


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

 <p>State of North Dakota,</p> <p>Plaintiff/Appellee,</p> <p>vs.</p> <p>Cody Atkins,</p> <p>Defendant/Appellant.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Supreme Court No. 20200172</p> <p>District Court No. 18-2018-CV-02604</p>
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ON APPEAL FROM ORDER DENYING POST-CONVICTION RELIEF AND ORDER
DISMISSING MOTION TO RECONSIDER
FROM THE DISTRICT COURT
FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY, NORTH DAKOTA
THE HONORABLE JOHN THELEN, PRESIDING

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUES

- I. Whether the district court erred when denying Atkins' Application for Post-Conviction Relief?**
- II. Whether the district court erred when dismissing Atkins' Motion to Reconsider?**

FACTS

[¶1] Atkins was charged September 8, 2014, with Gross Sexual Imposition for having sexually perpetrated upon a two-year old child. Atkins penetrated a two year old's vagina with his finger and also held the toddler down so his co-defendant, Thomas Pinkney, could forcibly penetrate the toddler with a tampon. Atkins confessed to this offense and subsequently pled guilty. Atkins' co-defendant also confessed and pled guilty. Atkins was sentenced to 20 years at the North Dakota Department of Corrections with 5 years suspended for 10 years and 10 years of supervised probation to follow.

[¶2] Since the time of sentencing, Atkins has filed numerous post-conviction matters. Atkins filed a direct appeal claiming that the District Court failed to comply with Rule 11 of the North Dakota Rules of Criminal Procedure. See State v. Atkins, 2016 ND 13, ¶ 5, 873 N.W.2d 676. The appeal was denied based on claims of ineffective assistance of counsel and Rule 11 violations. The North Dakota Supreme Court found that Atkins had raised the Rule 11 claims for the first time on appeal and that the record was not sufficient to establish support for ineffective assistance of counsel. Id.

[¶3] On March 23, 2016, Atkins filed his first petition for post-conviction relief in 18-2016-CV-00559 alleging ineffective assistance of counsel. (Appellant's App. at 9.) Atkins was appointed counsel. On July 1, 2016, the petition was dismissed as counsel never filed a brief in support of Atkins' petition. (Appellant's App. at 12.)

[¶4] On September 21, 2016, Atkins refiled his March 23, 2016, petition as a second post-conviction relief action in 18-2016-CV-01909. (Appellant's App. at 13.) The petition was identical to 18-2016-CV-00559. The petition contained bare allegations of ineffective assistance of counsel. The State responded putting Atkins to his proof.

Atkins then filed a supplemental brief articulating six ways in which his trial counsel was ineffective, including failing to call witnesses at his preliminary hearing or sentencing, failing to notify him that he could cross-examine witnesses, failing to explain matters to Atkins, complaining that his counsel believed Atkins was lying, allegations that Atkins was coerced into making statements, and that he had an alibi for the underlying offense. (Appellee's App. at 4-7.) No affidavit or other supporting minimal evidence was filed in support of the brief. On April 12, 2017, the State moved to summarily dismiss Atkins' second petition for post-conviction relief based upon the fact that Atkins failed to provide any evidentiary support subsequent to being put to his proof. (Appellee's App at 8-14.) The State's motion was granted. (Appellant's App. at 16.) Atkins appealed in Atkins v. State, 2017 ND 290, 904, N.W.2d 738, and the District Court's order was affirmed on February 2, 2017.

[¶5] On July 24, 2017, Atkins filed a Rule 35 Motion for Reduction of Sentence in 18-2014-CR-01844. Atkins alleged he was entitled to a reduction of sentence because he was prohibited from using the Internet as part of his probation conditions. Judge Lolita Hartl Romanick denied the motion on August 4, 2017. (Appellee's App. at 15-22.) The Court indicated that the motion was a third post-conviction action and articulated the previous instances in which Atkins could have raised the issue, but failed to do so. Id.

[¶6] On November 17, 2017, Atkins filed a Motion to Dismiss in 18-2014-CR-01844 alleging, essentially, an illegal prosecution. (Appellee's App. at 23.) There was no supporting affidavit, brief, or other information to provide support for the claim. The State moved to dismiss. (Appellee's App. at 24.) The motion was dismissed on December 12, 2017. (Appellee's App. at 25.)

[¶7] On February 2, 2018, Atkins filed a Motion to Vacate Judgment and Withdraw Plea in 18-2014-CR-01844. (Appellee's App. at 26-29.) Atkins did not serve the State. On February 6, 2018, after becoming aware of the motion, the State filed a Brief in Opposition to the Motion to Vacate Judgment and Withdraw Plea indicating that Atkins did not support his motion with any legal argument, case law, or brief. (Appellee's App. at 30-33.) Atkins was appointed counsel on February 21, 2018, with respect to his Motion to Withdraw Plea. Two days prior to a hearing on the motions, Atkins filed a Motion for a New Trial and requested an attorney represent him on the new motion, which was granted. The motions were subsequently consolidated and counsel filed a supplemental brief alleging that the plea of guilty should be withdrawn due to a manifest injustice and that Atkins Motion for New Trial should be granted based on newly discovered evidence. (Appellee's App. at 34-40.) The State resisted the motion. (Appellee's App. at 41-52.) An evidentiary hearing was held on August 10, 2018. Atkins alleged newly discovered evidence claiming that there were new text messages, a sexual assault kit, and new information relating to the credibility of the State's witnesses and evidence tampering by the State. Atkins offered exhibits in support of his motion, which were considered by the Court. Atkins was able to testify at length about his claims and was subject to cross-examination. Counsel argued on his behalf. His claims were fully and finally considered and on October 31, 2018, the Court entered an order denying Atkins' motion and finding that, despite the pleadings being filed in the criminal case, they were, in fact, a third (fourth if you count the Rule 35 Application) application for post-conviction relief. (Appellee's App. at 53-72.) Atkins filed an appeal on November 21, 2018. The North Dakota Supreme Court affirmed the district court's finding that the

motions were subject to the Uniform Post-Conviction Act as well as affirming the substantive denial of the motion based upon res judicata and misuse of process. Atkins v. State, 2019 ND 145, 928 N.W.2d 441. The North Dakota Supreme Court also affirmed the denial of the motion based upon newly discovered evidence. Id.

[¶8] On November 15, 2018, Atkins filed a fourth application for post-conviction relief in 18-2018-CV-02604. (Appellant's App. at 17.) Atkins initially alleged he was entitled to relief due to an unlawful arrest warrant, involuntary confession, inconsistent statements, false evidence, the sexual assault kit, unlawful entry, judicial bias, malicious prosecution, an illegal charging document, and an illusory plea. (Appellant's App. at 17.) The State filed responsive pleadings, including an Answer, and a Motion to Summarily Dismiss based upon the doctrines of misuse of process and res judicata. (Appellant's App. 21, 22.) On December 7, 2018, the District Court issued an order granting the State's motion and dismissing Atkins's petition for post-conviction relief based upon misuse of process and res judicata. (Appellee's App. at 73-80.) Atkins appealed. On appeal, the North Dakota Supreme Court reversed and remanded because the District Court had not permitted Atkins the 14 days he was entitled to reply to the State's motion after being put to his proof. The District Court was instructed to allow Atkins an opportunity to respond to the State's Motion to Dismiss. See Atkins v. State, 2019 ND 146, 928 N.W.2d 438.

[¶9] Post-remand, in June of 2019, Atkins abandoned issues 1, 3, 4, 5, 7, and 9 of his claim for Post-Conviction Relief in 18-2018-CV-02604, preserving only three original issues: an involuntary confession, knock and announce, and malicious prosecution, and adding a new claim post-remand of ineffective assistance of post-

conviction counsel. (Appellee's App. at 98-111.) Atkins was given the opportunity to be present and heard at a hearing on November 8, 2019. Atkins was represented by counsel and his counsel articulated his position regarding the State's Motion to Dismiss. On December 19, 2019, the District Court issued an Order Denying Post-Conviction Relief. (Appellant's App. at 29.) Atkins did not appeal the District Court's order. Instead, on January 6, 2020, Atkins filed a Motion to Reconsider pursuant to Rule 60(b) of the North Dakota Rules of Civil Procedure. (Appellant's App. at 39.) Atkins reiterated previous arguments he had made to the District Court and argued that the court should reconsider its dismissal of Post-conviction Relief. The State responded with a Brief in Opposition to Defendant's Rule 60(b) Motion to Reconsider. (Appellee's App. at 90-97.) A hearing was held on June 5, 2020. Atkins, at that time, was represented by counsel. Arguments were made and on June 9, 2020, the District Court denied the Motion to Reconsider. (Appellant's App. at 48.)

LAW AND ARGUMENT

I. The district court's order denying Atkins' Post-Conviction Relief Application should be affirmed.

[¶10] A court may deny an application for post-conviction relief on the ground of res judicata if the claim has been fully and finally determined in a previous proceeding. N.D.C.C. § 29-32.1-12(1). Further, a court can deny relief on the grounds of misuse of process. Misuse of process occurs when an applicant presents a claim of relief for which the applicant inexcusably failed to raise either in a proceeding leading to judgment of conviction and sentence or in a previous post-conviction proceeding or files multiple applications containing a claim so lacking in factual support or legal basis as to be frivolous. N.D.C.C. § 29-32.1-12(2). The district court's finding of fact in a post-conviction proceeding are reviewed under a clearly erroneous standard. Middleton v. State, 2014 ND 144, ¶ 5, 849 N.W.2d 196. A finding is clearly erroneous only if 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 it, a reviewing court is left with a definite and firm conviction a mistake has been made. Id. This Court has stated that questions of law are fully reviewable on appeal of a post-conviction proceeding. Id.

[¶11] The three issues raised in Atkins Post-Conviction Application that he did not subsequently abandon were an allegation of an involuntary confession, malicious prosecution, and an allegation regarding "knock and announce". Initially, Atkins' Post-Conviction Relief Application contained ten claims for relief. However, on June 10, 2019, Atkins abandoned the remaining issues and persisted in only those three claims. (Appellee's App. at 98-111.) Atkins also added a new allegation of ineffective assistance of post-conviction relief counsel. (Appellee's App. at 81-89, and 98-111.)

However, it was the State's position that the scope of remand was to give Atkins' the opportunity to respond to the State's Motion for Summary Disposition with respect to the original ten claims, not to add new claims to litigate. See Atkins v. State, 2019 ND 146, ¶ 7.

[¶12] With respect to the three original claims, all three were barred by the doctrine of res judicata. The malicious prosecution was raised in Atkins' Motion to Dismiss in the underlying criminal case, 18-2014-CR-01844, on November 17, 2017. (Appellee's App. at 23-25). Atkins raised the issue of an involuntary confession in his first Application for Post-Conviction Relief in 18-2016-CV-0059. (Appellant's App. at 9.) Atkins alleged that there was an illegal entry into his home to serve the arrest warrant. (Appellant's App. at 9.) Atkins previously raised allegations with respect to the arrest warrant in his Motion to Vacate Judgment and Withdraw Plea of Guilty and Motion for a New Trial in 18-2014-CR-01844. (Appellee's App. at 28.) Finally, with respect to the involuntary confession claim, Atkins raised this issue in Post-Conviction Relief Application in 18-2016-CV-01909, which was dismissed and subsequently affirmed by Atkins v. State, 2017 ND 290. All three of these issues were appropriately dismissed by the District Court under the doctrine of res judicata as they had been fully and finally determined. To the extent that the "knock and announce" claim varied from Atkins' claim of an illegal entry/warrant, this Court has previously stated that applicants are not entitled to post-conviction relief when their claims are variations of previous claims that have been rejected. Garcia v. State, 2004, ND 81, ¶22, 678 N.W.2d 568. As such, the knock and announce claim was justifiably dismissed under the doctrine of res judicata or misuse of process. The district court appropriately dismissed the three

preserved claims of post-conviction relief in this case and the order should be affirmed.

[¶13] With respect to the allegation of ineffective assistance that was added after remand, this Court should affirm the district court's order denying post-conviction relief. Again, this Court remanded Atkins' case to give him an opportunity to counter the State's defense of res judicata and/or misuse of process regarding the initial ten claims that Atkins asserted entitled him to relief. Atkins, 2019 ND 146, ¶ 7.

II. The district court's order dismissing Atkins' Motion to Reconsider should be affirmed.

[¶14] On January 6, 2020, subsequent to the district court's second Order Denying Defendant's Application for Post-Conviction Relief on December 19, 2019, Atkins filed a *pro se* Motion to Reconsider under Rule 60(b) of the North Dakota Rules of Civil Procedure. (Appellant's App. at 39.) In the Brief in Support of Motion to Reconsider, Atkins raised an allegation of newly discovered evidence and ineffective assistance of post-conviction counsel. (Appellant's App. at 39.) The State responded urging the district court to dismiss the motion. (Appellee's App. at 90-97.) Atkins was subsequently appointed and represented by counsel who filed a Supplemental Brief on April 24, 2020, which focused on the allegation of ineffective assistance of post-conviction counsel. (Appellee's App. at 112-114.)

[¶15] Rule 60(b) of the North Dakota Rules of Civil Procedure provides that the court may relieve a party from a final judgment for any of six reasons; (i) mistake, inadvertence, surprise or excusable neglect; (ii) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (iii) fraud (whether denominated intrinsic or extrinsic), misrepresentation, or other

misconduct of an adverse party; (iv) the judgment is void; (v) the judgment has been satisfied, released, or discharged, or a previous judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (vi) any other reason justifying relief from the operation of the judgment. N.D.R.Civ.P. 60(b). Rule 60(b) is not a substitute for an appeal and should not be used to relieve a party from free, calculated, and deliberate choices. Olander Contracting Co. v. Gail Wachter Investments, 2003 ND 100, ¶10, 663 N.W.2d 204 (2003). Judgments should be set aside under Rule 60(b) only in exceptional circumstances where the application of equitable principles demands that such an extraordinary remedy be used to prevent an injustice from occurring. Id. Further, Rule 60(b) only permits a judgment to be set aside, not any imposition of affirmative relief. Id. A district court's denial of a motion for reconsideration will not be reversed on appeal absent a manifest abuse of discretion. Larson v. Larson, 2002 ND 196, ¶11, 653 N.W.2d 869. A district court abuses its discretion only when it acts in an arbitrary, unreasonable, or unconscionable manner, or when its decision is not the product of a rational mental process leading to a reasoned determination. Id.

[¶16] In the case at hand, Atkins never articulated which subsection he was relying on under Rule 60(b), however his counsel later articulated N.D.R.Civ.P. 60(b)(6). Counsel for Atkins argued that he should be allowed to withdraw his guilty plea and the criminal judgment set aside. A hearing was held on June 5, 2020. Arguments were made and the district court denied Atkins Motion to Reconsider.

[¶17] The district court's order must be affirmed. All the matters Atkins raised had been fully and finally determined, subsequent to many written pleadings and post-

conviction relief hearings. There is no reason that justified relief in this case under Rule 60(b)(6) of the North Dakota Rules of Civil Procedure. Further, Atkins was limited on remand to simply counter the State's affirmative defenses of res judicata and misuse of process. Essentially, the Rule 60(b) motion was a vehicle for Atkins to allege he was entitled to relief based on ineffective assistance of post-conviction counsel, despite not initially pleading this in his post-conviction relief application. It was the State's position that the district court should not even address this matter substantively. However, substantively Atkins was not constitutionally entitled to post-conviction counsel, nor is he permitted to make a claim of ineffective post-conviction counsel. Jensen v. State, 2019 ND 126, 927 N.W.2d 479. N.D.C.C. § 29-32.1-09(2) prohibits a claim of ineffective assistance of post-conviction counsel. Atkins relied on Moore v. State, 2013 ND 214, 839 N.W.2d 834. However, since that opinion, there were widespread legislative reforms regarding post-conviction relief. A claim of ineffective assistance of post-conviction counsel is not permissible under N.D.C.C. § 29-32.1. Atkins was not been able to cite any case law post enactment of S.B. 2227, whereas the State cited several cases, including Jensen which confirm this rule of law. Furthermore, even if this were a viable complaint in a post-conviction relief application, Atkins has had multiple opportunities to be heard on these issues and had never raised it in his second, third, or even in his fourth post-conviction relief application regarding prior post-conviction counsel. In his Supplemental brief in support of his motion to reconsider, Atkins complains of counsel from his first post-conviction relief application in 18-2016-CV-00559, Attorney O'Day. However, Atkins did not allege ineffective assistance of post-conviction counsel in his second post-conviction relief application in 18-2016-CV-01909. Atkins complains of his

second post-conviction relief counsel Attorney Hartl who represented him in 18-2016-CV-01909. However, in what was deemed his fourth application for post-conviction relief, his Motion to Withdraw Plea of Guilty and Motion for a New Trial in 18-2014-CR-01844, Atkins did not raise a claim of ineffective assistance of post-conviction relief counsel related to Mr. Hartl. Now in Atkins' 5th post-conviction relief pleadings, he alleges all prior post-conviction relief counsel were ineffective. Not only should the claims be dismissed substantively, but the allegations with respect to both O'Day and Hartl, should be barred by the doctrine of misuse of process as Atkins failed to raise them previously when he had an opportunity to do so. With respect to his allegation that Attorney Gorham was ineffective, it is the State's position that the allegation is beyond the scope of the purpose for the remand in this case. Atkins did not raise it in his application for post-conviction relief. Further, even if considered substantively, which Atkins did have an opportunity to be heard on, the district court appropriately denied the Motion to Reconsider as the district court followed the prevailing case law in North Dakota. The district court's decision was not an abuse of discretion. The district court relied on the law and found that Atkins was not entitled to relief. Therefore, the court's order should be affirmed.

CONCLUSION

[¶18] Based upon the above-stated facts, law, and argument, the district court's order must be reversed and the case remanded for further briefing.

Dated this 14th day of December, 2020.

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THE HONORABLE JOHN THELEN, PRESIDING

CERTIFICATE OF COMPLIANCE

SA#130448

[¶1] The State of North Dakota, by and through Assistant State's Attorney
Meredith H. Larson hereby certifies that the attached brief complies with the page
limitation as set forth in Rule 32 of the North Dakota Rules of Appellate Procedure. The
electronically filed brief contains sixteen (16) number of pages.

Dated this 11th day of December, 2020.

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STATE OF NORTH DAKOTA)
) SS
COUNTY OF GRAND FORKS)

BRIEF OF APPELLEE
APPENDIX OF APPELLEE
CERTIFICATE OF COMPLIANCE

Monty G. Mertz and said e-mail address is: fargopublicdefender@nd.gov

At the office of the Grand Forks County States Attorney's Office.

Shari J. Harker
States Attorney's Office

Subscribed and sworn to before me this 14th day of December, 2020.

Notary Public

JENNIFER ALVSTAD
Notary Public
State of North Dakota
My Commission Expires March 26, 2021