

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Tanner Thorstad,)	
)	Supreme Court No. 20170427
Petitioner and Appellant,)	
)	
vs.)	
)	Civil No. 30-2017-CV-00580
State of North Dakota,)	Criminal No. 30-2015-CR-00406
)	
Respondent and Appellee.)	

BRIEF OF PETITIONER-APPELLANT, TANNER THORSTAD

Appeal from Order Entered on October 4, 2017

In District Court, Morton County, State of North Dakota

The Honorable Cynthia M. Feland

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE ISSUES.....	¶1
STATEMENT OF THE CASE.....	¶2
STATEMENT OF THE FACTS.....	¶5
LAW AND ARGUMENT.....	¶8
CONCLUSION.....	¶16

TABLE OF AUTHORITIES

Court Rules:

N.D.R.Civ.P. 52(a)..... ¶8

Statutes:

N.D.C.C. §29-32.1-09(3)..... ¶10

Cases:

Chisolm vs. State, 2015 ND 279, 871 N.W.2d 595..... ¶9

Heckelsmiller vs. State..... ¶9

Patterson vs. State, 2016 ND 212; 886 N.W.2d 684, 687..... ¶8, 9

Ratliff vs. State, 2016 ND 149, 882 N.W.2d 716..... ¶9

STATEMENT OF THE ISSUES

¶1 Whether the District Court erred when it granted the Motion to Summarily Dismiss the Application for Post-Conviction Relief filed by the State.

STATEMENT OF THE CASE

¶2 This is an appeal arising from an Order, filed on October 4, 2017, and entered by the Honorable Cynthia M. Feland, granting the Motion for Summary Dismissal of the Application for Post-Conviction Relief which the Appellant, Tanner Thorstad (hereinafter “Thorstad”) filed on July 13, 2017 in Case No. 30-2017-CV-00580. (App. Pg. 61) On the 17th day of April, 2015, a Criminal Complaint, listing twelve (12) Counts, was filed against Mr. Thorstad in Case No. 30-2015-CR-00406. Mr. Todd Ewell was appointed to represent Mr. Thorstad during those proceedings. (App. Pg. 5, Dkt. #5)

¶3 On the 30th day of November, 2015, a Change of Plea was held, and Mr. Thorstad was sentenced. (App. Pg. 6, Dkt. #46) Beginning on February 17, 2016, Mr. Thorstad attempted to modify the sentence entered on three occasions, but his Motions were denied. (App. Pg. 6-7, Dkt. #'s 53, 58 ,60, 65, 67 and 72)

¶4 Thereafter, on the 13th day of July, 2017, Mr. Thorstad filed his Application for Post-Conviction Relief, alleging ineffective assistance of counsel during the criminal proceedings, and which was docketed under Case No. 30-2017-DV-00580. (App. Pg. 54, Dkt. #1) The State filed a Motion for Summary Dismissal, which was contested. On the 4th day of October, 2017, the Court issued its Memorandum Opinion and Order granting the State’s Motion for Summary Dismissal. (App. Pg. 54, Dkt. #17) A Notice of Appeal was timely filed on the 5th day of December, 2017. (App. Pg. 54, Dkt.# 18)

STATEMENT OF THE FACTS

¶5 On the 17th day of April, 2015, the State of North Dakota (hereinafter “State”) filed a criminal Complaint against Mr. Thorstad, charging him with the following crimes: Count I, Burglary, a Class C Felony; Count II, Unlawful Entry Into a Motor Vehicle, a Class C Felony; Count III, Unlawful Entry Into a Motor Vehicle, a Class C Felony; Count IV, Unlawful Entry Into a Motor Vehicle, a Class C Felony; Count V, Robbery, a Class A Felony; Count VI, Reckless Endangerment, a Class C Felony; Count VII, Burglary, a Class C Felony; Count VIII, Unlawful Entry Into a Motor Vehicle, a Class C Felony, Count IX, Theft of Property, a Class C Felony; Count X, Criminal Mischief, a Class C Felony; Count XI, Reckless Driving, a Class B Misdemeanor; and Count XII, Fleeing or Attempting to Elude a Peace Officer, a Class C Felony. (App. Pg. 1, Dkt #1, Pg. 8)

¶6 A change of plea hearing was scheduled for, and held, on the 23rd day of November, 2015. (App. Pg. 6, Dkt.#46) At the time, Mr. Thorstad thought that he was entered into a binding plea agreement. However, the binding plea agreement to which he was agreed was not properly presented to the Court. (App. Ppg. 55-57) As a result, the Defendant was ultimately sentenced to eight consecutive years in prison. (App. Ppg. 13-18)

¶7 On July 13, 2017, Mr. Thorstad filed his Application for Post-Conviction Relief. (App. Pg. 55) He alleged that at the Change of Plea Hearing in his Criminal Case, he thought that he was entering into a binding plea agreement that his attorney negotiated with the State’s Attorney. However, the plea agreement that he thought he was agreeing to was not presented to the judge, and he was sentenced to more prison time that he had thought. Mr. Thorstad claimed ineffective

assistance of counsel. (App. Ppg. 55-56) On August 12, 2017, the State filed its Answer, together with a Motion for Summary Dismissal and Motion for Abrogation of Privilege, together with supporting briefs. (App. Pg. 58; Pg. 54, Dkt. #6-12) Mr. Thorstad opposed the Motion, but on the 4th day of October, 2017, the Court issued its Memorandum Opinion and Order granting the Motion for Summary Dismissal. Mr. Thorstad's Application for Post-Conviction Relief was dismissed. (App. Pg. 61) This appeal was initiated with the timely filing of a Notice of Appeal on the 5th day of December, 2017. (App. Pg. 54, Dkt.#18)

LAW AND ARGUMENT

¶8 With respect to Post-Conviction Relief petitions, this Court has stated that such proceedings are civil in nature, and that they are governed by the North Dakota Rules of Civil Procedure. This Court has stated: "...a district court's findings of fact will not be disturbed unless they are clearly erroneous under N.D.R.Civ.P. 52(a). A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by the evidence, or if, although there is some evidence to support it, a reviewing court is left with a definite and firm conviction that a mistake has been made. Patterson vs. State, 2016 N.D. 212 ¶6; 886 N.W.2d 684, 687

¶9 In the instant case, Mr. Thorstad is claiming ineffective assistance of counsel with respect to the presentation of the plea agreement that he agreed to. In instances where the claim involves such a claim, this court has also stated: "Whether a petitioner received ineffective assistance of counsel is a mixed question of law and fact, fully reviewable on appeal" Id. The Court also noted:

To prevail on a postconviction claim of ineffective assistance of counsel, the petitioner has the heavy burden of proving '(1) counsel's representation fell below an objective standard of reasonableness, and (2) the petitioner was prejudiced by counsel's deficient performance.' Id. at ¶7, pg. 687 (Citing Ratliff vs. State, 2016 ND 149, ¶6, 882 N.W.2d 716, quoting Chisolm vs. State, 215 ND 279, ¶8, 871 N.W.2d 595)

In addition, the party seeking post-conviction relief on a claim of ineffective assistance of counsel must also show that if his counsel had not erred, then the outcome would have been different.

Heckelsmiller vs. State, 2004 ND 191, ¶3-4, 687 N.W.2d 454

¶10 Mr. Thorstad's Application was summarily dismissed by the District Court, upon the State's Motion. N.D.C.C. §29-32.1-09(3) reads: "The Court may grant a motion by either party for summary disposition if the application, pleadings, any previous proceedings, 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(3) In the instant case, the District Court reviewed transcript of the change of plea and sentencing hearing, determined that Mr. Thorstad freely and voluntarily pled guilty and submitted himself to sentencing by the Court, and as a result, that he failed to satisfy all of the requirements when presenting a claim for ineffective assistance of counsel. The District Court's decision in this respect was in error.

¶11 At the change of plea and sentencing hearing in the underlying criminal case, it was made clear part-way through the proceedings that the Defendant, and counsel for both the State and the Defendant, intended for the matter to be submitted via a plea agreement. However, they did not tell the Court at the commencement of the proceedings. According to the transcript, the Court stated: "THE COURT: So here's the problem with that, you just had me take a plea without telling me that there was a potential plea agreement or getting permission from the Court to do it at this late stage, so I'm not inclined to take this as a plea agreement." (App. Pg. 36, Lines 23-25 and Pg. 37, Lines 1-2)

¶12 It is clear from reading the transcript that the parties contemplated that Defendant's change of plea would be predicated on a plea agreement negotiated with the State. However, as the transcript made clear, his counsel failed to notify the Court at the outset of the proceedings that

there was, in fact, a plea agreement. At the start of the proceedings, the Court thought that Mr. Thorstad was pleading guilty pursuant to an open plea. It was only part-way through that an actual plea agreement was mentioned, and by that time, it was too late. The Court would only accept his guilty plea as an open plea.

¶13 The State made it clear that the sentence it wanted was the same whether there was a plea agreement, or an open plea: ten (10) years in prison, with five (5) years suspended for a period of three (3) years. (App. Pg. 38, Lines 9-10 and Lines 21-24, Pg. 40, Lines 11-15) Instead of taking that recommendation, the Court sentenced Mr. Thorstad to actual jail time totaling eight years when accounting for the sentence on all counts. (App. Ppg. 13-16)

¶14 The representation by Mr. Thorstad's attorney was defective in that it was clear that the Court required notice, in advance, that he was pleading guilty pursuant to a plea agreement. The terms of that plea agreement, as set forth by the State, were for less time than he was actually sentenced to. The Court made it clear that it would not accept a plea agreement without prior notice. But for that mistake by Mr. Thorstad's attorney, his sentence would have been less.

¶15 While it could be argued that the Court may not have accepted the sentence negotiated between Mr. Thorstad and the State, there is nothing in the record to indicate that if his attorney had notified the Court appropriately that the matter was being submitted pursuant to a plea agreement, that it would not have accepted the negotiated sentence. Court's often accept the sentences negotiated by the parties when submitting matters for disposition by plea agreement. It is true that the Court warned Mr. Thorstad on two occasions that he could be facing fifty (50) years or more in prison as a result of his plea, and he agreed to proceed with his plea of guilty. However, under the circumstances, he was left with little actual choice given that his attorney failed to preserve his right to plead guilty under the terms of the plea agreement negotiated with the State.

Because of the mistake of his attorney, Mr. Thorstad's only options were to plead guilty and take his chances with the sentence, or take the matter to trial and take his chances with sentencing. The mistake on the part of his attorney left him with no real option.

CONCLUSION

¶16 The District Court erred in granting the State's Motion for Summary Disposition and dismissing Mr. Thorstad's Application for Post-Conviction Relief. For the reasons set forth herein, Mr. Thorstad requests that the Court enter an order reversing the District Court's decision and remanding the matter for evidentiary hearing.

Dated: January 16, 2018.

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CERTIFICATE OF SERVICE

I certify that on the 16th day of January, 2018, I caused the Brief of Petitioner-Appellant, Tanner Thorstad, and the Appendix to Brief of Petitioner-Appellant to be served electronically via E-mail upon the following:

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Dated: January 18, 2018.

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CERTIFICATE OF SERVICE

I certify that on the 17th day of January, 2018, I caused the Brief of Petitioner-Appellant, Tanner Thorstad, and the Appendix to Brief of Petitioner-Appellant to be served via United States Mail, postage pre-paid, upon the following:

Mr. Tanner Thorstad
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I further certify that on the 26th day of January, 2018, I caused the corrected Brief of Petitioner-Appellant Tanner Thorstad, together with the corrected Appendix of Petitioner Appellant, Tanner Thorstad, to be served upon the Petitioner-Appellant, Tanner Thorstad, via United States mail, postage prepaid, at the address listed above, and electronically via E-mail upon the following:

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