

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

Thomas Jeames Keller, Petitioner-Appellant, vs. State of North Dakota, Respondent-Appellee	Supreme Court No. 20180391 Case No. 30-2018-CV-00350
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On appeal from the Order denying Post-Conviction Relief
entered September 17, 2018
Morton County District Court
South Central Judicial District
State of North Dakota
The Honorable Cynthia M. Feland, Presiding

APPELLANT'S BRIEF

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[¶1]

Statement of the Issue

- I. Whether the district court erred by denying Mr. Keller's application for post-conviction relief.

Statement of the Case

[¶2] This is an appeal from an order denying post-conviction relief regarding Michael Jeames Keller (hereinafter referred to as “Mr. Keller”). (Appellant’s App. at 16). On April 12, 2018, Mr. Keller filed a pro se Application for Post-Conviction Relief. (Appellant’s App. at 7). The State of North Dakota filed an Answer. (Appellant’s App. at 10). The district court conducted an evidentiary hearing on Mr. Keller’s application. (Appellant’s App. at 1). On September 17, 2018, the district court issued an order denying Mr. Keller any post-conviction relief. (Appellant’s App. at 11). Mr. Keller now appeals the September 17, 2018, Order. (Appellant’s App. at 16).

Statement of the Facts

[¶3] In 2017, Mr. Keller was charged with three driving related offenses, which stemmed from an auto accident. (Appellant’s App. at 3). Mr. Keller was appointed an attorney. (Evidentiary Hearing Tr. at 11, ln. 25 - 12, ln. 3). During the course of the representation, Mr. Keller and his attorney discussed the possibility of pleading guilty to these offenses. (Evidentiary Hearing Tr. at 19, ln. 11 - 20, ln. 12).

[¶4] Mr. Keller suffers from a number of medical conditions, including psychomotor seizures. (Change of Plea Hearing Tr. at 12, ln. 21 - 14, ln. 3; Evidentiary Hearing Tr. at 12, ln. 11 - 13, ln. 4). Mr. Keller discussed these medical conditions with his attorney, prior to the change of plea hearing. See id. Mr. Keller informed his attorney that he would like to obtain a presentence investigation report, to help explain the impact of these medical

conditions to the district court. (Evidentiary Hearing Tr. at 7, ln. 16 - 20; at 8, ln. 2 - 5). Mr. Keller's attorney believed that the nature of Mr. Keller's medical conditions was something that the district court "should be aware of in sentencing." (Evidentiary Hearing Tr. at 12, ln. 7 - 15).

[¶5] Mr. Keller's attorney did not attempt to gather any information related to Mr. Keller's medical conditions prior to the change of plea hearing. (Evidentiary Hearing Tr. at 16, ln. 4 - 8). Mr. Keller's attorney did not request or obtain a presentence investigation report, prior the change of plea hearing. (Change of Plea Hearing Tr. at 12, ln. 4 - 9).

[¶6] The district court conducted a change of plea and sentencing hearing on January 4, 2018. (Change of Plea Hearing Tr. at 2, ln. 1 - 12). At the hearing, Mr. Keller's attorney requested that the district court delay sentencing while a presentence investigation report was generated. (Change of Plea Hearing Tr. at 12, ln. 4 - 9). Mr. Keller's attorney believed that it was necessary to make the request for a presentence investigation report, because the results of such a report would have been helpful for sentencing. (Evidentiary Hearing Tr. at 24, ln. 11 - 19). When asked by the Court, Mr. Keller described the driving that led to these criminal charges as: "more than likely it was a psychomotor seizure which occurred which caused the accident." (Change of Plea Hearing Tr. at 14, ln. 6 - 10). However, neither Mr. Keller nor his attorney were able to supplement this explanation with any sort of medical information. (Change of Plea Hearing Tr. *passim*). Ultimately, the district court did not order a presentence investigation report and proceeded immediately to sentencing. (Change of Plea Hearing Tr. at 19, ln. 8 - 23). The district court exceeded the State's sentencing recommendation and sentenced Mr. Keller to a four year term of imprisonment. (Change of

Plea Hearing Tr. at 10, ln. 11 - 19: at 19, ln. 13 - 23: Evidentiary Hearing Tr. at 19, ln. 4 - 6).

[¶7] On April 12, 2018, Mr. Keller filed a pro se Application for Post-Conviction Relief. (Appellant's App. at 7). The district court conducted an evidentiary hearing. (Evidentiary Hearing Tr. at 3, ln. 1 - 8). During the hearing, Mr. Keller's attorney testified. (Appellant's App. at 12, ¶ 4). Mr. Keller did not testify at the evidentiary hearing. (Appellant's App. at 14, ¶ 9). During the hearing, Mr. Keller's attorney was questioned about the failure to obtain a presentence investigation report, the failure to investigate Mr. Keller's medical conditions and the failure to obtain and present evidence about those medical conditions to the district court. See id. The district court denied Mr. Keller any sort of post-conviction relief and Mr. Keller now appeals. (Appellant's App. at 11 - 16).

Law and Argument

[¶8] This is an appeal of an order denying post-conviction relief. (Appellant's App. at 16). This Court has jurisdiction over this appeal under N.D. Const. art. VI § 6 and N.D.C.C. § 29-32.1-14. North Dakota Century Code Section 29-32.1-14 provides, "A final judgment entered under this chapter may be reviewed by the supreme court of this state upon appeal as provided by rule of the supreme court." Id.

Standard of Review

[¶9] Post-conviction relief proceedings are civil in nature and are governed by the North Dakota Rules of Civil Procedure. Broadwell v. State, 2014 ND 6, ¶ 5, 841 N.W.2d 750. On

appeal, findings of fact are reviewed under the “clearly erroneous” standard set forth in N.D.R.Civ.P. 52(a). See id. A finding of fact is clearly erroneous, “if it is not supported by any evidence or if, although there is some evidence to support it, a reviewing court is left with a definite and firm conviction a mistake has been made.” Id. Questions of law are fully reviewable on appeal of a post-conviction relief proceeding. See id. Additionally, the issue of ineffective assistance of counsel is a “mixed question of law and fact which is fully reviewable by this court.” Id. at ¶ 7.

I. The district court erred when it denied Mr. Keller’s application for post-conviction relief.

[¶10] The district court’s dismissal of Mr. Keller’s application for post-conviction relief is reversible error. Mr. Keller’s application alleges ineffective assistance of counsel. “To succeed on a claim for ineffective assistance of counsel, a petitioner must prove counsel’s performance fell below an objective standard of reasonableness and the deficient performance prejudiced him.” Garcia v. State, 2004 ND 81, ¶ 5, 678 N.W.2d 568, (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). The first prong of the Strickland test requires that an attorney’s performance be measured by an objective standard of reasonableness, considering the prevailing professional norms. Garcia at ¶ 5. The second prong of the Strickland test requires a showing of “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id.

[¶11] Mr. Keller’s attorney provided ineffective assistance of counsel, by failing to obtain a presentence investigation report. N.D.R.Crim.P. 32(c) permits a court to order a

presentence investigation and the creation of a report, which includes the following information about the defendant: (i) family, educational, and social history; (ii) employment history and financial condition; (iii) the circumstances affecting the defendant's behavior; and (iv) any other information that the Court orders. N.D.R.Crim.P. 32(c)(3)(A). N.D.C.C. § 12.1-32-02(11) provides certain specified offenses for which a presentence investigation report is required to be created before sentencing. N.D.C.C. § 12.1-32-02(11). A presentence investigation report was not required for the driving-related charges that Mr. Keller faced. See id. As such, the district court had the authority to order a presentence investigation and report at any time, but was not required to do so. See State v. Wardner, 2006 ND 256, ¶ 8, 725 N.W.2d 215.

[¶12] N.D.C.C. § 12.1-32-02(11) was enacted to ensure that the State properly advised the sentencing court about a defendant's prior offenses. Rencountre v. State, 2015 ND 62, ¶ 17, 860 N.W.2d 837. To that end, N.D.C.C. § 12.1-32-02(11) was enacted to primarily benefit the State, not the defendant. See id. However, when a defendant has relatively few, minor offenses, this information is helpful to the Court and weighs in favor of a less severe sentence. In addition, a presentence investigation report can be beneficial to synthesize and explain complex medical information for the Court. Under those circumstances, such a report can be favorable to the defendant, while also being helpful to the sentencing court. These were the exact circumstances of Mr. Keller's case. A presentence investigation report which documented and explained Mr. Keller's medical conditions would have been helpful to the Court, but was also necessary to the defense. A presentence investigation report describing Mr. Keller's medical conditions would have explained the root cause for the auto

accident. Although his medical conditions may not have been sufficient to completely absolve Mr. Keller of criminal responsibility, an explanation of those medical conditions would have better explained Mr. Keller's situation to the district court and would likely have resulted in a lesser sentence.

[¶13] At the district court level, Mr. Keller's claim was argued as a failure to obtain a presentence investigation report. (Appellant's App. at 14, ¶ 9). While this case was argued to the district court as a failure to obtain a presentence investigation report, Mr. Keller's claim of ineffective assistance of counsel is better described as a failure to adequately investigate and a failure to obtain and submit certain helpful medical information in mitigation of the sentence. In Strickland, the United State Supreme Court held a criminal defense attorney "has a duty to make reasonable investigations" prior to trial. Strickland v. Washington, 466 U.S. 668, 691 (1984). Mr. Keller's attorney failed to properly investigate Mr. Keller's medical situation and obtain proof thereof, so that it could be submitted to the sentencing court. Ultimately, Mr. Keller's attorney provided ineffective assistance of counsel, by failing to take the necessary steps to ensure that the district court understood Mr. Keller's medical conditions and considered those medical conditions at the time of sentencing. Whether this was done through a presentence investigation report or by taking some other steps to properly document those medical conditions is secondary.

[¶14] Mr. Keller's attorney did not take an appropriate course of action to ensure that the district court was advised of his medical conditions prior to sentencing. Mr. Keller advised his attorney that he would like a presentence investigation report, in order to explain the impact of his medical conditions to the district court. (Evidentiary Hearing Tr. at 7, ln. 16 -

20: at 8, ln. 2 - 5). Mr. Keller's attorney agreed that Mr. Keller's medical conditions were something about which the district court should know prior to sentencing and that it would be helpful to the defense to explain the conditions to the district court. (Evidentiary Hearing Tr. at 12, ln. 7 - 15: at 24, ln. 11 - 19). Despite these facts, Mr. Keller's attorney did not request a presentence investigation prior to the change of plea. (Change of Plea Hearing Tr. at 12, ln. 4 - 9). More important, Mr. Keller's attorney did not take any actions to investigate the matter and gather the favorable medical information on his own prior to the change of plea. (Evidentiary Hearing Tr. at 16, ln. 4 - 8). Instead, Mr. Keller's attorney waited until during the change of plea hearing to first request a presentence investigation. (Change of Plea Hearing Tr. at 12, ln. 4 - 9). Given the fact that a presentence investigation report was discretionary, not mandatory, for this type of offense, this was incredibly risky decision. See N.D.C.C. § 12.1-32-02(11). The nature of such a risk is apparent, as the district court ultimately chose not to order a presentence investigation report and proceeded to sentencing without any sort of documentation of Mr. Keller's medical conditions. (Change of Plea Hearing Tr. at 19, ln. 8 - 23). The more appropriate course of action would have been for Mr. Keller's attorney to prepare in advance of the hearing, by obtaining such records before the court date, rather than hoping the district court will order someone else to do it. Such a risky decision cannot be considered strategy. Instead, it must be considered a deficient performance by Mr. Keller's attorney and below the prevailing professional norms. This satisfies the first prong on the Strickland test.

[¶15] Mr. Keller was prejudiced as a result of his attorney's incomplete pretrial investigation. The second prong of the Strickland test requires a showing of "a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Garcia, at ¶ 5. Because of his attorney's deficient performance, Mr. Keller was not able to explain his medical conditions to the sentencing court. Mr. Keller was prejudiced, as the district court did not have a presentence investigation report or any other information to document and explain his medical conditions to the court. Had such information been presented, the district court would have been in a better position to understand the root cause for the auto accident and Mr. Keller's actions. This could only have served to mitigate the sentence. The prosecutor was made aware of this information through multiple communications with Mr. Keller's attorney. This led the prosecutor to make the favorable sentencing recommendation that he did. However, the district court was not made aware of such medical information. This resulted in the district court exceeding the State's sentencing recommendation and sentencing Mr. Keller to a longer term of imprisonment. (Change of Plea Hearing Tr. at 10, ln. 11 - 19; at 19, ln. 13 - 23; Evidentiary Hearing Tr. at 19, ln. 4 - 6). Under these circumstances, there is a reasonable probability that, but for counsel's errors, the district court would have sentenced Mr. Keller less severely. As such, the second Strickland prong is satisfied and a reversal is warranted.

Conclusion

[¶16] For the foregoing reasons, Mr. Keller respectfully requests that the district court's order denying his application for post-conviction relief be reversed and remanded for further proceedings. Those further proceedings should include a re-sentencing, after the district court is properly advised of Mr. Keller's serious medical conditions.

Dated this 18th day of February, 2018.

/s/ Scott O. Diamond

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

Thomas Jeames Keller, Petitioner-Appellant, vs. State of North Dakota, Respondent-Appellee	Supreme Court No. 20180391 Case No. 30-2018-CV-00350 Certificate of Service
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[¶1] I hereby certify that on the 18th day of February, 2019, the following documents:

1. Appellant's Brief;
2. Appellant's Appendix; and
3. Certificate of Service.

were served, via email, upon the following individual:

Email: Brian.Grosinger@mortonnd.org
Brian David Grosinger
Morton County State's Attorney Office

and were served, via first class mail, upon the Petitioner-Appellant, as follows:

Thomas Jeames Keller, # 51580
c/o Missouri River Correctional Center
1800 48th Ave. SW
Bismarck, ND 58506

Dated this 18th day of February, 2018.

/s/ Scott O. Diamond

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