

IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA

Marlon Comes,)	
)	
v.)	Supreme Court No.: 20170346
Petitioner and Appellant,)	District Court No.: 36-2017-CV-00200
)	
v.)	
)	
State of North Dakota,)	
)	
Respondent and Appellant.)	
Appellee)	

APPEAL FROM THE DISTRICT COURT ORDERS SUMMARILY DISMISSING
POST-CONVICTION RELIEF AND DENYING THE MOTION FOR NEW
TRIAL IN RAMSEY COUNTY DISTRICT COURT, NORTHEAST JUDICIAL
DISTRICT, NORTH DAKOTA DATED SEPTEMBER 6, 2017, THE
HONORABLE DONOVAN A. FOUGHTY, PRESIDING

BRIEF OF THE APPELLEE

Kari M. Agotness
ND ID 06375
Ramsey County State's Attorney
524 4th Ave. NE., Unit 16
Devils Lake, ND 58301
Telephone: (701) 662-7077
Facsimile: (701) 662-7090
E-mail: ramseysa@nd.gov

ATTORNEY FOR APPELLEE

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ISSUES PRESENTED

[¶1] I. The district court properly dismissed Marlon Comes's petition for post-conviction relief.

II. The district court properly denied Marlon Comes's motion for a new trial.

STATEMENT OF THE CASE

[¶2] Marlon Comes's statement of the case does accurately depict some of the prior litigation pertaining to the murder of Donald Jerome which occurred on December 14, 1995. On October 18, 1996, Marlon Comes (hereinafter Comes) entered guilty pleas to the charges of Murder, a Class AA Felony and the crime of Robbery, a Class A Felony. Judge Foughty sentenced Comes to life imprisonment in the Department of Corrections, with the right of parole for Murder and a concurrent ten (10) years for Robbery, with 307 days of credit for time served.

[¶3] Comes's first post-conviction relief was filed on February 24, 1999, wherein he claimed ineffective assistance of counsel, and involuntarily entering a plea of guilty, and a denial of his right to a fair trial. The district court denied the petition, and Comes appealed. This court summarily affirmed the district court's decision. Comes v. State, 2000 ND 142, 618 N.W.2d 724. Comes's second post-conviction relief petition was filed April 1, 2011. Again Comes claimed ineffective assistance of counsel and included a claim of prosecutorial misconduct. The district court denied the second petition on January 3, 2013, and Comes did not appeal that denial. A third petition for post-conviction relief was filed by Comes on April 25, 2013, with another claim of ineffective assistance of counsel, prosecutorial misconduct, misconduct by the state crime laboratory and judicial error. The

district court summarily dismissed the petition on January 21, 2014. A fourth application for post-conviction relief was filed on November 20, 2015, with an argument for a new interpretation of state law. The district court denied the petition and Comes appealed. This court summarily affirmed the district court's decision. Comes v. State, 2016 ND 118, 881 N.W.2d 256.

[¶4] This fifth application for post-conviction relief was filed on May 10, 2017. Comes's application claims he shall be subjected to an ex post facto punishment in violation of the United States Constitution Article I, section 10. The district court summarily dismissed Come's petition on July 19, 2017 and ultimately denied Come's Motion for New Trial and Reconsideration on September 6, 2017.

LAW AND ARGUMENT

[¶5] **I. The district court properly dismissed Come's petition for post-conviction relief.**

Post-conviction relief proceedings are civil in nature and governed by the North Dakota Rules of Civil Procedure. Kinsella v. State, 2013 ND 238, 840 N.W.2d 625. A district court may summarily dismiss an application for post-conviction relief if there is no genuine issue of material facts and the moving party is entitled to a judgment as a matter of law. Waslaski v. State, 2013 ND 56, 828 N.W.2d 787. Also, a district court may summarily deny a petition for post-conviction relief summarily when it is not filed within the statutory two year time-limit. Lehman v. State, 2014 ND 103, 847 N.W.2d 119; N.D.C.C. § 29-32.1-09.

[¶]6 Comes entered guilty pleas to the charges of murder and robbery over twenty-one years ago. Comes has had four prior petitions for post-conviction reliefs. In 2015, North Dakota state law was amended to provide a two year statute of limitations for post-conviction relief actions. N.D.C.C. § 29-32.1-01(2). There are three exceptions to the two year statute of limitations. The first is where the petition alleges the existence of newly discovered evidence, the second if petitioner suffered from a physical disability or mental disease and the third is if the petitioner asserts a new interpretation of federal or state law, and that the new interpretation is retroactively applicable to the petitioner's case. N.D.C.C. § 29-32.1-01(3). At issue in the present matter is the third exception, specifically, a new interpretation of state law that is retroactively applicable to Comes's case. This is a similar argument raised by Comes in his 2015 post-conviction application proceeding summarily dismissed by this appellate court. There is no genuine issue of material fact. As such the district court properly summarily dismissed Come's post-conviction application for relief filed on May 10, 2017. A court may summarily dismiss a post-conviction application in four instances under the Uniform Post-Conviction Procedure Act. Of note to this matter is the reason listed in N.D.C.C. § 29-32.1-09 (1):

- (1) The court, on its own motion, may enter a judgment denying a **meritless application on any and all issues raised in the application before any response by the state**. The court also may summarily deny a second or successive application for similar relief on behalf of the same applicant and may summarily deny any application **when the issues raised in the application have previously been decided by the appellate court in the same case**. (Emphasis added)

[¶7] **II. The district court properly denied Comes’s motion for a new trial.**

Comes’s motion for a new trial, governed by N.D.R.Crim.P. 33, is argued as necessary in the interest of justice. The argument essentially is that Comes’s punishment is increased by the district court refusal to apply the law for sentencing as indicated in 1996. This crime occurred in December 1995 and Comes pled guilty in October 1996. At both of those times, N.D.C.C. § 12.1-32-09.1 required that one “who receives a sentence of imprisonment is not eligible for release from confinement on any basis until eighty-five percent of the sentence imposed by the court has been served.” An addition to the statute occurred in 1997 that indicated an offender’s remaining life expectancy would be calculated using a mortality table established by rule of the supreme court. *Id.* This mortality table was promulgated by the North Dakota Supreme Court in N.D.Sup.Ct.Admin.R. 51 enacted in February 2005. Comes was given notice of this by letter in December 2014. The mortality table did not increase the punishment attached to Comes’s crime of murder and robbery, rather it left untouched his sentence of life with the possibility of parole and altered a method to be followed in fixing a parole release date. The U.S. Supreme Court has analyzed a similar law postponing parole board hearings for individuals that committed more than one offense for taking a life. See California Dept. of Corrections v. Morales, 514 U.S. 499 (U.S. 1995). The eighty five percent rule is imposed as a condition of parole and is not a mandatory minimum sentencing requiring disclosure under N.D.R.Crim.P. 11(b)(1)(H). State v. Sambursky, 2006 ND 223, ¶10, 723 N.W.2d 524 (citing State v. Magnuson, 571 N.W.2d 642 (ND 1997)). See also Houle v. State, 482 N.W.2d 24, 30 (ND 1992). A district court’s failure to advise a defendant of implications

of the eighty-five percent service requirement does not affect the voluntariness of a plea. Sambursky, at ¶10. The district court properly denied Comes's motion for a new trial.

CONCLUSION

[¶ 8] The trial court properly summarily dismissed the application for post-conviction relief and properly denied the motion for new trial. The Appellee requests that the Court affirm the district court decision.

Respectively submitted on November 30, 2017.

/s/ Kari M. Agotness
ND License No. 06375
Ramsey County State's Attorney
524 4th Ave. NE, Unit 16
Devils Lake, ND 58301
Telephone: (701) 662-7077
Facsimile: (701) 662-7090
Email: kmagotness@nd.gov
Service Email: ramseysa@nd.gov
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State of North Dakota,)	Certificate of Service
)	
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)	

The undersigned, being of legal age, being first duly sworn deposes and says that she served true copy of the following:

Appellee's Brief

Upon:

Kiara Kraus-Parr, Appellant's Attorney, by electronic mail at kiara@krausparrlaw.com

Dated November 30, 2017

/s/Kari M. Agotness

Kari M. Agotness
ND ID 06375
Ramsey County State's Attorney
524 4th Ave. NE., Unit 16
Devils Lake, ND 58301
Telephone: (701) 662-7077
Facsimile: (701) 662-7090
E-mail: ramseysa@nd.gov
Attorney for Appellee