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FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAY 8, 2020
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Jason Wayne Oien,	)	
	)	
Petitioner and Appellant,	)	Supreme Court No. 202000030
vs.	)	
	)	District Ct. No. 09-2019-CV-02175
State of North Dakota,	)	
	)	
Respondent and Appellee.	)	

APPELLEE'S BRIEF

Appeal from the Order Denying Post-Conviction Relief
in Cass County District Court, East Central Judicial District,
January 28, 2020 the Honorable Thomas R. Olson, Presiding

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[¶4] I. Whether the district court correctly concluded that Oien's post-conviction relief claims were barred because the court had already ruled on them and, alternatively, his application was filed after the two-year limitation period expired.

[¶5] **STATEMENT OF CASE**

[¶6] Oien appeals from a district court judgment denying his application for post-conviction relief. Oien had sought relief from his convictions, which included habitual offender sentencing after his guilty plea to manslaughter. He contends the district court should have determined he proved ineffective assistance of counsel. Oien specifically claims his "trial counsel did not advise him of the habitual offender status, and if they did, he was taking [medications], which made him 'out cold' or cloudy.'" (Oien's Brief ¶ 16.)

[¶7] The State argues that the district court correctly denied Oien's post-conviction relief application. Two alternative grounds support the district court's decision. First, Oien had – in a previous post-conviction relief application - argued ineffective assistance of counsel based on the allegation he did not know he would potentially be facing habitual offender sentencing. The district court already heard and denied the claim; so res judicata supported denial of it. Second, Oien failed to file his post-conviction relief application within the two-year statute of limitations period in N.D.C.C. § 29 32.1-01(2), and the record did not show any basis for an exception to the period. The State requests that this Court affirm the district court's decision.

[¶8] STATEMENT OF FACTS

[¶9] A. Criminal Proceedings.

[¶10] In the spring of 2015, Oien was charged with multiple offenses, including conduct relating to violence perpetrated against Joey Gaarsland. (Index # 1, 09-2015-CR-01669.) Gaarsland died shortly thereafter, and charges were amended to include murder, a class AA felony. (Index #'s 9 &10, 09-2015-CR-01669.) Gaarsland applied for a public defender, and an attorney was assigned to represent him. (Index #'s 12 & 15, 09-2015-CR-01669.) A few months later, the State filed notice of intent to seek habitual offender sentencing. (Index # 34, 09-2015-CR-01669.)

[¶11] In the spring of 2016, Attorney Rhianna Gorham was appointed to represent Oien, because the prior attorney had a conflict. (Index # 107, 09-2015-CR-01669.) Over the next several months, Oien (through counsel) filed multiple motions, including ones to sequester a detective, to exclude photographs, to exclude evidence of prior bad acts, to compel discovery, for lesser included offense instructions, for a bill of particulars, to exclude other evidence, and to suppress identification. (Index #'s 133, 139, 143, 159, 163, 167, 179, 200, & 204, 09-2015-CR-01669.)

[¶12] In September 2016, Oien appeared with Attorney Gorham and Attorney Jessica Ahrendt at a change of plea hearing. At the outset, the State announced that Oien would be pleading guilty to charges including manslaughter

and that there was an agreement that the State, at a later sentencing hearing, would seek habitual offender sentencing, which would "double the cap." (Index # 281, 09-2015-CR-01669 "COP" at 2:23-3:3.) Attorney Gorham and Oien himself confirmed they understood. (COP at 3:9-19.) Oien ultimately entered guilty pleas to the charges, including manslaughter. (COP at 5:5-8:6.) Through colloquy, the court learned that Oien had sufficient time to consult with counsel (COP at 4:10-24), that Oien understood the charges and potential penalties (COP at 4:25-5:4), that Oien knew he was waiving his rights (COP at 20-23), that Oien had not been threatened or coerced (COP at 8:10-12), that no promises had been made to Oien (COP at 8:13-15), and that Oien understood the court was not required to follow the recommendation of either the State or his attorney (COP at 11:2-20). Reiterating the habitual offender position, the State explained that the court "would have the option of sentencing on Count 1, the B felony, but with the maximum not of 10 years but of 20 years." (COP at 15:14-25.) Oien's attorneys confirmed the defense understanding, indicating the only issue involved whether certified copies of the prior convictions supporting habitual offender sentencing would be provided. (COP at 15:25-17:18.)

[¶13] In January 2017, a sentencing hearing occurred. At the outset, Oien's attorney indicated agreement that the certified copies of prior convictions qualified Oien for sentencing under the habitual offender statute. (Index # 283, 09-2015-CR-01669 "Sent." at 8:22-24.) The State argued for a fifteen-year habitual offender

sentence on the manslaughter count. (Sent. at 24:10-17.) Oien, through his attorney, recommended the court not impose habitual offender sentencing. (Sent. at 24:23-25:8.) Oien himself addressed the court, saying he had "great compassion" for the victim's family and that he was not a "monster." (Sent. at 27:19-22.) The court imposed a fifteen-year habitual offender sentence on the manslaughter count. (Sent. at 28:12-15, 30:13-15.)

[¶14] Judgment was entered on January 6, 2017. (Index # 232, 09-2015-CR-01669.) Oien filed a notice of appeal. (Index # 233, 09-2015-CR-01669.) This Court ordered the matter remanded for the district court to amend the judgment to specify Oien was sentenced as a habitual offender. (Index. # 240.) An amended judgment was entered on February 1, 2017. (Index # 241.) Upon Oien's motion, his appeal was ultimately dismissed. (Index # 248.)

[¶15] In May 2017, Oien filed a letter requesting a sentence reduction. (Index # 249, 09-2015-CR-01669.) In the letter, Oien claimed the State inappropriately sought to seek habitual offender sentencing. (Index # 249, 09-2015-CR-01669.) Oien alleged that the State agreed to only seek habitual offender sentencing if Oien proceeded to trial. (Index # 249, 09-2015-CR-01669.) In a letter filed June 6, 2017, Oien again claimed he "wasn't suppose[d] to get habitual offender" sentencing." (Index # 253, 09-2015-CR-01669.) The court denied Oien's request for a sentence reduction. (Index # 265, 09-2015-CR-01669.)

[¶16] B. **Oien's Previous Post-Conviction Relief Action.**

[¶17] In September 2017, Oien made his first application for post-conviction relief. (Index # 26, 09-2019-CV-02175.) Oien included an ineffective assistance of counsel claim based on the habitual offender sentence being imposed "when that wasn't the agreement." (Index # 26, 09-2019-CV-02175.) Oien also claimed his plea "was not made voluntarily and with understanding of the nature of the charge and consequences of the plea." (Index # 26, 09-2019-CV-02175.)

[¶18] After a hearing, the court denied Oien's application. The court found that "[d]efense counsel, particularly Attorney Ahrendt, discussed the ramifications and likelihood of a finding of habitual offender, and she believes Oien understood these ramifications and likelihood of a finding of habitual offender. (Index # 27, 09-2019-CV-02175.) The court further found that "[w]hile it was likely that Oien would be found a habitual offender, defense counsel would argue that even so, it need not be considered in any sentencing" and "[t]he habitual offender issue was discussed often in the months and weeks before trial." (Index # 27, 09-2019-CV-02175.) The court determined that Oien pleaded guilty voluntarily and that his counsel was not ineffective. (Index # 27, 09-2019-CV-02175.)

[¶19] **C. <u>Oien's Current Post-Conviction Relief Action</u>.**

[¶20] On June 24, 2019, Oien filed his second application for post-conviction relief. (App. 3.) Included in Oien's claims were allegations that his lawyer promised him he would not receive habitual offender sentencing and his pleas were not voluntary because he was on several medications. (App. 17, 22.) Oien

submitted an affidavit asserting that when he pleaded guilty he was unaware of potential habitual offender sentencing and that he was "under the influence of 6 different medications, which made things incredibly cloudy and difficult for [him] to understand." (App. 23.) The State responded to Oien's claim, asserting res judicata, misuse of process, and untimeliness under the two-year statute of limitations in N.D.C.C. § 29-32.1-01.

[¶21] A hearing was held in January 2020. Attorneys Gorham and Ahrendt testified that before Oien pleaded guilty, they had multiple discussions with him about the potential for habitual offender sentencing. (App. 33:11-35:20, 38:20-37:2, 41:15-43:19.) They also testified that Oien appeared to understand the change of plea proceeding and there were no indications he was suffering from any conditions impacting his competency. (App. 37:20-28:17, 48:6-15.) Oien's father, sister, and mother each testified that they were present for discussion between Oien and his counsel on the day of the change of plea hearing. (App. 47:9-19, 28:2-13, 30:2-11.) Each claimed that there was no discussion of habitual offender sentencing, though Oien's sister at one point said the conversation included that Oien's attorneys "were going to ask for ten years" [and] [t]he State would ask for twenty." (App. 47:20-48:12,48:14-49:15, 50:12-31:4.) Not one testified that Oien was suffering from any conditions or did not understand the proceedings. (App. 47:6-51:7.) In describing the change of plea hearing, Oien's father testified that he concluded, "it's up to [Oien] what he does." (App. 48:21-22.)

[¶22] Oien testified that his attorneys told him that if he pleaded guilty, he would not be facing potential habitual offender sentencing. (App. 51:17-53:1.) Upon being asked about his inability to understand the change of plea proceeding, Oien alluded to his "medication messing with [him]" when the State indicated it was still seeking habitual offender sentencing. (App. 55:14-23.) Oien indicated that his attorneys assured him that on the manslaughter count, he would be sentenced to a maximum of ten years. (App. 55:18-57:7.)

[¶23] At the end of the hearing, the State again argued that Oien's application was not timely filed and that the issues had already been decided. (App. 58:16-20.) Indicating that it was denying Oien's application, the court concluded that it had previously ruled on the matter and that the statute of limitations had expired. (App. 58:7-13.) An order denying post-conviction relief was entered. (App. 60.) Oien appealed. (App. 61.)

[¶24] **STANDARD OF REVIEW**

[¶25] The district court's decision denying post-conviction relief was based on two independent grounds: res judicata and untimeliness. Each ground is subject to full review. See Steen v. State, 2007 ND 123, ¶ 13, 736 N.W.2d 457 ("Generally, the applicability of res judicata is a question of law and is fully reviewable on appeal."); see Ungar v. North Dakota State Univ., 2006 ND 185, ¶ 10, 721 N.W.2d 16 ("The applicability of res judicata is a question of law, fully reviewable on appeal."); Eagleman v. State, 2016 ND 54, ¶ 8, 877 N.W.2d 1 (explaining the issue required the Court to determine when the post-conviction relief applicant's conviction became final for the purposes of N.D.C.C. § 29–32.1–01(2), and "[s]tatutory interpretation is a question of law, fully reviewable on appeal").

[¶26] **LAW AND ARGUMENT**

[¶27] **I. The district court correctly concluded that Oien's post-conviction relief claims were barred because the court had already ruled on them and, alternatively, his application was filed after the two-year limitation period expired.**

[¶28] Both res judicata and untimeliness were proper grounds supporting the district court's denial of Oien's application. (App. 58:8-13.) Either alone was sufficient.

[¶29] **A. Res judicata was a proper ground for denying relief.**

[¶30] Under N.D.C.C. § 29-32.1-12, a post-conviction relief application may be denied on the ground of res judicata. If the same claim or claims were fully and finally determined in a previous proceeding, res judicata applies. Wacht v. State, 2015 ND 154, ¶ 8, 864 N.W.2d 740 (citing N.D.C.C. § 29-32.1-12(1)). A post-conviction relief proceeding is not intended to allow a defendant "multiple opportunities to raise the same or similar issues[.]" State v. Atkins, 2019 ND 145, ¶ 12, 928 N.W.2d 441, as corrected (May 28, 2019).

[¶31] The district court correctly denied Oien's application because the court "had previously ruled on th[e] matter," i.e., res judicata applied. At the outset, it's important to note that the State asserted res judicata in its initial pleading. (Index # 9 at ¶¶ 1, 4, & 5, 09-2019-CV-02175.) Thus it was properly preserved. See State v. Moore, 2010 ND 229, ¶ 9, 791 N.W.2d 376; see also N.D.C.C. § 29-32.1-12(3). In his prior application, Oien claimed ineffective assistance of counsel based on

allegedly not knowing about the potential for habitual offender sentencing and that his plea "was not made voluntarily and with understanding of the nature of the charge and consequence of the plea." (Index # 26, 09-2019-CV-02175.) Those are the same claims he made in his present application; "I was promised by my lawyer 8 years" and "[My] guilty plea was not voluntary" are the claims from his current application (App. 17) that he relies upon (Petitioner's Brief at ¶¶ 15-16). Res judicata bars them.

[¶32] Oien's increased specificity, i.e., that his plea was allegedly involuntary because of his medication use, does not permit him to relitigate the same general issue. "Petitioners are not entitled to post-conviction relief when their claims are variations of previous claims that have been rejected in prior proceedings." Smestad v. State, 2011 ND 163, ¶¶ 6-8, 801 N.W.2d 691 (concluding res judicata barred the petitioner's claim involving the authenticity of his signature on documents extending probation when the general issue of whether probation had been properly extended had been previously litigated); Flanagan v. State, 2006 ND 76, ¶ 7, 712 N.W.2d 602 (concluding res judicata barred a petitioner's claim when the basis for it switched from constitutional to statutory grounds).

[¶33] Denying Oien's current application because the issues raised had already been decided during the proceedings on the previous relief application was appropriate. The district court's decision should be affirmed.

[¶34] **B. <u>Untimeliness was a proper ground for denying relief</u>**.

[¶35] Under N.D.C.C. § 29-32.1-01(2), a petitioner must file an application for post-conviction relief within two years of the date the conviction becomes final. A conviction becomes final when: (a) the time for appeal to this Court expires, (b) if an appeal was taken, the time for petition to the United States Supreme Court expires, or (c) if review was sought in the United States Supreme Court, the date the Court issued a final order. N.D.C.C. § 29-32.1-01(2). Three exceptions to the two-year limitation period are: (1) newly discovered evidence, (2) "[t]he petitioner establishes that the petitioner suffered from a physical disability or mental disease that precluded timely assertion of the application for relief;" and (3) a new interpretation of law that is retroactively applicable. N.D.C.C. § 29-32.1-01(3)(a). If an exception applies, the application must be filed "within two years of the date the petitioner discovers or reasonably should have discovered the existence of the new evidence, the disability or disease ceases, or the effective date of the retroactive application of law." N.D.C.C. § 29-32.1-01(3)(b).

[¶36] Oien failed to file his second post-conviction relief application within two years of the date his conviction became final. Oien's conviction became final by March 3, 2017, at the latest. That was thirty days after the amended judgment was issued. See N.D.R.App. 4(b)(1)(A) (setting thirty days after the judgment as the time within which a criminal defendant's notice of appeal must be filed). Because there was no appeal maintained to this Court, there would be no basis for seeking United States Supreme Court review, and the original appeal period

expiration date must be used for calculating the limitation period. Two years from that date was March 3, 2019. Oien did not file his current application until June 24, 2019. (App. 3.) Oien's application was untimely.

[¶37] Moreover, there was no basis for an exception to the two-year limitation period. The only exception Oien alludes to is a physical disability or mental disease that precluded timely assertion of the application. (Petitioner's Brief ¶ 14.) It's true that Oien testified to his "medication messing with [him]" when the State indicated at the change of plea hearing it was still seeking habitual offender sentencing. (App. 55:14-23.) But the district court was not obligated to accept Oien's testimony as reliable. See generally City of Jamestown v. Neumiller, 2000 ND 11, ¶ 12, 604 N.W.2d 441. ("A trial court is not obliged to believe the testimony of defense witnesses.") None of his family members who testified, asserted Oien was suffering from any condition impacting his competency at the change of plea hearing. (App. 47:6-51:7.) In fact, Oien's father presumably believed that Oien was not suffering from any disability or disease; he testified that the decision on how to proceed was "up to [Oien]." (58:21-22.) Both of his attorneys testified that Oien appeared to understand the change of plea proceeding and there were no indications he was suffering from any conditions impacting his competency. (App. 37:20-28:17, 48:6-15.) In the proceedings on Oien's prior application, the court had already found that his attorney had "discussed the ramifications and likelihood of a finding of habitual offender" and concluded "Oien pled guilty voluntarily." (Index

27, 09-2019-CV-02175.) Finally, one should consider the fact that Oien actually voiced his claim multiple times within the two-year limitation period. In his May 2017 letter requesting a sentence reduction, his June 2017 letter, and his prior relief application, Oien asserted his habitual offender sentencing claim. (Index #'s 249 & 253, 09-2015-CR-01669; Index # 26, 09-2019-CV-02175.) So, regardless of whether his medications caused him to not comprehend the habitual offender claim at the time of his change of plea, the record shows he was capable within the two-year limitation period of asserting the claim and did so multiple times. Nothing precluded Oien from timely asserting his claim.

[¶38] Denying Oien's application because it was not filed within the statutory limitation period was appropriate. The district court's decision should be affirmed.

[¶39] **CONCLUSION**

[¶40] The district court correctly concluded that Oien's post-conviction relief claims were barred by either res judicata or the two-year statute of limitations. The State requests this Court affirm the district court's judgment.

Respectfully submitted this 8th day of May 2020.

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[¶41] **CERTIFICATE OF COMPLIANCE**

[¶42] I hereby certify that this brief complies with N.D.R.App.P. 32(a)(8). The page count, including this certificate, is nineteen pages.

Dated this 8th day of May, 2020.

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[¶43] **CERTIFICATE OF SERVICE**

[¶44] A true and correct copy of the foregoing document was sent by email on the 8th day of May, to: Laura C. Ringsak at lringsak@midcontwork.com

Reid A. Brady, NDID# 05696