

**IN THE SUPREME COURT**

**STATE OF NORTH DAKOTA**

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<b>ANTONIO MATTHEWS,</b>	)	
	)	
<b>Petitioner / Appellant,</b>	)	<b>Supreme Court No.</b>
	)	<b>20160037</b>
<b>vs.</b>	)	<b>District Court No.</b>
	)	<b>18-2016-CV-01212</b>
<b>STATE OF NORTH DAKOTA,</b>	)	
	)	
<b>Respondent / Appellee.</b>	)	

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**APPELLANT'S BRIEF**

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**Appeal from the Order Denying Appellant's Application for Post-Conviction Relief, Dated January 22, 2016, by the Honorable Lolita G. Hartl Romanick of the North East Central Judicial District.**

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### **[¶ 3] STATEMENT OF THE ISSUES**

[¶ 4] Whether the District Court erred in finding that the Appellant failed to establish ineffective assistance of counsel.

### **[¶ 5] STATEMENT OF THE CASE**

[¶ 6] Antonio Matthews (hereinafter “Appellant”) was tried and convicted of two counts of Gross Sexual Imposition, two counts of Robbery, Terrorizing, and two counts of Felonious Constraint. (Appellant’s App. at 1-2). In July 2015 the Appellant filed an application for post-conviction relief citing ineffective assistance of counsel. (Appellant’s App. at 19-21). Appellant appeals from the Order of the District Court, dated January 22, 2016, denying Appellant’s application for post-conviction relief. (Appellant’s App. at 75). On December 8, 2015, a post-conviction hearing was held before the Honorable Lolita Hartl Romanick. (Appellants’ App. at 59).

[¶ 7] The Appellant filed a timely notice of appeal on January 26, 2016, pursuant to North Dakota Rule of Appellate Procedure 4. (Appellant’s App. at 75). The District Court had jurisdiction under N.D.C.C. § 27-05-06 and N.D. Const. art. VI, § 8. The Supreme Court has jurisdiction under N.D.C.C. § 29-32.1-1.

### **[¶ 8] STATEMENT OF THE FACTS**

[¶ 9] On September 30, 2013, the State of North Dakota filed a criminal complaint charging Appellant with two counts of Gross Sexual Imposition, two counts of Robbery, Terrorizing, and two counts of Felonious Restraint. (Appellant’s App. at 1). On August 12, 2014, the Appellant was tried and convicted of all counts. (Appellant’s App. at 8). On July 6, 2015, the Appellant filed an application for post-conviction relief on grounds of ineffective assistance of counsel. (Appellant’s App. at 19-21).

[¶ 10] On December 8, 2015, a post-conviction hearing was held where testimony was provided by the Appellant's trial attorney, Sergeant Mike Jennings, and the Appellant himself. (Appellant's App. at 9). On January 22, 2016, the Honorable Lolita Hartl Romanick denied the Appellant's application for post-conviction relief. (Appellant's App. at 74).

### [¶ 11] ARGUMENT

[¶ 12] This Court has outlined the criteria of North Dakota law on ineffective assistance of counsel very succinctly:

The Sixth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment, and Article I, § 12 of the North Dakota Constitution guarantee a criminal defendant effective assistance of counsel. In accord with the test established by the United States Supreme Court . . . a defendant claiming ineffective assistance of counsel has the heavy burden of proving (1) counsel's representation fell below an objective standard of reasonableness, and (2) the defendant was prejudiced by counsel's deficient performance. Effectiveness of counsel is measured by an objective standard of reasonableness considering the prevailing norms. The defendant must first overcome the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Trial counsel's conduct is presumed to be reasonable and courts consciously attempt to limit the distorting effect of hindsight. The prejudice element requires a defendant to establish a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Not only does a criminal defendant have the heavy, demanding burden of proving counsel's assistance was ineffective, a defendant claiming ineffective assistance of counsel must specify how and where trial counsel was incompetent and the probably different result. A reasonable probability is probability sufficient to undermine the confidence in the outcome.

Tweed v. State, 2010 ND 38, ¶ 26, 779 N.W.2d 667, 678 (internal citations and quotations omitted).

[¶ 13] In the present case, the Appellant argues that his trial attorney failed to file a motion to suppress evidence based on the search of Appellant's residence and vehicle. (Appellant App. at 42). The evidence seized included a BB gun, a purple Polo shirt, a black North Face Jacket, a white t-shirt, and two iPhones. (Appellant App. at 63). The Appellant argues that without this evidence, there may have not been charges brought against him. (Appellant App. at 42). The appellant was deprived of his Constitutional right of effective assistance of counsel. Therefore, the District Court erred in finding that the Appellant failed to establish ineffective assistance of counsel.

[¶ 14] This Court's Standard of Review for post-conviction relief proceedings has been clearly established:

A trial court's findings of fact in a post-conviction proceeding will not be disturbed on appeal unless clearly erroneous under N.D.R.Civ.P 52(a). A finding is clearly erroneous if it induced by an erroneous view of law, if it is not supported by any evidence, or if, although there is some evidence to support it, a reviewing court is left with a definite and firm conviction a mistake has been made. Questions of law are fully reviewable on appeal of post-conviction proceeding.

Broadwell v. State, 2014 ND 6, ¶ 5, 841 N.W.2d 750 (internal citations and quotations omitted).

[¶ 15] ***The District Court Erred In Holding That Mr. Ogren's Conduct Did Not Fall Below The Objective Standard Of Reasonableness That Is Expected.***

[¶ 16] "Effectiveness of counsel is measured by an 'objective standard of reasonableness' considered 'prevailing professional norms.'" Garcia v. State, 2004 ND 81, ¶ 5, 678 N.W.2d 568 (quoting DeCoteau v. State, 2000 ND 44, ¶ 8, 608 N.W.2d 240).

The specific allegation of ineffectiveness in this case is Mr. Ogren's failure to file a motion to suppress the evidence based on the search of the Appellant's residence and vehicle. (Appellant's App. at 42). Failure to file a pre-trial motion to suppress, by itself, does not equate to the ineffective assistance of counsel. Roth v. State, 2007 ND 112, ¶ 10, 735 N.W.2d 882, citing Ernst v. State 2004 ND 152, ¶ 11, 683 N.W.2d 891. This court addressed the legal standard a petitioner must establish when claiming ineffective assistance of counsel based on a trial attorney's failure to file a Fourth Amendment suppression motion. Roth, 2007 ND 112. The petitioner must first establish that the failure to file a motion to suppress evidence fell below an objective standard of reasonableness. Id. ¶ 7, 735 N.W.2d 887. Second, the petitioner must establish that there was actual prejudice, not merely possible prejudice. Id. ¶ 10, 735 N.W.2d 888. Specifically, the petitioner must prove: (1) that the Fourth Amendment Claim is meritorious, and (2) that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice. Id.

[¶ 17] The District Court in its Order dated January 22, 2016, the Appellant failed to meet the first prong because he offered no evidence or testimony to establish what the prevailing professional norm is for "ineffective assistance of counsel." (Appellant's App. at 71). It was therefore presumed that Mr. Ogren's representation fell within the wide range of professional assistance. Id. The District Court felt that Mr. Ogren exercised reasonable professional judgment in not filing a suppression motion because Mr. Ogren felt such a motion lacked merit, would have been a waste of time and resources, and that there was sufficient evidence to charge the Appellant. Id. However, Mr. Ogren agreed that the evidence seized was very important to the case. Tr. Post-Conviction Hr'g pg. 15.

Additionally, he testified that it is possible that the State could have gone for other charges without this information. Id.

[¶ 18] Additionally, upon reviewing the search warrant, we find no solidified nexus between that which is sought to be searched and contraband sought. The search warrant in question, contained multiple addresses, indicating the law enforcement were acting on a hunch rather than probable cause on a specified actor and specified evidence. Therefore, filing a Motion to Suppress would not have lacked merit. Mr. Ogren's failure file a motion to suppress is obvious ineffective assistance of counsel. Had it not been for counsel's unprofessional errors, the results of the proceedings would have been different. Therefore, the subsequent charges that followed the search of the Appellant's residence and vehicle, should have been suppressed.

**[¶ 19] *The District Court Erred In Holding That The Appellant Was Not Prejudiced By Mr. Ogren's Deficient Performance.***

[¶ 20] "To demonstrate prejudice, the defendant must establish a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been difference, and the defendant must specify how and where trial counsel was incompetent and the probable different result." Middleton v. State, 2014 ND 144, ¶ 6, 849 N.W.2d 196 (quoting State v. Meyers, 2009 ND 141, ¶ 15, 770 N.W.2d 713). "A reasonable probability is a probability sufficient to undermine the confidence in the outcome . . ." Id. Sergeant Jennings testified at the post-conviction hearing that the evidence seized was very important. Tr. Post-Conviction Hr'g pgs. 8-9. He also agreed that without the evidence contained in the exhibits there may not have been charges brought against the Appellant. Id. This testimony, coupled with that of Mr. Ogren's, it is clear that had a suppression motion been filed, the outcome of the case would have been different.

[¶ 21] The District Court found that the Appellant failed to articulate and support what evidence was offered that should have been suppressed and thus, failed to establish the second prong. (Appellant's App. at 72). The District Court also found that Sergeant Jennings's testimony cited above only shows a *mere possibility*, that absent the evidence seized, charges *might* not have been filed against the Appellant. (Appellant's App. at 72).

[¶ 22] Further, the District Court stated that the Appellant needed to establish more – that the Fourth Amendment motion to suppress was meritorious and that the outcome would have been different had Mr. Ogren filed the motion. (Appellant's App. at 73). The Appellant did meet his burden. Both Mr. Ogren and Sergeant Jennings's testified to the importance of the evidence seized, yet that evidence seized was through a warrant obtain through questionable, at best, methods. Therefore a motion to suppress that evidence would have been meritorious. Furthermore, both witnesses testified that without the evidence, either different charges would have been filed or no charges would have been filed. Therefore, the petitioner has proven that there is a reasonable probability the outcome would have been different absent the evidence.

[¶ 23] **CONCLUSION**

[¶ 24] For these reasons, the Appellant respectfully requests this Court reverse and remand the district court's order denying his post-conviction application, or in the alternative, he be afforded a new trial with proper effective assistance of counsel.

Dated this Monday, March 7, 2016.

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FOR THE STATE OF NORTH DAKOTA**

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	)	
<b>vs.</b>	)	<b>District Court No.: 18-2015-CV-01212</b>
	)	
	)	
<b>State of North Dakota,</b>	)	
	)	
<b>Respondent / Appellee.</b>	)	

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**CERTIFICATE OF SERVICE**

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I, Samuel A. Gereszek, attorney for the Petitioner / Appellant, and officer of the court, hereby certify that I served a true and correct copy of the following:

1. *Appellant's Brief (electronically in .pdf and Word)*
2. *Appellant's Appendix (electronically in .pdf)*

On the following:

<b>Clerk of the Supreme Court North Dakota Supreme Court</b>	<b>M. Jason McCarthy Attorney for Respondent – Appellee</b>	<b>Mr. Antonio Matthews, #40366 North Dakota State Penitentiary P.O. Box 5521 Bismarck, ND 58506-5521</b>
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All done by Electronic Filing pursuant to N.D. Sup. Ct. Admin. Order 14.

Dated this Sunday, March 7, 2016

**HAMMARBACK & SCHEVING, P.L.C.**

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