

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Edward D. Waslaski, Jr.)	
)	
Petitioner – Appellant,)	
)	Supreme Court Nos. 20120291
)	20120292
)	20120293
)	
vs.)	District Court Nos. 09-2012-CV-00610
)	09-2012-CV-00625
)	09-2012-CV-00627
)	
State of North Dakota,)	
)	
Respondent and Appellee.)	

APPELLEE’S BRIEF

Appeal from the Denial of the Application for Post-Conviction Relief entered on July 26, 2012, in East Central District Court, in Fargo, Cass County, State of North Dakota, The Honorable Douglas R. Herman, Presiding.

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[¶3] STATEMENT OF ISSUE

[¶4] I. Whether the trial court erred when it summarily denied the Petitioner's Application for Post-Conviction Relief.

[¶5] STATEMENT OF CASE

[¶6] The Defendant appeals from a denial of his Application for Post-Conviction Relief dated July 10, 2012. The State requests that this Court affirm the district court's denial.

[¶7] STATEMENT OF FACTS

[¶8] In 09-06-K-04669, the Petitioner entered a plea of guilty to Disorderly Conduct for which he received a 30 day straight time sentence on April 30, 2007. In 09-06-K-04760 the Petitioner entered a plea of guilty to Disorderly Conduct for which he received a 30 day straight time sentence on May 8, 2007. On May 8, 2007, the Petitioner also entered a plea of guilty to Violation of a Domestic Violence Protection Order for which he received a straight time sentence of 151 days.

[¶9] The Petitioner filed what was treated as a Motion to Withdraw Plea of Guilty in file in cases 09-06-K-4760 and 09-06-K-4772 on June 6, 2007. Petitioner argued that he had not been advised of any federal sentencing consequences in his 2007 motions. The Honorable Douglas R. Herman denied the motions on July 20, 2007.

[¶10] The Petitioner filed for Post-Conviction Relief on February 24, 2012. The State filed and Answer requesting among other things that the Petitioner's Application for Post-Conviction Relief be summarily dismissed. The Petitioner's Application for Post-Conviction Relief was denied on July 10, 2012, 2011. Notice of Appeal was filed on July 18, 2012.

[¶11] STANDARD OF REVIEW

[¶12] The standard of review for an appeal from a summary denial of post-conviction relief has been established in North Dakota.

“This Court reviews an appeal from a summary denial of post-conviction relief as it reviews an appeal from a summary judgment. Berlin v. State, 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. ‘Although we have stated claims of ineffective assistance of counsel are ordinarily unsuited to summary disposition without an evidentiary hearing, we have upheld summary denials of post-conviction relief when the applicants were put to their proof, and summary disposition occurred after the applicants then failed to provide some evidentiary support for their allegations.’ Steinbach v. State, 2003 ND 46, ¶15, 658 N.W.2d 355.” Parizek v. State, 2006 ND 61, ¶ 4, 711 N.W.2d 178.

[¶13] **LAW AND ARGUMENT**

[¶14] In his application for post-conviction relief, the Petitioner makes two claims; first that his conviction was obtained in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and secondly that he had ineffective assistance of counsel.

[¶15] The court may summarily dismiss an application for post-conviction relief when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Hughes v. State, 2002 ND 28, ¶ 4, 639 N.W.2d 696. The party opposing summary disposition is entitled to all reasonable inferences and to an evidentiary hearing if a reasonable inference raises a genuine issue of material fact. Id. In this case there is no genuine issue of material fact.

[¶16] I. **The conviction was not obtained in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.**

[¶17] An applicant's petition to withdraw a guilty plea under the Uniform Post-Conviction Procedure Act generally is treated as a motion to withdraw a plea under Rule 32(d), N.D.R.Crim.P. Davenport v. State, 2000 ND 218, ¶ 7, 620 N.W.2d 164. Under Rule 32(d), N.D.R.Crim.P., a defendant can only withdraw a guilty plea if withdrawal is necessary to correct a manifest injustice. Id. The determination of whether a manifest injustice exists is within the trial court's discretion and will be reversed on appeal only for an abuse of discretion. Id. An abuse of discretion under Rule 32(d), N.D.R.Crim.P., occurs when the trial court's legal discretion is not exercised in the interests of justice. Id.

[¶18] Pursuant to N.D.R.Crim. P. Rule 11(b) the court may not accept a plea of guilty without first addressing the defendant personally ... in open court, informing the defendant of and determining that the defendant understands the following: ... [t]he mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered.

[¶19] The Petitioner argues that his conviction should be vacated because the plea was not knowingly made. The Petitioner made a similar argument in 2007. The Petitioner was unable to make the necessary showing in 2007 and he has not provided any additional information in this Application for Post Conviction Relief. The trial court advised the Petitioner of the maximum penalty and any minimum mandatory sentences. The court was not required to advise the Petitioner of every possible collateral consequence of pleading guilty. State v. Abdullahi, 2000 ND 39, 607 N.W.2d 561 ¶19.

[¶20] The Petitioner has not included a transcript of the proceeding to support his contention that he was not advised of his rights at the initial appearance or at the time of his plea. He makes reference to a transcript in his brief but there is not a copy in the appendix and the State has not received a copy. The Petitioner has a lengthy criminal history and as such is familiar with the judicial process. Suggesting he is unfamiliar with his rights and so forth is absurd. There was no violation of the Petitioner's constitutional rights. He has failed to provide any support for his argument.

[¶21] II. The Counsel for the Petitioner was effective.

[¶22] 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, 2011 ND 126, 799 N.W.2d 360.

[¶23] Petitioner states that he was provided ineffective assistance of counsel because he was not provided the necessary information regarding how his misdemeanor could become a felony. This argument is flawed because Petitioner did not plead guilty to a felony. Each crime Petitioner pled to is a misdemeanor and there is absolutely no chance they could ever be converted to a felony. Additionally Petitioner claims that he was not informed of how his state court

convictions would affect his federal sentence. The Petitioner has provided no proof that the state convictions had any effect on his federal sentence. Information provided to the State by the federal prosecutor suggests that the state convictions were not even taken into account and the Petitioner was given a downward departure under the federal guidelines. In any event the Petitioner has provided absolutely no evidence to support his position. Finally, the Petitioner suggests that his attorneys did not discuss his options prior to trial or that he could proceed to trial. The Petitioner was advised of his rights by the court. He has multiple prior convictions; therefore, his suggestion that he was not aware his various options is absurd.

[¶24] CONCLUSION

[¶25] 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 26th day of September, 2012.

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[¶26] CERTIFICATE OF SERVICE

[¶27] A true and correct copy of the foregoing document was sent by e-mail on the 3rd day of October, 2012, to: Benjamin C. Pulkrabek at Pulkrabek@lawyer.com.

Leah J. Viste