

IN THE SUPREME COURT OF NORTH DAKOTA

George Robert Lyons,

Petitioner and Appellant,

v.

State of North Dakota,

Respondent and Appellee.

Supreme Court File No.
20200333
Grand Forks County File No.
18-2020-CV-00591

APPELLANT BRIEF

BRIEF OF PETITIONER-APPELLANT, GEORGE ROBERT LYONS

Appeal from the Order Denying Petitioner's Amended Application for Post-Conviction

Relief

Entered on the 9th day of November, 2020.

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

The Honorable John A. Thelen

ORAL ARGUMENT REQUESTED

Benjamin C. Pulkrabek
ND Bar No. 02908
Pulkrabek Law Office
402 First Street NW
Mandan, ND 58554
Office: 701-663-1929
Pulkrabek@lawyer.com
Attorney for the Appellant

TABLE OF CONTENTS

Paragraph
Number

TABLE OF AUTHORITIES..... Page 3

STATEMENT OF ISSUE..... ¶1

NATURE OF CASE..... ¶2 - ¶20

STATEMENT OF FACTS..... ¶21 - ¶26

STANDARD OF REVIEW ¶27

LAW AND ARGUMENT..... ¶28- ¶38

ISSUE I: Was the decision by Mr. Lyons trial attorney to not use information he had to impeach the victim ineffective assistance of counsel and if he had used that information to impeach the victim would that have changed the way the trial ended?

CONCLUSION..... ¶39 - ¶41

TABLE OF AUTHORITIES

Paragraph Number

CASES

Brewer v. State, 2019 ND 69, 924 N.W.2d 87 (N.D. 2019) ¶27

Hunter v. State, 2020 ND 224, 949 N.W.2d 841 (N.D. 2020) ¶28

Rourke v. State, 2018 ND 137, ¶5, 912 N.W.2d 311 ¶28

Strickland v. Washington, 466 U.S. 668 (1984) ¶34, ¶35, ¶36

Oral Argument:

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

Abbreviations:

Pagep.

Line L.

Transcript of proceedings Tr.

STATEMENT OF THE ISSUE

- ¶1 **ISSUE I.** Was the decision by Mr. Lyons trial attorney to not use information he had to impeach the victim ineffective assistance of counsel and if he had used that information to impeach the victim would that have changed the way the trial ended?

NATURE OF THE CASE

¶2 On June 28, 2017 the case began against George Robert Lyons with the filing of an affidavit of probable cause and a complaint.

¶3 The criminal information was filed on July 31st, 2017. A motion to amend the information was filed on January 2, 2018. An amended information was filed on January 9, 2018.

¶4 The jury trial began on January 9, 2017. Count 1 was dismissed. It ended with a guilty verdict to Count 2 and not guilty verdicts to Counts 3 and 4.

¶5 The criminal judgment was filed on July 2nd, 2018. That judgment was appealed and a transcript was ordered on July 6, 2018.

¶6 The North Dakota Supreme Court affirmed the criminal judgment in State of North Dakota v. Lions, 2019 ND 175, 930 N.W. 2d 156.

¶7 Mr. Lyons filed a post-conviction relief application on March 4, 2020. The state responded to that application on March 19, 2020.

¶8 A notice of hearing was filed on March 31, 2020.

¶9 A stipulation agreement to continue the evidentiary hearing was filed on June 26, 2020.

¶10 A motion for leave to amend petition for post-conviction relief was filed on July 31, 2020.

[¶11] A stipulation to continue evidentiary hearing was filed on August 11, 2020.

[¶12] The order granting the stipulation to continue was filed on August 18, 2020.

[¶13] The order granting motion to amend post-conviction petition was filed on August 25, 2020.

[¶14] A zoom post-conviction hearing was held on September 18, 2020.

[¶15] An order denying petitioner's amended application for post-conviction relief was entered on December 2, 2020.

[¶16] Mr. Lyons filed a notice of appeal on December 2, 2020.

[¶17] The Notice of Filing the Notice of Appeal was filed on December 2, 2020.

[¶18] The clerk's certificate of appeal was filed on December 18, 2020.

[¶19] The transcript of the post-conviction hearing and the clerk's supplemental certificate of appeal was filed on January 26, 2020.

[¶20] This matter is now before the North Dakota Supreme Court.

STATEMENT OF FACTS

[¶21] The petitioner, George Robert Lyons filed a post-conviction petition on March 4, 2020 that included several different claims. At the evidentiary hearing on Mr. Lyons' post-conviction petition Mr. Lyon's attorney, Kyle Craig, informed the court that the evidentiary hearing would be limited exclusively to the amended Petition for Post-Conviction. That amended petition only made one claim and it was ineffective assistance of counsel.

[¶22] During the post-conviction hearing the petitioner offered and had accepted into evidence Exhibit A. Exhibit A contained information that the victim in Mr. Lyon's criminal case had made similar allegations about being sexually assaulted at a different time and place by another person. In that sexual assault there was no physical injury to her, any evidence of a sexual assault and she couldn't identify the assailant. Because of the above facts that assault was never charged out. The above information however, was all made known to the defense before Mr. Lyon's trial. Mr. Lyons discussed this information with attorney Mottinger and during that discussion he told Attorney Mottinger he wanted it used to impeach the victim at trial.

[¶23] Attorney Mottinger decided at trial to disregard Mr. Lyons discussion to use the information to impeach the victim and made no attempt to impeach her.

[¶24] The following quote from the Tr. p. 13 L. 14 – p. 14 L. 11 explains Attorney Mottinger's decision not to try to impeach the victim:

- “Q. Okay. Well, let me ask you this because I know the State will likely ask it as well. The information regarding these prior allegations made by Jane Doe -- why did you not utilize that at trial?
- A. It's been my experience, after trying these cases for almost 40 years -- I didn't do a lot of criminal work when I initially started this -- that you want to be very careful regard to trying to impeach a witness, particularly a child witness, a young witness, particularly a sexual abuse witness. And if you're going to impeach them, you better be able to blow them out of the water because if you can't the jury's going to punish somebody, and the only -- they can't punish me. It's going to come down pretty heavy on the defendant. In this particular case -- and I did discuss this with Mr. Lyons -- the information that we'd received was that the case was not pursued as the perpetrator was not identified. There was no indication that anybody discounted her report; there was no indication that anybody took the position that an assault had not occurred; simply that it was not pursued because she couldn't identify a perpetrator and there was no physical evidence to support her allegations.” (Emphasis added)

[¶25] Another reason Attorney Mottinger didn't want to try to impeach the victim was Mr. Lyons had similar sexual charges pending in Polk County, Minnesota, and he was afraid trying to impeach the victim would open the door for the state to get into evidence Mr. Lyons' pending charge in Minnesota.

[¶26] The testimony of both Attorney Mottinger and Mr. Lyons at the evidentiary hearing established that they had several discussions about the discovery given to them by the state. Most of how Attorney Mottinger was going to proceed at Mr. Lyons trial and how he would use the discovery was agreed to by Mr. Lyons. The only thing Mr. Lyons and Attorney Mottinger disagreed about was whether or not the information that they had about the victim's prior sexual assault should be used to impeach the victim at Mr. Lyon's trial.

STANDARD OF REVIEW

[¶27] The standard of review when the issue raised on appeal is ineffective assistance of counsel according to Brewer v. State, 2019 ND 69, 924 N.W.2d 87 (N.D. 2019) is a mixed question of law and fact that is fully reviewable on appeal.

ARGUMENT

I. ISSUE I: Was the decision by Mr. Lyons trial attorney to not use information he had to impeach the victim ineffective assistance of counsel and if he had used that information to impeach the victim would that have changed the way the trial ended?

[¶28] According to Hunter v. State, 2020 ND 224, 949 N.W.2d 841 ¶10 (N.D. 2020) "Post-conviction proceedings are civil and the applicant has the burden of establishing the grounds for relief" Rourke v. State, 2018 ND 137, ¶5, 912 N.W.2d 311.

"To succeed on a claim for ineffective assistance of counsel, the applicant must show: (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different. Id. (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984) ...”

[¶29] In a criminal law suit the criminal defense lawyer is the Defendant’s agent and he must either follow the Defendant’s ultimate decision or convince the judge to let him withdraw from the case.

[¶30] Other examples of criminal Defendant’s ultimate right to make decisions in his criminal case are:

1. The right to enter the plea he wants,
2. The right to go or not to go to trial, and
3. The right to accept or not to accept a plea bargain offered by the state.

[¶31] A criminal defense attorney is never allowed in a felony case to:

1. Enter the plea he thinks the Defendant should enter,
2. Make the final decision whether or not the Defendant should go to trial,
3. Make the final decision on whether or not the Defendant should accept the plea bargain offered by the state.

[¶32] At a criminal trial the Defendant should be allowed to make any decision on trial strategy. If his attorney doesn’t agree his attorney should take that decision before the trial judge. After all, if Defendant is found guilty, he is the one who ends up doing the time and paying the fine.

[¶33] Attorney Mottinger’s opinion on who he believes determines all of the trial strategy at criminal trials is found in the Tr. p. 16 L. 24 - p. 17 L. 3:

“Q. Okay. But as the attorney in the matter, who determines the trial strategy?”

A. I'd like to think that I do; however, that's come under question in recent years. But it is the attorney's ultimate decision in terms of what evidence to offer."

[¶34] According to Strictland v. Washington, 466 U.S. 668 (1984) when a Defendant claims his trial attorney was ineffective and incompetent because of something he did or didn't do while representing the Defendant in his criminal case, a two-prong test is applied to what the trial attorney did or didn't do to determine whether or not it was ineffective and incompetent.

[¶35] The first prong in Strictland requires the Defendant to produce testimony and evidence that what his trial attorney did fell below the objective standard of reasonableness in the case before the Court. Mr. Lyons is claiming his trial attorney, Steve Mottinger, was ineffective and incompetent because he refused to follow Mr. Lyons' reasonable decision to use the information the defense had about a prior sexual assault to impeach the victim when she testified at his criminal trial. Mr. Lyons believes his decision to impeach the witness on information the defense had was reasonable. He, not Attorney Mottinger, is the one who has to serve the time and pay any fine if he loses. Therefore Mr. Lyons believes he should have been allowed by Attorney Mottinger to make the ultimate decision on whether or not his trial attorney should try to impeach the victim when she testified at trial.

[¶36] The second prong in Strictland requires Mr. Lyons to show that the end result of his trial would be different if attorney Mottinger had tried to impeach the victim.

[¶37] Attorney Mottinger admits that in order to win a case by impeaching the victim he had to blow her out of the water (Tr. p. 13 L.25 – p. 14 L. 1):

“And if you're going to impeach them, you better be able to blow them out of the water...”

[¶38] Exactly what is required to blow the victim out of the water is not known by the writer of this brief. In this case Attorney Mottinger had information that at a prior time the victim in Mr. Lyons' case had been sexually assaulted and there was no physical evidence to support that claim. Would the information the defense had about the victim's prior claims of sexual assault be sufficient to blow her out of the water? The answer to that question is decided by the jury and not Attorney Mottinger. Therefore, Attorney Mottinger should have followed Mr. Lyon's decision and try to impeach this victim.

CONCLUSION

[¶39] Attorney Mottinger's performance fell below the objective standard of reasonableness when he refused to, and did not follow, Mr. Lyons' reasonable decision to impeach the victim with the information he had about prior sexual assault where she couldn't identify the assailant and there was no physical evidence to support that sexual assault.

[¶40] The decision as to whether or not impeaching the victim would result in a not guilty verdict is up to the jury and not Attorney Mottinger. In this case there is a good possibility if Attorney Mottinger had impeached the victim the jury would have found Mr. Lyons not guilty.

[¶41] This case should be remanded to the district court with an order requiring that court to grant Mr. Lyons post-conviction petition and allow Mr. Lyons to have another trial.

Dated this 25th day of February, 2021.

/S/ Benjamin C. Pulkrabek

Benjamin C. Pulkrabek

ND Bar No. 02908

Pulkrabek Law Office

402 First Street NW

Mandan, ND 58554

(701) 663-1929

pulkrabek@lawyer.com

Attorney for Appellant, George Robert Lyons

IN THE SUPREME COURT OF NORTH DAKOTA

George Robert Lyons,
Petitioner and Appellant,

v.

State of North Dakota,
Respondent and Appellee.

Supreme Court File No.
20200333
Grand Forks County File No.
18-2020-CV-00591

**CERTIFICATE OF
COMPLIANCE**

[¶1] This appellant's brief and appendix complies with the page 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. The brief in this matter consists of 11 pages and appendix consists of 66 pages.

Dated this 25th day of February, 2021.

/S/ Benjamin C. Pulkrabek
Benjamin C. Pulkrabek
ND Bar No. 02908
Pulkrabek Law Office
402 First Street NW
Mandan, ND 58554
(701) 663-1929
pulkrabek@lawyer.com
Attorney for the Appellant

IN THE SUPREME COURT OF NORTH DAKOTA

George Robert Lyons,

Petitioner and Appellant,

v.

State of North Dakota,

Respondent and Appellee.

Supreme Court File No.

20200333

Grand Forks County File No.

18-2020-CV-00591

CERTIFICATE OF SERVICE

[¶1] I certify that a true and correct copy of the following, specifically:

1. Appellant Appendix
2. Appellant Brief
3. Certificate of Compliance
4. Certificate of Service

by electronically serving the same through the North Dakota Supreme Court e-filing system and that e-filing will provide service to the following:

North Dakota Supreme Court
supclerkofcourt@ndcourts.gov

Rachel Rae Egstad
Grand Forks County States Attorney
sasupportstaff@gfcounty.org

and by U.S. postal service with proper postage affixed to:

George Robert Lyons
c/o Rush City Correctional Facility
Inmate ID#260021
7600 – 525th Street
Rush City, MN 55069
Petitioner/Appellant

Dated this 25th day of February, 2021.

/S/ Benjamin C. Pulkrabek
Benjamin C. Pulkrabek
ND Bar No. 02908
Pulkrabek Law Office
402 First Street NW, Mandan, ND 58554
(701) 663-1929
pulkrabek@lawyer.com
Attorney for the Petitioner/Appellant