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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20160256
Burleigh County No.: 08-2015-CV-00840 **STATE OF NORTH DAKOTA**

Danny Joseph Myers,)
)
Petitioner and Appellant,)
)
vs.)
)
State of North Dakota,)
)
Respondent and Appellee.)

APPEAL FROM JUDGMENT DISMISSING PETITIONER'S APPLICATION FOR
POST-CONVICTION RELIEF ENTERED ON JUNE 29, 2016

SOUTH CENTRAL JUDICIAL DISTRICT

HONORABLE DAVID E. REICH, PRESIDING

BRIEF OF RESPONDANT
STATE OF NORTH DAKOTA

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ISSUE PRESENTED FOR REVIEW

[¶ 1] Whether the district court erred in not finding Danny Myers' application to be a misuse of process?

[¶ 2] Whether the district court was proper in dismissing Danny Myers' application for post-conviction relief under N.D.C.C. §§ 29-32.1-09(1) and 29-32.1-09(3)?

[¶ 3] Whether Myers' sentence imposed during the revocation proceeding was in violation of the laws or Constitutions of the United States or North Dakota?

STATEMENT OF THE CASE

[¶ 4] This case comes to this Court as a consolidation of multiple criminal cases dating back to 2012. Appellant's Appendix at pages 3-17 (hereinafter "App. 3-17"). Danny Myers (hereinafter "Myers") appeals the district court's order dismissing his Post-Conviction Relief Application on June 29, 2016. App. 40-42.

[¶ 5] Myers was charged, pled guilty, and revoked on four separate criminal cases; 08-2011-CR-02739, 08-2012-CR-00335, 08-2012-CR-00638, and 08-2012-CR-00796. App. 3-17. Myers originally appealed all four sentences, but he later moved to dismiss the appeal, which was granted on August 21, 2013. App. 21. On August 29, 2013, Myers submitted an application for post-conviction relief. App. 18, 75. On July 28, 2014, a post-conviction relief hearing was held. App. 20. Myers' application for post-conviction relief was denied. App. 20. This Court summarily affirmed the denial of Myers' post-conviction relief application. Myers v. State, 2015 ND 54, 861 N.W.2d 172.

[¶ 6] Myers filed another application for post-conviction relief on April 20, 2015. App. 1. The State responded to the post-conviction relief application and filed a motion for summary disposition on May 19, 2015. App. 1. The motion for summary disposition was granted on June 17, 2015. App. 1. Myers appealed the granting of the motion for summary disposition and this Court reversed the case. App. 2. Myers filed a response to the State's motion for summary disposition on March 31, 2016. App. 2. The district court dismissed Myers' post-conviction relief application on June 29, 2016. App. 2. Myers filed the notice to appeal for this case on July 14, 2016. App. 2.

STATEMENT OF THE FACTS

[¶ 7] On December 12, 2011, Myers was charged with Aggravated Assault – Domestic Violence, a class C felony, in case number 08-2011-CR-02739. App. 3. On February 13,

2012, Myers was charged with Theft of Property, a class C felony, in case number 08-2012-CR-00335. App. 7. On March 22, 2012, Myers was charged with Hindering Law Enforcement, a class A misdemeanor; Failure to Transfer Title, a class B misdemeanor; and Driving While License Privilege is Suspended, a class B misdemeanor, in case number 08-2012-CR-00638. App. 11. On April 5, 2012, Myers was charged with Possession of Drug Paraphernalia, a class C felony, and Carrying a Concealed Firearm or Weapon, a class A misdemeanor, in case number 08-2012-CR-00796. App. 15.

[¶ 8] On April 24, 2012, Myers pled guilty to the Aggravated Assault – Domestic Violence charge. The Court signed the criminal judgment on April 27, 2012, and sentenced Myers to five years at the Department of Corrections and Rehabilitation with all five years suspended; Myers was also placed on supervised probation for five years. App. 44. The Court stated on the record that if Mr. Myers violated his probation that he was going to get the whole five years. App. at 74.

[¶ 9] On June 8, 2012, Myers pled guilty to the Theft of Property, Possession of Drug Paraphernalia, and Carrying a Concealed Firearm or Weapon charges. On June 12, 2012, Myers pled guilty to the Hindering Law Enforcement and Driving While License Privilege is Suspended charges. App. 10. The Failure to Transfer Title charge was dismissed. App. 10.

[¶ 10] On August 21, 2012, Myers was sentenced on case numbers 08-2012-CR-00335, 08-2012-CR-00638, and 08-2012-CR-00796. App. 7, 12, 16. For the Theft of Property charge, Myers was sentenced to five years with all five years suspended for a period of three years of supervised probation. App. 49. For the Possession of Drug Paraphernalia charge, Myers was sentenced to five years with all five years suspended for a period of

three years of supervised probation. App. 52. For the Carrying a Concealed Dangerous Weapon charge, Myers was sentenced to one year with the entire sentence suspended for a period of two years of supervised probation. App. 52-53. For the Hindering Law Enforcement charge, Myers was sentenced to one year with the entire sentence suspended for a period of two years of supervised probation. App. 51. For the Driving While License Privilege is Suspended Charge, Myers was sentenced to thirty days with the entire sentence suspended for a period of two years of unsupervised probation. App. 11.

[¶ 11] The criminal judgment from case number 08-2012-CR-00796 stated the sentences would run concurrently with each other and shall also run concurrently with the sentences in 08-2012-CR-00335, 08-2012-CR-00638, and 08-2012-CR-01400. App. 53. The criminal judgment from case number 08-2012-CR-00796, did not mention whether case number 08-2011-CR-02739 would be concurrent or consecutive. App. 53.

[¶ 12] On April 18, 2013, the State filed a petition for revocation of probation in case number 08-2011-CR-02739. App. 5. On April 22, 2013, the State filed a petition for revocation of probation in the remaining cases relevant to this proceeding. App. 8, 12, 16. A consolidated revocation hearing was held on April 29, 2013, for all of Myers' cases. App. 5, 8, 12, 16. At the revocation hearing, Myers admitted that he had violated the conditions of his probation in that he used or possessed methamphetamine. App. 60. The Court also found that Myers violated his terms of probation by failing to inform or provide change of residence, employment, or pertinent information; and failed to report to his probation officer for the months of August 2012, November 2012, January 2013, and February 2013. App. 58, 60.

[¶ 13] In case number 08-2011-CR-02739, Myers had his probation revoked and was sentenced to five years in prison with the sentence running concurrently with cases 08-2012-CR-00638 and 08-2012-CR-00335. App. 62. In case number 08-2012-CR-00335, Myers had his probation revoked and was sentenced to five years in prison with the sentence running concurrently with cases 08-2012-CR-00638 and 08-2011-CR-02739. App. 66. In case number 08-2012-CR-00796, Myers had his probation revoked and was sentenced to five years in prison on Count 1 and one year in prison on Count 2 with the sentence running concurrently to each other and consecutively to cases 08-2012-CR-00335, 08-2012-CR-00638, and 08-2011-CR-02739. App. 69-70. In case number 08-2012-CR-00638, Myers had his probation revoked and was sentenced to one year in prison on Count 1 and thirty days in prison for Count 3 to run concurrently with 08-2012-CR-00796. App. 68.

[¶ 14] On August 29, 2013 Myers' filed his initial Post-Conviction Relief Application arguing, in part, that his conviction was obtained by a plea of guilty that was unlawfully induced or not made voluntarily of the nature of the charges. App. 18, 75-79. On December 19, 2013, Myers reiterated this argument by filing a supplemental brief arguing that he was not aware that he could be sentenced to consecutive sentences if he violated his probation. App. 18, 80-84. The district judge addressed this concern in its order on post-conviction relief application dated July 28, 2014. Specifically, the district court stated that it neglected to mention it on the record, but it did find that Myers was adequately informed that he could be sentenced to consecutive sentences. App. 85. This Court summarily affirmed the denial of his application stating that Myers argued for the first time on appeal that upon revocation of his probation, the district court erred by

imposing an unauthorized extension of his sentence. Myers v. State, 2015 ND 54, 861 N.W.2d 172.

[¶ 15] Myers filed the present Post-Conviction Relief Application on April 20, 2015. App. 1. The state filed its response to Myers' application, a motion for summary disposition, and a brief in support of its motion on May 19, 2015. App. 1. Myers filed a response to the motion for summary disposition on March 31, 2016. App. 2. The district court summarily dismissed this application on June 29, 2016. App. 40-42. The district court found that the Post-Conviction Relief Application was not a misuse of process. App. 42. However, the district court did dismiss the application under N.D.C.C. §§ 29-32.1-09(1) and 29-32.1-09(3). App. 42.

ARGUMENT

I. Standard of Review

[¶ 16] Post-conviction proceedings are civil in nature and are governed by the North Dakota Rules of Civil Procedure. Broadwell v. State, 2014 ND 6, ¶ 5, 841 N.W.2d 750. A trial court findings will not be disturbed unless they are clearly erroneous under N.D.R.Civ.P 52(a). Id. "A finding 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 it, a reviewing court is left with a definite and firm conviction a mistake has been made." Id. Questions of law are fully reviewable on appeal for post-conviction relief. Id. This Court "will not set aside a district court's decision merely because the court applied an incorrect reason, if the result is the same under the correct law and reasoning." Johnson v. State, 2004 ND 130, ¶ 13, 681 N.W.2d 769.

II. The district court Erred by Not Finding Myers' Post-Conviction Relief Application to be a Misuse of Process.

[¶ 17] Misuse of process, an affirmative defense, under N.D.C.C. § 29-32.1-12 occurs “if a defendant inexcusably fails to raise an issue in an initial post-conviction application.” Clark v. State, 1999 ND 78, ¶ 23, 593 N.W.2d 239. A person seeking post-conviction relief must raise all of his or her claims in a single post-conviction proceeding because post-conviction proceedings are not intended to allow defendant multiple attempts to raise the same or similar issues. Jensen v. State, 2004 ND 200, ¶ 9, 688 N.W.2d 374. “Defendants who inexcusably fail to raise all of their claims in a single post-conviction proceeding misuse the post-conviction process by initiating a subsequent application raising issues that could have been raised in the earlier proceeding.” Id.

[¶ 18] The State agrees with Myers that the district court did not address the issue presented in his second post-conviction application, namely: that Myers' sentences were in violation of the laws or Constitutions of the United States or North Dakota. However, the State believes that if the district court analyzed this issue it would have dismissed this application for misuse of process. The dismissal of this application should have happened under misuse of process, N.D.C.C. § 29-32.1-09(1), and N.D.C.C. § 29-32.01-09(3). Thus, the State believes this Court should uphold the dismissal of Myers second post-conviction application.

[¶ 19] Myers claims that he did raise this issue in his initial post-conviction application; however, this is not the case. Myers, in his initial application, argued that (1) his conviction was obtained by a plea of guilty that was unlawfully induced or not made voluntarily of the nature of the charges and (2) denial of effective assistance of counsel. In his facts for ground one Myers stated that he thought the sentences were to run

concurrent and he agreed to plead guilty to five years, not ten years. Then in his supplemental brief, Myers' reiterated that the district court did not explain the possibility of consecutive sentences and he thought he could only be sentenced to a total of five years if he violated his probation. Both the initial post-conviction application and supplemental brief support the fact that Myers was arguing that his plea was not made voluntarily and/or was unlawfully induced. In its order on the initial post-conviction, dated July 29, 2014, the district court correctly addressed this issue finding that "Mr. Myers was adequately informed that he could be sentence[d] to consecutive sentences."

[¶ 20] This Court was correct in holding that that Myers' argued for the first time on appeal, that upon his revocation, the district court erred by imposing an unauthorized extension of his sentence. Myers v. State, 2015 ND 54, ¶ 1. Myers did not address this issue in his initial post-conviction application or his supplemental brief; Myers only argued that his plea was not made voluntary and/or was unlawfully induced. If Myers addressed this issue at the district court level in his initial post-conviction application, this Court could have addressed the issue in Myers v. State, 2015 ND 54. However, instead of addressing this issue in his initial post-conviction application, Myers waited to bring up this argument until the current post-conviction application.

[¶ 21] Myers' actions of not addressing this issue during his initial post-conviction proceeding and then filing a new post-conviction application asserting this issue is exactly what the affirmative defense of misuse of process was enacted to protect against. The district court in its order dismissing Myers' second post-conviction application, did address the wrong issue. The district court stated "Myers correctly asserts that he did raise his current issue regarding his understanding of the maximum sentence he could

receive in his prior application for post-conviction relief.” As a result, the district court found that Myers’ second post-conviction application was not a misuse of process. However, the State cannot find anywhere Myers asserts the initial claim of lack of understanding in his second application, or anywhere Myers asserts that the period he was sentenced to is in violation of the laws or Constitutions of the United States or North Dakota in his initial application. Myers second post-conviction application only asserts two issues (1) the conviction was obtained or the sentence was imposed in violation of the laws or the Constitutions of the United States and/or North Dakota and (2) that in the case of a suspended execution of sentence, the court can only revoke the probation and cause the defendant to suffer the penalty of the sentence previously imposed upon the defendant. In Myers’ second application the supporting facts for both grounds are relating to Myers’ sentence upon revocation being illegal or unauthorized.

[¶ 22] The issue presented in this application is a completely different issue than what was argued in Myers’ first post-conviction application. In his brief to this Court, Myers states that the district court failed to address the issue presented by the Appellant. The State agrees with this statement. However, the district court in his second application addressed the same issue as the district court did in his first application. Therefore, if the district court missed the issue presented in this case; the issue in this application cannot be the same issue presented in Myers’ original application.

[¶ 23] Myers’ did not assert the issues presented in this post-conviction application in his initial post-conviction application. Therefore, this post-conviction application falls squarely into the misuse of process definition of inexcusably failing to raise an issue in an initial post-conviction application. Myers asserts that his excuse for not properly raising

this issue is lack of understanding. This argument must fail; however, because Myers himself wrote the initial post-conviction application and the supplemental brief to his application. He clearly had enough understanding to write and articulate the points he wanted in both his initial post-conviction application and his supplemental brief to his application. Myers states it was his intention all along to address this issue, but if that is the case he should have brought it up in either his initial post-conviction application or his supplemental brief to that application and not have waited until that case ended to file another post-conviction application. Myers' excuse of lack of understanding cannot be an excusable failing because then anyone filing a successive post-conviction application can use this excuse endlessly and just state that he or she did not understand what they were writing or arguing.

[¶ 24] Even if this Court concludes that Myers did raise this issue in his initial post-conviction application, filing this second post-conviction application is still a misuse of process. "Bringing successive motions on the same issue is a misuse of the post-conviction process." State v. Johnson, 1997 ND 235, ¶ 12, 571 N.W.2d 372. In Johnson, the defendant first argued that his sentence was illegal because his probationary period exceeded the maximum period allowed, and then he argued that consecutive probationary periods were prohibited. Id. at ¶ 11. This Court concluded that the second argument was simply a variation of his earlier appeal and bringing the motion was a misuse of the post-conviction application process. Id. at ¶ 13-14. Thus, even if Myers did raise the issue in his initial post-conviction application, this application is a misuse of process because it is a successive motion on the same issue or a simple variation of the argument made in his initial post-conviction application.

[¶ 25] For the reasons stated above, the State believes the district court erred by not dismissing Myers' application for misuse of process. However, this Court should not set aside the district court's decision because the result is the same under the correct law and reasoning. See Johnson v. State, 2004 ND 130, ¶ 13.

III. The District Court was Proper in Dismissing Myers' Post-Conviction Relief Application under N.D.C.C §§ 29-32.1-09(1) and 29-32.1-09(3).

[¶ 26] No matter what this Court concludes on the misuse of process issue, the district court was still correct in dismissing the application under N.D.C.C. §§ 29-32.1-09(1) and 29-32.1-09(3). North Dakota Century Code section 29-32.1-09(1) allows a court to "summarily deny a second or successive application for similar relief on behalf on the same applicant[.]" North Dakota Century Code section 29-32.1-09(3) allows a court to grant "summary disposition if the application, pleadings, any previous proceeding, discovery, or other matters of record show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."

[¶ 27] Even with missing the issue in this post-conviction application, the district court was correct in finding that this second application was requesting similar relief. The issue addressed in this post-conviction application was not addressed in Myers' initial application; however, the issue is still requesting similar relief. The initial application stated that Myers was unlawfully induced or did not understand the consequences of pleading guilty. In this application, Myers states that his sentence is in violation of the laws of Constitutions of the United States or North Dakota. Both of Myers' post-convictions applications are requesting similar relief; both applications assert that Myers should not serve the full sentence imposed by the district court because of violation of the laws or Constitutions of the United States or North Dakota. The first post-conviction

application argued that Myers' plea was unlawfully induced or not voluntary, and this application argued that Myers' sentence is not authorized by the law. Whether the district court analyzed the issue in Myers' first application or second application, the result is the same: that Myers' is requesting similar relief in a second or successive application. Therefore, no matter the reasoning, the district court would have reached the same result in finding that Myers' second application should be dismissed under N.D.C.C. 29-32.1-09(1).

[¶ 28] The same reasoning holds true when looking at the district court dismissing this application under N.D.C.C. § 29-32.1-09(3). The district court dismissed this application, under this section, because of the district court's previous order. However, whether the district court analyzed the correct issue, this application was going to be dismissed. If the court addressed the correct issue, it would have noticed that this Court stated in Myers v. State, 2015 ND 54, ¶ 1, 861 N.W.2d 172, that Myers did not address the current issue in his initial post-conviction application. Therefore, the previous proceedings show there is no genuine issue to address because this issue should have been addressed in Myers' initial application. Additionally, for the reasons stated in the proceeding section, the sentence imposed by the district court was valid and therefore there was no genuine issue of material fact and the State was entitled to judgment as a matter of law.

[¶ 29] Even if the district court addressed the correct issues in Myers' second application it would have dismissed this application under these sections. Therefore, the district court's order dismissing Myers' application should be affirmed under N.D.C.C. §§29-32.1-09(1) and 29-32.1-09(3).

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IV. The Sentence Imposed by the District Court was Not In Violation of the Laws or the Constitutions of the United States or North Dakota.

[¶ 30] Myers' sentence was imposed in accordance with the laws and Constitutions of the United States and North Dakota. "This Court has long held that the current provisions of N.D.C.C. § 12.1-32-07(6) allow a trial court to impose a harsher sentence upon revocation of probation." Peltier v. State, 2003 ND 27, ¶ 13, 657 N.W.2d 238 (citing State v. Vavrosky, 442 N.W.2d 433, 437 (N.D. 1989) and State v. Miller, 418 N.W.2d 614, 616 (N.D. 1988)). "This Court has also consistently held that resentencing a defendant after revocation of probation to a sentence greater than that originally imposed does not violate the double jeopardy or due process clauses." Id. (citing Davis v. State, 2001 ND 85, ¶ 11, 625 N.W.2d 855 and State v. Jones, 418 N.W.2d 782, 786 (N.D. 1988)). This Court has "reasoned that N.D.C.C. § 21.1-32-07(6) gives a defendant notice that violation of the conditions of probation could result in imposition of a harsher sentence and therefore a defendant has no legitimate expectation in the finality of the originally imposed sentence." Id. (citing State v. Lindgren, 483 N.W.2d 777, 779 (N.D. 1992) and State v. Gefroh, 458 N.W.2d 479, 483 (N.D. 1990)).

[¶ 31] The case at issue is very similar to the facts in Peltier. 2003 ND 27. In Peltier, the defendant pled guilty to four charges and was sentenced to various periods of incarceration and five years of probation all to run concurrent with each other. Id. at ¶ 2. After completing his incarceration sentence, the defendant was placed on supervised probation and eventually had his probation revoked. Id. at ¶ 3. The defendant was resentenced to serve some of the sentences consecutively and some of the sentences concurrently. Id. This Court concluded that "the trial court was no longer bound by the terms on the plea agreement, and was free to impose consecutive sentences resulting in a

harsher sentence.” *Id.* at ¶ 19. (citing *State v. Ulmer*, 1999 ND 245, ¶ 4, 603 N.W.2d 865). Thus, this Court held that the consecutive sentences imposed by the district court were valid because they were within the parameters of the sentences that were available at the time of the initial sentencing under N.D.C.C. § 12.1-32-07(6). *Id.* at ¶ 20.

[¶ 32] Myers arguments against the imposition of his sentence are contrary to the long line of cases handed down by this Court addressing this issue. Therefore, the district court’s sentence was not imposed in violation of the laws or the Constitutions of the United States or North Dakota.

CONCLUSION

[¶ 33] The State realizes that Myers addressed additional issues in his brief. However, the State believes the issues addressed in its brief are the appropriate issues that are necessary to address in order to resolve this case.

[¶ 34] Although, the district court did not address the issues presented in Myers’ second post-conviction application, the result would have been the same if it did address the correct issues. The result either way is that Myers’ post-conviction application would have been dismissed. Therefore, the State respectfully requests that this Court uphold the district court’s Order Dismissing Post-Conviction Relief Application.

RESPECTFULLY SUBMITTED:

Dated this 13th day of October, 2016.



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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,)
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Plaintiff-Appellant,)
)
-vs-)
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Danny Joseph Myers,) Supreme Ct. No. 20160256
)
Defendant-Appellee,) District Ct. No. 08-2015-CV-00840
)

STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

I, Elvedina Papalichev, being first duly sworn, depose and say that I am a Legal Resident over 21 years old, and on the 13th day of October, 2016, I deposited in a sealed envelope a true copy of the attached:

1. Brief of Plaintiff-Appellee
2. Affidavit of Mailing

in the United States mail at Bismarck, North Dakota, postage prepaid, addressed to:

Samuel A. Gereszek
Attorney at Law
Hammarback & Scheving, P.L.C.
308 Demers Avenue
East Grand Forks, MN 56721

which address is the last known address of the addressee.

Elvedina Papalichev
Elvedina Papalichev

Subscribed and sworn to before me this 13 day of October, 2016.

[Signature]
Notary Public
Burleigh County, North Dakota

