ORIGINAL

IN THE SUPREME COURT 20030007

STATE OF NORTH DAKOTA

Patrick T. McMorrow,	)	
	)	Supreme Court No.
Petitioner-Appellant,	)	
	)	20030007
-vs-	)	
	)	
State of North Dakota,	)	Cass County District Court No.
	)	
Respondent-Appellee.	)	09-02-C-1471

APPELLEE BRIEF

APPEAL FROM JUDGMENT
ENTERED ON FEBRUARY 21, 2003
IN THE EAST CENTRAL JUDICIAL DISTRICT COURT, CASS COUNTY,
STATE OF NORTH DAKOTA
THE HONORABLE RALPH R. ERICKSON, PRESIDING

LORI S. MICKELSON (#05188)
TRENT W. MAHLER (#05817)
Assistant State's Attorneys
Cass County State's Attorney's Office
P.O. Box 2806
Fargo, ND 58108-2806
Phone: (701) 241-5850
Fax: (701) 241-5838
Attorneys for Respondent-Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Supreme Court

North Dakota Supreme Court

Statutes

North Dakota Rules

STATEMENT OF THE ISSUES

The issues upon appeal before the North Dakota Supreme Court in this matter, as submitted by the Appellant, are as follows:

I. Whether the Trial Court's finding that Mr. McMorrow failed to prove prosecutorial misconduct was clearly erroneous.

II. Whether the Trial Court's finding that Mr. McMorrow failed to prove relevance of the Civil Restraining Order Proceedings was clearly erroneous?

III. Whether the Trial Court's finding that Mr. McMorrow failed to prove that he was prejudiced by excessive bail was clearly erroneous?

IV. Whether the Trial Court's finding that Mr. McMorrow failed to prove a Rule 16 violation was clearly erroneous?

V. Whether the Trial Court's finding that Mr. McMorrow failed to prove ineffective assistance of counsel was clearly erroneous?

VI. Whether the Trial Court's denial of Mr. McMorrow's several pre-hearing motions was an abuse of discretion?

STATEMENT OF THE CASE AND FACTS

Appellant Patrick T. McMorrow shall hereinafter be referred to as "defendant". Appellee State of North Dakota shall hereinafter be referred to as "State".

The State concurs with the Statement of the Case within the defendant's Appellate Brief, with the following additions for clarification purposes. The defendant was sentenced on March 8, 2002 for two charges of Violation of Protection Order, both Class C Felonies, failure to register as a sex offender, a Class A Misdemeanor, and for a revocation of probation on a charge of Terrorizing, a Class C Felony, to two years with the North Dakota Department of Corrections, credit for forty-eight days served. Tr. 7, l. 8-19; Tr. 62, l. 5-21. The defendant testified at the evidentiary hearing on December 20, 2002. Tr. 3-57. After the defendant testified, the State made a motion for summary disposition, Tr. 69, l. 23-25, which the Court granted. Tr. 89, l. 20; App. 22-23.

The State would also concur with the Statement of the Facts within defendant's Appellate Brief to the extent that the defendant's testimony is set forth, however the State does not agree with the content of the defendant's testimony.

ARGUMENT

BURDEN OF PROOF AND STANDARD OF REVIEW

As a preliminary matter, the State asserts that the burden of establishing a basis for post-conviction relief at the District Court level rests on the applicant. Abdi v. State, 2000 ND 64, ¶8, 608 N.W.2d 292. A trial court may summarily dismiss an application for post-conviction relief if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. N.D.C.C. §29-32.1-09(1); St. Claire v. State, 2002 ND 10, ¶11, 368 N.W.2d 39. If the moving party establishes there is no genuine issue of material fact, the burden shifts to the nonmoving party to show that a genuine issue of material fact exists. Syvertson v. State, 2000 ND 185, ¶13, 620 N.W.2d 362. A party opposing a motion for summary disposition must raise an issue of material fact. Id.

The State moved for summary disposition in this matter. Docket no.8; App. 14. The District Court provided the defendant a hearing before the trial court on his post-conviction application. The defendant testified and arguments were presented by counsel, and the District Court granted the State's motion for summary disposition and denied the defendant's post-conviction application. Tr. 89, l. 20; App. 22-23.

Actions for post-conviction relief under Chapter 29-32.1, N.D.C.C., are civil in nature. St. Claire, 2002 ND 10, ¶8, 638 N.W.2d 39. As such, a trial

court's findings of fact in actions for post-conviction relief under Chapter 29-32.1 will not be disturbed unless clearly erroneous pursuant to Rule 52(a), N.D.R.Civ.P. Houle v. State, 482 N.W.2d 24, 25-26 (N.D. 1992). A finding of fact is clearly erroneous if it is 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 the finding, a reviewing court is left with a definite and firm conviction a mistake has been made. DeCoteau v. State, 2000 ND 44, ¶¶ 10-11, 608 N.W.2d 240.

I. Whether the Trial Court's finding that Mr. McMorrow failed to prove prosecutorial misconduct was clearly erroneous.

The defendant claims that there was prosecutorial misconduct because of selective or discriminatory prosecution. "A defendant alleging selective prosecution must show that the State has not generally prosecuted other similarly situated persons and that the State selected the defendant for prosecution for discriminatory reasons." State v. Kraft, 539 N.W.2d 56, 58 (N.D. 1995) (citing State v. Mathisen, 356 N.W.2d 129 (N.D. 1984)). "A defendant claiming selective prosecution must establish other similarly situated individuals have not been prosecuted and the prosecution of the defendant is based upon constitutionally impermissible considerations." Gale v. North Dakota Board of Podiatric Medicine, 1997 ND 83, ¶ 32, 562 N.W.2d 878 (citing Mathisen, 356 N.W.2d at 133; State v. Knoefler, 325 N.W.2d 192, 198 (N.D. 1982)). "A failure to prosecute one person, similarly situated, does not meet the threshold of our selective enforcement test." Kraft, 539 N.W.2d at 58.

The defendant testified at the hearing about reports that he made to the police that were never prosecuted. Tr. 23-28; Docket nos. 40, 41, 42, 43. On cross-examination, the State questioned the defendant about the sufficiency of the evidence in the police reports that were not prosecuted. Tr. 39-41. The defendant did not offer sufficient testimony that other similarly situated individuals have not been prosecuted and that the prosecution of the defendant is based upon constitutionally impermissible considerations.

In finding that the defendant had not shown selective prosecution, the trial court stated, in part:

> Now, on selective prosecution what's the burden? The burden isn't that he was prosecuted and other people have - - who might have done the same thing have not been prosecuted, it's not that alone. In addition the (sic) that, he has to establish that there has been some purposeful or intentional misconduct on the part of the authorities who prosecuted, that would involve both the police and the prosecutors. More specifically, what he's got to show is that there has been some sort of improper motive, that somebody has been motivated by some evil intent not merely just sloppy police or poor decision making, that's not enough. And that to me seems to be a problem here. . . . I can't say that the selective determination is an abuse of that sort of discretion. I can't say that there is a selective prosecution based upon the record before me that would be unconstitutional, that would violate the equal protection clause. I can't do it. Tr. 84, l. 17 - Tr. 86, l. 6.

The burden of proving prosecutorial misconduct is on the defendant. The defendant failed to meet his burden. The finding of the trial court that the defendant failed to prove prosecutorial misconduct was not clearly erroneous.

II. Whether the Trial Court's finding that Mr. McMorrow failed to prove relevance of the Civil Restraining Order Proceedings was clearly

erroneous?

Section 29-32.1-12, N.D.C.C., provides, in part:

> 2. A court may deny relief on the ground of misuse of process. Process is misused when the applicant:
>
> a. Presents a claim for relief 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;

In regards to misuse of process, the Supreme Court has held as follows:

> We therefore hold that misuse of process under N.D.C.C. ch. 29-32.1 occurs (1) if the defendant has inexcusably failed to raise an issue in a proceeding leading to judgment of conviction and now seeks review in a first application for post-conviction relief; (2) if the defendant inexcusably fails to pursue an issue on appeal which was raised and litigated in the original trial court proceedings, *see*, *e.g., State v. Willey* 381 N.W.2d 183 (N.D.1986); and finally, (3) if a defendant inexcusably fails to raise an issue in an initial post-conviction application, *see, e.g., Silvesan v. State*, 1999 ND 62.

Clark v. State, 1999 ND 78, ¶ 23, 593 N.W.2d 329, 334.

The defendant claims that the protection order should not have been issued because he never engaged in violence against Paula Larson, as shown by the transcript from the civil protection order hearing. Tr. 18, l. 24 - Tr. 19, l. 2; Docket No. 39. The defendant made a direct appeal to the Supreme Court challenging the issuance of the protection order, and that the district court's issuance of the order was affirmed. Larson v. McMorrow, 2002 ND 108, ¶2, 651 N.W.2d 692; Tr. 19, l. 3-8; Tr. 48, l. 13-25. The defendant had his day in Court regarding this matter when he directly appealed the grant of the protection order to the Supreme Court. The defendant never raised this issue to the trial court before entry of his guilty pleas in the criminal matters. To try to bring it up now in

the post conviction relief action is a misuse of process.

As to this issue, the trial court determined,

I don't see where Judge Racek's determinations that were made in the

underlying domestic violence protection order case where they fit at all. I mean, I think that that was litigated. He made some determinations. There was an opportunity to bring that to the supreme court, that opportunity was exercised. The issuance of the order was confirmed. Even if it had been an unlawful order our law does establish that the violation of an unlawful court order can in itself still be a violation of an order subject to a criminal prosecution. The idea being is that we don't want everybody just choosing on their own which order they are going to follow and which ones they aren't. And there have been lawyers that have been disciplined in the not so recent past for advising their clients to ignore certain court orders because they said they were not possibly lawful. So, I just don't think you can do that. And I think that that claim is - - there is insufficient evidence to indicate. This is not a 1983 action. This is not an action in which there is a claim for money damages arising out of unconstitutional actions. This is a post-conviction relief action. I don't think it fits within the post-conviction relief statute. Tr. 87, l. 10 - Tr. 88, l. 6.

The finding of the trial court that the defendant failed to prove relevance of the

civil restraining order proceedings was not clearly erroneous.

III. Whether the Trial Court's finding that Mr. McMorrow failed to prove

that he was prejudiced by excessive bail was clearly erroneous?

Rule 46, N.D.R.Crim.P, provides, in part:

(a) **Release before trial.**
(1) At the initial appearance before a magistrate of a person charged with an offense, the magistrate shall order the person released pending trial on the person's personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the magistrate, unless the magistrate determines, **in the exercise of the magistrate's discretion**, that such release will not reasonably assure the appearance of the person as required . . . (emphasis added)
(3) In determining which conditions of release will reasonably assure appearance, the magistrate, on the basis of available information, shall consider the nature and circumstances of the offense charged, the weight of the evidence against the person, the person's family ties, employment, financial resources,

character and mental condition, the length of the person's residence in the community, the person's record of convictions, the person's record of appearance at court proceedings or of flight to avoid prosecution or failure to appear voluntarily at court proceedings, and the nature and seriousness of the

danger to any person or the community posed by the person's release.

The defendant testified that his bail was set at $60,000 for an A misdemeanor. Tr. 30, l. 6-11. On cross-examination by the State, the defendant admitted that there were a number of times that he was arrested and the allegation was that he was violating the protection order by having some type of contact. Tr. 45, l. 4-14. The defendant was in custody on a number of different files for a number of different offenses occurring within a narrow frame of time. The defendant was in custody for failure to register as a convicted sexual offender, a class A misdemeanor, Docket no. 45; violation of protection order, a class C felony, Docket no. 46; violation of protection order, a class C felony, Docket no. 47; violation of protection order, a class A misdemeanor, Docket no. 48; violation of order prohibiting contact, a class A misdemeanor, Docket no. 49; violation of order prohibiting contact, a class A misdemeanor, Docket no. 50; and on a revocation petition for an original charge of terrorizing, a class C Felony, Docket no. 51. Tr. 62, l. 5 - Tr. 63, l. 8. Due to the number of charges that were facing the defendant, as well as the nature of the charges, the bail amount that was set by the trial court was appropriate and not excessive under the circumstances.

The trial court, held in regards to this issue, "The excessive bail. Frankly, there were many considerations that went into the question of bail. And it seems to me that the amount of the bail, while somewhat unusual, is within the amount or is within the purview of the discretion of the judge." Tr. 88, l. 7-11. The finding of the trial court that the defendant failed to prove that he was prejudiced by

excessive bail was not clearly erroneous.

IV. Whether the Trial Court's finding that Mr. McMorrow failed to prove a Rule 16 violation was clearly erroneous?

The defendant asserts that he was not provided access to discovery by his attorneys or by the Court. The defendant testified at the motion hearing that he did not receive copies of the police reports, but also stated that he was represented by counsel. Tr. 32, l. 10-25. The defendant could not offer any proof that he was not provided copies of his police reports. The State's Attorney's Office could not have any contact with the defendant since he was represented by counsel. "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." N.D.R.Prof.Conduct. 4.2.

In addressing this issue, the trial court stated, "The violations of Rule 16. Once again, those violations of law do not rise to the level to afford the relief indicated here, I think that - - well, frankly at looking at the record, I don't think there's been any indication that Rule 16 was intentionally violated by the State. That there were requests made and that those requests were not complied with." Tr. 88, l. 12-18. The finding of the trial court that the defendant failed to prove a Rule 16 violation was not clearly erroneous.

V. Whether the Trial Court's finding that Mr. McMorrow failed to prove ineffective assistance of counsel was clearly erroneous?

The United States Supreme Court stated a two-part test for determining ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) which this Court laid out in Woehlhoff v. State, 487 N.W.2d 16, 17 (N.D. 1992): "First, a defendant must show that counsel's representation fell below an objective standard of reasonableness. 466 U.S. at 688, 104 S.Ct. at 2064. Second, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. 466 U.S. at 694, 104 S.Ct. at 2068."

The defendant did not make any specific allegations as to why his defense counsel were ineffective in his petition for post conviction relief. Docket no. 1; App. 3-4. The defendant also did not offer any specific testimony that supported his ineffective assistance of counsel claim. When asked by defense counsel to articulate for the Judge why his attorneys were ineffective, the defendant responded that his attorneys kept saying he was guilty. Tr. 21, l. 25. He then continued about the conditions of the jail and not having access to law books and wanting to represent himself. Tr. 22, l. 1-20. None of the defendant's testimony indicated that "counsel's representation fell below an objective standard of reasonableness or that but for counsel's unprofessional errors, the results of the proceedings would have been different."

As to this issue, the trial court stated, in part, "Based on the record that has been presented to the Court here, there is an insufficient quantum of evidence for the Court to find that the weight of the evidence would sustain a finding of ineffective assistance of counsel." Tr. 88, l. 20-24. The trial court's finding that the defendant failed to prove ineffective assistance of counsel was not clearly erroneous.

VI. Whether the Trial Court's denial of Mr. McMorrow's several pre-hearing motions was an abuse of discretion?

The defendant made motions for depositions and for a change of venue, both of which were denied by the trial court on November 21, 2002. Docket nos. 32-33. On December 5, 2002, the trial court issued a Memorandum & Order more specifically addressing the defendant's numerous requests. Docket no. 37; App. 18-21. The trial court noted that none of the defendant's requests were in the appropriate form to be considered, however the trial court did address the issues raised by the defendant. Id.

The defendant appears to specifically focus on the denial of his request for discovery. Although discovery is allowed in post-conviction proceedings, N.D.C.C. §29-32.1-08, the defendant did not show what discovery he desired that he was denied. The defendant made a motion for depositions, but did not indicate who he wanted to depose. Docket no. 32. In response to questions by the trial court, the defendant stated he wanted to subpoena "all the people with the Fargo Police Department that I've had contact with over the last 14 years

now. . . . And the state's attorney's office. There's got to be something wrong here." Tr. 65, l. 20-25.

The trial court laid out specific reasons in its Memorandum & Order as to why the requests were not being granted. Docket no. 37; App. 18-21. The defendant did not offer any testimony at the evidentiary hearing that supported his requests for discovery or depositions. The trial court did not abuse its discretion in denying the prehearing motions of the defendant.

CONCLUSION

Based upon the above and foregoing, the defendant's appeal is without merit, and the State of North Dakota respectfully requests that the Order Granting Summary Disposition dated January 31, 2003, and subsequent Judgment of the Honorable Ralph R. Erickson, District Judge, be, in all things, affirmed.

Respectfully submitted this 2nd day of May, 2003.

_____
Lori S. Mickelson (NDID #05188)
Assistant State's Attorney
Cass County State's Attorney's Office
P.O. Box 2806
Fargo, ND 58108-2806
Phone: (701) 241-5850

_____
Trent W. Mahler (NDID #05817)
Assistant State's Attorney
Cass County State's Attorney's Office
P.O. Box 2806
Fargo, ND 58108-2806
Phone: (701) 241-5850