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FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JULY 27, 2016
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Darrius Patterson,	)	
	)	
Petitioner/Appellant,	)	Supreme Court No. 20160117
vs.	)	
	)	District Court No. 09-2015-CR-01071
State of North Dakota,	)	
	)	
Respondent/Appellee.	)	

Appeal from the Memorandum Opinion entered February 1, 2016, and from the Judgment, entered March 2, 2016.
Cass County District Court
East Central Judicial District
The Honorable Steven E. McCullough, Presiding

APPELLEE'S BRIEF

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A. [¶5] Whether Patterson satisfied the Unreasonableness Prong of Strickland.

B. [¶6] Whether Patterson satisfied the Prejudice Prong of Strickland.

[¶7] **STATEMENT OF THE CASE**

[¶8] Appellant's rendition of the Statement of the Case is satisfactory.

[¶9] **STATEMENT OF FACTS**

[¶10]Appellant's rendition of the Statement of the Facts is satisfactory.

[¶11] **STANDARD OF REVIEW**

[¶12]"The issue of ineffective assistance of counsel is a mixed question of law and fact which is fully reviewable on appeal." Roth v. State, 2011 ND 112, ¶ 11, 735 N.W.2d 882. The district 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). Moore v. State, 2007 ND 96, ¶ 8, 734 N.W.2d 336. 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, this Court is left with a definite and firm conviction a mistake has been made. State v. Sambursky, 2008 ND 133, ¶ 7, 751 N.W.2d 247. Odom v. State, 2010 ND 65, ¶10, 780 N.W.2d 666.

[¶13] **LAW AND ARGUMENT**

I. [¶14] The Court did not err in finding Patterson did not receive ineffective assistance of counsel.

[¶15] "The burden of establishing grounds for post-conviction relief rests upon the petitioner." Flanagan v. State, 2006 ND 76, ¶10, 712 N.W.2d 602 (citations omitted). "Following Strickland v. Washington, 466 US 668 (1984), this Court applies a two-part test to evaluate ineffective assistance of counsel claims. The test requires the defendant to show that counsel's representation was objectively unreasonable that the defendant was prejudiced by counsel's deficient performance. The unreasonableness prong requires that the defendant overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." The prejudice prong requires proof that, "but for his counsel's errors, the result of the proceeding would have been different." The Strickland test has been described by this Court as a "heavy, demanding burden." Sayler v. State, 2005 ND 166, ¶9, 704 N.W.2d 559. (citations omitted). Id. The Court must consciously attempt to limit the distorting effect of hindsight. Flanagan, at ¶10. A "reasonable probability" of a different result is a probability sufficient to undermine confidence in the outcome. Id., at ¶10. "If it is easier to dispose of an ineffective assistance of counsel claim on the ground of lack of sufficient prejudice, that course should be followed." Greywind v. State, 2004 ND 213, ¶15, 689 N.W.2d 390.

A. [¶16] Patterson did satisfy the Unreasonableness Prong of

Strickland.

[¶17] The District Court found that Patterson's Appellate Attorney Ben Pulkrabek's opinion that filing a request under N.D.R.Crim.P. 35 precluded appealing the issues therein was erroneous. This decision was based upon Mr. Pulkrabek's testimony that this is his belief as to the state of the law and that he told Patterson this. (Transcript (Tr.) at 77:14-20; 90:15-21). The District Court, before rendering its opinion, had each attorney provide a letter brief on the issue of whether a Rule 35 filing precluded using the issues in the Rule 35 in an appeal. (Appellant's App. at 30, 33, and 36.) Based upon the testimony and the law, the District Court's decision that Mr. Pulkrabek's erroneous opinion fell below an objective standard of reasonableness is not clearly erroneous.

B. [¶18] Patterson did not satisfy the Prejudice Prong of Strickland.

[¶19] Patterson relies on the holding in State v. Murphy, 2014 ND 201, 855 N.W.2d 647 as a basis for stating that there is a reasonable probability that he would have prevailed on appeal. However, Murphy does not support Patterson's contention. Murphy does confirm that under N.D.C.C. § 19-03.1-23.2 a trial court does have the discretion to sentence as a first time offender a person with no prior predicate offenses in North Dakota. Murphy, at ¶31 and ¶32. This Court did not stop with that analysis, however. At issue was also the interplay between N.D.C.C. § 19-03.1-23.2 and 19-03.1-23(5). The difference being the latter included the language "a law of another state or the federal government which is equivalent to an offense under this chapter" and the former did not. Id., at ¶31

(citing 19-03.1-23(5)). In discussing this issue this Court stated:

> That is not to say, however, a court would not consider an "equivalent" offense as contemplated under N.D.C.C. § 19-03.1-23(5) because the court must still find "extenuating or mitigating circumstances" to justify any suspension of a sentence. A district court's analysis could still include consideration of a defendant's "equivalent" convictions in any other state or federal jurisdiction."

Id., at ¶32.

[¶20] Patterson claims that the different conclusion by the judge regarding applying N.D.C.C. §19-03.1-23(5) in his case and Murphy's case is an impossibility because the sentencings were only two months apart and Patterson's sentencing was first. Patterson finds it inconceivable that the same judge could decide in one case (Patterson's) that there was no basis for using discretion and yet discretion did not exist in the other case (Murphy's). While this may be a little odd, it does not rise to the level of a reasonable probability of a different result.

[¶21] The District Court stated in its Memorandum Opinion and Order Denying Petitioner's Request for Post-Conviction Relief in comparing the two cases:

> Here, Patterson asserts his sentence was illegal because the trial court failed to grant him a suspended or deferred sentence. However, while the trial court had the discretion to grant Patterson a suspended or deferred sentence, it was not bound under North Dakota law to grant him such a sentence. The trial court exercised its discretion and simply decided Patterson was not entitled to a suspended or deferred sentence under Chapter 19-03.1. … Patterson argues that the Murphy case is analogous to his, and based upon the reasoning in Murphy, Patterson should have been given a deferred or suspended sentence. However, in Murphy, the district court had refused to determine whether it had discretion to find a first violation and grant a deferred or suspended sentence under Chapter 19-03.1 when a criminal defendant had previously been convicted of crimes in another state.

> Murphy, 2014 ND 201, ¶22, 855 N.W.2d 647. Conversely, the trial court in Patterson's case did not claim it lacked discretion to decide whether Patterson was entitled to a deferred or suspended sentence, but rather, that in its discretion, Patterson was not entitled to a deferred or suspended based upon the circumstances of his case.

(Appellant's App. at 47.) It is irrelevant that two months later the same judge decided that he had no discretion.

[¶22] CONCLUSION

[¶23] Therefore, the State respectfully requests this Court affirm Judge McCullough's decision.

Dated this 27th day of July, 2016.

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[¶24] CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was sent by e-mail on the 29th day of July, 2016, to: Jessica Ahrendt @ gfpublicdefender@nd.gov

Gary E. Euren