

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Galen Paul Rufus,)	
)	
Petitioner/Appellant,)	Supreme Court No. 20160445
)	
vs.)	
)	
State of North Dakota,)	District Court No. 51-2015-CV-01755
)	
Respondent/Appellee.)	
)	

APPEAL FROM THE DISTRICT COURT
 POST-CONVICTION ORDER DATED DECEMBER 8, 2016
 IN AND FOR THE COUNTY OF WARD, STATE OF NORTH DAKOTA,
 NORTH CENTRAL JUDICIAL DISTRICT
 HONORABLE GARY H. LEE
 JUDGE OF THE DISTRICT COURT, PRESIDING

CORRECTED BRIEF OF APPELLEE

Kelly A. Dillon #05296
 Deputy Ward County State's Attorney
 Ward County Courthouse
 PO Box 5005
 Minot ND 58702-5005
 Telephone (701) 857-6480
51wardsa@wardnd.com
 Attorney for Respondent/Appellee

TABLE OF CONTENTS

Table of Authorities ¶1

Statement of Facts..... ¶2

Standard of Review..... ¶9

Law and Argument ¶11

 I. The Trial Court Did Not Err in Declining to Consider Rufus’s
 Post-Hearing Amended Petition ¶13

 II. The Trial Court Did Not Err in Finding that Rufus Failed to Establish
 that He Was Denied Effective Assistance of Counsel ¶15

 a. Waiver of Trial by Jury ¶19

 b. Failure to Pursue Entrapment Defense ¶24

 c. Failure to Communicate..... ¶29

 III. The Trial Court Did Not Err in Finding Rufus Failed to Establish
 Any Due Process Violations.. ¶32

 IV. Issues Not Raised Below or Challenges to this Court’s Prior
 Decision are Not Properly Before the Court..... ¶35

Conclusion ¶38

[¶1] TABLE OF AUTHORITIES

Cases:

Coppage v. State, 2014 ND 42, 843 N.W.2d 291 ¶17

Gustafson v. Gustafson, 2014 ND 8, 841 N.W.2d 743..... ¶14

Kinsella v. State, 2013 ND 238, 840 N.W.2d 625..... ¶10

Noorlun v. State, 2007 ND 118, 736 N.W.2d 477..... ¶22

Sambursky v. State, 2006 ND 223, 723 N.W.2d 524 ¶16

State v. Rufus, 2015 ND 212, 868 N.W.2d 534..... ¶6, 36

State v. Schmidt, 2011 ND 238, 807 N.W.2d 593..... ¶25

Strickland v. Washington, 466 U.S. 668 (1984)..... ¶16, 17, 31

Wilson v. State, 1999 ND 222, 603 N.W.2d 47..... ¶16

Statutes, Rules or Other Authorities:

N.D.C.C. 12.1-01-03(3) ¶25

N.D.C.C. 12.1-05-11(1) ¶25

N.D.C.C. 12.1-05-11(2) ¶25

N.D.C.C. 29-32.1-12..... ¶37

[¶2] STATEMENT OF FACTS

[¶3] Galen Paul Rufus, Petitioner/Appellant, hereinafter, “Rufus,” was charged with human trafficking, possession of marijuana with intent to deliver, possession of marijuana paraphernalia, and possession of schedule II and III controlled substances on September 27, 2013. Appendix, hereinafter “App.” 123, ¶5. He made his initial appearance on September 30, 2013. App. 123, ¶5. On October 4, 2013, Attorney Tom P. Slorby filed a Notice of Appearance on behalf of Rufus. App. 123, ¶6. A preliminary hearing was held November 7, 2013, at which the Court found probable cause and Rufus was bound over for trial. App. 123, ¶7.

[¶4] On February 18, 2014, Rufus, in consultation with counsel, pleaded guilty to the drug charges. App. 123, ¶8. He was remanded to the custody of the Ward County Sheriff pending resolution of the human trafficking charge and sentencing. App. 123, ¶8. Attorney Slorby moved to withdraw on March 4, 2014, citing Rufus’s dissatisfaction with his representation and Rufus’s suspicion that the Court was biased against counsel. App. 124, ¶9. A Substitution of Counsel, substituting Attorney William Kirschner, was filed April 10, 2014. App. 124, ¶9.

[¶5] On May 23, 2014, Rufus filed a Waiver of Jury Trial. App. 124, ¶10. The Waiver, signed by Rufus, provided that it was made “knowingly, and voluntarily, and [in reliance] upon the advice of counsel.” App. 127, ¶27. The Waiver further provided, “I have had a reasonable period of time to deliberate, and make this waiver.” App. 127, ¶27. A bench trial was held, the Honorable Gary H. Lee presiding, on May 28, 2014. App. 124, ¶10. The Court issued its Findings and Verdict on June 13, 2014. App. 124, ¶10. Ultimately, Rufus was sentenced to ten years, with five years suspended, on the

human trafficking charge. App. 124, ¶13.

[¶6] Rufus appealed his conviction to the North Dakota Supreme Court, alleging insufficiency of the evidence. The North Dakota Supreme Court affirmed the conviction on August 25, 2015. State v. Rufus, 2015 ND 212.

[¶7] On October 23, 2015, Rufus filed an application for post-conviction relief. As grounds for relief, petitioner alleged ineffective assistance of counsel, due process violation, denial of a fair trial, and greater protections under the North Dakota Constitution. App. 6-24. A hearing on the application was held November 10, 2016, before the Honorable Gary H. Lee, Judge of the District Court. At the hearing, Rufus's counsel advised that the issues had been narrowed to only those presented at the hearing. Transcript, hereinafter "Tr.", page 59, lines 1-4.

[¶8] On December 2, 2016, Rufus filed, pro se, a Motion to Amend Post-Conviction Application and Amended Application for Post-Conviction Relief – PROPOSED, which set forth an additional ten issues. App. 30-55. The Amended Application included five exhibits. App. 56-121. The trial court issued its Order denying Rufus's application on December 8, 2016. App. 122-134. Rufus timely appealed. App. 135.

[¶9] STANDARD OF REVIEW

[¶10] 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.2d 625. Whether a petitioner received ineffective assistance of counsel is a mixed question of law and fact, reviewable under a clearly erroneous standard. 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 the finding, a reviewing court is left with a definite and firm conviction a mistake has been made. Id.

[¶11] LAW AND ARGUMENT

[¶12] Rufus raises a number of issues in his Appellant's Brief, some of which were addressed by the trial court, the majority of which were not properly raised below. The State will address, in substance, the issues actually decided by the trial court and will attempt to address the remaining issues raised by Rufus.

[¶13] **I. The Trial Court Did Not Err in Declining to Consider Rufus's Post-Hearing Amended Petition.**

[¶14] A number of issues were raised by Rufus in his pro se motion to amend petition. The trial court, in declining to consider the issues brought in the motion to amend petition, relied on Gustafson v. Gustafson, 2014 ND 8, ¶30, 841 N.W.2d 743, in reasoning that such post-hearing filing would give Rufus an unfair advantage of avoiding cross examination, and a free response on his own terms to the arguments and evidence presented at the hearing. App.123, ¶4. At the hearing on the petition, Rufus's counsel advised that the issues had been narrowed to only those presented at the hearing. Tr. 59, lines 1-4. The trial court's finding is not clearly erroneous.

[¶15] **II. The Trial Court Did Not Err in Finding that Rufus Failed to Establish that He Was Denied Effective Assistance of Counsel.**

[¶16] In order to succeed on a claim of ineffective assistance of counsel, the petitioner must show counsel's performance was deficient and the deficient performance prejudiced the petitioner. Strickland v. Washington, 466 U.S. 668, 694 (1984). A defendant claiming ineffective assistance of counsel must establish two elements: (1) counsel's performance was deficient, and (2) counsel's deficient performance prejudiced the defendant. Wilson v. State, 1999 ND 222, ¶8, 603 N.W.2d 47. The petitioner must overcome the presumption that his attorney's performance was reasonable, and that the

attorney's deficient performance prejudiced him. Sambursky v. State, 2006 ND 223, ¶13, 723 N.W.2d 524.

[¶17] Ineffective assistance of counsel is a mixed question of law and fact. Coppage v. State, 2014 ND 42, ¶17, 843 N.W.2d 291; *hereinafter* Coppage IV. The test to evaluate an ineffective assistance of counsel claim is derived from Strickland v. Washington, 466 U.S. 668 (1984). A defendant claiming ineffective assistance of counsel bears the heavy burden of proving (1) counsel's representation fell below an objective standard of reasonableness, and (2) the defendant was prejudiced by counsel's deficient performance. The defendant must first overcome the "strong presumption" that counsel's representation fell within the wide range of reasonable professional assistance, and courts must consciously attempt to limit the distorting effect of hindsight." Coppage IV, 2014 ND 42, ¶17.

[¶18] In limiting the issues to those presented at the hearing, Rufus asserts that Attorney Kirschner was ineffective in waiving trial by jury, failing to pursue a defense of entrapment, and failing to meet with him and keep him apprised of the progress of the case.

[¶19] **a. Waiver of Trial by Jury**

[¶20] Rufus filed a written waiver of jury trial, signed by him, on May 23, 2014. In that document, he acknowledges having been advised of his right to trial by jury. He acknowledges his understanding that, by waiving his right to trial by jury, his case will be tried to a District Judge who will make all factual and legal determinations. He asserts that the waiver is made "knowingly, and voluntarily, and [] upon the advice of counsel." He further asserts that no threats or promises were made to induce him to waive jury trial.

Finally, he acknowledges having had “a reasonable period of time to deliberate, and make this waiver.” App. 127, ¶27.

[¶21] At the hearing on the petition, Rufus denied discussing the matter of waiver of trial by jury with Attorney Kirschner. Tr. p. 14, line 4 – p. 15, line 8. Attorney Kirschner testified that he met with Rufus in person and discussed the issue of trying the case to a jury or to the court. Tr. p. 55, line 17 – p. 56, line 11. He testified that, in the course of those discussions, he advised Rufus and, ultimately, left the decision to Rufus. Tr. p. 57, lines 3-19.

[¶22] Petitioner knowingly and voluntarily waived his right to trial by jury after consultation with his attorney. This was a strategic move by counsel. A reviewing court should not second guess tactical or strategic matters. Noorlun v. State, 2007 ND 118, ¶12, 736 N.W.2d 477. “Strategic choices by counsel ‘made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.’” Id. Courts do not impose their collective judgment upon counsel, or apply the distorting effect of hindsight, as to matters of strategy. Id.

[¶23] The trial court herein found Rufus’s waiver of trial by jury to be knowing and voluntary and, as such, that Rufus failed to meet his burden to show that Attorney Kirschner’s advice to waive trial by jury fell below an objective standard of reasonableness. App. 127, ¶¶ 27, 28. That finding is not clearly erroneous.

[¶24] **b. Failure to Pursue Entrapment Defense**

[¶25] Rufus is alleging that he was entrapped and, as such, the State was without authority to charge him with human trafficking. Entrapment is an affirmative defense. N.D.C.C. 12.1-05-11(1). Section 12.1-05-11(2), N.D.C.C., provides:

“A law enforcement agent perpetrates an entrapment if, for the purpose of obtaining evidence of the commission of a crime, the law enforcement agent induces or encourages and, as a direct result, causes another person to engage in conduct constituting such a crime by employing methods of persuasion or inducement which created a substantial risk that such crime will be committed by a person other than one who is ready to commit. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.”

The defendant has the burden of proving an affirmative defense by a preponderance of evidence. N.D.C.C. 12.1-01-03(3). Entrapment is generally a question of fact. State v. Schmidt, 2011 ND 238, ¶9, 807 N.W.2d 593. Entrapment is a question of law only where the facts and their inferences supporting a finding of entrapment are undisputed. Id.

[¶26] Rufus acknowledged at the hearing on the petition that on September 13, 2015, he responded to an advertisement on craigslist.org for a “girl” who wanted to make money while her mother was away. Tr. p. 20, lines 11-22. He acknowledged again contacting the poster of the ad on September 19, 2013. Tr. p. 21, lines 3-9. He acknowledged exchanging messages with the undercover officer on September 27, 2013, and talking about rates for various sex acts. Tr. p. 23, lines 2-24. He acknowledged discussing a meeting to exchange the girl’s services and going to the meeting location. Tr. p. 24, lines 4-13. On cross examination he affirmed that he alone engaged in the conduct forming the basis of the charge of human trafficking. Tr. 43, lines, 1-15; 45, lines 11-25; 46, lines 10-20.

[¶27] Attorney Kirschner testified that he researched the issue of entrapment and concluded that, under the facts of the case, Rufus had not been entrapped, but rather, law enforcement merely afforded him the opportunity to commit the crime. Tr. 56, lines, 16-25. Rufus was not entrapped, but rather, initiated and directed the conversations with the

undercover officer. At most, the undercover officer merely afforded Petitioner the opportunity to commit the crime.

[¶28] The trial court herein found that Rufus failed to show that Attorney Kirschner's assessment of the non-viability of an entrapment was wrong. App. 129, ¶35. The trial court found Attorney Kirschner's alternate theory of the case was, at best, an unsuccessful defense strategy. App. 129, ¶36. This finding is not clearly erroneous.

[¶29] **c. Failure to Communicate**

[¶30] Rufus testified to a single face-to-face meeting with Attorney Kirschner during his pretrial detention. Tr. 11, lines 6-18. He denied any pretrial telephone conversations. Tr. 12, lines 4-7. He later acknowledged, on cross examination, that he had spoken to Mr. Kirschner on the telephone. Tr. 37, lines 13-24. Attorney Kirschner testified to at least two face-to-face visits with Rufus at the Ward County Jail. Tr. p. 53, line 14 – p. 54, line 13. He testified to numerous telephone calls and letters with Rufus. Tr. 54, lines 14-18. He testified that, at one point, he sent a letter to Rufus wherein he mentioned that he had not received a telephone call from Rufus in some time. Tr. 54, lines 21-25. The trial court received the jail visitor log showing a visit by Kirschner of approximately one hour on May 20, 2014, approximately one week before trial. Tr. 35, lines 16-25.

[¶31] The trial court found that the testimony and the visitor log refuted Rufus's claim of ineffective assistance of counsel. App. 130, ¶39. It found Rufus failed to establish that Attorney Kirschner fell below an objective standard of reasonableness, or that more communication would have created a different result as required by Strickland. App. 131, ¶40. This finding is not clearly erroneous.

[¶32] **III. The Trial Court Did Not Err in Finding Rufus Failed to Establish Any Due Process Violations.**

[¶33] Rufus alleged that the State “changed dates, times and actions in the arguments, to make it appear that Petitioner was a Human Trafficker.” He offered no support for this allegation. He ignores the trial court’s findings and verdict, finding him guilty beyond a reasonable doubt. He ignores the decision of this Court, upholding the trial court’s verdict.

[¶34] The trial court found this allegation to be unsupported by evidence. App. 133, ¶47. It found that Rufus failed to offer any more than mere suspicion that evidence “may have been altered by an unknown person, at some unknown time...” App. 133, ¶48. Mere speculation is not evidence. This finding is not clearly erroneous.

[¶35] **IV. Issues Not Raised Below or Challenges to this Court’s Prior Decision are Not Properly Before the Court.**

[¶36] The remainder of Rufus’s Appellant’s Brief contains issues not raised below or challenges to this Court’s decision in State v. Rufus, 2015 ND 212, 868 N.W.2d 534. The Court broke down the statute under which Rufus was charged. Id. ¶12. The Court addressed the culpability requirement. Id. ¶22. The Court addressed the “fictitious victim” argument. Id. ¶31. The Court found the evidence sufficient to support the verdict. Id. ¶¶27, 28. The Court addressed the “substantial step” element of the offense. Id. ¶24. The Court addressed Rufus’s “knowledge.” Id. ¶27.

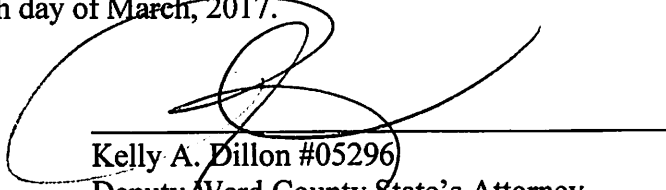
[¶37] These issues are a reiteration of Rufus’s argument to this Court that the evidence was insufficient to support the district court’s verdict. As such, they have been fully and finally determined in a previous proceeding, and are res judicata and misuse of process. N.D.C.C. 29-32.1-12. Appeal of a denial of post-conviction relief is not the appropriate

forum to challenge a decision of this Court.

[¶38] CONCLUSION

[¶39] The trial court's findings that Rufus failed to meet his burden of proof that he was denied effective assistance of counsel are not clearly erroneous. The State respectfully prays that the trial court's denial of the petition for post-conviction relief be affirmed.

Respectfully submitted this 7th day of March, 2017.



Kelly A. Dillon #05296
Deputy Ward County State's Attorney
Ward County Courthouse
PO Box 5005
Minot ND 58702-5005
Telephone (701) 857-6480
51wardsa@wardnd.com
Attorney for Respondent/Appellee

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Galen Paul Rufus,)
)
 Petitioner/Appellant,) Supreme Court No. 20160445
)
 vs.)
)
 State of North Dakota,) District Court No. 51-2015-CV-01755
)
 Respondent/Appellee.)
)

AFFIDAVIT OF SERVICE


Lynnae Rudland, being first duly sworn, deposes and says:

That she is a citizen of the United States of America, over the age of twenty-one years, and is not a party to nor interested in the above entitled action; that on the 3rd day of March, 2017, this Affiant provided a true and correct copy of the following documents in the above entitled action:

BRIEF OF APPELLEE

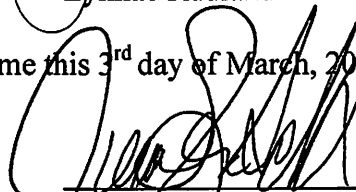
That said envelope was addressed to the following person at his address as follows:

**GALEN PAUL RUFUS
PO BOX 5521
BISMARCK ND 58506-5521**



Lynnae Rudland

Subscribed and sworn to before me this 3rd day of March, 2017, by Lynnae Rudland



Notary Public

