

**Filed 7/1/15 by Clerk of Supreme Court
IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

2015 ND 163

Gene Carl Kirkpatrick,

Petitioner and Appellant

v.

State of North Dakota,

Respondent and Appellee

No. 20150039

Appeal from the District Court of Cass County, East Central Judicial District,
the Honorable Steven L. Marquart, Judge.

AFFIRMED.

Per Curiam.

Monty G. Mertz, 912 Third Avenue South, Fargo, N.D. 58103-1707, for
petitioner and appellant.

Birch P. Burdick, State's Attorney, P.O. Box 2806, Fargo, N.D. 58108-2806,
for respondent and appellee.

Kirkpatrick v. State

No. 20150039

Per Curiam.

[¶1] Gene Kirkpatrick appealed from a district court judgment summarily dismissing his second application for postconviction relief. In 2011, Kirkpatrick was convicted by a jury of conspiracy to commit murder and conspiracy to commit burglary, and his conviction was affirmed on appeal. State v. Kirkpatrick, 2012 ND 229, 822 N.W.2d 851. Kirkpatrick’s first application for postconviction relief claimed that as a result of his trial attorney’s recommendation he not testify at trial, he received ineffective assistance of counsel. After an evidentiary hearing, the district court denied Kirkpatrick’s application, and the judgment was affirmed in Kirkpatrick v. State, 2015 ND 49, 861 N.W.2d 172.

[¶2] Kirkpatrick’s second application for postconviction relief claimed he received ineffective assistance of counsel during pretrial plea discussions as to whether he would have to serve at least 85 percent of a proposed 25 year prison sentence for conspiracy to commit murder before being eligible for parole. The State moved for summary dismissal of Kirkpatrick’s application, arguing he misused the postconviction relief process by not raising the issue in his first application. The district court concluded Kirkpatrick misused the process, and granted the State’s motion for summary dismissal. We summarily affirm under N.D.R.App.P. 35.1(a)(6).

[¶3] Gerald W. VandeWalle, C.J.
Dale V. Sandstrom
Daniel J. Crothers
Lisa Fair McEvers
Carol Ronning Kapsner