
 IN THE SUPREME COURT OF NORTH DAKOTA

James Kremer,)	Supreme Court File No.
)	2021054
)	
Petitioner and Appellant,)	Ward County No.
)	51-2021-CV-0147
v.)	
)	
State of North Dakota,)	APPELLANT'S BRIEF
)	
Respondent and Appellee.)	

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.

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

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Oral Argument:

Oral argument has been requested to emphasize and clarify the Petitioner's written arguments on their merits.

JURISDICTION

[¶ 1] The district court had jurisdiction under N.D.C.C. § 29-32.1-01. The North Dakota Supreme Court has jurisdiction over the appeal of this matter pursuant to N.D.C.C. § 29-32.1-14 which provides that, “[a] final judgment entered under this chapter may be reviewed by the supreme court of this state upon appeal as provided by rule of the supreme court.” Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provision article VI § 6, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06, N.D.C.C., which provides as follows:

“An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03. An appeal may be taken by the defendant from:

1. A verdict of guilty;
2. A final judgment of conviction;
3. An order refusing a motion in arrest of judgment;
4. An order denying a motion for new trial; or
5. An order made after judgment affecting any substantial right of the party.”

N.D.C.C. § 29-28-06.

STATEMENT OF THE ISSUES

[¶ 2] I. Whether the district court erred by summarily dismissing Mr. Kremer’s petition for post-conviction relief.

STATEMENT OF CASE

[¶ 3] This is an appeal from the Ward County Order summarily dismissing Mr. Kremer's application for post-conviction relief, signed April 21, 2021. Mr. Kremer was convicted, after pleading guilty, of three counts of possession of prohibited materials underlying criminal case. *See State v. Kremer*, 51-2016-CR-176. Upon his conviction, the district court ordered Mr. Kremer into the custody of ND DOCR for five years, a consecutive five years and a consecutive three years suspended for three years of supervised probation.

[¶ 4] Mr. Kremer submitted an application for post-conviction relief on January 28, 2021 seeking reversal of his convictions based on ineffective assistance of counsel, actual innocence, prosecutorial misconduct, an invalid guilty plea, an illegal search and seizure leading to his conviction

[¶ 5] The State filed a motion for summary dismissal in the case on February 8, 2021. The district court granted the motion on April 21, 2021. Mr. Kremer timely appeals from that Order.

STATEMENT OF FACTS

[¶ 6] The facts of the underlying criminal matters are found in *Kremer v. State*, 2020 ND 132, 945 N.W.2d 279.

[¶ 7] Mr. Kremer asserted that his trial counsel, Mr. Baumann, was ineffective because he did not communicate with Mr. Kremer, failed to explain the charges to him, would not allow Mr. Kremer to ask for a lower

sentence at sentencing, and did not give the court any mitigating information at sentencing.

[¶ 8] He additionally claimed that he was actually innocent of the charge, because he was not aware that the prohibited materials were on his laptop.

[¶ 9] Finally, Mr. Kremer asserted that the State destroyed exculpatory evidence showing he never accessed the prohibited materials, thereby showing he was unaware of their existence.

LAW AND ARGUMENT

I. Whether the district court erred by summarily dismissing Mr. Kremer’s petition for post-conviction relief.

Standard of Review

[¶ 10] Post-conviction relief proceedings are civil in nature and governed by the North Dakota Rules of Civil Procedure. *Delvo v. State*, 2010 ND 78, ¶ 10, 782 N.W.2d 72. This Court applies a ‘clearly erroneous’ standard found in N.D.R.Civ.P. Rule 52(a) when reviewing a district court’s findings of fact on an appeal under the Uniform Post-Conviction Procedure Act. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if 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, ¶ 5, 891 N.W.2d 745. However, questions of law are fully reviewable on appeal of a

post-conviction proceeding. *Broadwell v. State*, 2014 ND 6, ¶ 5, 841 N.W.2d 750.

[¶ 11] If there is no genuine issue of material fact, a district court may summarily dismiss an application for post-conviction relief and the moving party is entitled to judgment as a matter of law. *Waslaski v. State*, 2013 ND 56, ¶ 7, 828 N.W.2d 787; *see* N.D.C.C. § 29–32.1–09(3). This Court reviews summary denial of post-conviction relief as an appeal from summary judgment. *Johnson v. State*, 2015 N.D. 7, ¶ 4, 858 N.W.2d 632 (N.D. 2015). The opposing party is entitled to all reasonable inferences at the preliminary stages of a post-conviction proceeding and is entitled to an evidentiary hearing if a reasonable inference raises a genuine issue of material fact. *Howard v. State*, 2015 ND 102, 863 N.W.2d 203, 205 (N.D. 2015). “A genuine issue of material fact exists if reasonable minds could draw different inferences and reach different conclusions from the undisputed facts.” *Vandeberg v. State*, 2003 ND 71, ¶ 5, 660 N.W.2d 568.

[¶ 12] Generally, summary disposition is not appropriate when there are claims of ineffective assistance of counsel. *Wong v. State*, 2010 ND 219, ¶ 15, 790 N.W.2d 757. A claim of ineffective assistance of counsel is based on matters occurring outside the court record or transcript, and therefore the record and transcripts are not adequate to decide the claims and an evidentiary hearing is necessary to consider other evidence beyond the

record. *Id.* However, ultimately the district court dismissed Mr. Kremer's cases on the basis of res judicate and timeliness.

Res Judicata and Timeliness

[¶ 13] Mr. Kremer asserted in his post-conviction application that evidence existed on his laptop that was exculpatory, and that evidence was destroyed by the State. This claim had not been previously alleged and res judicata does not apply to it. Therefore, the Court must look to the whether the claim was timely.

[¶ 14] Mr. Kremer's application is timely under N.D.C.C 29-32.1-01(3)(a)(3) due to a new interpretation of state law. Previously, a defendant was allowed to withdraw a guilty plea at any time to correct a manifest injustice. This Court recently said withdrawing a guilty plea shall be treated only as a post-conviction relief action, thereby creating a new timeframe. A new interpretation of how the withdrawal of a guilty plea is handled is provided in paragraph eleven (11) of *State v. Atkins*, 2019 ND 145, 928 N.W.2d 441. Therefore, Mr. Kremer has two years from the holding in *Atkins* to file a post-conviction application. In paragraph sixteen of the district court's order granting summary dismissal the Court stated that the holding in *Atkins* did not change the available remedy of Rule 11. *See* N.D.R.Crim.P. 11. However, the remedy was not the interpretation that was at issue, the timeframe for withdrawing a plea was interpreted as being exclusively

controlled by the post-conviction procedures act and not the criminal procedural rule.

Ineffective assistance of counsel:

[¶ 15] In order for Mr. Kremer to succeed on a claim for ineffective assistance of counsel, he must prove his counsel's performance fell below an objective standard of reasonableness and the deficient performance prejudiced him. *Garcia v. State*, 2004 ND 81, ¶ 5, 678 N.W.2d 568, (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). The first prong of the *Strickland* test requires that an attorney's performance be measured by an objective standard of reasonableness, considering the prevailing professional norms. *Garcia* at ¶ 5. The second prong of the *Strickland* test requires a showing of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

[¶ 16] Effectiveness of counsel is measured by an objective standard of reasonableness considering the prevailing norms. A defendant must defeat the strong presumption that a counsel's conduct falls within the wide range of reasonable assistance. Trial counsel's conduct is presumed to be reasonable, and courts consciously attempt to limit the effect of hindsight. To establish prejudice a defendant must show a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. A defendant claiming ineffective assistance of counsel must specify how and where trial counsel was incompetent and the probably different result. A

reasonable probability is probability sufficient to undermine the confidence in the outcome. *Tweed v. State*, 2010 ND 38, ¶ 26, 779 N.W.2d 667, 678.

[¶ 17] On the ineffective claim, Mr. Kremer notes that because this case was summarily dismissed without a hearing the district court did not take specific testimony about whether Mr. Baumann did not allow Mr. Kremer to speak with the court as required by Rule 11 or make any arguments for mitigation. However, viewing all inferences in the light most favorable to the non-moving party this Court can infer that Mr. Kremer was kept from speaking and his attorney made no mitigating arguments at sentencing.

CONCLUSION

[¶ 18] The district court in its order held Mr. Kremer's application to be untimely, but pursuant to Rule 11 there is no time bar to withdraw a plea. Based upon this Court's interpretation in *Atkins* Mr. Kremer has two years to file a withdrawal of plea. Therefore his application was timely and the issue of exculpatory evidence was has never been previously addressed or his inability to request a lower sentence at his change of plea.

[¶ 19] WHEREFORE, Mr. Kremer respectfully requests that this Court reverse the district court's Order and allow Mr. Kremer to create a complete record by having his evidentiary hearing.

Dated this 6th day of July, 2021.

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IN THE SUPREME COURT OF NORTH DAKOTA

James Kremer,)	Supreme Court File No.
)	2021054
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Petitioner and Appellant,)	Ward County No.
)	51-2021-CV-00147
v.)	
)	
State of North Dakota,)	CERTIFICATE OF
)	COMPLIANCE
Respondent and Appellee.)	

[¶ 1] This Appellant’s Brief complies with the page limit of 38 set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure.

Dated: July 6, 2021.

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Petitioner and Appellant,)	Ward County No.
)	51-2021-CV-00147
v.)	
)	
State of North Dakota,)	DECLARATION
)	OF SERVICE
Respondent and Appellee.)	

[1] The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Brief, Appendix, and Certificate of Compliance

And that said copies were served upon:

Rozanna Larson, State's Attorney, 51wardsa@wardnd.com

by electronically filing said documents through the court's electronic filing system and upon appellant at his last known address by placing a true and correct copy of said documents in a sealed envelope with USPS:

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Dated: July 6, 2021.

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