
IN THE SUPREME COURT OF NORTH DAKOTA

Jorge Alberto Velasquez,)	Supreme Court File No.
)	20200043
)	
Petitioner and Appellant,)	Cass County Civil No.
)	2016-CV-02392
)	
v.)	
)	
State of North Dakota,)	Appellant’s Brief
)	
Respondent and Appellee.)	

**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.**

**APPELLANT’S BRIEF
ORAL ARGUMENT REQUESTED**

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Oral Argument:

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

Transcript References:

The evidentiary hearing for this matter was conducted on January 24, 2020.

The transcript of that hearing is referred to as “PCR.” in this brief.

JURISDICTION

[¶ 1] The district court had jurisdiction under N.D.C.C. § 29-32.1-01. The North Dakota Supreme Court has jurisdiction over the appeal of this matter pursuant to N.D.C.C. § 29-32.1-14 which provides that, “[a] final judgment entered under this chapter may be reviewed by the supreme court of this state upon appeal as provided by rule of the supreme court.” Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provisions, the North Dakota legislature enacted sections 29-28-03 and 29-28-06, N.D.C.C., which provides as follows:

“An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03. An appeal may be taken by the defendant from:

1. A verdict of guilty;
2. A final judgment of conviction;
3. An order refusing a motion in arrest of judgment;
4. An order denying a motion for new trial; or
5. An order made after judgment affecting any substantial right of the party.”

N.D.C.C. § 29-28-06.

STATEMENT OF THE ISSUES

[¶ 2] I. Whether Mr. Velasquez's attorney in the underlying criminal matter was ineffective.

STATEMENT OF CASE

[¶ 3] This is an appeal from the January 27, 2020 Cass County Order entered by the Honorable Steven L. Marquart denying Jorge Velasquez's request for post-conviction relief. The underlying criminal matter for this post-conviction matter is Cass County case number 09-2014-CR-02253.

[¶ 4] Mr. Velasquez was appointed Attorney Jay Greenwood on June 23, 2014. A change of plea hearing was held on December 15, 2014. Mr. Velasquez pleaded guilty to all three counts. He was placed on supervised probation. A hearing to revoke his probation occurred on August 22, 2016. The district court revoked and resentenced Mr. Velasquez in the underlying criminal matter. Mr. Velasquez filed a Rule 35 motion on August 29, 2016. That motion was denied by the court on September 1, 2016. Mr. Velasquez filed post-conviction relief petition in the case, however he did not appear for the hearing. In June of 2019 Mr. Velasquez wrote to the court indicating he was homeless and did not receive proper notice of the previous hearing date. *See* Index #34.

[¶ 5] Mr. Velasquez requested and the court granted him counsel for the post-conviction proceeding. Attorney Don Krassin was assigned on August 2, 2019. A motion to re-open the post-conviction case was filed on November

5, 2019. An evidentiary hearing was held on January 24, 2020. Mr. Velasquez's request for post-conviction relief was denied by the court on January 27, 2020. *See* Index 66. A Judgment was issued on January 31, 2020, which incorporated the court's Order denying relief. Mr. Velasquez timely appealed the Judgment.

STATEMENT OF FACTS

[¶ 6] On June 23, 2014, Mr. Velasquez was charged with aggravated assault, a class C felony, terrorizing, a class C felony, and simple assault, a B misdemeanor, in case 09-2014-CR-02253. His girlfriend at the time alleged that Mr. Velasquez punched, choked, and threatened to kill her. She later recanted her statement. Law enforcement reports indicated that Mr. Velasquez made admissions at the time of his arrest, on unrelated warrants.

[¶ 7] Mr. Velasquez was appointed Attorney Jay Greenwood on June 23, 2014. *See* Index #9. At the post-conviction hearing in this matter Mr. Velasquez testified that his attorney, Mr. Greenwood, did not meet with him or discuss his case prior to the change of plea. PCR p. 8. He also stated Mr. Greenwood never provided him discovery or went through the discovery with him. PCR p. 10.

[¶ 8] Mr. Velasquez testified at the post-conviction hearing that he felt he was being railroaded into pleading guilty. PCR pp 6-7. He testified that he did not believe he would get a fair trial due to the complaining witness's connections; her mother was an attorney and her grandfather a

judge. PCR p. 9. Mr. Velasquez testified that because he did not believe he would receive a fair trial he changed his plea on January 24, 2020.

[¶ 9] On August 17, 2016, Mr. Velasquez timely filed a petition for post-conviction relief. His petition alleged four grounds for post-conviction relief. He alleged:

1. Mr. Greenwood was ineffective
2. prosecutorial misconduct
3. insufficient evidence to support the conviction
4. newly discovered evidence.

[¶ 10] Mr. Velasquez's first post-conviction counsel was Attorney Scott Thompson. Mr. Velasquez's hearing for post-conviction relief was continued twice until May 5, 2017. Mr. Velasquez did not appear at that time and his case was dismissed. *See* Index # 29. Mr. Velasquez sent a letter to the court, filed June 17, 2019, asking to have his post-conviction hearing reopened because he did not receive notice of the last hearing. *See* Index #34. Mr. Velasquez was assigned Attorney Krassin to represent him in the reopened post-conviction proceeding. *See* Index #43.

[¶ 11] A post-conviction hearing was held and the requested relief was denied by the court Mr. Velasquez timely appealed the trial court's denial of his post-conviction application.

LAW AND ARGUMENT

I. Whether Mr. Velasquez's attorney in the underlying criminal matter was ineffective.

Standard of Review

[¶ 12] This is an appeal of an order denying post-conviction relief. (Appendix 10). This Court has jurisdiction over this appeal under N.D. Const. art. VI § 6 and N.D.C.C. § 29-32.1-14. North Dakota Century Code Section 29-32.1-14 provides, “A final judgment entered under this chapter may be reviewed by the supreme court of this state upon appeal as provided by rule of the supreme court.” *Id.*

[¶ 13] “Post-conviction relief proceedings are civil in nature and are governed by the North Dakota Rules of Civil Procedure.” *Delvo v. State*, 2010 ND 78, ¶ 10, 782 N.W.2d 72. This court applies a ‘clearly erroneous’ standard found in N.D.R.Civ.P. Rule 52(a) when reviewing a trial court’s findings of fact from an appeal under the Uniform Post-Conviction Procedure Act. This Court’s standard of review for post-conviction relief proceedings has been clearly established:

A trial court’s findings of fact in a post-conviction proceeding will not be disturbed on appeal unless clearly erroneous under N.D.R.Civ.P. 52(a). A finding is clearly erroneous if it induced by an erroneous view of law, if it is not supported by any evidence, or if, although there is some evidence to support it, a reviewing court is left with a definite and firm conviction a mistake has been made. Questions of law are fully reviewable on appeal of post-conviction proceeding.

Broadwell v. State, 2014 ND 6, ¶ 5, 841 N.W.2d 750 (internal citations and quotations omitted).

[¶ 14] The Sixth Amendment, made applicable to the states through the Fourteenth Amendment, and Article I, § 12 of the North Dakota Constitution guarantees that a person charged with a crime is “entitled to

effective assistance of counsel at critical stages of criminal proceedings.”

Peterka v. State, 2015 ND 156, ¶ 25, 864 N.W.2d 745 (citing *Adams v. Illinois*, 405 U.S. 278, 279, 92 S.Ct. 916, 31 L.Ed.2d 202 (1972)). Ineffective assistance of counsel is a mixed question of law and fact. This Court has held a mixed question of law and fact is fully reviewable without the restraints of Rule 52(a) *State v. Foster*, 1997 ND 8, ¶ 18, 560 N.W.2d 194 (citing *State v. Skaro*, 474 N.W.2d 711, 716-17 (N.D. 1991)).

[¶ 15] The United States Supreme Court has developed a two-part test to review ineffective assistance of counsel claims. A defendant claiming ineffective assistance of counsel has the 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. In the present case, Mr. Velasquez testified that his attorney did not provide discovery or review it with him.

[¶ 16] Effectiveness of counsel is measured by an objective standard of reasonableness considering the prevailing norms. A defendant must defeat the strong presumption that a counsel’s conduct falls within the wide range of reasonable assistance. Trial counsel’s conduct is presumed to be reasonable and courts consciously attempt to limit the effect of hindsight. To establish prejudice a defendant must show a reasonable probability that, but for counsel’s errors, the result of the proceedings would have been different. A defendant claiming ineffective assistance of counsel must

specify how and where trial counsel was incompetent and the probably different result. A reasonable probability is probability sufficient to undermine the confidence in the outcome. *Tweed v. State*, 2010 ND 38, ¶ 26, 779 N.W.2d 667, 678. North Dakota Rule of Professional Conduct 1.3 requires that a lawyer act with reasonable diligence and promptness when representing a client. North Dakota Rule of Professional Conduct 1.4 states:

A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's consent is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) make reasonable efforts to keep the client reasonably informed about the status of a matter;
- (4) promptly comply with the client's reasonable requests for information; and
- (5) consult with the client about any relevant information on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.

A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The North Dakota Commission on Legal Counsel for Indigents (CLCI)

Performance Standard 4.1 states,

“Defense counsel should act with reasonable diligence and promptness in representing a client. Counsel has the obligation to keep the client informed of the progress of the case in a timely manner, where it is possible to do so. This includes an obligation to provide copies of police reports, filed documents and other relevant documents to the client, unless it is not appropriate to do so in the specific case.”

[¶ 17] Trial counsel’s failure to provide Mr. Velasquez a copy of his paper discovery pre-trial or review the video recording with him fell below an objective standard of reasonableness. Mr. Greenwood no longer remembered what admissions Mr. Velasquez made and the video was not presented at the post-conviction hearing. Mr. Velasquez testified that he told law enforcement that he did whatever she said I did, but that he did not admit to the specific allegations as the State was alleging. If Mr. Velasquez had an opportunity to review the video evidence against him, he would have been able to explain to his attorney and ultimately a jury that he did not commit the crimes that he was accused of.

[¶ 18] The United States Supreme Court established the method to analyze substantive-due-process claims.

First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, “deeply rooted in this Nation’s history and tradition, and “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed.” Second, we have required in substantive-due-process cases a “careful description” of the asserted fundamental liberty interest. Our Nation’s history, legal traditions, and practices thus provide the crucial “guideposts for responsible decision making,” that direct and restrain our exposition of the Due Process Clause. As we stated recently...the Fourteenth Amendment “forbids the government to infringe...‘fundamental’ liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.

Washington v. Glucksberg, 521 U.S. 702, 719-21 (1997). The due process clauses of the Fifth and Fourteenth Amendments to the Constitution as well as Article I, § 12 of the North Dakota Constitution guarantees no person shall

be deprived of life, liberty or property without due process of law. Here the fundamental right is that of liberty. A criminal defendant is guaranteed the right to assistance of counsel, meaning the ultimate goals of the case is left to the sole discretion of a criminal defendant. North Dakota Rule of Professional Conduct 1.2 states, “a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.” Therefore, the fundamental right to assist in one’s own defense is well established in the United States’ Constitution, North Dakota’s Constitution and the Rules of Professional Conduct for attorneys in the State of North Dakota. Mr. Velasquez testified that he did not receive copies of his discovery, he never heard or saw any video recordings. This infringed upon his ability to assist in his own defense which coerced him to plead guilty. If he had an opportunity to discuss the case with his attorney prior to in court at his change of plea he would not have plead guilty. Therefore, prong two of the Strickland test is also met and the district court should have granted Mr. Velasquez’s request to withdraw his plea to correct a manifest injustice created by ineffective assistance of counsel.

CONCLUSION

[¶ 19] The district court’s conclusion that Mr. Greenwood was effective was not supported by the record. Because Mr. Greenwood’s performance was

ineffective Mr. Velasquez's post-conviction relief should have been granted by the court.

[¶ 20] WHEREFORE Mr. Velasquez respectfully requests that the district court's order denying his post-conviction relief be reversed and a new trial granted.

Dated this 17th day of April, 2020

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State of North Dakota,)	CERTIFICATE OF
)	COMPLIANCE
Respondent and Appellee.)	

[¶ 1] This Appellant’s Brief complies with the page limit of 38 set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure.

Dated: April 17, 2020.

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[¶ 1] This Appellant’s Brief complies with the page limit of 38 set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure.

Dated: April 17, 2020.

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State of North Dakota,)	CERTIFICATE OF SERVICE
)	
Respondent and Appellee.)	

¶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 Brief-revised

¶2] And that said copies were served upon:

Tanya Martinez, State's Attorney, sa-defense-notices@casscountynd.gov

by electronically filing said documents through the court's electronic filing system and a copy was placed in a sealed envelope with USPS and served at his last known address upon:

Jorge Velasquez
c/o Roberts County Jail
412 3 Ave E
Sisseton, SD 57262-1551

Dated: April 21, 2020.

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