

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

Kyle Christopher White,)	Supreme Court No. 20180307
)	
)	
Petitioner/Appellant,)	
)	District Court No. 18-2018-CV-00029
vs.)	
)	
State of North Dakota,)	
)	
Respondent/Appellee.)	

ON APPEAL FROM DENIAL OF POST-CONVICTION RELIEF
FROM THE DISTRICT COURT
FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY, NORTH DAKOTA
THE HONORABLE JUDGE LOLITA G. HARTL ROMANICK, PRESIDING

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUE

- I. Whether the district court properly denied White's Application and Petition for Post-Conviction Relief in 18-2018-CV-00029?**

STATEMENT OF THE FACTS

[¶1] On June 25, 2013, an Information was filed in Grand Forks District Court charging Kyle Christopher White (hereinafter referred to as “White”), with two counts of Failure to Register as a Sexual Offender. Information, June 25, 2013. Specifically, White is required to register as a sex offender and an offender against children in the State of North Dakota. Affidavit of Probable Cause, June 25, 2013. Under this requirement, White has three (3) days to change his residence and five (5) days to change his employment in writing with the Grand Forks Police Department. Affidavit of Probable Cause, June 25, 2013. As of May 26, 2013, White was no longer living at Centre Inc. and no longer working at Ruby Tuesday’s. On June 10, 2013, White still had failed to change his registration with the Grand Forks Police Department. Affidavit of Probable Cause, June 25, 2013.

[¶2] An initial appearance was held on June 25, 2013. White was read his rights to include the right to assistance of an attorney at each stage of the proceeding, the right to have a jury trial or to waive a jury trial, the right to confront witnesses, and the right to have a preliminary hearing. Initial Appearance Tr. pp. 2-5. On June 1, 2013, attorney David Ogren was appointed to be White’s public defender. Notice of Assignment of Counsel, July 2, 2013. On July 17, 2013, White waived his right to a preliminary hearing. Preliminary Hrg. Tr. pp. 3-4.

[¶3] A revocation of probation hearing was held on August 12, 2013, for White’s other open cases: 18-2011-CR-1692, 18-2012-CR-481, 18-2012-CR-611, and 18-2012-CR-865. Revocation of Probation Hearing and Pretrial Conference Tr. p. 2. During that hearing, White admitted to knowing that he had to register and stated, “I mean, I have to

register as a sex offender in the state, and it's very hard to do anything even if you're not registered as a sex offender, you know." Revocation of Probation Hearing and Pretrial Conference Tr. p. 12. White went on to state that he forgot that he had to register and unregister when he goes back home to the reservation and had the understanding that he did not have to register when on the reservation. Revocation of Probation Hearing and Pretrial Conference Tr. p. 14. Mr. Ogren also stated that when White is on the federal Indian lands with his reservation, he does not need to register, but he does have to register when he is on state lands in this jurisdiction. Revocation of Probation Hearing and Pretrial Conference Tr. pp. 17-19. Mr. Ogren indicated that it would be best to continue the pretrial conference to allow White more time to go over the plea agreement and discuss the habitual offender status. Revocation of Probation Hearing and Pretrial Conference Tr. pp. 21-22. However, White insisted that they handle the pretrial that same day and pled guilty to both counts of Failure to Register as Sexual Offender. Revocation of Probation Hearing and Pretrial Conference Tr. pp. 22-25.

[¶4] When asked by the court if he had anything he wished to state prior to sentencing, White stated again that he knew he had to register on state lands. Revocation of Probation Hearing and Pretrial Conference Tr. pp. 27-28. White was subsequently sentenced as a habitual offender to concurrent sentences of ten (10) years in counts 1 and 2, with six (6) years suspended for three (3) years of supervised probation after release from incarceration. Revocation of Probation Hearing and Pretrial Conference Tr. p. 29.

[¶5] White then brought a Rule 35 Motion. Motion for Reduction of Sentence Pursuant to Rule 35, October 28, 2013. White did not raise that he had been sentenced pursuant to an illegal sentence, nor did he raise that he should not have been sentenced as

someone who had failed to register as a sex offender. Instead, White raised that this was an unduly harsh or unjust sentence and that he asked for relief as the court found appropriate. Affidavit in Support of Motion, October 28, 2013. The Order stated White has a lengthy criminal history and is a danger to society based upon his history, and therefore denied White's Rule 35 Motion. Order Disposing of Motion, December 11, 2013.

[¶6] The State then filed a Petition for Revocation with allegations that White failed to reside at the place of residence approved by his probation officer, failed to refrain from the use or possession of non-prescribed controlled substances, failed to report to his probation officer as directed and failed to comply with an intermediate measure of the North Dakota Department of Corrections and Rehabilitation to avoid revocation. Petition for Revocation, December 29, 2016. Mr. Ogren was appointed to represent White on the probation revocation. Notice of Assignment of Counsel, January 6, 2017.

[¶7] On February 21, 2017, White's Revocation of Probation Hearing was held. At this hearing, White indicated that he was satisfied with Mr. Ogren's representation. Revocation of Probation Hearing Tr. p. 7. White admitted to the allegations within the Petition. Revocation of Probation Hearing Tr. pp. 8-10. White goes on to state that he does have a criminal history, and that he knows he has to register as a sex offender when he is living off the reservation on state land based upon his federal sex offense conviction. Revocation of Probation Hearing Tr. pp. 28-29. White was then sentenced to a lesser sentence than he had originally been sentenced to: six (6) years instead of the ten (10) years. Order for Revocation, March 8, 2017.

[¶8] On January 3, 2018, White filed his Application for Post-Conviction Relief alleging ineffective assistance of counsel. On May 17, 2018, the State (Respondent) filed their Answer to Petitioner's Application for Post-Conviction Relief. On June 4, 2018, an evidentiary hearing was held. White was present and represented by his counsel, Daniel Borgen. The State was represented by Megan Jo Kvasager Essig.

[¶9] Testimony was taken from Mr. Ogren. Mr. Ogren testified that his office has represented White since 2007 on a number of cases. Post-Conviction Relief Hearing Tr. p. 7. Mr. Ogren also testified that from his understanding, White had a conviction in federal court that did not require him to register while he was on the reservation, but because of North Dakota laws, if he comes off the reservation and goes into North Dakota then he is required to register. Post-Conviction Relief Hearing Tr. p. 8. Mr. Ogren stated that he provided what he believed to be a complete file of discovery that he received in the case to Mr. Borgen. Post-Conviction Relief Hearing Tr. p. 9.

[¶10] Mr. Ogren went on to testify that he did not believe he was given any orders or judgments in discovery that required White to register, but he had explored this exact issue in another case earlier on and found out White had a federal charge that required him to register. Post-Conviction Relief Hearing Tr. p. 11. The court followed up with Mr. Ogren to ensure they understood his testimony, and he reiterated that this was an issue in an earlier case and he had determined that there was such a conviction which required registration in North Dakota. Post-Conviction Relief Hearing Tr. pp. 12-13. Further, Mr. Ogren testified that he did not recall White telling him that he did not have to register, but that he wanted to go back into federal court to try overturn his conviction that required him to register. Post-Conviction Relief Hearing Tr. p. 14.

[¶11] Testimony was then taken from White. Throughout his testimony, White stated that he was not required to register as a sex offender. Post-Conviction Relief Hearing Tr. pp. 21, 23, 25-27. Closing arguments were made on the record, and Judge Lolita G. Hartl Romanick entered her findings on the record denying White his post-conviction relief. On August 1, 2018, the court issued an order denying post-conviction relief. Order Denying Petitioner's Application for Post-Conviction Relief, August 1, 2018.

[¶12] White appeals the district court's denial of post-conviction relief with respect to the August 1, 2018 order related to the allegation of ineffective assistance of counsel. The State resists White's appeal and urges this Court to affirm the district court's order.

LAW AND ARGUMENT

I. The district court properly denied White’s application for post-conviction relief.

[¶13] Post-conviction relief hearings are civil in nature and are governed by the North Dakota Rules of Civil Procedure. Patten v. State, 2008 ND 29 ¶8, 745 N.W.2d 626. The issue of ineffective assistance of counsel is a mixed question of law and fact that is fully reviewable by the North Dakota Supreme Court. Id. However, a trial court’s findings of fact in a post-conviction relief proceeding will not be disturbed unless clearly erroneous. Id. 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, a reviewing court is left with a definite and firm conviction a mistake has been made. Id.

[¶14] An applicant for post-conviction relief bears a “heavy burden” to prevail on an ineffective assistance of counsel claim. Lindsey v. State, 2014 ND 174, ¶19, 852 N.W.2d 383. The petitioner must show that 1) counsel’s representation fell below an objective standard of reasonableness and 2) that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. Id. (citing Strickland v. Washington, 466 U.S. 668, 688, 694 (1984)). There is a “strong presumption” that counsel’s conduct is within a wide range of reasonable professional assistance. State v. Nikel, 2006 ND 25, ¶11, 708 N.W.2d 867 (citing Strickland v. Washington, 466, U.S. 668, 689 (1984)).

[¶15] The standard for determining whether Mr. Ogren was effective is well-settled. “The standard of effective counsel . . . is ‘not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering

reasonably effective assistance.” State v. Kroeplin 266 N.W.2d 537, 542 (N.D. 1978) (quoting West v. State of Louisiana, 478 F.2d 1026, 1033 (5th Cir. 1973). “A defendant claiming ineffective assistance of counsel has a heavy burden of proving counsel's representation fell below an objective standard of reasonableness and the defendant was prejudiced by counsel's deficient performance.” Smestad v. State, 2011 ND 163, 801 N.W.2d 691, 693 (citing Flanagan v. State, 2006 ND 76 ¶ 10, 712 N.W.2d 602).

A criminal defendant has the right to be represented by counsel under the Sixth Amendment to the United States Constitution and Article I, Section 12 of the North Dakota Constitution. The constitutional right to counsel guarantees effective assistance of counsel. When reviewing claims of ineffective assistance of counsel, we apply the United States Supreme Court's two-part test from Strickland v. Washington[.] First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.

State v. Garge, 2012 ND 138, ¶ 10, 818 N.W.2d 718 (quoting State v. Dahl, 2009 ND 204, ¶ 22, 776 N.W.2d 37; Abdi v. State, 2000 ND 64, ¶ 29, 608 N.W.2d 292; Strickland v. Washington, 466 U.S. 668 (1984)) (internal citations omitted). The Strickland standard requires this Court to “indulge a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.” State v. Nikle, 2006 ND 25, ¶ 11, 708 N.W.2d 867. “Trial counsel's conduct is presumed to be reasonable and courts consciously attempt to limit the distorting effect of hindsight.” Ernst v. State, 2004 ND 152, ¶ 9, 683 N.W.2d 891 (quoting Garcia v. State, 2004 ND 81, ¶ 5, 678

N.W.2d 568) See also State v. Kroeplin, 266 N.W.2d 537, 542 (N.D. 1978); State v. Berger, 148 N.W.2d 331, 337 (N.D. 1967).

[¶16] In the case at hand, the Petitioner is stating that because Mr. Ogren did not have any orders or judgments in his file that require White to register, then Mr. Ogren's performance was deficient. As the State has set forth above, Mr. Ogren did testify that he did not have any orders or judgments, but that he did have knowledge from a prior case with a similar issue that White was indeed convicted of a federal offense that required him to register as a sex offender. Further, Mr. Ogren testified that he did not recall White telling him that he did not have to register, but that he wanted to go back into federal court to try overturn his conviction that required him to register.

[¶17] In fact, White has stated multiple times on the record that he knew he had to register because of a prior federal conviction. Specifically, he stated this at his pretrial hearing before he pled guilty and he said it again at his probation revocation hearing. But when it came to his post-conviction evidentiary hearing, he testified that he had no such conviction and he never knew he had to register.

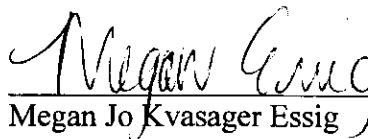
[¶18] Additionally, as the court referenced in its Order Denying Petitioner's Application for Post-Conviction Relief, White has had several opportunities to raise these issues. White had the chance to raise the issue at the Probation Hearing and Pretrial Conference before he pled guilty. As stated above, Mr. Ogren suggested that they continue the Pretrial Conference to allow White more time but White insisted they handle the hearing that day. White also could have raised the issues during the revocation of his probation and in his Rule 35 Motion, but he did not.

[¶19] To satisfy Strickland's prejudice prong, White must "establish a reasonable probability that, but for his counsel's errors, the result of the proceeding would have been different." Ernst v. State, 2004 ND 152, ¶ 9. In fact, virtually no evidence was offered to overcome the "strong presumption" that counsel's conduct was within a wide range of reasonable professional assistance. See State v. Nikel, 2006 ND 25, ¶11. Furthermore, White failed to present any credible evidence that the result of the proceedings would have been different. White's argument regarding ineffective assistance of counsel fails to meet either prong of Strickland. The district court did not err when denying post-conviction relief and therefore White's appeal must be denied.

CONCLUSION

[¶20] For the above-stated reasons, White's appeals should be denied.

DATED this 22nd day of January, 2019.



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