

20100177

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

OCT 29 2010

WESLEY CODY,
Petitioner-Appellant,

STATE OF NORTH DAKOTA

-vs-

STATE OF NORTH DAKOTA,

) Supreme Court No. 20100177

Respondent-Appellee.

) District Court No. 08-04-K-1032

) SA File No. F363-04

BRIEF OF RESPONDENT-APPELLEE

APPEAL FROM DENIAL OF POST-CONVICTION RELIEF

BURLEIGH COUNTY DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
HONORABLE BRUCE A. ROMANICK, PRESIDING

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STATEMENT OF THE ISSUE

Whether the district court erred in denying Cody's Application for Post-Conviction Relief on the grounds of ineffective assistance of counsel?

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STATEMENT OF FACTS

[¶1] While the State agrees largely with Cody’s Statement of Facts, the State contends, contrary to Cody’s ¶23, that the record shows Cody understood that he was entering a guilty plea to a felony offense. (Post-Conviction Relief Hearing Tr. 15:2-10). Further, contrary to Cody’s ¶27, the evidence in the record only raises the possibility the individual in the video surveillance may have been Native American, and may have been Clint Foolbear, but there was no was positive identification of anyone in particular. (*Id.* at 22:4-23). Finally, at his change of plea, Cody was ordered by the district court to pay restitution in the amount of \$187.21, which is the total of the three checks for which the State provided a factual basis, and he did not contest that amount at the change of plea, or at any time in the record. (Change of Plea Tr. 9:12 – 10:19).

[¶2] Additional facts not included in either party’s statement may be necessary to argument of the issue presented. Those additional facts are included in the State’s Argument section as needed.

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ARGUMENT

I. The trial court did not err in denying Cody’s Application for Post Conviction Relief.

[¶3] Cody argues the district court erred in denying his Application for Post-Conviction Relief because his trial counsel was ineffective and that affected the outcome of this case. The Record does not support his position.

A. Standard of review for post-conviction relief proceedings.

[¶4] Post-conviction relief proceedings are civil in nature. *Heckelsmiller v. State*, 2004 ND 191, ¶ 5, 687 NW2d 454. The issue of ineffective assistance of counsel is a mixed question of law and fact fully reviewable upon appeal. *Heckelsmiller*, 2004 ND at ¶5. Nonetheless, a trial court’s findings of fact in a post-conviction relief proceeding will not be disturbed unless they are clearly erroneous. *Id.*; See N.D.R.Civ.P. 52(a). 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, even if there is some evidence to support it, a reviewing court is left with a definite and firm conviction a mistake has been made. *Heckelsmiller* at ¶ 5. “A defendant who pleads guilty upon the advice of counsel ‘may only attack the voluntary and intelligent character of the guilty plea,’” *Damron v. State*, 2003 ND 102, ¶9, 663 NW2d 650, quoting *Tollett v. Henderson*, 411 US 258, 267 (1973); see also, *McMorrow v. State*, 2003 ND 134, ¶5, 667 NW2d 577.

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2 **B. Burden and standard to prove ineffective assistance of counsel.**

3 ¶5] The burden of proving ineffective assistance of counsel is a heavy
4 one, requiring proof that 1) counsel's representation fell below an objective
5 standard of reasonableness, and 2) the defendant was prejudiced by counsel's
6 deficient performance. *Heckelsmiller*, 2004 ND 191 at ¶ 3 (citing *Strickland v.*
7 *Washington*, 466 US 668 (1984)). The effectiveness of counsel is measured by
8 an "objective standard of reasonableness" considering "prevailing
9 professional norms." *Heckelsmiller* at ¶ 3 (quoting *Strickland*, 466 US at 688).
10 The defendant must first overcome the "strong presumption that counsel's
11 conduct falls within the wide range of reasonable professional assistance."
12 *Heckelsmiller* at ¶ 3 (quoting *Strickland*, 466 US at 689). Trial counsel's
13 conduct is presumed reasonable and courts consciously attempt to limit the
14 distorting effect of hindsight. *Heckelsmiller* at ¶ 3.
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17 ¶6] The prejudice element requires a defendant to "establish a
18 reasonable probability that, but for his counsel's errors, the result of the
19 proceeding would have been different." *Heckelsmiller* at ¶ 4 (quoting
20 *Syverston v. State*, 2000 ND 185, ¶ 22, 620 NW2d 362). A "reasonable
21 probability" is a probability sufficient to undermine confidence in the outcome
22 of the case. *Heckelsmiller* at ¶ 4; *Strickland*, 466 US at 694. In the context of
23 a guilty plea, the prejudice prong of the test governing a claim of ineffective
24 assistance of counsel is satisfied if the defendant shows there is a reasonable
25 probability that, but for counsel's errors, he would not have pleaded guilty and
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2 would have insisted on going to trial. *Patten v. State*, 2008 ND 29, ¶ 9, 745
3 NW2d 626.

4 **C. Cody's trial counsel was effective.**

5 [¶7] The trial court concluded that Cody failed to establish his trial
6 counsel was deficient in his representation, because Cody was aware of
7 evidence that tended to establish his guilt of the offense pled to, was given an
8 opportunity to withdraw his guilty plea before the district court accepted the
9 same when protesting he may have a defense, received a misdemeanor-
10 eligible probation sentence, and avoided further charges of bail jumping. The
11 district court also found at the time he changed his plea, Cody did so
12 voluntarily and with full awareness of the consequences. (App. 20). This
13 conclusion is supported by the Record and the district court did not abuse its
14 discretion in reaching the factual grounds on which the conclusion rests.
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16 [¶8] During the change of plea and sentencing, efforts were made to
17 ensure Cody was changing his plea with a full awareness of his rights and the
18 consequences of his pleading guilty. (*See generally* Change of Plea
19 Transcript). Cody admitted he knew the consequences of his plea and it was
20 intelligent and voluntary. (Post-Conviction Hearing Tr. 14:13 – 15:10).
21 Further, even though he was aware of the possible defenses he may have to
22 the charge, he never once complained during the change of plea or sentencing
23 process that trial counsel did not properly follow up on that information or
24 was otherwise representing him inadequately. In fact, when given an
25 opportunity to confer with trial counsel when asked if he still wanted to enter
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2 a guilty plea, Cody wished to proceed, and had informed trial counsel of the
3 same. (See Post-Conviction Relief Hearing Tr. 23:10-19, 24:20-25; see also
4 Change of Plea Tr. 8:9-14).

5 [¶9] At no time during the change of plea hearing did Cody raise any
6 concerns trial counsel had not adequately represented him. It was not until
7 Cody's Application for Post-Conviction Relief, filed over a year after his
8 change of plea and sentencing, and only after his probation was revoked, that
9 this issue was first raised. Cody's testimony during the hearing on his Petition
10 for Post-Conviction Relief confirmed that he believed his guilty plea was in
11 his best interest and had discussed that fact with his attorney. (Tr. 13:25 –
12 14:1-9). This was never disputed.

13
14 [¶10] Trial counsel also testified. He stated he had reviewed all the
15 evidence with Cody. (Post-Conviction Hearing Tr.23:25 – 24:16). He further
16 testified he and Cody had discussed whether it was in Cody's best interest to
17 plead guilty, and they had determined it was. (*Id.* at 25:13-20).

18
19 [¶11] Cody's knowledge of the evidence he now presents at the time
20 he pled guilty and was sentenced, trial counsel's efforts to discuss the
21 evidence with him and discern Cody's best interests, Cody's failure to
22 complain about trial counsel's representation of him during the dispositional
23 proceedings, and the detailed inquires of the trial court to ensure he was
24 changing his plea knowingly, voluntarily and intelligently, should compel this
25 Court to reject his appeal. He has not met the heavy burden of showing
26 deficiency, particularly given the legal presumption that trial counsel was
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2 acting competently. Cody's arguments invite the very hindsight analysis this
3 Court has stated is not appropriate and should be rejected. The trial court was
4 not clearly erroneous in reaching the factual conclusions necessary to support
5 its conclusion that trial counsel was not ineffective. Accordingly, Cody's
6 argument should fail.

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8 **D. Even if this Court were to find deficient performance by trial**
9 **counsel, there has been no showing of prejudice.**

10 [¶12] While the district court did not have to reach the issue of
11 prejudice because it did not find deficient representation, its finding that Cody
12 suffered no prejudice should be affirmed. Even if there were a basis to
13 conclude that trial counsel had been deficient, there is no reasonable
14 probability that the outcome would have been different.

15 [¶13] Here, as previously discussed with citation to the appropriate
16 portions of the Record, Cody was aware of the evidence he now suggests may
17 have exculpated him before and at the time he entered his guilty plea and had
18 reviewed this with his trial counsel. At the time he changed his plea he was
19 advised of the rights he was giving up by doing so and was asked if anyone
20 had promised him anything or threatened him to cause him to withdraw his
21 not guilty plea, to which he answered he had not. He then entered a guilty plea
22 to the charge and a factual basis was presented for each essential element of
23 the offense, confirmed that no one had promised him anything or threatened
24 him to cause him to enter a guilty plea, and acknowledged having enough time
25 to discuss the matter with his trial counsel. Cody confirmed these facts at the
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2 hearing on post-conviction relief. (Tr. 13:10 – 15:10). So, too, did his trial
3 counsel. (*Id.* 25:1-12).

4 [¶14] Cody's admitted awareness when he changed his plea of all the
5 evidence he now presents, his lack of complaint about trial counsel's
6 performance during the dispositional process, and the extensive efforts of the
7 trial court to ensure the integrity of the guilty plea negate his claim that he
8 would have maintained his not guilty plea had trial counsel done more. Indeed
9 Cody never really suggests what more trial counsel might have done for him.
10 There is nothing in the Record, other than Cody's self-serving assertions over
11 a year after his change of plea, to undermine the confidence in the outcome of
12 the case (*i.e.*, his decision to plead guilty).

14 [¶15] To the contrary, as the district court points out, Cody's post-
15 conviction relief hearing does nothing more than reinforce the evidence of his
16 guilt of the offense to which he pleaded guilty. That is, were Cody to have
17 persisted in his not guilty plea and proceeded to trial, even if the video and
18 Cody's testimony or other evidence tended to negate Cody's guilt on two of
19 the checks that he does not believe he wrote, just the same the handwriting
20 exemplar on a fourth check matches the one check he recalled writing four
21 years after the offense was committed, and the sum of those two checks was
22 over \$100, meaning that even on the uncontested evidence he asked the
23 district court to consider in post-conviction relief Cody's guilt could have
24 been established. There is almost zero probability that had Cody gone to trial
25 the outcome would've been the windfall benefit of getting out of jail so soon
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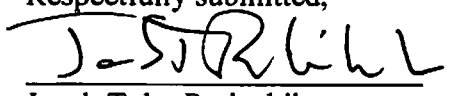
with a misdemeanor all-suspended but time served sentence. Additionally, Cody may have faced felony bail jumping charges.

[¶16] Cody had every opportunity to insist on his right to a trial, and made a knowing, voluntary, and intelligent decision to plead guilty. To allow him to withdraw his guilty plea makes the change of plea process little more than a hollow formality with no real substance. Cody is not prejudiced today just because he regrets his decision to change his plea yesterday or last month or last year or two years ago. Cody has not established he suffered prejudice, and this Court should reject his contention he did so.

CONCLUSION

[¶17] In consideration of the foregoing, the State requests this Court affirm the district court's denial of post-conviction relief in all respects.

Dated this 29th day of October, 2010.

Respectfully submitted,

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Respondent-Appellee,) District Ct. No. 08-04-K-1032
.....) SA File No. F363-04

STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

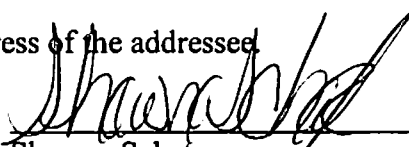
Shawna Schatz, being first duly sworn, depose and say that I am a United States citizen over 21 years old, and on the 29th day of October, 2010, I deposited in a sealed envelope a true copy of the attached:

- 1. Brief of Respondent-Appellee
- 2. Affidavit of Mailing

in the United States mail at Bismarck, North Dakota, postage prepaid, addressed to:

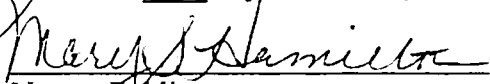
Carey Goetz
Attorney at Law
P.O. Box 1695
Bismarck, ND 58502

which address is the last known address of the addressee.


Shawna Schatz

Subscribed and sworn to before me this 29th day of October, 2010.

MARY S HAMILTON
Notary Public
State of North Dakota
My Commission Expires April 14, 2016


Notary Public
Burleigh County, North Dakota