

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20190043
Burleigh County No.: 08-2018-CV-02600

Lekemia D'Andre Caster,)
)
Petitioner and Appellant,)
)
vs.)
)
State of North Dakota,)
)
Respondent and Appellee.)

APPEAL FROM ORDER SUMMARILY DENYING
POST-CONVICTION RELIEF APPLICATION
ENTERED ON JANUARY 30, 2019

SOUTH CENTRAL JUDICIAL DISTRICT

HONORABLE DAVID E. REICH, PRESIDING

BRIEF OF APPELLEE
STATE OF NORTH DAKOTA

Tessa M. Vaagen, # 07828
Burleigh County Assistant State's Attorney
514 E Thayer Ave.
Bismarck, ND 58501
(701) 222-6672

TABLE OF CONTENTS

Page/Paragraph No.

TABLE OF CONTENTSi

TABLE OF AUTHORITIESii

ISSUES PRESENTED FOR REVIEW¶ 1

STATEMENT OF THE CASE.¶¶ 2-8

STATEMENT OF FACTS¶¶ 9-14

ARGUMENT¶¶ 15-34

 I. THE DISTRICT COURT DID NOT ERR IN GRANTING THE
 STATE’S MOTION FOR SUMMARY DISPOSITION.¶ 15

 A. Standard of Review¶¶ 16-17

 B. The district court did not err by summarily dismissing Caster’s
 application for post-conviction relief.....¶¶ 18-34

 1. Caster’s argument that the State’s Answer and Motion were
 untimely filed should be rejected as it was not raised below and is
 without merit.¶¶ 19-23

 2. Caster failed to prove he was entitled to relief on the ground of
 the district court not continuing the revocation hearing.¶¶ 24-26

 3. Caster failed to timely raise the information he had from Burleigh
 County Social Services and that information did not amount to newly
 discovered evidence.¶¶ 27-31

 4. Caster failed to prove the amended Criminal Judgment was
 entered in violation of the Sixth Amendment.¶¶ 32-34

CONCLUSION¶¶ 35-37

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Paragraph No.</u>
<u>Bell v. State,</u> 1998 ND 35, 575 N.W.2d 211	¶ 23
<u>Delvo v. State,</u> 2010 ND 78, 782 N.W.2d 72	¶¶ 16, 17, 36
<u>Henke v. State,</u> 2009 ND 117, 767 N.W.2d 881	¶¶ 16, 18, 35
<u>In re Estate of Nelson,</u> 2015 ND 122, 863 N.W.2d 521	¶ 36
<u>Moe v. State,</u> 2015 ND 93, 862 N.W.2d 510	¶ 21
<u>Moore v. State,</u> 2007 ND 96, 734 N.W.2d 336	¶ 29
<u>State v. Caster,</u> 2017 ND 87, 894 N.W.2d 908	¶¶ 8, 12, 25
<u>State v. Juntunen,</u> 2014 ND 86, 845 N.W.2d 325	¶ 36
<u>State v. McAvoy,</u> 2008 ND 204, 757 N.W.2d 394	¶ 25
<u>North Dakota Century Code</u>	<u>Paragraph No.</u>
N.D.C.C. § 29-32.1-01	¶ 29
N.D.C.C. § 29-32.1-06	¶¶ 20, 22, 26
N.D.C.C. § 29-32.1-09	¶ 16
N.D.C.C. § 29-32.1-12	¶ 26
<u>North Dakota Rules</u>	<u>Paragraph No.</u>
N.D.R.Civ.P. 6	¶ 20

ISSUE PRESENTED FOR REVIEW

[¶1] Whether the district court erred in granting the State's Motion for Summary Disposition.

STATEMENT OF THE CASE

[¶2] On May 6, 2015, the Appellant and Petitioner below, Lekemia Caster, was convicted of two (2) counts of Child Neglect or Abuse. Appendix at page 6 (hereinafter “App. ____.”). Caster did not appeal his conviction.

[¶3] On June 30, 2016, the State filed a Petition for Revocation. App. 6. The Petition contained the six (6) allegations. The first four (4) allegations were about the Petitioner using or possessing marijuana. The last two (2) allegations were about new charges that were pending.

[¶4] Caster had his initial appearance on the petition at the Bond Hearing held on July 1, 2016. App. 6. A Revocation of Probation Hearing was set for July 27, 2016. App. 6.

[¶5] Caster requested that the hearing be reset due to medical issues on July 26, 2016. App. 6. His request was denied and the hearing was held on July 27, 2016. App. 6. Caster failed to appear at the hearing and a bench warrant was issued. App. 6.

[¶6] Caster was picked up on the bench warrant and another bond hearing was held on July 29, 2016. App. 6. Shortly after the hearing, Caster applied for court appointed counsel. App. 6. His request was denied due to income on August 2, 2016. App. 6. A new date for the Revocation of Probation Hearing was set on August 22, 2016. App. 6. That hearing was reset again. App. 6.

[¶7] The Revocation of Probation Hearing was held on September 13, 2016. App. 6. Caster appeared without counsel. App. 7. The district court moved forward with the hearing and ultimately revoked Caster’s probation and resented him to eighteen (18) months straight time. App. 7.

[¶8] Caster appealed the Amended Judgment to this Court. App. 7. This Court entered an Opinion and Judgment affirming the district court's judgment on May 18, 2017. App. 7. See State v. Caster, 2017 ND 87, 894 N.W.2d 908.

STATEMENT OF FACTS

[¶9] On October 8, 2018, Caster filed a “Petition for Relief Chapter 29-32.1 Uniform Postconviction Procedure Act,” or an Application for Post-Conviction Relief. App. 1, 8-11.

[¶10] In his application, Caster argued the trial court erred when it refused to grant a continuance of the revocation hearing held on September 13, 2016, and alleged newly discovered evidence. Accompanying his Application was a document he titled “Criminal Case Records Search Results.” App. 1. Specifically, Caster argued the trial court erred by not continuing the revocation proceeding because there were open criminal charges alleged as grounds for revocation. App. 9. Caster also alleged newly discovered evidence in the form of information from Burleigh County Social Services from January 26, 2015. App. 10.

[¶11] The State filed an Answer and Motion for Summary Dismissal on November 8, 2018. App. 1. The Motion listed the grounds for summary dismissal as follows:

- 1) the Petitioner’s Application was untimely filed;
- 2) the Petitioner’s Application does not raise an issue of material fact; and/or [sic]
- 3) the Petitioner’s Application constitutes a misuse of process;
- 4) the Petitioner’s Application presents a claim that was fully and finally determined in a previous proceeding.

App. 16.

[¶12] The State submitted a Brief in Support of State’s Motion for Summary Disposition. App. 1, 17-21. The State argued the statute of limitations for the information from Burleigh County Social Services was two (2) years from the date his original conviction became

final, which was thirty (30) days from May 6, 2015, or June 5, 2015. App. 18-19. The State also argued the claim regarding the continuance was already finally determined in State v. Caster, 2017 ND 87, 894 N.W.2d 908. App. 19. Additionally, despite the State’s contention the information from Burleigh County Social Services had to be raised earlier than the commencement of the action below, the State also argued the information from Burleigh County Social Services did not qualify as “newly discovered evidence” as defined in Chapter 29-32.1. App. 19.

[¶13] On November 26, 2018, Caster submitted an Amended Petition, alleging the Amended Criminal Judgment was obtained in violation of the Sixth Amendment right to counsel. App. 22. Caster also submitted a Brief, arguing his Petition was timely filed and the Amended Criminal Judgment was obtained in violation of the Sixth Amendment right to counsel. App. 25-27. Caster seemed to waive the issues regarding the continuance in light of the pending criminal charges. App. 26.

[¶14] On January 30, 2019, the district court entered an Order summarily denying Caster’s Application “[f]or the reasons articulated in the State’s Motion.” App. 28.

ARGUMENT

[¶15] I. THE DISTRICT COURT DID NOT ERR IN GRANTING THE STATE'S MOTION FOR SUMMARY DISPOSITION.

A. Standard of Review

[¶16] Section 29-32.1-09(3), N.D.C.C., provides, "The court may grant a motion by either party for summary disposition if the application, pleadings, any previous proceeding, discovery, or other matters of record show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." "A petitioner must support his or her application with evidence if the State moves for summary dismissal." Delvo v. State, 2010 ND 78, ¶ 12, 782 N.W.2d 72.

A petitioner is not required to provide evidentiary support for his petition until he has been given notice he is being put on his proof. At that point, the petitioner may not merely rely on the pleadings or on unsupported, conclusory allegations, but must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact. If the petitioner presents competent evidence, he is then entitled to an evidentiary hearing to fully present that evidence.

Henke v. State, 2009 ND 117, ¶ 11, 767 N.W.2d 881. "A genuine issue of material fact exists if reasonable minds could draw different inferences and reach different conclusions from the undisputed facts." Id. at ¶ 12.

[¶17] "[S]ummary denial of an application for post-conviction relief [is] similar to an appeal from a summary judgment." Delvo, 2010 ND 78, ¶ 9, 782 N.W.2d 72. "The party opposing the motion for summary disposition is entitled to all reasonable inferences at the preliminary stages of a post-conviction proceeding and is entitled to an evidentiary hearing if a reasonable inference raises a genuine issue of material fact." Id.

B. The district court did not err by summarily dismissing Caster's application for post-conviction relief.

[¶18] In order to survive a summary dismissal, Caster's application and subsequent pleadings had to contain competent evidence that raised an issue of material fact regarding whether the district court erred in denying his request for a continuance, whether the information from Burleigh County Social Services was timely raised and amounted to newly discovered evidence, and whether the Amended Criminal Judgment was entered in violation of Caster's right to counsel. See Henke, 2009 ND 117, ¶ 11, 767 N.W.2d 881.

1. Caster's argument that the State's Answer and Motion were untimely filed should be rejected as it was not raised below and is without merit.

[¶19] Caster surreptitiously argues the State's Answer and Motion were untimely filed. This argument should be rejected as it was not raised in the district court, the district court was allowed to consider an Answer and Motion filed beyond the thirty (30) days, and Caster failed to demonstrate he was prejudiced by the late filing.

[¶20] The State concedes its Answer was filed one (1) day late. See N.D.R.Civ.P. 6 (indicating the time period for filing "exclude[s] the day of the event that triggers the period"). However, there is nothing within section 29-32.1-06, N.D.C.C., requiring the State to file a Motion for Summary Dismissal within thirty days. Rather, the statute says "Within thirty days after the docketing of an application . . . the state shall respond by answer *or* motion." N.D.C.C. § 29-32.1-06(1) (emphasis added). There is nothing requiring that both be filed within thirty (30) days.

[¶21] Caster had the requisite notice to raise the timeliness issue prior to the filing of his Amended Petition and Brief. He did not do so. App. 22-27. "This Court has repeatedly held that issues not raised or considered in the district court cannot be raised for the first time

on appeal” Moe v. State, 2015 ND 93, ¶ 11, 862 N.W.2d 510. Therefore, his argument should not be considered.

[¶22] Moreover, the statute dictating the time for filing a responsive pleading indicates the pleading shall be filed “[w]ithin thirty days after the docketing of an application or within any further time the court may allow” N.D.C.C. § 29-32.1-06(1). The statute clearly allows the district court to extend the State’s time to respond. While the district court did not specifically extend the State’s filing deadline, the district court implicitly allowed the late filing by not clearly striking it from the record or stating that it did not consider the State’s late filing in its Order.

[¶23] Finally, this Court has addressed a case wherein the State’s responsive filing was grossly untimely. See Bell v. State, 1998 ND 35, ¶23, 575 N.W.2d 211. This Court indicated the district court did not abuse its discretion in considering the response, also noting the petitioner had failed to show he was prejudiced by the State’s late filing. Id. at ¶¶28-29. In the present case, apart from the bare assertion that the State’s Answer or Motion were minimally untimely, Caster has failed to show he suffered prejudice by the district court allowing the late filing. Accordingly, this argument should be rejected.

2. Caster failed to prove he was entitled to relief on the ground of the district court not continuing the revocation hearing.

[¶24] Caster raised the district court’s denial of a continuance at the revocation hearing as a ground for relief in his Petition. App. 9. It is worth noting that it appears Caster waived his challenge to the district court’s denial of his request for a continuance. See App. 26. In his Brief in the court below, he acknowledged that he previously raised the continuance issue on direct appeal in the criminal case and that this Court had affirmed the district

court's denial of the continuance. App. 26. As such, the State does not believe this Court should address that issue in this appeal.

[¶25] Nevertheless, even if this Court considers his argument regarding summary disposition on the request to continue claim, the district court's order should be affirmed. Caster's claim that the revocation hearing should have been continued was already finally determined in State v. Caster, 2017 ND 87, 894 N.W.2d 908. Caster directly appealed the district court's decision to proceed with the revocation despite the continuance discussion and the new crimes included as allegations within the petition. This Court affirmed the district court's decision to proceed. That decision was in line with its previous case law, including its decision in State v. McAvoy, 2008 ND 204, 757 N.W.2d 394.

[¶26] In its Motion below, the State indicated it was moving for summary dismissal on the grounds that Caster's Petition presented a claim that was already fully and finally determined in another proceeding. App. 16. That is one of the defenses that may be raised by the State via answer or motion. N.D.C.C. § 29-32.1-06(3). The State supported that ground for dismissal in its Brief. App. 19. "An application for postconviction relief may be denied on the ground that the same claim or claims were fully and finally determined in a previous proceeding." N.D.C.C. § 29-32.1-12. Therefore, as discussed above, because this Court fully and finally determined this claim in a previous proceeding, which was found by the district court, the district court's Order granting the State's Motion for Summary Disposition on this ground should be affirmed.

3. Caster failed to timely raise the information he had from Burleigh County Social Services and that information did not amount to newly discovered evidence.

[¶27] Caster alleged he had newly discovered evidence from Burleigh County Social Services that would have changed the result of the criminal proceedings. The “evidence” he claimed as new was some information about his working with Burleigh County Social Services from January 2015 until his case was closed in August 2015. App. 3.

[¶28] While it is unclear whether Caster wanted to use that information to attack the underlying conviction or the revocation, the State addressed both its brief submitted in support of its Motion for Summary Disposition. For this information to be effective in a postconviction proceeding attacking his original conviction, Caster would have had to file his application within two years from the date his original conviction became final, which was thirty (30) days from May 6, 2015, or June 5, 2015. Caster failed to do so.

[¶29] For the information to have been considered by the district court, Caster had to show it qualified as “newly discovered evidence.” N.D.C.C. § 29-32.1-01(3). Subsection 3 of section 29-32.1-01, N.D.C.C. provides the Court “may consider an application for relief under this chapter if . . . (1) The petition alleges the existence of newly discovered evidence, . . . which if proved and reviewed in light of the evidence as a whole, would establish the petitioner did not engage in the criminal conduct for which the petitioner was convicted.” To satisfy this burden the Petitioner must show the following:

- (1) the evidence was discovered after trial, (2) the failure to learn about the evidence at the time of trial was not the result of the defendant’s lack of diligence, (3) the newly discovered evidence is material to the issues at trial, and (4) the weight and quality of the newly discovered evidence would likely result in acquittal.

Moore v. State, 2007 ND 96, ¶ 9, 734 N.W.2d 336. Per the Petitioner’s Application, this information existed on January 26, 2015. This information existed months before the Petitioner pled guilty in the underlying criminal case. In his application, the Petitioner indicates he was working with social services by attending classes and meetings. That means he knew about the information back in January of 2015. Therefore, that information is not “new.” It should have been raised well before this time.

[¶30] The information about social services also does not show the Petitioner did not engage in the criminal conduct for which he was convicted. If anything, having to work with social services would be more likely to show he was guilty of the charges.

[¶31] The State also argued the Petitioner’s work with social services was irrelevant to the revocation proceedings because none of the allegations were about him failing to follow through with social services. This falls directly in line with one of the grounds the State listed as a reason for summary disposition, i.e., “the Petitioner’s Application does not raise an issue of material fact” App. 16. Therefore, because the State argued Caster’s Petition failed to raise an issue of material fact, and because the information he had from Burleigh County Social Services does not raise an issue of material fact, the district court did not err in summarily dismissing Caster’s Petition “for reasons in the State’s Motion.”

4. Caster failed to prove the Amended Criminal Judgment was entered in violation of the Sixth Amendment.

[¶32] Caster argued he was denied the right to counsel at his revocation hearing. In support of his argument, Caster made some bare assertions in his Amended Petition and then made legal argument in his Brief. App. 22-23, 25-27.

[¶33] While the State did not file a response to this argument, it was still on Caster to prove he was entitled to relief. He did not do so. Caster merely mentioned the Transcript

from the Revocation Hearing at the bottom of his Application. App. 3. He did not provide a transcript from the revocation hearing. If this Court takes his mere mention of the Transcript and nothing more, and determines Caster did not properly submit the Transcript for the district court, Caster failed to prove he was entitled to relief on that ground. All he submitted to the court was bare assertions that he asked for counsel and his request was denied. That alone does not constitute a Sixth Amendment violation. For example, Requests for counsel can be denied for reasons such as incomplete applications for court appointed counsel, making too much income to qualify for court-appointed counsel, or even not hiring an attorney in time for the court proceeding.

[¶34] Should this Court determine the Transcript was properly before the district court, Caster still did not meet his burden. In fact, the Transcript shows the district court inquired into Caster's income status, determined he was still working, and implied Caster likely would not qualify given his current employment. Furthermore, Caster indicated he was in the process of trying to obtain an attorney for the other open criminal cases, but did not specify he was looking to hire an attorney for the revocation proceeding. Therefore, Caster failed to prove he was entitled to relief on that ground and the district court did not err in summarily dismissing Caster's Petition.

CONCLUSION

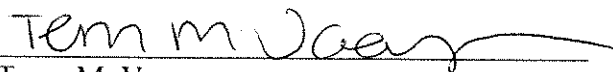
[¶35] In conclusion, Caster failed to satisfy his burden of proving he was entitled to postconviction relief. See Henke v. State, 2009 ND 117, ¶ 11, 767 N.W.2d 881. Since Caster was unable to support his application with evidence after the State put him to his proof, the district court did not err in summarily dismissing Caster's Petition.

[¶36] A more extensive Order should not be required of the district court in this case. The district court, in its Order, cites directly to the State's Motion for Summary Disposition. The State's Notice, Motion, and Brief all cite to the relevant legal provisions and set forth adequate bases for the district court to summarily dismiss the action. This is unlike this Court's decision in In re Estate of Nelson, where this Court was uncertain about under which legal provision the district court dismissed the claim. 2015 ND 122, ¶ 7-9, 863 N.W.2d 521. It is also unlike State v. Juntunen, 2014 ND 86, 845 N.W.2d 325 because this Court's review of a district court's motion to suppress is more fact intensive than its review of a summary dismissal of postconviction relief. In reviewing summary dismissals of postconviction relief, neither the lower court nor this Court engages in fact-finding, but rather gives all reasonable inferences to the Petitioner. See Delvo v. State, 2010 ND 78, ¶ 10, 782 N.W.2d 72. For this reason, nothing more is required of the district court than the Order it rendered in this case.

[¶37] For these reasons, the State respectfully requests that this Court affirm the district court's Order Granting Motion for Summary Disposition and Denying Application for Post-Conviction Relief.

RESPECTFULLY SUBMITTED:

Dated this 23rd day of April, 2019.


Tessa M. Vaagen
Burleigh County Assistant State's Attorney
ND Bar ID# 07828
514 E Thayer Ave.
Bismarck, ND 58501
Office (701) 222-6672

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Lekemia D'Andre Caster,)
)
Petitioner - Appellant,)
)
-vs-)
)
State of North Dakota,) Supreme Ct. No. 20190043
)
Respondent - Appellee,) District Ct. No. 08-2018-CV-02600
)

STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

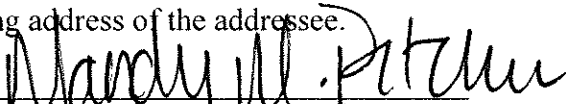
I, Mandy M. Pitcher, being first duly sworn, depose and say that I am a Legal Resident over 21 years old, and on the 23 day of April, 2019, a true and correct copy of the attached:

- 1. Brief of Respondent-Appellee
- 2. Affidavit of Service

were mailed to the following:

Samuel A. Gereszek
Brudvik Law Office P.C.
308 DeMers Avenue
East Grand Forks, MN 56721
Telephone: (218) 773-6841
Email: sam@brudviklaw.com

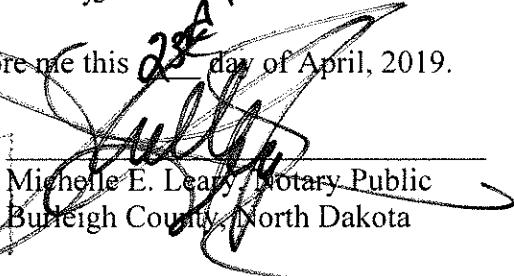
which address is the last known mailing address of the addressee.



Mandy M. Pitcher

Subscribed and sworn to before me this 23rd day of April, 2019.

MICHELLE E. LEARY
Notary Public
state of North Dakota
My Commission Expires December 31, 2019



Michelle E. Leary, Notary Public
Burleigh County, North Dakota