

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

Derek Lynn Foreid,)	
)	Supreme Court No. 20100325
Petitioner/Appellant,)	
)	
v.)	
)	Ward Co. No. 2006-K-1988
State of North Dakota,)	
)	
Respondent/Appellee,)	

APPEAL FROM THE ORDER OF SUMMARY DISMISSAL OF APPLICATION FOR
POST-CONVICTION RELIEF BY THE DISTRICT COURT FOR THE NORTHWEST
JUDICIAL DISTRICT, THE HONORABLE DOUGLAS L. MATTSON PRESIDING
ON SEPTEMBER 29, 2010

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES

¶1 Whether the Trial Court erred in summarily dismissing Derek Foreid's Application for Post-Conviction Relief?

STATEMENT OF THE CASE

¶2 This is an appeal from the Ward County Order summarily dismissing Derek Foreid's ("Foreid") application for post-conviction relief entered by the Honorable Douglas L. Mattson filed September 29, 2010. (Appendix ("A") 4, Docket ("D") 51, A. 32-40).

¶3 Foreid has petitioned this court on appeal to review the Order denying post-conviction relief. Foreid's judgment of conviction was entered May 5, 2008. (A. 2, D. 95). The crimes convicted of and sentences imposed were entered after jury verdict and were as follows: Count I: Gross Sexual Imposition, Class AA felony. Foreid was sentenced to serve twenty years imprisonment, ten years suspended for a period of ten years, credit for 131 days served, and the 85% rule applied. Foreid filed an appeal to the North Dakota Supreme Court and the Supreme Court affirmed the criminal judgment. *State of North Dakota v. Derek Lynn Foreid*, 2009 ND 41, 763 N.W.2d 475.

¶4 On October 28, 2009, Foreid filed a pro se Application for Post-Conviction Relief on the grounds of Ground One: Insufficiency of the Evidence, Ground Two: Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant, Ground Three: Ineffective Assistance of Counsel. (A. 3, D. 128, A. 5-7). Foreid was appointed counsel for his application for post-conviction relief (A. 3, D. 136) and his attorney filed a Brief in Support of Application for Post-Conviction Relief. (A. 3, D. 145, A. 8-14). The State filed its Response to Brief

for Post-Conviction Relief on July 8, 2010. (A. 4, D. 147, A. 15-18). The District Court filed its Order for Hearing on August 19, 2010. (A. 5, D. 151, A.19-22). Foreid filed a Supplement to Application for Post-Conviction Relief with an Affidavit of Derek Foreid in Support of Application for Post-Conviction Relief on September 15, 2010. (A. 4, D. 153, A. 23-25). The State filed its Response to Supplemental Application for Post-Conviction Relief on September 15, 2010. (A. 4, D. 156, A. 26-31). On September 29, 2010, the District Court filed its Order Summarily Dismissing Application for Post-Conviction Relief and Vacating Transport Order. (A. 4, D. 158, A. 32-40). A hearing on the application was not held. Foreid timely filed a Notice of Appeal on October 4, 2010. (A. 4, D. 159, A. 41). The undersigned attorney was appointed to represent Foreid on this appeal.

STATEMENT OF THE FACTS

¶5 A hearing was not held on the application for post-conviction relief filed by Derek Foreid. Judge Mattson relied on the information from the application and denied the post-conviction application. This matter was denied without argument or testimony.

¶6 Foreid reasserts the allegations in the petition in as far as it may be considered without having been developed through testimony.

LAW AND ARGUMENT

¶7 Jurisdiction. Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provisions, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06, N.D.C.C., which provides as follows:

“An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03. An appeal may be taken by the defendant from:

1. A verdict of guilty;
2. A final judgment of conviction;
3. An order refusing a motion in arrest of judgment;
4. An order denying a motion for new trial; or
5. An order made after judgment affecting any substantial right of the party.”

N.D.C.C. § 29-28-06.

¶8 ISSUE: Whether the Trial Court erred in summarily dismissing Derek Foreid’s Application for Post-Conviction Relief?

¶9 This Court has indicated that an appeal from the summary dismissal of an application for post-conviction relief will be reviewed in a manner similar to the review of an appeal from a summary judgment motion. *DeCoteau v. State*, 1998 ND 199, ¶4. 586 N.W.2d 156. Accordingly, “[t]he party opposing the motion for summary disposition is entitled to all reasonable inferences at the preliminary stages of post-conviction proceeding, and is entitled to an evidentiary hearing if a reasonable inference raises a genuine issue of material fact. *Id.* (citing *Owens v. State*, 1998 ND 106, ¶13, 578 N.W.2d 542).

¶10 The North Dakota Supreme Court “applies the ‘clearly erroneous’ standard set forth in Rule 52(a), N.D.R.Civ.P., when reviewing a trial court’s findings of fact on an appeal from a final judgment or order under the Uniform Post-Conviction Procedure Act.” *State v. Foster*, 1997 ND 8, ¶18, 560 N.W.2d 194. The District Court’s findings of fact will not be disturbed on appeal unless clearly erroneous. 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, a reviewing court is left with a

definite and firm conviction a mistake has been made. *Clark v. State*, 2008 ND 234, ¶11, 758 N.W.2d 900. The decision of the district court to summarily dismiss the post-conviction application without development of the record was clearly erroneous as it is not support by case law. Further, Foreid raised a material issue of fact and should have been allowed to present the testimony at an evidentiary hearing.

¶11 North Dakota law provides that “[a] person who has been convicted of and sentenced for a crime may institute a proceeding applying for relief” under Chapter 29-32.1 of the North Dakota Century Code (Uniform Post-Conviction Procedure Act) upon 8 enumerated grounds. N.D.C.C. 29-32.1-01(1). A post-conviction proceeding “is not a substitute for and does not affect any remedy incident to the prosecution in the trial court or direct review of the judgment of conviction or sentence in an appellate court.” N.D.C.C. 29-32.1-01(2). North Dakota law provides that a “court may grant a motion...for summary disposition if the application, pleadings, any previous proceeding, discovery, or other matters of record show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” N.D.C.C. 29-32.1-09(1). “If an evidentiary hearing is necessary, the court may determine which issues of material fact are in controversy and appropriately restrict the hearing.” N.D.C.C. 29-32.1-09(2).

¶12 Additionally, North Dakota law states “[a]n application for post-conviction relief may be denied on the ground that the same claim or claims were fully and finally determined in a previous proceeding.” N.D.C.C. 29-32.1-12(1). “A court may deny relief on the ground of misuse of process. Process is misused when the applicant

[p]resents a claim for relief which the applicant inexcusably failed to raise either in a proceeding leading to judgment of conviction and sentence or in a previous post-conviction proceeding.” N.D.C.C. 29-32.1-12(2)(a). The North Dakota Supreme Court has held that a misuse of process occurs in the following situations:

- “1. if the defendant has inexcusably failed to raise an issue in a proceeding leading to judgment of conviction and now seeks review in a first application for post-conviction relief;
2. if the defendant inexcusably fails to pursue an issue on appeal which was raised and litigated in the original trial court proceedings, and finally[;]
3. if a defendant inexcusably fails to raise an issue in an initial post-conviction application.”

Bell v. State, 2001 ND 188, ¶7, 636 N.W.2d 438. “[W]hen claims have been raised previously on direct appeal...they cannot be raised again in a subsequent post-conviction application.” Heyen v. State, 2001 ND 126, ¶9, 630 N.W.2d 56. Further, the North Dakota Supreme Court has held that it is a misuse of process when issues appropriate for review on direct appeal are not raised on direct appeal and no reason is given to the Court in the post-conviction relief application as to why those issues were not raised in the direct appeal. Syvertson v. State, 2000 ND 185, ¶17, 620 N.W.2d 362. Finally, the North Dakota Supreme Court has held that summary dismissal of post-conviction claims of ineffective assistance of counsel is generally not appropriate. Everett v. State, 2008 ND 199, ¶21, 757 N.W.2d 530.

¶13 Applicants for post-conviction relief are not required to include all supporting evidentiary matter in their original post-conviction application. The State of North Dakota has adopted the Uniform Post-Conviction Procedure Act to control this matter. N.D.C.C. §29-32.1-04 provides the rules to follow regarding post-conviction

applications:

“1. The application must identify the proceedings in which the applicant was convicted and sentenced, give the date of the judgment and sentence complained of, set forth a concise statement of each ground for relief, and specify the relief requested. Argument, citations, and discussion of authorities are unnecessary.

2. The application must identify all proceedings for direct review of the judgment of conviction or sentence and all previous post-conviction proceedings taken by the applicant to secure relief from the conviction or sentence, the grounds asserted therein, and the orders or judgments entered. The application must refer to the portions of the record of prior proceedings pertinent to the alleged grounds for relief. If the cited record is not in the files of the court, the applicant shall attach that record or portions thereof to the application or state why it is not attached. Affidavits or other material supporting the application may be attached, but are unnecessary.”

N.D.C.C. §29-32.1-04.

“The statute does not require the applicant to include in the original application all supporting evidentiary matter necessary.” *State v. Bender*, 1998 ND 72, ¶19, 576

N.W.2d 210. *Foreid* “must set forth a concise statement for each ground of relief and specify the relief requested.” *Eagleman v. State*, 2004 ND 6, ¶11, 673 N.W.2d 241.

Foreid did set for a concise statement for each ground of relief and did specify the relief requested in his application.

¶14 When considering *Foreid*’s post-conviction application, the District Court relied strictly on the materials set out in *Foreid*’s application. “It would be blatantly unfair to subject a defendant’s post-conviction application to summary dismissal for failure to provide evidentiary support not available in the record of prior proceedings, when the statute explicitly provides such additional evidentiary support is ‘unnecessary’ in the original application.” *Wilson v. State*, 1999 ND 222, ¶15, 603 N.W.2d 47 (citing *Bender*, at ¶20).

¶15 Foreid was fully prepared to present any and all evidence in support of his application at an evidentiary hearing. However, Foreid was not allowed to testify or present testimony, or other evidence, on the issues raised to further develop a record to consider effectiveness of counsel and post-conviction was denied on the record.

¶16 A post-conviction proceeding affords an opportunity to establish a record for review on appeal. “The express purpose of the Uniform Post-Conviction Procedure Act, as codified in N.D.C.C. 29-32.1, is to furnish a method to develop a complete record to challenge a criminal conviction.” Bender, at ¶20 (citing State v. Wilson, 466 N.W.2d 101, 103 (N.D. 1991)). The post-conviction hearing allows the parties to “fully develop a record on the issue of counsel’s performance and its impact on the defendant’s case and to challenge a criminal conviction and sentence.” DeCoteau at ¶7. The District Court rendered its decision based upon the record of the sentencing and the assertions made by counsel in pleadings not allowing other evidence to be presented.

¶17 N.D.C.C. §29-32.1-10 sets forth what evidence may be heard at a post-conviction hearing. N.D.C.C. §29-32.1-10 provides:

- “1. Evidence must be presented in open court, recorded, and preserved as part of the record of the proceedings.
2. A certified record of previous proceedings may be used as evidence of facts and occurrences established therein, but use of that record does not preclude either party from offering additional evidence as to those facts and occurrences.
3. The deposition of a witness may be received in evidence, without regard to the availability of the witness, if written notice of intention to use the deposition was given in advance of the hearing and the deposition was taken subject to the right of cross-examination.”

N.D.C.C. §29-32.1-10.

Foreid was not given the opportunity to present his evidence in open court or to proffer information needed to create an adequate record. The record does not show occurrences that happen outside of the courtroom nor did it allow Foreid to expand the points cited in his application for post-conviction.

¶18 Foreid properly made assertions that Counsel's performance was ineffective in his application for post-conviction relief. However, the District Court failed to allow him to develop those arguments. N.D.C.C. §29-32.1-10(2) allows either party to develop additional facts as to the occurrences that appear in the record. The District Court failed to allow for this development of potential ineffectiveness in representation.

¶19 A different procedural environment exists to explore the question of effectiveness of counsel in a post-conviction proceeding. Without confinement to the transcript, post-conviction procedures allow development of additional evidence to evaluate claims. Bender at ¶21. This applies in particular when, as in Foreid's case, "the defendant's allegations of ineffective assistance involve incidents which did not occur in open court and require additional evidence and development of a record for review." *Id.* (citing *State v. Robertson*, 502 N.W.2d 249, 251 n.1 (N.D. 1993)). When confinement to a transcript to decide an application for post-conviction occurs, like in this case, "the post-conviction procedure becomes no better than direct review on appeal." *State v. Wilson* 466 N.W.2d 101 (N.D. 1991). Foreid was not allowed to present additional evidence for the record. Therefore, the District Court erred in strictly relying on prior proceedings and Foreid's application, necessitating a remand to the District Court for development of such assertions.

¶20 Foreid alleges prosecutorial misconduct in obtaining the conviction by the unconstitutional failure to disclose potentially exculpatory material. The allegations set forth in Foreid's application and the accompanying brief provided a sufficient basis and the District Court erred in denying Foreid the opportunity to fully develop this allegation through witness testimony at an evidentiary hearing, necessitating a remand to the District Court for development of such assertions.

CONCLUSION

¶21 For the aforementioned reasons, the Appellant Derek Foreid's application for post-conviction was erroneously summarily dismissed by the District Court. The Court erred in not providing Foreid with an evidentiary hearing or taking oral argument from counsel and relying on Foreid's application. Therefore, Foreid prays the Court reverse the lower court's decision and remand this matter for a post-conviction hearing.

Respectfully submitted this 20th of December, 2010.



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) CERTIFICATE OF SERVICE
 Respondent/Appellee,)

I, Mark T. Blumer, do hereby certify that on December 20, 2010, I served the following documents:

1. Appellant's Appendix (PDF to Opposing Counsel and Supreme Court)
2. Appellant's Brief (PDF to Opposing Counsel and Word to Supreme Court)

On:

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by Electronic Filing, pursuant to N.D. Sup. Ct. Admin. Order 16.

Dated this the 20th day of December, 2010.

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