

20100177

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
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SEPTEMBER 28, 2010
STATE OF NORTH DAKOTA

Wesley Cody,)	
)	
Appellant,)	Supreme Court No. 20100177
)	
vs.)	Burleigh County No. 08-04-K-1032
)	
State of North Dakota,)	
)	
Appellee.)	

BRIEF OF APPELLANT

APPEAL FROM MEMORANDUM OPINION AND ORDER

DENYING POST-CONVICTION RELIEF

THE DISTRICT COURT, SOUTH CENTRAL JUDICIAL DISTRICT,

COUNTY OF BURLEIGH, STATE OF NORTH DAKOTA

THE HONORABLE BRUCE A ROMANICK, PRESIDING

DATED MAY 13, 2010

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STATEMENT OF THE ISSUE

Wesley Cody's conviction for forgery, in violation of N.D.C.C. § 12.1-24-01, should be vacated and granted a new trial because he received ineffective assistance of counsel when entering his guilty plea.

STATEMENT OF THE CASE

¶ 1 This is an appeal from the Memorandum Opinion and Order Denying Post-Conviction Relief entered by the Honorable Bruce A. Romanick on May 13, 2010. (App. 17-22).

¶ 2 By Criminal Complaint dated May 19, 2004, Wesley Cody ("Cody") was charged with one count of Forgery in violation of N.D.C.C. § 12.1-24-01, a Class C Felony. In Count 1, it was alleged Cody and another defendant, Travis Brendel, knowingly and falsely wrote checks on another's account in excess of \$100. (App. 3-4).

¶ 3 Cody pled guilty on October 29, 2004 with the assistance of trial counsel. (Change of Plea Tr.). He was initially sentenced one year imprisonment, with all time suspended for a period of eighteen months, during which time Cody was on supervised probation. (App. 5-9).

¶ 4 On May 5, 2009, Cody's probation was revoked and he was sentenced eighteen months incarceration. (App.10-12).

¶ 5 Cody applied for post-conviction relief, pro se, on November 18, 2009. (App. 13-16). He initially raised two issues: 1) ineffective assistance of counsel, and 2) credit for time served. However, after investigation, the issue of credit for time served was abandoned due to lack of sufficient evidence. (Post-Conviction Relief Tr. 28:7-11).

¶ 6 On May 7, 2010, a hearing on Cody's post-conviction application was held before the trial court. Cody and trial counsel both testified at the hearing. See (Post-Conviction Relief Tr.).

¶ 7 The Trial Court denied Cody's application for post-conviction relief on May 13, 2010, in a Memorandum Opinion and Order Denying Post-Conviction Relief. (App. 17-22).

¶ 8 Cody appealed from the Trial Court's order on June 11, 2010. (App. 23).

STATEMENT OF THE FACTS

¶ 9 On October 28, 2008, Cody appeared for a change of plea hearing before the trial court with his trial counsel.

¶ 10 The trial court advised Cody of his rights through the Rule 11(b), North Dakota Rules of Criminal Procedure, colloquy. (Change of Plea Tr. 2:20-25; 3:1-22).

¶ 11 Pursuant to Rule 11(b)(3), the trial court asked the State to establish a factual basis for the guilty plea. Id. at 4:4-5. The State argued to the trial court Cody had issued forged checks to the following businesses: 1) Mini Mart for \$47.00; 2) Polar Package Place for \$50.00; and, 3) Pony Express for \$89.44. Id. at 4:21-25; 5:1-6; 6:3-4. (App. 30, 31, 32).

¶ 12 The trial court then inquired of trial counsel, who proceeded to state, "...there were several people involved, and kind of a --- he [Cody] was involved in the one particularly, Pony Express, that was his involvement, filling out the checks." Id. at 7:4-10.

¶ 13 Cody then spoke at the hearing, advising the Court he was only involved in forging the Pony Express check. Id. at 8:6. The trial court advised Cody to go to trial if he had a defense. Cody's response was, "No. No. I'm saying I was only involved in the one. Yeah, I admit I was involved in the one." Id. at 8:9-13. Despite this, the trial court accepted the factual basis and guilty plea. Id. at 8:16.

¶ 14 Cody was sentenced to one year, with all of that time suspended, and given eighteen months of supervised probation, in addition to restitution in the amount of \$187.21 and credit for 60 days of time served in the event his probation of later revoked.

(App. 5-9). A Criminal Judgment with Appendix A was issued on November 4, 2004.

(App. 5-9).

¶ 15 Cody's probation was revoked on May 5, 2009, and he was sentenced to eighteen months with the Department of Corrections. (App. 10-12).

¶ 16 On November 18, 2009, Cody applied for post-conviction relief, alleging ineffective assistance of counsel and improper credit for time served. (App. 13-16).

¶ 17 A hearing on Cody's application was held before the same trial court on May 7, 2010, whereby both Cody and his trial counsel testified. (Change of Plea Tr.).

¶ 18 Cody testified again at his post-conviction hearing that he only forged the Pony Express check. (Post-Conviction Relief Hearing Tr. 8:4-10. He denied forging the Mini Mart check and Polar Package Express check. Id. at 8:12-25.

¶ 19 Cody further testified he informed trial counsel he did not author or assist in passing the Mini Mart or Polar Package Express checks. Id. at 9:1-3.

¶ 20 When asked why he had pled guilty, Cody stated his trial attorney told him "our best bet would be we could take the plea agreement, I probably could get into drug treatment. I would be out of prison in three, four months. I was like, well, that sounds better than sitting here for six months until my next court date." Id. at 17-22.

¶ 21 During the investigation, Cody took a hand exemplar. (App. 26). Cody was fairly certain they tested his handwriting against all of the checks. (Post-Conviction Relief Hearing Tr. 12:4-6). However, the handwriting exemplar provided by the State was for the Pony Express check and a check to Best Stop. These were found to be authored by Cody. (App. 24-29).

¶ 22 No factual basis for the Best Stop check was set forth by the State at the Change of Plea hearing (Post-Conviction Relief Hearing Tr. 15:18-20; Change of Plea Tr. 4:21-25; 5:1-6; 6:3-4).

¶ 23 Under cross-examination by the State, Cody stated he believed he was only pleading guilty to the Pony Express check, not the Mini Mart or Polar Package Express checks. (Change of Plea Tr. 14:24-25; 15:1).

¶ 24 Cody further testified, under cross-examination, “we were going to try to get it to be a misdemeanor, meaning it was only -- it was under a \$100. But then [The State] brought up two other checks. So that I had nothing to do with.” (Post-Conviction Relief Hearing Tr. 15:4-7).

¶ 25 At the post-conviction hearing, trial counsel admitted Cody had previously told him he had authored only one check. Id. at 20:3-5.

¶ 26 Trial counsel also testified that, had Cody only pled to the Pony Express check, it would have been a Class A misdemeanor because it was under \$100. Id. at 20:20-24.

¶ 27 With regard to the Mini Mart check, there was an indication, based upon video footage, that the check was passed by a Native American male named Clint Foolbear. Id. at 22:7-10.

¶ 28 Trial counsel testified he reviewed the stills from the video tapes taken at the time the crimes were committed and, upon questioning as to whether Mr. Cody appeared in any of them, stated they were grainy and difficult to see. Id. at 22:16-23.

LAW & ARGUMENT

I. DEFENDANT’S CONVICTION SHOULD BE VACATED BECAUSE HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

A. Jurisdiction

¶ 29 The North Dakota Supreme Court has jurisdiction to review an appeal from an order denying an application for post-conviction relief under N.D. Const. art. VI, §§ 2 and 6, and N.D.C.C. § 29-32.1-14. State v. Austin, 2007 ND 30, ¶ 7, 727 N.W.2d 790.

B. Standard of Review

¶ 30 The North Dakota Supreme Court has held the standard of review in a post-conviction proceeding is the clearly erroneous standard. “The district court's findings of fact in a post-conviction proceeding will not be disturbed on appeal unless clearly erroneous under N.D.R.Civ.P. 52(a).” Odom v. State, 2010 ND 65, ¶ 10, 780 N.W.2d 666.

¶ 31 Further, “[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, this Court is left with a definite and firm conviction a mistake has been made. Id.”

¶ 32 “The issue of ineffective assistance of counsel is a mixed question of law and fact which is fully reviewable on appeal. Id.”

C. Argument

1. Ineffective Assistance of Counsel Standard

¶ 33 According to the North Dakota Supreme Court, “the petitioner must prove (1) counsel's representation fell below an objective standard of reasonableness, and (2) the defendant was prejudiced by counsel's deficient performance.” Jacob v. State, 2010 ND

81, ¶ 11, 782 N.W.2d 61. (internal citations and quotations omitted). When claiming ineffective assistance of counsel, the petitioner bears a heavy burden. Id.

¶ 34 Trial counsel's performance is presumed to be reasonable. Id. To meet the second element, the petitioner must “establish a reasonable probability that, but for his counsel's errors, the result of the proceeding would have been different.” Id.

2. Guilty Pleas

¶ 35 Under Rule 11(b)(1), North Dakota Rules of Criminal Procedure, the trial court “may not accept a plea of guilty without first, by addressing the defendant personally ... in open court, informing the defendant of and determining that the defendant understands” a litany of rights. The trial court in this case did satisfy this requirement of N.D.R.Crim.P. 11. (Change of Plea Hearing, 2:20-25; 3:1).

¶ 36 Rule 11(b)(2) requires the trial court to ensure a plea is voluntary. It appears this, too, was done properly in this matter. Id. at 3:10-23.

¶ 37 Finally, Rule 11(b)(3) requires the establishment of a factual basis for the plea. According to Rule 11(b)(3), “[b]efore entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.” (emphasis added). The importance of this issue cannot be understated:

Because the record did not affirmatively indicate that a factual basis existed, the trial court erred in presuming the existence of a factual basis and in accepting the guilty plea. Obtaining a factual basis for the plea serves important purposes. First, it assures that a defendant who seeks to plead guilty is in fact guilty. Persons whose conduct does not fall within the charges brought by a prosecutor should not plead guilty, but unless a factual basis is required, the risk of innocent persons being adjudicated guilty is enhanced. In addition, the finding of a factual basis, when made a matter of record, eliminates post-conviction factfinding proceedings aimed at determining the accuracy of guilty pleas. Finally, the information developed in determining the factual basis is often useful to the court at sentencing.

Kaiser v. State, 417 N.W.2d 175, 178 (N.D. 1978) (citing, A.B.A. Standards for Criminal Justice, Receiving and Acting Upon a Plea, Section 14-1.6(a), page 14.34).

¶ 38 “A factual basis is a statement of facts that assures the defendant is guilty of the charged offense.” State v. Blurton, 2009 ND 144, ¶ 16, 770 N.W.2d 231. “The defendant must admit to conduct in the factual basis that constitutes the charged offense and the court should compare each element of the charged offense to the facts the defendant admits.” Id. (emphasis added). See also State v. Head, Not Reported in N.W.2d, 2008 WL 3896764, 3 (MN 2008) (unpublished) (citing State v. Iverson, 664 N.W.2d 346, 350 (Minn.2003)) (stating, “[a]n adequate factual basis for a guilty plea does not exist where the defendant's statements contradict his plea.”

¶ 39 Finally, this Court has stated, “[i]neffective assistance of counsel during plea negotiations can invalidate a guilty plea and make granting withdrawal appropriate, to the extent that the counsel's deficient performance undermines the voluntary and intelligent nature of defendant's decision to plead guilty.” State v. Lium, 2008 ND 232, ¶ 22, 758 N.W.2d 711 (quoting, United States v. Artega, 411 F.3d 315, 320 (2d Cir.2005)).

¶ 40 Trial counsel’s performance fell below an objective standard of reasonableness in this case. He allowed his client to enter a guilty plea to a felony charge when a factual basis could not be established to support the felony charge, and he knew his prior to the hearing, according to testimony given. Given the necessity of establishing a factual basis, allowing Cody to plead guilty to a felony when he proclaimed his innocence meets the first prong of the ineffective assistance of counsel requirement.

¶ 41 Further, the second prong of the argument has been met. Cody admitted to writing a check for less than \$100. This would have made the crime a Class A misdemeanor, whereby he would have only faced one year imprisonment instead of five years under a Class C felony charge. N.D.C.C. § 12.1-32-01. If Cody only pled to the Pony Express check, upon revocation, the most Cody could have been sentenced to was one year imprisonment, with credit for time served. (App. 32) However, because he was allowed by both trial court and trial counsel to plead to a Class C felony, despite his proclamation of innocence with regard to the Mini Mart and Polar Package Express checks, he faced up to five years' imprisonment. (App. 30, 31)

¶ 42 Cody served eighteen months imprisonment upon revocation, which is more time than he could have lawfully received if he pled guilty to only the Pony Express check. (App. 32). The sentencing differences clearly show he suffered prejudice under the second prong of the ineffective assistance of counsel standard.

¶ 43 The trial court states that, because the handwriting exemplar showed Cody to be the author of the Best Stop check for \$16.64, he would still have been guilty of a felony. (App. 19, 20). However, this point is unnecessary to the analysis of this case. This check was not included in the State's factual basis when it attempted to establish Cody was guilty of a Class C felony. (Change of Plea Tr. 4:21-25; 5:1-6; 6:3-4.)

CONCLUSION

¶ 44 Wesley Cody's conviction for forgery, in violation of N.D.C.C. § 12.1-24-01, should be vacated because he received ineffective assistance of counsel when entering his guilty plea.

Dated this 20th day of September, 2010

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,)	
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Appellee,)	Supreme Court No. 20100042
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vs.)	Burleigh County No. 08-09-K-1381
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Wesley Cody,)	
)	
Appellant.)	

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2010, the following document:

1. **Brief of Appellant**
2. **Appendix of Appellant**

was electronically filed with the Clerk of Court and served upon the following parties electronically and sent to:

Jacob Rodenbiker
jarodenbiker@nd.gov

Dated this 20th day of September, 2010.

/s/
Carey A. Goetz