

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

Rec'd non-substantive  
corrections April 16, 2021

**James Charles Thompson** )  
Petitioner & Appellant ) Supreme Court No.  
 ) 20210038  
 )  
vs. ) Stutsman County No.  
 ) 47-2020-CV-00571  
**State of North Dakota,** )  
Respondent & Appellee )

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**APPELLEE'S BRIEF**

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On Appeal From the Order Denying Petitioner's Application for Post-Conviction Relief

Entered on the Fifth day of January, 2021.

In District Court, Stutsman County, State of North Dakota.

The Honorable Cherie Clark.

Fritz Fremgen (04875)  
State's Attorney, Stutsman County  
511 Second Avenue Southeast  
Jamestown, ND 58401  
(701) 252-6688  
ffremgen@stutsmancounty.gov  
attorney@stutsmancounty.gov e serve  
Attorney for Appellee

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## [¶ 2] STATEMENT OF THE ISSUES

- [¶ 3] Whether the district court erred in when it granted the State's motion to dismiss Thompson's Application for post-conviction relief due to the statute of limitations.
- [¶ 4] Whether the district court erred when it granted the State's motion for summary dismissal of Thompson's Application for post-conviction relief.

## [¶ 5] STATEMENT OF THE FACTS

[¶ 6] On November 16, 2020, Thompson filed a motion to vacate judgment and sentence that the court treated as an application for post-conviction relief. Appellant's Appendix [hereinafter ATA] at 7-9.

[¶ 7] On November 16, the Clerk of District Court issued a letter addressed to Thompson informing him that “[t]he Court may grant a motion by either party for summary disposition if . . . there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.” ATA at 9.

[¶ 8] On November 24, 2020, the State filed its Answer to the Petition, denying all claims and reserving the right to make several motions and engage in discovery. Appellee's Appendix [hereinafter AEA] at 5-9.

[¶ 9] On November 25, 2020, the State filed a *Notice of Motion, Motion for Summary Dismissal, and Brief in Support of Motion*. The State did not request a hearing on the motion. The State provided a proposed order, which Judge Clark signed on January 5, 2021. ATA 10-14 (motion); 35-36 (Order).

[¶ 10] On November 25, 2020, the State filed its *Notice of Motion, Motion to*

*Dismiss Based on Statute of Limitation, and Brief in Support of Motion.*<sup>1</sup> The State did not request a hearing on the motion. The State filed a proposed order, which the trial court judge signed the proposed order on January 5, 2021.

[¶ 11] On December 1, 2020, Thompson applied for a government provided attorney. ATA at 3, 47-2020-CV-00571, Index # 15. On December 1, 2020, the application was approved. ATA at 3, 47-2020-CV-00571, Index # 16. On December 3, 2020 Thompson's case was assigned attorney Kyle Craig. ATA at 3, 47-2020-CV-00571, Index # 17.

[¶ 12] On December 14, 2020, Thompson's counsel, Kyle R. Craig, filed a motion requesting an additional 120 days “to put together an amended petition.” AEA at 15. The only reason Craig provided for his request was, “[t]he undersigned was recently assigned and is in the process of doing an investigation into the claim and obtaining medical records.” *Id.* Thompson did not request any additional time to respond to the State’s motions.

[¶ 13] On December 22, 2020, the State filed it’s *Response to the Motion to Amend Petition and its Assertion of Affirmative Defenses of Laches and Misuse of Process*. ATA at 22-34. The State argued that, according to Rule 3.2 of the Rules of Court, the State’s motions should be granted because the Appellant had failed to respond to the motions. ATA at 22. The State noted that Thompson had failed to

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<sup>1</sup> It is unclear why Thompson did not include this in his statement of facts or in the Appellant's Appendix. Thompson did include at page 15 of the Appellant's Appendix a *State’s Exhibit 1*, but that was an exhibit filed with the *State's Motion to Dismiss Based on Statute of Limitations*; not an exhibit for the *Motion for Summary Dismissal*. See ATA at 3, Index 11-13.

indicate anywhere in his motion any evidence that the statute of limitation exceptions set forth in North Dakota Century Code section 29-32.1-01 applied. ATA at 23, ¶ 4. The State also noted that the Thompson’s request for extension of time remained silent on any evidence of the statute of limitations exception,<sup>2</sup> ATA at 23, ¶ 4, and that “[t]he issue of whether Thompson’s Petition for Vacation is time barred should be addressed before granting any motion to amend.” ATA at 23, ¶ 5. The State argued that the issue of timeliness is a jurisdictional question. ATA at 23, ¶ 6 (citing State v. Abe, 2001 MT 260, ¶¶ 13-17, 307 Mont. 233, 236-37, 37 P.3d 77, 79-80 (finding that the one-year statute of limitations for postconviction relief is a “jurisdictional limit on litigation and its waiver may only be justified by a clear miscarriage of justice, one so obvious that the judgment is rendered a complete nullity”)). The State also argued that the motion to amend was untimely under Rule 15 of the North Dakota Rules of Civil Procedure. ATA at 24, ¶ 7. The State argued in the alternative that the doctrine of laches, set forth in Johnson v. State, 2006 ND 122 ¶¶ 3-14, 714 N.W.2d 832, applied because of Thompson's unreasonable delay.

[¶ 14] On January 6, 2021, the trial court judge's *Order Granting Summary Dismissal* was filed. ATA at 35-36. In it, the judge found both that Thompson’s arguments were “nonsensical and unsupported” and that “[t]here is no legal issue

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<sup>2</sup> In Thompson's *Request for Additional Time to Respond*, which for some reason was not included in the Appendix, that “[t]he undersigned was . . . in the process of doing an investigation into the claim and obtaining medical records.” AEA at 15. However, the State noted in its *Response* that “Thompson never said why he was looking for [the medical records].” ATA at 26, ¶ 13.

and no genuine issue of material fact.” ATA at 35, ¶¶ 3-4. The Court’s authority for this dismissal is found in North Dakota Century Code section 29-32.1-09(3).

[¶ 15] Also on January 6, 2021, the trial court's Order Dismissing Application Due to Statute of Limitation was filed. AEA at 16-17. The trial court found that “[t]he record indicates no basis for exception to the two year statute of limitations and Thompson has brought none to the court’s attention. Id. ¶4.

[¶ 16] ARGUMENT

[¶ 17] Thompson's sole argument on appeal seems to be that the district court summarily dismissed the Petition without giving Thompson an opportunity to respond to the State’s motions. Thompson fails to distinguish between the State’s two motions—in fact he does not include the Motion to Dismiss Based on Statute of Limitations or the Order Dismissing the Application Due to Statute of Limitations in his Appendix. Thompson takes issue with the fact the District Court did not address his motion to amend his petition before granting summary dismissal and dismissing due to statute of limitations. Appellant provides a standard of review that analyzes whether a Court needs to allow a Petitioner to respond despite the fact that Appellant failed to respond to the State’s motions.

***[¶ 18] The District Court Did Not Err When it Dismissed the Application Due to Statute of Limitations or When it Granted Summary Dismissal Under N.D.C.C. § 29-32.1-09(3)***

[¶ 19] Appellant Thompson waived the argument that the trial judge erred when dismissing the application due to statute of limitations. Thompson instead argues

that the trial judge erred by not allowing Thompson time to respond to the State's motions. The Respondent was provided the fourteen days required by Rule 3.2 to respond to the motions and failed to respond within the 14 days.

[¶ 20] The trial court did not err because she allowed Appellant ample time to respond to State's motions.

**[¶ 21] *Standard of review:***

[¶ 22] Thompson quotes Friesz v. State, 2021 ND 37, 956 N.W.2d 338, for the proposed standard of review. In Friesz, the Court dismissed due to a lapsed statute of limitations without giving the Petitioner time to respond. Id. ¶ 8 (“This Court has recently held that ‘[u]nless clear from the record that any response a party could make would be futile, justice requires a party be granted the opportunity to respond as required under N.D.R.Ct. 3.2.’”).

**[¶ 23] Analysis**

[¶ 24] Section 29-32.1-09(1) of North Dakota Century Code, provides: “The court, on its own motion, may enter a judgment denying a meritless application on any and all issues raised in the application before any response by the state.” However, “[o]nce the State has responded, sua sponte summary disposition by the court is no longer available, and the State is required to move for summary disposition.” Whetsel v. State, 2021 ND 28, ¶ 5, 955 N.W.2d 57, 58.

[¶ 25] Unlike in Friesz, Thompson did not respond to either of the State's motions within the 14 days provided by Rule 3.2 and really never made a response



to either in any substantial way. The North Dakota Supreme Court “has applied N.D.R.Ct. 3.2 to set the response time afforded an applicant subsequent to a request by the State for summary dismissal of an application for post-conviction relief.” Friesz, 2021 ND 37 ¶ 6. Rule 3.2 (a)(2) of the North Dakota Rules of Court requires the non-moving party to file an answer brief within 14 days after service of the brief. In this case, Thompson was given the 14 days to respond but failed to respond or to request more time to respond inside the 14 days. The State filed its motions on November 25, 2020. The 14<sup>th</sup> day expired on the 10<sup>th</sup> of December 2020. On the 15<sup>th</sup> of December 2020, four days after the deadline, Thompson filed a request for more time to amend his petition. ATA at 3, 47-2020-CV-571 Index # 18. Thompson's filing did not address the statute of limitations issue at all.

[¶ 26] Rule 3.2 (c) of the North Dakota Rules of Court provides as follows:

Failure to file a brief by the opposing party may be deemed an admission that, in the opinion of party or counsel, the motion is meritorious. Even if an answer brief is not filed, the moving party must still demonstrate to the court that it is entitled to the relief requested.

In Lang v. Bank of North Dakota, the North Dakota Supreme Court found that “failure to respond to the motion is an admission that the motion was meritorious.” 530 N.W.2d 352, 354 (N.D. 1995) (citing Rule 3.2(b), N.D.R.O.C. and Vorachek v. Citizens State Bank of Lankin, 421 N.W.2d 45, 53 (N.D.1988)). Accordingly, the trial court was well within its authority to deem both of the State’s motions as

meritorious.

**[¶ 27] Argument #2—Appellant waived any argument that the trial court erred in dismissing the application due to statute of limitations.**

[¶ 28] Appellant has made no argument that the dismissal due to statute of limitations was erroneous and Appellant has therefore waived the argument. The only time Thompson mentions the statute of limitations in his Appellant's Brief is when he concedes that the statute of limitations set forth in North Dakota Century Code section 29-32.1-01 has lapsed. Appellant Br. ¶ 25. Thompson did not even include the State's motion to dismiss based on the statute of limitations or the trial court's *Order Dismissing the Application Due to Statute of Limitations* in his appendix. Nor does Thompson address the motion and concomitant order in his statement of facts. The only argument that can be gleaned relating to the Statute of Limitations is when he states that the Petition could be filed "under N.D.C.C. § 29-32.1-01(3)," however, his only argument mentioning this is to contend, "[t]o determine whether any of the above exceptions in N.D.C.C. § 29-32.1-01(3) apply to Mr. Thompson's post-conviction petition attorney Craig needed time to question Mr. Thompson and get his medical records." Appellant Br. ¶ 26. Thompson does not assert the trial court erred in dismissing due to statute of limitations, does not describe how that dismissal was erroneous, and does not provide a standard of review to analyze the propriety of the dismissal due to the statute of limitations.

**[¶ 29] The trial court did not err in dismissing the application due to the statute**

*of limitations because the Appellant failed to demonstrate any of N.D.C.C. § 29-32.1-01(3) applied.*

[¶ 30] North Dakota Century Code Chapter 29-32.1 sets forth the Uniform Postconviction Procedure Act. It contains a two year statute of limitations as follows:

2. Except as provided in subsection 3, an application for relief under this chapter must be filed within two years of the date the conviction becomes final. A conviction becomes final for purposes of this chapter when:
  - a. The time for appeal of the conviction to the North Dakota supreme court expires;
  - b. If an appeal was taken to the North Dakota supreme court, the time for petitioning the United States supreme court for review expires; or
  - c. If review was sought in the United States supreme court, the date the supreme court issues a final order in the case.

N.D.C.C. § 29-32.1-01.

[¶ 31] The next section sets forth a number of exceptions to the statute of limitations:

3. a. Notwithstanding subsection 2, a court may consider an application for relief under this chapter if:
  - (1) The petition alleges the existence of newly discovered evidence, including DNA evidence, which if proved and reviewed in light of the evidence as a whole, would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted;
  - (2) The petitioner establishes that the petitioner suffered from a physical disability or mental disease that precluded timely assertion of the application for relief; or
  - (3) The petitioner asserts a new interpretation of federal or state constitutional or statutory law by either the United States supreme court or a North Dakota appellate court and the petitioner establishes that the interpretation is retroactively applicable to the

petitioner's case.

b. An application under this subsection must be filed within two years of the date the petitioner discovers or reasonably should have discovered the existence of the new evidence, the disability or disease ceases, or the effective date of the retroactive application of law.

Id.

[¶ 32]Thompson concedes that the statute of limitations set forth in North Dakota Century Code section 29-32.1-01 has lapsed. Appellant Br. ¶ 25. In his brief, Appellant asserts, “Mr. Thompson is not an attorney. He needed an attorney to help him draft his post-conviction petition. However, according to the rules, he can’t qualify for an appointed attorney until he drafts his own and files a post-conviction petition.” Appellant Br. ¶ 23. The Appellant goes on to assert that “[t]he attorney appointed for Mr. Thompson’s post-conviction petition was Kyle Craig. Attorney Craig needed time to investigate the facts involved in Mr. Thompson’s post-conviction petition, amend Mr. Thompson’s post-conviction petition, and get Mr. Thompson’s medical records.” Appellant Br. ¶ 24.

[¶ 33] The trial court judge did not abuse her discretion in finding that, “[t]he record indicates no basis for exception to the two year statute of limitations and Thompson has brought none to the court’s attention. AEA at 16-17, ¶ 4; *Murphy v. State*, 2014 ND 84, ¶6 845 N.W.2d 327. Nowhere in the initial pleading did Appellant provide any indication that any of the exceptions applied. ATA at 7-8. Moreover, the only indication that any of the exceptions could have applied came,

after the deadline to respond to the motion, in Appellant's motion to amend the petition, as follows: "The undersigned was recently assigned and is in the process of doing an investigation into the claim and obtaining medical records." AEA at 15. The trial court could easily conclude that any medical records available now existed at the time of conviction or more than two years ago.

***¶ 34] The trial court did not err in failing to address the Appellant's Motion to Amend***

¶ 35] Thompson takes issue with the fact that the trial court never addressed his motion to allow more time to amend his complaint. The trial court did not have jurisdiction to address the motion for time to amend because the statute of limitations had lapsed.

***¶ 36] Standard of Review.***

¶ 37] "A decision on a motion to amend a pleading under N.D.R.Civ.P. 15(a) is addressed to the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion." Johnson v. State, 2006 ND 122, ¶ 7, 714 N.W.2d 832, 836

***¶ 38] Analysis***

¶ 39] By finding that the statute of limitations had lapsed, the trial court recognized it did not have jurisdiction over the matter, so it would have been inappropriate to address Thompson's motion for time to amend. See State v. Abe, 2001 MT 260, ¶¶ 13-17, 307 Mont. 233, 236-37, 27 P.3d 77, 79-80; Bush v. Com.,

236 S.W. 3d 621, 623 (Ky. Ct. App. 2007); *United States v. Davis*, 2007 WL 2177684, \*2 (E.D. La. 2007); *Herbst v. State*, No. M201401918CCAR3PC, 2015 WL 4575140, at \*3 (Tenn. Crim. App. July 30, 2015) (“[T]he one-year limitations period is an element of the right to file the [post-conviction] action and is a condition upon its exercise.”); T.C.A. § 40–30–102(b) (“*No court shall have jurisdiction to consider a petition filed after the expiration of the limitations period....*”); Tenn. Sup.Ct. R. 28, § 4(B); *Nix*, 40 S.W.3d at 464 (noting that “the one-year statutory period is an element of the right to file a post-conviction petition and . . . it is not an affirmative defense that must be asserted by the State”). Indeed, because failure to comply with the statute of limitations precludes jurisdiction, courts have a duty to ensure that the post-conviction statute of limitations is satisfied and must dismiss a post-conviction petition on this basis sua sponte if necessary. T.C.A. § 40–30106(b) (“If it plainly appears ... that the petition was not filed . . . within the time set forth in the statute of limitations ..., the judge shall enter an order dismissing the petition.”).

[¶ 40] By dismissing the application, the trial court effectively denied Thompson’s request for “additional time to put together an amended petition.” AEA at 15.

Thompson has shown no evidence this method was an abuse of discretion.

**[¶ 41] *The trial court Did Not Err in Granting Summary Dismissal***

**[¶ 42] *Standard of review***

[¶ 43] In *Myers v. State*, the North Dakota Supreme Court found that the following

standard of review in “summary dismissals of applications for postconviction relief” was “well-established”:

“Post-conviction relief proceedings are civil in nature and governed by the North Dakota Rules of Civil Procedure.” *Wacht v. State*, 2015 ND 154, ¶ 6, 864 N.W.2d 740 (quoting *Haag v. State*, 2012 ND 241, ¶ 4, 823 N.W.2d 749). A district court may summarily dismiss an application for postconviction relief if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. N.D.C.C. § 29–32.1–09(3). A court may also summarily dismiss “a second or successive application for similar relief on behalf of the same applicant.” N.D.C.C. § 29–32.1–09(1). This Court reviews an appeal from summary dismissal of postconviction relief as it would review an appeal from a summary judgment. *Wacht*, at ¶ 6. “The party opposing the motion for summary dismissal is entitled to all reasonable inferences to be drawn from the evidence and is entitled to an evidentiary hearing if a reasonable inference raises a genuine issue of material fact.”

2017 ND 66, ¶ 7, 891 N.W.2d 724 (quoting *Chisholm v. State*, 2020 ND 19, ¶ 8, 937 N.W.2d 520, 522).

#### **[¶ 44] Analysis**

[¶ 45] Thompson never responded to the *State’s Motion for Summary Dismissal* and never requested an evidentiary hearing. Even if he had, it is difficult to see how any fact finder could find that Thompson had raised a genuine issue of material fact in his motion to vacate judgment and sentence. The trial court found “Thompson’s legal claims a) that a bond must be filed and delivered, and b) that there was no claim upon which relief can be granted, are both nonsensical and unsupportable.” ATA at 35, ¶3. The trial court went on, She stated that, “The court is unaware of any authority establishing what Thompson claims is a

requirement and Thompson provides no authority for his contention.”

**[¶ 46] CONCLUSION**

[¶ 47] For the foregoing reasons, the State respectfully requests that this Honorable Court affirm Judge Clark’s Order Granting Summary Dismissal and Order Dismissing Application Due to Statute of Limitations.

Dated April 16, 2021.

Fritz Fremgen  
State’s Attorney, Stutsman County  
511 Second Avenue Southeast  
Jamestown, ND 58401  
(701) 252-6688 (04875)  
ffremgen@stutsmancounty.gov  
attorney@stutsmancounty.gov eserve  
Attorney for Appellee



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<b>State of North Dakota,</b>	)
Respondent & Appellee	)

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**APPELLEE’S RULE 32(e) CERTIFICATE OF COMPLIANCE**

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[¶1] This “Appellee’s Brief,” filed on April 16, 2021, by attorney for the Respondent and Appellee, complies with the 38 page limit set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure. This document contains a total of 17 pages.

Dated April 9, 2021.

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Fritz Fremgen (04875)  
State’s Attorney, Stutsman County  
511 Second Avenue Southeast  
Jamestown, ND 58401  
(701) 252-6688  
ffremgen@stutsmancounty.gov  
attorney@stutsmancounty.gov  
Attorney for Appellee

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Respondent & Appellee	)

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**CERTIFICATE OF SERVICE**

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[¶ 1] On April 9, 2021, the “Appellee’s Brief” was electronically to the Appellant’s attorney, Benjamin C. Pulkrabek, at: [pulkrabek@lawyer.com](mailto:pulkrabek@lawyer.com).

[¶ 2] On April 9, 2021, the “Appellee’s Brief” was electronically filed with the Clerk of the Supreme Court at [supclerkofcourt@ndcourts.gov](mailto:supclerkofcourt@ndcourts.gov)

Dated April 9, 2021.

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Fritz Fremgen (04875)  
State’s Attorney, Stutsman County  
511 Second Avenue Southeast  
Jamestown, ND 58401  
(701) 252-6688  
[ffremgen@stutsmancounty.gov](mailto:ffremgen@stutsmancounty.gov)  
[attorney@stutsmancounty.gov](mailto:attorney@stutsmancounty.gov)  
Attorney for Appellee

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**CERTIFICATE OF SERVICE**

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[¶ 1] On April 16, 2021, the corrected “Appellee’s Brief” and corrected "Appellee's Appendix" were electronically served to the Appellant’s Attorney, Benjamin C. Pulkrabek, at: [pulkrabek@lawyer.com](mailto:pulkrabek@lawyer.com).

[¶ 2] On April 16, 2021, the corrected “Appellee’s Brief” and corrected "Appellee's Appendix" were electronically filed with the Clerk of the Supreme Court at [supclerkofcourt@ndcourts.gov](mailto:supclerkofcourt@ndcourts.gov)

Dated April 21, 2021.

Fritz Fremgen  
State’s Attorney, Stutsman County  
511 Second Avenue Southeast  
Jamestown, ND 58401  
(701) 252-6688 (04875)  
[ffremgen@stutsmancounty.gov](mailto:ffremgen@stutsmancounty.gov)  
[attorney@stutsmancounty.gov](mailto:attorney@stutsmancounty.gov)  
Attorney for Appellee