
 IN THE SUPREME COURT OF NORTH DAKOTA

James Richard Kremer,)	Supreme Court File No.
)	20190408
Petitioner and Appellant,)	
)	Ward County No.
v.)	51-2018-CV-01305
)	
State of North Dakota,)	APPELLANT'S BRIEF
)	
Respondent and Appellee)	

Appeal from the Order Denying Post-Conviction Relief in Ward
County District Court, North Central Judicial District, North Dakota
December 4, 2019, the Honorable Douglas L. Mattson presiding

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

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Rule 11 (b) of North Dakota Rules of Criminal Procedure¶46, ¶50, ¶53

Oral Argument:

Oral argument has been requested to emphasize and clarify the Petitioners written arguments on their merits.

Transcript References:

The hearing on Petitioner/Appellant Kremer's petition for Post-Conviction relief was held on August 12, 2019. The hearing transcript is referred to as [T.] in this Brief.

The other Transcript involved in this Appeal is the Change of Plea Transcript from the hearing conducted on February 25, 2016. That Transcript is referred to as [CoPT.] in his Brief.

STATEMENT OF THE ISSUES

- I. **[¶1] ISSUE I:** Whether or not Defendant/Appellant James Richard Kremer's counsel's performance in this case was inadequate and a violation of his sixth amendment rights?

- II. **[¶2] ISSUE II.** Whether or not the District Judge in this case failed to inform Defendant/Appellant James Richard Kremer of all of the rights he has under Rule 11 of the North Dakota Rules of Criminal Procedure?

NATURE OF THE CASE

[¶3] This case began in Federal Court when Petitioner/Appellant James Richard Kremer (Mr. Kremer) was indicted on charges that involved possession of pornography.

[¶4] The Federal Prosecutor, Mr. Kremer, and his attorney entered into a plea agreement that dismissed Mr. Kremer's Federal charges, provided for similar charges to be brought in State Court, and that Mr. Kremer plead guilty in State Court or the charges in State Court would be dismissed and the case would go back to Federal Court.

[¶5] Mr. Kremer was charged, plead guilty in State Court, and was sentenced.

[¶6] This legal action involved in the case began with a Post-Conviction Relief Application filed on 07/23/2018.

[¶7] Another application for Post-Conviction Relief was filed on 09/21/2018.

[¶8] The State filed a Motion for Summary Dismissal on 10/03/2018 and the defense filed a response to that Motion on 10/16/2018.

[¶9] The Court filed an Order Denying Motion for Summary Dismissal on 12/07/2018.

[¶10] The defense filed a supplementary Brief for Post-Conviction hearing on 06/18/2019 and State filed an opposition to that Brief on 07/12/2019.

[¶11] An Order denying Post-Conviction Relief was filed on 12/04/2019.

[¶12] The defense filed a Notice of Appeal and Request for Transcript on 12/23/2019.

[¶13] A Notice of Appeal being misfiled was filed on 12/23/2019.

[¶14] The Notice of filing the Notice of Appeal was filed on 12/24/2019.

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

STATEMENT OF FACTS

[¶16] This case began in Federal District Court when Petitioner/Appellant James Richard Kremer (Mr. Kremer) was indicted for crimes involving child pornography.

[¶17] The Federal Prosecutor in this case decided to and did offer a plea bargain that would dismiss all of Mr. Kremer's Federal charges and have the charges then brought in the District Court of North Dakota. Another requirement of the plea agreement was after the crimes were charged Mr. Kremer had to plead guilty to this case in the North Dakota District Court or this case would be sent back to the Federal Court.

[¶18] Transferring the charge to the District Court in North Dakota would be beneficial to Mr. Kremer because in Federal Court if he was convicted or plead guilty to the crimes charged there is a mandatory minimum fifteen (15) years sentence required. Change of Plea Hearing transcript at Page 4, Lines 12-17:

“Additionally, he is facing a 15-year minimum mandatory in the Federal prison system if he goes to trial on those Federal charges. So, the 10 years in prison in the DOCR followed by three years of supervised probation is not only appropriate but lenient given these circumstances.”

[¶19] The Stipulation transferring the charges to North Dakota State Courts appears in the Appendix at pages 28-29. This stipulation is signed by the Federal prosecutor, Mr. Kremer, and Mr. Kremer's Attorney.

[¶20] The charges against Mr. Kremer in state Court are:

1. Possession of Certain Materials Prohibited, a class C Felony
2. Possession of Certain Materials Prohibited, a class C Felony
3. Possession of Certain Materials Prohibited, a class C Felony

4. Possession of Certain Materials Prohibited, a class C Felony
5. Possession of Certain Materials Prohibited, a class C Felony

[¶21] The plea agreement in North Dakota State Court is set out in the Change of Plea Hearing transcript at Page 3, Lines 1-9:

“The offer in Count 1, five years flat time. Count 2, five years flat time, consecutive to Count 1. Count 3, would be three years of supervised probation, consecutive to Counts 1 and 2. The State would therefore dismiss Counts 4 and 5. Additionally, \$525 in Court costs, and \$575 in attorney fees, which the State feels appropriate as Mr. Baumann has worked very hard to negotiate on this file. However, given this particular case the State is not particularly willing to bend.”

[¶22] Mr. Kremer decided to accept the above Federal Prosecutors plea bargain and signed the stipulation (Appellant’s Appendix pages 28-29).

[¶23] After the stipulation was signed Mr. Kremer’s Federal charges were dropped and he was charged in District Court in Ward County, North Dakota, with the five (5) Counts listed above.

[¶24] Mr. Kremer was then brought before to the District Court in Ward County North Dakota for a Change of Plea Hearing on February 25, 2016. At that hearing he plead guilty to Counts 1, 2, & 3. Counts 4, & 5 were dismissed.

[¶25] On February 25, 2016 Mr. Kremer had an attorney representing him at that Change of Plea Hearing. Prior to that hearing Mr. Kremer had only talked to that attorney twice by phone. The only face-to-face conference Mr. Kremer had with his attorney took place for a few minutes just before the hearing started.

[¶26] The following testimony of Mr. Kremer at his Post-Conviction Hearing is about his contact with his change of plea attorney is found in the Transcript P. 4 L. 14 to P. 5 L.

1:

“Q: And how many times did you meet with Mr. Baumann prior to your changing your plea?

A: I never met with him prior to changing my plea.

Q: How many times did you talk to him prior to changing your plea?

A: Twice

Q: Did he ever send you the discovery to review?

A: No.

Q: Did he ever go through the essential elements of the crime with you?

A: No.

Q: Did he ever go through the facts with you?

A: No.”

[¶27] The following testimony of Mr. Kremer at his Hearing on Appeal on August 12, 2019 found in the Transcript on Appeal P. 7 L.5-19:

“Q: When was the first time you actually met your state attorney?

A: It was at the Change of Plea Hearing.

Q: Were you able to meet with him at that time?

A: It would be just a few minutes prior to the hearing itself.

Q: And at that time did your attorney go through anything with you regarding the facts and your change of plea?

A: No.

Q: Did your attorney argue any mitigating factors at the sentencing?

A: No.

Q: Did your attorney say anything on your behalf at the sentencing?

A: No.”

[¶28] On the 23rd day of July, 2018 Mr. Kremer filed his petition for Post-Conviction Relief.

[¶29] In that petition he listed several issues. At the hearing on his Post-Conviction Petition for Relief he and his attorney reduced those issues to just two. The first was ineffective assistance of counsel. The second dealt with the sufficiency of the evidence which included Rule 11 of the North Dakota Rules of Criminal Procedure.

[¶30] The following testimony of Mr. Kremer at his Post-Conviction Evidentiary Hearing on Appeal on August 12, 2019 is found in the Transcript on Appeal P. 13 L.17 to P.14 L.7:

“THE COURT: And you are still under oath. What I want to understand with what your attorney is arguing is that you are withdrawing all the arguments in your petition but for the two that are mentioned, ineffective assistance of counsel and there wasn’t sufficient factual basis. Are you in agreement with that?

MR. KREMER: Yes.

THE COURT: So you are waiving or withdrawing anything else that was in your petition?

MR. KREMER: Yes. We are withdrawing the others.

THE COURT: Other than what's in counsel's petition plus the two items:
Ineffective assistance of counsel, and not sufficient factual
basis; is that correct?

MR. KREMER: Correct.”

[¶31] At Mr. Kremer's Post-Conviction Hearing the only witness called by Petitioner Kremer was Mr. Kremer. The state called no witnesses.

[¶32] Mr. Kremer claims that if his attorney at or before the Change of Plea Hearing had told him at the Change of Plea Hearing what all the State had to prove for him to be found guilty of the charges, he would have plead not guilty and gone to trial. The reason he would have plead not guilty is because he knew what the facts were in his case, what he had done and what he had done did not include all of the elements required to convict him.

ARGUMENT

ISSUE I. Whether or not Defendant/Appellant James Richard Kremer's counsel's performance in this case was inadequate and a violation of his sixth amendment rights?

[¶33] The standard of review according to *Middleton v. State of North Dakota* 2014 ND 144:

“The issue of ineffective assistance of counsel is a mixed question of law and fact which is fully reviewable by this court. To succeed on a claim for ineffective assistance of counsel, a petitioner must prove counsel's performance fell below an objective standard of reasonableness and the deficient performance prejudiced him. Even where the court finds that counsel's representation fell below an objective standard of reasonableness, prejudice is not normally assumed. Unless counsel's errors are so blatantly and obviously prejudicial that they would in all cases, regardless of the other evidence presented, create a reasonable probability of a different result, the prejudicial effect of counsel's errors must be assessed within the context of the remaining evidence properly presented and the overall conduct of the trial. Courts need not address both

elements of the ineffective assistance of counsel test, and if a court can dispose of the case by addressing only one element, it is encouraged to do so.”

Broadwell, 2014 ND 6, ¶ 7, 841 N.W.2d 750 (citations and internal quotation marks omitted). “To demonstrate prejudice, the defendant must establish a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different, and the defendant must specify how and where trial counsel was incompetent and the probable different result.” Murchison v. State, 2011ND 126, ¶8,799N.W.2d 360 (quoting State v. Myers, 2009 ND 141, ¶ 15, 770N.W.2d 713). “A reasonable probability is a probability sufficient to undermine confidence in the outcome” Murchison, at ¶ 8 (quoting Myers, at ¶ 15).”

[¶34] A Defendant’s sixth amendment rights to counsel is discussed in Stickland vs. Washington 466 U.S. 688 (1984). That case established the following two-part test for an ineffective assistance of counsel claim:

1. Counsel’s performance fell below an objective standard of reasonableness.
2. Counsel’s performance gives rise to a reasonable probability that if counsel had performed adequately the result would have been different.

[¶35] In each case where ineffective assistance of counsel is claimed the Courts examine the facts involve in that claim to determine whether or not the facts in that case establish that the way Defendant’s attorney handled the case fell below an objective standard of reasonableness.

[¶36] All of the ineffective assistance of counsel claimed by Mr. Kremer are found in the transcript of the Change of Plea Hearing which took place on February 25, 2016.

[¶37] The following are a list of claims Mr. Kremer has as to why he received ineffective assistance of counsel during his Change of Plea Hearing:

1. His Change of Plea attorney never met with him until minutes before the Change of Plea Hearing.

2. His Change of Plea attorney only talked to him twice by phone prior to the Change of Plea Hearing.
3. His Change of Plea attorney never sent him any of the discovery in his case or discussed the discovery in his case with him.
4. His Change of Plea attorney never discussed with him the essential elements of the crimes charged in his case.
5. His Change of Plea attorney never discussed with him the facts of his case or his change of plea.

[¶38] What we have in this case is a Change of Plea Hearing attorney who did nothing in this case for Mr. Kremer except be present in Court with him when he plead guilty according to the plea agreement.

[¶39] All of the above claims of Mr. Kremer for ineffective assistance of counsel were testified to by Mr. Kremer at the Change of Plea Hearing. The state elected to put in no evidence or testimony to dispute Mr. Kremer's testimony.

[¶40] Any one of the five reasons stated above by itself many not be enough to establish ineffective assistance of counsel. However, when all given are considered together Mr. Kremer has met the first of the two tests required by Washington. He has established that his attorney, prior to a Change of Plea Hearing, was ineffective because his attorney didn't do anything to assist him in his case or to inform him about how the law applies to his case.

[¶41] This gets Mr. Kremer to the second test in Washington. In this second test Mr. Kremer has to establish there would have been a different result in his case if his Change

of Plea attorney had discussed his case with him and given him essential information about his case.

[¶42] Usually the claim that there would have been a different result is difficult to prove or establish because the ineffective assistance of counsel involves a jury verdict or a Judge's decision. Neither of those are involved in this case. In this case the issue involved is Mr. Kremer's guilty plea. He is claiming if he knew or was told at or before his guilty plea what the essential elements of the crimes charged were, he would have never plead guilty. Only Mr. Kremer knows whether or not he would have plead guilty. He says if he knew the essential elements of the crime charged, he would have plead not guilty.

[¶43] Mr. Kremer knows what will happen when this case is sent back to the District Court and he pleads Not Guilty. See CoPT. P. 10 L. 21-22"

“THE DEFENDANT: I understand if I plead not guilty it would get sent back to federal court.”

[¶44] Therefore when this case is sent back to the North Dakota District Court and he refuses to plead guilty, according to the plea bargain, he will be back in Federal Court and have to go to trial.

ISSUE II. Whether or not the District Judge in this case failed to inform Defendant/Appellant James Richard Kremer of all of the rights he has under Rule 11 of the North Dakota Rules of Criminal Procedure?

[¶45] The District Court in *State v. Kaiser*, 417 N.W.2d 376 (N.D. 1987) exercised it's discretion when it denied his petition for Post-Conviction Relief. According Kaiser the standard of review is that in the absence of an abuse of discretion the trial Court's determination won't be reversed on appeal. *State v. Kraft*, 413 N.W.2d 303, 308 (N.D. 1987); *Holte v. Carl Albers, Inc.*, 370 N.W. 2d 520, 526 (N.D.1985); *South v. National*

R.R. Passenger Corp., 290 N.W.2d 819, 840 (N.D.1980); Kresel v. Giese, 231 N.W.2d 780, 790 (N.D.1975).

[¶46] In North Dakota a District Judge must give a criminal Defendant certain advice before he can accept a Defendant's guilty plea. That advice is set out in Rule 11 (b) of the North Dakota Rules of Criminal Procedure:

“11(b) Advice to defendant.

(1) The court may not accept a plea of guilty without first, by addressing the defendant personally [except as provided in Rule 43(b)] in open court, informing the defendant of and determining that the defendant understands the following:

- (A) the right to plead not guilty, or having already so pleaded, to persist in that plea;
- (B) the right to a jury trial;
- (C) the right to be represented by counsel at trial and at every other stage of the proceeding and, if necessary, the right to have the counsel provided under Rule 44;
- (D) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;
- (E) the defendant's waiver of these trial rights if the court accepts a plea of guilty;
- (F) the nature of each charge to which the defendant is pleading;
- (G) any maximum possible penalty, including imprisonment, fine, and mandatory fee;
- (H) any mandatory minimum penalty;
- (I) the court's authority to order restitution; and
- (J) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.”

[¶47] In Mr. Kremer's case the District Judge at the Change of Plea Hearing on February 25, 2016 said, CoPT. P.5 L.14-17:

“I need to advise you of your rights, the charges you are facing and the penalties that accompany those charges, and then following that we will go into a change of plea.”

[¶48] The rights the District Judge told to Mr. Kremer begin in the Change of Plea Transcript P. 5 L. 23 to P. 7 L. 17:

“THE COURT: Thank you. Thank you, Mr. Baumann. Sir, you do have the right to the assistance of a lawyer at all stages of these proceedings. You have the right to talk to that lawyer before you enter a plea, make any statement or answer any questions. And to the extent you may be unable to pay for a lawyer without undue financial hardship you have the right to have legal services provided to you at public expense. And indeed that’s what’s happened here. Mr. Baumann and the public defender’s office has been appointed to represent you.

You have a privilege against self-incrimination which means you have the right to remain silent. If you make any statements concerning any facts which give rise to these charges those statements could later be used against you in this or any other criminal prosecution.

If you enter into a plea of not guilty you have the right at trial to testify or not testify as you alone may choose in this matter. And if you choose to remain silent no inference of guilty can attach from your exercise of your right to remain silent at trial.

You are at this stage presumed to be innocent of all charges and the fact that you have been charged in not evidence of wrongdoing. You can be convicted in this matter only if the State proves to the satisfaction of the jury that you have committed all the essential elements of the offense as charged by proof beyond a reasonable doubt.

If you enter into a plea of not guilty you are entitled to have trial conducted in open court within a reasonable time after arraignment. You are entitled to a jury of 12. Any jury verdict of guilty must be unanimous.

At trial you have the right to see your accusers in court and question them in court. You have a right but not a responsibility to present witnesses at trial who will testify on your behalf. You also have a right to compel witnesses to come to court for you. You do that by asking your lawyer or the court to issue a subpoena to make people come to court for you.

Unless otherwise excused by me, you must appear in person at all future proceedings. But, if you enter your plea here today, two things: One, you have given up all those rights we have just now talked about; and two, there will be no further proceedings. Do you understand all that, sir?

THE DEFENDANT: Yes.”

[¶49] After that Mr. Kremer plead guilty to the first 3 of 5 charges the following was said at T. P. 12 L.23 to P. 13 L. 13:

“THE COURT: You earlier heard Ms. Pierson outline some of the reasons for the plea as it was given here, the plea agreement that was given here. That they found a hard drive that contained numerous images of child pornography including some videos. You heard all that, correct?

THE DEFENDANT: Correct.

THE COURT: And, Ms. Pierson, would that have been your factual basis in support of the guilty pleas in this matter?

MS. PIERSON: More or less, Your Honor.

THE COURT: Well, is it more or is it less?

MS. PIERSON: I can save the specifics for sentencing.

THE COURT: The Court will find that there is an adequate factual basis to accept the Defendant's plea."

[¶50] Mr. Kremer believes that the above language from the Change of Plea Transcript fails to establish the District Court properly advised Mr. Kremer of the advice required to be given to a criminal Defendant by Rule 11(b)(1)(F), 11(b) 3 and 11(b)(4)(A) of the North Dakota Rules of Criminal Procedure.

[¶51] According to *State v. Bates* 2007 ND 15 726 N.W. 2nd 595 (2007) ¶8:

"A factual basis is a statement of facts to assure the defendant is guilty of the crime charged. See *Kaiser v. State*, 417 N.W.2d 175, 178 (N.D. 1987). In *Kaiser*, we discussed the manners in which a factual basis may be established, which include: First, the court could inquire directly of the defendant concerning the performance of the acts which constituted the crime. Secondly, the court could allow the defendant to describe to the court in his own words what had occurred and then the court could question the defendant. Thirdly, the court could have the prosecutor make an offer of proof concerning the factual basis for the charge. *Id.* We have also stated, "[t]o establish a factual basis for the plea, the court must ascertain 'that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty.' The court accepting the plea should compare the elements of the 3 crime charged to the facts admitted to by the defendant." *Froistad*, 2002 ND 52, ¶ 19,641 N.W.2d 86 (citations omitted)."

[¶52] The above quotes in paragraphs 47, 48, and 49 state what was said in Court by the District Judge, Mr. Kremer, and the prosecutor. These statements fail to include the factual basis set out above in *Bates* ¶8. What was done and said by the Court and prosecutor in Mr. Kremer's case does not establish a factual basis for Mr. Kremer's plea and the District Judge didn't ascertain that the conduct Mr. Kremer admitted to constitutes the offense charged in his information.

[¶53] Therefore, this case on Issue II should be remanded to the District Court with an order to the District Court to determine if Mr. Kremer still wants to plead guilty pursuant to the plea agreement. If Mr. Kremer wants to still plead guilty, he should be correctly advised of all of his rights under Rule 11 (b) of the North Dakota Rules of Criminal Procedure. However, if Mr. Kremer does what he has said he will do he will not plead guilty. Then, according to the terms of the plea agreement, the North Dakota District Court will notify the Federal Court that Mr. Kremer has plead not guilty.

CONCLUSION

[¶54] In Issue I of this case, Mr. Kremer has met both the requirements of the two tests in Washington and established ineffective assistance of his Change of Plea Attorney, both before and during his Change of Plea Hearing on February 25, 2016. Therefore, this case should be remanded to the District Court where Mr. Kremer should be:

- 1.) Given an appointed attorney
- 2.) Allowed to withdraw his guilty pleas
- 3.) Enter not guilty pleas

[¶55] In Issue II Mr. Kremer has established that the District Judge in his case didn't fully advise him of all of the rights set out in 11 (b) North Dakota Rules of Criminal Procedure. Therefore, this case should be remanded to the District Court where Mr. Kremer should be:

- 1.) Given an appointed attorney
- 2.) Allowed to withdraw his guilty pleas
- 3.) Enter not guilty pleas

[¶56] After the not guilty pleas are entered Federal Court should be notified. What happens after that is up to the Federal Court.

Dated this 28th day of January, 2020

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James Richard Kremer,)	Supreme Court File No.
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Petitioner and Appellant,)	
)	Ward County No.
v.)	51-2018-CV-01305
)	
State of North Dakota,)	CERTIFICATE OF COMPLIANCE
)	
Respondent and Appellee.)	

[¶1] This Appellant’s Brief and Appendix complies with the pages limit of 38 for the Brief and 100 pages for the Appendix set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, as the Brief consists of 19 pages and Appendix consists of 48 pages.

Dated this 28th day of January, 2020

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IN THE SUPREME COURT OF NORTH DAKOTA

James Richard Kremer,)	Supreme Court File No.
Plaintiff and Appellee,)	20190408
)	
v.)	Ward County No.
)	51-2018-CV-01305
)	
State of North Dakota,)	CERTIFICATE OF SERVICE
Defendant and Appellant.)	

[¶1] The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Appellant's Appendix
Appellant's Brief

By email at the below address upon:

Rozanna Larson
Ward County States Attorney
Roza.larson@co.ward.nd.us

By efilng at the below address upon:

North Dakota Supreme Court
supclerkofcourt@ndcourts.gov

And by placing a true and correct copy of said items in a sealed envelope with USPS mail to:

James Richard Kremer
C/O James River Correctional Center
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Jamestown, ND 58401

Dated this 28th day of January, 2020

/S/ Cassy Larson
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