IN THE SUPREME COURT

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

RESPONDENTS' AND APPELLEES' BRIEF

Subbmitted by:

Bowman County State's Attorney's Office
James D. Gion (ND ID#03881)
104 1st Street NW, Suite #10
Bowman, North Dakota 58623

Attorney for Plaintiff/Appellee

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STATEMENT OF THE ISSUE

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

FACTS

¶1) The facts as related in the Appellant Froistad's brief are accurate for the purposes of this matter. However, the State believes the record should have included the State's Brief in Support of Motion to Dismiss Application for Post-Conviction Relief, along with the accompanying Exhibits A - K.

LAW AND ARGUMENT

¶2) Froistad is appealing from the summary dismissal of his Petition for Post Conviction Relief, claiming the trial court erred. The basis of Froistad's claim appears to be that the State failed to provide Froistad with a copy of the State Fire Marshal's report and a report from ATF, and further that new data now indicates that certain video segments taken from Froistad's computer were actually created prior to the birth of his daughter, and therefore the video could not have been one of Froistad and his daughter.

¶3) A review of the State's file fails to reveal any document that was prepared by ATF. However, that report may have existed, or may have been an oral report, as the prosecution at that time is not currently prosecuting this matter. The State believes the arguments hereinafter addressing the State Fire Marshal's report will also apply equally to any other reports.

¶4) **Nature of Argument**: The issue before the court deals with Post-Conviction Procedure as set forth in NDCC Chapter 29-32.1. The State may move to dismiss an application for post-conviction relief when it is evident from the application that the applicant is not entitled to relief and no purpose would be served by further proceedings. NDCC §29-32.1-06(2). The trial court is allowed to grant a motion for summary dismissal

of the application if the matters of record show no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. NDCC §29-32.1-09(1).

¶5) **Genuine Issue of Material Fact**: The State did not dispute the failure to provide a copy of the State Fire Marshal's report or provide the information about an ATF report. Further the State did not dispute the possibility of new evidence to indicate the origin of the video segments predated the birth of Froistad's daughter. The trial court correctly determined that there were no genuine issues of material fact, and then proceeded to treat the matter like a motion for summary judgment.

> We review an appeal from summary denial of post-conviction relief as we would review an appeal from summary judgment. The party opposing the motion for summary disposition is entitled to all reasonable inferences to be drawn from the evidence and is entitled to an evidentiary hearing if a reasonable inference raises a genuine issue of material fact. For summary judgment purposes, the evidentiary assertions of the party opposing the motion are assumed to be true.

Klose v. State, 2008 ND 143, ¶9, 752 NW 2nd 192.

¶6) Pursuant to Klose, the trial court proceeded to determine if Froistad was entitled to withdraw his plea of guilty or was entitled to a new trial, based upon the assumption that the State did not provide the fire reports and that the video segments predated the birth of Froistad's daughter.

¶7) Froistad carries the burden in the request to withdraw his plea of guilty.

> When a court has accepted a plea and imposed sentence, the defendant cannot withdraw the plea unless withdrawal is necessary to correct a 'manifest injustice'. *(Citations omitted).* The finding of whether a manifest injustice exists, which would necessitate the withdrawal of a guilty plea, rests within the court's discretion and will not be reversed on appeal except for an abuse of discretion. *(Citations omitted).*

> An abuse of discretion under N.D.R.Crim.P. 32(d) occurs when the court's legal discretion is not exercised in the interests of justice. *(Citations omitted).*

Froistad v. State, 2002 ND 52,(¶9), 641 NW 2nd 86 (ND 2002). *(ND R.CrimP 32(d) has been moved to ND R.CrimP 11(d).)* The trial court determined there was no manifest injustice, and Froistad must show an abuse of discretion. In order to do so, it has to be proven that the trial court did not exercise it's discretion in the interests of justice.

¶8) **Failure to Provide Fire Reports**: Froistad claimed that the State's failure to provide the State Fire Marshal's report and the substance of the report of an ATF investigator violated the law as set forth in Brady v. Maryland, 373 US 83 (1963) and further expounded upon in Rummers v. State, 2006 ND 216, 722 NW 2nd 568 (ND 2006). Rummers held that a *Brady* violation has occurred if:

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.

¶9) There is no dispute that the State was in possession of the State Fire Marshal's report and at some time was informed that the ATF investigator indicated he could not conclude arson. A question remains as to whether this evidence is favorable to the defendant in light of other evidence, but for this analysis one can conclude the reports would have been favorable to Froistad.

¶10) There is a question as to whether Froistad had the reports, or, more importantly, could have obtained the reports with reasonable diligence. Froistad called Bowman City Chief of Police on March 27, 1998, almost three years after the fire. During the conversation Froistad told Huso that Froistad was responsible for the fire that claimed his daughter's life. Huso told Froistad that the fire marshal had determined the fire started accidentally in the southeast corner of the living room. Froistad responded that the fire marshal was mistaken, because Froistad himself had set the fire. Based upon Huso's statement (Exhibit C of the Respondent's Brief in Support of Motion to Dismiss Application for Post-Conviction Relief dated February 15, 2012), Froistad was aware the State Fire Marshal had conducted an investigation.

¶11) No evidence has been presented that the State deliberately suppressed the evidence. However, there does not appear to be a requirement of deliberate suppression.

> (I)n order for there to be a *Brady* violation, there are three components: 1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; 2) the State must have suppressed the evidence, either deliberately or inadvertently; and 3) prejudice to the defendant ensued. This case also addressed the question of the defendant not raising alleged violations of the *Brady* rule in prior post-conviction or habeus corpus proceedings.

Strickler v. Greene, Warden, 527 US 263 (1999), 119 S. Ct. 1936

¶12) Is there a reasonable probability that the outcome of the proceeding would have been different if Froistad would have been in possession of the fire reports? The trial court found that Froistad made multiple confessions of killing his daughter. The fact remains that Froistad, knowing on March 27, 1998 that the State Fire Marshal had determined the fire to be accidental, still entered into a negotiated plea agreement on

August 7, 1998. He made the decision to plead guilty to the reduced sentence with the knowledge that there was a question about arson. He also made that decision while represented by legal counsel. He applied for post-conviction relief in 2002, in part based upon ineffective assistance of counsel, and was denied. Froistad v. State, 2002 ND 52, 641 NW 2nd 86 (ND 2002).

¶13) The trial court correctly ruled that Froistad was aware of the State Fire Marshal's report, and that because Froistad voluntarily pled guilty to murder, there was no reasonable probability that the outcome of the proceedings would have been different had the copy of the State Fire Marshal's report, or the oral report of the ATF investigator, been disclosed.

¶14) **Newly discovered evidence about video**. Froistad claims that there is new evidence to indicate the video segments, which were alleged to depict him and his daughter, were actually produced prior to his daughter's birth. Therefore, Froistad claims, the individuals depicted therein could not have been him and his daughter, and this is new evidence and should lead to a new trial.

¶15) In order to obtain a new trial based on newly discovered evidence, Froistad needs to meet the following four-pronged test: "(1) the evidence was discovered after trial, (2) the failure to learn about the evidence at the time of trial was not the result of the defendant's lack of diligence, (3) the newly discovered evidence is material to the issues at trial, and (4) the weight and quality of the newly discovered evidence would likely result in an acquittal. *(Citations omitted)*". Tweed v. State, 2010 ND 38, ¶16, 779 NW 2nd 667.

¶16) Froistad is assuming the evidence concerning the origin of the video was only available after 1998. However, Froistad did have access to the video during the criminal proceeding, and could have been in a position to determine the date of origin. It would seem obvious that Froistad would, and should, have known whether he and his daughter were the subjects of the video found on his computer. If the people in the video were not him or his daughter, Froistad had every opportunity to apply the science available at the time to prove they were not in the video. The State would argue the evidence was not discovered after the plea agreement, and if the date of origin is evidence, Froistad had every opportunity to learn about that evidence at that time.

¶17) Even if the date of origin of the video is determined to be 'new evidence', Froistad still had to meet the final two prongs of the test. The date of origin of the video, and the fact that the people in the video may not have been Froistad and his daughter, have no material impact on the issues of the charges in his North Dakota proceedings. Froistad faced charges of murder. Froistad insists the State's charges hinged on Froistad's killing his daughter to cover up his sexual abuse of his daughter as a motive for the murder. However, motive is not an element of the charge of murder. Given the statements Froistad made to law enforcement, and in on-line chat rooms, and the statement of factual basis he signed (reviewed in Froistad v. State, *id.*), the trial court was not convinced that, if the information about the video predating the birth of Froistad's daughter was newly discovered evidence, the weight and quality of that evidence would result in an acquittal.

¶18) Froistad essentially convicted himself by pleading guilty, and he did so with the knowledge that the State Fire Marshal believed the fire to have been an accidental

electrical fire. As to whether he believed the images on the video to have been him and his daughter or not, only Froistad knows. He waived his right to have the State present evidence against him and to prove his guilt beyond a reasonable doubt. The images on the video, taken from his computer, were apparently identified at one time as having been Froistad and his daughter by his daughter's mother and a social worker (see Memorandum Opinion and Order dated October 1, 2012, page 6). As the trial court opined, evidence as to the date of origin may have been impeachment evidence, but it does not directly pertain to Froistad's guilt or innocence of the charge of murder.

CONCLUSION

¶19) The trial court initially determined there was no genuine issue of material fact. It then went on to determine , based upon the facts as established, if the State was entitled to judgment as a matter of law. Froistad did not show there was a manifest injustice that would allow him to withdraw his guilty plea. Froistad did not satisfy the trial court that Froistad was unaware of the fire reports, nor that there was 'newly discovered' evidence that was relevant to his guilt of the crime of murder. The trial court did not err in summarily dismissing Froistad's Application for Post-Conviction Relief, and that decision should be affirmed.

Respectfully submitted:

James D. Gion (ND ID#03881)
Bowman County State's Attorney's Office
23 Main Avenue South, P.O. Box 101
Regent, North Dakota 58650-0101

Corrected page

CERTIFICATE OF SERVICE

¶20) A true and correct copy of the foregoing Brief of Appellee was on this 2nd day of January, 2013, mailed to the attorney for the Appellant addressed as follows:

Mr. Benjamin C. Pulkrabek, Esq.
402 1st Street NW
Mandan, North Dakota 58554-3118

and further that a true and correct copy was sent on the same date via electronic transmission to

pulkrabek@lawyer.com

__s/James D. Gion _____

James D. Gion (ND ID#03881)