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FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
APRIL 22, 2015
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Gene Carl Kirkpatrick,

Petitioner - Appellant,

vs.

Supreme Court No. 20150039
District Court No. 09-2014-CV-03364

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 for misuse of process.

[¶5] II. Whether the District Court erred by not finding excusable neglect in Kirkpatrick's second post-conviction application.

[¶6] III. Whether the District Court erred by finding Kirkpatrick was well aware of the 85% sentencing law at the time of his previous post-conviction application.

[¶7] IV. Whether Kirkpatrick is entitled to post-conviction relief on the merits of his claim of ineffective assistance of counsel in the plea negotiation process.

[¶8] **STATEMENT OF THE CASE**

[¶9] 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".

[¶10] 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.

[¶11] On June 24, 2013, Kirkpatrick filed a pro se application for post-conviction relief ("PCR") claiming ineffective assistance of trial counsel ("PCR1"). (Docket ID#1, Court File No. 09-2013-CV-01740.) The district court appointed him counsel. His counsel filed an amended PCR petition on January 15, 2014. (Docket ID#27, Court File No. 09-2013-CV-01740.) 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. After conducting an evidentiary hearing on August 7, 2014, the district court denied Kirkpatrick post-conviction relief. Kirkpatrick appealed. This court summarily affirmed the district court. Kirkpatrick v. State, 2015 ND 49, __ N.W.2d __.

[¶12] Kirkpatrick filed his second PCR application on December 3, 2014 ("PCR2"). (App.: 3-7.) The State resisted. (App.: 8-20.) The district court denied Kirkpatrick relief through summary disposition. (App.: 40-42.) Kirkpatrick timely appealed. (App.: 43-44.)

[¶13] **STATEMENT OF THE FACTS**

[¶14] 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.

[¶15] Most of the verbiage within Kirkpatrick's Statement of Facts appears to be recitations of his arguments or beliefs. The State does not recognize those as "facts".

[¶16] The affidavits of Kirkpatrick and his trial counsel Martin, submitted by Kirkpatrick to the district court, speak for themselves. (App.: 32-39.) At the time the district court denied Kirkpatrick relief in PCR2 it had those affidavits, together with all the files and its own recollection of the proceedings in the underlying criminal case and PCR1.

[¶17] After the jury found Kirkpatrick guilty, the State filed a sentencing brief. (Docket ID#476, Court File No. 09-2009-CR-03845.) Kirkpatrick's counsel did as well. (Docket ID#666, Court File No. 09-2009-CR-03845.) Within the briefs both parties concluded the 85% sentencing law did not apply to the conspiracy charges on which Kirkpatrick was found guilty. N.D.C.C. §12.1-32-09.1.

[¶18] Other relevant facts are woven into the following arguments.

[¶19] **ARGUMENT**

[¶20] Within this brief the State posed its statement of the legal issues, and laid out its argument, in a manner corresponding to the issues stated in Kirkpatrick's Brief, paragraphs 3-7.

[¶21] **I. The District Court did not err by denying Kirkpatrick post-conviction relief for misuse of process.**

[¶22] In PCR2, Kirkpatrick claims his counsel was ineffective in advising him during pretrial plea discussions, and/or the State committed prosecutorial misconduct. Both claims relate to the applicability of the 85% sentencing law to his conspiracy charges. N.D.C.C. §12.1-32-09.1. The district court denied his claims as a misuse of process. (App.: 40-41.)

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

[¶24] 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. 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.

[¶25] B. Misuse of Process – The Law.

[¶26] PCR may be denied as a misuse of process if the applicant has inexcusably failed to raise the claim in a prior proceeding leading to a judgment of conviction or a previous PCR proceeding, or has filed multiple applications containing a claim so lacking in factual support or legal basis as to be frivolous.

N.D.C.C. §29-32.1-12(2); Steen v. State, 2007 ND 123, ¶13, 736 N.W.2d 457 (defendants who inexcusably fail to raise all their claims in a single post-conviction proceeding misuse the post-conviction process); Johnson v. State, 2006 ND 122, ¶14, 714 N.W.2d 832 (inherent to the concept of misuse of process is the obligation of a litigant to raise issues in a proper and timely fashion). An applicant must show an excuse, such as newly discovered evidence, which could not have been raised in his first PCR application. Garcia v. State, 2004 ND 81, ¶22, 678 N.W.2d 568.

[¶27] Misuse of process is an affirmative defense to be pled by the State. N.D.C.C. §29-32.1-12(3). In PCR2, the State expressly asserted that affirmative defense both in its Motion to Dismiss or Motion for Summary Disposition and in its Response to Application for Post-Conviction Relief. (Docket ID#9 and ID#10, Court File No. 09-2014-CV-03364.)

[¶28] C. Kirkpatrick's Second Post-Conviction Application Constitutes a Misuse of Process.

[¶29] In PCR1, Kirkpatrick claimed his counsel (Martin) was ineffective because he advised Kirkpatrick against testifying. At the related evidentiary hearing, the State invited Kirkpatrick to fully describe his claims. That portion of the hearing transcript takes up ten pages. (Tr. 24:11 – 34:17, Court File No. 09-2013-CV-01740.) Kirkpatrick did not raise his current claims at that time. (Kirkpatrick Brief, ¶34.) Kirkpatrick's explanation for that failure is because: (1) he is not a lawyer and cannot be expected to know these things, and (2) until recently he was unaware of Lafler v. Cooper, 566 U.S. __, 132 S.Ct. 1376 (2012).

(Kirkpatrick Brief, ¶27.) The State asserts Kirkpatrick's explanations for his failure do not qualify as valid excuses under N.D.C.C. §29-32.1-12(2).

[¶30] 1. Being a Non-Lawyer is Not an Excuse.

[¶31] If the fact that Kirkpatrick is not a lawyer constitutes a valid excuse, it would essentially eviscerate the misuse of process law. Although not unheard of, the State asserts it is rare that a lawyer familiar with criminal law is himself a criminal defendant. If every defendant could use their "non-lawyer" status as a valid excuse and was thereby entitled to file multiple PCR applications, then N.D.C.C. §29-32.1-09(2) would be of negligible value. The State presumes the Legislature did not intend this to be a meaningless law. N.D.C.C. §1-02-38(2); Meier v. ND Dept. of Human Services, 2012 ND 134, ¶10, 818 N.W.2d 774 (this court presumes the Legislature acts with purpose and does not intend to perform idle acts). Furthermore, although Kirkpatrick is not a lawyer, he is nevertheless mature, college-educated with advanced coursework in business and well-spoken. (Tr. 52:18-23, Court File No. 09-2013-CV-01740.)

[¶32] 2. Lack of Awareness of Lafler is Not an Excuse.

[¶33] Kirkpatrick's claim that he only recently learned of Lafler does not qualify as a valid excuse. Lafler was decided on March 21, 2012. Kirkpatrick did not file his initial petition for PCR1 until fifteen months later on June 24, 2013. He filed his amended PCR1 petition on January 15, 2014, approximately twenty-two months after Lafler. At the subsequent evidentiary hearing on August 7, 2014, more than twenty-eight months after Lafler was decided, Kirkpatrick failed to

articulate his current claims. The State asserts that a significant purpose underlying the misuse of process law would be lost if a defendant may justify multiple PCR applications on his desire to use case law long since decided. See generally, Silvesan v. State, 1999 ND 62, ¶9, 591 N.W.2 131 (discussing the genesis of N.D.C.C. §29-32.1-12 by referring to the Comment, Uniform Post-Conviction Procedure Act §12 wherein it refers, among other things, to the "potential evil of fragmentation").

[¶34] Kirkpatrick's reliance on Lafler also seems misplaced for another, albeit related, reason, namely that the underlying concept in Lafler was decades-old law. The courts have long recognized a defendant is entitled to effective assistance of counsel at all critical stages of trial. Adams v. Illinois, 405 U.S. 278, 279, 92 S.Ct. 916 (1972)(defendant entitled to effective assistance of counsel at critical stages of criminal proceedings). Although more often stated in the context of a guilty plea, rather than plea negotiations, the plea process is a critical stage and a defendant is entitled to effective assistance of counsel at that time. Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366 (1985) (two-part Strickland test applies to guilty pleas); Padilla v. Kentucky, 559 U.S. 356, 373, 130 S.Ct. 1473 (2010) (negotiation of a plea bargain is a critical phase); Ernst v. State, 2004 ND 152, ¶8, 683 N.W.2d 891 (entry of a guilty plea is a critical stage). Accordingly, the potential value of Lafler to Kirkpatrick would seem to be the remedy it proposes in certain circumstances. The State asserts this more recently devised remedy does not justify Kirkpatrick's failure to claim in PCR1 that his counsel was ineffective

during plea discussions.

[¶35] Furthermore, there is nothing in Kirkpatrick's situation akin to newly discovered evidence. Kirkpatrick acknowledges he was aware of the 85% sentencing law before he went to trial. According to his trial counsel's affidavit, the State told Martin on June 14, 2010, that Kirkpatrick's charges did not qualify for the 85% sentencing law. Martin then told co-counsel Light to review that position. Light advised that he was not "fully convinced" of the State's position, and that information was provided to Kirkpatrick. (App.: 38, ¶¶6-9.) Although Martin was not specific on the date, it is reasonable to presume Kirkpatrick was aware of the 85% sentencing law during the summer of 2010. His trial was a year later in July 2011. He would have been reminded of the law during the time between his verdict and his sentence when both sides filed sentencing briefs concurring on the 85% sentencing law. If Kirkpatrick's recollection is assumed to be correct, he was aware well before trial that the State and his counsel then disagreed on the issue, and thereafter agreed. This all happened in 2010 and 2011. There is no newly discovered evidence. Although Lafler put a finer point on a potential remedy, Kirkpatrick did not need Lafler to raise his ineffective assistance claim in PCR1.

[¶36] D. No Prosecutorial Misconduct.

[¶37] Kirkpatrick makes an "alternative" argument that either his counsel was ineffective, or the State committed prosecutorial misconduct, in stating the 85% sentencing law did not apply to a conspiracy charge. (Kirkpatrick Brief, ¶¶24, 42.) The State asserts its position was justified and there was no misconduct. Not only

did the State take that position, but so did Kirkpatrick's trial counsel in his sentencing brief. Kirkpatrick's appellate counsel does not appear to argue the State committed misconduct, nor argue why the State's position on the 85% sentencing law is wrong. Appellant's counsel simply repeats Kirkpatrick's alternative argument.

[¶38] N.D.C.C. §12.1-32-09.1 states that the 85% sentencing law applies to murder and certain types of burglary (among other crimes), or an attempt to commit those crimes. It does not, however, include a conspiracy to commit those crimes. The statute was enacted in the 1995 legislative session as House Bill 1218. In reviewing the publicly available legislative history, it appears the bill was an effort to be tougher on crime. The 85% language was the "truth in sentencing" provision. It arose on the heels of congressional passage of the Violent Crime Control and Law Enforcement Act of 1994. Within that Act, Congress authorized grant funding to states which experienced increased inmate populations. One way to qualify for such a grant was for a state to ensure that violent offenders served at least 85% of their imposed sentences. The original version of House Bill 1218 contained no reference to either attempts or conspiracies. The final version of the bill included attempts. By virtue of the fact the bill was modified to expressly address attempts, but not conspiracies, it is fair to conclude conspiracies are excluded. Furthermore, it is a fundamental rule of statutory construction that "the Legislature intended all that it said, and that it said all that it intended to say." State v. Blunt, 2010 ND 144, ¶54, 785 N.W.2d 909. The reasoning behind why conspiracy is excluded,

whatever it may be, is irrelevant to this appeal.

[¶39] Although the State asserts there was no prosecutorial misconduct, had there been a claim for prosecutorial misconduct Kirkpatrick should have raised it in his criminal appeal, which he did not. Laib v. State, 2005 ND 187, ¶¶6-7, 705 N.W.2d 845 (defendant's failure to raise claim of prosecutorial misconduct on direct appeal but later raised on PCR was a misuse of process).

[¶40] E. Summary Disposition Was Appropriate.

[¶41] A court may grant summary disposition on PCR if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. N.D.C.C. §29-32.1-09(3). The party opposing a summary disposition motion is entitled to all reasonable inferences at the preliminary stages of the PCR proceeding and to an evidentiary hearing if a reasonable inference raises a genuine issue of material fact. Dunn v. State, 2006 ND 26, ¶10, 709 N.W.2d 1. Once the moving party has initially shown there is no genuine issue of material fact, the burden shifts to the opposing party to demonstrate there is a genuine issue of material fact. Id. The party opposing may not merely rely on pleadings or unsupported, conclusory allegations, but must present competent admissible evidence by affidavit or other means which raises an issue of material fact. Id. Summary disposition is generally inappropriate in claims of ineffective assistance of counsel because of the need to develop a record in an evidentiary hearing. However, summary disposition may be appropriate even for claims of ineffective assistance of counsel if there is no genuine issue of material fact. Id., ¶12; Mackey v. State, 2012 ND 159, ¶5, 819

N.W.2d 539 (summary disposition upheld where applicant was put to his proof and applicant failed to provide evidentiary support for his allegation). This court reviews summary disposition in the same manner it would an appeal from summary judgment. Mackey, ¶5.

[¶42] The State resisted Kirkpatrick's PCR claims. Although the State noted in its response that Kirkpatrick had not yet provided support for his claims, the State expressly put him to his proof and requested the district court give him 30 days to respond. (Docket ID#9, ¶¶5-6, and Docket ID#10, ¶¶12, 17-18, Court File No. 09-2014-CV-03364.) In his responsive affidavit, Kirkpatrick acknowledged he did not raise his current claims prior to filing PCR2. (App.:32 - 35.) If Kirkpatrick's affidavit is taken as true, together with Martin's affidavit to the extent does not differ with Kirkpatrick's, and given all reasonable inferences from the two, there is no genuine issue of material fact relative to Kirkpatrick's misuse of process. He knew all the pertinent facts before he was sentenced in the criminal case, which was nearly two years before he filed PCR1. As a result, when Kirkpatrick filed PCR2 he misused the process and summary disposition was appropriate.

[¶43] **II. The District Court did not err by not finding excusable neglect in Kirkpatrick's second post-conviction application.**

[¶44] Kirkpatrick's arguments that he is a non-lawyer and only recently became aware of Lafler do not qualify as valid excuses for a misuse of process, as addressed in §I.C above.

[¶45] **III. The District Court did not err by finding Kirkpatrick was well aware of the 85% sentencing law at the time of his previous post-conviction application.**

[¶46] As addressed in §I.C above, Kirkpatrick was well aware of the 85% sentencing rule a full year before he went to trial, including the State's position that it did not apply to his charges. He would also have been aware of his own counsel's position that it did not apply at least as early as weeks before sentencing. As a result, he should have been aware of his alleged claim of ineffective assistance of counsel long before he filed for PCR1 in 2013, and before his evidentiary hearing on PCR1 in 2014. As a result, the State asserts the district court was correct in denying Kirkpatrick's PCR2 claims as a misuse of process.

[¶47] **IV. Kirkpatrick is not entitled to post-conviction relief on the merits of his claim of ineffective assistance of counsel in the plea negotiation process.**

[¶48] Kirkpatrick claims that if this court overrules the district court's summary disposition, then the State already conceded that Kirkpatrick received ineffective assistance of counsel. (Kirkpatrick Brief, ¶41.) This is presumably the basis for his request that this court vacate the underlying criminal judgment and require the State to offer a plea for a sentence not to exceed 25 years. (Kirkpatrick Brief, ¶58.) The State asserts Kirkpatrick's argument is mistaken, that it made no such concession and that no such relief is warranted.

[¶49] Kirkpatrick's "concession" argument appears rooted in his claim the State did not respond to his "factual assertions". In response to Kirkpatrick's

claims, the State argued that its affirmative defenses should lead the court to summarily dispose of the case without the need of an evidentiary hearing. However, the State also requested Kirkpatrick be given 30 days to respond, which he did. If the district court decided not to grant the State's summary disposition motion, the State indicated it would seek testimony on the issue of ineffective assistance of counsel at an evidentiary hearing. (Docket ID#10, ¶¶17–18, Court File No. 09-2014-CV-03364.) The State would then address his claims in the context of the facts elicited from that testimony and the two-prong Strickland test. Strickland v. Washington, 466 U.S. 668 (1984).

[¶50] If on appeal this court determines PCR2 was not a misuse of process, then the State asserts Kirkpatrick is not simply entitled to relief. Rather, the State then requests the case be remanded to the district court for an evidentiary hearing to more fully develop the facts of Kirkpatrick's claims and to test the support for them. The State will address the merits when those facts are known.

[¶51] **CONCLUSION**

[¶52] For all the reasons provided above, the State asserts there is no genuine issue of material fact and respectfully requests this Honorable Court affirm the district court's denial of post-conviction relief.

[¶53] Respectfully submitted this 22nd day of April, 2015.

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[¶54] **CERTIFICATE OF SERVICE**

[¶55] A true and correct copy of the foregoing document was sent by e-mail on the April 22, 2015, to: Monty Mertz at fargopublicdefender@nd.gov.

Birch P. Burdick