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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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SUPREME COURT NO.: 20140197

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Allen Wayne Rencountre,

Petitioner and Appellant

- vs -

State of North Dakota,

Respondent and Appellee

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APPEAL FROM THE CIVIL JUDGMENT
NORTH CENTRAL JUDICIAL DISTRICT
WARD COUNTY CR. NO. 51-2014-CV-00448
THE HONORABLE GARY LEE PRESIDING

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# BRIEF

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## STATEMENT OF THE ISSUES

[¶1] ISSUE: I. Was Attorney Paul Probst ineffective in his representation of Allan Rencountre?

ISSUE: II. Because the court failed to follow the procedure required in NDCC 12.1-32-02(11) is Mr. Rencountre entitled to be resentenced?

## NATURE OF THE CASE

[¶2] In 2010 Allen Wayne Rencountre was charged with:

1. Attempted Murder ( a Class A Felony);
2. Fleeing or Attempting to Elude a Police Officer (a Class C felony).

[¶3] Also the prosecutor filed A Dangerous Special Offender against Mr. Rencountre.

[¶4] On April 27, 2011 Mr. Rencountre entered a plea of guilty to the attempted murder charge. The charge of fleeing or attempting to elude a police officer was dismissed and the court determined Mr. Rencountre was a dangerous special offender.

[¶5] The court then sentenced Mr. Rencountre to 30 years in prison with 10 suspended and following his release he would have 5 years of supervised probation.

[¶6] On April 4, 2012 Mr. Rencountre filed an application for Post-Conviction Relief.

[¶7] The State on May 5, 2012 filed a Notice and Motion for Summary Disposition in opposition to Petitioner's Application for Post-Conviction Relief.

[¶8] Mr. Rencountre requested a hearing on his Petition for Post-Conviction Relief on August 8, 2013.

[¶9] Mr. Rencountre also on August 8, 2013 filed a Supplement to Petitioner's Application for Post-Conviction Relief.

[¶10] A Post-Conviction hearing was held on May 5, 2014.

[¶11] An Order denying Petitioner for Post-Conviction Relief was filed on May 29, 2014.

[¶12] A Notice of Appeal was filed on June 3, 2014 with an Order for Transcript and a Notice of Filing the Notice of Appeal.

[¶13] A Clerk's Certificate of Appeal was filed on June 30, 2014.

[¶14] This matter is now before the North Dakota Supreme Court.

## STATEMENT OF FACTS

[¶15] App. P.38. On October 10, 2010 Minot Central Dispatch got a 911 call that a desk clerk at the Guest Lodge Motel had been shot. Minot Central Dispatch then notified the Minot Police units that a desk clerk at the Guest Lodge Motel had been shot. One of the Minot Police Officers responding to the above notification was Officer Schoenrock. When Officer Schoenrock arrived at the Guest Lodge Motel he found and talked to the desk clerk , who had been shot, Jerome Vilandre. Mr. Vilandre told Officer Schoenrock he did not and had not really seen the person who shot him. Mr. Vilandre said that prior to the shooting he was sitting at his desk, looked up, heard the shots and saw the shooter go out the door. In a later conversation with Officer Schoerock, Mr. Vilandre said he thought the shooter was a bigger person, wearing a dark hoodie and a ball cap. He was not certain of the ethnicity of the shooter and that he and the shooter didn't exchange any words.

[¶16] App. P.39. Sometime later on the morning of October 10, 2010 Lt. Roed was driving west bound on Highway 2 and 52 west of Minot, North Dakota. He noticed headlights of a vehicle coming up behind him at a high rate of speed. When the vehicle passed him Lt. Roed decided to speed up and follow that vehicle. After Lt. Roed's vehicle reached a speed of 90 miles per hour he activated his emergency lights and siren. This caused the vehicle he was following to pull over at mile post 138 for about 30 seconds. Then driver of the vehicle drove off and Lt. Roed pursued him at speeds up to

115 miles per hour. Other officers were notified about the situation and they placed spikes ahead in the road. The vehicle that Lt. Roed's was following ran over these spikes and the vehicles tires were punctured. The driver of the vehicle then pulled into a Cenex Station parking lot and stopped the vehicle. Then the driver of the vehicle just remained seated in the vehicle and started taking an occasional drink from a bottle in his left hand. The Law officers at the Cenex station parking lot observed this drinking and also noticed that the driver had a pistol in his right hand.

[¶17] One of the law officers at the scene was Officer Wheeler. Officer Wheeler became the negotiator for the other law officers. He got the driver of the vehicle to hand the pistol out the window to another law enforcement officer. After that the driver of the vehicle, refused to get out of the vehicle, continued to drink whiskey out of a bottle and listed to music on the radio. He also started saying "I shot him... I shot him... I shot him." One of the officers then diverted the drivers attention to his side of the vehicle while other law enforcement officers went up to the other side of the vehicle and tazed the driver. This tazing got the driver of the vehicle out of the vehicle. Shortly after that the driver of the vehicle was identified as Allen Rencountre.

[¶18] Mr. Rencountre was later charged with:

1. Attempted Murder of Mr. Vilandre;
2. Fleeing or Attempting to Elude a Peace Officer;

[¶19] Also the prosecutor filed a dangerous special offender against Mr. Rencountre.

[¶20] The attorney hired by Mr. Rencountre to represent him on the above charges was Paul Probst. Attorney Probst after he was hired told Mr. Rencountre he would bring a

suppression motion to suppress statements made by Mr. Rencountre to law enforcement. One of the problems in this case is that attorney Probst never did bring a suppression motion to suppress statements made by Mr. Rencountre to law enforcement.

[¶21] Regarding the above suppression motion the court said in its Order Dismissing said: App. P. 86.

> [12] Attorney Probst testified at the post-conviction relief hearing. He admits the matter was discussed. However, he did not file the motion. He testified that it would have been a very close call to establish that Rencountre was intoxicated to the point where his statements and waiver of rights might be considered non-voluntary. Further, attorney Probst testified that in his opinion, suppressing Rencountre's statements would have been a hollow victory. Other over-whelming evidence of guilty existed. While attorney Probst did not elaborate on what this other, over-whelming evidence was, the Court would note that the victim survived the shooting, and would no doubt testify. Assuming he identified Rencountre as his assailant in front of the jury, guilt would not be difficult to foresee. It would throughout the entire proceeding, his complaints at the hearing were twofold. First, he asserts attorney Probst should have made a motion to suppress his statements because he was intoxicated when he made them. Second, he claims that attorney Probst should have obtained a second opinion regarding Rencounter's mental condition at the time of the offense.

[22] The first obvious problem with the above court's statement is the victim in this case Mr. Vilandre couldn't identify the shooter (see the above quote from official

report at [15]). Also the above quote from the order at [21] makes it clear that it would be a close call as to whether or not Mr. Rencountre was intoxicated to a point where his statements and waiver of rights might be considered non-voluntary.

[¶23] The one thing that is clear in Mr. Rencountre's case is that there is no eye witness that can identify him as the shooter of Jerome Vilandre. Therefore if there is a conviction in his case it would have to be decided on circumstantial evidence.

[¶24] Attorney Probst had Mr. Rencountre sent to the Jamestown Hospital for a mental health examination. That examination was done by PHD Lynn Sullivan. PHD Sullivan's report on the examination came back stating App. P. 46. "It is this evaluators opinion to a reasonable degree of psychological certainty that if it were not for Mr. Rencountre's state of intoxication at the time of the alleged defenses, he would have not engaged in such behavior". This above statement by PHD Sullivan eliminates mental disease or mental defect a legal defense. Therefore the fact that Mr. Rencountre has a post-traumatic stress disorder can't be used as a defense.

[¶25] Mr. Rencountre knew he had post-traumatic stress disorder. This fact caused him to question PHD Sullivan's determination that his post-traumatic stress disorder wasn't involved in his behavior on October 10, 2010. To clarify PHD Sullivan's determination he asked attorney Probst if he could get a second mental health evaluation. Attorney Probst's response was he couldn't have one.

[¶26] Had attorney Probst brought the suppression motion he had promised Mr. Rencountre, the court, would then have had to determine whether Mr. Rencountre was so intoxicated his statements to law officers should be suppressed or that he was not so intoxicated that his statements to law officers didn't have to be suppressed. If the court

were to rule Mr. Rencountre wasn't so intoxicated the person doing Mr. Rencountre's second mental health evaluation would have to consider, that ruling in deciding whether or not intoxication resulted in Mr. Rencountre's serious loss or distortion of his capacity to recognize reality or that Mr. Rencountre's post-traumatic stress disorder was involved in the loss or distortion of his capacity to recognize reality. Therefore the denying of a suppression motion in this case would have a serious effect on the result of a second mental health evaluation. The granting of the suppression motion would also help Mr. Rencountre's case because it would reduce the State's evidence.

[¶27] After attorney Probst told Mr. Rencountre he couldn't have a second mental health examination and that he wouldn't bring a suppression motion, Mr. Rencountre believed he had only two choices; (1) accept the plea agreement, or (2) get sentenced to life in prison. A life sentence is really no choice at all. In order to avoid a life sentence Mr. Rencountre believed his only choice was to take the plea agreement.

[¶28] At Mr. Rencountre's guilty plea he decided to waive a presentence report. When this occurs the Court can accept such a waiver but according to NDCC 12.1-32-02(11) must have in place of a presentence report a filed written criminal history report when an element of force is involved in the crime. In Rencountre's case there was force because a pistol was involved. So according to the above statute prior to the sentencing of Mr. Rencountre there had to be a filed written criminal history report.

[¶29] App. P.93. In this case the court in its order concedes it didn't follow the procedure required in NDCC 12.1-32-02(11).

> [32] Rencountre asserts the Court failed to follow proper sentencing procedures required by Section 12.1-32-02(11), NDCC. That section

requires the Court to have filed a written criminal history report before sentencing a defendant if use of force is an element of the offense. The written report must be filed and made part of the record. The Court concedes it did not follow the mandates of this statute.

[¶30] The court's reasoning as to why it didn't have to follow the procedure in NDCC 12.1-32-02(11) is set out in App. P.95.

[38] There is no purpose to a re-sentencing. No wrong information will be righted. Rencountre has suffered no prejudice. The law respects form less than substance. Section 31-11-05(23), NDCC. The law neither does nor requires idle acts. Section 31-11-05(23), NDCC. Bringing Rencountre back for re-sentencing merely because a piece of paper, containing the same information that was provided to the Court verbally, was not filed is an exaltation of form over substance. Bringing him back for re-sentencing so that a piece of paper can be filed is an idle act. The petition for post-conviction relief due to the Court's failure to require the filing of a criminal history report at the time of sentencing is DENIED.

[¶31] If the above court's reasoning is the law in North Dakota, North Dakota courts don't have to follow the procedure mandated to them by a state statute. Also according to above court's reasoning when a North Dakota court doesn't follow procedure mandated by statute, if a Defendant objects to a courts failure to follow the State's statute, the burden is on the Defendant to show that the Court's failure prejudiced the Defendant. The court in this case then goes on to say that even if Mr. Rencountre can show prejudice

that won't really matter because if the case is remanded the court will give the Mr. Rencountre the same sentence.

## ISSUES

[¶32] **ISSUE I. Was Attorney Paul Probst ineffective in his representation of Allan Rencountre?**

## ARGUMENT

[¶33] Standard of Review

[¶4] Post-conviction relief proceedings are civil in nature and governed by the North Dakota Rules of Civil Procedure. McMorrow v. State, 516 N.W.2d 282, 283 (N.D. 1994); Varnson v. Satran, 368 N.W.2d 533, 536 (N.D. 1985). "This 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. However, ineffectiveness of counsel is a mixed question of law and fact and we have held such questions are fully reviewable by this court without the restraints of Rule 52(a), N.D.R.Civ.P." State v. Foster, 1997 ND 8, ¶18, 560 N.W.2d 194 (citing State v. Skaro, 474 N.W.2d 711, 716-17 (N.D. 1991)).

[¶5] The Sixth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment, and Article I, 12 of the North Dakota Constitution, guarantee a defendant effective assistance of counsel. DeCoteau v. State, 1998 ND 199, ¶6, 586 N.W.2d 156. The United States Supreme Court has developed a two-part test for allegedly ineffective assistance of counsel, and we use this test to assess claims based on the state constitution. Woehlhoff v. State, 487 N.W.2d 16, 17 (N.D. 1992). To succeed on a claim for ineffective assistance of counsel, a person must show counsel's performance fell below an objective standard of reasonableness and the deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668 (1984); State v. Robertson, 502 N.W.2d 249, 251 (N.D. 1993). This test applies to claims counsel was ineffective for failing to file a notice of appeal. Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000); Whiteman v. State, 2002 ND 77, ¶10, 643 N.W.2d 704.

[¶34] In this case Mr. Rencountre is claiming his attorney Paul Probst was ineffective as his counsel. This ineffectiveness was the result of attorney Probst not keeping him informed about he case, not making a suppression motion on statements Mr.

Rencountre made to law enforcement officers and telling Mr. Rencountre he could not have a second mental health evaluation.

[¶35] The following language referred to below appears in the Courts Order App. P. 86 and appears above in [¶21] above.

[¶36] From the language that appears in [¶21] the Court believes the evidence in the case is over – whelming because the victim Jerome Vilandre is alive and can identify Mr. Rencountre. The official version of the alleged offense appears in the App. P. 38. That version makes it clear Jeremy Vilandre is alive but he didn't really see the shooter and he doesn't know the shooters ethnicity. Therefore since there is no witness to identify the shooter in this case the State doesn't have overwhelming evidence against the Defendant and the case will have to be decided on circumstantial evidence.

[¶37] In the quote from the judges Order the success or failure of Mr. Rencounter's suppression motion is a close call. Therefore there is good reason to believe that Mr. Rencountre's Motion to Suppress could have been successful. If it were successful there would be that less evidence that the State would have for this circumstantial evidence case. If the suppression motion weren't successful the denial of the suppression motion could still improve Mr. Rencounter's case. The reason why a denial could help is that the court in denying, the suppression motion would have to find that Mr. Rencountre at the time of the alleged offense was not intoxicated to a point where his statement and waiver of rights would be considered involuntary. Therefore Mr. Rencountre's degree of intoxication in the judge's ruling would be a lesser degree of intoxication then that used by PHD Lynne Sullivan in determining Mr. Rencountre's mental state at the time of the alleged crime. The use of a lesser degree of intoxication in a second mental health evaluation of Mr.

Rencountre could result in different evaluation of Mr. Rencountre's mental health at the time of the alleged crime and could result in a different determination of the effect that his post traumatic stress syndrom had on him at the time of the alleged crime.

[¶38] In this case there was no jury trial. Therefore the question is if Mr. Rencountre had he known all the facts about his case, had had the suppression motion made, and had a second mental health evaluation done, would he have gone to trial instead of pleading guilty?

[¶39] In Mr. Rencountre's case there are a lot of possible facts that one could speculate that the State could have or couldn't' have. The facts that are known at this time are the victim, Jeremy Vilandre can't identify the shooter and that Mr. Rencountre after being caught in the high speed chase said he shot someone. These facts are circumstantial evidence and many more facts are needed for the State to prove its case beyond a reasonable doubt.

[¶40] According to Strickland vs Washington 466 US 668, the second prong of the test that Mr. Rencountre must establish is that his attorney Probst's ineffective performance prejudiced him. Mr. Rencountre believes that he has established:

(1) that attorney Probst's ineffective performance cause him to believe the States case was overwhelming, and his only option was to plead guilty;

(2) that whether or not his suppression motion prevailed or failed his case would be helped by the ruling;

(3) that a second evaluation had a good possibility of improving his case;

(4) that his attorney Paul Probst never gave him proper legal advise and did not provide him with all the information about the case.

[¶41] Because of what has been stated above Mr. Rencountre has established that attorney Probst's representation of him was ineffective and that attorney Probst's ineffectiveness prejudiced him. Also he has established many sound reasons why he would have gone to trial, had attorney Probst not forced him to believe that the only way out of a life sentence was to plead guilty. Therefore Mr. Rencountre has proved both prongs required to establish ineffective assistance of counsel.

[¶42] **ISSUE II. Because the court failed to follow the procedure required in NDCC 12.1-32-03(11) is Mr. Rencountre entitled to be resentenced?**

[¶43] In this case the statute involved is NDCC 12.1-32-02(11):

> "Before sentencing a defendant on a felony charge under section 12.1-20.03, 12.1-20-03.1, 12.1-20-11, 12.1-27.2-02, 12.1-27.2-03, 12.1-27.2-04, or 12.1-27.2-05, a court shall order the department of corrections and rehabilitation to conduct a presentence investigation and to prepare a presentence report. A presentence investigation for a charge under section 12.1-20-03 must include a risk assessment. A court may order the inclusion of a risk assessment in any presentence investigation. In all felony or class A misdemeanor offenses, in which force, as defined in section 12.1-01-04, or threat of force is an element of the offense or in violation of section 12.1-22-02, or an attempt to commit the offenses, a court, unless a presentence investigation has been ordered, must receive a criminal record report before the sentencing of the Defendant. Unless otherwise ordered by the court, the criminal record report must be conducted by the department of corrections and rehabilitation after consulting with the prosecuting attorney regarding the defendant's criminal record. The criminal record report must be in

writing, filed with the court before sentencing, and made a part of the court's record of the sentencing proceeding." (Emphasis added)

[¶44] The court in its Order admits it did not follow the procedure in NDCC 12.1-32-02[11] and get a written criminal record report filed after Mr. Rencountre waived a presentence report.

[¶45] From the court's arguments in its Order it appears the court has decided a written criminal record report wouldn't have contained any useful information because Mr. Rencounter had informed the court he had no criminal record. Therefore at sentencing the court didn't need a written criminal record report because the court knew all it needed to know about Mr. Rencountre and would if the case ever sent back for sentencing give Mr. Rencountre the same sentence no matter what the criminal record report says.

[¶46] The language in NDCC 12.1-32-02[11] clearly required that the Criminal Record Report must be in writing and filed in the court before sentencing. (emphasis added) The above language in NDCC 12.1-32-02[11] is different from NDCC 12.1-32-02(6) which requires a written statement by the court accompany a sentence. (emphasis added) NDCC 12.1-32-02(6) has been interpreted in State vs Ennis 464 NW2d 378 (ND 1990). Ennis makes it clear that statutory direction for written reasons by a sentencing judge does not authorize general appellate review of a sentencing judge's discretion.

[¶47] In Mr. Rencountre's case he isn't asking the court to review his sentence. The reason for this is Mr. Rencountre's issue occurred before sentencing. The reason that it occurred before sentencing is the NDCC 12.1-32-02[11] requires the criminal record report must be in writing and filed with the court before sentencing.

[¶48] According to Ennis Requirements a written statement made by the fact finder is satisfied where the trial court states its findings and reasons on record which is transcribed to permit review.

[¶49] The above language in Ennis doesn't apply to Mr. Rencountre's case because NDCC 12.1-32-02[11] requires the writing and filing of the criminal record report be done before the sentencing begins.

[¶50] The Standard of Review in this case raised by this issue requires a statutory interpretation of NDCC 12.1-32-02(11). According to State vs Bachmeier 2007 ND42 [10] 729 NW2d 141 the Standard of Review of statutory interpretations are questions of law and are fully reviewable on appeal.

[¶51] Therefore in order to follow the procedure required by NDCC 12.1-32-02[11] this case must be remanded to the district court where the sentencing stage of the proceedings must be conducted after the filing of a criminal record report.

## CONCLUSION

[¶52] For the above and foregoing reason this matter should be remanded to the district court and Mr. Rencountre should be allowed an opportunity to withdraw his guilty plea and have a trial. Should Mr. Rencountre decide he doesn't want to withdraw his plea the court would than be required to file a criminal record report and re-sentence Mr. Rencountre.

DATED this 12 day of September, 2014.

Benjamin C. Pulkrabek

Benjamin C. Pulkrabek, ID #02908

## CERTIFICATE OF SERVICE BY MAIL

[¶53] The undersigned hereby certifies that she is an employee in the office of Pulkrabek Law Firm and is a person of such age and discretion as to be competent to serve papers.

That on September 12, 2014, she served, by e-mail and mailed a copy of the following:

**APPELLEES APPENDIX AND BRIEF**

to: Christene Reierson
Asst. State's Attorney
51wardsa@wardnd.com

Mailed to: Allen Rencountre
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P.O. Box 5521
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The undersigned further certifies that on September 12th, 2014, she served electronically on the Clerk, North Dakota Supreme Court, the APPELLEES APPENDIX AND BRIEF.

Sharon Renfrow, Admin. Legal Assistant
Pulkrabek Law Office