

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Warren James Wilkinson, Sr.,)	Supreme Court No. 20220282
)	
Petitioner and Appellant,)	Civil No. 18-2022-CV-145
)	
vs.)	
)	
State of North Dakota,)	
)	
Respondent and Appellee.)	

BRIEF OF PETITIONER-APPELLANT WARREN JAMES WILKINSON SR

Appeal from Order dated September 21, 2022

In District Court, Grand Forks County, State of North Dakota

The Honorable John A. Thelen

Laura C. Ringsak (#08146)
 Attorney for Appellant
 103 South 3rd Street Ste. 6
 Bismarck, ND 58501
 (701) 255-1344
lringsak@midconetwork.com

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STATEMENT OF THE ISSUES

¶1 Whether the Trial Court erred in denying the petitioner’s application for post-conviction relief.

STATEMENT OF THE CASE

¶2 This is an appeal of the Northeast Central Judicial District Order dated September 21, 2022, denying Warren James Wilkinson Senior’s (“Wilkinson”) application for post-conviction relief, based on the underlying case where he was charged with one count of Gross Sexual Imposition (18-2019-CR-918). R. 54. A hearing was held on June 10, 2022. R. 69. The issues raised at the hearing were regarding trial counsel failing to file necessary pretrial motions, allowing Wilkinson to testify, etc. R. 69. The Court entered an Order denying Wilkinson’s application for post-conviction relief on September 21, 2022. R. 54. A notice of appeal was filed by Wilkinson on September 22, 2022. R. 55.

STATEMENT OF FACTS

¶3 This is an appeal of the Northeast Central Judicial District Order dated September 21, 2022, denying Warren James Wilkinson Senior’s (“Wilkinson”) application for post-conviction relief, based on the underlying case where he was charged with one count of Gross Sexual Imposition (18-2019-CR-918). R. 54. Wilkinson filed a Petition for Post-Conviction Relief on January 13, 2022. R. 1. The Petition was not detailed with specifics, and the State moved to dismiss the post-conviction for failure to raise any issues outlined in Section 29-32.1 of the North Dakota Century Code. R. 15. The State also moved for a more definite statement under Rule 12(e). R. 17.

¶4 Wilkinson, through counsel, filed an Amended Petition for Post-Conviction Relief, alleging trial counsel committed professional errors, including the following: Failure to

conduct meaningful investigation into the charge against Wilkinson; Failure to collect security footage from the alleged victim's school; Failure to interview witnesses in preparation for trial; Failure to develop any beneficial fact witnesses; Failed to file a motion pursuant to N.D.R.Evi. 412 prior to trial; and Trial attorney directly conceded the issue of guilt in his opening statement, without consent from Wilkinson. R. 25. The Court denied the State's Motion to Dismiss. R. 46.

¶5 A hearing was held on June 10, 2022. R. 69. Mr. Ogren, Wilkinson's trial attorney on the charge of Gross Sexual Imposition, testified. R. 69. Mr. Ogren testified that there was an accusation from the same victim in this case about Wilkinson sexually assaulting her in the past, but was later recanted by the alleged victim and ultimately nothing was done with that allegation. R. 69. Mr. Ogren admitted that despite the crux of the defense's argument regarding credibility, he failed to file a motion under Rule 412 to introduce that accusation, later recanted, prior to trial in that matter. R. 69. Mr. Ogren did not believe there was an exception that was applicable to Wilkinson's case under Rule 412 to allow him to introduce an allegation, later recanted. R. 69. However, Mr. Ogren failed to test the evidence prior to trial by filing a motion arguing subpart (b)(1)(c) of Rule 412, which allows for evidence whose exclusion would violate the defendant's constitutional rights. R. 69. Ultimately, Mr. Ogren did ask the witness questions, which were objected to by the State, and was ruled by the Judge that Mr. Ogren's questions were not permitted under Rule 412. R. 69.

¶6 Mr. Ogren also admitted that he conceded for Mr. Wilkinson in trial that he was attempting to direct a child to perform sexual acts on herself. R. 69. Mr. Ogren talked about this with Wilkinson, and to Mr. Ogren's knowledge, Wilkinson agreed. R. 69. Mr.

Ogren also testified that he and Wilkinson discussed Wilkinson testifying on a number of different occasions, and Wilkinson did testify in a limited manner to refute the alleged victim. R. 69. However, Wilkinson's testimony did not do him any favors. R. 69.

¶7 The parties submitted closing briefs. R. 49, 51. Ultimately, the Court entered an Order denying the application for post-conviction relief on September 21, 2022. R. 54. On September 22, 2022, Wilkinson filed a notice of appeal. R. 55.

LAW AND ARGUMENT

I. The Standard of Review.

¶8 Regarding the specific errors made by counsel, this Court has explained the law when claiming ineffective assistance of counsel through post-conviction relief:

The Sixth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment, and Article I, § 12 of the North Dakota Constitution guarantee a criminal defendant effective assistance of counsel. In accord with the test established by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984), a defendant claiming ineffective assistance of counsel has a heavy burden of proving (1) counsel's representation fell below an objective standard of reasonableness, and (2) the defendant was prejudiced by counsel's deficient performance. Effectiveness of counsel is measured by an objective standard of reasonableness considering prevailing professional norms. The defendant must first overcome the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Trial counsel's conduct is presumed to be reasonable and courts consciously attempt to limit the distorting effect of hindsight. The prejudice element requires a defendant to establish a reasonable probability that, but for his counsel's errors, the result of the proceeding would have been different. Not only does a criminal defendant have the heavy, demanding burden of proving counsel's assistance was ineffective, a defendant claiming ineffective assistance of counsel must specify how and where trial counsel was incompetent and the probable different result. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Heckelsmiller v. State, 2004 ND 191, ¶ 3-4, 687 N.W.2d 454 (internal citations and quotations omitted).

¶9 This Court has established the following as standards for post-conviction relief proceedings:

Proceedings on applications for post-conviction relief are civil in nature and governed by the North Dakota Rules of Civil Procedure. The petitioner has the burden of establishing grounds for post-conviction relief. The district court's findings of fact in a post-conviction proceeding will not be disturbed on appeal unless they are clearly erroneous under N.D.R.Civ.P. 52(a). A finding of fact is clearly erroneous if induced by an erroneous view of the law, if no evidence exists to support it, or if the reviewing court is left with a definite and firm conviction a mistake has been made. Questions of law are fully reviewable on appeal in post-conviction proceedings.

Tweed v. State, 2010 ND 38, ¶ 15, 779 N.W.2d 667 (internal citations omitted).

II. Wilkinson's Trial Counsel's Conduct Fell Below The Standard Of Reasonableness That Is Expected And Constitutionally Ensured.

¶10 "Effectiveness of counsel is measured by an 'objective standard of reasonableness' considering 'prevailing professional norms.'" DeCoteau v. State, 2000 ND 44, ¶ 8, 608 N.W.2d 240 (citing Lange v. State, 522 N.W.2d 179, 181 (N.D. 1994), quoting Strickland, 466 U.S. at 688). This Court stated in Tweed v. State, that "[t]he prejudice element requires a defendant to 'establish a reasonable probability that, but for his counsel's errors, the result of the proceeding would have been different.'" 2010 ND 38, ¶ 26, 779 N.W.2d 667 (quoting Syvertson v. State, 2000 ND 185, ¶ 22, 620 N.W.2d 362). "[T]he Defendant must specify how and where trial counsel was incompetent and the probable different result." Middleton v. State, 2014 ND 144, ¶ 6, 849 N.W.2d 196 (citing Murchison v. State, 2011 ND 126, ¶ 8, 799 N.W.2d 360 (quoting State v. Myers, 2009 ND 141, ¶ 15, 770 N.W.2d 713)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" Id.

¶11 In the present case, Wilkinson claims that Mr. Ogren's representation fell below an objective standard of reasonableness in five regards, as follows:

1. Mr. Ogren stated on the record that he did not file a motion because in his opinion it would be better to try and "sneak it past" the State. When questioned about whether Mr. Eyre was generally unprepared or not paying attention during trial, Mr. Ogren admitted that Mr. Eyre is always prepared. Mr. Ogren acknowledged that his trial strategy was to try and sneak favorable testimony past Mr. Eyre even though Mr. Ogren knew Mr. Eyre is always well prepared for trial. A reasonable attorney would not use this trial strategy knowing the State was well prepared.

2. Mr. Ogren failed to secure the video surveillance footage from the alleged victim's school. On the record, Mr. Ogren conveniently claimed he had no recollection of the request made by Mr. Wilkinson. Mr. Ogren then went on to say that the security footage would not have been useful because the alleged victim was not at the school that day. However, without the video footage to confirm, Mr. Ogren is not able to make that determination.

3. Mr. Ogren also failed to determine the authenticity of the recordings which the State alleged were of Mr. Wilkinson and the alleged victim. When asked on the record, Mr. Ogren again conveniently was unable to recall whether Mr. Wilkinson had told him the recordings were fake. Mr. Ogren then went on to state that even if Mr. Wilkinson had told him the recordings were fake, Mr. Ogren wouldn't have believed him. Mr. Ogren failed to investigate the authenticity of the recordings further and failed to secure expert witness testimony regarding the recordings. Mr. Ogren should have investigated this further and developed Mr. Wilkinson's defense accordingly.

4. Not only did Mr. Ogren fail to determine the authenticity of the tapes, Mr. Ogren made concessions about the recordings during his opening statement. Mr. Ogren claimed on the record that he obtained Mr. Wilkinson's consent to make the concessions and that he explained the tactical benefit of the concessions. However, Mr. Ogren failed to recognize that by conceding that Mr. Wilkinson was the voice in the recording allegedly asking the victim for a 'blow job,' that the jury would view Mr. Wilkinson as a predator.

5. Mr. Ogren failed to adequately prepare Mr. Wilkinson to testify. Mr. Ogren on the record admitted it was not until the second day of trial that he and Mr. Wilkinson discussed the idea of Mr. Wilkinson testifying. However, Mr. Ogren acknowledged that he only spent 1 hour with Mr. Wilkinson preparing him for both direct examination and cross examination in a AA felony trial. Mr. Ogren not only told Mr. Wilkinson he had a choice

in whether or not to testify but Mr. Ogren actually encouraged Mr. Wilkinson to testify. Mr. Ogren was in a position of trust and authority which Mr. Wilkinson gave a lot of deference. Mr. Ogren also stated on the record that the advice he gave Mr. Wilkinson was to keep his testimony as short as possible to avoid giving the State ‘things to pick at.’ This statement solidifies that Mr. Ogren failed to adequately prepare Mr. Wilkinson to testify. Mr. Ogren also acknowledged on the record that Mr. Wilkinson's testimony did not ‘help’ but that it did not ‘hurt’ either. If Mr. Wilkinson's testimony was not going to be helpful for his defense, Mr. Ogren should not have encouraged Mr. Wilkinson to testify.

R. 51.

¶12 Wilkinson’s allegations of ineffective assistance of counsel in the present case, as listed above, prejudiced him because he was ultimately found guilty at trial. Had Mr. Ogren filed the 412 motion, Wilkinson believes it would have been successful and he would have been able to introduce evidence about the alleged victim’s character. Further, Wilkinson argues that had Mr. Ogren not made concessions about recordings, then the jury would not have believed that Wilkinson was a predator. Additionally, Wilkinson should not have testified, as his testimony was not helpful.

CONCLUSION

¶13 For the reasons outlined above, Wilkinson respectfully requests that this Court reverse and remand.

Dated this 27th day of December, 2022.

/s/ Laura Ringsak
Laura C. Ringsak (#08146)
Attorney for Appellant
103 South 3rd Street Ste. 6
Bismarck, ND 58501
(701) 255-1344
lringsak@midconetwork.com

CERTIFICATE OF SERVICE

True and correct copies of BRIEF OF APPELLANT were e-mailed through the North Dakota Supreme Court e-filing portal, to the following this 27th day of December, 2022:

Andrew Eyre
Grand Forks County Assistant State's Attorney
sasupportstaff@gfcounty.org

and mailed to the following:

Warren Wilkinson
North Dakota State Penitentiary
PO Box 5521
Bismarck, ND 58506-5521

/s/ Laura Ringsak
Laura C. Ringsak (#08146)
Attorney for Appellant
103 South 3rd Street Ste. 6
Bismarck, ND 58501
(701) 255-1344
lringsak@midconetwork.com

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Appellant's brief contains 9 pages consisting of the cover page through the conclusion and signature block and complies with the page limits outlined in North Dakota Rules of Appellate Procedure Rule 32(a)(8)(A).

Dated 27th day of December, 2022. /s/ Laura Ringsak
Laura C. Ringsak (#08146)
Attorney for Appellant
103 South 3rd Street Ste. 6
Bismarck, ND 58501
(701) 255-1344
lringsak@midconetwork.com