

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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SUPREME COURT NO.: 20120291, 20120292 & 201293

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Edward D. Waslaski, Jr.,

Petitioner-Appellant

- vs -

State of North Dakota

Respondent-Appellee

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APPEAL FROM THE CRIMINAL JUDGMENTS  
EAST CENTRAL JUDICIAL DISTRICT  
CASS COUNTY CR. NO. 09-2012-CV-00610/625/627  
THE HONORABLE DOUGLAS R. HERMAN, PRESIDING

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BRIEF

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701/663-1929

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**STATEMENT OF THE ISSUES**

**[¶1] ISSUE:**

**I. Did the trial court err when it summarily denied Edward D. Waslaski Jr.'s Application for Post-Conviction Relief?**

## **NATURE OF THE CASE**

¶2 Edward D. Waslaski, Jr. filed his Application for Post-Conviction Relief in the District Court in Cass County, Fargo, North Dakota on February 24, 2012. The State filed State's Answer to Petitioner's Application for Post-Conviction Relief and Motion for Dismissal on March 15, 2012. Mr. Waslaski Jr. then filed Petitioners Response to State's Answer on June 6, 2012. Mr. Waslaski Jr.'s attorney, Mark T. Blumer filed Petitioner's Supplemental Response to State's Answer to Petitioner's Application for Post-Conviction Relief and Motion for Dismissal on June 26, 2012.

¶3 The trial judge issued an Order Denying Mr. Waslaski Jr.'s. Application for Post-Conviction Relief on July 10, 2012.

¶4 The judgment denying Mr. Waslaski Jr.'s Application for Post-Conviction Relief was filed on July 20, 2012.

¶5 Mr. Waslaski Jr. filed his Notice of Appeal on July 20, 2012. This matter is now before the North Dakota Supreme Court.

## **STATEMENT OF FACTS**

¶6 Mr. Waslaski Jr.'s Application for Post Conviction Relief involves the following Cass County District Court's numbers charges and attorneys who represented him on the charges:

1. 06-K-4669, Disorderly Conduct, attorney was Mark Beauchene;
2. 06-K-4760, Disorderly Conduct, attorney was Dennis Fisher;
3. 06-K-4772, Violation of a Domestic Violence Protection Order, attorney was Dennis Fisher.

[¶7] Mr. Waslaski Jr. plead guilty to all of the above charges. In is Application for Post-Conviction Relief Mr. Waslaski Jr. raises two issues:

1. Ineffective assistance of counsel;
2. That his guilty pleas were obtained and his sentence imposed in violation of his constitutional rights under Rule 11 of the Federal Rules of Criminal Procedure and Rule 11 of the North Dakota Rules of Criminal Procedure.

[¶8] Facts to support Mr. Waslaski Jr.'s above two issues are set out in his Application for Post-Conviction Relief, Petitioner's Response to State's Answer and Petitioner's Supplemental Response to State's Answer to Petitioner's Application for Post-Conviction Relief and Motion for Dismissal.

#### **ISSUE**

[¶9] Did the trial court err when it summarily denied Edward D. Waslaski Jr.'s Application for Post-Conviction Relief?

#### **ARGUMENT**

[¶10] The standard of review of a summary disposition of post conviction relief according to Vandenburg vs State 2003 ND 71, 600 NW2d 568 is:

“The procedure followed for a motion for the summary disposition of a petition for post-conviction relief is similar to that followed for a motion for summary judgment.” Weaver, 2003 ND 47, ¶5, 658 NW2d 352.

Proceedings for post-conviction relief are civil in nature and all rules and statutes applicable in civil proceedings are available to the parties. Id.

Our review of a summary denial of post-conviction relief is like the review of an appeal from a summary judgment. Id. A trial court may summarily

dismiss an application for post-conviction relief if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Id. The initial burden is on the moving party to show there is no genuine issue of material fact, the burden shifts to the non-movant to demonstrate there is a genuine issue of material fact. Id. For the summary disposition of a petition for post-conviction relief, the moving party bears the burden of showing there is no dispute as to either the material facts or the inferences to be drawn from undisputed facts, and that the movant is entitled to judgment as a matter of law. Id.; N.D.C.C. § 29-32.1-09(1). A genuine issue of material fact exists if reasonable minds could draw different inferences and reach different conclusions from the undisputed facts. See Belgarde v. Rosenau, 388 N.W.2d 129, 130 (N.D. 1986).

[¶11] The reasons why Mr. Waslaski Jr. claims his attorneys were ineffective are:

1. That his attorneys didn't inform him how his convictions on two disorderly conduct charges and violation of a domestic violence protection order before disposing of his federal charge would increase his federal sentence because all prior convictions enhance a federal sentence according to the federal sentencing guidelines.

2. His attorneys were both fully aware of the fact that entry pleas of guilty to the two disorderly conduct charges, and the violation of a protection order prior to disposing of his federal charges would enhance his federal sentencing under the federal sentencing guidelines.

3. That when the district judge in court was discussing and explaining to him how a misdemeanor charge of violating a protection order could become a felony his attorney,

Dennis Fisher interrupted and said “he understands judge”. This stopped the district judge’s discussion and explanation at a time when Mr. Waslaski Jr. still didn’t understand how a misdemeanor charge of violating a protection order could become a felony.

4. His attorneys didn’t discuss with him his options prior to trial or inform him that he could proceed to trial.

5. His attorneys were well aware of what information and rights a district judge in North Dakota must give under NDR of Crim Pro. 11(b) but they didn’t require the judge to give Mr. Waslaski Jr. that information or rights.

6. His attorneys didn’t inform him of the information and rights a North Dakota judge is required to give him under NDR of Crim. Pro. 11(b).

7. Mr. Waslaski Jr. would not have entered guilty pleas to his two disorderly conduct charges and his violation of a protection order had either the district judge and/or his attorneys fully explained his rights and the ramifications of guilty pleas to his three State charges prior to disposing of his federal charges.

[¶12] The State in its Answer to Mr. Waslaski Jr.’s claim of ineffective assistance of counsel only refers to the fact that Mr. Waslaski Jr. claimed that his attorney Dennis Fisher prevented him from getting the necessary information to know how a misdemeanor can become a felony. None of the other above issues claiming ineffective assistance of counsel are mentioned in the State’s Answer.

[¶13] According to Parizek vs State 2006 ND 61, 711 NW2d 178 “the initial burden is on the moving party to show there is no genuine issue of material fact.” Id “If the movant initially shows there is no genuine issue of material fact, the burden shifts to the non-movant to demonstrate there is a genuine issue of material fact.”



[¶14] Therefore because of what is said above in Parizek the State's Answer only put Mr. Waslaski Jr. on notice that he had to respond to the State's claim his argument about not being provided enough information as to how his misdemeanor could become a felony. Because of the State's limited Answer Mr. Waslaski Jr. according to Parizek didn't have to respond to six of his above claims about how his counsel were ineffective.

[¶15] The trial court in its Order granting summary dismissal of Mr. Waslaski Jr.'s Application for Post-Conviction Relief said "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."

[¶16] the above statement by the trial judge is limited to the issue of Mr. Waslaski Jr. not being provided the necessary information regarding how a felony becomes a misdemeanor. Nothing in the trial courts Order addresses six of Mr. Waslaski Jr.'s claims of ineffective counsel. Therefore Mr. Waslaski Jr. should have been allowed to have a hearing on those six issues.

[¶17] According to Everett v. State, 2008 ND 199, 757 N.W.2d 530:

[¶21] While summary dismissal generally is not appropriate for post-conviction claims of ineffective assistance of counsel, it is appropriate if the petitioner does not raise a genuine issue of material fact. Klose v. State, 2008 ND 143, ¶ 9, 752 N.W.2d 192 (citing Dunn v. State, 2006 ND 26, ¶ 12, 709 N.W.2d 1). To avoid summary dismissal of an ineffective assistance of counsel claim, the post-conviction applicant must introduce

evidence to meet the two-pronged Strickland v. Washington test. Prong one requires the defendant show that counsel's performance was deficient. Strickland v. Washington, 466 U.S. 668, 687 (1984). Prong two requires proving the deficient performance prejudiced the defendant. Id. The petitioner must "specify how and where counsel was incompetent and the probable different result. "Klose, 2008 ND 143, ¶9, 752 N.W.2d 192 (citing Steen v. State, 2007 ND 123, ¶19, 736 N.W.2d 457). A petitioner's failure to "show how, but for the attorneys' errors, the results of the proceedings would have been different" justifies a district court's decision to summarily dismiss the ineffective assistance of counsel claim. Hughes v. State, 2002 ND 28, ¶7, 639 N.W.2d 696.

[¶18] Mr. Waslaski Jr. believes he has met the two prong test in the above quote from Everett. He believed he has met the prong one requirement when he said his counsel knew but failed to tell him how his guilty pleas in State court to the two disorderly conduct charges and violation of a domestic violence protection order prior to disposing of his federal charge would because of the federal sentencing guidelines enhance his sentence in federal court. He also believes he has met the prong two requirement because had he been told about the enhancement of his federal sentence he never would have plead guilty to the two disorderly conduct charges and the violation of a domestic violence protection order prior to disposing of his federal charge.

[¶19] In issue two Mr. Waslaski Jr.'s claims his State convictions should be vacated because his plea wasn't knowingly made. In support of this claim he sets out what the trial judge failed to advise him under Rule 11 of Criminal of Federal Procedure

and Rule 11 of the North Dakota State Rules of Criminal Procedure. He also shows how this failure to advise violates his Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

[¶20] The State has two reasons for summary dismissal of Mr. Waslaski Jr.'s issue two.

[¶21] The first reason is because Mr. Waslaski Jr. in 2007 made a Motion to Withdraw Pleas of Guilty in 09–06-K-4760 and 09-06-K-4772. In this Motion Mr. Waslaski Jr. claimed he had not been advised of any federal sentencing consequences and that Motion was denied.

[¶22] The second reason deals with NDR of Crim Pro 11(b) and what Mr. Waslaski was advised and not advised. According to the State the trial judge didn't have to advise Mr. Waslaski Jr. of every possible collateral consequence of pleading guilty. Therefore if the trial judge did leave anything essential out, Mr. Waslaski Jr. because of his lengthy criminal history was familiar with the judicial process and therefore was familiar with all his rights. The State cites no statute or case law that supports its claim that a Defendants criminal history or knowledge eliminates some of the information and rights a North Dakota State Judge is required to give a Defendant under NDR of Crim Pro 11(b).

[¶23] The following statement from the trial court's Order shows the trial court agrees with the State that because of Mr. Waslaski Jr.'s prior criminal history and knowledge he doesn't have to be informed about all his rights. "Additionally 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."

[¶24] An individuals prior history and knowledge of criminal law and criminal procedure is not an excuse for a district judge not giving a defendant his rights under NDR of Crim Pro 11(b).

**CONCLUSION**

[¶25] For the above and forgoing reasons the district judge should have denied the State's Motion for Summary Dismissal of Mr. Waslaski Jr.'s Application for Post-Conviction Relief and allow Mr. Waslaski Jr. to have an evidentiary hearing.

[¶26] This matter should be remanded to the District Court with an Order requiring the District Court to allow Mr. Waslaski Jr. to have an evidentiary hearing.

DATED this 24th day of August, 2012.

/s/ Benjamin C. Pulkrabek  
Benjamin C. Pulkrabek, ID #02908

**CERTIFICATE OF SERVICE BY MAIL**

[¶27] 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 August, 24th, 2012, she served, by e-mail and mail a copy of the following:

**APPELLANT’S BRIEF**

to:	Mailed to:
Leah J. Viste Cass CountyState’s Attorney’s Office <a href="mailto:Vistel@casscountynd.gov">Vistel@casscountynd.gov</a>	Edward Waslaski Jr. FCI - Sandstone P.O. Box 1000 Sandstone, MN 55072

The undersigned further certifies that on August, 24th, 2012, 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