

in the north dakota state supreme court bismarck, north dakota

ORIGINAL

anthony james moore appellant)

vs,)

state of north dakota appellee)

BRIEF OF APPELLANT

20050263

supreme court no. 20050263

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

case no. 05-c-1021

NOV - 4 2005

STATE OF NORTH DAKOTA

the nature of the proceeding is appeal from the order denyimng postconviction
under n.d.c.c. 29.32-1 and the order denying and quashing subpoena in the
cass county district court on july 29 2005 by judge steven mccullough.

Anthony James Moore
anthony james moore 22547
north dakota state penitentiary
bismarck, north dakota 58506-5521

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GROUND JURISDICTION

the grounds of which the jurisdiction of the supreme court is invoked is under rules of appellate procedure 4(A) and n.d.c.c. 29.32.1-14.

STATEMENT OF THE ISSUES

(1) whether the district court misapplied and overread n.d.c.c. 31-01-06.2 to support its order to quash the subpoena for andrea or whether the failure of ms larson to testify has caused a miscarriage of justice or deprived the petitioner of a fair hearing.

(2) whether attorney at law mark a beauchene meets the 2 part test for ineffective assistance of counsel.

STATEMENT OF THE CASE

the nature of the case is a postconviction petition filed in the cass county diastrict court the ciourse of the proceeding is a evidentiary hearing held and the disposition is a denial of postconviction under n.d.c.c. 29.32.1

CERTIFICATE

i anthony james moore the appellat certifies that this brief was not prepared on a computer or word processor.

STATEMENT OF THE FACTS

(1) on july 12 2005, court appointed attorney douglas nesheim served ms andrea larson with a subpoena to be at the evidentiary hearing on july 29 2005.

(2) on july 29 2005 the court quashed the subpoena for ms andrea larson. see transcript hearing on subpoena quash,

(3) rule 35 of criminal procedure does not preclude an appeal from the conviction.

(4) mr mark a beauchene concedes that he was ineffective see evidentiary hearing.

(5) on january 17 2002 ms larson was present at the sentencing hearing.

(6) mr beauchene concedes that he has been a licensed attorney for 23 years from 1979 to 2001.

(7) mr beauchene concedes that he required me to provide him with correspondends that i take responsibility for convicted offense.

(8) the petitioner concedes that he does not take responsibility for the convicted offense.

(9) mr beauchene concedes that the appellant and him has had 14 telephone conversations thus proving that everytime we spoke he requested of me to provide him with a correspondend of taking responsibility.

(10) mr beauchene concedes that a motion for sentence reduction and a direct appeal can be done at the same time.

(11) mr beauchene did not go forward with direct appeal.

(12) mr beauchene did not advise me that a rule 35 can be done at the same time as direct appeal.

(1) WHETHER THE DISTRICT COURT MISAPPLIED AND OVERREAD N.D.C.C. 31-01-06.2 TO SUPPORT ITS ORDER TO QUASH THE SUBPOENA FOR ANDREA LARSON OR WHETHER THE FAILURE OF MS LARSON TO TESTIFY HAS CAUSED A MISCARRIAGE OF JUSTICE OR DEPRIVED THE PETITIONER OF A FAIR HEARING.

n.d.c.c. 31-01-06.2 does not even apply it has been misapplied and overread the petitioner is not seeking information to be disclosed while ms larson was engaged in gathering writing photographing or editing news. but only as a witness to what she actually heard at the sentencing hearing on january 17 2002, thus failure of ms larson to testify and the court quashing the subpoena has caused a miscarriage of justice her testimony will prove that the sentencing transcripts are false there is no evidence from any other source ms larson testimony is necessary and critical in this matter the petitioner is not seeking any information which is the exclusive property of ms larsen or her employer the petitioner only seeks to question her as would any private citizen observer in the court to read the statute to exclude such testimony would be overreading the statute, see district court docket entries numbers 1-20 ms larson testimony is necessary to have a fair hearing on the issue of falsification of the sentencing record n.d.c.c. 31-01-06.2 provides; no person shall be required in any proceeding or hearing to disclose any information or the source of any information procured or obtained while the person was engaged in gathering writing photographing or editing news and was employed by or acting for any organization engaged in publishing or broadcasting news unless directed by order of a district court of this state which after hearing finds that the failure of disclosure of such evidence will cause a miscarriage of justice.

if someone is not allowed to participate in a evidentiary hearing that will prove that the sentencing transcripts are false that is a miscarriage of justice and it is also violates rules of evidence 501 rules of evidence 501 provides; except as otherwise provided constitution or statute or by these or other rules promulgated by the supreme court of this state no person has a privilege to

- (1) refuse to be a witness;
- (2) refuse to disclose any matter
- (3) refuse to produce any object or writing or
- (4) prevent another from being a witness or disclosing any matter or producing any object or writing.

(2) WHETHER ATTORNEY AT LAW MARK A BEAUCHENE MEETS THE 2 PART TEST FOR INEFFECTIVE ASSISTANCE OF COUNSEL.

counsel's representation fell well below an objective standard of reasonableness by not going forward with direct appeal knowing that a motion for sentence reduction under rule 35 and direct appeal can be done at the same time rule 35 does not preclude an appeal by the defendant from the conviction, see *woelhoff v state* 487 n.w.2d 16,17 the united states supreme court has stated a two part test for allegedly ineffective assistance of counsel and we use this test to assess claims based on the state constitution first a defendant must show that a counsel's representation fell below an objective standard of reasonableness second the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors the results of the proceedings would have been different, in this case if mr beauchene would not of sabotage direct appeal the appellant would have continued with direct appeal to the north dakota supreme court on the claims of insufficiency of evidence and inaccurate jury instructions, counsel's representation fell well below an objective standard of reasonableness by not continuing with direct appeal knowing that a motion for reduction of sentence under rule 35 can be done simultaneously direct appeal or vice-versa counsel's actions are clearly unreasonable,

the petitioner answered a question and proved under direct examination there is a reasonable probability that but for counsels unprofessional errors the results of the proceeding would have been different see transcript of hearing at page 15 lines 20-25 and page 16 lines 1-2 which provides:

so what your-- if you would have appealed from the conviction what issues would you believe you would have had for the supreme court to address?

a. insufficiency of evidence, inaccurate jury instructions.

q. and do you feel that you would have succeeded at the supreme court

a. well absolutely yes.

the appellant has shown mr beauchene to be ineffective see transcript of hearing page 14 lines 67-21 which provides:

a. yes on january 24 2004 mark a beauchene attorney at law came down to the cass county jail and said to me that the north only chance that you have is a rule 35 sentence reduction don't go to the north dakota supreme court for any help. they have not overturned a conviction for a rapist in over 23 years this is your best option is to dismiss direct appeal and i promise and guarantee you a sentence reduction of 7 years prison term trust me. you will be out in 5 year tops. so what if you did not do it. the sentence will be equivalent to a class B felony. i know how the court works and operate sign this waiver and agreement, and also i am going to need something from you in writing stating that you'll take responsibility for the convicted offense.

because of mr beauchenes sabotaging actions the appellant believed that he had to agree to dismiss the appeal in order to ask for relief under rule 35 see transcript of hearing page 31 lines 170-19 which provides:

q. did you believe that you had to agree to dismiss the appeal in order to ask for relief under rule 35?

a. yeah.

CONCLUSION

remand with an order for another evidentiary hearing with ms andrear larsen present to give testimony what she actually heard and witnessed on january 17 2002 sentencing hearing and the appellant be allowed to direct appeal or a 7 year prison term,

Anthony James Moore

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dated this 3 day of november 2005,

