

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

20050321

Jimmie Lee Bates, Jr., )  
)  
)  
Petitioner/Appellant, )  
)  
-vs- )  
)  
State of North Dakota, )  
)  
Respondent/Appellee. )

SUPREME COURT NO. 20050321  
DISTRICT COURT NO. 09-05-C-00448

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STATE OF NORTH DAKOTA

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**Brief of Petitioner/Appellant  
Jimmie Lee Bates, Jr.**

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Appeal from Judgment  
entered on September 2, 2005  
In District Court, County of Cass, State of North Dakota  
The Honorable John C. Irby

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## STATEMENT OF THE CASE

This is an appeal from a Judgment which denied an application for post-conviction relief, and was entered on the 2nd day of September, 2005, by the Court, the Honorable John C. Irby, Judge of the District Court, presiding. The Defendant, Jimmie Lee Bates, Jr., filed his Application for Post-Conviction Relief on February 10, 2005. (App. at 2 through 11).<sup>1</sup> (Docket 1). The State responded, and an evidentiary hearing was held on May 6, 2005 and August 25, 2005. On September 2, 2005, the Court entered its Opinion and Order for Judgment, in which the Court denied Mr. Bates's Application for Post-Conviction Relief. (App. at 32)(Docket 32). Judgment was entered thereupon the same day. (App. at 34)(Docket 33). Notice of Appeal was filed on September 16, 2005 (Docket 51 & App. 35).

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<sup>1</sup>The Appendix to Appellant's brief will be abbreviated "App."

## STATEMENT OF THE ISSUE

### Whether The Trial Court's Finding that Mr. Bates Failed to Prove Ineffective Assistance of Counsel was Clearly Erroneous?

## STATEMENT OF FACTS

Mr. Bates was present and testified at the evidentiary hearing on his petition for post-conviction relief. (Tr. 5-57)<sup>2</sup>

Mr. Bates was represented by appointed counsel Mark Beauchene. Mr. Bates was arrested and jailed in this case in March, 2003. Mr. Beauchene visited Mr. Bates in the jail a few days later. Mr. Beauchene asked Mr. Bates to write down in his own words what happened the night of May 19-20, 2000. (Tr. 7). Mr. Bates had not seen any of the Rule 16 discovery prior to writing his memory of what happened. Petitioner's Exhibit 1 is the letter Mr. Bates wrote to Mr. Beauchene with the recitation of facts. (Docket 18). Mr. Beauchene provided copies of the discovery to Mr. Bates about two weeks later, and Mr. Bates wrote a letter to Mr. Beauchene giving his analysis of the Rule 16 discovery. Petitioner's Exhibit 2, Docket 19. (Tr. 9-10). Mr. Beauchene did not see Mr. Bates again while he was in jail. Mr. Bates bonded out of jail on June 9, 2003. (Tr. 11).

Mr. Bates did not meet with Mr. Beauchene again concerning his case until one week before the trial, which started on October 21, 2003. Mr. Bates called Mr. Beauchene several times to discuss his case. He called Mr. Beauchene's office to tell him he had not left town, after he bonded out of jail. (Tr. 12). He was able to

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<sup>2</sup>

The Transcript of the hearing will be referred herein as Tr. The Transcript of the continued hearing will be referred to as Tr. #2.

schedule a meeting in September, but was unable to make the appointment because of a family matter. (Tr. 12). In his letter, Petitioner's Exhibit 2, Mr. Bates called Mr. Beauchene's attention to factual discrepancies, especially pertaining to the victim's claims. (Tr. 12). Mr. Bates felt that these were significant issues which needed to be investigated. (Tr. 13). About three and one half years passed between the alleged crime and Mr. Bates' trial. (Tr. 14).

Mr. Bates believes that the central issue in his trial was the credibility of the alleged victim. (Tr. 14). One of the central issues was that Mr. Bates had been to Ms. LaCosta's apartment, had left, and then made a telephone call to the apartment. (Tr.15). It was very important to Mr. Bates that he be able to trace that telephone call. Mr. Bates claimed he had been invited back to the apartment by Ms. LaCosta, and she testified that there was no such call, while Mr. Bates testified at trial that he had made the call. (Tr.16). Mr. Bates tried to impress upon Mr. Beauchene that it was very important to establish that the telephone call had been made. After they met one week before trial, Mr. Beauchene called him and told him that he could not find the telephone call. The company that had the phone had been bought out and he did not know how to find the number. (Tr.17).

Mr. Bates testified that Mr. Beauchene did not challenge any of the prospective jurors for cause. (Tr.18-20). One of the jurors was a relative of Mr. Burdick, the prosecutor. One lady was the wife of a U.S. Attorney. Another lady worked in the Sheriff's office. Mr. Bates was forced to use his peremptory challenges for these people. (Tr.20). Mr. Bates also asked Mr. Beauchene to make a motion for a change of venue. Mr. Beauchene did not make a motion for a

change of venue. (Tr. 20-21).

Mr. Beauchene did not make a motion pertaining to the sufficiency of the evidence at the close of the State's case. (Tr. 22). Mr. Bates felt this was a serious mistake. (Tr. 23).

Petitioner's Exhibit 3 was a portion of the Affidavit of Probable cause in which Ms. LaCosta related to Officer Durr her version of what had occurred. (Tr. 25; Docket 20). Petitioner's Exhibit No. 4 is a portion of the transcript at trial, pages 64 through 90. (Tr. 26-27; Docket 21). Ms. LaCosta told the police that the individual had held a knife on the right side of her cheek. (Tr. 27). At trial, she testified that the knife was placed at her throat. Mr. Beauchene did not cross examine her as to the inconsistency. (Tr. 28). Mr. Bates even asked him to question her about the knife during the trial, and he did not. (Tr. 29).

Ms. LaCosta told the police on the night of the incident that the man made some noise in the living room, and then she heard the door slam, and she then laid there for about five minutes before getting up, and first thing she did was get up and check on her children. (Tr. 30). At trial, she testified that she got up right away, put her underwear on, ran out to see if he was gone, and then closed and locked the door. She then saw that the phone cord had been cut. (Tr. 30). Mr. Beauchene did not cross-examine her on this inconsistency. (Tr. 31). Mr. Bates brought that discrepancy to Mr. Beauchene's attention. (Tr. 31).

Petitioner's Exhibit No. 5 is a portion of the Affidavit of Probable Cause containing the interview of a Mr. O'Shaughnessy. (Tr. 31; Docket 22). Mr. O'Shaughnessy stated that he had buzzed someone into the building, whom he

thought was a black man. (Tr. 32). The implication was that this was how Mr. Bates got into the building, and this made him look bad. (Tr. 32). Mr. Bates testified at trial that he had been invited to the apartment by Ms. LaCosta, and that she had buzzed him into the building. (Tr. 33). Petitioner's Exhibit No. 6 is the portion of the transcript containing Mr. O'Shaughnessy's testimony. (Tr. 34; Docket 23). Mr. O'Shaughnessy had told the police that his roommate asked him to turn the television down because he heard something. He heard some laughing in apartment 203, but nothing else. (Tr.34). Mr. Beauchene did not ask Mr. O'Shaughnessy about that. (Tr. 35). The witness had also testified that the security building had a front and a back door. (Tr. 35). Mr. O'Shaughnessy was the only witness who testified that the rear door often does not work. (Tr. 36). Petitioner's Exhibit No. 7 was a portion of the Affidavit of Probable Cause wherein the Officer investigated the building and stated that it was a security building. (Tr. 37-38; Docket 24). Also, as shown in Petitioner's Exhibit No. 3, the officers who responded on the night in question both had to be let in, front and back, by Ms. LaCosta. (Tr. 38). This was significant because Mr. O'Shaughnessy had testified that the back door did not work 90 percent of the time. (Tr. 38). Mr. Beauchene did not question the officers about these facts. (Tr. 39).

Mr. Bates felt that Mr. Beauchene was not prepared for the trial. He did not ask the questions that Mr. Bates wanted him to ask. (Tr. 39). The trial came down to Ms. LaCosta's credibility versus Mr. Bates' credibility. (Tr. 40). When Mr. Bates was questioned in 2001 about the crime he told the officer that he did not know anything about it. (Tr. 40). He had moved his family to Texas, and felt he had done



nothing wrong and did not want to be involved. (Tr. 40).

Mr. Bates testified consistently with the facts he had related in the first letter to Mr. Beauchene. (Tr. 40-41). He did not have access to the police reports when he wrote the facts down. (Tr. 41).

Mr. Bates did stick to his story that he had not had sex with anyone in the apartment until after the DNA report was received. (Tr. 48). Mr. Bates acknowledged that the change of his story was very much suspect. (Tr. 49). Mr. Bates did not explain to the jury why he had lied at first. (Tr. 50). Ms. LaCosta never identified him as her attacker. (Tr. 54-55).

When the hearing was continued, defense counsel had filed an affidavit and exhibits which established that the phone company typically cannot retrieve telephone calls more than three years after they are made. App. 15-31:Docket 27. Had an effort been made in 2003 to prove the telephone call had been made by Mr. Bates from the pay phone to Ms. LaCosta's apartment it is likely that it could have been retrieved. App. 16. Petitioner's Exhibits 8 and 9 were received, and are letters Mr. Bates had written to Mr. Beauchene. (Tr. #2, 10-12; Docket 29 & 30).

Mr. Mark A. Beauchene testified at the continued hearing. (Tr. #2 14-35). Mr. Beauchene represented Mr. Bates on the charge of gross sexual imposition. (TR #2, 16). Mr. Beauchene could not state how many times he met with or talked to Mr. Bates about the case, but he recorded that he spent 52 hours on the case. (Tr. #2, 17). He did ask Mr. Bates to write down his goals and objectives in the case. (Tr. #2, 17). Mr. Bates raised the importance of a phone call he said he had made to Ms. LaCosta. Mr. Beauchene and an investigator tried to find the

existence of the telephone call before the trial.(Tr. #2, 18). They were not able to find the record. (Tr. #2, 18-19). Ms. LaCosta was questioned about the call during the trial.

Mr. Beauchene did not have any specific recollection about striking any of the prospective jurors for cause. (Tr. #2, 20). Mr. Beauchene felt that he and Mr. Bates had agreed on who to strike from the jury. (Tr #2, 21-22). Mr. Beauchene saw no basis for making a motion for a change of venue. Mr. Beauchene also did not make a Rule 29 motion, because he felt that there was no likelihood that such a motion would have been granted. (Tr. #2, 22). When asked about the inconsistencies in the witnesses' testimony, he could not specifically recall the issues Mr. Bates was concerned with. (Tr. #2, 240-25). Mr. Beauchene felt he was adequately prepared for the trial. (Tr #2, 25-26). He did say that he wished he could have been able to prove the existence of the telephone call. He felt he had done an adequate job trying to locate the telephone call. (Tr.#2, 25-26). He testified that, when the jury was deliberating, Mr. Bates told him he had done a fine job. (Tr. #2, 26-27). Mr. Beauchene did acknowledge that he wished he had gone after the telephone records sooner, and that Mr. Bates emphasized that he had been invited over to the apartment. (Tr. #2, 31). He did not depose the complaining witness prior to trial. (Tr. #2, 31). Mr. Beauchene agreed that the victim's testimony and credibility were central to the case. (Tr. #2, 33). He also agreed that, if it could have been established that the call from the pay phone had been made by Mr. Bates, it would have been a critical fact to undermine her version of the events. (Tr. #2, 33).

## Argument

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

The Defendant, Jimmie Lee Bates, Jr., filed his Petition for Post-Conviction Relief on February 10, 2005. 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, 657 N.W.2d 238:

[¶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.

Mr. Bates gave several factual examples of how his attorney did not provide effective assistance of counsel. By claiming ineffective assistance of counsel, Mr. Bates in effect based his Application for Post-Conviction Relief upon **NDCC 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. Bates believes that he has proven that he received ineffective assistance of counsel. Mr. Bates believes that the Trial Court's findings to the contrary are clearly erroneous.

Mr. Bates proved that Mr. Beauchene failed to prepare properly for the trial in several respects. Mr. Beauchene failed in a timely manner to try to establish proof that Mr. Bates had called Ms. LaCosta's apartment from a pay phone on the night in question. The record establishes that, had he researched the telephone call right when he was appointed, the records would likely would have been available. App. 16. Mr. Beauchene failed to challenge any jurors for cause, including Mr. Burdick's relative, the wife of a U.S. Attorney, and a woman who worked for the Sheriff's office. This forced Mr. Bates to use his peremptory challenges for those people. Mr. Beauchene failed to make a motion for a change of venue. Mr. Beauchene failed to cross-examine State's witnesses on critical inconsistencies in the evidence. Mr. Beauchene failed to make a Rule 29 Motion at the close of the State's evidence.

The primary failure of Mr. Beauchene was not trying to locate the telephone call from the pay phone Mr. Bates testified he made to Ms. LaCosta's apartment, which would have supported his claim that she talked to him and invited him to the apartment. She denied under oath that any such telephone call was made. The record establishes that, had Mr. Beauchene immediately sought a record of that telephone call, he would have likely been able to establish whether that call had been made. He did not make any attempt to locate that call until one week before trial. By then it was too late. The records are generally not available three years after they are made. App. 16. If it had been shown that a telephone call had been made as claimed by Mr. Bates, Ms. LaCosta's credibility would have been severely damaged. Her credibility was central to the case. Mr. Bates claimed consent, and their testimony was diametrically opposed. Had the telephone call been proven, the outcome of the trial would have probably been different. *Heckelsmiller v. State*, 2004 ND 191, 687 N.W.2d 454.

## CONCLUSION

WHEREFORE, Petitioner prays that this Court reverse the Trial Court's Judgment, and vacate the judgment of conviction, and order that the matter be remanded to the District Court for appropriate proceedings.

Respectfully submitted this 14<sup>th</sup> day of November, 2005.



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**RE: Jimmie Lee Bates, Jr., Petitioner/Appellant and State of North Dakota,  
Respondent/Appellee**

**Supreme Court No. 20050321  
Cass County Case No. 09-05-C-00448**

**CERTIFICATE OF SERVICE BY MAIL**

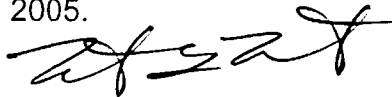
I, Monty G. Mertz, do hereby certify that, on the 14th day of November, 2005, I served the Brief of Petitioner/Appellant and the Appendix upon the following, by placing true and correct copies in envelopes addressed as follows:

Ms. Penny Miller  
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and depositing the same, with postage prepaid, in the United States Mails at Fargo, North Dakota.

Dated this 14th day of November, 2005.



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