20180268
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
NOVEMBER 6, 2018
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Jessy Duane Olson,	)	
	)	**Supreme Ct. No. 20180268**
Petitioner/Appellant,	)	
	)	**District Ct. No. 09-2017-CV-01528**
vs.	)	
	)	
State of North Dakota,	)	
	)	
Respondent/Appellee.	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF CASS COUNTY
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE TOM OLSON

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STATEMENT OF ISSUES

I. Whether the district court erred in denying Olson's Application for Post Conviction Relief.

STATEMENT OF CASE

[¶1] This is an appeal from the Cass County District Court's Order and Judgment denying Respondent's Application for Post-Conviction Relief. (App. pp. 149-151; 154).

[¶2] In the underlying criminal case for which Appellant, Jessy Duane Olson ("Olson"), seeks post-conviction relief - *i.e.*, Cass County Case No. 09-2015-CR-01700, Olson was originally charged, by the filing of a Criminal Information on May 22, 2015, with the following offenses: (1) Murder, a Class AA Felony; (2) Conspiracy to Commit Aggravated Assault, a Class B Felony; (3) Conspiracy to Commit Aggravated Assault, a Class C Felony; and (4) Conspiracy to Commit Aggravated Assault, a Class C Felony. (App. pp. 33-34).

[¶3] On or about March 17, 2016, the State filed an Amended Criminal Information in which Count 1 was amended to Accomplice to Murder and Count 2 was dismissed. Counts 3 and 4 remained as originally charged. (App. pp. 48-49). On March 17, 2016, Olson entered Alford pleas to the Amended Information in Case No. 09-2015-CR-01700.

[¶4] On October 31, 2016, a sentencing hearing was held in Case No. 09-2015-CR-01700. At said hearing, Olson was sentenced to twenty (20) years in prison on Count 1, and five (5) years concurrent on Counts 3 and 4 of the Amended Information. The Criminal Judgment was entered on October 31, 2016.

[¶5] On November 2, 2016, Olson appealed his convictions in case no. 09-2015-CR-01700. The appeal was dismissed by Olson on or about March 24, 2017.

[¶6] On June 1, 2017, Olson filed a Notice of Intent to File for Post-Conviction Relief which commenced Cass County Case No. 09-2017-CV-01528. On June 15, 2017, the State filed an Answer because the Notice of Intent to File for Post-Conviction Relief had been docketed as an Application for Post-Conviction Relief. (App. p. 7). Olson filed a *Pro Se* Application for Post-Conviction Relief on November 20, 2017. (App. pp. 4-6).

[¶7] Olson filed a Pre-Hearing Brief and Disclosure of Witnesses and Exhibits on February 20, 2018. The State interpreted the Pre-Hearing Brief as an Amended Application for Post-Conviction Relief, and as a result, the State filed a Response and Brief. (App. pp. 8-12).

[¶8] Olson filed a true Supplemental Application for Post-Conviction Relief on April 18, 2018. (App. pp. 13-26). An Affidavit from Olson was filed with, and incorporated by reference in, the Supplemental Application. (App. pp. 27-33).

[¶9] A hearing on Olson's Application for Post-Conviction Relief was held on June 15, 2018. Once the evidence was closed, the trial court, from the bench, denied Olson's request for post-conviction relief and directed the State to draft the appropriate Order. (App. pp. 141-145).

[¶10] On June 29, 2018 the trial court issued its Order for Judgment. (App. pp. 146-148). Olson filed his Notice of Appeal July 2, 2018. (App. pp. 149-150). The trial court then entered Judgment on July 11, 2018 and Olson filed his Amended Notice of Appeal on July 30, 2018. (App. pp. 151; 152-153).

STATEMENT OF FACTS

[¶11] Olson was originally arrested on May 17, 2015 and charged with three (3) counts of conspiracy to commit aggravated assault. (App. p. 76). However, after one of the named victims, namely Joey Gaarsland, passed away, the original case was dismissed and a new Criminal Information was filed on May 22, 2015 commencing Cass County Case No. 09-2015-CR-01700. (App. pp. 33-34; 77). Therein, the State of North Dakota charged Olson with the following criminal offenses:

Count 1: Murder of Joey Gaarsland, a Class AA Felony.

Count 2: Conspiracy to Commit Aggravated Assault of Joey Gaarsland, a Class B Felony.

Count 3: Conspiracy to Commit Aggravated Assault of Laura Gaarsland, a Class C Felony.

Count 4: Conspiracy to Commit Aggravated Assault of Matt Breitbach, a Class C Felony.

[¶12] Olson made an initial appearance on the aforementioned charges on May 22, 2015. Olson was not represented by counsel at the initial appearance and appeared via interactive television. (App. pp. 35-45; 77). At said appearance, Olson was provided with an instruction on the basic rights one has when charged with a crime. (App. pp. 36-42). The charges specifically applicable to Olson were explained by the trial court as follows:

Court: Thank you. In this file, 1700, the new file, Mr. Olson, you are charged by way of a four count information. Have you received a copy of that charging document from the State?

Olson: Yes, sir.

Court: In that, sir, the State has charged you and alleged against you in count one, murder. Count two, conspiracy to commit aggravated assault. Count three, conspiracy to commit aggravated assault, and count four, conspiracy to commit aggravated assault. Each of the four charges alleged to have occurred on or about May 17, 2015 here in Cass County. As charged out and alleged against you by the State, sir, count one is a class AA felony, carries a maximum penalty of life imprisonment without the benefit of parole. It carries a minimum penalty of $1,000 in legislative fees. Count two is a B felony, carries a maximum penalty of ten years imprison, a fine of $20,000 or both. It carries a minimum penalty of legislative of $750. Counts three and four are each class C felonies. They each carry maximum penalties of five years imprison, a fine of $10,000 or both. Counts three and four each carry minimum penalties for legislative fees of $500. Sir, do you understand the four charges against you?

Olson: Yes, sir.

Court: Do you understand the maximum and minimum penalties for all four charges?

Olson: Yes, sir.

(App. pp. 43-44).

[¶13] Attorney Patrick Rosenquist was appointed as Olson's counsel shortly the initial

appearance. (App. p. 77). Attorney Rosenquist met with Olson at the detention center after being assigned to the case. Olson offered the following testimony about those initial attorney-client meetings:

> "I had a meeting with him and I told him exactly what happened. And he said, okay, and then he comes back a week later or something with the first deal and that was no more than 20, no less than 15. The first one that jumps on it is going to get the best deal. I said, no, I don't want that. He replied, why? Because nobody saw you touch him? If you want to go to trial, you need to find a different lawyer."
>
> (App. p. 13).

[¶14] Attorney Rosenquist denied that he ever told Olson that he was not willing to take the case to trial. (App. p. 129).

[¶15] The preliminary hearing in Case No. 09-2015-CR-01700 was held on August 6, 2015. At said preliminary hearing, there was no specific evidence presented indicating that Olson physically harmed Joey Gaarsland. (App. pp. 146-148). Nonetheless, the trial court found there was sufficient probable cause to bind Olson over for trial. However, the trial court did not arraign Olson on April 6, 2015.

[¶16] On October 22, 2015, the Court issued an Order Granting Ex Parte Motion for Mental Health Evaluation in Forma Pauperis.

[¶17] On March 16, 2016, Attorney Rosenquist notified Olson that there was a new plea offer involving an Alford plea. Olson indicates that March 16, 2016 was the first time he and Attorney Rosenquist had discussed the workings of the Alford plea (App. pp. 82-83).

[¶18] After speaking with Attorney Rosenquist, Olson was under the impression that by entering Alford Pleas, he would be entitled to unlimited appeals and post-convictions because he wasn't actually pleading guilty. Olson testified that Attorney Rosenquist explained that, by entering an Alford plea, he wasn't saying he was guilty, he was just saying that because he was present at the scene of the crime, that he could be found guilty

of accomplice, merely by being present. (App. pp. 82-83). Olson felt he would be allowed to withdraw his Alford pleas at anytime if he did not agree with his sentence. (App. p. 88).

[¶19] Attorney Rosenquist testified that he spoke with Olson about the Alford plea process on several occasions with all discussions lasting in total 15-20 minutes. (App. p. 139).

[¶20] On March 16, 2016, the Court issued a Notice of Change of Plea Hearing. The Change of Plea Hearing was scheduled for the next day, March 17, 2016. Olson testified that Attorney Rosenquist convinced Olson to plead guilty to an Amended Information on March 16, 2016. Olson then testified that he tried to change his mind on the morning of March 17, 2016, but Attorney Rosenquist made Olson feel like it was too late because the hearing had been set and a debriefing arranged with the prosecutor and law enforcement. [1] Specifically, Olson testified in pertinent part as follows:

> "Q. How many days before that hearing were you presented with that offer?
>
> A. Like two days - - a day.
>
> Q. Okay.
>
> A. Yea, the day before - - I want to say the 16th he threw that plea at me. I told him I did not want to take a deal. He tried to sell the deal on me. Told me him and the prosecutor have a deal worked out. We would argue for five years and I would probably get five years. I said, okay, but then the next morning on the 17th I woke up and I called him right away, it must have been early, like 9:00 in the morning. I say, hey, I don't want to take no deal. And then at this point he seemed like stressed and like, well, we only got 24 hours. It was a 24-hour deal. We got like 12 hours left and they're coming her at line one o'clock to meet with you with the detectives. I was like, what? I didn't want to take the deal but somehow he worked me back in. He used the line, I don't believe it's 85% and it's

---

[1] Olson stated in his Affidavit that he wanted to speak with his mother making a decision but was unable to do so because he did not have funds on his books at the detention center. (App. p. 30).

> not a AA.
>
> And then two hours later we're trying to do the thing, I'm trying to read the paper and comprehend. I can't do that. But I see the words AA and I'm hey, it's a AA, you said it wasn't. Oh, well it is. I said I don't believe it is, but it is. That was that.
>
> You know, I don't feel like he went out of his way and he did all this stuff up and you know, it's like I had no time to think. I tried to cancel it, and then two hours later I'm sitting with the prosecutor. I'm sitting with all the detectives, and then like 20 minutes after they put me in a caur hauling me down to make - - to change my plea. I was under the impression - - I had no idea they were throwing 20 years at it - - recommending 20 years. I thought my lawyer had a deal that hey, you plead guilty to Alford plea, you can get your five years. We'll argue for five years. If you don't get it, you should pull your plea. It's an Alford plea. You're not pleading guilt, an that's the impression I took on that. I had the multiple times - - I don't even know what appeal is, but I have unlimited appeals and post-conviction." ... "I just remember calling him back the morning of the 17th, or whatever the date was, and said I did not want it. He's like oh, the Judge is going to be mad. The prosecutor is going to be mad. You're looking at life. He kept saying that and, I don't know. It was like a one-way street. I got this, we only had a certain amount of time. It was a 24-hour deal. I was rushed into it. I didn't even have a night to sleep on it. You know, I was under the impression five years for being in the parking lot of some bar fight that I tried to break up."
>
> (App. pp. 84-85).

[¶21] Olson stated in his Affidavit that while Olson was trying to change his mind about entering Alford pleas, Attorney Rosenquist told Olson that if he took his case to trial, he would be sentenced to life in prison. (App. p. 29). Attorney Rosenquist testified that there was significantly more nuance to Olson's statement. (App. p. 130).

[¶22] Olson testified that, on March 16, 2016, the day before he changed his plea, he was under the impression that his attorney and the prosecutor had a plea deal in place and that Olson's sentence would be, at most, five (5) years in prison. Olson was led to believe that Accomplice to Murder was a lesser offense to Murder. He thought that the charge of Murder was "out the window." (App. p. 86). Olson was never told the maximum possible sentence for Accomplice and, according to Olson, the nature of the offense

against the backdrop of the facts of Olson's case were explained to him by Attorney Rosenquist as follows:

> "Q. And what was your understanding of what it meant - - did your attorney explain to you what it meant to be an accomplice?
>
> A. Yeah, pretty much just being there in the parking lot. Why was I there in the parking lot? Because I got kicked out of the bar. You know, that's all I understood accomplice was. I was under the impression it wasn't like a murder. It was accomplice, because I was present."
>
> (App. p. 86).

[¶23] Olson testified that prior to entering his Alford pleas, he had no idea that a 20 year sentence was a possibility. (App. p. 87). Olson testified: "It was accomplice. Accomplice ain't murder. I was under the impression it was all worked out. I thought I was having five years." Olson testified that he was not aware that the State would be recommending 20 years in prison as Olson's sentence. Olson testified that he did not know that the State would be asking for a twenty (20) year sentence until several months after his change of plea hearing. (App. p. 88-90).

[¶24] On March 17, 2016, shortly before the change of plea hearing, Olson met with his attorney, two (2) prosecutors for the State, and several officers. During that meeting, Olson signed a Proffer Agreement which provides in pertinent part, as follows:

> "The parties have discussed a resolution should Jessy Olson fully and accurately provide information regarding the events in question and continue to cooperate with the State in the prosecution of the other defendants. In that event, Jessy Olson would enter a guilty plea and the State would cap its recommendation at 20 years imprisonment. Any plea is an open plea, meaning Jessy will be free to argue for whatever sentence he deems appropriate."
>
> (App. pp. 46, 106-108).

[¶25] At the post-conviction hearing on June 15, 2018, Olson was asked to read the entire Proffer Agreement. It took Olson a significant amount of time to read the one (1) page agreement. Once he finished reading the agreement, Olson indicated that he did not

read it before he signed it back on March 17, 2016. (App. pp. 107-108).

[¶26] Olson explained that he was given the Proffer Agreement for the first time on March 17, 2016 while he and several other people were in a very small meeting room at the detention center. Olson explained that there six (6) or seven (7) people in the room with him, all of whom were either attorneys or officers, when he was handed the Proffer Agreement. When Olson was handed the Proffer Agreement, he "just pretty much skimmed through it" because he didn't "want to look stupid." (App. pp. 113-114).

[¶27] Olson testified that he has a learning disability that makes comprehending the written word difficult. Olson is easily distracted when he reads. While he was reviewing the Proffer Agreement the first time, he was distracted because there were people in the room laughing and talking. (App. pp .114-115). Attorney Rosenquist did not disagree with Olson's testimony regarding how the Proffer Agreement was presented to Olson, the environment at the time, and the manner in which it was reviewed by Olson. (App. p. 133).

[¶28] Nobody ever read the Proffer Agreement out loud to Olson. He was not aware that the agreement said that the State would be capping their sentencing recommendation at 20 years when he skimmed over it on March 17, 2016. The first time he noticed that the Proffer Agreement made mention of 20 years was when he took several minutes to read it during the post-conviction hearing on June 15, 2018. (App. p. 115).

[¶29] On March 17, 2016, Olson appeared for a Change of Plea Hearing on an Amended Information. In the Amended Information, the charge in Count I was changed from "Murder" to "Accomplice to Commit Murder" and now read as follows:

> "Count 1: **ACCOMPLICE TO COMMIT MURDER** in violation of Section 12.1-03-01(1)(b), 12.1-16-01(1)(b), 12.1-32-01(1), N.D.C.C. in that on or about May 17, 2015: The defendant acted as an accomplice to aid another in committing Murder, to-wit: that on or about the above-stated date, the defendant, **JESSY DUANE OLSON**, acted as an

accomplice to the murder of Joey Gaarsland by intending that an offense be committed and aiding another in committing the offense that resulted in the death of Joey Gaarsland."

(App. p. 48-49).

[¶30] Olson entered Alford pleas to Counts 1, 3 and 4 of the Amended Information. (App. pp. 52-55).

[¶31] The trial court did not instruct Olson of any right to have a preliminary hearing on the Amended Information. (App. pp. 50-58). Olson testified that he did not know he had the right to a preliminary hearing on the Amended Information. (App. pp. 99-100). However, Olson did sign a Notification of Rights and Acknowledgment Form more than a year prior on May 22, 2015 in which Olson was informed that one charged with a felony has the right to a preliminary hearing and that said right can be waived. (App. p.). [2]

[¶32] The trial court also failed to advise Olson of the maximum possible sentence on the amended charge in Count 1 of the Amended Information prior to accepting Olson's Alford Plea. The trial court also did not advise Olson of the maximum potential penalties in Counts 3 and 4 at the change of plea hearing on March 17, 2016. However, unlike the amended charge of Accomplice to Murder, Olson had been advised of the maximum potential penalties of Counts 3 and 4 eight months prior at his initial appearance. (App. pp. 50-58). [3]

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[2] The form does not disclose to the recipient the maximum possible sentence for accomplice to murder (or any other offense).

[3] At the post-conviction hearing, the Judge tried to get the prosecutor to establish that Olson viewed a video showing his rights prior to entering pleas to the Amended Information. However, the record only indicates that the rights video was shown to Olson at his arraignment in May of 2015. Additionally, there is nothing in the record to indicate that the video would provide any rights beyond what is stated in the Notification and Acknowledgment of Rights Form. (App. pp. 110-111; 116-119).

[¶33] Olson testified that he was never informed by his attorney or anyone else that the charge of accomplice to murder carried a maximum possible sentence of life in prison. (App. p. 96). When provided with the Amended Criminal Information, Olson noticed that accomplice to murder was charged as a AA Felony. Previously, Olson's attorney told him that it was going to be an A Felony. Nonetheless, it was not explained at that time that the charge carried a maximum possible sentence of life in prison and Olson was likewise unaware of said possibility. (App. pp. 98-99).

[¶34] As far as the factual basis for Olson's plea, the following was provided to the trial court by the State:

> "In Fargo, North Dakota, May 17, 2015, there was an altercation outside of Rick's and Speck's Bar. Involved in that altercation were Joey and Laura Gaarsland on the one side, and on the other side Mr. Olson, Mr. Moen, Mr. Morris and Jason Oien. During the altercation, Mr. Gaarsland suffered serious injuries as a result of which he died. The Defendant participated in that and aided another, who intended to commit the offense of murder. The Defendant intended to help him. One of his co-conspirators, one of the other accused, one of his fellow accomplices engaged in the behavior that resulted in Mr. Gaarsland's death. In addition, during the fight or brawl a malay took place outside of the bar, Matt Breitbach was struck and knocked unconscious or otherwise suffered bodily injury. In addition, Laura Gaarsland was struck, injured, suffered serious bodily injury by virtue of either being knocked unconscious or she did have a broken finger. What happened is the four co-conspirators all agreed to do and accomplish these things. At least that's the evidence that the State would present. In addition, I'm sure the Court is familiar with the bloody shirt and the story about the pool ball and all of those other things that have been offered into evidence at the preliminary hearing."
>
> (App. p. 56).

[¶35] A PSI was Ordered following the Change of Plea Hearing. Olson contends that he did not have an opportunity to go over the PSI Report with counsel. Olson's trial counsel contends that he did go over the PSI Report with Olson. (App. pp. 95; 130).

[¶36] Olson testified that sometime after his change of plea hearing, he found out that the State was going to ask that Olson be sentenced to twenty (20) years in prison. (App.

pp. 88-90). Olson testified that he informed Attorney Rosenquist that he wanted to withdraw his Alford pleas. Olson testified that Rosenquist told him that if he withdraws his plea, Olson will sit in prison longer than everyone else; that the judge and prosecutor will be mad; and that Olson will be sentenced to life in prison. (App. pp. 91-92). Olson testified that the conversation ultimately led to his attorney being under the impression that he was fired from the case:

> "I tried to pull my plea. Rosenquist didn't want me to pull my plea. He got frustrated. He said, so what, am I fired? I said, yeah, if my plea isn't pulled. He goes, that's it. I'll cut all communication. He said the word, and it was like a big relief to him it seemed ... And the next thing I know, he puts in a withdrawal to jump off my case as counsel."
>
> (App. pp. 88-89).

[¶37] On August 15, 2016, Attorney Rosenquist filed a Motion to Withdraw as Olson's Counsel. On August 22, 2016, Olson filed a letter with the Court which outlined various reasons he felt his counsel had been ineffective and in which he requested that a new attorney be appointed. (App. pp. 59-61).

[¶38] A hearing was held on the Motion to Withdraw on September 19, 2016. At the hearing, the communication between the Court and Olson went as follows:

> **Court:** [I]t's the Court's inclination to not appoint a new lawyer for you. That's just my inclination. If you want to fire him, then I'm going to make sure that you're ready to represent yourself unless you're going to hire your own lawyer. Do you understand that? That's why I want you, because all I can consider in whether or not to have Mr. Rosenquist dismissed from the case or allow you to fire him is what you give me in this letter and what you tell me in court today. So I'm going to give you another chance to tell me if you have any other reasons than that which is contained in your letter?
>
> **Olson:** I feel I was under the impression that I was getting five years. I didn't know they were recommending between 20 and in between 15. Hell, I can get that if I go to trial.
>
> **Court:** Except you can't go to trial. You've already pled guilty, sir.
>
> **Olson:** Yeah.

Court: You'll have to convince the Court to allow you to withdraw your guilty plea.

Olson: I just don't know how this works. How can I go from being charged with murder – intentional murder, if I didn't know about it, and it goes from murder to accomplice?

Court: Again, I'm not here to answer your questions, sir. Those are questions that prove the reason why you need a lawyer. Do you understand that?

Defendant: Yes.

Court: And so, the question returns to: have you any other reason why you believe Mr. Rosenquist should be removed form this case, other than that which you set forth in your letter?

Olson: No.

Court: Do you understand that if I allow you to fire him you may be on your own?

Olson: Yeah. I understand that.

Court: And you think that's better than having a qualified, very competent capable lawyer like Mr. Rosenquist?

Olson: No. I like Mr. Rosenquist.

Court: That's not about liking him. He's capable. He's competent. He's well respected.

Defendant: It was the heat of the moment. You know, getting angry, there is still questions that I don't understand.

(App. pp. 62-74).

[¶39] Olson testified that he was under the impression that Attorney Rosenquist was not willing to take his case to trial. (App. p. 82). At the hearing on September 19, 2016, Olson was understandably left with the impression that if Attorney Rosenquist was allowed to withdraw, Olson would be forced to represent himself. Regarding the thought of representing himself, Olson said "I'm not capable of that. I can barely tie my shoes." (App. p. 93). Olson went on to state:

"Q. So did you feel that you were stuck?

A. Yeah. I felt like I was stuck. Because if I pulled my - - if I pulled my plea, I have an attorney that is already trying to withdraw off my case as counsel, but if I pull my plea, yeah, he don't want to go to trial. He's going to pull off. The choice was his, and the choice was mine if I want to fire him and keep him - - so it was basically our choice. So I figured I would go to trial by myself or give a shout with Mr. Rosenquist who told me right off the bat when he threw the first plea deal that he don't want to go to trial.

Q. Okay. So at that point did you even feel like you had any - -

A. I felt trapped. I felt railroaded. I felt like because they let the publicity all over the news and everything, that I was the one being made an example of...

Q. Okay. But at that point, after your motion to withdraw hearing, I mean, did you feel like there was any avenue for you to even get to trial?

A. No. I felt there was no way to go to trial. I would have went to trial by myself, and I wouldn't have known what to do. I would have felt like I was wasting everybody's time if I showed up by myself, you know, no.

Q. You were under the impression if you went to trial you would have to represent yourself at that AA trial?

A. Yes. I felt stuck."

(App. pp. 93-95).

[¶40] On October 31, 2016, Olson was sentenced to 20 years in prison on Count 1, and 5 years concurrent on Counts 3 and 4.

[¶41] On November 2, 2016 Olson filed a Notice of Appeal. Olson was advised by his appellate counsel, Samuel A. Gereszek, to withdraw his appeal and pursue post conviction relief. Attorney Gereszek withdrew the appeal on Olson's behalf, and the same was dismissed on or about March 24, 2017. (App. p. 97).

[¶42] It is also imperative that this Court review and consider the record related to Olson's diminished capacity.

[¶43] Olson has been incarcerated at all times since his original arrest date of March 17,

2015. (App. p. 76). Shortly after his arrest, he was prescribed three (3) medications at the detention center. He was prescribed Buspar, Prozac, and another prescription, which Olson could not recall the name of at the time of his post-conviction hearing. Olson took Buspar and another medication to help him cope with the anxiety and nightmares he was experiencing while being charged for the murder of Joey Gaarsland. Olson was not specifically aware of the reason he was prescribed and taking Prozac. Prior to his arrest on March 17, 2015, Olson had never been prescribed these drugs. (App. pp. 78-79).

[¶44] The prescription drugs that Olson was taking made Olson not "think as much" while the underlying criminal charges were pending against him. The drugs made him "feel like everything was going to be okay." (App. pp. 79-80). Olson was taking all of the aforementioned prescription drugs when his attorney first presented him with a plea deal on March 16, 2016 which quickly evolved to a change of plea hearing on said plea deal the following day on March 17, 2016. [4] Likewise, he was on said prescriptions when the Proffer Agreement was placed in front of him, while several detectives and attorneys were in the room, on March 17, 2016. (App. p. 87).

[¶45] Olson has been diagnosed with a learning disability which impacts his ability to comprehend. (App. p. 81). He has difficulty reading and comprehending. Olson had no idea what was going on while he was in court with Attorney Rosenquist at the various hearings which took place during the underlying criminal case. (App. p. 80). While representing Olson, Attorney Rosenquist believed that Olson had cognitive difficulties. (App. 123).

[¶46] Olson dropped out of high school after completing the 10th grade. It took Olson substantial effort to obtain a GED while incarcerated in 2008 or 2009 and he claims to not

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[4] The trial court did not ask Olson if he was under the influence of any medications before accepting his guilty plea.

have retained anything he had learned after passing the GED test. (App. p. 80).

[¶47] Olson has suffered from two (2) significant head/brain injuries in his lifetime. In 1986, he suffered a bruised brain stem in a car accident and was in a coma for two (2) weeks. When he woke up from the coma, he had gone from right to left handed, and had to learn how to walk, talk and be potty trained all over again now at the age of six (6). (App. p. 81).

[¶48] In 2011 Olson was the victim of an assault. He was hit over the head with a baseball bat. As a result of the assault, Olson suffered an injury to his brain and, to this day, has little control over the right side of his body. (App. pp. 81-82).

LAW AND ARGUMENT

I. Whether the district court erred in denying Olson's Application for Post Conviction Relief.

A. Jurisdiction.

[¶49] This Court has jurisdiction over this appeal under Art. VI, § 6, N.D. Const. And N.D.C.C. § 29-32.1-14.

B. Standard of Review.

[¶50] "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. In post-conviction relief proceedings, a district court's findings of fact will not be disturbed unless they are clearly erroneous under N.D.R.Civ.P. 52(a). Cue v. State, 2003 ND 97, ¶ 10, 663 N.W.2d 637. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by the evidence, or if, although there is some evidence to support it, a reviewing court is left with a definite and firm conviction that a mistake has been made. DeCoteau v. State, 2000 ND 44, ¶ 10, 608 N.W.2d 240. Questions of law are fully reviewable on appeal of a post-conviction proceeding. Peltier v. State, 2003 ND 27, ¶ 6, 657 N.W.2d 238."

Greywind v. State, 2004 ND 213, ¶ 5, 689 N.W.2d 390.

[¶51] In the current case, Olson contends that his Alford pleas were not freely and voluntarily given.

> "When a defendant applies for post-conviction relief seeking to withdraw a guilty plea, we generally treat the application as one made under N.D.R.Crim.P. 32(d). Bay v. State, 2003 ND 183, ¶ 7, 672 N.W.2d 270. Withdrawal of a guilty plea is allowed when necessary to correct a manifest injustice, and whether there has been a manifest injustice supporting withdrawal of the plea lies within the district court's discretion. State v. Zeno, 490 N.W.2d 711, 713 (N.D. 1992). In determining whether the district court abused its discretion, we may be required to review the court's preliminary finding of fact, which will not be disturbed unless they are clearly erroneous. Houle v. State, 482 N.W.2d 24, 25-26 (N.D. 1992)."
>
> Greywind, at ¶ 7.

[¶52] Olson also contends that he was denied effective assistance one two separate grounds. The first being the typical ineffective assistance of counsel based on attorney performance or non-performance, and the other being on the grounds that Olson was denied effective assistance of counsel when the trial court failed to appoint new counsel after it was clear that the attorney-client relationship between Olson and Attorney Rosenquist had clearly broken down.

> "Whether a petitioner received ineffective assistance of counsel is a mixed question of law and fact and is fully reviewable on appeal. Klose v. State, 2005 ND 192, ¶ 10, 705 N.W.2d 809. Under N.D.R.Civ.P. 52(a), the district court's findings of fact will not be disturbed on appeal unless clearly erroneous."
>
> Blackcloud v. State, 2018 ND 50, ¶ 5, 687 N.W.2d 454.

[¶53] Lastly, Olson argues that his conviction should be overturned because accomplice to extreme indifference murder is an incognizable offense under North Dakota law. Said issue is a question of law which is fully reviewable on appeal. Peltier v. State, 2003 ND 27, ¶ 6, 657 N.W.2d 238.

C. Olson's Alford pleas were not knowingly, intelligently and voluntarily given.

[¶54] Under N.D.R.Crim.P. 11, before accepting Olson's Alford pleas, the trial court was required to advise Olson of certain rights, including "any maximum possible penalty." See N.D.R.Crim.P. 11(G). "The requirement to advise the defendant under

N.D.R.Crim.P. 11 is mandatory and binding upon the court." Sambursky v. State, 2006 ND 223, ¶ 9, 723 N.W.2d 524. This Court has recognized that "N.D.R.Crim.P. 11 does not require 'ritualistic compliance'; however, a court must 'substantially comply with the rule's procedural requirements' to ensure a defendant is entering a voluntary and intelligent guilty plea." State v. Trevino, 2011 ND 232, ¶ 8, 807 N.W.2d 211.

[¶54] In order for Olson to prevail on his request to withdraw guilty pleas, he must establish that the withdrawal is necessary to correct a manifest injustice. State v. Zeno, 490 N.W.2d 711, 713 (N.D. 1992). "The decision whether a manifest injustice exists for withdrawal of a guilty plea lies within the trial court's discretion and will not be reversed on appeal except for an abuse of discretion." State v. Abdullahi, 2000 ND 39, ¶ 7, 607 N.W.2d 561 (citing State v. Hendrick, 543 N.W.2d 217, 219 (N.D.1996)). An abuse of discretion under N.D.R.Crim.P. 32(d) occurs when the court's legal discretion is not exercised in the interest of justice. Abdullahi, at ¶ 7 (citing State v. Dalman, 520 N.W.2d 860, 862 (N.D.1994)). "A trial court abuses its discretion when it acts in an arbitrary, unreasonable, or capricious manner, or misinterprets or misapplies the law." State v. Farrell, 2000 ND 26, ¶ 8, 606 N.W.2d 524. "A decision is not arbitrary, capricious, or unreasonable if the exercise of discretion is the product of a rational mental process by which the facts and the law relied upon are considered together for the purpose of achieving a reasoned and reasonable interpretation." Tibert v. City of Minto, 2006 ND 189, ¶ 8, 720 N.W.2d 921. "A manifest injustice includes procedural errors by a sentencing court." State v. Gunwall, 522 N.W.2d 183, 185 (N.D. 1994).

[¶55] In the current case, Olson made an initial appearance on the original Criminal Information on May 22, 2015. During that appearance, the Court informed Olson that he was charged with "Murder" and that the maximum potential penalty if convicted was life without parole. (App. pp. 43-44). The trial court made no reference to "accomplice"

during the initial appearance. Since Olson was facing felony charges, the trial court did not arraign Olson at th time of his initial appearance.

[¶56] Olson also was not arraigned on the original Information at his preliminary hearing on August 6, 2015. "[A]rraignment must be conducted in open court and consists of: (1) ensuring the defendant has a copy of the indictment, information, or complaint; (2) reading the indictment, information, or complaint to the defendant or stating the defendant the substance of the charge and then (3) asking the defendant to plead to the indictment, information or complaint." N.D.R.Crim.P. 10.

[¶57] The Amended Information amending the charge of Murder to Accomplice to Murder was filed on March 17, 2016 - *i.e.*, approximately eight (8) months after Olson had his initial appearance. The Amended Information is the only charging document that Olson was ever arraigned on in accordance with N.D.R.Crim.P. 10. Before accepting Olson's Alford pleas, the trial court was mandated to comply with N.D.R.Crim.P. 11.

[¶58] The trial court did not inform Olson of the maximum possible penalty of Accomplice to Murder, as well as the two (2) counts for Conspiracy to Commit Aggravated Assault. These are fundamental requirements that a Court must "substantially comply" with before accepting guilty pleas. See State v. Wallace, 2018 ND 225, ¶ 10, 918 N.W.2d 64 (this court ordered withdrawal of guilty plea was required where trial court failed to substantially comply with the requirement that Defendant be informed of any mandatory minimum sentence).

[¶59] In the current case, the State will likely argue that substantial compliance with Rule 11(G) was met because at the beginning of the change of plea hearing when the prosecutor made the following statement:

> "The real significant change is Count One would be amended from Murder to Accomplice to Murder. We charge it out in the alternative just to Accomplice to Murder. Same offense level. Same potential penalties

apply."

(App. p. 51).

[¶60] Olson respectfully disagrees that substantial compliance with Rule 11(G) was accomplished by a combination of the following: Olson was informed via ITV of the maximum sentence for murder in May of 2015; eight (8) months later, an Amended Information was filed in which the charge of murder amended to accomplice, which is a rather complex legal theory; and a short statement from the prosecutor was made that the "same potential penalties apply".

[¶61] When adding to the equation Olson's learning disability; the traumatic head injuries he suffered; the limited education; that Olson was highly medicated with prescription mind and mood altering drugs; this Court should have a firm conviction that the trial court acted in an arbitrary, unreasonable, or capricious manner by refusing to allow Olson to withdraw his guilty pleas.

[¶62] Once Olson realized that the crime he had plead guilty to carried the same potential penalties as AA Murder, he wanted to withdraw his guilty plea and be appointed a new attorney. The trial court essentially informed Olson that he had two (2) options, stick with Attorney Rosenquist, or proceed *Pro Se.*

[¶63] At the preliminary hearing in the underlying proceeding, no witnesses were identified that observed Olson lay a finger on Joey Gaarsland. Taking that into consideration, along with all the other circumstances outlined herein, clearly shows that a manifest injustice has occurred and, therefore, Olson respectfully requests that this Court allow Olson to withdraw his Alford pleas and proceed to trial.

D. Accomplice to extreme indifference murder is an incognizable offense in the State of North Dakota.

[¶64] As a matter of first impression, Olson requests that the Court make a

determination as to whether accomplice to extreme indifference murder under N.D.C.C. § 12.1-16-01(b) is a cognizable offense.

[¶65] In the Amended Information dated March 16, 2016, the State charged Olson with accomplice to commit a murder classified under N.D.C.C. § 12.1-16-01(b), which occurs when an person "[c]auses the death of another human being under circumstances manifesting extreme indifference to the value of human life."

[¶66] Specifically, the Information charges Olson with accomplice under N.D.C.C. § 12.1-03-01(1)(b), claiming Olson "acted as an accomplice to the murder of Joey Gaarsland by intending that an offense be committed and aiding another in committing the offense that resulted in the death of Joey Gaarsland." Section 12.1-03-01(1)(b) provides, "A person may be convicted of an offense based upon the conduct of another person when . . . [w]ith intent that an offense be committed, he . . . aids the other to commit it." (Emphasis added). As stated, the State contended that the "offense committed" was extreme indifference murder under N.D.C.C. § 12.1-16-01(1)(b).

[¶67] This Court has held "conspiracy to commit extreme indifference murder, under N.D.C.C. §§ 12.1-06-04 and 12.1-16-01(1)(b), is not a cognizable offense." State v. Borner, 2013 ND 141, ¶ 20, 836 N.W.2d 383.

> "Extreme indifference murder is a general intent crime, not a specific intent crime. See State v. Erickstad, 2000 ND 202, ¶ 25, 620 N.W.2d 136. Under N.D.C.C. § 12.1-16-01(1)(b), a person does not intend to cause the death of another human-being, but rather death is a consequence of the defendant's willful conduct. See Erickstad, at ¶ 25. In other words, extreme indifference murder results in an unintentional death from behavior manifesting an extreme indifference to the value of human life. Conspiracy, however, requires the intent to cause a particular result that is criminal. To be guilty of conspiracy to commit murder, an individual must intend to achieve the results--causing the death of another human being. Therefore, charging a defendant with conspiracy to commit unintentional murder creates an inconsistency in the elements of conspiracy and extreme indifference murder that is logically and legally impossible to rectify. An individual cannot intend to achieve a particular offense that by its definition is unintended."

Borner, 2002 ND at ¶ 18, 836 N.W.2d 383.

[¶68] Further, the Court stated, "[T]o find a person guilty of conspiracy to commit murder, the State must prove (1) an intent to agree, (2) an intent to cause death, and (3) an overt act." Id. at ¶ 20. Since an extreme indifference murder results in an unintentional death, it is impossible for there to be a charge of conspiracy to commit an unintentional death. [5]

[¶69] For the same reasons, Olson puts forth that accomplice to commit unintentional murder should be deemed an incognizable offense. The North Dakota Supreme Court, in State v. Baumgartner, 2001 ND 202, ¶ 10, 637 N.W.2d 14, clarified that: "[O]ne cannot be an accomplice without having the requisite criminal intent for the underlying offense, even if he or she is a co-conspirator." In State v. Deery, 489 N.W.2d 887, 888 (N.D. 1992), the North Dakota Supreme Court, similarly explained that, "[t]he test to determine whether or not an individual is an accomplice is whether or not that individual and the defendant could be indicted and punished for the same crime." [Internal Citations Omitted].

[¶70] Accomplice requires aid with the intent that the offense be committed. Saari v. State, 2017 ND 94, ¶ 8, 893 N.W.2d 764. Therefore, Accomplice to Commit an Extreme Indifference Murder, where the death is unintentional, is not a cognizable offense in North Dakota.

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[5] Attempted murder under N.D.C.C. § 12.1–16–01(1)(b) is also an incognizable offense. Dominguez v. State, 2013 ND 249, ¶ 25, 840 N.W.2d 596.

E. Olson was denied effective assistance of counsel.

1. Performance of Counsel.

[¶71] "The Sixth Amendment of the United States Constitution guarantees a criminal defendant the right to effective assistance of counsel. [Internal citations omitted]. A post-conviction relief petitioner alleging ineffective assistance bears the burden of proving two elements or prongs. [Internal citations omitted]. First, the petitioner must prove that the attorney's performance fell below an objective standard of reasonableness. [Internal citations omitted]. An attorney's performance is measured considering the prevailing professional norms. [Internal citations omitted]. The defendant must overcome the strong presumption that counsel's representation fell within the wide range of reasonable professional assistance, and courts must consciously attempt to limit the distorting effect of hindsight. [Internal citations omitted]. Second, the petitioner must show that the attorney's deficient performance prejudiced him. [Internal citations omitted]."

Sambursky v. State, 2006 ND 223, ¶ 13, 723 N.W.2d 524.

[¶72] Olson must show that there is a reasonable probability that, but for counsel's unprofessional errors, there would have been a different result. Lindsey v. State, 2014 ND 174, ¶ 19, 852 N.W.2d 383.

[¶73] In the current case, Olson provided substantial testimony which established that he was not adequately informed of his rights by his trial attorney. Likewise, he did not understand the charges filed against him or the proposed resolution involving Alford pleas.

[¶74] The evidence reflects that Olson was presented with a plea offer which he didn't understand on March 16, 2016. Before being given a fair opportunity to consider the plea offer and ask questions, a meeting with prosecutors and law enforcement, as well as a change of plea hearing, had been expeditiously scheduled for March 17, 2016. When Olson tried to change his mind and persist in his not guilty pleas, his attorney convinced him otherwise. When Olson informed his counsel that he wanted to withdraw his guilty plea, counsel filed a Motion seeking to be removed as Olson's counsel. Olson felt

"trapped", "stuck" and "railroaded" due to the manner in which trial counsel represented him.

2. Denial of appointment of new counsel.

[¶75] Olson was deprived of his Sixth Amendment right to counsel when the trial court denied Attorney Rosenquist's Motion to Withdraw and Olson's request for new counsel.

[¶76] "A request for newly appointed counsel should be examined with the rights and interest of the [defendant] in mind, tempered by consideration of judicial economy. The court should inquire on the record into the reasons for the complaints about counsel." In Interest of J.B., 410 N.W.2d 530, 532 (citations omitted). The court should have made specific findings regarding whether irreconcilable conflicts exist between defendant and counsel; timing of request; inconvenience to witnesses; quality of counsel, etc. Id. at 533.

[¶77] Here, before Olson was even heard on the matter, informed Olson that he was not inclined to appoint him new counsel. The Court did not give Olson's statements any credibility, when a review of the record, does, at least somewhat, corroborate what Olson was saying.

[¶78] In the very least, the fact that a Motion to Withdraw was filed based upon Attorney Rosenquist being terminated, followed by the letter from Olson outlining perceived ineffectiveness of counsel, the Court should have viewed this as an irreconcilable conflict. "[A]n accused who is forced to [continue proceedings] with the assistance of appointed counsel with whom he has become embroiled in an irreconcilable conflict is denied effective assistance of counsel." United States v. Hart, 557 F.2d, 163 (8th Cir. 1977).

CONCLUSION

[¶79] For the foregoing reasons, it is respectfully requested that the Judgment be Reversed and the trial court be directed to allow Olson to withdraw his Alford pleas.

Respectfully submitted this _9th_ day of November, 2018.

/s/ Garrett D. Ludwig
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