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In the Supreme Court
State of North Dakota

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APR 25 2013

STATE OF NORTH DAKOTA

Matthew Swearingen,)
Petitioner / Appellant,)

vs.)

Supreme Court No. 20130063

State of North Dakota,)
Respondent / Appellee)

SUPPLEMENTAL BRIEF - Appellant

Appeal from Ramsey County District Court
Civil Case No. 36-2012-CV-00170, and related
Criminal Case No. 36-10-K-00730

In Devils Lake, North Dakota

The Honorable Donovan Foughty Presiding

Matthew Swearingen

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Issues Presented

- I. N.D.R. Crim. Procedure 52(b)
- II. Denial of transcript, Nov. 10, 2010, Preliminary hearing, and support in issue regarding Ineffective Assistance of Counsel. (Adequacy of Preliminary Hearing)
- III. Denial of the Jan. 4, 2013 Post-Conviction transcript.
- IV. The responsibility of the District Court when accepting a stipulation or Jury waiver.
- V. Whether the District Court erred in understanding the Petitioners arguments in regards to the claim of Ineffective Assistance of Counsel.

Supplemental Law and Argument

I. N.D.R. Crim. P. 52(b)

1] N.D.R. Crim. P. 52(b) authorizes an appellate court to notice an error raised for the first time on appeal if it infringes upon the substantial rights of a defendant.

II. Denial of transcript, Nov. 10, 2010, preliminary hearing, and support in issue regarding ineffective assistance of counsel. (Adequacy of preliminary hearing.)

2] N.D.R. Crim. P. Rule 5.1(c): Preliminary examination.

(c) Record. A verbatim record of the proceedings must be furnished to the defendant and to the state. If a transcript is required by the defendant, the cost of the transcript and related cost must be borne by the state if the magistrate finds the defendant is financially unable to pay for the transcript without undue hardship.

3] "Provision that an accused may cross-examine witnesses testifying against him and may introduce evidence in his own behalf during the preliminary examination, to determine if a crime has been committed and if probable cause exists requiring the accused to stand trial, should not be hastily disregarded as mere formality, as it provides among other things, an opportunity to fashion a vital impeachment tool for use in cross-

examination of the states witnesses at trial and a means by which counsel can more effectively discover the states case and make possible the preparation of a proper defense to meet the case at trial." (State v. Kunkel), 366 N.W.2d 799, (1985)

4] "The right to cross-examine is a constitutional right. The right is absolute and the denial of the right as to material evidence is prejudicial error requiring a new trial. The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the accuracy of the truth-determining process. It is, indeed, an essential and fundamental requirement for the kind of fair trial which is this Country's Constitutional goal." (State v. Hilling), 219 N.W.2d 164, (1974)

5] "Assistance of counsel is plainly defective when the record affirmatively shows ineffectiveness of a Constitutional dimension or the defendant points to some evidence in the record to support the claim." (Both v. State), ND 106, (2006)

6] For Scott Thompson to claim that the Preliminary hearing was waived is an error of constitutional dimension. To point specifically to the ineffectiveness, I was denied the Constitutional right to cross-examine, the opportunity to challenge probable cause was lost, and Mr.

Thompson hastily disregarded an essential means by which he could more effectively discover the states case, and make possible the preparation of a proper defense to meet the case at trial.

7] Further, for Lonnie Olson, Ramsey County states attorney, to assert:

"The defendant claimed that he had a preliminary hearing on the matter, although the courts records show that he waived the preliminary hearing" [A-17] is misleading and not supported by any evidence.

N.D.R. Crim.P. Rule (5)(c)(1)(a): If the offense charged is a Felony, the defendant has the right to a preliminary examination. The defendant may waive the right to a preliminary examination at the Initial appearance if assisted by Counsel. Upon reviewing the Oct. 18, 2010 Initial appearance transcript, [B-9], one will find both the request and scheduling of a preliminary hearing.

8] To prevail on a claim of Ineffective assistance of Counsel, both parts of the Strickland test must be met, First, that counsels representation was defective. No stipulation or waiver was presented to the Court in regards to the preliminary hearing. Because of Mr. Thompson belief, I was denied the right of effective cross-examination, "a constitutional error of the first magnitude and no amount

of showing of want of prejudice would cure it." (State v. Hilling), 219 N.W.2d 164, (1974)

The second part, that counsels deficient performance affected the outcome of the case or that the defendant suffered prejudice as a result, can be shown as despite the fact upon reviewing the record [B-9], Scott Thompson, the District Court, and Prosecutor, Lonnie Olson, all believe that the Courts records show that the preliminary hearing was waived. [A-17]

III. Denial of the January 4, 2013 Post-Conviction Transcript.

9] The United States Supreme Court recognizes that adequate and effective appellate review is impossible without a trial transcript or adequate substitute, they held that states must provide trial records to inmates unable to buy them. (Griffin v. Illinois), 351 US 12, (1956) Additionally, "refusal to afford full appellate review solely because of poverty was a denial of due process and equal protection." (Griffin v. Illinois), 351 US 12 (1956)

10] In the order denying request for transcript the court stated:

"In this particular case the issue raised in the

post-conviction proceeding on Jan. 4, 2013, were addressed in the related criminal action where transcripts have been prepared. "[A-41] In the Plaintiff's brief, [A-17] Lonnie Olson himself states:

"The defendant asserted a number of things. The defendant claimed that he had a preliminary hearing on the matter, although the court's records show that he waived the preliminary hearing. He asserted that his attorney did not talk to him, discuss the case, request discovery from the state, or knowingly waive a jury trial." One of the issues he failed to mention was a letter that was submitted as evidence from the Disciplinary Review Board of the Supreme Court of North Dakota, file No. 5154-NE-1103. This letter was in regards to a complaint filed against Scott Thompson, which led to an investigation that was handled by the Inquiry Committee Northeast. This letter was submitted and allowed into evidence by the District Court. [A-1, 6/20/12 exhibit - Doc 10#2 | sealed] Testimony in regards to this letter, and complaint, can only be found in the Jan. 4, 2013 Post-conviction proceedings. The results from this investigation did not exist at the time of trial. It is impossible for it to be found in a related criminal action where transcripts have been prepared.

11] "An ineffective assistance of Counsel claim should be made in an application for post-Conviction relief so that an evidentiary record can be made that will allow scrutiny of the reasons underlying counsels conduct." (Roth v. State.), ND 106 (2006) At the Jan. 4, 2013 Post-Conviction hearing, claims of ineffective assistance of Counsel were raised, and a record for review was established. By the Court denying transcript of the Jan. 4, 2013 hearing, the Court has also denied full appellate review.

IV. The responsibility of the District Court when accepting a stipulation or Jury waiver.

12] In regards to the Jury waiver, this was also an issue discussed at the Post-Conviction hearing. As to the issue of the Jury waiver being valid, the District Court is partially correct in its claim that the issue can be found in a related criminal action in which transcript have been prepared. [A-41] However, this issue is in regards to the trial courts responsibilities, and this issue has never been raised on appeal. [A-37]

13] "The North Dakota Supreme Court Jealously preserves the right to a trial by Jury, and has ruled that a waiver must be in accordance with rule 23(a), N.D.R.Crim.P. Trial by Jury - Trial by Jury in all cases provided by law unless the defendant

waives a Jury trial in writing or in open Court with the approval of the Court and consent of the prosecuting attorney. In addition, section 29-16-02 N.D.C.C. provides: Issues of fact tried by Jury -- when trial by Jury may be waived. In any case, whether a misdemeanor or felony, a trial jury may be waived by the consent of the defendant and the states attorney expressed in Open Court and entered on the minutes of the Court. Otherwise the issue of fact must be tried by the Jury. (State v. Balde), 498 N.W.2d 819, (1993)

14] "The importance of having Jury trial waivers affirmatively expressed on the record becomes apparent when the trial courts role in approving such a waiver is considered. The responsibility of a trial Court in this area is two-fold. First, the court must ascertain whether or not the defendants jury trial waiver is a voluntary, knowing, and intelligent decision done with sufficient awareness of the relevant circumstances and likely consequences." (State v. Kranz), 353 N.W.2d 748, (1984)

15] "It is also the trial courts responsibility to jealously preserve the right to trial by Jury. A trial court should not automatically approve Jury trial waivers." (State v. Kranz), 353 N.W.2d 748 (1984)

16] "Trial by Jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues

of fact in criminal cases above the grade of petty offense. In such cases the value and appropriateness of jury trial have been established by long experience, and are not to be denied. Not only must the right of the accused to a trial by a Constitutional jury be jealously preserved, but the maintenance of the jury as a fact-finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in the degree as the offenses dealt with increase in gravity." (State v. Kranz), 353 N.W.2d 748, (1984)

17] Upon examination of the Jan. 25, 2011 pretrial conference transcript [A-31], one will find I was never addressed by the court as to the waiver of such an inviolate right, nor does the record or stipulation reveal that the waiver was a voluntary, knowing, and intelligent decision done with

sufficient awareness of the relevant circumstances and likely consequences.

18] "In order to jealously preserve a defendant's fundamental right to trial by jury, with a caution increasing in gravity, the Court of Appeals of North Dakota holds that an attorney may not waive his client's constitutional right to a jury trial in a felony case. In such cases, an express waiver must be made personally by the defendant in writing or in open court." (State v Bakke), 498 N.W.2d 819, (1993) Further, "The waiver of an "inviolable right", essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants, must be a matter of certainty and not implication." (State v. Bakke), 498 N.W.2d 819, (1993)

19] In viewing the stipulation [A-28], one finds the only signed document is the undated piece of paper making reference to the Ramsey Co. Case No. 36-10-K-00730. These signatures could potentially be submitted with any document in regards to Ramsey Co. No. 36-10-K-00730, as it does not specify what the signatures are for, nor give a date as to when the document was signed. The document merely "implies" its belonging to the stipulation that was submitted to the District Court on Jan. 24, 2011.

V. Whether the District Court erred in understanding the Petitioners arguments in regards to the claim of Ineffective Assistance of Counsel.

20] On Feb. 12, 2013 the District Court denied the motion for Reconsideration for Post-Conviction relief, and/or, New trial claiming it was without merit. [B15-B25] In the Courts order denying Post-Conviction relief it states: "based on the Petitioners testimony he essentially is making the same argument he made before the Supreme Court." [A37]

21] N.D.R. Civ. P. 52(a) A trial courts finding of fact are clearly erroneous when induced by an erroneous view of the law, not supported by any evidence, or when a reviewing court is left with a definite and firm conviction a mistake has been made.

22] The arguments raised and made at the Jan. 4, 2013 Post-Conviction hearing were that of Ineffective assistance of Counsel. To provide a better idea:

23] On 11/20/2010 a Preliminary hearing was held. [B2] Mr. Thompson's belief that this was waived hastily disregarded my essential, fundamental right to cross-examine, and the right to a fair trial. However, despite repeated request, I have

been denied these transcripts, [B10-B14], therefore unable to fully raise this issue on appeal.

24] On 12/08/2010 a motion for Bill of Particulars and dismissal of case was filed. On 12/21/2010 this motion was denied. [B2, B3]

25] On 1/24/2011 a stipulation/agreement was submitted by Scott Thompson in regards to a bench trial, rather than a Jury Trial. [B3]

26] On 1/31/2011 a motion for Discovery was filed in accordance with Rule 16, N.D.R.Crim.P. [B3]
The requested Discovery was for the Audio Recordings of the interviews, as stated in the narrative Police report, as there were discrepancies as to the factual information listed in the report. The Police responded that the recordings were lost. This only further supports the claim of ineffectiveness as Mr. Thompson had waited almost 4 months, after a preliminary hearing was held, and a waiver of Jury trial submitted, to request and listen to material that should have been in his possession early on at the appointment of Counsel, and may have very well contained favorable or exculpatory information.

27] On 3/08/2011 Mr. Thompson proceeded to a bench trial, without being provided the requested Discovery, that the Prosecutor had a Constitutional duty

to inquire into and examine (US v Agurs), 427 US 97, (1976), and raises this question: if it is mandatory that all such information be delivered to a Defendant in advance of trial so he may appraise the same; so that he may know in what regard to exercise his constitutional right to Compulsory process to secure the attendance of witnesses; so that he may exercise his constitutional right to the effective assistance of Counsel by having his attorney in a position to be able to prepare for a proper defense, to know what witnesses to summon and what evidence to subpoena, and so that the Defendant may have a fair trial under the standards required by the United States Supreme Court in Brady v Maryland, 373 US 83, (1963), why did Mr. Thompson deny my Constitutional rights and place me at such an unfair advantage? Im left believing Mr. Thompson did not aide in a legal defense, he assisted in "Judicial suicide."

28] These were the issues raised at the Jan. 4, 2013 Post Conviction hearing. The evidence presented that day was to the claim of ineffective assistance of Counsel. For the District Court to rule that the "Petitioner is making the same arguement made before the Supreme Court", [A-37] is not a factual claim, nor a claim supported by any

evidence. The Supreme Court has never been presented with the issues herein, [A3-A8]; [A9-A12]; [A22-A26]; [B15-B25], and the issues have never been "addressed in the related criminal action where transcripts have been prepared." [A41] The only party presenting evidence previously heard, and wanting "evidence that proved that a jury would have found him not guilty" [A17], is the Ramsey County States Attorney, Lonnie Olson, as seen in the Plaintiffs Brief Post-Conviction Relief. [A15-A20]

Conclusion

29] The issue of ineffective assistance of Counsel is a mixed question of law and fact which is fully reviewable by the appellate court. In addition, as authorized by N.D.R.Crim.P. 52(b), an appellate court may notice an error raised for the first time on appeal if it infringes upon the substantial rights of a defendant. What can be more substantial in trial matter, than the right to trial by jury? The North Dakota Court of Appeals jealously preserves this fundamental right. (State v. Balcke), 498 N.W.2d 819, (1993). As stated in the opinion by Ralph J. Erickstad:

"It is important that nothing be left to

implication on such an important matter as Jury trial. When waiver is entered by counsel and a defendant stands by without expressly acquiescing, a difficult fact question may be presented for an appellate court. Whether to be tried by a jury is an important matter to be decided by a defendant; it is not merely a tactical decision that may be left to defense counsel." (State v. Bakke), 498 N.W.2d 819 (1993)

It is also the trial courts responsibility to jealously preserve the right to trial by jury, as it is the normal and preferable mode of disposing of issues of fact. The value and appropriateness of jury trial have been established by long experience, and are not to be denied. (State v. Kranz), 353 N.W.2d 748, (1984)

Wherefore, for the reasons stated here in, In addition to counsels Prayers, I respectfully pray that in the interest of fairness; to the trial court; myself; and Justice; the Supreme Court of North Dakota direct that the presiding Judge of the Northeast Judicial District assign this case to another Judge for all further proceedings, and as authorized

(14)

by N.D.R.Crim.P. 52(b), in regards to Ramsey
County Criminal case No. 36-10-K-00730,
Reverse and Remand for New Trial.

Respectfully submitted this 23rd
day of April, 2013.

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20180068

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APR 25 2013

Certificate of Service
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I hereby certify that on the 23rd day of
April, 2013, I mailed the following:
- Supplemental Brief and Appendix -

by placing said document in pre-stamped
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