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

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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

APPEAL FROM ORDER DENYING POST-CONVICTION RELIEF
DATED JUNE 27, 2018
CASS COUNTY DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE THOMAS R. OLSON, PRESIDING.

APPELLEE'S BRIEF

Tristan J. Van De Streek, #05849
Assistant State's Attorney
Cass County Courthouse
P.O. Box 2806
Fargo, North Dakota 58108
(701) 241-5850
Sa-defense-notices@casscountynd.gov
Attorney for Plaintiff-Appellee

Nicholas S. Samuelson
Law Clerk
Writing under R. Ltd. Practice of Law
by Law Students.
P.O. Box 2806
Fargo, North Dakota 58108
(701) 241-5850

[¶1] **TABLE OF CONTENTS**

[¶2] TABLE OF AUTHORITIES

Other State Cases:

Statutes:

Other Statutes:

[¶3] **STATEMENT OF THE ISSUES**

[¶4] I. Whether Olson's Alford plea was given knowingly, intelligently, and voluntarily.

[¶5] II. Whether Accomplice to Extreme Indifference Murder is a cognizable offense under North Dakota law.

[¶6] III. Whether Olson received effective assistance of counsel.

[¶7] IV. Whether the district court erred in denying Attorney Rosenquist's motion to withdraw.

[¶8] **STATEMENT OF THE CASE**

[¶9] In the underlying criminal case, Olson entered Alford pleas to Accomplice to Murder and two counts of Conspiracy to Commit Aggravated Assault. He was sentenced to twenty years' imprisonment. After Olson was sentenced, he filed an application for post-conviction relief which alleged (1) his Alford plea was not voluntarily and intelligently made; (2) accomplice to murder under N.D.C.C. § 12.1-16-01(1)(b) is not a cognizable offense; (3) he received ineffective assistance of counsel; and (4) the trial court erred by not appointing substitute counsel. A hearing was held and the district court denied Olson's application for post-conviction relief. Olson now appeals.

[¶10] STATEMENT OF FACTS

[¶11] On May 17, 2015, the Petitioner, Jessy Duane Olson, was involved in a melee at Rick's Bar in Fargo. Olson was arrested and charged with three counts of conspiracy to commit aggravated assault. (Appendix "App." at 76.) However, after one of the victims died from injuries sustained during the incident, the original case was dismissed and a second Information was filed. (App. at 33-34; 41-44.) The new Criminal Information charged Murder in Count 1 and Counts 1-3 of the original information were renumbered as Counts 2-4. (App. at 33-34.)

[¶12] Olson first appeared in court on May 22, 2015. (App. at 35-45.) At Olson's initial appearance, he was read a list of the rights of criminal defendants. (App. at 36-41.) Olson was provided a copy of the Criminal Information by the State. (App. at 43-44.) The Court then explained the charges and their maximum and minimum penalties. (App. at 44.)

[¶13] Attorney Patrick Rosenquist was appointed to represent Olson. (App. at 77.) On March 16, 2016, Attorney Rosenquist informed Olson of a plea offer from the State. The proposed plea deal contemplated that the State would cap its sentencing recommendation at 20 years' imprisonment if Olson pled guilty and agreed to testify in his codefendants' cases. Olson was free under the agreement to argue for any sentence he deemed appropriate. (App. at 46.) Olson signed a Proffer Agreement with Attorney Rosenquist present on March 17, 2016. (App. at 46.)

[¶14] A change of plea hearing was held on March 17, 2016. (App. at 51.) The State filed an amended Information which amended Count 1 from Murder to Accomplice to Murder. (App. at 51.) The State noted that the amended charge carried level of offense and the same potential penalties. (App. at 51.) Olson's attorney did not object to the State's motion to amend. (App. at 51.) Olson's attorney also waived a formal reading of the Amended Information. (App. at 52.) The Court inquired whether Olson had been read his rights at a previous hearing. (App. at 52.) Olson indicated that he had been read his rights and that he understood them. (App. at 52.)

[¶15] Olson entered Alford pleas to Counts 1, 3, and 4. (App. at 54-55, 57.) Count 2 was dismissed. (App. at 54.) The Court found that Olson's pleas were supported by a sufficient factual basis and were freely and voluntarily given. (App. at 57.) At the conclusion of the change of plea hearing, Olson stated that he was satisfied with his attorney's representation. (App. at 58.)

[¶16] Attorney Rosenquist moved to withdraw as counsel for Olson. A hearing was held on the motion on September 19, 2016. (App. at 63.) The Court denied Attorney Rosenquist's motion to withdraw. (App. at 70.)

[¶17] Olson filed an application for post-conviction relief. (App. at 4.) In Olson's application for post-conviction relief, he argued that he should be able to withdraw his guilty pleas because (1) his guilty pleas were not voluntarily and intelligently made, (2) the charge of Accomplice to Extreme Indifference Murder is not a cognizable offense, (3) he received ineffective assistance of counsel, and

(4) the district court should have appointed new counsel for Olson. (App. at 13-26.)

[¶18] A post-conviction hearing was held on June 15, 2018. (App. at 75.) Olson testified at the hearing. (App. at 76.) Olson's attorney, Patrick Rosenquist, also testified at the hearing. (App. at 120.) An Order denying Olson's application for post-conviction relief was entered on June 27, 2018. (App. at 149-151.) Olson now appeals.

[¶19] STANDARD OF REVIEW

[¶20] Olson argues that the district court erred in denying his application for post-conviction relief. Post-conviction relief proceedings are governed by the North Dakota Rules of Civil Procedure. Flanagan v. State, 2006 ND 76, ¶ 9, 712 N.W.2d 602. The district court's findings of fact in a post-conviction proceeding will not be set aside on appeal unless clearly erroneous under N.D.R.Civ.P. 52(a). Rümmer v. State, 2006 ND 216, ¶ 8, 722 N.W.2d 528 (citing Laib v. State, 2005 ND 187, ¶ 11, 705 N.W.2d 845). "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, this Court is left with a definite and firm conviction a mistake has been made." Odom v. State, 2010 ND 65, ¶ 10, 780 N.W.2d 666.

[¶21] Olson seeks to withdraw his guilty plea and proceed to trial. When a defendant applies for post-conviction relief seeking to withdraw a guilty plea, this Court treats 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, this Court may be required to review the court's preliminary finding of fact, which will not be disturbed unless clearly erroneous. Houle v. State, 482 N.W.2d 24, 25-26 (N.D. 1992).

[¶22] One of Olson's arguments is that he was denied effective assistance of counsel. The issue of ineffective assistance of counsel is a mixed question of law and fact which is fully reviewable on appeal. Roth v. State, 2011 ND 112, ¶ 11, 735 N.W.2d 882.

[¶23] LAW AND ARGUMENT

[¶24] I. Olson's Alford pleas were made knowingly, voluntarily, and intelligently.

[¶25] A guilty plea must be made knowingly, intelligently, and voluntarily. State v. Blurton, 2009 ND 144, ¶ 10, 770 N.W.2d 231. A defendant who voluntarily pleads guilty "waives the right to challenge non-jurisdictional defects and may only attack the voluntary and intelligent character of the plea. Id. at ¶ 18. Rule 11 of the North Dakota Rules of Criminal Procedure provides a framework for determining whether a plea is knowingly and voluntarily given. Id. at ¶ 10.

[¶26] When accepting a guilty plea, N.D.R.Crim.P. 11(b)(1) requires a court to address the defendant and advise him of the following:

> (A) the right to plead not guilty, or having already so pleaded, to persist in that plea;
> (B) the right to a jury trial;
> (C) the right to be represented by counsel at trial and at every other stage of the proceeding and, if necessary, the right to have the counsel provided under Rule 44;
> (D) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;
> (E) the defendant's waiver of these trial rights if the court accepts a plea of guilty;
> (F) the nature of each charge to which the defendant is pleading;
> (G) any maximum possible penalty, including imprisonment, fine, and mandatory fee;
> (H) any mandatory minimum penalty; and
> (I) the court's authority to order restitution.

Id. However, N.D.R.Crim.P. 11 "does not require 'ritualist compliance,' but 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. Barnes, 2015 ND 64, ¶ 8, 860 N.W.2d 466.

[¶27] The record indicates that Olson was read his rights and that he understood them. At the March 17, 2016 change of plea hearing, the Court explained to Olson that by pleading guilty, even on an Alford basis, he would be giving up rights including the rights to a jury trial, presumption of innocence, the right not to self-incriminate, and the right to confront witnesses. (App. at 52-53.) The Court also reminded Olson of the more exhaustive list of rights that was read to him at his initial appearance. (App. at 52.) Olson indicated that he remembered his rights and understood them. (App. at 52.)

[¶28] The record further indicates that Olson was aware of the maximum penalties for and the nature of the charges to which he pled guilty. An Amended Criminal Information was filed at the change of plea hearing. (App. at 51.) The new Information amended Count 1 from Murder to Accomplice to Murder. (App. at 51.) The prosecutor stated at the hearing that the new charge was the same level of offense as the previous charge and that it carried the same potential penalties. (App. at 51.) Olson had previously been informed at his initial appearance on May 22, 2015 that Count 1, Murder, was a Class AA Felony and carried a maximum sentence of life imprisonment without parole. (App. at 44.) Olson's attorney stated that he had reviewed the Amended Information with Olson. (App. at 51-52.) Olson's attorney then waived a reading of the Amended Information. (App. at 52.) When the Court took Olson's Alford plea to the amended charge of Accomplice to Murder, it again noted that Count 1, Accomplice to Murder, was a Class AA Felony. (App. at 54.) The Court found that Olson had freely and voluntarily given his Alford pleas. (App. at 57.)

[¶29] Here, the Court substantially complied with the requirements of N.D.R.Crim.P. 11(b). There was some variance from what could be called "ritualistic" compliance. For example, Olson was not directly informed of the maximum penalty on Count 1 at the change of plea hearing. However, he was informed of the maximum penalty at a previous hearing and was informed that the maximum penalty still applied. (App. at 44, 51.) Moreover, Olson had reviewed the Amended Information with his attorney and waived a formal reading of the

Amended Information. (App. at 51-52.)

[¶30] It is the State's position that the district court's acceptance of Olson's Alford plea was not in error because it substantially complied with N.D.R.Crim.P. 11(b). See Barnes, 2015 ND 64, ¶ 8, 860 N.W.2d 466. However, if this Court finds the district court did err in failing to advise Olson of the maximum penalty during the change of plea hearing, the Court should disregard it because it was harmless and does not affect the defendant's substantial rights. N.D.R.Crim.P. 52(a). See also Abdi v. State, 2000 ND 64, ¶ 23, n. 1, 608 N.W.2d 292 (the harmless error provision of N.D.R.Crim.P. 52 applies to all criminal rules including N.D.R.Crim.P. 11).

[¶31] **II. Accomplice to Commit Extreme Indifference Murder is a cognizable offense under North Dakota law.**

[¶32] Olson argues that Accomplice to Extreme Indifference Murder (Count 1), is not a cognizable offense. Olson entered an Alford plea to Accomplice to Extreme Indifference Murder under N.D.C.C. § 12.1-16-01(1)(b). Under subsection (b) of N.D.C.C. § 12.1-16-01(1), a person is guilty of murder, a class AA felony, if the person "[c]auses the death of another human being under circumstances manifesting extreme indifference to the value of human life[.]"

[¶33] Olson cites State v. Borner, to support his argument that accomplice to commit extreme indifference murder is not a cognizable offense under North Dakota law. 2002 ND 141, ¶ 18, 836 N.W.2d 383. In Borner, this Court held that "*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." Id. at ¶ 20 (emphasis added). However, Olson has not cited any authority that accomplice is synonymous with conspiracy. "The North Dakota Criminal Code is consistent in its separate treatment of co-conspirators and accomplices[.]" State v. Lind, 322 N.W.2d 826, 842 (N.D. 1982). "The definition of 'accomplice' in Section 12.1–03–01(1)(a) and (b), specifies acts different from those set forth in the definition of 'criminal conspiracy' in Section 12.1–06–04(1)." Id.

[¶34] "The 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." State v. Deery, 489 N.W.2d 887, 888 (N.D. 1992). "[P]resence at the scene of a crime is a fact which, together with other facts, may support a finding that the defendant acted as an accomplice." State v. Pronovost, 345 N.W.2d 851, 853 (N.D. 1984). "Additional facts which would support a finding of accomplice liability include acting upon a common plan in furtherance of a conspiracy; acting with the kind of culpability required for the offense and sharing the criminal intent of the principal; approving the criminal act by active participation in it or by, in some manner, encouraging it; positioning one's self as a lookout to hinder apprehension of the principal; or driving a get away car or otherwise fleeing the scene." Id. Olson's conduct falls under the definition of accomplice.

[¶35] Moreover, other states with accomplice liability statutes similar to North Dakota's have held that accomplice crimes to an underlying offense

requiring recklessness mens rea, including reckless murder based on extreme indifference to human life, are cognizable. See Ex parte Simmons, 649 So.2d 1282, 1284-85 (Ala. 1994). The Simmons court noted:

> Accomplice liability does not require that the accomplice intend for the principal to act in a reckless manner. Rather, accomplice liability requires only that the accomplice intend to promote or assist the principal, having knowledge that the principal is engaging in, or is about to engage in, criminal conduct. The mental state required for complicity is the intent to aid the principal in the criminal act or conduct, not the intent of the principal that death occur either intentionally or recklessly. In other words, for a person to be guilty of reckless murder as an accomplice, he need not know or decide whether the principal will act intentionally; *rather, the accomplice need only have knowledge that the principal is engaging in reckless conduct and intentionally assist or encourage that conduct with the intent to promote or facilitate its commission.*

Id. at 1285 (citations omitted) (emphasis added).

[¶36] Other courts have called this the "majority rule." See e.g., State v. Garnica, 209 Ariz. 96, 99, 98 P3d 207, 210 (Ct. App. 2004) ("There is no Arizona case law that addresses the issue of whether a defendant can be liable as an accomplice for a reckless offense. Other states, and commentators have dealt with the issue. While there is not complete unanimity on the issue, there appears to be a majority rule allowing accomplice liability in such circumstances.").

[¶37] **III. Olson was not denied effective assistance of counsel.**

[¶38] The Sixth Amendment to the United States Constitution and Article I, § 12 of the North Dakota Constitution guarantee a criminal defendant a right to effective assistance of counsel. Heckelsmiller v. State, 2004 ND 191, ¶ 3, 687

N.W.2d 454. The test for effectiveness of counsel was laid out by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). The "Strickland test" requires a defendant claiming ineffective assistance of counsel to prove (1) his counsel's representation fell below an objective standard of reasonableness, and (2) the defendant was prejudiced by counsel's defective performance. Flanagan, 2006 ND 76, ¶ 10, 712 N.W.2d 602. The same test is used to assess ineffective assistance of counsel claims under the state constitution. Id. at ¶ 11.

[¶39] **A. Olson's counsel performed within the bounds of "objective reasonableness."**

[¶40] Effectiveness of counsel is measured by an 'objective standard of reasonableness' considering 'prevailing professional norms.' Id. at ¶ 10 (quoting Heckelsmiller, 2004 ND 191, ¶¶ 3-4, 687 N.W.2d 454). Judicial scrutiny of counsel's performance must be highly deferential. Strickland, 466 U.S. at 689. Regarding *post hoc* review of attorney performance, the Strickland court stated:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, *a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance*; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Id. (emphasis added).

[¶41] Olson has not alleged a specific deficiency in his counsel's performance. Rather, he makes vague reference to the fact that he felt "trapped," "stuck," and "railroaded" because of his counsel's performance. (Appellant's Brief at ¶ 74.) A defendant's subjective dissatisfaction with the quality of his representation does not rise to a violation of his constitutional rights. Olson cites no specific instance of unprofessional conduct, nor any authority in support of his claim of ineffective assistance of counsel. Because there is no specific allegation of unprofessional conduct and courts indulge in a presumption of effectiveness, the district court properly concluded that Olson's counsel was effective.

[¶42] **B. Olson was not prejudiced by his counsel's performance.**

[¶43]The second prong in a claim for ineffective assistance of counsel requires a defendant to establish that counsel's deficient performance prejudiced the defendant. Stoppleworth v. State, 501 N.W.2d 325, 327 (N.D. 1993). Here, the Defendant entered an Alford plea, so the ineffective assistance of counsel analysis is slightly modified. "The second prong of the Strickland test is satisfied in the context of a guilty plea if the defendant shows 'there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" Lindsey v. State, 2014 ND 174, ¶ 19, 852 N.W.2d 383 (quoting Ernst v. State, 2004 ND 152 ¶ 10, 683 N.W.2d 891). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Flanagan, 2006 ND 76, ¶ 10, 712 N.W.2d 602. "This requires a 'substantial,' not just 'conceivable,' likelihood of a different result." Cullen v. Pinholster, 563 U.S.

170, 189 (2011).

[¶44] All courts "require something more than defendant's 'subjective, self-serving' statement that, with competent advice, he would" not have pled guilty and would have insisted on going to trial. 3 Wayne LaFave et al., Criminal Procedure § 11.10(d) (3d ed. 2007). The petitioner "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." Padilla v. Kentucky, 559 U.S. 356, 372 (2010). To determine whether rejecting the plea bargain would be rational, the Court looks to predict the likely outcome if the case had gone to trial. Bahtiraj v. State, 2013 ND 240, ¶ 16, 840 N.W.2d 605 (citing Hill v. Lockhart, 474 U.S. 52, 59-60 (1985)). "The movant must allege facts that, if proven, would support a conclusion that the decision to reject the plea bargain and go to trial would have been rational, e.g., valid defenses, a pending suppression motion that could undermine the prosecution's case, or the realistic potential for a lower sentence." Bahtiraj, 2013 ND 240, ¶ 16, 840 N.W.2d 605 (quoting Stiger v. Commonwealth, 381 S.W.3d 230, 237 (Ky. 2012)).

[¶45] Olson's subjective and self-serving statement that but for Attorney Rosenquist's allegedly defective representation, he would have not entered Alford pleas and proceeded to trial is insufficient to satisfy the second prong of Strickland. Olson has alleged no facts in support of his conclusion that rejecting the plea deal would have been rational under the circumstances. Because Olson did not prove he was prejudiced by specific errors by counsel, the district court properly concluded his counsel was not ineffective.

[¶46] **IV. The district court did not err when it did not appoint new counsel for Olson.**

[¶47] This Court has held that "the matter of substitution of appointed counsel is committed to the sound discretion of the trial court and, absent a showing of good cause for the substitution, a refusal to substitute is not an abuse of discretion. State v. Klein, 1997 ND 25, ¶¶ 22-24, 560 N.W.2d 198, *overruled on other grounds*, Froistad v. State, 2002 ND 52, ¶ 6, 641 N.W.2d 86. "A trial court abuses its discretion only when it acts in an arbitrary, unreasonable, or capricious manner, or misinterprets or misapplies the law." State v. Ripley, 2009 ND 105, ¶ 22, 766 N.W.2d 465 (quoting State v. Frohlich, 2007 ND 45, ¶ 11, 729 N.W.2d 148).

[¶48] In a similar case, State v. Klein, the defendant made a motion for substitution of counsel. 1997 ND 25, ¶ 6, 560 N.W.2d 198. The trial court considered briefs and denied the motion after a hearing. Id. On appeal, this Court found the trial court did not abuse its discretion because the defendant did not show good cause for a substitution. Id. at ¶ 24. To the contrary, this Court noted that the district court order recognized "statements by the defendant that he was satisfied with his counsel and wished to have him to continue to represent his interests." Id.

[¶49] Likewise, at several times during Olson's criminal case, Olson stated his satisfaction with Attorney Rosenquist's representation. For example, at the March 17, 2016 change of plea hearing, when asked whether he was satisfied with

Attorney Rosenquist's representation, Olson stated, "Yeah. He's a dang good lawyer" and "If I had money, I would pay." (App. at 58.) At the September 19, 2016 hearing on Attorney Rosenquist's motion to withdraw, the Court informed Olson, "[y]ou don't get to pick a substitute lawyer just because you don't like the lawyer you have. (App. at 67.) To this, Olson replied, "[w]ell, I like him." (App. at 67.) Olson went on to explain that he thought he would be sentenced to five years rather than 20 years. (App. at 68.) Rather than a breakdown in the attorney-client relationship, Olson's basis for wanting to fire Attorney Rosenquist was his own confusion about the terms of the plea agreement.

[¶50] Olson did not prove good cause existed for Attorney Rosenquist to withdraw as counsel of record. Therefore, the district court did not abuse its discretion in denying the request.

[¶51] CONCLUSION

[¶52] Because the district court's findings of fact were not clearly erroneous, its denial of Olson's request to withdraw his guilty plea was not an abuse of discretion. See Houle, 428 N.W.2d at 25-26. For this, and the other reasons stated herein, the State respectfully requests this court **AFFIRM** the district court's order denying Olson's application for post-conviction relief.

Respectfully submitted this 6th day of December, 2018.

Tristan Van de Streek, NDID #05849
Assistant State's Attorney
Cass County Courthouse
211 Ninth Street South
P.O. Box 2806
Fargo, North Dakota 58108
(701) 241-5850
Attorney for Respondent-Appellee

Nicholas S. Samuelson
Law Clerk
Writing under R. Ltd. Practice of Law
by Law Students.
211 Ninth Street South
P.O. Box 2806
Fargo, North Dakota 58108
(701) 241-5850

[¶53] CERTIFICATE OF SERVICE

[¶54] A true and correct copy of the foregoing document was sent by e-mail on the 6th day of December, 2018, to: gludwig@kelschlaw.com

Tristan Van de Streek