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STATE OF NORTH DAKOTA

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

<p>Byron Loren Whetsel Petitioner- Appellant, Vs. State of North Dakota Respondent- Appellee,</p>	<p>Supreme Court No. 20200262 Case No. 2020-cv-66</p>
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On appeal from the Order Denying Application for Post-Conviction Relief

Filed September 8, 2020

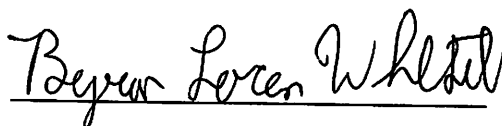
Ransom County District Court

Southeast Judicial District

State of North Dakota

The Honorable Jay A Schmitz, presiding

APPELLANT'S BRIEF



Byron Loren Whetsel # 34982
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[¶1] Statement of the Issues:

1. Whether the District Court erred in denying Mr. Whetsel's Post-Conviction before he had time to respond?

Statement of the Case

[¶2] This is an appeal from an Order denying an Application for Post-Conviction regarding Byron Loren Whetsel (hereinafter referred to as “Mr. Whetsel”). On September 8, 2020 Whetsel filed a pro se Application for Post-Conviction Relief. See. Appellant App. at 1. The State filed an answer on September 9, 2020. On September 10, 2020 the State filed a supplemental reply, On September 15, 2020, the Court entered an Order denying Whetsel’s Application for Post-Conviction Relief. Whetsel filed an appeal on October 1, 2020.

Statement of the Facts

[¶3] Mr. Whetsel went to a jury trial on February 1, 2017 in which the jury found Mr. Whetsel guilty of Murder, child abuse and neglect, Judgement was entered on April 5, 2017. Mr. Whetsel appealed the Criminal Judgement to the North Dakota Supreme Court, the Court affirmed the Criminal Judgement. State v. Whetsel, 2017 ND 237.

[¶4] Mr. Whetsel filed an application for post-conviction relief on October 17 2017, in which he alleged ineffective assistance of counsel. A hearing was held and the Court ultimately found that Whetsel did not receive ineffective assistance of counsel. Mr. Whetsel appealed the decision and the Supreme Court affirmed the district court’s decision. Whetsel v. State, 2019 ND 237.

[¶5] Mr. Whetsel filed another post-conviction on September 8, 2020, in which the State responded on September 9, 2020 and filed a supplemental on the 10th of September. The District Court entered the Order denying his Post-Conviction on September 15, 2020.

Law & Argument

I. Whether the District Court erred in denying Mr. Whetsel’s Post-Conviction before he had time to respond?

[¶6] Post-conviction relief proceedings are civil in nature and governed by the North Dakota Rules of Civil Procedure. This Court reviews a summary denial of an application for post-conviction relief similar to 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. *Delvo v. State*, 2010 ND 78, ¶ 10, 782 N.W.2d 72 (internal citations and quotations omitted). "A petitioner for post-conviction relief has the burden of establishing grounds for post-conviction relief." *Steen v. State*, 2007 ND 123, ¶ 12, 736 N.W.2d 457.

[¶7] Mr. Whetsel filed his Post-Conviction on September 8, 2020, the State filed an answer on September 9, 2020, and the District Court denied the Post-Conviction on September 15, 2020. This Court has held on many occasions that Defendants are allowed 14 days to respond to the State's Motion. See, *Vogt v. State*, 2019 ND 236; 933 NW2d 916, *Atkins v. State*, 2019 ND 146, 928 N.W.2d 438. Both cases were on Rule 3.2 of the North Dakota Rules of Court, this case is like *Vogt* where the State responded and the Court took the Response as a Motion to dismiss this Court held that a Petitioner is require to be given notice if the Courts intent is to dismiss the application and the Petitioner is required 14 days to respond to the State's answer. Mr. Whetsel was clearly not given 14 days to respond which is clearly a violation of the Rules.

CONCLUSION

[¶8] Mr. Whetsel request this Honorable Court to reverse and remand with the instruction to allow Whetsel 14 days to respond to the State's answer and if the State asks for a summary dismissal then they should provide notice to Whetsel within reasonable time.

Byron Loren Whetsel

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CERTIFICATE OF COMPLIANCE

[¶9] The undersigned hereby certifies, in compliance with N.D.R.App.P. 32(a)(8)(A), that this Appellant's Brief was prepared with Microsoft Word, and the total number of pages in the Brief, including the table of contents, the table of authorities, and the certificate of compliance is 8 pages.

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In RE: Whetsel v. State
Supreme Court # 20200262
Ransom County Case No. 37-2020-CV-66

I, Byron Whetsel, do hereby certify that on 2 day of November, 2020,
true copies of the Appellant's brief and Appendix were mailed to:

Clerk of Supreme Court
600 E. Boulevard Ave
Bismarck ND 58505

and to

Fallon Kelly (State's Attorney)
316 Main St.
P.O. Box 391
Lisbon, ND 58054-0391

To the best of my knowledge, this is the mailing address for the Court
and State's Attorney

Dated this 18th day of November, 2020

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