

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

Duwayne C. Glende,)	
)	Supreme Court No. 20160304
Petitioner/Appellant,)	
)	Walsh Co. No. 50-2016-CV-00257
)	
State of North Dakota,)	
)	
Respondent/Appellee,)	

APPEAL FROM THE JUDGMENT OF DISMISSAL OF THE COURT ENTERED
AUGUST 23, 2016, DISMISSING APPLICATION FOR POST-CONVICTION
RELIEF, THE DISTRICT COURT FOR THE NORTHEAST JUDICIAL DISTRICT,
THE HONORABLE LEE A. CHRISTOFFERSON, PRESIDING

BRIEF OF APPELLANT

By: Mark T. Blumer
Attorney at Law
ND Bar ID#: 04669
P.O. Box 7340
Fargo, ND 58106
Telephone: (701) 893-5529
mark@marktblumerlaw.com

TABLE OF CONTENTS

Table of Contents.....p.2

Table of Authorities.....p.3

Statement of the Issues.....¶1

Statement of the Case.....¶2

Facts of the Case.....¶6

Law, Argument and Jurisdiction.....¶10

Issues:
The trial court erred in dismissing the Application for Post-Conviction Relief for
failure to file within the two-year statute of limitations.....¶1

Conclusion.....¶25

TABLE OF AUTHORITIES

CASES

Bell v. State, 2001 ND 188, 636 N.W.2d 438.....¶15

Berlin v State, 2005 ND 110, 698 N.W.2d 266..... ¶15

Clark v. State, 2008 ND 234, 758 N.W.2d 900.....¶17

DeCoteau v. State, 1998 ND 199, 586 N.W.2d 156.....¶16

Haag v. State, 2012 ND 241, 823 N.W.2d 749.....¶12

Kinsella v. State, 2013 ND 238, 840 N.W.2d 625.....¶12

Owens v. State, 1998 ND 106, 578 N.W.2d 542.....¶16

State v. Bender, 1998 ND 72, 576 N.W.2d 210.....¶18,19

State v. Foster, 1997 ND 8, 560 N.W.2d 194.....¶17

State v. Wilson, 466 N.W.2d 101 (N.D. 1991).....¶19

Waslaski v. State, 2013 ND 56, 828 N.W.2d 787.....¶12

Wong v. State, 2010 ND 219, 790 N.W.2d 757.....¶15

STATUTORY MATERIALS AND RULES OF PROCEDURE

N.D.C.C. Sect. 29-28-03.....¶10

N.D.C.C. Sect. 29-28-06.....¶10

N.D.C.C. Sect. 29-32.1.....¶11

N.D.C.C. Sect. 29-32.1-01(1).....¶10

N.D.C.C. Sect. 29-32.1-01(2).....¶10,13,14

N.D.C.C. Sect. 29-32.1-06(2).....¶25

N.D.C.C. Sect. 29-32.1-09(1).....¶10,15

N.D.C.C. Sect. 29-32.1-09(2).....¶11

N.D.C.C. Sect. 29-32.1-04.....	¶18
N.D.C.C. Sect. 29-32.1-10.....	¶20
N.D.R.Civ.P. 52(a).....	¶17

STATEMENT OF THE ISSUES

¶1] The trial court erred in dismissing the Application for Post-Conviction Relief for failure to file within the two-year statute of limitations.

STATEMENT OF THE CASE

¶2] This is an appeal from the Walsh County Order dismissing, Duwayne C. Glende's ("Glende") Application for Post-Conviction Relief ("Application") on August 23, 2015. (Appendix ("A") 2, Docket ("D"). 61, A. 12).

¶3] On May 4, 2012, in Walsh County Criminal Court No. 50-2011-CR-00206, Criminal Judgments were entered against Glende on Counts 1 and 6, both Class A felony Gross Sexual Imposition, and Count 10, Class AA felony Gross Sexual Imposition. (A. 9, 10, 11).

¶4] Glende filed an Application for Post-Conviction Relief ("Application") on August 20, 2015, (A.1, D. 1, A. 12). The Walsh County State's Attorney filed its Answer of Respondent to Petitioner's Application for Post-Conviction Relief on September 4, 2015. (A.2, D. 20, A. 43). On June 21, 2016, the Court issued an Order on Petitioner's Motion Requesting Ruling on Mental Health or Physical Disability Exception. (A. 2, D. 55, A. 57). An Amended Order on Petitioner's Motion Requesting Ruling on Mental Health or Physical Disability Exception was filed August 16, 2016 (A.2, D. 60, A. 65) and on August 23, 2016 a Judgment of Dismissal was filed (A. 2, D.61, A. 68).

¶5] A Notice of Appeal was filed on September 8, 2016. (A. 3, D. 64, A. 69).

STATEMENT OF THE FACTS

¶6] On June 2, 2011, Glende was charged with nine counts of Class A felony Gross Sexual Imposition (GSI) and three counts of Class AA felony GSI. (Walsh County Court File No. 50-2011-CR-00206). (A. 4). On May 4, 2012, pursuant to a plea agreement,

Glende entered pleas of guilty to Count 1, Count 6, (A felonies) and Count 10 (AA felony). Glende was sentenced on May 4, 2012 to serve a term of imprisonment at the North Dakota Department of Corrections and Rehabilitation of twenty (20) years with five (5) years suspended on each count, to run concurrent. On July 26, 2012, Glende filed a Motion for Reduction of Sentence pursuant to N.D.R.Crim.P. Rule 35(b). The trial court denied the Rule 35(b) Motion. Glende did not file an appeal of the underlying case or on the denial of Rule 35(b) Motion. Glende did not appeal on the underlying case and Glende has not filed previous applications for post-conviction relief. (A. 9, 10, 11).

[¶7] Glende filed an Application for Post-Conviction Relief (“Application”) on August 20, 2015, (A. 1, D. 1, A. 12), Brief in Support of Application (A.1, D. 7, A. 23), Affidavit of Duwayne C. Glende (A. 1,D. 8, A. 22) and Request for Hearing on Petitioner’s Application for Post-Conviction Relief (A.1, D. 10, A. 43). In his Application, Glende argued exceptions to the issue the two-year statute of limitations for filing an Application, alleged ineffective assistance of counsel, and violation of due process of law. Glende argues that as a result of his diagnosed chronic depression and mild strokes prior to the two-year deadline, as well as the major stroke 1 month and 18 days after the deadline, allow for an exception to the statute of limitations. The Walsh County State’s Attorney filed its Answer of Respondent to Petitioner’s Application for Post-Conviction Relief on September 4, 2015. (A.2, D. 20, A. 44). Glende ordered transcripts of the preliminary hearing two bond hearings, change of plea, and sentencing which were provided and made a part of the trial court record.

[¶8] On February 8, 2016, Glende filed a Brief in Support of Request for Court Order and Request for Court Order for Medical Records. (A. 2, D. 37, 38, A. 47, 49). The

Order for Release of Medical Information was filed March 16, 2016. (A. 2, D. 44, A. 50). On June 9, 2016, Glende filed a Motion Requesting Ruling on Mental Health or Physical Disability Exception. (A. 2, D. 48, 49, 50 A. 51). As exhibits to the Motion Requesting Ruling on Mental Health or Physical Disability, Glende also filed a psychiatric evaluation, psychiatric progress notes, single nursing note and doctor call note as exhibits to his Motion. (A. 2, D. 51, 52, 53).

[¶9] The Order on Petitioner’s Motion Requesting Ruling on Mental Health or Physical Exception was filed June 21, 2016 (A. 2, D. 55, A. 57). A letter from Glende to his attorney and Affidavit of Proof by Paul Even Smestad were filed on July 8, 2016. (A. 2, D. 57, 58, A. 59, 62). Taking into consideration the issue of clerical error and tolling of the Application due to the previous R35 filing, an Amended Order on Petitioner’s Motion Requesting Ruling on Mental Health or Physical Exception was filed August 16, 2016. (A. 2, D. 60, A. 65). An evidentiary hearing on the Petition was not held. The trial court dismissed the petition finding that the statute of limitations had run on the claim, pursuant to NDCC 29-32.1-01(2). The Judgment of Dismissal was filed August 23, 2016. (A. 2, D. 61, A. 68). Glende timely filed his Notice of Appeal on September 8, 2016. (A. 3, D. 23, A. 69).

LAW AND ARGUMENT

[¶10] Jurisdiction. Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provisions, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06, N.D.C.C., which provides as follows:

“An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03. An appeal may be taken by the

defendant from:

1. A verdict of guilty;
2. A final judgment of conviction;
3. An order refusing a motion in arrest of judgment;
4. An order denying a motion for new trial; or
5. An order made after judgment affecting any substantial right of the party.”

N.D.C.C. § 29-28-06.

[¶11] North Dakota law provides that “[a] person who has been convicted of and sentenced for a crime may institute a proceeding applying for relief” under Chapter 29-32.1 of the North Dakota Century Code (Uniform Post-Conviction Procedure Act) upon 8 enumerated grounds. N.D.C.C. 29-32.1-01(1). A post-conviction proceeding “is not a substitute for and does not affect any remedy incident to the prosecution in the trial court or direct review of the judgment of conviction or sentence in an appellate court.”

N.D.C.C. 29-32.1-01(2). North Dakota law provides that a “court may grant a motion...for 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.” N.D.C.C. 29-32.1-09(1). “If an evidentiary hearing is necessary, the court may determine which issues of material fact are in controversy and appropriately restrict the hearing.”

N.D.C.C. 29-32.1-09(2).

[¶12] “Post-conviction relief proceedings are civil in nature and governed by the North Dakota Rules of Civil Procedure.” Kinsella v. State, 2013 ND 238, ¶4, 840 N.W. 625. A District court may summarily dismiss an application for post-conviction relief if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” Waslaski v. State. 2013 ND 56, ¶7, 828 N.W.2d 787. “Questions of law are

fully reviewable on appeal of a post-conviction proceeding.” Haag v. State, 2012 ND 241, ¶4, 823 N.W.2d 749.

[¶13] N.D.C.C. § 29-32.1-01(2) provides a two year statute of limitations for post-conviction relief applications following conviction. The amendments only made exceptions for the existence of newly discovered evidence; a physical or mental disease by the petitioner which precluded timely assertion of the application for relief; or a new interpretation of law which a petitioner must establish has retroactive application to his case. In such instances, the petitioner must file an application within two years of the date the petitioner discovers or reasonably should have discovered the existence of the new evidence, the disability or disease ceases, or the effective date of the retroactive application of law.

[¶14] Glende filed his application for post-conviction relief on August 20, 2015. The District Court judge held that Glende’s application is barred by the statute of limitations contained in North Dakota Century Code 29-32.1-01(2) and the trial court, dismissed Glende’s Application.

[¶15] N.D.C.C. § 29-32.1-09(1), allows a trial court to summarily enter a judgment on its own motion denying a meritless application even before the State makes a response. Previous case law had indicated that a trial court had the power to “summarily dismiss an application for post-conviction relief if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” Bell v. State, 2001 ND 188, ¶6, 636 N.w.2d 438, 441. Under N.D.C.C. ¶29-32.1-06(2), the State may move for dismissal of a post-conviction application for failure to state a claim for which relief can be granted. “A court may, on its own initiative, ... dismiss [an application] for failure to

state a valid claim.” Wong v. State, 2010 ND 219, ¶8, 790 N.W.2d 757. However, the court should use the power sparingly and with great care to protect the parties’ rights and “only when ... it is impossible for the [applicant] to prove a claim for which relief can be granted.” *Id.* (quoting Berlin v. State, 2005 ND 110, ¶7, 698 N.W.2d 266). In reviewing the court’s decision, we construe “the application in the light most favorable to the applicant and accept[] the well-pleaded allegations as true.” Wong, at ¶9. “We will affirm a dismissal for failure to state a claim if it would be impossible for the applicant to prove a claim for which relief can be granted.” *Id.*

[¶16] This Court has indicated that an appeal from the summary dismissal of an application for post-conviction relief will be reviewed in a manner similar to the review of an appeal from a summary judgment motion. DeCoteau v. State, 1998 ND 199, ¶4. 586 N.W.2d 156. Accordingly, “[t]he party opposing the motion for summary disposition is entitled to all reasonable inferences at the preliminary stages of post-conviction proceeding, and is entitled to an evidentiary hearing if a reasonable inference raises a genuine issue of material fact. *Id.* (citing Owens v. State, 1998 ND 106, ¶13, 578 N.W.2d 542).

[¶17] The North Dakota Supreme Court “applies the ‘clearly erroneous’ standard set forth in Rule 52(a), N.D.R.Civ.P., when reviewing a trial court’s findings of fact on an appeal from a final judgment or order under the Uniform Post-Conviction Procedure Act.” State v. Foster, 1997 ND 8, ¶18, 560 N.W.2d 194. The District Court’s findings of fact will not be disturbed on appeal unless clearly erroneous. 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, a reviewing court

is left with a definite and firm conviction a mistake has been made. Clark v. State, 2008 ND 234, ¶11, 758 N.W.2d 900. The decision of the district court to summarily dismiss the post-conviction application without development of the record was clearly erroneous as it is not support by case law. Further, Comes raised a material issue of fact and should have been allowed to present the testimony at an evidentiary hearing.

[¶18] Applicants for post-conviction relief are not required to include all supporting evidentiary matter in their original post-conviction application. The State of North Dakota has adopted the Uniform Post-Conviction Procedure Act to control this matter. N.D.C.C. §29-32.1-04 provides the rules to follow regarding post-conviction applications:

“1. The application must identify the proceedings in which the applicant was convicted and sentenced, give the date of the judgment and sentence complained of, set forth a concise statement of each ground for relief, and specify the relief requested. Argument, citations, and discussion of authorities are unnecessary.

2. The application must identify all proceedings for direct review of the judgment of conviction or sentence and all previous post-conviction proceedings taken by the applicant to secure relief from the conviction or sentence, the grounds asserted therein, and the orders or judgments entered. The application must refer to the portions of the record of prior proceedings pertinent to the alleged grounds for relief. If the cited record is not in the files of the court, the applicant shall attach that record or portions thereof to the application or state why it is not attached. Affidavits or other material supporting the application may be attached, but are unnecessary.”

N.D.C.C. §29-32.1-04.

“The statute does not require the applicant to include in the original application all supporting evidentiary matter necessary.” State v. Bender, 1998 ND 72, ¶19, 576 N.W.2d 210.

[¶19] A post-conviction proceeding affords an opportunity to establish a record for review on appeal. “The express purpose of the Uniform Post-Conviction Procedure Act,

as codified in N.D.C.C. 29-32.1, is to furnish a method to develop a complete record to challenge a criminal conviction.” Bender, at ¶20 (citing State v. Wilson, 466 N.W.2d 101, 103 (N.D. 1991)). The post-conviction hearing allows the parties to fully develop a record on the issue of counsel’s performance and its impact on the defendant’s case and to challenge a criminal conviction and sentence.

[¶20] N.D.C.C. §29-32.1-10 sets forth what evidence may be heard at a post-conviction hearing. N.D.C.C. §29-32.1-10 provides:

- “1. Evidence must be presented in open court, recorded, and preserved as part of the record of the proceedings.
2. A certified record of previous proceedings may be used as evidence of facts and occurrences established therein, but use of that record does not preclude either party from offering additional evidence as to those facts and occurrences.
3. The deposition of a witness may be received in evidence, without regard to the availability of the witness, if written notice of intention to use the deposition was given in advance of the hearing and the deposition was taken subject to the right of cross-examination.”

N.D.C.C. §29-32.1-10.

[¶21] In the case at hand, the trial court dismissed Comes application for post-conviction relief. The trial court, in its Order, and Amended Order, on Petitioner’s Motion Requesting Ruling on Mental Health or Physical Disability, the trial court determined that Glende had been sentenced on May 4, 2012, the time for appeal expired June 4, 2012, and the Rule 35 motion for reduction of sentence was denied on August 2, 2012, therefore, the Application needed to be filed by August 2, 2014. The Application was filed August 20, 2015, 1 year and 18 days beyond the two-year period.

[¶22] Glende had filed a thorough brief in support of his application. Glende argues, in his brief Because his application was timely due to mental disease which include chronic


depression disorder. Glende also argues that he had several minor strokes after the date of judgment and a massive stroke on September 26, 2014. In his Application, Glende indicates that he had begun the Application process March 28, 2014, when he requested a copy of the Case Summary from the Walsh County Clerk of Court “During the last day of April, 2014, and during the months of May, June, July, and August, 2014, Glende had multiple minor strokes, which left [him] confused, disorganized, and disoriented and thus unable to finish his almost completed pro se Application and supporting documents”. (Id., ¶9). On September 23, 2014, Glende had a major stroke and was hospitalized, transferred to the medical center at the North Dakota State Penitentiary in Bismarck, and then returned to James River Correctional Center on November 24, 2014. (Id. ¶10). Glende argues that the minor strokes and chronic depression prior to the two-year deadline made it impossible for him to finish and file the Application prior to the 2 year deadline. Glende argues that an exception to the statute of limitations applies in his case. [¶23] In its Order, the trial court noted that, although the psychological evaluation dated July 31, 2012 provides a diagnosis of chronic depression disorder, Glende was prescribed medication and instructed to have contact with behavioral health. The trial court also noted that on November 6, 2013, progress reports by Madeline Free, M.D., indicated Glende’s attention, concentration, and memory were all grossly intact. Dr. Free’s Axis I diagnosis was major depressive episode, moderate, recurrent and she recommended continued medication usage and referral to chaplain services. The trial court held that “[N]othing in these medical records suggest a mental disease that precluded timely assertion of his application”. [¶24] The trial court also held that the assertion a stroke, which occurred on September

26, 2014, where Glende was transferred to Sanford Hospital, could and may have caused physical disability, the stroke event was well past the two-year period (August 2, 2012 to August 2, 2014) and cannot be used to stay the statute of limitations. (Id.). The trial court erred in determining the exceptions to the two-year statute of limitations did not apply.

CONCLUSION

¶25] For all the reasons stated above, Duwayne C. Glende respectfully prays that the Supreme Court reverse the Judgment dismissing Glende's Application for Post-Conviction Relief, and remand to the District Court for further proceedings.

Respectfully submitted this 14th of November, 2016.



Mark T. Blumer, ND Bar ID #: 04669
Attorney at Law
P.O. Box 7340
Fargo, ND 58106
Telephone: (701) 893-5529
mark@marktblumerlaw.com

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

Duwayne C. Glende,)	
)	Supreme Court No. 20160304
Petitioner/Appellant,)	
)	Walsh Co. No. 50-2016-CV-00257
)	
State of North Dakota,)	
)	CERTIFICATE OF SERVICE
Respondent/Appellee,)	

I, Mark T. Blumer, do hereby certify that on November 18, 2016, I served the following documents:

1. Appellant Brief (with correction)
3. Certificate of Service

Walsh County State's Attorney
Grafton, ND
walhsa@nd.gov

Duwayne Glende
JRCC
5521 Circle Dr.
Jamestown, ND 58401

on the Walsh County State's Attorney at the email addresses shown above and on Duwayne Glende, by first class U.S. mail, postage prepaid, to the address shown above.



Mark T. Blumer
Attorney for Defendant/Appellant
ND ID #: 04669
P.O. Box 7340
Fargo, ND 58106-7340
Telephone: (701) 893-5529
mark@marktblumerlaw.com

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

Duwayne C. Glende,)	
)	Supreme Court No. 20160304
Petitioner/Appellant,)	
)	Walsh Co. No. 50-2016-CV-00257
)	
State of North Dakota,)	
)	CERTIFICATE OF SERVICE
Respondent/Appellee,)	

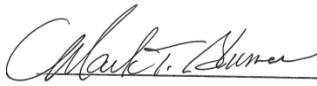
I, Mark T. Blumer, do hereby certify that on November 14, 2016, I served the following documents:

1. Appellant Brief and Appendix
3. Certificate of Service

Walsh County State's Attorney
Grafton, ND
walhsa@nd.gov

Duwayne Glende
JRCC
5521 Circle Dr.
Jamestown, ND 58401

on the Walsh County State's Attorney at the email addresses shown above and on Duwayne Glende, by first class U.S. mail, postage prepaid, to the address shown above.



Mark T. Blumer
Mark T. Blumer
Attorney for Defendant/Appellant
ND ID #: 04669
P.O. Box 7340
Fargo, ND 58106-7340
Telephone: (701) 893-5529
mark@marktblumerlaw.com