

IN THE SUPREME COURT OF NORTH DAKOTA

James Ryan Burden,

Petitioner and Appellant,

v.

State of North Dakota,

Respondent and Appellee.

Supreme Court File No.

202000143

Grand Forks County File No.

18-2017-CV-02782

APPELLANT BRIEF-----
BRIEF OF PETITIONER-APPELLANT, JAMES RYAN BURDEN

Appeal from Order Following Evidentiary Hearing

Entered on March 26, 2020

In District Court, Grand Forks County, State of North Dakota

The Honorable Lolita G. Hartl Romanick

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUE

¶1 **ISSUE I.** Whether or not Trial Counsel's legal advice to Mr. Burden to waive his preliminary hearing and his convincing and allowing Mr. Burden to waive his right to a preliminary hearing fell below the standard of reasonableness that is expected and constitutionally insured?

NATURE OF THE CASE

¶2 On 10/20/2017 the Post-Conviction Relief application was filed.

¶3 The state filed an answer to that Post-Conviction Relief application on 11/20/2017.

¶4 A motion to file an amended petition for Post-Conviction Relief was filed on 12/20/2017.

¶5 An order allowing the filing of an amended petition for Post-Conviction Relief was filed on 02/26/2018.

¶6 On 02/26/2018 an amended Post-Conviction application was filed with the state filing an amended answer on 03/26/2018.

¶7 The state filed a motion for summary dismissal of petitioner's petition for Post-Conviction application on 07/05/2018 and the order granting summary dismissal was entered on 07/23/2018.

¶8 The petitioner filed a motion for granting relief from summary dismissal on 09/04/2018.

¶9 The petitioner filed a notice of appeal on 09/21/2018.

¶10 The state's response to petitioner's motion for relief was filed on 09/21/2018.

¶11 The North Dakota Supreme Court ordered a remand on 09/26/2018 to address petitioner's motion for relief on 09/26/2018.

[¶12] A clerk's certificate of appeal was filed on 10/19/2018.

[¶13] On 07/25/2019 the North Dakota Supreme Court entered an opinion reversing and remanding and a judgment.

[¶14] The petitioner filed a response to the states motion for summary judgment on 08/25/2019.

[¶15] An order following and evidentiary hearing which denied petitioner's petition for post-conviction relief was entered on March 27, 2020.

[¶16] After the evidentiary hearing an order denying the Defendant's Petition for Post-Conviction relief was entered on 03/27/2020.

[¶17] On 05/13/2020 a notice of filing the notice of appeal was filed and amended order for transcript was filed on 05/14/2020.

STATEMENT OF FACTS

[¶18] Post-conviction relief applications are civil in nature and governed by the North Dakota Rules of Civil Procedure. *Flanagan v. State*, 2006 ND 76, ¶ 9, 712 N.W.2d 602. The Sixth Amendment of the United States Constitution, applied through the Fourteenth Amendment to the States, and Article I, Section 12, of the North Dakota Constitution guarantee criminal defendants effective assistance of counsel. *State v. Garge*, 2012 ND 138, ¶ 10, 818 N.W.2d 718. An ineffective assistance of counsel claim is a mixed question of law and fact, fully reviewable by this Court. *Flanagan*, at ¶ 9.

[¶19] In this case the Plaintiff James Ryan Burden (Mr. Burden) had filed a Post-Conviction Relief Petition. That Petition had been heard and denied by the District Court. It was then appealed to the North Dakota Supreme Court *Burden vs. State* 2019 ND 178 930 N.W.2d 619. That appeal remanded this case for an evidentiary hearing.

[¶20] At 9:26 a.m. on October 14th, 2019 because of a remand order from the North Dakota Supreme Court an evidentiary hearing was held in the above entitled matter.

[¶21] The only witness called by Petitioner was the Petitioner, James Ryan Burden (Mr. Burden).

[¶22] The original Petition for Post-Conviction Relief contained collateral attacks on two different judgments. One judgment was in case number 18-2016-CR-00877. The charge involved in that case was Contributing to the Deprivation of Delinquency of a minor. The other case number is 18-213-CR-01443 and it involves a Revocation.

[¶23] When the remand hearing began, Transcript Page 5 L7 – L19:

“MR. SHEELEY: Yeah. The original Petition for Post-Conviction Relief contained collateral attacks on two different Judgments. One would be the Contributing to the Deprivation or Delinquency of a Minor, which Mr. Burden still intends on going forward with today.

The other was the probation revocation. That issue is essentially moot. He served his time on that. It’s over with. There’s really no reason to continue to attack that; so we’re going to withdraw attacking that revocation at this time.

So we’ll just focus on Contributing to the Deprivation or Delinquency of a Minor conviction, it that makes – I hope what makes sense to the Court.”

[¶24] Because of the above statement from the transcript the remainder of this brief will only involve case number 18-2016-CR-00877 Contributing to the Deprivation or Delinquency of a minor.

[¶25] The attorney representing Mr. Burden in case number 18-2016-CR-00877 was David Ogren. The charge in that case originally was a class B felony. In North Dakota Defendants charged with any felony according to North Dakota Rules of Criminal Procedure Rule 5 (C)(1)(A), have a right to a preliminary hearing.

[¶26] Some of the testimony Mr. Burden gave at his preliminary hearing is found on Transcript Page 17 Line 4 – Page 18 Line 16:

- “Q. So did you have a -- you know you have the right to a preliminary hearing. Did you and your attorney discuss that?
- A. I did -- I did bring it up, yes.
- Q. And did you ultimately waive your preliminary hearing?
- A. I did that based on his advice, yes.
- Q. But you feel if you hadn't waived, this charge would have been dismissed at the preliminary hearing?
- A. I definitely feel that it would have been amended right away.
- Q. After -- when did you first see this text message log?
- A. I believe it was the first time I met with Mr. Ogren.
- Q. And when did you bring up the Affidavit of Probable Cause issues to him?
- A. I didn't -- I never -- I don't think I ever actually saw the Affidavit.
- Q. Did he explain to you that once you understood that this person you're indicating was a minor, that in order to convict you, the State would have to show you tried to meet her after she said she was a minor? Did your attorney talk to you about that?
- A. He -- that was when I brought up -- when I first talked to him that I told him I would take his -- (The court reporter asked the witness to repeat.)
- A. When I first met with him, that's when he told me that it wasn't -- it was not a, in his words, "traditional Luring case" because there was no follow-up, basically; so -- and that's why I planned to pursue it to trial.
- Q. And if you didn't think there was evidence, why did you waive your preliminary hearing?
- A. That was based on his advice. He said that it was -- wasn't necessary.
- Q. So if you did this over again, would you have waived your preliminary hearing?
- A. No.”

[¶27] The witness called by the State at the remand hearing was Plaintiff Mr. Burden's attorney Dave Ogren. The following is part of his testimony at the preliminary hearing,

Transcript Page 53 L. 4 – Page 55 L. 1:

- “Q. Do you recall having the discussion with Mr. Burden about the preliminary hearing?
- A. We did. Like I said, it's getting to be three years ago; so it's -- but I remember visiting with him on it and us making the decision that we waive it at that point. Because, obviously, he could be faced with the chats that had taken place between him and the minor. Like I said, even throwing out any pictures, there was still those chats which were enough to uphold a probable cause.
- Q. And you would agree that it would be the judge who makes that decision at the preliminary hearing --
- A. It would be.
- Q. -- for the probable cause? And if the judge found it was not probable cause, this Luring charge would have been dismissed; is that right?
- A. It would have been dismissed at that point but very likely without prejudice, thereby allowing the State to either bring it back again with further evidence or to charge out a different criminal act.
- Q. And had it been dismissed, you and Mr. Burden wouldn't have had to make this plea agreement decision? Is that fair to say?
- A. Not at that point.
- Q. Could have possibly happened in the future but --
- A. Could have easily.
- Q. And you would agree, your -- you know, you've been doing this for a bunch of years. In your review of this case, the evidence of the inviting and importuning or the second part of the statute was pretty tenuous; is that --
- A. Well, that was the concerns that -- when I mentioned it's not your "traditional Luring case." But, like I said, the problem that we had were (verbatim) the actual sexual contact of the discussion.

- Q. And sometimes you go in front of the jury and they don't really care? Is that fair to say?
- A. And that's the bigger issue. Sometimes if the jury hears that, they don't want to hear anything else. They've already made up their mind. So it was a real risk going to trial in that respect.
- Q. You would hope at a preliminary hearing the judge would put the subjective feelings aside and look at the law; is that correct?
- A. You hope, yes. But, like I said, there's -- probable cause at a preliminary hearing does not take a whole lot for them to find."

[¶28] Mr. Burden's attorney in his closing argument said at Transcript P. 66 L. 1 to P. 67 L. 3:

"Mr. Burden felt the communication wasn't sufficient at the outset to tell him -- provide him with requisite information of what a preliminary hearing is.

It was clear they both were on the same page at the time that this really wasn't a "traditional Luring case," I think was the words that were used. And that's true, because Luring explicitly requires that once the individual knows that the person they're communicating with is a minor, they have to take steps to invite and importune or otherwise make arrangements to meet with this person they think was a minor.

That's the second part of the statute. And I think Mr. Ogren even acknowledged that that didn't occur here.

Now, there's some dirty talk, which sometimes, if you're in front of a jury, can lead the jury to do things that maybe don't completely follow the law, but the time to challenge this would have been at the preliminary hearing. And Mr. Ogren had a duty to explain that fact to Mr. Burden, and it doesn't sound like that happened. They just decided to waive the preliminary hearing.

And the consequence of that is this -- is that if these facts would have been put in front of a judge at the preliminary hearing on a Luring charge, there's a reasonable possibility that the case would have been dismissed, and that's Step 2, reasonable probability that the result of this case would have been different.

I think when the Court reviews the evidence, reviews the testimony of what occurred through the transcripts, there was no -- Mr. Burden wasn't inviting, importuning, or otherwise making arrangements to meet this girl for a sexual purpose."

ARGUMENT

I. The Standard of Review.

[¶29] Post-conviction relief hearings are civil in nature and are governed by the North Dakota Rules of Civil Procedure. Patten v. State, 2008 ND 29 ¶8, 745 N.W.2d 626. The issue of ineffective assistance of counsel is a mixed question of law and fact that is fully reviewable by the North Dakota Supreme Court. Id.

II. ISSUE: Whether or not Trial Counsel's legal advice to Mr. Burden to waive his preliminary hearing and his convincing and allowing Mr. Burden to waive his right to a preliminary hearing fell below the standard of reasonableness that is expected and constitutionally insured.

[¶30] In this case Mr. Burden's right to a preliminary hearing is set out in North Dakota Rules of Criminal Procedure Rule 5 (c)(1)(A):

“(c) Right to Preliminary Hearing.
(1) Waiver.

(A) If the offense charged is a felony, the defendant has the right to a preliminary hearing. The defendant may waive the right to preliminary hearing at the initial appearance if assisted by counsel.”

[¶31] In this case Mr. Burden's attorney testified that there was a good possibility that Mr. Burden would prevail at his preliminary hearing. However, Mr. Burden's trial attorney testified he advised Mr. Burden to waive the hearing because the trial judge could dismiss with prejudice and the same charge could be brought against him again or he could be charged with a different crime.

[¶32] Even if the above testimony is true it is still no reason to waive a preliminary hearing. Preliminary hearings in North Dakota should be held if the charge doesn't fit the crime and the judge can then decide if the charge doesn't fit the crime.

[¶33] In case #18-2017-CV-2782 in the trial court’s Order Following Evidentiary Hearing under Law the following appears: In paragraphs [43] and [44]:

“[¶43] Proceedings on applications for post-conviction relief are civil in nature and are governed by the North Dakota Rules of Civil Procedure. Johnson v. State, 2005 ND 188, ¶ 6, 705 N.W.2d 830. Generally, such a “petition must be filed within two years of the date the conviction becomes final unless the petition alleges existence of newly discovered evidence, ... which if proved and reviewed in light of the evidence as a whole, would establish that the petitioner did not engage in the criminal conduct for which [he] was convicted.” Everett v. State of North Dakota, 206 ND 78, ¶ 16, 877 N.W.2d 796. The party seeking post-conviction relief bears the burden of establishing grounds for relief. ID. At ¶ 15. A party waives an issue by not providing supporting argument, and without supportive reasoning or citations to relevant authorities, and argument is without merit. Kautzman v. Kautzman, 2003 ND 140, ¶ 15, 668 N.W. 2d 59; State v. Witzke, 2009 ND 169, ¶ 4, 776 N.W.2d 232.

[¶44] To prevail on a post-conviction claim for ineffective assistance of counsel, a petitioner must bear a heavy burden to show: (1) trial counsel’s representation fell below an objective standard of reasonableness and (2) that in turn prejudiced the petitioner. Roth v. State, 2007 ND 112, ¶ 7, 735 N.W.2d 882; Rummer v. State, 2006 ND 216, ¶ 10, 722 N.W.2d 528; Matthews v. State 2005 ND 202, ¶ 10, 706 N.W.2d 74; Strickland v. Washington, 446 U.S. 668, 668, 694, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). A petitioner must overcome a strong presumption that counsel’s representation fell within the wide range of professional assistance. Laib v. State, 2005 ND 187, ¶ 9, 705 N.W.2d 845; Cullen v. Pinholster, 563 U.S. 170, 189, 131 S. Ct. 1388, 1403 (2011).”

[¶34] The above quote eloquently sets out the nature of this case, the rules governing, and the burden that Mr. Burden must show to prevail.

[¶35] Mr. Burden believes he has through his testimony and his trial attorney’s testimony at trial shown that he didn’t understand from his trial attorney’s explanation:

1. What a preliminary hearing was,
2. That if he prevailed at the preliminary hearing the charge of Luring Minors by Computer or Other Electronic Means would be dismissed,
3. That his attorney thought that Mr. Burden could prevail at a preliminary hearing,

4. That Mr. Burden gained nothing by waiving his preliminary hearing.
5. What he was giving up by waiving a preliminary hearing
6. That he was never told by his attorney that when a preliminary is dismissed it can't be recharged unless the procedure in Walker v. Schneider, 477 N.W.2d 167, (N.D. 1991).

[¶36] According to the above quotes from the Order Following Evidentiary hearing Mr. Burden has to prove two things at the hearing on his post-conviction application:

1. That the trial counsel's representation fell below an objective standard of reasonableness and
2. How trial counsel representation substantially prejudiced him.

[¶37] From what has been said above Mr. Burden has established that the facts in his case establish his trial attorney did not have had any good legal reason for advising and getting him to dismiss his preliminary hearing. His attorney was also aware that Mr. Burden gained nothing by waiving a preliminary hearing and if a preliminary hearing was held he had nothing to lose and it could end with a dismissal of his criminal charges. Therefore, Mr. Burden has established his trial attorney's advise to dismiss and requiring him to waive his preliminary wasn't sound legal advice and fell below the objective standard of reasonableness for a North Dakota trial attorney.

[¶38] As to 2 above Mr. Burden gained nothing by his waiving of a preliminary hearing. After the waiver he was substantially prejudiced because he gained nothing, was still charged with a class B Felony, and could have ended up going to trial on that charge.

[¶39] The fact that this all had a good ending because his attorney at a later date negotiated a very favorable plea bargain doesn't cure the ineffective assistance of counsel

that occurred when his trial attorney advised him and got him to waive a preliminary hearing.

CONCLUSION

[¶40] For the above and foregoing reasons this case should be remanded to the district court with an order requiring the trial court to issue an order granting Mr. Burden's post-conviction petition.

Dated this 1st day of July, 2020

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CERTIFICATE OF COMPLIANCE

[¶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 13 pages and Appendix consists of 119 pages. A payment for each additional page in the amount of \$0.50 per page has been mailed to the North Dakota Supreme Court.

Dated this 1st day of July, 2020

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APPELLANT BRIEF

[¶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:

Thomas Andrew Gehrz
Grand Forks County States Attorney
sasupportstaff@gfcounty.org

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 Ryan Burden
113 N. 11th Street
Grand Forks, ND 58201

Dated this 1st day of July, 2020

/S/ Cassy Larson
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113 N. 11th Street
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/S/ Cassy Larson
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