

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

Roger Lee Davies, Petitioner-Appellant, vs. State of North Dakota, Respondent-Appellee	Supreme Court No. 20180059 Case No. 27-2017-CV-00199
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On appeal from the Order granting Summary Disposition
and Judgment of Dismissal, filed January 18, 2018,
McKenzie County District Court
Northwest Judicial District
State of North Dakota
The Honorable Benjamin J. Johnson, Presiding

APPELLANT'S BRIEF

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[¶1]

Statement of the Issues

- I. Whether the district court erred in the factual finding that Mr. Davies did not file an affidavit in response to the State's motion for summary disposition.
- II. Whether the district court erred by granting the State's motion for summary disposition.

Statement of the Case

[¶2] This is an appeal from an Order granting Summary Disposition and from the Judgment dismissing an Application for Post-Conviction Relief regarding Roger Lee Davies (hereinafter referred to as “Mr. Davies”). On March 27, 2017, Mr. Davies filed a pro se Application for Post-Conviction Relief and requested a hearing on his Application. (Appellant’s App. at 4). The State of North Dakota filed an Answer and moved for summary disposition. (Appellant’s App. at 29 - 30). On December 18, 2017, the district court conducted a motion hearing on the State’s motion, but did not conduct an evidentiary hearing on the merits of Mr. Davies’ Application. (Appellant’s App. at 1 - 3: 12/18/17 Motion Hearing Tr. at 2, ln. 1 - 31, ln. 17). On January 18, 2018, the district court issued an Order granting Summary Disposition and an accompanying Judgment dismissing Mr. Davies’ Application without an evidentiary hearing. (Appellant’s App. at 42 - 43). Mr. Davies now appeals the January 18, 2018, Order and Judgment. (Appellant’s App. at 44).

Statement of the Facts

[¶3] In 2014, Mr. Davies was charged with Continuous Sexual Abuse of Child. (Appellant’s App. at 4). On November 7, 2014, Mr. Davies pled guilty to this charge. (Change of Plea Hearing Tr. at 8, ln. 5 - 6). During the change of plea hearing, the district court advised Mr. Davies that, as part of the binding plea agreement, “that the Court would not be able to sentence you to more than 15 years.” (Change of Plea Hearing Tr. at 6, ln. 24 - 25). During the hearing, the district court did not hear a factual basis for the guilty plea. (Change of Plea Hearing Tr. at 8, ln. 5 - 12). Instead, after Mr. Davies indicated a plea of

guilty, the district court stated, “I know that there’s an affidavit in the file, and the criminal information. Is there anything that anybody wants to put on the record for a factual basis, other than what’s in the file?” See id. Neither the State nor the defense offered any additional facts. See id. Later in the hearing, the district court found that there was a factual basis, presumably based on the facts of the affidavit of probable cause. (Change of Plea Hearing Tr. at 9, ln. 23). No other factual basis was offered during the hearing and Mr. Davies never agreed to the existence of a factual basis that would support the guilty plea. (Change of Plea Hearing Tr. at 2, ln. 1 - 10, ln. 24). Throughout the change of plea hearing, Mr. Davies was never asked whether he was acknowledging the existence of facts that supported the guilty plea or the existence of evidence from which a trier of fact could reasonably conclude that Mr. Davies committed the crime. See id.

[¶4] On a later date, Mr. Davies was sentenced to a term of fifteen years imprisonment, followed by lifetime supervised probation. (Appellant’s App. at 4).

[¶5] On March 27, 2017, Mr. Davies filed a pro se Application for Post-Conviction Relief. (Appellant’s App. at 4). Mr. Davies’ Application alleges that his attorney provided ineffective assistance of counsel. See id. at 5 - 16, ¶ 13 - 29). Of particular importance for this appeal, the Application claims ineffective assistance of counsel related to Mr. Davies’ competency to enter into a plea agreement, Mr. Davies’ understanding of the plea agreement and the information given to Mr. Davies prior to pleading guilty. See id. at 11. In addition, the Application alleges that Mr. Davies’ trial counsel never discussed the lifetime probationary requirement and that Mr. Davies would not have pled guilty if he had been made aware of it. See id. at 16, ¶ 29. Mr. Davies’ Application also claims judicial bias,

problems with the charging document, that the sentence was unduly harsh and prosecutorial misconduct. See id. at 16 - 26. The Application contains a verification, by which Mr. Davies acknowledges the veracity of the contents of the Application and indicates that it “can be treated as an affidavit”. See id. at 26 - 27. The Application is signed by Mr. Davies, as Petitioner and Affiant, and his signatures are properly notarized. See id. In addition to filing his Application for Post-Conviction Relief, Mr. Davies filed a written request for a hearing and for an attorney. (Appellant’s App. at 28). The district court appointed attorney Thomas Glass (hereinafter referred to as “Mr. Glass”) to represent Mr. Davies in relation to his post-conviction relief case. (Appellant’s App. at 1).

[¶6] The State answered and moved for summary disposition. (Appellant’s App. at 29 - 30). Mr. Glass filed a request for a hearing on the Application for Post-Conviction Relief. (Appellant’s App. at 31). Mr. Glass filed a response resisting the State’s motion for Summary Disposition and requesting that the motion be addressed at a hearing. (Appellant’s App. at 32).

[¶7] On October 7, 2017, Mr. Glass filed an affidavit. (Appellant’s App. at 33 - 34). Mr. Glass’ affidavit states that Mr. Davies resists the State’s Motion for Summary Disposition and requests an evidentiary hearing. See id. Mr. Glass’ affidavit also states the Mr. Davies agrees with the information in the affidavit and requests that it be submitted on his behalf, by and through his attorney. See id. The affidavit indicates that Mr. Davies’ original trial counsel, who represented him on the underlying criminal charge, provided ineffective assistance of counsel in three important ways. See id. The affidavit states that trial counsel failed to consider Mr. Davies’ limited understanding of the law and the effects of a guilty

plea as part of a plea agreement. See id. The affidavit indicates that, during sentencing, trial counsel failed to argue that Mr. Davies had a very low recidivism rate and failed to inform Mr. Davies about possible sentencing alternatives. See id. The Mr. Glass' affidavit also indicates that trial counsel never had a discussion with Mr. Davies about his due process rights and how they were violated. See id.

[¶8] On October 10, 2017, Mr. Davies filed a Supplemental Affidavit on his own, in support of his Application for Post-Conviction Relief. (Appellant's App. at 35 - 36). This affidavit states that during the change of plea hearing, the Court did not hear a factual basis for the guilty plea. See id. The affidavit also states that Mr. Davies did not agree to a factual basis because one was never provided. See id. The affidavit concludes that this failure violated Mr. Davies' rights. See id.

[¶9] On October 23, 2017, Mr. Davies filed a Second Supplemental Affidavit of Proof by Roger Lee Davies. (Appellant's App. at 37 - 41). This second affidavit by Mr. Davies indicates that Mr. Davies' original trial counsel provided ineffective assistance of counsel during the sentencing, by not arguing certain sentencing factors. See id. Instead of arguing those sentencing factors, trial counsel stated during sentencing, "As for factors one through five. I am not going to make a mockery of this Court, and waste the Court's time, by even attempting to argue these factors. It is clearly evident from the facts in this case that factors one through five are not in Mr. Davies' favor." See id. This second affidavit states that had trial counsel properly represented Mr. Davies at sentencing, there is a reasonable probability that the sentence would have been different. See id.

[¶10] On November 6, 2017, Mr. Glass moved to withdraw. (Appellant's App. at 1 - 3).

One day later, the district court issued an order, permitting Mr. Glass to withdraw as Mr. Davies' attorney. See id.

[¶11] On December 18, 2017, the district court conducted a motion hearing on the State's motion for summary disposition. At the hearing, Mr. Davies elected to represent himself. (12/18/17 Motion Hearing Tr. at 2, ln. 24 - 3, ln. 7). At the hearing, there was discussion about whether Mr. Davies had filed an affidavit in response to the State's motion for summary disposition. (12/18/17 Motion Hearing Tr. at 4, ln. 10 - 6, ln. 12). The district court noted that Mr. Glass filed an affidavit on October 7, 2017, but concluded that the Court would not give Mr. Glass' affidavit any evidentiary weight and would not consider the affidavit in its ruling. (12/18/17 Motion Hearing Tr. at 5, ln. 25 - 6, ln. 12). The district court determined that there would not be an evidentiary hearing and instead proceeded with a motion hearing on the State's summary disposition motion. (12/18/17 Motion Hearing Tr. at 7, ln. 1 - 4). The State and Mr. Davies argued the summary disposition motion. (12/18/17 Motion Hearing Tr. at 7, ln. 9 - 22, ln. 2). No witnesses were called and no evidence was presented by either side. See id. After both sides presented their legal arguments, the district court considered the State's motion. In considering the State's motion, the district court repeatedly mentioned that no evidence was presented to the Court in affidavit form. (12/18/17 Motion Hearing Tr. at 22, ln. 21 - 23: at 23, ln. 1 - 3: at 23, ln. 12 - 13: at 24, ln. 19 - 20: at 25, ln. 13 - 14: at 26, ln. 9 - 10: at 27, ln. 3 - 4: at 27, ln. 20 - 21: at 28, ln. 17 - 18: at 29, ln. 4 - 8). During the district court's consideration of the motion, Mr. Davies reasserted that there had not been a discussion between him and his trial counsel "about probation at all." (12/18/17 Motion Hearing Tr. at 26, ln. 4 - 6). However, the district court

was unwilling to consider Mr. Davies' statements which were offered that day. Ultimately, the district court granted the State's motion and summarily dismissed the Application without an evidentiary hearing. (12/18/17 Motion Hearing Tr. at 30, ln. 21 - 23).

[¶12] On January 18, 2017, the district court issued a written Order Granting Summary Disposition. (Appellant's App. at 42). The Order confirms that the hearing was a hearing on the State's motion for Summary Disposition and that Mr. Davies represented himself at the hearing. See id. The Order states, "IT IS HEREBY ORDERED, that for the reasons stated on the record by this court, including the fact that the Petitioner did not file an affidavit in response to the Motion for Summary Disposition, the Respondent's Motion for Summary Disposition is granted. This post-conviction relief is hereby dismissed." Id. The Order does not contain any other findings of fact or conclusions of law. See id. On the same date, the district court ordered that a Judgment of Dismissal be entered. (Appellant's App. at 43). No evidentiary hearing was ever held on Mr. Davies' Application. (Appellant's App. at 1 - 3). Mr. Davies now appeals the January 18, 2018, Order and Judgment. (Appellant's App. at 44).

Law and Argument

[¶13] This is an appeal of an order granting summary disposition on behalf of the State and the resulting judgment dismissing an application for post-conviction relief. (Appellant's App. at 32). This Court has jurisdiction over this appeal under N.D. Const. art. VI § 6 and N.D.C.C. § 29-32.1-14. North Dakota Century Code Section 29-32.1-14 provides, "A final judgment entered under this chapter may be reviewed by the supreme court of this state upon

appeal as provided by rule of the supreme court.” Id.

Standard of Review

[¶14] “Post-conviction relief proceedings are civil in nature and are governed by the North Dakota Rules of Civil Procedure.” Delvo v. State, 2010 ND 78, ¶ 10, 782 N.W.2d 72. Mr. Davies appeals the district court order granting the State’s motion for summary disposition. Mr. Davies specifically challenges the factual finding that “the Petitioner did not file an affidavit in response to the Motion for Summary Disposition,” as stated in the district court’s order. On appeal, findings of fact are reviewed under the “clearly erroneous” standard set forth in N.D.R.Civ.P. 52(a). Broadwell v. State, 2014 ND 6, ¶ 5, 841 N.W.2d 750. A finding of fact is clearly erroneous, “if it is not supported by any evidence or if, although there is some evidence to support it, a reviewing court is left with a definite and firm conviction a mistake has been made.” Id. Questions of law are fully reviewable on appeal of a post-conviction relief proceeding. See id. Additionally, the issue of ineffective assistance of counsel is a “mixed question of law and fact which is fully reviewable by this court.” Id. at ¶ 7. Mr. Davies also challenges the district court’s decision to grant the State’s motion for summary disposition and deny him post-conviction relief without a hearing. The standard of review for an appeal from a motion for summary disposition is analogous to an appeal from a motion for summary judgment. See Delvo at ¶ 10. “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.” Id. (quoting Berlin v. State,

2005 ND 110, ¶ 6, 698 N.W.2d 266). When the State moves for summary disposition of a petition for post-conviction relief, the petitioner must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact. Delvo at ¶ 12. “If the petitioner presents competent evidence, he is then entitled to an evidentiary hearing to fully present that evidence.” Id.

I. The district court erred in the factual finding that Mr. Davies did not file an affidavit in response to the State’s motion for summary disposition.

[¶15] The district court erred by finding that Mr. Davies had not filed an affidavit in response to the State’s motion for summary disposition. The district court’s order stated that it was granting the State’s motion for summary disposition, “for the reasons stated on the record by this court, including the fact that the Petitioner did not file an affidavit in response to the Motion for Summary Disposition.” (Appellant’s App. at 42). A review of the “reasons stated on the record” during the motion hearing reveals that the district court’s decision was made on the premise that Mr. Davies had not filed an affidavit in response to the State’s motion. (12/18/17 Motion Hearing Tr. at 22, ln. 3 - 30, ln. 23). The district court begins its decision with a comparison of Mr. Davies’ case to Atkins v. State, 2017 ND 290, 904 N.W.2d 738, which had been decided only a few weeks earlier (12/18/17 Motion Hearing Tr. at 22, ln. 3 - 5). In Atkins, this Court affirmed a district court decision summarily dismissing Atkins’ application for post-conviction relief because Atkins was put to his proof and failed to file any affidavits or other comparable means of evidence to support his allegations. Atkins v. State, 2017 ND 290, ¶ 1 - 4, 904 N.W.2d 738. In this case, the district court found the facts to be “really similar to Atkins,” and concluded that “we don’t have any

evidence presented through affidavit form prior to this hearing.” (12/18/17 Motion Hearing Tr. at 22, ln. 3 - 22). With regard to Mr. Davies’ claim of ineffective assistance of counsel, The district court stated, “in order to survive the summary judgment, I need an affidavit with that, and I don’t have that in the record.” (12/18/17 Motion Hearing Tr. at 23, ln. 12 - 26, ln. 20). With regard to Mr. Davies’ other claims, the district court repeatedly mentioned that no affidavits were filed. (12/18/17 Motion Hearing Tr. at 27, ln. 3 - 4: at 27, ln. 20 - 21: at 28, ln. 17 - 18: at 29, ln. 4 - 8).

[¶16] The district court’s factual finding that “the Petitioner did not file an affidavit in response to the Motion for Summary Disposition” is reviewed under the “clearly erroneous” standard. Broadwell v. State, 2014 ND 6, ¶ 5, 841 N.W.2d 750. Simply put, the district court’s factual finding is wrong. Mr. Davies filed several affidavits throughout the case. First, Mr. Davies’ initial Application for Post-Conviction Relief should be considered an affidavit. “An affidavit is a written declaration under oath made without notice to the adverse party.” N.D.C.C. § 31-04-02. Mr. Davies’ initial Application is a written declaration, made under oath, whereby he acknowledges the veracity of the contents of the document. (Appellant’s App. at 26 - 27). The verification portion of the Application states that it is to be treated as an affidavit. See id. The Application is signed by Mr. Davies, as Petitioner and Affiant, and his signatures are properly notarized, in the same manner as an affidavit. See id. Under these circumstances, to ignore the facts presented in Mr. Davies’ Application, based on the title of the document or the time that it was filed, is placing form over substance.

[¶17] In addition to the initial Application, on October 7, 2017, Mr. Davies filed an

affidavit, by and through his attorney, Mr. Glass. (Appellant's App. at 33 - 34). This was filed after the State's motion for summary disposition and clearly states that Mr. Davies resists the State's Motion and requests an evidentiary hearing. See id. Under the circumstances, there can be no doubt that it is "an affidavit in response to the Motion for Summary Disposition" as mentioned in the district court's order. The affidavit states the Mr. Davies agrees with the information in the affidavit and requests that it be submitted on his behalf, by and through his attorney. See id. There is nothing in the record to indicate why Mr. Glass needed to prepare and file an affidavit of his own, rather than have the Mr. Davies execute the affidavit. Perhaps, there were difficulties in arranging for the execution of an affidavit by Mr. Davies, as Mr. Davies was incarcerated in a different part of the State than his attorney. Regardless of the reason, this is an affidavit that was submitted in response to the Motion for Summary Disposition, contrary to the factual finding of the district court's order.

[¶18] Interestingly, prior to its ruling, the district court acknowledged the existence of Mr. Glass' affidavit, but refused to consider it. During the motion hearing, the district court stated, "There was an affidavit filed in October -- October 7th, -- just indicating that Mr. Davies resisted the motion; response to paragraph six never stated -- but this is all from Mr. Glass, who, I guess, can't -- I mean, he can file an affidavit if he wants, but I can't take his affidavit regarding something that he doesn't have personal knowledge about." (12/18/17 Motion Hearing Tr. at 5, ln. 25 - 6, ln. 7). It is clear error to make the factual finding that "the Petitioner did not file an affidavit in response to the Motion for Summary Disposition", when the district court was aware of Mr. Glass' affidavit.

[¶19] Whether the district court erred by refusing to consider the facts contained in Mr. Glass' affidavit is an equally interesting question. The district court completely disregarded the affidavit, because it came from Mr. Davies' attorney. It is not uncommon for an attorney to file an affidavit in a case, especially in response to a summary judgment motion. Such affidavits are typically about the existence of certain documents or physical evidence, the existence of which the attorney argues creates a genuine issue of fact or in some way supports his or her client's claim. Mr. Glass' affidavit should not be automatically disregarded, simply because it came from Mr. Davies' attorney and not directly from Mr. Davies. The facts contained in the affidavit were just as relevant. The district court indicated that it could not "take his affidavit regarding something that he doesn't have personal knowledge about." However, the affidavit itself does not say that Mr. Glass does not have personal knowledge about these facts. (Appellant's App. at 33 - 34). The affidavit itself is silent about how Mr. Glass came to understand the facts set forth in his affidavit. See id. The district court assumed that Mr. Glass had no personal knowledge about the facts set forth in the affidavit, but there is nothing that supports that assumption other than an attorney-client relationship between Mr. Davies and Mr. Glass, which was formed at a later date. To completely disregard the contents, and very existence, of the affidavit for this reason is clearly erroneous.

[¶20] In addition to the initial Application, and Mr. Glass' affidavit, on October 10, 2017, Mr. Davies filed a Pro Se Supplemental Affidavit by Roger Lee Davies in support of Post-Conviction Relief Application. (Appellant's App. at 35 - 36). This was also filed after the State's motion for summary disposition, but before the motion hearing. See id. Whatever

the reasons the district court had for disregarding Mr. Davies' initial Application and Mr. Glass' affidavit, there seems to be no valid reason for not recognizing the existence of this affidavit. This was an affidavit directly from Mr. Davies, filed with the district court in response to the State's motion for summary disposition, the existence of which makes the district court's factual finding that "the Petitioner did not file an affidavit in response to the Motion for Summary Disposition" clearly erroneous.

[¶21] Despite the factual finding contained in the order, the district court briefly mentioned this particular affidavit during the motion hearing. (12/18/17 Motion Hearing Tr. at 22, ln. 14 - 30, ln. 12). During the hearing, the district court noted that there was "a short filing by Mr. Davies" and that "I believe it mainly dealt with the factual basis." (12/18/17 Motion Hearing Tr. at 22, ln. 14 - 16). The district court stated that it had reviewed the transcript of the November 7, 2014, change of plea hearing and found that a factual basis was provided via the affidavit of probable cause. (12/18/17 Motion Hearing Tr. at 22, ln. 16 - 30, ln. 6). The district court then acknowledged that it was an affidavit filed by Mr. Davies and stated, "I do believe there was one other issue that Mr. Davies brought up in that. Oh, and I apologize. It was an affidavit indicating that no factual basis was done; that the affiant, Mr. Davies, did not agree to the factual basis. I think I addressed those two things." (12/18/17 Motion Hearing Tr. at 30, ln. 7 - 12). In fact, the district court had not addressed the requirement that Mr. Davies acknowledge the facts related to the factual basis. (12/18/17 Motion Hearing Tr. at 22, ln. 14 - 30, ln. 12). Inexplicably, the district court discussed the existence of this affidavit, while making the factual finding "that the Petitioner did not file an affidavit in response to the Motion for Summary Disposition". Although the district court

believed that it had “addressed those two things” contained in Mr. Davies’ affidavit, the district court did not explain any reason why the affidavit would not be considered. There is no rational explanation for the incongruity between the district court discussion of the existence of Mr. Davies’ affidavit and the resulting order finding that Mr. Davies did not file an affidavit. The subsequent factual finding which ignores the existence of this affidavit and finds that Mr. Davies did not file an affidavit is clearly erroneous.

[¶22] In addition to the initial Application, Mr. Glass’ affidavit, and Mr. Davies’ October 3, 2017, affidavit, Mr. Davies filed a Second Supplemental Affidavit of Proof by Roger Lee Davies on November 8, 2017. (Appellant’s App. at 37 - 41). This was also filed after the State’s motion for summary disposition but before the motion hearing. See id. Mr. Davies’ second affidavit indicates that his original trial counsel provided ineffective assistance of counsel during the sentencing by not arguing certain sentencing factors. See id. The district court did not consider this affidavit, in its discussion on the record, during the motion hearing, or in its ruling. As with the other three affidavits, the existence of this affidavit makes the district court’s ruling clearly erroneous.

[¶23] Given the existence of the multiple affidavits which were filed, and the limited factual findings which were made, it is difficult, if not impossible, to understand the district court’s rationale for its ruling. In post-conviction relief matters, North Dakota law requires the district court to make explicit findings of fact and clearly explain its conclusions of law. N.D.C.C. § 29-32.1-11 states, in part:

29-32.1-11. Findings of fact - Conclusions of law - Order.

1. The court shall make explicit findings on material questions of fact and state expressly its conclusions of law relating to each issue presented.
2. If the court rules that the applicant is not entitled to relief, its order must indicate whether the decision is based upon the pleadings, is by summary disposition, or is the result of an evidentiary hearing.

Subsection one requires the district court to make explicit findings of fact and conclusions of law in relation to each issue presented in a post-conviction relief application. See id. In this case, the district court completely ignored this statutory requirement. As such, appellate review of the district court's action is difficult. The district court stated that it was granting the State's motion "for the reasons stated on the record by this court, including the fact that the Petitioner did not file an affidavit in response to the Motion for Summary Disposition". (Appellant's App. at 42). As discussed, there were four affidavits which contained facts related to Mr. Davies' claim of ineffective assistance of counsel and wrongful conviction and which were filed with the Court prior to the motion hearing. (Appellant's App. at 1 - 3). The existence of these four affidavits simply cannot be reconciled with the district court's stated reason for granting the State's motion. Given the record in this case, the district court's factual finding must be considered clearly erroneous. Under the circumstances, this court should reverse the district court's order and remand this case for further proceedings.

II. The district court erred by granting the State's motion for summary disposition.

[¶24] This Court need not go any further than the review of the district court's order, which is based on such a clearly erroneous understanding of the facts so that a remand is required.

This Court is urged to remand, so that the district court can create a proper record and give Mr. Davies' application the proper consideration that it is due. However, to the extent that this Court chooses to consider the merits of the State's motion, your Appellant is required to do so as well. Had the district court properly considered the multiple affidavits filed by Mr. Davies, it would have denied the State's motion for summary disposition.

[¶25] Mr. Davies' initial Application for Post-Conviction Relief contained sufficient facts to survive a motion for summary disposition. When the State moves for summary disposition of a petition for post-conviction relief, the petitioner must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact. Delvo v. State, 2010 ND 78, ¶ 12, 782 N.W.2d 72. As previously discussed, Mr. Davies' application meets all of the statutory requirements for an affidavit. N.D.C.C. § 31-04-02. It is a written declaration, made under oath, signed by Mr. Davies and properly notarized, in which Mr. Davies states that the facts contained are true and states that it is to be treated as an affidavit. (Appellant's App. at 26 - 27). Under the circumstances, it would be error to not consider these facts when ruling on a motion for summary disposition.

[¶26] There are a few particular facts contained in Mr. Davies' Application that bear mention. Mr. Davies' Application claims that he was provided ineffective assistance of counsel at the time of his guilty plea. (Appellant's App. at 5 - 16 , ¶ 13 - 29). Specifically, Mr. Davies claims that his trial counsel failed to supply him with sufficient information to properly consider the decision to either plead guilty or go to trial. See id. at 11. In addition, Mr. Davies claims that during his conversations with his trial counsel, he was never advised about the possibility of lifetime probation and he would not have agreed to a plea which

included the possibility of lifetime probation. See id. at 16, ¶ 29. These statements are particularly important, because it relates to representation that was provided in a private conversation between Mr. Davies and his attorney. By necessity, such a conversation occurs outside of the courtroom, and outside of the presence of the Judge and the prosecutor, and is not part of the Court record.

[¶27] This court has previously recognized that, generally, summary disposition is not appropriate for claims of ineffective assistance of counsel. Coppage v. State, 2011 ND 227, ¶ 14, 807 N.W.2d 585. As explained in Coppage, “In most cases, claims of ineffective assistance of counsel are based on matters occurring outside the court record or transcript, and therefore the record and transcripts are not adequate to decide the claims and an evidentiary hearing may be required to consider other evidence beyond the record.” Id. Mr. Davies claims he was provided ineffective assistance of counsel during a private conversation between himself and his attorney. He claims his attorney did not provide him with the information necessary to make an informed choice to plead guilty or to go to trial and did not advise him of the possibility of lifetime probation. This is a genuine issue of material fact, which could only be properly considered at an evidentiary hearing, where the district court could hear from Mr. Davies and his attorney about what was said during those conversations. As a result, it was error to grant the motion for summary disposition and to dismiss Mr. Davies’ application without an evidentiary hearing.

[¶28] Mr. Glass’ affidavit also contains facts which were sufficient to overcome the State’s motion for summary disposition. Mr. Glass’ affidavit indicates that Mr. Davies’ attorney failed to consider Mr. Davies’ limited understanding of the law and the effects of a guilty

plea as part of a plea agreement and never had a discussion with Mr. Davies about his due process rights and how they were violated. (Appellant's App. at 34, ¶ 6 - 8). These claims also relate to representation that is provided outside of the courtroom, and therefore, outside of the Court's record. A claim that an attorney failed to properly advise a criminally accused defendant about the effects of a guilty plea and the defendant's due process rights can only be properly considered after an evidentiary hearing in which one or both of the individuals involved in the conversation can testify about what was said and what representation was provided. Mr. Glass' affidavit alleges facts, which if true, would support a claim of ineffective assistance of counsel and which create a genuine issue of material fact. Under the circumstances, summary disposition was in appropriate

[¶29] Mr. Davies' affidavit dated October 3, 2017, also contained facts which were sufficient to overcome a motion for summary disposition. In his Pro Se Supplemental Affidavit by Roger Lee Davies in Support of Post-Conviction Relief Application, Mr. Davies states that, during the change of plea hearing, the district court did not hear a factual basis for his guilty plea, nor did Mr. Davis agree to one. (Appellant's App. at 35 - 36). The affidavit concludes that this failure violated Mr. Davies' rights. See id.

[¶30] "A factual basis is a statement of facts to assure the defendant is guilty of the crime charged." State v. Berg, 2015 ND 61, ¶ 8, 860 N.W.2d 829 (quoting State v. Bates, 2007 ND 15, ¶ 8, 726 N.W.2d 595). Rule 11(b) of the Rules of Criminal Procedure outlines the procedural requirements with which the Court must comply while taking a guilty plea and states:

(b) Advice to defendant.

(1) The court may not accept a plea of guilty without first, by addressing the defendant personally [and determining that the defendant understands certain enumerated rights].

(2) Ensuring That a Plea is Voluntary. Before accepting a plea of guilty, the court must address the defendant personally [and determine that the plea is voluntarily made and free from coercion or promises].

(3) Determining the Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(4) Acknowledgment by Defendant. Before entering judgment on a guilty plea, the court must determine that the defendant either:

(A) acknowledges facts exist that support the guilty plea;
or

(B) while maintaining innocence, acknowledges that the guilty plea is knowingly, voluntarily and intelligently made by the defendant and that evidence exists from which the trier of fact could reasonably conclude that the defendant committed the crime.

N.D.R.Crim.P. 11(b). Rule 11(b)(3) requires the district court to determine that there is a factual basis for the guilty plea. See id. Rule 11(b)(4) requires the defendant to acknowledge either the existence of facts that support the guilty plea or the existence of evidence from which a trier of fact could reasonably conclude that the defendant committed the crime. See id. Rule 11 was amended effective March 1, 2014, to incorporate this requirement. See N.D.R.Crim.P. 11, Explanatory Note. See also State v. Berg, 2015 ND 61, n.1, 860 N.W.2d 829.

[¶31] In this case, Mr. Davies' affidavit states that, during the change of plea hearing, the

district court did not hear a factual basis for his guilty plea, nor did Mr. Davis agree to one. (Appellant's App. at 35 - 36). These statements raise a genuine issue of material fact, which would be justify an evidentiary hearing on this issue. Delvo v. State, 2010 ND 78, ¶ 10, 782 N.W.2d 72. Although no factual basis was recited on the record, the transcript of the change of plea hearing reveals that the district court stated, "I know that there's an affidavit in the file, and the criminal information. (Change of Plea Hearing Tr. at 8, ln. 7 - 8). The record is not clear, but presumably, the district court relied on the affidavit of probable cause to find the factual basis. (Change of Plea Hearing Tr. at 9, ln. 23). Given the rulings of this Court, it would seem that the district court could conclude that a factual basis existed from this affidavit in the Court's record. State v. Berg, 2015 ND 61, ¶ 8, 860 N.W.2d 829. However, in addition to concluding that a factual basis exists, the district court was also required to determine whether Mr. Davies acknowledged the existence of facts that supported the guilty plea. N.D.R.Crim.P. 11(b)(4). Mr. Davies' affidavit clearly states, "That affiant did not agree to a factual basis because one was never presented at the change of plea hearing." (Appellant's App. at 35, ¶ 3). A review of the change of plea hearing transcript reveals that Mr. Davies' assertion in this regard was correct. These facts relate back to his original petition which stated that the conviction was obtained in violation of North Dakota law. (Appellant's App. at 5, ¶ 12). Given the procedural posture of the case, Mr. Davies' Pro Se Supplemental Affidavit, dated October 3, 2017, was enough to raise a factual question of whether the plea was properly taken. Under the circumstances, it was error to grant the State's motion for summary disposition.

Conclusion

[¶32] For the foregoing reasons, Mr. Davies respectfully requests that the district court's Order be reversed and remanded for further proceedings.

Dated this 4th day of April, 2018.

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**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

<p>Roger Lee Davies, Petitioner-Appellant, vs. State of North Dakota, Respondent-Appellee</p>	<p style="text-align: center;">Supreme Court No. 20180059</p> <p style="text-align: center;">Case No. 27-2017-CV-00199</p> <p style="text-align: center;">Certificate of Service</p>
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[¶1] I hereby certify that on the 4th day of April, 2018, the following documents:

1. Appellant’s Brief;
2. Appellant’s Appendix; and
3. Certificate of Service.

were served, via email, upon the following individual:

Email: mcsa@co.mckenzie.nd.us
Charles Burke Neff
McKenzie County State's Attorney

and was served, via first class mail, upon the Petitioner-Appellant, as follows:

Roger Lee Davies, # 040932
c/o James River Corrections Center
2521 Circle Drive
Jamestown, ND 58401

Dated this 4th day of April, 2018.

 /s/ Scott O. Diamond
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