

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

Kyle Christopher White, Petitioner-Appellant, vs. State of North Dakota, Respondent-Appellee	Supreme Court No. 20180307 Case No. 18-2018-CV-00029
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On appeal from the Order denying post-conviction relief
entered August 1, 2018
Grand Forks County District Court
Northeast Central Judicial District
State of North Dakota
The Honorable Lolita G. Hartl Romanick, Presiding

APPELLANT'S BRIEF

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[¶1]

Statement of the Issue

- I. Whether the district court erred by denying Mr. White's application for post-conviction relief.

Statement of the Case

[¶2] This is an appeal from an order denying post-conviction relief after an evidentiary hearing regarding Kyle Christopher White (hereinafter referred to as “Mr. White”). On January 3, 2018, Mr. White filed a pro se Application for Post-Conviction Relief. (Appellant’s App. at 8). The State of North Dakota filed an Answer. (Appellant’s App. at 30). The district court conducted an evidentiary hearing on Mr. White’s application. (Appellant’s App. at 1). On August 1, 2018, the district court issued an order denying any sort of post-conviction relief. (Appellant’s App. at 32). Mr. White now appeals the August 1, 2018, order. (Appellant’s App. at 38).

Statement of the Facts

[¶3] Mr. White was charged with two counts of Failure to Register as a Sexual Offender. (Appellant’s App. at 7). The charging document alleges that “having pled guilty to or been found guilty of a crime as a sexual offender,” Mr. White failed to notify law enforcement of a change of address and a change of employment. Id. Mr. White was appointed an attorney on these charges. See id. (Evidentiary Hearing Tr. at 7, ln. 16 - 22).

[¶4] Mr. White’s court appointed attorney obtained the discovery from the State. (Evidentiary Hearing Tr. at 9, ln. 6 - 9). The discovery did not contain any Court Orders, Criminal Judgments or any other evidence that showed Mr. White was required to register as an offender. (Evidentiary Hearing Tr. at 11, ln. 14 - 19; at 12, ln. 14 - 19). Mr. White was not provided a copy of the discovery from his court-appointed attorney. (Evidentiary Hearing Tr. at 23, ln. 17 - 24).

[¶5] Mr. White did not have a North Dakota State Court conviction that required registration. (Evidentiary Hearing Tr. at 8, ln. 10 - 23). Mr. White's attorney believed that Mr. White had a prior Federal Court conviction, which by its terms did not require registration and did not require registration while Mr. White was in his hometown, which is on the Spirit Lake Reservation, but did require registration if Mr. White was residing in North Dakota outside of the Spirit Lake Reservation. See id. Mr. White's attorney was unsure whether the Federal Court conviction required Mr. White to register as an offender against a minor or a sexual offender, if he resided in North Dakota outside of the Spirit Lake Reservation. (Evidentiary Hearing Tr. at 8, ln. 25 - 9, ln. 3). Mr. White advised his attorney that he had been told by the sentencing Judge in Federal Court that he would not need to register as a result of the Federal Court conviction. (Evidentiary Hearing Tr. at 14, ln. 15 - 22). Mr. White repeatedly told his attorney that he did not need to register as an offender against minors or as a sex offender. (Evidentiary Hearing Tr. at 21, ln. 20 - 22, ln. 6). Mr. White gave his attorney the names of a number of individuals involved in the Federal case and asked his attorney to contact these individuals. See id. Mr. White's attorney was unwilling to take any actions to look into the Federal Court conviction. (Evidentiary Hearing Tr. at 14, ln. 3 - 22).

[¶6] Based on the advice of his attorney, Mr. White pled guilty to both charges against him. (Evidentiary Hearing Tr. at 25, ln. 11 - 20). Mr. White would not have pled guilty, if his attorney had provided him with the discovery or told him there was no evidence in the discovery that he needed to register. (Evidentiary Hearing Tr. at 24, ln. 13 - 21). Mr. White was sentenced to a term of imprisonment, followed by a term of probation. (Appellant's

App. at 3).

[¶7] After release from prison, Mr. White began probation. See id. White’s probation was later revoked and he was resentenced to a longer term of imprisonment. See id.

[¶8] On January 3, 2018, Mr. White filed a pro se Application for Post-Conviction Relief, alleging ineffective assistance of counsel. (Appellant’s App. at 8). After an evidentiary hearing, the district court issued an order denying any sort of post-conviction relief. (Appellant’s App. at 32). Mr. White now appeals the order denying post-conviction relief. (Appellant’s App. at 38).

Law and Argument

[¶9] This is an appeal of an order denying post-conviction relief. (Appellant’s App. at 32). This Court has jurisdiction over this appeal under N.D. Const. art. VI § 6 and N.D.C.C. § 29-32.1-14. North Dakota Century Code Section 29-32.1-14 provides, “A final judgment entered under this chapter may be reviewed by the supreme court of this state upon appeal as provided by rule of the supreme court.” Id.

Standard of Review

[¶10] Post-conviction relief proceedings are civil in nature and are governed by the North Dakota Rules of Civil Procedure. Broadwell v. State, 2014 ND 6, ¶ 5, 841 N.W.2d 750. On appeal, findings of fact are reviewed under the “clearly erroneous” standard set forth in N.D.R.Civ.P. 52(a). See id. A finding of fact is clearly erroneous, “if it is not supported by any evidence or if, although there is some evidence to support it, a reviewing court is left

with a definite and firm conviction a mistake has been made.” Id. Questions of law are fully reviewable on appeal of a post-conviction relief proceeding. See id. Additionally, the issue of ineffective assistance of counsel is a “mixed question of law and fact which is fully reviewable by this court.” Id. at ¶ 7.

I. The district court erred when it denied Mr. White’s application for post-conviction relief.

[¶11] The district court’s dismissal of Mr. White’s application for post-conviction relief is reversible error. Mr. White’s application alleges ineffective assistance of counsel. “To succeed on a claim for ineffective assistance of counsel, a petitioner must prove counsel’s performance fell below an objective standard of reasonableness and the deficient performance prejudiced him.” Garcia v. State, 2004 ND 81, ¶ 5, 678 N.W.2d 568, (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). The first prong of the Strickland test requires that an attorney’s performance be measured by an objective standard of reasonableness, considering the prevailing professional norms. Garcia at ¶ 5. The second prong of the Strickland test requires a showing of “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. The two pronged Strickland test applies to challenges to guilty pleas that were entered as a result of ineffective assistance of counsel. Hill v. Lockart, 474 U.S. 52, 58 (1985). When the claim of ineffective assistance of counsel relates to a guilty plea, this Court has held that the application is treated as one made under Rule 11(d) of the North Dakota Rules of Criminal Procedure. Moore v. State, 2013 ND 214, ¶ 10, 839 N.W.2d 834. Withdrawal of the guilty plea is allowed when necessary to correct a manifest injustice. See id.

[¶12] Mr. White’s attorney provided ineffective assistance of counsel by failing to adequately review the discovery with Mr. White, by failing to provide him the discovery and by failing to advise Mr. White that the discovery did not include proof of a registration requirement.

[¶13] With regard to the first Strickland prong, the performance of Mr. White’s attorney fell below an objective standard of reasonableness. Mr. White was charged with two counts of Failing to Register under N.D.C.C. § 12.1-32-15. (Appellant’s App. at 7). Although there were two counts, the conduct alleged in each count is identical and serves as a great example of the State overcharging duplicative crimes. See id. N.D.C.C. § 12.1-32-15(3)(b) requires a homeless individual to register, if the individual, “Has pled guilty or nolo contendere to, or been adjudicated for or found guilty of, an offense in a court of this state for which registration is mandatory under this section or an offense from another court in the United States, [...].” Although the Information does not explain why Mr. White is required to register and Mr. White’s attorney never investigated further, it seems that the State’s theory of the crime was that the Federal Court conviction was an offense from another Court in the United States, for which registration would otherwise be mandatory.

[¶14] The performance of Mr. White’s attorney fell below an objective standard of reasonableness, when he failed to adequately review the discovery with Mr. White and failed to explain that the discovery did not contain evidence which would allow the State to prove both elements of the crime of Failure to Register. The State is required to prove each and every element of the crime beyond a reasonable doubt. State v. Jahner, 2003 ND 36, ¶ 15, 657 N.W.2d 266. To prove the crime of Failure to Register, the State would be required to

prove two things: 1) that the individual is required to register and 2) that the individual did not properly register within the time allowed by law. N.D.C.C. § 12.1-32-15. Other than a justification or excuse defense, the only objectively reasonable way for an attorney to defend an individual charged with this crime would be to argue: 1) the individual is not required to register, or 2) the individual properly registered within the time allowed by law.

[¶15] Given that there are only two reasonable ways to defend against these charges, it is objectively unreasonable for a criminal defense attorney to fail to properly review the discovery and to fail to recognize that the discovery does not include any evidence of a need to register. The discovery obtained from the State did not include any evidence that Mr. White was required to register. (Evidentiary Hearing Tr. at 9, ln. 6 - 9; at 11, ln. 14 - 19; at 12, ln. 14 - 19). During the evidentiary hearing, Mr. White's attorney testified that he believed that Mr. White would be required to register if Mr. White was residing in North Dakota outside of the Spirit Lake reservation, as a result a prior Federal Court conviction. (Evidentiary Hearing Tr. at 8, ln. 10 - 23). However, the question is not whether Mr. White was required to register. That question overlooks the State's burden of proof. Given the State has the burden of coming forward with evidence that proves the case beyond a reasonable doubt, the question is whether the State has evidence which will prove that Mr. White was required to register. Based on the discovery, the State had no such evidence. When faced with these facts, to counsel a criminally accused defendant to plead guilty rather than have a trial is objectively unreasonable.

[¶16] The district court found that the performance of Mr. White's attorney did not fall below an objective standard of reasonableness. (Appellant's App. at 37, ¶ 14). The question

of ineffective assistance of counsel is a “mixed question of law and fact which is fully reviewable by this court.” Broadwell v. State, 2014 ND 6, ¶ 7, 841 N.W.2d 750. Despite this standard of review, one portion of the district court’s order bears mention. In its order, the court notes that when asked about his attorney’s representation, “Mr. White responded by stating that he was satisfied with the representation.” (Appellant’s App. at 36, ¶ 12). The district court seems to have relied on this statement in reaching the conclusion that Mr. White’s attorney performed at an objectively reasonable standard. To the extent that the district court considered Mr. White’s statement in evaluating the performance of his attorney, such reliance was error. As the United States Supreme Court discussed in Kimmelman v. Morrison, “A layman will ordinarily be unable to recognize counsel’s errors and to evaluate counsel’s professional performance, [...]; consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case.” Kimmelman v. Morrison, 477 U.S. 365, 378 (1986) (internal citations omitted). For these reasons, Mr. White’s lay evaluation of his attorney’s performance at the time of the guilty plea is of little consequence. At the time, Mr. White’s attorney had not provided Mr. White with all of the discovery. Nor had his attorney informed Mr. White that the discovery did not contain any evidence that he needed to register, or of the State’s need to prove this element of the crime. Had Mr. White been aware of this, he no doubt would have answered the district court’s question differently. To rely upon this statement, when evaluating his attorney’s performance was error.

[¶17] With regard to the second Strickland prong, the petitioner must show that he or she was prejudiced as a result of counsel’s errors. Garcia v. State, 2004 ND 81, ¶ 5, 678 N.W.2d

568. In the context of a guilty plea, in order to satisfy the second Strickland prong, “the defendant must show that 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.” Hill v. Lockart, 474 U.S. 52, 58 (1985). In this case, Mr. White’s attorney should have provided him with the discovery and advised him that the discovery did not include any evidence that he needed to register. Without evidence of the need to register, Mr. White’s attorney should have counseled him against a guilty plea and that the State could not prove the case against him. During the evidentiary hearing, Mr. White testified that he would not have pled guilty, if his attorney had provided him with the discovery or told him there was no evidence in the discovery that he needed to register. (Evidentiary Hearing Tr. at 24, ln. 13 - 21). Knowing that the State could not prove the case, such a course of action would be expected. Under the circumstances, there is a reasonable probability, if not a strong likelihood, that Mr. White would not have pleaded guilty and instead would have insisted on a trial. As a result, Mr. White can show both prongs of the Strickland test and the district court erred by finding that his attorney did not provide ineffective assistance of counsel. A reversal is warranted.

Conclusion

[¶18] For the foregoing reasons, Mr. White respectfully requests that the district court’s order denying his application for post-conviction relief be reversed and remanded for further proceedings.

Dated this 23rd day of November, 2018.

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