

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

James Richard Kremer,)
) **Supreme Court No. 20190408**
 Petitioner and Appellant,)
) **District Court No. 51-2018-CV-01305**
)
 vs.)
)
)
 State of North Dakota,)
)
 Respondent and Appellee.)

APPELLEE’S BRIEF

**APPEAL FROM ORDER DENYING POST-CONVICTION RELIEF
IN WARD COUNTY DISTRICT COURT
NORTH CENTRAL JUDICIAL DISTRICT
DATED DECEMBER 4, 2019
NORTH CENTRAL DISTRICT COURT
THE HON. DOUGLAS L MATTSON, PRESIDING**

ORAL ARGUMENT NOT REQUESTED

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STATEMENT OF THE ISSUES

[¶2] Issue I: The district court properly determined Appellant did not receive inadequate assistance of counsel.

[¶3] Issue II: The district court complied with Rule 11 of the North Dakota Rules of Criminal Procedure.

[¶4] Issue III: The district court improperly denied the State's Motion for Summary Dismissal.

JURISDICTIONAL STATEMENT

[¶5] This Court has jurisdiction to hear this case pursuant to the provisions of N.D.Const., art. VI §§2, 6; N.D.R.App.P. 3, 4; and N.D.C.C. § 29-28-06(2)

STATEMENT OF THE CASE

[¶6] Appellant is appealing from an order denying his application for post-conviction relief. Appellant App. 30-41. Appellant dated his application for post-conviction relief July 17, 2018 and filed the application on July 23, 2018. Appellant App. 3, 7-13. The State filed a Motion for Summary Dismissal and Brief in Support of Motion for Summary Disposition and in Opposition to Petitioner's Application for Post-Conviction Relief on October 3, 2018. Appellant App. 4. The district court denied the State's Motion for Summary Dismissal on December 7, 2018. Appellant App. 16-18.

[¶7] Appellant filed a Supplemental Brief for Post-Conviction Hearing on June 18, 2019. Appellant App. 20-23. The State filed State's Response to Petitioner's Supplemental Brief for Post-Conviction Hearing on July 1, 2019. Appellant App. 24-27. The district court ordered the State respond to Appellant's arguments in the initial application for post-conviction relief and provided Appellant an opportunity to respond. The State filed State's Brief in Opposition to Petitioner's Application for Post-Conviction Relief on July 12, 2019. Appellee App. 7-19. Appellee filed a Response to State's Brief on July 19, 2019. Appellant App. 5.

[¶8] The district court held a Post-Conviction Hearing on August 12, 2019. Appellant App. 5. The district court directed the parties file post hearing briefs. Appellant App. 5. Appellant filed Petitioner’s Closing Brief on August 27, 2019. Appellant App. 5. The State filed State’s Brief Following Evidentiary Hearing on September 11, 2019. Appellee App. 5. The district court took the matter under advisement and issued the Order Denying Post-Conviction Relief on December 4, 2019. Appellant App. 30-41. Appellant now appeals that order.

STATEMENT OF FACTS

[¶9] In January of 2014, agents of the Federal Bureau of Investigation began an investigation into images involving sexual acts and/or performances by minor children that were downloaded by an IP address in Minot, ND. Appellee App. 20. The IP address belonged to Charlotte Kremer who lived with her son, Appellant James Kremer, in Minot, ND. Appellee App. 20. A federal search warrant was executed for the Kremer residence on March 6, 2014. Appellee App. 20. Appellant told agents that he was the only one who used his ASUS laptop computer, that he downloaded pornographic materials “by the batch,” and that his Western Digital external hard drive contained “questionable” material. Appellee App. 21.

[¶10] FBI computer analysts located approximately 241 images and two videos of sexual acts and/or performances by minor children on Appellant’s laptop and hard drive, including 29 different series of known child victims. Appellee App. 29. Analysts recovered Appellant’s search history. Appellee App. 22. During an interview with agents, Appellant admitted to possessing child pornography:

On January 23, 2015, J. Kremer was re-interviewed by FBI agents. At that time, J. Kremer was confronted about specific search terms, including “loli*,” which is short for “Lolita,” “mafia sex,” hussy fan,” “pthc,” and

“kiddy” that were used on the ASUS laptop. Longer search terms included “Pthc 11yo Cambodian Thai Girl Fucked Cum,” “Pthc young children from illegal ukrainian agency new,” and “Valya 7E 7yo in ass fucked MAP NEW PTHC Kids sex ptsc pthc kingpass hussyfan babyj jenny babyshivid.” J. Kremer admitted to searching specific terms and claimed that he performed these searches out of curiosity. J. Kremer later admitted that he had a “Kept” folder in which he stored the files he liked. J. Kremer stated that he would keep files he liked, regardless of the age of the individual(s) in the image and/or video.

Appellee App. 22. PTHC stands for pre-teen hardcore. Appellee App. 8.

[¶11] Appellant was charged federally and faced a 15-year minimum mandatory prison sentence for possessing the child pornography. Appellant App. 31. To avoid the 15-year minimum mandatory federal prison sentence, Appellant entered into a Stipulation with the federal government wherein he agreed to be charged in state court for the child pornography and plead guilty at the earliest convenient opportunity. Appellant App. 28. The Stipulation required Appellant to not file “any motions to dismiss, motions to suppress, or any similar motions.” Appellant App. 28-29. Appellant and his attorney signed the Stipulation on November 19, 2015. Appellant App. 29.

[¶12] Appellant was charged by way of a complaint on January 26, 2016, with five counts of Possession of Certain Materials Prohibited in district court in Ward County. Appellee App. 24-25. Appellant waived his right to a preliminary hearing and then pled guilty to counts 1, 2, and 3 at a change of plea hearing on February 25, 2016. Change of Plea Transcript page 4, line 21 to page 5, line 12, page 12, line 11 to 22. Appellant had a copy of the information in front of him at the time he changed his plea. Change of Plea Transcript page 7, line 18 to 21. On June 10, 2016, Appellant was sentenced pursuant to the terms of the negotiated plea agreement. Five years on count 1, a consecutive five years

on count 2, and three years of supervised probation consecutive to counts 1 and 2. Appellee App. 4. Per the plea agreement, Counts 4 and 5 were dismissed. Appellee App. 4.

[¶13] Appellant filed an appeal in the underlying case which was subsequently withdrawn. Appellee App. 5.

LAW AND ARGUMENT

[¶14] I. The District Court Properly Determined Appellant Did Not Receive Inadequate Assistance of Counsel

[¶15] Appellant has not shown that Attorney Baumann was ineffective. To succeed on a claim of ineffective assistance of counsel, petitioner must show counsel's performance was deficient and this prejudiced the petitioner. Strickland v. Washington, 466 U.S. 668, 694 (1984). "[Petitioner] must overcome a presumption that his attorney's performance fell within the broad range of reasonableness." Sambursky v. State, 2006 ND 223, ¶14, 723 N.W.2d 524. "[T]he court must consider all circumstances and decide whether there were errors so serious that defendant was not accorded that 'counsel' guaranteed by the Sixth Amendment." Id.

[¶16] A defendant claiming ineffective assistance of counsel must establish two elements: (1) counsel's performance was deficient, and (2) counsel's deficient performance prejudiced the defendant. Wilson v. State, 1999 ND 222, ¶8, 603 N.W.2d 47. "Effectiveness of counsel is measured by an objective standard of reasonableness considering prevailing professional norms." State v. Steen, 2004 ND 228, ¶9, 690 N.W.2d 239. "Counsel's conduct is presumed to be reasonable and courts consciously attempt to limit the distorting effect of hindsight." Id. To prevail, petitioner is required to "overcome the 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" Heckelsmiller v. State, 2004 ND 191, ¶3, 687 N.W.2d 454.

[¶17] Appellant fails to meet either prong under Strickland. Appellant states Attorney Baumann’s performance was deficient for five reasons. Appellant Br. ¶ 37. Appellant fails to argue why any of his reasons should be considered deficient performance, merely making the conclusory statement that the result is deficient performance. Appellant Br. ¶ 40. See State v. Meador, 2010 ND 139, ¶ 15, 785 N.W.2d 886 (“[A]n argument is without merit when a party does not provide supportive reasoning or citations to relevant authorities.”); State v. Cone, 2014 ND 130, ¶ 19, 847 N.W.2d 761 (finding conclusory assertions are not sufficient; courts do not need to consider arguments that are not adequately supported and briefed); McMorrow v. State, 2003 ND 134, ¶ 12, 667 N.W.2d 577 (conclusory arguments are without merit unless supported by reasoning to relevant authorities).

[¶18] Appellant was facing a mandatory minimum of 15 years in federal prison. Appellee App. 41. Appellant received a sentence of 10 years with three years probation to follow in state court. Appellee App. 31. Appellant cannot show that an attorney who negotiates a significantly shorter prison sentence is somehow deficient under Strickland. An attorney who negotiates a sentence as lenient as the one Appellant received in district court is very effective and proficient.

[¶19] Appellee’s brief is incorrect when dealing with the second prong of Strickland. Appellee states “[i]n 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.” Appellee Br. ¶ 41. That is not the second prong of Strickland. The second prong of Strickland is that counsel’s deficient performance prejudiced the defendant. Wilson ¶ 8. Appellant cannot show he was prejudiced by Attorney Baumann’s performance because he benefitted greatly from

Attorney Baumann's performance. Appellant received the benefit of Attorney Baumann negotiating a significantly shorter prison sentence. This is the exact opposite of an attorney's performance prejudicing his client.

[¶20] II. The District Court Complied With Rule 11 of the North Dakota Rules of Criminal Procedure.

[¶21] Appellant's brief argues the district court failed to comply with "Rule 11(b)(1)(F), 11(b)(3) and 11(b)(4)(A) of the North Dakota Rules of Criminal Procedure."

¶ 50. Each will be analyzed separately.

[¶22] A. The District Court Complied With Rule 11(b)(1)(F).

[¶23] At the Change of Plea hearing, the following exchange took place prior to Appellant changing his plea:

The Court: All right. As I say, all Counts 1 through 5 are essentially the same count. They are possession of prohibited materials. And as has been discussed it's child pornography. Do you understand the charge?

The Defendant: Yes.

The Court: In each of these five counts?

The Defendant: Yes.

Change of Plea Transcript, Page 8, line 6 to 13. The guilty pleas occurred later in the hearing. Change of Plea Transcript, Page 12, line 11 to 22. The district court told Appellant the nature of each charge to which he was pleading, consistent with N.D.R. Crim. P. 11(b)(1)(F).

[¶24] B. The District Court Complied With Rule 11(b)(3).

[¶25] N.D.R. Crim. P. Rule 11(b)(3) requires the district court determine there is a factual basis for the plea. In arguing the district court failed to comply with this rule, Appellant ignores case law and the record. Appellant Br. ¶ 50-52. At the Change of Plea

Hearing, the district court stated Appellant was charged with five counts of possession of prohibited materials. Change of Plea Transcript, Page 2, line 9-10. Assistant State's Attorney Pierson informed the district court the search warrant FBI agents executed on Appellant's electronics located 197 files of child pornography. Change of Plea Transcript, Page 3, line 15-18. Assistant State's Attorney Pierson then told the court, [Appellant's]

searches were particularly on point for finding child pornography on the black web and uTorrent using specific code words, as alleged in the Complaint, through the descriptions and hash values of these images they contained graphic portrayals of minors. I believe, according to the discovery, like I mentioned, that has been provided, these minors were prepubescent, some appeared to be as young as three years old, being both orally and vaginally penetrated.

Change of Plea Transcript, Page 3, line 22 to Page 4, line 6. The following exchange took place later in the hearing:

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.

Change of Plea Transcript, Page 12, line 23 to Page 13, line 13. "A factual basis is a statement of facts to assure the defendant is guilty of the crime charged." State v. Bates, 2007 ND 15, ¶ 8, 726 N.W.2nd 595. Assistant State's Attorney Pierson that Appellant used specific search terms to seek out child pornography and that 197 files of child

pornography were found in his electronics. A sufficient factual basis was provided at the Change of Plea Hearing to satisfy N.D.R. Crim. P. 11(b)(3).

[¶26] Appellant’s Brief chooses to ignore that a district court “may conclude that a factual basis exists from anything on the record.” Mackey v. State, 2012 ND 159, ¶ 9, 819 N.W.2d 539. The district court had an Affidavit of Probable Cause, sworn to by FBI Agent Bryan Snyder, which supported the five charges Petitioner faced. Appellee App. 20-23. The Court also had a sworn complaint, signed by FBI Agent Bryan Snyder, detailing with great specificity the basis for all five counts. Appellee App. 24-25. The Complaint states:

That on or about November 8, 2013 and ending November 9, 2013, in the County of Ward, North Dakota, [James Richard Kremer] committed the offense(s) of:

Count 1: The defendant, knowing of its character and content, knowingly possessed any motion picture, photograph, or other visual representation that included sexual conduct by a minor. To wit: **James Richard Kremer**, knowing of its character and content, knowingly possessed a digital image labeled “E:\Stills\pthc (316).JPG,” with the SHA1(base16) hash value “8ee772dee0b3552868818bb568eb7e6cb68c67c,” which portrayed a prepubescent white female without pants or underwear on, with her legs spread and vagina exposed. Said offense is a CLASS C FELONY.

Count 2: The defendant, knowing of its character and content, knowingly possessed any motion picture, photograph, or other visual representation that included sexual conduct by a minor. To wit: **James Richard Kremer**, knowing of its character and content, knowingly possessed a digital image labeled “E:\Stills\pthc (371).jpg,” with the SHA1(base16) hash value “deccc582d92e33044aa4a60b0691fel1719e4690,” which portrayed a white minor female with legs spread and vagina exposed with a small amount of hair on her vagina. Said offense is a CLASS C FELONY.

Count 3: The defendant, knowing of its character and content, knowingly possessed any motion picture, photograph, or other visual representation that included sexual conduct by a minor. To wit: **James Richard Kremer**, knowing of its character and content, knowingly possessed a digital image labeled “E:\Stills\1248433404886.jpg,” with the SHA1(base16) hash value “29d78fbf5740ea9f47fa411d2ff2ad05556dc592,” which portrayed a

prepubescent white female laying naked on a bed, on her back, with her chest and vagina exposed. Said offense is a CLASS C FELONY.

Id. “Relying on the contents of the entire record for finding a factual basis is consistent with the language of N.D.R.Crim.P. 11(b)(3), which merely requires that a factual basis be established before entering judgement on a guilty plea.” Mackey ¶13 (internal citations omitted). The district court properly determined sufficient compliance with N.D.R. Crim. P. 11(b)(3).

[¶27] C. The District Court Complied With N.D.R. Crim. P. 11(b)(4)(A).

[¶28] N.D.R. Crim. P. 11(b)(4)(A) requires “[b]efore entering judgment on a guilty plea, the court must determine that the defendant acknowledges facts exist that support the guilty plea.” At the beginning of the Change of Plea Hearing, Assistant State’s Attorney Pierson laid out the basis for the five counts of possession of certain materials prohibited Appellant was facing. Change of Plea Transcript, page 3, line 15 to page 4, line 6. Appellant heard Ms. Pierson tell the district court that the FBI searched his home, locating 197 files of child pornography. Id. Appellant heard Ms. Pierson tell the district court his “searches were particularly on point for finding child pornography.” Id. page 3, line 22-33. And Appellant heard Ms. Pierson tell the district court the graphic nature of the child pornography, children “as young as three years old, being both orally and vaginally penetrated.” Id. page 4, line 4-6. Appellant heard all of that before he plead guilty to three counts of Possession of Certain Materials Prohibited. Id. page 12, line 11 to 22.

After Appellant pled guilty, this exchange took place:

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.

Id. page 12, line 23 to page 13, line 4. Appellant heard the factual basis laid out by the State, pled guilty, and then the district court if he had heard the factual basis prior to his plea. Appellant acknowledged he had heard the factual basis and in doing so acknowledged facts exist to support the guilty plea. The district court complied with N.D.R. Crim. P. 11(b)(4)(A).

[¶29] III. The District Court Improperly Denied State’s Motion for Summary Dismissal.

[¶30] Under N.D.C.C. §29-32.1-01(2)(a), “an application for relief under [the Uniform Postconviction Procedure Act] must be filed within two years of the date the conviction becomes final. A conviction becomes final when “[t]he time for appeal of the conviction to the North Dakota Supreme Court expires.” Id. Rule 4(b)(1) of the North Dakota Rules of Appellate Procedure states that “[i]n a criminal case, a defendant’s notice of appeal must be filed with the clerk of the supreme court within 30 days after the entry of judgment or order being appealed.” Essentially, a typical defendant has two years and 30 days from judgment to pursue an application for post-conviction relief.

[¶31] The State anticipates Appellant will argue N.D.C.C. § 29-32.1-01(2)(b) applies, which extends the period in which an application may be filed “[i]f an appeal was taken to the North Dakota supreme court.” Appellant did file an appeal with the Court, but he did not complete his appeal to the Court, voluntarily withdrawing his appeal before briefs were filed, meaning there was no argument before the Court and no opinion filed by the Court. Taking an appeal to the North Dakota Supreme Court clearly means seeing the appeal through to the issuance of an opinion. If the legislature wished to allow for an extended period in which to apply for post-conviction relief without seeing the appeal through to an opinion, the statutory language would not include “the time for petitioning

the United States supreme court for review expires.” Id. “Words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears.” There is nothing for the United States Supreme Court to review when a petitioner voluntarily withdraws his petition. N.D.C.C. § 01-02-02. The context of the statute is also clear, the legislature intended the extra time for a post-conviction application only if the appeal is taken through to an opinion. N.D.C.C. § 01-02-03. Giving a petitioner who voluntarily withdraws his petition the benefit of a time extension under N.D.C.C. § 29-32.1-01(2)(b) would be ludicrous or absurd. “Statutes must be construed to avoid a ludicrous or absurd result.” State v. Alles, 216 N.W.2d 805 at 817 (1974).

[¶32] Appellant was sentenced on June 10, 2016. Since Appellant withdrew his appeal, electing to not take it to the Court, the judgment finalization date is July 10, 2016. Appellant’s own application for post-conviction relief states it was submitted on July 17, 2018. This is beyond the period in which Appellant has the right to file his application. Since Appellant was late in filing his application, the Court should properly deny his appeal.

CONCLUSION

[¶33] The district court correctly determined Appellant has not shown he received ineffective assistance of counsel. The district court also correctly determined there was substantial compliance with N.D.R. Crim. P. 11 at the Change of Plea Hearing. The district court was incorrect in denying the State’s Motion for Summary Dismissal based upon the argument above.

[¶34] Based upon the foregoing, the State respectfully requests that the district court’s Order Denying Post-Conviction Relief be affirmed.

ORAL ARGUMENT NOT REQUESTED

Dated this 27th day of February, 2020.

/s/ Christopher Nelson _____
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vs.)	
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Respondent and Appellee.)	

CERTIFICATE OF COMPLIANCE

[1] The undersigned hereby certifies that the Brief of Respondent/Appellee, is in compliance with Rule 32 of North Dakota Rules of Appellate Procedure and the brief contains 15 pages.

Dated this 27th day of February, 2020.

/s/ Christopher Nelson
Christopher W. Nelson (#08708)

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AFFIDAVIT OF SERVICE

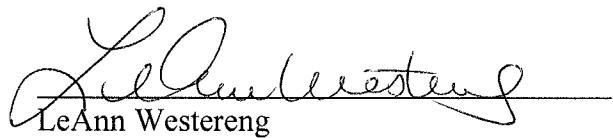
LeAnn Westereng, being first duly sworn, deposes and says:

That she is a citizen of the United States of America, over the age of twenty-one years, and is not a party to nor interested in the above entitled action; that on the 27th day of February, 2020, this Affiant provided a true and correct copy of the following documents in the above entitled action:

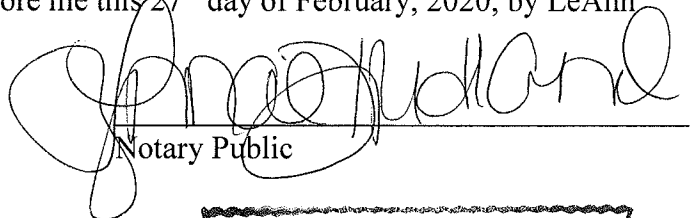
APPELLEE'S BRIEF with AFFIDAVIT OF COMPLIANCE AND APPENDIX OF RESPONDENT-APPELLEE

By electronic service to the following:

BENJAMIN C PULKRABEK
pulkrabek@lawyer.com


LeAnn Westereng

Subscribed and sworn to before me this 27th day of February, 2020, by LeAnn Westereng


Notary Public

LYNNAE RUDLAND
Notary Public
State of North Dakota
My Commission Expires April 26, 2022