

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,)
)
 Plaintiff and Appellee.)
)
 - vs -)
)
 Wesley Alan Cody,)
)
 Defendant and Appellant)

Supreme Court Case No. 20160357
District Court Case No. 47-2016-CR-00261

APPEAL FROM THE CRIMINAL JUDGMENT
SOUTHEAST JUDICIAL DISTRICT
STUTSMAN COUNTY CRIMINAL NO. 47-2016-CR-00261
THE HONORABLE THOMAS E. MERRICK PRESIDING

BRIEF

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ABBREVIATIONS

Transcript - Tr.

Page - P.

Line - L.

STATEMENT OF THE ISSUES

[¶1] ISSUES:

I. Was attorney Scott Brand's representation of defendant appellant Wesley Alan Cody at Mr. Cody's Restitution hearing ineffective assistance of counsel?

NATURE OF THE CASE

[¶2] This case involves only the restitution hearing that was held on the 21st day of September, 2016 in the Stutsman County Courthouse in Jamestown, North Dakota. District Judge Thomas E. Merrick presided at that hearing.

[¶3] The reason the restitution hearing was held was because Defendant/Appellant Wesley Alan Cody had plead guilty to a crime that involved damage to a 2001 GMC Sierra Duramax truck owned by Bryon Bohnet, damage to property owned by the city of Jamestown, North Dakota and damage to property owned by BNSF.

[¶4] At the conclusion of that restitution hearing Judge Merrick decided what amount of money would be awarded to Mr. Bohnet, the City of Jamestown, North Dakota and the BNSF for the damage Mr. Cody had done to their property.

STATEMENT OF FACTS

[¶5] The only issue involved in this case is whether or not the defendant/appellant Wesley Alan Cody received ineffective assistance of counsel from his attorney Scott Brand during his restitution hearing. This restitution hearing was held because Mr. Cody had entered a plea of guilty to the theft of property on June 22, 2016 of a 2001 GMC Sierra Duramax truck (GMC). That GMC along with property belonging to the city of Jamestown, North Dakota and track belonging to BNSF were damaged by Mr. Cody in one vehicle accident when he was apprehended.

[¶6] The restitution damage for the GMC was calculated by the trial judge by using a figure from Exhibit 6 that appeared after gross parts \$7,591.33 and a figure that appeared after other parts \$191.30. The trial judge then totaled these two figures and got \$7,782.63

for the total cost of repair parts which he awarded to the owner of the GMC Bryon Bohnet because Mr. Bohnet said he was going to repair his GMC.

[¶7] The restitution damages for the property belonging to the city of Jamestown, North Dakota were calculated from exhibits 1, 2, 3 and 4. Exhibit 1 shows that the accident damaged done to the Jamestown water sprinkling system that is located in the Zonta Park area was \$226.80. Exhibit 2 shows that the accident did electrical damage that was repaired by Advantage Electric for \$246.35. Exhibit 3 shows the accident did damage to a chain-link fence and the new fencing repairing that damage was done by Newman Signs at a cost of \$5200. Exhibit 4 showed that there was work that the Jamestown Forestry Department would have to do in the future. The court didn't allow this bill.

[¶8] Exhibit 5 shows damage to track belonging to BNSF in the accident was \$807.86. None of that damage was allowed by the court because that damage was for work done that would have been paid whether or not it was done on that track or some other track.

[¶9]. The total amount of restitution for damages awarded by the trial judge was \$13,455.78. Mr. Cody's attorney Scott Brand during the trial never offered any evidence or testimony to dispute any of the damages established by Byron Bohnet the owner of the GMC or any of the damages established by the city of Jamestown, North Dakota. Also attorney Brand during the trial never offered any evidence or testimony showing that Mr. McCoy did not have the ability to pay the \$13,455.78.

ISSUE

[¶10] ISSUE I. Was attorney Scott Brand’s representation of defendant appellant Wesley Alan Cody at Mr. Cody’s Restitution hearing ineffective assistance of counsel?

ARGUMENT

[¶11] According to *Middleton v State*, 2014 ND 144, 849 N.W.2d 196 “the issue of ineffective assistance of counsel is a mixed question of law and fact which is fully reviewable by this court.” Therefore since the issue in this case is ineffective assistance of counsel the above quote in Middleton makes fully reviewable the standard of review in this case.

[¶12] All criminal defendants in North Dakota are guaranteed effective assistance of counsel. This guarantee is found in the Sixth Amendment to the United States Constitution and is made applicable to the states through the 14th Amendment, and Article 1 § 12 of the North Dakota Constitution.

[¶13] According to *North Dakota v. Gates* 2015 ND 177 [¶7] 865 NW2d 816 “district courts have a wide degree of discretion when determining restitution awards.” *State v. Gendron*, 2008 ND 70 ¶8,747 NW2d 125. In ordering restitution, the court shall consider:

- (1) the reasonable damages sustained by the victims;
- (2) the ability of the defendant to pay monetary reparations; and
- (3) the likelihood that attaching a condition related restitution will serve a valid rehabilitation purpose.

[¶14] In this case Scott Brand who was the attorney for defendant/appellant Wesley Alan Cody failed to put in any testimony or evidence during the restitution hearing regarding Mr. Cody's ability to pay any monetary reparations. Attorney Brands failure to put in any testimony or evidence regarding Mr. Cody's ability to pay monetary reparations is found in the Tr. P. 37, L.1-11.

THE COURT: Well, there is a reason because you've been rude through this entire hearing. You're getting a fair shake here. The numbers are what they are. I assume what you're going to do is put in some evidence about his ability to pay. Apparently, he just doesn't want to pay it. He's not arguing that he can't pay this, he just doesn't want to pay it. I understand that that's the tactic you've decided take. I find it hard to believe that he's got the ability to pay that much, but you haven't brought it up. But again, that was your burden, and you didn't bring up any evidence on it.

[¶15] State v. Putney, 2016 ND 135, 881 NW2d 663 is a case where Putney's attorney informed the trial judge that Putney's defense would be limited to his ability to pay. The end result of that defense was that Mr. Putney only had to pay one half of the total amount owed.

[¶16] Attorney Brand's failure to put in any evidence or testimony regarding Mr. Cody's ability to pay clearly establishes that Mr. Cody had no representation at all on an issue that should have been raised and would have reduced the total amount of restitution. Had Mr. Cody been called to testify at the restitution hearing his testimony about his ability to pay restitution would have been similar to the testimony given by Mr. Putney in State v. Putney because both Mr. Cody and Mr. Putney were in the North Dakota penitentiary when their restitution hearings were held and both would have had the

problem of an ex-con finding a job after his release. In Putney the defense of inability to pay lowered the restitution that Mr. Putney had to pay. Because the factual situation in Cody is similar to Putney, had the issue of and ability to pay been raised in Cody, Mr. Cody's restitution would have also been lowered.

¶17] Attorney Brand also failed to put in any testimony or evidence to question the values and costs put in by Bryon Bohnet the owner of the 2001 GMC Sierra Duramax truck (GMC) and the city of Jamestown, North Dakota's costs for repairing 300 feet of chain-link fence. Values and costs for a 2001 GMC would have been easy to find in a blue book or on Google. The 2001 GMC in this case was purchased by Mr. Bohnet 2011 for \$9600. Four years have passed since that purchase and Mr. Bohnet has put several more miles on a 2001 GMC since he purchased it. Therefore the 2001 GMC would be worth considerably less than the \$9600 that Mr. Bohnet paid for it in 2011. As to the repairing of the city of Jamestown, North Dakota 300 feet of chain-link fence the costs of that repair could have been gotten from Google or from a chain-link fence installer.

¶18] Because attorney Brand put in no evidence or testimony regarding the costs and values of the 2001 GMC or for the repair of the 300 feet of chain-link fence his only legal assistance to Mr. McCoy's defense at the restitution hearing was to make objections to the admissibility of some of the exhibits that established costs and values for restitution. None of these objections were sustained.

¶19] In order for Mr. Cody's claim for ineffective assistance of counsel to succeed there are certain things he must to establish. Those things are set out in Strickland v. Washington 466 U.S. 668 (1984) and require that Mr. Cody prove (1) his counsel Scott

Brand's representation fell below an objective standard of reasonableness, (2) that Mr. Cody was prejudiced by his attorney, Scott Brand's deficient performance.

[¶20] The way Strickland measures the effectiveness of counsel is by an objective standard of reasonableness considering prevailing professional norms. Strickland also requires that a Defendant must first overcome the strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance and Strickland presumes that trial counsel's conduct is reasonable and that the courts consciously attempt to limit the distorting effect of hindsight.

[¶21] The prejudice element in Strickland requires a Defendant to establish a reasonable probability that but for his counsel's errors the result of the proceeding would've been different. Not only does a criminal defendant have the heavy demanding burden of proving counsel's assistance was an effective, a Defendant claiming ineffective assistance of counsel must specify how and where trial counsel was incompetent and the probability of a different result. A reasonable probability is a probability sufficient to undermine confidence in the outcome. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice which we expect will often be so that course should be followed.

[¶22] According to (1) above in Strickland Mr. Cody must establish that his attorney Scott Brand's representation at Mr. Cody's restitution hearing fell below an objective standard of reasonableness. Mr. Cody believes from what has been written above he has established that the only thing that attorney Brand did during Mr. Cody's restitution hearing was to object to the admission of some of the exhibits that showed the

cost of repairing damages. None of these objections were sustained. Such representation falls below the range of reasonable professional assistance.

[¶23] When an attorney represents a defendant at a restitution hearing and that defendant is in the penitentiary and has no money to pay restitution that attorney must bring up at the restitution hearing his defendant's inability to pay. There is no way that a claim of inability to pay can increase a restitution amount and Putney is a good example of how a claim of inability to pay can reduce a restitution amount.

[¶24] In this case attorney Brand had to know or should have known that a claim of inability to pay would reduce the amount of restitution that the trial judge would order. Only attorney Brand knows why he didn't during the restitution hearing offer evidence and testimony that Mr. Cody didn't have the ability to pay restitution. Attorney Brand did know that Mr. Cody was in the penitentiary and didn't have the ability to pay restitution. Therefore his legal duty was to bring evidence and testimony before the court that Mr. Cody didn't have the ability to pay.

[¶25] In this case attorney Brand knew or should have known that there were things he could have done to reduce the amount of restitution that Mr. Cody would have to pay, but instead of doing them, attorney Brand decided to do nothing. This decision to do nothing falls below an objective standard of reasonableness.

[¶26] According to (2) above Mr. Cody has to show that he was prejudiced by attorney Brand's deficient performance. Mr. Cody can show that prejudice by showing that he had to pay the maximum damages established when there were defenses available that attorney Brand could have used, but didn't, to reduce those damages. The most apparent of those defenses was Mr. Cody's inability to pay. Another of those defenses

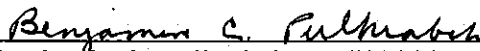
would have been to get bluebook and Google values for the 2001 GMC. Since Mr. Bohnet purchased that 2001 GMC for \$9600 in 2011 and at that time it had over 300,000 miles on it, the passage of four years and his driving it during that time should have substantially reduced the 2001 GMC's value. Another defense would have been to get a Google value for repairing 300 feet of chain-link fence or to get an installer or chain-link fences to give his estimate for the repairing of 300 feet of a chain-link fence.

[¶27] In this case we have an attorney Scott Brand who made no attempt to find any costs or values for the items damaged by Mr. Cody. Anyone who has ever had to get estimates on a particular project or on damages knows that each estimate that he or she gets comes with a different amount. These different estimates would have ended this case with a different result than the trial judge reached. Then that different result would have been changed again when the trial judge considered Mr. Cody's ability to pay.

CONCLUSION

[¶28] For the above and foregoing reasons attorney Brand's legal counseling of Mr. Cody during Mr. Cody's restitution hearing can only be considered ineffective assistance of counsel. To correct this ineffectiveness this case must be remanded to the District Court, a new trial must be ordered, and a new attorney must be appointed to represent Mr. Cody at that trial.

DATED this 26 day of January, 2017.


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CERTIFICATE OF SERVICE BY MAIL

[¶29] 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.

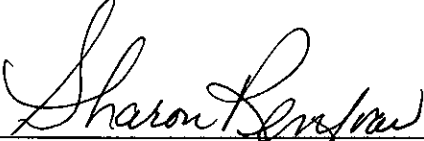
That on January 26th, 2017, she served, by e-mail and mailed a copy of the following:

APPELLANTS APPENDIX AND BRIEF

to: Frederick Russell Fremgen
Stutsman Co. States Attorneys Office
47sa@nd.gov

Mailed to: Wesley Cody
NDSP
P.O. Box 5521
Bismarck, ND 58506

The undersigned further certifies that on January 26th, 2017, 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

[29] 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 January 30th, 2017, she served, by e-mail and mailed a copy of the following:

APPELLANTS APPENDIX AND BRIEF WITH CORRECTIONS

to: Frederick Russell Fremgen
Stutsman Co. States Attorneys Office
47sa@nd.gov

Mailed to: Wesley Cody
NDSP
P.O. Box 5521
Bismarck, ND 58506

The undersigned further certifies that on January 30th, 2017, she served electronically on the Clerk, North Dakota Supreme Court, the APPELLANTS APPENDIX AND BRIEF.

 /s/Sharon Renfrow
Sharon Renfrow, Admin. Legal Assistant
Pulkrabek Law Office