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IN THE SUPREME COURT

ORIGINAL

FOR THE STATE OF NORTH DAKOTA

20000023

Comes vs State of North Dakota

RECEIVED BY CLERK
SUPREME COURT

APR 11 '00

Supreme Court No. 20000023

District Court No. 96-K-5720

FILED
OFFICE OF THE
CLERK OF SUPREME COURT

APR 10 2000

STATE OF NORTH DAKOTA

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

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES

I. WHETHER THE DEFENDANT, MARLON LEON COMES RECEIVED
INEFFECTIVE LEGAL ASSISTANCE THROUGH HIS TRIAL COUNSEL?

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STATEMENT OF CASE

I. NATURE OF THE CASE, PROCEEDINGS AND DISPOSITION:

This is an Appeal from a decision of the District Court of Ramsey County which denied the Defendant's Post-Conviction Relief Motion by a decision of this Court rendered on the 19th day of January, 2000. (Appendix page 5)

The Defendant, Marlon Leon Comes, plead guilty to the charges of Murder and Robbery at a Change of Plea hearing on July 22, 1996. Following the plea of guilty on July 22, 1996, Marlon Leon Comes was sentenced on the Murder and Robbery charges on October 18, 1996, Case No. 96-K-5720 A & B. At the sentencing hearing, Marlon Leon Comes requested substitute legal counsel as he indicated he did not believe he received effective legal assistance and also requested permission to withdraw his plea of guilty entered earlier. (see Sentencing Trial Transcript page 1-2) (Appendix page 7,8) Following this discourse between Marlon Leon Comes, his trial counsel and the Court, the Court then proceeded to Sentence this Defendant for the charges of Murder and Robbery.

Following the sentencing hearing of October 18, 1996, this Defendant filed a Motion for Post Conviction Relief. It should be noted that Marlon Leon Comes filed this Motion pro se and that Comes' present counsel was appointed by the Trial Court prior to the hearing dealing with the Motion for Post Conviction Relief. A hearing was held on Defendant's Motion for Post Conviction Relief on September 29, 1999. As noted earlier, the Trial Court issued an Order denying Defendant's application for Post Conviction Relief dated January 19, 2000, (Appendix page 5), and Marlon Leon Comes' counsel filed a Notice of Appeal dated January 26, 2000. (see Appendix page 4)

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STATEMENT OF FACTS

This case arises out of the robbery and murder of a clerk in a Super Pumper store located in Devils Lake, North Dakota. On December 14, 1995, Marlon Leon Comes along with three (3) other accomplices committed armed robbery of the Super Pumper Convenience Store in Devils Lake, North Dakota. During the course of this Robbery the store attendant, Donald Jerome was shot and killed. As a result of these crimes being committed, Marlon Leon Comes who was 15 years of age at the time of the above incidents was charged along with two (2) other juveniles with the crimes of murder and robbery. Following Marlon Leon Comes being charged with these crimes he was appointed Indigent Defense Counsel who represented Marlon Leon Comes at all times of the proceedings. However, Marlon Leon Comes indicated to the Court on October 18, 1996, that he was dissatisfied with his attorney who was initially appointed to represent him in these charges (see Post Conviction Relief Trial Transcript p. 5 line 18.) (Appendix page 9) During the course of these proceedings the Court later appointed a second trial counsel to represent Marlon Leon Comes on the charges of Murder and Robbery. Comes trial counsel waived his right to a preliminary hearing which he indicates is one basis for Comes' claim of ineffective assistance of counsel. (see Post Conviction Relief trial transcript p 8 lines 1-10.) (Appendix page 10) Following this waiver the Defendant was scheduled for a Change of Plea hearing dated July 22, 1996. At this hearing the Defendant changed his plea to Guilty to the charges of Murder and Robbery and sentencing was set for a later date. (see Change of Plea trial Transcript p. 2 lines 11-22.) (Appendix page 6) This Court reconvened for sentencing on October 18, 1996, at which time the Court imposed sentence upon Marlon Leon Comes

1 for these charges. Before rendering sentence Marlon Leon Comes again requested that
2 he be appointed different counsel which request was joined in by his trial counsel, Scott
3 Thompson. (see Sentencing Trial transcript p. 1 lines 8-25.) (Appendix page 7) The
4 Court denied this request and proceeded with sentencing. Following this hearing, Marlon
5 Leon Comes filed the Post Conviction Relief Motion pro se.

6
7 **LAW AND ARGUMENT**

8
9 This Court in Stoppeworth vs State 501 NW 2nd 325, ND 1993 page 327. stated
10 the following dealing with ineffective assistance of counsel cases:

11
12 **“A defendant is guaranteed effective assistance of counsel by both**
13 **the federal and North Dakota Constitutions. US Const. amend. VI and**
14 **ineffective-assistance-of-counsel argument, it is the Defendant’s**
15 **burden to prove that counsel’s assistance was ineffective at trial.**
16 **State vs Skaro, 474 NW 2nd 711, 714 (N.D. 1991). In carrying that**
17 **burden, the defendant must establish two elements. “First, the**
18 **defendant must prove that the Counsel’s performance was deficient.**
19 **Second, the defendant must prove that the deficient performance**
20 **prejudiced the defendant.” State vs Wilson, 488 N.W. 2nd 618, 622**
21 **(N.D. 1992) {citing Strickland vs Washington, 466 U.S. 668, 104 S.Ct.**
22 **2052, 80 L.Ed. 2nd 674 (1984) }.**

23 Marlon Leon Comes raises several issues regarding his trial counsels’ engagement
24 in their representation of him as being deficient. The primary issues raised by Marlon
25 Leon Comes is that given his age of 15 years at the time of the Murder and Robbery, and
26 his age of 16 years at the time of his change of plea and sentencing required his attorneys
27 to spend more time and advising him of his legal rights. This included inadequately
advising Comes of the consequences of his guilty plea.

1 Marlon Leon Comes indicated to his counsel, specifically Mr. Thompson, that he
2 did not believe that Mr. Thompson was spending enough time representing him on these
3 very serious charges. This point is demonstrated by Mr. Thompson's testimony in the
4 Post Conviction Relief hearing as follows: (see Post-Conviction Relief Transcript p. 40
5 lines 17-25.) (Appendix page 12)

6
7 Question: Did he object to you as the way the case was handled?

8 Answer: There was a point in time where um, he didn't feel I was coming
9 down to visit with him enough and he made an objection about my
10 representation. I informed the Court of that, photocopied the file
11 and took it to Mr. Burianek after he was appointed, discussed with
12 Mr. Burianek the file. We then came back. Todd and I both talked
13 to Marlon. Then we got another hearing where Marlon told the
14 Court that um, alright if I continued to help represent him and so. I
15 continued to represent him.

16
17 Clearly from Mr. Thompson's own testimony Marlon Leon Comes was concerned
18 about the amount of time he spent with Mr. Thompson during the course of these
19 proceedings.

20
21 Marlon Leon Comes further testified at the Post Conviction Relief Hearing (see
22 Transcript page 20 lines 13, 14, 15) (Appendix page 11) "I agreed - just because I
23 thought I had no choice but to agree with them because they were representing me."
24 Because of Marlon Leon Comes age, limited educational background, and inexperience
25 Marlon Leon Comes felt he had no choice but to follow the instructions of his attorneys
26 as to a guilty plea on the Murder and Robbery charges.

27
28 Marlon Leon Comes further believes he received deficient legal advice when his
29 trial counsel waived his right to a preliminary hearing. (See Post Conviction Relief
30 transcript p. 8 line 1-10, and lines 22-24) (Appendix page 10)

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Question: What was the discussion?

Answer: Well then Mr. Thompson came to see me, he said that oh, we'll just go in there and waive your preliminary hearing because you know, there's too much evidence against you and if the Judge - if the Judge see's all that he may get mad and that's basically what he said.

Question: That's your memory of the discussion of the preliminary hearing?

Answer: Yes.

Question: And so what did you say?

Answer: So I said, yea.

Question: So at that point and time you said, yes what? Waive it.

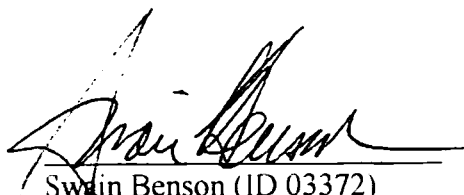
Answer: Yea, because I felt that - well, you know, what can I do. What can I possibly - he's not going to listen to me.

Again we see Marlon Leon Comes' attitude being quite fatalistic and apparently he believed he had no choice or decision making powers as far as the preliminary hearing was concerned. Speaking purely hypothetically perhaps it was error on the part of Comes' trial attorney to waive the preliminary hearing as presentation of that evidence may have convinced Marlon Leon Comes that a guilty plea was in fact the wisest tactical decision to take in this case. However, by Comes' trial counsel waiving the preliminary hearing, Mr Comes never had the opportunity to analyze the state's case in terms of the evidence which the state had against him.

1 CONCLUSION

2 Based upon the foregoing arguments Marlon Leon Comes respectfully request
3 this Court to reverse the Trial Courts Order dated January 19, 2000, denying Comes'
4 request for Post Conviction Relief. (Appendix page 5) Further, Marlon Leon Comes
5 requests that this matter be remanded to the Trial Court for trial on all issues herein.

6 Respectfully submitted this 10th day of April, 2000.

7
8 

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