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STATE OF NORTH DAKOTA

IN THE SUPREME COURT STATE OF NORTH DAKOTA

Supreme Court No. 20150070

JOHN WILLARD GREYWIND, JR.,

Petitioner and Appellant,

v.

STATE OF NORTH DAKOTA,

Respondent and Appellee.

ON APPEAL FROM POST-CONVICTION
FROM THE DISTRICT COURT OF NORTH DAKOTA
NORTHEAST JUDICIAL DISTRICT

# BRIEF FOR PETITIONER AND APPELLANT

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1. WHETHER THE TRIAL COURT ERRED IN SUMMARILY DISMISSING JOHN GREYWIND'S APPLICATION FOR POST-CONVICTION RELIEF AND SUBSEQUENT MOTION TO RECONSIDER?

## STATEMENT OF THE CASE

[¶1] John Greywind has petitioned this court on appeal to review the Order Denying Post-Conviction relief dated January 15, 2015, and the Order Amending Order Denying Post-Conviction Relief dated March 12, 2015. See, Appendix at p. 000005, 000067. Mr. Greywind's judgment of conviction on the underlying matter was entered on May 7, 2013, with the Honorable Lee Christofferson presiding. The crime convicted and sentence imposed were entered upon a plea of guilty and were as follows:

1. 36-2013-CR-138: Count 1: Robbery. Mr. Greywind was sentenced to ten (10) years with the North Dakota Department of Corrections and Rehabilitation with six (6) years suspended for five (5) years supervised probation, credit of thirty-five (35) days.

[¶2] Mr. Greywind filed an Application for Post-Conviction Relief on November 20, 2014, on the grounds of Ineffective Assistance of Counsel, harsher sentence than co-defendant, and prosecutorial misconduct. See, Appendix at p. 000002. Counsel was appointed to represent Mr. Greywind in the Post-Conviction matter on December 9, 2014. Defense counsel requested discovery material on December 11, 2014, and received discovery from the State on December 18, 2014. On January 15, 2015, the Honorable Lee Christopherson denied the application for post-conviction without a hearing, Defense counsel was not afforded the opportunity to file a brief in support of the Petitioner's application, and the State did not file a response to the Petitioner's initial application. Defense counsel filed

a Motion to Reconsider on February 13, 2015, and the Court denied the Motion on March 12, 2015. See, Appendix at p. 000058. This appeal follows.

## STATEMENT OF THE FACTS

[¶3] A hearing was not held on the application for post-conviction relief. The Honorable Lee Christopherson relied on the information from the application and summarily dismissed the post-conviction application on January 15, 2015. See, Appendix at p. 000005. This matter was denied without argument or testimony. The Honorable Lee Christopherson subsequently denied a Motion to Reconsider on March 12, 2015. See, Appendix at p. 000067.

[¶4] The Appellant reasserts the allegations in the petition in so far as it may be considered without having been developed through testimony.

## ARGUMENT

[¶5] This Court has indicated that an appeal from the summary dismissal of an application for post-conviction relief will be reviewed in a manner similar to the review of an appeal from a summary judgment motion. DeCoteau v. State, 1998 ND 199, ¶4, 586 N.W.2d 156. Accordingly, "[t]he party opposing the motion for summary disposition is entitled to all reasonable inferences at the preliminary stages of post-conviction proceeding, and is entitled to an evidentiary hearing if a reasonable inference raises a genuine issue of material fact. Id. (citing Owens v. State, 1998 ND 106, ¶13, 578 N.W.2d 542).

[¶6] Also, the Supreme Court "applies the "clearly erroneous" standard set forth in Rule 52(a), N.D.R.Civ.P., when reviewing a trial court's findings of fact on an appeal from a final judgment or order under the Uniform Post-Conviction Procedure Act." State v. Foster, 1997 ND 8, ¶18, 560 N.W.2d 194. 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.

Clark v. State, 2008 ND 234, ¶11, 2008 WL 5246330. The decision of the district court to summarily dismiss the post-conviction application without development of the record was clearly erroneous as the Court considered facts outside of the post-conviction. Mr. Greywind raised a material issue and should have been allowed to

present testimony at a hearing.

## I. THE DISTRICT COURT FOR THE NORTHEAST JUDICIAL DISTRICT ERRED IN SUMMARILY DISMISSING THE APPLICATION FOR POST-CONVICTION RELIEF.

### A. Applicants are not required to include all supporting evidence in their original post-conviction application.

[¶7] The State of North Dakota has adopted the Uniform Post-Conviction Procedure Act to control this matter. N.D.C.C. §29-32.1-04 states the rules to follow regarding post-conviction applications:

> 1. The application must identify the proceedings in which the applicant was convicted and sentenced, give the date of the judgment and sentence complained of, set forth a concise statement of each ground for relief, and specify the relief requested. Argument, citations, and discussion of authorities are unnecessary.
> 2. The application must identify all proceedings for direct review of the judgment of conviction or sentence and all previous post-conviction proceedings taken by the applicant to secure relief from the conviction or sentence, the grounds asserted therein, and the orders or judgments entered. The application must refer to the portions of the record of prior proceedings pertinent to the alleged grounds for relief. If the cited record is not in the files of the court, the applicant shall attach that record or portions thereof to the application or state why it is not attached. Affidavits or other material supporting the application may be attached, but are unnecessary.

N.D.C.C. §29-32.1-04. "The statute does not require the applicant to include in the original application all supporting evidentiary matter necessary." State v. Bender, 1998 ND 72, ¶19, 576 N.W.2d 210. Mr. Greywind "must set forth a concise statement for each ground of relief and specify the relief requested."

Eagleman v. State, 2004 ND 6, ¶11, 673 N.W.2d 241. Mr. Greywind set forth a concise statement for each ground of relief and specified the relief requested in his application.

**B. The purpose of the Uniform Post-Conviction Procedure Act is to furnish a method to develop a complete record to challenge a criminal conviction.**

[¶8] A post-conviction proceeding affords an opportunity to establish a record for review on appeal. "The express purpose of the Uniform Post-Conviction Procedure Act, as codified in N.D.C.C. Ch. 29-32.1, is to furnish a method to develop a complete record to challenge a criminal conviction." Bender, at ¶20 (citing, State v. Wilson, 466 N.W.2d 101, 103 (N.D. 1991)). The post-conviction hearing allows the parties to "fully develop a record on the issue of counsel's performance and its impact on the defendant's case and to challenge a criminal conviction and sentence." DeCoteau, at ¶7. The District Court rendered its decision based upon the record of the sentencing hearing and did not allow other evidence to be presented. Therefore, under Bender, testimony should have been taken to establish a record where the record was void. The Court never afforded Mr. Greywind the opportunity to flush out his counsel's performance. There is much more to effectiveness of counsel than the result obtained. The question of Counsel's performance is not one of competence but effectiveness. The Court did not allow Mr. Greywind to present testimony or to testify at a hearing.

### C. The District Court improperly relied solely upon records of previous proceedings and bare assertions necessary in post-conviction application petition to deny relief.

[¶9] Mr. Greywind was not given the opportunity to present his evidence in open court or to proffer information needed to create an adequate record. There is a high standard imposed on a Petitioner alleging ineffective assistance of counsel. One such standard not imposed at this stage is for him to specify with affidavit or materials establishing ineffectiveness until he has been put to his proof. "A petitioner may attach affidavits or other supporting materials to the application, but they are unnecessary." Ude v. State, 2009 ND 71, ¶8, 764 N.W.2d 419 (citing, Bender, ¶19). "A petitioner is not required to provide evidentiary support for his petition until he has been given notice he is being put on his proof." Id. The State never responded putting Mr. Greywind to his proof in this case; therefore, he moves this Court to allow him an opportunity to establish the record to challenge the conviction.

[¶10] Mr. Greywind properly asserted that his counsel's performance was deficient in his application for post-conviction relief. However, the District Court failed to allow him to develop those arguments. N.D.C.C. §29-32.1-10(2) allows either party to develop additional facts as to the occurrences that appear in the record. The Supreme Court recently provided a Court may summarily dismiss an application for post-conviction, but may not go beyond the pleadings in the post-

conviction case. Chisholm v. State, 2014 ND 125, 848 N.W.2d 703. The District Court failed to allow for development of potential ineffectiveness in representation by relying upon transcripts from the underlying criminal case. To do so is an erroneous view of the law given this Court has held that there may be ineffective assistance of counsel in a guilty plea. (See generally, Sambursky v. State, 2006 ND 223, 723 N.W.2d 524 (holding that misinformation portrayed to a defendant leading to a guilty plea may be grounds for a claim of ineffective assistance of counsel)).

[¶11] This applies in particular when, as in Mr. Greywind's case, "the defendant's allegations of ineffective assistance involve incidents which did not occur in open court and require additional evidence and development of a record for review." Id (citing State v. Robertson, 502 N.W.2d 249, 251 n.1 (N.D. 1993)). When confinement to a transcript to decide an application for post-conviction occurs, as in this case, "the post-conviction procedure becomes no better than direct review on appeal." State v. Wilson, 466 N.W.2d at 103. The District Court did not allow Mr. Greywind to present additional evidence for the record. Therefore, the District Court erred in strictly relying on prior proceedings and Mr. Greywind's application, necessitating a remand to the District Court for an evidentiary hearing on the Petition.

## II. THE DISTRICT COURT FOR THE NORTHEAST JUDICIAL DISTRICT ERRED IN DENYING MR. GREYWIND'S MOTION TO RECONSIDER.

[¶12] The District Court used its extraordinary powers granted it by N.D.C.C. § 29-32.1-09, which was amended in 2013 by the Legislature and the implications have been clarified by the Court. This case is directly analogous to the case in Chisholm. In Chisholm, the District Court, on its own motion, summarily dismissed an application for post-conviction for failure to state a claim to which the defendant would be entitled to relief. The Supreme Court carefully reviewed the previous standards for being allowed to provide for a record and reaffirmed a petitioner need not set out, in affidavit or supporting argument, his position. Furthermore, in remanding to the District Court for an evidentiary hearing, the Supreme Court declared §29-32.1-09(1) inapplicable when the District Court determines a petitioner cannot establish ineffectiveness by considering facts from the criminal case.

> The court determined Chisholm could not prove his ineffective assistance claims after it considered evidence from the criminal proceedings relating to Chisholm's statements to police. Because the court relied on information outside the application in determining the application was frivolous and wholly without merit, N.D.C.C. § 29-32.1-09(1) does not apply.
> …
> However, Chisholm was entitled to notice that his application may be summarily dismissed and an opportunity to file an answer brief with supporting materials to demonstrate the existence of a genuine issue of material fact.
> …
> [W]e conclude the court erred in summarily dismissing the

application.

Chisholm, at ¶17-19. In this matter, the District Court relied on evidence from the criminal proceedings, which were not included in Mr. Greywind's Application for Post-Conviction, when it issued the Order Denying Post-Conviction Relief. The evidence from prior criminal proceedings the District Court relied on in its Order to deny the Post-Conviction Application were as follows:

a. "A transcript of the sentencing hearing of both the petitioner and his co-defendant was prepared and made a part of this decision."

b. "The incriminating evidence was strong and the minimum mandatory sentence was not going away."

c. "As admitted at the sentencing hearing, the petitioner was the muscle to the robbery and he held an exposed the knife when dealing with the employee."

d. "He seemed eager to plead guilty and begin serving his time."

e. "While, in fact, he received two more years than the co-defendant, the difference was the knife."

f. "While the petitioner, with the knife, accosted the employee with a demand for money, the co-defendant was hiding in the restroom."

g. "The co-defendant did not have the weapon nor make any threat with the weapon."

h. "The reason the co-defendant was charged and convicted of robbery

is that he committed a theft and aided the petitioner by being actually present in the building when the dangerous weapon (knife) was used, which makes it a B felony for the co-defendant."

i. "Any claim that the co-defendant was the ring leader or crime planner is irrelevant to the language of this statute."

j. "In this case, as well as the companion case of the co-defendant, the prosecutor engaged in discussions and negotiations with the defendants through their attorneys to reach agreements that were consistent with the facts, the law, the prior criminal history, and the ends of justice."

See, Appendix at p. 000005-000008. The bulk of the District Courts Order contained reasoning's and conclusions which were obtained from a transcript of the Preliminary and Sentencing hearings, and not from the application for post-conviction relief. Id.

[¶13] Mr. Greywind is entitled to a hearing to establish a record. Evidence should be taken pursuant to N.D.C.C. §29-32.1-10 which states:

1. Evidence must be presented in open court, recorded, and preserved as part of the record of the proceedings.
2. A certified record of previous proceedings may be used as evidence of facts and occurrences established therein, but use of that record does not preclude either party from offering additional evidence as to those facts and occurrences.
3. The deposition of a witness may be received in evidence, without regard to the availability of the witness, if written notice of intention to use the deposition was given in advance of the hearing and the deposition was taken subject to the right of cross-examination.

Id.

## CONCLUSION

[¶14] For the aforementioned reasons, the Appellant Mr. John Greywind's application for post-conviction was erroneously summarily dismissed by the District Court. The Court erred in not taking oral argument from counsel and relying on Mr. Greywind's application, which is contrary to N.D.C.C. §29-32.1-04, 10. Therefore, Mr. Greywind prays the Court reverse the lower court's decision and remand this matter for a post-conviction hearing.

Dated this 2nd day of April, 2015.

Respectfully submitted:

/s/
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