

IN THE SUPREME COURT OF NORTH DAKOTA FILED
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DEC 18 2013

REGINALD E. TWEED,)	
)	
Appellate/Petitioner,)	STATE OF NORTH DAKOTA
)	Supreme Court No. 20130246
V.)	
)	Cass County No. 2010-CV-4415
STATE OF NORTH DAKOTA,)	
)	
Appellee/Respondent.)	
)	
)	

APPELLATE'S REPLY BRIEF

APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
ORDER FOR JUDGEMENT FOR
APPLICATION FOR POST CONVICTION RELIEF ENTERED IN THE
DISTRICT COURT OF THE EAST CENTRAL JUDICIAL DISTRICT,
THE HONORABLE FRANK L. RACEK, PRESIDING ON AUGUST 2, 2013.

Reginald E. Tweed, Pro Se
Petitioner-Appellant
P.O. Box 5521
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ARGUMENT

1. It is important to note, that the only issue before the lower court, and now before this Court, is whether or not Mr. Brain Nelson was ineffective as post conviction counsel for Tweed.

Tweed, the lower court, and the State agree that the first prong has been met, due to the fact that no one has argued to the contrary, thus there is no dispute for the Supreme Court to settle. Mr. Nelson's performance fell below an objective standard of reasonableness, and was therefore ineffective as Tweed's counsel. It is now a small step to prove the second prong, and that is, that Mr. Nelson's deficient performance prejudiced Tweed.

Tweed has proven both prongs in this case. The testimony of all the witnesses, the expert, the evidence, and Mr. Nelson's own admissions indicate that Tweed's right to effective counsel has been violated; he did not receive effective counsel at his 2009 post conviction hearing. The evidence and witnesses at the July 15th hearing further proved that Mr. Nelson's deficient performance prejudiced Tweed.

Tweed has provided this Court with many examples, in his Brief and in the transcripts; of how Nelson's deficient performance prejudiced him. The State has basically chosen to focus on only one example. Throughout the 'Appellee's Brief', the state repeatedly says (Appellee's Brief paragraph ¶4) "...he (Tweed) did not present evidence showing his actions were insufficient, and Sumner's actions were clearly sufficient, to cause Dorff's death." This is obviously poisoned fruit from Mr. Nelson's deficient performance during Tweed's first post conviction. And it was not an issue properly before the lower court, and is therefore moot. In the Appellee's Brief, the state

used about 2,000 words to ‘spin’ and argue the one moot point, and chose not use the remaining 6,000 words to address any other of Tweed’s numerous examples in his petition and Brief, regarding the issue of how Nelson’s deficient performance prejudiced him, and how the lower court erred or arbitrarily made the order, or made it in absence of clear and convincing evidence, and/or based on evidence beyond the scope of the Supreme Court’s order, or how it disregarded evidence and testimony of witnesses including an expert. The State did not offer any substantial evidence or argument to refute Tweed’s claim that judge Racek was bias, had a conflict of interest or any valid reasons to disregard evidence or witnesses, especially the only expert on record. If they could have, they certainly would have, they had opportunity, but basically chose to focus on one issue.

2. Tweed was barred by the Supreme Court from bringing up any new evidence to the lower court on July 15th, 2013 regarding his actions the night Terry Dorff lost his life, because he was limited, by the Supreme Court order, to the sole issue of ineffective assistance of post conviction counsel.

It was unfair for the state to bring arguments, in their brief, that were beyond the scope of the Supreme Court’s order which specifically limited the hearing to ineffective post conviction counsel. Tweed can certainly prove he clearly did not cause Dorff’s death in a new trial, and present new evidence and new witnesses before a new jury, where he will surely be acquitted, if supplied with effective counsel. Causation is a jury question, and only they can properly weigh evidence at a new trial, but all new evidence and new witnesses are barred due to Mr. Nelson deficient performance. In the context of

the evidence and overall conduct of Tweed's 1991 trial, Tweed was not believed.

Evidence now exists that can clearly show a jury, Tweed did not kill Dorff, and/or refute Dr. Frikke has been barred by Nelson's deficient performance.

In paragraph (¶7) of the Appellee's Brief, the state argued that "...Tweed failed to prove the prejudice element of his ineffective claim. Tweed did not present evidence showing his actions were clearly insufficient..." The states argument is flawed because Tweed was specifically barred from bringing any new evidence that did not pertain to the ineffectiveness of Mr. Nelson and how counsel's deficient performance prejudiced Tweed. Tweed gave many examples in his Appellate's Brief and in the court transcripts regarding causation and his actions reducing or negating his culpability, and how he was prejudiced, because the new evidence and witnesses are now barred.

In reply to the Appellee's Brief (paragraph ¶7), some of the issues Tweed already raised, that are barred by the Supreme Court in the instant case, that can help Tweed reduce or negate his culpability, or clearly show how his actions were insufficient or could bring causation into play are;

A) Evidence of DNA to help prove that after Tweed left the scene, either Aaron Anderson, Jill O'Donnell, or David Sumner put the gag back in Dorff's mouth, Hit Dorff with a rock three times, and put the pillow on Dorff's head. All had opportunity, and all could describe the crime scene before any information was released to the public, even Tweed could not describe the crime scene as accurately as Anderson. B) The 911 call Tweed placed from the Highway Host in West Fargo to further get Dorff aid. C) Dr. Reay's 2005 recanting of his 1989 findings regarding 'hog-tying' and 'positional asphyxia' further refuting Dr. Frikke's 1991 findings and testimony, as she admittedly

based her findings on his erroneous findings. D) Jason and Sheri Johnson are new witnesses that have never been heard before any court are new evidence that have new information of David Sumner's own admissions bragging that he killed a guy and got away with it. E) A psychologist's opinion of Tweed's frame of mind after being sexually assaulted by Dorff. F) Equal rights as a sexual assault victim, since Tweed was a male instead of a female in 1991, the sexual assault has unfairly been down played by the State's attorney's office by being referred to as an 'advance', 'approach', or simply being 'hit on' by Dorff. G) Any new evidence regarding Tweed's actions the night of April 8th, 1991. H) Evidence that can dispute cause of death now exist, but has been barred, including but not limited to blood loss, positional asphyxia, and hog-tie. I) The State now believing Tweed was truthful at his 1991 trial.

All these things plus many others Tweed has claimed in his second post conviction, are barred by the Supreme Court and can not be brought up or used, therefore, prejudice has resulted from Mr. Nelson's deficient performance. Tweed wanted these issues addressed at his first post conviction but they were not, and as a result Tweed has been harmed. Which means the state's argument fails with their attempt to argue that the court properly concluded Tweed was not prejudiced as a result of Mr. Nelson's ineffectiveness. The second prong of ineffectiveness has clearly been met, as Tweed undoubtedly has been harmed, and in the interest of justice the lower court's order must be reversed.

3. In paragraph ¶30 of the Appellee's Brief, The State unfairly refers to questions that they asked Mr. McCabe, that were beyond the scope of the Supreme Court's order.

They asked him (Tr. Of Post-Conviction Relief Hearing, July 15th, 2013 “Tr of PCR” at 33:19-22) “You are not aware if any evidence that discredits the State’s position and Dr. Frikke’s in Mr. Tweed’s trial?” And in paragraph ¶31 of the Appellee’s Brief, they unfairly refer to questions that they asked Mr. Tuntland, that were beyond the scope of the Supreme Court’s order. (Tr. of Post-Conviction Relief Hearing, July 15th, 2013 “Tr of PCR” at 155:1-3) “You cannot point to anything specific that Sumner would say that would exonerate Tweed?”

These questions had nothing to do with ineffective assistance of counsel, so are therefore moot. Perhaps if Mr. Nelson followed Tweed’s instructions, was effective as counsel, and had not prejudiced Tweed by not gathering the information for Tweed’s first post conviction, then Mr. McCabe and Mr. Tuntland would have been in a position to answer the questions. But the questions are poisoned fruit from Mr. Nelson’s deficient performance. What is important and relevant, is what Attorney Chad McCabe did testify to, (Tr. of PCR” at 31:8-10) And (Tr. of PCR” at 33:18) A: “I think Mr. Tweed deserves a new trial.”

The Expert Tom Tuntland testified that Mr. Nelson’s deficient performance prejudiced Tweed. It is relevant and the only issue properly before this Court. (see July 15th, 2013 PCR TR. 146:13-20): Q: “So based on your review of the pleadings in this case and transcript and the Supreme Court’s opinion, have you been able to formulate an opinion as to the effectiveness of Mr. Nelson in handling Mr. Tweed’s case?”

A: “Yes. In my opinion, Mr. Nelson did not handle the post-conviction effectively, and **his ineffectiveness was prejudicial to Reginald Tweed.**”

Any chance in 2013 for any of Tweed's witnesses gathering that information to present to the court or to the state has been barred, or ruined by Mr. Nelson's 2009 deficient performance.

4. In paragraph ¶41, ¶42, ¶43 of the Appellee's Brief, they start each paragraph by stating "Tweed presented nothing..." At the time frames they are talking about originate from the time Tweed was represented by Mr. Nelson at his first post conviction, so they are actually proving Tweed's case, because to be accurate, the questions should have been starting out with "Mr. Nelson presented nothing..." This helps to prove Mr. Nelson was not effective and how Tweed has now been prejudiced by his deficient performance.

Sumner made a deposition (TR of PCR at Exhibit 3.) In response to paragraph ¶42 of the Appellee's Brief, it is very important to note that Sumner had a perfect opportunity to lie and say "Tweed did it all!", or "Tweed knew about it, but didn't stop me or tell the police what I did!" Instead he opted to be truthful in silence then to lie with words. He knows he killed Dorff after Tweed left and never told Tweed. He already told Wegner, Suedel, Jason Johnson, and Sheri Johnson that he did it. He likely, did not want to face perjury charges or give the state new evidence against him, regardless; it is barred due to Mr. Nelson's deficient performance. A jury can now be ordered to hold Sumner's silence against him as an indication of guilt. And it is still possible to prosecute Sumner.

5. Tweed actually shown, Mr. Nelson was ineffective and how he was, and is, still being prejudiced by Mr. Nelson's deficient performance. In every case, if an attorney does nothing to prepare for a hearing and does not follow his client's instructions on how

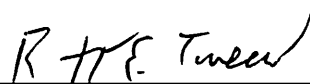
and where to find evidence to prove he can win his case, and that attorney doesn't even bother to discuss it with his client, and as a result the case is denied, and all the issues the client wanted him to raise are barred in the future, than that attorney was ineffective and prejudiced his client. Just like Mr. Nelson did in Tweed's case. Tweed also showed that if it was not for all the counsel's errors the results of the first post conviction would have been different, and that he will be acquitted in a new trial.

CONCLUSION

Tweed has no criminal history prior to 1991. Nelson was ineffective and prejudiced Tweed. The preponderance of evidence is entirely in Tweed's favor, and the State has no evidence or witnesses that would secure a conviction of Tweed. Simply put, there is no confidence in the conviction of Reginald Tweed for 'AA' Murder. His case must be weighed by a new jury.

A mistake has been made in this case. This Court can in good conscience vacate his conviction, reverse the lower court's order, or alternatively grant a new trial where he will most certainly be acquitted, or at minimum grant Tweed a new post conviction with an entirely new and fair judge.

Dated this 18 day of December, 2013.



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CERTIFICATE OF SERVICE BY MAIL **FILED**
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STATE OF NORTH DAKOTA)
) SS.
COUNTY OF BURLEIGH)

DEC 18 2013

STATE OF NORTH DAKOTA

The undersigned, being duly sworn under penalty of perjury, deposes and says: I am over the age of 18 years old, and on the 18 day of December, 2013, I Reginald E. Tweed Box 5521 Bismarck, ND 58506-5521 mailed 8-copies of the following to the Supreme Court, and 1-copy to State's Attorney's Office:

"Appellate's Reply Brief"
"Certificate of Service by Mail"


By placing it/them in a prepaid envelope, and addressed as follows:

Clerk of Supreme Court
Sarah Erck, Deputy Clerk
1st Floor, Judicial Wing
600 E. Boulevard Ave
Bismarck, ND 58505-0530

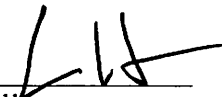
Reid Brady
State's Attorney's Office
Box 2806
Fargo, ND 58108

And depositing said envelope in the Mail at the following address: Box 5521 Bismarck, ND 58506-5521

AFFIANT


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Subscribed and sworn to before me this 18th day of December, 2013


Notary Public
In the County of Burleigh

My commission Expires On May 14, 2018

