

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

**20110344, 20110346,
20110347, & 20110348**

FILED
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FEBRUARY 28, 2012
STATE OF NORTH DAKOTA

| | | |
|------------------------|---|---------------------------------------|
| Mark Palmer, |) | |
| |) | Supreme Court Nos. |
| Petitioner/Appellant, |) | 20110344 (McHenry Co. No. 00-K-00033) |
| |) | 20110346 (McHenry Co. No. 00-K-00034) |
| vs. |) | 20110347 (McHenry Co. No. 00-K-00035) |
| |) | 20110348 (McHenry Co. No. 00-K-00036) |
| |) | |
| |) | |
| State of North Dakota, |) | |
| |) | APPELLEE'S BRIEF |
| Respondent/Appellee. |) | |

BRIEF OF APPELLEE

**APPEAL FROM MEMORANDUM OPINION DENYING RULE 60(B)(1) RELIEF
DATED OCTOBER 5, 2011
MCHENRY COUNTY DISTRICT COURT
NORTHEAST JUDICIAL DISTRICT
THE HONORABLE JOHN C. MCCLINTOCK, JR., PRESIDING**

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STATEMENT OF THE ISSUES

I. Whether the trial court abused its discretion in denying Mark Palmer's Motion for Relief from Judgment.

STATEMENT OF THE CASE

[¶ 1] Mark Palmer (hereinafter "Palmer") was found guilty of four counts of Gross Sexual Imposition for engaging in sexual contact with a minor in the Spring of 1999. On May 3, 2001, the Northeast Judicial District Court sentenced Palmer to ten (10) years in jail on each count, with seven (7) years suspended on each count, each sentence to run consecutive to the prior sentence.

[¶ 2] Palmer appealed the judgment of conviction to the Supreme Court of North Dakota, arguing two issues: (1) the selection of jury pool members by Deputy Sheriff Vannatta and administrator Zahn did not satisfy statutory requirements for random jury selection, and (2) ineffective assistance of counsel. On January 15, 2002, the Supreme Court of North Dakota affirmed the judgment of conviction in the Northeast Judicial District. State v. Palmer, 2002 ND 5, 638 N.W.2d 18.

[¶ 3] On February 2, 2011, Palmer, *pro se*, filed a Motion for Post-Conviction Relief. Palmer asserted six grounds for relief in his petition. On February 16, 2011, Coral J. Mahler was appointed to represent Palmer in the matter. On March 1, 2011, the State of North Dakota, through State's Attorney Marie A. Roller, responded to Palmer's Motion, arguing that the Court should summarily dismiss the petition. Counsel for Palmer did not respond to the State's Motion.

[¶ 4] On May 16, 2011, the Court entered a Memorandum Opinion and Order Denying Petitioner's Application for Post-Conviction Relief. On May 23, 2011, counsel for Palmer filed

a Motion for Relief Per N.D.R.Civ.P. 60, seeking relief from the Memorandum Opinion and Order Denying Petitioner's Application for Post-Conviction Relief. This Motion for Relief was denied in a Memorandum Opinion dated October 5, 2011. Palmer filed a timely Notice of Appeal from said Memorandum Opinion.

STATEMENT OF THE FACTS

[¶ 5] Palmer was originally convicted in 2001, following a jury trial, upon four (4) charges of Gross Sexual Imposition. Palmer appealed his conviction, which was affirmed by this Court. State v. Palmer, 2002 ND 5, 638 N.W.2d 18.

[¶ 6] On February 2, 2011, Palmer, *pro se*, filed a Motion for Post-Conviction Relief. Palmer identified primary claims of Double Jeopardy or Multiplicity, suppression of evidence by the prosecution, evidence not previously presented and heard exists, ineffective assistance of counsel, judicial misconduct/prejudice, prosecutorial misconduct, appellate defense counsel and prosecutor misconduct, violation of the IV, V, VI, VII, and XIV Amendments of the United States Constitution, and violation of Article IV, Section 2 of the United States Constitution.

[¶ 7] On February 16, 2011, Coral J. Mahler was appointed to represent Palmer in the Post-Conviction Relief matter. On March 1, 2011, the State of North Dakota, through State's Attorney Marie A. Roller, responded to Palmer's Motion, arguing that the Court should summarily dismiss the petition because Palmer had failed to show any genuine issues of material fact for each of the allegations, and that Palmer's application should be denied on res judicata and misuse of process grounds.

[¶ 8] Through the State's response and motion for the Court to summarily dismiss the Motion for Post-Conviction Relief, Palmer and his counsel were put on notice that Palmer must support the application for post-conviction relief with evidence. Palmer was required to file a response by

March 10, 2011, and failed to do so. On May 16, 2011, over two (2) months after the deadline for Palmer to respond to the State’s motion for the Court to summarily dismiss, the Court entered a Memorandum Opinion and Order Denying Petitioner’s Application for Post-Conviction Relief.

[¶ 9] On May 23, 2011, counsel for Palmer filed a Motion for Relief Per N.D.R.Civ.P. 60. The State filed a Response to Palmer’s Motion for Relief, contending that Palmer had failed to assert a meritorious defense, or even an answer to the State’s motion for summary disposition of the original Motion for Post-Conviction Relief.

[¶ 10] On October 5, 2011, the Court denied Palmer’s Motion for Relief in a Memorandum Opinion.

LAW AND ARGUMENT

I. Whether the trial court abused its discretion in denying Mark Palmer’s Motion for Relief from Judgment.

A. Standard of Review.

[¶ 11] In appeals from decisions denying a motion for relief from judgment, “[a] trial court’s decision to deny relief under N.D.R.Civ.P. 60(b) will not be overturned on appeal absent an abuse of discretion.” Manning v. Manning, 2006 ND 67, ¶ 15, 711 N.W.2d 149. “We do not determine whether the court was substantively correct in entering the judgment from which relief is sought, but determine only whether the court abused its discretion in ruling that sufficient grounds for disturbing the finality of the judgment were not established.” Id. “A court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when it misinterprets or misapplies the law.” Vanderscoff v. Vanderscoff, 2010 ND 202, ¶ 9, 790 N.W.2d 470 *citing* In re I.K., 2003 ND 101, ¶ 8, 663 N.W.2d 633. “Whether the court abused its discretion is never assumed and must be affirmatively established.” Id.

B. The trial court did not abuse its discretion in denying Palmer's Motion for Relief from Judgment.

[¶ 12] “Post-conviction relief proceedings are civil in nature and are governed by the North Dakota Rules of Civil Procedure.” Overlie v. State, 2011 ND 191, ¶ 6, 804 N.W.2d 50 citing Wheeler v. State, 2008 ND 109, ¶ 5, 750 N.W.2d 446. “If there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, the district court may summarily dismiss an application for post-conviction relief.” Overlie v. State, 2011 ND 191, ¶ 6, 804 N.W.2d 50 citing Sambursky v. State, 2006 ND 223, ¶ 7, 723 N.W.2d 524.

[¶ 13] “A petitioner is not required to provide evidentiary support for his petition until he has been given notice he is being put on his proof.” Ude v. State, 2009 ND 71, ¶ 8, 764 N.W.2d 419 citing State v. Bender, 1998 ND 72, ¶ 20, 576 N.W.2d 210. “At that point, the petitioner may not merely rely on the pleadings or on unsupported, conclusory allegations, but must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact.” Ude v. State, 2009 ND 71, ¶ 8, 764 N.W.2d 419 citing Wheeler v. State, 2008 ND 109, ¶ 5, 750 N.W.2d 446.

[¶ 14] Palmer was given notice that he was being “put on his proof” on March 1, 2011, by the filing of the State’s Motion to Summarily dismiss his Motion for Post-Conviction Relief. Palmer was required to file a response by March 10, 2011, and failed to do so. Due to the fact that Palmer thus failed to raise any issue of material fact, the trial court, on May 16, 2011, over two (2) months after the deadline for Palmer to respond to the State’s motion, entered a Memorandum Opinion and Order Denying Petitioner’s Application for Post-Conviction Relief.

[¶ 15] In response to said Memorandum Opinion, on May 23, 2011, counsel for Palmer filed a Motion for Relief Per N.D.R.Civ.P. 60. In the Motion for Relief, Palmer’s counsel states, “[t]his

attorney is requesting relief under the North Dakota Rules of Civil Procedure at Rule 60. I believe what most closely resembles my actions would be Rule 60(b)(1) which allows for grounds for relief from final judgment, order or proceeding for mistake and inadvertence.” See Motion for Relief Per NDR CivP. 60, p. 53 of the Appellant’s Appendix.

[¶ 16] “Rule 60(b)(1), North Dakota Rules of Civil Procedure, provides, in part: ‘On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment or order in any action or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; [...].’” King v. Montz, 219 N.W.2d 836, 839 (N.D. 1974) citing N.D.R.Civ.P. 60(b)(1).

[¶ 17] With regard to Rule 60(b), N.D.R.Civ.P., this Court held that, “[w]here a default has been regularly entered it is largely within the discretion of the trial court to say whether the defendant shall be permitted to come in afterwards and make his defense and, unless an abuse of discretion be made to appear, this court will not interfere.” King v. Montz, 219 N.W.2d 836, 839 (N.D. 1974) citing Sioux Falls Construction Co. v. Dakota Flooring, 109 N.W.2d 244 (N.D. 1961).

This Court further stated that, “[o]rdinarily, where a judgment has been entered by default and a prompt application made at a reasonable time to set it aside, *with a tender of an answer disclosing a meritorious defense* (emphasis my own), the court should, on reasonable terms, sustain the motion and permit the cause to be heard upon the merits.” Id. “Where timely relief is sought from a default judgment *and the movant has a meritorious defense* (emphasis my own), doubt, if any, should be resolved in favor of the motion to set aside the judgment so that cases may be decided on their merits.” King v. Montz, 219 N.W.2d 836, 839 (N.D. 1974) citing 7 Moore’s Federal Practice (2s ed.) 60.19, pages 232, 233.

[¶ 18] Counsel for Palmer filed its Motion for Relief on May 23, 2011, only seven (7) days after the Memorandum Opinion and Order Denying Petitioner’s Application for Post-Conviction Relief was entered. In King v. Montz, the motion to vacate the default judgment, the proposed answer, and supporting affidavits were filed on behalf of the Montzes only seven days after the date of notification of the default judgment. The State concedes relief was timely sought, however, Palmer and his counsel yet again failed to assert a meritorious defense, or to even raise issues of material fact to dispute the trial court’s summary dismissal of the original Motion for Post-Conviction Relief. Palmer neither filed a supporting affidavit, nor a proposed answer which raised any issue of material fact with the Motion for Relief. As such, the district court did not abuse its discretion in ruling that sufficient grounds for disturbing the finality of the judgment were not established, and its denial of Palmer’s Motion for Relief on October 5, 2011 was appropriate.

C. In determining whether the district court abused its discretion, only issues raised in the motion to the district court are considered.

[¶ 19] “In determining whether the district court abused its discretion by denying [a] 60(b) motion, [this Court] only consider[s] the issues [...] raised in [the] motion to the district court. Citibank (South Dakota) v. Peterson, 2011 ND 86, ¶ 8, 797 N.W.2d 312 citing State Bank of Burleigh County Trust Co. v. Patten, 357 N.W.2d 239, 242 (N.D. 1984).

[¶ 20] In the Motion for Relief Per N.D.R.Civ.P. 60 counsel for Palmer set out “Comes now, Coral J. Mahler, to move the Court through the North Dakota Rules of Civil Procedure at Rule 60(b)(1) [...]” See Motion for Relief Per NDRCivP. 60, p. 53 of the Appellant’s Appendix. Palmer’s counsel then detailed the actions she had thus far taken, and explained “[t]his attorney has no explanation for her lack of action other than this was during a time of extreme duress in

the attorney's personal life." See Motion for Relief Per NDRCivP. 60, p. 54 of the Appellant's Appendix. Palmer's counsel further states, "This attorney is requesting relief under the North Dakota Rules of Civil Procedure at Rule 60. I believe what most closely resembles my actions would be Rule 60(b)(1) which allows for grounds for relief from a final judgment, order or proceeding for mistake and inadvertence." See Motion for Relief Per NDRCivP. 60, p. 54 of the Appellant's Appendix.

[¶ 21] The only issue(s) raised in the motion to the district court was mistake and inadvertence under N.D.R.Civ.P. 60(b)(1). Therefore, the only issue(s) the district court could have addressed at that time was whether sufficient grounds for disturbing the finality of the judgment were established based upon the assertion of mistake and inadvertence. As set out above, the district court did not abuse its discretion in ruling that sufficient grounds for disturbing the finality of the judgment were not established, and its denial of Palmer's Motion for Relief on October 5, 2011 was appropriate.

a. Excusable neglect.

[¶ 22] Palmer sets out in his appellate brief that, "Counsel argued in her Motion for Relief Per NDRCivP, 60, that she had committed mistake or inadvertence, although it might appear that the terms which she used to describe her mistake or inadvertence also included excusable neglect." See Appellee's Brief, ¶ 13. Again, the only issue(s) raised in the motion to the district court was mistake and inadvertence under N.D.R.Civ.P. 60(b)(1). Therefore, the only issue(s) the district court could have addressed at that time was whether sufficient grounds for disturbing the finality of the judgment were established based upon the assertion of mistake and inadvertence, and "[i]n determining whether the district court abused its discretion by denying [a] 60(b) motion, [this Court] only consider[s] the issues [...] raised in [the] motion to the district court." Citibank

(South Dakota) v. Peterson, 2011 ND 86, ¶ 8, 797 N.W.2d 312 citing State Bank of Burleigh County Trust Co. v. Patten, 357 N.W.2d 239, 242 (N.D. 1984). As such, it is not appropriate to consider what “might” or should have been an argument asserted by Palmer’s counsel, but only what argument or issue was actually raised, and therefore considered by the district court.

[¶ 23] In the alternative, the district court did not abuse its discretion in ruling that sufficient grounds for disturbing the finality of the judgment were not established based upon an assertion of excusable neglect.

[¶ 24] “Excusable neglect is a fluid concept, encompassing ‘both simple, faultless omissions to act and, more commonly, omissions caused by carelessness.’” Leftbear v. State, 2007 ND 17, ¶ 9, 631 N.W.2d 150 quoting Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship, 507 U.S. 380, 388 (1993). “In most instances, ignorance of the rules, or mistakes construing the rules, are insufficient to establish excusable neglect.” Leftbear v. State, 2007 ND 17, ¶ 9, 631 N.W.2d 150 citing Ceridian Corp. v. SCSC Corp., 212 F.3d 398, 403 (8th Cir. 2000). “However, the rules do provide some flexibility for a court ‘to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party’s control.’” Leftbear v. State, 2007 ND 17, ¶ 9, 631 N.W.2d 150 quoting Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship, 507 U.S. 380, 388 (1993).

[¶ 25] The district court, in determining whether a judgment should be vacated, applies this Court’s three part test. US Bank National Ass’n v. Arnold, 2001 ND 130, ¶ 24, 631 N.W.2d 150 see Bender v. Liebelt, 303 N.W.2d 316, 318 (N.D. 1981). “[T]his court will ‘grant motions to reopen judgments, when promptly made, when the grounds stated satisfy the requirements of Rule 60 for re-opening, and when an answer appearing to state a meritorious defense is

presented.’’ Bender v. Liebelt, 303 N.W.2d 316, 318 (N.D. 1981) quoting Perdue v. Sherman, 246 N.W.2d 491, 496 (N.D. 1976).

[¶ 26] The Motion for Relief Per NDRCivP. 60 was promptly made. It is also assumed that the grounds stated satisfied the requirements of Rule 60 for re-opening. Palmer, however, failed to satisfy the third part of the test; no answer was presented which disclosed a meritorious defense. Palmer neither filed a supporting affidavit, nor a proposed answer which raised any issue of material fact with the Motion for Relief. As such, the district court did not abuse its discretion in ruling that sufficient grounds for disturbing the finality of the judgment were not established, and its denial of Palmer’s Motion for Relief on October 5, 2011 was appropriate.

Conclusion

[¶ 27] Palmer has not demonstrated that the trial court abused its discretion in ruling that sufficient grounds for disturbing the finality of the judgment were not established. As such, the Memorandum Opinion denying Palmer’s Motion for Relief Per NDRCivP 60 should be affirmed.

Dated this 28th day of February, 2012.

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