20140321
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
DECEMBER 8, 2014
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME COURT NO. 20140321

Gene Carl Kirkpatrick,

Petitioner - Appellant,

vs. Supreme Court No. 20140321
District Court No. 06-2013-CV-01740

State of North Dakota,

Respondent - Appellee.

APPELLEE'S BRIEF

APPEAL FROM JUDGMENT DENYING APPLICATION
FOR POST-CONVICTION RELIEF
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE STEVEN L. MARQUART, PRESIDING

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[¶3] **ISSUES PRESENTED**

[¶4] I. Whether the District Court erred by denying Kirkpatrick post-conviction relief.

[¶5] **STATEMENT OF THE CASE**

[¶6] Appellant Gene Carl Kirkpatrick is hereafter referred to as "Kirkpatrick". Appellee State of North Dakota is hereafter referred to as "State". Kirkpatrick's trial counsel, Mack Martin, is hereafter referred to as "Martin". Michael Nakvinda, who was convicted of killing Philip Gattuso, is hereafter referred to as "Nakvinda". Philip Gattuso is hereafter referred to as "Gattuso".

[¶7] Kirkpatrick was charged with conspiracy to commit murder (Count 1) and conspiracy to commit burglary (Count 2) relating to the death of his son-in-law, Gattuso, on or about October 26, 2009. The jury found Kirkpatrick guilty of both counts. In October 2011 the District Court sentenced him to serve life imprisonment without the possibility of parole (Count 1) and 10 years (Count 2), to run concurrently. Kirkpatrick appealed. This court affirmed his conviction. State v. Kirkpatrick, 2012 ND 229, 822 N.W.2d 851. In April 2013, the District Court denied Kirkpatrick's motion to reduce his sentence pursuant to N.D.R.Crim.P. 35.

[¶8] In July 2013 Kirkpatrick filed a pro se application for post-conviction relief ("PCR") claiming ineffective assistance of counsel, without otherwise refining that claim. (Appellant's Appendix "App.": 4.) The District Court appointed him counsel. His counsel filed an amended

PCR petition on January 15, 2014. (App.: 5-9.) Within it Kirkpatrick claimed he was ineffectively represented by trial counsel because: (1) his charges were both conspiracies, (2) Kirkpatrick should have testified in his trial to the lack of any agreement with Nakvinda, (3) as a trial strategy his counsel prevented him from doing so, and (4) that trial strategy was objectively unreasonable. The State resisted. (App.: 10-14.)

[¶9] The District Court conducted an evidentiary hearing on August 7, 2014. Kirkpatrick and his trial counsel, Martin, were witnesses. The District Court denied Kirkpatrick post-conviction relief. (App.: 10-14.) Judgment was entered on August 15, 2014. (App.: 34.) Kirkpatrick timely filed a Notice of Appeal on September 9, 2014. (App.: 35.)

[¶10] **STATEMENT OF THE FACTS**

[¶11] In the underlying criminal conviction the State alleged Kirkpatrick conspired with Nakvinda to murder Kirkpatrick's son-in-law (Gattuso) and commit burglary to cover up the murder. For a summary explanation of the State's case, see Kirkpatrick, 2012 ND 229, ¶¶2-5, 822 N.W.2d 851 and State v. Nakvinda, 2011 ND 217, ¶¶2-7, 807 N.W.2d 204.

[¶12] In general, the State concurs with Kirkpatrick's Statement of Facts. However, the State offers this additional context to its last sentence. Attorney Martin acknowledged Kirkpatrick's testimony might have been the "best evidence" to clarify what Kirkpatrick meant in his recorded interview. However, when asked if it was the "best defense" in a conspiracy case, Martin responded "That's one of many ways you can do it." (Transcript of Trial "Tr." 76:7-22.) Martin also testified that many risks accompany subjecting a defendant to cross-examination, and discussed what those were in Kirkpatrick's case, all of which will be addressed in more detail in the State's argument that follows.

[¶13] **ARGUMENT**

[¶14] **I. The District Court did not err in denying Kirkpatrick post-conviction relief.**

[¶15] A. Legal Bases/Burden for Post-Conviction Relief.

[¶16] Post-conviction relief ("PCR") is not a constitutional right but rather a statutory remedy devised by the Legislature. The conditions under which PCR may be claimed are identified in N.D.C.C. §29-32.1-01.

[¶17] PCR proceedings are civil in nature. Tweed v. State, 2010 ND 38, ¶15, 779 N.W.2d 667. The burden of establishing a basis for PCR rests with the petitioner. Id. A petitioner claiming ineffective assistance of counsel must establish both prongs of the Strickland test, namely he bears the burden of proving (1) his counsel's performance fell below an objective standard of reasonableness, and (2) he was prejudiced by the deficient performance. Gullickson v. State, 2014 ND 155, ¶5, 849 N.W.2d 206; Strickland v. Washington, 466 U.S. 668 (1984). To meet the first prong, a petitioner must overcome the strong presumption that his counsel's performance was within a broad range of reasonableness considering prevailing professional norms. Id., ¶6. To meet the prejudice prong, a petitioner carries the heavy burden of establishing a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different and how it would have differed. Osier v. State, 2014 ND 41,

¶10, 843 N.W.2d 277. Unless counsel's errors are so blatantly and obviously prejudicial that they would in all cases, regardless of the other evidence presented, create a reasonable probability of a different result, the prejudicial effect of counsel's errors must be assessed within the context of the remaining evidence properly presented and the overall conduct of the trial. Id., ¶11. A court does not need to address both prongs if it can resolve the claim by addressing only one prong, and the court is encouraged to do so. Id.; Wong v. State, 2011 ND 201, ¶19, 804 N.W.2d 382 (court need not analyze whether petitioner was prejudiced if petitioner cannot show counsel's performance was deficient).

[¶18] Whether a defendant received ineffective assistance of counsel is a mixed question of law and fact and is fully reviewable on appeal. Osier, ¶10. A District Court's findings of fact are reviewed under the clearly erroneous standard. Wong, ¶15.

[¶19] B. Defendants have a right to testify on their own behalf.

[¶20] A defendant has a constitutional right to testify on his own behalf. Rock v. Arkansas, 483 U.S. 44, 51-53 (1987)(derived from the 14th Amendment's Due Process Clause, the 5th Amendment's prohibition on compelled testimony and the 6th Amendment's Compulsory Process Clause). This is a fundamental constitutional guarantee, hence it is a personal right and

only the defendant may waive it. Id.; U.S. v. Bernloehr, 833 F.2d 749, 751 (8th Cir. 1987); Frey v. Schuetzle, 151 F.3d 893, 897-98 (8th Cir. 1998); State v. Antoine, 1997 ND 100, ¶5, 564 N.W.2d 637. A waiver must be knowing and voluntary. Bernloehr, 833 F.2d at 751; Frey, 151 F.3d at 898; Antoine, ¶5. However, unlike other constitutional rights that can be waived only after the court makes a formal inquiry, the trial court does not have a duty to verify the defendant who is not testifying has voluntarily waived his right. Id. A court is entitled to presume the attorney and client discussed the right and the defendant voluntarily agreed upon the final decision. Antoine, ¶5. Silence connotes acquiescence. Id., ¶8; Frey, 151 F.3d at 898. Instead, if a defendant did not voluntarily agree not to testify, then the defendant has a duty to affirmatively act at an appropriate time to express his desire to testify. Antoine, ¶6; see also Bernloehr, 833 F.3d at 751-52. For example, "he can reject his lawyer's tactical decision by insisting on testifying, speaking to the court or discharging his lawyer." Antoine, ¶6 (quoting U.S. v. Joelson, 7 F.3d 174 (9th Cir. 1993)).

[¶21] A defendant's right to testify has been specifically addressed by this Court on multiple occasions. In Antoine, defense counsel rested without calling the defendant to the stand. The defendant said nothing and was convicted of simple assault on a peace officer. In the direct appeal of his

conviction, this court opined that a defendant "may not indicate by his actions his apparent acquiescence in his attorney's decision that he not testify, and then later argue he was silenced against his will." Antoine, ¶8 (citing Bernloehr, 833 F.3d at 752). More recently in Mulske, a direct criminal appeal from a theft conviction, this court stated "a defendant may not wait for the outcome of the trial and then seek reversal by claiming that, despite having expressed to counsel a desire to testify, he or she was deprived of that opportunity". State v. Mulske, 2007 ND 43, ¶8, 729 N.W.2d 129, (citing People v. Bradford, 14 Cal.4th 1005, 60 Cal.Rptr.2d 225, 929 P.2d 544, 574 (1997)). "Because Mulske failed to exercise his right to testify during the evidence-taking stage of his trial, he made a knowing and voluntary waiver of that right." Mulske, ¶14. Earlier this year, Robert Delaney invited this court to abandon its precedent in Antoine and Mulske and to declare a trial court's duty to obtain from a defendant, on the record, an affirmative waiver of his right to testify. This court declined that invitation, quoting Mulske in opining that a court has no duty to verify a defendant has voluntarily waived his right to testify. Delaney v. State, 2014 ND 27, ¶1, 844 N.W.2d 362, 2014 WL 938512 (N.D.).

[¶22] C. Kirkpatrick's claim is without merit.

[¶23] Kirkpatrick's claim that Martin denied him the opportunity to testify is inconsistent with the whole of the evidence and without merit.

1. Kirkpatrick was an educated man.

[¶24] Kirkpatrick was neither mentally nor educationally handicapped. Rather, he was mature, college educated with advanced coursework in business and well-spoken. (Tr. 52:18-23.)

2. Kirkpatrick was represented by an experienced attorney.

[¶25] Kirkpatrick was represented by a highly experienced counsel, who has practiced criminal defense in Oklahoma's state and federal courts for 35 years. Martin was actively involved in the American Board of Criminal Lawyers, the National Association of Criminal Defense Lawyers, was former president of the Oklahoma Criminal Defense Lawyers Association, former president of the Oklahoma County Bar Association, former vice president of the Oklahoma Bar Association and has been inducted into the American College of Trial Lawyers and the American Board of Criminal Lawyers. (Tr. 58:14 – 60:20.) Martin was not thrust upon Kirkpatrick against his will, but a lawyer he chose after considering multiple lawyers. (Tr. 11:10 – 12:1; 26:1 – 28:5.) Kirkpatrick does not argue Martin was inexperienced, incompetent, failed to communicate with him or slept during proceedings. (Tr. 32-34.)

Instead, Kirkpatrick said about Martin: "… there's no doubt that Mack Martin is a very good attorney." (Tr. 29:1-2.) Kirkpatrick's sole argument on post-conviction relief is that he should have testified. (Tr. 34:7-21.)

3. Martin devoted a lot of time to, and worked closely with Kirkpatrick on, the case.

[¶26] Although not his primary argument on post-conviction relief, Kirkpatrick testified that Martin was "very stretched time-wise" on his case. (Tr. 28:21-22.) However, that argument is not otherwise supported by the evidence. Kirkpatrick acknowledged he and Martin spent a lot of time together during the pendency of his case, including traveling together from Oklahoma to Fargo to attend a deposition in the Nakvinda case, to testify in the Nakvinda trial and to attend hearings in Kirkpatrick's own case. (Tr. 12:2-9; 29-30.) Kirkpatrick indicated Martin discussed with him the nature of the charges, the evidence against him, including his two-hour-and-forty seven-minute recorded interview with investigators, how Martin expected the State to use its evidence and how Martin would respond to it. (Tr. 13:14 – 25; 14:17 – 15:7.) Kirkpatrick also testified: "I had a lot of confidence in Mack, and I still – you know, Mack is a good – you know, he's an effective, trained attorney." (Tr. 21:6-9.)

[¶27] Martin described his relationship with Kirkpatrick in this way: "We had a very, very good working relationship. We spent a lot of time

together." (Tr.61:4-5.) Although they did not know one another prior to this case, Martin considers Kirkpatrick as "a friend". They have had three-to-ten conversations over the last few years of Kirkpatrick's incarceration. (Tr. 59:24 – 60:2.)

4. Martin provided the jury with significant evidence about the lack of an agreement between Kirkpatrick and Nakvinda.

[¶28] Martin testified the main focus of Kirkpatrick's defense against conspiracy was the absence of an agreement between Kirkpatrick and Nakvinda. (Tr. 73:15 – 19; 75:6 – 10; 73:15 – 19.) Martin utilized a variety of witnesses to demonstrate the lack of such an agreement including, among others, Debbie Baker, police investigators Paul Lies ("Lies") and Paula Ternes ("Ternes"), and psychiatrist Dr. David Tiller ("Dr.Tiller"). Debbie Baker lived in Oklahoma and knew both Kirkpatrick and Nakvinda. She testified about a conversation she had with Nakvinda prior to Gattuso's death. Nakvinda told her Kirkpatrick did not have the guts to go through with killing Gattuso and Kirkpatrick would never have to know if Nakvinda did it. (Tr. 62:11 – 63:2.) Martin also cross-examined police investigator Lies in great detail about his recorded interview with Kirkpatrick. Using a transcript of the interview, Martin elicited that Kirkpatrick told Lies many times that he had no agreement with Nakvinda to kill Gattuso. (Tr. 63:2 – 64:2.) Martin utilized

Kirkpatrick's handwritten statement to investigators as further evidence of the lack of an agreement. (App.16-21.) Martin created a trial exhibit, adding a tally mark to reflect each time Kirkpatrick denied the existence of an agreement, for a total of 26 marks. (App. 15.) In his cross-examination of police investigator Ternes, Martin elicited that Kirkpatrick testified under oath in Nakvinda's trial, as a witness for the State, that: "There was never one time an agreement or any kind of meeting of the minds or commitment or anything … I never told him to do it. Mike [Nakvinda] never said he was going to do it. We never came to that agreement. We talked about it. I said it in that statement. There was a lot of locker room talk, guy talk…". (Tr. 64:3 – 65:4.; App. 22-28.) Ternes also testified that when the State asked Kirkpatrick, during Nakvinda's trial, whether Kirkpatrick repeatedly told investigator Lies that he never told Nakvinda to "go ahead and do it", Kirkpatrick responded: "That's a hundred percent correct. I never told him to." (App. 28:5-15.) Ternes also confirmed that during Nakvinda's trial Kirkpatrick testified he paid Nakvinda $3,000 to work on various handyman projects (rather than for expenses to kill Gattuso), that Baker's testimony in Kirkpatrick's trial was consistent with her testimony in Nakvinda's trial and that Baker could not conceive Kirkpatrick would have been involved in Guttuso's murder. (App. 28-29.) Martin called Dr. Tiller as an expert

witness. Prior to trial, Dr. Tiller had evaluated Kirkpatrick and diagnosed him with a condition he described as complicated grief. Dr. Tiller opined that the nature of Kirkpatrick's emotions, anger and stress prior to Gattuso's murder, which stemmed from the death of his daughter (Gattuso's wife) and how he perceived the way Gattuso was raising Kirkpatrick's granddaughter, led Kirkpatrick to vent, to talk about things he did not intend to carry out, which worked as a measure of therapy. This testimony supported Martin's argument that Kirkpatrick simply engaged in mere "locker room talk" and had no agreement with Nakvinda to kill Gattuso. (Tr. 65:5 – 66:12.)

5. Kirkpatrick's potential trial testimony.

[¶29] Martin prepared Kirkpatrick to testify in his criminal case, hence Kirkpatrick was well aware of his right to testify. In his post-conviction hearing, Kirkpatrick described the purpose of his intended trial testimony this way: "To explain the fact first-hand that there was no formal agreement, that I never told him (Nakvinda) to do it, and that it's very clear and evident that I never told him to do it." (Tr. 19:13-21.) When asked whether Martin discussed with him the potential pitfalls of testifying, including cross-examination, Kirkpatrick responded: "Yeah, he said those things, but those aren't – that's not an astonishing statement, is it? And I know I'm being a smart-aleck, and I apologize. But of course he said that." (Tr.

53:19 – 54:13.) When asked whether he would concede he tends to talk a lot when questioned, Kirkpatrick responded in a joking manner: "Do you think so?" When the State then asked: "… therein can sometimes be found problems, you understand that?", Kirkpatrick responded: "Boy, Mr. Burdick and I are in a hundred percent agreement on at least that." (Tr. 54:14-21.)

[¶30] Kirkpatrick argues his own testimony would have been the "best evidence" in his criminal case. However, the State asserts he could also have become his own worst enemy and Martin knew it. Martin testified that "there's a whole bevy of things" you should consider when deciding whether a criminal defendant should testify. Amongst those considerations Martin specifically mentioned four: (1) whether the defendant can intelligently communicate; (2) whether the defendant has given a prior statement and whether he may be contradicted on the stand; (3) whether the defendant has felony convictions; and (4) the status of the case when it may be time for the defendant to testify. (Tr. 67:10 – 68:3.) Martin stated that a defendant can be hurt by testifying and it has happened many times in his experience. (Tr. 68:4-13.) Martin acknowledged Kirkpatrick has a difficult time answering a question directly, noting he is prone to volunteering information as evidenced both in his recorded statement and his testimony during the post-conviction hearing. (Tr. 68:14 – 69:5.) His post-conviction

counsel alluded to this same tendency. After having asked Kirkpatrick what his best defense would have been in the criminal case, part of Kirkpatrick's answer seemingly likened police investigators to Islamic terrorists. His post-conviction counsel then responded: "Let's rein you in, Mr. Kirkpatrick." (Tr. 17:1-19.) Although Kirkpatrick could have been cross-examined about many things he said during his 2-hour-and-47-minute interview, there were at least five topics which were particularly dicey for him: (1) the videotape Kirkpatrick made of Gattuso's house, at Nakvinda's request, shortly before Gattuso's murder; (2) his knowledge of Gattuso's schedule at the time he was murdered, thereby not only ensuring Gattuso would be home, but also providing Kirkpatrick an alibi time; (3) Kirkpatrick's negotiations with Nakvinda about the monetary price for murdering Gattuso; (4) Kirkpatrick's statements that it was "key" that any such transactions be at arm's length from Kirkpatrick so that he would have plausible deniability; and (5) the $3,000.00 Kirkpatrick gave Nakvinda for "expenses" just days before the murder. (Tr. 69:6 – 70:19.) Furthermore, Kirkpatrick could have been cross-examined about his telephone communications with Nakvinda, which had been plentiful in the two months preceding the murder but suddenly ceased the week immediately before the murder. (Tr. 69:19 – 70:6.)

[¶31] Martin explained that although they prepared for Kirkpatrick's testimony, he advised Kirkpatrick during the trial that he would be "better off with him not testifying, that there were many, many pitfalls that we could face if he did testify", that it was in his "best interest" not to testify. (Tr. 71:10-23; 77:8-22.) Martin further explained: "… as the trial progressed, it became my belief that it would be more damaging for us if he testified than if he didn't based upon, obviously, my incorrect belief that the trial was going better than it did based on how the cross-examination and things were going." (Tr. 71:3-9.) Martin's perception of their success seemed well-founded given that he was able to get in evidence: (1) Kirkpatrick's repeated denials of an agreement; (2) Nakvinda's statements to Debbie Baker; and, (3) Dr. Tiller's opinion Kirkpatrick had engaged in mere "locker room talk". He did all that without exposing Kirkpatrick to the pitfalls of cross-examination. Martin testified that: "Gene [Kirkpatrick] was very receptive to my suggestions. I mean, we may have discussed it – I'm sure we discussed it in greater detail, but I can't - but Gene relied on my advice. I will – I must say that's very accurate… I don't recall him ever insisting on testifying." (Tr. 72:2-9.)

[¶32] When asked by his post-conviction counsel if he agreed not to take the stand or whether Martin "circumvented" him from doing so, Kirkpatrick responded: "Well, I guess – you, to be honest, I guess both, but he

circumvented it because he was my counsel … if they're my doctor or lawyer or stockbroker, I take their advice. That's what I pay them for." (Tr.20:18-25.) Kirkpatrick reinforced that by further testifying: "He changed his course one hundred eighty degrees, and he convinced me, coerced me, all those nice little words, that it would be a mistake and that I should follow his advice. And that's what I paid him for, is his advice. And I, obviously, am going to take my doctor's and my attorney's advice 99.9 percent of the time. And he thought we were winning anyway and thought that the risk outweighed the benefit." (Tr. 55:22 – 56:5.) When asked if he approached the court or anyone requesting the right to testify, Kirkpatrick responded: "What a question. Of course not." (Tr. 55:3-6.)

6. Jury received standard instruction.

[¶33] Although Kirkpatrick does not otherwise argue the point, the State notes that Kirkpatrick's jury was instructed they may draw no inference from a defendant's silence at trial. (Court File No. 09-2009-CR-03845, Docket ID#653, p.29.) A prosecutor may not mention such silence, nor did the State at Kirkpatrick's trial.

7. Kirkpatrick voluntarily decided not to testify.

[¶34] Martin's trial strategy to attack the existence of an agreement was not objectively unreasonable. Nor was his opinion that he made

considerable headway with that strategy by utilizing Kirkpatrick's recorded statement, written statement and sworn testimony in Nakvinda's case, all in Kirkpatrick's own voice, so to speak, together with other evidence. Nor was it objectively unreasonable for Martin to explain to Kirkpatrick that cross-examination held real dangers for someone with his tendency towards verbosity, especially when his prior statements contained other damaging admissions. To the contrary, the State suggests many may consider it malpractice not to have done so. Nor was it objectively unreasonable for Martin, under those circumstances, to advise Kirkpatrick against testifying. The jury ultimately found Kirkpatrick guilty. However, unsuccessful trial strategies do not render a counsel's performance defective and this court does not second-guess such strategies through the distorting effects of hindsight. Garcia v. State, 2004 ND 81, ¶8, 678 N.W.2d 568 (citing Breding v. State, 1998 ND 170, ¶9, 584 N.W.2d 493).

[¶35] More importantly, Kirkpatrick was not misinformed of his right to testify, nor improperly influenced not to testify and was not otherwise prevented from testifying. See Mulske, ¶13. Instead, the State asserts the record clearly shows Kirkpatrick knew he could testify and had prepared to do so. He had a good relationship with Martin and trusted his legal skills and experience at assessing the course of the trial and the dangers of

cross-examination. Kirkpatrick made a considered, knowing and voluntarily decision to follow Martin's advice, thereby waiving his right to testify. Kirkpatrick took no affirmative action to notify the court he wished to testify. He first raised the issue nearly two years after his conviction as a post-conviction relief claim. His silence at trial connotes his acquiescence in not testifying. Antoine, ¶8; Bernloehr, 833 F.3d at 752.

[¶36] Quoting from State v. Robinson, 138 Wash.2d 753, 762-63, 982 P.2d 590 (1990), Kirkpatrick argues a defense attorney does not have to engage in actual misconduct or coercion to improperly prevent a defendant from testifying. (Kirkpatrick Brief, ¶34.) Robinson summarizes case law from a variety of jurisdictions, stating a defendant's right to testify is violated if the decision not to testify was made against his will, including not only an attorney's use of threats and coercion, but also circumstances where an attorney flagrantly disregards a defendant's desire to testify. Id. However, Robinson also states a defendant who accepts tactical advice from his counsel may not later claim he was denied the right to testify. Id. "Unaccompanied by coercion, legal advice concerning [the] exercise of the right to testify infringes no right, but simply discharges defense counsel's ethical responsibility to the accused." Id. (quoting Lema v. U.S., 987 F.2d 48, 52 (1st Cir. 1993)). Robinson continues: "… the defendant must prove that the

attorney refused to allow him to testify in the face of the defendant's unequivocal demands that he be allowed to do so. In the absence of such demands by the defendant, however, we will presume that the defendant elected not to take the stand upon the advice of counsel." Robinson, 138 Wash.2d at 764. Robinson is not governing law in North Dakota. Even if it was, the State asserts Kirkpatrick's facts establish he willingly chose to follow his lawyer's advice and voluntarily relinquished his right to testify.

[¶37] Kirkpatrick has not carried his heavy post-conviction burden.

¶38] CONCLUSION

[¶39] For all the reasons provided above, the State respectfully requests this Honorable Court affirm the District Court's denial of post-conviction relief.

[¶40] Respectfully submitted this 8th day of December, 2014.

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[¶41] CERTIFICATE OF SERVICE

[¶42] A true and correct copy of the foregoing document was sent by e-mail on the 8th day of December 2014 to: Monty Mertz at fargopublicdefender@nd.gov

Birch P. Burdick