

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Morris Jerome Brickle-Hicks,	)	
	)	
Petitioner-Appellant,	)	
	)	
-vs-	)	
	)	
State of North Dakota,	)	Supreme Ct. No. 20210073
	)	
Respondent-Appellee.	)	Dist. Ct. No. 08- <del>2021</del> -CV-1909
		2020

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**BRIEF OF RESPONDENT-APPELLEE**

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Appeal from Order Denying Post-Conviction Relief  
Dated February 23, 2021

Burleigh County District Court  
South Central Judicial District  
The Honorable John Grinsteiner, Presiding

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**STATEMENT OF THE ISSUE**

[¶1] Whether Hicks's trial counsel's representation was ineffective, and whether that ineffective representation prejudiced Hicks.

## STATEMENT OF THE CASE

[¶2] Morris Jerome Brickle-Hicks, (hereinafter “Hicks”) appeals an Order denying post-conviction relief dated February 23, 2021, which stems from his application for post-conviction relief from a murder conviction issued in Burleigh County Criminal Case No. 08-2016-CR-01128. (Appellant’s Appendix, hereinafter “A.App.” p. 17, ¶¶8, 9).

[¶3] In this case, Hicks was charged with AA Felony Murder of Misty Coffelt, pursuant to N.D.C.C. § 12.1-16-01. (State’s Appendix, hereinafter “S.App.” p. 3, Index #1). Hicks was represented in this matter by Attorney James Loraas (hereinafter “Attorney Loraas”) and Attorney Todd Ewell (hereinafter “Attorney Ewell”). On December 14, 2016, Hicks filed a motion to suppress evidence. (S.App., p. 4, Index #50). On April 19, 2017, a hearing was held on his motion. On May 1, 2017, the district court entered the Order denying Hicks’s motion to suppress evidence. (S.App., p. 5, Index #87). On September 29, 2017, a jury found Hicks guilty of murder. (S.App., p. 9, Index #270). The jury did not find that Hicks acted under the influence of extreme emotional disturbance. (*Id.*). Criminal Judgment was entered on December 22, 2017. (S.App., p. 10, Index #278).

[¶4] On January 4, 2018, Hicks filed his notice of appeal. (S.App., p. 10, Index #281). In his brief filed on April 16, 2017, Hicks alleged: 1) the district court erred in not suppressing evidence derived from his interrogation because he did not give a valid waiver of Miranda rights; 2) the district court erred in not suppressing evidence derived from his interrogation because he was

coerced and his statements were involuntary; and 3) the clothing obtained from Hicks should have been suppressed because it was fruit of the poisonous tree. *State v. Brickle-Hicks*, 2018 ND 194, ¶4, 916 N.W.2d 781. On September 20, 2018, this Court found sufficient competent evidence to support the district court's Order denying Hicks's pre-trial motion to suppress and subsequently affirmed his Criminal Judgment. *Brickle-Hicks*, 2018 ND 194, ¶¶21, 22, 916 N.W.2d 781; S.App., p. 10, Index #291.

[¶5] On June 26, 2020, Hicks filed a petition for post-conviction relief. (A.App., p. 5–7). On July 31, 2020, the State filed its response. (A.App., p. 8). On January 25, 2021, Hicks filed an amended petition for post-conviction relief through attorney Kyle Craig. (A.App., pp. 9–11). In his original and amended post-conviction relief petition, Hicks asserted three (3) claims: 1) his trial attorneys, James Loraas and Todd Ewell were ineffective in representing him at all stages of trial, specifically, by failing to subpoena witness Brian Carver and introduce him as the true culprit; 2) his trial counsel was ineffective by failing to raise the Rule 16 issue; and 3) the State failed to disclose exculpatory evidence prior to trial. (A.App., pp. 6, 9–10).

[¶6] On February 19, 2021, the State filed its response to the amended petition. (A.App., pp. 12–13). In its answers, the State again denied the allegations and raised the defense of res judicata and misuse of process. (A.App., pp. 8, 12).

[¶7] On February 22, 2021, a hearing was held on Hicks's post-conviction relief petition. (A.App., p. 3). On February 23, 2021, an order was

entered by the district court denying Hicks's petition for post-conviction relief. (A.App., pp. 14–18). Hicks timely appealed. (A.App., p. 19).

### **STATEMENT OF THE FACTS**

[¶8] Hicks had a hearing on his application which included testimony by Attorney Loraas. Hicks's attorney Kyle Craig determined that Attorney Ewell's role was very minimal and therefore, testimony from him was unnecessary. (Transcript of Post-Conviction Relief Hearing, hereinafter "Tr." 27:5–9).

[¶9] During the post-conviction hearing regarding Hicks's ineffective assistance of counsel claims, Attorney Loraas testified that: 1) Hicks had confessed to striking Misty at least five (5) or six (6) times, kicking her in the head, dragging her and setting her on a pallet, and then removed her sweatshirt, emptied the contents of her purse and threw it into a dumpster; 2) Hicks admitted it was only himself and Misty present during this altercation; 3) Hicks admitted Brian Carver was not present at any point during this altercation; 4) Hicks had initially provided several other versions of what happened that night, but none were supported by evidence; 5) Attorney Loraas had unsuccessfully attempted to suppress Hicks's confession, DNA and clothing evidence; and 5) because of the overwhelming amount of evidence against Hicks, Attorney Loraas's trial strategy was to emphasize that Hicks had been called a racial slur and was verbally attacked, felt threatened, and because he was intoxicated, his mental state was not reasonable and therefore, he did not mean to kill Misty. (Tr. 6:1–12:15).

[¶10] In its order denying Hicks’s application for post-conviction relief, the district court found Hicks had failed to establish that Attorney Loraas’s representation fell below an objective standard of reasonableness in any respect. (A.App., pp. 16, 17).

[¶11] In his current appeal, Hicks argues Attorney Loraas was ineffective and subsequently prejudicial, because Attorney Loraas allegedly relied only on information provided to him by law enforcement, failing to conduct his own investigation of Brian Carver or alternatively, subpoena Carver as a witness in Hicks’s criminal trial, showing Carver as the true culprit. (Appellant’s Brief, hereinafter “A.Brief” ¶¶16, 17).

[¶12] The remainder of the facts pertinent to this case are contained in the Statement of the Case above.



## ARGUMENT

**I. The district court properly denied Hicks’s petition for post-conviction relief because Hicks has not satisfied either prong of the *Strickland* standard entitling him to relief regarding ineffective assistance of counsel.**

**A. Standard of Review**

[¶13] The standard of review for a claim of ineffective assistance of counsel in a post-conviction proceeding is well established:

Post-conviction relief proceedings are civil in nature and governed by the North Dakota Rules of Civil Procedure. Whether a petitioner received ineffective assistance of counsel is a mixed question of law and fact and is fully reviewable on appeal. Under N.D.R.Civ.P. 52(a), the district court’s findings of fact will not be disturbed on appeal unless clearly erroneous. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, it is not supported by any evidence, or if, although there is some evidence to support the finding, a reviewing court is left with a definite and firm conviction a mistake has been made.

*Roe v. State*, 2017 ND 65, ¶¶4–5, 891 N.W.2d 745 (citations and quotation marks omitted).

[¶14] The Sixth Amendment of the United States Constitution guarantees a criminal defendant the right to effective assistance of counsel. *Sambursky v. State*, 2006 ND 223, ¶13, 723 N.W.2d 524. In order to prevail on a post-conviction claim of ineffective assistance of counsel, the petitioner bears a heavy burden. *Rümmel v. State*, 2006 ND 216, ¶10, 722 N.W.2d 528. The petitioner must prove that (1) counsel’s representation fell below an objective standard of reasonableness, and (2) the petitioner was prejudiced by counsel’s deficient performance. *Matthews v. State*, 2005 ND 202, ¶10, 706 N.W.2d 74.

[¶15] In order to meet the first prong, the petitioner must overcome the strong presumption that counsel’s representation fell within the wide range of reasonable professional assistance. *Laib v. State*, 2005 ND 187, ¶9, 705 N.W.2d 845. An attorney’s performance is measured by the prevailing professional norms. *Sambursky*, 2006 ND 223, ¶13, 723 N.W.2d 524. A trial court must consider all the circumstances and decide whether there were errors so serious that the defendant was not accorded the “counsel” guaranteed by the Sixth Amendment. *Klose v. State*, 2005 ND 192, ¶10, 705 N.W.2d 809.

[¶16] In order to meet the second prong, the petitioner must show there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Roth v. State*, 2006 ND 106, ¶10, 713 N.W.2d 513. The petitioner must prove not only that counsel’s representation was ineffective, but must specify how and where counsel was incompetent and the probable different result. *Laib*, 2005 ND 187, ¶10, 705 N.W.2d 845. If it is easier to dispose of an ineffective assistance claim on the ground of lack of sufficient prejudice, that course should be followed. *Wright v. State*, 2005 ND 217, ¶11, 707 N.W.2d 242.

**B. Hicks fails to establish his trial counsel was ineffective or that he was prejudiced by such ineffective representation.**

[¶17] Hicks asserts that his counsel, Attorney Loraas, was ineffective at his criminal trial by failing to investigate or subpoena witness Brian Carver, in order to identify him as the true culprit. A petitioner for post-conviction relief “making a claim of ineffective assistance must identify the acts or omissions of

counsel that are alleged not to have been result of reasonable professional judgment.” *Strickland v. Washington*, 466 U.S. 668, 690 (1984). “The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.” *Id.* This Court has stated it does not second-guess reasonable trial strategy through the distorting lens of hindsight, and an unsuccessful trial strategy does not make for defective assistance of counsel. *Brewer v. State*, 2019 ND 69, ¶6, 924 N.W.2d 87; *DeCoteau v. State*, 2000 ND 44, ¶13, 608 N.W.2d 240.

[¶18] In this case, Attorney Loraas testified at Hicks’s post-conviction hearing there was no sufficient evidence Brian Carver was involved in Misty Coffelt’s murder. (Tr. 6:1–9:25). Hicks confessed to the crime in a police interview and video of this interview was presented to the jury at trial, along with testimony from multiple officers who had interacted with Hicks prior to or during the interview. (Tr. 6:11–21). In the video, Hicks admitted to law enforcement that he struck Misty at least five (5) or six (6) times, kicked her in the head, and drug her body across the cement and onto a pallet outside of Runnings. (Tr. 6:4–7:11). This was further corroborated by DNA evidence and testimony from the medical examiner regarding Misty’s injuries and cause of death. (Tr. 6:4–7:11).

[¶19] Additionally, video evidence supported Hicks’s statement that he removed the sweatshirt Misty was wearing. (Tr. 24:11-21). He admitted to

dumping out the contents of her purse and throwing it in a dumpster at Buffalo Wild Wings, which was also supported by video evidence. (Tr. 24:11-21).

[¶20] Moreover, Attorney Loraas attempted to suppress the evidence against Hicks, including his confession. (Tr. 6:10–21). However, after the suppression hearing, the district court denied the motion and this Court affirmed the district court’s decision in Hicks’s direct appeal. *Brickle-Hicks*, 2018 ND 194, ¶¶ 21, 22, 916 N.W.2d 781; S.App., p. 10, Index #291.

[¶21] Based on the overwhelming amount of evidence presented at trial, along with the confession, it was Attorney Loraas’s trial strategy to emphasize that Hicks had been called a racial slur and was verbally attacked, felt threatened, and because he was intoxicated, his mental state was not reasonable and therefore, he did not mean to kill Misty. (Tr. 8:13–9:25). It was not the trial strategy to suggest Carver was the true culprit, since Hicks had already confessed to the altercation with Misty and the State had an overwhelming amount of evidence to support his confession. (Tr. 6:1–8:12). There was no evidence Carver had anything to do with Misty’s death. (Tr. 7:22–8:3). Relying on information gathered by law enforcement during their investigation is not unreasonable and Attorney Loraas sufficiently cross-examined the State’s witnesses about this information at trial.

[¶22] Further, if Carver had testified, he could have undermined Hicks’s claims about the alleged racial-slur or the alleged altercation with Carver and a knife, hindering Hicks’s defense strategy. (Tr. 21:1–25:5). There was no evidence Hicks’s claim of the alleged racial-slur or alleged altercation

with Carver and a knife had occurred. (Tr. 23:3–25:5). Hicks initially provided law enforcement with several different versions of what happened that night, ranging from being “jumped” by several Native Americans near Denny’s to the final version where he described the altercation with only Misty, admitting to repeatedly hitting and kicking her in the head. (Tr. 10:1–12:15; 21:20–25:5). The DNA evidence introduced at trial supported this final version, as no evidence supported any of the other versions Hicks provided to law enforcement. (Tr. 21:1–25:5). Although unsuccessful, Attorney Loraas’s trial strategy does not render his assistance as ineffective.

[¶23] Since Hicks cannot show his counsel was ineffective, he cannot show he was prejudiced by such representation. Hicks fails to show by any competent evidence that he is not guilty of the crime he was convicted of or that Carver was the true culprit. Hicks confessed to brutally assaulting Misty and leaving her in the exact location her body was found. He does not offer any support for his assertion that testimony by Carver at trial would have changed his murder conviction. The evidence shows Carver was not involved and Hicks admitted Carver was not involved.

### **CONCLUSION**

[¶24] Hicks has failed to prove that his trial attorney’s representation fell below a reasonable standard or that he was prejudiced by such ineffective representation. Therefore, the district court did not err in denying Hicks’s post-conviction relief application and the State respectfully requests that the Order denying post-conviction relief dated February 23, 2021 be affirmed.

Dated this 9<sup>th</sup> day of July, 2021.

/s/ Julie Lawyer

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Law Clerk  
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**CERTIFICATE OF COMPLIANCE**

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[¶1] The undersigned, as attorney for the Appellee in the above matter, hereby certifies that this brief complies with the page limitation in N.D.R.App.P. 32(a)(8).

Dated this 9th day of July, 2021.

/s/ Julie lawyer  
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Respondent - Appellee,	)	District Ct. No. 08-2021-CV-1909
	)	

STATE OF NORTH DAKOTA    )  
  ) ss  
COUNTY OF BURLEIGH     )

I, Katie A Wangler, declare that I am a United States citizen over 21 years of age, and on the 9<sup>th</sup> day of July, 2021, I served the following:

1. Brief of Respondent-Appellee
2. Appendix
3. Certificate of Compliance
4. Consent
5. Unsworn Declaration of Service by Electronic Filing

via electronic service to the following:

Kiara Kraus-Parr  
Attorney at Law  
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Which is the last reasonable ascertainable email address of the addressee.

I declare, under penalty of perjury under the law of North Dakota, that the foregoing is true and correct.

Signed on the 9<sup>th</sup> day of July, 2021 at Bismarck, North Dakota.

          /s/ Katie A. Wangler            
Katie A. Wangler