

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

| | | |
|----------------------------------|---|--|
| James Kremer, |) | |
| |) | Supreme Court No. 20210154 |
| Petitioner and Appellant, |) | |
| |) | District Court No. 51-2021-CV-00147 |
| |) | |
| vs. |) | |
| |) | |
| |) | |
| State of North Dakota, |) | |
| |) | |
| Respondent and Appellee. |) | |

APPELLEE’S BRIEF

**Appeal from the Order entered April 21, 2021
in Ward County District Court,
North Central Judicial District, North Dakota,
the Honorable Douglas L. Mattson presiding**

ORAL ARGUMENT REQUESTED

Christopher W. Nelson (#08708)
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| <u>Cases</u> | <u>Paragraph</u> |
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| <u>State v. Kremer</u> , 2018 ND 61, 907 N.W.2d 403 | ¶5, 11 |
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| <u>Statutory Materials and Rules</u> | <u>Paragraph</u> |
| N.D.C.C. § 29-32.1-01 | ¶6, 8, 11 |
| N.D.R.App.P 4 | ¶6 |
| N.D.R.Crim.P. 11 | ¶8 |

STATEMENT OF THE ISSUE

[¶1] I. The district court properly summarily dismissed Appellant's petition for post-conviction relief.

STATEMENT OF THE CASE

[¶2] Appellee agrees with Appellant's Statement of the Case, but does add this arose from Appellant's second application for post-conviction relief. See Kremer v. State, 2020 ND 132, 945 N.W.2d 279. Appellant's prior application for post-conviction relief also raised the issue of ineffective assistance of counsel. Id. ¶ 7.

STATEMENT OF FACTS

[¶3] This Court succinctly laid out the facts of the underlying criminal case in Appellant's previous appeal on post-conviction. Id. ¶¶ 1-3.

[¶4] Appellant filed an appeal in the underlying criminal case which was then withdrawn, leading this Court to issue its mandate on September 20, 2016, making the judgement final on October 20, 2016. Appellant App. A 22, ¶ 14.

[¶5] This Court previously determined Appellant did not receive ineffective assistance of counsel. Kremer v. State, 2020 ND 132, 945 N.W.2d 279, ¶ 13. This Court previously determined Appellant acknowledged facts exist in support of his guilty plea in the underlying criminal matter. Id. ¶ 20. Finally, this Court previously determined the district court properly ordered the laptop and external hard drive, which contained the child pornography Appellant pled guilty to possessing, forfeited and destroyed after Appellant appealed the order. State v. Kremer, 2018 ND 61, 907 N.W.2d 403.

LAW AND ARGUMENT

I. The district court properly summarily dismissed Appellant's petition for post-conviction relief

A. Timeliness

[¶6] Appellant's application for post-conviction relief was untimely. Under N.D.C.C. § 29-32.1-01(2)(a), "an application for relief under [the Uniform Postconviction Procedure Act] must be filed within two years of the date the conviction becomes final. A conviction becomes final [under the Uniform Postconviction Procedure Act] when the time for appeal of the conviction to the North Dakota Supreme Court expires." Rule 4(b)(1) of the North Dakota Rules of Appellate Procedure states "[i]n a criminal case, a defendant's notice of appeal must be filed with the clerk of the supreme court within 30 days after the entry of judgment or order being appealed."

[¶7] Appellant filed and withdrew an appeal to this Court in the underlying criminal case. Appellee App. 5, ¶ 7. This Court issued its mandate on September 20, 2016, making the conviction final on October 20, 2016. Appellee App. 5, ¶ 7. Appellant had a deadline of October 20, 2018 to file an application for post-conviction relief. Appellant filed his application for post-conviction relief on January 22, 2021, more than two years after his deadline. Appellant App. A 8.

[¶8] Appellant contends his application was "timely under N.D.C.C. 29-32.1-01(3)(a)(3) due to a new interpretation of state law." Appellant Br. ¶ 14. Appellant bases this argument on this Court's holding in State v. Atkins, 2019 ND 145, 928 N.W.2d 441. Appellant Br. ¶ 14. Appellant is mistaken in his interpretation of Atkins. Atkins merely pointed out that the remedy sought by Appellant - withdrawing his guilty plea - has been unchanged since 1985 even though the provisions were modified and moved to North

Dakota Rules of Criminal Procedure 11(d) in 2010. at ¶ 11. Atkins did not create a new timeline for the filing of post-conviction relief applications. The district court was correct in finding Appellant’s application was more than two years late. Appellant App. A 23, ¶ 16.

B. Ineffective Assistance of Counsel

[¶9] This is an issue previously litigated between the parties, with this Court already having ruled on Appellant’s claim of ineffective assistance of counsel. Kremer v. State. “*Res judicata* prevents relitigation of claims that were raised, or could have been raised, in prior actions between the same parties.” Chisholm v. State, 2020 ND 19, 937 N.W.2d 520, ¶ 16 (internal citations omitted). In Chisholm, this Court barred a second application for post-conviction relief when “[Appellant] could have raised these claims in the previous postconviction action but did not do so” based upon *res judicata*. Id. ¶ 16. Appellant’s claims of ineffective assistance of counsel are barred by *res judicata*. Id. ¶ 16. The Appellant is estopped from raising ineffective assistance of counsel again.

C. Appellant Guilt

[¶10] Appellant next says “he is actually innocent of the charge, because he was not aware that the prohibited materials were on his laptop.” Appellant Br. ¶ 8. Appellant pled guilty to the offenses at a change of plea hearing. The State offered a factual basis for the offense at the change of plea hearing and Petitioner acknowledged facts existed to support his plea. Kremer v. State, 2020 ND 132, ¶ 20. Even when an applicant for post-conviction relief argues actual innocence, as argued by Appellant, if “[t]he court properly determined the conduct to which [Appellant] admitted was sufficient to support the guilty plea,” then “a manifest injustice necessitating the withdrawal of [Appellant’s] guilty plea [does] not exist.” State v. Howard, 2011 ND 117, 798 N.W.2d 675, ¶¶ 3-5. The North Dakota

Supreme Court has already determined the conduct to which Petitioner admitted was sufficient to support his guilty plea. Kremer v. State.

D. Destroyed Evidence

[¶11] The issue of the forfeiture and destruction of the items Appellant claims would exonerate him has already been litigated by Appellant and adjudicated by both the District Court and then the North Dakota Supreme Court. State v. Kremer. The North Dakota Supreme Court upheld the order to forfeit and destroy Petitioner's laptop and portable hard drive. Id. ¶ 1. While this issue is raised in Appellant's Statement of the Facts, it is not briefed out in Appellant's Brief. Appellant Br. ¶ 9. Furthermore, under N.D.C.C. 29-32.1-01(3)(a)(1), Appellant could have filed a petition for post-conviction relief if "[t]he petition alleges the existence of newly discovered evidence." The Statute requires the evidence actually exist. Appellant concedes the evidence has been destroyed, making this relief inapplicable to him.

CONCLUSION

[¶12] The district court correctly determined Appellant was not entitled to post-conviction relief and summary disposition was appropriate.

[¶13] Based upon the foregoing, the State respectfully requests that the district court's Order Granting State's Motion for Summary Disposition be affirmed.

Dated this 28th day of July, 2021.

/s/ Christopher Nelson
Christopher W. Nelson (#08708)
Assistant State's Attorney
Ward County State's Attorney's Office
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| Respondent and Appellee. |) | |

CERTIFICATE OF COMPLIANCE

[1] The undersigned hereby certifies that the Brief of Respondent/Appellee, is in compliance with Rule 32 of North Dakota Rules of Appellate Procedure and the brief contains 8 pages.

Dated this 28th day of July, 2021.

/s/ Christopher Nelson
Christopher W. Nelson (#08708)

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REQUEST FOR ORAL ARGUMENT

[1] In light of defense making a request for oral argument, the State requests the same.

Dated this 28th day of July, 2021.

/s/Christopher W. Nelson
Christopher W. Nelson #08708

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AFFIDAVIT OF SERVICE

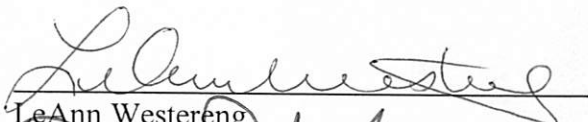
LeAnn Westereng, being first duly sworn, deposes and says:

That she is a citizen of the United States of America, over the age of twenty-one years, and is not a party to nor interested in the above entitled action; that on the 27th day of July, 2021, this Affiant provided a true and correct copy of the following documents in the above entitled action:

APPELLEE'S BRIEF and APPENDIX OF RESPONDENT AND APPELLEE

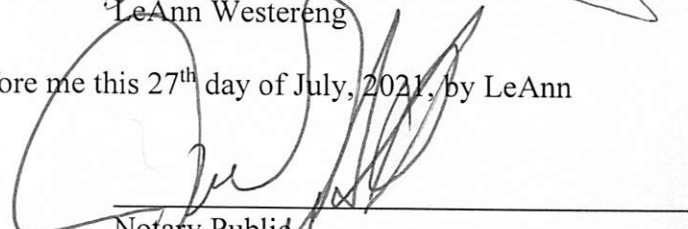
By electronic service to the following:

KIARA COSTA KRAUS-PARR
ATTORNEY FOR APPELLANT
service@kpmwlaw.com



LeAnn Westereng

Subscribed and sworn to before me this 27th day of July, 2021, by LeAnn Westereng



Notary Public

JENNIFER SCHLECHT
Notary Public
State of North Dakota
My Commission Expires April 14, 2025

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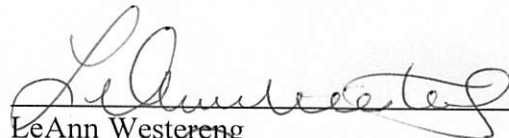
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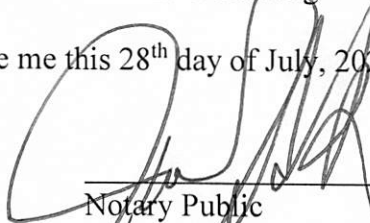
By electronic service to the following:

KIARA COSTA KRAUS-PARR
ATTORNEY FOR APPELLANT
service@kpmwlaw.com



 LeAnn Westereng

Subscribed and sworn to before me this 28th day of July, 2021, by LeAnn Westereng



 Notary Public

JENNIFER SCHLECHT
 Notary Public
 State of North Dakota
 My Commission Expires April 14, 2025