

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

Ryan R. Corman,)	
)	
)	Supreme Court No. 20120307
)	District Court No. 18-07-K-01498
Petitioner and Appellant)	
)	
)	
vs.)	
)	
State of North Dakota,)	
)	
)	
Respondent and Appellee)	

ON APPEAL FROM THE DISTRICT COURT
FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY, NORTH DAKOTA
THE HONORABLE JOEL D. MEDD, PRESIDING.

BRIEF OF APPELLEE

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TABLE OF CONTENTS

Table of Authorities ii

Statement of the Issues..... iii

Statement of the Case..... ¶1

Statement of the Facts..... ¶9

Law and Argument ¶13

I. The District Court did not err when it denied the Petitioner’s application for post-conviction relief.

- A. *The Petitioner requested a hearing on the question of summary judgment, but failed to move the issue forward by contacting the scheduling clerk to set up a hearing regarding summary judgment or an evidentiary hearing. The issue is incorrectly being raised for the first time on appeal.*
- B. *The Petitioner’s claims are barred by Res Judicata and Misuse of Process.*
- C. *There is no legally supported basis for the Petitioner to claim that any of his grounds for relief are newly discovered. The Petitioner was put on his proof and failed to present anything beyond unsupported conclusory allegations.*

Conclusion ¶33

TABLE OF AUTHORITIES

U.S. SUPREME COURT CASES

Celetex Corp. v. Catrett, 477 U.S. 317 (1986)..... ¶16

NORTH DAKOTA STATE CASES

Clark v. State, 1999 ND 78, 593 N.W.2d 329 ¶¶26, 24

Flanagan v. State, 2006 ND 76, 712 N.W.2d 602 ¶¶14, 15

Jelsing v. Peterson, 2007 ND 41, 729 N.W.2d 157 ¶13

Klose v. State, 2005 ND 192, 705 N.W.2d 809..... ¶13

Laib v. State, 2005 ND 187, 705 N.W.2d 845..... ¶24

Murchinson v. State, 1998 ND 85, 578 N.W.2d 514..... ¶¶8, 24

State v. Blurton, 2009 ND 144, 770 N.W.2d 231 ¶19

State v. Clark, 1997 ND 199, 570 N.W.2d 195 ¶26

State v. Corman, 2009 ND 96, 765 N.W.2d 530 ¶¶6, 9, 10, 11, 21, 22, 25

State v. Vondal, 2011 ND 186, 803 N.W.2d 578 ¶19

Steinbach v. State, 2003 ND 46, 658 N.W.2d 355 ¶¶15, 16, 22, 30, 31, 32, 33

Ude v. State, 2009 ND 71, 764 N.W.2d 419 ¶¶13, 14, 15

Wheeler v. State, 2008 ND 109, 750 N.W.2d 446..... ¶13

NORTH DAKOTA STATUTES

N.D.C.C. § 12.1-32-01..... ¶9

N.D.C.C. § 12.1-32-15..... ¶¶2, 3, 22

N.D.C.C. § 14-10-06..... ¶¶1, 2, 9

N.D.C.C. § 29-32.1-01 ¶27

N.D.C.C. § 29-32.1-04..... ¶13

N.D.C.C. § 29-32.1-12.....¶¶1, 20, 23, 24, 27

NORTH DAKOTA RULES

N.D.R.Civ.P.52 ¶13

N.D.R.Crim.P.52 ¶19

STATEMENT OF THE ISSUES

- I. Whether the District Court erred when it denied the Petitioner's application for Post-Conviction Relief?**

STATEMENT OF THE CASE

[¶1] The Petitioner, Ryan Ray Corman (hereinafter “Corman”) appeals from an order denying his application for post-conviction relief. (Appellant’s Appendix. at 44). In June of 2007, Corman was charged with contributing to the delinquency of a minor in violation of N.D.C.C. § 14-10-06 and harassment. (Appellee’s App. at 1.) Corman pled not guilty to both charges. (Appellant’s App. at 1.)

[¶2] The District Court found Corman not guilty of harassment but guilty of contributing to the delinquency or deprivation of a minor, in violation of N.D.C.C. § 14-10-06. (Appellee’s App., 2-8.) In June of 2008, Corman was sentenced to serve one year in the Grand Forks County Correctional Center, with six months suspended. (Appellee’s App. at 2.) The Court also ordered Corman to register as a sexual offender under N.D.C.C. § 12.1-32-15(2)(d) and (e). (Appellee’s App., 2-8.)

[¶3] Corman appealed this judgment to the North Dakota Supreme Court, alleging insufficient evidence to support his conviction and that the District Court erred in requiring him to register a sexual offender. (Appellee’s App. at 9.) The decision was confirmed by this court on direct appeal May 14, 2009, but modified to reflect the sex offender registration as pursuant only to N.D.C.C. § 12.1-32-15(2)(e). (Appellee’s App. at 14.)

[¶4] On October 3, 2011, Corman filed an application for Post-Conviction Relief. (Appellant’s App. at 8). He alleged nine grounds for relief. (Appellant’s App., 8-22.) First, he alleged that law enforcement and the State’s Attorney knowingly supplied false information to the Court and fabricated untrue charges. (Appellant’s App. at 9.) Second, he argued that his conviction was obtained through the use of false instruments, false

information, and perjured testimony from State's witnesses. (Appellant's App. at 9.) Third, he alleged illegal and unethical witness tampering by the State's Attorney. (Appellant's App. at 10.) Fourth, he argued that his conviction was obtained from witnesses deemed unreliable at trial. (Appellant's App. at 11.) Fifth, he alleged that the State used false information to enhance his sentence in retaliation for his insistence on going to trial. (Appellant's App. at 11.) Sixth, he claimed the State had provided false information to the psychologist who completed his Pre-Sentence Investigation. (Appellant's App. at 13.) Seventh, that the tainted PSI erroneously caused the District Court to require sexual offender registration. (Appellant's App. at 13.) Eighth, he argued that the State substituted opinion for fact at trial which denied him a fair trial, due process, and equal protection. (Appellant's App. at 16.)

[¶5] The State of North Dakota filed a Brief in Opposition, arguing that the application should be dismissed because the claims were barred by either res judicata or misuse of process under to N.D.C.C. § 29-32.1-12. (Appellant's App., 23-30.) Furthermore, the State requested summary disposition because there was no genuine issue of material fact. (Appellant's App. at 29.) In his brief to the District Court, Corman, represented by counsel, requested a hearing as to the issue of summary judgment. (Appellant's App. at 37.) The Honorable Judge Joel Medd contacted the parties on May 11, 2012, stating that in order to set up a hearing, the Defendant would need to contact the scheduling clerk in order to set up a hearing date. (Appellee's App. at 9.) Judge Medd also stated that if the Defendant failed to contact the clerk within ten days, the Court would rule on the matter without a hearing. (Appellee's App. at 9.) The

District Court ultimately decided the matter without a hearing and filed a memorandum decision on July 10, 2012. (Appellant's App., 39-43.)

[¶6] The District Court ruled that each of Corman's grounds for relief were barred by res judicata or misuse of process. (Appellant's App. at 42.) Specifically, claims one, two, four, six, and seven were held to present essentially two arguments: insufficient evidence to convict him and the erroneous requirement to register as a sexual offender. (Appellant's App. at 42.) Both of these issues were addressed at his initial trial in District Court and raised on direct appeal to the Supreme Court. State v. Corman, 2009 ND 96, 765 N.W.2d 530; Appellant's App. at 42. The District Court noted that because the issues had already been raised in Corman's direct appeal, they could not be subsequently raised in a Post-Conviction Relief application. (Appellant's App. at 42.)

[¶7] As to the remaining claims - three, five, eight, and nine - the District Court held them barred by misuse of process. (Appellant's App. at 42.) Under these grounds, Corman claimed that his record of past offenses was false, that the State acted impermissibly at trial, and the Court erred in allowing the State's alleged misconduct. (Appellant's App., 10, 11-12, 16-22.) After review of the prior proceedings, the District Court made the determination that Corman was able to object to these alleged issues at trial, but was overruled. (Appellant's App. at 42.) Corman did not pursue those particular claims on his direct appeal before the Supreme Court. (Appellant's App. at 42; Appellee's App., 9-15.) As a result of the failure to pursue the issues on direct appeal, the issues were held to be barred under misuse of process. (Appellant's App. at 42.)

[¶8] The District Court made the additional holding that there was no legally supported basis for Corman to claim that his grounds for relief were newly discovered.

(Appellant's App. at 42.) Corman filed for appeal of the District Court's decision on July 25, 2012. (Appellant's App. at 42.)

STATEMENT OF THE FACTS

[¶9] In June of 2007, the State charged Corman, a 47-year-old male, with contributing to the delinquency of a minor in violation of N.D.C.C. § 14-10-06, and harassment under N.D.C.C. § 12.1-32-01-(5). State v. Corman, 2009 ND 85, ¶ 2, 765 N.W.2d 530. The State alleged that Corman, a 47-year-old male, provided pornographic DVDs and magazines to R.L., a 15-year-old juvenile male, and that Corman left telephone messages threatening to assault R.L.'s father and also threatened to call social services to have R.L. removed from his home. Id.

[¶10] At a March 2008 bench trial, R.L.'s mother testified that Corman and R.L. had known each other since 2003. Corman, ¶ 3. The mother had arranged for Corman to be an informal "big brother" for R.L. because R.L.'s father was in prison. Id. The mother testified she became concerned about Corman's relationship with her son when Corman began purchasing expensive gifts for R.L. and when R.L. began to bring home sexually explicit DVDs and magazines. Id. The mother testified about an incident in December 2006, when Corman provided R.L. with a bag of magazines, including "Hustler" and "Barely Legals". Id. The mother testified she found sexually explicit DVDs in R.L.'s possession beginning in late summer 2006. Corman, ¶ 3. The mother testified she confiscated the DVDs and made R.L. throw away the magazines. Id. Grand Forks police officer William Macki testified that the police confiscated the DVDs in March 2007. Id. The mother testified that Corman denied supplying her son with the materials when she confronted him. Id.

[¶11] Six DVDs were received into evidence at trial. Corman, ¶ 4. Officer Macki testified he had viewed portions of the DVDs, which contained “hard core pornographic” video with full nudity, oral sex, and vaginal sex, “including male and female sex and female/female sex, and this was to include ejaculation.” Id.

[¶12] R.L. testified Corman purchased the magazines and DVDs for him. Corman, ¶ 5. R.L. testified he and Corman would drive to the Plain Brown Wrapper in Grand Forks and he would wait in the car while Corman would go inside to purchase the items, which Corman then gave to R.L. Id. R.L. testified this occurred about once a month between August and December 2006. Id. R.L. also testified Corman showed R.L. where sexually explicit materials were kept in Corman’s house and allowed R.L. to view them. Id. At trial, Corman admitted to having “pornographic” materials in his home, but denied showing or giving R.L. any materials, maintaining that he spoke to R.L. about taking things that were not his and that when he confronted R.L., R.L. “was very contrite, and apologized to [Corman] because we had a very good trust thing going on and I had trusted him.” Corman, ¶ 5. Corman also testified he frequented the Plain Brown Wrapper “[o]nce a month or less.” Id. The Court found Corman not guilty of harassment, but found him guilty of contributing to the delinquency or deprivation of a minor. Corman, ¶ 6.

LAW AND ARGUMENT

I. The District Court did not err when it determined that summary dismissal of the Petitioner's application for post-conviction relief was appropriate.

[¶13] Post-conviction relief is governed by N.D.C.C. Chapter 29-32.1. Post conviction relief proceedings are civil in nature and are governed by the North Dakota Rules of Civil Procedure. Wheeler v. State, 2008 ND 109, ¶ 5, 750 N.W.2d 446. The requirements for an application for post-conviction relief are set forth in N.D.C.C. § 29-32.1-04. Ude v. State, 2009 ND 71, ¶ 8, 764 N.W.2d 419. 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 v. State, 2005 ND 192, ¶ 10, 705 N.W.2d 809. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support it, or if the reviewing court, on the entire evidence, is left with a definite and firm conviction a mistake has been made. Jelsing v. Peterson, 2007 ND 41, ¶ 11, 729 N.W.2d 157.

[¶14] The petitioner has the initial burden of establishing grounds for the post-conviction relief. Flanagan v. State, 2006 ND 76, ¶ 10, 712 N.W.2d 602. A petitioner must set forth a concise statement of each ground for relief and specify the relief requested, refer to the pertinent portions of the record of prior proceedings, and if those portions are not in the record, the petitioner must attach those portions to the application. Ude, ¶ 8. A petitioner may attach affidavits or other supporting materials to the application, but they are unnecessary. Id.

[¶15] 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. Id. The petitioner is

effectively put on his proof if the State moves for summary disposition pointing out a lack of evidence, and a minimal burden shifts to the petitioner to provide some competent evidence to support his claim. Steinbach v. State, 2003 ND 46, ¶ 17, 658 N.W.2d 355. 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 raise an issue of material fact. Flanagan, 2006 ND 76, ¶ 10. If competent evidence is provided, the defendant is entitled to an evidentiary hearing. Steinbach, 2003 ND 46, ¶ 17.

[¶16] Although the party seeking a summary disposition bears the initial burden of showing there is no genuine issue of material fact, the United States Supreme Court has explained that “the burden on the moving party may be discharged by ‘showing’ - that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party’s case.” Steinbach, 2003 ND 46, ¶ 12 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)).

A. The Petitioner requested a hearing on the question of summary judgment, but failed to move the issue forward by contacting the scheduling clerk to set up a hearing regarding summary judgment or an evidentiary hearing. The issue is incorrectly being raised for the first time on appeal.

[¶17] Corman’s counsel was notified on May 11, 2012, by the Honorable Joel Medd that briefs had been received regarding Corman’s application. (Appellee’s App. at 9.) He stated that the matter had been left pending, and would move forward when the Defendant contacted the scheduling clerk in order to set a hearing on the Motion for Summary Judgment. Id. He also stated that if the Defendant did not contact the clerk

within the next 10 days to set a hearing, the Court would rule on the matter without a hearing. Id. The Court ultimately did not receive anything from Corman and decided the issue without a hearing on July 9, 2012. (Appellant’s App., 39-43).

[¶18] On appeal, Corman argues that he should now be allowed to have a hearing in District Court, and that the District Court erred when it decided his application on written briefs. (Appellant’s Brief at 6). Since Corman failed on his own end to move ahead with requesting a hearing in District Court, this argument is being presented for the first time on appeal.

[¶19] The Supreme Court does not address issues that are raised for the first time on appeal. State v. Blurton, 2009 ND 144, ¶ 770 N.W.2d 231. Only an “obvious error or defect that affects substantial rights may be considered even though it was not brought to the court’s attention.” N.D.R.Crim.P. 52(b). “We exercise the power to notice obvious error cautiously and only in exceptional circumstances where the defendant has suffered serious injustice.” State v Vondal, 2011 ND 186, ¶ 5, 803 N.W.2d 578. The error must be a clear deviation from an applicable legal rule under current law to constitute an obvious error. Blurton, ¶ 8. In Corman’s case, the issue does not rise to the level of obvious error. The issue of whether Corman was unfairly denied a hearing should not be heard for the first time on appeal.

B. The Petitioner’s claims are barred by Res Judicata and Misuse of Process.

[¶20] An application for post-conviction relief may be denied if “the same claim or claims were fully and finally determined in a previous proceeding.” N.D.C.C. § 29-32.1-12(1). Under grounds one, two, four, six, and seven, Corman has alleged that law

enforcement and the State's Attorney knowingly supplied false information to the court in order to obtain false arrest; conviction was obtained through the State's knowing submission of false instruments, false information, and coercive testimony; conviction was obtained through illegal and unethical witness tampering by the State's Attorney; conviction was obtained through the use of testimony by witnesses deemed unreliable and untruthful during trial; and the State knowingly used false information and tendered false instruments to the Court to both achieve conviction and to enhance his sentence in unlawful retaliation for Corman's insistence on going to trial. (Appellant's App., 8-22.)

[¶21] The District Court found that these claims amounted to challenges to the sufficiency of evidence to support his conviction and a challenge to the requirement that he register as a sexual offender. (Appellant's App. at 42). Both of those arguments have already been raised and ruled upon on direct appeal. State v. Corman, 2009 ND 85, 765 N.W.2d 530.

[¶22] In Corman, the Supreme Court found that the evidence was sufficient for a rational fact finder to convict Corman beyond a reasonable doubt of contributing to the delinquency or deprivation of a minor, and thus affirmed the conviction. Corman, ¶ 13. The Court also affirmed the sentence requirement that Corman register as a sexual offender, modifying the judgment slightly to reflect registration as pursuant only to N.D.C.C. § 12.1-32-15(2)(e), rather than to both subsections (d) and (e). Corman, ¶ 22.

[¶23] Thus, grounds one, two, four, six, and seven requested by Corman have been fully and finally determined at two prior proceedings. Res Judicata occurs when "the same claim or claims were fully and finally determined in a previous proceeding." N.D.C.C. § 29-32.1-12(1). Because these claims have already been raised on direct

appeal to this Court, they cannot subsequently be raised in a post-conviction relief application, and are barred by Res Judicata, Murchinson v. State, 1998 ND 85, ¶ 7, 578 N.W.2d 514.

[¶24] As to Corman's grounds for relief which were not raised on direct appeal, they are barred by misuse of process. Under N.D.C.C. § 29-32.1-12(2)(a), a court may deny an application for post-conviction relief on the ground of misuse of process when the defendant has inexcusably failed to raise an issue in a proceeding leading to a judgment of conviction or inexcusably failed to raise an issue on a direct appeal. A defendant who has failed to raise an issue in prior proceedings may not raise it in a subsequent application for post-conviction relief. *See* Laib v. State, 2005 ND 187, ¶ 6, 705 N.W.2d 845; Murchinson, 2003 ND 38, ¶ 11.

[¶25] The District Court found that Corman raised issues three, five, eight, and nine at trial. (Appellant's App. at 42). These issues include claims that Corman's record of past sex offenses was false, the State acted impermissibly at trial, and the Court erred in allowing the State's misconduct. Id. As to these issues, the District Court found that it was clear reviewing the prior proceedings that all those issues were presented at trial and that Corman's objections were overruled. Id. Corman then failed to pursue those claims in his direct appeal before the Supreme Court. Id.; Corman, ¶ 7.

[¶26] The Supreme Court found that misuse of process barred a similar claim in Clark v. State, 1999 ND 78, 593 N.W.2d 329. Clark was found guilty at trial and pursued a direct appeal of that judgment to the Supreme Court. State v. Clark, 1997 ND 199, ¶ 2, 570 N.W.2d 195. The Supreme Court affirmed the judgment. Id. Clark went on to

pursue an application for post-conviction relief. Clark, 1999 ND 78, ¶ 3. In those proceedings, the District Court granted a motion by the state for summary dismissal. Id.

[¶27] On appeal, the Supreme Court found that the issues raised by Clark which were raised and litigated in the proceeding leading to judgment but not pursued on direct appeal were barred by misuse of process under N.D.C.C. § 29-32.1-12 and § 29-32.1-01(2). Clark, 1999 ND 78, ¶ 22. The grounds for relief raised by Clark which fell into this category are similar in substance to those raised by Corman, revolving around prosecutorial misconduct. Clark, 1999 ND 78, ¶ 25. Procedurally, these issues in Clark are nearly identical to Corman's grounds three, five, eight, and nine in that they were issues raised at trial but not pursued on direct appeal. In accord with Clark, these claims should be barred by misuse of process.

C. There is no legally supported basis for the Petitioner to claim that any of his grounds for relief are newly discovered. The Petitioner was put on his proof and failed to present anything beyond unsupported conclusory allegations.

[¶28] Corman states that his nine grounds for relief are issues that were not known to the District Court or his defense counsel at the time of trial, and thus would not have been made part of the record of the trial and would not have been reviewed by the Supreme Court at Corman's direct appeal. (Appellant's Brief at 35). However, Corman has neglected to point out any evidence in record or to provide any form of supplementary evidence to support his claim.

[¶29] In its brief in opposition to Corman's application for post-conviction relief, the State requested summary judgment. (Appellant's App. at 29). Although the State, as movant, bore the initial burden of showing there was no genuine issue of material fact,

that burden was effectively discharged when the State pointed out in its motion that there was a complete absence of evidence supporting Corman's case. The State's filing served notice to Corman that he was being put on his proof to provide some competent evidence to support his claim. *See State v. Steinbach*, 2003 ND 46, ¶ 17, 658 N.W.2d 355 (“[o]nce the State moves for summary disposition pointing out the absence of supporting evidence, the defendant is put on notice of the issue and minimal burden shifts to the defendant to provide some competent evidence to support his claim.”) At this point, Corman bore the burden of submitting some form of evidentiary support for his claim. Corman failed to provide anything, and the District Court ruled that there were no legally supported grounds for his assertions to be considered newly discovered, and therefore unable to be raised at trial or during appeal. (Appellant's App., 42-43.)

[¶30] Corman asks that he be granted a hearing based entirely on unsupported conclusory allegations, and has failed to point out any evidence in the record or to submit any new evidence in the form of supplements or affidavits supporting his claims. The Supreme Court addressed a similar request in *State v. Steinbach*, 2003 ND 46, ¶ 17, 658 N.W.2d 355.

[¶31] In an application for post-conviction relief, Steinbach listed eighteen reasons why he felt his counsel was ineffective, but did not provide any evidentiary support or supplementary documents to support his claim. *Steinbach*, ¶ 13. The State moved to dismiss the application, contending the claim of ineffective assistance failed on the merits. *Id.* at ¶ 14. In his response, Steinbach argued that he was entitled to an evidentiary hearing, but failed to make specific citation to evidence on the record or to supplement his application with additional documentation or affidavits. *Id.*

[¶32] The Supreme Court held that Steinbach had failed to present any evidence to the trial court to show there was a genuine issue of material fact warranting an evidentiary hearing. Id. at ¶ 16. The Court stated:

Once the State moves for summary disposition pointing out the absence of supporting evidence, the defendant is put on notice of the issue and a minimal burden shifts to the defendant to provide some competent evidence to support his claim. If competent evidence is provided, the defendant is entitled to an evidentiary hearing.... Once the burden was shifted to Steinbach, he cannot merely rely on the pleadings or unsupported conclusory allegations, but must present some competent admissible evidence by affidavit or other comparable means.

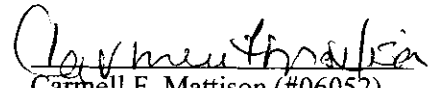
Id. at ¶ 18.

[¶33] Corman's claim that he is entitled to an evidentiary hearing to develop each of his issues fails in this same fashion. The State moved for summary judgment in its reply to Corman's post-conviction relief application, pointing out the lack of a material issue of genuine fact. (Appellant's App., 28-29). This effectively put Corman on notice of the issue and shifted a burden to him to provide some competent evidence to support his claim. Steinbach, ¶ 17. However, Corman continues to rely solely on conclusory allegations which he has failed to support with competent evidence of any sort. Under this court's holding in Steinbach, Corman has not met the minimal burden required in order to be afforded an evidentiary hearing, and is therefore not entitled to one.

CONCLUSION

[¶34] The State respectfully requests that this Court affirm the District Court's decision to deny Corman's application for post-conviction relief.

Respectfully submitted this 19 day of September, 2012.



Carmell F. Mattison (#06052)

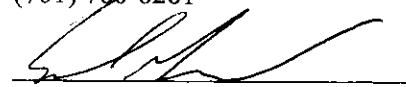
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