

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

Sean Michael Kovalevich,)	Supreme Court No. 20180109
)	
)	
Petitioner/Appellant,)	
)	District Court No. 18-2017-CV-00957
vs.)	
)	
State of North Dakota,)	
)	
Respondent/Appellee.)	

ON APPEAL FROM DENIAL OF POST-CONVICTION RELIEF
FROM THE DISTRICT COURT
FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY, NORTH DAKOTA
THE HONORABLE JUDGE THELEN, PRESIDING

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUE

- I. Whether the district court properly denied Kovalevich's Application and Petition for Post-Conviction Relief in 18-2017-CV-00957?**

STATEMENT OF THE FACTS

[¶1] On October 31, 2013, Kovalevich was found guilty of two counts of Gross Sexual Imposition and one count of Corruption of a Minor in 18-2012-CR-03069. The underlying facts of the criminal case were previously outlined for this Court in detail in State v. Kovalevich, 2015 ND 11. Subsequent to the verdict, Kovalevich filed a Motion for a New Trial. Def.'s Mot. For New Trial, Nov. 14, 2013. On January 27, 2014, the district court ruled denied the motion for new trial. District Ct. Order Denying Def.'s Mot. For New Trial, Jan. 27, 2014.

[¶2] Two days after the ruling denying the Motion for New trial was issued, Kovalevich filed a Motion to Dismiss alleging a Rule 16 violation. Def. Mot. To Dismiss, Jan. 29, 2014. The State filed a responsive brief on February 12, 2014, and a hearing on the matter was held on February 13, 2014. State's Brief in Opp'n to Def.'s Mot. To Dismiss, Feb. 12, 2014. The court subsequently ruled that it was unable to grant relief pursuant to Rule 16 post-trial and denied Kovalevich's Motion on procedural grounds. District Ct. Order Denying Def's Mot. To Dismiss, Feb. 13, 2014. On February 24, 2014, Kovalevich was sentenced to 30 years with the North Dakota Department of Corrections and 10 years of supervised probation. Kovalevich filed a Notice of Appeal on March 13, 2014. His appeal alleged the district court erred when denying his post-trial Motion to Dismiss and Motion for New Trial. His appeal was denied and conviction and sentence was affirmed on January 15, 2015. State v. Kovalevich, 2015 ND 11, 858 N.W.2d 625. On November 18, 2015, Kovalevich filed a Petition and Application for Post-Conviction Relief alleging prosecutorial misconduct and ineffective assistance of counsel. Petition and Application for Post-Conviction Relief, November 18, 2015, 18-2015-CV-2064. The

State filed a Motion for Summary Disposition as to the allegation of prosecutorial misconduct on December 18, 2015. The State denied the allegations of ineffective assistance of counsel. Answer, Motion for Summary Disposition and Brief in Support of Motion for Summary Disposition and in Opposition to Petition and Application for Post-Conviction Relief, December 18, 2015, 18-2015-CV-2064. The district court granted the State's Motion for Summary Disposition as to the allegation of prosecutorial misconduct based on the grounds of misuse of process and res judicata. Order Granting Summary Disposition, in Part, and Denying, in Part, Respondent's Motion for Summary Judgment, January 11, 2016, 18-2015-CV-2064. An evidentiary hearing was held limited to the issue of ineffective assistance of counsel. Kovalevich alleged ineffective assistance of counsel for multiple reasons including failing to file pretrial motions, filing procedurally deficient motions, failing to request a continuance, and failing to depose the victim. Subsequent to the evidentiary hearing, the district court filed an Order Denying Post-Conviction Relief. Order Denying Post-Conviction Relief, April 15, 2016, 18-2015-CV-2064.

[¶3] On May 25, 2016, Kovalevich filed a Notice of Appeal of the district court's denial of Post-Conviction Relief. However, before filing a brief with the North Dakota Supreme Court, Kovalevich filed a Motion for a New Trial in this case, 18-2015-CV-02064, as well as in the underlying criminal case 18-2012-CR-3069. The North Dakota Supreme Court remanded this case for the district court to hear the two new motions. Kovalevich alleged in 18-2015-CV-2064 Motion for New Trial that he should be granted a new trial due to "newly discovered evidence" and ineffective assistance of counsel. The allegation of newly discovered evidence arose from the evidentiary hearing April 14,

2016, in which Kovalevich filed a subpoena duces tecum on Agent Zachmeier which produced two (2) pages of previously undiscovered handwritten field notes. Kovalevich alleged that the two (2) pages of handwritten notes constituted “newly discovered evidence”. The allegation of ineffective assistance of counsel was a reassertion of previously litigated complaints regarding a procedurally improper Motion to Dismiss. In 18-2012-CR-3069, Kovalevich filed a pro se Motion for New Trial alleging newly discovered evidence which led him to believe the Bureau of Criminal Investigations (BCI) did not have jurisdiction to investigate his case and thus he was entitled to a new trial. The State resisted both motions. A hearing was held on September 1, 2016. The district court denied both motions and specifically ruled that the ineffective assistance of counsel claimed had been previously fully and finally determined. Order Denying Motion for New Trial, September 7, 2016, 18-2015-CV-2064. The court also denied Kovalevich’s pro se motion in the criminal case ruling that BCI had jurisdiction. Order Denying Motion for New Trial, September 7, 2016, 18-2012-CR-3069.

[¶4] A notice of appeal was filed in both 18-2012-CR-3069 and 18-2015-CV-2064. There were three issues on appeal: 1) Whether the district court erred in denying Post-Conviction Relief; 2) Whether the district court erred in denying a Motion for New Trial in 18-2015-CV-2064; and 3) Whether the district court erred in denying a Motion for New Trial in 18-2012-CR-3069. On March 1, 2017, the North Dakota Supreme Court filed an opinion affirming the district court’s orders denying post-conviction relief and the motions for new trial. Kovalevich v. State, 2017 ND 40.

[¶5] On April 17, 2017, Kovalevich filed a second application for Post-Conviction Relief. His petition alleged: 1) The victim’s due process rights were violated, 2) selective

and vindictive prosecution, 3) newly discovered evidence, and 4) unlawful conviction. The State filed an Answer, Motion for Summary Dismissal, and Brief in Support of Motion for Summary Dismissal on May 15, 2017. On June 2, 2017, Petitioner filed Response to State's Motion for Summary Disposition. On June 6, 2017, the district court issued an Order Reserving Ruling on Motion for Summary Judgment. On July 19, 2017, Petitioner filed a Supplemental Application for Post-Conviction Relief and a Brief in Support along with six exhibits further detailing his complaints set forth in the second application for Post-Conviction Relief. The State filed a brief in response entitled Respondent's Brief in Response to Plaintiff's Supplemental Application on June 16, 2017, with two exhibits, interviews of the victim.

[¶6] On October 30, 2017, an evidentiary hearing was held. Kovalevich was present and represented by his counsel, Jeffrey Glynn. The State was represented by the undersigned. The State renewed its Motion for Summary Disposition. Both counsel for Kovalevich and the State articulated arguments on this issue. The court granted summary disposition in part and denied it in part. Summary Disposition was granted as to Issue I (Due Process Rights Violation), Issue II (Selective and Vindictive Prosecution) and Issue IV (Violation of N.D.C.C. § 12-60-09) based on the doctrines of res judicata and misuse of process. The district court signed an order granting summary disposition in part on February 6, 2018. Order Granting Summary Disposition in Part and Denying in Part, February 6, 2018. The evidentiary hearing on October 30, 2017, proceeded with respect only to Issue III raised by the Defendant, Newly Discovered evidence. Testimony was taken from Craig Zachmeier and Kovalevich also testified. The issue was taken under advisement and parties were ordered to file closing arguments subsequent to receiving the

transcript from the hearing. Closing arguments were filed by both parties and on February 12, 2018, the court issued an order denying post-conviction relief. Order Denying Second Application for Post-Conviction Relief, February 12, 2018.

[¶7] Kovalevich appeals the district court's denial of post-conviction relief with respect to the February 12, 2018 order related to the allegation of newly discovered evidence. It does not appear that Kovalevich is appealing the February 6, 2018, order granting summary disposition in part. The State resists Kovalevich's appeal and urges this Court to affirm the district court's order.

LAW AND ARGUMENT

I. The district court properly denied Kovalevich's application for post-conviction relief.

[¶8] Post-conviction relief proceedings are civil in nature and are governed by the North Dakota Rules of Civil Procedure. Garcia v. State, 2004 ND 81, ¶ 6, 678 N.W.2d 568. 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.

[¶9] In order to prevail on an allegation of newly discovered evidence, an individual must show 1) evidence was discovered after trial; 2) the failure to learn about evidence at the time of the trial was not a result of the defendant's lack of diligence; 3) the newly discovered evidence was material to issues at trial and 4) weight and quality of newly discovered evidence would likely result in an acquittal. N.D.R.Crim.P. 33, State v. Steinbach, 1998 ND 18, 22. Kovalevich alleged that there was newly discovered evidence that was exculpatory in nature regarding the time frame in which the sexual assaults were perpetrated.

[¶10] Kovalevich was charged with 3 counts of sexual offenses against the juvenile victim. Count 1 was an AA Felony Gross Sexual Imposition alleging he perpetrated sexual acts upon the victim between February 3 and 6, 2012. Count 2 alleged

an AA Felony Gross Sexual Imposition between the same dates. Count 3 was a charge of Corruption of a Minor as a Class C Felony between August 3 and 5, 2012. The victim was fifteen years of age when Count 3 was perpetrated upon her. At issue with respect to newly discovered evidence was a receipt *sought and obtained* by Kovalevich sometime *after April 6, 2017*. Transcript of Post-Conviction Relief Hearing, October 30, 2017, p. 25. Kovalevich's position was that the receipt, documenting a stay at the Canad Inns between July 21 and 23, 2012, was newly discovered evidence and changed the timeline of the victim's disclosure.

[¶11] Under Rule 33 of the North Dakota Rules of Criminal Procedure, the first prong of a successful claim of newly discovered evidence requires the defendant or petitioner to establish that the evidence was discovered after trial. In the case at hand, the evidence was sought and obtained after April 6, 2017, and filed with the district court on July 19, 2017. The State stipulated that the first prong has been met.

[¶12] The second prong of a successful claim of newly discovered evidence requires that the defendant prove that the failure to discover the evidence was not as a result of his lack of diligence. N.D.R.Crim.P. 33. Kovalevich actually admitted during the evidentiary hearing that the failure to discover evidence was a result of his lack of diligence. Kovalevich testified that the first time he asked the Canad Inn for the receipt was in a letter on April 6, 2017. Post-Conviction Relief Hearing Tr., October 30, 2017, p. 25. Kovalevich testified that he was fully aware of when he stayed at the Canad Inns. Post-Conviction Relief Hearing Tr., October 30, 2017, p. 27. Kovalevich testified that he used his own credit cards to pay for the hotel rooms. Post-Conviction Relief Hearing Tr., October 30, 2017, p. 28. Further, he testified that he had access to his own credit card

records prior to trial. Post-Conviction Relief Hearing Tr., October 30, 2017, p. 28.

Kovalevich testified that he did not need a court order of any kind to obtain the additional receipt. Post-Conviction Relief Hearing Tr., October 30, 2017, p. 28. Kovalevich admitted he simply had to ask for the receipt by letter. Post-Conviction Relief Hearing Tr., October 30, 2017, p. 28. Kovalevich admitted that he did not ask for the receipt prior to trial, prior to the direct appeal, or prior to his previous motions for new trial and first post-conviction relief application. Post-Conviction Relief Hearing Tr., October 30, 2017, pp. 26-27.

[¶13] Based on the testimony set forth above, Kovalevich could not meet prong two required to set forth a successful claim of newly discovered evidence. The evidence may have been new, but it certainly was not hard for Kovalevich to obtain. He had ample time to do so, and the rules require that in order for evidence to be considered “newly discovered” it cannot be due to a lack of diligence on the petitioner or defendant’s part. That is exactly what has happened in this case. Kovalevich asked the court to give him a second bite at the apple and present a new defense to the court, as his first defense of having a platonic, yet romantic, relationship with a child was not successful. The rules and case law do not permit it and the district court denied his request. The North Dakota Supreme Court has stated a defendant misuses the post-conviction process by initiating a subsequent application raising issues that could have been raised in an earlier proceeding. Silvesan v. State, 1999 ND 62, ¶ 10, 591 N.W.2d 131. Further, a defendant who is aware of information before trial and fails to conduct further inquiry that would have led to the evidence that he asserts is “newly discovered” cannot claim due diligence. State v. Sievers, 543 N.W.2d 491, 497 (N.D. 1996). In the case at hand, by Kovalevich’s own

admissions, he was fully aware of when he stayed at the Canad Inn, used his own credit cards, had access to obtain credit card receipts, and simply had to ask the Canad Inn for their records by letter yet failed to do so. Kovalevich misuses the post-conviction process. There is absolutely no reason, and no reason set forth by Kovalevich, why this was not discovered previously, argued at trial, post-trial motions, direct appeal, or in his multiple motions for new trial and first post-conviction relief application. As set forth in North Dakota Rules of Criminal Procedure and by the North Dakota Supreme Court in State v. Sievers, Kovalevich's claim of newly discovered evidence failed on the second prong as the lack of discovery of the receipt was due directly as a result of Kovalevich's lack of diligence. The district court specifically ruled that Kovalevich failed to meet prong two of the requirements to make a successful claim of newly discovered evidence. The court found that while the exhibit may have been newly obtained, it was not difficult for Kovalevich to obtain even years after the trial, that Kovalevich had sole knowledge to the exact dates he stayed at the hotel, and full access to his credit card statements.

[¶14] The district court extensively addressed Kovalevich's arguments with respect to prong two and found that pursuant to State v. Sievers, Kovalevich's claim failed. The district court indicated that it was unnecessary to address prongs three and four, however, did engage in the analysis for purposes of appeal. Under Rule 33 of the North Dakota Rules of Criminal Procedure, the third prong and fourth prong to successfully establish a claim of newly discovered evidence are intertwined. They require a defendant to establish that the evidence was material to the case and the weight and quality of the evidence would likely result in an acquittal. N.D.R.Crim.P. 33.

[¶15] Kovalevich presented an additional receipt of a hotel stay and alleged that it

was material and would likely result in an acquittal. Kovalevich's argument was that the receipt demonstrated that the timeline of the charged incidents as inaccurate. However, that is inconsistent with the evidence. At trial, the victim testified she traveled with Kovalevich to Grand Forks on more than two occasions. Jury Trial Tr. p. 44. She testified that there was a time that they stayed at the Canad Inns and Kovalevich perpetrated sexually inappropriate behavior upon her but no sexual act took place. Jury Trial Tr. P. 45. She was in eighth grade. Jury Trial Tr. P. 46. The victim testified that she was aware that a receipt was not located for this incident and that it is possible they could have been staying at a different hotel for this incident. Jury Trial Tr. p. 46. Further, the victim testified about the two charged incidents in which receipts were located. Jury Trial Tr. pp. 47-59. The victim testified that in February of 2012, she was a fourteen year old girl in the eighth grade and Kovalevich took her to Grand Forks, took her shopping, bought her clothes, and to the Canad Inns to the water park because she'd never been to one and she liked water parks. Jury Trial Tr. pp. 47-49. She also testified that between February 3 and February 6, 2012, Kovalevich perpetrated sexual acts upon her twice on two different days in Grand Forks. Jury Trial Tr. pp. 49-50. The victim also testified about Count 3- Corruption of a Minor, which is not relevant to this proceeding. The victim was subjected to extensive cross-examination regarding this timeline, the jurisdictional issues, and her allegations in general.

[¶16] Kovalevich wanted the district court to give him a second bite at the apple relying on evidence that was not presented to the jury, the police interviews of the victim. Further, Kovalevich improperly interpreted those interviews. When reviewing those interviews, context is critical. Law enforcement was interviewing a fifteen year old

victim who had been transported, by Kovalevich, around the entire State, and groomed over a period of years, so he could perpetrate sexual acts upon her. Certainly, her interviews, reviewed with intricate scrutiny and taken in pieces, could lead one to have questions regarding the timeline; however, her testimony, which was clear, is what was and is relevant. Furthermore, even reading the victim's detailed law enforcement interviews, she was clear that she recalled a time visiting Grand Forks, in the beginning of the year, where no sexual acts took place, and then two subsequent trips to Grand Forks where they did. See Post-Conviction Hearing Exhibit 4, October 30, 2017, p. 19. S.M. told law enforcement the second trip, where sexual acts took place, was also during the winter around January of 2012, and that she traveled to Fargo subsequently. See Post-Conviction Hearing Exhibit 4, October 30, 2017, p. 19. Law enforcement was able to obtain records from Canad Inns corroborating this information with a receipt from Canad Inns February 3-6, 2012, and a subsequent receipt from Fargo immediately following the Grand Forks stay. In the victim's second interview, she indicated there were probably 4 or 5 trips to Canad Inns and that he may have used different names. See Post-Conviction Hearing Exhibit 5, pp. 20-21. Furthermore, the victim very specifically identified *also* staying at the Canad Inns with Kovalevich after the State Fair in Minot in 2012, but a receipt was never located by law enforcement. See Post-Conviction Hearing Exhibit 4, pp. 40-41, Post-Conviction Hearing Exhibit 5, pp. 20-21.

[¶17] Kovalevich argued that the receipt documenting his stay in July of 2012, was exculpatory and material. Simply because there was an additional receipt located does not, in any way, change the testimony given, the interviews taken, or the timeframe in which Kovalevich perpetrated sexual acts upon the child. In fact, the receipt is

consistent with the victim's statements that there were multiple stays at the Canad Inns, that Kovalevich may have used different names, and that Kovalevich took her to the Canad Inns after the State Fair in Minot, ND in July of 2012, but a receipt was never located. It is true, that the victim indicated that prior to the February 2012 incident set forth in Count 1 and Count 2, Kovalevich had taken her to the Canad Inns to stay and no illegal sexual acts took place. The victim was very clear that the non-charged conduct from the first trip to Grand Forks was at the very beginning of 2012 in her interviews with law enforcement and that the February 2012 incident happened afterwards.

Furthermore, Kovalevich had an opportunity to engage in extensive cross-examination of the victim at trial regarding his allegation that her timeline was inaccurate. Kovalevich had full access to this receipt and failed to obtain it, but even if one disregards the fact that he did not obtain the corroborating receipt as he should have, Kovalevich was fully aware of when he took the victim to the water park hotel to molest her. He could have simply cross-examined her on this topic if this information was, in fact, material or would have led to an acquittal. To do otherwise is completely illogical. Additionally, if this new receipt from July of 2012 had been presented to the State prior to Kovalevich's trial, it would have been charged as a fourth count of sexual offenses, Corruption of a Minor as a Class C Felony and it would have been deemed inculpatory and consistent with the victim's account of traveling to Grand Forks subsequent to the State Fair in Minot in 2012. In absolutely no way is this information, Kovalevich had access to and failed to obtain prior to trial, exculpatory, material, or likely to have led to an acquittal.

[¶18] The district court found that Kovalevich's argument did not match up with the totality of the testimony and evidence presented as trial, as well as the investigative

interviews which were made part of the record in this post-conviction proceeding. The court went through a detailed analysis of the information testimony provided by the victim regarding the timeline and agreed with the State that the additional receipt was not exculpatory, but rather likely inculpatory in nature.

[¶19] In order to successfully appeal the district court's decision, Kovalevich would have to establish that the district court's order was clearly erroneous with respect to a finding of fact. Kovalevich fails to articulate for this Court specifically how the district court's findings of fact were clearly erroneous. In fact, Kovalevich fails to articulate any argument whatsoever with respect to prong 3 and 4. Further, on prong 2 the district court's order was supported by facts and testimony, even from Kovalevich himself, as set forth above. The district court's decision was not clearly erroneous and should be affirmed.

CONCLUSION

[¶20] For the above-stated reasons, Kovalevich's appeals should be denied.

DATED this 16 day of May, 2018.



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IN DISTRICT COURT, GRAND FORKS COUNTY, NORTH DAKOTA

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v

State of North Dakota,

Respondent/Appellee.

AFFIDAVIT OF SERVICE

BY EMAIL

Supreme Court No. 20180109

District Court No. 18-2017-CV-00957

SA# 124635

STATE OF NORTH DAKOTA)

) SS

COUNTY OF GRAND FORKS)

The undersigned, being of legal age, being first duly sworn deposes and says that on the 16th day of May, 2018, she served true copies of the following documents:

Brief of Appellee

via email transmission to:

Benjamin C. Pulkrabek
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States Attorney's Office

Subscribed and sworn to before me this 16th day of May, 2018.



Notary Public

mjl

