

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

APR 29 2015

Garron Gonzalez,)
)
 Petitioner-Appellant,)
)
 -vs-)
)
 State of North Dakota,)
)
 Respondent-Appellee,)
)

STATE OF NORTH DAKOTA

Supreme Ct. No. 20150050
20150051
District Ct. No. 08-2013-cv-02334
08-2013-cv-02338

BRIEF OF PLAINTIFF-APPELLEE

APPEAL FROM ORDER DENYING POST-CONVICTION RELIEF

Burleigh County District Court
South Central Judicial District
The Honorable James S. Hill, Presiding

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STATEMENT OF THE ISSUES

- [¶1] I. Whether the petitioner properly raised his constitutional issue challenging the statute of limitations on filing post-conviction relief.

- [¶2] II. Whether the two-year statute of limitations on the filing of post-conviction relief violates the petitioner's constitutional rights.

STATEMENT OF THE CASE

[¶3] A. **Burleigh County case 08-2013-cv-02334**

[¶4] The petitioner filed applications for post-conviction relief in two criminal cases in Burleigh County. In Burleigh County Case 08-2013-cv-02334, the petitioner filed an application for post-conviction relief from the judgment issued in Burleigh County Criminal Case 08-05-K-00082 on October 22, 2013. In the criminal case, the petitioner pled guilty to the offense of Failure to Register as a Sex Offender, class A misdemeanor, on January 14, 2005. (Appendix (hereinafter “App.”) I, pp. 12-13). The conviction became final thirty (30) days after judgment was imposed and the time for an appeal had passed, specifically on February 13, 2005. (App. I, p. 20).

[¶5] The State filed its response to the petitioner’s application on November 18, 2013 and requested dismissal of the petition as the petition was not filed within two (2) years of the conviction becoming final. (App. I, p. 20-21). The trial court denied the request for dismissal in its order dated March 13, 2014. (App. I, p. 27-28). The State then moved for summary judgment / disposition of the application on September 2, 2014. (App. I, p. 29). The petitioner filed a reply to the State’s motion for summary judgment on September 9, 2014. (App. I, pp. 30-41). The trial court filed an Order on January 29, 2015 denying the application finding that the petitioner’s application was barred by the two-year statute of limitations. (App. I, pp. 49-51). The petitioner filed a timely notice of appeal on February 25, 2015.

[¶6] B. Burleigh County case 08-2013-cv-02338

[¶7] In Burleigh County Case 08-2013-cv-02338, the petitioner filed an application for post-conviction relief from the judgment issued in Burleigh County Criminal Case 08-03-K-02928 on October 22, 2013. In the criminal case, the petitioner pled guilty to two (2) counts of Gross Sexual Imposition and was sentenced on April 16, 2004. (App. II, pp. 4-5). The conviction became final on May 23, 2004 after the time for an appeal had passed. (App. II, p. 19). The petitioner's probation was subsequently revoked on February 1, 2005 and again on February 8, 2011. (App. II, p. 5). He filed an appeal of the second revocation which was affirmed on August 26, 2011. (App. II, p. 5).

[¶8] The State filed its response to the petitioner's application on October 23, 2013 and requested dismissal of the petition as the petition was not filed within two (2) years of the conviction becoming final. (App. II, p. 19-20). The State moved for summary judgment / disposition of the application on September 2, 2014. (App. II, p. 30). The petitioner filed a reply to the State's motion for summary judgment on September 9, 2014. (App. II, pp. 31-42). The trial court filed an Order on January 27, 2015 denying the application finding that the petitioner's application was barred by the two-year statute of limitations. (App. II, pp. 50-54). The petitioner filed a timely notice of appeal on February 25, 2015. (App. II, p. 57).

STATEMENT OF THE FACTS

[¶] This appeal is based upon the denial of a post-conviction relief application due to an untimely filing of the application. The facts relative to the appeal are contained in the brief under the Statement of the Case.

ARGUMENT

[¶10] When a constitutional issue is raised, this Court’s standard of review is de novo. State v. Loughead, 2007 ND 16, ¶ 7, 726 N.W.2d 859.

[¶11] **I. Whether the petitioner properly raised his constitutional issue challenging the statute of limitations on filing post-conviction relief.**

[¶12] “This Court has repeatedly and consistently held that issues or contentions not raised or considered in the district court cannot be raised for the first time on appeal from a judgment or order, and this Court will not address issues raised for the first time on appeal.” Risovi v. Job Service North Dakota, 2014 ND 60, ¶ 12, 845 N.W.2d 15 (quoting Beeter v. Sawyer Disposal LLC, 2009 ND 153, ¶ 20, 771 N.W.2d 282). Appellants are not allowed on appeal to argue new theories or develop new strategies that were not presented to the trial court. In re Johnson, 2013 ND 146, ¶ 10, 835 N.W.2d 806. An appeal is for this Court to review what happened in the trial court, therefore, issues brought to this Court must first have been raised in the trial court. Kilzer v. Binstock, 339 N.W.2d 569, 572 (N.D.1983).

[¶13] Constitutional issues must also first be brought before the trial court before they can be raised on appeal. Caldis v. Board of Cnty. Comm'rs, Grand Forks Cnty., 279 N.W.2d 665, 667 (N.D.1979). “It is fundamental to the adversary process that each party be afforded an opportunity to bring up its ‘heavy artillery’ in defense of or attack upon an issue, especially if the issue is of a constitutional nature. Id. (citing So. Valley Grain Dealers v. Bd. of Cty. Com'rs, 257 N.W.2d 425 (N.D.1977)). “By deciding an issue not

previously raised, we infringe upon the opportunity of the district court to consider the question as the court of first instance.” Caldis, 279 N.W.2d at 667.

[¶14] The petitioner did not raise the issue of the constitutionality of N.D.C.C. § 29-32.1-01(2) in his application, his reply to the State’s response to his application, or in his reply to the State’s motion for summary judgment. This issue is not properly before this Court as it was not raised in the trial court and should, therefore, not be considered by this Court.

[¶15] II. Whether the two-year statute of limitations on the filing of post-conviction relief violates the petitioner’s constitutional rights.

[¶16] Statutes are presumed to be in compliance with the United States and North Dakota constitutions. N.D.C.C. § 1-02-38(1). A statute will only be declared unconstitutional if the person challenging constitutionality can demonstrate that the statute is unconstitutional. Best Products Co., Inc. v. Spaeth, 461 N.W.2d 91, 96 (N.D.1990). Acts of the legislature are presumed to be constitutional and any doubt about a statute’s constitutionality must be resolved in favor of its validity. So. Valley Grain Dealers, 257 N.W.2d at 434. The challenger must bring the “heavy artillery” to the court or forfeit the attack entirely. Effertz v. North Dakota Workers' Comp. Bureau, 481 N.W.2d 218, 223 (N.D.1992). Furthermore, the North Dakota Constitution states that this Court “shall not declare a legislative enactment unconstitutional unless at least four of the members of the court so decide.” N.D. Const. Art. VI, § 4. Therefore, “we require a party ‘do more than submit bare assertions to

adequately raise a constitutional issue,' we only decide those issues 'thoroughly briefed and argued,' and 'a party waives an issue by not providing adequate supporting argument'." Weeks v. North Dakota Workforce Safety & Ins., 2011 ND 188, ¶ 9, 803 N.W.2d 601 (quoting Olson v. Workforce Safety & Ins., 2008 ND 59, ¶ 26, 747 N.W.2d 71).

[¶17] The petitioner failed to raise the constitutional issue before the trial court and did not bring the "heavy artillery" required to challenge the constitutionality of the statute. The petitioner claims that there should be a grace period for the filing of applications for post-conviction relief for those old cases that would be barred from filing applications after the modifications to N.D.C.C. § 29-32.1-01(2) took effect. The petitioner filed his applications for post-conviction relief nine (9) years after his convictions for gross sexual imposition had been final and eight (8) years after his conviction for failure to register as a sex offender had become final. Prior to August 1, 2013 when the modifications to N.D.C.C. § 29-32.1-01(2) became effective, the petitioner had nine (9) and eight (8) years, respectively, within which to file his application. He failed to do so.

[¶18] N.D.C.C. § 29-32.1-01(2) allows applications of post-conviction relief to be filed after the two year statute of limitations if certain criteria are met. The petitioner did not allege his reasons for application of post-conviction relief fell within any of those criteria.

[¶19] Even if a grace period had been allowed, the defendant's applications are without merit and should be denied without the need for a

further evidentiary hearing. The application in case 08-2013-cv-02334 alleges that the trial court did not inform the petitioner of his rights at his initial appearance before taking a guilty plea and that he was deprived of his right to counsel. App. I, pp. 1-13. The partial transcript included with the application indicated the trial court asked the petitioner if he was present when the rights were explained and if he had any questions regarding those rights. *Id.* at 13. The petitioner answered “no” indicating he had no questions and implying that he understood his rights. *Id.*

[¶20] The trial court does not have to proceed with a rigid list of questions to comply with Rule 11 of the North Dakota Rules of Criminal Procedure. As long as substantial compliance with the rule is shown, there is no violation. *State v. Murphy*, 2014 ND 202, ¶ 12, 855 N.W.2d 647. In the petitioner’s case, the trial court stated it had read the rights while the petitioner was present in court and inquired of the petitioner if he had any questions regarding his rights. There was no violation.

[¶21] The application in case 08-2013-cv-02338 alleges that the trial court did not inform the petitioner that he could be resentenced to the maximum sentence allowed upon a revocation. App. II, p. 32. There is no requirement under Rule 11 that the trial court must make such an advisement. Therefore, if the trial court did not advise him of the penalty available at a revocation, there was no violation of the petitioner’s rights. The petitioner’s claims have no merit and were rightfully dismissed.

CONCLUSION

[¶22] Based upon the foregoing, the State respectfully requests that the order denying application for post-conviction relief be affirmed.

Dated this 29 day of April, 2015.



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Petitioner-Appellant,)
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-vs-)
) Supreme Ct. No. 2015005
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Respondent-Appellee,) 08-2013-cv-02338
.....)
STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

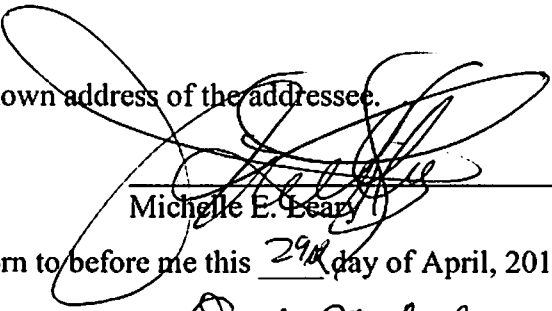
Michelle E. Leary, being first duly sworn, depose and say that I am a United States citizen over 21 years old, and on the 29 day of April, 2015, I deposited in a sealed envelope a true copy of the attached:

- 1. Brief of Plaintiff-Appellee
- 2. Affidavit of Mailing

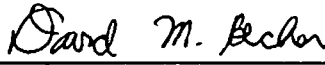
in the United States mail at Bismarck, North Dakota, postage prepaid, addressed to:

Benjamin C. Pulkrabek
Attorney at Law
402 1st St NW
Mandan, ND 58554

which address is the last known address of the addressee.


Michelle E. Leary

Subscribed and sworn to before me this 29th day of April, 2015.


David M. Becker, Notary Public
Burleigh County, North Dakota

