

**IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA**

Miguel Humberto Medina-Romero,)	
)	
Petitioner-Appellant,)	
)	Supreme Court No.: 20140287
v.)	Pembina Co. No.: 34-2013-CV-00128
)	District Court No.: 34-10-K-00242
State of North Dakota)	
)	
Respondent-Appellee)	

**APPEAL FROM THE DISTRICT COURT ORDER
DENYING PETITIONER'S MOTION FOR
POST-CONVICTION RELIEF ENTERED ON JULY 23, 2014,
BY THE PEMBINA COUNTY DISTRICT COURT,
THE HONORABLE LAURIE A. FONTAINE, PRESIDING.**

BRIEF OF APPELLEE

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

- A. Whether the District Court Erred in Denying the Petition for Post-Conviction Relief Claiming Trial Counsel Failed to Interview and Call a Material Witness, Resulting in Ineffective Assistance of Counsel.

- B. Whether the District Court Erred in Denying the Petition for Post-Conviction Relief Claiming Trial Counsel Failed to Explain the Voir Dire and Jury Selection Process Properly to Petitioner, Resulting in Ineffective Assistance of Counsel.

STATEMENT OF FACTS

¶ 1 Miguel Humberto Medina-Romero (Petitioner) was charged in October 2010, with Murder, and Unlawful Possession/Manufacturing of a Controlled Substance. An amended complaint was filed on January 7, 2011, adding the charges of Manufacture, Deliver or Possess with Intent to Deliver a Controlled Substance and Tampering with Physical Evidence. The Tampering charge was later dismissed and Petitioner went to trial on the remaining three charges. He was convicted by jury verdict on August 5, 2011, on the two drug charges and the murder charge. Petitioner was sentenced on October 18, 2011, to Life without Parole in the custody of the Department of Corrections and Rehabilitation for the murder charge and consecutive sentences on the drug charges.

¶ 2 In November 2011, Petitioner appealed his conviction, alleging the District Court erred when it a) denied his motion to allow the jury to view the crime scene, b) refused to change wording in the jury instruction from “great bodily injury” to “serious bodily injury” or to provide a definition of “great bodily injury,” and c) denied his motion for judgment of acquittal on the unlawful possession of a controlled substance with intent to deliver. Petitioner also alleged that he was entitled to a transcript that “truly discloses” what occurred in District Court. The North Dakota Supreme Court upheld Petitioner’s conviction in their opinion delivered on July 12, 2013. State v. Romero, 2013 ND 77, 830 N.W.2d 586 (N.D. 2013).

¶ 3 Petitioner filed a letter asking for post-conviction relief on July 31, 2013. At the same time he submitted an application for court appointed counsel, which was granted on that same day. The District Court chose to treat the letter as a petition for post-conviction relief. A formal Application for Post-Conviction Relief was filed on September 19, 2013,

and counsel was assigned to the case on October 9, 2013. Ultimately, a total of nine issues were brought up in Petitioner's brief dated January 20, 2014; eight of them argued ineffective assistance of either trial or appellate counsel, while the ninth argued prejudice by the court in favor of the State in its ruling on issues relevant to the case. A hearing was held before the Honorable Laurie A. Fontaine on June 23, 2014, and the Petitioner's Motion was denied in a written opinion dated July 21, 2014. The opinion stated the Petitioner failed to provide trial counsel was ineffective in its representation of him. Specifically, Petitioner neither showed what the testimony of the alleged "eyewitness" would be nor how it would have impacted the outcome of the trial. The issue of whether Petitioner was properly informed as to the voir dire process was not raised, but the issue of whether the jury was properly questioned and impanelled was raised and the District Court determined adequate measures were taken to provide an unbiased jury. An appeal of this denial was filed in a timely fashion on August 14, 2014.

STANDARD OF REVIEW

¶ 4 Henke v. State, holds: "Our standard for reviewing a summary denial of a petition for post-conviction relief is similar to our standard for reviewing an appeal for summary judgment." 2009 ND 117, ¶ 9, 767 N.W.2d 881 (N.D. 2009). Proceedings for post-conviction relief are civil in nature and all rules and statutes applicable in civil proceedings are available to the parties. Weaver v. State, 2003 ND 47 ¶ 5, 658 N.W.2d 352 (N.D. 2003). In Haag v. Sate, 2012 ND 241, ¶ 4, 823 N.W.2d 749 (N.D. 2012), the court held: "A District Court may summarily dispose of a petition for post-conviction relief if there are no genuine issues of material fact and the party requesting summary disposition is entitled to judgment as a matter of law". (quoting Vandeberg v. State, 2003 ND71, ¶ 5, 660 N.W.2d 568 (N.D. 2003)).

LAW AND ARGUMENT

INEFFECTIVE ASSISTANCE OF COUNSEL GENERALLY

¶ 5 A criminal defendant is entitled to effective assistance of counsel as guaranteed by the Sixth Amendment of the United States Constitution as well as the North Dakota State Constitution. Strickland v. Washington, 466 U.S. 668, 687 (1984); see also State v. Strutz, 2000 ND 22, 606 N.W.2d 886 (N.D. 2000); Woehlhoff v. State, 487 N.W.2d 16, 17 (N.D. 1992); Auman v. United States, 67 F.3d 157, 162 (1995). The purpose of the Sixth Amendment guarantee to the effective assistance of counsel “is to ensure that criminal defendants receive a fair trial.” Strickland at 689. In order to prove ineffective assistance of counsel, a petitioner must establish two elements referred to as the “Strickland Test”: (1) Counsel's performance was deficient, and (2) his defense was prejudiced by that deficiency. Id. It is a petitioner's burden to prove both elements, and failure to do so is fatal to his claim. State v. McLain, 403 N.W.2d 16, 17 (N.D. 1987). The burden on the petitioner is a "heavy burden." Abdi v. State, 608 N.W.2d 292 (N.D. 2000).

¶ 6 Petitioner will be unable to prove the two elements of the “Strickland Test” required to show Attorney Rob Fleming (Fleming) provided ineffective assistance of counsel and thus the District Court did not err in denying his motion for post-conviction relief. Although Petitioner claims that Fleming failed to conduct a reasonable investigation into a material witness and failed to explain the voir dire and jury selection process, Petitioner cannot show that counsel’s representation was ineffective and therefore led to anything but a fair trial.

DEFICIENT PERFORMANCE

¶ 7 In order to prove ineffective assistance of counsel, a petitioner must establish two elements referred to as the “Strickland Test”: (1) Counsel's performance was deficient, and (2) his defense was prejudiced by that deficiency. Strickland at 687. "Deficiency means that counsel's performance fell below an objective standard of reasonableness, and prejudice means that, but for counsel's errors, a reasonable probability exists that the result . . . would have been different." Id. at 694. To prove the first element of the “Strickland Test” a petitioner must show that “counsel’s representation fell below an objective standard of reasonableness.” Id. at 687. To satisfy this element, the Supreme Court for the State of North Dakota requires consideration of all circumstances to determine whether there were errors so serious the defendant was not accorded that counsel guaranteed by the Sixth Amendment. McLain at 17.

PREJUDICE

¶ 8 To prove ineffective assistance of counsel under the second element of the “Strickland Test” a petitioner must show that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Strickland at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. “The reviewing court must not consider the attorney error in isolation, but instead must assess how the error fits into the big picture of what happened at trial.” Id. at 696.

A. The District Court Did Not Err in Denying Petitioner’s Post-Conviction Relief Claim that Trial Counsel Was Ineffective for Failing to Interview and Call a Material Witness.

MATERIAL WITNESS

¶ 9 The first claim made by Petitioner alleges that the District Court erred in denying the Petition for Post-Conviction Relief when Petitioner’s trial counsel failed to interview and call a material witness whose testimony could have proven beneficial and exculpatory. Petitioner claims he is entitled to relief under the Uniform Post Conviction Procedure Act, North Dakota Century Code (N.D.C.C.) § 29-32.1 because Fleming failed to conduct a reasonable investigation and failed to properly prepare for trial. In order to prove ineffective assistance of counsel Petitioner must prove that he was represented by counsel whose performance was deficient and that the deficiency caused him to be prejudiced. Strickland at 687.

¶10 Petitioner claims that Fleming did not provide reasonably effective assistance when he allegedly failed to conduct an adequate and thorough trial preparation and investigation and this fell below the reasonable standard of representation. Petitioner bears the burden to overcome the strong presumption that counsel's performance was reasonable. Middleton v. Roper, 455 F.3d 838, 846 (2006). However, it is required that counsel conduct more than a cursory investigation and not lack preparation or investigation. Strickland at 690-91. Judge Laurie A. Fontaine, in her Order Denying Application for Post-Conviction Relief, states “Mr. Robert Fleming and Mr. Neil Fleming represented [Romero]’s argument within the range of reasonable assistance.” July 21, 2014, Docket 34-2013-CV-00128, (No. 36) ¶16.

¶ 11 In order to prove ineffective assistance of counsel under the second element of the “Strickland Test” a petitioner must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Strickland at 694.

¶ 12 In Wainwright, petitioner claimed that counsel was ineffective because he unreasonably failed to call a defense expert to testify at trial. Holder v. United States, 2008 U.S. Dist. LEXIS 55405, 108 (citing Wainwright v. Lockhart, 108 80 F.3d 1226, 1230 (1996)). In that case, there was no evidence presented to the Court detailing as to what the expert witness would testify, therefore requiring the Court to assume that the testimony would have been most favorable to the Petitioner. Id. at 110-11. The Court found that even with this favorable testimony, the strong testimony presented on behalf of the Government greatly outweighs the testimony of this expert witness, and therefore would not cause petitioner to receive ineffective assistance of counsel. Id. Wainwright is similar to the current case in that even with the additional witness’s testimony; the testimony provided by the State would greatly outweigh the additional testimony of this eyewitness.

¶ 13 Petitioner claims that Fleming did not conduct an adequate investigation nor did he properly prepare for trial because he did not call “Rica Senum” (Senum) as an eyewitness. Petitioner claimed this “eyewitness” was necessary to showing witnesses called by the State lied at trial. In paragraph 6 of her Order Denying Application for Post-Conviction Relief, Judge Fontaine determined, “The Petitioner, however, did not go on to show what that witness would have said or how that would have changed the result of his trial. No statement of that witness was presented to the Court and no evidence

showing how that would have changed the outcome was presented.” The Judge of the District Court believed that the testimony of the additional witness would not have changed the outcome of the case; therefore, the Petitioner failed to prove the second element of the “Strickland Test.” at 687.

¶ 14 In Amire, the Court found that although counsel had not called forth an unidentified witnesses’ testimony, counsel had “called witnesses, put in exhibits, and cross examined the state’s witnesses” which would not lead a jury to change the verdict. Holder v. United States, 2008 U.S. Dist. LEXIS 55405, 108, 125 (citing Amire v. Bowersox, 238 F.3d 1023, 1031 (2001)). The Court found that the outcome would not have been different had additional testimony been presented. Id. The testimony that would have been provided by the witness at trial was already supported by the testimony presented at trial, “such that the additional testimony would not have affected the outcome.” Id. The Court concluded that in this situation the “Strickland Test” had not been met. 466 U.S. at 687.

¶ 15 Petitioner claims that the evidence provided by Senum would be rebuttal eyewitness testimony to the harmful evidence provided against him at trial. Specifically, Petitioner testified that two witnesses were not being truthful during trial which was evidenced by written statements, which if had been provided, would have assisted him in aiding counsel in preparing a better defense. June 23, 2014 Tr. 15-17. Fleming testified that although he did not provide copies of the statements to Petitioner, they were discussed before trial; therefore Petitioner was aware of the original written statements. June 23, 2014 Tr. 53. Paragraph 15 of Judge Fontaine’s Order Denying Application for Post-Conviction Relief, holds not giving Petitioner written copies of statements but

discussing those statements with him in person, did not rise to the level of ineffective assistance of counsel.

¶ 16 Petitioner testified that Fleming cross-examined the State's witnesses during the trial. June 23, 2014 Tr. 15. Petitioner claims that if the testimony of Senum would have been presented, it would have rebutted the testimony of the two witnesses who were not being truthful. However, Petitioner did not provide the court information as to what the actual testimony would be, nor how it would have impacted the outcome of the trial. The court notes Fleming did cross-examine witnesses at trial regarding their inconsistent statements to law enforcement and they admitted to lying. Therefore, the lack of testimony from Serum did not prejudice Petitioner.

¶ 17 Petitioner cited to State v. Skaro, claiming that case is distinguishable from the case at hand in that Fleming presented no trial strategy regarding the eyewitness accounts of Senum. 474 N.W.2d 711, 716 (N.D. 1991). The Court found that counsel who called in witnesses whom he deemed to be necessary to support his client, and who examined and cross-examined witnesses was not found to be deficient. Id. at 717. This is similar to the present case, in which Fleming called in witnesses, which he deemed to be necessary to the defense. Additionally, Fleming did examine and cross-examine witnesses brought forth on behalf of the State and Petitioner.

¶ 18 In Rompilla v. Beard, Petitioner's trial counsel failed to examine the court file on his previous convictions, although counsel knew that the prosecution would be using this against him. 162 L. Ed. 2d 360, 383 (2005). The Court found that had the defense counsel examined this file, they would have discovered leads in which they could have used to their benefit. Id. at 390-91. This case is dissimilar from the present case in that there was

deficient performance in Rompilla because trial counsel failed to examine a document which it knew the prosecution intended to use against their client. Id. In this case, Fleming never failed to examine documents that would be used by the prosecution. Additionally, the evidence in Rompilla that was undiscovered was substantial in contrast to the alleged testimony that could be presented by Senum which would not change the outcome of Petitioner's case. Id.

¶ 19 Fleming, therefore, did conduct a fair and reasonable investigation into the criminal case brought against Petitioner. Fleming met with Petitioner on several occasions to discuss the status of his case to include the actors, vehicles, house, statements, his version and efforts in preparing cross-examination of these individuals. June 23, 2014 Tr. 53-54. Additionally, it should be noted that Fleming did not turn over discovery to his client while he was incarcerated because it contained documents protected by attorney-client privilege and Fleming was concerned about Petitioner's privacy during incarceration. Fleming testified he chose to discuss the case at great length with Petitioner instead of provide physical copies to him, which is evidenced in both the testimony of Attorney Rob Fleming and Romero. June 23, 2014 Tr. 13 & 54.

B. The District Court Did Not Err in Denying Petitioner's Post-Conviction Relief Claim that Trial Counsel Was Ineffective for Failing To Explain Voir Dire and Jury Selection

VOIR DIRE AND JURY SELECTION

¶ 20 The second claim made by Petitioner alleges that the District Court erred in denying the Petition for Post-Conviction Relief because trial counsel failed to explain the voir dire and jury selection process properly to Petitioner. Petitioner claims he is entitled

to relief because Fleming did not give guidance or assistance, claiming counsel failed to explain the voir dire and jury selection process properly to Petitioner.

¶21 Petitioner claims that Fleming failed to properly explain the voir dire and jury selection process to Petitioner. This claim is contradicted by Petitioner's own testimony. Early on in the Post-Conviction Relief hearing held on June 23, 2014, Petitioner explains the voir dire and jury selection process when he claims that he could not receive a fair trial in Pembina County because "everyone knew the family directly or indirectly." June 23, 2014 Tr. 10. Later in the Post-Conviction Relief Appeal proceeding, Petitioner claims that he did not understand the voir dire process which was the basis behind his assertion of ineffective assistance of counsel. June 23, 2014 Tr. 24.

¶22 Petitioner's claim that he was not properly advised as to voir dire is contradicted by the testimony given by Fleming. Specifically, Fleming states that the defense spent a "fair amount of time" on the issues and every single juror "testified that they could be fair and impartial." June 23, 2014 Tr. 49. Additionally, it should be noted Petitioner was at the table when the defense was picking the jury. June 23, 2014 Tr. 51. Before defense counsel would strike people, they would discuss it with Romero, who was able to give his input as to whom he thought should be stricken (on the preemptory challenge). June 23, 2014 Tr. 51. The decision to strike the most damaging people came from a combination of professional knowledge on behalf of defense counsel on voir dire and the opinion of the Petitioner, leading Fleming to believe, in good faith, that the jury could be fair and impartial. June 23, 2014 Tr. 52.

¶23 Judge Fontaine, in her Order Denying Application for Post-Conviction Relief, states that a juror questioned the immigration status of Romero. Fleming responded and

that issue was never brought up again during the jury selection process which shows that there is no prejudice towards any other jurors or the trial in general. “All jurors that remained in the trial said they could be fair and impartial.” July 21, 2014, Docket 34-2013-CV-00128, (No. 36) ¶11. Judge Fontaine determined, “In the jury selection process all jurors who claimed knowledge of the case were objected to and were removed.” The Judge believed that the voir dire and jury selection process was properly explained to Petitioner; therefore, proving that Petitioner could not prove either element one or two of the “Strickland Test.” at 687.

¶24 Although Petitioner claims he did not receive a proper explanation of the voir dire and jury selection process, it is apparent from his own testimony, the testimony of Fleming, and the Order Denying Application for Post-Conviction Relief of Judge Fontaine that he did in fact receive proper explanation of this process. Fleming acted in a strategic way in order to provide Petitioner with a fair and impartial jury. Petitioner claims that if he had received proper explanation of the voir dire and jury selection process, Petitioner could have requested a bench trial. The record is clear, Petitioner did in receive proper instructions and failed to request a bench trial. Therefore, it is not due to ineffective assistance of counsel that Petitioner received a guilty verdict during jury trial.

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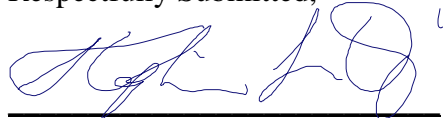
CONCLUSION

¶ 25 The purpose of the Sixth Amendment guarantee to the effective assistance of counsel “is to ensure that criminal defendants receive a fair trial.” Strickland at 689. At no point in time did Fleming exhibit conduct that would fall below an objective level of reasonableness, creating an unfair trial for Petitioner. Since Petitioner is unable to prove either element of the “Strickland Test,” the Court should find that Petitioner has not met the burden of proving ineffective assistance of counsel. Id. at 687.

¶ 26 Under N.D.Civ.P. 52(a)(6), A district court’s findings will not be set aside unless clearly erroneous. Petitioner has failed to show the district court erred when it denied his petition for post-conviction relief. The State respectfully requests, for the reasons stated above, the North Dakota Supreme Court affirm the Order Denying Romero’s Application for Post-Conviction relief in its entirety.

Dated this 19th day of December, 2014.

Respectfully Submitted,



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**APPEAL FROM THE DISTRICT COURT DECISION
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CERTIFICATE OF SERVICE

¶1 I, Stephenie L. Davis, certify that on the 9th day of December, 2014, I e-mailed a true and correct copy of the following document filed in the above-entitled action:

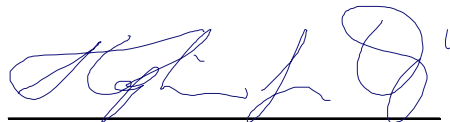
BRIEF OF APPELLEE

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Dated this 19th day of December, 2014.



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