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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

David C. Berlin,	)	
	)	
Petitioner-Appellant,	)	Supreme Court Nos. 20050030
	)	
vs.	)	District Court No. 04-C-02246
	)	
State of North Dakota,	)	
	)	
Respondent-Appellee.	)	
_____		)

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APPEAL FROM ORDER ENTERED DECEMBER 2, 2004, IN DISTRICT  
COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA  
THE HONORABLE GEORGIA DAWSON

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**RESPONDENT-APPELLEE'S BRIEF**

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**[¶1] TABLE OF AUTHORITIES**

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[¶2] **STATEMENT OF ISSUES**

- I. Whether the trial court should have granted an evidentiary hearing before denying Appellant Berlin's application for Post-Conviction Relief.

**[¶3] STATEMENT OF THE CASE**

The State adopts the Appellant's statement of the case.<sup>1</sup>

**[¶4] STATEMENT OF THE FACTS**

The State adopts Berlin's statement of the case with a few additions. Berlin agreed he was freely and voluntarily pleading guilty as charged. Tr., p. 4, lines 1-2.<sup>2</sup> In this case there was not a Rule 11 Plea Agreement; only a proposed criminal judgment was submitted to the Court. Tr., p. 2, line 17. Additionally, Berlin's trial counsel, with Berlin present and before formal sentencing, acknowledged Berlin had "a chemical dependency issue with alcohol" and was to be "incarcerated for 2 years" which "would benefit both himself and society." Tr., p. 7, lines 18-24. Immediately following that statement, Berlin responded by stating "That's been my problem all my life. I got to quit drinking, no doubt." Tr., p. 7-8, line 25 and line 1 respectively. Berlin also had a chance to dispute his attorney's statements but he only commented on the issue of court ordered treatment. Tr., p. 8, lines 6-9. (stating "you won't court order it so I (court interrupts) OK.") After that exchange, the court sentenced Berlin to two years and one year at the Department of Corrections on count one and count two respectively to run concurrent with each other. Tr., p. 8, lines 10-21. After the court issued its sentence no other statements or objections were made.

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<sup>1</sup>The applicant/appellant/defendant will herein after be referred to as *Berlin*.

<sup>2</sup>The State will refer to the transcript of the change of plea/sentencing hearing as "*Tr.*"

[¶5] **ARGUMENT**

[¶6] **I. The Court did not err in denying Berlin's application for Post-Conviction Relief because the record indicated there was no genuine issue as to any material fact.**

[¶7] Trial courts are permitted to screen applications for post-conviction relief to weed out facially invalid claims. State v. Bender, 1998 ND 72, ¶ 20, n. 2, 576 N.W.2d 210. “Preliminary judicial dismissal of an application may be appropriate to dispose of ‘unmistakably frivolous allegations’ or ‘wholly frivolous’ applications. Id. An appeal is frivolous if it is groundless, without merit, or persists in bad faith litigation. Torgerson v. Torgerson, 2003 ND 150, ¶ 23, 669 N.W.2d 98. Additionally, a trial court's findings of facts 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.

[¶8] Berlin’s Post-Conviction Relief Application in this case was frivolous because it did not make out a genuine issue as to any material fact to trigger the requirements of the Uniform Post-Conviction Procedure Act. Post-conviction relief may only be granted if it meets the conditions of the Uniform Post-Conviction Procedure Act. The part of the Act which is relevant to Berlin's claim is Section 1(a) which states:

1. A person who has been convicted of and sentenced for a crime may institute a proceeding applying for relief under this chapter upon the ground that:
  - a. The conviction was obtained or the sentence was imposed in violation of the laws or the Constitution of the United States or of the laws or Constitution of North Dakota;

**[¶9] A. Berlin's claim number one and number three are wholly frivolous and the court did not err in summarily dismissing the petition.**

[¶10] Berlin asserts three grounds for relief. With regard to the first and third allegation, the first being his constitutional rights were violated because no complaint was filed and the third being he was compelled to be a witness against himself. See Appellant's Appendix p. 11 & 26-27. Berlin was provided a copy of the two count information alleging Theft of Property and Fleeing or Attempting to Elude a Peace Officer. Tr., p. 1-2, lines 23-25 & lines 1-7. Berlin was also informed of the maximum penalties on each count. Tr., p. 2, lines 1-7. The court also reminded Berlin that by pleading guilty he was giving up certain constitutional rights including "your right not to incriminate yourself." Tr., p. 3, line 20-21. Because Berlin was put on notice of the charge against him and since he waived certain rights by pleading guilty there were no genuine issue as to any material fact for which the court had to provide a hearing.

**[¶11] B. Berlin's claim number two - ineffective assistance of counsel -was also appropriately dismissed based on the record as again no genuine issue of material fact was raised.**

[¶12] Berlin's second claim for post-conviction relief is based on ineffective assistance of counsel. Berlin claims his trial counsel was ineffective in that he was told if he pleads guilty he would only be sentenced to 4 months when in fact he was sentenced to 2 years. See Appellant's Appendix p. 26-27. The record at the sentencing hearing clearly establishes such a claim to be false. At the sentencing hearing, Berlin's trial counsel stated that Berlin was to be "incarcerated for 2 years" which "would benefit both himself and society." Tr., p. 7, lines 18-24. Berlin did not object to his trial counsel's statement

and in fact he followed that statement by himself stating “[t]hat’s been my problem all my life. I got to quit drinking, no doubt.” Tr., p. 7-8, line 25 and line 1 respectively. The trial court could reasonably infer without an additional hearing that Berlin’s claim was without merit.

[¶13] Berlin also incorrectly relies on the presumption that there was a plea agreement in his case. At the sentencing hearing, the State recommended Berlin ultimately serve a straight time sentence of two years. Tr., p 6, lines 2-13. There was no plea agreement pursuant to Rule 11(d) of the North Dakota Rules of Criminal Procedure between the State and Berlin. Because of such, Berlin cannot claim that the sentence was illegally imposed upon him. See e.g., DeCoteau v. State, 504 N.W.2d 552, 556 (N.D. 1993) (holding one reason for post-conviction hearings is to review illegal sentences). In the absence of any Rule 11 plea agreement, a district court is free to impose any sentence it deems appropriate as long as it does not exceed the maximums prescribed by law. Berlin’s false reliance on a supposed four-month sentence is not grounds for post-conviction relief.

[¶14] Furthermore, a criminal defendant has “the heavy, demanding burden of proving counsel’s assistance was ineffective.” Mertz v. State, 535 N.W.2d 834, 836 (N.D. 1995). Berlin’s claim for ineffective assistance of counsel must claim two elements. First, the trial counsel’s performance was deficient; and second, trial counsel’s deficient performance prejudiced the defendant. State v. Palmer, 2002 ND 5, ¶ 11, 638 N.W.2d 18. The defendant must establish that, but for trial counsel’s deficient performance, there is a reasonable probability that the result of the proceeding would have been different. Id. “The defendant must also specify how and where trial counsel was incompetent and the



probable different result.” Id. Even assuming Berlin had the belief he would only receive a four month sentence and the court gave him a two year sentence that does not establish how his sentence was legally incorrect or how his trial counsel's performance was so deficient as to fall below an objective standard of reasonableness and the deficient performance was prejudicial. See State v. Ernst, 2004 ND 152, ¶15, 683 N.W.2d 891.

[¶15] A post-conviction hearing should not be granted if it will not resolve any factual disputes that might affect the conviction. Mertz, 535 N.W.2d at 837. “Post-conviction proceedings are not fishing expeditions....” Id. Summary judgment of a claim of ineffective assistance of counsel without an evidentiary hearing is appropriate if the defendant fails to raise a genuine issue of material fact. Id. at 838. Berlin has failed to raise any genuine issue of material fact as to why the district court should have granted an evidentiary hearing

[¶16] **CONCLUSION**

[¶17] The trial court's dismissal of Berlin's application for post-conviction relief is permissible and should be upheld. Because Berlin’s application for post-conviction relief does not meet the requirements of N.D.CENT. CODE § 29-32.1-01, Berlin should not be entitled to the relief afforded by the Uniform Post-Conviction Procedure Act. Furthermore, the trial court’s dismissal was not based on a question of law but rather the review of the record which indicates the trial court was not clearly erroneous.

Respectfully submitted this 31<sup>st</sup> day of March, 2005.

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