

In The Supreme Court
State of North Dakota

20120119

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SUPREME COURT MAR 20 2012

State of North Dakota,
Appellee - Plaintiff

v.

Case No. 20120119


Kyle Mackey,
Appellant - Defendant.

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

MAR 19 2012

Appellant's Brief STATE OF NORTH DAKOTA

ON APPEAL FROM THE HAMOURE DISTRICT COURT
HONORABLE RICHARD W. GROSZ, PRESIDING



Kyle Mackey, prose
2521 Circle Drive
Jamestown, ND 58401

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Statement of the Case

This is an appeal from the Lamoure District Court's denial of post conviction Relief under N.D.R.C. § 29-32.1, as Appellant did not waive his federal Constitutional Rights as such Rights were exclusively waived by Counsel and thereby denied substantive due process at the plea hearing, and denial of procedural due process in the denial of right to present a post conviction claim to the Court, and entitle the Appellant to a remand to consider post conviction relief.

Statement of Facts

The defendant, Kyle Mackey, was charged with Luring a minor by Computer, a class c felony and Goose sexual imposition, in September 2009.

ON March 24, 2010, Under a plea agreement, Mackey agreed to plead guilty upon terms of a (5) - (15) year sentence. At the hearing, the Court on April 14, 2010, Asked Mr. Mackey's Attorney, Mr. Aaland, "do you acknowledge that there is a Factual basis for this plea of guilty? ... I would acknowledge and so stipulate your honor."

ON December 15, 2011, Mackey petitioned the Court to withdraw his plea because he did not waive his federal Constitutional, under N.D.C.C. 29-32.1.

ON February 2, 2012, the State moved to have Summary Judgment entered based on an unexcusably raised issue of federal Rights violation, as, not raised.

ON February 8, 2012, the Court entered Summary Judgment under Rule 3.2 N.D.R.Ct. The Court held that "The express provision of this Rule (F.R.Crim P. Rule 11) clearly do not require the Factual basis for the plea to be obtained only through the defendant and not his lawyer."
This Appeal was taken.

Issues Presented

1. "Whether the defendant must understand the facts in relation to the law before he may waive his Federal Constitutional Rights?"

2. Whether a failure to raise a Federal claim on direct appeal, bars an application for post conviction relief under N.D.C.C. § 29-32.1?

3. Whether Counsel's performance was insufficient to meet Strickland & Washington's Requirements?

Argument

Whether the defendant must understand, the facts of his case, in relation to the law, before he may waive his Federal Constitutional Rights?

Standard of Review

This court may review an appeal from a summary denial of post-conviction relief the same as a motion for Summary Judgment. Berlin v. State, 2005 ND 110 R.6, 698 N.W.2d 266. Section 29-32.1, N.D.C.C., requires that when applying for post-conviction relief, a petitioner's application must set forth a concise statement of each ground for relief, and the specific relief requested. Arguments, citations, and discussions of Authorities are unnecessary. 29-32.1, 04(1), and affidavits or other material supporting the application are not necessary. If the State does move for Summary Judgment, the petitioner must support the application with evidence. State v. Bender, 1998 ND 72, R.20, 576 N.W.2d 210. The district Court cannot dismiss summarily an application for post conviction relief on its own accord. The district Court erred in dismissing petitioner's claim without an evidentiary hearing. Parizek v. State, 2006 ND 61 R.10, 711 N.W.2d 178.

Here, the State did not move for summary dismissal, and the Court summary dismissed Mackey's application for post conviction relief.

The district Court cannot put Mr. Mackey to his proof. Hecke v. State, 2009 ND 117 N.15. ~~15~~

" only a party can move for summary disposition, under N.D.C.C. § 29-32.1-09. See (A-16) The Court stated "

" Respondent, State of North Dakota's motion, as construed by the Court pursuant to Court order by memorandum dated January 5, 2012, to Summary Dismiss petitioner, Kyle Taff Mackey's Petition for Post-Conviction Relief dated December 15, 2011, is Granted. Petitioner, Kyle Taff Mackey's Petition for Post Conviction Relief dated December 15, 2011, is Denied and Dismissed. as a matter of law with prejudice and with no costs or disbursements awarded to any party. "

The State filed "only" an Answer to petition for Post-conviction Relief under N.D.C.C. 29-32.1."

The Appellant has now for the first time invoked his federal Constitutional Rights and his first post conviction motion under 29-32.1.

The interest in finality is the same with regard to both federal and state prisoners. Reed v. Farley, 512 US 339, 129 L.Ed 2d 277 at (17) and (Citing) Francis v. Henderson, 425 US 536, 542 (1976). A failure to raise a Federal Claim on direct appeal does not bar post-conviction Relief. Kaufman v. U.S., 394 U.S. 217, 12 (1969).

The district Court in this appeal and this case, held:

"Petitioner submits no ~~justification~~ justifiable excuse as to why the claims made in this petition were not brought before the ~~North Dakota~~ North Dakota Supreme Court as part of his appeal of the Court's Amended Judgment, Conviction and Amended Sentence nor did the Petitioner submit these claims to this Court as grounds for his prior Motion to withdraw, which was denied by this Court and formed the basis of the aforementioned Appeal, concerning the above-entitled Matter." The Claims ~~and~~ in this Petition could have and should have been brought as part of this Appeal and to this Court as part of his Motion."

See Order and Judgment dated January 10, 2012.

Pursuant to Boykin v. Alabama, 395 US 283,
the US Supreme Court held:

" Because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts. "

This does not mean that a defendant's attorney must understand or waive a defendant's federal rights, but the defendant must possess this understanding of the law in relation to the facts and only defendants can waive their federal Constitutional Rights and only by an intentional relinquishment or abandonment of a known right or privilege. Id. at NS 9, 10, 11.

In this case, the judge held, without Authority, that these claims of violations in a post-conviction motion is a misuse of process. Nothing can be further from the truth, as it was the purpose of the State Legislature in passing the North Dakota post-conviction Relief Act § 29-32.1 was to allow defendants a state remedy to attack their convictions and the denial of that right denied petitioner his due process rights of the Fourteenth Amendment of the U.S. Constitution.

Whether defendant Kyle's Counsel was meeting the standards set forth in Strickland v. Washington, 466 US 668 (1984)?

The Sixth Amendment guarantees the defendant the right to effective assistance of Counsel in a criminal prosecution. Yarborough v. Gentry, 540 U.S. 1 (2003). The right to counsel who is effective applies to both retained and appointed Counsel. Cayler v. Sullivan, 466 US 335, 344-45 (1980). The due process clause of the Fourteenth Amendment guarantees the right to effective assistance of Counsel on a first appeal as of right in State Courts. Evitts v. Lucey, 469 US 387, 396-399 (1985). A defendant claiming that his counsel was ineffective, must show and prove that (1) Counsel's performance fell below an objective standard of reasonableness, and (2) Counsel's deficient performance prejudiced the defendant, resulting in an unreliable or fundamentally unfair outcome in the proceedings. Id. at 691-692. of 466 U.S. In deciding whether Counsel's performance was ineffective, a court must consider the totality of the circumstances. Strickland at 690.

The appellant claimed that his counsel was ineffective because he allowed defendant to enter a guilty plea without an understanding of the facts in relation to the law. Appellant's Counsel went so far as to admit for the defendant in his Answer to the Court that in Counsel's own words without conversing with the defendant, that:

" I would acknowledge and so stipulate your honor. "

In response to the Court's question "Mr. Aoland, do you acknowledge that there's a factual basis for this plea of guilty?" See transcript p 15 R 11-14 April 14, 2010.

It is clearly established Federal law that the defendant and not the defendant's Counsel, must possess an understanding of the law in relation to the facts. Boykin, 395 US 239 at R. 11.

In this case, the appellant was not asked if he personally possessed an understanding of the law in relation to the facts and Counsel not only stood by and allowed the defendant to plead guilty but also gave his understanding of the law in relation to the facts in Answer for the defendant and prejudiced defendant in the fundamental denial of his Constitutional Rights.

Counsel was not Acting as counsel that the defendant was entitled to under the Sixth Amendment because Counsel's performance "fell below an objective standard of reasonableness, and, Counsel's deficient performance prejudiced the defendant, resulting in an unreliable or fundamentally unfair outcome in the defendant's plea agreement proceedings. See also Glover v. U.S., 531 U.S. 198, 201, 204 (2001). The Appellee's Counsel should not have answered as to Appellant's understanding of the facts and law and in effect waived Appellant's Federal Constitutional Rights.

The issue of waiver of Appellant's federal rights by Counsel was properly in the trial Court under 29-32.1 and the Court abused his discretion and Authority in dismissing this claim without an evidentiary hearing.

Wherefore, the Appellant prays this Court reverse and remand with instructions for an evidence hearing.