

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Rodney Harold Friesz,)	Supreme Court No. 20190178
)	
Petitioner and Appellant,)	Civil No. 30-2018-CV-00419
)	
vs.)	
)	
State of North Dakota,)	
)	
Respondent and Appellee.)	

BRIEF OF PETITIONER-APPELLANT RODNEY HAROLD FRIESZ

Appeal from Order dated on May 14, 2019

In District Court, Morton County, State of North Dakota

The Honorable David Reich

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STATEMENT OF THE ISSUES

¶1 Whether the Trial Court Erred in Denying the Petitioner’s Petition for Post-Conviction Relief.

STATEMENT OF THE CASE

¶2 This is an appeal of the South Central Judicial District Order dated May 14, 2019, denying Rodney Friesz’s (“Friesz”) Application for Post Conviction Relief. (App. 31.) Friesz’s Application for Post Conviction Relief alleged evidence exists that was not presented to the court, which requires a vacation of the conviction pursuant to Section 29-32.1-01(1)(e) of the North Dakota Century Code. (App. 14.) Friesz’s Application further alleged the following grounds: That the confession in the underlying case was coerced; That evidence was obtained through an unconstitutional search and seizure and an unlawful arrest; That the prosecution failed to disclose evidence; That there was a denial of effective assistance of counsel and a right to an appeal; and that Friesz was denied the right to call witnesses. (App. 14.) On February 4, 2019, a hearing was held. (App. 31.) The Court entered an Order denying Friesz’s Application for Post Conviction Relief on May 14, 2019. (App. 31.) A notice of appeal was filed on June 10, 2019. (App. 36.)

STATEMENT OF FACTS

¶3 Friesz filed an Application for Post Conviction Relief alleging several grounds in relation to the underlying case, State v. Friesz, 2017 ND 177, 898 N.W.2d 688. The facts of the underlying case have been explained in detail in State v. Friesz, 2017 ND 177, 898 N.W.2d 688, and will be repeated as necessary for the purpose of this appeal.

¶4 In October of 2014, Friesz was charged with Murder and Arson. Id. at ¶ 2. The court held a jury trial on both counts. Id. at ¶ 12. Friesz was found guilty of the lesser

included offense of manslaughter and arson. Id. Friesz appealed alleging a search of the residence and seizure of property was illegal, and that there was insufficient evidence to support the convictions of manslaughter and arson. Id. at ¶13, 34. The Supreme Court concluded that the search of the residence and seizure of property was legal and evidence supports the convictions. Id. at ¶ 24, 33, 41, 46.

¶5 Friesz then filed an Application for Post Conviction Relief alleged evidence exists that was not presented to the court, which requires a vacation of the conviction pursuant to Section 29-32.1-01(1)(e) of the North Dakota Century Code. (App. 14.) Friesz's Application further alleged the following grounds: That the confession in the underlying case was coerced; That evidence was obtained through an unconstitutional search and seizure and an unlawful arrest; That the prosecution failed to disclose evidence; That there was a denial of effective assistance of counsel and a right to an appeal; and that Friesz was denied the right to call witnesses. (App. 14.)

¶6 A hearing was held on February 4, 2019. During the commencement of the hearing, Mr. Myhre, counsel for Friesz, moved to withdraw the following grounds of Friesz's petition: 1. Conviction was obtained by use of evidence obtained pursuant to an unconstitutional search and seizure; 2. Conviction obtained by use of evidence pursuant to an unlawful arrest; 3. Conviction obtained through the denial of the right to call favorable witnesses; and 4. Denial of Right to Appeal. (Tr. p. 4-6, ln. 13-4; Feb. 4, 2019.) The Court granted withdrawal of the claims above. (Tr. p. 4-6, ln. 13-4; Feb. 4, 2019.) Mr. Myhre then proceeded to indicate that the primary issue before the court is the claim of ineffective assistance of counsel. (Tr. p. 6, lns. 5-10; Feb. 4, 2019.)

¶7 Travis Finck, Friesz's prior attorney in the majority of the underlying case, testified

that while meeting with Friesz, they discussed the theory of self-defense. (Tr. p. 7-8, lns. 13-23; Feb. 4, 2019.) This theory was developed based upon the beliefs that Friesz had believed Mr. Jassman was going to attempt to kill Friesz. (Tr. p. 8-9, lns. 24-4; Feb. 4, 2019.) However, a few days prior to the trial, a continuance was granted to conduct discovery on newly discovered information regarding other individuals who may have been involved, therefore the theory of the case changed. (Tr. p. 10-11, lns. 10-5; Feb. 4, 2019.) Finck then met with at least one individual, and based upon the information Finck received after meeting with this individual, there became some difficulties with the theory of self-defense and how Friesz wished to proceed and Mr. Finck withdrew. (Tr. p. 11, lns. 11-25; Feb. 4, 2019.)

¶8 Prior to Mr. Finck withdrawing, he filed a motion to suppress evidence based on law enforcement's entry into the residence and whether or not exigent circumstances applied and whether certain items of relevance were removed. (Tr. p. 9, lns. 17-25; Feb. 4, 2019.) This motion was denied. State v. Friesz, 2017 ND 177, ¶12, 898 N.W.2d 688. However, Friesz did give confessions or statements, and Mr. Finck never filed a motion to suppress the confessions or statements because Mr. Finck believes the theory of self-defense is admitting that you did the crime, but it is only in the context of defending oneself. (Tr. p. 12, lns. 6-11; p. 13-14, lns. 10-6; Feb. 4, 2019.) Mr. Finck does not recall any specific conversations he and Friesz had in regard to suppressions Friesz's confessions or statements with being inconsistent with the theory of self-defense. (Tr. p. 16, lns. 14-21; Feb. 4, 2019.)

¶9 After Mr. Finck withdrew, Mr. Monte Mertz was assigned as Friesz's counsel. (Tr. p. 19, lns. 7-12; Feb. 4, 2019.) Mr. Mertz was aware of the new information, in that a man

named Michael Bonogofsky took responsibility for shooting the victim in this case, Mr. Jassman. (Tr. p. 22, Ins. 20-23; Feb. 4, 2019.) However, Mr. Bonogofsky acknowledged that he admitted to others he killed the victim Mr. Jassman, however he further explained that he did not kill Mr. Jassman, but he told others that while he was in jail to establish a criminal reputation. (Tr. p. 23-24, Ins. 19-10; Feb. 4, 2019.) Therefore, Mr. Mertz continued to pursue a self-defense theory for Friesz. (Tr. p. 24, Ins. 13-15; Feb. 4, 2019.) Mr. Mertz found that the confessions or statements by Friesz were advantageous because the jury was able to see and hear Friesz explain why he did what he did, because he honestly believed that he and his family had been threatened and were in danger of being killed. (Tr. p. 27-28, Ins. 19-14; Feb. 4, 2019.) Because of the advantages of Friesz's statements, with allowing Friesz to explain why he did what he did, and not exposing him to cross-examination, Mr. Mertz did not consider filing a motion to suppress those confessions or statements. (Tr. p. 28, Ins. 15-25; Feb. 4, 2019.) However, Friesz also gave confessions or statements to non-law enforcement, which were not suppressed because Mr. Mertz did not believe a suppression motion would be meritorious. (Tr. p. 30, Ins. 10-25; p. 42, Ins. 1-4; Feb. 4, 2019.)

¶10 Mr. Mertz further noted that Friesz did sometimes have some ideas that Mr. Mertz described as “irrational” or that his story would change from “I shot Mr. Jassman” to “I didn’t shoot Mr. Jassman” and Friesz often contradicted himself at times. (Tr. p. 38, Ins. 2-25; p. 43, Ins. 2-21; Feb. 4, 2019.) In fact, Mr. Mertz referred to some of Friesz’s ideas as “delusional” and was aware Friesz is mentally ill, which deteriorated and that he may have permanent brain damage from methamphetamine use like schizophrenia and conspiracy theories. (Tr. p. 24, ln. 19; p. 43-44; Ins. 22-4; Feb. 4, 2019.) Regardless of Friesz’s

mental illness, Mr. Mertz testified that he pursued every trail that Friesz requested. (Tr. p. 35, Ins. 14-18; Feb. 4, 2019.) Mr. Mertz also noted that he obtained a mental evaluation Mr. Finck had requested, where that examiner ruled Friesz had been acting under psychotic paranoid delusions. (Tr. p. 24-25, Ins. 24-15; Feb. 4, 2019.) Therefore, Mr. Mertz obtained a second opinion on Friesz's mental capacity, which resulted in the same opinion, that Friesz was mentally ill and operating under severe psychotic delusions due to long term heavy methamphetamine usage. (Tr. p. 25, Ins. 13-24; Feb. 4, 2019.)

¶11 The parties submitted closing briefs. (Tr. p. 46, Ins. 12-23; Feb. 4, 2019.) Mr. Myhre argued that Friesz asserts that because both his counsel failed to move to suppress multiple confessions, which were not freely or voluntarily given, he was denied effective assistance of counsel. (App. 19.) Mr. Myhre further argued that while Mr. Mertz considered Friesz to be "delusional," due to a long term abuse of substances, Mr. Mertz never considered Friesz's defense based upon insanity versus based upon intoxication. (App. 19.) While the temporary effects of voluntary intoxication would not afford a defense to a criminal charge, but permanent psychotic symptoms due to long-term usage of substances would afford a defense of insanity to a criminal charge. (App. 19.) However, neither Mr. Finck nor Mr. Mertz did any further investigation as to a defense of mental insanity. (App. 19.) Friesz challenges trial counsel for failure to present a defense based on his mental illness and failure to suppress statements since he was "delusional." (App. 19.)

¶12 On May 14, 2019, the trial court issued an order denying Friesz's application for post conviction relief (App. 31.) The court found that the assertion that trial counsel could have pursued a different strategy or trial tactic is not evidence of ineffective assistance and

that he could not establish that he was prejudiced by his attorneys' performance. (App. 31.) On June 10, 2019, Friesz filed a notice of appeal. (App. 36.)

LAW AND ARGUMENT

I. The Standard of Review.

¶13 This Court has explained the law when claiming ineffective assistance of counsel through post conviction relief:

The Sixth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment, and Article I, § 12 of the North Dakota Constitution guarantee a criminal defendant effective assistance of counsel. In accord with the test established by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984), a defendant claiming ineffective assistance of counsel has a heavy burden of proving (1) counsel's representation fell below an objective standard of reasonableness, and (2) the defendant was prejudiced by counsel's deficient performance. Effectiveness of counsel is measured by an objective standard of reasonableness considering prevailing professional norms. The defendant must first overcome the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Trial counsel's conduct is presumed to be reasonable and courts consciously attempt to limit the distorting effect of hindsight. The prejudice element requires a defendant to establish a reasonable probability that, but for his counsel's errors, the result of the proceeding would have been different. Not only does a criminal defendant have the heavy, demanding burden of proving counsel's assistance was ineffective, a defendant claiming ineffective assistance of counsel must specify how and where trial counsel was incompetent and the probable different result. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Heckelsmiller v. State, 2004 ND 191, ¶ 3-4, 687 N.W.2d 454 (internal citations and quotations omitted).

¶14 This Court has established the following as standards for post conviction relief proceedings:

Proceedings on applications for post-conviction relief are civil in nature and governed by the North Dakota Rules of Civil Procedure. The petitioner has the burden of establishing grounds for post-conviction relief. The district court's findings of fact in a post-conviction proceeding will not be disturbed

on appeal unless they are clearly erroneous under N.D.R.Civ.P. 52(a). A finding of fact is clearly erroneous if induced by an erroneous view of the law, if no evidence exists to support it, or if the reviewing court is left with a definite and firm conviction a mistake has been made. Questions of law are fully reviewable on appeal in post-conviction proceedings.

Tweed v. State, 2010 ND 38, ¶ 15, 779 N.W.2d 667 (internal citations omitted).

¶15 In the present case, Friesz contends the following: 1. That his trial counsel failed to file a motion to suppress confessions or statements; and 2. That his trial counsel did not pursue mental health investigations regarding the defense of insanity.

II. Friesz’s Trial Counsel’s Conduct Fell Below The Standard Of Reasonableness That Is Expected And Constitutionally Ensured.

¶16 “Effectiveness of counsel is measured by an ‘objective standard of reasonableness’ considering ‘prevailing professional norms.’” DeCoteau v. State, 2000 ND 44, ¶ 8, 608 N.W.2d 240 (citing Lange v. State, 522 N.W.2d 179, 181 (N.D. 1994), quoting Strickland, 466 U.S. at 688). Friesz’s allegations of ineffective assistance of counsel in the present case is that trial counsel did not move the court to suppress confessions or statements, nor did trial counsel pursue mental health investigations regarding the defense of insanity.

¶17 Both of Friesz’s trial counsel admitted not filing a motion to suppress statements or confessions made by Friesz to other individuals. (Tr. p. 12, lns. 6-14; p. 28, lns. 15-23, p. 30, lns. 10-25; Feb. 4, 2019.) Furthermore, both of Friesz’s trial counsel acknowledged that Friesz had a mental illness. (Tr. p. 24-25, lns. 21-24; p. 40-41, lns. 19-10; p. 43-44, lns. 22-10; Feb. 4, 2019.) In fact, trial counsel’s adjectives for Friesz’s behavior were “delusional,” “psychotic,” “psychosis,” “psychotic delusions,” “mentally ill,” “paranoid schizophrenia,” and “irrational.” (Tr. p. 24, ln. 19; p. 25, lns. 5-23; p. 38, ln. 8; p. 43, lns. 22-23; Feb. 4, 2019.) Trial counsel indicated that heavy long term use of methamphetamine can result in permanent brain damage. (Tr. p. 43, lns. 22-25; Feb. 4,

2019.) However, neither trial counsel ever investigated the possibility of the defense of mental insanity.

III. Friesz Was Prejudiced By His Trial Counsel's Lack Of Diligence And Poor Preparation.

¶18 This Court stated in Tweed v. State, that “[t]he prejudice element requires a defendant to ‘establish a reasonable probability that, but for his counsel's errors, the result of the proceeding would have been different.’” 2010 ND 38, ¶ 26, 779 N.W.2d 667 (quoting Syvertson v. State, 2000 ND 185, ¶ 22, 620 N.W.2d 362). “[T]he Defendant must specify how and where trial counsel was incompetent and the probable different result.” Middleton v. State, 2014 ND 144, ¶ 6, 849 N.W.2d 196 (citing Murchison v. State, 2011 ND 126, ¶ 8, 799 N.W.2d 360 (quoting State v. Myers, 2009 ND 141, ¶ 15, 770 N.W.2d 713)). “A reasonable probability is a probability sufficient to undermine confidence in the outcome” Id.

¶19 Friesz argues that the “reasonable probability” of errors in the present case is that Friesz’s out of court statements should have been suppressed and that the defense of insanity should have been investigated and pursued. Given the fact that both counsel acknowledged several times that Friesz was mentally ill and delusional and likely suffered from permanent brain damage. (Tr. p. 24, ln. 19; p. 25, lns. 5-23; p. 38, ln. 8; p. 43, lns. 22-23; Feb. 4, 2019.) Friesz argues that it is possible that he could have been found not guilty by reason of lack of criminal responsibility with the defense of insanity. Friesz further argues that the issue of whether or not Friesz made delusional statements or confessions to various people, must be considered and if not for the delusional out of court statements or confessions provided by Friesz due to his mental illness, there would not be sufficient evidence to convict Friesz of either the manslaughter or arson charge.

CONCLUSION

¶20 Friesz’s trial counsel failed to file a motion to suppress confessions or statements; and 2. That his trial counsel did not pursue mental health investigations regarding the defense of insanity. Friesz respectfully requests that this Court reverse and remand.

Dated this 1st day of October, 2019.

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CERTIFICATE OF SERVICE

True and correct copies of BRIEF OF APPELLANT and APPENDIX OF APPELLANT were e-mailed to the following this 1st day of October, 2019:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Appellant's brief contains 12 pages consisting of the cover page through the conclusion and signature block and complies with the page limits outlined in North Dakota Rules of Appellate Procedure Rule 32(a)(8)(A).

Dated 1st day of October, 2019.

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