

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20150145

Matthew Alan Eagleman,

Petitioner and Appellant.

- VS -

State of North Dakota,

Defendant and Appellee

APPEAL FROM THE CIVIL JUDGMENT
NORTHEAST JUDICIAL DISTRICT
RAMSEY COUNTY CR. NO. 36-2014-CV-00177
THE HONORABLE JOHN FOUGHTY PRESIDING

BRIEF

BENJAMIN C. PULKRABEK

ATTORNEY AT LAW
402 - 1ST NW
MANDAN, ND 58554
701/663-1929
N.D. State Bar ID No. 02908
PULKRABEK@LAWYER.COM

TABLE OF CONTENTS

| | |
|--|-----|
| Table of Contents | i |
| Table of Cases | ii |
| Abbreviations | iii |
| Statement of the Issues | ¶1 |
| Nature of the Case | ¶2 |
| Statement of Facts | ¶14 |
| Issue Presented: | |
| I. Was the assistance of counsel that was provided to Defendant/ Petitioner, Matthew Alan Eagleman by his attorneys during the hearing that corrected his illegal sentence ineffective and did that ineffective assistance prejudice him? | |
| Argument | ¶23 |
| Conclusion | ¶44 |
| Certificate of Service | ¶45 |

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

TABLE OF CASES

| | |
|-------------------------------------|-----------|
| State vs Perales | |
| 2012 ND 158, 820 NW2d 119. | . ¶16,32 |
| State v. Stavig, | |
| 2006 ND 63 711 NW2d 183 . | . ¶16,32 |
| State vs Eagleman, | |
| 2013 ND 101, 831 NW2d 759. | ¶19,26,41 |
| <u>Patten v. State,</u> | |
| 2008 ND 29 ¶8, 745 N.W.2d 626 . | ¶25 |
| Strickland v. Washington | |
| 466US668,668,694 (1984) . | ¶38,39 |
| Ex parte White | |
| 75 Okl.Cr. 204, 130 P.2d 103, 104 . | ¶42 |
| United States v. Locke, | |
| 409 F.Supp. 600. . | ¶42 |

STATUTES

| | |
|---|-----------------------|
| NDR of Crim. Pro 35 | ¶18 |
| Fourteenth Amendment | ¶23 |
| North Dakota Constitution Article 1 § 5 | ¶23 |
| | |
| NDCC 12.1-20-03 | ¶15 |
| NDCC 12.1-32-01(2) | ¶27 |
| NDCC 12.1-32-02 | ¶28 |
| NDCC 12.1-20-03.1 | ¶28 |
| NDCC 12.1-20-11 | ¶28 |
| NDCC 12.1-27.2-02 | ¶28 |
| NDCC 12.1-27.2-03 | ¶28 |
| NDCC 12.1-27.2-04 | ¶28 |
| NDCC 12.1-2.2-05 | ¶28 |
| NDCC 12.1-20-30 | ¶28 |
| NDCC 12.1-01-04 | ¶28 |
| NDCC 12.1-22-02 | ¶28 |
| NDCC 12.1-32-02(10)(11) | ¶31,34,35,36,37,40,44 |
| NDCC 29-32.1-01(2) | ¶41 |
| | |
| Blacks Law Dictionary Fifth Edition | ¶42 |

ABBREVIATIONS

Illegal Sentencing Transcript - IST

Line - L.

Page - P.

STATEMENT OF THE ISSUES

[¶1] ISSUES:

I. Was assistance of counsel that was provided to Defendant/Petitioner, Matthew Alan Eagleman by his attorneys during the hearing that corrected his illegal sentence ineffective and did that ineffective assistance prejudice him?

NATURE OF THE CASE

[¶2] The Defendant, Matthew Alan Eagleman filed an Application for Post Conviction Relief on June 13, 2014. Attached to that application were the following exhibits:

1. Application for Post Conviction Relief;
2. Motion to Correct Illegal Sentence;
3. Notice of Motion to Correct Illegal Sentence;
4. Brief in Support of Motion to Correct Illegal Sentence;
5. Certificate of Service;
6. Letter;
7. Demand for Change of Judge;
8. Order Denying Demand for Change of Judge;
9. Opposition to Motion to Correct Illegal Sentence;
10. Order Denying Defendant's Motion to Correct Illegal Sentence filed December 3, 2013;
11. Notice of Appeal;
12. Supreme Court Notice;
13. Order of Dismissal.

[¶3] The State filed an Answer Opposing Mr. Eagleman's Post Conviction Relief on November 13, 2014.

[¶4] An Order Dismissing Mr. Eagleman's Petition for Post Conviction Relief was filed on April 4, 2015.

[¶5] Mr. Eagleman filed a Motion for a New Trial on May 8, 2015.

[¶6] An appeal on the dismissal of Mr. Eagleman's Petition for Post Conviction Relief was filed on May 11, 2015. Also filed on that date was a Notice of Filing the Notice of Appeal.

[¶7] The State filed a Response to the Motion for New Trial on June 2, 2015.

[¶8] A Supreme Court's Order of Remand was filed on June 8, 2015 and on June 8, 2015, a combined Notice and Motion of Remand was filed.

[¶9] An Order dismissing Mr. Eagleman's Motion for a New Trial was entered on June 16, 2015.

[¶10] A clerk's certificate of Appeal to Mr. Eagleman's attorney was filed on June 22, 2015.

[¶11] A Notice of Appeal on the Motion for New Trial was filed on July 7, 2015.

[¶12] A clerk's supplemental certificate of appeal was filed on July 15, 2015.

[¶13] Both matters appealed are now before the North Dakota Supreme Court.

STATEMENT OF FACTS

[¶14] In this appeal there are two separate appeals to the North Dakota Supreme Court. The first appeal is from a district court's Order Dismissing Defendant/Appellant Matthew Alan Eagleman's Petition for Post Conviction Relief. The second appeal is from a district court's Order Dismissing Mr. Eagleman's Motion for New Trial.

[¶15] The above appeals can be traced back to May 15, 2002 when Mr. Eagleman was charged in the District Court in Ramsey County, North Dakota with crimes of a Class A Misdemeanor, harboring a runaway minor and a Class A Felony, Gross Sexual Imposition. The crime of Gross Sexual Imposition is defined in NDCC 12.1-20-03. On September 19, 2002 Mr. Eagleman plead guilty to both charges. Mr. Eagleman was

sentenced to one year in prison with all time suspended for two years on the harboring charge and to five years in prison on the gross sexual imposition charge with all imprisonment suspended for four years while he was on supervised probation.

[¶16] Since that time Mr. Eagleman has had more than two parole revocations and more than two re-sentencings on these crimes. North Dakota law according to *State vs Perales*, 2012 ND 158, 820 NW2d 119 and *State vs Stavig* 2006 ND 63 711 NW2d 183 only allow an individual in North Dakota to serve 2 periods of probation for the same crimes.

[¶17] In July of 2011 the State of North Dakota filed a third petition to revoke Mr. Eagleman's probation. On August 31, 2011 the North Dakota District Court found Mr. Eagleman had violated his conditions of probation and sentenced him to 20 years in prison, 10 to serve and credit for 7 years and 37 days with the balance of 10 years suspended for 10 years during which he would be placed on supervised probation.

[¶18] The State moved to correct the above illegal sentence on August 31, 2011 under N.D.R.Crim.P. 35 because that sentence ordered him to serve a third period of probation for the same crimes. A hearing on that motion was held on October 16, 2012. During that hearing the Court decided an individual can't be sentenced to more than 2 terms of probation for the same crimes and then resentenced Mr. Eagleman to 20 years in prison. The Order of Correction of Illegal Sentence was signed on October 31, 2012.

[¶19] Mr. Eagleman then appealed from that Order of Correction of an Illegal Sentence. The North Dakota Supreme Court ruling on that appeal is *State vs Eagleman* 2013 ND 101, 831 NW2d 759. That ruling was filed on June 19, 2013. Petition for

Remand was denied July 18, 2013 and the case was remanded to the District Court on August 15, 2013.

[¶20] In the district court on June 13, 2013 Mr. Eagleman filed an application for Post Conviction Relief. An Order dismissing Mr. Eagleman's Petition for Post Conviction was filed on April 20, 2014. On May 11, 2015 Mr. Eagleman filed a Notice of Appeal in the Dismissal of his Petition for post conviction relief.

[¶21] Mr. Eagleman filed Motion for New trial was filed on May 8, 2015. An Order Dismissing the Motion for New Trial was filed on June 16, 2015. On July 2, 2015 a Notice of Appeal was filed on the Order Dismissing the Motion for New Trial.

ISSUES

[¶22] **ISSUE I. Was the assistance of counsel that was provided to Defendant/Petitioner, Matthew Alan Eagleman by his attorneys during the hearing that corrected his illegal sentence ineffective and did that ineffective assistance prejudice him?**

ARGUMENT

[¶23] All criminal defendants in North Dakota because of the Sixth Amendment to the United States Constitution which is made applicable to the states through the Fourteenth Amendment and Article 1 § 15 of the North Dakota Constitution are guaranteed effective assistance of council.

[¶24] The issue of whether or not a criminal defendant in North Dakota receives ineffective assistance of counsel during criminal proceeding is usually raised in a Petition for Post- Conviction Relief.

[¶25] Post-conviction relief hearings are civil in nature and are governed by the North Dakota Rules of Civil Procedure. Patten v. State, 2008 ND 29 ¶8, 745 N.W.2d 626. The issue of ineffective assistance of counsel is a mixed question of law and fact that is fully reviewable by the North Dakota Supreme Court. Id. 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. Id.

[¶26] According to State vs Eagleman 2013 ND 101, 831 NW2d 759 [11] . . . When a Defendant's probation is revoked for violations of conditions the balance the sentencing court sought to achieve by tailoring terms of imprisonment for a term of probation is destroyed. We therefore conclude the illegal probationary terms in Eagleman 2008 and 2011 sentences invalidates those sentences in their entirety and the district court was authorized to impose any other sentence that was available at the time of the initial sentencing . . .

[¶27] The above quote makes it clear that at the hearing to correct the illegal sentence on October 16, 2012, Mr. Eagleman could and would be sentenced by the judge to any sentence that is allowed under North Dakota Law for a Class A Felony. That sentence is according to NDCC 12.1-32-01(2) . . . a maximum penalty of twenty years' imprisonment, a fine of ten thousand dollars, or both may be imposed.

[¶28] Prior to a sentence being imposed NDCC 12.1-32-02 requires:

10. A court shall order a defendant to pay fifty dollars to the department of corrections and rehabilitation at the time a presentence investigation is initiated to partially defray the costs incurred by the department for the preparation of the presentence report. The court may also order that any additional costs incurred by the department relating to

the presentence investigation and report be paid by the investigation and preparing the report as established by the department.

11. Before sentencing a defendant on a felony charge under section 12.1-20-03.1, 12.1-20-11, 12.1-27-2-02, 12.1-27.2-03, 12.1-27.2-04, or 12.1-2.2-05, a court shall order the department of corrections and rehabilitation to conduct a presentence investigation and to prepare a presentence report. A presentence investigation for a charge under section 12.1-20-03 must include a risk assessment. A court may order the inclusion of a risk assessment in any presentence investigation. In all felony or class A misdemeanor offenses, in which force, as defined in section 12.1-01-04, or threat of force is an element of the offense or in violation of section 12.1-22-02, or an attempt to commit the offenses, a court, unless a presentence investigation has been ordered, must receive a criminal record report before the sentencing of the defendant. Unless otherwise ordered by the court, the criminal record report must be conducted by the department of corrections and rehabilitation after consulting with the prosecuting attorney regarding the defendant's criminal record. The criminal record report must be in writing, filed with the court before sentencing, and made a part of the court's record of the sentencing proceeding. Emphasis added.

[¶29] In this case Mr. Eagleman's counsel knew or should have known the information provided to the trial court when Mr. Eagleman was originally sentenced was almost 10 years old. Therefore an up to date presentence report and risk assessment prior to sentencing would be required to inform the trial court about Mr. Eagleman's current situation.

[¶30] Mr. Eagleman in his post conviction application and Motion for New Trial claims that his counsel prior to his correction of illegal sentence on October 16, 2012, failed to request discovery, failed to consult with an independent evaluator or to determine what his sex offender risk level was. The clerk certificate agrees with Mr. Eagleman's claim and contains no discovery request by his counsel, no attempt by his counsel to get an independent evaluator and no attempt by his counsel to determine his offender risk level.

[¶31] Had a hearing been held on Mr. Eagleman's post conviction application Mr. Eagleman could have called as a witness the attorney who represented him at his

correction of an illegal sentence hearing and asked him to explain why prior to or at that hearing he didn't require the trial court to comply with the requirements of NDCC 12.1-32-02(10)(11). Also, Mr. Eagleman could have asked the attorney who represented him at the hearing on the correction of illegal sentence why they didn't consult an independent evaluator, get a risk assessment for Mr. Eagleman and why they didn't do more investigating for mitigating evidence.

[¶32] The only favorable information given by Eagleman's counsel at his Correction of Illegal Sentencing hearing was: Illegal Sentencing Transcript (IST) P.6.L.3-P.7.L.16.

MR. FLEISHMAN: Your Honor, going back to 2008 the court imposed 20 years with 13 years suspended, credit for four years and 89 days served. So, essentially he got - - it was a net sentence of seven years incarceration to do three additional.

Then he got resentenced in August 2011 with three more years added. The sentence being 20 years with 10 years suspended. At some point I think we have to say; when is it going to stop? Certainly, the Court noted in Perales and Stavig that they didn't want us - - the legislation didn't intend to see unlimited extensions of probation and with this case it seems like there is unlimited extensions of period of incarcerations.

Mr. Eagleman was only 18 at the time when this offense was committed. He's been in custody most of his life and at some point the court's got to give him a chance. He's served pretty much - - almost 10 years. I talked to the Department of Corrections and as of now, he's served seven years and about seven months total - - accumulative on all of these sentences.

Plus, there was civil commitment proceedings from December 2006 to February 2008, which he was pretty much in custody a year and 48 days on that. He's never gotten credit for that amount of time served.

He has not had problems while in custody. He's completed cognitive groups, offender groups, parenting classes. He's earned his GED. He would like to start college. He's - - his faith is very important to him. He's the Chaplin's Assistant. He's helped - - he's a certified member of the Service Dogs of American. Helping to train service dogs. He's had no write ups in the penitentiary or in the county jail. He does not use alcohol or smoke or use drugs.

He's 29 years old and he would like to relocate to Fargo where juvenile deprivation proceedings are currently pending with his daughter. The mother of the child has issues with substance abuse and they are looking at potential termination of parental rights action in that juvenile proceeding.

[¶33] The transcript of the Illegal Sentencing Hearing in the index states:

No witnesses called

No exhibits presented to court

[¶34] At the Illegal Sentencing hearing Mr. Eagleman's counsel should have at least put in testimony and/or evidence that would inform the court about the information required in NDCC 12.1-32-02(10(11)). Failure to put in such testimony and/or evidence is ineffective assistance of counsel.

[¶35] According to Eagleman Supra any sentence that was possible under North Dakota law for a class A Felony could be given to Mr. Eagleman at the correction of illegal sentence hearing. Therefore at that hearing his counsel should have gotten all of the

sentencing information required before the court mandated by NDCC 12.1-32-02(10)(11).

[¶36] North Dakota Criminal Defendants at their sentencing should be sentenced according to the North Dakota sentencing laws and Defendant's counsel and should require the trial court follow North Dakota sentencing laws. An argument can always be made that the requirements of NDCC 12.1-32-02(10)(11) would not have been favorable for Mr. Eagleman. The problem with this argument is that the results whether favorable or unfavorable are required by NDCC 12.1-32-02(10)(11). The court doesn't get around complying with the law because the result might be unfavorable to Mr. Edelman and Mr. Edelman's attorney doesn't get around requiring the court to comply to the sentencing laws because the results might be unfavorable.

[¶37] Without the required information in NDCC 12.1-32-02(10)(11) Mr. Eagleman got the maximum of 20 years. Under North Dakota law Mr. Eagleman had a right to have the required information in NDCC 12.1-32-02(10)(11) before the trial court prior to him being sentenced. Had the North Dakota Legislature not believed the required information NDCC 12.1-32-02(10)(11) would have an effect on district judges at sentencing, they would not have passed legislation requiring it.

[¶38] In order for Mr. Eagleman to prevail on a post-conviction relief application based on ineffective assistance of counsel, the first thing he must show is that his counsel's assistance fell below the objective standard of reasonableness. Mr. Eagleman has done this by setting out above the things his counsel failed to do or not do either prior to or at the Correction of Illegal Sentence hearing on October 12, 2012 and why his counsel's doing or not doing something was an ineffective assistance of counsel.

Strickland v. Washington 466US668,668,694 (1984).

[¶39] The second thing Mr. Eagleman must do to prevail on a post-conviction relief application is to show that there is a reasonable probability but for counsel's unprofessional errors, the result of the proceeding would be different. *Strickland vs. Washington* 466US66, 668, 694 (1984).

[¶40] Mr. Eagleman doesn't believe he has to establish that his sentencing result would have been different in his case. This belief is based on the fact North Dakota law requires that prior to sentencing he is entitled under NDCC 12.1-32-02(10)(11) to have certain information before the trial court and have that information considered by the trial court before he is sentenced. If his counsel at the correction of illegal sentencing on October 26, 2012 had been giving effective assistance of counsel that information would have been before the trial court.

[¶41] The statute of limitations for Defendant's Post-Conviction Application is NDCC 29-32.1-01(2). NDCC 29.-32.1-01(2) became law on August 1, 2013. The correction of Mr. Eagleman's illegal Sentence began with the State making a motion to correct it. Then a hearing was held on that Motion on October 16, 2013. At the conclusion of that hearing Mr. Eagleman was sentenced to 20 years. Mr. Eagleman then appealed that sentence. The Supreme Court ruling on that appeal was *State vs. Eagleman* 2013 ND 101 831 NW2d 759, which filed on June 19, 2013. A Petition for Rehearing was denied on July 18, 2015. The case was remanded to the district court on August 15, 2013. Therefore, the correction of the illegal sentence was completed 14 days after NDCC 29-32.1-01(2) became law.

NDCC 29-32.1-01(2) Except as provided in subsection 3, an application for relief under this chapter must be filed within two years of the date the conviction becomes final.

A conviction becomes final for purposes of this chapter when: a. The time for appeal of the conviction to the North Dakota supreme court expires.

[¶42] According to Blacks Law Dictionary Fifth Edition defines Conviction:

The final consummation of the prosecution including the judgment or sentence, or as is frequently the case, the judgment or sentence itself. Ex parte White, 75 Okl.Cr. 204, 130 P.2d 103, 104. The state of a criminal proceeding where the issue of guilt is determined. United States v. Locke, 409 F.Supp. 600.

[¶43] The fact that the sentencing was 14 days after NDCC 29-32.1-018 became law makes the Remedy of Post-Conviction Review available to Mr. Eagleman's Correction of an Illegal sentence.

CONCLUSION

[¶44] Mr. Eagleman has a right to have certain information before the trial court prior to sentencing. Mr. Eagleman's counsel at his Correction of an Illegal Sentence Hearing knew or should have known that North Dakota law required the trial court to have that information before the court before it could sentence Mr. Eagleman. Mr. Eagleman's Counsel's failure to have before the trial court at least the information required by NDCC 12.1-32-02(10)(11) before or during the hearing on October 16, 2012 is ineffective assistance of counsel. This case should be remanded to the trial court with an order requiring the trial court prior to re-sentencing of Mr. Eagleman to allow Mr. Eagleman to:

(1) Present evidence and testimony at a post-conviction hearing about the ineffective assistance of counsel he received from the attorney who represented him at the Correction of Illegal sentence hearing on October 16, 2014.

(2) Present to the trial court the information required by NDCC 12.1-32-02 (10)(11).

(3) Have the information required by NDCC 12.1-32-02 (10)(11) considered by trial court before his sentence is given.

DATED this 17 day of August, 2015.


Benjamin C. Pulkrabek, ID #02908

CERTIFICATE OF SERVICE BY MAIL

[¶45] The undersigned hereby certifies that she is an employee in the office of Pulkrabek Law Firm and is a person of such age and discretion as to be competent to serve papers.

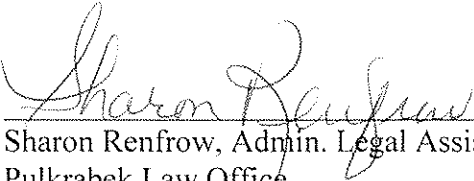
That on August 17th, 2015, she served, by e-mail and mailed a copy of the following:

APPELLANTS APPENDIX AND BRIEF

to: Lonnie Olson
Ramsey County State's Attorney
Lwolson@nd.gov

Mailed to: Matthew Eagleman
JRCC
2521 Circle Dr.
Jamestown, ND 58401

The undersigned further certifies that on August 17th, 2015, she served electronically on the Clerk, North Dakota Supreme Court, the APPELLANTS APPENDIX AND BRIEF.


Sharon Renfrow, Admin. Legal Assistant
Pulkrabek Law Office