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ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Randal R. Steen Applicant/Appellant, vs. State of North Dakota, Respondent/Appellee.	)	STATE OF NORTH DAKOTA Supreme Court No. 2006349 Crim. Case No. 02-K-01113 Post-Con. No. 03-C-02185

PETITION FOR REHEARING OF APPELLANT STEEN

APPEAL OF ORDER DENYING POST-CONVICTION

APPEAL FROM THE DISTRICT COURT
BURLEIGH COUNTY, BISMARCK, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE DONALD L. JORGENSEN, PRESIDING

Randal R. Steen, pro se
Applicant/Appellant
James River Correctional Center
2521 Circle Drive
Jamestown, North Dakota
58401

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I. THIS COURT ERRED BY NOT GRANTING STEEN RELIEF FOR RECEIVING INEFFECTIVE ASSISTANCE OF COUNSEL.

It is absolutely ludicrous for this Court to say that Steen did not receive ineffective assistance of counsel at every step of the process until he finally chose to represent himself only because there was not way he could trust another court appointed attorney.

This Court in its opinion at ¶5 states that "The court stated it had not been furnished transcripts of the trial and other proceedings relevant to the application and there was no judtification for the failure to provide those transcripts despite permitting Steen and his post-conviction counsel additional time after the hearing to file those transcripts."

As Steen stated at the Supreme Court oral argument, Steen did not fail, his attorney did. Had the district court judge said, "Mr. Steen, I need a copy of them transcripts." By God, he would have got a copy. The judge said "Counsel, do you intend to file with the court a transcript of the trial?" Steen's counsel, (Todd A. Schwarz) then stated, "I'll have a transcript over on Monday for the court if that would be okay." See (Evidentiary Hearing Tr. at pp. 38-39).

Upon a motion for reconsideration, the district court granted Steen's counsel, not Steen, ten days to submit the transcript. Again, Schwarz failed.

It was only after all of this that Steen felt forced to represent himself, only in that he drafted and filed his own Supreme Court brief. Steen felt he had no choice because he surely coundn't trust Schwarz anymore nor yet another court

appointed attorney.

It is inconceivable that this Court can honestly say Steen did not receive ineffective assistance of counsel.

This Court in its opinion at ¶7 discusses the motion for new trial and it was also discussed at the oral argument. Steen submitted three sworn affidavits, two of which are basically confessions from Steen's sons stating that they were respnsible for leaving the items in the motel room and that Steen did not know they had left them.

Had Steen's trial counsel subpoenaed these witnesses for trial as Steen demanded, surely the outcome would have been different.

Here again, how any court can not grant Steen relief is beyond imagination. Clearly, even proof of "actual innocence" is not enough to prevail through our North Dakota Judicial system.

This Court in its opinion at ¶16 states "These issues could have and should have been raised in prior proceedings, including his previous direct appeal, but were not."

If, in fact, these issues could have and should have been raised in prior proceedings, then shouldn't have one of Steen's prior counsel included them in prior proceedings?

This Court in its opinion at ¶18 states "Steen also argues he received ineffective assistance of appellate counsel, his claim fails because he represented himself in the consolidated appeals." That is not an accurate statement.

Steen was appointed appellate counsel (Robert v. Bolinske,

Jr.). Bolinske told Steen he had no appealable issues. Then, behind Steen's back Bolinske wrote to Penny Miller and stated that Steen wanted to dismiss his appeal without ever asking Steen if that's what he wanted. Steen would've never known if Penny Miller had not wrote back to Bolinske stating that nowhere in her records did it appear that Steen wanted to dismiss his appeal. Steen then wrote to Penny Miller and asked for a copy of the letter Bolinske sent to her. Steen immediately thereafter fired Bolinske and at the same time simultaneously filed an application for post-conviction relief along with an application for new counsel. (Todd A. Schwarz) was appointed by the district court to represent Steen with any issues he had on direct appeal and post-conviction.

Schwarz pretended like he was helping Steen but only when Steen forced Schwarz's hand could Steen get anything done. Schwarz finally sold Steen out by not providing the trial transcripts to the court after the post-conviciton evidentiary hearing, even after having a second chance to submit them through the district court's reconsideration.

Nobody in their right mind can honestly say that Steen received effective assistance. Nobody understands why the Supreme Court Justice's can't see it, when the average lay person can easily see ineffective assistance. It surely doesn't take a jurispudence degree to know Steen has not receoved effective assistance of counsel.

It is unconscionable what our system of prosecutors, court appointed attorneys, and district court judges are doing

to people who cannot afford to retain and/or hire an attorney who will actually do something for them. The court appointed lawyers help the prosecutors gain convictions and do it without a conscience. And, the district court judges condone and basically promote this.

Furthermore, it is completely unconscionable for this North Dakota Supreme Court to uphold or affirm these convictions the State gains due to the assistance, or lack thereof, from court appointed attorneys. The current system in North Dakota is unconstitutional. For details, See REVIEW OF INDIGENT DEFENSE SERVICES IN NORTH DAKOTA, BY "The Spangenberg Group" (N.D. 2004). This study tells the true horrors of how bad it really is here in North Dakota. The study tells how the district court judges control court appointed contracts and they promote ineffective assistance. The district court judges tell these lawyers not file to many motions and if they do, it seems that the judges retaliate. Therefore, the attorneys on these contracts haven't much choice but to provide their clients with ineffective assistance of counsel.

II. THIS COURT ERRED BY CLAIMING ALL OF STEEN'S ISSUES WERE RES JUDICATA AND/OR MISUSE OF PROCESS.

The district court granted the State relief by saying that all the issues were res judicata. The State had also raised misuse of process. But the trial court did not rule on this ground, thereby denying it or impliedly denying it, or just plain ignoring it.

Steen did address misuse of process as an issue in his Motion for Judgment on the Pleading/Summary Disposition, at

pages 13-26 of this motion. See State's Appendix at 68, 80-94.

The State, at pages 3-4 of their "Brief of Respondent/ Appellee," argues both res judicata and misuse of process. On page 3, the State claims the trial court found that the issues were either res judicata or misuse of process. This is unfounded in the order.

On page 3, the State cites Johnson v. State, 2004 ND 130, 681 N.W.2d 769, citing it in the context of a misuse of process argument.

¶13 of Johnson, says that on appeal this Court can uphold the trial court's ruling on the ground of misuse of process even though the district court only ruled that the issues were res judicata, and made no mention of misuse of process. The State had raised it as a defense. This Court held that: "However, we will not set aside a district court's decesion merely because the court applied an incorrect reason, if the result is the same under the correct law and reasoning." quoting from ¶13. Then this Court upheld the district court on the ground of misuse of process, even though it was not ruled on by the district court.

Steen appealed the district court's order, based only on the order saying the issues were res judicata, because that was the issue, because that was the notice given to Steen.

The State, if they wanted to appeal and argue the misuse of process issue, should have appealed the district court's order also. They should have filed a Cross-Notice of Appeal, appealing the denial or refusal to rule on their misuse of

process claim. That is, after the defendant files his notice of appeal, the State files a notice of appeal, to appeal the denial of their claim of misuse of process.

This Court was without jurisdiction to hear and decide an issue which was not appealed. Steen did not appeal misuse of process. This Court was without jurisdiction to hear and decide any argument on misuse of process by the State, or for this Court to raise it sua sponte.

Using the "logic" of using another reason to uphold the district court's order, as in ¶13 of "Johnson v. State," id., denies to one his due process right of notice.

Steen did not know misuse of process could be an issue on appeal, and thus did not appeal it and argue it in his appeal brief.

For the State's Attorney to use a reason not used by the trial court, is to "allow" the State to enter through a "side door" and thereby "side wind" Steen. It allows or creates a deceit, a fraud on Steen.

This Court was without juridiction to hear the issue not raised with a cross-notice of appeal. Plus, due process of law of notice is denied.

The State attempted to bar the applicant, "Steen" under 29-32.1-12. Res Judicata/Misuse of Process. The district court said all of Steen's claims were res judicata. This Court upheld the district court and went further to say that if the claims weren't res judicata then they could have been misuse of process. In subsection (1) a post-conviction claim may be

denied if the same claim was fully and finally determined in a previous proceeding. Res Judicata and Misuse of Process are affirmative defenses that must be pleaded by the State. N.D.C.C. §29-32.1-12(3). The burden of proof is also on the State. Id. Even where process is misused, a court is not required to deny a post-conviction applicant relief on that ground. The plain language of the statute says that a court "may" deny relief on the ground of misuse of process. N.D.C.C. §29-32.1-12(2).

In Clark v. State, 1999 ND 78, 593 N.W.2d 329, the North Dakota Supreme Court comprehensively addressed the affirmative defense of misuse of process. Steen cited this case during oral argument. Chapter 29-32.1 of the North Dakota Century Code, which is this State's codification of the Uniform Post-Conviciton Procedure Act of 1980, says that misuse of process may occur when a defendant has "inexcusably failed" to raise an issue in a prior proceeding. To shed light on the breadth of the term "inexcusable" the Court examined the history of the uniform act. According to the Court:

> Under Section 12 of the 1980 Uniform Post-Conviction Procedure Act and N.D.C.C. §29-32.1-12(2), "misuse of process" on issues not raised in the original trial court proceedings occurs if the defendant "inexcusably failed" to raise the issue during those proceedings. Originally, the 1980 Uniform Act contained the words "deliberate or inexcusable," which tracks the A.B.A. Standards. However, when the Uniform Act was presented to the Uniform Laws Committee, the "deliberate" was omitted. See Proceedings in Committee of the Whole, Uniform Post-Conviction Procedure Act, July 26 and 29, 1980, at 168-75. "Deliberate" was omitted bases on the belief a "deliberate" act could at times be excusable, but an "inexcusable" act would almost surely be one committed deliberately or intentionally. Id. Such a standard helps balance the competing notions mentioned while ensuring our criminal jsutice system does not fall victim to intricate schemes

> to delay, prolong, or otherwise manipulate the system to one's advantage, perceived or otherwise.

Clark, 1999 ND at ¶22. The foregoing passage from Clark gives shape to the term "inexcusable" ans shows that it really does have meaning. The drafters of the uniform act did not intend for a claim to be dismissed merely because the claimant failed to raise it at some earlier stage. See Id. The particular claim must only be dismissed if its porponent's failure was "inexcusable." N.D.C.C. §29-32.1-12(2)(a). The term "inexcusable" is apparently akin to "deliberate" and "intentional" and was chosen with an eye toward thwarting "intricate schemes to delay, prolong, or otherwise manipulate the system to one's advantage. . ." Clark, 1999 ND at ¶22 (citing Proceedings in Committee of the Whole, Uniform Post-Conviction Procedure Act, July 26 and 29, 1980, at 168-75).

In this case, the State has fallen far short of showing any kind of deliberate or intentional act aimed at manipulating the system. The State's contention and this Court's ruling ignores the fact that misuse of process is an affirmative defense and that the burden of proof rests squarly on the State's own shoulders. Steen is not required to show that any such failure was excusable until the State has provided evidence to the contrary. Assertion is not evidence, and the fact that the State's invitation to enter a finding of misuse of process can be seen as recognition of the distinction. While it is true the State's initial burden may shift, the burden can only be passed after the State has established that there are no genuine issues of material fact. See Clark, 1999

ND at ¶5. Here, the State has failed to do so. And, this Court should not have affirmed the district court's ruling.

It is inconceivable to think that any Supreme Court Justice, in good conscience, would affirm a conviction gained and sustained in complete violation of basic fundamental fairness guaranteed to every criminal defendant under our constitutional system.

Steen has not received one stitch of fundamental fairness.

For any court appointed lawyer, State's attorney, and district judge to allow a defendant to stand trial while dressed in prison attire one day and jail clothing the second day of a jury trial proves they don't care about fundamental fairness.

Second:

The State was allowed to supplement the record with bogus bench warrants during Steen's consolidated appeal.

In a recent decision, the Court reiterated and stated: "Only items in the record may be included in the appendix. The author's signature on the brief, under [N.D.R.App.P.] 32, certifies compliance with this rule." N.D.R.App.P. 30(a)(1). "This rule prohibits parties from trying to sway this Court with materials and information that were not before the district court." See State v. Proell, 2007 ND 17, ¶16, 726 N.W.2d 591 (citing Schwan v. Folden, 2006 ND 28, ¶13, 708 N.W.2d 863).

Allowing the prosecutor to supplement the record with items that had never been before the district court and then telling Steen his warrantless arrest argument was misplaced is just another example of how unfair our North Dakota judicial system really is. It appears that the Court Rules are only strickly

enforced upon the criminal defendant and that they do not really have to be followed by the State's employee's, i.e., police, prosecutors, court appointed lawyers, district court judges, and finally the Supreme Court Justice's.

The State's attorney hoodwinked this Court and Steen by supplementing the record with the bogus bench warrants.

Again, Steen was denied due process and denied the basic fundamental fairness guarnateed by our Constitution.

Our judicial system needs to follow the simplicity of this Bible verse: "Better a little with righteousness than much gain with injustice." See Proverbs 16:8.

CONCLUSION

After five and half years of fighting, the system has Steen pretty well beat down, left in a state of utter hopelessness if you will. The judicial system has taught Steen that they are saying, "Guilty or innocent, makes no difference, how dare you take a case to trial." And, if you do and lose, you get five times the prison time as you would've got had you pled guilty.

Steen prays that this Court take a closer look at the many claims he has put forward throughout his appeals and grant him the relief any citizen of this United States of America would deserve had they been treated like Steen.

Dated this ____ day of August 2007.

Randal R. Steen, pro se
James River Correctional Center
2521 Circle Drive
Jamestown, North Dakota
58401