

ORIGINAL (e-filed)

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA  
SUPREME COURT NO. 20050321

20050321

Jimmie Lee Bates Jr.,

Petitioner - Appellant,

vs.

State of North Dakota,

Respondent - Appellee.

**FILED**  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

DEC 12 2005

STATE OF NORTH DAKOTA

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APPELLEE'S BRIEF

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APPEAL FROM JUDGMENT ON POST-CONVICTION RELIEF  
ENTERED ON SEPTEMBER 2, 2005  
EAST CENTRAL JUDICIAL DISTRICT  
DISTRICT COURT NO. 09-05-C-00448  
THE HONORABLE JOHN C. IRBY, JUDGE

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## **¶1 ISSUES PRESENTED**

¶2] Whether the District Court was clearly erroneous in concluding Bates failed to prove ineffective assistance of trial counsel.

## **¶3 STATEMENT OF THE CASE**

¶4] Appellant Jimmie Lee Bates shall hereinafter be referred to as "Bates". Appellee State of North Dakota shall hereinafter be referred to as "State".

¶5] In the underlying criminal case, Bates was convicted of gross sexual imposition, a Class A felony. On March 8, 2004, the District Court sentenced Bates to 12 years imprisonment, as straight time without a suspended portion. This Court summarily affirmed the conviction in Bates' direct appeal. State v. Bates, 2004 ND 222, ¶1, 691 N.W.2d 193.

¶6] Bates filed an application for post-conviction relief on February 10, 2005. App. p.2 - 7. The State filed responsive motions on March 6, 2005, and related brief and affidavit. App. p.12 - 14; Docket Nos. 8 and 9. The District Court held evidentiary hearings on May 6, 2005, and August 25, 2005. The District Court issued its Opinion and Order for Judgment on September 2, 2005, denying Bates any relief. App. p.32 - 33. A judgment was also entered on September 2, 2005. App. p.34. Bates timely filed a notice of appeal on September 16, 2005. App. p.35.

## **¶7 STATEMENT OF THE FACTS**

¶8] The State in large part concurs with the Statement of the Facts contained within Bates' Brief. Appellant's Brief, p.2 - 7. However, the State

provides the following additions or clarifications.

[¶9] Bate's refers to the rape victim as "Ms. Lacosta". The victim's name was actually Lacosta Rickford. Accordingly, that reference would more correctly be "Ms. Rickford". In order to avoid any confusion, the State refers to Ms. Rickford in this brief simply as "victim".

[¶10] Bates was somewhat mistaken when he stated in his brief he did not explain to the jury why he first lied to officers about having sex with anyone at the apartment that night. Appellate Brief, p.6. When asked about that lie, Bates testified on direct examination that the media jumps "on band wagons" and he felt it would "blow over". Trial Tr. at p.276, ln.2 - 13. On cross examination he further testified he did not want to get involved in a rape case, that the accusation alone can ruin a person's life. Trial Tr. at p.297, ln.3 - 8.

[¶11] Bates presented certain letters he wrote to his trial counsel in support of his latter post-conviction claims. One of those letters, Exhibit 9 (Docket No. 30), was offered by Bates during the August 25, 2005 hearing, well after his initial testimony on May 6, 2005. The last paragraph of Exhibit 9 states: "Today is March 10, 2003. I still haven't gotten Rule 16 discovery." Bates testified he wrote it to his trial attorney after that attorney was assigned to his case. PC2 Tr. at p.10, ln.22 - p.11, ln.6. Upon cross examination, when that statement was specifically drawn to his attention, Bates testified the statement was accurate when written. PC2 Tr. at p.13, ln.5 - 10. However, Bates later acknowledged the statement could not have been accurate because he had not yet been arrested on March 10, 2003 and his trial counsel had not yet been

assigned. PC2 Tr. at p.37, ln.17.

¶12] There are various transcripts referenced within this brief. The criminal trial transcript will be referred to as "Trial Tr.". The May 6, 2005 post-conviction transcript will be referred to as "PC1 Tr.". The August 25, 2005 post-conviction transcript will be referred to as "PC2 Tr.".

### ¶13] **ARGUMENT**

#### ¶14] I. **Jurisdiction.**

¶15] The Supreme Court has jurisdiction of this post-conviction appeal under N.D. Const. art. VI, § 6, N.D.C.C. §29-32.1-14 and Rule 4(d), N.D.R.App.P.

#### ¶16] II. **Post-Conviction Relief - Burden of Proof.**

¶17] The petitioner carries the burden of establishing a basis for post-conviction relief. Abdi v. State, 2000 ND 64, ¶8, 608 N.W.2d 292.

#### ¶18] III. **Post-Conviction Relief - Standard of Review.**

¶19] Actions for post-conviction relief under Chapter 29-32.1, N.D.C.C., are civil in nature. Id. Bates alleges ineffective assistance of trial counsel. Although that determination may present a mixed question of law and fact and hence be fully reviewable by this court, a district court's findings of fact in post-conviction relief proceedings will not be disturbed unless clearly erroneous pursuant to Rule 52(a), N.D.R.Civ.P. Laib v. State, 2005 ND 187, ¶11, \_\_\_ N.W.2d \_\_\_. 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. Peltier v. State, 2003 ND 27, ¶6, 657 N.W.2d 238.

¶20 IV. **Ineffective Assistance of Counsel - Generally.**

¶21 The Sixth Amendment of the United States Constitution and Article I, §12 of the North Dakota Constitution entitle a criminal defendant to effective assistance of counsel. Laib, at ¶9. In order to prove a claim for ineffective assistance of counsel, the defendant must establish two elements: (1) counsel's performance was deficient, and (2) his defense was prejudiced by that deficiency. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984); Greywind v. State, 2004 ND 213, §13, 689 N.W.2d 390. The defendant has the burden to prove both elements, and failure to do so is fatal to the claim. State v. McLain, 403 N.W.2d 165, 17 (ND 1987). This is a "heavy burden". Laib, at ¶9.

¶22 For the first element (deficient performance), a defendant must demonstrate his counsel's representation fell below an objective standard of reasonableness. Strickland, 466 U.S. at 668, 104 S.Ct. 2052 (reasonableness is measured under the prevailing professional norms). The Court should consider all of the circumstances to determine whether there were errors *so serious the defendant was not accorded that counsel guaranteed by the 6<sup>th</sup> Amendment*. McLain, 403 N.W.2d at 17 (emphasis added). The defendant must overcome a "strong presumption" that trial counsel's representation fell within the wide range of reasonable professional assistance. Laib, at ¶9. Courts must consciously attempt to limit the distorting effect of hindsight. Id.; see also, McLain, 403 N.W.2d at 18 (a great deal of deference is accorded to trial counsel); Strickland, 466 U.S. at 689, 104 S.Ct. 2052 (strong presumption of reasonable professional



conduct).

¶23] For the second element (prejudice), a defendant must establish “but for” counsel’s unprofessional errors the result of the proceedings would have been different. Greywind, at ¶13. The defendant must present proof of actual prejudice. McLain, 403 N.W.2d at 18. In a criminal case the question becomes whether or not there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt of the accused’s guilt. Id. The term “reasonable probability” in this context has been defined as a probability “sufficient to undermine confidence in the outcome”. Strickland, 466 U.S. at 694, 104 S.Ct. 2052 (1984). Unless counsel’s errors are so blatantly and obviously prejudicial that they would create a reasonable probability of a different result in all cases, regardless of the other evidence presented, the prejudicial effect of those errors must be assessed within the context of the remaining evidence properly presented and the overall conduct of the trial. Laib, at ¶10.

¶24] V. **Ineffective Assistance of Counsel - The Testimony.**

¶25] Bate's claims his appointed counsel was ineffective in several ways. His primary allegation is his counsel failed to adequately investigate, and secure, records of a pay telephone call that Bates claims he made to the victim that night. Bates also makes a passing reference, without offering any significant argument, to other alleged failings, namely: failing to challenge certain jurors for cause, failing to make a change of venue motion, failing to adequately cross-examine witnesses and failing to make a Rule 29 motion at the close of the State's case. Each allegation is addressed below. On these latter ones the State provides a somewhat limited response given Bates' limited argument.

[¶26] A. Investigation of Alleged Telephone Call.

[¶27] Bates alleges his counsel failed to timely investigate the existence of a telephone call Bates claims he made to the victim's apartment on the night of the rape. The implication by Bates was that he called the victim late at night, she invited him to come to the apartment and they had consensual sex. Trial Tr. at p.269, ln.13 - p.274, ln.9. He claims the existence of the call was a critical part of his defense. PC1 Tr. at p.17, ln.13 - 24.

[¶28] The underlying incident occurred in May 2000. Bate's trial counsel was appointed in March 2003 and the trial was held in late October 2003. Bates' trial counsel testified that he hired a private investigator to locate records about the call. The investigator spent about five hours searching for the records. PC2 Tr. at 18, ln. 13 - 24. He was unable to locate the alleged records. Bate's post-conviction counsel indicated his own attempts in 2005 were similarly fruitless and the telephone company indicated they could not locate records more than 3 years old, at best. App. p.15-17, ¶¶6 - 7; App. p.18 - 31. Even if his trial counsel had looked for those records immediately upon being assigned to the case, which the post-conviction record does not establish as a recognized standard of practice, counsel still may not have been able to locate such records. They may already have been destroyed. Or, as the victim testified, the call never took place. Trial Tr. at p.84, ln.10 - 17.

[¶29] To give context to Bates' post-conviction claims, it is worth stating that Bates told officers he did not have sex with anyone on the night in question. Trial Tr. at p.257, ln.1 - p.258, ln.16. Only at trial did Bates acknowledge he had sex with the victim, after the State presented DNA results proving it. PC1 Tr. at

p.48, ln.11 - p.49, ln.9. Bates also acknowledged the jury, who knew about the change in his stories, had reason to suspect his testimony. Id. Bates' story at trial was the sex was consensual, the victim got angry with him when he sexually underperformed, he pushed the victim away and she hit her head, implying the victim wanted to get even with him for that and so falsely claimed rape. Trial Tr. at p.274, ln.11 - 275, ln.3; p.292, ln.5 - p.293, ln.7. The victim testified it was rape. A considerable weakness in Bates' story was that the allegedly retaliating victim never identified Bates as her attacker. She was attacked at night, in a dark room while she was on her stomach. Trial Tr. at p.63, ln.22 - p.67, ln.20; p.69, ln.11 - 16; PC1 Tr. at p.53, ln.25 - p.54, ln.8; p.54, ln.22 - p.55, ln.8. She was unable to see her attacker. However, she was able to say he was a black man, because she saw his hand holding the knife to her head. Trial Tr. at p.71, ln.6 - 17. The victim suggested to officers it might be someone other than Bates. Trial Tr. at p.71, ln.23 - 24. When that other person had an alibi, officers looked at others and identified Bates.

[¶30] As for the "deficient performance" prong, the record contains nothing establishing that the wide range of reasonable professional assistance referred to in Laib required Bates' trial counsel to search for telephone records within the first two months of his representation, some five months before trial. Bates' counsel testified that he was not aware that such records would be destroyed at all. PC2 Tr. at p.31, ln.11 - 19. If such telephone records ever existed, then according to Bates they would need to have been obtained by mid-May 2003, at the latest. App. at p.15 - 17, ¶¶6 - 7. The State further asserts that trial counsel's behavior was not on its face deficient.

¶31] As for the “prejudice prong”, this court has stated that if it is easier to dispose of an ineffective assistance of counsel claim on the ground of insufficient prejudice, then that approach should be followed. Heckelsmiller v. State, 2004 ND 191, ¶5 , 867 N.W.2d 454. In this case there was significant testimonial and physical evidence establishing Bates committed the crime, including Bates’ own changing story. See, Bates, 2004 ND 222, ¶1, 691 N.W.2d 193; Opinion and Order for Judgment, App. p.34. There is directly conflicting testimony about Bates ever making the alleged telephone call. Even if Bates had presented documentary evidence of such a call, it would not establish what was said during the call. Bates did not present a credible motive for the victim’s alleged retaliation. Furthermore, Bates did not provide an explanation of why, if the victim wished to retaliate against him, she did not then identify him as the perpetrator of the crime. The State asserts Bates has not, and is incapable of, supporting the prejudice prong required for a claim of ineffective assistance of counsel.

¶32] B. Jury Selection.

¶33] Bates alleges his counsel was ineffective for failing to strike *for cause* certain members of the jury pool. His allegation appears to stem from three circumstances: (1) one member of the jury pool had a distant familial relationship to the prosecutor, (2) one member of the jury pool was the spouse of an assistant U.S. Attorney, and (3) one member of the jury pool worked with the Cass County Sheriff’s office.

¶34] There is no transcript of *voir dire*. However, the prosecutor prepared an affidavit to clarify the facts. Docket No. 9. Within the affidavit the

prosecutor explained that one jury panel member was the sister of the wife of a cousin of the prosecutor's wife. The State volunteered that relationship in open court during *voir dire*. The prosecutor recollected the panel member then indicating she could listen to and fairly decide the case based upon its merits. Docket No. 9. As for the panel member who was the spouse of an assistant U.S. Attorney, the U.S. Attorneys' office had no involvement in Bates' case. As for the Cass County Sheriff's office employee, the Cass County Sheriff's office had no investigatory involvement in Bates' case, which was investigated by the Fargo Police Department.

¶35 Bates' counsel testified that just prior to final jury selection he and Bates agreed upon which jurors might be good for the defense and which they should strike. Counsel indicated he was satisfied with the jury that was selected. PC2 Tr. at 21, ln.3-23.

¶36 Bate's counsel requested the District Court allow an additional (seventh) peremptory strike for each side, given that an alternate juror was also being selected. The District Court allowed the additional strike.

¶37 None of the three panel members identified by Bate's presented situations supporting a strike "for cause". The State asserts the *voir dire* performance by Bates' counsel was, on its plain face, not deficient. Because none of the panel members Bates referred to actually listened to the case, Bates suffered no prejudice. Furthermore, Bates did not identify any other panel members whom he needed to, and was otherwise unable to, strike.

¶38 C. Venue.

¶39 Bates alleges his counsel should have moved for a change in

venue. This allegation seems to be rooted in his jury selection issues addressed above. It appears Bates misunderstands the purpose of and bases for a change of venue. A court shall transfer a trial, upon defendant's motion, if the court is satisfied there exists in the county "so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial". Rule 21, N.D.R.Crim.P. Bates did not provide an adequate basis for alleging such a prejudice. Bates' counsel testified that he had no reason to make a venue change motion in this case. PC2 Tr. at p.22, ln.7-10.

[¶40] D. Cross Examination.

[¶41] Bates alleges his counsel was ineffective because he failed to adequately cross-examine the State's witnesses on "critical inconsistencies". While Bates only passingly mentions this in his Appellate Brief, the State briefly responds to a few portions of testimony:

[¶42] 1. Knife position: Bates states the victim told police the defendant held a knife to the side of her face, but in trial said it was held to her throat. PC1 Tr. at p.27, ln.13 - p.29, ln.10. The State asserts there is little difference between the two, given the context of the situation. For his trial counsel to have asked further questions about it would have been to dwell on the presence of the knife at her head. Bates himself had a difficult time explaining where the side of the face ended and the throat began. PC1 Tr. at p.56, ln.9 - 24.

[¶43] 2. Security building: Bates claims his counsel did not adequately explore the "secure" nature of the apartment building in which the crime occurred. His trial counsel did

not recall considering that the concept of security needed more of a discussion than it got. PC2 Tr. at p.24 - 25. Regardless of the presence of locks on the apartment building, John O'Shaunessy, a resident in the building, testified at trial that the outer doors often did not lock when they closed. He also testified that he remotely "buzzed" someone into the building, whom he did not know, about the time the rape was alleged to have occurred. Trial Tr. at p.141, ln.10 - 14; p.144, ln.3. O'Shaunessy did not see who he buzzed in, but testified that person's voice sounded like it belonged to a black man. Id. Bates is a black man.

[[44] 3. Bates' notes to counsel: Bates claims his counsel did not follow the direction regarding cross-examination contained within notes Bates gave him during trial. PC1 Tr. at p.28, ln.22 - p.29, ln.10. However, Bates only offered a few examples (see above) and was otherwise unable to specify exactly what his counsel should have accomplished, but did not. Nor did he meaningfully support why such failures were prejudicial. His trial counsel testified that his clients commonly give him notes during trial. If he considers their suggestions good ones, then he follows them. If not, then not. PC2 Tr. at p.24, ln.2 - 15.

[[45] Bates' trial counsel further testified that after the close of the evidence in the criminal case, while they were in a conference room, Bates said to him: "No matter how this case turns out, I think you did a – and I don't know if

he said “a hell of a job” or “a heck of a job” or “a fine job”, but I remember him saying that it was – he thought I did an excellent job in this case in defending him.” PC2 Tr. at p.26 - 27.

¶46] The State asserts the inconsistencies identified by Bates were not critical and, considering the nature and amount of the evidence in general, were inconsequential. The Hon. John Irby presided over the criminal trial, as well as the post-conviction hearings. In his Opinion and Order for Judgment, Judge Irby found that “any deficiencies in performance by Petitioner’s trial counsel did not rise to the level required to meet the [first prong of the test]. Even if trial counsel’s performance had been deficient, Petitioner did not show the necessary prejudice, considering the significant weight of the evidence presented against him at trial.” App. p.32 - 33.

¶47] E. Rule 29.

¶48] Bates alleges his counsel was ineffective because he did not preserve a sufficiency-of-the-evidence issue by making a motion under Rule 29, N.D.R.Cr.P. Failure to make such a motion means the issue is not preserved for appeal. City of Bismarck v. Towne, 1999 ND 49, ¶8, 590 N.W.2d 893. The State acknowledges Bate’s counsel did not make such a motion. However, as a matter of law, failure to make that motion is not ineffective representation when the State has presented a prima facie case. State v. Jackson, 2002 ND 105, ¶3, 646 N.W.2d 676.

¶49] About Rule 29, Bates’ counsel testified there was enough evidence presented by the State to pass a Rule 29 challenge, and stated he must have decided there was no likelihood of success on that motion at trial. PC2 Tr. at p.22, ln.16 - 23.



[¶50] Bates raised the same sufficiency of the evidence issue on direct appeal. The Supreme Court found sufficient evidence to support the guilty verdict. Bates, at ¶1. Pursuant to N.D.C.C. §29-32-1-12 a court may deny a post-conviction application on the grounds of *res judicata* or misuse of process if, among other things, the claim was fully and finally determined in a previous proceeding. See, Hughes v. State, 2002 ND 28, ¶4, 639N.W.2d 696. Bates has no basis for post-conviction relief on this issue.

[¶51] **CONCLUSION**

[¶52] For all the reasons stated herein, the State respectfully requests this Honorable Court affirm the District Court's denial of post-conviction relief for Bates.

Respectfully submitted this \_\_\_\_th day of December, 2005.

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[¶53] **CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing document was sent by e-mail on this \_\_\_\_ day of December, 2005, upon:

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