

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Reginald E. Tweed,)	
)	
Petitioner and Appellant,)	Supreme Court No. 20130246
vs.)	District Ct. No. 2010-CV-4415
)	
State of North Dakota,)	
)	
Respondent and Appellee.)	

Appeal from the Findings of Fact, Conclusions of Law, and Order for Judgment
dated August 2, 2013
East Central Judicial District
the Honorable Frank L. Racek, Presiding

APPELLEE’S BRIEF

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[¶3] STATEMENT OF ISSUE

[¶4] I. Whether the district court properly concluded Tweed failed to prove the prejudice element of his ineffective assistance of counsel claim because he did not present evidence showing his own actions were clearly insufficient, and Sumner's actions were clearly sufficient, to cause Dorff's death.

[¶5] STATEMENT OF CASE

[¶6] Tweed appeals from the district court's denial of his post-conviction relief claim of ineffective assistance of counsel. Tweed challenges the district court's ruling that he failed to prove his claim.

[¶7] The State argues that the district court properly concluded Tweed failed to prove the prejudice element of his ineffective assistance of counsel claim. Tweed did not present evidence showing his own actions were clearly insufficient, and Sumner's actions were clearly sufficient, to cause Dorff's death. The State requests this Court affirm the district court's decision.

[¶8] STATEMENT OF FACTS

[¶9] A. The Murder & Trial

[¶10] In April of 1991, police found Terry Dorff dead on his waterbed at his Fargo home. State v. Tweed, 491 N.W.2d 412, 413 (N.D. 1992). Dorff, unclothed from the waist down, had been gagged, hog-tied, and badly beaten about the face and head. Id. A large bloodied rock lay beside Dorff's head. Id. Also near Dorff's body was a unique key chain – photos of which police released

to the media for help in solving the case. Id. After seeing media reports, Tweed's wife contacted police and stated that the key chain was Tweed's. Id.

[¶11] Tweed later went to pick up the key chain. When doing so, he spoke with officers and admitted "that he and David Sumner ... hit Dorff about the face and head with their fists, ... bound him in the 'hog-tie' position, ... placed a large gag in his mouth, ... struck him on the head with a large rock, and then [] fled his residence in Dorff's car." Id.

[¶12] Dr. Maureen Frikke performed an autopsy and determined Dorff died from blood loss and asphyxia. Tweed v. State, 2010 ND 38, ¶ 5, 779 N.W.2d 667. Frikke found that the blood loss was due to five head lacerations, caused by blunt force trauma, possibly being struck by the rock police discovered on Dorff's bed. Id. Just two of the lacerations, Frikke believed, could have caused "immediate, significant blood loss." Id. Frikke found that the asphyxia was caused by several factors: Dorff's hog-tied position, the gag in Dorff's mouth, and the position of Dorff's face against the waterbed. Id. A hog-tied position alone, Dr. Frikke noted, had caused death in other cases. Id.

[¶13] The State charged Tweed and Sumner with murder and theft. State v. Tweed, 491 N.W.2d 412, 412 (N.D. 1992). At trial, officers testified about the discovery of Dorff's body and Tweed's admissions, and Dr. Frikke testified about the cause of death. Tweed v. State, 2010 ND 38, ¶¶ 4-5, 779 N.W.2d 667.

[¶14] During the defense case, Tweed testified that after Dorff met Tweed and Sumner at an adult bookstore, Dorff invited them to Dorff's home; that at

Dorff's home, Dorff made several advances toward Tweed; that Tweed got very angry and began punching Dorff in the face and head; that Sumner joined in the beating; that Dorff began hitting back and yelling, and threatened to call police; that Tweed and Sumner gagged and hog-tied Dorff to prevent him from making noise and from fighting back; that "they then hit Dorff over the head with the large rock to knock him out, 'so [they] could get a head start before he woke up and called the police.'" State v. Tweed, 491 N.W.2d 412, 413 (N.D. 1992).

[¶15] Besides testifying himself, Tweed called Sumner as a witness. (Tr. of Oct. 21-25, 1991, at 331:25-334:17); Tweed v. State, 2010 ND 38, ¶ 6, 779 N.W.2d 667. When asked about the events involving Dorff, Sumner refused to answer, asserting his rights under the Fifth Amendment. (Tr. of Oct. 21-25, 1991, at 331:25-334:17); Tweed v. State, 2010 ND 38, ¶ 6, 779 N.W.2d 667.

[¶16] The jury found Tweed guilty of murder and theft. State v. Tweed, 491 N.W.2d 412, 413 (N.D. 1992). On the murder count, the court imposed a sentence of life imprisonment. Id. Tweed appealed, and this Court affirmed. Id.

[¶17] **Tweed's First Post-Conviction Action**

[¶18] About seventeen years after he was found guilty, Tweed filed a petition for post-conviction relief. Tweed v. State, 2010 ND 38, ¶12, 779 N.W.2d 667. Tweed's claims included newly discovered evidence and ineffective assistance of counsel. Id.

[¶19] The newly discovered evidence claim was based on the statement of

Todd Suedel, a prisoner incarcerated with Sumner, who told police Sumner admitted "that he took part in the murder by hitting Dorff"; that "between the four walls and myself that no one could prove how many times he hit Dorff with the rock"; and that "Tweed hit him once or twice and then left the room[.]" Id. at ¶¶ 10, 12. The newly discovered evidence claim was also based on the theory that Sumner, who had been acquitted, was now available as a witness. Id. at ¶ 12. The ineffective assistance of counsel claim was based in part on Tweed's attorney's failure to raise Sumner's availability as a witness because Sumner had been acquitted while Tweed's appeal was pending. Id. Concluding neither claim was proven, the district court denied Tweed's petition. Tweed appealed.

[¶20] Addressing Tweed's newly discovered evidence claim, this Court recognized that Tweed bore the burden of proving Suedel's statement was likely to lead to acquittal. Id. at ¶ 19. At the outset, the Court noted that "Suedel's statement corroborates evidence at trial[.]" Id. Citing N.D.C.C. § 12.1-02-05, the Court explained that "for Suedel's statement to be likely to lead to an acquittal, it would have to demonstrate Tweed's actions were clearly insufficient to cause Dorff's death, while Sumner's actions were clearly sufficient. Id. Pointing out Dr. Frikke's testimony about the cause of death and Tweed's own testimony that he wrestled Dorff on the bed, helped gag and hog-tie Dorff, and struck Dorff in the head with the rock, the Court concluded that "Tweed admitted to committing several acts that directly caused Dorff's death." Id. at ¶ 20. The Court concluded that "even if Suedel's statement were admitted into evidence and jurors inferred Sumner struck

Dorff outside Tweed's presence, Tweed would still likely be found guilty of murder." Id. Simply put, "Suedel's statement does not demonstrate Tweed's actions were clearly insufficient to cause Dorff's death, nor that Sumner's were clearly sufficient." Id. The Court thus rejected Tweed's newly discovered evidence claim. Id.

[¶21] Addressing Tweed's ineffective assistance of counsel claim, the Court noted that Tweed bore the burden of proving that Sumner's testimony would likely lead to an acquittal. Id. at ¶ 23. At the outset, the Court recognized that Tweed failed to show the likely substance of Sumner's testimony. Id. at ¶ 23. The Court pointed out that Tweed produced neither an affidavit nor trial testimony from Sumner. Id. Turning to Suedel's statement about what Sumner had purportedly said, the Court again explained that was insufficient to likely result in acquittal. Id. The Court, accordingly, rejected Tweed's ineffective assistance of counsel claim.

[¶22] C. **Tweed's Second Post-Conviction Action**

[¶23] About nine months after this Court rejected his arguments about his first postconviction relief application, Tweed filed a second application for postconviction relief. Tweed v. State, 2011 ND 228, ¶ 5, 807 N.W.2d 599. Tweed claimed newly discovered evidence, prosecutorial misconduct, ineffective assistance of trial counsel, and ineffective assistance of post-conviction counsel.

[¶24] In the ineffective assistance of post-conviction counsel claim, Tweed alleged (1) "Tweed repeatedly told his attorney[, Brian Nelson,] to contact David Sumner and Todd Suedel and get affidavits or statements from them and subpoena

them to attend the 09-04-09 hearing”; (2) “Nelson failed to follow his client’s instructions”; (3) “Tweed instructed his attorney[, Chad McCabe,] to raise a few issues on his appeal” and “McCabe never followed his client’s instructions.” (Application for Post-Conviction Relief at 73-74.)

[¶25] The State moved for summary dismissal of all the claims, except ineffective assistance of post-conviction counsel. Tweed v. State, 2011 ND 228, ¶ 5, 807 N.W.2d 599. The district court granted the motion and included all the claims. Id. Tweed appealed. Id. at ¶ 1.

[¶26] Addressing Tweed's ineffective assistance of post-conviction counsel claim, the Court noted it included (1) that "his prior post-conviction counsel was ineffective for failing to contact two potential witnesses, file affidavits from the witnesses, and subpoena the witnesses to attend the hearing on his application for post-conviction relief [and] ... he failed to follow Tweed's instructions[,] [and] (2) and "his appellate counsel in his prior post-conviction proceeding was ineffective for failing to raise the issues Tweed wanted him to raise on appeal[.]" Id. at ¶ 7. The Court further noted that Tweed alleged the result of his previous post-conviction hearing would have been different but for his attorneys' ineffectiveness. Id. Concluding "it may have been possible for Tweed to prove a claim for which relief could be granted[.]" this Court reversed the district court's summary dismissal of the ineffective assistance of post-conviction relief counsel claim. Id. at ¶ 10.

[¶27] Addressing Tweeds other claims, the Court affirmed the summary dismissal of them based on res judicata and misuse of process. *Id.* at ¶ 12. The case thus was remanded for proceedings only on Tweed’s ineffective assistance of post-conviction counsel claim. *Id.* at ¶ 13.

[¶28] D. **Proceedings After Remand on the Second Post-Conviction Relief Application**

[¶29] After remand, the district court held a hearing on Tweed’s ineffective assistance of post-conviction counsel claim. Tweed called several witnesses at the hearing.

[¶30] One of Tweed’s witnesses was Chad McCabe, who testified that he “felt the issues [on appeal] were very good”; that he was “disappointed the Supreme Court took the position they[sic] did”; and that he was not aware of any evidence that discredited the State’s position and Dr. Frikke’s in Tweed’s trial. (Tr. of Post-Conviction Relief Hearing, July 15, 2013 “Tr. of PCR” at 31:24-32:1, 33:19-22.)

[¶31] Another of Tweed’s witnesses was expert Tom Tuntland, who testified that Nelson was ineffective because he failed to talk to or depose Suedel, Wagner,¹ and Sumner (Tr. of PCR at 146:21-148:4); that Suedel and Wagner would provide exculpatory evidence (Tr. of PCR at 147:1-22, 153:3-20); that he could not identify anything specific that Sumner would say that would exonerate Tweed (Tr. of PCR at 155:1-3) but later that Sumner would provide exonerating

¹ Tweed spelled the last name, “Wegner,” while the court spelled it, “Wagner.”

evidence to Tweed by testifying that Sumner previously invoked his rights under the Fifth Amendment (Tr. of PCR at 160:6-162:13); that he could not identify anything that Suedel would state, that was different than the statement Suedel had previously made and was admitted at Tweed's first post-conviction hearing (Tr. of PCR at 159:11-16); and that he was unaware of any evidence that Wagner would present that would exonerate Tweed (Tr. of PCR at 159:17-160:5).

[¶32] Tweed himself testified that Nelson should have talked with and deposed Suedel and Wagner (Tr. of PCR at 111:11-116:5); that Tweed believed Wagner would testify that "Sumner admitted murdering someone" (Tr. of PCR at 114:22-25); that Tweed wanted Nelson to have a medical expert at the first post-conviction hearing because he "figured that ... another pathologist or someone with another medical degree could find out, that maybe, perhaps, [Dorff] died some other way" (Tr. of PCR at 118:22-25); and that "DNA evidence could show that someone other than [Tweed] or Sumner could have killed Terry Dorff" (Tr. of PCR at 135:2-8).

[¶33] Only three exhibits were admitted during the hearing. The first exhibit was a handwritten note from Mark Boening, a prosecutor who helped with the trial, along with a copy of the statement Suedel had previously made. (Tr. of PCR at Exhibit 1.) The second exhibit included lab reports and correspondence from 1992. (Tr. of PCR at Exhibit 2.) The third exhibit included Sumner's recent answers to the parties' written deposition questions. (Tr. of PCR at Exhibit 3.) In the answers, Sumner indicated that he was not aware of anyone who could refute

(1) Tweed's own admissions or (2) Dr. Maureen Frikke's trial testimony. (Tr. of PCR at Exhibit 3.)

[¶34] The district court found that Nelson obtained a written statement from Suedel, which was admitted in evidence during the first post-conviction proceeding; that Nelson gathered information on a witness named Helmuth Wagner who may have overheard Sumner make incriminating statements while incarcerated; and that at Tweed's second post-conviction hearing, Tweed presented no additional information about what Wagner's specific testimony would be and instead simply alluded to Wagner corroborating Suedel. (App. at 1-3.) The court reasoned that (1) Tweed presented nothing about how Suedel would exonerate Tweed, beyond what was previously rejected during Tweed's first post-conviction proceeding, (2) Tweed presented nothing about how Wagner would exonerate Tweed, and (3) Tuntland's assertion that Sumner's invocation of the Fifth Amendment might permit the jury to infer that Sumner struck Dorff outside Tweed's presence, but that would not eliminate Tweed's culpability, i.e., show that Sumner's conduct was clearly sufficient to cause Dorff's death and Tweed's conduct clearly insufficient. (App. at 1-6.) The court, accordingly, concluded that Tweed failed to prove the prejudice element of his ineffective assistance of counsel claim. (App. at 1-5, 1-6.)

[¶35] **STANDARD OF REVIEW**

[¶36] Review of a district court's decision on an ineffective assistance of counsel claim involves a mixed question of law and fact. Greywind v. State, 2004

ND 213, ¶13, 689 N.W.2d 390. The district court's legal conclusions are reviewed de novo, while the clearly erroneous standard is applied to the court's factual findings. Id. Under the latter standard, a factual finding is clearly erroneous "if it is induced by an erroneous view of the law, if it is not supported by any evidence, or if, although there is some evidence to support the finding, a reviewing court is left with a definite and firm conviction a mistake has been made." Heckelsmiller v. State, 2004 ND 191, ¶ 5, 687 N.W.2d 454.

[¶37] **LAW AND ARGUMENT**

[¶38] Although Tweed labels his argument as five different ones implicating various constitutional rights, his only claim is that the district court erred in concluding he failed to prove ineffective assistance of counsel.

[¶39] I. **The district court properly concluded Tweed failed to prove the prejudice element of his ineffective assistance of counsel claim because he failed to present evidence showing his own actions were clearly insufficient, and Sumner's actions were clearly sufficient, to cause Dorrf's death.**

[¶40] For an ineffective assistance of counsel claim, a post-conviction relief applicant must prove (1) his attorney's conduct fell below an objective standard of reasonableness, and (2) a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Coppage v. State, 2013 ND 10, ¶ 12, 826 N.W.2d 320 (citation omitted). Unless counsel's error is so blatantly prejudicial that it would in every case, regardless of the other evidence admitted, create a reasonable probability of a different outcome, the prejudicial effect of the error "must be assessed within the context of the remaining evidence properly

presented and the overall conduct of the trial.” Id. (internal quotations and citations omitted).

[¶41] Tweed presented nothing showing how Suedel would exonerate Tweed. During his previous post-conviction proceeding, Tweed introduced Suedel’s statement, and this Court explained that the statement did not exculpate Tweed. During his current post-conviction proceeding, Tweed presented no affidavit or testimony of Suedel. Moreover, Tweed’s expert, Tuntland, conceded that he could not identify anything specific that Suedel would state that would be different from Suedel’s statement in the previous post-conviction proceeding.

[¶42] Tweed also presented nothing showing how Sumner would exonerate Tweed. Tweed relied upon Tuntland’s assertion that Sumner would testify that Sumner had previously invoked his Fifth Amendment right against self-incrimination. But Tweed ignored the key fact – that this Court previously emphasized and the district court noted - that evidence implicating Sumner does not exonerate Tweed. Further, Sumner’s current testimony that he previously invoked his Fifth Amendment is nothing new; Sumner already told the jury that at Tweed’s trial. Still further, Sumner’s answers to written deposition questions indicate he was unaware of any witness who could refute either Tweed’s admissions or Dr. Frikke’s testimony.

[¶43] Finally, Tweed presented nothing showing how Wagner would exonerate Tweed. At the outset, Tweed failed to allege that Nelson was ineffective for not presenting evidence from Wagner. Indeed, Tweed identified Suedel and

Wagner as the two witnesses Nelson failed to procure, and included Wagner as part of his prosecutorial misconduct claim – which this Court affirmed the summary dismissal of. (Application for Post-Conviction Relief at 73-74, 5.) Regardless, Tweed presented no testimony or affidavit from Wagner. Further, Tweed’s own testimony that he believed Wagner would testify that “Sumner admitted murdering someone” (Tr. of PCR at 114:22-25) does not eliminate Tweed’s culpability. Indeed, it is comparable to, and even less reliable and more vague than, Suedel’s statement. Finally, Tweed’s expert conceded that he was unaware of any evidence that Wagner would present that would exonerate Tweed. (Tr. of PCR at 159:17-160:5.)

[¶44] Tweed’s argument that the State has shown “bias toward Tweed and prejudiced his case” is not an issue properly before this Court. (Appellant’s Brief at 14.) Tweed’s prosecutorial misconduct claim was rejected, and the only issue on remand was ineffective assistance of post-conviction counsel. Tweed’s claim that Clark lied during argument in the post-conviction hearing itself is insupportable; as noted, Tweed – in his allegations regarding Attorney Nelson’s ineffectiveness – identified only Sumner and Suedel, and not Wagner. And regardless, the court actually addressed the issue of whether Wagner could exonerate Tweed.

[¶45] Simply put, Tweed failed to present evidence showing that his own actions (helping hit, hog-tie, gag, smash over the head with a rock, and leave on a waterbed) were clearly insufficient, and Sumner’s actions were clearly sufficient,

to cause Dorrf's death. The district court thus properly concluded Tweed failed to prove ineffective assistance of post-conviction counsel.

[¶46] **CONCLUSION**

[¶47] Because the district court properly concluded Tweed failed to prove the prejudice element of his ineffective assistance of counsel claim, this Court should affirm the district court's decision.

Dated this 4th day of December, 2013.

Cherie L. Clark, NDID #6306
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Assistant State's Attorneys
Attorneys for Plaintiff-Appellee

[¶48] CERTIFICATE OF SERVICE

[¶49] A true and correct copy of the foregoing document was sent by mail on the 4th day of December, 2013, to: Reginald Tweed at North Dakota State Penitentiary, 3100 E. Railroad Ave, Bismarck, North Dakota 58506.

Cherie L. Clark, NDID #06306