

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Roger Davies,)	
)	
Petitioner-Appellant,)	
)	Supreme Court No. 20180059
vs.)	
)	
State of North Dakota,)	McKenzie Co. No. 27-2017-CV-00199
)	
Respondent-Appellee.)	
)	
)	
)	
)	

BRIEF OF RESPONDENT-APPELLEE

APPEAL FROM ORDER GRANTING SUMMARY DISPOSITION AND
JUDGMENT OF DISMISSAL, FILED JANUARY 18, 2018

McKENZIE COUNTY DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT
HONORABLE BENJAMIN J. JOHNSON, PRESIDING

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11 James Wm. Moore et al., Moore's Federal Practice ¶ 56.13[1] (3d ed.1999).....¶6

STATEMENT OF THE ISSUES

[¶1] The District Court did not err in finding that Mr. Davies did not file a responsive affidavit to the State's Motion for Summary Disposition.

[¶2] The District Court properly granted the State's Motion for Summary Disposition.

STATEMENT OF THE CASE

[¶3] The State would agree with the Statement of the Case as laid out by Respondent-Defendant.

STATEMENT OF THE FACTS

[¶4] The State would agree with the Statement of Facts as laid out by the Respondent-Defendant.

STANDARD OF REVIEW

[¶5] "Our standard of review for denial of an application for post-conviction relief is well-established. "Post-conviction relief proceedings are civil in nature and are governed by the North Dakota Rules of Civil Procedure." Burke v. State, 2012 ND 169, ¶ 10, 820 N.W.2d 349.

"In post-conviction relief proceedings, a district court's findings of fact will not be disturbed unless they are clearly erroneous under N.D.R.Civ.P. 52(a). Cue v. State, 2003 ND 97, ¶ 10, 663 N.W.2d 637. 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. DeCoteau v. State, 2000 ND 44, ¶ 10, 608 N.W.2d 240. Questions of law are fully reviewable on appeal of a post-conviction proceeding. Peltier v. State, 2003 ND 27, ¶ 6, 657 N.W.2d 238." Greywind v. State, 2004 ND 213, ¶ 5, 689 N.W.2d 390." Parshall v. State, 2018 ND 69, ¶ 5, 908 N.W.2d 434, 435.

ARGUMENT

I. The District Court did not err in finding that Mr. Davies did not file a responsive affidavit to the State's Motion for Summary Disposition.

[¶6] The District Court was not clearly erroneous in determining that any affidavits did not apply to the summary disposition hearing. A Motion for Summary Disposition in Post-Conviction matters operates similar to a Motion for Summary Judgment. Steinbach v. State, 2003 ND 46, ¶¶ 11, 658 N.W.2d 355. "In such a case the rule allows the defendant to put the plaintiff to its proof, without the necessity of a full trial, by merely "pointing out" to the trial court the absence of evidence to support the plaintiff's case. Black, at ¶ 19 (citing Celotex, at 325, 106 S.Ct. 2548; Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1315 (9th Cir.1995); 11 James Wm. Moore et al., Moore's Federal Practice ¶ 56.13[1] (3d ed.1999)). This rule serves the policy underpinning Rule 56, N.D.R.Civ.P., "by allowing the defendant to put the plaintiff to its proof when the record contains no evidence on an essential element of the plaintiff's claim." Black, at ¶ 20." Steinbach, 2003 ND 46, ¶¶ 11-12.

[¶7] This means that Mr. Davies needed to provide more than just mere allegations in order to overcome the Motion for Summary Judgment. By the rules of Motions for Summary Judgment (N.D. Rule of Civ. Pro. 56(e)(2)) this is done with an affidavit. The only affidavit that gets close to this standard is one filed by Mr. Davies on October 23, 2017, and discusses an issue he had not raised until that point. In fact, the end of that affidavit restates general and non-specific allegations about his case. As the District Court indicated at the hearing, it was relying on this Court's opinion in Atkins, where the Petitioner did not file competent evidence to refute the Motion for Summary Disposition. "A motion for summary disposition puts the burden on the defendant to provide competent evidence to support his claim, and the defendant is only entitled to an evidentiary hearing if that burden is met." Steinbach, 2003 ND 46, ¶ 17, 658 N.W.2d 355." Atkins v. State, 2017 ND 290, ¶ 8, 904 N.W.2d 738, 740, reh'g denied (Jan. 26, 2018).

[¶8] While it is true that his attorney filed an affidavit, there is no showing that he had personal knowledge that created a material issue of fact. "An attorney's affidavit must be made on personal knowledge. McCull Farms, 2013 ND 169, ¶ 31, 837 N.W.2d 359; see also N.D.R.Civ.P. 56(e). "An attorney's affidavit is not a substitute for the party's personal knowledge and is admissible only to prove facts that are within the attorney's personal knowledge and to which he is competent to testify." McCull Farms, at ¶ 31." Markgraf v. Welker, 2015 ND 303,

¶ 17, 873 N.W.2d 26, 33. While it may be standard form for an attorney to file an affidavit, in order to overcome the burden in a Motion for Summary Disposition, the attorney must have personal knowledge of those facts. Here there is no showing that Attorney Glass had personal knowledge that would meet Mr. Davies' burden.

[¶9] Mr. Davies attempts to rescue his claim by stating that his initial Application for Post-Conviction Relief, filed March 27, 2017, should operate as the requisite affidavit. This is not anticipated in the statutes and is not proper procedures. The reason for the affidavit is that, following allegations in the initial filing, the State may, but is not required, to respond with a Motion for Summary Disposition. See N.D.C.C. § 29-32.1-09. Once this is filed, the Defendant is put to his proof and must put forward some evidence to show a material issue of fact. To allow the initial application to suffice as the affidavit would render the need for an affidavit meaningless. The initial application is comparable to a complaint, in that one party puts the other on notice of claims. In filing a Motion for Summary Disposition, a party lets the court know there are deficiencies in those claims. It is then incumbent on the non-moving party to show, through evidence and affidavit, that those claims are valid and/or a material issue of fact exists. Again, to allow the initial application to act as the affidavit would turn the process inside out.

[¶10] The order signed by the District Court in this case, states that based on the

findings on the record, including a lack of responsive affidavit, the Motion for Summary Disposition is granted. When one looks at the transcript of the hearing, the court made several findings in which to grant the motion. Mr. Davies would ask this Court to reverse because the District Court failed to cite those reasons in its written order. While it is true that N.D.C.C. § 29-32.1-11 requires explicit findings of fact, that statute applies when the District Court makes factual findings. Gonzalez v. State, 2017 ND 109, ¶ 10, 893 N.W.2d 473, 474, reh'g denied (May 16, 2017). In this case, this was an order following Motion for Summary Disposition, which does not require a factual basis. “Nevertheless, the district court's failure to articulate the basis for its decision is not a bar to summary dismissal. See N.D.R.Civ.P. 52(a)(3) (stating “[t]he court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion”).” Atkins v. State, 2017 ND 290, ¶ 10, 904 N.W.2d 738, 740, reh'g denied (Jan. 26, 2018) The District Court’s order is not clearly erroneous because it cites back to the findings made on the record. There is no reason for this Court to reverse on the basis for clearly erroneous as the order references the oral findings at the hearing.

II. The District Court properly granted the State’s Motion for Summary Disposition.

[¶11] While Summary Disposition is not ordinarily appropriate for ineffective assistance of counsel claims, this Court has allowed them in prior decisions.

“However, this Court 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.” *Id.*” *Atkins v. State*, 2017 ND 290, ¶ 6, 904 N.W.2d 738, 739, reh'g denied (Jan. 26, 2018). When there is no basis in law for such a claim, and no material issue of fact, Summary Disposition is appropriate. In this case, the District Court made such a ruling. In regards to the issue of whether the phone calls from law enforcement to Mr. Davies was proper, the District Court found that there was no issue of ineffective assistance of counsel, and no factual issue would change the fact that the law is not on Mr. Davies’s side. The District Court also found that he was sentenced based off of a plea agreement, and the original District Court Judge sentenced in line with the agreed upon range. There was no factual issue that need be presented. The same arguments are made in regards to defective charging document, harsh sentence, and judicial bias; that legally Mr. Davies does not have an issue here. Whether there is a material issue of fact on these specific issues is irrelevant, as the lack of an evidentiary hearing doesn’t change the fact that the law is against Mr. Davies on these issues. In regards to prosecutorial misconduct, there is simply no evidence presented that supports this claim. Taken all together, what the District Court was presented was allegations in the initial application for relief. When the State put Mr. Davies to his proof in its Motion for Summary Disposition, Mr. Davies filed to provide

sufficient evidence, through affidavit, to show a material issue of fact or that such facts would change the law provided. As such, the District Court properly granted the Motion for Summary Disposition.

[¶12] In regards to the factual basis, this was raised for the first time in Mr. Davies's supplemental affidavit. It was not addressed in his initial application, not in the State's Motion for Summary Disposition, so it should not be addressed now, as it was not responsive to the Summary Disposition. If this Court were to address this issue, there is still no material fact that would change the legal issue. This Court has stated that there is no one method for a District Court to handle a factual basis. "Further, we looked to federal authorities and stated "[i]n addition to questioning the parties, a trial court may conclude that a factual basis exists from anything that appears on the record." Id. at ¶ 13 (quotation marks omitted); see also State v. Glaser, 2015 ND 31, ¶ 27, 858 N.W.2d 920 ("Relying on the contents of the entire record in finding a plea's factual basis is consistent with the language of Rule 11(b)(3).")" State v. Berg, 2015 ND 61, ¶ 8, 860 N.W.2d 829, 833. In this case, the District Court took notice of the affidavit of probable cause, which both the attorney for the State and Mr. Davies agreed with. (Change of Plea Hearing Tr. Pg. 8, lns. 5-12). Further, Mr. Davies admitted to the conduct just after the factual basis. (Change of Plea Hearing Tr. Pg. 9 lns. 6-9). The safeguards of N.D.R.Crim.P. 11 were met in this case. Again, this Court should not have to address this issue, but if it does, there is still no basis for an

evidentiary hearing.

CONCLUSION

[¶13] In this case, the District Court did not err when it found there was no responsive affidavit to the Motion for Summary Disposition. The District appropriately granted the Motion for Summary Disposition because there were not material issues of fact raised by the Defendant that would warrant denying Summary Disposition.

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I certify that a true and correct copy of the **Brief of Respondent-Appelle** was emailed to the following parties via electronic mail on the 4th of May, 2018:

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