

STATE OF NORTH DAKOTA
NORTH DAKOTA SUPREME COURT

SUPREME COURT NO. 20180109

Sean Kovalevich,)
)
 Petitioner/Appellant,)
 vs.)
)
 State of North Dakota,)
)
 Respondent/Appellee.)

APPEAL FROM THE CIVIL JUDGMENT
NORTHEAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY CIVIL NO. 18-2017-CV-00957
THE HONORABLE JOHN THELEN PRESIDING

BRIEF

BENJAMIN C. PULKRABEK

ATTORNEY AT LAW
402 - 1ST ST. NW
MANDAN, ND 58554
701-663-1929
N.D. State Bar ID No. 02908
PULKRABEK@LAWYER.COM

TABLE OF CONTENTS

Table of Contents	¶I
Table of Cases	¶ii
Abbreviations	¶iii
Statement of Issues	¶1
Nature of the Case	¶2
Statement of Facts	¶18

Issue Presented:

I. Did the trial court at the conclusion of the post conviction err when it found that Mr. Kovalevich's newly discovered evidence (Exhibit 2) was only newly acquired evidence and not newly discovered evidence? ¶1, 23

Argument	¶24
Conclusion	¶26
Certificate of Service	¶28

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES
TABLE OF CASES

State vs Lavallie 2015 ND 74, 861 N.W.2d 168	¶24
Wacht v. State 2015 ND 154, ¶11, 864 N.W.2d 740	¶24
N.D.Crim.P. 33	¶24

ABBREVIATIONS

Transcript - T.
Appendix - App.
Page - P.
Line - L.
Question - Q.
Answer - A.

STATEMENT OF ISSUE

[¶1] Did the trial court at the conclusion of the post conviction petition err when it found that Mr. Kovalevich's newly discovered evidence (Exhibit 2) was only newly acquired evidence and not newly discovered evidence?

NATURE OF THE CASE

[¶2] This case began when Defendant, Sean Kovalevich (Mr. Kovalevich) on April 17, 2017 made a Post Conviction Relief Application and filed it with the court.

[¶3] On April 19, 2017 Mr. Kovalevich applied for indigent defense services and on the same date a Notice of Eligibility for Appointed Counsel was filed.

[¶4] The State's answer to Mr. Kovalevich's Post Conviction Relief Application was filed on May 15, 2017 along with a 3.2 Motion and a Motion for Summary Disposition of Petitioner and Petition for Post Conviction Relief.

[¶5] Mr. Kovalevich filed a response to State's Motion for Summary Judgment was filed on June 5, 2017.

[¶6] A Supplemental Application for Post Conviction Relief and Brief was filed on July 19, 2017.

[¶7] An Order of continuance was filed on September 27, 2017.

[¶8] The Post Conviction Hearing was held on October 30, 2017.

[¶9] Mr. Kavolevich was present at that hearing.

[¶10] At the conclusion of he Post Conviction Hearing the judge ordered both sides to file proposed order as to how the case should end.

[¶11] The proposed order from the State was filed on January 16, 2018 and the proposed order from Mr. Kovalevich was filed on January 23, 2108.

[¶12] An Order denying Mr. Kovalevich's Application for Post Conviction Relief was entered on February 12, 2018.

[¶13] Mr. Kovalevich filed a Notice of Appeal on March 16, 2018 and an Order for Transcript was filed on the same date.

[¶14] The Notice of Filing the Notice of Appeal was filed on March 16, 2018.

[¶15] A Notice Amending the Notice of Appeal with Preliminary Issues was filed on March 22, 2018.

[¶16] The Notice of Filing of the Amended Notice of Appeal was filed on March 22, 2018.

[¶17] This case is now before the North Dakota Supreme Court.

STATEMENT OF FACTS

[¶18] Petitioner/Appellant, Sean Michael Kovalevich (Mr. Kovalevich) is appealing from the district court denial of his application for post conviction relief. In Mr. Kovalevich's application for post conviction relief there were four allegations raised. On October 30, 2017 at the start of post conviction petition hearing, the court heard and ruled on the State's motion for summary disposition of allegations 1, 2, and 4 in Mr. Kovalevich's application for post conviction relief. That court ruling is found in the T. P.8, L.18024 and it granted summary disposition of allegations 1, 2 and 4. After this ruling the only allegation remaining was allegation 3, newly discovered evidence.

[¶19] At Mr. Kovalevich's trial, State vs Kovalevich Case No, 18-2012-CR-03069 the State put into evidence Exhibits #251 and #252. Exhibit #251 was a receipt from the CanadInn in Grand Forks, North Dakota that showed Mr. Kovalevich had a room there from February 3rd to 6th of 2012. Exhibit #252 was a receipt from the

CanadInn in Grand Forks, North Dakota that showed Mr. Kovalevich had a room at the CanadInn in Grand Forks, North Dakota from August 13 to 15 of 2012.

[¶20] The newly discovered evidence in this case is a receipt Mr. Kovalevich recently discovered (Exhibit 2). He got Exhibit 2 in a response to two letters he sent to the CanadInn in Grand Forks, North Dakota requesting receipts for the dates he stayed at the CanadInn in 2012. Exhibit 2 could not be discovered by the State and was not disclosed to Mr. Kovalevich in response to his discovery motions to the State because the name Kovalevich had been incorrectly spelled by CanadInn employee as Kozalevich (emphasis added) and not Kovalevich. Therefore this receipt (Exhibit 2) was not discovered before or during trial in State vs Kovalevich Case No. 18-2012-CR-03069. Had it been discovered Exhibit 2 would have established that Mr. Kovalevich alleged offenses occurred after S.M. turned 15 on June 14th of 2012.

[¶21] The following testimony of Mr. Kovalevich is found in T.P.15,L.14 to P.16,L.18.

Q. Okay. So we have one in February 2012 which is Exhibit 1, one in July of 2012 which is Exhibit 2, and the one in August 2012 which is Exhibit 3.

A. Yes.

Q. And why is it important that there was a receipt dated July of 2012?

A. In her interviews, S.M. had described three trips to the CanadInn. She had stated that on the first trip there was no sexual activity and on the second two trips that there was sexual activity. She had her birthday in between which would have been in June 14 turning 15. I was charged with the February dates as being, I guess, the first trip and the August date as being

one of the subsequent trips. With these three new receipts it matches the three trips, I guess, that she described. The first trip where she said no sexual activity happened. With these new three receipts would have been prior to her birthday, and the second two trips would have been after her birthday, so if sexual activity only happened on the second two trips, I couldn't have been charged with AA felonies.

Q. So when the July receipt was not found, they basically treated it, February, as going to agree that she forgot about the timeline and that February must have been the time when sexual contact had occurred and therefore she would have been 14 at that time, is that what you're saying?

A. Right. Once they were presented with the two receipts that they did have, came to that conclusion.

Q. Okay. And?

[¶22] Had Mr. Kovalevich been given in his discovery motion to the State Exhibit 2 prior to or during the trial in State vs Kovalevich Case No. 18-2012-CR-03069 he would have been able to prove that at his first stay at the CanadInn in February of 2012 that there was no sexual activity between him and M.S.. He would also have been able to prove that if any sexual activity did occur between him and M.S. it was after her 15th birthday on Jun 14, 2012. Therefore the charges against him should have been two Class C felonies and not two Class AA felonies.

ISSUE

[¶23] Did the trial court at the conclusion of the post conviction petition err

when it found that Mr. Kovalevich's newly discovered evidence (Exhibit 2) was only newly acquired evidence and not newly discovered evidence?

ARGUMENT

{¶24} The Standard of Review in this case involves the review of a trial judge's decision denying Mr. Kovalevich's Motion for a New Trial which was based on newly discovered evidence. Such a review is made under an abuse of discretion standard. According to *State v. Lavallie*, 2015 ND 74, 861 N.W.2d 168 "A district court abuses its discretion only if it acts in an arbitrary, unreasonable, or unconscionable manner, if its decision is not the product of a rational mental process leading to a reasoned determination, or if it misinterprets or misapplies the law." Id.

{¶1} An application for post-conviction relief based on newly discovered evidence is similar to a request for a new trial based on newly discovered evidence under N.D.Crim.P. 33. *Wacht v. State*, 2015 ND 154, ¶11, 864 N.W.2d 740. "To prevail on a motion for new trial on the basis of newly discovered evidence under N.D.Crim.P. 33, the defendant must show (1) the evidence was discovered after trial (2) the failure to learn about the evidence at the time of trial was not the result of the defendant's lack of diligence, (3) the newly discovered evidence is material to the issues at trial, and (4) the weight and quality of the newly discovered evidence would likely result in an acquittal." *Wacht*, at ¶11.

{¶7} In order to obtain relief based on newly discovered evidence, the second prong provides that the failure to learn about the evidence at the time of trial was not the result of the defendant's lack of diligence. Mr. Kovalevich testified that he sent two separate letters to the CanadInn requesting said receipts. When he

finally received the newly discovered evidence Exhibit 2 he learned the reasons why said receipt was so hard to find was because a CanadInn employee had inadvertently spelled “Kovalevich”, as “Kozalevich”, There is no way Mr. Kovalevich could have known or anticipated that the hotel would make this misspelled mistake. It seems clear that this was an honest mistake by a CanadInn employee and one that couldn’t be discovered by Mr. Kovalevich until the CanadInn sent him Exhibit 2. Therefore accordingly, Mr. Kovalevich’s failure to learn about this receipt, Exhibit 2 before or during his trial was not the result of the Mr. Kovalevich’s lack of diligence. It was a discovery problem caused by a CanadInn employee.

[¶25] According to S.M. no sexual acts occurred during the first trip Mr. Kovalevich and S.M. made to Grand Forks, North Dakota. This first trip according to the evidence and testimony had to be the trip in February of 2012. Therefore the alleged sexual acts in this case could have only taken place in July and August of 2012. Both of these months took place after S.M. fifteenth birthday which was June 14, 2012.

CONCLUSION

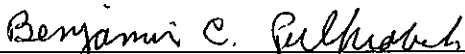
[¶26] The newly discovered evidence Exhibit 2 wasn’t discovered by the State prior to or during Mr. Kovalevich’s trial in Case No. 18-20120CR-03069. The States discovery was prevented by CanadInn employee because he or she misspelled Mr. Kovalevich’s last name as Kozalevich (emphasis added).

[¶27] Mr. Kovalevich at his hearing on his post-conviction application showed that:

1. Exhibit 2 was discovered after his trial

2. His failure to learn about Exhibit 2 at an earlier date was because of an error a CanadInn employee made on the spelling of his name and without his diligence in sending two letters to the CanadInn Exhibit 2 would have never been discovered.
3. The newly discovered evidence Exhibit 2 is material to the issues at trial because if it had been known or during trial the charges against him would have been Class C felonies and not Class AA felonies.
4. The weight and quality of the newly discovered evidence Exhibit 2 would have resulted in an acquittal on his two Class AA charges.

Dated this 24 day of April, 2018.



Benjamin C. Pulkrabek, ID #02908
Attorney at Law
402 - 1st St. NW
Mandan, ND 58554
701-663-1929
Pulkrabek@lawyer.com

CERTIFICATE OF SERVICE BY MAIL

[¶28] The undersigned hereby certifies that she is an employee in the office of Pulkrabek Law Firm and is a person of such age and discretion as to be competent to serve papers.

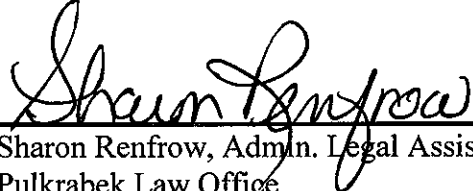
That on April 24, 2018, she served, by e-mail and mailed a copy of the following:

APPELLANTS APPENDIX AND BRIEF

to: Meredith Huseby Larson
Grand Forks State's Attorneys Office
meredith.larson@gfcounty.org

Mailed to: Sean Kovalevich
c/o NDSP
P.O. Box 5521
Bismarck, ND 58506

The undersigned further certifies that on April 24, 2018, she served electronically on the Clerk, North Dakota Supreme Court, the APPELLANTS APPENDIX AND BRIEF.



Sharon Renfrow, Admin. Legal Assistant
Pulkrabek Law Office