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JULY 4, 2014
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

Rustin Dale Bentz,	)	
	)	Supreme Court No. 20140138
Petitioner/Appellant,	)	
	)	Burleigh Co. No. 08-2013-CV-02464
	)	
State of North Dakota,	)	
	)	
Respondent/Appellee,	)	

APPEAL FROM THE ORDER OF THE COURT DATED APRIL 4, 2014 DENYING PETITIONER'S APPLICATION FOR POST-CONVICTION RELIEF BY THE DISTRICT COURT FOR THE SOUTH CENTRAL JUDICIAL DISTRICT, THE HONORABLE CYNTHIA M. FELAND PRESIDING

BRIEF OF APPELLANT

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[¶1] Did the Trial Court err in denying Rustin Dale Bentz Application for Post-Conviction Relief?

STATEMENT OF THE CASE

[¶2] This is an appeal from the Burleigh County Order denying Rustin Dale Bentz ("Bentz") application for post-conviction relief entered by the Honorable Cynthia M. Feland, filed April 4, 2014 (Appendix ("A") 2, Docket ("D") 23, A. 38).

[¶3] On August 8, 2011, Bentz was charged with: COUNT I: Criminal Trespass, a class C felony, COUNT II: Terrorizing, a class C felony, and COUNT III: Terrorizing, a class C felony. (A. 3-4). On October 7, 2011, the State and Defendant stipulated to have a Mental Health Evaluation completed to determine whether defendant lacked criminal responsibility.

[¶4] On November 23, 2011, a mental health evaluation was completed and the petitioner was determined to be competent to stand trial. This evaluation was filed with the trial court at that time. The Criminal Trespass charge in Count I was dismissed, an Information was filed followed by an Amended Information being filed December 7, 2011. (A. 5-6). The amended information removed the allegation in Count III that Bentz was in possession of a firearm, an allegation that required a mandatory minimum sentence.

[¶5] On December 7, 2009, Bentz changed his plea to guilty to both Counts II and III (terrorizing) and was sentenced, in part, to serve one (1) year with the North Dakota Department of Corrections, credit for eighty-seven days, with the balance suspended for a period of three (3) years. The sentences for Counts II and III to run concurrently. (A. 7-11). Bentz probation was revoked, an Amended Criminal Judgment was filed March 28,

2012 and Bentz was sentenced to serve five (5) years with the North Dakota Department of Corrections with credit for 157 days previously served. The sentence imposed on Counts II and III were to be served consecutively to each other. (A. 12-13).

[¶6] Bentz filed an Application for Post-Conviction Relief on November 6, 2013. (A. 1, D. 1, A. 14-32), in which Bentz alleged GOUND ONE: The prosecuting authority violated petitioner's due process rights, by employing improper methods calculated to produce a wrongful conviction (prosecutorial misconduct in charging Bentz with two counts of terrorizing when it should have been one count charged); GROUND TWO: ineffective assistance of counsel. On November 21, 2013 the State filed its State's Answer to Application for Postconviction Relief was filed November 21, 2013 (A. 1, D. 8, A. 33) and State's Notice of Motion and Motion for Summary Disposition of Application for Post-Conviction Relief (A. 1, D. 9, A. 34). Defendant's Response and Brief to State's Motion for Summary Disposition of Application for Post Conviction Relief was filed December 23, 2013. (A. 1, D. 17, A. 35).

[¶7] An evidentiary hearing on the Application was held on April 2, 2013. (Transcript ("T"). The Court's Order denying Bentz Application was filed April 4, 2014. (A. 2, D. 23, A. 39). The Notice of Appeal was filed April 16, 2014. (A. 2, D. 24, A. 40).

STATEMENT OF THE FACTS

[¶8] On August 8, 2011, Bentz was charged with Criminal Trespass and two (2) counts of Terrorizing, each a class C felony. In October 2011, Bentz was referred to the North Dakota State Hospital for an evaluation to determine whether he had lacked criminal responsibility at the time of the alleged crimes. In November 2011, the evaluation was completed and the conclustions were that he did not lack criminal responsibility and that

he was competent to stand trial.

[¶9] On December 7, 2011, Bentz appeared with his attorney, Chad McCabe ("McCabe) and changed his plea to the two counts of terrorizing. Bentz was sentenced to serve one (1) year with the North Dakota Department of Corrections, credit for eighty-seven days, with the balance suspended for a period of three (3) years. The sentences for Counts II and III to run concurrently. (A. 7-11). Bentz probation was revoked, an Amended Criminal Judgment was filed March 28, 2012 and Bentz was sentenced to serve five (5) years with the North Dakota Department of Corrections with credit for 157 days previously served. The sentence imposed on Counts II and III were to be served consecutively to each other. (A. 12-13).

[¶10] At the April 2, 2014 evidentiary hearing on his Application, Bentz trial attorney, McCabe, testified that he had represented Bentz on a number of cases, including the cases which were at issue in Bentz Application. (T. p. 12, l. 2-5). As the underlying case proceeded, McCabe, along with the State, had Bentz undergo a mental evaluation at the state hospital, "largely due to a result of heavy methamphetamine or amphetamine use". (T. p. 12, l. 4-7). The request that Bentz go to the state hospital for an evaluation was due to the fact Bentz had, on numerous occasions, informed McCabe that Bentz was hearing voices. (T. p. 32, l. 24 – p. 33, l. 3).

[¶11] The portion of the evaluation that McCabe thought was important was that Bentz was found to be "confused and socially isolated. They said he was withdrawn and introverted". (T. p. 12, l. 13-16). Additionally, McCabe testified the report from the evaluation indicated that "[Bentz] thought judgment is probably poor. It is likely that he experiences unusual perceptual or sensory events, including hallucinations, magical

thinking, or delusional beliefs. His thought processes are likely to be marked by confusion, distractibility, and difficulty concentrating. And he may experience his thoughts as blocked, withdrawn, or somehow influenced by others", that "they suggested he was not purposefully exaggerating or malingering his symptoms", and his "statements were odd, illogical, and nonsensical; and these increased in frequency as the interview progressed". (T. p. 12, l. 23 – p. 13, l. 12).

[¶12] Regarding the conclusions of the evaluation, McCabe testified "[I]t says, although he demonstrated some paranoid and other bizarre ideas…it didn't interfere with his competency to stand trial". (T. p. 13, l. 13-17). McCabe further testified that, at the time of the evaluation, it was his understanding Bentz was still suffering from heavy methamphetamine use. (T. p. 14, l. 1-6). The evaluator strongly encouraged Mr. Bentz to seek a psychiatric treatment for his psychotic symptoms, which he has not done at the time of the hearing on the Application. (T. p. 25, l. 11-16). There have been no professional or medical diagnoses that Bentz has schizophrenia. (T. p. 27, l. 9-23).

[¶13] At the hearing on the application for post-conviction relief, McCabe expressed his concern whether Bentz' guilty plea was done knowingly (Id. l. 15 and p. 15, l. 7-8) and that McCabe hoped Bentz did, but [McCabe] didn't know. (T. p. 15, l. 14). McCabe's testimony was that the trial judge had not read the mental health evaluation, as McCabe understood, and that McCabe had tried to summarize the evaluation. (T. p. 14, l. 24 – p. 15, l. 4). McCabe testified that he explained the plea to Bentz and McCabe "hoped he understood it. [Bentz] seemed to understand. (Id. l. 18-19). "[McCabe] at the time was hoping that we were doing the right thing and that he understood. But now reading his complaint that he did not know what was going on at the time, I don't now". (T. p. 16, l.

7-10).

[¶14] When asked by the trial judge whether McCabe needed more time, he responded no. McCabe testified that "at the time he was okay and he understood it and he was going to get probation and he understood we'd negotiated. So I did think at the time that he knew what was going on". (T. p. 16, l. 15-19). At the time of the pleas, Bentz did not say anything to McCabe that would lead McCabe to believe he didn't understand. (T. p. 17, l. 6-9). McCabe does not recall discussing with Bentz that the sentence could be consecutive. (T. p. 17, l. 24 – p. 18, l. 1). At the time, the sentences were to run concurrent. (T. p. 18, l. 16). McCabe's testimony was that Bentz knew he could be sentenced to five years on each charge but that it was very possible Bentz did not understand the maximum sentence which could be imposed if the sentences were run consecutively. (T. p. 18, l. 25 – p. 19 l. 7). McCabe does not recall any discussion with Bentz regarding concurrent versus consecutive sentences. (T. p. 22, l. 12-13).

[¶15] Bentz testimony was that he did discuss the plea agreement with McCabe and that he understood it, but when the judge asked if Bentz understood it, Bentz testified that he didn't "know the terms or whatever, like, what was brought up before, consecutive, concurrent, which count, two counts…" (T. p. 38, l. 2-23). Bentz testified that, at the time of sentencing, he did not understand that if he violated probation he could receive a total sentence of ten years. (T. p. 39, l. 12-15). Bentz does agree that, at sentencing, he was informed by the court that if he violated probation he could come back and be resentenced to the maximum sentence. (T. p. 41, l. 1-4). Bentz "did not know the max was consecutive or it could be switched over from concurrent to consecutive". (T. p. 54, l. 15-16).

[¶16] Prior to the change of plea and sentencing, Bentz informed McCabe that he did not think the witnesses would show up for trial and that [Bentz] thought that they should go to trial on the charges. (T. p. 45, l. 9-12). Bentz t\testified that he simply agreed with McCabe's recommendation to accept the plea agreement without really thinking about it, but in the "back of my mind, I was still on the no-deal deal.. (T. p. 52, l. 6-23).

[¶17] As a result of the ineffective assistance provided to Bentz by McCabe, Bentz entered pleas of guilty and was sentenced to concurrent probationary sentences. Bentz had not been informed by McCabe that the sentences could be converted to consecutive sentences at a revocation hearing, and Bentz was not aware what a consecutive sentence was. McCabe agrees that he is uncertain whether Bentz entry of guilty pleas was made knowingly. Bentz was reluctant to accept the plea agreement and had a desire to go to trial as he believed the "victims" would not appear at trial. Had Bentz taken the matters to trial, it is highly likely the "victims" would not have appeared to provide testimony and the result would have been dismissal of the charges.

[¶18] There is no issue that Counts 2 and 3 were completely different counts of terrorizing which, although the charges stem from the same event, they involved different victims. (T. p. 30, l. 19 – p. 31, l. 8).

[¶19] The application for post-conviction relief was denied. Bentz subsequently filed this appeal.

LAW AND ARGUMENT

[¶20] Jurisdiction. Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provisions, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06, N.D.C.C., which

provides as follows:

> "An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03. An appeal may be taken by the defendant from:
>
> 1. A verdict of guilty;
> 2. A final judgment of conviction;
> 3. An order refusing a motion in arrest of judgment;
> 4. An order denying a motion for new trial; or
> 5. An order made after judgment affecting any substantial right of the party."

N.D.C.C. § 29-28-06.

[¶21] ISSUE: Did the Trial Court err in denying Rustin Dale Bentz Application for Post-Conviction Relief?

[¶22] The North Dakota Supreme Court "applies the 'clearly erroneous' standard set forth in Rule 52(a), N.D.R.Civ.P., when reviewing a trial court's findings of fact on an appeal from a final judgment or order under the Uniform Post-Conviction Procedure Act." State v. Foster, 1997 ND 8, ¶18, 560 N.W.2d 194. The District Court's findings of fact will not be disturbed on appeal unless clearly erroneous. A finding of fact 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. Clark v. State, 2008 ND 234, ¶11, 758 N.W.2d 900.

[¶23] North Dakota law provides that "[a] person who has been convicted of and sentenced for a crime may institute a proceeding applying for relief" under Chapter 29-32.1 of the North Dakota Century Code (Uniform Post-Conviction Procedure Act) upon 8 enumerated grounds. N.D.C.C. 29-32.1-01(1). A post-conviction proceeding "is not a substitute for and does not affect any remedy incident to the prosecution in the trial court

or direct review of the judgment of conviction or sentence in an appellate court." N.D.C.C. 29-32.1-01(2). North Dakota law provides that a "court may grant a motion…for summary disposition if the application, pleadings, any previous proceeding, discovery, or other matters of record show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." N.D.C.C. 29-32.1-09(1). "If an evidentiary hearing is necessary, the court may determine which issues of material fact are in controversy and appropriately restrict the hearing." N.D.C.C. 29-32.1-09(2).

[¶24] Additionally, North Dakota law states "[a]n application for post-conviction relief may be denied on the ground that the same claim or claims were fully and finally determined in a previous proceeding." N.D.C.C. 29-32.1-12(1). "A court may deny relief on the ground of misuse of process. Process is misused when the applicant [p]resents a claim for relief which the applicant inexcusably failed to raise either in a proceeding leading to judgment of conviction and sentence or in a previous post-conviction proceeding." N.D.C.C. 29-32.1-12(2)(a). The North Dakota Supreme Court has held that a misuse of process occurs in the following situations:

> "1. if the defendant has inexcusably failed to raise an issue in a proceeding leading to judgment of conviction and now seeks review in a first application for post-conviction relief;
>
> 2. if the defendant inexcusably fails to pursue an issue on appeal which was raised and litigated in the original trial court proceedings, and finally[;]
>
> 3. if a defendant inexcusably fails to raise an issue in an initial post-conviction application."

Bell v. State, 2001 ND 188, ¶7, 636 N.W.2d 438. "[W]hen claims have been raised previously on direct appeal…they cannot be raised again in a subsequent post-conviction

application." Heyen v. State, 2001 ND 126, ¶9, 630 N.W.2d 56. Further, the North Dakota Supreme Court has held that it is a misuse of process when issues appropriate for review on direct appeal are not raised on direct appeal and no reason is given to the Court in the post-conviction relief application as to why those issues were not raised in the direct appeal. Syvertson v. State, 2000 ND 185, ¶17, 620 N.W.2d 362.

[¶25] Applicants for post-conviction relief are not required to include all supporting evidentiary matter in their original post-conviction application. The State of North Dakota has adopted the Uniform Post-Conviction Procedure Act to control this matter. N.D.C.C. §29-32.1-04 provides the rules to follow regarding post-conviction applications:

> "1. The application must identify the proceedings in which the applicant was convicted and sentenced, give the date of the judgment and sentence complained of, set forth a concise statement of each ground for relief, and specify the relief requested. Argument, citations, and discussion of authorities are unnecessary.
>
> 2. The application must identify all proceedings for direct review of the judgment of conviction or sentence and all previous post-conviction proceedings taken by the applicant to secure relief from the conviction or sentence, the grounds asserted therein, and the orders or judgments entered. The application must refer to the portions of the record of prior proceedings pertinent to the alleged grounds for relief. If the cited record is not in the files of the court, the applicant shall attach that record or portions thereof to the application or state why it is not attached. Affidavits or other material supporting the application may be attached, but are unnecessary."

N.D.C.C. §29-32.1-04.

"The statute does not require the applicant to include in the original application all supporting evidentiary matter necessary." State v. Bender, 1998 ND 72, ¶19, 576 N.W.2d 210. Ruddell "must set forth a concise statement for each ground of relief and specify the relief requested." Eagleman v. State, 2004 ND 6, ¶11, 673 N.W.2d 241. Ruddell did set for a concise statement for each ground of relief and did specify the relief

requested in his application.

[¶26] A post-conviction proceeding affords an opportunity to establish a record for review on appeal. "The express purpose of the Uniform Post-Conviction Procedure Act, as codified in N.D.C.C. 29-32.1, is to furnish a method to develop a complete record to challenge a criminal conviction." Bender, at ¶20 (citing State v. Wilson, 466 N.W.2d 101, 103 (N.D. 1991)). The post-conviction hearing allows the parties to fully develop a record on the issue of counsel's performance and its impact on the defendant's case and to challenge a criminal conviction and sentence.

[¶27] N.D.C.C. §29-32.1-10 sets forth what evidence may be heard at a post-conviction hearing. N.D.C.C. §29-32.1-10 provides:

> "1. Evidence must be presented in open court, recorded, and preserved as part of the record of the proceedings.
>
> 2. A certified record of previous proceedings may be used as evidence of facts and occurrences established therein, but use of that record does not preclude either party from offering additional evidence as to those facts and occurrences.
>
> 3. The deposition of a witness may be received in evidence, without regard to the availability of the witness, if written notice of intention to use the deposition was given in advance of the hearing and the deposition was taken subject to the right of cross-examination."

N.D.C.C. §29-32.1-10.

[¶28] In his Application, Bentz provided supporting facts regarding the allegations and was granted an evidentiary hearing.

[¶29] Bentz must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty. Testimony at the hearing indicate that a mental health evaluation was conducted to determine whether Bentz lacked criminal responsibility for the crimes charged. Additionally, testimony indicated that Bentz was

hearing voices, at least prior to the change of plea hearing, that he was confused, socially isolated, (T. p. 12, l. 13-16), his judgment is probably poor, it is likely that he experiences unusual perceptual or sensory events, including hallucinations, magical thinking, or delusional beliefs. His thought processes are likely to be marked by confusion, distractibility, and difficulty concentrating. And he may experience his thoughts as blocked, withdrawn, or somehow influenced by others. As a result of this evaluation, it was dependent on his attorney to ensure that Bentz fully understood the plea agreement and the possibilities that Bentz faced, both at trial, should he be found guilty, as well as if the agreed upon probation were to be revoked. This advice would include the possibility of consecutive sentencing for the separate counts.

[¶30] The testimony by Bentz is that he did not fully understand that there was a possibility of receiving a consecutive sentence if his probationwas revoked. Bentz testified that McCabe did not explain that to him and that he was not aware of that when the Court explained the sentence to him. Bentz testified that he simply agreed with McCabe's recommendation to accept the plea agreement without [Bentz] giving it thought and that [Bentz] did not believe that the "victim" would appear at trial to testify. Although Bentz told McCabe that he would accept the plea agreement, Bentz still wanted to take the matters to trial. The lack of understanding is consistent with the conclusions of the mental health evaluation. Had McCabe fully informed Bentz that, if revoked, Bentz could receive consecutive sentences Bentz would have requested the matters go to trial. As a result of the ineffective assistance of counsel, Bentz did not knowingly enter his guilty pleas as he did not know the full consequences of those pleas.

CONCLUSION

[¶31] For all the reasons stated above, the District Court erred in denying Rustin Dale Bentz' application for post-conviction relief. Therefore, Bentz prays this Court reverse the lower court's decision and remand this matter with instructions that the District Court enter an Order granting Bentz' application for post-conviction relief.

Respectfully submitted this 4th of July, 2014.

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I, Mark T. Blumer, do hereby certify that on 4th day of July, 2014, I served the following documents:

1. Appellant Brief
2. Appellant Appendix
3. Certificate of Service

Christine Hummert McAllister
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to Christine Hummert McAllister at the electronic mail addresses shown above and Mr. Bentz was served by 1st Class US Mail, postage prepaid, to the address shown above, by depositing the same in the US Mail at Fargo, ND.

Dated this 4th day of July, 2014.

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