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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Gene Carl Kirkpatrick,	)	
	)	**Supreme Court no. 20140321**
Petitioner/Appellant,	)	
	)	
	)	**District Court no. 2013-CV-01740**
-vs-	)	
	)	
State of North Dakota,	)	
	)	
Respondent/Appellee,	)	
	)	

Brief of Petitioner/Appellant Gene Carl Kirkpatrick

Appeal from Judgment Entered on August 15, 2014

In District Court, County of Cass, State of North Dakota
The Honorable Steven L. Marquart

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¶ 3 Issue

¶ 4 Whether the District Court Judgment denying Kirkpatrick's application for Post Conviction Relief should be reversed?

¶ 5 Statement of the Case

¶ 6 Kirkpatrick was convicted by a jury in July 2011 of conspiracy to commit murder and conspiracy to commit burglary. He was denied all relief on direct appeal. ***State v. Kirkpatrick*, 2012 ND 229, 822 N.W.2d 851.**

¶ 7 Kirkpatrick then applied for post-conviction relief on June 24, 2013. (Doc ID # 1 & 27; App. 4 & 5-9)(Entries in the Clerk's Register of Action will be Doc ID# and pages in the Appendix App.) An evidentiary hearing was held on August 7, 2014. (Transcript of evidentiary hearing, hereinafter Tr.). All relief was denied. Findings of Fact, Conclusions of Law, and Order for Judgment were entered on August 14, 2014, Doc ID# 50, App. 30-33). Judgment was entered on August 15, 2014. (Doc ID# 53; App. 34). Notice of Appeal was filed on September 9, 2014. (Doc ID# 62; App. 35).

¶ 8 Statement of Facts

¶ 9 Kirkpatrick believes he was deprived of effective assistance of counsel because he was advised by his attorney not to testify at his trial.

¶ 10 This Court described the background of the criminal case in the direct appeal:

> On October 26, 2009, Kirkpatrick's son-in-law, Phillip Guttuso, was found bludgeoned to death in his Fargo home. Guttuso's car and various household items were stolen. Michael Nakvinda, a man Kirkpatrick had employed on miscellaneous projects, was convicted in December 2010 of murdering Guttuso. ***State v. Nakvinda*, 2011 ND 217, 807 N.W.2d 204.**
>
> After Guttuso's death, law enforcement met with Kirkpatrick in his home state of Oklahoma on October 31, 2009, and obtained a statement from him. Based on Kirkpatrick's incriminating interview statements, Kirkpatrick was charged with conspiracy to commit murder and conspiracy to commit burglary.
>
> A jury trial was held in July 2011. At trial, the State introduced Kirkpatrick's interview with law enforcement as evidence that after Guttuso's wife, who was Kirkpatrick's daughter, died in March 2009, Kirkpatrick wanted the Guttusos' child raised in Oklahoma, not in Fargo with Guttuso. Because Guttuso would not give up custody of the child, the State argued Kirkpatrick and Nakvinda conspired to murder Guttuso. Kirkpatrick's interview with law enforcement provided evidence Kirkpatrick and Nakvinda discussed killing Guttuso on multiple occasions; Kirkpatrick provided $3,000 to Nakvinda for expenses a few days prior to Guttuso's death; and Kirkpatrick provided Nakvinda with Guttuso's schedule and a videotape of Guttuso's home "for [Nakvinda] to . . . be familiar with the place."
>
> In his law enforcement interview, Kirkpatrick stated that while he did want the child to come to Oklahoma, his statements to Nakvinda about killing Guttuso were not to be taken seriously because, "I said [to Nakvinda] we're just talking about this stuff . . . . I don't know that I want to do this." Kirkpatrick asserted Nakvinda misinterpreted his intentions and unilaterally decided to kill Guttuso.

***State v. Kirkpatrick*, 2012 ND 229, ¶¶ 2 – 5, 822 N.W.2d 851**.

¶ 11 Kirkpatrick's asserts he received ineffective assistance of counsel because he was advised not to take the stand at his trial. (Tr. 34, LL 7-17).

¶ 12 An evidentiary hearing on Kirkpatrick's petition as held on August 7, 2014. (Tr. Doc ID# 63). Kirkpatrick and his trial attorney, Mack Martin, testified. Kirkpatrick was charged with two conspiracy counts. The defense trial strategy

was to argue there was no agreement between Kirkpatrick and Nakvinda to commit the crimes. (Tr. 13, L 9; 14, L 16). Kirkpatrick testified that he never made an agreement with Nakvinda. He agreed that they "talked about things" which he characterized as "locker room talk." (Tr. 15, L 15; 16, LL 1-2).

¶ 13 Kirkpatrick was interviewed by detectives for nearly three hours, and he felt that his words had been "twisted around." (Tr. 16, LL 13-25). Kirkpatrick and his trial attorney, Martin, discussed how to counter the statements he, Kirkpatrick, had made during his police interview. (Tr. 17, L 25, 18, L 15). Kirkpatrick asserted that the best way to explain his statements in the interview would have been for him to testify. (Tr. 18, LL 13-15). Kirkpatrick understood from the beginning of his trial that he would testify. Martin told the jury in his opening statement that they would hear from Kirkpatrick himself. (Tr. 19, LL 1 -12).

¶ 14 Kirkpatrick asserted he would have testified there was no agreement and he did not tell Nakvinda to commit the crimes. (Tr. 19, LL 15-21). However, near the end of the trial, Martin persuaded him not to testify. (Tr. 21, LL 3-9). Kirkpatrick wanted to testify and felt ready to testify. (Tr. 20, LL 12-17). Kirkpatrick acquiesced in Martin's advice because he was "very convincing" and if he chose to testify it would be "against his (Martin's) will and desire." (Tr. 21, LL 3-6).

¶ 15 Kirkpatrick acknowledged that during his police interview he had stated "twenty-five or thirty times in the two-and-a-half hour interview that I'd never told Mike to do it." (Tr. 21, LL 15-16). Notwithstanding that evidence, Kirkpatrick maintains that his attorney did not allow him to testify and consequently he was not able to participate in his defense. (Tr. 22, LL 9-20).

¶ 16 Kirkpatrick asserted that the only effective way to explain the incriminating statements from his interview to the jury would be to testify himself. He asserted that it is common knowledge among attorneys that juries want to hear from the defendant. He believes his failure to testify had a significant impact on the jury's decision and put him at an extreme disadvantage. Martin's decision that he should not testify was against Kirkpatrick's wishes. (Tr. 23, LL 2-18).

¶ 17 Kirkpatrick acknowledged that Martin is an experienced attorney, but he questioned some of the things Martin did during the trial. He felt Martin was "stretched time-wise." (Tr. 28, LL 11-25; 29, LL 1-3). Martin spent a long time cross examining the detective about Kirkpatrick's recorded interview, and created a tally sheet for the number of times Kirkpatrick claimed there was no agreement. (Tr. 36, LL1-25). The tally sheet reflected twenty-six times Kirkpatrick stated there was no agreement. (Tr. 37, LL 1-22)(Exhibit, Doc ID# 47, App. 15).

¶ 18 Kirkpatrick prepared a written statement at the end of his interview at the detective's request. Kirkpatrick also asserted in that statement there was no agreement. (Tr. 38-39)(Exhibit, Doc ID# 48, App. 16-21). Martin also cross-examined one of the detectives about Kirkpatrick's testimony during Nakvinda's trial. It was pointed out in Kirkpatrick's trial that Kirkpatrick testified during Nakvinda's trial that he never told Nakvinda to "do it", Nakvinda never said he was going to "do it" and there was never an agreement, and a lot of "locker-room talk." (Tr. 45, LL 8-16)(Exhibit, pp 562-565, Doc ID# 49; App. 22-29).

¶ 19 Kirkpatrick asserted that he and Martin had a strong disagreement about whether he should testify. He felt Martin changed course one hundred eighty degrees and convinced and coerced Kirkpatrick not to testify. (Tr. 55, LL 11-25).

¶ 20 Martin has extensive experience in criminal defense in state and federal courts. (Tr. 58, LL 10-25; 59, LL 1-20). Martin and Kirkpatrick had a very good working relationship and met numerous times to discuss his case. (Tr. 61, LL 4-12). Martin testified that there are risks involved with having a criminal defendant testify and he felt Kirkpatrick would have had a hard time answering questions directly if he had testified. (Tr. 68, LL 4-22). Martin testified that he incorrectly felt the trial was going well, and that having Kirkpatrick testify may do more harm than good. (Tr. 71, LL 3-23). Martin could not recall Kirkpatrick ever "insisting on testifying." Martin conceded that in hindsight maybe Kirkpatrick should have testified. (Tr. 72, LL 8-9, LL 19-24). Martin agreed that the best evidence to refute the alleged agreement would have been Kirkpatrick's testimony. (Tr. 75, L 25; 76, LL 1-22).

¶ 21 Argument

¶ 22 **The judgment denying Kirkpatrick post conviction relief should be reversed.**

¶ 23 Kirkpatrick was deprived of a fair trial and due process through ineffective assistance of counsel.

¶ 24 Standard of Review

¶ 25 The standard of review for ineffective assistance of counsel was stated by this Court in ***Sambursky v. State*, 2008 ND 133, ¶ 7, 751 N.W.2d 247:**

> Post-conviction relief proceedings are civil in nature and governed by the North Dakota Rules of Civil Procedure. ***Flanagan v. State*, 2006 ND 76, ¶ 9, 712 N.W.2d 602.** Whether a petitioner received ineffective assistance of counsel is a mixed question of law and fact and is fully reviewable on appeal. ***Klose v. State*, 2005 ND 192, ¶ 10, 705 N.W.2d 809.** Under **N.D.R.Civ.P. 52(a),** the district court's findings of fact will not be disturbed on appeal unless clearly erroneous. "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by any evidence, or if, although there is some evidence to support the finding, a reviewing court is left with a definite and firm conviction a mistake has been made." ***Heckelsmiller v. State,* 2004 ND 191, ¶ 5, 687 N.W.2d 454.**

¶ 26 In ***Wong v. State*, 2011 ND 201, ¶ 15, 804 N.W.2d 382** this Court described the petitioner's burden:

> This Court has described the "heavy burden" a petitioner bears to succeed on an ineffective assistance of counsel claim:
>
> > [A] defendant claiming ineffective assistance of counsel has a heavy burden of proving (1) counsel's representation fell below an objective standard of reasonableness, and (2) the defendant was prejudiced by counsel's deficient performance. "Effectiveness of counsel is measured by an 'objective standard of reasonableness' considering 'prevailing professional norms.'" The defendant must first

> overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." "Trial counsel's conduct is presumed to be reasonable and courts consciously attempt to limit the distorting effect of hindsight."

Citations Omitted.

¶ 27 To succeed with a claim for ineffective assistance of counsel, a petitioner must prove 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).** The prejudice element requires the petitioner to establish a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, and the petitioner must point out with specificity how and where trial counsel was incompetent and the probable different result. ***Decoteau v. State*, 1998 ND 199, ¶ 6, 586 N.W.2d 156.**

¶ 28 Regarding the first prong of the ***Strickland*** test, Kirkpatrick believes he has proven that Martin's performance fell below acceptable standards. Specifically, Martin convinced and effectively coerced Kirkptarick to refrain from testifying in his own defense. The plan from the beginning was that Kirkpatrick would testify. (Tr. 55, LL 11-25). Martin told the jury in the opening statement that Kirkpatrick would testify. (Tr. 19, LL 1-12). Kirkpatrick's defense was that he never entered into an agreement with Nakvinda to commit the crimes. It was essential for his defense that Kirkpatrick testify to explain to the jury in his own words the misunderstandings created during his lengthy police interview. (Tr. 23, LL 2-18).

At the eleventh hour, Martin convinced and effectively coerced Kirkpatrick not to testify. (Tr. 21, LL 3-6).

¶ 29 Martin's actions fell below an objective standard of reasonableness because when he prevented Kirkpatrick from testifying, he failed to use the most effective piece of evidence, which was Kirkpatrick's testimony to convince the jury that he never agreed to commit the crime. (Tr. 75, L 25; 76, LL 1-22).

¶ 30 A criminal defendant has a fundamental, constitutional right to testify:

> A criminal defendant has a constitutional right to testify in his or her own defense. ***Rock v. Arkansas*, 483 U.S. 44, 49 (1987); United *States v. Bernloehr*, 833 F.2d 749, 751 (8th Cir.1987)**. This right is derived from the Fourteenth Amendment's due process clause, the Sixth Amendment's Compulsory Process Clause, and the Fifth Amendment's prohibition on compelled testimony. ***Rock*, 483 U.S. at 51-53**. "Because the right to testify is a fundamental constitutional guarantee, only the defendant is empowered to waive the right." ***Bernloehr*, 833 F.2d at 751**. A defendant's waiver of this right must be made knowingly and voluntarily. ***Id***. We have previously held that a knowing and voluntary waiver of the right may be found based on a defendant's silence when his counsel rests without calling him to testify. ***Id.* at 751-52**. We stressed that under such circumstances the defendant must act "affirmatively" rather than apparently "acquiesc[ing] in his counsel's advice that he not testify, and then later claim[ing] that his will to testify was overcome." ***Id***. (internal quotation omitted).

***Frey v. Schuetzle*, 151 F.3d 893, 897-898 (8th Cir. 1998)**. Kirkpatrick did not assert his right to testify on the record. It may be argued that he knowingly and voluntarily waived his constitutional right to testify when he said nothing after his attorney rested the defense case without calling him to the stand. However, Kirkpatrick asserts that the reason he did not testify is he received ineffective assistance of counsel.

¶ 31 "Cases in which courts have found a denial of a defendant's right to testify almost invariably involve ineffective assistance of counsel." ***State v. Mulske*, 2007 ND 43, ¶ 13, 729 N.W.2d 129 (*quoting United States v. Bernloehr*, 833 F.2d 749, 752 n. 2 (8th Cir.1987).** Kirkpatrick asserts that he wanted to testify but was prevented from testifying by Martin. Martin and Kirkpatrick had agreed that he would testify and Martin told the jury he would testify in the opening statement for the defense. Kirkpatrick knew he had the option to testify. Kirkpatrick wanted to testify, to explain what he meant by some of the presumably incriminating statements he made during his police interview. To Kirkpatrick, the trial strategy from the beginning was that he would testify. (Tr. 19, LL 1-12). It was Martin who made the one hundred eighty degree turn and effectively coerced Kirkpatrick to not testify. In effect, Kirkpatrick's free will was overborne by the force of Martin's argument, given Martin's experience and expertise. (Tr. 21, LL 3-6).

¶ 32 Unsuccessful trial strategy, freely undertaken, does not constitute ineffective assistance of counsel. ***Noorlun v. State*, 2007 ND 118, ¶ 12, 736 N.W.2d 477.** As Martin explained, whether or not the defendant should testify involves myriad considerations. (Tr. 68, LL 4-22). However, the choice to testify or not belongs to the defendant, not his attorney or the court. ***Bernloehr*, 833 F.2d at 751.** Kirkpatrick asserts that he was not left with the choice to testify; Martin insisted that he should not. (Tr. 22, LL 9-20).

¶ 33 In his trial, the jury listened to the two and half hour police interview in which Kirkpatrick said many things, some of which were incriminating. (Tr. 18, LL 3-15).

It was essential for Kirkpatrick to testify at trial to clarify what he meant and allow the jury to judge his credibility. (Tr. 23, LL 2-18). Kirkpatrick asserts that Martin's decision and advice that he not testify fell below an objective standard of reasonableness. Kirkpatrick asserts that he was severely prejudiced by his failure to testify, and the outcome of the trial would likely been different had he testified.

¶ 34 The defense attorney does not have to engage in actual misconduct or "coercion" to improperly prevent the defendant from testifying:

> However, we disagree with the State's narrow interpretation of the phrase "actually prevented from testifying." An attorney can prevent his client from testifying even without using coercion or misrepresentation. As this case demonstrates, attorneys can prevent their clients from testifying by refusing to call the defendant as a witness even though the attorney knows that the defendant wants to testify. It is well established that the ultimate decision whether or not to testify rests with the defendant. ***State v. Thomas,* 128 Wash.2d 553, 558, 910 P.2d 475 (1996).** If the decision to testify is made against the will of the defendant, it is axiomatic that the defendant has not made a knowing, voluntary, and intelligent waiver of his right to testify. ***United States v. Teague,* 908 F.2d 752, 759 (11th Cir.1990), *vacated by* 932 F.2d 899 (11th Cir.1991), *rev'd on reh'g on other grounds by en banc,* 953 F.2d 1525 (11th Cir.1992).** Therefore, a defendant's right to testify is violated if "the final decision that he would not testify was made against his will." **908 F.2d at 759. *See also Jordan v. Hargett,* 34 F.3d 310, 312-13 (5th Cir.1994); *Lema v. United States,* 987 F.2d 48, 53 (1st Cir.1993) (right to testify is violated if a defendant's will to testify is "overborne" by defense counsel).** Courts have held that a defendant's right to testify is violated not only when an attorney uses threats and coercion against his client, but also when the attorney flagrantly disregards the defendant's desire to testify. ***United States v. Robles,* 814 F.Supp. 1233, 1242 (E.D.Pa.1993); *United States v. Butts,* 630 F.Supp. 1145, 1147 (D.Me.1986).**
>
> This is not to say that defendants who accept tactical advice from their attorneys on the decision to testify can later claim that their right to testify was denied. ***State v. Hardy,* 37 Wash.App. 463, 466-67, 681 P.2d 852 (1984); *State v. King,* 24 Wash.App. 495, 500, 601 P.2d 982 (1979).** We must distinguish between cases in

> which the attorney actually prevents the defendant from taking the stand, and cases in which counsel "merely advise[s][the] defendant against testifying as a matter of trial tactics." ***King,* 24 Wash.App. at 499, 601 P.2d 982**. Furthermore, while the decision to testify should ultimately be made by the client, it is entirely appropriate for the attorney to advise and inform the client in making the decision to take the stand. "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." ***Lema,* 987 F.2d at 52 (citations omitted).**

***State v. Robinson*, 138 Wash. 2d 753, 762-763, 982 P2d 590**. Kirkpatrick asserts he proved that the decision to not testify was made against his will, and that his will was overborne by Martin, who disregarded Kirkpatrick's desire to testify. Therefore, Martin's performance fell below an objective standard of reasonableness. Kirkpatrick asserts the outcome of the trial would have been different had he been able to personally explain his statement by testifying. Kirkpatrick asserts that the trial court's findings to the contrary are, on this record, clearly erroneous. (Findings of Fact, ¶¶ 12-15; App. 32).

¶ 35 Kirkpatrick was deprived of his constitutional right to a fair trial due to ineffective assistance of counsel.

¶ 36 Conclusion

¶ 37 The Judgment of the District Court should be reversed.

Respectfully submitted this 6th day of November, 2014.

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CERTIFICATE OF SERVICE BY ELECTRONIC MEANS

I, Monty G. Mertz, do hereby certify that, on the 6th day of November, 2014, I served the Brief of Petitioner/Appellant Gene Carl Kirkpatrick and the Appendix in this case on the following:

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by sending an E mail to Sa-defense-notices@casscountynd.gov with the documents attached in PDF format. To the best of my knowledge, this is the Eservice address for Mr. Burdick.

Dated this 6th of November, 2014.

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