

**IN THE SUPREME COURT**  
**STATE OF NORTH DAKOTA**

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**SUPREME COURT NO. 20100171**

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Alman Andrew Wong,

Petitioner-Appellant,

-vs-

State of North Dakota,

Respondent-Appellee.

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APPEAL FROM THE CRIMINAL JUDGMENT  
SOUTH CENTRAL JUDICIAL DISTRICT  
MORTON COUNTY CR. NO. 30-08-K-880  
THE HONORABLE BRUCE B. HASKELL, PRESIDING

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BRIEF

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## ISSUE

[¶1] Did the trial judge err when he dismissed Defendant/Appellant, Alman Andrew Wong's Petition for Post Conviction Relief on the pleadings pursuant to NDCC Chapter 29-32.1

## NATURE OF THE CASE

[¶2] Defendant/Appellant, Alman Andrew Wong (Mr. Wong) plead guilty to the criminal offenses of Gross Sexual Imposition and Aggravated Assault and judgment and sentence was entered on December 16, 2009. Mr. Wong did not appeal that judgment and sentence.

[¶3] On April 8, 2010 Mr. Wong made out and signed an application for Post-Conviction Relief. That application was filed on April 12, 2010.

[¶4] The State responded to the application with an Answer to Petition for Post-Conviction Relief dated May 11, 2010 and filed on May 12, 2010.

[¶5] The trial judge entered an Order dated May 24, 2010 dismissing on the pleadings, Mr. Wong's Petition for Post-Conviction Relief. That Order was filed May 25, 2010.

[¶6] Mr. Wong on June 6, 2010 signed a Notice of Appeal on the denial of his Post-Conviction application. That appeal was filed on June 9, 2010.

[¶7] This case is now before the North Dakota Supreme Court.

## STATEMENT OF FACTS

[¶8] Defendant/Appellant, Alman Andrew Wong (Mr. Wong) plead guilty to the criminal charges of Gross Sexual Imposition and Aggravated Assault. On December 16, 2009 he was sentenced to life imprisonment without parole and on the

Aggravated Assault charge he received a 5 year consecutive sentence to the Gross Sexual Imposition charge.

[¶9] There never was an appeal from the judgment and sentence entered on December 16, 2009.

[¶10] Mr. Wong signed an Application for Post Conviction Relief on April 8, 2010. The Application was filed on April 12, 2010. App p. 3.

[¶11] The State responded to Mr. Wong's application for Post Conviction Relief with an Answer to Petition for Post Conviction Relief dated May 11, 2010 and filed on May 12, 2010. App. p. 6.

[¶12] No where in the State's Answer is there any request for Summary Judgment.

[¶13] No hearing was ever held in the District Court on Mr. Wong's Application for Post Conviction Relief.

[¶14] On May 24, 2010 the trial judge signed an Order dismissing on the pleadings, Mr. Wong's Application for Post Conviction Relief. That Order was filed may 25, 2010. App. p.9.

[¶15] Mr. Wong then pro se signed on June 6, 2010 a Notice of Appeal of the Order denying his Application for Post Conviction Relief. The Notice of Appeal was filed June 9, 2010.

#### ARGUMENT

[¶16] According to Vandenburg v. State 2003 ND71, 600 NW2d 568 the standard of review is:

[¶17] [¶5] "The procedure followed for a motion for the summary disposition of

a petition for post-conviction relief is similar to that followed for a motion for summary judgment.” Weaver, 2003 ND 47, ¶15. Proceedings for post-conviction relief are civil in nature and all rules and statutes applicable in civil proceedings are available to the parties. Id. Our review of a summary denial of post-conviction relief is like the review of an appeal from a summary judgment. Id. A trial court may summarily dismiss an application for post-conviction relief if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Id. The initial burden is on the moving party to show there is no genuine issue of material fact. Id. If the movant initially shows there is no genuine issue of material fact, the burden shifts to the non-movant to demonstrate there is a genuine issue of material fact. Id. For the summary disposition of a petition for post-conviction relief, the moving party bears the burden of showing there is no dispute as to either the material facts or the inferences to be drawn from undisputed facts, and that the movant is entitled to judgment as a matter of law. Id.; N.D.C.C. § 29-32.1-09(1). A genuine issue of material fact exists if reasonable minds could draw different inferences and reach different conclusions from the undisputed facts. See Belgarde v. Rosenau, 388 N.W.2d 129, 130 (N.D. 1986).

[¶18] Defendant/Appellant, Alman Andrew Wong in his application for Post Conviction Relief raised the following issues:

1. Denial of effective assistance of counsel;
2. His guilty pleas were unlawfully induced;
3. He was incompetent to stand trial;

[¶19] If any of the above issues are proven Mr. Wong would be entitled to Post Conviction Relief.

[¶20] What facts Mr. Wong will establish to prove as to issues 1 and 2 above are not known at this time

[¶21] As to issue 3 above, competency to stand trial there are documents available. These documents indicate a psychiatric exam of Mr. Wong was ordered in that case. The results of that psychiatric exam according to Mr. Wong's Petition for Post-Conviction Relief was he was found to be incompetent.

[¶22] Since Mr. Wong did not appeal from the judgment and sentence entered on December 16, 2009, the first time Mr. Wong could have raised the issue of affective assistance of counsel was in his Application for Post-Conviction Relief.

[¶23] Roth v. State 2006 ND 106, 713 NW2d 513 [¶12] An ineffective assistance of counsel claim should be made in an application for post-conviction relief so that an evidentiary record can be made that will allow scrutiny of the reasons underlying

[¶24] Mr. Wong in his Application for Post Conviction Relief followed the above procedure in Ross. Mr. Wong's factual situation is similar to Ross because both of them first raised their ineffective assistance of counsel claim in their applications for post conviction relief.

[¶25] According to the following in Kaiser v. State 2005 ND 49, 693 NW 2d post conviction proceedings are civil.

[¶26] [¶ 8] Because post-conviction relief proceedings are civil in nature and all rules and statues applicable in civil proceedings are available to the parties, see

Vandeberg v. State, 2003 ND 71, ¶5, 660 N.W.2d 568, Johnson, under N.D.R.Civ.P. 56(e), should have been afforded 30 days after service of the State’s brief within which to serve and file an answer brief and supporting papers in opposition to the request for summary disposition.

Under N.D.R.Civ.P. 56(e), a motion for summary judgment “and supporting papers must be served at least 34 days before the motion may be heard” and “[t]he adverse party shall have 30 days after service of a brief within which to serve and file an answer brief and supporting papers.” Thus, we conclude that Kaiser, “under N.D.R.Civ.P. 56(c), should have been afforded 30 days after service of the State’s brief within which to serve and file an answer brief and supporting papers.” Johnson, at ¶6.

[¶27] In the case now before the court Mr. Wong’s Application for Post Conviction Relief is dated April 8, 2010 and filed April 12, 2010. The State’s answer to this application is dated May 11, 2010, filed May 12, 2010. The trial judge’s order dismissing Mr. Wong’s Application and pleading is dated May 24, 2010 and filed May 25, 2010.

[¶28] The State’s Answer to Mr. Wong’s Petition for Post Conviction Relief is dated May 11, 2010. According to Kaiser, Mr. Wong after the service of the State’s Brief had 30 days to file an answer and brief and supporting papers in opposition to the State’s request for summary judgment.

[¶29] According to Kaiser paragraph [9]

[¶30] Under N.D.R.Civ.P. 56(e), a motion for summary judgment “and supporting papers must be served at least 34 days before the motion may be heard” and



“[t]he adverse party shall have 30 days after service of a brief within which to serve and file an answer brief and supporting papers.”

[¶31] Therefore at least 34 days has to pass before the trial judge can hear a Motion for Summary Judgment.

[¶32] Instead of waiting 34 days to rule on the Motion for Summary Judgment, District Court Judge Bruce B. Haskell only waited 13 days.

#### CONCLUSION

[¶33] In Kaiser because the trial judge didn't give Mr. Kaiser 30 days to respond to the State's Motion and Brief the judgment was reversed and the case remanded to the District Court. Because the trial judge in Mr. Wong's case didn't give Mr. Wong 30 days to respond to the State's Motion and Brief and decided and granted Summary Judgment before 34 days passed the judgment in this case should also be reversed and the case remanded to the District Court.

DATED this \_\_\_\_ day of July, 2010.

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**CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing documents were served electronically on the following individual on this 13th day of July, 2010.

Brian Grosinger  
Morton County  
Assistant State's Attorney  
bgrosing@nd.gov

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Benjamin C. Pulkrabek