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STATE OF NORTH DAKOTA

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

CRIMINAL

In the Supreme Court State of North Dakota

Kyle T. Mackey

Plaintiff/Appellant,

vs.

State of North Dakota,

Defendant/Appellee,

Regarding Plaintiff's Appeal from the District Court Order Denying Motion to Reopen Judgment, Entered April 4, 2014

District Court of the Southeast Judicial District
The Honorable Jay A. Schmitz Presiding

BRIEF OF APPELLEE

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III. The District Court properly denied Mackey's petition for post-conviction relief on several grounds, including the ground that Mackey lacked standing to object to the interview method of the minor witnesses.

LAW AND AGRUMENT

[¶1] **I. Mackey's continued petitions for post-conviction relief amount to a misuse of process.**

[¶2] The Supreme Court of North Dakota affirmed the district court's denial of a previous motion by Mackey to withdraw his plea of guilty by means of a Judgment dated October 18, 2011 and filed November 29, 2011 as reported in State v. Mackey, 2011 ND 203, 805 N.W.2d 98.

[¶3] The Supreme Court of North Dakota subsequently affirmed the district court's dismissal of a previous Petition for Post-Conviction Relief and subsequent Amended Petition for Post-Conviction Relief by means of a Judgment dated and filed July 26, 2012 as reported in State v. Mackey, 2012 ND 159, 819 N.W.2d 539.

[¶4] Defendant filed a petition for habeas relief under 28 U.S.C. § 2254 in U.S. Federal District Court which was Dismissed on February 28, 2013 as reported in Mackey v. Redmann, 3:12-cv-00065-KKK.

[¶5] "Post-conviction proceedings are not intended to allow defendants multiple opportunities to raise the same or similar issues, and the defendants who inexcusably fail to raise all of their claims in a single post-conviction proceeding misuse the post-conviction process by initiating a subsequent application raising issues that could have been raised in the earlier proceeding." Jensen v. State, 2004 ND 200, ¶9, 688 N.W.2d 374, 377. Mackey continues to misuse process by repeatedly presenting claims for relief which he inexcusably failed to raise in prior hearings in this matter or which were raised and already considered by the district court and by the Supreme Court of North Dakota on appeal. N.D.C.C. § 29-32.1-12(2)(a).

[¶6] The district court's April 4, 2014 Order, at ¶15, [Appellant's App. at 116] denied Mackey's post-conviction relief petition for several grounds. One of these included misuse of process because even though Mackey was aware of the first trial attorney's alleged errors by September of 2010, Mackey inexcusably failed to raise a claim for ineffective assistance of counsel in Mackey's first application for post-conviction relief, which Mackey filed on December 15, 2011. [*See,* State v. Mackey, 2012 ND 159 at ¶3, 819 N.W.2d 539]. The district court made factual findings, one of which was that "Mackey testified at that he received and reviewed all the evidence from [the trial attorney's] file at the time he hired a [subsequent attorney] in early September 2010, and believed at that time that [the first trial attorney] had made errors that constituted ineffective assistance of counsel." [Appellant's App. at 115]. The Supreme Court of North Dakota reported that Mackey filed his first application for post-conviction relief on December 15, 2011. [*See,* State v. Mackey, 2012 ND 159 at ¶3, 819 N.W.2d 539].

[¶7] Mackey therefore knew of alleged errors and he failed to raise them in his first petition for post-conviction relief.

[¶8] II. **The District Court properly denied Mackey's petition for post-conviction relief on Mackey's argued grounds of ineffective assistance of counsel.**

[¶9] After determining that there was a misuse of process, the district court's April 4, 2014 Order [Appellant's App. at 113] went on to consider the factual allegations being made by Mackey in support of his petition for post-conviction relief. The District Court heard evidence from Mackey's trial attorney and from Mackey on issues of ineffective assistance of counsel. [Appellant's App. at 114-116]. In the factual findings included in the district court's April 4, 2014 Order, the district court found that Mackey

understood the plea agreement and that he would receive a maximum of 15 years and a minimum of 5 years of imprisonment. [Appellant's App. at 114].

[¶10] The district court further found that the trial attorney's testimony was substantially more credible than testimony offered by Mackey. [Appellant's App. at 115]. The court found that the attorney kept Mackey reasonably informed as to the State's evidence and reasonably informed of other factors affecting case strategies. [Appellant's App. at 115]. One such factor was the risk of exposing himself to prosecution in Ramsey County and in other counties if he did not take the plea offer at the district court level when he plead guilty. [Appellant's App. at 115]. Mackey's trial attorney reasonably informed Mackey of the plea agreement parameters and "that the sentence of 8 years' actual incarceration was within those parameters because the suspended portion of the sentence was not a material deviation." [Appellant's App. at 115].

[¶11] The district court further found Mackey got a second opinion from another attorney before sentencing that second opinion concurred with the first attorney's assessments, strategies and advice after reviewing the proffered discovery materials. [Appellant's App. at 115]. Mackey's first trial attorney testified at the March 24, 2014 hearing that Mackey told him of other acts that Mackey committed with the victim, and that the acts described by Mackey could or would have led to additional GSI charges in other jurisdictions. [Appellant's App. at 115]. The district court also found that Ramsey County agreed not to file its own gross sexual imposition charge against Mackey if Mackey would plea guilty in the underlying LaMoure County case from which this appeal comes. [Appellant's App. at 115].

[¶12] Mackey testified that he received and reviewed all the evidence from file at the time he sought the second opinion in early September of 2010. [Appellant's App. at 115]. Mackey believed at that time that is first trial attorney had made errors that constituted ineffective assistance of counsel. [Appellant's App. at 115]. The district court found "Mackey failed to prove that [first trial attorney's] investigation was deficient, or that Mackey was not kept adequately informed as to the state of the evidence. Mackey presented no evidence that any witness or victim statements were unreliable because of allegedly coercive interview tactics used by law enforcement with the victim or other juvenile witnesses." [Appellant's App. at 115].

[¶13] Based on the foregoing findings of fact, the district court in its April 4, 2014 Order made conclusions of law regarding ineffective assistance of counsel. [Appellant's App. at 116]. The district court concluded that even if Mackey's claim had been properly and timely raised, Mackey failed to establish either prong of the ineffective assistance of counsel test. [Appellant's App. at 116]. The two prong test was set forth in Murchison v. State, 2011 ND 126, ¶8, 799 N.W.2d 360, wherein the moving party must establish not only ineffective assistance of counsel, but also that the results would have been different because of the ineffective assistance. Mackey first failed to establish that the first trial attorney's actions fell below an objectively reasonable standard of representation. [Appellant's App. at 116]. Mackey secondly failed to establish that the result of the proceeding would have been different but for the alleged errors of counsel. [Appellant's App. at 116]. These legal conclusions of the district court are based on and relate directly to the district court's findings of fact.

[¶14] The Supreme Court of North Dakota has described in Lund v. Lund, 2014 ND 133, ¶14; 848 N.W.2d 266, 271, when a finding of fact may be disregarded as clearly erroneous by an appellate court:

> A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, on the entire record, we are left with a definite and firm conviction a mistake has been made. Edward H. Schwartz Constr., Inc. v. Driessen, 2006 ND 15, ¶ 6, 709 N.W.2d 733. Under the clearly erroneous standard of review, a district court's choice between two permissible views of the weight of the evidence is not clearly erroneous, and simply because we may have viewed the evidence differently does not entitle us to reverse the district court. Id. On appeal, we do not reweigh conflicts in the evidence, and we give due regard to the district court's opportunity to judge the witnesses' credibility. Id.

Here, Defendant has failed to establish that the district court's factual findings were clearly erroneous. Therefore, the factual findings of the district court determined at the March 24, 2014 hearing are not clearly erroneous. Thus, those factual findings support a legal conclusion that Mackey failed to prove either prong of the two prong Murchison test. Therefore, Mackey has failed to establish ineffective assistance of counsel justifying post-conviction relief.

[¶15] III. **The District Court properly denied Mackey's petition for post-conviction relief on several grounds, including the ground that Mackey lacked standing to object to the interview method of the minor witnesses.**

[¶16] The Court's finding that Mackey lacked standing to object to interview methods of minor witnesses was a non-essential finding to the district court's conclusion that Mackey failed to establish ineffective assistance of counsel. Mackey provided no evidence that any coercion took place with minor witnesses or that any different result would have occurred if they were interviewed with a parent, guardian or attorney present. The record lacks any evidence that the witnesses were coerced other than inadmissible

allegations of Mackey without any first-hand knowledge.

[¶17] However, even if the lack of standing argument were essential to the district court's finding, Mackey's claim that the minor witnesses' statements would be excluded in any trial against Mackey is not accurate. The right of a minor child to have a parent or attorney is one created by statute in situations where the juvenile is being investigated for behavior that would be criminal if the juvenile was an adult. See N.D.C.C. § 27-20-26(1). This is a right a child may invoke only in proceedings against the child. There is no proceeding in this case against the minor victim or other minor witnesses. Further, the right is one that only the child may invoke, not the person alleged to have harmed such child. The Supreme Court of North Dakota discussed this right of a minor child when it decided In the Interest of K.H., 2006 ND 156, ¶12, 718 N.W.2d 575, where the Court stated:

> A juvenile has a statutory right to representation under N.D.C.C. § 27-20-26(1):
>
> > a party is entitled to representation by legal counsel at custodial, post-petition, and informal adjustment stages of proceedings under this chapter. . . . Counsel must be provided for a child not represented by the child's parent, guardian, or custodian at custodial, post-petition, and informal adjustment stages of proceedings under this chapter.
>
> This statute previously granted a right to counsel at "all stages of any proceedings." 1995 N.D. Sess. Laws ch. 124, § 13; Russell v. Z.C.B. (In the Interest of Z.C.B.), 2003 ND 151, ¶15, 669 N.W.2d 478. Under the revised version of the statute, a juvenile has a right to counsel starting at "custodial" stages of proceedings. N.D.C.C. § 27-20-26(1); *See also*, Interest of Z.C.B., at ¶14,15 (stating juvenile not in custody during routine questioning following ordinary traffic stop). If an extrajudicial statement is obtained by violating this statutory right, the statement **cannot be used against the child in a criminal proceeding.** N.D.C.C. § 27-20-27(2); Interest of Z.C.B., at P13. (emphasis added).

CONCLUSION

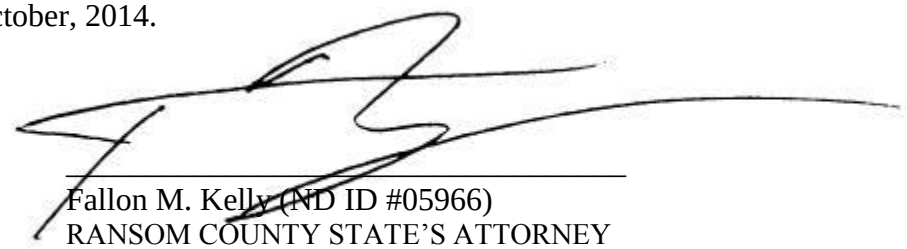
[¶18] The district court's April 4, 2014 Order included a legal conclusion that Mackey lacked standing to assert any alleged violations of the juvenile witnesses' rights to have a parent, guardian or attorney present during law enforcement interviews. [Appellant's App. at 115]. Brief of Appellant argues only issues of post-conviction relief and does not present argument regarding the April 28, 2014 Order denying motion to reopen judgment other than as that Order relates to the argument by Appellant that law enforcement improperly interviewed minor witnesses without presence of their parents, guardian or attorney. Appellee has addressed the issue of minor child interviews herein.

[¶19] Although the court concluded Mackey had no standing to object to the children's statements against him, this conclusion is unnecessary because the district court's April 4, 2014 Order ultimately determined that Mackey's petition was misuse of process.

[¶20] Even if the district court's determination of misuse of process was incorrect, the district court found that Mackey's legal representation 1) did not fall below objective standards of reasonableness and that, 2) Mackey failed to establish that he was prejudiced by any alleged errors. These legal findings were supported by factual findings that are not clearly erroneous. [Appellant's App. at 117].

[¶21] Therefore, the district court's April 4, 2014 order dismissing Mackey's post-conviction relief petition and the district court's April 28, 2014 Order denying motion to reopen judgment should both be affirmed.

Dated this 14th day of October, 2014.



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STATE OF NORTH DAKOTA

RE: STATE OF NORTH DAKOTA VS. KYLE TAFT MACKEY

SUPREME COURT NO.: 20140181
DISTRICT COURT CASE NO.: 23-09-K-00147

STATE OF NORTH DAKOTA)
)ss: **AFFIDAVIT OF ELECTRONIC SERVICE**
COUNTY OF RANSOM)

Karla J. Ulven, being first duly sworn, does depose and state that she is of legal age and not a party to the above-entitled matter.

On 14th day of October 2014, Affiant Emailed from Lisbon, North Dakota, a true and correct copy of the following documents:

1. Corrected Brief of Appellee in Word format;
2. Corrected Brief of Appellee in PDF format; and
3. Affidavit of Electronic Service.

On: Erin M. Conroy and Clerk of the Supreme Court

EMAIL ADDRESS: erin@fremstadlaw.com
supclerkofcourt@ndcourts.gov

To the best of Affiant's knowledge, the Email addresses, above given were the actual addresses of the parties intended to be served.

Karla J. Ulven

Subscribed and sworn to before me this 14th day of October, 2014.

Notary Public

(SEAL)

JULIE COLE
Notary Public
State of North Dakota
My Commission Expires June 30, 2018

RE: STATE OF NORTH DAKOTA VS. KYLE TAFT MACKEY

SUPREME COURT NO.: 20140181
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STATE OF NORTH DAKOTA)
)ss: **AFFIDAVIT OF ELECTRONIC SERVICE**
COUNTY OF RANSOM)

Karla J. Ulven, being first duly sworn, does depose and state that she is of legal age and not a party to the above-entitled matter.

On 10th day of October 2014, Affiant Emailed from Lisbon, North Dakota, a true and correct copy of the following documents:

1. Brief of Appellee in Word format;
2. Brief of Appellee in PDF format; and
3. Affidavit of Electronic Service.

On: Erin M. Conroy and Clerk of the Supreme Court

EMAIL ADDRESS: erin@fremstadlaw.com
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Karla J. Ulven

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Notary Public

(SEAL)

JULIE COLE
Notary Public
State of North Dakota
My Commission Expires June 30, 2018