20200143

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JULY 31, 2020
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

James Ryan Burden,	)	
	)	
Petitioner – Appellant,	)	**Supreme Court No. 20200143**
	)	
vs.	)	
	)	
State of North Dakota,	)	**Grand Forks County District Court**
	)	**Case No. 18-2017-CV-02782**
Respondent – Appellee.	)	

APPEAL FROM MARCH 26, 2020 ORDER FOLLOWING EVIDENTIARY HEARING IN POST-CONVICTION RELIEF
NORTHEAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY, NORTH DAKOTA
THE HONORABLE LOLITA G. HARTL ROMANICK, PRESIDING

NO ORAL ARGUMENT IS REQUESTED BUT THE STATE REQUESTS PERMISSION TO APPEAR AND ARGUE IF THE COURT SCHEDULES ORAL ARGUMENT

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUE

I. The District Court did not err by denying Appellant's Petition for Post-Conviction Relief.

STATEMENT OF THE FACTS

[¶1] The State adopts and incorporates herein by reference thereto the facts laid out by the District Court in paragraphs 2 through 66 of its March 26, 2020 Order Following Evidentiary Hearing. Order Following Evidentiary Hearing, ¶¶ 2 – 66, March 26, 2020.

STANDARD OF REVIEW

[¶2] The standard of review on a denial of post-conviction relief is as follows, per the North Dakota Supreme Court:

> "Post-conviction relief proceedings are civil in nature and are governed by the North Dakota Rules of Civil Procedure. *Varnson v. Satran*, 368 N.W.2d 533, 536 (N.D. 1985). The issue of ineffective assistance of counsel is a mixed question of law and fact that is fully reviewable by this Court. *Breding v. State*, 1998 ND 170, ¶ 4, 584 N.W.2d 493 (citing *Falcon v. State*, 1997 ND 200, ¶ 21, 570 N.W.2d 719). **Nonetheless, a trial court's findings of fact in a post-conviction relief proceeding will not be disturbed unless clearly erroneous.** N.D.R.Civ.P. 52(a); *Frey v. State*, 509 N.W.2d 261, 263 (N.D. 1993). A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by any evidence, or if, although there is some evidence to support the finding, a reviewing court is left with a definite and firm conviction a mistake has been made. *Burlington Northern and Sante Fe Railway Co. v. Burlington Resources Oil & Gas Co.*, 1999 ND 39, ¶ 10, 590 N.W.2d 422"

Patten v. State, 2008 ND 29, ¶ 8, 745 N.W.2d 626 (emphasis added).

LAW AND ARGUMENT

I. THE DISTRICT COURT'S ORDER FOLLOWING EVIDENTIARY HEARING WAS NOT CLEARLY ERRONEOUS

[¶3] The District Court made extensive findings of fact and conclusions of law that were amply supported by the record in this case. There is more than sufficient evidence contained within (1) the record of the entire case, (2) the matters of which the District Court took judicial notice and (3) the testimony provided at the October 14, 2019 evidentiary hearing to support the District Court's Order Following Evidentiary Hearing, and said Order is therefore not clearly erroneous.

II. APPELLANT HAS FAILED TO MEET HIS BURDEN FOR SHOWING INEFFECTIVE ASSISTANCE OF COUNSEL

[¶4] Appellant has not met the requirements this Court imposes when one makes a claim for ineffective assistance of counsel. This Court has advised as follows with respect to such claims:

> A defendant claiming ineffective assistance of counsel has a 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. Effectiveness of counsel is measured by an objective standard of reasonableness considering prevailing professional norms. The defendant must first overcome the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Trial counsel's conduct is presumed to be reasonable and courts consciously attempt to limit the distorting effect of hindsight.

Delvo v. State, 2010 ND 78, ¶ 16, 782 N.W.2d 72, 76 (citing *Clark v. State*, 2008 ND 234, ¶ 12, 758 N.W.2d 900). In *Bahtiraj v. State*, this Court quoted to the U.S. Supreme Court's *Premo v. Moore* case, particularly the following:

> Surmounting *Strickland* [*v. Washington*'s] high bar is never an easy task. **An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial or in pretrial proceedings, and so the *Strickland* standard must be applied with scrupulous care, lest intrusive post-trial inquiry threaten the**

> **integrity of the very adversary process the right to counsel is meant to serve.** Even under *de novo* review, the standard for judging counsel's representation is a most deferential one.... **It is all too tempting to second-guess counsel's assistance after conviction or adverse sentence.**

Bahtiraj v. State, 2013 ND 240, ¶ 9, 840 N.W.2d 605, 609 (quoting *Premo v. Moore,* 562 U.S. 115, 122, 131 S.Ct. 733, 739–40 (2011)) (emphasis added). The two prongs of *Strickland*, 466 U.S. 668, 104 S. Ct. 2052 (1984) must both be met. Appellant has failed to meet either prong.

[¶5] With respect to the first prong, Appellant argues that he "gained nothing by waiving his preliminary hearing." Appellant's Brief, ¶ 38 (July 1, 2020). He further states, "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." Id. This argument, however, does not demonstrate prejudice. Appellant's decision to waive his preliminary hearing did not prejudice his position, as he was still able to proceed to trial. Although Appellant argues that "he was substantially prejudiced because he gained nothing," this Court should not find that argument persuasive as to do so would in essence require defense attorneys to only advise their clients to waive preliminary hearings in exchange for some sort of explicit benefit. This Court has never before required such a practice, and it should not adopt one now where Appellant has also failed to meet the second prong of *Strickland*.

[¶6] With respect to the second prong, this Court has further advised as follows:

> The second prong requires Bahtiraj to show that there is a reasonable probability that, but for his counsel's error, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. The appropriate standard for prejudice in cases involving pleas was established in *Hill* [*v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366 (1985)], which held that **a defendant who enters a plea must show "a reasonable**

> **probability that, but for counsel's errors he would not have pleaded guilty and would have insisted on going to trial**." *Hill*, 474 U.S. at 59, 106 S.Ct. 366.
>
> **All courts "require something more than defendant's 'subjective, self-serving' statement that, with competent advice, he would" not have pled guilty and would have insisted on going to trial.** 3 Wayne LaFave et al., Criminal Procedure § 11.10(d) (3rd ed. 2007). **"A defendant must thus satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is '<u>sufficient to undermine confidence in the outcome' of the proceeding</u>."** *United States v. Dominguez Benitez*, 542 U.S. 74, 83, 124 S.Ct. 2333 (2004) (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052). **This standard "requires a 'substantial,' not just 'conceivable,' likelihood of a different result."** *Cullen v. Pinholster*, 563 U.S. 170, 189, 131 S.Ct. 1388, 1403 (2011) (quoting *Harrington v. Richter*, 562 U.S. 86, 111, 131 S.Ct. 770, 791 (2011)). The petitioner "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla* [*v. Kentucky*, 559 U.S. [356, 372], 130 S.Ct. 1473[, 1485 (2010)]. **This requires an examination and prediction of the likely outcome of a possible trial.** *Hill*, 474 U.S. at 59–60, 106 S.Ct. 366. **"The movant must allege facts that, if proven, would support a conclusion that the decision to reject the plea bargain and go to trial would have been rational, e.g., valid defenses, a pending suppression motion that could undermine the prosecution's case, or the realistic potential for a lower sentence."** *Stiger v. Commonwealth*, 381 S.W.3d 230, 237 (Ky.2012). "This standard of proof is 'somewhat lower' than the common 'preponderance of the evidence' standard." *Padilla v. Commonwealth*, 381 S.W.3d 322, 328 (Ky.Ct.App.2012) (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052). "[E]stablishing a valid ineffective assistance of counsel claim where the defendant pled guilty imposes a 'substantial burden.'" *Commonwealth v. Pridham*, 394 S.W.3d 867, 880 (Ky.2012) (citing *Premo*, 562 U.S. 115 at 132, 131 S.Ct. at 746).

Bahtiraj v. State, 2013 ND 240, ¶ 16, 840 N.W.2d 605, 611 (emphasis added). Thus, under the second *Strickland* prong, Appellant must show a "substantial likelihood of a different result", which requires "an examination and prediction of the likely outcome of a possible trial".

[¶7] Appellant argues that "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." Appellant's Brief, ¶ 39 (July 1, 2020). Appellant's argument here, however, contradicts the extensive case law cited above. Based upon the requirements of *Strickland* and *Bahtiraj*, a "very favorable plea bargain" is relevant since the Court is required to engage in an "examination and prediction of the likely outcome of a possible trial." *Id*., at ¶ 16. In addition, the District Court found in its Order Following Evidentiary Hearing that "[the] evidence would have been sufficient to establish probable cause on the charge of Luring a Minor with Computer or Other Electronic Means at the preliminary hearing". Order Following Evidentiary Hearing, ¶ 60, March 26, 2020. Appellant was therefore not prejudiced by his waiver of preliminary hearing. In addition, his original charge ultimately decreased from a Class B Felony (subject to a maximum 10-year prison sentence and the potential for lifetime sex offender registration) to a non-sexual Class A Misdemeanor (subject to a maximum 1-year jail sentence and no possibility of sex offender registration). It simply is not rational to assert that rejecting the plea agreement and going to trial would have been the better option.

CONCLUSION

[¶8] For the above-stated reasons, the State respectfully requests that this Court affirm the district court's Order Following Evidentiary Hearing.

DATED this 31st day of July, 2020.

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Plaintiff and Appellant,	)	**Supreme Court No. 20200143**
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vs.	)	
	)	
State of North Dakota,	)	**Grand Forks County District Court**
	)	**Case No. 20200143**
Defendant and Appellee.	)	

CERTIFICATE OF COMPLIANCE

SA#138676

[¶1] The State of North Dakota, by and through Assistant State's Attorney Thomas A. Gehrz hereby certifies that the attached brief complies with the page limitation as set forth in Rule 32 of the North Dakota Rules of Appellate Procedure. The electronically filed brief contains 11 number of pages.

Dated this 31st day of July, 2020.

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AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA)
) SS
COUNTY OF GRAND FORKS)

The undersigned, being of legal age, being first duly sworn deposes and says that on the 31st day of July, 2020, she served true copies of the following documents:

BRIEF OF APPELLEE
CERTIFICATE OF COMPLIANCE

electronically through the Court Electronic Filing System to:

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Julie A Swangler
States Attorney's Office

Subscribed and sworn to before me this 31st day of July, 2020.

JENNIFER ALVSTAD
Notary Public
State of North Dakota
My Commission Expires March 26, 2021

Notary Public

jka