

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Cody Michael Atkins,)	
)	Supreme Court No. 20200172
Petitioner/Appellant,)	
)	
)	Grand Forks Co. #2018-CV-02604
-vs-)	
)	
State of North Dakota,)	
)	
Respondent/Appellee.)	
)	

BRIEF of Petitioner/Appellant Cody Michael Atkins

**Appeal from Order Denying Petitioner's Application for Post-Conviction Relief
entered December 19, 2019 and from the Order Dismissing Motion to Reconsider
entered June 9, 2020**

**In District Court, County of Grand Forks, State of North Dakota
The Honorable John Thelen**

ORAL ARGUMENT REQUESTED

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[¶1] Statement of the Issues

[¶ 2] Whether the district court erred by concluding that Atkins has either raised the same claims in prior post-conviction proceedings, or that he failed to show good cause or excusable neglect for not having previously raised issues that would be newly discovered evidence in this post-conviction relief effort?

[¶ 3] Whether the district court erred by dismissing Atkins' motion to reconsider, specifically Atkins' claim that the law should be extended to recognize the right to effective assistance of post-conviction counsel, when that right to counsel has been granted as a substantial statutory right?

[¶ 4] Statement of the Case

[¶ 5] This is an appeal from the Order Denying Post-Conviction Relief entered on December 19, 2019, Index #124, Appendix 29, and from the Order Dismissing Motion to Reconsider, entered on June 9, 2020, Index #172, Appendix 48, in District Court, County of Grand Forks, State of North Dakota, The Honorable John A. Thelen, presiding, and the whole thereof.

[¶ 6] Atkins filed a pro se application for post-conviction relief. Index #1, Appendix 17. On December 3, 2018, the State filed an Answer and a motion to dismiss. Four days later, the district court granted the State's motion and dismissed Atkins' Application. Atkins appealed the Order granting the State's motion and denying post-conviction relief without an opportunity to respond. This court reversed and remanded because Atkins was not given the opportunity to respond to the state's motion to dismiss. Atkins v. State, 2019 ND 146, 928 N.W.2d 438. Atkins filed a pro se motion and brief, along with several exhibits. No action was taken on that motion. Atkins was represented by counsel at the time. Index ##91 through 101

inclusive. A hearing was held on November 8, 2019 and consisted of oral argument only. See Transcript of hearing, November 8, 2019. Atkins filed a Motion for Reconsideration pro se on January 6, 2020. Index ##125-128, Appendix 39. On April 24, 2020, Atkins' present attorney filed a brief raising the issue of ineffective assistance of post-conviction counsel as a violation of a substantial statutory right to counsel. Index #163. A hearing was held on June 5, 2020, and the Order Dismissing Motion to Reconsider was entered June 9, 2020. Index #172, and transcript of hearing on June 6, 2020. Notice of appeal was filed July 2, 2020, Index #173 and Appendix 49.

[¶ 7] Statement of the Facts

[¶ 8] In 2014, In Grand Forks County, Atkins was charged with Gross Sexual Imposition in case Number 18-2014-CR-01844. In 2015, Atkins pled guilty and was sentenced to a term of imprisonment. Atkins appealed, and the judgment was affirmed. State v. Atkins, 2016 ND 13, 873 N.W. 2d 676. The procedural history of the litigation since Atkins' guilty plea and conviction has been recited several times in this file and others. Atkins v. State, 2019 ND 146, ¶¶ 2 & 3, 928 N.W.2d 438.

[¶ 9] In March of 2016, Atkins filed a petition for post-conviction relief in case number 18-2016-CV-00559. That case alleged ineffective assistance of trial counsel during the criminal case. The case was dismissed for failing to file a brief in compliance with a scheduling order and the merits of the claim were never addressed. Atkins did not appeal the dismissal.

[¶ 10] In September of 2016, Atkins filed a second petition for post-conviction relief in case number 18-2016-CV-01909. This petition also alleged ineffective assistance of trial

counsel during the criminal case. This case was summarily dismissed, and Atkins was once again denied an evidentiary hearing on the merits of his claim.

[¶ 11] On November 15, 2018, Atkins filed a petition for post-conviction relief in case number 18-2018-CV-02604, which is the case that ultimately led to this appeal. Index #1, Appendix 17. Atkins' current application his conviction was obtained, and the imposition of the sentence violated the law and the existence of new evidence, not previously presented or heard. Atkins cites nine specific grounds for relief, which he summarizes as follows: An unlawful arrest warrant; an involuntary and coerced confession; inconsistent witness statements; that the prosecution used false evidence; the review by a medical doctor of a sexual assault kit; problems with the knock and announce requirement before the search of a house; judicial bias and prejudice; malicious prosecution; problems with the language of the charging document and that his guilty plea was illusory. Index #1, Appendix 17. On April 24, 2020, Atkins' present attorney filed a brief raising the issue of ineffective assistance of post-conviction counsel as a violation of a substantial statutory right to counsel. Index #163.

[¶ 12] On December 3, 2018, the State filed an Answer which denied the allegations in Atkins' Application. Index # 5, Appendix 21. Along with the Answer, the State filed a motion to dismiss the application, arguing that Atkins' application should be dismissed based on res judicata and misuse of process. Index ## 7-8, Appendix 22. The December 7, 2018, Order concluded that Atkins' claims were procedurally barred and denied Atkins any sort of post-conviction relief without an evidentiary hearing on June 9, 2020, Index #172, Appendix 48

[¶ 13] **Law and Argument**

[¶ 14] This Court has jurisdiction over this appeal under N.D. Const. art. VI § 6, N.D.C.C. § 29-28-06 and N.D.C.C. § 29-32.1-14. North Dakota Century Code Section 29-32.1-14 specifically permits the appeal of the final judgment entered in a post-conviction relief case. N.D.C.C. § 29-32.1-14. North Dakota Century Code Section 29-28-06 provides, in part, “An appeal may be taken by the defendant from [...] An order made after judgment affecting any substantial right of the party. Id.

[¶ 15] **Standard of Review**

[¶ 16] “Post-conviction relief proceedings are civil in nature and are governed by the North Dakota Rules of Civil Procedure.” Garcia v. State, 2004 ND 81, ¶ 6, 678 N.W.2d 568. On appeal, a trial court’s findings of fact will not be disturbed unless clearly erroneous. See id. Questions of law are fully reviewable on appeal of a post-conviction relief proceeding. Broadwell v. State, 2014 ND 6, ¶ 5, 841 N.W.2d 750.

[¶ 17] **I. The district court erred by concluding that Atkins has either raised the same claims in prior post-conviction proceedings, or that he failed to show good cause or excusable neglect for not having previously raised issues that would be newly discovered evidence in this post-conviction relief effort.**

[¶ 18] Atkins is deemed to have filed at least three applications for post-conviction relief prior to the one which is the subject of this appeal. Atkins v. State, 2019 ND 146, ¶ 2, 928 N.W.2d 438. The first application was dismissed because his appointed counsel failed to file a brief. See 18-2016-CV-00559, Index #10.

[¶ 19] Atkins filed a second application for post-conviction relief. 18-2016-CV-00559, Index #1. Assigned post-conviction counsel filed a brief in support of the application. Then the state filed a dispositive motion for summary disposition. 18-2016-CV-01909,

Index ##24 & 25. Atkins' post-conviction counsel failed to respond to this motion. No affidavits or exhibits were filed to resist the state's motion for summary disposition. 18-2016-CV-01909. The court granted the motion and Atkins appealed. This court affirmed. Atkins v. State, 2017 ND 290, 904 N.W.2d 738.

[¶ 20] Atkins' third effort started as a motion to vacate his guilty plea filed in the criminal case, 18-2014-CR-01844, Index #124. That motion was deemed by the trial court and this court as another effort to obtain post-conviction relief. An "evidentiary hearing" was held on August 10, 2018, but only Atkins testified and only one exhibit was introduced. Atkins post-conviction counsel called no other witnesses and offered no other evidence. The transcript of that hearing is filed in this case at Index #58. Only 52 pages, including all arguments and testimony. The court denied all relief, citing abuse of process and res judicata. 18-2014-CR-01844, Index #179, ¶¶ 45 – 49. Atkins appealed and this court affirmed the order. State v. Atkins, 2019 ND 145, 928 N.W.2d 441.

[¶ 21] To date, the denials of post-conviction relief for Atkins have been procedural, up to and including this fourth effort. See Id. The records, briefs, orders and opinions in all of these files demonstrate that three prior post-conviction attorneys have failed to investigate Atkins' factual claims, they failed to engage in discovery, they failed to depose or subpoena witnesses, and they failed to create an evidentiary record. The first attorney did nothing, and the application was dismissed for failure to file a brief. That started the snowball rolling down the procedural hill. From that point on the state has asserted the defenses of res judicata and/or misuse of process. N.D.C.C. § 29-32.1-06(12). When Atkins filed his second application for post-conviction relief, his court-appointed attorney did not file any response to the state's dispositive motion. N.D.C.C. §

29-32.1-09(3). Finally, when Atkins filed his third effort, although there was a hearing, his third court-appointed post-conviction counsel called no witnesses and introduced one exhibit at the hearing. Atkins is confronted with the principle that applicants for post-conviction relief are required to raise all their claims in a single action. Steen v. State, 2007 ND 123, ¶ 13, 736 N.W.2d 457. Atkins' first and best opportunity to present his claims should have been his first application for post-conviction relief, in March of 2016, but his post-conviction counsel did nothing. See letter at Index #43. Claims may be denied for misuse of process when the applicant "inexcusably" fails to raise claims in a prior proceeding. N.D.C.C. § 29-32.1-12. Atkins' good cause and justifiable excuse is the failure of his court-appointed counsel to properly present his claims and develop a record by presenting evidence. Myers v. State, 2017 ND 66, ¶ 9, 891 N.W.2d 724. The trial court in this case addressed this argument and decided it amounted to a claim of ineffective post-conviction counsel which is barred by statute. N.D.C.C. § 29-32.1-09(2). This court should rule that these failures by court-appointed counsel should suffice to establish good cause and justifiable excuse independent from an analysis of ineffective assistance of counsel applicable to the constitutional right to effective counsel. Atkins has not had a full and fair hearing of his factual claims. The state has failed to carry its burden to prove the affirmative defenses. N.D.C.C. § 29-32.1-12(3).

[¶ 22] II. The district court erred by dismissing Atkins' motion to reconsider, specifically Atkins' claim that the law should be extended to recognize the right to effective assistance of post-conviction counsel, when that right to counsel has been granted as a substantial statutory right.

[¶ 23] Atkins filed his "Motion for Reconsideration" pro se. Procedurally, for a person to have the assistance of appointed counsel, they must first file a pro se application for post-

conviction relief. Then they can apply for court appointed counsel, and if they qualify, an attorney is appointed for them. N.D.C.C. § 29-32.1-03 & § 29-32.1-05. Court appointed counsel may rely upon the original pro se filing, file an amended application, or file supplemental materials, as allowed by the Uniform Post-Conviction Procedure Act. N.D.C.C. § 29-32.1-07.

[¶ 24] Atkins bases his present motion upon N.D.R.Civ.P. 60(b). The state is correct that the rule is not intended as a substitute for an appeal. The state is also correct that Atkins' motion does not fit neatly into the enumerated subsections of Rule 60(b), subsections (1) through (5). However, the court can grant relief under subsection (6) for "Any other reason that justifies relief." Atkins asks this court to grant relief under N.D.R.Civ.P. 60(b)(6).

[¶ 25] Simply put, Atkins believes he should be allowed to withdraw his guilty plea and that the criminal judgment should be set aside, in file number 18-2014-CR-01844. He would then envision filing pre-trial motions, and depending on the rulings thereon, potentially take the case to a jury trial. Atkins believes the state has relied upon affirmative defenses at every turn, arguing procedure above substance. Atkins asserts that the state has not been held to its burden to prove its affirmative defenses. As the court noted in its order dated December 19, 2019, ¶ 7, Atkins' first application for post-conviction relief was dismissed because his court-appointed counsel failed to file a timely brief. Index # 124, Appendix 29. Unfortunately, that initial failure has enabled the state to argue misuse of process and res judicata from then on.

[¶ 26] Atkins' right to court appointed counsel in a post-conviction proceeding is not a constitutional right. As such, he is barred from seeking relief based upon ineffective assistance of post-conviction counsel as a violation of his constitutional rights. N.D.C.C. § 29-32.1-09(2). However, Atkins has a statutory right to court-appointed counsel in post-

conviction proceedings. N.D.C.C. § 29-32.1-05.

[¶ 27] Atkins asks this court to extend the law by ruling that his statutory right to court appointed post-conviction counsel is a substantial right which necessarily entitles him to effective representation by such counsel. Atkins asserts that if court appointed post-conviction counsel is ineffective, he would be deprived of a fair hearing, including procedural and substantive due process. See Hamilton v. State, 2017 ND 54, ¶ 26, 890 N.W. 2d 810, (Tufte, concurring). “It would be absurd and meaningless to have a statutory right to appointed counsel and not require that the counsel appointed be competent and effective.” Cody v. Cody, 2019 ND 14, ¶ 18, 921 N.W.2d. 679, citing and quoting Riddle v. Riddle, 2018 ND 62, ¶¶ 14-16, 907 N.W. 2d. 769, citing State v. T.L., 2018 ND 131, ¶¶ 28-29, 751 N.W.2d. 677.

[¶ 28] As noted above, the records reflect that Atkins’ first court appointed post-conviction counsel, Attorney O’Day, failed to file a timely brief, resulting in the dismissal of Atkins’ first post-conviction proceeding. The records establish Atkins’ had concerns with Attorney Hartl’s representation of him. Attorney Gorham undertook representation of Atkins despite the conflict of interest her office had representing others involved in the original criminal case.

[¶ 29] Atkins asserts the state seems to argue that there is a limit on how many times an applicant for post-conviction relief can base an application for relief upon newly discovered evidence. Theoretically, an application for post-conviction relief can be based upon newly discovered evidence as many times as the test in the statute is met. N.D.C.C. § 29-32.1-01(3)(a).

[¶ 30] Atkins asks this court to extend the law to take into consideration his claim that his substantial statutory right to effective and competent court-appointed post-conviction

counsel has been violated. Further, Atkins asks that this court find and conclude that he has been prejudiced by ineffective assistance of counsel, and that the outcome of his post-conviction petitions would likely have been different but-for such ineffective assistance.

[¶ 31] The opinion of the Colorado Supreme Court in Silva v. State, 156 P.3d 164 (Colo. 2007) is instructive. Significantly, the right to court-appointed counsel in post-conviction motions is more restrictive than the same right in North Dakota. Id. at 1168. In this opinion, the court found that there is no constitutional right to court-appointed post-conviction counsel. However, the court concluded that even their limited the statutory right to post-conviction counsel requires effective assistance of such counsel. The court stated in part:

As the United States Supreme Court stated, “a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all.” *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S.Ct.830, 83 L.Ed.2d 821 (1985). For that reason, post-conviction counsel must at least be minimally effective in order to give any meaning to the limited statutory right to post-conviction counsel discussed above. The *Strickland* two-pronged test has well-developed case law to aid in evaluating the minimal effectiveness of counsel. Because of this case law, *Strickland* can be easily applied to post-conviction counsel as well.

Id. at 1169. To repeat what was quoted above, it would be absurd and meaningless to have a statutory right to appointed counsel and not require that the counsel appointed be competent and effective. Atkins asks this court to fashion an appropriate remedy for him, considering that his post-conviction counsel all failed in their representation of Atkins.

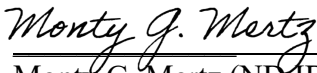
[¶ 32] **Conclusion**

[¶ 33] For the foregoing reasons, Atkins respectfully requests that the district court’s Order be reversed and remanded for further proceedings. On remand, Atkins requests an evidentiary hearing after an appropriate period to conduct investigation and discovery.

[¶ 34] **Oral Argument Requested**

[¶ 35] Oral argument has been requested to emphasize and clarify the Appellant's written arguments on their merits.

[¶ 36] Respectfully submitted this 13th day of October 2020.

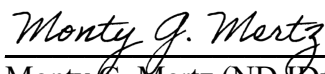


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[¶ 37] **Certificate of Compliance**

[¶ 38] The undersigned hereby certifies, in compliance with N.D.R.App.P. 32(a)(8)(A), that this *Brief of Appellant* was prepared with proportional typeface, 12-point font, and the total number of pages in the above Brief, including the table of contents, the table of authorities, the certificate of compliance, and the certificate of service is 14 pages.

[¶ 39] Dated this 13th day of October 2020.



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IN RE

Atkins v. State
Supreme Court No. 202000172
Grand Forks Co. No. 2018-CV-02604

**CERTIFICATE OF SERVICE
BY ELECTRONIC MEANS**

I, Monty G. Mertz, do hereby certify that, on the 13th day of October 2020, I served the on the following:

Carmell Mattison
Grand Forks County Assistant State's Attorney
P.O. Box 5607
Grand Forks, ND 58206

By sending an E mail to sasupportstaff@gfcounty.org with the Appellant's Brief and Appendix attached in PDF format. To the best of my knowledge, this is the Eservice address for Ms. Mattison.

Dated this 13th day of October, 2020.

Monty G. Mertz

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IN RE

State v. Adkins
Supreme Court No. 20200172
Cass County No. 2018-CV-02604

**CERTIFICATE OF SERVICE
N.D.R.App.P. 24**

I, Monty G. Mertz, do hereby certify that, on the 13th day of October, 2020, true copies of the **Appellant's Brief** and **Appendix** were mailed to:

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JRCC
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Petitioner/Appellant

To the best of my knowledge, this is the mailing address for Mr. Adkins.

Dated this 13th day of October, 2020.

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IN RE

State v. Atkins
Supreme Court No. 20200172
Cass County No. 2018-CV-02604

**CERTIFICATE OF SERVICE
N.D.R.App.P. 24**

I, Monty G. Mertz, do hereby certify that, on the 13th day of October, 2020, true copies of the **Appellant's Brief** and **Appendix** were mailed to:

Mr. Cody Atkins
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Petitioner/Appellant

To the best of my knowledge, this is the mailing address for Mr. Atkins.

Dated this 13th day of October, 2020.

Monty G. Mertz

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