

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

Antonio Matthews,)	Supreme Court No. 20160037
)	
Petitioner/Appellant,)	
)	District Court No. 18-2016-CV-01212
vs.)	
)	
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 LOLITA G. HARTL ROMANICK, PRESIDING

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUE

- I. Whether the district court properly denied Matthews' Application for Post-Conviction Relief?**

STATEMENT OF THE CASE

[¶1] On October 2, 2013, Matthews was charged with three counts of Gross Sexual Imposition, two counts of Robbery and Felonious Restraint, and one count of Terrorizing. (Appellant's App. at 5.) A jury trial was held August 11, 2014 through August 15, 2014. (Appellant's App. at 12.) Matthews was found guilty of all counts. (Appellant's App. at 12.) On July 16, 2015, Matthews filed a Petition for Post-Conviction Relief. (Appellant's App. at 19.) On July 22, 2015, Matthews was appointed counsel for the post-conviction proceedings. (Appellant's App. at 16.) The State of North Dakota, Respondent, filed an answer on August 14, 2015. (Appellant's App. at 22-23.) On October 22, 2015, Matthews filed a Continued and Amended Petition for Post-Conviction Relief and a Brief in Support of Conviction Relief. (Appellant's App. at 24-32.) On November 12, 2015, the State filed an Amended Answer to Petitioner's Amended Petition for Post-Conviction Relief and Brief in Response to Petitioner's Amended Petition for Post-Conviction Relief. (Appellant's App. at 33-41.)

[¶2] A hearing was held on December 8, 2015. (Appellant's App. at 17.) Testimony was taken from trial counsel for Matthews, David Ogren, and Detective Jennings from the Grand Forks Police Department. Subsequent to the hearing, written closing arguments were filed by Matthews and the State. The Honorable Lolita G. Hartl Romanick issued a written order on January 22, 2016 denying Matthews' Petition for Post-Conviction Relief. (Appellant's App. at 59-74.)

STATEMENT OF THE FACTS

[¶3] On September 30, 2013, at approximately 2 a.m., multiple 911 calls were placed from an apartment building on the north end of Grand Forks, North Dakota. Jury Trial Tr. pp. 222-223. The report initially was that there were females screaming for help in the hallway of the apartment complex. Jury Trial Tr. pp. 222-223. A short time later, a 911 call was placed from a neighbor of B.S. and N.C., the two women subsequently identified as the individuals screaming in the hallway. Jury Trial Tr. pp. 222-223. B.S. and N.C. initially reported a male, with his face concealed, forcibly entered their apartment, robbed and repeatedly sexually assaulted both women at gunpoint over an extended period. Jury Trial Tr. pp. 224-237. The offender had fled the apartment immediately prior to B.S. and N.C. running in the apartment complex hallway screaming for help. Jury Trial Tr. pp. 224-237.

[¶4] Law enforcement immediately responded. Jury Trial Tr. p. 223. B.S. and N.C. were transported to Altru Hospital for extended and comprehensive sexual assault examinations. Jury Trial Tr. pp. 241, 158-187. Their apartment was processed and evidence was collected. Jury Trial Tr. pp. 245-253. Statements were taken from many of the neighbors who had heard the young women screaming. Jury Trial Tr. pp. 174-213. Law enforcement commenced an extensive hunt for the offender based on the description initially provided by the victims. Jury Trial Tr. p. 236. B.S. and N.C. described the offender as a black male, approximately 200 lbs., with short hair and wearing a “doo rag” type item over his head, a t-shirt over his face, and possessing a gun. Jury Trial Tr. p. 79, 114, 135-140, 236. Further, B.S. and N.C. described the offender wearing a North Face brand jacket with some type of red embroidery on it, a collared purple polo shirt, and

pants. Jury Trial Tr. pp. 79-89, 114, 135-140. Both B.S. and N.C. were able to provide detailed descriptions about the offender's tattoos which included a tattoo on his stomach that was curved with some type of wording on it and a tattoo on his hand with curvy lettering and stars. Jury Trial Tr. pp. 81, 135-136. B.S. later was able to recall that the red embroidery on the black North Face jacket said "Summit Series". Jury Trial Tr. pp. 91-92. Both women relayed to law enforcement that their cell phones were stolen along with several hundred dollars in cash. Jury Trial Tr. p. 233. N.C. was able to provide details about the gun that the offender used, specifically that it was black, appeared to look like an M9 Beretta, had a magazine, and upon her gaining control of the weapon she realized that it was "fake" or plastic. Jury Trial Tr. pp. 114, 126-129.

[¶5] Corporal Derrick Johnston with the Grand Forks Police Department was one of the first officers on scene. Jury Trial Tr. p. 225. Cpl. Johnston testified that earlier in the evening of September 29, 2013, around midnight, he observed an individual in the Gateway Terrace trailer park matching the description of the suspect. Jury Trial Tr. p. 226. Further, he observed this same person, approximately 20-30 minutes later, approaching the Gateway Cenex convenience store. Jury Trial Tr. p. 227.

[¶6] Officer Rory Suby with the Grand Forks Police Department visited with a clerk at the Gateway Cenex gas station, which was in close proximity to B.S. and N.C.'s apartment. Jury Trial Tr. pp. 256-260. The clerk was identified as Dara Thumb. Jury Trial Tr. p. 260. Ms. Thumb provided a description of a man who matched the description provided by B.S. and N.C. of the rapist. Jury Trial Tr. pp. 265-266. Ms. Thumb observed a black man come into the Gateway Cenex at approximately 12:30 a.m. Jury Trial Tr. p. 265. Ms. Thumb observed the man to have a tattoo on his right hand and

purchased a pack of Newport cigarettes with a debit card. Jury Trial Tr. pp. 265-266.

Ms. Thumb also observed that the same man came in again at 2:30 a.m., driving a “maroonish red” Ford Explorer, and purchasing an Arizona Sweet Tea with one hundred dollars cash. Jury Trial Tr. pp. 265-266. During the 12:30 a.m. visit, Ms. Thumb observed the black male to be wearing a dark jacket either shiny, similar to Under Armour type clothing, or leather and denim jeans. Jury Trial Tr. pp. 265-267. During the 2:30 a.m. visit, the man was wearing different clothing, specifically, a red Adidas track suit. Jury Trial Tr. pp. 265-266.

[¶7] Armed with this additional information, law enforcement continued to investigate this case and brief other officers throughout the next few days. Sgt. Travis Jacobson was assigned as lead detective on the case. Jury Trial Tr. p. 418. On October 1, 2013, Sgt. Jacobson had an opportunity to visit with a patrol officer, Corporal Plorin, about the description of the offender by the victims as well as the possible connected description of the individual frequenting Gateway Cenex. Jury Trial Tr. p. 309. On the same day, Sgt. Jacobson was contacted by B.S. and notified that her stolen iPhone was turned on, which she was alerted to via email as a result of the “Find My iPhone App”. Jury Trial Tr. p. 428. The email provided to B.S. from the application included an address in which her cell phone had been turned on which was 3514 11th Ave North. Jury Trial Tr. pp. 429-430. Officers subsequently searched that location both the exterior and interior of the apartment complex but did not locate the phone at that time. That address was approximately 350 feet away from B.S. and N.C.’s apartment. Jury Trial Tr. p. 430.

[¶8] Despite not locating the phones, on October 1, 2013, Corporal Plorin located a suspect, matching the description provided by Dara Thumb, B.S. and N.C. at the same Gateway Cenex in a red Ford Explorer. Jury Trial Tr. pp. 313-319. Corporal Plorin stopped and visited with the individual. Jury Trial Tr. pp. 313-319. The individual provided the name of Shamir Thomas. Jury Trial Tr. p. 319. The individual was observed to have a tattoo on the top of his right hand which matched the description provided by B.S. and N.C. Jury Trial Tr. pp. 313-39. Subsequently it was learned that the individual was not Shamir Thomas, but rather Antonio Matthews. Jury Trial Tr. p. 321. Law enforcement was able to determine that Antonio Matthews resided in an apartment building located at 3514 11th Avenue North, which was the address where B.S.'s phone had been turned on, according to GPS technology used by the "Find My iPhone" application. Jury Trial Tr. p. 435. Although B.S. had left Grand Forks after the assault to be with her family, N.C. was still in the city of Grand Forks and was notified that a possible suspect was being detained at the Gateway Cenex. Jury Trial Tr. p. 439. Sgt. Jacobson drove to N.C.'s location to show her photographs of the tattoos that he had obtained from Matthews at the Gateway Cenex. Jury Trial Tr. p. 439. N.C. indicated the tattoos looked familiar. Jury Trial Tr. p. 439. Subsequently, N.C. was brought to the scene to advise law enforcement whether the suspect's physical description matched the physicality of the offender and whether the tattoos were consistent or the same as the offender's tattoos. Jury Trial Tr. p. 440. N.C. was discreetly shown Matthew's tattoos while she was in the back of Sgt. Jacobson's truck. Jury Trial Tr. pp. 139, 441. N.C. indicated that the physical description of Matthews was consistent with the person that attacked her. Jury Trial Tr. pp. 139, 442. N.C. indicated that the tattoos on Matthews'

body were consistent with the tattoos of her attacker. Jury Trial Tr. pp. 139, 443. N.C. indicated that Matthews' voice sounded familiar. Jury Trial Tr. p. 444.

[¶9] Matthews was subsequently detained, his rights were read, and he was interviewed by law enforcement. Jury Trial Tr. p. 444. Matthews provided multiple inconsistent statements and lies to law enforcement, which included lies related to his timeline of the evening. Jury Trial Tr. pp. 446-455. Matthews did admit to being at the Gateway Terrace trailer court earlier in the night on September 29, 2013. Jury Trial Tr. p. 446. Matthews also admitted to owning a red Adidas track suit, but claimed to be wearing it all night and into the morning of September 30, 2013. Jury Trial Tr. pp. 446-447. Matthews claimed to have left Gateway Terrace trailer court at 1:30 a.m. Jury Trial Tr. p. 447. Matthews denied knowing B.S. and N.C., denied having possession of their phones, denied owning any North Face brand clothing, denied owning the described weapon, and denied being at B.S. and N.C.'s apartment. Jury Trial Tr. pp. 446-455. Matthews further provided inconsistent information regarding his patronage of the Gateway Cenex gas station. Jury Trial Tr. pp. 446-455. A search warrant was executed on Matthew's apartment and the red Ford Explorer he was operating. Located within the apartment was the purple polo shirt described by B.S. and a gun matching the description provided by N.C. Jury Trial Tr. pp. 462-463. The gun had a magazine and appeared to be real, despite it being a BB gun. Jury Trial Tr. p. 466. There were also Newport brand cigarettes located within the apartment. Jury Trial Tr. p. 462. The red Ford Explorer was also searched. Located within the red Ford Explorer was B.S. and N.C.'s cellular telephones, the North Face jacket described by B.S. and N.C., and the white t-shirt

specifically described by B.S. used as a mask for Matthews' face. Jury Trial Tr. pp. 464-465. The cell phones were located in the vehicle behind the jack. Jury Trial Tr. p. 465.

[¶10] Matthews was subsequently charged with two counts of Gross Sexual Imposition, two counts of Robbery, Terrorizing, and two counts of Felonious Restraint. A jury trial was held on August 12-August 15, 2014. B.S. and N.C. testified in detail about the night Matthews broke into their apartment, robbed, and sexually assaulted them at gunpoint. Jury Trial Tr. pp. 62-142. B.S. specifically testified that she made a point of memorizing small details about the offender in case she was able to relay those to law enforcement. Jury Trial Tr. pp. 62-106. One of the details she recalled was that when the offender was raping her, his purple collared polo shirt kept getting in the way of his efforts to penetrate her and was falling into his pubic area. Jury Trial Tr. p. 80. The offender folded the purple polo shirt over his stomach which resulted in B.S. being able to observe a curved tattoo on his stomach with wording on it. Jury Trial Tr. pp. 80-81. B.S. further testified that the man who attacked them had a white t-shirt covering his face that had a Celtic type design with red and grey on it. Jury Trial Tr. 91.

[¶11] Both B.S. and N.C. testified that they did not see the offender's face, but did describe his physical makeup, the clothing he wore, and his tattoos. Jury Trial Tr. pp. 62-142. N.C. specifically testified that the offender had an athletic built, but heavy set with thick thighs and a big belly. Jury Trial Tr. p. 135. She testified that he had a tattoo on his right hand with a name on it in curvy lettering and stars. Jury Trial Tr. p. 135. N.C. testified that he had a curved tattoo on his belly that was big and hard to make out. Jury Trial Tr. pp. 135-136. N.C. testified in detail about the gun utilized by the offender. Jury Trial Tr. pp. 114, 126-129. N.C. testified that she was a member of the military and was

familiar with the M9 Beretta used by the military. Jury Trial Tr. pp. 114, 126-129. N.C. testified that it was not until she attempted to disarm the offender that she realized it was a fake or plastic gun. Jury Trial Tr. pp. 114, 126-129. B.S. and N.C. both detailed being held against their will and the offender specifically threatening to “pistol whip” N.C. Jury Trial Tr. pp. 83-84, 129, 141-142. Both N.C. and B.S. were shown exhibits at trial to identify. B.S. was shown photographs of Matthews’ tattoos. B.S. testified that she had been living out of state. Jury Trial Tr. p. 104. B.S. testified that prior to the trial she looked at the evidence in the case at the request of Sergeant Jacobson. Jury Trial Tr. p. 104. B.S. was able to identify the photograph of Matthews’ tattoos as the tattoos of her rapist. Jury Trial Tr. p. 105. B.S. identified the clothing seized from Matthews as the clothing that her rapist wore. Jury Trial Tr. pp. 93-96. B.S. further testified that she observed a photograph of Matthews and she knew that Matthews was her rapist based on her recognition of his eyes. Jury Trial Tr. pp. 105-106.

[¶12] At trial, neighbors of Matthews also testified about their observations of the night B.S. and N.C. were attacked. Jared Bosch testified that between September 29 and 30 of 2013, he lived in the same apartment building across the hall from Matthews. Jury Trial Tr. p. 276. Bosch testified that early the morning of September 30, 2013, at approximately 2 a.m., he saw Matthews kicking and pounding at Matthews’ apartment door. Jury Trial Tr. pp. 277, 284. Bosch described Matthews as looking frantic or nervous. Jury Trial Tr. p. 278. Bosch testified that Matthews made several trips to his vehicle and left at one point in that vehicle with loud rap music on in the vehicle. Jury Trial Tr. p. 278. Bosch observed Matthews “messaging” with something in his vehicle and specifically he could hear Matthews in the tire jack area of the vehicle. Jury Trial Tr. p.

279. Bosch testified that the vehicle was a late 90s red Ford Explorer. Jury Trial Tr. p.

280. Bosch observed Matthews also bringing something back in from the vehicle to his apartment which was concealed. Jury Trial Tr. p. 280. Madison Bowsher, another neighbor of Matthews, also testified consistent with the timeline and facts Bosch provided. Jury Trial Tr. 270-275.

[¶13] In addition to witness testimony and physical evidence that inculpated Matthews, scientific evidence was also presented. Jennifer Penner from the North Dakota State Crime Lab testified and was qualified as an expert in forensic science and DNA analysis. Jury Trial Tr. p. 496. Ms. Penner testified that the vaginal swabs from B.S.' sexual assault kit were presumptively positive for semen, but there was not a detectable amount of male specific DNA to develop a profile. Jury Trial Tr. p. 506. Ms. Penner testified that the vaginal swab from N.C.'s sexual assault kit had no semen detected. Jury Trial Tr. p. 508. However, N.C.'s external genitalia swabs were presumptively positive for semen although there was not sufficient DNA to amplify and analyze. Jury Trial Tr. p. 508. The gun described by N.C. and located in Matthews' bedroom was tested by Ms. Penner as well for DNA. Jury Trial Tr. p. 512. Ms. Penner testified that N.C., B.S. and Matthews were all contributors to DNA located on the weapon. Jury Trial Tr. pp. 512-513. The purple polo shirt described by B.S. as being worn by her rapist and having hung in the pubic area of her rapist during the rape was also tested by Ms. Penner. Jury Trial Tr. p. 513. This purple polo shirt was seized from Matthews' apartment. Jury Trial Tr. pp. 462-463. Ms. Penner testified that the DNA located on the shirt was a mixture of at least two individuals and neither B.S. or N.C. could be excluded as contributors. Jury Trial Tr. p. 513. The swab tested was collected

from the lower outside portion of the shirt. Jury Trial Tr. p. 514. With respect to statistical calculations, because only six of 13 genetic loci were used to calculate the frequency of an unrelated individual at random as possible sources of the DNA on the gun, the frequency was 1 in 89. Jury Trial Tr. pp. 514-515. The DNA from the purple polo shirt had thirteen of thirteen genetic loci to calculate a frequency from, which resulted in a statistic of 1 in 3,899,000 chance in the Caucasian population of an unrelated individual at random being a possible source of the DNA and 1 in 4,335,000 in the black population. Jury Trial Tr. p. 516. The lab report detailing these results was offered. Jury Trial Tr. p. 516. Jennifer Penner testified that the manner in which DNA results are given never provide a specific match, only an inclusion or an exclusion. Jury Trial Tr. p. 522.

[¶14] Also offered as evidence at trial were photographs from Matthews' Facebook profile which included a picture of Matthews wearing a purple polo shirt which was consistent with the purple polo shirt seized from Matthews' apartment. Jury Trial Tr. p. 406. The second photograph offered from Matthews' Facebook profile was a photograph of Matthews wearing a red Adidas shirt and pants. Jury Trial Tr. p. 407. This photograph was preserved as it was consistent with the information provided by Dara Thumb. Jury Trial Tr. p. 407.

[¶15] Finally, there was also testimony at trial regarding incriminating statements Matthews made while incarcerated. Jury Trial Tr. pp. 476-480. Testimony was elicited about recorded phone calls including a phone call where Matthews attempted to have his girlfriend and mother lie to law enforcement for him, just prior to the trial commencing. Jury Trial Tr. pp. 479-480.

[¶16] Matthews presented no testimony or evidence. Matthews was found guilty of all counts on August 15, 2014.

[¶17] An evidentiary hearing on Matthew's bid for post-conviction relief was held on December 8, 2015. Sergeant Mike Jennings testified. He indicated he was not the case detective. Evidentiary Hearing Tr. p. 9. He further indicated that he does not make charging decisions. Evidentiary Hearing Tr. p. 9. He also indicated that "possibly" charges would not have been filed without the evidence located during the search warrant. Evidentiary Hearing Tr. p. 9. Sergeant Jennings testified that the search warrant did not contain any typographical errors but that the affidavit in support of the warrant contained 2 typographical errors. Evidentiary Hearing Tr. p. 10. He further testified that while applying for the search warrant, there was an armed rapist at large in the community and that he was under pressure to keep the community safe. Evidentiary Hearing Tr. pp. 10-11. Finally, Sergeant Jennings testified that while he was applying for the search warrant, law enforcement was in the hallway of apartment 20 at 3514 11th Avenue South and in the parking lot of that apartment securing both the apartment and the vehicle that was searched. Evidentiary Hearing Tr. p. 11.

[¶18] David Ogren, Matthews' trial attorney testified. He indicated that the search warrant was supported by probable cause. Evidentiary Hearing Tr. p. 15. He further indicated that he would not file a baseless motion as it is a waste of time and resources. Evidentiary Hearing Tr. pp. 16-17.

On January 22, 2016, the Honorable Judge Lolita G. Hartl Romanick entered an Order Denying Matthews' Application for Post-Conviction Relief.

LAW AND ARGUMENT

I. The district court properly denied Matthews' Application for Post-Conviction Relief.

[¶19] 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. However, a trial court's findings of fact in a post-conviction relief proceeding will not be disturbed unless clearly erroneous. 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.

[¶20] In order to prevail on a post-conviction claim of ineffective assistance, the petitioner bears a heavy burden of establishing that 1) counsel's representation fell below an objective standard of reasonableness and 2) the petitioner was prejudiced by counsel's deficient performance. Rummer v. State, 2006 ND 216, ¶10, 722 N.W.2d 528. With respect to the first prong, a petitioner must overcome the strong presumption that counsel's representation fell within the wide range of professional assistance. Laib v. State, 2005 ND 187, ¶9, 705 N.W.2d 845. An attorney's performance is measured considering the prevailing professional norms. Sambursky v. State, 2006 ND 223, ¶13, 723 N.W.2d 524. When analyzing the first prong on a post-conviction claim, courts must be sure to limit the distorting effects of hindsight. Id. Further, for the second prong, the petitioner must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. Id.

[¶21] In the case at hand, Matthews alleged at the district court level that there was a lack of probable cause in the search warrant generally and that specifically there was a discrepancy in the address of the location to be searched in the affidavit of probable cause to support the search warrant which would have required a motion to have been filed to articulate the lack of probable cause as a result of this error. Matthews alleged that the failure to file a pretrial motion based on these two issues was constituted ineffective assistance by trial counsel. In order for Matthews' to have been successful at the district court level he would have had to establish that a failure to file a pretrial motion to suppress based on a lack of probable cause was 1) objectively unreasonable and fell below the prevailing professional norm and 2) that Matthews was prejudiced by the failure to file the motion because it would have been successful and he would have been found not guilty if the excludable evidence was not offered at trial. The district court found that there was sufficient probable cause even without the complained of evidence seized. (Appellant's App. at 69.) Further, the district court found that Matthews had not established either prong required to find that that trial counsel was ineffective. (Appellant's App. at 71.) On appeal, Matthews must establish that the district court erred when making these findings.

[¶22] Failure to file a pre-trial motion to suppress, by itself, does not equate to 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. The North Dakota Supreme Court addressed the legal standard a petitioner must establish when claiming ineffective assistance based on trial counsel's failure to file a Fourth Amendment suppression motion. Roth, 2007 ND 112. As set forth above, Matthews must first establish that the

failure to file the suppression motion fell below an objective standard of reasonableness. However, secondly, Matthews can only meet the second prong on a post-conviction relief if he can establish that there was actual prejudice, not merely possible prejudice. Id. at ¶10. Specifically, Matthews must prove that the Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice. Roth v. State, 2007 ND 112, ¶10; citing Kimmelman v. Morrison, 477 U.S. 365, 373-75, 106 S.Ct. 2574 (1986). Counsel is not ineffective for failing to make an argument that is meritless either at trial or on appeal. Id.

[¶23] Probable cause to search exists if it is establish that certain identifiable objects are probably connected with criminal activity and area probably found at the present time at an identifiable place. State v. Damron, 1998 ND 71, ¶6, 575 N.W.2d 912. All the information presented to establish probable cause should be taken together, not analyzed in a piecemeal fashion. Id. Further, courts should defer to a magistrate's determination of probable cause. Id. That decision will not be disturbed if there is a substantial basis for the conclusion. Id. A typographical error in the affidavit supporting the search warrant with respect to the place to be searched does not invalidate the search warrant itself. Search warrants where one part of the description of the premises to be searched is inaccurate but the description has other parts which identify the pace to be searched with particularity have routinely been upheld. United States v. Gitcho, 601 F.2d 369, ¶2 (8th Cir. 1979). Further, another factor which supports the legality of a search warrant with an inaccurate description of the location to be searched is where the premises to be searched has been previously surveilled or was being surveilled while the

search warrant was obtained. Id., citing United States v. Prout, 526 F.2d, 380, 387-3889 (5th Cir. 1976). Officers are often applying for and serving search warrants expeditiously, given the nature of the work, and it has been acknowledged that typographical errors can happen without causing the search warrant itself to become invalidated. United States v. Jones, 208 F.3d 603, ¶ 8 (7th Cir. 2003). The United States Supreme Court has stated that it is enough if the description is such that the officer with a search warrant can, with reasonable effort, ascertain and identify the place intended. Steele v. United States, 267 U.S. 498, 503 (1925). The North Dakota Supreme Court has addressed clerical errors in a search warrant in State v. Bollingberg, 2004 ND 30, 674 N.W. 2d, 281. In Bollingberg, a law enforcement officer submitted an affidavit in support of a search warrant which detailed the areas in which he believed there was probable cause to search, including the premises, outbuildings, vehicles and curtilage of the residence in question. Id. at ¶5. In the search warrant, there was a clerical error in that the officer failed to include the word premises in the probable cause and command portion of the search warrant. Id. at ¶6. The North Dakota Supreme Court upheld the district court's conclusion that the search warrant was not invalid based on the testimony that there had been a clerical error and the remaining portion of the search warrant supported the inference that the premises was to be searched. Id. at ¶¶17-20.

[¶24] In the instant case, Detective Mike Jennings submitted an affidavit in support of a search warrant. Detective Jennings detailed probable cause to search Matthews' apartment and vehicle. Matthews matched the initial physical stature and description provided by the victims including his race, height, weight, face shape, and age. Both victims described tattoos which matched Matthews' tattoos: a tattoo on the top

of the right hand and a tattoo on the abdomen in some type of script or writing. An individual matching the description provided by the victims was observed at the Cenex on Gateway Drive, which was two blocks from the victims' apartment, during the early morning hours following the crime, one time at 1:00 a.m. and one time at 2:30 a.m. The individual was initially wearing a black jacket, which was consistent with the description provided by the victims of the attacker wearing a black North Face jacket. The individual was observed in a different outfit on the second trip to the Cenex and was driving a maroon or red colored Ford Explorer. The affidavit further detailed that the both victims' cell phones were stolen the night of the attack. On October 1, 2013 at 7:30 a.m. a GPS signal was located from one of the victims' phones at 3514 11th Avenue North in Grand Forks, North Dakota. On the same day at 2:40 p.m., Grand Forks Police Department located an individual matching the description of the suspect at the same Gateway Cenex operating a maroon or red colored Ford Explorer. The individual had matching tattoos, both in substance and location, provided a false name to law enforcement, and lived at 3514 11th Avenue North Apartment #20. The person was ultimately identified as Matthews. The affidavit detailed that law enforcement went to 3514 11th Avenue North #20 to secure the apartment while waiting for the affiant to apply for a search warrant. Further, law enforcement secured the Ford Explorer in the parking lot and observed in plain view clothing that matched the clothing worn by the suspect during the attack. Not only did law enforcement secure the apartment and vehicle, but, they waited at both locations for the search warrant before searching the apartment and vehicle.

[¶25] Paragraphs IX and X of the affidavit contain a typographical error when

setting forth the location of Matthew's apartment. Paragraphs IX and X state 3544 11th Avenue North #20 instead of 3514 11th Avenue North #20. However, in the beginning of paragraph X the accurate address is listed as 3514 11th Avenue North #20. Further, paragraph XI sets forth the probable cause statement as well as the area in which law enforcement is requesting to search. Paragraph XI correctly sets forth 3514 11th Avenue North #20 as the location to be searched on two occasions. The search warrant which was submitted to and signed by Magistrate David Vigeland accurately sets forth 3514 11th Avenue North #20 as the place to be searched. There are no clerical errors with respect to the premises to be searched in the search warrant whatsoever. The testimony provided at the Post-Conviction Relief hearing reveals that the discrepancies in the affidavit to support the search warrant in paragraphs IX and X were simply typographical errors. Furthermore, at the time law enforcement was applying for the search warrant there was an armed rapist on the loose in Grand Forks and that safety of our community and expediency in applying for the search warrant was important. At no time was law enforcement unclear about the location to be searched. At the time Detective Jennings was applying for the search warrant there was one team of law enforcement securing 3514 11th Avenue North #20 and one team securing the 1997 Ford Explorer parked in the parking lot of 3514 11th Avenue North #20. The search warrant clearly directed law enforcement of the location to be searched.

[¶26] In order for Matthews to be successful in this case with respect to this issue, he must establish that the district court was clearly erroneous when it found that it did not fall below an objectively reasonable standard of representation to fail to file a suppression motion on the search warrant for an alleged lack of probable cause under these factual

circumstances and that Matthews was not prejudiced by the failure because the motion would have been meritless. Matthews could not establish actual prejudice and the motion would not have been successful. The evidence gathered by law enforcement at the time of the application for the search warrant was at minimum, probable cause. Further, as set forth in Bollingberg, Gitcho, Jones, and Steele any typographical error in the search warrant affidavit has no impact on the remaining probable cause or the search warrant itself, which clearly set forth the premises to be searched. Third and importantly, the evidence obtained from the residence of Matthews was a BB gun used during the commission of the crime and the purple polo shirt worn by Matthews during the crime. Even had those two items been suppressed, in Matthews' vehicle were multiple other pieces of evidence which linked Matthews to the crime to include the victims' cell phones, the North Face jacket worn by Matthews when he raped the victims, and the t-shirt worn by Matthews over his face as a disguise while he raped the victims. The search warrant contained probable cause. The location to be search was clear, despite any typographical errors in the supporting affidavit. Further, even had a motion had been filed and had been successful, Matthews cannot establish the result of the proceeding would have been any different given the volume of evidence seized from his vehicle linking him to the crime and the deference, by law, which is given to a magistrate's determination of probable cause. At the district court level, Matthews made broad sweeping assertions that the result would have likely been different. Matthews did not prove there was a reasonable probability the outcome would have been different absent the evidence. Sergeant Jennings merely testified it is **possible** that charges would not have been referred for prosecution. This is hardly proof or a reasonable probability of

a different result. Matthews' argument entirely ignored other incriminating facts, including, but not limited to, Matthews' repeated lies to law enforcement, both victims being able to describe Matthews' tattoos, the testimony that Matthews was near the victim's apartment at the time of the crimes, the testimony of Matthews' neighbors, the Find My iPhone App results, and the identification of Matthews, by the victims, by way of his eyes and voice. On appeal, Matthews makes the same conclusory and vague assertions. Matthews must establish on appeal that the district court erred when finding he failed to meet his burden at the district court level. Simply saying that the court erred because the result would have been different, but not articulating how or why, is not sufficient. In fact, the district court cited Johnson v. Buskohl Construction Inc., reiterating that courts are not ferrets and will not consider arguments that are not adequately articulated, supported, and brief. 2015 ND 268, ¶19, 871 N.W.2d 459. At the district court level, Matthews failed to articulate how trial counsel's decision not to file a pre-trial motion to suppress fell below the prevailing professional norm, how he would have been successful had he filed the motion, what items trial counsel should have sought to suppress, and how, despite all the other incriminating evidence, the result would have probably (not possibly) been different. Matthews' vague and conclusory assertions continue on appeal. The district court's decision to deny Matthews Petition and Amended Petition for Post-Conviction Relief was not clearly erroneous. Therefore, Matthews' Petition and Amended Petition for Post-Conviction Relief must be denied.

CONCLUSION

[¶27] For the above-stated reasons, Matthews appeal should be denied.

DATED this 6 day of April, 2016.



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

Antonio Matthews,)	Supreme Court No. 20160037
)	
Petitioner/Appellant,)	
)	District Court No. 18-2016-CV-01212
vs.)	
)	
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 LOLITA G. HARTL ROMANICK, PRESIDING**

AFFIDAVIT OF SERVICE

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 6th day of April, 2016, she served via e-mail true copies of the following documents:

BRIEF OF APPELLEE

and that said email was served on the address of:

Samuel A. Gereszek and said e-mail address is: sam@egflawyer.com

At the office of the Grand Forks County States Attorney's Office.

[Signature]
States Attorney's Office

Subscribed and sworn to before me this 6th day of April, 2016.

[Signature]
Notary Public

CV

JENNIFER FLECK
Notary Public
State of North Dakota
My Commission Expires April 13, 2019