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STATE OF NORTH DAKOTA

FEB 20 2018

Supreme Court Nos. 20170427

STATE OF NORTH DAKOTA

District Court Nos. 30-2017-CV-00580 [30-2015-CR-00406]

Tanner Thorstad,)
)
Petitioner and Appellant,)
)
v.)
)
State of North Dakota,)
)
Respondent and Appellee.)

BRIEF OF THE APPELLEE

APPEAL FROM THE MORTON COUNTY DISTRICT COURT ORDER
[OCTOBER 4, 2017] SUMMARILY DISMISSING PETITIONER'S
MOTION FOR POST-CONVICTION RELIEF

MORTON COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT
HONORABLE CYNTHIA M. FELAND, PRESIDING

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North Dakota Supreme Court Cases:

Atkins v. State, 2017 ND 290, 904 N.W.2d 738 _____ ¶¶15, 16, 17, 18, 27

Chase v. State, 2017 ND 192, 899 N.W.2d 280 _____ ¶16

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Wheeler v. State, 2008 ND 109, 750 N.W.2d 446 _____ ¶¶19, 27

Other Case Law:

Strickland v. Washington, 466 US. 668 (1984) _____ ¶21, 29, 30, 31

Statutes:

N.D. Cent. Code § 29-32.1-04 _____ ¶¶19,

N.D. Cent. Code § 29-32.1-09(3) _____ ¶¶15, 27

STATEMENT OF THE ISSUES

[¶1] Whether the District Court clearly erred in summarily denying the Petitioner's requested post-conviction relief based upon the record?

STATEMENT OF THE CASE AND FACTS

[¶2] Tanner Thorstad [hereinafter referred to as the Defendant] was represented by counsel Todd Ewell, who was appointed prior to the preliminary hearing and remained on the case through change of plea and sentencing on November 30, 2015. The Defendant, through counsel, had indicated the Defendant wished to waive trial and plead guilty on or before November 23, 2015, at which time a Notice to Appear was sent to the parties, setting the change of plea and sentencing for November 30, 2015. Register of Actions in 30-2015-CR-00406, Document ID #46.

[¶3] On November 30, 2015, moments prior to the hearing, the Defendant and counsel asked whether Ms. Goter, representing Morton County/State of North Dakota, would mind presenting the State's offer as a plea agreement between the parties. There was no change to the sentencing recommendation from the State's offer, and the State indicated there was no preference. November 30, 2015 was approximately ten days past the deadline for plea agreements outlined in the Scheduling Order, which was signed by the Defendant on July 27, 2015. Register of Actions in 30-2015-CR-00406, Document ID #32. See also Appendix at pg. 36, line 5 through p. 38, line 20.

[¶4] Judge Cynthia Feland advised the Defendant of his rights, the mandatory, minimum, and maximum possible sentences. Appendix at p. 20, line 23 through p. 22, line 16. Judge Feland asked the Defendant if he had enough time to confer with counsel and whether he was satisfied with his representation. Id. To which questions, the Defendant told the court "yes." Id.

[¶5] Judge Feland took the Defendant's pleas of guilty to each of the twelve counts alleged in the Amended Information. Register of Actions in 30-2015-CR-00406, Document ID #44; Appendix at p. 22, line 17 through p. 25, line 12. The Court ensured the Defendant was acting of his own free will, without coercion or influence. Appendix at p. 25, lines 13-23.

[¶6] Before proceeding to sentencing, the Court indicated it was not going to accept a plea agreement at that late stage. Appendix at p. 36, line 23 through p. 38, line 6. The Court again advised the Defendant of the possible range of sentencing and inquired of the Defendant whether he was proceeding on an open plea basis or requesting a jury trial. Id. The Defendant stated he was pleading guilty. Appendix at p. 37, line 19 through p. 38, line 6.

[¶7] The State and Mr. Ewell clarified for the District Court that the Defendant had requested a change of plea, which had been set, prior to any request for presenting the State's offer as a plea agreement. Appendix at p. 38, lines 7-18. The State also indicated the same sentencing recommendation was being made, whether or not the Court considered it as a plea agreement. Id. The State made its sentencing recommendation. Appendix at p. 38, line 21 through p. 42, line 2. Mr. Ewell made the Defendant's sentencing request, which paralleled the State's recommendation. Appendix at p. 42, line 8 through p. 43, line 19. The Defendant opted not to comment on sentencing when given the option. Appendix at p. 43, lines 20-24. The State and Mr. Ewell presented the same terms and proposed sentence, which the Defendant and Mr. Ewell wished to present as a plea agreement. Appendix at p. 38, line 21 through p. 42, line 2; Appendix at p. 42, line 8 through p. 43, line 19.

[¶8] The Court had already stated it would not consider sentencing other than open plea at this late stage and gave the Defendant the option of proceeding to trial in lieu of change of plea. Appendix at p. 36, line 23 through p. 38, line 6. The Defendant restated his intention of pleading guilty on an open plea basis. Id. The Court imposed sentence, after clarifying the Defendant's criminal history, making enquiries of the Defendant, contrasting the facts with another recent similar case, and by grouping the specific counts by victim and location as separate courses of conduct. Appendix at p. 43, line 25 through p.52, line 6.

[¶9] The Defendant subsequently filed three Motions for Reduction, Modification or Correction of Sentence. Register of Actions in 30-2015-CR-00406, Document ID #52-56, #59-62, and #66-69. The State responded to each, resisting the Defendant's motions. See Register of Actions in 30-2015-CR-00406, Document ID# 57, 63, and 70. The Court issued an Order Denying Rule 35 Reduction/Modification/Correction of Sentence in each instance. Register of Actions in 30-2015-CR-00406, Document ID#58, 65, and 72.

[¶10] The Defendant filed for Post-Conviction Relief on July 13, 2017, alleging ineffective assistance of his trial counsel during sentencing, specifically that his plea agreement hadn't been presented or argued properly. Register of Actions 30-2017-CV-00580, Document ID#1; Appendix at p. 55. The State Answered on August 12, 2017. Register of Actions in 30-2017-CV-00580, Document ID#5; Appendix at p. 58. The State filed Notice, Motions and Briefs in Support of the Motions for Summary Dismissal and Abrogation of Attorney-Client Privilege on August 12, 2017, based upon the record, including Transcript of the sentencing hearing in question.

Register of Actions in 30-2017-CV-00580, Document ID#6-11. The Defendant, through counsel, filed Briefs responding to each of the Motions on August 29, 2017.

Register of Actions in 30-2017-CV-00580, Document ID#6-11.

[¶11] The District Court issued a Memorandum and Order granting the State's requested summary dismissal of the post-conviction application on the basis of the record, stating that there was no genuine issue of material fact and that the Defendant failed to present competent admissible evidence of such issue. Appendix at p.61. The District Court filed the Transcript of Sentencing Hearing as an Exhibit to its Memorandum and Order. Register of Actions in 30-2016-CV-00580 and cited to it throughout its order in support of the findings of fact therein.

[¶12] The District Court made specific findings about the clarity with which every party to the sentencing, the Defendant, his counsel, and the State, were put on notice as to the Court not taking a plea or entertaining binding plea agreements at the late stage of the case. Appendix at p. 62, ¶3; p. 64-5, ¶6-7. The Court pointed to the fact that she had ascertained from the Defendant that he was satisfied with the representation of Mr. Ewell at the time of the sentencing. Appendix at p. 63, ¶4; p. 67, ¶10. The Court also pointed to the fact that it was the Defendant who elected to proceed on an open plea basis after being told by the Court that a plea on November 30, 2015 would only be considered on an open plea basis. Appendix at p. 68, ¶11; p. 63-4, ¶5-7.

[¶13] The Defendant appealed the Court's order summarily denying post-conviction relief.

STANDARD OF REVIEW

[¶14] The Standard of Review regarding post-conviction relief, specifically instances of a summary denial, is defined by Parizek v. State, 2006 ND 61, ¶4, 711 N.W.2d 178:

“This Court reviews an appeal from a summary denial of post-conviction relief as it reviews an appeal from a summary judgment. The party opposing the motion for summary disposition is entitled to all reasonable inferences at the preliminary stages of a post-conviction proceeding and is entitled to an evidentiary hearing if a reasonable inference raises a genuine issue of material fact.”

[¶15] In Atkins v. State, 2017 ND 290, the Court discussed the Standard of Review for summary dismissal of post-conviction relief cases, citing to Section 29-32.1-09(3) of the North Dakota Century Code:

“The court may grant a motion by either party for summary disposition if the application, pleadings, and 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 a judgment as a matter of law.” Atkins v. State, 2017 ND 290, ¶5, 904 N.W.2d 738.

[¶16] The Atkins Court continued that the applicant has the burden of establishing grounds for post-conviction relief. Atkins at ¶6 (citing Chase v. State, 2017 ND 192, ¶5, 899 N.W.2d 280). Although the Atkins Court cited Steinbach v. State, 2003 ND 46, ¶15, 658 N.W.2d 355 in stating that claims of ineffective assistance of counsel are *ordinarily* unsuited to summary disposition without an evidentiary hearing, the Atkins Court stated that it has “upheld summary denials of post-conviction relief when the applicants were put to their proof, and summary disposition occurred after the applicants then failed to provide some evidentiary support for their

allegations.” Atkins v. State, 2017 ND 290, ¶6, 904 N.W.2d 738 (citing Steinbach v. State, 2003 ND 46, ¶15, 17, 658 N.W.2d 355).

ARGUMENT

I. The District Court Did Not Err in Summarily Dismissing the Defendant's Application for Post-Conviction Relief Based Upon the Record.

[¶17] This Court has previously stated, “While summary dismissal generally is not appropriate for post-conviction claims of ineffective assistance of counsel, it is appropriate if the petitioner does not raise a genuine issue of material fact.” Atkins v. State, 2017 ND 290, ¶9, 904 N.W.2d 738 (citing Klose v. State, 2008 ND 143, ¶9, 752 N.W.2d 192). The Klose Court simply stated:

“To avoid summary dismissal of an ineffective assistance of counsel claim, the post-conviction applicant must present some evidence that his counsel’s performance fell below an objective standard of reasonableness, and he must overcome the presumption that his counsel’s performance was within the broad range of reasonableness.” Klose v. State, 2008 ND 143, ¶13, 752 N.W.2d 192.

[¶18] The Court has stated that once a petitioner is put to his proof (the respondent has answered and moved for summary judgment), the petitioner “must specify how and where counsel was incompetent and the probable different result.” Id. A petitioner who “fails to ‘show how, but for the attorneys’ errors, the results of the proceedings would have been different’ justifies a district court’s decision to summarily dismiss the ineffective assistance of counsel claims.” Atkins v. State, 2017 ND 290, ¶9, 904 N.W.2d 738 (citing Hughes v. State, 2002 ND 28, ¶7, 639 N.W.2d 696).

[¶19] State v. Bender outlined the requirements of N.D.C.C. § 29-32.1-04, in which it was recognized that it was the petitioner’s duty to “set forth a concise statement of each ground for relief, and specify the relief requested,” refer to the pertinent portions of the record of prior proceedings, and if those portions are not in the

record, the petitioner must attach those portions to the application. State v. Bender, 1998 ND 72, ¶19, 576 N.W.2d 210. A petitioner is required to provide evidentiary support for his petition when he has been given notice he is being put on his proof. Id. at ¶20. Once the petitioner has been put on his proof, he may not “merely rely on the pleadings or on unsupported, conclusory allegations, but must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact.” Wheeler v. State, 2008 ND 109, ¶5, 750 N.W.2d 446. If the petitioner presents competent evidence, he is then entitled to an evidentiary hearing to fully present that evidence. Steinbach v. State, 2003 ND 46, ¶17, 658 N.W.2d 355.

¶20 In the instant case, the Defendant made two specific claims in his application for post-conviction relief: 1) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea; and 2) Denial of effective assistance of counsel. See Appendix at p. 55-6. The Defendant’s only statements in support of those claims were “[e]ntered binding plea with lawyer & state[']s attorney befor[e] court, but both lawyer & state[']s attorney failed to properly present plea to judge” and “My lawyer failed to present binding plea to judge.” See Appendix at p. 56, ¶7(A)-7(B). The Defendant failed at any time, including when the State answered and filed its Motions for Summary Dismissal, to substantiate his claim through competent admissible evidence. In fact, the Defendant provided no affidavit, no reference to the record, and no transcript cites at all. The Defendant at no time

offered competent evidence of an issue of material fact as to the efficacy of his trial counsel at the time of sentencing.

[¶21] The District Court, however, considered the matter carefully before issuing her Order. Specifically, she looked at what such competent evidence would need to demonstrate in the case of post-conviction on the basis of ineffective assistance of counsel. The District Court cited to Strickland v. Washington, 466 U.S. 668 (1984), as it was interpreted by this court in Bowers:

“First, the defendant must show that his trial counsel’s representation fell below an objective standard of reasonableness. In establishing this objective standard, the defendant must overcome the strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. Second, the defendant must establish that trial counsel’s conduct was prejudicial to him[.] The Defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Appendix at p. 67, ¶9 (citing State v. Bowers, 426 N.W.2d 293 (N.D. 1988)).

[¶22] Further, the District Court considered the legal parameters in which it might issue an order granting summary judgment to the State in a claim of ineffective assistance of counsel. The District Court’s Memorandum and Order commences with an Introduction and Background, citing to specific documents and facts that are a matter of record and including as an Exhibit to the Order, a copy of the Transcript of Sentencing Hearing. See Appendix at p. 61-66, ¶¶1-6.

[¶23] Facts before the District Court as a matter of record included that the Defendant, with advice of counsel, before ever asking the State to form an agreement, had decided to plead guilty, and the matter was set for change of plea and sentencing. See Appendix at p. 38, lines 7-18; Appendix at p. 64, ¶6. The District Court was aware that the Defendant had been advised multiple times of his

rights, had been satisfied with Mr. Ewell's representation, knew of the possible maximum and mandatory minimum penalties, and was freely entering into his change of plea. See Appendix p. 63-65, ¶¶4-7.

[¶24] The District Court reflected that the State broached the subject of a plea agreement, after the Court had taken the Defendant's pleas to each count, and indicated that if the Court was willing to waive its deadline, which had expired, on plea agreements, the State would not object. See Appendix at p. 36, line 5-line 15; Appendix at p. 64, ¶6. The Court ascertained this matter had begun as an open plea and informed the parties and the Defendant that it would only accept a change of plea on that late date on an open plea basis. See Appendix at p. 36, line 16 through p. 37, line 20; Appendix at p. 64-65, ¶¶6-7.

[¶25] The District Court considered as well that as a matter of record, the Defendant had signed a scheduling order, indicating that plea agreements needed to be posed to the Court at least ten (10) days prior to trial. See Appendix at p. 62, ¶3, citing Register of Actions in 30-2015-CR-406 Document ID# 32. The District Court specifically quoted the signed Scheduling Order, wherein the Order stated, "[p]leas offered without such notifications will not be considered as plea agreements." The Defendant had notified the Court on November 23, 2015 that he requested the jury trial be set for a change of plea. See Register of Actions in 30-2015-CR-00406, Document ID #46. The date of the Defendant's requested change of plea, a matter of record, was already after the time for plea agreements had lapsed, and prior to any discussion of entering a plea agreement had been had with the State. Contrast Register of Actions in 30-2015-CR-00406, Document ID #46; Appendix at p. 38, lines

7-18; Appendix at p. 64, ¶6 with Appendix at p. 55-6, ¶¶6-7(B); Appendix at p. 38, lines 7-20.

[¶26] The District Court was also aware that the State and Mr. Ewell gave similar sentencing recommendations, which both parties stated were the same as those that had been contemplated as part of the potential plea agreement. See Appendix at p. 64, ¶6; Appendix at p. 38, lines 7-20. The District Court reflected in its Memorandum and Order, that she had heard argument in favor of the proposed sentence from the State and defense counsel, had afforded the Defendant the opportunity to comment on sentencing, which he declined, had considered the Defendant's criminal history, the facts and circumstances of the case, the possible mandatory sentences and arguments from counsel before imposing sentence. Appendix at p. 65, ¶65.

[¶27] The District Court, after outlining the relevant facts, pointed to the legal standard for granting summary disposition of an application for post-conviction relief, citing to the requirements of N.D.C.C. §29-32.1-09(3) and this Court's holding in Clarke v. State, 1999 ND 78, 593 N.W.2d 329, which echoes State v. Bender, 1998 ND 72, ¶19, 576 N.W.2d 210, cited above. The District Court, as this court recognized in such cases as Bender, Atkins, and Wheeler, recognized that the Defendant, once he was put on notice of the Motion for Summary Dismissal, was put to his proof, and at that point cannot "merely rely on the pleadings or on unsupported, conclusory allegations, but must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact." Appendix at p. 67, ¶8 (citing Lindsey v. State, 2014 ND 174, 852 N.W.2d 383;

State v. Bender, 1998 ND 72, ¶20, 576 N.W.2d 210; Atkins v. State, 2017 ND 290, ¶6, 904 N.W.2d 738 (citing Steinbach v. State, 2003 ND 46, ¶15, 17, 658 N.W.2d 355); Wheeler v. State, 2008 ND 109, ¶5, 750 N.W.2d 446.

[¶28] The District Court did not err in finding the Defendant failed to present competent admissible evidence by affidavit or other comparable means which would raise an issue of material fact. The District Court did not err, in looking at the legal framework allowing her to grant a summary dismissal, in her decision to do so, specifically finding that rather than presenting competent evidence of a genuine issue of material fact as to the efficacy of his trial counsel at sentencing, he relied on unsupported, conclusory allegations.

[¶29] The District Court considered the framework of Bowers and the Strickland test. The District Court's findings that the Defendant bore the burden of establishing Mr. Ewell's representation fell below an objective standard of reasonableness and that the Defendant failed meet the minimal burden of showing there was even a genuine issue of material fact as to the first prong of the Strickland test, are based on statutory requirements, the holdings of this Court and the Strickland Court, as well as the facts of this case. The Defendant presented no affidavit, and the record is clear on this issue. The Defendant, at the time of sentencing was satisfied with Mr. Ewell's representation, which fact was considered in the Order of the District Court. The District Court did not err in finding that the Defendant failed to present competent admissible evidence of a genuine issue of fact that Mr. Ewell's representation fell below an objective standard of reasonableness. See Appendix at p. 67, ¶10.

[¶30] Though the District Court did not need to consider the second prong of the Strickland test: whether the Defendant was prejudiced by an ineffective assistance of counsel and whether the result of the proceeding would have been different but for the failure of counsel, the District Court specifically addressed the issue in its Order. The District Court found that if it considered the second prong of Strickland, the whole of the record was against the Defendant. The District Court cited to the fact that she had specifically informed the Defendant she would not consider plea agreements before giving the Defendant the option on more than one occasion to either plead on an open plea basis or continue with trial. Appendix at p. 68, ¶11.

[¶31] The District Court specifically found from the record, “There was no evidence to suggest [the Defendant] would have declined to plead guilty had he been told that the State’s recommendation was non-binding on the court. In fact, the record indicates the exact opposite.” Id. The Defendant at no point offered any statements at odds with those in the transcript of the hearing and the record as a whole. Therefore, the District Court did not err in finding that the Defendant failed to establish that there was a genuine issue of material fact as to the second prong of the Strickland test. Id.

[¶32] Further, it could be argued, as pointed out in the Appellant’s Brief, that the District Court can at any time reject a plea agreement. In this instance, the District Court stated she would not accept a plea agreement and departed from the recommendations of the parties in imposing sentence. The District Court laid out with specificity her rationale in imposing sentence in that manner. There is nothing to suggest that had the parties presented their recommendations prior to the

agreement deadline on a binding plea basis that the District Court would have accepted the agreement. The District Court afforded the Defendant the same rights as to a Defendant whose binding plea was rejected—the option of withdrawing his guilty pleas and proceeding to trial or proceeding on an open plea basis. The Defendant opted to proceed on an open plea basis. The District Court was correct in finding the Defendant failed to establish a genuine issue of material fact as to whether or not he was prejudiced or the result would likely have been different as a result of ineffective assistance of counsel.

[¶33] Because the District Court correctly found that the Defendant failed to offer competent admissible evidence of a genuine issue of material fact as to the efficacy of his trial counsel, the District Court was also correct in finding that the Defendant was not entitled to an evidentiary hearing. See Steinbach v. State, 2003 ND 46, ¶17, 658 N.W.2d 355.

CONCLUSION

¶34] The District Court did not err, in looking at the legal framework allowing her to grant a summary dismissal of post-conviction matters, in her decision to do so, specifically finding that rather than presenting competent evidence of a genuine issue of material fact as to the efficacy of his trial counsel, the Defendant relied on unsupported, conclusory allegations and therefore was not entitled to an evidentiary hearing. For all of the foregoing facts and argument, the State of North Dakota respectfully requests this Court uphold the District Court's Order Granting Summary Dismissal of the Defendant's Application for Post-Conviction Relief.

¶35] Respectfully submitted this 20th day of February, 2018.

/s/ Gabrielle J. Goter

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Tanner Thorstad,)
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 Petitioner and Appellant,)
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 v.)
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 State of North Dakota,)
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 Respondent and Appellee.)

CERTIFICATE OF SERVICE

[¶1] The undersigned hereby certifies that on the 20th day of February, 2018, a true and correct copy of the **BRIEF OF THE APPELLEE** in PDF and Microsoft Word contained on a disc, seven bound and one unbound copies were filed in person with the Clerk of the North Dakota Supreme Court with a copy served upon the Defendant/Appellant by electronic mail to his counsel of record, Mark Sherer to his email address: mark@covenantlegalgroup.com

Dated the 20th day of February, 2018.

/s/ Gabrielle J. Goter

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