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SEPTEMBER 12, 2014
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Riak Riak,	)	
	)	
Petitioner and Appellant,	)	Supreme Court No. 20140128
vs.	)	
	)	District Court No. 09-2013-CR-00436
State of North Dakota	)	
	)	
Respondent and Appellee.	)	

APPEAL FROM THE CIVIL JUDGMENT
EAST CENTRAL JUDICIAL DISTRICT
CASS COUNTY CR. NO. 09-2013-CV-00436
THE HONORABLE JOHN C. IRBY PRESIDING

APPELLEE'S BRIEF

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[¶3] **STATEMENT OF CASE**

[¶4] In 09-2008-K-04448 the Defendant/Appellant was charged with Gross Sexual Imposition, a class A felony, occurring on or about November 15, 2008. Appellee's Appendix p. 1. He pled guilty to that charge and was sentenced on August 17, 2009. Based on the underlying crime and the Appellant's prior record he was sentenced to twenty (20) years, first to serve seventeen (17) years, with ten (10) years supervised probation to follow. Appellee's Appendix pp. It is important to note this was a guilty plea and not a conviction by judge or jury. The crime was the rape of an intoxicated and passed out woman and the evidence in the State's case was substantial, including an eye witness and DNA.

[¶5] On February 22, 2010, the Appellant filed a pro-se application for post-conviction relief. Appellee's Appendix pp. The Appellant's motion claimed ineffective assistance of counsel against his trial counsel, Mr. Mark Beauchene. He stated that Mr. Beauchene made representations to him that he wouldn't spend much time in prison by pleading guilty, he was not informed of the nature of the charge and consequences of the plea, Mr. Beauchene failed to investigate the State's witnesses for improper motive, he was not appraised of the test results on the DNA testing and was just worn down and wanted to move on so he plead guilty. The State filed an answer on March 19, 2010 and denied all allegations. Appellee's Appendix p.

[¶6] The indigent defense counsel appointed Mr. David Dusek as his post-conviction attorney. On September 30, 2010, the parties stipulated to a

continuance “because defense counsel needs more time to obtain information regarding an immigration issue that just arose this past week. The Defendant cannot make an informed decision whether he wants to continue with his Petition until the immigration issue is answered.” Appellee’s Appendix. p. This was granted by the district court on October 1, 2010. Appellee’s Appendix p. On November, 18, 2010, the Appellant withdrew his application for post-conviction relief by stipulation and the District Court judge signed the order on December 1, 2010. Appellee’s Appendix pp. It was clear from discussions with Mr. Dusek that the Appellant did not have a legal basis to withdraw his guilty plea but rather didn’t like the length of his sentence and preferred turning himself over to Immigration and Customs Enforcement to answer for the pending deportation proceedings.

[¶7] On February 6, 2013, the Appellant filed a second pro se motion for post-conviction relief. Appellant’s Appendix pp. 3-18. In Ground One, he renewed his complaints against trial counsel, Mr. Mark Beauchene for ineffective assistance of counsel. Ground Two complained that his sentence was too long. Again, Mr. David Dusek was appointed to represent him for this renewed motion. It remained clear to the undersigned that the Appellant’s biggest complaint is not a cognizable legal argument but rather the length of his Department of Corrections sentence and preference for resolving the pending deportation proceedings.

[¶8] On March 7, 2013, the State fashioned a request for additional time to respond as follows:

[¶9] 1. The undersigned State's Attorney has spoken with the Defendant's assigned attorney, David Dusek, from East Grand Forks, MN. He has requested further time to discuss this post-conviction relief motion with his client.

[¶10] 2. The Defendant filed a pro se application for post-conviction relief on February 5, 2013. The Defendant previously filed in 2010 a request for post-conviction relief which was ultimately withdrawn.

[¶11] 3. Defense counsel has asked the State for additional time to visit with his client about the merits of his post-conviction relief claim. The State does not object to this, in fact joins in the request after phone conversations with the Defendant's attorney, David Dusek, on March 7, 2013.

Appellant's Appendix pp. 23-25.

[¶12] On May 13, 2013, for the same reasons, the parties stipulated to an additional 60 days for the Petitioner to further discuss the merits of his claim with Mr. Dusek. Appellant's Appendix p. 27.

[¶13] On November 5, 2013, the district court issued a Notification of Dismissal stating "[t]he Court has been advised that the above entitled case has been settled or tried. To date closing documents have not been filed." The parties were given 14 days to file further documentation. Appellant's Appendix p. 30. Ultimately, on November 22, 2013, an "Order of DISMISS" (sic) was issued as

the 14 days had expired and "no closing documents were filed". Appellant's Appendix pp. 33-34.

[¶14] The State received a copy of the district court's correspondence with Mr. Riak dated February 25, 2014 stating the court was unable to act on his request made by latter on February 4, 2014. Appellant's Appendix p. 46. Upon information and belief, the State believes the district court was actually referring to the February 18, 2014 letter to the court. Appellant's Appendix on page 41. However, since the State was not included in the February 18, 2014 correspondence from Mr. Riak and no motion was filed, the State was unaware of the letter and did not file any response.

[¶15] Finally, the Appellant filed a Notice of Motion to Re-Open, Dismissed Application for Post-Conviction Relief, dated March 4, 2014. Appellant's Appendix p. 49-55. He levies two complaints against his twice-appointed post-conviction counsel, David Dusek. First, that Mr. Dusek said "he would get Petitioner deported and that this deportation would end Petitioner's United States incarceration". However, Mr. Dusek informed Petitioner this was now an immigration issue for which he was not authorized by the Commission on Legal Counsel for Indigents to represent him and advised him to continue his pro-se application for post-conviction relief. The Petitioner additionally alleged that Mr. Dusek did not inform him that the second motion for post-conviction relief had been dismissed but rather an evidentiary hearing would be held.

[¶16] The State responded to ineffective assistance of post-conviction relief

counsel claims against Mr. Dusek stating that N.D.C.C. § 29-32.1-09(2) prevented any such a claim. Appellant's Appendix p. 56-61. The State further wrote that any implied claims of ineffective assistance of counsel against his trial counsel Mr. Mark Beauchene during the guilty plea in the underlying matter was not and had never been supported by a claim that the guilty plea was involuntary or unintelligent, as is required by law. This was now a third, groundless motion for post-conviction relief and a misuse of process.

[¶17] The district court agreed and Denied the Petitioner's motion to reopen the previously withdrawn post-conviction motion and the dismissal of the second motion for post-conviction relief stating "[e]very application the Petitioner has brought forth has been lacking factual support or a legal basis under N.D.C.C. § 29-32.1-12. Appellant's Appendix p. 62-63. The conduct of the Petitioner in filing and re-filing these post-conviction applications with no legal or factual support arises to misuse of process under N.D.C.C. § 29-32.1-12(2)(b)."

[¶18] STATEMENT OF THE ISSUES

[¶19] **I. Was the Appellant's Motion to Reopen Dismissed Application for Post-Conviction Relief time barred?**

[¶20] **II. Did the District Court Trial properly deny Mr. Riak's Motion to Reopen Dismissed Application for Post-Conviction Relief?**

[¶21] STANDARD OF REVIEW

[¶22] "Post-conviction relief proceedings are civil in nature and governed by the North Dakota Rules of Civil Procedure." Kinsella v. State, 2013 ND 238, ¶ 4, 840 N.W.2d 625. "A district court may summarily dismiss an application for

post-conviction relief if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Waslaski v. State, 2013 ND 56, ¶ 7, 828 N.W.2d 787. "Questions of law are fully reviewable on appeal of a post-conviction proceeding." Haag v. State, 2012 ND 241, ¶ 4, 823 N.W.2d 749.

[¶23] "We review an appeal from a summary denial of post-conviction relief as we review an appeal from a summary judgment." Waslaski, 2013 ND 56, ¶ 7, 828 N.W.2d 787. "The party opposing the motion for summary disposition is entitled to all reasonable inferences at the preliminary stages of a post-conviction proceeding and is entitled to an evidentiary hearing if a reasonable inference raises a genuine issue of material fact." Parizek v. State, 2006 ND 61, ¶ 4, 711 N.W.2d 178. Once the moving party has established there is no genuine issue of fact, the burden shifts to the nonmoving party to show a genuine issue of fact exists. Clark v. State, 1999 ND 78, ¶ 5, 593 N.W.2d 329. The party resisting the motion cannot merely rely on the pleadings or unsupported conclusory allegations; rather the party must present competent admissible evidence by affidavit or other comparable means. Id. "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)." Wright v. State, 2005 ND 217, ¶ 9, 707 N.W.2d 242. Lehman v. State, 2014 ND 103, ¶ 4&5, 847 N.W.2d 119.

[¶24] LAW AND ARGUMENT

[¶25] I. Was the Appellant's Motion to Reopen Dismissed Application for Post-Conviction Relief time barred?

[¶26] It is the State's position that the Appellant had withdrawn all prior applications for post-conviction relief as they were meritless and the relief the Appellant was truly seeking was a shorter sentence, for which there were no legal grounds. This is the information the State was repeatedly receiving from his appointed counsel David Dusek. As such, when the Appellant filed his third motion for post-conviction relief, the State directly addressed the misuse of process and lack of merit of any claims.

[¶27] However, on August 1, 2013 during the pendency of the Appellant's second motion for post-conviction relief N.D.C.C. § 29-32.1-09(2), the North Dakota Legislature enacted a two (2)-year statute of limitations on post-conviction relief petitions.

[¶28] As mentioned, all previous post-conviction motions were withdrawn by the Appellant. His conviction and sentence would have become final on November 15, 2009. The statute of limitations for post-conviction relief would have expired on November 15, 2011. See Lehman v. State, 2014 ND 103, ¶17, 847 N.W.2d 119.

[¶29] **II. <u>Did the District Court Trial properly deny Mr. Riak's Motion to Reopen Dismissed Application for Post-Conviction Relief?</u>**

[¶30] **A. Ineffective Assistance of Post-conviction Counsel- David Dusek**

[¶31] N.D.C.C. § 29-32.1-09(2), as effective on August 1, 2013, states "[t]he court, on its own motion, may dismiss any grounds of an application which allege ineffective assistance of postconviction counsel. An applicant may not claim constitutionally ineffective assistance of postconviction counsel in proceedings under this chapter."

[¶32] The Appellant claimed ineffective assistance of counsel Mr. David Dusek in this third motion for post-conviction relief. The law does not support such claims against post-conviction counsel and all claims against Mr. Dusek were properly dismissed. <u>See</u> <u>Lehman v. State</u>, 2014 ND 103, 847 N.W.2d 119.

[¶33] As outlined above, the Appellant is now mischaracterizing the March 7, 2013 Request and May 13, 2013 Stipulation for Additional Time to Respond. The body of those documents, signed by both parties, clearly spells out the intent of the request for additional time:

[¶34] "Defense counsel has asked the State for additional time to visit with his client about the merits of his post-conviction relief claim. The State does not object to this, in fact joins in the request after phone conversations with the Defendant's attorney, David Dusek"

[¶35] The procedural history of this case is interspersed with pro-se filings and filings made by appointed counsel David Dusek. Because of this, not all

communications to the district court from the Appellant were consistent nor based in the law. Of course, all of the State's communications were only ever with Mr. David Dusek.

[¶36] A complete reading of the history of this case makes it clear there is no basis for the Appellant's claims against Mr. Dusek and dismissal of the third motion for Post-conviction relief was the appropriate remedy. The district court did not abuse its discretion.

[¶37] **B. Ineffective Assistance of Trial Counsel – Mark Beauchene**

[¶38] Should the pro-se motion in any way be seen as an implied attempt to renew his original ineffective assistance of counsel claims against his first counsel, Mr. Mark Beauchene, it is clear that the grounds are still and have always been wanting.

[¶39] "An applicant's attempt to withdraw a guilty plea under the Uniform Postconviction Procedure Act N.D.C.C. ch. 29-32.1, generally is treated as a motion to withdraw a guilty plea under N.D.R.Crim.P. 11(d). State v. Howard, 2011 ND 117, ¶ 3, 798 N.W.2d 675. A defendant who has been sentenced may not withdraw his guilty plea '[u]nless the defendant proves that withdrawal is necessary to correct manifest injustice[.]' N.D.R.Crim.P. 11(d)(2). 'The decision whether a manifest injustice exists for withdrawal of a guilty plea lies within the trial court's discretion and will not be reversed on appeal except for an abuse of discretion.' State v. Jones, 2011 ND 234, ¶ 8, 817 N.W.2d 313 (quotation omitted). 'A Court abuses discretion when it acts in an arbitrary, unreasonable, or

unconscionable manner, or it misinterprets or misapplies the law.' Id. (quotations omitted)" State v. Garge, 2012 ND 138, ¶ 8, 818 N.W.2d 718.

[¶40] "'A criminal defendant has a right to be represented by counsel under the Sixth Amendment to the United States Constitution and Article 1, Section 12 of the North Dakota Constitution.' State v. Dahl, 2009 ND 2004, ¶ 22, 776 N.W.2d 37. The constitutional right to counsel guarantees effective assistance of counsel. Abdi v. State, 2000 ND 64, ¶ 29, 608 N.W.2d 292. When reviewing claims of ineffective assistance of counsel, we apply the United States Supreme Courts two part test from Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984):

> 'First the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that the counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.'

Id at 687, 104 S.Ct. 2052; see Abdi, at ¶ 29.

'To prove 'prejudice,' a defendant who pleads guilty must prove that 'but for counsel's errors, the defendant would not have plead guilty and would have insisted on going to trial.' Abdi, at ¶ 29 (citing Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985))." Id at ¶ 10.

[¶41] "A defendant who pleads guilty upon advice of counsel 'may only attack the voluntary and intelligent character of the guilty plea.' Tollett v. Henderson, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973). The

voluntariness of such a guilty plea turns on 'whether that advice was within the range of competence demanded of attorneys in criminal cases.' Id. at 264, 93 S.Ct. 1602." Damron v. State, 2003 ND 102, ¶ 9, 663 N.W.2d 650.

[¶42] The Appellant did not claim that his guilty pleas were involuntary or unintelligent as required by the law. Nor, as required by law, has it been shown that any of Mr. Beauchene's work on this case was outside the range of competence demanded of attorneys in criminal cases. "Claims of ineffective assistance of counsel are often unsuited to summary disposition, but this Court has 'upheld summary denials of post-conviction relief when the applicants were put to their proof, and summary disposition occurred after the Applicant's then failed to provide some evidentiary support for their allegations.'" Mackee v. State, 2012 ND 159, ¶ 5, 819 N.W.2d 539 (citing Steinbach v. State, 2003 ND 46, ¶ 15, 658 N.W.2d 355).

[¶43] Additionally, any implied claims against Mr. Beauchene in the third motion for post-conviction relief are a misuse of process prohibited by N.D.C.C. § 29-32.1-12. While no hearing was held previously on these matters, the Appellant voluntarily withdrew his prior petition claiming ineffective assistance of trial counsel. Filing, withdrawing and then filing again, with no further explanation or supporting facts, any claims against Mr. Beauchene was an inexcusable omission or failure to act.

[¶44] CONCLUSION

[¶45] Therefore, the State respectfully requests this Court affirm the decision of the district court.

Dated this 12th day of September, 2014.

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[¶46] CERTIFICATE OF SERVICE

[¶47] A true and correct copy of the foregoing document was sent by e-mail on the 12th day of September, 2014, to: pulkrabek@lawyer.com

Ryan J. Younggren

[¶48] CERTIFICATE OF SERVICE

[¶49] A true and correct copy of the corrected foregoing document was sent by e-mail on the 19th day of September, 2014, to: pulkrabek@lawyer.com

Ryan J. Younggren

[¶50] CERTIFICATE OF SERVICE

[¶51] A true and correct copy of the second corrected foregoing document was sent by e-mail on the 22nd day of September, 2014, to: pulkrabek@lawyer.com

Ryan J. Younggren