

IN THE SUPREME COURT OF NORTH DAKOTA

Morris Jerome Brickle-Hicks,)	Supreme Court File No.
)	20210073
)	
Petitioner and Appellant,)	Burleigh County No.
)	08-2021-CV-1909
v.)	2020
)	
State of North Dakota,)	APPELLANT'S BRIEF
)	
Respondent and Appellee.)	

**Appeal from the order denying application for post-conviction relief
entered February 23, 2021 in Burleigh County district court, south
central judicial district, North Dakota, the Honorable John W.
Grinsteiner presiding.**

APPELLANT'S BRIEF
ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	3
JURISDICTION..... ¶	1
STATEMENT OF ISSUES	¶ 2
STATEMENT OF CASE..... ¶	3
STATEMENT OF FACTS..... ¶	6
LAW AND ARGUMENT..... ¶	10
I. Whether the district court erred by denying Mr. Brickle-Hicks’ petition for post-conviction relief..... ¶	10
CONCLUSION..... ¶	18

TABLE OF AUTHORITIES

Cases

<i>Adams v. Illinois</i> , 405 U.S. 278, 92 S.Ct. 916 L.Ed.2d 202 (1972).....	¶ 13
<i>Broadwell v. State</i> , 2014 ND 6, 7841 N.W.2d 750 (N.D. 2014)	¶ 10
<i>Delvo v. State</i> , 2010 ND 78, 782 N.W.2d 72 (N.D. 2010)	¶ 10
<i>Garcia v. State</i> , 2004 ND 81, 678 N.W.2d 568 (N.D. 2004)	¶ 14
<i>Peterka v. State</i> , 2015 ND 156, 864 N.W.2d 745 (N.D. 2015).....	¶ 13
<i>Roe v. State</i> , 2017 ND 65, 891 N.W.2d 745 (N.D. 2017)	¶ 10
<i>State v. Foster</i> , 1997 ND 8, 560 N.W.2d 194 (N.D. 2015)	¶ 13
<i>State v. Skaro</i> , 474 N.W.2d 711 (N.D. 1991)	¶ 13
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	¶ 14
<i>Tweed v. State</i> , 2010 ND 38, 779 N.W.2d 667 (N.D. 2010).....	¶ 15

Statutes, Rules, Codes

N.D.C.C. § 29-28-03	¶ 1
N.D.C.C. § 29-28-06	¶ 1
N.D.C.C. § 29-32.1-01.....	¶ 1
N.D.C.C. § 29-32.1-14.....	¶ 1
N.D.R.Civ.P 52(a).....	¶¶ 10, 13
N.D. Const. art. VI § 6	¶ 1
N.D. Const. art. I § 12.....	¶ 13

Oral Argument:

Oral argument has been requested to emphasize and clarify the Petitioner's written arguments on their merits.

Transcript References:

Mr. Brickle-Hicks' post-conviction relief hearing was held on February 22, 2021. The transcript of that hearing is referred to as Tr. in this brief.

JURISDICTION

[¶ 1] The district court had jurisdiction under N.D.C.C. § 29-32.1-01. The North Dakota Supreme Court has jurisdiction over the appeal of this matter pursuant to N.D.C.C. § 29-32.1-14 which provides that, “[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.” Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provision article VI § 6, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06, N.D.C.C., which provides as follows:

“An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03. An appeal may be taken by the defendant from:

1. A verdict of guilty;
2. A final judgment of conviction;
3. An order refusing a motion in arrest of judgment;
4. An order denying a motion for new trial; or
5. An order made after judgment affecting any substantial right of the party.”

N.D.C.C. § 29-28-06.

STATEMENT OF THE ISSUES

[¶ 2] I. Whether the district court erred by denying Mr. Brickle-Hicks’ petition for post-conviction relief.

STATEMENT OF CASE

[¶ 3] This is an appeal from the Burleigh County Order denying post-conviction relief, signed February 23, 2021. Appendix (App.) p. 14. Mr. Brickle-Hicks was convicted of murder pursuant to N.D.C.C. § 12.1-16-01, a AA felony, in the underlying criminal case. *See* 08-2016-CR-1128. The criminal complaint was filed on April 15, 2016, and the initial appearance was held the same day.

[¶ 4] Mr. Brickle-Hicks was initially appointed Attorney Finck. *See* Cr-1128 Index #9. Attorney Loraas replaced Mr. Finck on July 6, 2016. *See* Cr-1128 Index #26. The criminal information was amended on July 18, 2016, December 20, 2016, July 5, 2017, September 15, 2017, and September 20, 2017. *See* Cr-1128 Index #30; 53. The jury trial in this matter was held over five days, September 25, 2017 through September 29, 2017. The jury found Mr. Brickle-Hicks guilty. Mr. Brickle-Hicks was sentenced to life without parole. Mr. Brickle-Hicks directly appealed his conviction and this court affirmed the criminal judgment in the underlying criminal case.

[¶ 5] Mr. Brickle-Hicks filed a petition for post-conviction relief on June 26, 2020. App p. 5. He alleged that Mr. Loraas and the attorney assisting Mr. Loraas, Mr. Ewell, provided ineffective assistance of counsel for the pretrial, trial and appellate proceedings. App. p. 6; Tr. p. 5. He also alleged that the State failed to disclose exculpatory evidence prior to trial. App. p. 6. On July 14, 2020, Mr. Craig was appointed to represent Mr.

Brickle-Hicks. App. p. 3. Mr. Brickle-Hicks, through his counsel, filed an amended application on January 25, 2021. App. p. 3. The court held an evidentiary hearing on the post-conviction matter on February 22, 2021. *Id.* The district court ultimately denied Mr. Brickle-Hicks' application for post-conviction relief. Mr. Brickle-Hicks timely appealed from that order.

STATEMENT OF FACTS

[¶ 6] Mr. Brickie- Hicks alleged that his trial counsel failed to adequately prepare for trial, specifically that he did not investigate or conduct his own interview of a favorable defense witnesses, Brian Carver. App. p. 10, ¶ 7.

[¶ 7] Brian Carver was the victim's boyfriend at the time of the crime. Tr. p. 12. Mr. Brickle-Hicks had informed his attorneys that he was one of the individuals that used a racial slur against him Tr. p. 14. Mr. Brickle-Hicks' attorneys did not subpoena him for trial or present him as the true perpetrator of Misty Coffelt's murder.

[¶ 8] Mr. Brickle-Hicks made statements there had been a conflict with a knife between Mr. Carver and himself. Tr. p. 24. Mr. Carver was in incarcerated in Ohio after the Murder of Ms. Coffelt and could have been subpoenaed for trial. Tr. p. 26.

[¶ 9] Mr. Brickle-Hicks' attorney argued that if Mr. Carver testified at trial it could have resulted in a different outcome, specifically bolstering a self-defense or manslaughter claim. Tr. p. 28.

LAW AND ARGUMENT

I. Whether the district court erred by denying Mr. Brickle-Hicks' petition for post-conviction relief.

Standard of Review

[¶ 10] Post-conviction relief proceedings are civil in nature and governed by the North Dakota Rules of Civil Procedure. *Delvo v. State*, 2010 ND 78, ¶ 10, 782 N.W.2d 72. This Court applies a 'clearly erroneous' standard found in N.D.R.Civ.P. Rule 52(a) when reviewing a district court's findings of fact on an appeal under the Uniform Post-Conviction Procedure Act. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by any evidence, or if, although there is some evidence to support the finding, a reviewing court is left with a definite and firm conviction a mistake has been made. *Roe v. State*, 2017 ND 65, ¶ 5, 891 N.W.2d 745. However, questions of law are fully reviewable on appeal of a post-conviction proceeding. *Broadwell v. State*, 2014 ND 6, ¶ 5, 841 N.W.2d 750.

[¶ 11] The district court found Mr. Brickle-Hicks did not present evidence showing his attorneys' representation fell below an objective standard of reasonableness. Order Denying PCR ¶6; App. p. 16.

[¶ 12] The district court also found that Mr. Brickle-Hicks did not show how the result of the trial would have been different. Specifically, the court wrote, "there is nothing to support the notion that the result of the trial would be different had Carver testified." Order Denying PCR ¶8; App. p. 17.

[¶ 13] Ineffective assistance of counsel is a mixed question of law and fact. This Court has held a mixed question of law and fact is fully reviewable without the restraints of Rule 52(a) *State v. Foster*, 1997 ND 8, ¶ 18, 560 N.W.2d 194 (*citing State v. Skaro*, 474 N.W.2d 711, 716-17 (N.D. 1991)). The Sixth Amendment, made applicable to the states through the Fourteenth Amendment, and Article I, § 12 of the North Dakota Constitution guarantees that a person charged with a crime is “entitled to effective assistance of counsel at critical stages of criminal proceedings.” *Peterka v. State*, 2015 ND 156, ¶ 25, 864 N.W.2d 745 (*citing Adams v. Illinois*, 405 U.S. 278, 279, 92 S.Ct. 916, 31 L.Ed.2d 202 (1972)). In the present case, The United States Supreme Court has developed a two-part test to review ineffective assistance of counsel claims.

[¶ 14] In order for Mr. Brickle-Hicks to succeed on a claim for ineffective assistance of counsel, he must prove his 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.*

[¶ 15] Effectiveness of counsel is measured by an objective standard of reasonableness considering the prevailing norms. A defendant must defeat the strong presumption that a counsel's conduct falls within the wide range of reasonable assistance. Trial counsel's conduct is presumed to be reasonable and courts consciously attempt to limit the effect of hindsight. To establish prejudice a defendant must show a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. A defendant claiming ineffective assistance of counsel must specify how and where trial counsel was incompetent and the probably different result. A reasonable probability is probability sufficient to undermine the confidence in the outcome. *Tweed v. State*, 2010 ND 38, ¶ 26, 779 N.W.2d 667, 678.

[¶ 16] Although the court found that Mr. Loraas representation did not fall below an objective level of reasonableness it is clear from testimony that Mr. Brickle-Hicks' attorneys simply relied on the information provided to them by the police, who have a vested interest in closing cases and obtaining convictions. An objectively reasonable course of action would have been to conduct a deposition with Mr. Carver, or engage a private investigator to conduct an interview. Especially when the individual is alleged to be violent with a weapon, was at near the scene of the murder, and dating the victim.

[¶ 17] The district court also found that there was "nothing to support the notion that the result of the trial would be different had Carver testified." Order Denying PCR ¶8; App. p. 17. However, this is a clearly erroneous

factual finding. The was by way of Mr. Loraas' testimony a proffer of what would have been argued to the jury; Mr. Carver was part of the group that yelled racial slurs and Mr. Brickle-Hicks, was physically violent with a weapon, was in a dating relationship with the victim, and was at or near the scene at the time she was killed. This information would cast doubt upon the intentional or knowing element of murder and would have resulted in a different outcome at trial.

CONCLUSION

[¶ 18] WHEREFORE, Mr. Brickle-Hicks respectfully requests that this Court reverse the district court's order denying his application for post-conviction relief, vacate the criminal judgment, and the case be remanded for a new trial.

Dated this 9th day of June, 2021

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State of North Dakota,)	CERTIFICATE OF
)	COMPLIANCE
Respondent and Appellee.)	

[¶ 1] This Appellant's Brief complies with the page limit of 38 set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure.

Dated: June 9, 2021.

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[1] The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Appellant's Brief
Appellant's Appendix
Certificate of Compliance

And that said copies were served upon:

Julie A. Lawyer, State's Attorney, bc08@nd.gov

by electronically filing said documents through the court's electronic filing system and upon appellant at her last known address by placing a true and correct copy of said documents in a sealed envelope with USPS:

Morris Jerome Brickle-Hicks, #51297, c/o NDSP, PO Box 5521, Bismarck, ND 58506

Dated: June 9, 2021.

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