ORIGINAL

20060022 & 20060194

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20060022 and 20060194

State of North Dakota,

Plaintiff-Appellee,

- vs -

Shawn Austin,

Defendant-Appellant.

APPEAL FROM THE COURT JUDGMENT AND THE
ORDER DENYING POST CONVICTION RELIEF
SOUTH CENTRAL JUDICIAL DISTRICT
MCLEAN COUNTY CASE NO. 05-K-00042
THE HONORABLE DONALD L. JORGENSEN, PRESIDING

PETITION FOR REHEARING

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STATEMENT OF THE ISSUES

The points of law or facts that the Petitioner, Shawn Austin believes the Supreme Court overlooked or misapprehended are:

1. The Supreme Court allowing the exclusion of the testimony of Austin's psychological expert.

2. The Supreme Court's finding that Austin's trial counsel was effective.

3. The Supreme Court's finding that Austin failed to establish that his trial counsel was ineffective.

4. The Supreme Court's finding that Austin failed to establish that the trial result would have been different if his trial counsel had been effective.

NATURE OF THE CASE

This is a petition to rehear the opinion filed in the above entitled matter on February 28, 2007.

STATEMENT OF FACTS

Petitioner Shawn Austin ("Austin") believes the North Dakota Supreme Court overlooked or misapprehended the law when it ruled that:

1. The trial judge's decision to exclude the testimony of Austin's psychological expert was correct.

2. Austin's trial counsel was effective.

3. Austin failed to establish that his trial counsel was ineffective.

4. Austin failed to establish that the trial result would have been different had his trial counsel been effective.

ARGUMENT

SHOULD THE TESTIMONY OF AUSTIN'S PSYCHOLOGICAL EXPERT BEEN ADMITTED DURING THE TRIAL?

The following five findings of fact were made by the trial judge and are the reasons why he excluded the testimony of Austin's psychological expert:

1. The Defendant is not accused of being a pedophile, but rather having committed or engaged in a sexual act with a minor child.

2. The psychological tests employed by Dr. Kehrwald in his evaluation of the defendant are not intended to be employed for the purpose of determining whether or not the Defendant committed the alleged act.

3. The expert opinion and evaluation as prepared by Dr. Kehrwald is of no probative value to the jury in its determination of whether or not the Defendant committed the alleged crime.

4. The jury is able to make a factual determination of the Defendant's guilt or innocence in the above-entitled prosecution absent expert testimony of the Defendant's character trait of sexual interest in children.

5. The Defendant's character traits are not an element of the alleged offense.

The above five findings fail to consider the fact that the testimony of Austin's psychological expert would have informed the jury that Austin isn't sexually attracted to young females. Had Austin's jury been given such information they would have been able to decide the probability of whether or not Austin who isn't sexually attracted to young females would sexually assault a young female.

The following is Austin's interpretation of the above five findings and why each of them either overlook or misapprehend the fact that Austin's psychological experts testimony would have allowed a jury to determine the probability of whether Austin, who isn't sexually attracted to young females, would sexually assault a young female.

The trial court's finding in 1 above, finds that the victim was a young female, but fails to consider the fact that Austin isn't sexually interested in young females and that such a lack of interest raises the issue of probability of whether or not Austin who isn't sexually interested in young females would sexually assault a young female.

The trial Court's finding in 2 above, fails to consider the fact that the victim was a young female and that the Abel Assessment of Sexual Interest test ("AASI") that Dr. Edward Kehrwald gave Austin established that Austin wasn't sexually interested in young females. Therefore, informing the jury about the results of the AASI would have given the jury a reason to consider why Austin was less likely to have sexually assaulted a

young female.

The trial court's finding in 3 above, states the fact that Austin has no sexual interest in young females has no probative value for a jury in determining whether or not Austin has sexually assaulted a young female. Such a finding is flawed because there is no way that the fact that Austin not being interested in young females wouldn't be probative in determining whether or not Austin would have assaulted a young female.

The trial court's finding in 4 above, admits that a jury can much more easily convict Austin if they aren't told Austin isn't sexually interested in young females. Therefore, the jury should have been informed Austin wasn't interested in young females.

The trial court's finding in 5 above, fails to consider that the character trait of Austin's not being interested in young females would make it less likely he would sexually assault a young female.

The Supreme Court in *State v. Austin*, 2007 ND 30 gave the following reason for exclusion of expert testimony:

"Expert testimony is not admissible if "its probative value is substantially outweighed by the danger of unfair prejudice, conclusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Id.

Nowhere in the above five findings of the trial judge is there any finding that Dr. Kerhwald's testimony was not admissible because, its probative value is substantially outweighed by the danger of unfair prejudice, conclusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of

cumulative evidence.

The testimony of Austin's psychological expert, that Austin is not interested in young females, is testimony about a character trait of Austin. Character traits of a defendant are admissible as evidence under N.D.R.of.Evi 404(a)(1):

According to 404(a)(1) an accused can offer circumstantial evidence of character over the State's objection.

Therefore the testimony of Austin's psychological expert should have been admitted into evidence during Austin's trial. The exclusion of such testimony can only be done by overlooking or misapprehending the law.

WAS AUSTIN'S TRIAL COUNSEL INEFFECTIVE AND WOULD THE TRIAL RESULT HAVE BEEN DIFFERENT IF AUSTIN'S TRIAL COUNSEL HAD BEEN EFFECTIVE?

The fact that Austin's trial counsel, Chad McCabe ("Attorney McCabe") was ineffective and that the results of the trial would have been different had Attorney McCabe been effective are set out in the following questions that were asked by the prosecutor and the answers given by Austin's expert witness, Todd Schwartz ("Attorney Schwartz") at the post-conviction hearing:

Q. "We are here today to review a post conviction relief based on a legal standard that North Dakota adopts in Strickland vs. Washington standard, you are familiar with that? To cut to the short of that, basically you have to prove the defendant was not constitutional protected; in other words, the defense attorney's conduct, number one, was - - would you agree with me in interpreting that to mean that the

defense attorney's conduct was so ineffective as it violated the defendant's right to be represented by counsel: that is the first arm?"

A. "That is the first arm. And Mr. McCabe has admitted to me it was below that standard."

Q. "And the second arm would be then you have to prove that even if there is a defect that the defect would have changed the outcome in some particular way; correct?"

A. "Yes, I believe it would change the outcome." PCR. Tr. P. 24, L. 2 - 16.

No evidence was offered by the State to contradict Attorney McCabe's admission to Attorney Schwartz that his representation was so ineffective it violated Austin's right to be effectively represented by counsel, or that Attorney Schwartz was wrong in his conclusion that outcome of the trial would have been different had Attorney McCabe's representation not be ineffective.

The Supreme Court in *State v. Austin*, 2007 ND 30, expresses concern because Austin's trial counsel, Chad McCabe wasn't called by Austin to testify at the post-conviction hearing.

In medical malpractice cases in North Dakota, Plaintiff's claiming that their doctor committed malpractice prevail without calling the doctor who committed the malpractice. All plaintiff's in medical malpractice cases are required to do is, find an expert in the type of medical malpractice alleged. get that expert to review the plaintiff's medical records, conclude the doctor committed malpractice, and then have the expert testify at the trial, why, what the plaintiff's doctor did or didn't do to the plaintiff was

malpractice. If a Plaintiff in North Dakota can prevail in a medical malpractice case without calling the doctor who committed the malpractice, a defendant in a criminal case should also be able to prevail without calling the attorney that gave the ineffective assistance of counsel.

The following is the procedure Austin used in preparing for the post conviction hearing.

1. He had his trial transcript reviewed by Attorney Schwartz to see if Attorney Schwartz believed that the transcript established that Attorney McCabe gave ineffective assistance of counsel at Austin's trial and if the trial result would have been different if Austin had effective assistance of counsel at trial.

2. After Attorney Schwartz said that Austin's trial transcript show that Attorney McCabe's assistance at Austin's trial was ineffective and the trial result would have been different if Austin had received effective assistance of counsel, Austin scheduled a post-conviction hearing.

3. At the post-conviction hearing, Austin called Attorney Schwartz as a witness and before he testified about Austin's trial, qualified Attorney Schwartz as an expert.

4. Attorney Schwartz then testified about how the transcript established that Attorney McCabe gave ineffective assistance of counsel during Austin's trial and how the result of that trial would have been different with effective assistance of counsel.

5. Attorney Schwartz, at the post conviction hearing, also testified about discussions that Attorney McCabe had with Attorney Schwartz about Austin's case, both before and after trial and how, during these discussions, Attorney McCabe admitted to

Attorney Schwartz he was ineffective.

6. Attorney Schwartz also testified that Attorney McCabe asked Attorney Schwartz how to try Austin's case and then failed to follow any of Attorney Schwartz's advise.

In *State v. Austin*, 2007 ND 30, two of the issues raised by Austin were:

1. Did the trial judge err when he informed the jury, "That's all the transcripts and reading you'll receive"?

2. Did the trial judge err when he informed the jury, "There is no physical evidence; accordingly I don't want to waste your time or anyone else's if you are at an impasse"?

Both of these issues were lost on appeal because Attorney McCabe failed to enter any objections. There is no good legal reason why it would be a good trial tactic not to object. Attorney McCabe's failure to object when each of the above issues occurred during Austin's trial are examples of ineffective assistance of counsel.

Attorney McCabe had no good reason for not questioning the victim about the sexual assaults on the roof. The only explanation he gave was, "I never heard of the roof before. You know, I didn't ask the question. But I want to know how a child that was having trouble walking, got on that roof. I mean my client said why didn't you ask that, why didn't you ask that question. I didn't ask it. It struck me so odd when I heard that she was on the roof of this house, I didn't. I didn't know." Such an explanation is another admission by Attorney McCabe that he didn't know what to do during the trial and another example of ineffective assistance as counsel.

The trial judge's reason why Attorney McCabe's performance during trial had to be effective assistance of counsel is based on the pretrial motions Attorney McCabe made before trial. Pretrial motions usually have little if anything to do with effective representation during the trial. Obviously the trial judge's ruling on Austin's motion that denied the admission of Austin's psychological expert had nothing to do with Attorney McCabe's effective assistance during the trial.

The trial judge's main reason for rejecting Todd Schwartz's opinions that Attorney McCabe failed to give effective assistance of counsel and that the result would have been different if Austin had received effective assistance of counsel is that Attorney Schwartz wasn't credible as an expert witness because he had never testified as an expert before. There is no rule in North Dakota that a first time expert witness isn't reliable.

Austin produced testimony at the post conviction hearing that proved that:

1. Attorney McCabe provide Austin with ineffective assistance as counsel.

2. There would have been a different result at Austin's trial if he had effective assistance of counsel.

The State's response to the above proof was to produce no testimony or evidence at the post conviction hearing to refute Attorney Schwartz's testimony that Attorney McCabe provided Austin with ineffective assistance of counsel during the trial and that the trial result would have been different if Austin had effective assistance of counsel

CONCLUSION

Only by overlooking or misapprehending the law that applies to Austin's case could a court decide that Austin's trial counsel was effective and that the results of

Austin's trial wouldn't have been different with effective counsel.

For the above and forgoing reasons, Austin's Petition for Rehearing should be granted.

Dated this 12 day of March. 2007.

Respectfully submitted:

Benjamin C Pulkrabek

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CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that I am an employee in the office of Pulkrabek Law Firm and I am a person of such age and discretion as to be competent to serve papers.

That on March 12, 2007, she served, by mail, a copy of the following:

PETITION FOR REHEARING

by placing a true and correct copy thereof in an envelope and depositing the same, with postage prepaid, in the U.S. mail at Mandan, North Dakota, addressed as follows:

Ladd R. Erickson
Attorney at Law
P.O. Box 1108
Washburn, ND 58577

I further certifies that on March 12, 2007, I dispatched to the Clerk of the North Dakota Supreme Court, an original and seven copies of the PETITION FOR REHEARING and a 3½" computer diskette containing the full text of the PETITION.

Jacqueline Haag

Jacqueline Haag

Subscribed and sworn to before me on this 12 day of March, 2007.

BENJAMIN C. PULKRABEK
Notary Public
State of North Dakota
My Commission Expires Sept. 8, 2011

Benjamin C. Pulkrabek

Notary Public