

ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO. 20010139

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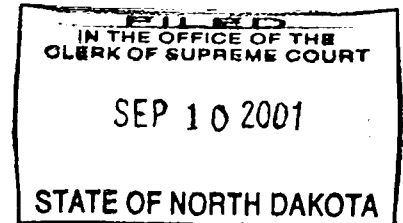
Kyle Kenneth Bell,

Petitioner-Appellant,

vs.

State of North Dakota,

Respondent-Appellee.



Appeal from Judgment entered May 21, 2001
Cass County District Court, East Central Judicial District
District Court Civil No. 09-01-C-0818
Honorable Frank L. Racek, Judge

BRIEF OF APPELLEE

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STATUTES:

North Dakota Century Code:

29-32.1	7, 12, 13
29-32.1-09	5, 6
29-21.1-09(1)	5
29-32.1-12	7
29-32.1-12(1)	8
29-32.1-12(2) (a)	10, 11

OTHER AUTHORITIES:

North Dakota Rules of Civil Procedure:

N.D.R.Civ.P. 52(a)	7
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North Dakota Rules of Criminal Procedure:

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1 appealed to this Court.

2 In Bell v. State, 1998 ND 35, 575 N.W.2d 211, this
3 Court characterized the issues in Bell's first application
4 for post-conviction relief as follows:

- 5 1) the prosecutor made false statements at the
6 preliminary hearing and disclosed confidential and
7 false information to the media,
- 8 2) his counsel failed to file a motion for change of
9 venue as he requested,
- 10 3) he should not have received the maximum sentence
11 because he pled guilty, he had requested mercy of the
12 court, he had found other similar cases without such
13 harsh sentences and Bell had been told by an officer
14 that he would try to get Bell a break,
- 15 4) the trial court failed to acknowledge a state
16 hospital report in sentencing him,
- 17 5) other inmates mistreated him by inflicting physical,
18 mental and emotional abuse on him,
- 19 6) he was denied due process because of false
20 statements and disclosures to the media and
- 21 7) the Cass County State's Attorney improperly refused
22 to charge out a case on his complaint.

23 In its opinion filed February 12, 1998 this court
24 rejected Bell's arguments and affirmed the trial court's

1 order dismissing Bell's application for post-conviction
2 relief.

3 On March 19, 2001 Bell's second application for post-
4 conviction relief was filed in the District Court for Cass
5 County. Bell raises eight (8) issues:

- 6 1) The State unconstitutionally proceeded by way of
7 Information instead of grand jury indictment,
- 8 2) he was denied his alleged sixth amendment right to
9 the assistance of counsel during an interrogation,
- 10 3) his conviction was obtained through an allegedly
11 unconstitutional coerced confession,
- 12 4) his conviction was wrongfully obtained by the use of
13 the media,
- 14 5) he should be permitted to withdraw his guilty plea
15 because he did not know the consequences of the plea,
- 16 6) his conviction was obtained through the use of
17 allegedly unconstitutional evidence,
- 18 7) his sentence was cruel and unusual punishment and,
- 19 8) the criminal judgment and conviction were allegedly
20 unconstitutional.

21 On March 19, 2001 Bell also filed what he labeled a
22 Motion for Order and Motion to Present Petitioner.

23 The Motion for Order asked the Court to issue an order
24 barring any newspaper or media any access to the post-

1 conviction proceedings.

2 The Motion to Present Petitioner asked the Court to
3 issue an order directing that Bell be presented to the Court
4 for a hearing.

5 On April 18, 2001 the State filed 1) a Motion to
6 Dismiss, 2) a Brief in Support of Motion to Dismiss and 3)
7 the State's Response to Petitioner's Motions for Order to
8 Present Petitioner and for Order Denying Media Access to
9 Proceedings.

10 Bell did not file any response to the State's Motion to
11 Dismiss.

12 On May 17, 2001 the District Court issued its
13 Memorandum Opinion and Order Granting Motion to Dismiss.

14 On May 21, 2001 the State served a Notice of Entry of
15 Judgment and a copy of the Judgment dated May 21, 2001 on
16 Bell.

17 On May 30, 2001 counsel for Bell filed a Notice of
18 Appeal.

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LAW AND ARGUMENT

I. THE DISTRICT COURT'S SUMMARY DISMISSAL OF BELL'S APPLICATION WAS PROCEDURALLY CORRECT

N.D.C.C. § 29-32.1-09 provides:

“1. 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 that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.

2. If an evidentiary hearing is necessary, the court may determine which issues of material fact are in controversy and appropriately restrict the hearing.”

Pursuant to N.D.C.C. § 29-32.1-09(1), a trial court may summarily deny an application for post-conviction relief if there is no genuine issue of material fact and as a matter of law the moving party is entitled to judgment. Clark v. State, 1999 ND 78, ¶ 5, 593 N.W.2d 329.

The North Dakota Supreme Court's review of a summary denial of an application for post-conviction relief is similar to the review of a denial of summary judgment under N.D.R.Civ.P. 56. Abdi v. State, 2000 ND 64, ¶ 8, 608 N.W.2d

1 292.

2 The "party opposing the motion for summary disposition
3 is entitled to all reasonable inferences at the preliminary
4 stages of a post-conviction proceeding, and is entitled to
5 an evidentiary hearing if a reasonable inference raises a
6 genuine issue of material fact." Syvertson v. State, 2000 ND
7 185, ¶ 13, 620 N.W.2d 362 (citation omitted).

8 If the moving party establishes there is no genuine
9 issue of material fact the burden shifts to the nonmoving
10 party to show a genuine issue of fact exists. Wilson v.
11 State, 1999 ND 222, ¶ 14, 603 N.W.2d 47 (citation omitted).

12 The resisting party may not merely rely on pleadings or
13 unsupported conclusory allegations. Clark v. State, 1999 ND
14 78, ¶ 5, 593, N.W.2d 329. Rather, the resisting party must
15 present competent admissible evidence by affidavit or other
16 comparable means which raises an issue of material fact. Id.

17 In this case Bell did not respond to the State's Motion
18 to Dismiss.

19 Because 1) N.D.C.C. 29-32.1-09 specifically authorizes
20 summary disposition and 2) Bell failed to present competent
21 admissible evidence by affidavit or other comparable means
22 raising an issue of material fact, the District Court's
23 summary dismissal of Bell's application for post-conviction
24 relief was not procedurally erroneous.

1 II. THE DISTRICT COURT'S DISMISSAL OF THREE OF BELL'S
2 ALLEGATIONS AS RES JUDICATA WAS PROPER

3 The North Dakota Supreme Court applies the "clearly
4 erroneous" standard of Rule 52(a) of the North Dakota Rules
5 of Civil Procedure when reviewing a trial court's findings
6 of fact on an appeal from a judgment or order under the
7 Uniform Post-Conviction Procedure Act. See, e.g., Jensen v.
8 State, 373 N.W.2d 894 (N.D. 1985); State v. Skaro, 474
9 N.W.2d 711, 716 (N.D. 1991); State v. Foster, 1997 ND 8,
10 ¶18, 560 N.W.2d 224.

11 "[A] trial court's findings of fact in actions for
12 post-conviction relief under chapter 29-32.1 will not be
13 disturbed unless clearly erroneous pursuant to Rule 52(a),
14 N.D.R.Civ.P." Houle v. State, 482 N.W.2d 24, 25-26 (N.D.
15 1992).

16 In this case at least three (3) of Bell's allegations
17 set forth in application for post-conviction relief were
18 properly dismissed under the doctrine of res judicata.

19 N.D.C.C. § 29-32.1-12 provides:

20 "1. An application for postconviction relief may
21 be denied on the ground that the same claim or
22 claims were fully and finally determined in a
23 previous proceeding.

24 2. A court may deny relief on the ground of misuse

1 of process. Process is misused when the applicant:
2 a. Presents a claim for relief which the applicant
3 inexcusably failed to raise either in a proceeding
4 leading to judgment of conviction and sentence or
5 in a previous postconviction proceeding; or
6 b. Files multiple applications containing a claim
7 so lacking in factual support or legal basis as to
8 be frivolous.

9 3. Res judicata and misuse of process are
10 affirmative defenses to be pleaded by the state.
11 The burden of proof is also upon the state, but,
12 as to any ground for relief which, by statute or
13 rule of court, must be presented as a defense or
14 objection at a specified stage of a criminal
15 prosecution, the applicant shall show good cause
16 for noncompliance with the statute or rule.”

17 N.D.C.C. § 29-32.1-12(1), allows for post-conviction
18 applications to be denied if the same claim or claims were
19 fully and fairly determined in a previous proceeding.

20 McMorrow v. State, 537 N.W.2d 365 (N.D. 1995); Murchison v.
21 State, 1998 ND 96, ¶ 7, 578 N.W.2d 514 (N.D. 1998).

22 Post-conviction proceedings are not intended to allow a
23 defendant multiple opportunities to raise the same issues.
24 State v. Manke, 361 N.W.2d 247, 248 (N.D. 1985).

1 A petitioner is not entitled to bring repetitious
2 actions when the contentions raised on appeal were simply
3 variations of previous arguments. State v. Johnson, 1997 ND
4 235, ¶13, 571 N.W.2d 372 (N.D. 1997).

5 Issues four (4), five (5), and seven (7) of Bell's
6 second application for post-conviction relief are all issues
7 which have previously been raised and litigated, or are
8 simply variations of earlier allegations made by the
9 petitioner.

10 Issue four (4), Bell's claim that his conviction was
11 wrongfully obtained by the use of the media, is simply a
12 variation on the allegation that the prosecutor made false
13 statements at the preliminary hearing and disclosed
14 confidential and false information to the media. This issue
15 was previously addressed in Bell's first post-conviction
16 application, and appeal therefrom. Bell v. State, 1998 ND
17 35 ¶14, ¶18, 575 N.W.2d 211 (N.D. 1998).

18 Issue five (5), Bell's claim that his guilty plea was
19 involuntary because he did not know the consequences of the
20 plea, is a variation on his request to withdraw his guilty
21 plea. This issue was addressed in Bell's direct appeal of
22 his conviction. State v. Bell, 540 N.W.2d 599, 600-01 (N.D.
23 1995).

24 Issue seven (7), Bell's claim that the sentence was

1 cruel and unusual punishment, is a variation on the
2 allegation that he should not have received the maximum
3 sentence because he pled guilty, he had requested mercy of
4 the court, he had found other similar cases without such
5 harsh sentences and Bell had been told by an officer that he
6 would try to get Bell a break. This issue was addressed in
7 the Bell's first post-conviction application and appeal
8 therefrom. Bell v. State, 1998 ND 35 ¶15, 575 N.W.2d at
9 215.

10 However, even if issues four (4), five (5) and seven
11 (7) had not been addressed in either the direct appeal, they
12 are all the type of issue which Bell has inexcusably failed
13 to raise in either his direct appeal or his first
14 application for post-conviction relief as required by
15 N.D.C.C. 29-32.1-12(2)(a).

16 In Clark v. State, 1999 ND 78, ¶ 23, 593, N.W.2d 329,
17 this Court explained that misuse of process occurs:

18 (1) if the defendant has inexcusably failed to raise an
19 issue in a proceeding leading to judgment of conviction
20 and now seeks review in a first application for
21 post-conviction relief;

22 (2) if the defendant inexcusably fails to pursue an
23 issue on appeal which was raised and litigated in the
24 original trial court proceedings; and

1 (3) if a defendant inexcusably fails to raise an issue
2 in an initial post-conviction application.

3 If issues four (4), five (5) and seven (7) are new
4 issues, then Bell has offered no explanation for his failure
5 to raise them in either the direct appeal or in his first
6 application for post-conviction relief.

7 Whether analyzed as a) res judicata as the District
8 Court concluded or b) a misuse of process pursuant to
9 N.D.C.C. § 29-32.1-12(2)(a), the District Court's dismissal
10 of issues four (4), five (5) and seven (7) of Bell's
11 application for post-conviction relief was not erroneous.

12 III. THE DISTRICT COURT'S DISMISSAL OF FIVE OF BELL'S
13 ALLEGATIONS AS MISUSE OF PROCESS WAS PROPER

14 The remaining five issues raised in Bell's second
15 application for post-conviction relief are misuse of process
16 as they had to be raised at the trial court level, on direct
17 appeal, or in the petitioner's first post-conviction
18 application, and/or they are bare unsupported conclusions.

19 See Clark v. State, 1999 ND 78, 593 N.W.2d 329 (N.D.
20 1999) (affirmed trial court's summary dismissal of a post-
21 conviction application holding, inter alia, that issues
22 raised were barred as misuse of process); Bell v. State,
23 1998 ND 35, 575 N.W.2d at 211 (affirmed trial court's
24 dismissal of petition for post-conviction relief holding,

1 inter alia, that petitioner had provided no factual support
2 for his claims).

3 In Clark, Daniel Clark (hereinafter, "Clark") was
4 convicted of manslaughter for the 1996 shooting death of
5 George Girodengo. Clark v. State, 1999 ND 78 ¶2, 593 N.W.2d
6 at 330-31. On direct appeal the North Dakota Supreme Court
7 affirmed the conviction. Id. at ¶2, 331.

8 After Clark's direct appeal he instituted a post-
9 conviction proceeding under N.D.C.C. ch. 29-32.1. Id. at
10 ¶3, 331. The State of North Dakota filed a motion for
11 summary dismissal of Clark's post-conviction relief
12 application asserting the affirmative defenses of res
13 judicata and misuse of process, and the trial court issued
14 an order granting the State's motion. Id. at ¶3, 6, 331.
15 Clark then appealed the dismissal to the North Dakota
16 Supreme Court raising fourteen issues of alleged error which
17 occurred at the trial court level. Id. at ¶4, 331.

18 The Court analyzed the affirmative defenses of res
19 judicata and misuse of process, and found that res judicata
20 did not apply to the allegations made by Clark. Id. at ¶6-
21 22, 331-334. With regards to misuse of process, the Court
22 found that there are three instances where misuse of process
23 under N.D.C.C. Chapter 29-32.1 can occur stating,

24 "We therefore hold that misuse of process under

1 N.D.C.C. ch. 29-32.1 occurs (1) if the defendant
2 has inexcusably failed to raise an issue in a
3 proceeding leading to judgment of conviction and
4 now seeks review in a first application for
5 post-conviction relief; (2) if the defendant
6 inexcusably fails to pursue an issue on appeal
7 which was raised and litigated in the original
8 trial court proceedings, and finally, (3) if a
9 defendant inexcusably fails to raise an issue in
10 an initial post-conviction application." Id. at
11 ¶23, 334 (internal citations omitted).

12 The Court then applied the affirmative defense to
13 Clark's allegations and held that misuse of process (either
14 issues not raised in proceedings leading to judgment of
15 conviction or issues raised and litigated in a proceeding
16 leading to judgment of conviction but not pursued on direct
17 appeal) applied to thirteen of the fourteen allegations that
18 Clark raised on appeal from the dismissal of his post-
19 conviction application. Id. at ¶24-29, 334-36.

20 In the appeal to this Court of Bell's first application
21 for post-conviction relief, this Court analyzed Bell's post-
22 conviction application and found that he supported his
23 application only with his own allegations stating,

24 "Bell's motion for default judgment had no

1 affidavits or other offers of proof attached.
2 Bell's motion asked the trial court to grant the
3 relief Bell had sought in his application for
4 post-conviction hearing; in effect, Bell relied
5 on his earlier application to prove his default
6 judgment claim. Bell supported his application for
7 post-conviction relief only with his own
8 allegations. Bell did not offer other affidavits,
9 records, or evidence. Bell's application, because
10 it was subscribed and sworn to, serves as an
11 affidavit. Bell's sworn statement contains
12 numerous conclusory allegations of prosecutorial
13 misconduct, misconduct by the attorney who
14 represented him at sentencing, and judicial
15 misconduct, along with a laundry list of other
16 alleged wrongs. Bell, however, has not offered
17 anything in addition to this sworn statement to
18 support his claim, and that statement is
19 convoluted, confused, and confusing." Id. at ¶13,
20 214-15 (internal citations omitted).

21 The Court then reviewed Bell's "affidavit" to determine
22 if he had asserted any factual bases to support his claims
23 for relief, and held that he had not. Id. at ¶14-20, 215-
24 216.

1 In his second petition for post-conviction relief
2 Bell's issues one (1), two (2), three (3), six (6), and
3 eight (8) are all allegations Bell had to raise at the trial
4 court level, on direct appeal, or in his first post-
5 conviction application, and as such are a misuse of process,
6 and/or they are nothing more than his own unsupported
7 conclusions.

8 Issue one (1) in Bell's second petition for post-
9 conviction relief is a claim that the State
10 unconstitutionally proceeded by way of an Information
11 instead of a Grand Jury Indictment. This is a claim that
12 Bell cannot raise for the first time in his second post-
13 conviction application as it had to be raised at the trial
14 court level in a proceeding leading to judgment of
15 conviction (i.e. a motion to dismiss the Information under
16 N.D.R.Crim.P. 12). See Clark v. State, 1999 ND 78 ¶23, 593
17 N.W.2d at 334.

18 Issues two (2), three (3), six (6), and eight (8) in
19 Bell's second petition for post-conviction relief are claims
20 that he was denied his alleged sixth amendment right to the
21 assistance of counsel during an interrogation, that his
22 conviction was obtained through an allegedly
23 unconstitutional coerced confession, that his conviction was
24 obtained through the use of alleged unconstitutional

1 evidence, and that the criminal judgment and conviction are
2 allegedly unconstitutional. These are all claims that Bell
3 had to raise at the original trial court level, on direct
4 appeal of his conviction, or in the petitioner's first post-
5 conviction application. See Clark v. State, 1999 ND 78 ¶23,
6 593 N.W.2d at 334.

7 Additionally, or alternatively, Bell presented to the
8 District Court no affidavits or comparable statements
9 setting forth a factual basis in support of any of the four
10 issues, apart from Bell's own application for post-
11 conviction relief. A post-conviction relief petitioner's
12 unsubstantiated claims are insufficient. See Bell v. State,
13 1998 ND 35 ¶13, ¶20, 575 N.W.2d at 215-16.

14 Because the District Court correctly concluded that
15 Bell's attempt to raise issues one (1), two (2), three (3),
16 six (6), and eight (8) constituted a misuse of process, the
17 District Court's dismissal of issues in Bell's application
18 for post-conviction relief was not erroneous.

19 IV. THE DISTRICT COURT'S SUMMARY DISMISSAL OF BELL'S
20 MOTION TO BE PRESENT AT A HEARING AND BAR THE MEDIA WAS
21 PROPER

22 Bell presented no authority to the District Court in
23 support of his request that the media be excluded from any
24 hearing.

1 Because the District Court summarily dismissed Bell's
2 second application for post-conviction relief, no
3 evidentiary hearing was necessary.

4 Because no evidentiary hearing was necessary, there was
5 no reason for the District Court to issue an order directing
6 that Bell appear for it.

7 Because no evidentiary hearing was necessary, there was
8 no reason to bar the media from it.

9 In light of the District Court's summary dismissal of
10 the merits of Bell's second application for post-conviction
11 relief, the District Court correctly dismissed Bell's motion
12 to be present at a hearing and bar the media.

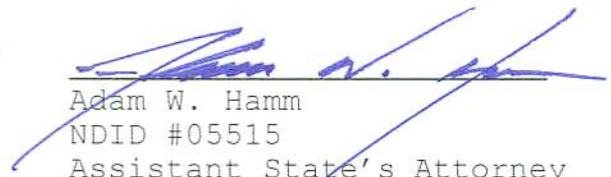
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CONCLUSION

The judgment of the District Court dismissing Bell's second application for post-conviction relief should be affirmed.



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