

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Alman Andrew Wong,)
)
Petitioner/Appellant,)
)
vs.)
)
State of North Dakota,)
)
Respondent/Appellee.)

Supreme Court No. 20100171
Morton Co. No. 30-08-K-0880

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

AUG 11 2010

STATE OF NORTH DAKOTA

.....
BRIEF OF RESPONDENT/APPELLEE
.....

APPEAL FROM CRIMINAL JUDGMENT
MORTON COUNTY DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE BRUCE B. HASKELL
PRESIDING JUDGE

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ISSUE

Whether the Trial Court erred in dismissing the Defendant's Petition for Post Conviction Relief.

FACTS

The Defendant was convicted of Gross Sexual Imposition, a Class AA Felony and Aggravated Assault, a Class C Felony, as alleged in the Amended Information. R.23.

The Defendant entered a guilty plea and a presentence investigation was ordered. R.24.

Prior to the sentencing the Defense made motions for mental evaluations. R.29, 30. The Motions were granted. R.31. The Defendant did not cooperate with the evaluation. R.38.

The Defendant was sentenced and Judgment was entered accordingly. R.40.

The Defendant filed a Petition for Post Conviction Relief. A.3. The application requests medical assistance and release from incarceration. A.5. The application asserts that there was ineffective assistance of counsel for failure to assert the defense of mental capacity. This is the defense the defendant scuttled by his own actions. The State filed an Answer. A.6. The State's Answer included a prayer for relief that the matter be dismissed. The Trial Court dismissed the Petition. A.9.

The Defense has appealed the dismissal of post conviction relief.

ARGUMENT

The State is entitled to dismissal as a matter of law.

In the instant case, the issues raised by the Defendant in the Application for Post Conviction Relief had already been raised and addressed prior to entry of Judgment. The Trial Court was aware of the issues. The Trial Court had personally observed the Defendant. The Trial Court had first-hand knowledge that the Defendant's allegations did not have substance. Under such circumstances the Trial Court has discretion to issue its order and avoid further delay.

A review of the precedents for post conviction relief shows that this Court recognizes the purpose of Chapter 29-32.1 is to permit challenges to criminal convictions and to provide a vehicle to develop a record. See, e.g. *Berlin v. State*, 2005 ND 110, 698 N.W.2d 266.

Nevertheless,

The statute does not expressly allow the court to dismiss on its own motion an application for post-conviction relief. It says the court “may grant a motion by either party for summary disposition.” However, a summary dismissal of a post-conviction application is analogous to dismissal of a civil complaint under N.D.R.Civ.P. 12(b) for failure to state a claim upon which relief can be granted. In such cases, we have held that a trial court may, on its own initiative, and in the cautious exercise of its discretion, dismiss a complaint for failure to state a valid claim under Rule 12(b). (Citation omitted.) We have warned this power must be exercised sparingly and with great care to protect the rights of the parties, and the court should dismiss under Rule 12(b) only when certain it is impossible for the plaintiff to prove a claim for which relief can be granted. (Citation omitted). The power of the court to dismiss a claim on its own motion under Rule 12(b) derives from the court’s inherent authority to dismiss a meritless claim. See Albrecht v. First Fed.Sav. & Loan Ass’n, 372 N.W.2d 893, 894 (N.D. 1985). We hold the trial court possesses the same inherent authority under N.D.C.C. § 29-32.1-09 to summarily dismiss an application for post-conviction relief when the statutory triggering conditions are met, i.e., there is no genuine issue as to any material fact and the party in whose favor the dismissal is entered is entitled to judgment as a matter of law.

Berlin at ¶7

In most ordinary circumstances, a hearing is considered on an issue of ineffective assistance of counsel. This case, however, is exactly the type of case that is contemplated by the language in *Berlin* cited above. Because the ineffective assistance of counsel

allegation by the Defendant is so obviously contrived by the Defendant himself, the Court has the power to dismiss.

The Order issued by Judge Haskell stated:

The defendant's Petition for Post-Conviction Relief is DISMISSED pursuant to N.D.C.C. 29-32.1-06(2) on the pleadings in that defendant has not alleged, nor can he prove a set of facts to support his claim that would entitle him to relief.

On its face, this order may appear to be overly concise. Examination of the record shows that to be untrue. Examination of the record shows that Motions were made with the Defendant's competency at issue. The record shows that the Defendant did not cooperate with the evaluations. Judge Haskell's observation of the Defendant's contrivance in the creation of this issue is clear. At a minimum, the record is clear that the motion was made, and the issue was addressed.

N.D.C.C. 29-32.1-06(2) states:

The state may move to dismiss an application on the ground that it is evident from the application that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings. In considering the motion, the court shall take account of substance regardless of defects of form.

During the course of the matter, mental capacity of the defendant became an issue, and there were motions for an evaluation. The Defendant refused to cooperate with the evaluation. As indicated in the statute, no purpose would be served by any further proceedings in the instant case.

The Defense claims that time should have been afforded the Defendant to respond to the State's Answer. *Delvo v. State*, 2010 ND 78, 782 N.W.2d 72 on quick read, may even support that position. *Delvo* indicates that once the Petitioner is put on notice he/she

will be put to proof, he/she must then support the allegations. That issue is not reached in the instant case. In the instant case the Trial Court is aware from the record and personal observation that the issues alleged have already been decided. Under those circumstances no amount of supplementing the pleadings or supporting with evidence will change the matter. Under such circumstances the Trial Court acted appropriately.

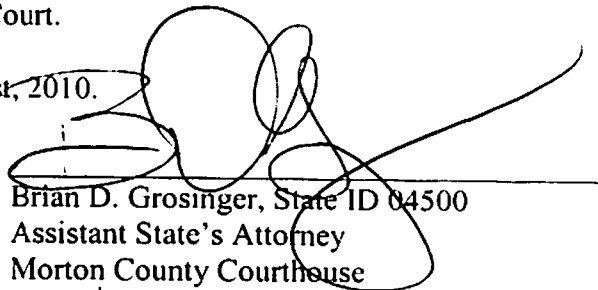
The Defense is accurate that the State did not make a separate motion for summary judgment. However, in the State's prayer for relief, the State requests that the matter be in all respects dismissed.

Again, this Court has established precedent that summary motion cannot be granted without a motion from a party. This Court, however, has established that a Trial Court can exercise its authority to grant dismissal, when in the cautious exercise of discretion the Trial Court determines there is no valid claim. This language is stated in *Berlin*, above, and is repeated in *Henke v. State*, 2009 ND 117, 767 N.W.2d 881, at ¶13. During the course of handing down the previous precedent, this Court was allowing for facts such as those that are present in this case. By doing that, this Court was recognizing the result of the instant case.

CONCLUSION

For the reasons stated above, the State of North Dakota respectfully requests the Court affirm the Order of the Trial Court.

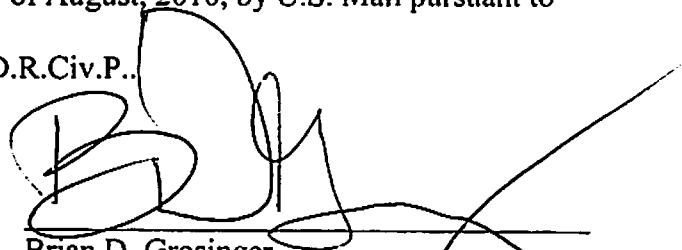
Dated this 11th day of August, 2010.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I made service of a copy of the foregoing **BRIEF OF RESPONDENT/APPELLEE** upon Benjamin C. Pulkrabek, Attorney at Law, 402 1st St. N.W., Mandan, ND 58554 on this 11th day of August, 2010, by U.S. Mail pursuant to Rule 49, N.D.R.Crim.P. and Rule 5(b), N.D.R.Civ.P..

A handwritten signature in black ink, appearing to read 'B. Grosinger', is written over a horizontal line. The signature is stylized and extends to the right of the line.

Brian D. Grosinger
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Morton County, North Dakota