
 IN THE SUPREME COURT OF NORTH DAKOTA

Derek Matthew Wisham,)	Supreme Court File No.
)	20200152
)	
Petitioner and Appellant,)	Morton County No.
)	30-2020-CV-394
v.)	
)	
State of North Dakota,)	APPELLANT'S BRIEF
)	
Respondent and Appellee.)	

Appeal from the order denying application for post-conviction relief entered April 28, 2020 in Morton County district court, south central judicial district, North Dakota, the Honorable David E. Reich presiding.

APPELLANT'S BRIEF
ORAL ARGUMENT REQUESTED

Kiara C. Kraus-Parr
 ND Bar No. 06688
Kraus-Parr, Morrow, & Weber
 424 Demers Ave
 Grand Forks, ND 58201
 Office: (701) 772-8991
 service@kpmwlaw.com
Attorney for the Appellant

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Oral Argument:

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

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 provision article VI § 6, 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 the district court erred by denying Mr. Wisham’s petition for post-conviction relief.

STATEMENT OF CASE

[¶ 3] This is an appeal from the Morton County Order Denying Application for Post-Conviction Relief, signed April 28, 2020 (Appendix p. 50). Mr. Wisham was charged with gross sexual imposition and assault in the underlying criminal case. The criminal complaint in case 30-2014-CR-00718 was filed on July 2, 2014. *See* 30-2014-CR-718 “CR718” Index # 1.

[¶ 4] The initial appearance was held on July 7, 2014. Mr. Wisham was appointed William Thomason. *See* CR718 Index # 7. Mr. Thomason motioned to withdraw on April 13, 2015, which was granted. Erica Shively was then appointed to represent Mr. Wisham. *See* CR718 Index # 34. She requested to withdraw on August 20, 2015, which was granted. Robert Quick was then appointed to the case. *See* CR718 Index # 64.

[¶ 5] A jury trial was set in the underlying criminal case, however, Mr. Wisham ultimately changed his plea on December 21, 2015, instead of proceeding to trial. Mr. Wisham was represented by Mr. Quick at the change of plea hearing. *See* CR718 Transcript Index # 99. Mr. Wisham was advised of his rights, stated that he understood his rights, and proceeded to enter a guilty plea to the amended charge of sexual imposition, a B felony, and assault. *Id.* at 7-8. He was sentenced to ten (10) years with the North Dakota Department of Corrections and Rehabilitation with all but four (4) years suspended for two (2) years on the sexual imposition charge and one (1) year on the assault charge with credit for time served for both counts. *Id.* at p. 20.

[¶ 6] Mr. Wisham's pro se application for post-conviction relief was filed on March 12, 2020. He alleged:

1. the conviction was obtained, or the sentence was imposed in violation of the laws or the Constitution of the United States or of the laws or Constitution of North Dakota.
2. The conviction was obtained under a statute that is in violation of the Constitution of the United States or the Constitution of North Dakota, or that the conduct for which the applicant was prosecuted is constitutionally protected.
3. The sentence is not authorized by law.
4. Evidence, not previously presented and heard, exists requiring vacation of the conviction or sentence in the interest of justice.
5. The sentence has expired, probation or parole or conditional release was unlawfully revoked, or the applicant is otherwise unlawfully in custody or restrained.

[¶ 7] The application was notarized and contained a verification, by which Mr. Wisham swore that the information contained therein was true. The State motioned for the court to dismiss based on statute of limitations and res judicata but does not identify which claims have previously been addressed by the court. On April 28, 2020, the court filed its order denying Mr. Wisham's application for post-conviction relief. Mr. Wisham, through his counsel, filed a motion to reconsider on May 5, 2020. The court denied that motion on May 26, 2020. Mr. Wisham now appeals the Order denying his post-conviction application.

STATEMENT OF FACTS

[¶ 8] Mr. Wisham has filed four previous post-conviction relief applications regarding Case No. 30-2014-CR-718. *See* Case No. 30-2016-CV-631; 30-2017-CV-233, 30-2017-CV-518; and 30-2017-CV-520. All the prior

applications were denied at the district court. Mr. Wisham appealed two of the district court's previous denials. *See Wisham v. State*, 2017 ND 235 and *Wisham v. State*, 2017 ND 236.

[¶ 9] In this application for post-conviction relief Mr. Wisham stated there was a breach of contract, referring to the terms of his plea. See PCR Application (Appendix p.5, pp 2-4). He explained in his application that he did not agree to a denial of probation, that he did not receive proper good-time calculation, that he did not agree to sex offender registration, that the charge he pled guilty to is improperly listed as a gross sexual imposition and not the amended sexual imposition, that his attorney never properly explained what an Alford plea was, that he did not agree to excessive treatment, that treatment is requiring additional punishment through extortion, and that his rights have not been properly restored to him in a violation of his right due process. He further explained in his application if he properly understood that an Alford plea is akin to a nolo contendere plea he would not have agreed to change his plea. He also alleged that his attorney did not explain the punishment attached to the crime, the culpability level of "willingly" or his probable sentence if he would have been convicted at trial. *Id.* (Appendix p.5 pp-24, 9).

[¶ 10] The State requested summary dismissal based on the application being made outside the statutory two-year limit and a general

claim that Mr. Wisham's claims had been previously decided. The district court denied Mr. Wisham's application for post-conviction. Stating:

Wisham's application does not state any of the grounds listed in 29-32.1-01(1) necessary which would entitle him to file an application for post-conviction relief. Furthermore, the application is filed well beyond the two year statute of limitations in 29-32.1-01(2) and the application does not state any of the exceptions to the two year statute of limitations listed in 29-32.1-01(3). For these reasons, Wisham's application for postconviction relief must be Dismissed.

See Order Denying p. 4, ¶ 6.

[¶ 11] The district court also found that N.D.C.C. 39-32.1-09 provides that the court may, on its own motion, deny a meritless application or a successive application for similar relief or any application when the issues have been decided by the appellate court. The district court does not address that the court may only summarily dismiss before the State's answer. *Id.* at ¶ 7.

[¶ 12] In Mr. Wisham's motion for reconsideration he addressed the two-year time limitation stating that N.D.C.C 29-32.1-01(3)(a)(3) starts the two years anew due to a new interpretation of state law. Mr. Wisham referred the district court to this Court's holding in *State v. Atkins*, 2019 ND 145. He also explained that the district court was not liberally construing the application. Mr. Wisham requested an evidentiary hearing on the matter. The district court denied the motion to reconsider and Mr. Wisham subsequently appealed the court's order denying his post-conviction application.

LAW AND ARGUMENT

I. **Whether the district court erred by denying Mr. Wisham’s petition for post-conviction relief.**

Standard of Review

[¶ 13] Post-conviction relief proceedings are civil in nature and are governed by the North Dakota Rules of Civil Procedure. *Burke v. State*, 2012 ND 169, ¶ 10, 820 N.W.2d 349. This Court has held “the purpose of the Uniform Postconviction Procedure Act, N.D.C.C. ch. 29-32.1, is to ‘furnish a method to develop a complete record to challenge a criminal conviction.’” *Chisholm v. State*, 2014 ND 125, ¶ 15, 848 N.W.2d 703. This Court applies a ‘clearly erroneous’ standard found in N.D.R.Civ.P. Rule 52(a) when reviewing a district court’s findings of fact on an appeal under the Uniform Post-Conviction Procedure Act. 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. *Roe v. State*, 2017 ND 65, ¶ 5, 891 N.W.2d 745.

[¶ 14] The standard of review for a summary denial of post-conviction relief has been well-established:

This Court reviews an appeal from a summary denial of post-conviction relief as it reviews an appeal from a summary judgment. The party opposing the motion for summary disposition is entitled to all reasonable inferences at the preliminary stages of a post-conviction

proceeding and is entitled to an evidentiary hearing if a reasonable inference raises a genuine issue of material fact.

Koenig v. State, 2018 ND 59, ¶ 26, 907 N.W.2d 344. “The party opposing the motion for summary disposition is entitled to all reasonable inferences at the preliminary stages of a post-conviction proceeding and is entitled to an evidentiary hearing if a reasonable inference raises a genuine issue of material fact.” *Owens v. State*, 1998 ND 106, ¶ 13, 578 N.W.2d 542.

[¶ 15] A guilty plea “must be entered knowingly, intelligently, and voluntarily to be valid.” *Peltier v. State*, 2015 ND 35, ¶ 14, 859 N.W.2d 381. Rule 11, N.D.R.Crim.P., is the framework the court uses to determine if a plea is entered into knowingly, intelligently, and voluntarily. *State v. Wallace*, 2018 ND 225, ¶ 6, 918 N.W.2d 64; *State v. Blurton*, 2009 ND 144, ¶ 10, 770 N.W.2d 231.

[¶ 16] Mr. Wisham stated there was a breach of contract, referring to his understanding of the terms of his plea. He explained in his application that he did not agree to a denial of probation. He did not receive a proper good-time calculation. He did not agree to sex offender registration and the charge he pled guilty to is improperly listed as a gross sexual imposition, not the amended sexual imposition. His attorney never properly explained what an Alford plea was and if he properly understood that an Alford plea is akin to a nolo contendere plea he would not have agreed to change his plea. He also alleged that his attorney did not explain the punishment attached to the crime, the culpability level of “willingly” or his probable sentence if he would

have been convicted at trial. As part of his plea, he did not agree to excessive treatment. He alleged that treatment is requiring an additional punishment. He has claimed that his rights have not been properly restored to him in a violation of his right due process. All of these allegations are directly linked to the question of whether Mr. Wisham's plea was knowingly, voluntarily, and intelligently made. If his allegations are correct, which a motion for summary judgment would have to infer, a manifest injustice occurred which would require the withdrawal of his plea.

[¶ 17] Mr. Wisham's application also alleges ineffective assistance of counsel. "To succeed on a claim for ineffective assistance of counsel, a petitioner must prove counsel's performance fell below an objective standard of reasonableness and the deficient performance prejudiced him." *Garcia v. State*, 2004 ND 81, ¶ 5, 678 N.W.2d 568, (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). The first prong of the Strickland test requires that an attorney's performance be measured by an objective standard of reasonableness, considering the prevailing professional norms. *Garcia* at ¶ 5. The second prong of the *Strickland* test requires a showing of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* The two-pronged *Strickland* test also applies to challenges to guilty pleas that were entered as a result of ineffective assistance of counsel. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). When the claim of ineffective assistance of counsel relates to a guilty plea,

the Court has held that the application is treated as one made under Rule 11(d) of the North Dakota Rules of Criminal Procedure. *Moore v. State*, 2013 ND 214, ¶ 10, 839 N.W.2d 834. Withdrawal of the guilty plea is allowed when necessary to correct a manifest injustice. *See Id.* The prejudice required in the context of a guilty plea is not ultimate success at trial but if not for counsel's error Mr. Wisham would not have pled guilty. *See Weaver v. Massachusetts*, 137 S.Ct. 1899 (2017). Mr. Wisham alleged in his application that was the case before the court.

[¶ 18] The State made a general allegation to the entire record that all of Mr. Wisham's claims have been previously decided. However, the "State must not merely 'respond' to put a petitioner on its proof; it must show the trial court it is entitled to judgment as a matter of law in its motion for summary disposition." *Delvo v. State*, 2010 ND 78, ¶ 13, 782 N.W.2d 72. The district court in denying the application stated, "Wisham's application does not state any of the grounds listed in 29-32. I-01(1) necessary which would entitle him to file an application for post-conviction relief. Furthermore, the application is filed well beyond the two year statute of limitations." *See Order Denying* p. 4, ¶ 6. But in the district court's Order on page one paragraph two it specifically identifies several of Mr. Wisham's reasons that his plea was not knowingly, voluntarily, or intelligently made. That finding of fact is clearly erroneous as the court's own order contradicts itself. As to the court's denial based on statutory time limitations, Mr. Wisham explained in his motion to

reconsider that the time limitation ran anew in 2019 based upon a new caselaw interpretation. The court in its denial of the motion to reconsider does not address the merits of that argument, which is an abuse of discretion.

[¶ 19] The district court may only grant summary disposition sua sponte under N.D.C.C. § 29-32.1-09 before the State responds. *See Ourada v. State*, 2019 ND 10, ¶ 4, 921 N.W.2d 677. The district court's analysis in paragraph seven, is a misapplication of the law and not a reason the court could dismiss the application. The State had responded and made a general claim of res judicata and statutory limitations to the application. Therefore, the court abused its discretion and this Court should reverse and remand the case to the district court for a hearing on the application.

CONCLUSION

[¶ 20] WHEREFORE, Mr. Wisham respectfully requests that this Court reverse the district court's order denying his application for post-conviction relief and the case be remanded to allow Mr. Wisham an evidentiary hearing on his claims.

Dated this 7th day of July, 2020

/s/ Kiara Kraus-Parr
ND Bar No. 06688
Kraus-Parr, Morrow, & Weber
424 Demers Avenue
Grand Forks, ND 58201
(701) 772-8991
service@kpmwlaw.com
Attorney for Appellant

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v.)	
)	
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: July 6, 2020.

/s/ Kiara Kraus-Parr
ND#06688
Kraus-Parr, Morrow, & Weber
424 Demers Avenue
Grand Forks, ND 58201
P: (701) 772-8991
F: (701) 795-1769
service@kpmwlaw.com
Attorney for Appellant

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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
Appellant's Appendix
Certificate of Compliance

And that said copies were served upon by electronically filing said documents through the court's electronic filing system:

Gabrielle Goter, Asst. State's Attorney, mortonsa@mortonnd.org

And upon Appellant at his last known address by placing a true and correct copy of said documents in a sealed envelope via USPS:

Derek Wisham, 407 1 St NE, Mandan, ND 58554

Dated: July 7, 2020.

/s/ Kiara Kraus-Parr
ND#06688
Kraus-Parr, Morrow, & Weber
424 Demers Avenue
Grand Forks, ND 58201
P: (701) 772-8991
F: (701) 795-1769
service@kpmwlaw.com
Attorney for Appellant

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And that said copies were served upon by electronically filing said documents through the court's electronic filing system:

Allen M. Kopyy, Asst. State's Attorney, mortonsa@mortonnd.org

And upon Appellant at his last known address by placing a true and correct copy of said documents in a sealed envelope via USPS:

Derek Wisham, 407 1 St NE, Mandan, ND 58554

Dated: July 7, 2020.

/s/ Kiara Kraus-Parr
ND#06688
Kraus-Parr, Morrow, & Weber
424 Demers Avenue
Grand Forks, ND 58201
P: (701) 772-8991
F: (701) 795-1769
service@kpmwlaw.com
Attorney for Appellant