

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

George Robert Lyons,)	Supreme Court No. 20200333
)	
Petitioner and Appellant,)	Case No. 18-2020-CV-00591
)	
vs.)	
)	
)	
State of North Dakota,)	
)	
Respondent and Appellee.)	

APPEAL FROM JUDGMENT DATED NOVEMBER 9, 2020
IN DISTRICT COURT, GRAND FORKS COUNTY, STATE OF NORTH DAKOTA
THE HONORABLE JOHN THELEN

BRIEF OF APPELLEE – ORAL ARGUMENT REQUESTED

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STATEMENT OF ISSUE

[¶1] Whether the District Court properly denied Lyons' Application for Post Conviction Relief in 18-2020-CV-00591?

STATEMENT OF THE FACTS

[¶2] Lyons was charged on the 28th day of June, 2017 with four counts of Gross Sexual Imposition for having engaged in separate sexual acts with Jane Doe, who was fourteen years old at the time. A jury trial was held January 9th – 12th, 2018. The first count of Gross Sexual Imposition was dismissed prior to trial beginning. Lyons was subsequently found guilty in Count 2 and not guilty in the remaining counts 3 and 4. Lyons was sentenced on July 2, 2018 to forty years in prison with twenty years suspended and ten years of supervised probation. Lyons appealed this conviction to the Supreme Court, which was upheld on appeal in State v. Lyons, 2019 ND 175, 930 N.W.2d 156.

[¶3] On March 4, 2020, Lyons filed a Post Conviction Relief Application. The State filed its Answer on March 19, 2020 putting Petitioner on his proof. Counsel was appointed and a brief was filed by Petitioner on July 31, 2020. In his Amended Petition for Post-Conviction Relief, Lyons asserted one issue and that was ineffective assistance of counsel. An evidentiary hearing was held on September 18, 2020 and trial defense counsel, Steve Mottinger, testified. Mr. Mottinger testified that he had been a defense attorney for the better part of 41 years. Post-Conviction Hearing Tr. p. 6. Mr. Mottinger was questioned whether or not the State had a particularly strong case against Mr. Lyons, to which he answered that the case hinged on the credibility of Jane Doe and Mr. Lyons. Tr. pp. 8-12. Exhibit A was introduced and admitted regarding the crux of the post-conviction relief. Tr. p. 9. In this Exhibit A, there was a report of an allegation made by Jane Doe regarding a sexual assault. Id.

[¶4] In this allegation, Jane Doe reported in May of 2008 that she had been sexually assaulted by an unknown individual in the apartment complex she resided in. When asked why this allegation was not used to impeach or impugn Jane Doe's credibility, Mr. Mottinger indicated that "you want to be very careful in regard to trying to impeach a witness, particularly a child witness, a young witness, particularly a sexual abuse witness." Tr. p. 13. Further, Mr. Mottinger testified that he discussed this with Lyons. Tr. p. 14. In addition, Mr. Mottinger discussed with Lyons the fact that there was no indication that anybody discounted Jane Doe's report. Id. The information was that the assault was not pursued because she could not identify a perpetrator and there was no physical evidence. Id. There was no indication that anyone took the position that it never happened or that Jane Doe had lied about it. Id. Mr. Mottinger testified that Lyons was very involved in his case, he had access to all the discovery and Mottinger specifically recalled the discussion he had with Lyons regarding using this report. Tr. p. 15. Further, Lyons did not indicate that he had any problems with the decision not to use it to Mr. Mottinger. Id.

[¶5] Mr. Mottinger discussed his lengthy experience further on cross examination in that he had determined over the course of trying these types of cases for over thirty-five years ago that less is more. Tr. p.17. He indicated that "if you do not believe that you can successfully destroy a witness's credibility, that it's sometimes best to leave it alone." Id. Mr. Mottinger discussed further implications of attacking a victim's credibility with then opening the door to Lyons' credibility and the Polk County cases, which Mr. Mottinger successfully motioned to exclude prior to trial. Tr. p. 18.

[¶6] Lyons testified in this hearing as well. In his testimony, Lyons stated that he was under the impression that trial strategy was left up to Mr. Mottinger’s judgment. Tr. p. 23. He testified that “in the end I trusted all of his judgment.” Tr. p. 24. He further agreed that he was pretty involved in his case and discussed strategies with Mr. Mottinger. *Id.* At the close of the hearing, Petitioner was given fourteen days to submit a closing brief and the State was given seven days to respond. After the closing briefs were filed, an Order Denying Petitioner’s Amended Application of Post-Conviction Relief was entered by the Honorable John Thelen on November 9, 2020. Lyons then filed this timely appeal on December 2, 2020.

[¶7] Lyons appeals the district court’s denial of post-conviction relief with respect to the November 9, 2020 order related to the allegation of ineffective assistance of counsel. The state resists Lyons’ appeal and urges this Court to affirm the district court’s order.

REQUEST FOR ORAL ARGUMENT

[¶8] Lyons has requested this Court schedule oral argument in this case pursuant to N.D.R.App.P. 28(h). Because the Appellant has requested oral argument, the State so requests to be present and argue on behalf of the Appellee.

LAW AND ARGUMENT

I. The district court properly denied the petitioner’s amended petition for post-conviction relief.

[¶9] Post-conviction relief is governed by N.D.C.C. Chapter 29-32.1. Post conviction relief proceedings are civil in nature and are governed by the North Dakota Rules of Civil Procedure. Wheeler v. State, 2008 ND 109, ¶ 5, 750 N.W.2d 446. The requirements for an application for post-conviction relief are set forth in N.D.C.C. § 29-32.1-04. Ude v. State, 2009 ND 71, ¶ 8, 764 N.W.2d 419.

[¶10] The petitioner has the initial burden of establishing grounds for the post-conviction relief. Flanagan v. State, 2006 ND 76, ¶ 10, 712 N.W.2d 602. Mere assertions are not enough to carry this burden. The Court can grant a motion for summary disposition “if the application, pleadings, and previous proceeding, discovery, or other matters of record show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” N.D.C.C. § 29-32.1-01(1). The party moving for summary disposition has the initial burden of showing an absence of a genuine issue of material fact. Klose v. State, 2008 ND 143, ¶ 9, 752 N.W.2d 192.

[¶11] A petitioner is not required to provide evidentiary support for his petition until he has been given notice he is being put on his proof. Id. The petitioner is effectively put on his proof if the State moves for summary disposition pointing out a lack of evidence, and a minimal burden shifts to the petitioner to provide some competent evidence to support his claim. Steinbach v. State, 2003 ND 46, ¶ 17, 658 N.W.2d 355. At that point the petitioner may not merely rely on the pleadings or on unsupported, conclusory allegations, but must present competent admissible evidence by affidavit or

other comparable means which raise an issue of material fact. Flanagan, 2006 ND 76, ¶ 10. If competent evidence is provided, the petitioner is entitled to an evidentiary hearing. Steinbach, 2003 ND 46, ¶ 17. In this instance, an evidentiary hearing was held.

[¶12] Lyons' petition is based on an allegation of ineffective assistance of counsel. The Sixth Amendment to the U.S. Constitution and Article 1, Section 12 of the North Dakota Constitution guarantee the effective assistance of counsel. However, it is important to note that the "Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough v. Gentry, 540 U.S. 1, 8 (2003).

[¶13] In Garge, the North Dakota Supreme Court laid out the basic framework under which this Court must analyze Petitioner's ineffective assistance of counsel claim.

A criminal defendant has the right to be represented by counsel under the Sixth Amendment to the United States Constitution and Article I, Section 12 of the North Dakota Constitution. The constitutional right to counsel guarantees effective assistance of counsel. When reviewing claims of ineffective assistance of counsel, we apply the United States Supreme Court's two-part test from Strickland v. Washington: First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

State v. Garge, 2012 ND 138, ¶ 10, 818 N.W.2d 718 (internal citations omitted). This Court must also "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." State v. Nikle, 2006 ND 25, ¶ 11, 708 N.W.2d 867 (citing Strickland v. Washington, 466 U.S. 668, 689 (1984)). "A defendant must overcome a strong presumption that counsel's performance falls within the wide range of reasonable professional assistance and courts must consciously attempt to limit the distorting effect of hindsight." Everett v. State, 2015 ND 149, ¶ 8, 864 N.W.2d 450.

Trial counsel's conduct is presumed to be reasonable and courts consciously attempt to limit the distorting effect of hindsight. The petitioner has the heavy and demanding burden of proving the counsel's assistance was ineffective and must specify how the counsel was deficient and specify the probable different result. A petitioner will not succeed on an ineffective assistance of counsel claim unless he proves counsel's performance was so deficient as to fall below an objective standard of reasonableness and the deficient performance was prejudicial. Generally, to meet the prejudice prong of the Strickland test, the defendant must establish a reasonable probability that, but for his counsel's errors, the result of the proceeding would have been different.

Ernst v. State, 2004 ND 152, ¶ 9, 683 N.W.2d 891 (internal citations omitted).

[¶14] Strickland provides for a two-prong test for ineffective assistance of counsel. To meet the prejudice prong of the Strickland test, the petitioner must establish a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. State v. Dahl, 2013 ND 25, ¶¶8, 15, 826 N.W.2d 922. To meet this burden the petitioner must prove not only that counsel's assistance was ineffective, but must demonstrate with specificity how and where trial counsel was incompetent and must specify the probable different result if trial counsel had not performed incompetently. Kinsella v. State, 2013 ND 238, ¶ 6, 840 N.W.2 625; Coppage v. State, 2013 ND 10, ¶ 12, 826 N.W.2d 320. The North Dakota Supreme Court has explained that "[u]nless counsel's errors are so blatantly and obviously prejudicial that they would in all cases, regardless of the other evidence presented, create a reasonable probability of a different result, the prejudicial effect of counsel's errors must be assessed within the context of the remaining evidence properly presented and the overall conduct of the trial." Broadwell v. State, 2014 ND 6, ¶ 7, 841 N.W.2d 750.

[¶15] The standard of review for a claim of ineffective assistance of counsel is clearly erroneous. Roe v. State, 2017 ND 65, ¶¶ 4-5, 891 N.W.2d 745. "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported

by the evidence, or if, although there some evidence to support the finding, a reviewing court is left with a definite and firm conviction a mistake has been made.” Id.

[¶16] In the case at hand, Lyons is stating that Mr. Mottinger was ineffective because he failed to use an allegation that Jane Doe had made in May of 2008 regarding a sexual assault to impeach her. As the State has set forth above, Mr. Mottinger and Lyons discussed this and it was Mr. Mottinger’s determination not to do so. Again, the decision was based on Mr. Mottinger’s lengthy experience as a defense attorney, the fact that the allegation was never shown to be false or give any indication that Jane Doe was lying, and because it could have opened the door to Lyons’ credibility.

[¶17] In his order denying Lyons’ application for post-conviction relief, the Honorable Judge Thelen carefully analyzes the issue of ineffective assistance of counsel. Order Denying Petitioner’s Amended Application for Post-Conviction Relief Index #45. In his order, Judge Thelen considered the testimony of Mr. Mottinger and the post hearing briefs. Id. He analyzed the claim for ineffective assistance of counsel under the appropriate Strickland test and found that Lyons did not meet his burden under Strickland and therefore, his application for relief should be denied. Based on his thorough analysis, it cannot be determined that the order was based on an erroneous view of the law or so clearly a mistake. Judge Thelen’s order was based on the correct ruling of law and was supported by the evidence presented in the post-conviction hearing. The district court did not err when denying post-conviction relief and therefore Lyons’ appeal must be denied.

CONCLUSION

¶18] For the above stated reasons, Lyons’ appeal should be denied. Therefore, the State of North Dakota respectfully requests that this Court **AFFIRM** the district court’s Order Denying Petitioner’s Amended Application for Post-Conviction Relief.

Dated this 26th day of March, 2021.

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CERTIFICATE OF COMPLIANCE
SA#154678

[¶1] The State of North Dakota, by and through Assistant State's Attorney Rachel R. Egstad 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 12 number of pages.

Dated this 26th day of March, 2021.

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