IN THE SUPREME COURT

STATE OF NORTH DAKOTA

20110088

Alman Andrew Wong,	)	Supreme Court No. 20110088
	)	
Petitioner/Appellant,	)	
	)	Morton Co. Cr. No. 30-08-K-880
vs.	)	
	)	
State of North Dakota,	)	
	)	
Respondent/Appellee.	)	

****

BRIEF OF RESPONDENT/APPELLEE

****

Appeal from Order Denying Post Conviction Relief
South Central Judicial District
The Honorable Bruce B. Haskell Presiding

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I: Whether the Trial Court erred at the sentencing stage of the criminal proceeding: and if this issue is appealable because it was not pled in the petition for post-conviction relief.

II: Whether there was ineffective assistance of counsel.

Facts

The Defendant was convicted of Gross Sexual Imposition and Aggravated Assault in District Court on December 15. 2009. A.70. The conviction was based on a guilty plea. The guilty plea was entered August 17. 2009. There was no direct appeal.

A hearing was held on the Defendant's Petition for post-conviction relief on March 14. 2011. T. cover. As the Petitioner the Defendant had the burden of proof. The defense was allowed to call witnesses and present evidence in its effort to prove the allegations of the Petition. The defense called four witnesses.

The first witness for the Defense/Petitioner was John Rhodes, a Federal Public Defender from the state of Montana. T.4 L.20. In general. the substance of Mr. Rhodes testimony was that the Defendant was incompetent. Mr. Rhodes testimony did include that the federal prosecution was dismissed in lieu of the charges in North Dakota. T.9. L.10.

Mr. Wong testified during his case in chief. He testified that he hears voices. T.11. L.23. Further that he hits his head to make the voices and stuff and the headaches and stuff go away. T.12. L.3.

Kent Morrow, Attorney at Law, testified as the first appointed counsel for the Defendant in the criminal matter. He testified that he was able to communicate with the Defendant. T.15. L.2. Mr. Morrow's representation of Wong did end when the Defendant had a violent outburst toward Mr. Morrow. T.13. L.5.

Wayne Goter, Attorney at Law, testified as the next court appointed attorney for the Defendant in the criminal matter. Mr. Goter was the Attorney for Wong when Wong pled guilty. Mr. Goter's testimony included that he had met with Wong multiple times.

T.18. L.13. Mr. Goter's testimony included that Wong was not normal, but could communicate and was competent. T.18. L.19./T.27. L.17. Mr. Goter's testimony was also that Wong was competent when he pled guilty. T.27. L.8. Mr. Goter's testimony included that he has had clients in the past that could not understand or discuss the proceedings, and they had been found incompetent. Wong could understand and discuss. T.19. L.3.

The Defense presented exhibits which are presented in the Appendix. The State rested on the evidence presented during the Defendant's case in chief. T. 32 L.20.

Ruling of the Trial Court:

The findings and rulings of the Trial Court were made on the record in open court, and can be found starting at page 48. The Court identifies that the Petition held three issues. T.48 L.13. It bears stating that a claim for relief that the Trial Court acted inappropriately at sentencing was not pled in the Petition, and was not identified by the Court as an issue for that reason. T.52.L.7.

The first issue addressed by the court was the claim of the unconstitutional failure of the prosecution to disclose evidence of the defendant's incompetency. T. 48. L. 13. In addressing this issue, the Trial Court states:

(T)he report from Montana which is the only thing Mr. Wong's application could be referring to in terms of previous incompetency proceedings is not even close to being conclusive that the defendant was found incompetent to stand trial. To the contrary, as I pointed our earlier when I was questioning Mr. Pulkrabek, it says that - - and I'll quote the first sentence of Exhibit 2 under the opinion on the issue of present competency to stand trial, "the limited information on Mr. Wong precludes asserting options with any reasonable certainty. T.48. L.19.

The Trial Court goes on to recognize that the exhibit refers to "some impairment." T. 49 L.6. The Trial Court goes on:

It does discuss medication and the fact that he could be restored to competence, which is interesting wording since there wasn't a finding that he was incompetent, but it says he could be restored to competence if he remains medication compliant. That of course is only part of the issue on ground three. The fact is he was not found incompetent by a court. I would note that when Mr. Rhodes testified, he testified that the Montana matter was dismissed not because the defendant was found incompetent, but because the federal authorities there knew that the defendant would be returned to custody in North Dakota . . . so there was never any finding of incompetency, so the underlying basis for ground three is erroneous first of all and number two, there's no evidence that the State was aware of this evaluation and report, had access to it, or in any way was under any duty to disclose that information. T.49. L.6.

The Trial Court then goes on to issue two, that the pleas of guilty were improperly induced. T.49. L24. The allegation is they were unlawfully induced. Because the Defendant was incompetent to stand trial, T.49. L.25. the Trial Court addressed that issue as follows:

Again, the defendant was not found incompetent, and we'll get to what the lawyers should have done . . . at the time Mr. Wong changed his plea to the charge, the attorneys that were handling it - - or the attorney, Mr. Goter, having had represented Mr. Wong before, testified that he was aware of the Montana proceedings, that he had advised the defendant to plead not guilty, and the defendant went ahead and pled on his own. Again, the transcript isn't here so we have no evidence of what the Court said to the defendant to determine the voluntariness or to determine his ability to understand the proceedings. It is this petitioner's burden of proving the matter and he certainly could have offered a copy of the transcript if he would have wanted to. But again, there was no finding of incompetency, therefore ground two hasn't been proved, that being unlawful inducement of the guilty plea. Again, it gets into the mental health issue, but the defendant pled guilty voluntarily Nobody induced him to. Mr. Goter indicated that to the contrary, he had advised his client not to plead guilty. T.50.L.1.

The Trial Court identified the final issue as ineffective assistance of counsel. T.50.L.16.

Ground one is ineffective assistance of counsel failed to properly investigate case. He would have found defendant was found incompetent on September 24, 2009, in a federal court of law. Again, that is factually inaccurate. The defendant was not found

incompetent in a court of law. There are some medical opinions that indicate some mental health issues, but that is the extent of it. Mr. Goter, being an experienced defense attorney, assessed his client's understanding of what was happening and his knowledge of the proceedings, made a determination that - - well I guess to put it the other way, he had no problem understanding him or communication with him. The fact that there was this Montana information may be would have put a reasonable attorney on notice or raised a red flag or whatever term you want to use. But, in this case Mr. Goter was aware of that and his decision-making was based on, at least in part on that knowledge and my understanding is that Mr. Goter intended for Mr. Wong to continue with his not guilty plea and possibly pursue the matter. Mr. Goter then filed a motion to have an evaluation. The motion was granted. The evaluation was accomplished, so there's nothing more that Mr. Goter could have done in his representation. He did exactly what Mr. Pulkrabek was claiming that he should have done---that being get an evaluation: he got one. The fact that it was after the change of plea isn't really significant because the Court then had that information before at the time of the sentencing. . . . . Mr. Morrow was involved for a very short time. There's nothing in his representation that indicates ineffective assistance of counsel. He was removed from the case after the altercation. Mr. Greenwood comes on the scene. . . . I believe that Mr. Grosinger was correct when he stated that this e-mail would have been given to the Court at the time of sentencing because the e-mail, which is document 38 in the file, was filed on December 15, which is the same date as the sentencing. So the Court - - it appears anyway, was provided with that document at the time. What Mr. Greenwood said in connection with this e-mail, we don't know because we don't have a copy of the transcript. Again, Mr. Wong could have gotten a copy of the transcript, given it to the Court, and then we would have known what happened. I guess I'll say I don't have any independent recollection for what it's worth, but we have to certainly be cognizant of the fact that this Court was provided this information and decided to proceed. Where Mr. Greenwood was ineffective this Court doesn't have any evidence. Whether the Court - - I should have done something different, I don't know because I don't remember what I did and the transcript isn't here to tell me what I did. Again, it's the petitioner's burden of proving what happened. All we are really left with here is may be a good argument that I shouldn't have proceeded with sentencing, but that wasn't one of the grounds raised. T.50.16.

The Trial Court denied post-coviction relief and issued an order accordingly.

A.88.

Argument

I.

The first issue raised by the Defense/Petitioner is that the Trial Court acted inappropriately when it did not stop the sentencing due to Wong's mental disease/defect. The State argues this issue is without merit.

This issue was not pled in the Petition. The Trial Court specified that it was not pled in the Petition, and stated that as a reason for not addressing this issue. Of further note, there was no transcript of the sentencing proceeding. Had this been an issue, that transcript would have been critical to the determination. Without the transcript, the defense has failed to prove anything specific regarding what occurred.

The State argues that there must be some notice of an issue to allow the State to defend the issue at the proceeding. Using the instant case for an example, had there been some notice that the Trial Court's action at sentencing would have been an issue, the State would have obtained a transcript of that proceeding to fully facilitate justifying the Trial Court's action.

In criminal cases, "a defendant cannot raise an argument for the first time on appeal when it was not made at the Trial Court for its consideration." *State v. Zahn*, 2007 ND 2, 725 N.W.2d 894. This Court has stated "[o]n appeal, we generally do not consider issues, even constitutional issues, not raised before the trial court." *State v. Weisz*, 2002 ND 207 ¶6, 654 N.W.2d 416 (citing *State v. Kensmoe*, 2001 ND 190, ¶ 17, 636 N.W.2d 183). "'One of the touchstones for an effective appeal on any proper issue is that the matter was appropriately raised in the trial court so it could intelligently rule on it.'" Id. (quoting State v. Osier, 1999 ND 28, ¶ 14, 590 N.W.2d 205).

In the instant case the Trial Court made reference to the possibility of such an issue, but then did not address the issue, at least in part because it had not been raised. "All we are really left with here is may be a good argument that I shouldn't have proceeded with sentencing, but that wasn't one of the grounds raised." T.52 L.7.

The State argues that what is happening on this issue is the Defendant is pulling one comment made by the Trial Court, based on the matter not being raised or considered, and is now attempting to parlay that into a winning appellate issue. The State argues this Court cannot allow that.

For the reason that the issue was not addressed at the Trial Court, and for the reason that the issue is based on exhibits the Trial Court found to be inconclusive, the State argues this issue is without merit.

II.

Ineffective assistance of counsel is governed by the Strickland test, originating from *Strickland v. Washington*, 466 U.S. 668 (1984) and is largely followed by this Court as per *Flanagan v. State*, 2006 ND 76, 712 N.W.2d 602. In short, the test requires that the performance of the accused counsel fall below an objective standard of performance, and then the second prong requires that the defendant be prejudiced. Prejudice is often judged by if the outcome would have been different.

The State argues that the first prong in the testimony of Mr. Morrow was, in his opinion, that Wong was able to communicate and understood the matter and the proceedings. When there was a conflict in the form of a violent outburst toward Mr. Morrow, he stepped down and withdrawal was granted by the Trial Court. In these facts

there is no performance on the part of Mr. Morrow that was deficient. The first prong has not been proved.

In regard to the second attorney, Mr. Goter, his testimony was that the Defendant was able to communicate and understood the proceedings. Mr. Goter's testimony recognized that he did not consider Wong to be "normal" but nevertheless he was able to communicate and understand. Mr. Goter's testimony included that he had years of experience as a lawyer and in criminal defense. Mr. Goter also testified that he had clients in the past that had been found incompetent. Wong, to the contrary was competent.

The Goter testimony is significant for several reasons. One being that it goes to the defendant at the time that the guilty plea was entered. Another is that the testimony is couched in terms of acceptable equivocation and based on significant experience on the point. The experience is persuasive without further argument. The acceptable equivocation is the testimony was couched with rational consideration. The State compares this with the "smoking gun" e-mail of Dr. Coombs, which is speculative and inconclusive.

In regard to the third attorney, Mr. Greenwood, he is in the unenviable position of facing the criticism of his performance having never had the opportunity to speak on his own behalf during the hearing on the matter. Nevertheless, his performance did not fall below an objective standard, and there is no proof sufficient to show that he did, such that would satisfy the first prong.

A transcript of the sentencing proceeding is not in the record. There was no testimony from Mr. Wong in regard to his complaints about the representation. There

may be the complaint that he may not have acted on the e-mail exhibit authored by Dr. Coombs, but the fact that the exhibit is in the Trial Court record, filed the same day as the sentencing proceeding, does not bear that out. If anything, it demonstrates that Mr. Greenwood did act in that regard. The Defense has not proven any substantial fact in regard to Mr. Greenwood's performance.

In the case of the three attorneys that represented Mr. Wong during the criminal prosecution there is insufficient proof of the first prong in regard to all three.

This Court recently issued a decision in *Murchson v. State*, 2011 ND 126. There are two things in this precedent that the State argues are relevant. First, there is nothing in *Murcheson* that changes the test/standard previously cited in *Strickland* or *Flanagan*. Second, in the opinion the *Murcheson* Court characterizes the burden on the Defendant as "heavy."

Finally, the State will argue the second prong of the test, although the chief argument is that prong should not be addressed due to the failure to prove the first prong. *Odom v. State,* 2010 ND 65, 780 N.W.2d 666.

The second prong is that the Defendant suffered prejudice as a result of the deficient performance. The Defendant's argument is based upon Section 12.1-04-04 N.D.C.C. that an individual cannot be tried, convicted, or sentenced when incompetent or unable to understand the proceedings. The statute does not require the trial court involved to take the issue on faith. The State argues that the trial court must make a determination that there is such a deficiency, and there must be some substance, i.e. proof of that incompetence.

In this situation. it is the same trial judge that exercised such healthy skepticism of the exhibits presented in the hearing for post-conviction relief, that would have made the call at the sentencing. (and the guilty plea). To prove this prong. the defense argument would have to be, that even though the trial judge didn't believe this evidence to be conclusive at the hearing for post-conviction relief, he would have believed it was conclusive back at sentencing. The State argues that position is without merit.

To further the argument that the position is without merit, the State also argues that the Trial Court did not abuse its discretion and made a rational determination in respect to the exhibits presented. The Trial Court concluded that the information from the Federal facility and the State facility were inconclusive based upon the initial premise of both was that they could not forward an opinion. Both, however, go on to express opinions in spite of the foundation to the contrary. The Defense would argue that the inability to start with an opinion is based upon the incompetence of the Defendant. It is just as easily explained by the guile of the Defendant. The State argues that when one considers the pattern in the record of outburst toward the defendant's lawyers, and coupled with the failure to cooperate at the time when answers might be obtained. that guile is the better explanation.

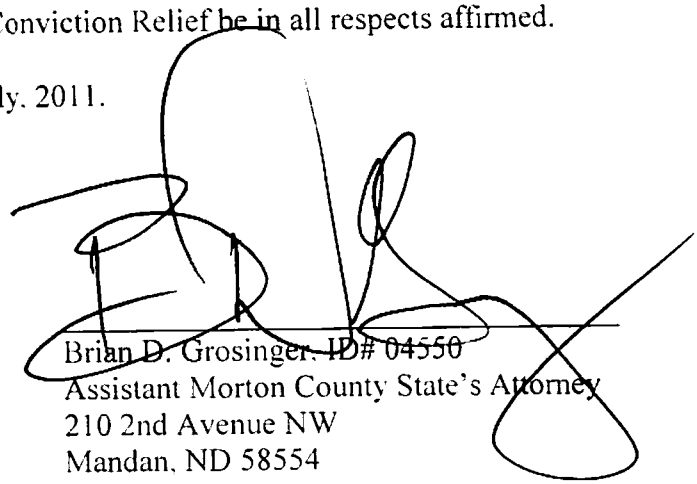
The State completes this argument by stating that for purposes of N.D.C.C. 12.1-04-04 mental illness alone is not sufficient to tie the Trial Court's hands. There must be proof of the inability to comprehend or communicate, which was not present in the instant case.

In the instant case neither prong was met at the hearing to the trial court.

Conclusion

For the reasons state above the State of North Dakota respectfully requests the Order Dismissing the Petition for Post-Conviction Relief be in all respects affirmed.

Dated this 1 day of July, 2011.



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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Alman Andrew Wong, Petitioner/Appellant, vs. State of North Dakota, Respondent/Appellee.	)))))))))	Supreme Court No. 20110088 District Court Case No. 30-08-K-880

STATE OF NORTH DAKOTA)
)SS.
COUNTY OF MORTON)

Karen A. Anderson, being first duly sworn, deposes and says that she is of legal age and on the 1st day of July, 2011, she served the attached **BRIEF OF RESPONDENT-APPPELLEE** upon the following by placing a true and correct copy thereof in an envelope addressed as follows:

Benjamin Pulkrabek
Attorney at Law
402 1st Street NW
Mandan, ND 58554

To the best of my knowledge and belief, such address was the actual post office address of the party(ies) to be so served; that the documents were mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

Karen A. Anderson
Karen Anderson

Subscribed and sworn to before me this 1st day of July, 2011.

Notary Public

BRIAN D. GROSINGER
Notary Public
State of North Dakota
My Commission Expires April 4, 2017