

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

| | | |
|----------------|---|---|
| Afrim Sadik |) | |
| Beciraj, |) | |
| |) | |
| Petitioner and |) | Supreme Court No.20120396; Criminal Case No. 09-2011- |
| Appellant, |) | CR-01438; Civil Case No. 09-2012-CV-02722 |
| |) | |
| vs. |) | |
| |) | |
| State of North |) | |
| Dakota, |) | |
| |) | |
| Respondent and |) | |
| Appellee. |) | |

APPEAL FROM THE CASE COUNTY DISTRICT COURT ORDER DATED
10/05/2012 DENYING PETITIONER'S APPLICATION FOR POST-CONVICTION
RELIEF

EAST CENTRAL JUDICIAL DISTRICT

BRIEF OF PETITIONER - APPELLANT,

AFRIM SADIK BECIRAJ

Bobbi L. Weiler (NDID 06546)
Jackson, Thomason & Weiler, P.C.
418 East Rosser Avenue Suite 320
Bismarck, ND 58501
Telephone: (701) 751-4847
FAX: (701) 751-4845
Attorney for the Appellant

TABLE OF CONTENTS

| | |
|---|-----------|
| Table of Authorities | Page 3, 4 |
| Jurisdictional Statement | ¶1 |
| Statement of the Issues Presented for Review | ¶2 |
| Statement of the Case | ¶3 |
| Statement of the Facts | ¶4 |
| Procedural Background | ¶5 |
| Legal Argument | ¶¶6-11 |
| A. Standard of Review. | |
| B. The District Court erred and denied Mr. Beciraj due process when it granted the State's Motion for Summary Disposition without giving the Appellant the required time to respond to said Motion and when the Appellant was not given proper Notice or Service of the Motion for Summary Disposition. | |
| Conclusion | ¶12 |
| Certificate of Service | Page 11 |

TABLE OF AUTHORITIES

| <u>Case Law:</u> | <u>Paragraph No:</u> |
|---|----------------------|
| <u>Armstrong v. Manzo</u> , 380 U.S. 545 (1965) | 7 |
| <u>Hoffman v. North Dakota Workers Comp. Bureau</u> , 1999 ND 66, 592 N.W.2d 533 | 7 |
| <u>In the interest of D.C.S.H.C.</u> , 2007 ND 102, 733 N.W.2d 902 | 7 |
| <u>Johnson v. State</u> , 2004 ND 130, 681 N.W.2d 767 | 8 |
| <u>Mathews v. Eldridge</u> , 424 U.S. 319 (1976) | 7 |
| <u>Rowley v. Cleaver</u> , 1999 ND 158, 598 N.W. 2d 125 | 6, 7 |
| <u>Schmalle v. Schmalle</u> , 1998 ND 201, 586 N.W.2d 677 | 7 |
| <u>State v. Ehli</u> , 2003 ND 133, 667 N.W.2d 635 | 7 |
| <u>State v. Treis</u> , 1999 ND 136, 597 N.W.2d 664 | 6 |
| <u>Stutsman County v. Westereng</u> , 2001 ND 114, 628 N.W.2d 305 | 7 |
| <u>Tormaschy v. Tormaschy</u> , 1999 ND 131, 596 N.W.2d 337 | 6 |
| <u>Tweed v. State</u> , 2010 ND 38, 779 N.W.2d 667 | 6 |
| <u>U.S. Constitutional Provisions:</u> | |
| U.S. Const. Amend. XIV § 1 | 6 |
| <u>North Dakota Constitutional Provisions:</u> | |
| N.D. Const. Art. I, § 12 | 6 |
| N.D. Const. Art. VI, §§ 1 and 6 | 1 |
| N.D. Const. Art. VI, § 8 | 1 |

North Dakota Rules of Civil Procedure

N.D.R.Civ.P 5(b)(1) 10

N.D.R.Civ.P. 56(c) 8

North Dakota Rules of Court

N.D.R.Ct. 3.2(a)(1) 10

N.D.R.Ct. 3.2(f) 8

I. JURISDICTIONAL STATEMENT.

[1] The District Court had jurisdiction pursuant to N.D. Const. Art. VI, § 8. This Court has jurisdiction under N.D. Const. Art. VI, §§ 1 and 6.

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW.

[2] The District Court erred and denied Mr. Beciraj due process when it granted the State's Motion for Summary Disposition without giving the Appellant the required time to respond to said Motion and when the Appellant was not given proper Notice or Service of the Motion for Summary Disposition.

III. STATEMENT OF THE CASE.

[3] Appellant pled guilty of Contributing to the Delinquency of a Minor on January 9, 2012. This case comes before the North Dakota Supreme Court on appeal from an Order granting the State's Motion for Summary Disposition on Appellant's Petition for Post-Conviction Relief. Mr. Beciraj filed his first Application for Post-Conviction Relief on the basis that he did not receive effective counsel at the trial level regarding his attorney's failure to adequately inform him of the consequences that pleading guilty would have on his immigration status, and that such lack of informing him of the consequences created a manifest injustice. The District Court summarily dismissed Mr. Beciraj's claims.

IV. STATEMENT OF THE FACTS.

[4] The relevant facts to this appeal are that Mr. Beciraj brought an application for post-conviction relief on or about September 4, 2012. (Register of Actions, 1; App. 5-11). The Appellant's Attorney was appointed and assigned on or about September 19, 2012. (App. 15). The State filed its Response to Petition for Post-Conviction Relief and

Motion for Summary Disposition on or about October 1, 2012. (Register of Actions, 14; App. 16-18). The State failed to serve any notice with its Motion for Summary Disposition. The State served the Appellant with its Response and Motion for Summary Disposition at the Sherburne County Jail on October 1, 2012. (App. 19). The State failed to serve the Appellant's Attorney. The District Court issued its Order granting the State's Motion for Summary Disposition on or about October 5, 2012. (App. 20).

V. PROCEDURAL BACKGROUND.

[5] The relevant facts to this appeal are that Mr. Beciraj brought an application for post-conviction relief on or about September 4, 2012. (Register of Actions, 1; App. 5-11). The Appellant's Attorney was appointed and assigned on or about September 19, 2012. (App. 15). The State filed its Response to Petition for Post-Conviction Relief and Motion for Summary Disposition on or about October 1, 2012. (Register of Actions, 14; App. 16-18). The State failed to serve any notice with its Motion for Summary Disposition. The State served the Appellant with its Response and Motion for Summary Disposition at the Sherburne County Jail on October 1, 2012. (App. 19). The State failed to serve the Appellant's Attorney. The District Court issued its Order granting the State's Motion for Summary Disposition on or about October 5, 2012. (App. 20).

VI. LEGAL ARGUMENT.

A. Standard of Review.

[6] "Proceedings on applications for post-conviction relief are civil in nature and governed by the North Dakota Rules of Civil Procedure." Tweed v. State, 2010 ND 38, ¶ 15, 779 N.W.2d 667 (internal citations omitted). However, a claimed violation of a constitutional right is reviewed de novo. Rowley v. Cleaver, 1999 ND 158, ¶ 8, 598

N.W. 2d 125; State v. Treis, 1999 ND 136, ¶ 11, 597 N.W.2d 664. Under the Fourteenth Amendment, no state may deprive a person of liberty without due process of law. U.S. Const. Amend. XIV § 1. The North Dakota Constitution provides the same protections under Article I, § 12. In addition, a clearly erroneous standard is the appropriate standard for reviewing errors in the findings of fact. Tormaschy v. Tormaschy, 1999 ND 131, ¶ 11, 596 N.W.2d 337.

B. The District Court erred and denied Mr. Beciraj due process when it granted the State's Motion for Summary Disposition without giving the Appellant the required time to respond to said Motion and without Appellant getting adequate Notice of the Motion.

[7] "A person is denied due process when defects in the procedure employed might lead to a denial of justice." State v. Ehli, 2003 ND 133, ¶ 10, 667 N.W.2d 635; see also Stutsman County v. Westereng, 2001 ND 114, ¶ 8, 628 N.W.2d 305; Hoffman v. North Dakota Workers Comp. Bureau, 1999 ND 66, ¶12, 592 N.W.2d 533. "The fundamental requirements of due process are notice and a fair opportunity to be heard." Id. citing Rowley v. Cleaver, 199 ND 158, ¶18, 598 N.W.2d 125; Hoffman at ¶12, 592 N.W.2d at 537; Schmalle v. Schmalle, 1998 ND 201, ¶ 9, 586 N.W.2d 677. It is a fundamental requirement of due process to be heard "at a meaningful time and in a meaningful manner." In the interest of D.C.S.H.C., 2007 ND 102, ¶ 11, 733 N.W.2d 902 citing Mathews v. Eldridge, 424 U.S. 319, 333 (1976), quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

[8] North Dakota Rule of Court 3.2 provides, "this rule does not apply to the extent it conflicts with another rule adopted by the Supreme Court." N.D.R.Ct. 3.2(f). North Dakota Rule of Civil Procedure 56 provides, "[a]n opposing party must have 30

days after service of a brief to serve and file an answer brief and supporting papers.” N.D.R.Civ.P 56(c). In addition, the North Dakota Supreme Court has already found that in a Post-Conviction Proceeding, the Petitioner must be given thirty (30) days to respond to a Motion for Summary Disposition. Johnson v. State, 2004 ND 130, ¶ 6, 681 N.W.2d 767. The Court in Johnson stated:

Johnson's application for post-conviction relief was filed on April 15, 2003, and the State's brief in response to the application requesting summary disposition without a hearing was filed on June 17, 2003. The district court denied the second application on July 1, 2003, two weeks after the State requested summary disposition. Because post-conviction relief proceedings are civil in nature and all rules and statutes applicable in civil proceedings are available to the parties, see Vandeberg v. State, 2003 ND 71, ¶ 5, 660 N.W.2d 568, Johnson, under N.D.R.Civ.P. 56(c), should have been afforded 30 days after service of the State's brief within which to serve and file an answer brief and supporting papers in opposition to the request for summary disposition. See Alerus Fin. v. Lamb, 2003 ND 158, ¶ 17, 670 N.W.2d 351.

Johnson, ¶6, 681 N.W.2d at 773.

[9] In this case, Mr. Beciraj was not given the required thirty (30) days to respond to the State's Motion for Summary Disposition. In fact, the Court issued its order four days after the State filed its Motion. Mr. Beciraj brought an application for post-conviction relief on or about September 4, 2012. (Register of Actions, 1; App. 5-11.) The State filed its Response to Petition for Post-Conviction Relief and Motion for Summary Disposition on or about October 1, 2012. (Register of Actions, 14; App. 16-18.) The District Court issued its Order granting the State's Motion for Summary Disposition on or about October 5, 2012. (App. 20.) Mr. Beciraj was not afforded due process of law. The District Court Judge erred when it failed to afford Mr. Beciraj thirty (30) days to respond to the State's Motion for Summary Disposition.

[10] In addition, Rule 5 of the North Dakota Rules of Civil Procedure provides that “if a party is represented by an attorney, service under this rule *must* be made on the attorney unless the court orders service on the party.” N.D.R.Civ.P. 5(b)(1) (emphasis added). Moreover, North Dakota Rule of Court 3.2 provides, “[n]otice must be served and filed with a motion. The notice must indicate the time of oral argument, or that the motion will be decided on briefs unless oral argument is timely requested.” N.D.R.Ct. 3.2(a)(1).

[11] The State failed to serve any notice with its Motion for Summary Disposition. In addition, the Appellant’s Attorney was appointed and assigned on or about September 19, 2012. (App. 15.) The State served the Appellant at the Sherburne County Jail with its Response and Motion for Summary Disposition on October 1, 2012, almost two weeks after the Appellant’s attorney was appointed. (App. 19). The State failed to serve the Appellant’s Attorney. The District Court erred when it granted the State’s Motion for Summary Disposition when the Motion was served improperly without serving a Notice of Motion with the Motion for Summary Disposition and the Motion was not properly served upon the attorney for the Appellant.

VII. CONCLUSION.

[12] For the foregoing reasons, Afrim Sadik Beciraj respectfully requests that this matter be in all things reversed.

Dated this 14th day of December, 2012.

/s/Bobbi L. Weiler
Jackson, Thomason & Weiler, P.C.
Bobbi L. Weiler (NDID 06546)
418 E Rosser Ave., Suite 320
Bismarck, ND 58501
Phone: 701-751-4847
Fax: 701-751-4845
Email: bweilerjt@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Petitioner - Appellant, Afrim Sadik Beciraj, was on the 14th day of December, 2012, served electronically to the following:

Ryan Younggren
Attorney at Law
younggrenr@casscountynd.gov

/s/Bobbi L. Weiler
Bobbi L. Weiler (NDID 06546)