

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

LeRoy Wheeler,)	Supreme Court Nos. 20150113
)	20150114
Petitioner/Appellant,)	20150115
)	
)	District Court Nos. 18-2015-CV-00248
vs.)	18-2015-CV-00249
)	18-2015-CV-00250
State of North Dakota,)	
)	
Respondent/Appellee.)	

ON APPEAL FROM DENIAL OF POST-CONVICTION RELIEF
FROM THE DISTRICT COURT
FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY, NORTH DAKOTA
THE HONORABLE DEBBIE KLEVEN, PRESIDING

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUES

- I. Whether the district court erred when it denied Wheeler's motion for post-conviction relief?**
- II. Whether the district court erred when it entered an order precluding Wheeler from any future filings in the district court?**

STATEMENT OF THE CASE

[¶1] On February 17, 2015, Wheeler filed a second petition for post-conviction relief with the district court in the above-referenced cases. The civil case numbers for post-conviction relief correspond with criminal case numbers 18-04-K-1644, 18-04-K-1645, and 18-04-K-1645. The State filed an answer and a Motion to Summarily Dismiss Application for Post-Conviction Relief and Brief in Support of Motion to Dismiss Application for Post-Conviction Relief based on N.D.C.C. §29-32.1-01(2) as the application was time barred. (State's Answer, Motion to Summarily Dismiss Application for Post-Conviction Relief, State's Brief in Support of Motion to Dismiss Application for Post-Conviction Relief, March 3, 2015.) On March 27, 2015 the district court denied Wheeler's petition and granted the State's Motion to Dismiss Application for Post-Conviction Relief as Wheeler's application was untimely pursuant to N.D.C.C. §29-32.1-01(2). (Order Granting State's Motion to Dismiss Application for Post-Conviction Relief and Order Regarding Any Future Filings, March 27, 2015.) Further, the district court entered an order precluding Wheeler from making any future filings. (Order Granting State's Motion to Dismiss Application for Post-Conviction Relief and Order Regarding Any Future Filings, March 27, 2015.) Wheeler filed notice of appeal of the district court order on April 22, 2015.

STATEMENT OF THE FACTS

[¶2] On June 17, 2004 Wheeler was charged with Contributing to the Delinquency of a Minor, Encouraging the Deprivation of a Minor, and Gross Sexual Imposition in case numbers 18-04-K-1646, 18-04-K-1644, 18-04-K-1645. (Information, June 17, 2004.) A jury trial was held May 3-6, 2005. Wheeler was convicted. (Verdict, May 6, 2005.) Wheeler appealed the criminal judgments to the North Dakota Supreme Court and they were affirmed. See State v. Wheeler, 2006 ND 95, 719 N.W.2d 384. However, it was remanded to the district court to correct a clerical error in the judgment. Id. Subsequent to his direct appeal being denied, Wheeler has filed a plethora of requests for relief in case numbers 18-04-K-1646, 18-04-K-1644, 18-04-K-1645. On March 7, 2007, Wheeler filed his first post-conviction relief application. (Application for Post-Conviction Relief, March 7, 2007.) The district court entered an order granting the State's Motion to Dismiss Petitioner's Application for Post-Conviction Relief on April 26, 2007. (Order and Judgment Granting State's Motion to Dismiss Petitioner's Application for Post-Conviction Relief, April 26, 2007.) Wheeler then filed a Petition for Supervisory Order and Petition for Rehearing on May 9, 2007. (Request for Supervisory Order and Petition for Rehearing, May 9, 2007.) They were denied on June 4, 2007. (Order Denying Petition for Rehearing, June 4, 2007; Order Denying Request for Supervisory Order, June 4, 2007.) Wheeler filed a Request for Leave to Allow Collection of Discovery Materials on June 6, 2007 which was denied by the district court on July 6, 2007. (Request for Leave to Allow Collection of Discovery Materials, June 4, 2007; Order Denying Request for Leave to Allow Collection of Discovery, July 6, 2007.) Wheeler filed a Notice of Appeal on June 8, 2007 and the North Dakota Supreme Court

entered a judgment affirming the district court's decision on July 14, 2008. (Notice of Appeal, June 8, 2007; Judgment Affirmed Post-Conviction, July 14, 2008.)

[¶3] Beginning in August of 2013, Wheeler began filing a series of documents relating to what he alleged was an invalidity of the verdict. On August 19, 2013, Wheeler filed a request to challenge the validity of the verdict. (Request to Challenge the Validity of the Verdict, August 19, 2013.) The request was denied by an order filed on September 17, 2013. (Order Denying Motion to Conduct an Investigation to Challenge the Validity of the Verdict, September 17, 2013.) Wheeler then filed a Motion for Leave of Court to Investigate the Invalidity of the Verdict on October 18, 2013. (Motion for Leave of Court to Investigate the Invalidity of the Verdict, October 18, 2013.) The district court entered a second order denying the request on November 20, 2013. (Order Denying Second Motion to Conduct an Investigation to Challenge the Invalidity of the Verdict, November 20, 2013.) Wheeler filed an application for Appointed Defense Services and Court-Appointed Counsel on December 9, 2013 and a Motion to Reconsider. (Motion for Reconsideration and for Appointment of Counsel, December 9, 2013.) Wheeler was granted court appointed counsel, though that counsel subsequently was permitted to withdraw as counsel. (Order Appointing Court Appointed Counsel, December 16, 2013; Order Allowing Withdrawal As Counsel of Record, July 25, 2014.) On April 16, 2014, Wheeler's Motion to Reconsider was denied. (Order Denying Motion to Reconsider, April 16, 2014.) On May 29, 2014 Wheeler filed a Motion to Reconsider Order Denying Motion to Reconsider. (Motion to Reconsider Order Denying Motion to Reconsider, May 29, 2014.) On June 11, 2014, the court denied that motion. (Order Denying Request to Clarify the Scope and Duration of the Appointment of Counsel and

Order Denying Motion to Reconsider Order Denying Motion to Reconsider, June 11, 2014.) On July 11, 2014 a second attorney was assigned to represent Wheeler in appeal he had filed on July 3, 2014. (Assignment of Counsel, July 11, 2014; Notice of Appeal, July 3, 2014.) However, that attorney filed a Motion to Dismiss Appeal with the North Dakota Supreme Court on August 14, 2014 and the appeal was dismissed August 15, 2014. (Order of Dismissal, August 15, 2015.) On December 11, 2014, Wheeler his third motion entitled Motion for Leave of Court To Challenge the Validity of the Verdict. (Motion for Leave of Court to Challenge the Validity of the Verdict, December 11, 2014.) On January 5, 2015, that motion was denied for the third time. (Third Order Denying Motion for Leave of Court to Challenge the Validity of Verdict, January 5, 2015.) On January 16, 2015 Wheeler filed a Motion to Reconsider Third Denial for Leave of Court to Challenge the Validity of the Verdict. (Motion to Reconsider Third Denial for Leave of Court to Challenge the Validity of the Verdict, January 16, 2015.) On February 6, 2015, the district court entered the Fourth Order Denying Motion for Leave of Court to Challenge the Validity of the Verdict. (Fourth Order Denying Motion for Leave of Court to Challenge Validity of Verdict, February 6, 2015.)

[¶4] On February 17, 2015, Wheeler filed his second post-conviction relief application alleging that the conviction was obtained illegally. His second post-conviction relief application was filed in civil case numbers 18-2015-CV-00248, 18-2015-CV-00249, 18-2015-CV-00250. Primarily Wheeler complains of prosecutorial and juror misconduct which stems from an unsupported allegation he makes that the State permitted the jury to see a news article that contained details of Wheeler's prior criminal history. (Post-Conviction Relief Application, February 17, 2015.) In addition, Wheeler

claims the transcripts were altered to exclude these “facts”. (Post-Conviction Relief Application, February 17, 2015.) The State filed an answer to Wheeler’s second Post-Conviction Relief Application on March 3, 2015 as well as a Motion to Dismiss Application for Post-Conviction Relief and Brief in Support. (Answer, March 3, 2015; Motion to Dismiss Application for Post-Conviction Relief and Brief in Support, March 3, 2015.) Wheeler filed a reply brief on March 11, 2015. (Defendant’s Reply Brief to the State on Post-Conviction Relief, March 11, 2015.) On March 27, 2015, the district court entered an Order Granting State’s Motion to Dismiss Application for Post-Conviction Relief and Order Regarding any Future Filings. (Order Granting State’s Motion to Dismiss Application for Post-Conviction Relief and Order Regarding any Future Filings, March 27, 2015.) On April 22, 2015, Wheeler filed notice of appeal. (Notice of Appeal, April 22, 2015.)

LAW AND ARGUMENT

I. The district did not err when it denied Wheeler's motion for post-conviction relief.

[¶5] N.D.C.C. §29-32.1-01(2) provides that an application for post-conviction relief must be filed within two years of the date of the conviction becoming final. A conviction becomes final under that chapter when the time for appeal of the conviction to the North Dakota Supreme Court expires; if an appeal was taken to the North Dakota Supreme Court, the time for petitioning the United States Supreme Court for review expires; or if review was sought in the United States Supreme Court, the date the Supreme Court issues a final order in the case. N.D.C.C. §29-32.1-01(2). N.D.C.C. §29-32.1-01(3) provides exceptions to the two year time frame; however, they do not apply in this case, nor has Wheeler asserted that they do. N.D.C.C. §29-32.1-01(2) became effective August 1, 2013.

[¶6] Wheeler filed his second post-conviction relief application on February 17, 2015. Pursuant to the terms set forth in N.D.C.C. §29-32.1-01(2) Wheeler's conviction was final in November of 2006 after the United States Supreme Court denied his Writ for Certiorari. In its Motion to Dismiss Application for Post-Conviction Relief and Brief in Support, the State alleged that Wheeler's second Post-Conviction Relief application was time-barred under N.D.C.C. §29-32.1-01(2). (Motion to Dismiss Application for Post-Conviction Relief and Brief in Support of Motion to Dismiss Application for Post-Conviction Relief, March 3, 2015.) The district court agreed and dismissed Wheeler's Post-Conviction Relief application. (Order Granting State's Motion to Dismiss Application for Post-Conviction Relief and Order Regarding any Future Filings, March 27, 2015.) Wheeler now alleges that the district court erred in what he alleges was a

retroactive application of N.D.C.C. §29-32.1-01(2). However, this Court has addressed similar allegations in Murphy v. State and Johnson v. State. Murphy v. State, 2014 ND 84, 845 N.W.2d 327, Johnson v. State, 2015 ND 7, 858 N.W.2d 632. In Murphy v. State, the defendant was convicted in October of 2005 of fleeing law enforcement. Murphy at ¶2. On September 19, 2013, Murphy filed a petition for post-conviction relief. Id. at ¶3. On November 1, 2013, the district court summarily dismissed Murphy's petition for post-conviction relief because as of August 1, 2013, an individual had two years after a conviction becomes final to request post-conviction relief. Id. The North Dakota Supreme Court upheld the district court's summary dismissal indicating that Murphy's application was in fact untimely as he filed it more than two years after his conviction became final and the exceptions to the two year limitation did not apply. Id. at ¶6. Further, this Court did not address the substance of his application as it was untimely filed. Id. at ¶7.

[¶7] In the case at hand, Wheeler's conviction was final in November of 2006. Wheeler's second post-conviction relief application was filed approximately eight years after his conviction was final. Wheeler alleges the district court erroneously applied N.D.C.C. 29-32.1-01(2) to his case because his conviction was final prior to the August 1, 2013 enactment of N.D.C.C. 29-32.1-01(2). However, in Lehman v. State, this Court indicated that a statute is applied retroactively when it is applied to a cause of action that arose prior to the effective date of the statute. Lehman v. State, 2014 ND 103, ¶11, 847 N.W.2d 119. A statute is applied prospectively when it is applied to a cause of action that arose subsequent to the effective date of the statute. Id. A statute is not regarded as operating retroactively because of the mere fact that it relates to antecedent events. Id.

[¶8] Wheeler filed his petition February 17, 2015. The two year time limit proscribed in N.D.C.C. §29-32.1-01(2) was effective August 1, 2013. The cause of action arose subsequent to the enactment of the statutory time limit. Consistent with the decisions in Murphy and Lehman, the district court did not err and properly denied Wheeler's second petition for post-conviction relief.

II. The district court did not err when it entered an order precluding Wheeler from making any future filings.

[¶9] District courts have the inherent authority to stem the abuses of judicial process. Holkesvig v. Grove, 2014 ND 57 ¶17, 844 N.W.2d 557. Further, this Court has indicated that the court has a responsibility to prevent single litigants from unnecessarily encroaching on the judicial machinery needed by others and that the rule applies equally to pro se litigants. Id. In Holkesvig v. Grove, this Court addressed a very similar order in which a district court ordered the Grand Forks County Clerk of Court not to accept any further pleadings from Holkesvig in his cases, other than a notice of appeal. Id. at ¶20. The district court found that the issues had all been exhausted in prior litigation, thus barred by res judicata or collateral estoppel. Id. at ¶¶13, 20. Res judicata prevents relitigation of claims that were raised, or could have been raised, in prior actions between the same parties. Id. at ¶12. In Holkesvig v. Grove, this Court went on to reiterate that pro se litigants do not have a license to harass others, clog the judicial machinery with meritless litigation, and abuse already overloaded court dockets. Id. This Court reviewed the district court's order to enjoin future litigation on an abuse of discretion standard. Id. at ¶17. This Court upheld the district court's decision to prevent future filings by Holkesvig and found that it was not an abuse of discretion. Id.

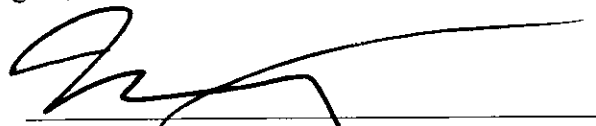
[¶10] In the case at hand, Wheeler has repetitively filed litigation making the

same allegations repeatedly, prosecutorial misconduct and juror misconduct. Wheeler files motions, motions to reconsider motions, motions to reconsider the denial of motions to reconsider, appeals, and now two post-conviction relief petitions. The district court found that Wheeler's motions and petitions are repetitive, frivolous, and barred by res judicata and collateral estoppel. The district court found that the second Petition for Post-Conviction Relief contains the same issues that had been addressed previously in prior litigation filed by Wheeler. The district court found that the motion and pleadings were excessive and cumbersome for both the State and the district court. In accordance with Holkesvig v. Grove, the district court did not abuse its discretion in controlling its docket and preventing previously litigated claims from being continuously and repetitively filed. Therefore, Wheeler's appeal should be denied.

CONCLUSION

[¶11] For the above-stated reasons, Wheeler's appeal should be denied.

DATED this 6th day of August, 2015.



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AFFIDAVIT OF SERVICE BY MAIL

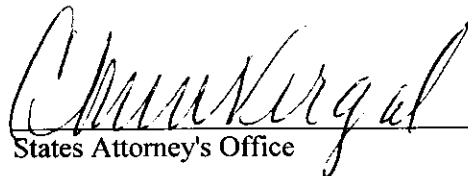
STATE OF NORTH DAKOTA)
) SS
COUNTY OF GRAND FORKS)

The undersigned, being of legal age, being first duly sworn deposes and says that on the 10th day of August, 2015, she enclosed in envelopes true copies of the following documents:

BRIEF OF APPELLEE

and that she addressed and deposited said envelopes, with the contents therein, in the U.S. Mails at Grand Forks, North Dakota, mail postage prepaid to the following:

LeRoy K. Wheeler #25949
N.D.S.P.
P.O. Box 5521
Bismarck, ND 58506



States Attorney's Office

Subscribed and sworn to before me this 6th day of August, 2015.

J. Fleck
Notary Public

cv

