to the applicant inexcusably failing to raise them in a proceeding leading to judgment of conviction. Id. The trial court also dismissed claim 4 alleging ineffective assistance of counsel, without holding an evidentiary hearing, finding that Steinbach failed to provide any evidentiary support for his claim after being put to his proof. Id. On appeal Steinbach alleged the district court erred in summarily dismissing his allegation of ineffective assistance of counsel without holding an evidentiary hearing. Id. at ¶ 9. In its opinion, the Court analyzed the procedural posture of the case at the trial level. Id. at ¶¶ 13-14. Steinbach filed an application alleging eight reasons post-conviction relief should be granted. Id. at ¶ 13. The State moved to dismiss the post-conviction relief application arguing that Steinbach failed to show how he met both the reasonableness and prejudice prong to constitute ineffective assistance of counsel. Id. at

¶14. Subsequently Steinbach responded to the motion for summary disposition but did not provide any supplemental evidence, in the form of an affidavit or other comparable means, to support his claim of ineffective assistance of counsel. Id. The Court held that once Steinbach was put to his proof, the minimal burden shifted to him to provide some competent evidence to support his claim. Id. at ¶¶ 17-18. If he had done that, Steinbach would have been entitled to an evidentiary hearing. However, in the absence of Steinbach providing any competent evidence, the State's motion was granted. The North Dakota Supreme Court found that summary dismissal was appropriate. Id. at ¶ 18.

[¶11] Additionally, in Atkins v. State, this Court affirmed a Grand Forks district court summary dismissal of a post-conviction relief claim of ineffective assistance of counsel, when, after being put upon his proof, Atkins' failed to meet the minimal burden to provide some competent evidence to support his claim. Atkins v. State, 2017 ND 290, ¶ 8, 904 N.W.2d 738. This Court also reviewed the district court's Order Granting Summary Dismissal which failed to articulate the basis for its decision. Id. at ¶¶9-10. Although the court did not provide a basis for its decision, this Court found that a failure to articulate the basis for a decision is not a bar to summary dismissal and the court was not required to state findings or conclusions. Id. at ¶ 10. Failure to produce evidence once the burden is shifted to the petitioner, regardless of whether an evidentiary hearing was scheduled, is grounds for summary dismissal. Id.

[¶12] In the case at hand, Burden alleges that the district court erred when granting the State's Motion for Summary Dismissal on July 23, 2018. Burden claims he was not put on his proof when the State filed its Answer on November 20, 2017, or the Amended Answer on March 26, 2018. Burden alleges that he was not put to his proof

until the State filed a Motion for Summary Dismissal on July 5, 2018. Burden additionally alleges the district court failed to give him satisfactory time to respond once being put upon his proof.

A. Burden was put to his proof in the Amended Answer filed March 26, 2018.

[¶13] In Parizek v. State, this Court addressed what is required to shift the burden. Parizek v. State, 2006 ND 61, ¶ 7, 711 N.W.2d178. This Court provided that a movant may initially satisfy his burden of showing there is no genuine issue of material fact by demonstrating an absence of evidence supporting the petitioner's application. Id. At that point, a petitioner is "put on his proof" and the petitioner may no longer rely on unsupported allegations but must produce some competent, admissible evidence to show the presence of an issue of material fact. Ude v. State, 2009 ND 71, ¶ 8, 764 N.W.2d 419.

[¶14] In the case at hand, the State did not move for summary dismissal until July 5, 2018, however it is the State's position that Burden was put to his proof with the Amended Answer filed on March 26, 2018. In the State's Amended Answer the State specifically denied the allegations claiming there was no genuine issue of material fact, cited the case law for claiming ineffective assistance of counsel, and asserted that Burden could not meet that standard. The State demonstrated an absence of evidence supporting the petitioner's application. As set forth in Parizek and Ude, this is sufficient to shift the burden to petitioner, Burden, to provide competent, admissible evidence to show the presence of an issue of material fact. Burden failed to do so and on July 23, 2018, nearly four months after filing the Amended Answer shifting the burden to Burden, the district

court properly granted the State's Motion. The State urges this Court to affirm the district court's Orders.

- B. In the alternative, the district court properly granted the State's motion for summary dismissal fourteen days after it was filed and Burden failed to respond.

[¶15] Should this Court determine that Burden was not put to his proof until the State filed its Motion for Summary Dismissal, then the question is whether Burden should have been given fourteen days to respond pursuant to N.D.R.Civ.P. 12(b) and N.D.R.Ct. 3.2(a)(2), or thirty days to respond pursuant to N.D.R.Civ.P. 56. Essentially, the issue is whether the State's Motion for Summary Dismissal was a motion relying only on the pleadings or did it require the district court to consider matters outside of the pleadings. The district court found that the State simply relied on the pleadings and Burden was subject to a fourteen-day response time pursuant to N.D.R.Civ.P. 12(b) and N.D.R.Ct. 3.2(a)(2). In relying on its decision, the district court contrasted Johnson v. State, where the State moved for summary disposition and attached twenty-one exhibits for the court's consideration. Johnson v. State, 2005 ND 188, 705 N.W.2d 830. This Court in Johnson stated that when the State's motion for summary disposition relies solely on the pleadings, Rule 3.2 controls with respect to the appropriate time to respond. Id. at ¶ 18. However, when matters outside the pleadings are submitted for the court's review and the court relies on those matters, a thirty-day response period applies. Id. at ¶¶ 18, 24.

[¶16] In the case at hand, the State did not require the district court, or submit to the district court, any matters to consider outside of the pleadings. The district court relied only on the pleadings and the failure by Burden to provide any competent admissible evidence after the State put him to his proof. Even should this Court find that

Burden was not put to his proof until July 5, 2018 when the State submitted its Motion to Summarily Dismiss, Burden failed to provide any competent, admissible evidence within the applicable fourteen-day response period pursuant to N.D.R.Ct. 3.2(a)(2). Burden's position is that he had thirty days to respond because the district court relied on matters outside the pleadings. Burden fails to cite to any of those alleged matters. The district court followed the case law and guidance of this Court in Atkins, Ude, and Johnson when applying the burden shift, waiting for Burden to file competent and admissible evidence, and applying the fourteen-day response period. When Burden failed to comply with the prevailing case law, statute, and rules, the district court appropriately relied on the pleadings filed and granted the State's Motion for Summary Dismissal. Simply because the district court shifted the burden to the petitioner, as required by law, does not mean the district court relied on matters outside the pleadings when granting the State's Motion for Summary Dismissal.

II. The district court did not err when denying Burden's Rule 60 Motion for Relief.

[¶17] Burden filed a Motion for Relief under Rule 60 of the N.D.R.Civ.P. 60(b). Burden claimed the district court had made a mistake or that his motion should be granted for any other reason justifying relief. As set forth in the previous section, the district court did not err when granting the State's Motion for Summary Dismissal. As such, the district court properly denied Burden's Motion for Relief. It should further be noted that although Burden claims he was mistaken as to the timeline for which he was required to respond to the State's Motion for Summary Dismissal, he did not even respond within the thirty-day timeline under which he believed he was operating. In fact,

Burden's Motion for Relief was not even filed until September 4, 2018, which is also the first date in which Burden filed any evidence in the case. As set forth above, the district court properly granted the State's Motion for Summary Dismissal and properly denied Burden's Motion for Relief.

CONCLUSION

[¶18] Burden was put to his proof, at the latest, on March 26, 2018 when the State filed an Amended Answer establishing no genuine issue of material fact, citing the appropriate legal standards and case law, and alleging an absence of evidence supporting Burden's application. Burden failed to file any competent admissible evidence supporting his application after being put to his proof. Further, even if this Court found that Burden was not put to his proof until July 5, 2018 when the State filed a Motion for Summary Dismissal, the district court properly granted the motion after relying only on the pleadings and applying the appropriate timeline from N.D.R.Ct. 3.2(a)(2).

DATED this 5 day of December, 2018.



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CHERYL VERGAL
Notary Public
State of North Dakota
My Commission Expires June 19, 2020