

## IN THE SUPREME COURT

## STATE OF NORTH DAKOTA

Jorge Alberto Velasquez,	)	
	)	
Petitioner and Appellant,	)	Supreme Court No. 20200043
vs.	)	
	)	District Ct. No. 09-2016-CV-02392
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 27, 2020 the Honorable Steven L. Marquart, Presiding

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**[¶3] STATEMENT OF ISSUES**

[¶4] I. Whether the district court correctly concluded that Velasquez failed to prove ineffective assistance of counsel.

**[¶5] STATEMENT OF CASE**

[¶6] Velasquez appeals from a district court judgment denying his application for post-conviction relief. Claiming ineffective assistance of counsel, Velasquez had sought to withdraw his guilty pleas to aggravated assault, terrorizing, and simple assault. Velasquez contends that his attorney did not review discovery with him or discuss the case with him.

[¶7] The State asserts the district court correctly concluded Velasquez failed to prove ineffective assistance of counsel. The district court did not clearly err in finding Velasquez's conclusory and self-serving statements incredible based on the record. The State requests that this Court affirm the judgment.

## **[¶8] STATEMENT OF FACTS**

### **[¶9] A. Criminal Proceedings**

[¶10] In June 2014, Velasquez was charged with aggravated assault, terrorizing, and simple assault perpetrated against his girlfriend, Catharine Sundby. (Index # 1, 09-2014-CR-02253.) On the same day as his initial appearance, Velasquez applied for a public defender, and Jay Greenwood was assigned to represent him. (Index # 9, 09-2014-CR-02253.)

[¶ 11] In early November 2014, the case was scheduled for a change of plea hearing to occur in mid-December 2014. (Index # 15, 09-2014-CR-02253.) At the scheduled hearing, Velasquez pleaded guilty to each charge. (Index # 47, 09-2014-CR-02253 “COP,” at 2:16-3:1.) Velasquez confirmed that he had a chance to speak with his attorney and understood by pleading guilty he was giving up all the rights he had been advised of. (COP at 2:13-15, 3:2-16.) Velasquez indicated that no one had threatened or coerced him. (COP at 3:17-19.) The State provided a factual basis, which noted Velasquez’s girlfriend initially reported the crimes but later recanted, and included Velasquez’s admissions to punching, strangling, and threatening to kill his girlfriend. (COP at 3:20-4:9.) Velasquez stated he agreed with that factual basis. (COP at 4:10-12.)

[¶12] The parties jointly recommended a sentence that suspended all jail time on each count. (COP at 4:22-6:7.) Velasquez’s attorney alluded to the victim recantation issue and advised that “Velasquez was fairly adamant that he didn’t want

to [go to trial].” (COP at 5:24-6:3.) Further, “he’s told me he’ll contact the domestic violence assessment inventory people immediately” and “[h]e’ll sign the no contact order today.” (COP at 6:4-6.) Immediately after his attorney’s remarks, Velasquez was given an opportunity to address the court. (COP at 6:8-9.) He declined. (COP at 6:10.) The court imposed the parties’ recommended sentence, which included suspended jail time and probation. (COP at 6:11-7:11.)

[¶13] In the fall of 2015, the State petitioned to revoke Velasquez’s probation. (Index # 22, 09-2014-CR-02253.) Attorney Nicholas Thornton was appointed to represent Velasquez. (Index # 31, 09-2014-CR-02253.) After an August 2016 hearing, the court revoked Velasquez’s probation. (Index # 39, 09-2014-CR-02253.) Later that month, Velasquez moved for a reduction of sentence. (Index # 42, 09-2014-CR-02253.) Acknowledging that his motion was essentially a “plea for leniency” and he was “grateful[sic] for the sentence given,” Velasquez explained that sentence reduction would improve his job situation. (Index # 42 at ¶¶ 3-4, 09-2014-CR-02253.) The court denied the motion. (Index # 45, 09-2014-CR-02253.)

[¶14] B. **Post-Conviction Relief Proceedings**

[¶15] In August 2016, Velasquez applied for post-conviction relief. (App. 7.) The application listed four grounds: (1) ineffective assistance of counsel, (2) prosecutorial misconduct, (3) insufficiency of evidence, and (4) newly discovered evidence. (App. 8.) Those grounds were based upon: “Defendant’s personal

knowledge, Officer[] Wetsby[sic] supplement, Officer[] Holte supplement, Officer Fauske supplement, the discovery I received by lawyer Nicholas Thornton, Catherine[sic] Sundby[.]” (App. 9.)

[¶16] Velasquez requested appointment of a public defender. (Index # 5, 09-2016-CV-02392.) Velasquez’s request was approved. (Index # 5, 09-2016-CV-02392.) Scott Thompson was assigned to represent Velasquez. (Index # 10, 09-2016-CV-02392.) Velasquez was granted multiple continuances. (Index #’s 19, 26, 09-2016-CV-02392.) A hearing finally occurred in May 2017. (App. 12.) Although Thompson appeared, Velasquez did not. (App. 12.) Thompson had no information regarding Velasquez’s failure to appear. (App. 12.) The court dismissed Velasquez’s application for post-conviction relief. (App. 12.)\_

[¶17] More than two years later, Velasquez again requested appointment of a public defender. (Index # 37, 09-2016-CV-02392.) Velasquez’s request was again approved. (Index # 37, 09-2016-CV-02392.) A few months after that, Velasquez filed a motion to reopen the post-conviction relief proceeding. (App. 13.) In support, Velasquez asserted by affidavit that he did not commit the crimes he was convicted of. (Index # 45 at ¶ 3, 09-2016-CV-02392.) Velasquez also stated “[i]t was hard to get an attorney to represent me and several had to get off my case[.]” (Index # 45 at ¶ 4, 09-2016-CV-02392.) Further, he claimed to have limited time with Greenwood, who told him to plead guilty. (Index # 45, 09-2016-CV-02392.) The alleged harm was that his convictions were being used to enhance his



sentence for “other charges pending now.” (Index # 45, 09-2016-CV-02392.) Velasquez added that the prosecutor made inappropriate remarks and “threatened” him. (Index # 45, 09-2016-CV-02392.)

[¶18] A hearing was held in January 2020. Velasquez testified that he pleaded guilty because he felt “railroaded.” (PCR at 6:12-18.) If he didn’t plead guilty, Velasquez reasoned he “was still going to be found guilty” because the victim was related to an attorney and a judge. (PCR at 6:18-22.) Velasquez asserted that he had more than one attorney because “everybody claimed conflict of interest and they would drop my case before even taking it.” (PCR at 7:16-25.) Regarding Jay Greenwood, Velasquez claimed that he met Greenwood the day of court, was not given much time to consult with Greenwood, did not see discovery before he pleaded guilty, was advised that he wouldn’t be facing jail time if he pleaded guilty, and felt he would not receive a fair trial. (PCR at 8:1-10:25.) Further, Velasquez did not think Greenwood investigated the case or “did much of anything” for Velasquez. (PCR at 11:1-4.)

[¶19] Upon cross-examination, Velasquez acknowledged that police reports indicated he admitted to punching his girlfriend. (PCR at 12:3-5.) Velasquez claimed that he told police he did whatever his girlfriend said he did. (PCR at 11:25-12:1.) Attempting to explain that claim, Velasquez testified, “I wasn’t aware of what she was going to say.” (PCR at 12:1-2.) Although he denied that Greenwood should have contemplated future crimes that Velasquez would commit, Velasquez

asserted part of his argument was based upon the impact his convictions were having on offenses he was later charged with. (PCR at 12:25-13:10.)

[¶20] Greenwood testified that he did not recall specifics about his representation of Velasquez. (PCR 16:25-17:2, 17:19-21.) His standard practice was to send a letter to the client and a discovery request letter to the State. (PCR at 18:1-13.) Greenwood explained that the decision on how to proceed would have been Velasquez's; Greenwood would have simply explained the options. (PCR at 23:17-24:22.) From his recent review of the police reports offered at the hearing, Greenwood noted that Velasquez made significant admissions and an eyewitness existed. (PCR at 18:23-25, 20:25-21:9.)

[¶21] Copies of police reports from the incident were admitted into evidence. (PCR at 20:23.) Officer Hanson's report indicated that after being Mirandized, Velasquez said he punched and choked his girlfriend and told her he was going to kill her. (Index # 65 at pg. 3, 09-2016-CV-02392.) Officer Holte's and Officer Westby's reports documented his girlfriend's multiple injuries. (Index # 65 at pgs. 6-7 & 10, 09-2016-CV-02392.) Officer Fauske's report identified two witnesses who saw a male punching a female at the scene. (Index # 65 at pgs. 8-9, 09-2016-CV-02392.)

[¶22] The district court issued a written opinion denying Velasquez's application for post-conviction relief. (Index # 66, 09-2016-CV-02392.) The court found Velasquez's assertions that he was "railroaded[,]" he did not commit the

crimes, and Greenwood did no discovery were undercut by the record from the change of plea hearing. (Index # 66 at ¶¶ 5-6, 09-2016-CV-02392.) The court reasoned that it was not foreseeable that Velasquez’s convictions could be used years later in a federal prosecution. (Index # 66 at ¶¶ 8-9, 09-2016-CV-02392.) The court concluded that Greenwood “provided very good counsel resulting in a suspended sentence.” (Index # 66 at ¶ 10, 09-2016-CV-02392.) Judgment was entered. (App. 17.) Velasquez appealed. (App. 18.)

**[¶23] STANDARD OF REVIEW**

[¶24] Whether a defendant received ineffective assistance of counsel is a mixed question of law and fact fully reviewable on appeal. See Osier v. State, 2014 ND 41, ¶ 10, 843 N.W.2d 277. The district court's factual findings will not be overturned unless they are clearly erroneous. Thompson v. State, 2016 ND 101, ¶ 7, 879 N.W.2d 93. A factual finding is clearly erroneous if it is induced by an erroneous view of law, if it is unsupported by any evidence, or if, although some evidence supports the finding, the appellate court has a definite and firm conviction a mistake was made. Morris v. State, 2019 ND 166, ¶ 9, 930 N.W.2d 195.

**[¶25] LAW AND ARGUMENT**

**[¶26] I. The district court correctly concluded that Velasquez failed to prove ineffective assistance of counsel.**

[¶27] Velasquez challenges the district court’s conclusion he failed to prove his ineffective assistance of counsel claim. To prevail on such claim in the context of a guilty plea, a post-conviction relief applicant must show: (1) his attorney’s representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for attorney’s errors, he would not have pleaded guilty and would have insisted on going to trial.” Lindsey v. State, 2014 ND 174, ¶ 19, 852 N.W.2d 383. In a plea bargain scenario, the applicant must allege facts that, if established, would support a conclusion that rejecting the plea bargain would have been rational because valid defenses existed, a suppression motion could have undercut the prosecution, or a realistic potential existed for a lesser sentence. See Bahtiraj v. State, 2013 ND 240, ¶ 16, 840 N.W.2d 605. “No court is satisfied with a defendant’s subjective, self-serving statement that, with competent advice, he would have insisted on going to trial.” Booth v. State, 2017 ND 97, ¶ 9, 893 N.W.2d 186; see also Morales v. State, 2019 ND 137, ¶ 10, 927 N.W.2d 401.

[¶28] The record shows Velasquez failed to prove the first prong of his ineffective assistance of counsel claim. While Greenwood could not recall specifics, he explained that his standard procedure was to send an opening letter to his client. (PCR at 18:1-13.) It’s noteworthy that Velasquez did not testify that he

ever tried to reach Greenwood or that Greenwood ever failed to respond to a request. (PCR at 5:7-15:2.) What's more is that Velasquez was not credible in other statements. First, in both his affidavit and testimony, he swore there were multiple attorney conflicts and Greenwood ended up assigned to the case. (Index # 45 at ¶4, 09-2016-CV-02392; PCR at 7:16-25.) But that's not accurate; the record establishes that Greenwood was appointed from the outset and continued representing Velasquez through the change of plea hearing. (Index # 9, 09-2014-CR-02253.) Second, Velasquez's explanation of his statements to police was nonsensical; it is simply not believable that he told police he did whatever his girlfriend said - because he "wasn't aware of what she was going to say." (PCR at 12:1-2.) Third, Velasquez's testimony that he felt "railroaded" into pleading guilty (PCR at 6:12-18) was undercut by his representations to the court during the change of plea hearing. At the previous hearing, he advised the court that he had had time to speak with his attorney (COP at 2:13-15) and no one had threatened or coerced him (COP at 3:17-19). Fourth, his recent assertion of innocence was undercut by his acknowledgement during the change of plea hearing. At the previous hearing, he advised the court that he agreed with the prosecutor's asserted factual basis - which included his admissions to punching, strangling, and threatening to kill his girlfriend. (COP at 3:20-4:12.) In addition, Greenwood advised the court that Velasquez stated he would immediately begin coordinating his domestic violence

assessment. (COP at 6:4-6.) Put simply, Velasquez failed to show that Greenwood's conduct fell below an objective standard of reasonableness.

[¶29] The record shows Velasquez also failed to prove the second prong of his ineffective assistance of counsel claim. No valid defenses existed; Velasquez admitted to the crimes, the victim had multiple injuries, and two eyewitnesses (at least to part of the sequence of Velasquez's crimes) existed, (Index # 65, 09-2016-CV-02392.) No evidence showed a basis for a suppression motion. The police reports showed that Velasquez's admissions were made after he was Mirandized. (Index # 65 at pg. 3, 09-2016-CV-02392.) Finally, nothing suggested there was a realistic potential for a lesser sentence. As the court suggested, Velasquez received a lenient sentence, avoiding any jail time. See Bahtiraj. v. State, 2013 ND 240, ¶ 16, 840 N.W.2d 605. Velasquez's claims were based on his subjective, self-serving, and not credible statements. In short, Velasquez failed to show that there was a reasonable probability that, but for Greenwood's alleged errors, he would not have pleaded guilty and would have insisted on going to trial.

[¶30] **CONCLUSION**

[¶31] The district court correctly concluded that Velasquez failed to prove ineffective assistance of counsel. The State requests this Court affirm the district court's judgment.

Respectfully submitted this 1st day of May, 2020.

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**[¶32] CERTIFICATE OF COMPLIANCE**

[¶33] I hereby certify that this brief complies with N.D.R.App.P. 32(a)(8). The page count is fifteen pages.

Dated this 1st day of May, 2020.

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**[¶34] CERTIFICATE OF SERVICE**

[¶35] A true and correct copy of the foregoing document was sent by email on the 1st day of May, to: Kiara C. Kraus-Parr at service@kpmwlaw.com

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**[¶32] CERTIFICATE OF COMPLIANCE**

[¶33] I hereby certify that this brief complies with N.D.R.App.P. 32(a)(8). The page count is fifteen pages.

Dated this 1st day of May, 2020.

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