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JUNE 2, 2011
STATE OF NORTH DAKOTA

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

SUPREME COURT NO. 20110088

Alman Andrew Wong,

Petitioner-Appellant,

-vs-

State of North Dakota,

Respondent-Appellee.

APPEAL FROM ORDER DENYING POST CONVICTION RELIEF
SOUTH CENTRAL JUDICIAL DISTRICT
MORTON COUNTY CR. NO. 30-08-K-880
THE HONORABLE BRUCE B. HASKELL, PRESIDING

BRIEF

BENJAMIN C. PULKRABEK

Attorney for Appellant
402 First Street NW
Mandan, North Dakota 58554
(701) 663-1929
N.D. Bar Board ID No. 02908

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ISSUES

[¶1] At the Judgment and Sentence of Defendant/Appellant, Alman Andrew Wong on December 16, 2009, should Mr. Wong's incapacity, because of a mental disease and NDCC 12.1-04-04, have prevented the trial judge from sentencing Mr. Wong?

[¶2] Was counsel for Defendant/Appellant, Alman Andrew Wong ineffective in his assistance of counsel because he knew of Mr. Wong's mental disease but did not:

1. Require the trial court's ordered evaluations of Mr. Wong's Motions to determine his competence and criminal responsibility be completed before Mr. Wong was sentenced.
2. Stop the sentencing proceeding because of Mr. Wong's mental disease.
3. After sentencing make a motion to have the judgment and sentence vacated because of Mr. Wong's mental disease.

NATURE OF THE CASE

[¶3] This case involves a Petition for Post Conviction Relief filed by the Defendant/Appellant, Alman Andrew Wong (Mr. Wong). That petition was dismissed by an order of the District Court on May 24, 2010. That dismissal was appealed to the North Dakota Supreme Court on June 6, 2010.

[¶4] The North Dakota Supreme Court in *Wong v ND 2010 ND 219, 790 NW2d 757* reversed and remanded for further proceeding consistent with the opinion the District Court's dismissal.

[¶5] A post conviction hearing was held on May 16, 2011. At that hearing four witnesses testified, John Rhodes, Alman Andrew Wong, Ken Morrow and Wayne Goter.

[¶6] The trial court at the end of the hearing dismissed Mr. Wong's Petition for Post Conviction relief.

[¶7] Alman Andrew Wong then filed a Motion to Reconsider dated March 17, 2011. The State on March 25, 2011 resisted that motion.

[¶8] The trial courts order denying Post Conviction Relief was signed on March 18, 2011.

[¶9] The trial courts order denying Mr. Wong's Motion to Reconsider is dated March 30, 2011.

[¶10] Mr. Wong's Notice of Appeal was filed on April 1, 2011.

[¶11] This case is now before the North Dakota Supreme Court.

STATEMENT OF FACTS

[¶12] The Post Conviction hearing in the above entitled matter was held on the 16th of May, 2011. At the start of the hearing exhibits 1 and 2 were received. Exhibit 1 is a letter from Robert J. Palmquist, the warden at Sea Tac Washington talking about Mr. Wong being evaluated. Exhibit 2 is the federal detention center at Sea Tac Washington forensic evaluation of Mr. Wong. Tr. P.2, L1-14. Tr. P.1, L1-2. The first witness called to testify for Alman Andrew Wong was John Palmer Rhodes an assistant federal defender with the Federal Defender's of Montana. Tr. P.4, L.15-21. Federal Defender Rhodes was appointed to represent Mr. Wong on June 3, 2008. Mr. Wong

was charged in federal court with being a felon in possession of a firearm. Tr. P.5, L.11-19.

[¶13] Federal Defender Rhodes had trouble communicating with Mr. Wong in court. Because of the communication problem, the trial judge released Mr. Wong from the hearing and had him returned to the marshalls holding cell. Tr. P.5, L.20-25, P.6, L.1-12.

[¶14] Federal Defender Rhodes then drafted a motion requiring Mr. Wong to have a mental health evaluation. The judge signed the motion and Mr. Wong was transferred from Missoula Montana to Sea Tac federal prison in Seattle, Washington. Tr. P.6, L.12-15.

[¶15] Federal Defender Rhodes had other visits with Mr. Wong and talked to Mr. Wong by phone but at no time did Federal Defender Rhodes ever feel Mr. Wong could tell him what was going on in a way that would indicate that he understood what Federal Defender Rhodes was saying Tr. P.7, L.1-22.

[¶16] A hearing was held on September 15, 2008 to determine whether Mr. Wong should be forcibly medicated. At that hearing Mr. Wong tried to punch Federal Defender Rhodes in the face. Federal Defender Rhodes saw the punch coming and was able to jerk his head back and reduce the impact of the punch. Court security then took hold of Mr. Wong and the trial judge excused Mr. Wong from the proceeding. Tr. P.8. L. 1-25, P.9, L.1-7.

[¶17] The government on its own initiative dropped the federal charges and Mr. Wong was returned to North Dakota.

[¶18] Federal Defender Rhodes was shocked to learn that Mr. Wong was convicted in North Dakota. He was also shocked that no attorney from North Dakota contacted him about the Montana federal case. Tr. P.10, L. 16-22.

[¶19] Defendant/Appellant, Alman Andrew Wong was the second witness. Mr. Wong testified about hearing voices, banging or hitting his head to get rid of voices and stuff, and the headaches. Mr. Wong also testified he was medicated but didn't know what the medication was. Tr. P.11, L.18-25, P.12, L.1-7.

[¶20] The third witness was attorney Kent Morrow. Attorney Morrow was court appointed to represent Mr. Wong and did represent Mr. Wong through Mr. Wong's preliminary hearing. There was a physical altercation between Mr. Wong and attorney Morrow at that hearing when attorney Morrow mentioned a motion to have Mr. Wong evaluated. Tr. P.12, L.18-25, P.13, L.1-13.

[¶21] Prior to Mr. Wong's preliminary hearing attorney Morrow and Mr. Wong had a conference at the detention center. At that hearing Mr. Wong told attorney Morrow about being found incompetent to stand trial in a federal case in Montana. After hearing what happened to Mr. Wong in Montana, Attorney Morrow thought it was appropriate to make a motion for an evaluation of Mr. Wong. Tr. P.13, L.10-25, P.14, L.1-6. The reason attorney Morrow didn't get the motion for evaluation reduced to writing was because of the altercation at the preliminary. Tr. P.17, L.1-3.

[¶22] The fourth witness was attorney Wayne Goter. Attorney Goter was appointed to represent Mr. Wong after Attorney Morrow was disqualified because of the altercation at the preliminary. Tr. P.18, L.5-6.

[¶23] At a court appearance, attorney Goter expected Mr. Wong to plead not guilty, but Mr. Wong plead guilty. Attorney Goter didn't want Mr. Wong to plead guilty because attorney Goter wanted to have Mr. Wong evaluated. Mr. Wong prior to the hearing was getting along with attorney Goter, discussed the case with attorney Goter and said he wanted to plead guilty. Therefore, at the hearing attorney Goter decided it was Mr. Wong's call and said nothing in court when Mr. Wong plead guilty. Tr. P.18, L.12-25, P.19, L.1-9.

[¶24] After Mr. Wong's guilty plea attorney Goter learned about what had happened to Mr. Wong's charges in Montana. Because of what happened in Montana Attorney Goter filed a Motion to Withdraw Mr. Wong's guilty plea and a Motion for an Evaluation based on the information he had about what happened in Montana. Tr. P.19. L.8-17.

[¶25] At the Post Conviction Relief hearing on May 16, 2011 Judge Haskell denied the record contained any motion to withdraw a guilty plea. Assistant Morton County State's Attorney Brian Grosinger then produced a letter addressed to Judge Haskell that said accompanying the letter are motions for an evaluation of defendant for competency and criminal responsibility. Tr. P.25, L.10-23. Assistant State's Attorney Grosinger then stated the motions are docketed as items 29 and 30 and the judge's order granting them was item 31. Tr. P.26, L.14-15.

[¶26] Judge Haskell then decided that the issue was not whether Mr. Wong would have prevailed at trial or not, which is the issue in a lot of ineffective assistance cases but in the issue was whether Mr. Wong would have been declared incompetent and then would have proceeded down the mental health path as opposed to the criminal

path. Tr. P.28, L.20-24.

[¶27] Item 38 in the Clerk's Certificate App.P.13 is a letter to Wong's attorney Jay Greenwood and Morton County Assistant State's Attorney Brian Grosinger from Lincoln D. Coombs, Psy. D. who is a psychiatrist at the Jamestown State Hospital. Item 38 App.P.13 is dated November 19, 2009 and states in the first paragraph, "Mr. Wong arrived to NDSH this morning for his court ordered evaluation. When I attempted to assess Mr. Wong, he refused to undergo the assessment shortly after an interview was attempted. During our brief exchange, it was evident that Mr. Wong is suffering from a psychotic disorder, likely that of schizophrenia, paranoid type, as previously diagnosed. He informed me that he is not taking any antipsychotic medication currently and there is no data in the records to the contrary. During our brief assessment, it became apparent that Mr. Wong, as a result of the mental condition, is not able to assist in his own defense and lacks a rational (and perhaps factual) understanding of the proceedings against him."

[¶28] Since the letter, item 38 App.P.13 is dated several days before at the Judgment and sentence of Mr. Wong on December 16, 2009, both attorney Greenwood and Assistant Morton County Prosecutor Brian Grosinger were aware at the judgment and sentence that Mr. Wong because of his mental condition was not able to assist in his own defense and lacked a rational and perhaps a factual understanding of the proceeding against him.

[¶29] At the sentencing on December 16, 2009 Judge Haskell was also aware of what the letter, item 38 App.P.13 said about the mental condition of Wong. Judge Haskell's awareness is set out in the transcript at page 52, L.1-2 where Judge Haskell

says, we have to certainly be cognizant of the fact that the court was provided this information and elected to proceed.

[¶30] The Order signed by Judge Haskell granting and ordering the evaluation of Mr. Wong appears in the Clerk's Certificate as item 31 App.P.12. An examination of the entire Clerk's Certificate will show that it contains no evaluations of Mr. Wong. Also the Clerk's Certificate contains no motion to vacate the sentencing of Mr. Wong because of his mental disease at the time of sentencing.

ARGUMENT

[¶31] ISSUE I At the Judgment and Sentence of Defendant/Appellant, Alman Andrew Wong on December 16, 2009, should Mr. Wong's incapacity, because of a mental disease and NDCC 12.1-04-04, have prevented the trial judge from sentencing Mr. Wong?

[¶32] The standard of review in post-conviction relief hearings is set out in *Flanagan v State* 2006 ND 76 [¶9], 712 NW2d 607:

[¶33] At a post-conviction relief hearing the burden of establishing grounds for post-conviction relief rests on the petitioner. Post-conviction relief proceedings are civil in nature and are governed by the North Dakota Rules of Civil Procedure. *Laib v. State*, 2005 ND 187, ¶ 11, 705 N.W.2d 845. The issue of ineffective assistance of counsel is a mixed question of law and fact which is fully reviewable by this /court, *Klose v. State*, 2005 ND 192, ¶ 10, 705 N.W.2d 809. A trial court's findings of fact in a post-conviction proceeding will not be disturbed on appeal unless they are clearly erroneous under N.D.R.Civ.P. 52(a). *Klose*, at ¶ 10; *Laib*, at ¶ 11.

[¶34] According to State v Steen 2004 ND 228, 690 NW2d 238. It is up to Mr. Wong to establish he was mentally ill at the time he entered his guilty plea and/or at the time of judgment and sentence which was December 16, 2009.

[¶35] The statute that tells what should have been done because of Mr. Wong's mental illness is **NDCC 12.1-04-04**. Disposition of mentally unfit defendants. No person who, as a result of mental disease or defect, lacks capacity to understand the proceedings against the person or to assist in the person's own defense shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity endures.

[¶36] In this case after Mr. Wong entered his guilty plea his attorney Wayne Goter made the following motions for him:

1. Motion for Examination of Defendant at Public Expense to Determine Defendant's Fitness to proceed App.P.11.
2. Motion for Examination of Defendant at Public Expense to Determine Defendant's Lack of Criminal Responsibility App.P.10.

[¶37] The trial judge then signed an Order granting both of the above motions. App.P.12

[¶38] The judge's order for the examination of Mr. Wong was never done. A letter item 38 App.P.13 was sent to Mr. Wong's attorney Jay Greenwood and Assistant State's attorney Brian Grosinger from Lincoln D. Coombs Psy. D. a psychiatrist at the Jamestown Hospital stating that within the next week to three weeks Psychiatrist Coombs would generate and turn in a report indicating his findings that Mr. Wong lacks fitness to proceed. Psychiatrist Coombs never turned in that report. Therefore both Jay

Greenwood and Brian Grossinger were aware of the letter item 38 App.P.13 and its contents. At the time of the post convictions hearing the trial judge was also aware of the above letter because he said during the hearing “we have to certainly be cognizant of the fact the court was provided this information and elected to proceed”. Tr.P.52, L.1-2.

[¶39] Exhibit 1 App.P.17 and Exhibit 2 App. P’s. 18-69 prove Mr. Wong had a mental disease when he was held in Montana on federal charges. Item 38 App. P.13 is a letter from Lincoln D. Coombs Psy. D., a psychiatrist at the Jamestown, North Dakota State Hospital proves that Mr. Wong’s mental disease continued in North Dakota after his federal charges were dismissed in Montana and he was returned to North Dakota. Psychiatrist Coomb’s letter also proves that Mr. Wong’s mental disease continued to exist and couldn’t improve until he is given antipsychotic medication therapy.

[¶40] Many things have been cured by a trial courts questionings, rulings and instructions. One thing no trial court could cure by questionings, rulings, and instructions is Mr. Wong’s mental disease. Mr. Wong’s mental disease, until he receives antipsychotic medication, will prevent him from assisting in his own defense and while he has this mental disease he lacks rational (and perhaps factual understanding of the proceeding against him). Evan after Mr. Wong receives antipsychotic medication therapy there is no guarantee his mental disease will be cured.

[¶41] NDCC 12.1-04-04 mandates that when an individual lacks the capacity to understand the proceedings against him or to assist in his own defense that that individual can’t be tried, convicted or sentenced so long as that incapacity endures. Therefore because of language in 12.1-04-04 and his mental disease Mr. Wong’s plea

can't stand and he can't be tried or sentenced until his mental disease is brought under control.

[¶42] At and during the sentencing of Mr. Wong, the trial judge, Mr. Wong's attorney Jay Greenwood and prosecutor Brian Grossinger also were aware of the language in 12.1-04-04 and the fact that this statute stops sentencing when a mental disease prevents a defendant from understanding the proceedings against him or to assist in his own defense. The trial judge, Mr. Wong's attorney, Jay Greenwood and prosecutor Brian Grossinger were also aware of the letter item 38 App.P.13, its contents and the two motions that were pending. Therefore at least one of these individuals should have done something to stop the sentencing or at least made a motion after sentencing to set the sentence aside.

[¶43] At this time the only way to correct Mr. Wong's sentence is to vacate it and not to allow any further legal action to take place until Mr. Wong is evaluated and treated and that evaluation and treatment show that his mental disease no longer endures.

[¶44] ISSUE II. Was counsel for Defendant/Appellant, Alman Andrew Wong ineffective in his assistance of counsel because he knew of Mr. Wong's mental disease but did not:

- 1. Require the trial court's ordered evaluations of Mr. Wong's Motions to determine his competence and criminal responsibility be completed before Mr. Wong was sentenced?**
- 2. Stop the sentencing proceeding because of Mr. Wong's mental disease.**

3. After sentencing make a motion to have the judgment and sentence vacated because Mr. Wong has a mental disease.

[¶45] According to *Roth v. State* 2006 ND 106[¶12] 713 NW2d 513 Assistance of counsel is plainly defective when the record affirmatively shows ineffectiveness of a constitutional dimension or the defendant points to some evidence in the record to support the claim. *Id.* Here, Roth claims the affidavit in support of the search warrant is enough to establish ineffective assistance of counsel.

[¶46] Because of the above language in *Roth* Mr. Wong knows that at his post-conviction relief hearing it was up to him to produce evidence that Jay Greenwood, his attorney at his sentencing on December 16, 2009 and after said hearing was ineffective and fell below the objective standards of reasonableness. Mr. Wong believes he did produce such evidence at the post-conviction relief hearing when he produced the letter from psychiatrist Coombs item 38 App. P. 13. That letter showed Mr. Wong had a mental disease at the time he was sentenced and the seriousness of that mental illness. Also at th post-conviction relief hearing Mr. Wong pointed out that a Motion for Examination of Defendant at Public Expense to Determine Defendant's Lack of Criminal Responsibility item 29 App.P.10 and Motion for Examination of Defendant at Public Expense to Determine Defendant's Fitness to Proceed item 30 App.P.11 had been made by one of his former attorneys Wayne Goter. That these motions were then granted and ordered by the trial judge in item 31 App.P.12 but the evaluations ordered were never done.

[¶47] Mr. Wong's attorney, Jay Greenwood had to know about the letter item 38 App.P.13 and its contents because he is one of the parties that the letter was addressed

to. The Motion for Examination of Defendant at Public Expense to Determine Defendant's Lack of Criminal Responsibility item 29 App.P.10 and Motion for Examination of Defendant at Public Expense to Determine Defendant's Fitness to Proceed item 30 App.P.11 and the trial judges Order App.P.12 are all part of the clerk's certificate in this case and Mr. Wong's attorney Jay Greenwood should have either known or knew about them.

[¶48] Mr. Wong's attorney Jay Greenwood also knew or should have known that NDCC 12.1-04-04 mandates that a defendant can't be tried, convicted or sentenced when that defendant has a mental disease and lacks the capacity to understand the proceedings against him or to assist in his own defense.

[¶49] Mr. Wong believes the above order for evaluations should have been completed because of his mental illness which is proven in item 38 App.P.13. Therefore because Mr. Wong had proven he was mentally ill at sentencing the burden shifted to the State and prosecutor Grossinger or Mr. Wong's attorney Greenwood to show why attorney Greenwood's failed to stop the sentencing or make a motion to vacate the sentence wasn't ineffective assistance of counsel.

[¶50] Flanagan-Supra makes it clear that the range allowed for profession assistance of an attorney during a trial is very wide. Mr. Wong doesn't believe that the range for legal assistance of an attorney at trial is wide enough to allow his defense attorney Jay Greenwood, with the knowledge he had of Mr. Wong's mental disease and the two pending mental evaluation motions that had been ordered by the trial judge to just sit by and not to stop the sentencing of Mr. Wong. Then after sentencing, attorney Greenwood knew Mr. Wong had a mental disease but failed to make a motion to vacate

Mr. Wong's sentence because of Mr. Wong's mental disease.

[¶51] Flanagan–Supra also makes it clear that Mr. Wong must show the end result would be different if the sentencing had been stopped or if after sentencing a motion to set aside the sentence had been made by attorney Greenwood. At this time Mr. Wong believes that had the sentencing been stopped, because of his mental disease or a motion had been made to vacate his sentence after the sentencing because of his mental disease, he would be an individual with a mental disease in a mental institution and being evaluated and treated instead of being an inmate in the North Dakota State Penitentiary with a mental disease.

[¶52] Exactly what will happen after the evaluation and treatment Mr. Wong can't predict. It could result in any of the following:

- (1) The charges against Mr. Wong could be dismissed and he would be placed in a mental institution until his mental disease is under control;
- (2) Mr. Wong's mental problem could be brought under control and he could be brought to trial or he could plead to the charge.
- (3) There could be a jury trial and a jury could decide whether or not insanity is a defense to the crimes Mr. Wong is charged with.

[¶53] There is no doubt that Mr. Wong must be evaluated and treated to find out whether his future will be decided by just mental health treatment or mental health treatment and criminal punishment.

[¶54] Mr. Wong's attorney Jay Greenwood knew that Mr. Wong had a mental disease that prevents him from assisting in his own defense and because of that mental disease lacked the capacity to understand the proceedings against him. Attorney

Greenwood also knew that there were two mental evaluations ordered by the trial judge that needed to be done. Therefore, he should have done something to stop the sentencing or made a motion to vacate the sentencing. Attorney Greenwood's failure to do anything to stop the sentencing or to make a motion to vacate Mr. Wong's sentence under the circumstances of this case fall below the objective standard of reasonableness and is ineffective assistance of counsel.

CONCLUSION

[¶55] For the above and foregoing reasons this case must be remanded to the district court with an order requiring Mr. Wong to be evaluated and treated. Said remand should also require that Mr. Wong not be tried or allowed to plead guilty unless and until his mental disease is under control.

DATED this 2nd day of June, 2011.

/s/ Benjamin C. Pulkrabek
Benjamin C. Pulkrabek, ID# 02908
Attorney for Appellant, Alman Wong
402 First Street NW
Mandan, ND 58554
(701)663-1929

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing documents were served electronically

on the following individual on this 2nd day of June, 2011.

Brian Grosinger
Morton County
Assistant State's Attorney
brian.Grosinger@mortonnd.org

/s/ Sharon Renfrow

Sharon Renfrow