
IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

BYRON LOREN WHETSEL,)	SUPREME COURT CASE NO.:
)	<u>20200262</u>
Petitioner and Appellant,)	
)	
vs.)	
)	DISTRICT COURT NO.:
STATE OF NORTH DAKOTA,)	Civil No.: <u>37-2020-CV-00066</u>
)	
Respondent and Appellee,)	
)	

BRIEF FOR THE APPELLEE

APPEAL FROM THE DISTRICT COURT OF RANSOM COUNTY

SOUTHEAST JUDICIAL DISTRICT

DISTRICT COURT NO. 37-2020-CV-00066

JUDGMENT DISMISSING PETITION FOR POST-CONVICTION RELIEF

THE HONORABLE JAY SCHMITZ

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STATUTES AND RULES

¶ Nos.

28 U.S.C. §2101(c).....	[¶2]
N.D.C.C. §29-32.1-01(2).....	[¶3,7]
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N.D.R.Ct. 3.2.....	[¶10]
N.D.R.Civ.P. 12(b)(6).....	[¶4]

STATEMENT OF THE FACTS

UNDERLYING JURY TRIAL FACTS

[¶1] The underlying jury trial facts are outlined in the State’s Briefs for the Appellee found in Supreme Court Case Numbers 20170141 and 20190034. Mr. Whetsel’s previous appeal in Supreme Court No. 20190034 relating to his prior post-conviction relief petition was unsuccessful and this Court affirmed the dismissal. Whetsel v. State, 2019 ND 237, 933 N.W.2d 466. Mr. Whetsel is now appealing a dismissal of his second post-conviction relief petition. In this appeal, Mr. Whetsel’s argues he was not afforded 14 days to reply to the Court’s motion to dismiss before the district court ordered dismissal. Appellant’s Brief at ¶¶ 6-7.

DISTRICT COURT’S DISMISSAL

[¶2] The North Dakota Supreme Court’s judgment on Mr. Whetsel’s direct appeal in the criminal case was entered on October 17, 2017. Appx. at p. 11. See also State v. Whetsel, 2017 ND 237, 902 N.W.2d 924. Therefore, Mr. Whetsel’s time to file the pending Application for Post-Conviction Relief expired on or about January 15, 2018. Appx. at p. 11-12, 28 U.S.C. §2101(c). Mr. Whetsel did not file this Application for Post-Conviction Relief until September 8, 2020. Appx. 1. The district court’s reasoning for dismissal of Mr. Whetsel’s Application for Post-Conviction Relief was stated as follows: “I conclude that the State is entitled to judgment as a matter of law because the undisputed facts show that this application was not filed within two years of the date the defendant’s conviction became final.” Appx. 12.

ARGUMENT

I. The District Court Correctly Dismissed Appellant's Petition For Post-Conviction Relief.

[¶3] A district court may summarily dismiss on its own motion any application for post conviction relief and may do so even before the state files any response. N.D.C.C. §29-32.1-09. Mr. Whetsel's Application for Post-Conviction Relief alleges improper jury instructions. Mr. Whetsel does not allege any relief set forth within N.D.C.C. §29-32.1-01(3). Pursuant to N.D.C.C. §29-32.1-01(2), Mr. Whetsel had two years from the date the conviction became final to bring this post-conviction relief application. Since Mr. Whetsel has already previously appealed the conviction, his conviction became final when his time for petitioning the United States supreme court for review became final. Mr. Whetsel's time to petition the United States supreme court extended to ninety days after the date of entry of the North Dakota Supreme Court's judgment. N.D.C.C. §29-32.1-01(2)(b). The North Dakota Supreme Court's judgment on Mr. Whetsel's direct appeal in the criminal case was entered on October 17, 2017. Therefore, Mr. Whetsel's time to file the pending Application for Post-Conviction Relief expired on or about January 15, 2018. Mr. Whetsel did not file this Application for Post-Conviction Relief until September 8, 2020, which is more than two years after his conviction became final.

[¶4] Mr. Whetsel alleges no facts outside the pleadings. This is not a proceeding that would fall into the summary judgment standards and is rather a summary disposition proceeding subject to analysis under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The thirty (30) day time period for Mr. Whetsel to reply to any motion herein is inapplicable because he raises no issues outside the pleadings and there

are no issues of fact. It is undisputed that Mr. Whetsel's time to file his Application for Post-Conviction Relief expired long before September 8, 2020 when he filed his application herein.

[¶5] This Court has affirmed summary dismissal of post-conviction relief applications when brought outside the statutory two-year time limit. Lehman v. State, 2014 ND 103, 847 N.W.2d 119.

[¶6] In Keller v. State, 2015 ND 228, ¶25, 869 N.W.2d 424, this Court stated:

Because Keller has not shown a new constitutional or statutory interpretation applies to his case, we need not address part two of the two-part analysis under N.D.C.C. § 29–32.1–01(3)(a)(3)—whether the interpretations can be applied retroactively. Keller has failed to satisfy the requirements under N.D.C.C. § 29–32.1–01(3)(a)(3) to show an exception to the two-year filing limit. While the district court dismissed Keller's application for post-conviction relief on a different basis, we will not set aside a correct result merely because the district court dismissed for a different reason. See Guardianship of P.T., 2014 ND 223, ¶ 12, 857 N.W.2d 367 (citing Investors Title Insurance Co. v. Herzig, 2010 ND 169, ¶ 40, 788 N.W.2d 312).

[¶7] Mr. Whetsel is not arguing that a new constitutional or statutory interpretation applies to this case. Contrary to the facts in Keller, supra, the State in this case did allege application of the statute of limitations set forth in N.D.C.C. §29-32.1-01(2). The district court in this case provided the reasoning for its decision as follows: “I conclude that the State is entitled to judgment as a matter of law because the undisputed facts show that this application was not filed within two years of the date the defendant's conviction became final.” Therefore, the district court, on its own motion, made its decision ordering judgment of dismissal pursuant to N.D.C.C. §29-32.1-09(1). Mr. Whetsel's application is meritless because it is made outside the applicable period of limitations and it argues no exception to the two-year statute of limitations. The district court entered its decision after the State's Reply and Supplement to State's Reply, but the court appears to have made its

decision on its own motion. Even if the district court made its decision in response to the State's Reply and Supplement to State's Reply, the district court is allowed to dismiss a meritless application on its own motion or in response to the State's motion. Similar to this Court's reasoning in Keller, supra, if the district court dismissed Keller's application for post-conviction relief on motion of the State or on its own motion, this Court should not set aside a correct result merely because the district court dismissed on one's versus another's motion.

[¶8] No response of Mr. Whetsel would have been able to avoid application of the statute of limitations because the substance of his Application for Post-Conviction Relief only relates to jury instructions. Mr. Whetsel's time to argue improper jury instructions was on his direct appeal from the criminal conviction or at the time of his first ineffective assistance of counsel post-conviction relief application. In Chisholm v. State, 2014 ND 125, ¶16, 848 N.W.2d 703, this Court stated in dicta "[w]e conclude N.D.C.C. § 29–32.1–09(1) authorizes the court to dismiss a meritless application considering only the information in the application."

[¶9] The thirty (30) day time period in which to reply to a summary judgment motion is not applicable in this situation where there were no issues of material fact for the district court to consider.

[¶10] Mr. Whetsel has not and is not able to provide any exception to the statute of limitations. Even though Mr. Whetsel is seeking reversal of the district court's dismissal based on Rule 3.2 of the Rules of Court (see e.g. Atkins v. State, 2019 ND 146, 928 N.W.2d 438), Mr. Whetsel has not shown that he can avoid application of the two year period of

limitations. If the district court erred, it was harmless error and there is no apparent way Mr. Whetsel can avoid the two year statute of limitations.

CONCLUSION

[¶11] Based on all the above-stated reasons, the Appellee/Respondent, State of North Dakota seeks affirmation of the lower Court's Judgment Dismissing Mr. Whetsel's now second Application for Post-Conviction Relief.

Dated this 9th day of December, 2020.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for Appellee, State of North Dakota, hereby certifies that Appellee Brief was prepared with proportional typeface and that Appellant's Brief does not exceed 38 pages.

Dated this 9th day of December, 2020.

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