

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
NOVEMBER 26, 2012
STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20120381

Larry Allen Froistad Jr.,

Petitioner and Appellant

- vs -

Robyn Schmalenberger, Warden,
North Dakota State Penitentiary,
Eddy Wilson, Warden, Wyoming State Penitentiary

Respondents and Appellees

APPEAL FROM THE CRIMINAL JUDGMENT
SOUTHWEST JUDICIAL DISTRICT
BOWMAN COUNTY CR. NO. 06-2012-CV-00004
THE HONORABLE ZANE ANDERSON, PRESIDING

BRIEF

BENJAMIN C. PULKRABEK

ATTORNEY FOR APPELLANT

402 FIRST STREET NW
MANDAN, NORTH DAKOTA 58554
(701)663-1929
N.D. BAR BOARD ID NO. 02908

TABLE OF CONTENTS

Table of Contents	i
Table of Cases	ii
Statutes	iii
Statement of the Issue	¶1
Nature of the Case	¶2
Statement of the Facts	¶11
Argument	¶16
Issues Presented:	
ISSUE I: Did the trial judge err when he summarily dismissed petitioner Larry A. Froistad’s Application for Post Conviction Relief?	¶1, 15
Conclusion	¶30
Certificate of Service	¶31

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES
TABLE OF CASES

<u>Wheeler v. State,</u> 2008 ND 109, ¶ 5, 750 N.W.2d 446. . . .	¶16
<u>Ude v. State,</u> 2009 ND 71, ¶ 8, 764 N.W.2d 419. . . .	¶16,17
<u>Klose v. State,</u> 2005 ND 192, ¶ 10, 705 N.W.2d 809	¶16
<u>Jelsing v. Peterson,</u> 2007 ND 41, ¶ 11, 729 N.W.2d 157. . . .	¶16
<u>Flanagan v. State,</u> 2006 ND 76, ¶ 10, 712 N.W.2d 602	¶17,18
<u>Steinbach v. State,</u> 2003 ND 46, ¶ 17, 658 N.W.2d 355	¶18
<u>Brady v Maryland</u> 373 US 83 (1963)	¶19
<u>Rümmer v State,</u> 2006 ND 216, 722 N.W.2d 568	¶24,25
<u>Syverson, at ¶ 6 (quoting State v. Goulet,</u> 1999 ND 80, ¶ 15, 593 N.W.2d 345)	¶24

STATUTES

N.D.C.C, Chapter 29-32.1.	.	.	.	.	.	.	..	¶16
N.D.C.C. § 29-32.1-04.	.	.	.	.	.	.	.	¶16
N.D.R.Civ.P. 52(a)	.	.	.	.	.	.	.	¶16

STATEMENT OF THE ISSUES

[¶1] ISSUE:

I. Did the trial judge err when he summarily dismissed petitioner Larry A. Froistad's Application for Post Conviction Relief?

NATURE OF THE CASE

[¶2] On January 17, 2012 Petitioner-Appellant, Larry Allen Froistad Jr., (Froistad) filed a pro se application for Relief and Assistance.

[¶3] The State filed an answer to Froistad's Petition for Post Conviction Relief and Motion to Dismiss Application on February 16, 2012.

[¶4] A motion for scheduling order was filed on March 16, 2012 and a Scheduling Order was filed on April 9, 2012.

[¶5] The State filed a Motion for Summary Dismissal on April 26, 2012.

[¶6] Mr. Froistad filed a response to State's Motion for Summary Dismissal on May 2, 2012.

[¶7] An Application for Post Conviction Relief was filed by Froistad on July 23, 2012 and the State's Response was filed on August 6, 2012.

[¶8] The Court's Memorandum Opinion and Order Summarily Dismissing Petition/Application for Post Conviction Relief was filed on October 1, 2012. An order for judgment and dismissal was then entered on October 10, 2012.

[¶9] Mr. Froistad's Notice of Appeal was filed on October 12, 2012 and the Notice of Filing the Notice of Appeal was filed on October 10, 2012.

[¶10] This matter is now before the North Dakota Supreme Court.

STATEMENT OF FACTS

[¶11] Petitioner-Appellant, Larry Allen Froistad Jr., (Froistad) entered an alford plea of guilty in State vs. Larry Froistad, Case No. 98-K-029 in Bowman County District Court, Southwest Judicial District to the crime of murder, a Class AA felony. Sentence and judgment were entered against Froistad on October 14, 1998.

¶12] In 2001 Froistad filed a Petition for Post Conviction Relief in which he requested that the court allow him to withdraw his alford plea of guilty on the grounds his constitutional rights were violated because:

- 1) he was sentenced under a second plea agreement without a proper factual basis;
- 2) his plea was not voluntary; and
- 3) he was denied his right to counsel.

¶13] On March 29, 2001 the district court denied Froistad's petition. That denial was appealed to the North Dakota Supreme Court. On April 10, 2012 the North Dakota Supreme Court upheld the district courts denial of Froistad's petition.

¶14] Froistad in his petition for relief that is now on appeal before the North Dakota Supreme Court is requesting that he be allowed to withdraw his alford plea of guilty. The reasons he believes the district court should allow his alford plea of guilty to be withdrawn are new and haven't been raised before. These issues are:

1. The State prior to his alford plea of guilty didn't provide him with copy of the Fire Marshals report or a copy of the report of the ATF agent. Both reports contained exculpatory evidence.

2. The video that the State alleges contained incriminating evidence of Mr. Froistad engaging with sexual acts with the alleged murder victim, a minor child predated the birth of that minor child.

3. If law enforcement did not know that the video predated the birth of the alleged victim prior to Froistad's guilty plea then because they know now because technology has advanced to the point where it can prove that the date that the video was made is before the alleged child victims birth.

ISSUE

[¶15] Did the trial judge err when he summarily dismissed Petitioner's Petition/Application for Post Conviction Relief?

ARGUMENT

[¶16] 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.

[¶17] 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.

[¶18] 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.

[¶19] Ever since *Brady v Maryland* 373 US 83 (1963) the prosecution has had a duty to provide exculpatory evidence to a Defendant and any failure to disclose exculpatory evidence to a Defendant violates due process.

[¶20] In the case now before the court the State did not provide Defendant-Appellant, Larry Allen Froistad Jr., (Froistad) with a copy of the State Fire Marshall's report indicating the cause of the fire was accidental or a copy of the ATF Report indicating that arson could not be established.

[¶21] The State's excuse for not providing Froistad with a copy of the State Fire Marshall's report is that they didn't have to because Froistad was told by Donald Huse, the Bowman Chief of Police during a phone conversation that the State Fire Marshal's Report said that the fire started accidentally. The State has no excuse for its failure to provide Froistad with a copy of the ATF Report.

[¶22] The trial court said in its Memorandum Opinion and Order summarily dismissing Petition/Application for Post Conviction Relief that assuming the outcome claiming the State's failure to furnish the ATF report would have been different if Mr. Froistad had been furnished a copy of the ATF Report is pure speculation. The problem with such assumption by the trial court is that it uses pure speculation to justify a Brady failure by the State to provide exculpatory evidence to a Defendant. Had Froistad been aware of the Fire Marshals Report, the ATF Report and of the fact that the video of the minor child was made before the child victim in this case was born he should have had serious doubts of being guilty of murder of the minor child.

[¶23] Even if he didn't have serious doubts after Mr. Froistad entered a guilty alford plea., the prosecutor was required to present evidence to the trial court that would establish the death of the victim was caused by an arson fire started by Froistad. This the prosecutor could not do if he told the judge the cause of the fire wasn't arson according to the ATF report that the fire was accidental according to the State Fire Marshall's Report and that the image on the video was made before the alleged murder victim was born. Therefore the only way the State could have gotten the court to accept Mr. Froistad's guilty alford plea was to withhold such evidence from the court.

[¶24] According to Rümmer v State, 2006 ND 216, 722 N.W.2d 568. [¶21]...To establish a Brady violation, the defendant must prove: "(1) the government possessed evidence favorable to the defendant; (2) the defendant did not possess the evidence and could not have obtained it with reasonable diligence; (3) the prosecution suppressed the evidence; and (4) a reasonable probability exists that the outcome of the proceedings

would have been different if the evidence had been disclosed.” Syvertson, at ¶ 6 (quoting State v. Goulet, 1999 ND 80, ¶ 15, 593 N.W.2d 345).

[¶25] Rümmer in (2) above could apply to the State’s failure to provide a copy of the State Fire Marshall’s Report to Mr. Froistad because the trial court could decide verbal information satisfies Brady discovery. However there is no such excuse for the State’s failure to provide Mr. Froistad with a copy of the ATF Report and that the image on the video was not that of the minor child who died in the fire.

[¶26] The State’s only argument for its failure to provide a copy of the ATF Report is that the failure isn’t enough to cause a reasonable probability that the outcome of the proceedings would have been different. However, before Mr. Froistad has to respond to such an argument he believes that the facts an FBI Special Agent, Jane Turner stated the video predated the birth of the minor child who died in the fire must be considered. When it is, the question becomes “when did the State know the video image of the child wasn’t that of the child who died in the fire?” If the State knew the image of the child in the video wasn’t that of the child who died in the fire, before Mr. Froistad’s guilty alford plea, this exculpatory information should have been disclosed to Mr. Froistad before he entered his guilty alford plea. Also such information should have been given to the trial judge after Mr. Froistad entered his guilty alford plea. If the State did not know until after Mr. Froistad entered his guilty alford plea and the trial judge accepted that plea it is newly discovered evidence that is exculpatory and the interests of justice require Mr. Froistad be allowed to withdraw his guilty alford plea.

[¶27] The State in its brief claims that the charge against Mr. Froistad was murder so arson and sexual acts with a minor shouldn’t be considered. The problem with such a

claim is it fails to consider the fact that for murder in that case to have been the cause of the child's death, arson has got to be proven to be the cause of the fire. Arson can't be the cause of the fire because the ATF report says that arson can't be proven to be the cause of the fire. Also there is the fire marshals report that say the fire was accidental. An accidental fire that causes the death of a child can't be murder.

[¶28] Had the trial judge prior to his accepting Mr. Froistads guilty alford plea been told by the prosecutor that the Fire Marshall's report said the fire was accidental, that the ATF Report said that arson couldn't be proven and that the video tape was older than the birth of the child who died in the fire, it is not pure speculation that the outcome of the proceeding would have been different. This is because the trial judge knows what evidence is required to find Mr. Froistad guilty of murder and that an accidental fire doesn't prove murder. Also images of a child that were made years before the alleged victims birth aren't any reason to kill the minor child. Therefore had the trial judge known all of the above facts he would have never accepted Mr. Froistad's guilty alford plea. The trial judges refusal to accept Mr. Froistad's guilty alford plea would have been the outcome instead of the trial court's acceptance of Froistad's guilty alford plea.

[¶29] There is no court decision that says the State should be rewarded for not disclosing exculpatory evidence. It is time to put an end to the States refusal to give all exculpatory evidence to a Defendant. It is also time to stop finding excuses for the State's failure to provide Defendant with exculpatory evidence. The State's giving the defense copies of all exculpatory evidence in the State's file isn't that difficult. Sending a case back for a new trial is the only way the State will get the message required because of Brady.

CONCLUSION

[¶30] For the above and foregoing reasons this case should be remanded to the trial court with an order requiring the trial court to hold a hearing on the post conviction application.

Dated this 26th day of November, 2012.

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

CERTIFICATE OF SERVICE BY MAIL

[¶31] 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 November 26th, 2012, she served, by e-mail and mail a copy of the following:

APPELLANT'S BRIEF

to:	<u>e-mail</u>	<u>Mailed to:</u>
	James D. Gion	Larry A. Froistad Jr.
	Bowman County State's Attorney's Office	WSP
	Jimgion@ndsupernet.com	P.O. Box 400
		Rawling, WY 82301

The undersigned further certifies that on November 26th, 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

CERTIFICATE OF SERVICE BY MAIL

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 November 28th, 2012, she served, by e-mail and mail a copy of the following:

CORRECTED APPELLANT'S BRIEF AND APPELLANT'S APPENDIX

to: e-mail

James D. Gion
Bowman County State's Attorney's Office
Jimdgion@ndsupernet.com

Mailed to:

Larry A. Froistad Jr.
WSP
P.O. Box 400
Rawling, WY 82301

The undersigned further certifies that on November 28th, 2012, she served electronically on the Clerk, North Dakota Supreme Court, the CORRECTED APPELLANT'S BRIEF AND APPENDIX.

/s/ Sharon Renfrow
Sharon Renfrow, Legal Assistant to
Benjamin C. Pulkrabek