

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

Derek Lynn Foreid,)
)
Petitioner/Appellant.)
)
v.)
)
State of North Dakota,)
)
Respondent/Appellee.)

Supreme Court No. 20100325

Ward Co. No. 2006-K-1988

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

JAN 10 2011

STATE OF NORTH DAKOTA

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 APPELLEE

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STATEMENT OF THE ISSUES

- I. WHETHER THE TRIAL COURT DID NOT ERR IN SUMMARILY DISMISSING DEREK FOREID'S APPLICATION FOR POST-CONVICTION RELIEF?

STATEMENT OF CASE

The State has reviewed the petitioner's Statement of Case. With the exception of the omission that the State responded to petitioner's pro se Application for Post-Conviction Relief on November 12, 2009, the State has no objection. (ROA 133, Appellant's Appendix 3).

STATEMENT OF FACTS

As indicated in the petitioner's brief, the conviction was appealed and affirmed by the Supreme Court. State v. Foreid, 2009 ND 41, 763 NW2d 475. In his appeal of the conviction the defendant raised two issues. The first issue was that the Trial Court erred in granting the State's motion to amend the information. The second issue was that the Trial Court erred in denying the defendant's request for a lesser included instruction. (Appellee's Brief p. iii). The underlying facts supporting the conviction were provided in the State's brief, and are herein by reference incorporated. (Appellee's Brief pp. 1-3, A. pp. 1-3). In further support of the underlying facts supporting the conviction, the State specifically notes the victim, Jane Doe's testimony and the defendant's testimony highlighted in the Appellee's Brief pp. 14-16, TT. pp. 443-446, A. pp. 4-6).

The petitioner, in his pro se Application for Post-Conviction Relief alleged the following grounds: 1) insufficiency of evidence "consensual intercourse" "I claim actual innocence"; 2) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant. (Specific list excluded, see Appellant's Appendix p. 6); and 3) Ineffective assistance of counsel. (Specific list of alleged failure's of trial counsel excluded, see Appellant's Appendix p. 7). The State responded to the petitioner's pro se Application and asserted Misuse of Process. The State further argued that all three grounds asserted by the petitioner in his Application were variations of Insufficient Evidence, an issue the defendant failed to raise on direct appeal and was litigated in the original trial.

The petitioner filed a Brief in Support of Application for Post-Conviction Relief on June 29, 2010. In his brief to support the Application, the defendant provides facts

supporting the underlying conviction. (Appellant's Appendix pp. 8-9). These facts provided by the petitioner acknowledge the overwhelming testimony of all the witnesses of the intoxicated stated of Doe. The petitioner also acknowledges that the offense for which he was convicted occurred inside his pickup. He further acknowledges that the case "boiled down to a he said/she said case". The State filed a response to the petitioner's brief, putting him to his proof of the grounds alleged, specifically calling for proof that any of the alleged "evidence" he asserted was suppressed and/or failed to be obtained by his trial counsel would have supported his assertion of "consensual sex". The State further put him on his proof that any of the alleged evidence suppressed and/or failed to be obtained by his trial counsel even existed. In his brief in support of his petition, it is noted that the defendant did not address (i.e. dropped) Ground 1: Insufficient evidence.

On August 18, 2010, the Court entered an Order for Hearing. (Appellant's Appendix pp. 19-22). The Court specifically found that the State had put the petitioner on his proof, and provided the petitioner 30 days (close of business September 27, 2010) to provide Affidavits or other evidence to support his claim. The Court's Order gave the petitioner notice that if such Affidavits or other evidence was not received to support (ie prove) his claims then the hearing scheduled for October 1, 2010 would be cancelled. The petitioner filed a self-affidavit, again, simply regurgitating his allegations, without providing any proof or offer of how the suppressed and/or failed to be obtained evidence would have changed the outcome of the trial. The State filed a response to the petitioner's Supplemental Application for Post-Conviction Relief, and specifically noted the petitioner's lack of evidence to support his claims. (Appellant's Appendix pp. 26-31).

The Court issued an Order summarily dismissing the petitioner's Application for Post-Conviction Relief on September 28, 2010. (Appellant's Appendix pp. 32-40). In reference to the allegation that the State suppressed evidence, the Court specifically found:

“Based on Foried's application, brief, supplement to application, and affidavit, the Court finds that Foreid failed to sufficiently identify the evidence he contended was in the State's possession or should have been obtained by the State and disclosed to him and how that evidence might have likely changed the jury's verdict. The dispositive issue at trial was whether the sexual intercourse with N.N. was forced or consensual. Even if the evidence to which Foreid refers throughout his application, brief, and affidavit did exist or had been obtained and disclosed by the State, most of the evidence would have had no bearing on the issue of “forced versus consensual” sex. Other evidence, such as cell phone information, is speculative, unsupported, and conclusory. Without more, the Court is in the dark as to the exculpatory value of any of the alleged undisclosed evidence.”

(Appellant's Appendix p. 37)(emphasis added).

In reference to the petitioner's allegation of ineffective assistance of counsel, the Court specifically found, that after being put on his proof, the petitioner was given more than one opportunity to support his application for post-conviction relief with specific allegations that raised genuine issues of material fact. The Court further found “the allegations in Foreid's affidavit were non-specific and conclusory and failed to raise genuine issues of material fact on either of Foreid's grounds for post-conviction relief.”

(Appellant's Appendix p. 39).

ARGUMENT

I. WHETHER THE TRIAL COURT DID NOT ERR IN SUMMARILY DISMISSING DEREK FOREID'S APPLICATION FOR POST-CONVICTION RELIEF?

The petitioner asserts that the Court erred in summarily denying his application. The Court reviews an appeal from a summary denial of post-conviction relief as the appellate court would review an appeal from summary judgment. Whiteman v. State, 2002 ND 77 ¶7, 643 NW2d 704, 707, NDCC 29-32.1-09, subd. (1). The party opposing the motion for summary disposition of an application for post-conviction relief is entitled to all reasonable inferences at the preliminary stages of the post-conviction proceeding and is entitled to an evidentiary hearing if a reasonable inference raises a genuine issue of fact. Id. Once the party moving for summary disposition of an application for post-conviction relief without an evidentiary hearing has established there is no genuine issue of fact, the burden shifts to the non-moving party to show a genuine issue of fact exists and at that point, the party resisting the motion may not merely rely on the pleadings or unsupported conclusory allegations, but present competent admissible evidence by affidavit or other comparable means. Id. ¶21, p. 711. It is the State's position, that after being put to his proof, the petitioner failed to present competent admissible evidence showing a genuine issue of fact.

A. Alleged Suppression of Evidence by the State

The defendant asserts the State suppressed evidence favorable to him and his assertion that the sexual intercourse was consensual. In his application he provides a laundry list of "evidence" the State suppressed and/or failed to obtain and provide to him. To establish a *Brady* violation, the defendant must prove: (1) the government possessed evidence favorable to defendant, (2) defendant did not possess the evidence and could not have obtained it with reasonable diligence, (3) the prosecution suppressed the evidence, and (4) a reasonable probability exists that the outcome of the proceedings would have

been different if the evidence had been disclosed. Syvertson v. State, 2005 ND 128 ¶6, 699 NW2d 855, 857. (emphasis added). It is the State’s position, as will be further discussed below, that the defendant failed to meet his burden on each piece of evidence he lists.

1. Security camera recordings from Trinity Medical Center

The petitioner failed to provide any competent evidence the government possessed the video, if it existed, or how it would be favorable to him. *See e.g. Syvertson v. State*, 2005 ND 128 ¶8, 699 NW2d 855, 857 (citing Ohio v. Mosley, (citations omitted), the “prosecutorial machinery” does not extend to emergency medical technicians and firefighters who “were not gathering evidence, attempting to solve a crime or prosecuting the appellant”). The petitioner does not meet the first and third prong of Brady. The petitioner fails the second prong of Brady, in that he failed to show why through reasonable diligence he did not obtain the video. Finally, and most importantly, as found by the Trial Court, the dispositive issue in this matter was “consent v. force”. The petitioner failed, after being put to his proof, to provide any competent evidence that if the security video existed, there was a reasonable probability that the outcome would have been different. It is the State’s position that it would not have changed the outcome, as a security video of a person walking into a medical facility would simply corroborate witnesses that the victim sought treatment, it would not have shown the actual sexual intercourse to provide “direct” evidence as the defendant asserts in his brief and conclusionary affidavit. Therefore the petitioner fails to meet his burden of presenting a genuine issue of fact regarding this allegation.

2. Police dispatch recordings and telephone audio recordings, detail call lists of police officials

Recalling that the dispositive issue in the matter was “consent v. force”, the petitioner fails to establish factor (4) of the Brady analysis, when put on his proof that if disclosed prior to trial, the outcome would have been different. He failed to provide any competent evidence that such “evidence” would be direct evidence raising a genuine issue of fact to the dispositive issue of consent v. force.

3. The witnesses, and victim telephone, cell phone, text messaging

Again, after being put to his proof, he first failed to provide proof that such evidence existed. The petitioner failed to provide any competent evidence supporting the fourth factor of Brady, that there was a reasonable probability that the outcome would have been different, if such evidence was disclosed.

4. Video surveillance camera recordings from police vehicles

Upon review of the transcript of the trial, it is very apparent that police vehicles were not involved in the investigation of this matter. When that fact was pointed out in the State’s Supplemental Response to Post-Conviction Relief, the petitioner again failed to provide any competent evidence to raise a genuine issue of fact, or meet his burden under Brady. The petitioner sat through the entire trial, he was fully aware of the facts in this case, and that law enforcement was not dispatched to the scene of the offense or the residence where the party took place. The fact that he includes this allegation in his petition supports the State’s position that the petitioner is misusing the process and the Trial Court’s finding that the petitioner has not provided competent evidence raising a genuine issue of fact.

5. The identity of witnesses from the party where the victim and accused encountered each other from Trinity Medical Center.

There was no evidence that the victim and the accused encountered each other at Trinity Medical Center, or that there were any witnesses from Trinity Medical Center of the victim and the accused encountering each other. As stated in the FACTS above, the victim and the petitioner first met at the China Star, while he was working. The petitioner was then invited a party by another individual. The encounter between the victim and the accused took place at the party and in the back of his pickup.

6. Police failed to secure evidence – the vehicle – where alleged offense occurred, investigate for blood, hair, skin samples, finger prints, semen, saliva, failed to take custody of the vehicle or conduct forensic exam of the vehicle.

As stated numerous times above, the dispositive issue in this case was consent vs. force, not the identity of the assailant. The petitioner also ignores the fact that he fled “from the scene with the scene”. The scene of the crime was in his possession for nearly 12 hours before law enforcement had any contact with him. The defendant fails to meet the first three factors of Brady. Additionally forensic evidence as listed by the petitioner is needed when identity is unknown, or to assist in establishing the presence of a person being at the scene. Forensic evidence can not provide direct evidence of consent. In this matter the defendant admitted to having sexual intercourse with Doe, in the back of his pickup. The collection of forensic evidence was not necessary. The State did provide other evidence to support force by way of photos of injuries on Doe, testimony of her injuries, and testimony of her statements. The petitioner also received notice of evidence favorable to him, such as the clothing the victim was wearing was not torn, the petitioner

had his arm in a cast, most of the State's witness had been drinking, the victim was intoxicated and had made prior inconsistent statements. The petitioner fails the fourth factor of Brady in that forensic evidence would not have changed the outcome of the trial.

7. Blood Alcohol of the victim

Doe was brought into Trinity Hospital for treatment. There was no toxicology screen taken of the victim. Employees of Trinity Hospital are not employees of the State or Law Enforcement. When put to his proof, the defendant failed to provide any competent evidence how the victim's actual BAC level would have changed the outcome of the trial. A thorough reading of the trial transcript show that counsel for the petitioner cross examined all the witnesses, especially the victim, regarding intoxication, thereby calling into question the credibility of their recollection of the events. The jury heard from all the witnesses, including the petitioner just how much the victim had to drink and her state of intoxication on the night in question. The defendant fails to meet the burden set fourth in Brady that disclosure of an actual BAC would have changed the outcome of the trial.

8. Witness at party when returning from encounter – ect.

When put to his proof, the petitioner failed to identify any witnesses that had not previously been disclosed to him during discovery. Additionally, the petitioner sat through the trial and heard all the witnesses testify and name all the people present at the party. A thorough reading of the trial transcript shows there were no other witnesses present when the petitioner returned with the victim other than all those that testified. The defendant fails to raise any genuine issue of fact. By including this allegation, it

once again supports the State's position that the petitioner is misusing the process by making false allegations.

9. City of Minot Traffic surveillance security camera.

This issue was discussed above. Again, a clear indication that the petitioner is misusing the process. When put to his proof the petitioner fails to provide any proof that such security system exists, let alone if it did, how that would have changed the outcome of the trial. The petitioner fails to meet his burden under Brady.

It is the State's position that all the allegations of suppression of evidence by the State are conclusory. Once the burden had shifted to the petitioner he must show a genuine issue of fact exists and may not rely on pleadings or unsupported conclusory allegations. In this matter, once put to his proof, the petitioner simply reiterated the same conclusory allegations in a self affidavit. He did not provide any competent evidence to support his claim. The Trial Court was correct to summarily dismiss this allegation of the petition based upon the defendant's failure to meet his burden as set forth in Brady and NDCC 29-32.1-09 (1).

In addition to the above argument, it is the State's position the petitioner is misusing the process. Misuse of Process under the Uniform Post-Conviction Procedure Act occurs (1) if the defendant has inexcusably failed to raise an issue in a proceeding leading to judgment of conviction and now seeks review in 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 defendant inexcusably fails to raise an issue in an initial post-conviction application. St. Claire v. State, 2002 ND 10, ¶13, 638 NW2d 39, 43. In this matter, all of the petitioner's

allegations for the most part can be summarized as “Monday morning quarterbacking,” wherein he conjures up a laundry list of “evidence” claiming the State suppressed. The allegation as a whole is a “clever” disguise of attempting to raise the issue of “insufficient evidence” due to his laundry list of items “being suppressed or not obtained”. The petitioner did not raise this issue on appeal, and during litigation (the trial) the issue of insufficient evidence and the fact that the dispositive issue was consent v. force was amply argued. The petitioner inexcusably failed to not raise the issue on his direct appeal of the verdict.

B. Ineffective assistance of counsel.

A post-conviction petitioner claiming ineffective assistance of counsel bears a heavy burden; petitioner must prove (1) counsel’s representation fell below an objective standard of reasonableness, and (2) the petitioner was prejudiced by counsel’s deficient performance. Jacob v. State, 2010 ND 81 ¶11, 782 NW2d 61, 64. Trial counsel’s performance is presumed to be reasonable, for purposes of claim of ineffective assistance of counsel. Id. To meet the second element, the petitioner must “establish a reasonable probability that, but for his counsel’s error, the result of the proceeding would have been different. Id. at 65. In this matter, the petitioner alleges his trial counsel erred by failing to obtain all the same evidence he claims the State suppressed. For all the reasons already discussed, the petitioner fails to meet his burden of establishing a reasonable probability that the result of the jury verdict would have been different.

To demonstrate prejudice, the defendant must establish a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different, and the defendant must specify how and where trial counsel was incompetent

and probable different result. Eagleman v. State, 2004 ND 6, ¶6, 673 NW2d 241, 243. (quoting, State v. Palmer, 2002 ND 5, 638 NW2d 18). An attorney's decision cannot be analyzed in a vacuum, for purposes of a claim of ineffective assistance of counsel; performance must be viewed in the context of the entire trial. Jacob v. State, 2010 ND 81, ¶12, 782 NW2d 61, 65 (citing Flanagan v. State, 2006 ND 76, ¶17, 712 NW2d 602, testimony must be viewed "within the context of the other evidence and the overall conduct of the trial"). In this matter, the petitioner admitted to having sexual intercourse. He fails to identify or specify how the alleged "evidence" his trial attorney failed to obtain would have changed the outcome of the trial. The petitioner fails to specify the "crucial" evidence he claims to have instructed his attorney to obtain. He fails to identify by name other witnesses.

The victim, petitioner and other witnesses testified to the state of intoxication of the victim. The treating physician testified to the injuries in the vaginal area of the victim. The petitioner's trial counsel cross examined each witness, including the victim, regarding their intoxication and ability to recollect events accurately. The petitioner's trial counsel, in cross examination, had the physician admit that the injuries in the victim's vaginal area, could be caused by other means other than force. The jury observed there were no tears or rips on the victim's clothing. The jury heard that the petitioner had a cast on his arm at the time of the incident. In viewing all the evidence that was presented at trial, even by some stretch of the imagination and speculation of the "crucial" evidence the petitioner claims was missing, he fails to meet the burden of showing a reasonable probability of a different outcome.

On claims of ineffective assistance of counsel, the record and transcripts are generally not adequate to permit summary disposition. Ude v. State, 2009 ND 71, ¶15, 764 NW2d 419, 424. A petitioner may allege ineffective assistance of counsel based on matters occurring outside the court record or transcript, and when appropriate, a district court should consider evidence of ineffective assistance of counsel beyond the record. Id. In this matter the defendant does not allege any ineffective assistance of counsel that cannot be borne out from reviewing the record and transcript. All the allegations he asserts refers to alleged evidence he first asserts the State suppressed and then asserts his trial counsel was ineffective in that he failed to obtain such evidence. The District Court is justified in denying defendant's application for post conviction relief on the basis of ineffective assistance of counsel where, after state requested summary disposition, defendant presented no evidence to support his claims. Id. ¶14. The State requested summary disposition. The District Court in this case gave the petitioner several opportunities to present competent evidence to raise a genuine issue of fact. The petitioner did not. The District Court was justified in summarily dismissing the post conviction relief action.

Although the party seeking a summary disposition bears the initial burden of showing there is no genuine issue of material fact, the United States Supreme Court has explained that "the burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court-that there is an absence of evidence to support the nonmoving party's case. Steinbach v. State, 2003 ND 46, ¶12, 658 NW2d 355, 360. (other citations omitted). Although we have stated claims of ineffective assistance of counsel are ordinarily unsuited to summary disposition without an evidentiary hearing,


we have upheld summary denials of post-conviction relief when the applicants then failed to provide some evidentiary support for their allegations. Id. ¶15. (other citations omitted). (Mr. Steinbach responded to the State's motion for summary disposition but did not provide any supplemental documents which have provided any further evidentiary support for his allegation of ineffective assistance of counsel). In this matter, the petitioner failed to provide any supplemental documents other than his self affidavit reiterating his allegations. He provided no evidence that what he asserts existed, let alone made any showing that if it did exist the outcome would have been different.

CONCLUSION

For the above reasons, the State respectfully requests the Court affirm the District Court's summary denial of the petitioner's post conviction relief. The petitioner in this matter makes a long laundry list of "evidence" that the State and/or his trial attorney failed to collect. There is no proof that such evidence even exists nor, if it did, how such evidence would have changed the jury's verdict. The defendant's burden in a post conviction matter is outlined in Strickland v. Washington, 466 U.S. 668(1984). Simply making a list of "evidence" that was not presented is not sufficient to warrant a hearing or meet his burden. Nor is the State ever required to "prove" the non-existence of evidence and or make a showing of why it was not collected. The Court should not make that the new standard of investigation or State's burden by allowing this matter to proceed. Simply put, just because a petitioner makes the allegation, a hearing is not always warranted. Once the State responds and puts the petitioner on his proof, something more than bare bones allegations must be provided to raise a genuine issue of fact. That was not done in this matter. The petitioner failed to meet his burden as set forth in Whiteman

v. State, 2002 ND 77, 643 NW2d 704, Eagleman v. State, 2004 ND 6, 673 NW2d 241, Ude v. State, 2009 ND 71, 764 NW2d 419, Henke v. State, 2009 ND 117, 767 NW 881, and Jacob v. State, 2010 ND 81, NW2d 61. The defendant failed to provide any evidence in support of a genuine issue of fact that would support a reasonable probability the outcome of the trial would have been different on the dispositive issue of consent v. force.

Date this 10th day of January, 2011.


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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.)

AFFIDAVIT OF SERVICE BY MAIL

LeAnn Westereng, being first duly sworn, deposes and says:

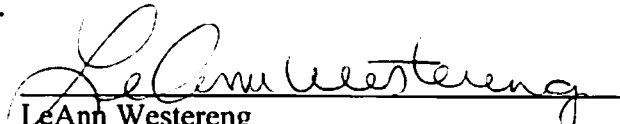
That she is a citizen of the United States of America, over the age of twenty-one years, and is not a party to nor interested in the above entitled action; that on the 10 day of January, 2011, this Affiant deposited in the mailing department of the United States Post Office at Minot, North Dakota, a sealed envelope with postage thereon duly prepaid, containing a true and correct copy of the following document in the above entitled action:

BRIEF OF APPELLEE

That said envelope was addressed to the following person at his address as follows:

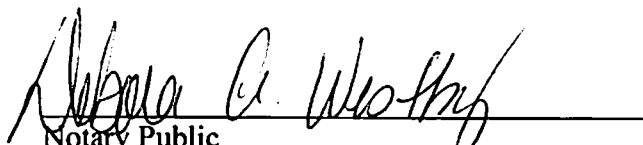
MARK T BLUMER
ATTORNEY AT LAW
PO BOX 475
VALLEY CITY ND 58072

That the above document was duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.


LeAnn Westereng

Subscribed and sworn before me this 10 day of January, 2011 by LeAnn Westereng.

DEBORAA WESTBY
Notary Public
State of North Dakota
My commission expires Mar 31, 2014


Notary Public