

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Darius Patterson, )  
 ) Supreme Court No. 20160117  
 Petitioner/Appellant, )  
 )  
 vs. )  
 ) Cass Co. No. 09-2015-CV-01071  
 State of North Dakota, )  
 )  
 Respondent/Appellee.)

APPEAL FROM THE MEMORANDUM OPINION AND ORDER DENYING  
PETITIONER'S REQUEST FOR POST-CONVICTION RELIEF ENTERED BY THE  
DISTRICT COURT FOR THE EAST CENTRAL JUDICIAL DISTRICT THE  
HONORABLE STEVEN E. MCCULLOUGH PRESIDING ON FEBRUARY 1, 2016,  
AND THE JUDGMENT ENTERED MARCH 2, 2016.

BRIEF OF THE APPELLANT

Jessica J. Ahrendt  
Grand Forks Public Defender Office  
405 Bruce Avenue, Suite 101  
Grand Forks, ND 58201  
(701) 795-3910  
ND ID #06231  
Attorney for Petitioner/Appellant.

\_\_\_\_\_

**Table of Contents**

Table of Contents . . . . . i

Table of Authorities . . . . . ii

Statement of Issues Presented for Review . . . . . iii

Statement of the Case . . . . . ¶¶1-10

    Nature of the Case and Procedural History . . . . . ¶¶1-4

    Statement of Facts . . . . . ¶¶5-10

    Jurisdictional Statement. . . . . ¶11

    LAW AND ARGUMENT . . . . . ¶¶12-30

    The district court erred in finding Mr. Patterson did not receive ineffective assistance of counsel

    I. Mr. Patterson Satisfied The Performance Prong Of The Strickland Framework By Showing That His Appellate Attorney’s Representation Fell Below an Objective Standard of Reasonableness. . . . . ¶16-20

    II. Mr. Patterson Satisfied The Second Prong Of The Strickland Framework When He Established That But For the Advice Received From His Appellate Attorney, The Outcome Of The Appeal Would Have Been Different. . . . . ¶¶21-30

CONCLUSION . . . . . ¶¶31-32

**Table of Authorities**

Federal Constitution

U.S. Const. amend. XVI. . . . . . ¶15

Federal Cases

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) ¶¶15, 17

North Dakota Constitution

N.D. Const. art. I, § 12. . . . . ¶15

N.D. Const. art. VI. . . . . ¶11

North Dakota Cases

Cue v. State, [2003 ND 97](#), [663 N.W.2d 637](#). . . . . ¶14

DeCoteau v. State, 200 ND 44, 608 N.W.2d 240 . . . . . ¶14

Ellis v. State, 2003 ND 72, 660 N.W.2d 603. . . . . ¶14

Johnson v. State, 2006 ND 122, 714 N.W.2d 832. . . . . ¶¶18, 23

Lang v. State, 522 N.W.2d 179 (N.D. 1994) . . . . . ¶22

Peltier v. State, 2003 ND 27, 657 N.W.2d 238 . . . . . ¶14

State v. Burke, 2000 ND 24, 606 N.W.2d 108 . . . . . ¶22

State v. Murphy, 2014 ND 202, 855 N.W.2d 647. . . . . ¶¶27, 28

Stopplesworth v. State, 501 N.W.2d 325 (N.D.1993) . . . . . ¶15

NORTH DAKOTA STATUTES

N.D.C.C. § 19—03.1-23.2. . . . . . ¶¶ 27, 28

N.D.C.C. § 29-32.1-03. . . . . . ¶11

N.D.C.C. § 29-32.1-14. . . . . . ¶¶11, 14

NORTH DAKOTA RULES

N.D.R.Civ.P 52(a) . . . . . ¶14

N.D.R.App.P. 4(d) . . . . . ¶11

## **Statement of Issue Presented for Review**

- I. Whether the Court Erred in Finding Patterson Did Not Receive Ineffective Assistance of Counsel.

## **Nature of the Case and Procedural History**

¶1 This appeal is taken from the Memorandum Opinion and Order Denying Petitioner's Request for Post-Conviction Relief entered February 1, 2016, and the Judgment entered March 2, 2016, by Judge Steven E. McCullough, Judge of the District Court for the East Central Judicial District, wherein Appellant Darrius Patterson's Application for Post Conviction Relief, was denied. [Docket 37, 39; App. 23-35].

¶2 On May 4, 2015, Patterson filed an Application for Post Conviction Relief. [Docket 1; App. 9-13]. The State filed a response opposing Patterson's petition for Post-Conviction Relief. [Docket 4; App.14-15].

¶3 An evidentiary hearing was held on November 5, 2015. See Transcript. On February 1, 2016, the District Court entered an Order denying Patterson's Application for Post-Conviction Relief on Ineffective Assistance of Counsel Claim, concluding that Patterson failed to prove the outcome of the appeal would have been decided differently. [Docket 37; App. 31]. On March 2, 2016, a Judgment was entered. [Docket 39; App. 35].

¶4 A Notice of Appeal was filed on March 31, 2016. [Docket 40; App. 36].

## Statement of Facts

¶5 On October 17, 2013, a jury found Patterson guilty of Delivery Within 1,000 feet of a School. [App. 2]. On January 6, 2014, Patterson was sentenced to 28 years with the North Dakota Department of Corrections. [App. 5-6]. On February 7, 2014, a Notice of Appeal was filed pro se by Patterson. [App. 7]. That same day, trial counsel filed a Rule 35 Motion for Reduction of Sentence in District Court. [App. 8-9]. On February 13, 2014, the District Court denied Patterson's request for a reduction of sentence. [Docket 40; App. 10].

¶6 On March 28, 2014, Attorney Ben Pulkrabek was assigned to represent Patterson on his appeal. [App. 11]. Pulkrabek did not request a transcript of the sentencing hearing. [Tr. 94-95]. On May 5, 2014, Pulkrabek filed Appellant's Brief on behalf of Patterson. [App. 11].

¶7 Prior to filing the brief Pulkrabek did not have any verbal or written contact with Patterson. [Tr. 87-88]. The day after Pulkrabek filed Appellant's Brief, May 6, 2014, Pulkrabek received a letter from Patterson and a document entitled "Sentencing Appeal". [Docket 33-34; App. 13-18; Tr. 84]. Patterson's letter to Pulkrabek stated that Pulkrabek had made no contact with Patterson, asked when the brief was due, and asked for his trial transcripts. [Docket 34; App. 13]. That same day, Pulkrabek sent Patterson a response letter stating that he had already submitted the brief and that Patterson could write a brief on his own but if he wanted the transcripts prior to this Court ruling on the case it would cost him \$ .25 a page or a total of \$40.25. [Docket 35; App. 19]. The State submitted its Appellee Brief on June 12, 2014. [App. 12].

¶8 Pulkrabek's first contact with Patterson either by phone or in person occurred on June 23, 2014, in a face to face meeting. [Tr. 24]. During that meeting, Pulkrabek advised Patterson that because Patterson filed a Rule 35 Motion for Reduction of Sentence he was barred from appealing any part of his original sentence. [Tr. 91-92].

¶9 On October 28, 2014, this Court affirmed the District Court. [App. 12]. Patterson subsequently filed for ineffective assistance of counsel in the Cass County District Court. [See Docket; App. 21-22]. An evidentiary hearing was held on November 5, 2015. At the conclusion of the hearing, the District Court asked the attorneys to file a letter memorandum regarding the issue of whether a Rule 35 motion precludes the appellant from raising all sentencing issues on appeal. [Tr. 110].

¶10 On February 1, 2016 the District Court issued a Memorandum Opinion and Order Denying Petitioner's Request for Post-Conviction Relief. [Docket 37; App. 37-38]. The District Court held that, "Here, Patterson's RULE 35 REQUEST TO REDUCE SENTENCE is a Rule 35(b) motion and not appealable. Therefore, Mr. Pulkrabek's belief that this motion precluded raising the issue of sentencing on appeal is erroneous." [App. 45]. However, the District Court held that although Pulkrabek's representation fell below an objective standard of reasonableness, the outcome of Patterson's case would not have been different. [App. 45].

### **Jurisdictional Statement**

¶11 The District Court had jurisdiction under N.D. Const. art. VI, § 8, and N.D.C.C. § 29-32.1-03. Patterson's appeal is timely under N.D.R.App.P. 4(d). The notice of appeal was filed within sixty days after the district court's order denying his application for post-conviction relief was entered. This Court has jurisdiction under N.D. Const. art. VI, §§ 2 and 6, and N.D.C.C. § 29-32.1-14.



## Law and Argument

¶12 On appeal, Patterson argues the District Court erred in denying his application for post-conviction relief. Patterson's appellate attorney provided ineffective assistance of counsel in that his representation fell below an objective standard of reasonableness and that the outcome of the appeal would have been different.

¶ 13 Standard of Review:

¶14 A post-conviction applicant carries the burden to establish a basis for relief. Ellis v. State, 2003 ND 72, ¶ 5, 660 N.W.2d 603. A District Court's denial of an application for post conviction relief is subject to review pursuant to N.D.C.C. §29-32.1-14. Questions of law are fully reviewable on appeal of a post-conviction proceeding. Peltier v. State, [2003 ND 27](#), ¶ 6, [657 N.W.2d 238](#). Findings of fact will not be disturbed unless they are clearly erroneous under N.D.R.Civ.P. 52(a). Cue v. State, [2003 ND 97](#), ¶ 10, [663 N.W.2d 637](#). A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by the evidence, or if, although there is some evidence to support it, a reviewing court is left with a definite and firm conviction that a mistake has been made. DeCoteau v. State, [2000 ND 44](#), ¶ 10, [608 N.W.2d 240](#).

¶15 The Sixth Amendment to the United States Constitution guarantees criminal defendants effective assistance of counsel, applied to the states through the Fourteenth Amendment, and N.D.Const. Art. I, §12. Id. at ¶6. In accordance with the two prong test established by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a defendant must satisfy both a performance prong and a prejudiced prong. Stopplesworth v. State, 501 N.W.2d 325, 327 (N.D.1993).

¶16 Patterson satisfied the performance prong of the Strickland framework by showing that his appellate attorney's representation fell below the objective standard of

reasonable. Pulkrabek did not have any contact with Patterson until after the brief had been submitted, did not meet with Patterson until June 2014, and when he did meet with him he gave incorrect legal advice when he told Patterson sentencing issues could not be raised at the appellate level because a Rule 35 motion had been filed in District Court.

¶17 A defendant claiming ineffective assistance of counsel has a heavy burden of proving that the representation received fell below the objective standard of reasonableness, and that the defendant was prejudiced by the deficient performance. Id. Within in this first performance prong, there is a strong presumption that the conduct of counsel fell within a wide range of reasonable professional assistance.

¶18 It is required that the petitioner overcome a strong presumption that the attorney's performance fell within the "wide range" of reasonable professional assistance prompting the attorney's performance to fall below an objective standard of reasonableness. Johnson v. State, 2006 ND 122 ¶ 20, 714 N.W.2d 832, 841.

¶19 Patterson's attorney's performance fell below the objective standard of reasonableness. The District Court found that, "Pulkrabek admitted he told Patterson he could not address the sentencing issue on appeal due to the RULE 35 REQUEST TO REDUCE SENTENCE..." [App. 44]. Then the District Court held that, "... Mr. Pulkrabek's belief that this motion precluded raising the issue of sentencing on appeal is erroneous." [App. 45].

¶20 The incorrect legal advice, coupled along with the fact that Pulkrabek did not have any contact with Patterson until after the brief had been submitted clearly shows Pulkrabek's representation fell below the line of reasonable.

¶21 Patterson satisfied the second prong of the Strickland framework when he established that but for Pulkrabek's erroneous legal advice, the outcome of the appeal would have been different.

¶22 To establish the second prong of the Strickland test, the defendant must establish a reasonable probability that, but for the unprofessional errors of counsel, the result of the proceeding would have been different, and the defendant must demonstrate with specificity how and where trial counsel was incompetent and the probable different result. State v. Burke, 2000 ND 24, ¶36, 606 N.W.2d 108. In determining whether counsel's performance was deficient, the court must consider all circumstances and decide whether there were errors so serious that the defendant was not accorded the counsel guaranteed by the Sixth Amendment. Lang v. State, 522 N.W.2d 179, 181 (N.D. 1994).

¶23 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." Strickland, at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. Johnson v. State, 2006 ND 122 ¶ 20, 714 N.W.2d 832, 841.

¶24 On March 28, 2014, Attorney Pulkrabek was appointed to represent Patterson. Pulkrabek was not trial counsel and was not involved in the case at the District Court level. After being appointed to represent Patterson, Pulkrabek did not talk with Patterson, he did not discuss the case with trial counsel to see if counsel had thoughts on appealable issues, and he did he obtain any additional transcripts of the District Court

proceedings such as sentencing. Without any additional information it was impossible to determine all of the potential appealable issues in this case.

¶25 This is precisely what happened. On May 5, 2014, Pulkrabek submitted Appellant's Brief on behalf of Patterson completely unaware that Patterson wanted to raise sentencing issues on appeal, and specifically wanted to raise the issue of whether a deferred imposition of sentence was available at sentencing for Patterson. This case was decided October 28, 2014.

¶26 On November 5, 2014, this Court addressed the issue of whether a deferred imposition of sentence was available to a Defendant if they have convictions in other jurisdictions but is being sentenced as a first time offender in the state of North Dakota. State v. Murphy, 2014 ND 202, 855 N.W.2d 647. This is the precise issue Patterson wanted to raise on appeal.

¶27 In Murphy, the District Court specifically found that, "the provision of 19-03.1-23.2 does not allow me to suspend or defer imposition of any portion of the sentence." State v. Murphy, 2014 ND 202 ¶17, 855 N.W.2d 647. In this case, on the post-conviction level, the Court specifically found that, "The trial court exercised its discretion and simply decided Patterson was not entitled to a suspended or deferred sentence under chapter 19-03.1." [App. 47].

¶28 This finding is impossible for the District Court to have made. Patterson was sentenced two months prior to Murphy and both Patterson and Murphy were sentence by the same Judge. The District Court stated that it exercised discretion in deciding whether Patterson was eligible for a deferred sentence on January 6, 2014. However, on March 6,

2014, that same Judge stated that he did not believe that 19-03.1-23.2 allowed him the discretion to suspend or defer Murphy's sentence.

¶29 Had the issue of whether Patterson been raised on appeal clearly the outcome of the appeal would have been different. Patterson would have been the case of first impression instead of Murphy and Patterson's case would have been remanded to the District Court for resentencing.

¶30 Patterson has satisfied the second prong of the Strickland test showing that he was prejudiced by the Ineffective Assistance of Counsel he received and the outcome would have been different.

### **CONCLUSION**

¶31 Based upon the submission, pleadings, testimony, argument and authority contained herein, the Appellant, Mr. Patterson respectfully requests that this Court find that he received Ineffective Assistance of Counsel when his Appellate attorney failed to have any contact with Patterson until after the brief had been submitted, failed to obtain a copy of the sentencing transcript, failed to address any sentencing issues on appeal, and misadvised Patterson in stating that sentencing issues could not be raised at the appellate level because a Rule 35 motion had been filed in District Court. It is further requested that this Court find that he was prejudiced by Attorney Pulkrabek's actions and that the outcome of the appeal would have been different had Attorney Pulkrabek raised issues regarding sentencing.

¶32 It is respectfully requested that this Court reverse and remand this case with instructions for the District Court to grant his post-conviction application.

Dated this 17<sup>th</sup> day of June, 2016.

Jessica J. Ahrendt  
Grand Forks Public Defender Office  
405 Bruce Avenue, Suite 101  
Grand Forks, ND 58201  
(701) 795-3910  
gfpublicdefender@nd.gov  
Attorney ID No. 06231  
Attorney for Appellant.

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Darrius Patterson,  
Petitioner/Appellant,

vs.

State of North Dakota,  
Respondent/Appellant.

AFFIDAVIT OF SERVICE

Supreme Court No. 20160117  
Cass Co. No. 09-2015-CV-01071

The undersigned, being of legal age, being first duly sworn deposes and says that on the 17<sup>th</sup> day of June, 2016, she served true copies of the following documents:

Appellant's Brief  
Appellant's Appendix

And that said copies were served upon:

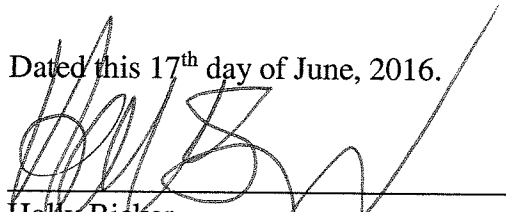
Tristan J. Van de Streek  
Cass County Assistant State's Attorney  
Email: [sa-defense-notices@casscountynd.gov](mailto:sa-defense-notices@casscountynd.gov)

and:


Darrius Patterson  
c/o NDSP  
PO Box 5521  
Bismarck ND 58506-5521

by mail.

Dated this 17<sup>th</sup> day of June, 2016.

  
\_\_\_\_\_  
Holly Bicker

Subscribe and sworn to before me this 17<sup>th</sup> day of June,  
2016.

  
\_\_\_\_\_  
Notary Public  
State of North Dakota  
County of Grand Forks

