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FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
OCTOBER 17, 2011
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Jeff Mosbrucker,	)	
Appellant/Petitioner	)	Supreme Court No. 20110219
v.	)	
State of North Dakota,	)	Morton County No. 30-06-K-1112
Appellee/Respondent.	)	

APPEAL FROM THE ORDER DENYING POST-CONVICTION RELIEF PETITION ENTERED BY THE DISTRICT COURT OF THE EAST CENTRAL JUDICIAL DISTRICT THE HONORABLE DONALD L. JORGENSEN, PRESIDING ON JULY 7, 2011

APPELLANT'S BRIEF

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STATEMENT OF THE ISSUES

[¶1] Did the Trial Court commit clear error in dismissing Mosbrucker's Petition for Post-Conviction Relief.

STATEMENT OF THE CASE

[¶2] This is an appeal of the dismissal of Jeff Mosbrucker's Application for Post-Conviction Relief by the District Court.

[¶3] On October 31, 2007, a Warrant of Arrest was issued and Complaint filed charging Jeff Mosbrucker with the crime of Gross Sexual Imposition, a Class C Felony. (Appendix ("A") 1). A jury trial was held on March 2, 2007 (A. 2) which ended in a mistrial (Transcript of Post-Conviction Relief Hearing, ("T") p. 34, l. 25 – p. 35, l. 1). A second trial was held July 31, 2007 (A. 3). The trial court granted defendant's motion for directed verdict regarding the allegation that Mosbrucker used force, but denied the motion for the inability to consent, and the jury found Mosbrucker guilty of that charge. (A. 18).

[¶4] On November 8, 2007, Mosbrucker was sentenced, in part, to serve ten years with the Department of Corrections and Rehabilitation, with five years suspended. (A. 4). On November 9, 2007 the trial court filed its Order Denying Motion for New Trial. (A. 5). On December 7, 2007, Mosbrucker filed an appeal of the criminal judgment. (Id.). The North Dakota Supreme Court Opinion affirming the criminal judgment was filed December 16, 2008. (State v. Mosbrucker, 2008 ND 219, ¶1, 758 N.W.2d 663).

[¶5] Mosbrucker filed an Application for Post-Conviction Relief ("Application"), Affidavit of Jeff Mosbrucker in Support of Petition for Post-Conviction Relief, and Brief

in Support of Application for Post-Conviction Relief on December 2, 2010. (A. 7, A. 9-17) and the State filed its Answer to the Defendant's Petition for Post-Conviction Relief (And Request for a Hearing) on December 27, 2010 (A. 7). An attorney was appointed to represent Mosbrucker on his application for post-conviction relief.

[¶6] An evidentiary hearing was held on June 3, 2011. (A. 2, See Transcript of Post-Conviction Relief Hearing, ("T")). The Court issued its Order Denying Post-Conviction Relief Petition July 7, 2011. (A. 8, A. 18-25). Mosbrucker timely filed his Notice of Appeal on July 29, 2011. (A. 8, A. 26). The undersigned attorney was appointed to represent Mosbrucker on his appeal.

FACTS OF THE CASE

[¶7] In 2006, Mosbrucker was charged with gross sexual imposition for engaging in a sexual act with Jane Doe, whom the State alleged was forced into the sexual act or had a mental disease or defect rendering her incapable of understanding the nature of the conduct. Mosbrucker's first trial in March 2007 ended in a mistrial and a second trial was held in July 2007. Mosbrucker at ¶2. Mosbrucker's made a motion for judgment of acquittal which was partially granted as to the allegation that Doe was forced into the sexual act, and denied as to whether Mosbrucker knew or had reasonable cause to believe Doe suffered from a mental disease or defect rendering her incapable of understanding the nature of the conduct. Id. at ¶3. Mosbrucker was found guilty of gross sexual imposition by the jury and Mosbrucker filed a motion for a new trial. The motion was denied. Id.

[¶8] Mosbrucker appealed his conviction and argued the conviction should be reversed because the trial court committed obvious error by allowing Dr. Degree to testify regarding Doe's ability to consent to sexual acts and her ability to understand the

implications of engaging in sexual acts. Id. at ¶4. Mosbrucker's appeal also argued that the conviction should be reversed because the evidence was insufficient to sustain the guilty verdict. Id. at ¶20. The North Dakota Supreme Court affirmed the criminal judgment. Id. at ¶1. Mosbrucker filed an Application for Post-Conviction Relief claiming ineffective assistance of counsel which was dismissed by the District Court after a hearing was held on his application for post-conviction relief. (T). Mosbrucker appeals the District Court's dismissal of his application for post-conviction relief.

LAW AND ARGUMENT

[¶9] The Uniform Post-Conviction Procedure Act provides:

> "1. A person who has been convicted of and sentenced for a crime may institute a proceeding applying for relief under this chapter upon the ground that:
>
> > a. The Conviction was obtained or the sentence was imposed in violation of the laws or the Constitution of the United States or of the laws or Constitution of North Dakota; …
> >
> > b. Evidence, not previously presented and heard, exists requiring vacation of the conviction or sentence in the interests of justice; …
>
> 2. A proceeding under this chapter 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. § 29-32-01.

[¶10] "Proceedings on applications for post-conviction relief are civil in nature and governed by the North Dakota Rules of Civil Procedure." Rummer v. State, 2006 ND 216, ¶9, 722 N.W.2d 528. "The petitioner has the burden of establishing grounds for post-conviction relief." Flanagan v. State, 2006 ND 76, ¶10, 712 N.W.2d 602. "The district 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)." Laib v. State, 2005 ND 187, ¶11, 705 N.W.2d 809.

[¶11] "To establish ineffective assistance of counsel, a party must prove (1) counsel's performance was deficient such that it fell below an objective stand of reasonableness; and (2) counsel's deficient performance prejudiced the defendant." Klose v. State, 2005 ND 12, ¶9, 705 N.W.2d 809.

[¶12] "The Sixth Amendment to the United States Constitution, and Article I, §12 of the North Dakota Constitution guarantee a criminal defendant effective assistance of counsel." E.g., Heckelsmiller v. State, 2004 ND 191, ¶3 687 N.W.2d 454; Garcia v. State, 2004 ND 81, ¶5, 67 N.W.2d 568. "In accord with the two-prong test established in Strickland v. Washington, 466 U.S. 668 (1984), a defendant claiming ineffective assistance of counsel bears the heavy burden of proving (1) counsel's representation fell below an objective standard of reasonableness, and (2) the defendant was prejudiced by counsel's deficient performance." Greywind v. State, 2004 ND 213, ¶13, 689 N.W.2d 390; Heckelsmiller, at ¶3. The defendant must first overcome the "strong presumption" that trial counsel's representation fell within the wide range of reasonable professional assistance, and courts must consciously attempt to limit the distorting effect in hindsight. Id.; Ernst v. State, 2004 ND 152, ¶9, 683 N.W.2d 891.

[¶13] "To meet the 'prejudice' prong of the Strickland test the defendant carried the heavy burden of establishing a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." Greywind at ¶13; Mathre v. State, 2000 ND 201, ¶3, 619 N.W.2d 627. "The defendant must prove not only that counsel's assistance was ineffective, but must specify how and where trial counsel was incompetent and the probable different result." Greywind at ¶13; Garcia at ¶5. "Unless counsel's errors are so blatantly and obviously prejudicial that they would in all cases, regardless of

the other evidence presented, create a reasonable probability of a different result, the prejudicial effect of counsel's errors must be assessed within the context of the remaining evidence properly presented and the overall conduct of the trial." State v. Steen, 2004 ND 228, ¶19, 690 N.W.2d 239.

[¶14] Mosbrucker claims ineffective assistance of counsel consisted of (1) "he was not presented with his offer for settlement of this case until shortly before trial", (2) "trial counsel failed to pursue expert testimony in opposition to the State's assessment of the alleged victim", (3) "trial counsel was ineffective in not suppressing his statement given to law enforcement", (4) "[I]f trial counsel would have objected to this statement at trial or attempted suppression, the issue would have been preserved". Additionally, Mosbrucker alleged that his counsel failed to perfect appeal from denial of new trial motion.

[¶15] A jury trial was held on March 2, 2007 (A. 2) which ended in a mistrial. A second trial was held July 31, 2007 (A. 3). Shortly before the second trial, Mosbrucker's defense attorney received a plea offer from the State in which defendant could plea to an amended charge of a Class A Misdemeanor. (T. p. 5, l. 17 – p. 6, l. 4). Mosbrucker's trial attorney testified that he did discuss the offer with Mosbrucker and it was rejected (Id. p. 6, l. 9-10) but does not recall when he discussed it with Mosbrucker however, he does agree that the discussion could have been "right before trial…and it could have been earlier, I don't know". (Id. l. 13-16). Mosbrucker's attorney testified that "I now the sticky point was he would have to register". (Id. p. 17, l. 6-7). Mosbrucker's attorney testified that when he receives plea offers, his standard practice is to send a letter when it's early in a case, if verbally and close, then he would try to get hold of the [client], if

the client is in custody he would try to leave a message, and if the client was in custody and it was urgent he would call and set up a time when the client could call him back at the office. (Id. p. 6, l. 19 – p. 7, l. 2). Again, Mosbrucker's attorney does not recall what happened in this instance. (Id. p. 7, l. 3-4).

[¶16] Mosbrucker testified that he received the offer "[L]ike five minutes before the second trial as I showed up at the courthouse". (Id. p. 22, l. 4-13). Mosbrucker's testimony was that he did not receive any phone messages or anything indicating that there was a new offer while he was at the Department of Corrections, North Dakota State Penitentiary and that they have a system there available where someone can leave a message and it would get to him, that at that time he was allowed to then contact an attorney through his case manager, and that attorneys are allowed to visit. (Id. p. 22, l. 17 – p. 23, l. 7). Mosbrucker testified that the offer was to amend the charge to a Class A misdemeanor, sexual assault with a one-year sentence and that he rejected the offer based upon his attorney's recommendation that we had a chance to win at trial. (Id. p. 23, l. 10-16).

[¶17] Mosbrucker argues that he did not have sufficient opportunity to contemplate that offer or review the terms with his attorney. (Id. l. 19-22). Mosbrucker's testimony was that if given more time to discuss the offer he would have contemplated accepting the offer reasoning that "[J]ust having a misdemeanor instead of a felony I would say would be the biggest factor". (Id. p. 23, l. 25 – p. 24, l. 7). By failing to present the State's offer to an amended charge with a reasonable time to review it and discuss it with his attorney, Mosbrucker's attorney performance fell below an objective standard of reasonableness and that deficient performance prejudiced Mosbrucker. Had Mosbrucker been provided

the offer with reasonable time for review and discussion with his attorney, Mosbrucker would have accepted the offer.

[¶18] Mosbrucker alleges that his trial counsel failed to pursue expert testimony in opposition to the State's assessment of the alleged victim. The issue at trial was whether or not the victim had the capacity to consent. Regarding the victim's capacity to consent, Mosbrucker's attorney testified that "the testimony quite definitely showed she understood she was having sex. To her father she said she knew she could get pregnant from it. She understood very well". (Id. p. 8, l. 1 – 3). Mosbrucker's attorney further testified that he did not depose Dr. Degree or have any conversation with him prior to the first trial. (Id. l. 8-11). At the first trial, Dr. Degree testified about the victim's capacity…about her inability to appreciate the seriousness or consequences of having sex. (Id. p. 7, l. 20-25). At trial, a September 21, 2006 letter of Dr. Degree, based upon a 1999 evaluation of the victim, was offered along with Dr. Degree's testimony, regarding the competency of the victim. (Id. p. 8, l. 12 – p. 9, l. 17). The victim was never evaluated after the 1999 evaluation and before either of Mosbrucker's trials.

[¶19] Mosbrucker's attorney testified that Dr. Degree "was a difficult witness to cross-examine. He was so pro-prosecution" but that Dr. Degree did agree that the victim did understand she was having sex. (Id. p. 18, l. 12-20). Mosbrucker's attorney believes that he thought he had developed the argument whether or not the alleged victim would be able to obtain competency in the six or seven years after the 1999 evaluation and prior to the alleged sexual act. (Id. p. 9, l. 20-25). Mosbrucker's attorney did not consult with an expert or have an independent examination done on the alleged victim closer to the time of the act versus six to seven years prior in time. (Id. p. 9, l. 3-6). Mosbrucker's attorney

testified that he does not recall any discussions with Mosbrucker about an independent expert closer to the time of the actual event. (Id. l. 16-20).

[¶20] At the first trial, Mosbrucker's attorney felt confident "we were going to win". (Id. p. 11, l. 1). He testified that at the second trial the questions, the issues became different than what I perceived the law to be" (Id. l. 2-4) and that he believed the issue was "whether she understood the nature of what she was doing, of having sex" and [I]nstead, we are talking about whether she appreciates the breadth and depth of these decisions, what are the consequences". (Id. l. 12-17). Mosbrucker's attorney testified that "[I] didn't see a need for an expert because of the way I perceived the law to be". (Id. l. 22-23). Mosbrucker's attorney agreed that there was a procedure for being able to have an expert appointed, however he is not convinced it would have been helpful as he probably would have had the expert focus on the issues he perceived. (Id. p. 12, l. 25 – p. 13, l. 8).

[¶22] Mosbrucker's attorney was ineffective by failing to interview or depose Dr. Degree prior to the trials. He was also ineffective by failing to discuss the competency issue of the alleged victim with an independent expert or to have an independent expert testify at court on the issue of whether the 1999 evaluation indicating the alleged victim was not competent to consent was still valid six or seven years later when the sexual act occurred. By failing to obtain the opinion or testimony of an independent expert, counsel's performance was deficient such that it fell below an objective standard of reasonableness and that deficient performance prejudiced the defendant as the defendant was not able to attack the testimony of Dr. Degree or provide evidence that the 1999 evaluation of the alleged victim was outdated and therefore not reliable.

[¶23] Mosbrucker alleges that trial counsel was ineffective in not suppressing his statement given to law enforcement and not objecting to the admissibility of that statement at trial thereby preserving the issue for appeal. Mosbrucker gave a statement to Deputy McClure when he was first arrested and questioned b Morton County Deputy Jerry McClure. (A. 11, paragraph 2). Mosbrucker testified that he discussed with his attorney statements that Mosbrucker had given to Deputy McClure and that he did so "right away". (Id. p. 24, l. 16-23). Mosbrucker's testimony was that "I told [McClure]—when I asked for an attorney, he said I would be advised that I would have to be placed under arrest at that time if I didn't want to talk. So I felt pressured to talk at that time" and that he was not allowed to consult an attorney. (Id. p. 24, l. 25 – p. 25, l. 5).

[¶24] Mosbrucker's attorney testified that he did not believe he and Mosbrucker talked about suppression of the statement, that he didn't remember it, and that he didn't see it being an area where it could be suppressed and that he did not see a constitutional issue. (Id. p. 12, l. 21 – p. 13, l. 8). Mosbrucker's attorney didn't see what issue would be eligible for suppression because Mosbrucker admitted he had sex with the alleged victim, the issue was her perceptions of what is going on and Mosbrucker testified in his defense. (Id. p. 18, l. 21 – p. 19, l. 2). Additionally, at trial, Mosbrucker's attorney did not object to the statement he gave to McClure and thereby did not preserve that issue for appeal. Mosbrucker's counsel's performance was ineffective for failure to file a motion to suppress the statements Mosbrucker gave to law enforcement at the time of his arrest without first being afforded the right to contact an attorney and Mosbrucker was prejudiced by the fact that those statements were admissible at trial requiring the Mosbrucker to testify at trial.

[¶25] Mosbrucker alleges that his attorney provided ineffective assistance by failing to perfect appeal from denial of new trial motion. On November 9, 2007 the trial court filed its Order Denying Motion for New Trial. (A. 5). On December 7, 2007, Mosbrucker filed an appeal of the criminal judgment. (Id.). The Notice of Appeal did not state that Mosbrucker was also appealing the denial of the motion for new trial. The Supreme Court held that "[B]ecause Mosbrucker did not file an amended or additional notice of appeal from the order denying his motion for new trial, we are without jurisdiction to review the order". (Mosbrucker at ¶25).

[¶26] Mosbrucker's attorney testified that "I asked for a simple reversal. We should win." (T. p. 14, l. 24-25). He further testified that "Did I cost him a new trial? I don't know what the Supreme Court rules are on that, or if the prayer for relief makes any difference, I don't know, if I ask for a reversal versus new trial". (Id. p. 16, l. 1-4).

[¶27] Mosbrucker's counsel's performance was deficient such that it fell below an objective standard of reasonableness by failing to appeal the denial of the motion for new trial. Although the Supreme Court affirmed the jury verdict, the Supreme Court did not have the issue of whether a new trial was warranted in this case based upon the evidence presented and therefore Mosbrucker was prejudiced.

CONCLUSION

[¶28] Mr. Mosbrucker has provided sufficient evidence that he was denied effective assistance of counsel in that he was not presented with his offer for settlement of this case until shortly before trial and not given sufficient time to review and discuss the offer with his attorney. Had his attorney contacted him in a reasonable manner and fully discussed

the options, Mosbrucker argues that he would have accepted the plea offer. His attorney failed to pursue expert testimony in opposition to the State's assessment of the alleged victim when the State was presenting evidence of an 1999 competency evaluation of the alleged victim which was six to seven years prior to the sexual act. Failure to do so prejudiced Mosbrucker at trial. Mosbrucker's was prejudiced when his counsel failed to file a motion to suppress his statement given to law enforcement without first being afforded the right to consult with an attorney and he did not object to that statement at trial thereby preserving the issue for appeal. Mosbrucker was prejudiced by his counsel failing to perfect an appeal from the district court's denial of new trial motion. It is respectfully requested that his prayer for relief be granted and that the district court Order denying Mosbrucker's Petition for Post-Conviction Relief be reversed.

Respectfully submitted this 17th day of October, 2011.

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