ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA 20030007

Patrick T. McMorrow,	)	
	)	
	)	SUPREME COURT NO. 20030007
Petitioner/Appellant,	)	
	)	DISTRICT COURT NO. 09-02-C-1471
-vs-	)	
	)	
State of North Dakota,	)	
	)	
Respondent/Appellee.	)	

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BRIEF OF PETITIONER/APPELLANT PATRICK T. MCMORROW

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

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STATEMENT OF THE CASE

This is an appeal from a Judgment which dismissed an application for post-conviction relief, and was entered on the 21st day of February, 2003, by the Court, the Honorable Ralph R. Erickson, Judge of the District Court, presiding. The Defendant, Patrick T. McMorrow, filed his Petition for Post-Conviction Relief on April 26, 2002. (App. 1).[1] Docket Number 1. The State responded with a Motion for Summary Disposition on May 23, 2002. (App. 10-15). Docket Number 8. An evidentiary hearing was held on December 20, 2002. On February 21, 2003, the Court ordered the dismissal of Mr. McMorrow's claim for post-conviction relief, and Judgment was entered accordingly. (App. at 24) Docket Numbers 62 and 64. A Notice of Appeal was filed on January 3, 2003 (App. 25). Docket Number 56. This Court would please note that the trial court ruled from the bench at the evidentiary hearing on December 20, 2002, and directed the State to prepare a conforming Order and Judgment. (Tr. 93). Mr. McMorrow filed his Notice of Appeal pro se without waiting for the formal entry of the Order and Judgment.

[1]**The Appendix to Appellant's brief will be abbreviated "App."**

STATEMENT OF THE ISSUES

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 FACTS

Mr. McMorrow was the only witness who testified at the evidentiary hearing on his petition for post-conviction relief. (Tr. 3-57)[2] Mr. McMorrow had a relationship with a woman named Paula Larson, for about eleven years. He lived with her for about seven of those years. (Tr. 8-9). Mr. McMorrow's current incarceration started to some extent with an allegation of simple assault against him, which was later dismissed, stemming from an attempt to discipline one of Ms. Larson's children. (Tr. 9). At some point a judge entered an order prohibiting Mr. McMorrow from having contact with Ms. Larson. (Tr. 10). In connection with a pattern of incidents related

[2]The Transcript of the hearing will be referred herein as Tr.

to Ms. Larson, Mr. McMorrow claimed that he was denied equal protection and due process by the police and Cass County prosecutors. (Tr. 10). One of Mr. McMorrow's chief complaints was that, even though he was ordered not to have contact with Ms. Larson, she continued to have contact with him. Mr. McMorrow wanted to get a restraining order against Ms. Larson, but he could not get anyone to help him. He asked the Fargo Police to help him, and they told him they could do nothing. He went to the Rape and Abuse Crisis Center, and was told they could not help him because they had assisted Ms. Larson in the past. He was told the same thing by the State Bar Association. (Tr. 12-13).

At some point, Ms. Larson brought a private civil action against Mr. McMorrow for a protection order. Ms. Larson testified at the hearing on the protection order and Mr. McMorrow cross-examined her. (Tr. 15-16). A transcript of the hearing was received as Plaintiff's Exhibit 1. Docket Number 39. During her testimony, Ms. Larson conceded that Mr. McMorrow had not ever threatened her with physical violence, but that she had threatened him with violence and had thrown things at him. (Tr. 16). She based her request for a protection order on a meeting at a store where Mr. McMorrow stated that "I know where you live, and you get what you ask for." (Tr. 17). Mr. McMorrow believed that there was no basis for the entry of the protection order, and that his appeal of the entry of that order was ineffective because he was denied provision of a transcript of the hearing. (Tr. 19). Mr. McMorrow believes that he was never factually guilty of violating any protection order. (Tr. 20). At the same time, Ms. Larson came over to his house, threatened

that she was going to kill him, hit him several times, threw things at him, and broke things in his house. He reported these things to the police and they said they could do nothing about it. (Tr. 20).

Mr. McMorrow claimed that his appointed attorneys kept saying he was guilty. He was kept in jail and did not have access to law books. He tried to make motions to the court, but nothing was done for him. He felt that he and one of his court-appointed attorneys, Mr. Mottinger, had a conflict, because of prior dealings they had, and that Mr. Mottinger was "working for the state." (Tr. 22).

Several police incident reports were received in evidence. Exhibits 2,3,4,& 5, Docket Numbers 40-44. Exhibit Number 2 was a report that Ms. Larson had trespassed at his house, which was never prosecuted. (Tr. 24). Exhibit Number 3 was a report of a burglary at his house, where a number of items were removed. Ms. Larson was never questioned and there was no prosecution. (Tr. 25). There was a time after he had reported Ms. Larson for trespassing at his house, and nothing was done because he "had no proof." She later came there again. He called the police, and then stood behind her car so she could not leave. When the police came, instead of arresting her for trespass, they then threatened to arrest him for felonious restraint. (Tr. 26). Exhibit Number 4 was a report about a missing computer, where again the police did not help him. (Tr. 27).

Mr. McMorrow also claimed that he had never been validly served with two of the restraining orders. He explained a conversation with a deputy who claimed to have left the papers in his mailbox, but he never received them. (Tr. 28-29).

Mr. McMorrow felt he received ineffective assistance of counsel in several respects. Mr. McMorrow felt that he had valid defenses to the charges against him, but he felt he had no choice but to plead guilty. (Tr. 30). He was being held in jail on a $60,000 bond on a class A Misdemeanor. (Tr. 29-30). He felt that he could not properly defend his cases because he was being held in jail, and that his attorneys told him he would stay in jail and that his bail would not be changed, and he should just plead guilty. (Tr. 31-32).

Mr. McMorrow also claimed violations of his right to discovery. He was represented by counsel, but his attorneys would not give him copies of the reports, and they would not let him fire his attorney. He also wanted an investigator to be hired for his defense. (Tr. 32-33). Exhibit Number 5 is the report of another incident where Mr. McMorrow wanted the police to assist him, and they ended up placing him in handcuffs. He tried to report what he thought was a crime and they told him no crime had been committed. (Tr. 36-37).

Plaintiffs exhibits 7 through 13 were received into evidence. Docket Numbers 45-51. These are the Judgments of Convictions and Orders relating to the sentences Mr. McMorrow is complaining of in his application for post-conviction relief. Exhibits 14 and 15 are orders denying Mr. McMorrow's applications for restraining orders. Docket Numbers 52 and 53.

The State did not present any evidence at the hearing.

Argument

I. The Trial Court's Finding that Mr. McMorrow Failed to Prove Prosecutorial Misconduct was Clearly Erroneous.

Mr. McMorrow filed his application for post-conviction relief on April 26, 2002. The State responded May 23, 2002. The evidentiary hearing was held on December 20, 2002. The trial court was, of course, bound by **N.D.C.C. Chapter 29-32.1,** the Uniform Post-Conviction Procedure Act as enacted in North Dakota. The standard of review applicable in this matter is set forth by this Court in ***Peltier v. State*, 2003 ND 27, ¶6:**

> [¶6] A trial court's findings of fact in post-conviction relief proceedings will not be disturbed unless they are clearly erroneous. ***Hill v. State*, 2000 ND 143, ¶17, 615 N.W.2d 135.** 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 it, a reviewing court is left with a definite and firm conviction that a mistake has been made. ***DeCoteau v. State,* 2000 ND 44, ¶ 10, 608 N.W.2d 240.** Questions of law are fully reviewable on appeal of a post-conviction proceeding. ***Falcon v. State*, 1997 ND 200, ¶ 9, 570 N.W.2d 719.**

First, Mr. McMorrow believes that the trial court's finding that he did not prove selective or discriminatory prosecution was clearly erroneous. The conscious exercise of selectivity in prosecution can violate the **Fourteenth Amendment of the United States Constitution** if it is based upon an unjustified, arbitrary standard, such as gender. ***Oyler v. Boles,* 368 U.S. 448, 456 (1962)**. Mr. McMorrow believes he proved that the state did not prosecute Paula Larson for her criminal conduct, while aggressively prosecuting him for similar conduct, and that they selected him

for prosecution for a discriminatory reason, i.e., that he is man, and she is a woman. Mr. McMorrow maintains that he did not waive this claim, because he did not voluntarily plead guilty. ***State v. Kraft*, 539 N.W.2d 56, 58 (N.D. 1995)**. Mr. McMorrow presented testimony and exhibits which established that he was prosecuted at the same time that Ms. Paula Larson was engaging in similar behavior, and his requests for equal treatment were rejected at every turn. There was no legitimate reason for the discriminatory behavior of the authorities. This unequal treatment violated his substantial rights. ***State v. Mathison*, 356 N.W.2d 129 (N.D. 1984); *State v. Gamble Skogmo, Inc.*, 144 N.W.2d 749 (N.D. 1966).**

II. The Trial Court's Finding that Mr. McMorrow Failed to Prove Relevance of the Civil Restraining Order Proceedings was Clearly Erroneous.

Mr. McMorrow presented the transcript of the hearing on the petition for a protection order filed by Ms. Larson. Exhibit 1, Docket Number 39. She admitted that he had never engaged in violence against her, but that she had engaged in violent acts against him. This was presented to show that there was no factual basis for his plea to the terrorizing charge in Cass County case number 02-102, Exhibit Number 13, Docket Number 51. This contention relates to the above argument as to selective or discriminatory enforcement, and the argument below as to ineffective assistance of counsel. Mr. McMorrow believes that this transcript proves that there was no basis for the entry of the protection order or of the criminal conviction for terrorizing.

III. The Trial Court's Finding that Mr. McMorrow Failed to Prove that He was Prejudiced by Excessive Bail was Clearly Erroneous.

Mr. McMorrow asserts that his bail of $60,000 when he was charged with a Class A Misdemeanor violated his constitutional right to be admitted to a reasonable bail, and to prepare his defense. **See N.D.R.Crim.P. 46.** This was a direct and substantial violation of the prohibition against excessive bail in the **Eighth Amendment to the United States Constitution**, and **Article I, Section 11 of the North Dakota Constitution**. The requirement is that the government's proposed conditions of release or detention not be 'excessive' in light of the perceived "evil." ***United States v. Salerno*, 481 U.S. 739, 753-754 (1988)**. Mr. McMorrow testified that he was prejudiced by the excessive bail in a number of ways. While in jail, he could not investigate the facts of his cases. He did not have access to a proper law library. He suffered physically in the jail from poor heating and food. His attorneys were ignoring his requests for assistance. He was not provided with the discovery materials. He testified that his situation caused him to feel he had no other choice other than to plead guilty as to the charges against him. He maintained his factual innocence, entering "***Alford***" pleas. (Tr. 30-34) ***See North Caroline v. Alford*, 400 U.S. 25 (1970)**.

IV. The Trial Court's Finding that Mr. McMorrow Failed to Prove a Rule 16 Violation was Clearly Erroneous.

Mr. McMorrow asserts that he was not provided access to discovery by his attorneys or by the Court in his criminal files. **See N.D.R.Crim.P. 16.** The State did

not present any evidence on this issue at the hearing in this matter. The State did not prove that discovery rules were, in fact, followed in his case. Mr. McMorrow felt that he would have been able to mount a factual defense to the charges against him, had he been able to examine the evidence, in order to prepare to meet that evidence. This claim relates to the excessive bail issue and the ineffective assistance of counsel issue, and the authority thereon.

V. The Trial Court's Finding that Mr. McMorrow Failed to Prove Ineffective Assistance of Counsel was Clearly Erroneous.

Mr. McMorrow gave several factual examples that his attorneys did not provide effective assistance to him in the underlying criminal files. Mr. McMorrow based his petition for post-conviction relief in part on **N.D.C.C. Section 29-32.1-01(a)**, in that his conviction was contrary to the laws and constitutions of the United States and the State of North Dakota because he was not afforded his right to effective assistance of counsel. The **Sixth Amendment of the United States Constitution**, through the **Fourteenth Amendment, and Article I, § 12, of the North Dakota Constitution** guarantee defendants a right to effective assistance of counsel. ***Decoteau v. State*, 1998 ND 199, ¶ 6, 586 N.W.2d 156, 157.** A defendant is denied his right to effective assistance of counsel if 1) his counsel's performance is deficient and 2) the deficient performance of counsel prejudices the defendant. ***Wilson v. State*, 1999 ND 222, ¶ 8, 603 N.W.2d 47.** Counsel's performance is deficient if it falls below an objective standard of reasonableness. ***E.g., DeCoteau v. State*, 1998 ND 199, ¶ 6, 586 N.W.2d 156, 157.** A defendant proves the

prejudice element if he shows with specificity how and where counsel's performance was deficient and that, but for counsel's errors, there is a reasonable probability that the trial result would have been different. ***Id.***

Mr. McMorrow testified that his attorneys were not interested in helping him defend the charges against him, and that because he would be convicted of at least one of the charges, his sentence would not be substantially different if he did successfully challenge some of the charges. (Tr. 21-23). He maintains that he was not factually guilty of the charges, and the insistence by his attorneys that he plead guilty effectively gave him no choice in the matter. The state did not present any contrary evidence. Neither of Mr. McMorrow's trial attorneys testified at the evidentiary hearing. If his attorneys had not insisted that he plead guilty, he believes that he could have proven his innocence. He was prejudiced by these failures.

VI. The Trial Court's Denial of Mr. McMorrow's Several Pre-Hearing Motions was an Abuse of Discretion.

Mr. McMorrow made several pro se pre-hearing motions, even though he was represented by counsel during this post-conviction petition process. He made a motion for discovery which was filed August 19, 2002, Docket Number 17. He made motions for depositions and for a change of venue which were filed November 13, 2002, Docket Numbers 32 and 33. He also made motions for a jury trial and for subpoenas of various people. These motions were all denied by the trial court, primarily in a Memorandum and Order filed December 5, 2002, Docket Number 37, App. 18-21. Mr. McMorrow felt strongly that in order to prove his claims, he would

need the relief requested. Discovery is allowed in post-conviction proceedings as allowed by the court, with good cause shown. **N.D.C.C. Section 29-32.1-08**. Mr. McMorrow believes that he provided good cause for the requests he made, and that the Court's denial of those requests was an abuse of discretion. This prevented him from effectively presenting his claims on his petition for post-conviction relief.

CONCLUSION

WHEREFORE, Petitioner prays that this Court reverse the Judgment of the trial court, and vacate the several judgments of conviction, and order that he be discharged form custody.

Respectfully submitted this 2nd day of April, 2003.

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RE: Patrick T. McMorrow, Petitioner/Appellant and State of North Dakota, Respondent/Appellee

Supreme Court No. 20030007
Cass County Case No. 09-02-C-1471

CERTIFICATE OF SERVICE BY MAIL

I, Monty G. Mertz, do hereby certify that, on the 2nd day of April, 2003, I served the Brief of Petitioner/Appellant and the Appendix upon the following, by placing true and correct copies in envelopes addressed as follows:

Ms. Penny Miller
Clerk of the Supreme Court
Judicial Wing, 1st Floor
600 East Boulevard Avenue
Bismarck, ND 58505

Mr. Lori S. Mickelson
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and depositing the same, with postage prepaid, in the United States Mails at Fargo, North Dakota.

Dated this 2nd day of April, 2003.

_____
Monty G. Mertz
Attorney for Petitioner/Appellant