

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Edward Morales,)	Supreme Court No. 20180408
)	
Petitioner and Appellant,)	District Court No. 53-2017-CV-00031
)	
-vs-)	
)	
State of North Dakota,)	
)	
Respondent and Appellee.)	

BRIEF OF APPELLANT EDWARD MORALES

Appeal from the District Court Order Summarily Dismissing

Application for Post-Conviction Relief

entered September 14, 2018.

In and for the County of Williams, State of North Dakota, Northwest Judicial District

Honorable Josh B. Rustad, Judge of the District Court, Presiding, regarding

cases 53-2017-CV-00031 and 53-2013-CR-02819.

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[¶1] STATEMENT OF THE ISSUES

[¶2] Whether the District Court erred in granting the State's motion to dismiss post-conviction applications.

[¶3] STATEMENT OF THE CASE

[¶4] This matter comes before the Court on direct appeal from the District Court's Order "Summarily Dismissing Application for Post-Conviction Relief" entered on September 14, 2018.

[¶5] Appellant Edward Morales ("Morales") initiated this case with a pro se application for post conviction relief. (Appx 16). Counsel was then appointed, but later withdrew. New counsel was appointed, and an amended application was submitted that focused on an ineffective assistance of counsel claim. (Appx 20). The State moved to dismiss the pro se application, and later the amended application. (Appx 23, 37). In response to the State's motions to dismiss, Morales submitted answers, and referenced an affidavit which provided sworn testimony in support of the ineffective assistance of counsel claim. (Appx. 34). The District Court granted the State's motion on September 14, 2018. Morales timely filed a Notice of Appeal. (Appx. 62)

[¶6] STATEMENT OF THE FACTS

[¶7] On or about the 28th day of November, 2013, Morales was the driver of a van involved in a motor vehicle accident, and that accident resulted in the death of his wife, Carmen Morales. (Appx 8). He was charged with Causing Death While Operating a Vehicle under the Influence of Alcohol, a Class A felony, in violation of NDCC § 39-08-01.2(1).

[¶8] Morales applied for and was assigned appointed counsel. After that counsel was permitted to withdraw, Morales was appointed attorney Nicole Foster. Morales pled guilty on October 31, 2014. (Appx. 9).

[¶9] Morales unsuccessfully appealed his criminal case.

[¶10] Morales began his post-conviction case in 2017. Morales' amended application focused on the issue of ineffective assistance of counsel. The allegations regarding ineffective assistance of counsel were as follows:

A. The Applicant was advised by his trial counsel, Nicole Foster ("Foster"), to conditionally plead guilty. Foster promised the Applicant that the Applicant would win his suppression issue at the Supreme Court and be released from custody. Foster did not correctly advise the Applicant that his case would not be dismissed even if he were to prevail at the Supreme Court. Foster did not correctly advise the Applicant that the statute that he was charged under simply requires the State to prove intoxication, not a specific blood alcohol content. Foster made these promises, advice and omissions in bad faith with the intent of securing a plea of guilty. She did this to conceal her lack of preparation for trial. Prior to the Applicant's plea, Foster had only met with him twice; once for a bond reduction hearing and once days before trial to coerce him into pleading guilty.

B. The Applicant pled guilty as a result of the bad-faith, erroneous information provided by Foster. But for Foster's bad-faith, erroneous advice, the Applicant would have not pled guilty and had a trial.

C. In May, 2016, six months after the Applicant's plea, the North Dakota Supreme Court suspended Foster's license to practice law due to multiple complaints. She was later disbarred due to her conduct involving her handling of thirty three client matters. Foster admitted that she had engaged in conduct involving dishonesty, fraud, deceit or misrepresentation that reflected adversely on her fitness as a lawyer and by engaging in conduct that was prejudicial to the administration of justice.

(Appx. 20).

[¶11] In response to the State's motions to dismiss, Morales filed a sworn affidavit, testifying, in the pertinent part:

"Ms. Foster told me that if I conditionally pled guilty to the offense of Causing Death While Operating a Vehicle Under the Influence of Alcohol, that my case would get reversed at the Supreme Court, and that I would be able to go free. She told me that I would have to plead guilty first before the Supreme Court would overturn my case so I could be set free.

I did not want to plead guilty because I am not guilty. I wanted to plead "no contest" because pleading guilty would sound like I am lying. I do not lie. Ms. Foster made it sound like pleading guilty to killing my wife was like a legal technicality that I needed to go

through to get my case thrown out by the Supreme Court so I could go free, so that is what I did. Ms. Foster did not tell me I could have a trial first before my appeal.

I would not have pled guilty if Ms. Foster had not lied to me and told me that I would go free if I did. Ms. Foster told me I had no choice but to plead guilty, and made me feel that I did not have any other choice because she was unprepared for a trial.

(Appx. 35)

[¶12] In its Order Dismissing Application for Post Conviction Relief, the district court wrote, “Petitioner did not . . . show any genuine material fact issues but rather only conclusory allegations regarding Attorney Foster's representation. The Court finds these to be generic claims not sufficient to defeat summary dismissal. There has been no showing of an objectively unreasonable deficient performance or any prejudice resulting from that performance.”

(Appx. 7)

[¶13] This appeal followed.

[¶14] **JURISDICTION**

[¶15] This Court has jurisdiction under N.D. Const, Art. VI, §6, and N.D.C.C. §28-27-02.

[¶16] **STANDARD OF REVIEW**

[¶17] The standard of review for appeals of orders dismissing post conviction relief applications where ineffective assistance of counsel is at issue was most recently summarized in *Stein v. State*, 2018 ND 264 at ¶5:

“A district court may summarily dismiss an application for post-conviction relief if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. N.D.C.C. § 29-32.1-09(1); *Johnson v. State*, 2006 ND 122, ¶ 19, 714 N.W.2d 832; *Heyen v. State*, 2001 ND 126, ¶ 6, 630 N.W.2d 56. This Court reviews an appeal

from summary denial of post-conviction relief as we would review an appeal from a summary judgment. *Johnson*, at ¶ 19; *Heyen*, at ¶ 6. The party opposing a motion for summary dismissal is entitled to all reasonable inferences to be drawn from the evidence and is entitled to an evidentiary hearing if a reasonable inference raises a genuine issue of material fact. *Heyen*, at ¶ 6. For summary judgment purposes, the evidentiary assertions of the party opposing the motion are assumed to be true. *Dinger v. Strata Corp.*, 2000 ND 41, ¶ 14, 607 N.W.2d 886. Ineffective assistance of counsel issues are mixed questions of law and fact, which are fully reviewable on appeal. *Heckelsmiller v. State*, 2004 ND 191, ¶ 5, 687 N.W.2d 454.

[¶18] **ARGUMENT**

- I. The District Court erred in granting the State's motion to dismiss post-conviction applications.

[¶19] Ineffective assistance of counsel cases require the petitioner to show two elements. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

[¶20] First, he must prove his attorney's performance fell below an objective standard of reasonableness. *Stein v. State* at ¶6. An attorney's performance is measured through consideration of the prevailing professional norms. *Id.* Petitioners must overcome the strong presumption that his counsel's representation fell within the wide range of reasonable professional assistance, and courts must consciously attempt to limit the distorting effect of hindsight. *Id.*

[¶21] Second, he must show that the attorney's deficient performance resulted in prejudice. *Id.* Prejudice is shown in the context of a guilty plea if the petitioner 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." *Id.*, citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

[¶22] In this case, Morales testified in a sworn affidavit that Attorney Foster lied to him and told him that the North Dakota Supreme Court would throw his case out and set him free if he pled guilty, so that is what he did. (Appx. 35). Since, for the purposes of summary disposition, Morales’ testimony must be taken as true, the first prong under *Strickland* should have been satisfied: generally speaking, the practice of lying to clients to induce them to plead guilty to serious felonies falls below an objective standard of reasonableness. The same can safely be said about an attorney recklessly or negligently promising certain outcomes of appeals in order to convince a client to plead guilty.

[¶23] Next, Morales testified by affidavit that he would “not have pled guilty if Ms. Foster had not lied ... and told me that I would go free if I did.” Again, for the purposes of summary disposition, Morales’ testimony must be taken as true, so the second prong under *Strickland* should have been satisfied as well.

[¶24] Given these factors, and given the recent ruling in *Stein*, where the issues presented here are similar, and the Court considered evidence of ineffective assistance of counsel beyond the record, there is no question that summary disposition in the instant case was inappropriate. The only explanation for the summary disposition was that the District Court did not take the sworn testimony of Morales as true, which it should have done. Morales is entitled to an evidentiary hearing on the allegations regarding his ineffective assistance of counsel claim, and this matter must be reversed and remanded.

[¶25] It should be noted that this matter is not an ordinary ineffective assistance of counsel case, as the attorney in question was Nicole Foster. See Disciplinary Board v. Foster, 2015 ND 114, 863 N.W.2d 241, Disciplinary Board v. Foster, 2017 ND 113, 894

N.W.2d 378, and Disciplinary Board v. Foster, 2017 ND 161, 896 N.W.2d 911. The damage that this disbarred attorney has single handedly done to her multiple clients is literally incalculable. Her conduct in other matters should have led credence to the testimony of Mr. Morales in his affidavit, but for some reason it did not. Mr. Morales is one of Ms. Foster's many victims. His allegations should have been taken more seriously.

[¶26] **CONCLUSION**

[¶27] The evidence Morales presented to the district court should have raised issues of material fact in support of his claim of ineffective assistance of counsel. The district court erred when it did not take the sworn testimony of Morales as true. Morales is entitled to an evidentiary hearing, and the district court's order summarily dismissing his case must be reversed so that there can be an actual hearing on the merits of his petition.

[¶28] Respectfully submitted this 26th day of December, 2018.

/s/ Matthew Arthurs

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ATTORNEY'S CERTIFICATE OF SERVICE

[¶29] The undersigned hereby certifies that a true and correct copy of the foregoing document, as well as Appellant's Appendix, was on the 26th day of December, 2018, emailed to:

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/s/ Matthew Arthurs

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[¶30] The undersigned hereby certifies that a true and correct copy of the foregoing document, as well as Appellant's Appendix was on the 26th day of December, 2018, emailed to:

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Edward Morales,)	Supreme Court No. 20180408
)	
Petitioner and Appellant,)	District Court No. 08-10-R-00305
)	
-vs-)	
)	Certificate of Service
State of North Dakota,)	
)	
Respondent and Appellee.)	

[1] The undersigned hereby certifies that on the 7th day of January, 2019, he served the following documents upon Edward Morales, inmate, James River Correctional Center, 2521 Circle Dr; Jamestown, North Dakota 58401 by placing them in a post paid envelope and depositing them in the United States Mail:

- A. Brief of Appellant
- B. Appellant's Appendix

[2] Dated this 7th day of January, 2019.

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