

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

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JANUARY 20, 2012
STATE OF NORTH DAKOTA

Elijah Addai,)	
)	
Petitioner and Appellant,)	
)	Supreme Court No. 20110318
vs.)	District Court No. 09-2010-CV-01281
)	
State of North Dakota,)	
)	
Respondent and Appellee,)	

APPELLEE’S BRIEF

Appeal from the Denial of the Application for Post-Conviction Relief entered on October 10, 2011, in East Central District Court, in Fargo, Cass County, State of North Dakota, The Honorable Wickham Corwin, Presiding.

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[¶ 3] STATEMENT OF ISSUES

- [¶ 4] I. Whether Defendant's trial counsel's representation fell below an objective standard of reasonableness and the Defendant was prejudiced by counsel's deficient performance.

[¶ 5] **STATEMENT OF CASE**

[¶ 6] The Defendant appeals from a denial of his Application for Post-Conviction Relief dated September 20, 2011. The Defendant was found guilty of Murder, a class AA felony, by jury verdict on December 11, 2008.

[¶ 7] The Defendant was sentenced to life in prison with the possibility of parole by District Court Judge Douglas Herman on February 17, 2009.

[¶ 8] A timely notice of appeal was filed and this Court affirmed the jury's verdict. State v. Addai, 2010 ND 29, 778 N.W.2d 555.

[¶ 9] The Defendant filed for Post-Conviction Relief on June 1, 2011. A hearing was held on August 30, 2011. The Honorable Wickham Corwin denied the application for post-conviction relief on September 20, 2011. A timely Notice of Appeal was filed on October 31, 2011. Appendix (hereinafter App.) at 48.

[¶ 10] STATEMENT OF FACTS

[¶ 11] The Defendant was charged in a single count Information with Murder, a class AA felony. Following a jury trial the Defendant was found guilty on December 11, 2008. The Defendant was sentenced to life in prison with the possibility of parole on February 17, 2009. The Defendant's conviction was affirmed by the North Dakota Supreme Court in State v. Addai, 2010 ND 29, 778 N.W.2d 555.

[¶ 12] On June 1, 2011, the Defendant filed an Application for Post-Conviction Relief. The State responded on August 2, 2011. A hearing was held on August 30, 2011, at which time the Defendant's trial counsel testified to his representation of the Defendant from the time he was appointed to the case through the trial and sentencing. The Defendant's Application for Post-Conviction Relief was denied on September 20, 2011. Notice of Appeal was filed on November 8, 2011.

[¶ 13] JURISDICTIONAL STATEMENT

[¶ 14] The district court had jurisdiction over this case pursuant to N.D. Const. art. VI, § 8, N.D.C.C. §§ 27-05-06 (4), and 40-18-19, and N.D.R.Crim.P. 37. This Court has jurisdiction over this appeal under N.D. Const. art. VI, § 6 and N.D.C.C. §§ 29-28-06 (5). This appeal is timely under N.D.R.App.P. 26.

[¶ 15] STANDARD OF REVIEW

[¶ 16] The standard of review for a claim of ineffective assistance of counsel has been well established in North Dakota.

Post-conviction relief proceedings are civil in nature and governed by the North Dakota Rules of Civil Procedure. *Flanagan v. State*, 2006 ND 76, ¶ 9, 712 N.W.2d 602. Whether a petitioner received ineffective assistance of counsel is a mixed question of law and fact and is fully reviewable on appeal. *Klose v. State*, 2005 ND 192, ¶ 10, 705 N.W.2d 809. Under N.D.R.Civ.P. 52(a), the district court's findings of fact will not be disturbed on appeal unless clearly erroneous. "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by any evidence, or if, although there is some evidence to support the finding, a reviewing court is left with a definite and firm conviction a mistake has been made." *Heckelsmiller v. State*, 2004 ND 191, ¶ 5, 687 N.W.2d 454.

Clark v. State, 2008 ND 234, 758 N.W.2d 900, 905.

[¶ 17] **LAW AND ARGUMENT**

[¶ 18] **The Defendant’s trial counsel's representation did not fall below an objective standard of reasonableness and the Defendant was not prejudiced by counsel's deficient performance.**

[¶ 19] To establish a claim of ineffective assistance of counsel a defendant “has a 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.” “Effectiveness of counsel is measured by an ‘objective standard of reasonableness’ considering ‘prevailing professional norms.’” To prevail on an ineffective assistance of counsel claim, “[t]he defendant must first overcome the ‘strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.’” “Trial counsel's conduct is presumed to be reasonable and courts consciously attempt to limit the distorting effect of hindsight.”

“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 the probable different result.” “A reasonable probability is a probability sufficient to undermine confidence in the outcome....”

Murchison v. State, 799 N.W.2d 360, 363 (N.D. 2011).

[¶ 20] The Defendant specifically argues that his trial counsel should have objected to the courtroom closure and should have required the trial court to have followed the procedure set out in Waller v. Georgia, 476 US 39 (1984) and Press Enterprise C. v. Superior Court of Cal Riverside City, 464 US 501 (1984).

Additionally, the Defendant cites Presley v. Georgia, 130 S. Ct. 721 (2010), as authority requiring that all trial courts' orders excluding the public from criminal trials consider all reasonable alternatives to closure on the record. This rationale incorrectly characterizes the holding in Presley. In Presley the court sua sponte closed the courtroom during voir dire over the defendant's objection. The court did not consider reasonable alternatives to closing the courtroom during voir dire on the record. The United States Supreme Court ultimately ruled that the court needed to consider alternatives to closure and reversed and remanded the case.

[¶ 21] The instant case differs from Presley in several significant ways. First, there was no objection by the defense to the closure. Second, the court closed the courtroom because the witness, a defense attorney, was testifying about a former client of his on a file that has been marked restricted by the clerk of court. Third, the trial court was clear about its reasons for closing the courtroom on the record. App. 58. The courtroom was closed for the limited purpose of that witness' testimony regarding the restricted file. The Defendant did not object because the witness was a defense witness called as a part of the defense strategy. The holding in Presley is not controlling in this case.

[¶ 22] This Court has already addressed the issue of the courtroom closure in State v. Addai, 2010 ND 29, 778 N.W. 2d 555.

[¶ 23] During the trial, the courtroom was briefly closed to allow testimony from another attorney about a criminal case against Mohamed Hossein, who was convicted of tampering with the evidence in the murder investigation. The attorney

objected to being called as a witness and stated that he would rather not comment on the case because it was a restricted file and the file was sealed. The court closed the courtroom during the attorney's testimony. The State objected to the court's decision to close the courtroom, but Addai's attorney indicated he did not have a problem with it. The State subsequently investigated the file and informed the court the file was restricted in error. The clerk's office removed the restriction on the file and the file was unsealed. The court ordered a transcript of the closed courtroom session and made the transcript available to the public.

[¶ 24] Addai argues the closing of the courtroom violated his right to a public trial. The Sixth Amendment of the United States Constitution guarantees a defendant the right to a public trial. The right to a public trial, however, "is not absolute and must give way in rare instances to other interests essential to the fair administration of justice ." *State v. Garcia*, 1997 ND 60, ¶ 20, 561 N.W.2d 599.

[¶ 25] Addai did not object to the court's decision to close the courtroom. "A party may not assert alleged irregularities during a trial unless the party objects when they occur and allows the trial court an opportunity to take appropriate action to remedy any prejudice that may result from the alleged irregularities." *State v. Hernandez*, 2005 ND 214, ¶ 12, 707 N.W.2d 449. Issues that are not raised before the district court, including constitutional issues, "generally will not be addressed on appeal unless the alleged error rises to the level of obvious error under N.D.R.Crim.P. 52(b)." *State v. Parisien*, 2005 ND 152, ¶ 17, 703 N.W.2d 306. The defendant has the burden of proving plain error that affects his

substantial rights to establish obvious error. Id. "Only constitutional error that is 'egregious' or 'grave' is subject to the obvious error rule." Id.

[¶ 26] Any error in closing the courtroom was not egregious or grave and does not rise to the level of obvious error. The courtroom was closed for a brief period of time. The court closed the courtroom after learning the case the witness was testifying about was restricted. The court later learned the case was marked restricted in error and made a transcript of the witness's testimony available to the public. Addai failed to object to the court's decision to close the courtroom, and he has failed to prove the court's decision was plain error affecting his substantial rights.

[¶ 27] The Defendant's trial counsel's representation did not fall below an objective standard of reasonableness. Trial counsel met with the Defendant and discussed the trial strategy extensively. Post Conviction Relief Hear Transcript (hereinafter PCRHT) 15. The Defendant was aware of the nature of the defense strategy and was aware of his right to testify. Id. The Defendant's trial counsel did not object to the courtroom closure. Specifically trial counsel said on the record at trial, "I'm not here to argue about that part of that (whether the file was actually restricted) so I don't have a problem with this." App. 58.

[¶ 28] The testimony of that particular witness was part of the defense strategy. The Defendant's trial counsel specifically did not object because part of the strategy involved the testimony of this witness. The Defendant has not established that his trial counsel's performance fell below an objective standard

of reasonableness by not objecting to the courtroom closure. In fact, trial counsel's lack of objection was part of the trial strategy to secure that witness testimony of behalf of the defense.

[¶ 29] Finally, the Defendant has not established how he may have been prejudiced by deficient performance of his trial counsel. The Defendant's burden requires that he show by a reasonable probability that the result of the trial would have been different if it were not for the ineffective assistance of trial counsel. The Defendant has failed to meet this burden. The testimony of the witness during the courtroom closure concerned the witness' representation of Mohamed Hossein in a criminal case in which Mr. Hossein was convicted of tampering with evidence in the murder investigation for which the Defendant has now been convicted. That testimony was used as evidence to attempt to deflect the Defendant's responsibility in the murder. The fact is the witness testimony was a benefit to the Defendant. It would have been prejudice to the defense had the trial court not allowed the witness to testify due to the alleged restricted nature of the file or the concern that the information was covered by attorney – client privilege. There was no prejudice to the Defendant.

[¶ 30] This matter has already been litigated and the appeal should be denied.

[¶ 31] CONCLUSION

[¶ 32] Based on the foregoing reasons the State respectfully requests that the denial the Defendant's Application for Post-Conviction Relief be affirmed.

Respectfully submitted this 19th day of January, 2012.

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[¶ 33] CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was sent by e-mail on the 25th day of January, 2012, to: Benjamin C. Pulkrabek at pulkrabek@lawyer.com

Leah J. Viste