

Supreme Court No. 20140181
District Court No. 23-09-K-00147

State of North Dakota

In the Supreme Court

Kyle T. Mackey

Petitioner
~~Plaintiff~~/Appellant,

vs.

State of North Dakota,

Respondent
~~Defendant~~/Appellee,

Appeal from the District Court's Order Denying Motion to Reopen Judgment, by the Lamoure County District Court, Southeast Judicial District, the Honorable Jay Schmitz, Presiding.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES

- I. The district court improperly denied Mackey's petition for post-conviction relief on the grounds that Mackey did not have standing to object to the interview method of the minor witnesses.

- II. The district court improperly denied Mackey's petition for post-conviction relief on the grounds of ineffective assistance of counsel.

STATEMENT OF THE CASE

[¶1] On September 16, 2009, the Defendant, Kyle Mackey, (hereinafter “Mackey”) was charged with three counts of Gross Sexual Imposition, a class AA felony. (App. at 6-7). On April 14, 2014, Mackey entered a plea of guilty to three counts of Gross Sexual Imposition. The district court ordered a pre-sentence investigation. (App. at 10). On August 10, 2010, Mackey was sentenced to thirty (30) years of incarceration first to serve eight (8) years with the balance of twenty-two (22) years suspended for a period of five (5) years. Mackey had credit for thirty (30) days already served. (App. at 11).

[¶2] On September 7, 2010, Mackey substituted his trial counsel, Cash Aaland, with William Kirshner. (App. at 19). On September 9, 2010, Mackey, through his attorney, timely filed for a Notice of Appeal. (App. at 21). Mackey then requested and received an extension to file his brief. (App. at 22).

[¶3] On January 28, 2011, Mackey filed a motion to withdraw his plea. (App. at 24). In response to Mackey’s motion to withdraw his guilty plea, the district court amended the criminal judgment issued on August 10, 2010. (App. at 35). The amended judgment sentenced Mackey to fifteen (15) years imprisonment, first to serve eight (8) years with the balance of seven (7) years suspended for a period of five (5) years. (App. at 35). Mackey then appealed the amended judgment entered on February 2, 2011. (App. at 37). During the pendency of the appeal, on May 13, 2011, Mackey made a motion for a reduction of sentence. (App. at 39). The district court denied the motion on the basis

that the court loses jurisdiction over a case once the appeal to the Supreme Court has been made.

[¶4] On November 25, 2011, the Supreme Court issued an opinion on Mackey's case. The opinion affirmed the district court's decision. State v. Mackey, 2011 ND 203, 805 N.W.2d 98. On December 6, 2011, the district court issued a memorandum of denial on Mackey's motion for a reduction in sentence.

[¶5] Mackey petitioned the district court on a motion for post-conviction relief on December 15, 2011. (App. at 33). Mackey's post-conviction petition alleged ineffective assistance of trial counsel, asked to withdraw his guilty plea, claimed Mackey lacked an understanding of the law and alleged his plea was not voluntary. Mackey made a request for a change of judge on December 29, 2011. (App. at 38). The request was denied on January 3, 2012. (App. at 39). Mackey's post-conviction petition was denied by the district court on January 10, 2012. (App. at 54). Mackey filed a motion to reconsider on January 13, 2012, which the court treated as an amended petition for post-conviction relief. The district court denied the amended petition, which included a demand for change of judge on January 17, 2012. (App. at 56).

[¶6] In response to Mackey's amended petition, the State filed an answer dated February 2, 2012. In its decision, the district court treated the State's answer as a request for summary judgment. (App. at 58). On February 10, 2012, the district court issued an order for amended judgment granting the state's request for summary judgment and denying Mackey's petition for post-conviction relief. (App. at 58). Mackey filed a

timely notice of appeal on February 16, 2012. (App. at 80). The Supreme Court affirmed the district court's order denying Mackey's petition for post-conviction relief. Mackey v. State, 2012 ND 159, 819 N.W.2d 539.

[¶7] On April 3, 2013, Mackey filed a second petition for post-conviction relief alleging evidence in his case was illegally or inappropriately obtained through coercion, coaching or other misuse of process. Mackey also alleged ineffective assistance of counsel. (App at 79) The State answered Mackey's petition requesting a dismissal of the petition for post-conviction relief on April 3, 2013. (App. at 81). A hearing was granted and held on March 24, 2014. At the hearing, Mackey's first attorney, Cash Aaland, testified. On April 4, 2014, the district court issued a written findings of fact, conclusions of law and order for judgment denying Mackey's second petition for post-conviction relief. (App. at 113).

[¶8] On April 24, 2014, Mackey filed a motion to request an extension of time to file his notice of appeal. On the same date, he filed written objections pursuant to Rule 46 of the North Dakota Rules of Civil Procedure to Aaland's testimony alleging that any attorney-client privilege was inappropriately waived. (App. at 120). On April 28, 2014, the district court issued an order denying Mackey's motion to reopen the judgment. (App. at 175). Mackey requested an extension of time to file his notice of appeal which was granted by the district court. (App. at 179). Mackey filed a notice of appeal on May 15, 2014 and now brings this appeal, which pursuant to order by the North Dakota

Supreme Court includes an appeal from the order dated April 28, 2014 and the order dated April 4, 2014. (App. at 190).

STATEMENT OF FACTS

[¶9] The facts of the underlying case are established by virtue of two opinions issued by the North Dakota Supreme Court in State v. Mackey, 2011 ND 203, 805 N.W.2d 98; and Mackey v. State, 2012 ND 159, 819 N.W.2d 539.

[¶10] In his second petition for post-conviction relief, Mackey alleges that the evidence used against him was obtained inappropriately or illegally through coercion or undue influence. Mackey also argues that he had ineffective assistance of counsel when trial counsel failed to interview witnesses and failed to investigate the circumstances of witness interviews by law enforcement.

LAW AND ARGUMENT

[¶11] “Post-conviction relief proceedings are civil in nature and governed by the North Dakota Rules of Civil Procedure.” Delvo v. State, 2010 ND 78, ¶ 10, 782 N.W.2d 72 (quoting Clark v. State, 2008 ND 234, ¶ 11, 758 N.W.2d 900).

- I. The district court improperly denied Mackey’s petition for post-conviction relief on the grounds that Mackey did not have standing to object to the interview method of the minor witnesses.

[¶12] Mackey argues his guilty plea was involuntary because the witnesses in his case were coerced him into giving evidence against him. (Tr. at 32, lines 3-12). When a defendant applies for post-conviction relief seeking to withdraw a guilty plea, this Court generally treats the application as one made under N.D.R.Crim.P. 32(d). Bay v. State, 2003 ND 183, ¶ 7, 672 N.W.2d 270. Withdrawal of a guilty plea is allowed when necessary to correct a manifest injustice, and whether there has been a manifest injustice supporting withdrawal of the plea lies within the district court's discretion. State v. Zeno, 490 N.W.2d 711, 713 (N.D. 1992). In determining whether the district court abused its discretion, this Court may review the district court’s preliminary findings of fact, which will not be disturbed unless they are clearly erroneous. Houle v. State, 482 N.W.2d 24, 25-26 (N.D. 1992).

[¶13] Due process is satisfied when the whole record clearly reflects the defendant’s knowledge of the rights being waived. Greywind v. State, 2004 ND 213, ¶ 8, 689 N.W.2d 390 (quoting State v. Olson, 544 N.W.2d 144, 147 (N.D. 1996)). An attack on a defendant’s plea of guilty may only go to the voluntary and intelligent character of

the guilty plea, and its voluntariness turns on whether the advice was within the range of competence demanded of attorneys in criminal cases. Damron v. State, 2003 ND 102, ¶ 9, 663 N.W.2d 650. “A guilty plea is valid if it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” Greywind, at ¶ 8 (citing Houle, 482 N.W.2d at 26).

[¶14] The record reflects that the district court questioned Mackey’s counsel at the time Mackey entered his plea. The district court did not question Mackey and Mackey previously articulated that he did not know that he had a right to speak at his hearing. (Tr. at 28, lines 17-25). Mackey did not claim any lack of understanding. Rather, Mackey told the district court his attorney “never met with [him]” and “didn’t meet with [him] about the charges at all.” Mackey told the court he was not informed of the circumstances of the interviews.

[¶15] Mackey did not understand the terms of the plea agreement because of his limited contact with his attorney and his attorney’s failure to investigate the unreliable nature of the minor witness testimony against Mackey.

[¶16] The district court found there was nothing in the record to indicate that [Mackey] did anything other than enter voluntary pleas. The district court abused its discretion in refusing to allow Mackey to withdraw his guilty plea, because the district court failed to consider Mackey’s lack of knowledge on the coercion tactics used by law enforcement to inappropriately illicit testimony from minor witnesses. In its order, the district court explained, “Mackey lacks standing to assert any alleged violation of the

juvenile witnesses' [sic] rights to have a parent, guardian or attorney present during law enforcement interviews.” (App. at 175). In Mackey’s second petition for post-conviction relief, Mackey alleges that the minor witnesses should have had a parent present during the interviews. Mackey also alleged the interviews were conducted illegally, the witnesses were coerced with threats and the interviews were tainted with undue influence. Specifically, Mackey argued that the minor witness was threatened with a juvenile referral if she did not cooperate with law enforcement. Mackey argued that the district court should allow him to withdraw his guilty plea and proceed to trial. Mackey argued that at the trial level, he should be allowed to move to suppress these statements and proceed to trial. (App. at 181).

[¶17] The district court denied Mackey’s petition based on the issue of the parent presence during the interview; however, the district court failed to address the additional problems with the witness interviews, including issues of coercion, undue influence and tainted interviews. The unreliable nature of the evidence against Mackey and his attorney’s failure to investigate renders Mackey’s plea involuntary.

II. The district court improperly denied Mackey’s petition for post-conviction relief on the grounds of ineffective assistance of counsel.

[¶18] Mackey’s trial counsel was ineffective when he failed to address issues surrounding the evidence collected against Mackey, especially as it pertained to the interviews of the minor witnesses. The standard of review for a claim of ineffective assistance of counsel in a post-conviction appeal is well-established. Petitions for post-conviction

relief 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.

[¶19] Whether a petitioner received ineffective assistance of counsel is a mixed question of law and fact and is fully reviewable on appeal. Under N.D.R.Civ.P. 52(a), 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 (citations omitted).

[¶20] The Sixth Amendment, applicable to state law through the Fourteenth Amendment, provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.” U.S. Const. amend. VI; see also Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (holding that the Sixth Amendment right to counsel in all criminal prosecutions is a fundamental right essential to fair trial and obligatory upon the states through the Fourteenth Amendment). Article I, § 12 of the North Dakota Constitution also guarantees a criminal defendant the right to effective assistance of counsel. Klose v. State, 2005 ND 192, ¶ 9, 705 N.W.2d 809.

[¶21] In Strickland v. Washington, 466 U.S. 668, 687 (1984), the United States Supreme Court established the two-prong test for whether a convicted criminal defendant's ineffective assistance of counsel claim warrants a reversal of conviction. “First, the defendant must show that counsel's performance was deficient. This requires showing

that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.” Id. Second, the defendant must show that the deficient performance prejudiced his or her defense. Id. “This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” Id.

[¶22] This Court has explained that the “[e]ffectiveness of counsel is measured by an ‘objective standard of reasonableness’ considering ‘prevailing professional norms.’” DeCoteau v. State, 2000 ND 44, ¶ 8, 608 N.W.2d 240 (quoting Strickland, 466 U.S. at 688). There is a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance and establish that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant to demonstrate with specificity how and where trial counsel was incompetent, and it is probable a different result would have been obtained had trial counsel not performed incompetently. Klose, 2005 ND 192, ¶ 9, 705 N.W.2d 809 (citation omitted). In reviewing a trial counsel's conduct in an ineffective assistance of counsel claim, the Court must abstain from “distorting effect of hindsight.” Garcia v. State, 2004 ND 81, ¶ 5, 678 N.W.2d 568.

[¶23] In the district court's order denying Mackey's application for post-conviction relief, the court first addressed each of Mackey's claims against his trial attorney, Cash Aaland. The district court determined that Attorney Aaland’s testimony regarding his strategic choices in Mackey’s case were not below the standard of performance and the court

found performance was not deficient in failing to suppress the victim's statements and interviews because Mackey lacked standing to make any such objections. (App. at 24, ¶¶ 6-7).

[¶24] In this case, Aaland's failure to critically examine the manner and method in which the interviews of the minor witnesses were conducted resulted in prejudice against Mackey. Mackey noted in his second petition for post-conviction relief that the interviews of the minor witnesses were the result of coercion and undue influence. The interviews were conducted in contravention to North Dakota statute regarding interviews of minor witnesses. Further, mistakes were made by Attorney Aaland, including the failure to interview any proposed witnesses, failure to depose the victim and failure to meet with Mackey and explain the case. (Tr. at 5, lines 15-20.)

[¶25] During the evidentiary hearing, counsel for Mackey emphasized that Aaland's failure to investigate the conditions of the interviews resulted in inherently unreliable evidence against Mackey. This inherently unreliable evidence caused the underlying judgment to be questioned. Aaland never deposed a single potential witness in Mackey's case. (Tr. at 18, line 9.) Aaland's failure to appropriately investigate the witnesses falls below an objectively reasonable performance. See Walker v. State, 2012-211267, ___S.W.2d ___ (S.C. App. 2014) (granting post-conviction relief when defense counsel failed to investigate potential witnesses).

[¶26] In Walker, trial counsel failed to interview potential alibi witnesses for the defense. The South Carolina Supreme Court upheld the circuit court's grant of post-conviction

relief explaining that the defense attorney has an obligation to conduct an independent investigation, which includes contacting and interviewing potential witnesses. A defense attorney's failure to contact those witnesses to determine if testimony would be helpful or to investigate the circumstances around that testimony would have resulted in a different outcome, then post-conviction relief should be granted.

[¶27] Mackey's second petition for post-conviction relief should have been granted by the district court. This court should reverse and remand with instructions for the district court to grant Mackey's second petition for post-conviction relief. Mackey should be allowed to withdraw his guilty plea and proceed to trial on his charges.

CONCLUSION

[¶28] The district court's denial of Mackey's second petition for post-conviction relief should be reversed.

Dated this 10th day of September, 2014.



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CERTIFICATE OF COMPLIANCE

[¶29] The undersigned, as one of the attorneys representing Appellants, and one of the authors of the Brief of Appellant, hereby certifies that said brief complies with Rule 32(a)(7)(A) of the North Dakota Rules of Appellate Procedure, in that the brief was prepared with proportional typeface and that the total number of words does not exceed 10,500 from the portion of the brief entitled “Statement of Issues” through the signature block. The word count was verified with the assistance of the undersigned’s word processing software, which also counts abbreviations as words.

Dated this 10th day of September, 2014.



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KYLE TAFT MACKEY.)	
)	
)	
Plaintiff/Appellant,)	CERTIFICATE OF SERVICE
v.)	
)	
STATE OF NORTH DAKOTA,)	Supreme Court No. 20140181
)	Case No: 23-09-K-00147
)	
Defendant/Appellant.)	
)	

[¶ 1] I, Erin M. Conroy, an attorney licensed in the State of North Dakota, hereby certify that on **September 10, 2014**, the following documents were filed with the Clerk of the North Dakota Supreme Court.


- a. Brief of Appellant
- b. Appendix; and
- c. Certificate of Service

[¶ 2] A copy of this document was served electronically on all separately represented parties at the following e-mail addresses below:

Fallon M. Kelly
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[¶ 3] This service was made under N.D.R.Ct. 3.5; N.D.R.Crim.P. 49; and N.D.R.Civ.P. 5(b).

[¶ 4] Dated: September 10, 2014.



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