

20140197

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SUPREME COURT

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

FILED  
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CLERK OF SUPREME COURT

OCT 14 2014

Allen Wayne Rencountre, )  
)  
Petitioner/Appellant, )  
)  
vs. )  
)  
State of North Dakota, )  
)  
Respondent/Appellee. )  
)

Supreme Court No. 20140197  
STATE OF NORTH DAKOTA

District Court No. 51-2012-CV-00448

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APPEAL FROM THE DISTRICT COURT  
CIVIL ORDER DATED MAY 29, 2014  
IN AND FOR THE COUNTY OF WARD, STATE OF NORTH DAKOTA,  
NORTH CENTRAL JUDICIAL DISTRICT  
HONORABLE GARY H. LEE  
JUDGE OF THE DISTRICT COURT, PRESIDING

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**BRIEF OF APPELLEE ~~(CORRECTED)~~**

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[¶1] STATEMENT OF THE ISSUES

[¶2] I. The Court did not err in finding Attorney Paul Probst provided effective assistance of counsel to Allen Rencountre.

[¶3] II. The Court did not err in denying Allen Rencountre's request to return this matter to the sentencing stage of the proceedings because the Court did not comply with Section 12.1-32-02 of the North Dakota Century Code.

#### [¶4] STATEMENT OF THE CASE

[¶5] This is an appeal from an Order denying post-conviction relief dated May 29, 2014. On April 27, 2011, Allen Rencountre entered a guilty plea to the charge of Criminal Attempt – Murder, a class A felony. (Appellant’s Appendix (App.) p. 83). The trial court also found that Allen Rencountre was a special dangerous offender at the time of the change of plea. (App. p. 83). Allen Rencountre was sentenced to thirty (30) years with the North Dakota Department of Corrections and Rehabilitation, with ten (10) years suspended. (App. p. 83). Allen Rencountre was also placed on five (5) years of supervised probation following his release from incarceration. (App. p. 83). On April 23, 2012, Allen Rencountre filed an Application for Post-Conviction Relief. (App. p. 1, 4). Allen Rencountre claimed ineffective assistance of counsel and newly discovered evidence. (App. p. 5). On May 24, 2012, the State filed State’s Brief in Support of Motion for Summary Disposition and in Opposition to Petitioner’s Application for Post-Conviction Relief. (App. p. 47). On August 8, 2013, a Supplement to Petitioner’s Application for Post-Conviction Relief was filed by Attorney Daniel Borgen. (App. p. 76). A hearing was held on the application for post-conviction relief on May 5, 2014. (App. p. 2, 84). On May 29, 2014, an Order was issued by the Honorable Gary H. Lee denying Allen Rencountre’s Application for Post-Conviction Relief. (App. p. 83). Notice of Appeal was filed on June 3, 2014. (App. p. 96).

## [¶6] STATEMENT OF FACTS

[¶7] On October 11, 2010, Allen Rencountre made his initial appearance in District Court in Ward County for Criminal Attempt – Murder, a class A felony, and Fleeing or Attempting to Elude a Peace Officer, a class C felony. (App. p. 47). Allen Rencountre retained Attorney Paul Probst to represent him on the Criminal Attempt – Murder and Fleeing charges. (Transcript on Appeal (Tr.) p. 7-8, l. 19-25, 1). The preliminary hearing and arraignment were held on November 18, 2010. (App. p. 47). An Adjudicative Competency and Criminal Responsibility Evaluation of Allen Rencountre was received on or about March 14, 2011. (App. p. 47). On April 27, 2011, a pretrial conference was held. (App. p. 47). At the pretrial conference, Allen Rencountre entered a plea of guilty to Criminal Attempt – Murder. (App. p. 47). The State dismissed the charge of Fleeing or Attempting to Elude a Peace Officer. (App. p. 47). Allen Rencountre was sentenced to thirty (30) years with the North Dakota Department of Corrections and Rehabilitation, with ten (10) years suspended and five (5) years of supervised probation following incarceration. (App. p. 83). Allen Rencountre filed a Petition for Post-Conviction Relief on April 23, 2012. (App. p. 1, 4). A hearing on the Petition for Post-Conviction Relief was held on May 5, 2014. (App. p. 2, 84).

[¶8] Two issues were presented at the hearing for post-conviction relief: first, ineffective assistance of counsel; and second, failure of the Court to order a written criminal background check or presentence investigation prior to sentencing. (Tr. p. 4, l. 18-22). With regard to the ineffective assistance of counsel, two issues were presented to the trial court. (Tr. p. 21, l. 2-3). The first issue was that Attorney Probst did not file a motion to suppress the statements made by Allen Rencountre. (Tr. p. 21, l. 3-4). The

second issue was that Attorney Probst did not obtain a second opinion regarding the psychological evaluation done by the North Dakota State Hospital. (Tr. p. 21, l. 4-5).

[¶9] Attorney Probst testified at the hearing that he did discuss filing a motion to suppress with Allen Rencountre. (Tr. p. 8, l. 7-10). Attorney Probst also testified that he did not file a motion to suppress the statements. (Tr. p. 8, l. 11-12). Attorney Probst stated that he did not file the motion because Allen Rencountre was provided the Miranda advisement and waived his rights, which was clearly shown on the audio and/or video recording of the interview with Allen Rencountre. (Tr. p. 8, l. 18-22). Allen Rencountre also signed a waiver of his rights before he spoke with law enforcement. (Tr. p. 12, l. 2-3). When asked by law enforcement about his intoxication and whether “his head was clouded” or if he could make “good judgments,” Allen Rencountre told officers “I’m good, just pissed off.” (App. p. 40). The issue in the motion to suppress would have been whether Allen Rencountre knowingly and voluntarily waived his rights due to intoxication. (Tr. p. 12, l. 5-18). Attorney Probst testified that if a motion had been filed the outcome of the motion “could have gone either way.” (Tr. p. 12, l. 19-21).

[¶10] Attorney Probst further testified that whether or not the motion was filed, and whether or not the motion was meritorious, would not have changed the outcome in this matter due to overwhelming evidence against Allen Rencountre. (Tr. p. 13, 16-25). The Court followed up on Attorney Probst’s comments about overwhelming evidence and stated:

They played the video of him walking into the lobby of the hotel. I mean, I remember the preliminary hearing. The video clearly shows Mr. Rencountre or someone looking like Mr. Rencountre walking into the lobby of the hotel, leveling a pistol at the night clerk and pulling the trigger numerous times.

(Tr. p. 14, l. 2-7).

[¶11] The second issue raised was the failure to obtain a second opinion of the Adjudicative Competency and Criminal Responsibility Evaluation of Allen Rencountre. (Tr. p. 21, l. 4-5). Attorney Probst testified that he requested and received a mental health evaluation from the North Dakota State Hospital. (Tr. p. 9, l. 5-9). Attorney Probst also testified that he reviewed the results of the evaluation with Allen Rencountre. (Tr. p. 9, l. 10-11). Attorney Probst recalled that the mental health evaluation found that Allen Rencountre was competent to proceed with trial. (Tr. p. 9, l. 14-18). Attorney Probst also testified that Allen Rencountre did not ask about getting a second opinion, and that if Rencountre had asked, Attorney Probst would have obtained a second opinion if it was warranted. (Tr. p. 9, l. 19-25).

[¶12] Allen Rencountre also testified at the post-conviction relief hearing. Allen Rencountre stated that he believed a motion to suppress was going to be filed because of his intoxication. (Tr. p. 16, l. 19-25). Allen Rencountre testified that an explanation was never provided to him why the motion was not filed. (Tr. p. 17, l. 2-4). Allen Rencountre testified that if the motion had been filed and he had prevailed, he would not have changed his plea to guilty and would have probably taken the matter to trial. (Tr. p. 18, l. 11-14). Allen Rencountre also testified that he obtained a mental health evaluation and that he was diagnosed with PTSD. (Tr. p. 17, l. 5-11). Allen Rencountre also testified that the evaluator found that he was “highly intoxicated” at the time of the commission of the offense. (Tr. p. 17, l. 11). That determination was made by self-reporting. (Tr. p. 24-25, l. 21-25, 1-2). Allen Rencountre stated that he asked Attorney



Probst for a second opinion. (Tr. p. 17, l. 12-13, 19-21). Allen Rencountre testified that Attorney Probst told him that a second opinion was not possible. (Tr. p. 17, l. 21).

[¶13] The second post-conviction issue argued by Allen Rencountre was that the trial court failed to order a written criminal background check prior to sentencing. (Tr. p. 4, l. 20-22). The trial court conceded that it did not follow the procedures outlined in Section 12.1-32-03 of the North Dakota Century Code regarding a written criminal history. (App. p. 93). The court noted that it had information from the State at the time of sentencing that Allen Rencountre had no prior criminal history. (App. p. 93). Further, Allen Rencountre waived his right to a presentence investigation and requested that he proceed directly to sentencing. (App. p. 93). The Court went through the fourteen (14) sentencing factors before imposing sentence on Allen Rencountre and specifically noted that the defendant had no prior criminal history on factor seven and noted that the lack of criminal history weighed in Allen Rencountre's favor. (App. p. 93-94).

[¶14] The court pointed out that "the question is whether this failure to follow the requirements of the statute prejudiced any of Rencountre's rights." (App. p. 94). The court held that Allen Rencountre was not prejudiced. (App. p. 94). "All that the criminal history report would have shown was that Rencountre had no prior history. This fact was made known to the Court, and was considered by the Court in sentencing." (App. p. 94). The court found that there was no purpose to returning this matter to the sentencing phase of the proceedings just to have the information the court already had provided in a written format. (App. p. 94-95).

[¶15] The trial court denied Allen Rencountre's Petition for Post-Conviction Relief. (App. p. 83). This appeal follows. (App. p. 96).

[¶16] LAW AND ARGUMENT

[¶17] I. The Court did not err in finding Attorney Paul Probst provided effective assistance of counsel to Allen Rencountre.

[¶18] This Court has provided the following standard of review for issues of ineffective assistance of counsel:

Proceedings for post-conviction relief are civil in nature and are governed by the North Dakota Rules of Civil Procedure. A petitioner for post-conviction relief has the burden of establishing grounds for relief. A district court's findings of fact in a post-conviction proceeding will not be disturbed on appeal unless clearly erroneous under N.D.R.Civ.P. 52(a). Ineffective assistance of counsel is a mixed question of law and fact and is fully reviewable on appeal.

Jacob v. State, 2010 ND 81, ¶ 10, 782 N.W.2d 61 (internal citations omitted). Allen Rencountre argued that his trial attorney, Paul Probst, was ineffective in his representation.

[¶19] “A defendant claiming ineffective assistance of counsel must establish two elements: (1) counsel's performance was deficient, and (2) counsel's deficient performance prejudiced the defendant.” Wilson v. State, 1999 ND 222, ¶ 8, 603 N.W.2d 47. “An attorney's performance is measured considering the prevailing professional norms. The defendant must overcome the strong presumption that counsel's representation fell within the wide range of reasonable professional assistance, and courts must consciously attempt to limit the distorting effect of hindsight.” Sambursky v. State, 2006 ND 223, ¶ 13, 723 N.W.2d 524.

[Petitioner] must present some evidence that his attorney's performance fell below an objective standard of reasonableness. [Petitioner] must also overcome a presumption that his attorney's performance fell within the broad range of reasonableness. In making such a determination, the court must consider all circumstances and decide whether there were errors so

serious that defendant was not accorded that ‘counsel’ guaranteed by the Sixth Amendment.

Id. at ¶ 14.

[¶20] “Second, the petitioner must show that the attorney’s deficient performance prejudiced him. In order to meet this standard, the petitioner must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” Id.

All courts require something more than defendant’s subjective, self-serving statement that, with competent advice, he would not have pled guilty and would have insisted on going to trial. A defendant must thus satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is sufficient to undermine confidence in the outcome of the proceeding. This standard requires a substantial, not just conceivable, likelihood of a different result. The petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.

Bahtiraj v. State, 2013 ND 240, ¶ 16, 840 N.W.2d 605 (internal citations and quotations omitted).

[¶21] In this case, the specific allegations of ineffective assistance of counsel were that Attorney Paul Probst failed to file a motion to suppress and failed to obtain a second opinion after receiving the results of the Adjudicative Competency and Criminal Responsibility Evaluation of Allen Rencountre. Allen Rencountre must show that Attorney Probst’s performance was deficient by not filing the motion to suppress and that not filing the motion to suppress prejudiced Mr. Rencountre. Attorney Probst stated that he did not file the motion because Allen Rencountre was provided the Miranda advisement and waived his rights, which was clearly shown on the audio and/or video recording of the interview with Allen Rencountre. (Tr. p. 8, l. 18-22). Allen Rencountre also signed a waiver of his rights before he spoke with law enforcement. (Tr. p. 12, l. 2-

3). When asked by law enforcement about his intoxication and whether “his head was clouded” or if he could make “good judgments,” Allen Rencountre told officers “I’m good, just pissed off.” (App. p. 40).

[¶22] The Court summarized Attorney Probst’s testimony that any suppression of the statements of Allen Rencountre would have been a “hollow victory.” (App. p. 86). Attorney Probst testified there was other overwhelming evidence of Allen Rencountre’s guilt. (Tr. p. 13, l. 16-25). The overwhelming evidence includes surveillance video of the shooting, description of the shooter by the desk clerk, the statements of witnesses outside of the Guest Lodge, and the weapon that was in Allen Rencountre’s hand when apprehended by law enforcement. (App. p. 38-41). Allen Rencountre failed to overcome the strong presumption that Attorney Probst’s performance fell within the range of reasonable professional assistance.

[¶23] Further, Allen Rencountre must show that he was prejudiced by the failure to file the motion to suppress. Allen Rencountre testified that if the motion to suppress had been filed and granted “I probably would have went to trial . . . .” (Tr. p. 18, l. 11-14). Allen Rencountre has not provided the court with anything to show that there would have been a different result sufficient to undermine the court’s confidence in the outcome of the proceeding. If a motion to suppress had been filed, and the court suppressed Allen Rencountre’s statements, Rencountre still faced a mountain of evidence, including witnesses, physical evidence, and a video of Rencountre shooting the victim. Allen Rencountre has not met the second prong of the ineffective assistance of counsel standard.

[¶24] Allen Rencountre also argued ineffective assistance of counsel by failing to obtain a second opinion regarding the mental evaluation Rencountre underwent at the North Dakota State Hospital. Dr. Lynne Sullivan recommended that “Mr. Rencountre not be found to have lacked criminal responsibility for the offenses with which he is currently charged.” (App. p. 46). Allen Rencountre testified that he requested a second opinion from Attorney Probst, which was denied. (Tr. p. 17, l. 12-13, 19-21). Allen Rencountre argues that his diagnosis of PTSD and his intoxication should have been subject to a second opinion. (Tr. p. 17, l. 11-13). Attorney Probst recalled that the mental health evaluation found that Allen Rencountre was competent to proceed with trial. (Tr. p. 9, l. 14-18). Attorney Probst also testified that Allen Rencountre did not ask about getting a second opinion, and that if Rencountre had asked, Attorney Probst would have obtained a second opinion if it was warranted. (Tr. p. 9, l. 19-25).

[¶25] The court stated in its order that “The report of the evaluator concluded that Rencountre was competent to stand trial and assist in his defense.” (App. p. 88). “The evaluator further determined that Rencountre did not appear to be suffering from any mental disease or defect at the time of the offense, and that he did not lack criminal responsibility at the time of the offense.” (App. p. 88).

[¶26] As the court reasoned in the Order, there is no evidence or proof provided by Allen Rencountre that a second opinion would have been different from the opinion issued by Dr. Lynne Sullivan. (App. p. 91). Again, the court stated there must be more than a mere allegation that Allen Rencountre would have not entered a plea and insisted on going to trial. (App. p. 89-90). The court stated “The defendant must allege facts which, if proven, would support the conclusion that a decision to reject a plea and go to

trial would have been rational.” (App. p. 90). One of the factors to take into consideration when determining whether it is a rational decision to reject a plea and go to trial, is the strength of the State’s case. (App. p. 90). Other than Allen Rencountre’s statements, no proof has been provided to show that a second evaluation regarding criminal responsibility would have had a different outcome. As the court stated, Allen Rencountre did not provide medical or psychological records from any time before or after his guilty plea which would support his allegations. (App. p. 91).

[¶27] Allen Rencountre has failed to meet the test for ineffective assistance of counsel of Attorney Probst when a second opinion was not obtained regarding the Adjudicative Competency and Criminal Responsibility Evaluation. This Court should affirm the district court’s findings that Allen Rencountre had effective assistance of counsel in Attorney Paul Probst.

[¶28] II. The Court did not err in denying Allen Rencountre’s request to return this matter to the sentencing stage of the proceedings because the Court did not comply with Section 12.1-32-02 of the North Dakota Century Code.

[¶29] North Dakota law states:

. . . . In all felony or class A misdemeanor offenses, in which force . . . or threat of force is an element of the offense . . . 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.

N.D. Cent. Code § 12.1-32-02(11). The trial court concedes that it did not follow this provision of the Century Code. (App. p. 93).

[¶30] The court noted that it had information from the State at the time of sentencing that Allen Rencountre had no prior criminal history. (App. p. 93). Further, Allen Rencountre waived his right to a presentence investigation and requested that he proceed directly to sentencing. (App. p. 93). The Court went through the fourteen (14) sentencing factors before imposing sentence on Allen Rencountre and specifically noted that the defendant had no prior criminal history on factor seven and noted that the lack of criminal history weighed in Allen Rencountre's favor. (App. p. 93-94).

[¶31] The State agrees with the trial court that remanding this matter back to the trial court for resentencing would be of "no purpose." (App. p. 94-95). The trial court cited two maxims of jurisprudence: "The law respects form less than substance" and "The law neither does nor requires idle acts." (App. p. 95 (quoting N.D. Cent. Code §§ 31-11-05(19) & (23))). There are other maxims that may also be applicable: "One who consents to an act is not wronged by it" and "Acquiescence in error takes away the right of objecting to it." N.D. Cent. Code §§ 31-11-05(6) & (7).

[¶32] Allen Rencountre waived his right to a presentence investigation. (App. p. 93). Further, Allen Rencountre had no prior criminal history. As the court states "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 . . . [and] an idle act." (App. p. 95). The outcome will not change because the information the court had at the time of sentencing will not change. This argument should be denied by the Court and the matter should not be remanded for re-sentencing.

[¶33] CONCLUSION

[¶34] Allen Rencountre did not meet his burden at the hearing for post-conviction relief to show that Attorney Paul Probst rendered ineffective assistance of counsel. Therefore, this matter should be affirmed on the ground of ineffective assistance of counsel. Additionally, the court did not err in denying Allen Rencountre's request to have this matter returned to the sentencing phase of the proceedings by failing to follow the provisions of subsection 11 of Section 12.1-32-02 of the North Dakota Century Code. Therefore, the Order issued by the District Court of Ward County on May 29, 2014 regarding Allen Rencountre's Petition for Post-Conviction Relief should be affirmed.

Respectfully submitted this 21<sup>st</sup> day of October, 2014.



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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Allen Wayne Rencountre, )  
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Petitioner/Appellant, ) Supreme Court No. 20140197  
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State of North Dakota, ) District Court No. 51-2012-CV-00448  
)  
Defendant/Appellant. )  
)

**[¶35] AFFIDAVIT OF SERVICE BY MAIL**

Lynnae Rudland, being first duly sworn, deposes and says:

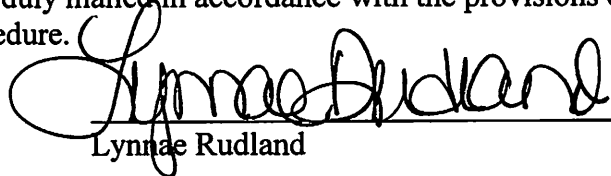
That she is a citizen of the United States of America, over the age of twenty-one years, and is not a party to nor interested in the above entitled action; that on the 21 day of October, 2014, this Affiant deposited in the mailing department of the United States Post Office at Minot, North Dakota, a sealed envelope with postage thereon duly prepaid, containing a true and correct copy of the following document in the above entitled action:

**BRIEF OF APPELLEE (CORRECTED)**

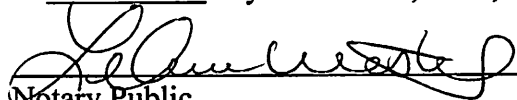
That said envelope was addressed to the following person at his address as follows:

**BENJAMIN C PULKRABEK  
ATTORNEY AT LAW  
402 1<sup>ST</sup> ST NW  
MANDAN ND 58554**

That the above document was duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

  
\_\_\_\_\_  
Lynnae Rudland

Subscribed and sworn to before me this 21 day of October, 2014, by  
Lynnae Rudland

  
\_\_\_\_\_  
Notary Public

