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MAY 23, 2018
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Jason Wayne Oien,	)	
	)	
Petitioner/Appellant,	)	Supreme Court No. 20180078
vs.	)	
	)	District Court No. 09-2017-CV-02757
State of North Dakota,	)	
	)	
Respondent/Appellee.	)	

APPEAL FROM ORDER DENYING POST-CONVICTION RELIEF
DATED FEBRUARY 22, 2018
CASS COUNTY DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE THOMAS R. OLSON, PRESIDING

APPELLEE'S BRIEF

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[¶1] **STATEMENT OF THE ISSUE**

[¶2] Whether Oien received effective assistance of trial counsel.

[¶3] **STATEMENT OF FACTS**

[¶4] On September 27, 2016, Jason Wayne Oien ("Oien") pled guilty to Manslaughter and two counts of Criminal Conspiracy (Appellant's Appendix ["App."] at 11). Oien was sentenced on January 6, 2017 (Appellant's App. at 11). He was found to be a habitual offender which resulted in enhanced sentences (Appellant's App. at 11).

[¶5] Oien filed a Petition for Post-Conviction Relief, claiming ineffective assistance of counsel (Appellant's App. at 11). A hearing was held on the matter on February 9, 2018. At the hearing, Oien called two attorneys who had represented him: Rhiannon Gorham and Jessica Ahrendt (Appellant's App. at 11).

[¶6] The district court made findings of fact regarding Oien's petition for post-conviction relief. (Appellant's App. at 11-12). Among these findings were that defense counsel: met frequently with Oien and developed a strategy for trial, discussed the likelihood that Oien would be found a habitual offender in the weeks and months before trial, did not overpower Oien's will or threaten him to plead guilty, and was prepared to proceed on the morning of trial but Oien pled guilty (Appellant's App. at 12).

[¶7] On February 13, 2018, Judge Thomas Olson issued an order denying Oien's petition for post-conviction relief, concluding that Oien's counsel was neither ineffective nor defective to warrant a new trial (Appellant's App. at 14).

[¶8] STANDARD OF REVIEW

[¶9] The issue of ineffective assistance of counsel is a mixed question of law and fact which is fully reviewable on appeal. Roth v. State, 2011 ND 112, ¶ 11, 735 N.W.2d 882. Post-conviction relief proceedings are governed by the North Dakota Rules of Civil Procedure. Flanagan v. State, 2006 ND 76, ¶ 9, 712 N.W.2d 602. The district court's findings of fact in a post-conviction proceeding will not be set aside on appeal unless clearly erroneous under N.D.R.Civ.P. 52(a). Rümmer v. State, 2006 ND 216, ¶ 8, 722 N.W.2d 528 (citing Laib v. State, 2005 ND 187, ¶ 11, 705 N.W.2d 845). "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by any evidence, or if, although there is some evidence to support the finding, this Court is left with a definite and firm conviction a mistake has been made." Odom v. State, 2010 ND 65, ¶ 10, 780 N.W.2d 666 (quoting Sambursky v. State, 2008 ND 133, ¶ 7, 751 N.W.2d 247). "[T]he reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." N.D.R.Civ.P. 52(a)(6).

[¶10] LAW AND ARGUMENT

[¶11] I. The decision denying Oien's Application for Post-Conviction Relief should be affirmed because the district court properly concluded that Oien's representation by counsel was neither defective nor prejudicial.

[¶12] The issue of ineffective assistance of counsel is a mixed question of law and fact which is fully reviewable on appeal. Roth v. State, 2011 ND 112, ¶ 11, 735 N.W.2d 882. Post-conviction relief proceedings are governed by the North Dakota Rules of Civil Procedure. Flanagan v. State, 2006 ND 76, ¶ 9, 712 N.W.2d 602. The district court's findings of fact in a post-conviction proceeding will not be set aside on appeal unless clearly erroneous under N.D.R.Civ.P. 52(a). Rümmer v. State, 2006 ND 216, ¶ 8, 722 N.W.2d 528 (citing Laib v. State, 2005 ND 187, ¶ 11, 705 N.W.2d 845). "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by any evidence, or if, although there is some evidence to support the finding, this Court is left with a definite and firm conviction a mistake has been made." Odom v. State, 2010 ND 65, ¶ 10, 780 N.W.2d 666 (quoting Sambursky v. State, 2008 ND 133, ¶ 7, 751 N.W.2d 247). "[T]he reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." N.D.R.Civ.P. 52(a)(6).

[¶13] A. The performance of Oien's counsel satisfies the reasonableness prong.

[¶14] Effectiveness of counsel is measured by an 'objective standard of reasonableness' considering 'prevailing professional norms.' Id. at ¶ 10 (quoting

Heckelsmiller, 2004 ND 191, ¶¶ 3-4, 687 N.W.2d 454.). Judicial scrutiny of counsel's performance must be highly deferential. Strickland, 466 U.S. at 689.

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, *a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance*; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Id. (emphasis added).

[¶15] After Oien's trial lawyers testified at the post-conviction hearing and were cross-examined by attorneys for the State, the district court made findings of fact regarding their performance. Among the factual findings were that defense counsel frequently met with Oien, was prepared to go forward on the morning of trial, discussed the likelihood of a habitual offender finding, did not overpower Oien's will or threaten him to plead guilty, and was prepared on the morning of trial to go forward (Appellant's App. at 13). The district court then concluded based on its findings of fact that the performance of Oien's lawyers did not fall below an objective standard of reasonableness.

[¶16] Oien asserts that Attorney Gorham convinced him to plead guilty despite a judicial finding of fact to the contrary. The appellant has not stated a reason for this Court to question the validity of the district court's findings. This Court gives deference to district court findings of fact unless they are clearly

erroneous. Rümmer, 2006 ND 216 ¶ 8, 722 N.W.2d 528. Because the appellant has not briefed the Court on why it should set aside the district court's findings related to Oien's guilty plea and the district court was better situated to assess the credibility of the witnesses, this Court should defer to the district court's findings of fact. Based on the district court's factual findings, and taking into account the strong presumption that counsel's conduct falls within the range of reasonable professional conduct, it is clear that Oien's counsel was effective.

[¶17] **B. Oien was not prejudiced by his counsel's performance because he has not shown a reasonable probability that proceeding to trial would have resulted in a not guilty verdict.**

[¶18] The second prong in a claim for ineffective assistance of counsel requires a defendant to establish that counsel's deficient performance prejudiced the defendant. Stoppleworth v. State, 501 N.W.2d 325, 327 (N.D. 1993). "The second prong of the Strickland test is satisfied in the context of a guilty plea if the defendant shows 'there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" Lindsey v. State, 2014 ND 174, ¶ 19, 852 N.W.2d 383, 390 (quoting Ernst v. State, 2004 ND 152 ¶ 10, 683 N.W.2d 891. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Flanagan, 2006 ND 76, ¶ 10, 712 N.W.2d 602. "This requires a "substantial," not just "conceivable," likelihood of a different result." Cullen v. Pinholster, 563 U.S. 170, 189 (2011).

[¶19] All courts "require something more than defendant's 'subjective, self-serving' statement that, with competent advice, he would" not have pled guilty and would have insisted on going to trial. 3 Wayne LaFave et al., Criminal Procedure § 11.10(d) (3rd ed.2007). The petitioner "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." Padilla v. Kentucky, 559 U.S. 356, 372 (2010). In doing so, "[t]he movant must allege facts that, if proven, would support a conclusion that the decision to reject the plea bargain and go to trial would have been rational, *e.g.*, valid defenses, a pending suppression motion that could undermine the prosecution's case, or the realistic potential for a lower sentence." Bahtiraj v. State, 2013 ND 240, ¶ 16, 840 N.W.2d 605 (quoting Stiger v. Commonwealth, 381 S.W.3d 230, 237 (Ky. 2012)).

[¶20] Oien contends that had he gone to trial instead of entering an Alford plea, there is a "good possibility" he would have been found not guilty. He has alleged no facts in support of that claim. He has not identified any weaknesses in the State's case. He has only provided a self-serving statement that he would have insisted on going to trial. The applicable test asks whether "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Lindsey, 2014 ND 174, ¶ 19, 852 N.W.2d 383, 390 (quoting Ernst, 2004 ND 152 ¶ 10, 683 N.W.2d 891. A "reasonable probability" requires a "substantial," not just "conceivable," likelihood of a different result. Cullen, 563 U.S. at 189. Without any facts supporting Oien's claim of a "good possibility" he would be found not guilty at trial, the likelihood

of such an outcome is merely conceivable. Because Oien has not alleged any facts supporting his conclusion that proceeding to trial rather than pleading guilty would result in a not guilty verdict, he has failed to show that he was prejudiced by his counsel's performance.

[¶21] CONCLUSION

[¶22]For the foregoing reasons, the State respectfully requests this court **AFFIRM** the district court's order denying Oien's petition for post-conviction relief.

Respectfully submitted this 23rd day of May, 2018.

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[¶23] CERTIFICATE OF SERVICE

[¶24] A true and correct copy of the foregoing document was sent by email on the 23rd day of May, 2018, to: pulkrabek@lawyer.com.

Tristan Van de Streek