

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

DYLAN SAARI,)	
)	
)	
Petitioner / Appellant,)	Supreme Court No.
)	20160263
vs.)	District Court No.
)	36-2015-CV-00073
STATE OF NORTH DAKOTA,)	
)	
Respondent / Appellee.)	
)	

APPELLANT’S BRIEF

Appeal from the Order Denying Appellant’s Application for Post-Conviction Relief, Dated June 21, 2016, by the Honorable Lee A. Christofferson of the Northeast Judicial District.

Samuel A. Gereszek (ND Bar ID # 07040)
HAMMARBACK & SCHEVING, P.L.C.
308 DeMers Avenue
East Grand Forks, MN 56721
Telephone: (218) 773-6841
Facsimile: (218) 773-2845
Email: sam@egflawyer.com
ATTORNEY FOR THE APPELLANT

[¶ 1] **TABLE OF CONTENTS**

TABLE OF CONTENTS ¶ 1

TABLE OF AUTHORITIES ¶ 2

STATEMENT OF THE ISSUE ¶ 3

STATEMENT OF THE CASE ¶ 6

STATEMENT OF THE FACTS ¶ 10

ARGUMENT ¶ 17

CONCLUSION ¶ 24

[¶ 2] TABLE OF AUTHORITIES

Cases

Broadwell v. State, 2014 ND 6, 841 N.W.2d 750 ¶ 16

State v. Ballard, 328 N.W.2d 251 (N.D. 1982)..... ¶¶ 18, 23

Statutes

N.D.C.C. § 12.1-03-01 ¶ 14

N.D.C.C. § 12.1-06-02..... ¶¶ 18, 25

N.D.C.C. § 27-05-06..... ¶ 9

N.D.C.C. § 29-32.1-14..... ¶ 9

Rules

N.D.R.App.P. 4 ¶ 9

Constitutional Provisions

N.D. Const. art. VI, § 2..... ¶ 9

N.D. Const. art. VI, § 8..... ¶ 9

[¶ 3] STATEMENT OF THE ISSUES

[¶ 4] Whether the district court abused its discretion in determining that Dylan Jay Saari (hereinafter “Appellant”) acted with the requisite intent to satisfy the elements of accomplice to forgery.

[¶ 5] Whether the district court abused its discretion in determining the Appellant’s trial counsel was effective.

[¶ 6] STATEMENT OF THE CASE

[¶ 7] The Appellant filed an application for post-conviction relief on April 7, 2015. (Appellant’s Appendix “A.A.” at 3.) On May 15, 2015, the State responded with a one page answer. (A.A. at 25.) Nearly a year later, on February 19, 2016, the district court notified the parties its intent to issue an opinion based on the pleadings due to inactivity by the parties. (A.A. at 26.) The Appellant’s counsel then filed a request for a hearing on February 22, 2016. (A.A. at 27.)

[¶ 8] On June 6, 2016, a hearing was held where testimony was taken from the Appellant himself and the Appellant’s trial counsel. (A.A. at 2.) On June 21, 2016, the district court issued an order denying the Appellant’s application for post-conviction relief. (A.A. at 28.)

[¶ 9] The Appellant filed a timely notice of appeal on July 14, 2016, pursuant to North Dakota Rule of Appellate Procedure 4. (A.A. at 45.) The district court had jurisdiction under N.D.C.C. § 27-05-06 and N.D. Const. art. VI, § 8. The North Dakota Supreme Court has jurisdiction under N.D.C.C. § 29-32.1-14 and N.D. Const. art. VI, § 2.

[¶ 10] STATEMENT OF THE FACTS

[¶ 11] The Statement of Facts is taken from the Appellant's own application for post-conviction relief, and the district court's order denying the application, and the Devils Lake Police Report (State's Exhibit #1), which is found within the Appellant's Appendix on pages 3-24; 28-44; and 62-72 respectively. On October 21, 2014, while in custody on a pending probation revocation matter (unrelated to the current post-conviction relief), the Appellant made a series of phone calls to his significant other, "Dru". These phone calls were recorded and reviewed by Detective Schwab.

[¶ 12] The phone calls contained the couple discussing ways in which to get the Appellant out on bond, which was then a \$3,000.00 cash bond. The district court copied, verbatim, the conversations and bolded certain sections believed to be the most incriminating. (A.A. at 31-40.) On October 21, 2014, Dru presented \$3,000.00 cash to bond the Appellant out of jail. However, Lake Region Law Enforcement Center personnel were suspicious as to the source of the money and contacted the Appellant's probation officer and Detective Schwab. During the investigation, Detective Schwab was able to ascertain the source of the \$3,000.00, as coming from the bank account of a "Johnnie Candle," the boyfriend of Dru's mother, from check #2618. Moreover, the owner of the account signed an affidavit of forgery, as he was not the author of the check, nor the signor. Additionally, the bank tellers reported that Dru was the individual who presented the check for cash.

[¶ 13] Based on the telephone conversations and the affidavit of forgery by Johnnie Candle, Detective Schwab filed a report with the State's Attorney's Office which resulted in charges of forgery against Dru and conspiracy to commit forgery against the

Appellant. On October 23, 2014, the Appellant was found in violation of his probation conditions and resentenced to 3 years with the North Dakota Department of Corrections (in an unrelated matter).

[¶ 14] Then on November 6, 2014, thirteen days after being charged, and only eight days after being appointed counsel, the Appellant plead guilty to the charge of Accomplices in violation of N.D.C.C. § 12.1-03-01 based on the conduct of Dru and her forgery of Johnnie Candle's check to bond the Appellant out of jail.

[¶ 15] The Appellant has subsequently filed this post-conviction relief application after a proper review of all the pertinent discovery. The Appellant's primary issue stems around this Court's concept that Accomplice and Facilitation are two starkly different crimes. Therefore, given what was known to the district court, the Appellant, and his attorney on November 6, 2014, the Appellant inappropriately plead guilty to an over-charged offense for which there was not the requisite intent. Additionally, the Appellant asserts that because his trial attorney improperly advised the Appellant prior to receiving the discovery, and without properly reviewing the case and statutory construction, the Appellant was denied his Constitutional right to effective assistance of counsel.

[¶ 16] 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.... 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)

[¶ 17] ARGUMENT

[¶ 18] The Appellant lacked the requisite intent to be properly convicted or found guilty of Accomplices. The Appellant’s conduct more appropriately fits the statutory construction of “facilitation” in violation of N.D.C.C. § 12.1-06-02. This Court has noted:

While the facilitation and accomplice statutes both use words having the same meaning, such as “assistance” and “aids,” the main difference lies in the context in which they are used. The accomplice statute makes it a crime for any person “with intent that an offense be committed, . . . commands, induces, procures, or aids the other to commit it” whereas the facilitation statute makes it a crime if a person knowingly provides substantial assistance to a person intending to commit a felony, and that person in fact commits the crime contemplated. A major distinction exists between the two statutes. Under the accomplice statute, the giving of aid with intent that the offense be committed is the key element, whereas under the facilitation statute knowingly providing assistance without intent to commit an offense to a person who intends to commit a felony and actually commits the crime contemplated, is the key element and difference.

State v. Ballard, 328 N.W.2d 251, 252-53 (N.D. 1982) (emphasis added).

[¶ 19] In the instant case, the Appellant’s only interaction with the perpetrator of the crime is via telephone from within a correctional facility. Although it is clear from the conversations, the Appellant is requesting that Dru come up with his bond money, and doing so in a very demanding way, the transcripts of the conversations never show the Appellant commanding, inducing, procuring, or aiding Dru to commit a crime. Dru discusses with the Appellant getting money back from a debit card at Walmart, where he suggests buying something of higher value and returning the item for cash. The owner of

the card is only discussed as “the dude.” (A.A. at 34.) The Appellant’s involvement as a criminal accomplice is clearly not met through the utilization of some “dude’s” card.

[¶ 20] The State attempts to show the Appellant’s accomplice status through his alleged coercion of Dru to forge a check from Johnnie Candle’s checkbook. However, the disconnect here is that while incarcerated, how is the Appellant commanding, inducing, procuring, or aiding, Dru in the crime. There can be little question, through the investigation, that Dru did commit the crime of forgery. However, the Appellant had zero ability to command, induce, procure, or aid Dru in the commission of the crime.

[¶ 21] The Appellant was very desperate to be bonded out, and this can be seen from the conversations with Dru, but one cannot be an accomplice of a crime from within a correctional center. To believe this is possible would run counter to the very logic of bond and some reasons for it. A factor for bond is the security of the public at large, to presume that incarcerated individuals can be “accomplices” to criminal activity while incarcerated completely negates that factor in bond consideration.

[¶ 22] However, in contrast, facilitation by an incarcerated individual falls more into the realm of possibility. What the district court fails to consider is the free will of the criminal actor. As an accomplice, individuals are working as a team to accomplish criminal ends, and if one party backs out or fails, the other party will and can step up and complete the criminal act. Whereas, a facilitator, may not have that luxury, and just as an incarcerated individual, can tell someone how to complete a crime, but the free will of the actual actor is the key element in the completion of the crime. Should the actual actor be struck with a change of conscious, the crime is over and will not be committed, and cannot

be committed. Thereby, one cannot possess the “intent” to commit an offense on the free will of another’s actions.

[¶ 23] Therefore, under this Court’s analysis in Ballard, the key elemental difference between facilitation and accomplice is the “intent that an offense be committed...” 328 N.W.2d at 253. Thus, as the Appellant could not possess the intent to commit a crime from within the correctional center where he could not possibly commit the crime; his only criminal act was that of facilitation wherein he provided assistance to Dru in the commission of forgery.

[¶ 24] **CONCLUSION**

[¶ 25] Wherefore, since Criminal Facilitation is a violation of N.D.C.C. § 12.1-06-02 and is an A Misdemeanor, the Appellant’s conviction of Accomplice, a C Felony and sentence of 5 years, is illegal and is thus not authorized by law. A sentence not authorized by law is a remedy available to those under the Uniform Post-Conviction Procedure Act and the Appellant respectfully requests this Court reverse the district court’s order and remand for findings consistent with such a holding.

Dated this Wednesday, November 2, 2016.

/s/ Samuel A. Gereszek
Samuel A. Gereszek (ND Bar ID # 07040)
HAMMARBACK & SCHEVING, P.L.C.
308 DeMers Avenue
East Grand Forks, MN 56721
Telephone: (218) 773-6841
Email: sam@egflawyer.com
ATTORNEY FOR THE APPELLANT

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

Dylan Saari,)	
)	
Appellant,)	Supreme Court No.: 20160263
)	
vs.)	District Court No.: 36-2015-CV-00073
)	
)	
State of North Dakota,)	
)	
Appellee.)	

CERTIFICATE OF SERVICE

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 (.pdf and word formats); and,*
2. *Appellant's Appendix*

On the following:

**Clerk of the Supreme Court
North Dakota Supreme
Court**

**Lonnie W. Olson
Attorney for Respondent –
Appellee**

Mr. Dylan Saari
2521 Circle Drive
Jamestown, ND 58401

supclerkofcourt@ndcourts.gov lwolson@nd.gov

Served via U.S. Mail

All done by Electronic Filing pursuant to N.D. Sup. Ct. Admin. Order 14.

Dated this Wednesday, November 2, 2016.

HAMMARBACK & SCHEVING, P.L.C.

/s/ Samuel A. Gereszek

Samuel A. Gereszek (ND Bar ID # 07040)
Hammarback & Scheving, P.L.C.
308 DeMers Avenue
East Grand Forks, MN 56721
Telephone: (218) 773-6841
sam@egflawyer.com
Attorney for Petitioner/Appellant