

IN THE SUPREME COURT OF NORTH DAKOTA

Bruce Alan Fleck,

Petitioner and Appellant,

v.

State of North Dakota,

Respondent and Appellee.

Supreme Court File No.
20210089
Burleigh County File No.
08-2019-CV-02603

APPELLANT BRIEF-----
BRIEF OF PETITIONER-APPELLANT, BRUCE ALAN FLECK

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

Entered on the 11th day of March, 2021.

In District Court, Burleigh County, State of North Dakota

The Honorable Bonnie Storbakken

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

Paragraph
Number

TABLE OF AUTHORITIES..... Page 3

STATEMENT OF ISSUE..... ¶1

NATURE OF CASE..... ¶2 - ¶12

STATEMENT OF FACTS..... ¶13 - ¶15

STANDARD OF REVIEW ¶16

LAW AND ARGUMENT..... ¶16- ¶21

ISSUE I: Did Mr. Fleck at his post-conviction hearing establish that his attorney at his revocation hearing provided him ineffective assistance of counsel and he was prejudiced by that ineffective assistance of counsel?

CONCLUSION..... ¶22 - ¶25

TABLE OF AUTHORITIES

Paragraph Number

CASES

State v. Stavig, 2006 ND 63, 711 N.W.2d 183 (N.D. 2006) ¶16, ¶19, ¶20

State v. Causer, 2004 ND 75, 678 N.W.2d 552, cert. denied, 543 U.S. 906 (2004) ... ¶16

Strickland v. Washington, 466 U.S. 668 (1984) ¶17

OTHER AUTHORITIES

United States Constitution, Sixth Amendment ¶17, ¶22

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.** Did Mr. Fleck at his post-conviction hearing establish that his attorney at his revocation hearing provided him ineffective assistance of counsel and he was prejudiced by that ineffective assistance of counsel?

NATURE OF THE CASE

[¶2] This is an appeal from the denial of an application for post-conviction relief.

[¶3] The application for post-conviction relief was filed on 08/20/2019.

[¶4] The state made a motion for summary disposition on 09/27/2019.

[¶5] The state filed an answer to petitioner's application for post-conviction relief on 10/3/2019.

[¶6] The post-conviction hearing was held on 02/08/2021.

[¶7] The petitioner filed his closing argument on 03/01/2021 and the state filed its post-hearing brief on 03/01/2021.

[¶8] An order denying petitioner's post-conviction application was entered on 03/11/2021.

[¶9] Petitioner's notice of appeal and order for transcript was filed on 03/22/2021.

[¶10] The notice of filing the notice of appeal was filed on 03/22/2021.

[¶11] The clerk's certificate of appeal was filed on 04/16/2021.

[¶12] This case is now before the North Dakota Supreme Court.

STATEMENT OF FACTS

[¶13] The Petitioner in this case Bruce Alan Fleck (Mr. Fleck) on August 12, 2019 filed his application for post-conviction relief. In that application Mr. Fleck claimed

that Justin Balzer, the attorney who represented him at his revocation hearing provided him with ineffective assistance of counsel.

[¶14] Mr. Fleck's claims of ineffective assistance of counsel are:

1. That Attorney Balzer did not meet with or speak to him about the revocation hearing until approximately one hour before the revocation hearing.
2. That attorney Balzer at the revocation hearing was not prepared for that hearing because he had not obtained the discovery material.
3. That attorney Balzer did not inform Mr. Fleck of the consequences of a guilty plea and wanted Mr. Fleck to plead guilty without any type of plea bargain in place.
4. That attorney Balzer at the revocation hearing was aware that Mr. Fleck's mental state was altered because Mr. Fleck had been denied his medication but attorney Balzer did nothing to make the court aware of Mr. Fleck's mental condition.
5. That attorney Balzer at the revocation hearing failed to inform the court that Mr. Fleck had applied for acceptance at Hope Manor and there was a good chance he would be accepted.

[¶15] Only two witnesses were called at Mr. Fleck's post-conviction hearing; Attorney Justin Balzer and Mr. Fleck. The court after hearing the sworn testimony of these two witnesses ruled that Mr. Fleck had failed to prove any of his ineffective assistance of counsel claims and that Attorney Balzer had properly represented Mr. Fleck.

ARGUMENT

- I. ISSUE I:** Did Mr. Fleck at his post-conviction hearing establish that his attorney at his revocation hearing provided him ineffective assistance of counsel and he was prejudiced by that ineffective assistance of counsel?

STANDARD OF REVIEW

[¶16] The standard of review when the issue raised on appeal is ineffective assistance of counsel according to State v. Stavig, 2006 ND 63, 711 N.W.2d 183 (N.D. 2006):

“[¶6] This Court applies a two-step process when reviewing a revocation of probation. State v. Causer, 2004 ND 75, ¶ 30, 678 N.W.2d 552, cert. denied, 543 U.S. 906 (2004). First, we review whether the defendant violated his or her probation under a clearly erroneous standard. Id. at ¶ 31. "A finding of fact is clearly erroneous if, although there may be some evidence to support it, the reviewing court on the entire evidence, is left with a definite and firm conviction a mistake has been made." Id. Second, we review whether the district court abused its discretion by revoking the defendant's probation. Id. at ¶ 32. "A trial court abuses its discretion when it acts in an arbitrary, unreasonable, or capricious manner, or misinterprets or misapplies the law." Id.”

[¶17] The sixth amendment to the United States Constitution guarantees all criminal Defendants the right to effective assistance of counsel. According to Strickland v. Washington, 466 U.S. 668 (1984) an individual asserting ineffective assistance of counsel must demonstrate:

1. That his counsel’s performance fell below an objective standard of reasonableness.
2. That as a result of the ineffective assistance the criminal Defendant was prejudiced by the ineffective counsel.

[¶18] In this case it appears that Attorney Balzer told Mr. Fleck if he admitted the allegations in the revocation of probation hearing the court could put him back on probation.

[¶19] The following testimony of Attorney Balzer regarding Mr. Fleck’s chance of being put on probation appear in the Tr. p. 13 L. 13 – 25:

- “Q. Okay. Mr. Fleck's underlying case was a 2014 criminal case, and this was a, you said, second or third revocation, is that correct?
A. A second or third, I'm not -- I can't remember quite for sure.
Q. And given that this is a 2014 case, Stavik [Stavig] would apply, is that correct?
A. I believe so.
Q. Okay. So that the Court wouldn't be able to put him back on probation after a second revocation. Is that your understanding?
A. That's my understanding.
Q. All right.”

[¶20] Because of State v. Stavik, 2006 ND 63, 711 N.W.2d 183 (N.D. 2006), prior to the post-conviction hearing, Attorney Balzer should have told Mr. Fleck that if he admitted the allegation in the revocation of probation hearing he had to be incarcerated and there was no chance of him getting probation. Attorney Balzer also should have told Mr. Fleck that his only chance of not being incarcerated was to deny the allegations in the revocation of probation and present any defense he has against those allegations at the revocation of probation hearing.

[¶21] Mr. Fleck should have been fully informed by Attorney Balzer of the law that applied to his case before the revocation hearing so the choice he would have made would have been an informed choice.

CONCLUSION

[¶22] Criminal Defendants in the United States of America are guaranteed under the sixth Amendment to the United States Constitution the right to effective assistance of counsel. Effective assistance of counsel requires that counsel inform criminal defendants of the law that applies to that Defendant's case so that Defendant can make informed decision on how to proceed.

[¶23] In this case now before the Court Mr. Fleck was not properly informed by his counsel Attorney Balzer about the law that applied to his revocation. Therefore, Mr.

Fleck was denied his right to be informed about the law and wasn't able to make an informed decision.

[¶24] The state's response to the above will probably be that it doesn't matter that Mr. Fleck wasn't informed about the applicable law to his revocation hearing because the court would have found he violated the allegations in the revocation petition. That may be true but Mr. Fleck has a right to make an informed decision of how to proceed in his case. Had he known he was going to be incarcerated if he admitted the allegations, he would have denied the allegations and have had a contested hearing.

[¶25] This case should be remanded to the district court with an Order that the district court give Mr. Fleck the opportunity to make an informed decision on whether he wants a trial on the allegations.

Dated this 10th day of May, 2021.

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**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 8 pages and appendix consists of 41 pages.

Dated this 10th day of May, 2021.

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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:

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

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Dated this 10th day of May, 2021.

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