

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20200099
Burleigh County No.: 08-2019-CV-02237

Tilmer Everett,)
)
Plaintiff and Appellant,)
)
vs.)
)
State of North Dakota,)
)
Defendant and Appellee.)

APPEAL FROM THE ORDER OF THE DISTRICT COURT SUMMARILY
DISMISSING EVERETT'S POST-CONVICTION RELIEF APPLICATION,
DATED SEPTEMBER 24, 2019

SOUTH CENTRAL JUDICIAL DISTRICT

HONORABLE BRUCE A. ROMANICK, PRESIDING

BRIEF OF APPELLEE
STATE OF NORTH DAKOTA

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ISSUES PRESENTED FOR REVIEW

[¶ 1] Whether the district court was correct in summarily dismissing Everett's Post-Conviction Relief Application.

STATEMENT OF THE CASE

[¶ 2] On December 7, 2006, a jury convicted Tilmer Everett (Everett) of gross sexual imposition and the criminal judgment was entered. This Court affirmed the judgment. *State v. Everett*, 2008 ND 126, 756 N.W.2d 344.

[¶ 3] Everett has filed numerous post-conviction relief applications, all of which have been denied by the district court. Everett appealed these decisions. In eight of those cases, this Court affirmed the dismissals by the district court. *See Everett v. State*, 2016 ND 78, 877 N.W.2d 796; *Everett v. State*, 2015 ND 162, 870 N.W.2d 26; *Everett v. State*, 2012 ND 189, 821 N.W.2d 385; *Everett v. State*, 2011 ND 221, 806 N.W.2d 438; *Everett v. State*, 2010 ND 226, 795 N.W.2d 37; *Everett v. State*, 2010 ND 4, 789 N.W.2d 282; *Everett v. State*, 2008 ND 199, 757 N.W.2d 530; *State v. Everett*, 2014 ND 191, 858 N.W.2d 652. This Court refused to hear three of those cases as they were deemed un-appealable. *Everett v. State*, 2017 ND 111, 893 N.W.2d 506; *Everett v. State*, 2017 ND 93, 892 N.W.2d 898, *Everett v. State*, 2018 ND 114, 910 N.W.2d 835.

[¶ 4] On June 11, 2015, Everett filed his ninth application for post-conviction relief. State's Appendix at page 17 (Index #456, 457). On August 5, 2015, the district court denied Everett's application. *Id.* at p. 17 (Index #460), p. 20-21. The district court found Everett's filings to be repetitive, excessive, and cumbersome. *Id.* at p. 20, ¶ 11. As a result, the district court barred Everett from filing future proceedings without leave of the court. *Id.* This order also relieved the State from responding to Everett's filings unless the Court specifically asked

the State to do so. *Id.* This Court upheld that order in *Everett v. State*, 2016 ND 78.

[¶ 5] On July 5, 2019, Everett filed a motion requesting permission to file a petition against F.L. and the Abused Adult Resource Center (“A.A.R.C.”). *Id.* at p. 1 (Index #3). Also on July 5, 2019, Everett filed an application for post-conviction relief. *Id.* at p. 1 (Index #1). On July 15, 2019, Everett filed a subpoena invoking Discovery Post Conviction Relief N.D.C.C. Statute 29-32.1-08, seeking audio tapes of a June 20, 2006 protection order companion Case No. 06-R-265. *Id.* at p. 2 (Index #29). On August 8, 2019, Everett filed a motion to compel, requesting the district court to compel the State to respond to his application for relief and permission to file a petition. *Id.* at p. 2 (Index #50, 53). On September 12, 2019, Everett filed a motion against the State for allegedly violating a judicial order on discovery regarding Case No. 08-06-K-01026, again claiming the prosecution was withholding evidence. *Id.* at p. 2 (Index #56-57). On September 19, 2020, Everett filed a subpoena requesting an A.A.R.C. victim advocate’s last name. *Id.* at p. 3 (Index #65).

[¶ 6] On September 24, 2019, the district court ordered a dismissal of the application for failure to seek permission for leave to file and failure to show the new information Everett presented was newly discovered evidence. *Id.* at p. 2 (Index # 62), p. 22-25. The court also denied all motions brought by Everett pursuant to this post-conviction relief application. *Id.* at p. 22-25.

[¶ 7] On September 27, 2019, Everett filed a motion for reconsideration on the alleged newly discovered evidence. *Id.* at p. 3 (Index #71). The court denied this motion on November 12, 2019. *Id.* at p. 3 (Index #81). On November 19, 2019, Everett filed a motion to compel, requesting the court to compel the State to prepare and serve an order for judgment, referencing the denial September 24, 2019 of his July 5, 2019 post-conviction relief petition. *Id.* at p. 3 (Index #89).

[¶ 8] On January 6, 2020, Everett filed a motion for mistrial, arguing the prosecution withheld exculpatory evidence given to them by Everett on August 19, 2019. *Id.* at p. 3 (Index #92). On January 23, 2020, a judgment was entered on Everett's Case No. 08-2019-CV-02237, summarily denying Everett's application for post-conviction relief and dismissing the pursuant motions. *Id.* at p. 3 (Index #95), p. 26. Everett has now appealed this decision. On May 20, 2020, Everett filed a motion alleging misconduct by the State for sending evidence to this Court for review on appeal. *Id.* at p. 4 (Index #122). On June 22, 2020, Everett filed his Appellant Brief.

STATEMENT OF THE FACTS

[¶ 9] In both of his July 5, 2019 motions [(1) requesting permission to file a petition against F.L. and the A.A.R.C. and (2) application for post-conviction relief], Everett once again alleges that the Burleigh County State's Attorney's Office and the South Central District Court purposefully withheld information and are wrongfully imprisoning him. *Id.* at p. 1 (Index #1-3), Appellant's Brief at page 6-22. Specifically, Everett alleges that: 1) he was illegally accused and arrested by the Bismarck Police Department; 2) police and prosecutors colluded against him at trial; and 3) the prosecution intentionally withheld information from Everett in an attempt to defraud him. *Id.*

[¶ 10] Everett's post-conviction application had a similar theme to his previous filings, namely, that the South Central District Court and the Burleigh County State's Attorney's Office have an alleged pre-conceived vendetta against him. However, this motion included alleged newly discovered information by Everett. *Id.* Ultimately, Everett argued that the information contained in the transcript of the protection order proceeding was new evidence the prosecution intentionally withheld, and as a result, he should be granted an evidentiary hearing on the matter. *Id.*

[¶ 11] The State did not respond to Everett's motion pursuant to the August 6, 2015 district court order. State's App'x at p. 17 (Index # 460), p. 20-21. On September 24, 2019, the district court ordered Everett's petition for post-conviction relief be dismissed, pursuant to the 2015 district court order that

Everett must ask permission to file future proceedings without leave from the court. *Id.* at p. 2 (Index # 62), 22-25. The district court also ordered a dismissal of the application for failure to show that the new information Everett presented was newly discovered evidence. *Id.* The district court opined that the new information presented by Everett “failed to show there is a reasonable inference that would raise a genuine issue of material fact; therefore, he is not entitled to a[n] [evidentiary] hearing.” *Id.* at p. 2 (Index #62), p. 24 ¶ 10. The court also denied all motions brought by Everett pursuant to this post-conviction relief application. *Id.* at p. 2 (Index # 62), p. 25 ¶ 13.

[¶ 12] On January 23, 2020, a judgment was entered summarily denying Everett’s application for post-conviction relief and dismissing the pursuant motions, based on the reasons outlined in the September 24, 2019 district court order. *Id.* at p. 3 (Index #95), p. 26. Everett has now appealed this decision.

[¶ 13] In his June 22, 2020, appeal, Everett argues the district court: 1) erred in dismissing the alleged new evidence; 2) erred in failing to entertain his motion to compel the alleged withheld evidence; and 3) erred in failing to entertain his motion for mistrial on the alleged withheld evidence.

ARGUMENT

I. THE DISTRICT COURT'S DISMISSAL OF EVERETT'S POST-CONVICTION RELIEF APPLICATION WAS CORRECT BECAUSE HE FAILED TO ASK FOR LEAVE TO FILE HIS APPLICATION.

[¶ 14] In 2015, the district court barred Everett from filing an application for post-conviction relief without permission of the district court and relieved the State from responding to Everett's filings without specific request from the district court. State's App'x at p. 17 (Index #460), p. 20-21. This Court upheld that order in *Everett v. State*, 2016 ND 78. On July 5, 2019, Everett filed a motion requesting permission to file a proper application for post-conviction relief under N.D.C.C. 29-32.1-01(3), pursuant to the district court's August 2015 order. However, also on July 5, 2019, Everett filed his application for post-conviction relief pursuant to N.D.C.C. 29-32.1-01(3). On September 24, 2019, the district court dismissed Everett's application for post-conviction relief because he failed to request permission to file a new action. Everett has failed to acknowledge the court's precise language in the August 5, 2015 order, which states:

Everett may pursue his right to appeal to the North Dakota Supreme Court, but he may not file any further motions or pleading in or related to his criminal action 08-06-K-1026 at the district court level, *except after seeking and receiving approval* of the presiding judge of the South Central Judicial District or his/her designee to file a proper application under N.D.C.C. § 29-32.1-04 where Everett succinctly and concisely establishes an exception to the statute of limitation under N.D.C.C. § 29-32.1-01(3) and is not subject to summary disposition under N.D.C.C. § 29-32.1-09. The State is relieved from responding to any further motions or pleadings filed in the District Court in these cases, unless the District Court reviews the motion or pleading, determines it

has merit and, in writing, permits Everett's filing and requests a response.

Id. (emphasis added).

[¶ 15] Since this Court has affirmed the district court's decision in *Everett v. State*, 2016 ND 78 at ¶ 24, and because Everett failed to receive approval from the district court before filing his petition for post-conviction relief, the State agrees with the district court in that "[t]his matter is dismissed for Everett's failure to request permission to file a new action."

II. THIS COURT SHOULD DISMISS EVERETT'S APPEAL BECAUSE ORDERS DENYING LEAVE TO FILE ARE NOT APPEALABLE.

[¶ 16] The State maintains this matter is similar in procedure to that decided in *Everett v. State*, 2018 ND 114 at ¶ 11, and therefore is not appealable, since the current matter dismissed by the district court is also one regarding permission to file a motion under Everett's criminal case (08-06-K-0126). Since Everett filed both his request for permission and his application for relief on July 5, 2019, Everett had not yet received approval to file his application for relief from the district court. Therefore, the district court's order stating "[t]his matter is dismissed for Everett's failure to request permission to file a new action" should be viewed as a denial of leave to file, which is not appealable. *See Everett v. State*, 2018 ND 114 at ¶ 11.

[¶ 17] Even further, Everett attempts to argue the district court's January 23, 2020 order dismissing his motion to compel and motion for mistrial were prejudicial. Appellant's Brief, p. 19-21. He repeats his previous claims of

collusion and corruption, stating the district court ignored his motions and newly discovered evidence, and is now illegally withholding his submitted evidence, thus making the order dismissing his motions as prejudicial. *Id.*

[¶ 18] Everett has failed to show how this dismissal was prejudicial to him, or how the State has illegally withheld this alleged new evidence by submitting it to this Court for review in Everett's current appeal. Based on the previous injunctive order denying Everett leave to file further motions pursuant to his post-conviction relief application, the court did not abuse its discretion and was not prejudicial when it dismissed Everett's further motions after it denied his first and amended post-conviction relief application. As the district court already entered judgment on his post-conviction relief application regarding his newly discovered evidence, the order Everett references in his appeal merely denies him the approval required under the prior injunctive order, which is not an appealable order. *Everett v. State*, 2017 ND 93, at ¶¶ 13, 14.

III. THE DISTRICT COURT'S DISMISSAL OF EVERETT'S POST-CONVICTION RELIEF APPLICATION WAS CORRECT BECAUSE THE ISSUES RAISED ARE BARRED BY RES JUDICATA AND MISUSE OF PROCESS.

[¶ 19] Additionally, the fact remains that even if the district court had given permission for Everett to file a proper application for post-conviction relief, this application would still have been dismissed on the following grounds: 1) Everett failed to meet his burden in proving how the alleged new evidence would have changed the outcome of his trial as required under N.D.C.C. § 29-32.1-01(3)(a)(1); 2) Everett's filing is res judicata; and 3) Everett's filing is a

misuse of process.

A. Standard of Review

[¶ 20] The North Dakota Supreme Court's "standard of review for a summary denial of post[-]conviction relief is well established" and

[t]his Court reviews an appeal from a summary denial of post-conviction relief as it reviews an appeal from a summary judgment. '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.'... Section 29-32.1-09(3), N.D.C.C., provides: 'The court may 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 a judgment as a matter of law.'

Murphy v. State, 2014 ND 84, 14, 845 N.W.2d 327 (quoting *Parizek v. State*, 2006 ND 61, 14, 711 N.W.2d 178). That said, the district court order barring Everett from future filings states that Everett's only recourse is to seek and receive approval to file a proper application under N.D.C.C. § 29-32.1-04, following the guidelines set forth in N.D.C.C. §§ 29-32.1-01(3) and 29-32.1-09. State's App'x at p. 17 (Index #460), p. 20-21. Essentially, any filing by Everett must establish the existence of newly discovered evidence, and that the evidence would establish that Everett did not commit the crime for which he was convicted.

[¶ 21] Additionally, it appears that the district court reviewed Everett's post-conviction relief application, as well as the supporting transcript before summarily denying Everett's filings. As such, it would be most appropriate to apply the standard of review for a summary denial of an application for post-conviction relief

in this case.

B. Everett failed to establish how the alleged new evidence shows that he did not engage in the criminal conduct for which he was convicted, as required under N.D.C.C. § 29-32.1-01(3)(a)(I).

[¶ 22] Under N.D.C.C. § 29-32.1-01, an application for post-conviction relief must be filed within two years of the date that the conviction became final, unless, among other reasons:

The petition alleges the existence of newly discovered evidence, including DNA evidence, which if proved and reviewed in light of the evidence as a whole, would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted.

N.D.C.C. § 29-32.1-01(3)(a)(I).

[¶ 23] Everett filed his application under the exception provided here. However, Everett's application failed to establish how the alleged newly discovered evidence contained in the transcript or audio disc of the transcript attached to his application establishes he did not engage in the criminal conduct for which he was convicted. Nor did his application establish that the purported evidence would have changed the outcome of his underlying jury trial. Instead, Everett's application focused on how the alleged new evidence supposedly shows coercion, collusion, and unethical practices by the District Court, State's Attorney's Office, law enforcement, and other agencies.

[¶ 24] In his application, Everett attached a transcript and audio disc of a non-hearing of a protection order, as well as communications between Everett and district court reporters Lisa Soma and Ronda Colby. However, noted by the

district court, this transcript is not new evidence, simply the same argument Everett has consistently used through his appeal and post-conviction efforts. This transcript and audio disc is of a non-hearing that took place on June 20, 2006, in front of Honorable Sonna Anderson, regarding a temporary protection order placed on Everett on June 6, 2006 signed by Honorable Bruce Romanick. Everett alleges this transcript is proof F.L. was coerced to provide a false statement to law enforcement. He also alleges the transcript is proof that an A.A.R.C. victim advocate coerced F.L. into making this alleged false statement about him surrounding his May 30, 2006 criminal arrest. Everett further argues that the State intentionally withheld this information from him, as it would have allegedly been evidence in his favor regarding his criminal case.

[¶ 25] Although this transcript from a June 20, 2006 non-hearing contains a reference to Everett's criminal case, it has no relevance to his criminal conviction in Case No. 08-06-K-01026. Everett was incarcerated during this time, and had been since his May 30, 2006 arrest. Moreover, F.L. did not show up to testify. The hearing was rescheduled for June 30, 2020, all while Everett still remained incarcerated for his separate criminal charges. When F.L. failed to show for the second hearing, the matter was dismissed. In fact, at no point did F.L., Everett, or any witnesses testify in this proceeding. As summarized by the district court, this newly discovered evidence was simply another court making a record of continuing a hearing where the petitioner and respondent did not appear. State's App'x, at p. 2 (Index # 62).

[¶ 26] As such, the protection order, transcript, and the audio format of the transcript regarding a companion case that occurred after the fact does nothing to support that Everett did not engage in the criminal conduct for which he was convicted. By failing to meet the burden outlined in N.D.C.C. § 29-32.1-01(3)(a)(1), Everett's application was appropriately dismissed, and thus, should be affirmed.

C. The issues raised by Everett are barred by res judicata and as a misuse of process.

[¶ 27] Under N.D.C.C. § 29-32.1-12, "the State may claim the affirmative defenses of res judicata and misuse of process as grounds for denial of a post-conviction application." *Klose v. State*, 2008 ND 143, ¶ 9, 752 N.W.2d 192; *see also* N.D.C.C. § 29-32.1-12(3). Section 29-32.1-12 of the North Dakota Century Code provides in relevant part:

1. An application for post-conviction relief may be denied on the ground that the same claim or claims were fully and finally determined in a previous proceeding.
2. A court may deny relief on the ground of misuse of process. Process is misused when the applicant:
 - a. Presents a claim for relief which the applicant inexcusably failed to raise either in a proceeding leading to judgment of conviction and sentence or in a previous post-conviction proceeding; or
 - b. Files multiple applications containing a claim so lacking in factual support or legal basis as to be frivolous.

[¶ 28] In this case, Everett's application for post-conviction relief is barred by res judicata and as a misuse of process. Everett has raised these claims on multiple prior occasions, and his claims are clearly lacking factual or legal support. Therefore, the district court's order for summary dismissal should be

affirmed.

1. The issues raised by Everett are barred by res judicata.

[¶ 29] Once again, Everett argues that he has found new information concerning an alleged false report made by an individual identified as F.L. However, F.L.'s alleged coerced statement pertains to a companion case that took place in 2006. The transcript Everett attached is of this companion case, which Everett has already presented to this Court in his previous post-conviction appeal. *See Everett v. State*, 2019 ND 149, Appellant's Brief. Everett alleges this transcript of a non-hearing that took place on June 20, 2006, in front of Honorable Sonna Anderson transcript is proof F.L. was coerced by an A.A.R.C. victim advocate to provide a false statement to law enforcement in Case No. 06-9442.

[¶ 30] Also in his brief, Everett alleges that the State intentionally withheld this information from him, as it would have been evidence in his favor regarding his criminal case. Everett claims that the audio format of the transcript allows him to identify a victim advocate, and this would have allowed him to call her as a witness in his criminal trial. However, this companion case has already been addressed in prior applications for post-conviction relief, and there is nothing in the transcript that supports Everett's conclusions.

[¶ 31] As such, the State denies Everett's allegations of withholding exculpatory evidence, since this was not evidence against Everett and the State did not withhold it. *See State's App'x* at p. 2 (Index # 62). As this companion

case has already been addressed in Everett's prior applications for post-conviction relief, these repeated claims raised in Everett's current application are barred by res judicata and the district court's order for dismissal should be affirmed.

2. The issues raised by Everett are barred as a misuse of process.

[¶ 32] Everett's filing is also barred as a misuse of process. Relief may be denied as a misuse of process "if the applicant ' [f]iles multiple applications containing a claim so lacking in factual support or legal basis as to be frivolous. *Steen*, 2007 ND 123, ¶ 13 (citing *Jensen v. State*, 2004 ND 200, ¶ 9, 688 N.W.2d 374). Here, Everett alleges that he has obtained new evidence that entitles him to post-conviction relief. However, as previously stated, the information presented by Everett is not directly related to his criminal case. Rather, it pertains to a companion case that took place in 2006. Everett has failed to establish how the alleged new evidence has any bearing on his criminal case or how it would have changed the outcome at trial. He merely continues to repeat the same claims of conspiracy and corruption by the State by submitting documents with no relevance to his criminal verdict. Since Everett's filing lacks factual support and legal basis, it is a misuse of process and the district court's order for summary dismissal should be affirmed.

CONCLUSION

[¶ 33] For these reasons, the State respectfully requests that this Court affirm the South Central District Court's Order summarily dismissing Everett's Application for Post-Conviction Relief.

RESPECTFULLY SUBMITTED:

Dated this 21st day of July, 2020.

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IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

State of North Dakota,)	
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Plaintiff/Appellee,)	Supreme Court No. 20200099
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-vs-)	Burleigh County Case No.
)	08-2019-CV-02237
Tilmer Everett,)	
)	
Defendant/Appellant)	

CERTIFICATE OF COMPLIANCE

[¶ 1] COMES NOW Karlei Neufeld of Bismarck, North Dakota, and hereby certifies that the attached Brief of the Appellee and Appendix are in compliance with Rule 32(a)(8)(A), North Dakota Rules of Appellate Procedure.

[¶ 2] The number of pages in the principal Brief, excluding any addenda, is twenty (20) pages, according to the page count of the filed electronic document. The number of pages in the Appellee's Appendix, is twenty-six (26) pages.

Dated this 21st day of July 2020.

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State of North Dakota,)
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Defendant-Appellant,) District Ct. No. 08-2019-CV-02237

STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

1. Brief of Plaintiff-Appellee
2. Certificate of Compliance
3. Appendix of Petitioner-Appellee
4. Affidavit of Service

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Subscribed and sworn to before me this 21 day of July, 2020.

is 21 day of July, 2020.
Jeanne E. Huelbace
 Notary Public,
 Burleigh County, North Dakota

