

ORIGINAL

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

20000023

Comes vs. State of North Dakota

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT  
MAY 08 2000  
STATE OF NORTH DAKOTA

Supreme Court No. 20000023

District Court No. 96-K-5720

APPEAL FROM THE ORDER DENYING APPLICATION FOR POST  
CONVICTION RELIEF FROM THE DISTRICT COURT JUDGE  
NORTHEAST JUDICIAL DISTRICT

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BRIEF OF APPELLEE

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RAMSEY COUNTY STATES ATTORNEY  
DEVILS LAKE, NORTH DAKOTA

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TABLE OF CONTENTS

1  
2  
3  
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6  
7  
8  
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11  
12  
13  
14  
15  
16  
17  
18  
19  
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22  
23  
24  
25  
26  
27  
28

Page

Table of Authorities.....	i
Issue Presented .....	ii
Statement of the Case .....	1
Law and Argument.....	4
Conclusion .....	6

RAMSEY COUNTY STATES ATTORNEY  
DEVILS LAKE, NORTH DAKOTA

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21  
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24  
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27  
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TABLE OF AUTHORITIES

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<u>CASES</u>	<u>PAGE</u>
<u>State v. McDonnell</u> , 550 N.W.2d 62,65 (N.D. 1996) . . . .	4
<u>State v. Touche</u> , 545 N.W.2d 193,195 (1996) . . . . .	4

ISSUE PRESENTED

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WHETHER THE DEFENDANT RECEIVED ADEQUATE LEGAL COUNSEL  
IN LIGHT OF OVERWHELMING EVIDENCE AGAINST HIM.

RAMSEY COUNTY STATES ATTORNEY  
DEVILS LAKE, NORTH DAKOTA

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STATEMENT OF THE CASE

On December 14, 1995, the Defendant, along with co-defendants, Adrian Alex and Wayne Greywater, committed a robbery at the Superpumper store in Devils Lake. The Defendant murdered the convenience store clerk, by shooting him in the back of the head, execution style, with a sawed off shotgun, propelling a shotgun slug through his head.

The Defendant was appointed Scott R. Thompson, of Devils Lake to act as his court appointed attorney. Mr. Thompson began practicing law in 1977 and has done criminal defense since that time. Transcript at page 33, hereinafter Tr.at p.33. In his 22 years of practice, he handles, on the average, 700 to 1000 criminal cases a year, and in his years of practice, this would have been the fourth or fifth murder case that he has handled. Tr.at p.34, lines 1-10. Further, the Court appointed another experienced criminal defense attorney, Todd Burianek of Grafton, to represent Mr. Comes in May or June of 1996, and was also present with Mr. Thompson and the Defendant at a pretrial conference which was held on July 22, 1996. Tr.at p.52, lines 5-10. Mr. Burianek also has extensive criminal defense experience, handling at least one prior murder case, namely State vs. Werner Kunkel. Tr.at p.34, lines 11-15.

When Mr. Thompson was initially appointed to represent the Defendant on December 15, 1995, Mr. Thompson met with the Defendant for an hour and a half. Tr.at p.35, lines 7-

1 8. They started going through their initial tactics of  
2 appearing at the initial appearance and requesting a  
3 preliminary hearing and then after receiving the evidence in  
4 discovery, make a decision as to whether or not to go through  
5 the preliminary hearing. Tr.at p.35, lines 9-14. A  
6 transfer hearing was held in January 1996 for transfer the  
7 case from juvenile court to adult court. Tr.at p.35, lines  
8 15-16. Mr. Thompson had also analyzed that transfer hearing  
9 process, based upon the recent Supreme Court decision in  
10 State vs. Barry Garcia, the Cass County case which had  
11 remarkable similarities to this case. Tr.at p.35, lines 20-  
12 25. Mr. Thompson advised the Defendant to waive the case  
13 into adult court, as he had reviewed the evidence, and  
14 believed the State to have sufficient evidence to support  
15 the motion. Tr.at p.35, lines 24-25. He had also had  
16 meetings with the Defendant prior to transfer hearing.  
17 Tr.at p.36, lines 1-3. Mr. Thompson also had numerous  
18 contacts with the Defendant, in addition to reviewing the  
19 evidence. Tr.at p.36.

20 Further analysis of the case occurred after the co-  
21 defendants, Adrian Alex and Wayne Greywater, changed their  
22 pleas to guilty. The co-defendants had continued with their  
23 right to a preliminary hearing and continued with their  
24 pleas of not guilty, and demanded a jury trial. In light of  
25 that, they could not be deposed by Mr. Thompson to determine  
26 what they would testify to. Tr.at p.39. Mr. Thompson had

1 regular meetings and conferences with Mr. Schwarz, who  
2 represented the defendant Alex, and Monte Stensland, who  
3 represented the defendant Greywater. Tr.at p.39. After the  
4 co-defendants plead guilty, Mr. Thompson, on behalf of the  
5 Defendant, deposed both the defendants, Adrian Alex and  
6 Wayne Greywater. Tr.at p.39, lines 19-21. The Defendant  
7 heard that Mr. Alex and Mr. Greywater were going to testify  
8 that the Defendant murdered Donald Jerome. Further, Mr.  
9 Thompson also reviewed the statement of Mr. Y, (pseudonym) a  
10 juvenile, who would also testify that the Defendant murdered  
11 the convenience store clerk.

12 The co-defendants, and witnesses, was just the tip of  
13 the iceberg of the case against the Defendant. The  
14 Defendant commenced to implicate himself in the various  
15 letters he wrote from the Law Enforcement Center to other  
16 friends, and continued to do so even though Mr. Thompson  
17 advised him not to. Tr.at p.40, lines 6-10. After awhile,  
18 both Mr. Burianek and Mr. Thompson would meet with the  
19 Defendant for continued advice. Tr.at p.41, lines 20-25.  
20 Mr. Burianek and Mr. Thompson would also meet with him on  
21 their own. Tr.at p.41, lines 2-3. Mr. Thompson explained  
22 the analysis of the evidence that he used to determine that  
23 there was a significant likelihood that the Defendant would  
24 be convicted. Tr.at p.41, lines 15-25. Mr. Thompson  
25 advised him to plead guilty to an open plea, and based upon  
26 the sentencing of Barry Garcia, he felt it was a likelihood

1 that he would get life with the benefit of parole because he  
2 admitted to the act and took responsibility for it, whereas  
3 Mr. Garcia took the case to a jury and was not given the  
4 opportunity for parole because he did not accept  
5 responsibility. Tr.at p.42, lines 9-15. In fact, Mr.  
6 Thompson and Mr. Burianek's advice to the Defendant was  
7 quite accurate, as he, in fact, was given life with the  
8 opportunity for parole. Tr.at p.42, lines 24-25.

9 Mr. Thompson and Mr. Burianek further inquired as to  
10 issues of changing venue. Tr.at p.43.

11 The only evidence presented by the Defendant in support  
12 of his post conviction relief motion was the Defendant's own  
13 testimony. Tr.at p.4-33.

#### 14 LAW AND ARGUMENT

15 The burden of proof in alleging ineffective assistance  
16 of counsel claim lies upon the defendant to prove that the  
17 representation of counsel fell below an objective standard  
18 of reasonableness and further that there is a reasonable  
19 probability that but for the counsel's unprofessional  
20 errors, the results of the proceedings would have been  
21 different. State v. Touche, 545 N.W.2d 193, 195 (1996).  
22 Further, the Defendant must provide the Court with evidence  
23 in the record to support the claim of ineffective assistance  
24 of counsel. State v. McDonnell, 550 N.W.2d 62,65 (N.D.  
25 1996). There is no evidence in the record or anywhere that  
26 trial counsel's representation fell below an object standard



1 of reasonableness, let alone there was a reasonable  
2 probability that the results would have been different. The  
3 Defendant was represented by not one but two very  
4 experienced criminal defense attorneys, who both represented  
5 the Defendant, and advised the Defendant in this case.

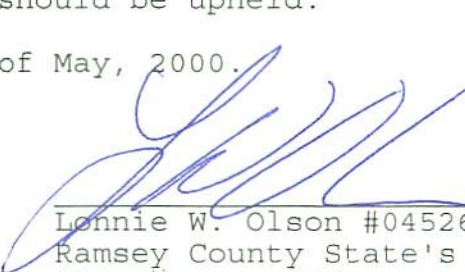
6 The Defendant's only assertion appears to be that he  
7 did not feel that Mr. Thompson spent enough time with him.  
8 Spending sufficient time in the Defendant's own estimation  
9 is not a criteria of ineffective assistance of counsel. The  
10 only potential assertion of ineffective assistance of  
11 counsel pertains to his claim that he should not have waived  
12 the preliminary hearing. In one initial meeting with the  
13 Defendant, Mr. Thompson did explain what the charges were  
14 and what the potential evidence was and he told the  
15 Defendant of that. Tr.at p.36, lines 16-18. Further, Mr.  
16 Thompson went through the files and discussed them with the  
17 Defendant, gave him statements that were relevant for him to  
18 read and discussed things like police reports, and forensic  
19 reports that had come back from the state lab, and the state  
20 hospital psychological evaluation. He further talked with  
21 him about the autopsy report. Tr.at p.38. lines 7-13.  
22 Further, the Defendant was present when the depositions of  
23 the co-defendants Wayne Greywater and Adrian Alex were  
24 taken. Tr.at p.39, lines 18-25. In Mr. Thompson's  
25 professional opinion, in which Mr. Thompson has extensive  
26 experience as a criminal defense attorney, he believed that

1 the Defendant would be convicted if he went to trial. Tr.at  
2 p.38, lines 19-20. Mr. Buriank also apparently believed  
3 that the evidence was sufficient to convict the Defendant,  
4 as Mr. Thompson stated that otherwise they would have gone  
5 to trial. In fact, at no point did the Defendant even tell  
6 his attorney that he wanted to go to trial. Tr.at p.51,  
7 lines 22-23. Both Mr. Buriank and Mr. Thompson were  
8 present when the Defendant changed his plea. Tr.at p.52,  
9 lines 15-17. Thus, the Defendant was given two highly  
10 qualified attorneys, and both advised him as to their  
11 opinions as to a chance of acquittal.

#### 12 CONCLUSION

13 Based upon the foregoing, the Defendant has not proved  
14 to the Court that the trial attorneys representation was  
15 below an objective standard of reasonableness, or that there  
16 was reasonable probability that for the attorneys  
17 unprofessional errors the results would have different. The  
18 decision of the trial court to deny the Defendant's motion  
19 for post conviction relief should be upheld.

20 Dated this 3rd day of May, 2000.

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