

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20110318

Elijah Addai,

Petitioner-Appellant

- vs -

State of North Dakota

Respondent-Appellee

APPEAL FROM THE CRIMINAL JUDGMENT
EAST CENTRAL JUDICIAL DISTRICT
CASS COUNTY CR. NO. 2010-CV-01281
THE HONORABLE WICKHAM CORWIN, PRESIDING

BRIEF

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ABBREVIATIONS

Page - P.

Line - L.

Transcript - Tr. Oct. 18, 2007
Tr. Feb. 17, 2009
Tr. I means Transcript on Appeal Volume I
Tr. II means Transcript on Appeal Volume II
Tr. III means Transcript on Appeal Volume III
Tr. IV means Transcript on Appeal Volume IV
Tr. V means Transcript on Appeal Volume V
Tr. VI means Transcript on Appeal Volume VI
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Post Conviction Relief Transcript - PCRT

STATEMENT OF THE ISSUES

[¶1] ISSUE:

I. Did the Defendant, Elijah Addai receive ineffective assistance of counsel during his criminal trial because his trial counsel failed to object to the trial courts order removing the public from part of his trial and his trial counsel also failed to require the trial court to follow the proper procedure before issuing an order to exclude the public from part of his trial?

NATURE OF THE CASE

[¶2] On August 20, 2007 Elijah Addai (Addai) was charged with a class AA murder of David Delonais. To this charge Addai entered a plea of not guilty.

[¶3] The criminal jury trial was held before Judge Cynthia Rothe-Seeger in the District Court of Cass County in Fargo, North Dakota. The trial began on December 1, 2008 and concluded on December 11, 2008 with a verdict of guilty.

[¶4] On February 17, 2009 judgment and sentence was entered, sentencing Addai to life in prison with a possibility of parole.

[¶5] On June 1, 2011, Addai made and filed a Motion for Post-Conviction Relief.

[¶6] The State replied to Addai's Motion for Post-Conviction Relief on August 2, 2011 and also made a motion for Dismissal.

[¶7] A hearing was held on the Motion for Post-Conviction Relief on August 30, 2011.

[¶8] The trial judge's Memorandum Opinion denying Addai's Motion for Post-conviction Relief was issued on September 20, 2011.

[¶9] Addai filed a Notice of Appeal of the Order Denying his Motion for Post-Conviction Relief on October 31, 2011.

[¶10] The Notice of Filing the Notice of Appeal was filed November 8, 2011.

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

STATEMENT OF FACTS

[¶12] Elijah Addai (Addai) on August 19, 2007 was charged in a single count Information with a class AA felony murder of David Delonais for stabbing Mr. Delonais with a knife. To this charge Addai entered a plea of not guilty. Tr. Oct. 18, 2007, P.4, L.17-25, P.5, L.1-25, P.6., L.1-15

[¶13] Addai's criminal trial was held before District Judge Cynthia Rothe-Seeger in the District Court of Cass County in Fargo, North Dakota. The trial began on December 1, 2008 and ended with a guilty verdict on December 11, 2008. Tr. I, II, III, IV, V, VI, VII, VIII, IX, P.1-917

[¶14] The judgment and sentence of Addai took place on February 17, 2009. The sentence Addai received was life in prison with possibility of parole. Tr. Feb 17, 2009, P.24, L.17-23

[¶15] Addai appealed the judgment to the North Dakota Supreme Court. State vs Addai, 2010 ND29, 778 NW2d 555 affirmed Addai's judgment and sentence.

[¶16] On June 1, 2011 Addai made and filed a Motion for Post-Conviction Relief. App. P. 4.

[¶17] The State answered Addai's Application for Post-Conviction Relief on August 2, 2011. The Answer included a Motion for Dismissal. App. 27.

[¶18] The hearing on the Post-Conviction Relief Motion was held on August 30, 2011. PCRT P.4, L.1-9 During that hearing Addai raised an additional issue that was added to the issues already raised in the Motion for ineffective assistance of counsel. The new issue involved the trial courts closure of the courtroom to the public and Addai's

attorneys failure to object to such closure. PCRT, P.20, L.13-25, P.21, L.1-9.

[¶19] The testimony of Addai's trial counsel at the Post-Conviction Relief Hearing regarding the closure of the courtroom to the public and what he did or didn't do is found at PCRT, P.11, L. 14-25, P.12, L. 1-25, P.13, L. 1-6. App 75.

[¶20] The closure of the courtroom to the public during part of Addai's trial was done by court order. Tr. IV, P.688, L.7-10 That order was issued when attorney, Jesse Lange was testifying. The reason it was issued was attorney Lange informed the court that his testimony involved another case and that case was marked restricted and sealed. Tr. IV, P.687, L.18-25, P.688, L.1-25, P.689, L.1-3 The court's ordered closure of Addai's trial to the public was issued without having a hearing to consider reasonable alternatives to closing the courtroom to the public. Tr. IV, P.688, L.4-12

[¶21] The State objected to the trial courts order closing of the courtroom to the public. Addai's trial attorney did not object. Tr. IV, P.690, L.9-20

[¶22] After attorney Lange testified the State checked out the file marked restricted and sealed and found out the designation of restricted on that file was an error. Tr. IV, P.702, L.18-23 The district clerk then removed the restricted designation from that file. Tr. IX, P. 702, L.24-25 The state's attorney then made a motion to have a transcript of attorney Lange's testimony during the trial made and then that transcript made available to the public. The court granted that motion. Tr. V, P.749, L.9-25, P.749, L.1-2

[¶23] The trial court issued a Memorandum Order denying Addai's Motion for Post Conviction Relief on September 20, 2011. App. P. 36-43. Addai filed a Notice of

Appeal of that denial on October 31, 2011. App. P. 48.

[¶24] Notice of Filing the Notice of Appeal was filed on November 8, 2011. App. P. 51 to 54.

ARGUMENT

[¶25] **ISSUE 1. Did the Defendant, Elijah Addai receive ineffective assistance of counsel during his criminal trial because his trial counsel failed to object to the trial courts order removing the public from part of his trial and his trial counsel also failed to require the trial court to follow the proper procedure before issuing an order to exclude the public from part of his trial?**

[¶26] The Standard of Review when the issue of ineffective assistance of counsel is raised at post-conviction relief hearings is set out in *Flanagan v State* 2006 ND 76 [¶9], 712 NW2d 607:

[¶27] 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.

[¶28] Defendants in North Dakota have a right during their criminal trials to be

represented by competent trial counsel. One of the duties of competent trial counsel is to protect the Defendant's constitutional right during that trial. The constitutional right that Addai's trial counsel did not protect was his right to have the public present during his entire trial.

[¶29] A North Dakota Defendant's right to have the public present during his criminal trial is set out in the 6th Amendment to the United States Constitution.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by a impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

[¶30] A North Dakota Defendants right to have the public present during his criminal trial is also set out in the North Dakota Constitution at Section 12.

Section 12. In criminal prosecutions in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf; and to appear and defend in person and with counsel. No person shall be twice put in jeopardy for the same offense, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law.

[¶31] In the case now before the court, part of Addai's trial was closed to the

public by court order. Addai's trial counsel made no objection to this order. Addai's trial counsel testimony regarding the closure of the courtroom to the public at the Post-Conviction Relief Hearing is as follows: T.P., P.11, L.14-25, P.12, L.1-25, P.13, L.1-6.

Q. Getting back for a moment to all of the different hearings that were held, were any of them closed hearings?

A. No. The courtroom was closed during the trial, but none of the hearings prior to trial were closed. And, I'm sorry. I should rephrase that. There was a span of time during trial that the courtroom was closed, locked. However, not the entire trial, and not the hearings prior.

Q. All right. And, of course, I do know we've talked about this a little bit, but did you object to the courtroom being closed?

A. I would like to read the transcript. I can tell you that when it was happening, I knew what was happening and I realized that what –

Q. Let me stop you and back up. Why was there a request made for the courtroom to be closed?

A. There was a file that we were talking about, a record, and I believe it was going to the credibility of – Semereab Tesafaye's credibility. It was something to do with his record. The clerks had marked the case as "sealed," as if it were a juvenile file. I can only tell you that I – at the time, I thought that was a mistake, but it's not my file. It's the clerks', and they were noting it as being sealed. The judge didn't know exactly what to do at this point, and so at some point Rothe-Seeger asked the courtroom to be locked, and the courtroom emptied, I believe. The – and what's going through my head at this point,

because this issue had come up within the last year here, is that locking the courtroom is – I mean, for lack of a better term – a big no-no. And so in my head, I’m – I think that I made a mistake here because I think that I should have just stood up and hollered “objection.” And this was an issue that was raised, and I think part of the problem is that I should have said “objection,” and here’s where I think that I make my error in that I knew the door was being locked. I knew that was a mistake. I kind of half-objected to it but didn’t fully, completely object to it, and I think that the proper thing at that point would have been just to blatantly object to the courtroom being closed altogether.

[¶32] The above testimony of Addai’s trial counsel makes it clear that he knew when he testified at the post-conviction relief hearing he should have objected but didn’t to the closure of the courtroom during part of Addai’s trial.

[¶33] According to *Presley vs Georgia* 558 US ___ (2010), 130 S Ct 721, 175 L Ed2d 675 in *Press-Enterprise I*, for instance neither the Defendant nor the prosecution requested an open courtroom during juror voir dire proceedings; in fact both specifically argued in favor of keeping transcript of the proceedings confidential. *Id.*, at 503-504. the court nonetheless found it was error to close the courtroom. *Id.* at 513.

[¶34] Giving Addai’s trial counsel a chance to explain what he did or didn’t do during Mr. Addai’s trial regarding the court’s ordered closure of the courtroom to the public is required by in all ineffective assistance of counsel cases by *Wong vs State* 2011 ND 201 ____.

[¶35] In addition to Addai’s trial counsel objecting to the court’s ordered closure of the courtroom during part of the trial, trial counsel should also have required the trial

court to follow the procedure for closure of courtrooms to the public during criminal trials set out in *Waller vs Georgia* 476 US 39 (1984) and *Press Enterprise Co vs Superior Court of Cal Riverside Cty* 464 US 501 (1984).

[¶36] According to Waller Supra the procedure that must be followed before excluding the public from a trial is:

“[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.” *Id.*, at 48.

[¶37] Press Enterprise Supra gives even more explicit orders than *Waller* on the procedure that must be followed before the public can be excluded from a criminal trial –

“Even with findings adequate to support closure, the trial court’s orders denying access to *voir dire* testimony failed to consider whether alternatives were available to protect the interests of the prospective jurors that the trial court’s orders sought to guard. Absent consideration of alternatives to closure, the trial court could not constitutionally close the *voir dire*.” 464 U.S., at 511.

[¶38] Presley Supra sets out the following procedure a court must follow before the courtroom in a criminal case can be closed to the public.

1. The trial court must first consider all reasonable alternatives to closure of the courtroom to the public in a criminal trial;
2. Whether or not the trial court has an overriding interest in the closure of a courtroom to the public during a criminal trial.

[¶39] Presley Supra requires all trial court's orders excluding the public from criminal trials to be reversed whenever the trial court has failed to consider all reasonable alternatives to closure.

[¶40] The North Dakota Supreme Court on February 17, 2010 inadvertently overlooked Presley when it filed State v Addai 2010 ND 29, 778 NW2d 555 and said [¶50] any error in closing the courtroom was not egregious or grave and does not rise to the lever of obvious error.

[¶41] State vs Roth 2006 ND 106, 713 NW2d 513 sets out the following requirements for ineffective assistance of counsel [¶12].... assistance of counsel is plainly defective when the record affirmatively show ineffectiveness of a constitutional dimension or the Defendant points to some evidence in the record to support the claim.

[¶42] Addai believes the record in his case now before the court supports the Roth requirements for ineffective assistance of counsel because:

1. The record shows Addai's trial counsel was ineffective to a constitution dimension involving his 6th Amendment right to have the public at his trial.
2. The record contains testimony of Addai's trial counsel stating he didn't object to the court's order closing the courtroom to the public but now knows he should have.

[¶43] When the district judge who presided at Addai's Post-Conviction Relief Hearing gave his memorandum Opinion denying Addai's issue regarding courtroom closure he relied on State v Addai 2010 ND 29, 778 NW2d 555 [¶47-50] Therefore it would appear that the district judge also inadvertently overlooked Presley.

[¶44] Murchison v State 2010 ND 129, 799 NW2d 360 requires a Defendant to

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.

[¶45] The following sets out what occurred during Addai's trial and the reasonable probabilities the result would be a new trial.

1. Addai's defense counsels failure to object to the trial courts Order closing the courtroom to the public while a witness testified;

2. Addais defense counsel's testimony at the Post-Conviction Relief Hearing admitting he should have objected to the Court Order closing the courtroom to the public when a witness testified;

3. Presley's requirement that during a criminal jury trial before a trial court can close the courtroom to the public it must consider all reasonable alternatives to the closure of the courtroom to the public;

4. That the trial record in Addai's case contains nothing to show the trial court in Addai's case considered any reasonable alternative before closing the courtroom to the public during a criminal trial.

5. Presley requires a new trial whenever a trial court doesn't consider all reasonable alternatives before closing the courtroom to the public during a criminal trial.

CONCLUSION

[¶46] For the above and foregoing reasons Mr. Addai's Petition for Post-Conviction Relief should be granted and Addai's should be given a new trial.

DATED at Mandan, North Dakota, this 6th day of December, 2011.

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CERTIFICATE OF SERVICE BY MAIL

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

That on December 6th, 2011, she served, by e-mail, a copy of the following:

APPELLANT'S BRIEF

to:

Leah J. Viste
Cass County State's Attorney's Office
Vistel@casscountynd.gov

The undersigned further certifies that on December 6th, 2011, she served electronically on the Clerk, North Dakota Supreme Court, the APPELLANT'S BRIEF.

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