original

20130151

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Casey Phillips,	Supreme Court No. 20130151
Petitioner and Appellant,	District Court No. 08-2013-CV-00025
vs.	
State of North Dakota,	
~~Defendant~~ Respondent and Appellee.	

RULE 24 SUPPLEMENTAL INDIGENT BRIEF

Appeal from the District Court Order Denying Post-Conviction Relief Request Dated April 18th, 2013

In and for the County of Burleigh, State of North Dakota

South Central Judicial District

Honorable Bruce B. Haskell, Judge of the District Court, Presiding

Casey Phillips
JRCC-
2521 Circle Drive
Jamestown, ND 58401

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUPPLEMENTAL ISSUE

[¶1] The lower court erred in its determination that counsel for Appellant did not violate Appellant's right to effective assistance of counsel, which is guaranteed under the Sixth Amendment of the United States Constitution and applied to the State of North Dakota through the Fourteenth Amendment.

STATEMENT OF THE CASE

[¶2] Same as the Statement of the Case in the Supplemental Brief of Appellant, which was filed by and through Robert W. Martin, Appointed Counsel for Appellant.

STATEMENT OF THE FACTS

[¶3] Same as the Statement of the Facts in the Supplemental Brief, which was filed by and through Robert W. Martin, Appointed Counsel for Appellant. Appellant further shows this Court that:

[¶4] During the evidentiary hearing, which was held in this matter on the 18th day of April, 2013, Appellant testified that he had explained to his appointed trial counsel, Mr. Thomas Glass, that prior to even the preliminary hearing, Appellant did not own or possess a black hand-gun. In fact, Appellant informed Mr. Glass that the black hand-gun, which Appellant's ex-wife turned in to Law Enforcement and which Law Enforcement stated Appellant had in his possession during the underlying offense in this matter was owned and possessed

by Appellant's disgruntled and angry ex-wife. (App. p. 21; PC Trans.)

LAW AND ARGUMENT

[¶5] ISSUE: The lower court erred in its determination that counsel for Appellant did not violate Appellant's right to effective assistance of counsel, which is guaranteed under the Sixth Amendment of the United States Constitution and applied to the State of North Dakota through the Fourteenth Amendment.

[¶6] Appellant's argument falls under the category of Ineffective assistance of Counsel, a valid claim in a Post-Conviction Relief Claim under NDCC Chapter 29-31. Ineffective assistance of counsel at any phase of a criminal proceeding, if proven, violates a defendant's Sixth Amendment Rights to a fair trial and adequate representation. That Amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S.Const. Amend. VI. The companion North Dakota State Constitutional provision provides:

> In criminal prosecutions in any court whatever, the party accused shall have the right to a speedy and

> public trial; to have the process of the court to compel the attendance of witnesses in his behalf; and to appear and defend in person and with counsel. No person shall be twice put in jeopardy for the same offense, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law.

N.D.Const. Art. I, §12.

[¶7] A claim of ineffective assistance of counsel essentially states that, even though Appellant had legal representation, that counsel was deficient to the point of negating Appellant's Federal and State Constitutional Rights to be represented by competent counsel, and that the actions of counsel prejudiced him. In scrutinizing an ineffective assistance of counsel claim, the primary concern is to confirm whether counsel's conduct so undermined the working of the adversary process that the findings at trial are unjust. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[¶8] Strickland is the seminal case in determining claims of ineffective assistance of counsel, in which the United States Supreme Court set forth a two part test to determine such a claim. Id. To prevail on his claim, Appellant must meet both parts of the test; first, that his counsel's representation was defective, and second, that counsel's deficient performance affected the outcome of the case or that the defendant suffered prejudice as a result. Strickland at 687, see also Siers v. Weber, 259 F.3d 969, 974 (8th Cir. 2001).

[¶9] The first part of the test, defective performance, must be shown to a degree that Appellant was essentially denied his Sixth Amendment Right to Counsel. Strickland at 687. Counsel's effectiveness is to be gauged by an "objective standard of reasonableness" considering "prevailing professional norms." Strickland at 688. To show prejudice under the second part of the test, Appellant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result...would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Siers, 259 F.3d at 974, quoting Strickland, 466 U.S. at 694. The Court is directed to review the totality of the evidence in determining the probability of a different outcome at trial. Id. As to the standard for the Court to use in such a determination, the United States Supreme Court has stated that the reasonable probability standard is lower than the preponderance standard. Williams v. Taylor, 529 U.S. 362, 405-406 (2000).

[¶10] In his Application for Post-Conviction Relief, Appellant claims that his original counsel in District Court failed to adequately advise and defend him to the degree that violated his rights. Mr. Glass failed to investigate and determine who owned and possessed the black hand-gun, and whether Appellant had a hand-gun in his possession at the time of the alleged offense. Also, Mr. Glass failed to depose any of the State's

Key Witnesses. Further, Mr. Glass failed to have a working knowledge of the state of the law, and properly advise Appellant regarding the state of the law.

[¶11] "As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." N.D.R.Prof. Conduct Preamble. It was incumbent upon Appellant's trial counsel to have a working knowledge of the state of the law. It was also incumbent upon Appellant's trial counsel to properly advise Appellant regarding the state of the law. Finally, it was incumbent upon Appellant's trial counsel to advise him appropriately with the correct information on the decision to plead guilty or to try the case.

[¶12] The questions under the first test in Strickland is whether or not the failure to note the current state of the law, the failure to investigate who owned and possessed the black hand-gun, the failure to determine if Appellant had a black hand-gun in his possession at the time of the alleged offense, the failure to depose any of the State's Key Witnesses by counsel is deficient conduct. Strickland at 687. Appellant argues that it is. Counsel is presumed to know the law, and the effects of the law on his client. Counsel is

presumed to have prepared and investigated and then communicated with Appellant all options. Investigating all known facts and keeping up with and monitoring both legislative and state changes to the law are simply a basic part of practicing law. By failing to do any investigating on his own or hiring an expert to investigate and by not being aware of the minimum mandatory statutory scheme, counsel was deficient below the standard in the community.

[¶13] The second test in Strickland, is essentially, was Appellant prejudiced by counsel's lack of knowledge, investigation or advice, and would that prejudice have made a difference in the outcome. Strickland at 694. Appellant argues that he was prejudiced, and that counsel's errors and advice did make a difference in the outcome. When negotiating a guilty plea, knowledge of the sentencing scheme and an investigation into all the underlying facts is essential. Upon advice of counsel, Appellant pled guilty to several counts of criminal behavior, assuming that the advice of Mr. Glass that Appellant was "...getting time served and hopefully you'll get probation." (App. p. 24, PC. Trans. p. 25, 1. 17-25) was knowledgeable.

[¶14] In Appellant's view, these charges were not a certain victory for the State, and he did wish to proceed to trial and to dispute the evidence the State had in Appellant's case, without the assumption that Appellant would be getting time

served, with a possibility of probation, Appellant would have more thoughtfully considered trying the case before a jury. The prejudice occurs in that, on misinterpretation of the statute, lack of investigation, and, upon advice of counsel, this option was effectively denied to Appellant. Had Appellant know that he would have to serve at least two (2) years in prison; Appellant would have put the State to the test at trial, and disputed the case as charged against him. Even if Appellant would have lost at trial and received a harsher sentence, appellant still could have maintained his innocence and would have had a chance at a lesser sentence. The uninformed and poor advice of counsel certainly made a difference in the outcome of the case, and the outcome would have been different if counsel had given accurate and informed information to Appellant.

[¶15] Trial counsel's representation of Appellant surely affected the outcome of the case and prejudiced Appellant. Had Appellant known his punishment was at least two (2) years and that a minimum mandatory did apply, the incentive to plead guilty would not have been there. Appellant would have elected to go to trial rather than plead. Appellant was inherently misled and uninformed by trial counsel's deficient performance and advice.

CONCLUSION

[¶16] From the arguments set forth above, and from the Record in this matter, Appellant requests that this Court reverse and overturn the denial of his Petition for Post-Conviction Relief from the District Court, and remand with direction to the District Court to grant his Petition for Post-Conviction Relief, allowing Appellant to withdraw his plea of guilty.

Dated this 10 day of April, 2014.

Casey Phillips
JRCC-
2521 Circle Drive
Jamestown, ND 58401

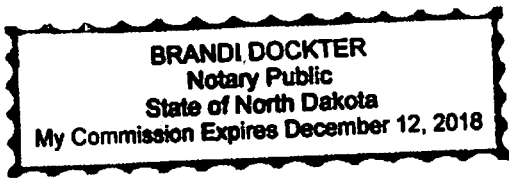
CERTIFICATE OF SERVICE

[¶17] I hereby certify I served, by United States Mail, the foregoing document upon the following parties:

Ms. Marjorie Kohls
Assistant Burleigh County States Attorney
514 East Thayer Ave.
Bismarck, ND 58501

Robert W. Martin
ND Public Defenders Office - Minot
11 Firsat Avenue SW
Minot, ND 58701

Subscribed and sworn to before me this 10 day of April, 2014, in Stutsman County, North Dakota.



Notary Public

BRANDI DOCKTER
Notary Public
State of North Dakota
My Commission Expires December 12, 2018