

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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SUPREME COURT NO.: 20110270 & 20110271

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Robert Lee Johnson,

Petitioner/Appellant,

- vs -

State of North Dakota,

Respondent/Appellee.

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APPEAL FROM ORDER DENYING MOTION  
SOUTHEAST JUDICIAL DISTRICT  
STUTSMAN COUNTY CR. NO. 47-06-K-01017/01018  
HONORABLE JUDGE RICHARD W. GROSS, PRESIDING

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PETITIONER/APPELLANT'S BRIEF

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## **STATEMENT OF THE ISSUES**

[¶1] 1. Whether the North Dakota Rules of Civil Procedure or the North Dakota Rules of Civil Procedure should be used in deciding Mr. Johnson's Motion to Correct Sentence?

[¶2] 2. Did the district judge err when he decided to act on his own initiative without any motion for dismissal from the State, to summarily dismiss Mr. Johnson's Motion?

### **NATURE OF THE CASE**

¶3] Petitioner/Appellant Robert Lee Johnson filed an alternative handwritten Motion to Correct Sentence, that is not dated, with the Clerk of District Court in Stutsman County, North Dakota, on August 25, 2011.

¶4] That motion was stamped by the Stutsman North Dakota Clerk of the District Court on August 25, 2011.

¶5] District Judge Richard W. Grosz on his own initiative wrote a hand written summary denial of Mr. Johnson's Motion that is dated August 25, 2011.

¶6] That Summary denial is stamped by the Clerk of the District Court of Stutsman County, North Dakota, on August 26, 2011.

¶7] Petitioner/Appellant appealed District Judge Richard W. Grosz's Summary denial on September 2, 2011 and the Supreme Court Clerk received on September 13, 2011.

¶8] This matter is now on appeal before the North Dakota Supreme Court.

## STATEMENT OF FACTS

[¶9] Appellant Robert Lee Johnson filed an alternative hand written Motion to Correct Sentence on August 25, 2011. The same day Mr. Johnson's Motion was filed, District Judge Richard W. Grosz on his own initiation wrote a hand written summary denial.

[¶10] Mr. Johnson then filed a Notice of Appeal.

## ISSUE

[¶11] **ISSUE I: Whether the North Dakota Rules of Civil Procedure or the North Dakota Rules of Civil Procedure should be used in deciding Mr. Johnson's Motion to Correct Sentence?**

## ARGUMENT

[¶12] Mr. Johnson's Motion to Correct Sentence (Motion) was made in the alternative and can be decided under either to NDR of Crim Pro 32(d) and NDR of Civ Pro 60(b)(ii).

[¶13] NDR of Crim Pro 32(d) allowed for the withdrawing of a guilty plea. NDR of Crim Pro 32(d) has been transferred to Criminal Rule 11(d)(1)(2)(3) on March 1, 2010. [¶14] NDR of Crim Pro 11(d)(1)(2)(3):

### **(d) Withdrawing a guilty plea.**

(1) *In General.* A defendant may withdraw a plea of guilty;

(A) before the court accepts the plea, for any reason or no reason; or

(B) after the court accepts the plea, but before it imposes sentence if:

(I) the court rejects a plea agreement under Rule 11(c)(5); or

(ii) the defendant can show a fair and just reason for the withdrawal.

(2) *Finality of a Guilty Plea.* Unless the defendant proves that withdrawal is necessary to correct a manifest injustice, the defendant may not withdraw a plea of guilty after the court has imposed sentence.

(3) *Prosecution Reliance on Plea.* If the prosecution has been substantially prejudiced by reliance on the defendant's plea, the court may deny a plea withdrawal request.

[¶15] NDR of Civ Pro 60(b)(ii) applies to newly discovered evidence in civil cases which by due diligence could not have been discovered in time to move for a new trial under NDR of Civ Pro 59(b);

[¶16] It is impossible to tell whether Mr. Johnson wants NDR of Crim Pro 11(d)(1)(2)(3) or NDR of Crim Pro 60(b)(ii) applied to his Motion because the remainder of his motion says nothing about withdrawing his plea or newly discovered evidence.

[¶17] Mr. Johnson's Motion goes on to mention double jeopardy, the 5<sup>th</sup> Amendment to the United States Constitution, substantial due process and the 14<sup>th</sup> Amendment to the United States Constitution.

[¶18] The only case cited in Mr. Johnson's Motion is *Brown v Ohio* 432 US 161, 97 Ct 2221 and 53 L Ed 2d 187. Brown deals with double jeopardy. Therefore it would appear because of what was said in Mr. Johnson's Motion about the 5<sup>th</sup> and 14<sup>th</sup> amendments to the United States Constitution and Brown that Mr. Johnson's Motion deals with double jeopardy.

[¶19] The district judge in his dismissal of Mr. Johnson’s motion states that Mr. Johnson did not explain how double jeopardy applied to his case. Therefore the district judge decided that Mr. Johnson’s Motion involves double jeopardy.

[¶20] Summary dismissal is only allowed in North Dakota under NDR of Civ Pro 56. There is no mention about any rule of Summary Judgment in the North Dakota Rules of Criminal Procedure.

[¶21] Mr. Johnson’s case begins with a criminal conviction that was appealed State vs Johnson 2008 ND 168, 765 NW2d 548. Since that appeal there have been two post conviction petitions in Johnson v State 2010 ND 213, 730 NW2d 741 and Johnson v State, 2011 ND 98, 799 NW2d 406. Summary judgment was applicable to both of these post conviction petitions and is applicable to Mr. Johnson’s Motion now before the court because the District Judge summarily dismissed Mr. Johnson’s Motion.

[¶22] The remainder of this brief is written under a belief that Mr. Johnson’s Motion is a post conviction petition.

**[¶23] ISSUE II. Did the district judge err when he decided to act on his own initiative, without any motion for dismissal from the State, to summarily dismiss Mr. Johnson’s Motion?**

[¶24] According to Vandenburg v. State 2003 ND71, 600 NW2d 568 the standard of review of a summary disposition of post conviction relief is:

[¶5] “The procedure followed for a motion for the summary disposition of a petition for post-conviction relief is similar to that followed for a motion for summary judgment.” Weaver, 2003 ND 47, ¶5. Proceedings for post-

conviction relief are civil in nature and all rules and statutes applicable in civil proceedings are available to the parties. *Id.* Our review of a summary denial of post-conviction relief is like the review of an appeal from a summary judgment. *Id.* A trial court may summarily dismiss an application for post-conviction relief if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Id.* The initial burden is on the moving party to show there is no genuine issue of material fact. *Id.* If the movant initially shows there is no genuine issue of material fact, the burden shifts to the non-movant to demonstrate there is a genuine issue of material fact. *Id.* For the summary disposition of a petition for post-conviction relief, the moving party bears the burden of showing there is no dispute as to either the material facts or the inferences to be drawn from undisputed facts, and that the movant is entitled to judgment as a matter of law. *Id.*; N.D.C.C. § 29-32.1-09(1). A genuine issue of material fact exists if reasonable minds could draw different inferences and reach different conclusions from the undisputed facts. *See Belgarde v. Rosenau*, 388 N.W.2d 129, 130 (N.D. 1986).

[¶25] The following in *Wong v State* 2010 ND 219, 790 NW2d 757 sets out the procedure to be followed by a district judge before he can dismiss an application for post conviction relief.

[¶26] A motion for dismissal under N.D.R.Civ.P. 12(b)(vi) is based on the pleadings, and when matters outside the pleadings are considered, the motion must be

treated as a motion for summary judgment under N.D.R.Civ.P. 56, N.D.R.Civ.P. 12(b); see also Kaiser v. State, 2005 ND 49, ¶9, 693 N.W. 2d. 26. When a dismissal under N.D.R.Civ.P. 12(b)(vi) is appealed, this Court construes the application in the light most favorable to the applicant and accepts the well-pleaded allegations as true. Johnson v. State, 2004 ND 130, ¶6, 681 N.W.2d 769. We will affirm a dismissal for failure to state a claim if it would be impossible for the applicant to prove a claim for which relief can be granted. Berlin, 2005 ND 110, ¶7, 698 N.W.2d 266.

[¶27] Here, the district court decided Wong had not alleged and could not prove a set of facts to support his claim for relief. In Wong's application for post-conviction relief, he alleged he was denied effective assistance of counsel, his guilty plea was unlawfully induced because he was not competent to stand trial, and he had been found incompetent to stand trial in a federal case in September 2009. Ineffective assistance of trial counsel may be a ground for granting post-conviction relief and generally may not be summarily decided. Henke, 2009 ND 117, ¶16, 767 N.W. 2d 881. Construing Wong's application in a light most favorable to him and accepting the allegations as true, it would not be impossible for Wong to prove a claim for which relief can be granted. Cf. Johnson, 2004 ND 130, 681 N.W.2d 769 (district court's decision to dismiss as treated as a dismissal of the pleadings for failure to state a claim and was affirmed because the claims were barred by res judicata or misuse of process). We conclude the district court erred in summarily dismissing Wong's application for post-conviction relief for failure to state a claim upon which relief could be granted.

[¶28] The State nevertheless argues the court's decision should be affirmed

because the court was familiar with the facts of the case, the issues raised in the application for post-conviction relief were raised and decided prior to entry of judgment in the criminal proceedings, and the court had first-hand knowledge that Wong's allegations were merciless.

[¶29] When a court considers matters outside the pleadings in ruling on a motion to dismiss under N.D.Civ.P. 12(b)(vi), the requirements for summary judgment under N.D.R.Civ.P. 56 apply. See N.D.R.Civ.P. 12(b); see also Kaiser, 2005 ND 49, ¶ 9, 693 N.W. 2d 26. A court may summarily dismiss an application for post-conviction relief under N.D.C.C. § 29-32.1-09, which is analogous to summary judgment, if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Berlin, 2005 ND 110, ¶ 6, 698 N.W.2d 266. "The party opposing the motion for summary disposition is entitled to all reasonable inferences at the preliminary stages of a post-conviction proceeding and is entitled to an evidentiary hearing if a reasonable inference raises a genuine issue of material fact." Id. A party responding to a motion for summary judgment must be given 30 days to file an answer, brief and supporting papers in opposition to the request for summary disposition. N.D.R.Civ.P. 56(c).

[¶30] Here the State did not move for summary disposition, and the court dismissed the application on its own initiative thirteen days after the State answered Wong's application. A district court possesses inherent authority to summarily dismiss an application for post-conviction relief under N.D.C.C. § 29-32.1-09 when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. Parizek v. State, 2006 ND 61, ¶¶ 5, 10, 711 N.W.2d 178. Although a court has inherent

authority to summarily dismiss an application on its own initiative, there must be no dispute as to the material facts or the inferences to be drawn from the undisputed facts before a court can dismiss an application under N.D.C.C. § 29-32.1-09. Parizek, at ¶ 10. Only a party can move for summary disposition under N.D.C.C. § 29-32.1-09 and put an applicant to his proof. Henke, 2009 ND 117, ¶ 15, 767 N.W.2d 881. The petitioner must be given notice and an opportunity to respond and submit evidence to demonstrate there is a genuine issue of material fact before an application can be dismissed. See id. at ¶¶ 15-16; Parizek, at ¶ 12.

[¶31] A district court possesses inherent authority to summarily dismiss an application for post-conviction relief under N.D.C.C. § 29-32.1-09 when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. Parizek v. State, 2006 ND 61, ¶¶ 5, 10, 711 N.W.2d 178. Although a court has inherent authority to summarily dismiss an application on its own initiative, there must be no dispute as to the material facts or the inferences to be drawn from the undisputed facts before a court can dismiss an application under N.D.C.C. § 29-32.1-09. Parizek, at ¶ 10. Only a party can move for summary disposition under N.D.C.C. § 29-32.1-09 and put an applicant to his proof. Henke, 2009 ND 117, ¶ 15, 767 N.W.2d 881. The petitioner must be given notice and an opportunity to respond and submit evidence to demonstrate there is a genuine issue of material fact before an application can be dismissed. See id. at ¶¶ 15-16; Parizek, at ¶ 12.

[¶32] What application for post conviction must contain and what can be added later is set out in Wong supra – [¶14] An applicant for post-conviction relief does not

need to provide proof or evidence with the application. N.D.C.C. § 29-32.1-04; Berlin, 2005 ND 110, ¶ 8, 698 N.W.2d 266. We have explained the requirements for filing an application for post-conviction relief:

While our case law requires a petitioner to establish a basis for post-conviction relief, a petitioner need not provide evidence or proof with an application.

N.D.C.C. § 29-32.1-04. A petitioner meeting the required conditions and applying for post-conviction relief must “set forth a concise statement of each ground for relief, and specify the relief requested. Argument, citations, and discussion of authorities are unnecessary. “N.D.C.C. § 29-32.1-04(1). “Affidavits or other material supporting the application may be attached, but are unnecessary. “N.D.C.C. § 29-32.1-04(2).

Vandeberg v. State, 2003 ND 71, ¶ 4, 660 N.W.2d 568 (quoting Weaver v. State, 2003 ND 47, ¶ 4, 658 N.W.2d 352). Because an application is submitted without evidence to support the claims, a petitioner must be put to his proof, given an opportunity to respond to the motion, and given an opportunity to submit evidence before the application can be summarily dismissed. Berlin, at ¶ 9.

### **CONCLUSION**

[¶33] In this case the district judge should have put Mr. Johnson to his proof and given him an opportunity to submit evidence on his Motion before the district judge summarily dismissed Mr. Johnson’s Motion.

[¶34] This matter should be remanded to the district court and the district court should be required to put Mr. Johnson to his proof and allow him to present evidence.

Dated this \_\_\_\_\_ day of October, 2011.

Respectfully submitted:

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that I am an employee in the office of Pulkrabek Law Office and I am a person of such age and discretion as to be competent to serve papers.

That on October 20, 2011, she served, by e-mail, a copy of the following:

**PETITIONER/APPELLANT'S BRIEF**

to:

Fritz Fremgen  
Stutsman County State's Attorney  
ffremgen@nd.gov

The undersigned further certifies that on October 20, 2011, she electronically filed with the Clerk of the North Dakota Supreme Court, Petitioner/Appellant's Brief.

/s/ Sharon Renfrow  
Sharon Renfrow, Legal Assistant to  
Benjamin C. Pulkrabek