

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20160276

Adam Scott Hamilton,

Petitioner and Appellant.

- VS -

State of North Dakota,

Defendant and Appellee

APPEAL FROM THE CIVIL JUDGMENT
NORTHEAST JUDICIAL DISTRICT
GRAND FORKS COUNTY CIVIL. NO. 18-2015-CV-01190
THE HONORABLE LOLITA G. HARTL ROMANICK PRESIDING

BRIEF

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ABBREVIATIONS

Appendix - App.
Transcript - Tr.
Line - L.
Page - P.

STATEMENT OF THE ISSUES

[¶1] ISSUES:

I. **Did the trial judge err when she denied Mr. Hamilton's request for a Transport Order and only allowed him to appear by telephone when he testified at his post conviction application hearing?**

NATURE OF THE CASE

[¶2] On July 14, 2015 Adam Scott Hamilton an inmate at the North Dakota State Penitentiary filed a Post Conviction Relief Application.

[¶3] On August 4, 2015 the State filed an Answer and a Motion for Summary Disposition of Mr. Hamilton's Post Conviction Relief Application.

[¶4] The court on August 26, 2015 denied summary disposition of issues one and three and granted summary disposition of issue two.

[¶5] On June 6, 2016 Mr. Hamilton's attorney filed a transport order so that Mr. Hamilton could be transported by Grand Forks North Dakota Sheriff's Officers from the State Penitentiary to the District Court in Grand Forks, North Dakota for the hearing on February 8, 2016 on his Post conviction Relief Application. That transport order was denied by the District Judge on January 25, 2016.

[¶6] At Mr. Hamilton's post conviction relief application hearing he was only allowed to appear and testify by telephone, for a maximum of 30 minutes and his use of the telephone was limited to his testimony only. After he testified his telephone was turned off by the District Judge. TR.P.45,L.14-17.

[¶7] A judgment denying Mr. Hamilton any post conviction relief was filed on June 17, 2016. Notice of Entry of Judgment was filed on June 28, 2016.

[¶8] Mr. Hamilton's Notice of Appeal and Order for Transcripts were filed on August 2, 2016.

[¶9] The Notice of Appeal was misfiled with the District Court on August 3, 2016.

[¶10] This case is now before the North Dakota Supreme Court.

STATEMENT OF FACTS

[¶11] Adam Scott Hamilton filed a post conviction relief application on July 14, 2015 that contained three issues as to why he should be granted post conviction relief.

These three issues were:

1. Ineffective assistance of counsel because his attorney was ineffective by not investigating allegations and for his failure to give adequate counsel to his pleading guilty.
2. That there were violations of North Dakota Rule of Criminal Procedure 11.
3. That Mr. Hamilton's conviction was obtained by the use of a coerced confession and his attorney was ineffective in not objecting to halt the confession that was obtained. That environment present at the time of the questioning violation of his constitutional rights.

[¶12] The State filed an Answer and Motion for Summary Disposition of Mr. Hamilton's Post Conviction Relief Application. The trial judge denied Summary Disposition of issues 1 and 3 and granted Summary Disposition of issue 2.

[¶13] On January 6, 2016 Mr. Hamilton's attorney filed a transport order so Mr. Hamilton could be personally present at the February 11, 2016 hearing on his post conviction relief application. On January 25, 2016 the district judge entered an order denying Mr. Hamilton's transport order.

[¶14] After the district judge entered her order denying Mr. Hamilton's transport order Mr. Hamilton's attorney made an affidavit App.P. 12 that stated he had made inquiry with the North Dakota state penitentiary relating to Mr. Hamilton appearing to testify by interactive video network television. That affidavit included Exhibit A which is North

Dakota State Penitentiary Warden Braun's policy for inmates at the penitentiary testifying by telephone at civil hearings, App. P.14. That policy order states that . . .

3. Hearings need to be scheduled for a time and not be listed on a general court calendar with a variable time.

4. Only hearings where inmates testimony is required are allowed. Inmates are only allowed to participate during their testimony and to answer questions.

5. Hearings may be no longer than 30 minutes in length and may not be spread over several time periods.

[¶15] Any chance of Mr. Hamilton being personally present at his post conviction relief hearing ended when the judge denied his transfer order. After that denial, Mr. Hamilton's only chance to participate in any part of his post conviction relief hearing was to appear according to Warden Braun's rules.

[¶16] Mr. Hamilton's attorney wanted to have him participate in as much of his post conviction relief hearing as possible. So, he requested that the trial judge issue an order allowing Mr. Hamilton to appear according to Warden Braun's rules.

[¶17] The District Judges response to Mr. Hamilton's attorneys request that Mr. Hamilton be allowed to appear according to Warden Braun's rules was to issue an order that said:

- a. The Plaintiff, Adam Scott Hamilton, may testify telephonically at the hearing in the matter on Wednesday, February 10, 2016 at 3:00 p.m. for a period not to exceed 30 minutes in length.

- b. The Plaintiff's testimony is required in as much as he seeks to establish a claim of ineffective assistance of counsel in this post conviction relief matter.

[¶18] At the hearing on Mr. Hamilton's post conviction relief application, because of the above district judge's Order, Mr. Hamilton was at the North Dakota State Penitentiary and appeared by telephone while the hearing on his post conviction relief application was being heard in Grand Forks, North Dakota. During that hearing he was only allowed to take part by telephone only while he testified and his telephone time was limited to 30minutes. The transcript shows the district judge shut off Mr. Hamilton's phone shortly after his trial attorney Blake Hankey began testifying. Tr. P.45, L.14-17.

[¶19] Mr. Hamilton's attorney was personally present in the District Court in Grand Forks, North Dakota when the hearing was held on Mr. Hamilton's post conviction relief application. During that hearing there was no facility provided for a confidential attorney-client relationship between Mr. Hamilton and his attorney and there was no provision made so that Mr. Hamilton and his attorney could discuss what was occurring during the hearing.

[¶20] Mr. Hamilton's objection to his only being allowed to appear by telephone for hearing on his post conviction application is found in the TR.P.2, L.16-24

MR. HAMILTON: I would actually - - I would like to object, Your Honor.

THE COURT: I'm sorry, Mr. Hamilton, you would object to what?

MR. HAMILTON: I, I object to this hearing because, according to North Dakota Century Code Rule 52, (sic) I am not right now allowed to have a conference call that is

confidential with my attorney, nor do I have means of receiving or commencing any kind of documents.

[¶21] The specific parts of the Administrative Rule 52 that Mr. Hamilton relied on were section 2 subsections (D) and (E) Tr.P.3.L.22-25 the district judge court ruling on Mr. Hamilton's above objection is found in the Tr.P.4.L22 to P.5. L.12.

THE COURT: Sir, there are multiple subparts to Rule 52. What is the specific section of Administrative Rule 52 that you are relying upon?

MR. HAMILTON: Section 2, Subsection (D) and (E).

THE COURT: All right. The Court has before it North Dakota Administrative Rule 52, Subpart 2(D) and (E) and that rule reads as follows:

Subpart (D) reads: Each interactive television site must provide a facility for a confidential attorney-client conference. There are two reasons that subpart does not apply today. This is not an interactive television site. Secondly this is not an attorney-client conference.

Subpart (E) provides: A method for electronic transmission of documents must be available at each interactive television site for use in conjunction with an interactive television proceeding.

Because this is not an interactive television proceeding, the Court rules that does not apply in this case, and we will proceed with this hearing. Your objection is overruled.

ISSUES

[¶22] **ISSUE I. Did the trial judge err when she denied Mr. Hamilton's request for a Transport Order and only allowed him to appear by telephone when he testified at this post conviction application hearing?**

ARGUMENT

[¶23] According to *Everett v State*, 2015 ND 149, 864 NW2d [¶5].

[¶5] Proceedings on applications for post-conviction relief are civil in nature and governed by the North Dakota Rules of Civil Procedure. *Flanagan v. State*, 2006 ND 76, ¶9, 712 N.W.2d 602. It is well established that an applicant for post-conviction relief has the burden of establishing grounds for relief. E.g., *Flanagan*, at ¶10; *Abdi v. State*, 2000 ND 64, ¶8, 608 N.W.2d 292. A district court's findings of fact in a post-conviction proceeding will not be disturbed on appeal unless they are clearly erroneous under *N.D.R.Civ.P. 52(a)*. *Laib v. State*, 2005 ND 187, ¶11, 705 N.W.2d 845. A finding of fact is clearly erroneous if induced by an erroneous view of the law, if no evidence exists to support it, or if the reviewing court is left with a definite and firm conviction a mistake has been made. *Syverston v. State*, 2005 ND 128, ¶4, 699 N.W.2d 855. Questions of law are fully reviewable on appeal in post-conviction proceedings. *Id.*

[¶24] In this case the Defendant/Appellant Adam Scott Hamilton made his objection to being only allowed to appear by telephone Tr.P.2, L.16-24 which appears above in paragraph 20. The courts ruling on Mr. Hamilton's objection is found in the Tr.P.4,L.22 to P.5,L.12 which appears above in paragraph 21. Therefore this issue should be fully reviewable on appeal.

[¶25] The North Dakota Rule of Civil Procedure that deals with witnesses testimony at trials is Rule 43(a) Evidence.

Rule 43. Evidence.

(a) **In open court.** At trial, the witnesses' testimony must be taken in open court unless a statute, the Rules of Evidence, these rules, or other court rules provide otherwise. For good cause, or on agreement of the parties, and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location. A party must give notice if a witness is unable to testify orally or if testimony by contemporaneous transmission may be necessary.

[¶26] In this case Mr. Hamilton's attorney tried to have his client Mr. Hamilton personally present for his post conviction relief hearing when he filed with the court a transportation order App.P.10. When court denied that transportation order App.P.11, Mr. Hamilton's attorney filed an affidavit with an exhibit regarding the use of interactive television. Interactive television is set out in Rule 52 Administrative Rules

[¶27] In this case the trial judge didn't use the procedure allowed by Rule 52 Administrative Rules or any other North Dakota rule regarding witnesses testifying. Instead of using any North Dakota court rule the trial judge used Warden Braun's penitentiary rules for inmates testify App.P.14.

[¶28] Post conviction relief petitions are civil according to Everett. The Sixth Amendment right to a court appointed attorney only applies to criminal cases but in North Dakota individuals filing for post conviction relief may qualify for court appointed counsel.

[¶29] In Mr. Hamilton's case he started his petition for post conviction relief and then because he was indigent requested and got appointed counsel to help him with his petition for post conviction relief. Such an appointment is made possible by NDCC 29-32.1-05.

20-32.1-05. Appointment of counsel -- Applicant's inability to pay costs and litigation expenses.

1. If an applicant requests appointment of counsel and the court is satisfied that the applicant is unable to obtain adequate representation, the court shall appoint counsel to represent the applicant.
2. Costs and expenses incident to a proceeding under the chapter, including fees for appointed counsel, must be reimbursed in the same manner as are costs and expenses incurred in the defense of criminal prosecutions.

[¶30] According to *State vs McMorrow*, 332 NW2d 232 (ND 1983):

It would be an ideal situation if every prisoner could have legal assistance in evaluating and filing his application. However, we believe the Iowa Supreme Court has reached a practical interpretation of the Revised Uniform Post-Conviction Procedure Act section on the appointment of counsel. We adopt the guidelines for trial courts stated in Mulqueen and Furgison. The appointment of counsel is discretionary, but applications should be read in a light most favorable to the applicant. If a substantial issue of law or fact may exist, counsel should be appointed. Trial judges ordinarily would be well advised to appoint counsel for most indigent post-conviction review applicants. See Furgison, supra, 217 N.W.2d at 615.

[¶31] If a post conviction petitioner is allowed to have an attorney appointed to help him with his petition, that help should include the petitioners right to be present at the post conviction relief hearing with his attorney. While that post conviction relief hearing is going on it should be at a place where petitioner can have a private conference with his attorney during the hearing if he or his attorney want such a conference. Also he should be able to discuss with his attorney what is or isn't taking place during that hearing. In Mr. Hamilton's case there was no place during his post conviction relief hearing that he could have private communication with his attorney. Also during that post conviction hearing he could not talk to his attorney about what was or wasn't happening during that hearing.

[¶32] A basic due process right is an opportunity to be heard. The following appears in Amendment 14§1 of the United States Constitution:

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

[¶33] The 14th Amendment due process applies to all states. In Mr. Hamilton's case the trial judge limited his right to be heard to only 30 minutes by telephone and these

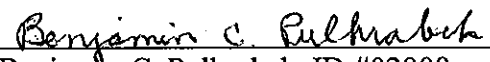
30 minutes were limited to his testimony only and it couldn't be divided so he could present rebuttal testimony after the States witnesses testified.

[¶34] During Mr. Hamilton's post conviction petitioner hearing he tried to put into evidence a 290 page exhibit. A partial exhibit is in App.P.53 and the entire exhibit can be seen on odyssey as document numbers 49 and 50 regarding certain prescription drugs that were prescribed for him and was using when he was arrested and the adverse affect of these drugs on a person who taking them was. Had Mr. Hamilton been able to discuss this exhibit with his attorney during the hearing that exhibit could have been presented in a manner that would have made it relevant to Mr. Hamilton's case and admissible evidence if an expert witness was called under Rule 803(18)(A)(B).

CONCLUSION

[¶35] For the above and foregoing reasons this case should be remanded to the district court with an Order to allow Mr. Hamilton to have a new trial on his post conviction relief application at which he will be allowed to be personally present or he will be allowed to participate at the hearing under Rule 51 of the Administrative Rules.

DATED this 11 day of October, 2016.



Benjamin C. Pulkrabek, ID #02908

CERTIFICATE OF SERVICE BY MAIL

[¶36] The undersigned hereby certifies that she is an employee in the office of Pulkrabek Law Firm and is a person of such age and discretion as to be competent to serve papers.

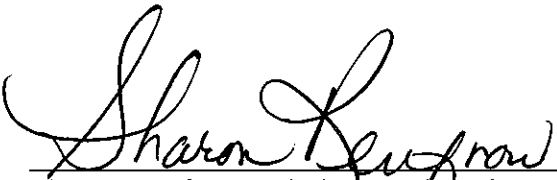
That on October 11th, 2016, she served, by e-mail and mailed a copy of the following:

APPELLANTS APPENDIX AND BRIEF

to: Lonnie Olson
Ramsey County State's Attorney
Lwolson@nd.gov

Mailed to: Adam Scott Hamilton
NDSP
P.O. Box 5521
Bismarck, ND 58506

The undersigned further certifies that on October 11th, 2016, she served electronically on the Clerk, North Dakota Supreme Court, the APPELLANTS APPENDIX AND BRIEF.



Sharon Renfrow, Admin. Legal Assistant
Pulkrabek Law Office

CERTIFICATE OF SERVICE BY MAIL

[¶36] The undersigned hereby certifies that she is an employee in the office of Pulkrabek Law Firm and is a person of such age and discretion as to be competent to serve papers.

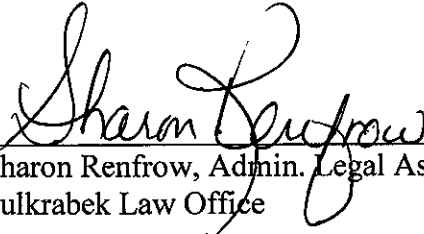
That on October 12, 2016, she served, by e-mail and mailed a copy of the following:

APPELLANTS APPENDIX AND BRIEF

to: M. Jason McCarthy
Grand Forks Co. States Attorneys Office
sasupportstaff@gfcounty.org

Mailed to: Adam Scott Hamilton
NDSP
P.O. Box 5521
Bismarck, ND 58506

The undersigned further certifies that on October 12, 2016, she served electronically on the Clerk, North Dakota Supreme Court, the APPELLANTS APPENDIX AND BRIEF.



Sharon Renfrow, Admin. Legal Assistant
Pulkrabek Law Office