

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

BYRON LOREN WHETSEL,)	SUPREME COURT FILE NO.
)	20210180
Petitioner and Appellant,)	20210181
)	
vs.)	
)	Ransom Co. District Court No.
STATE OF NORTH DAKOTA,)	37-2020-CV-00066
)	37-2020-CV-00092
Respondent and Appellee,)	
)	

BRIEF FOR THE APPELLEE, STATE OF NORTH DAKOTA

Appeal from the Orders Dismissing Petitioner’s Application for Post-Conviction

Relief Entered on the 17th day of June, 2021.

In District Court, Ransom County, State of North Dakota

THE HONORABLE JAY SCHMITZ

ORAL ARGUMENT REQUESTED

FALLON M. KELLY
ND ID# 05966
Ransom County State’s Attorney
316 Main Street
P.O. BOX 391
Lisbon, ND 58054
Telephone: (701) 683-4123
Email: fkelly@drtel.net
Attorney For Respondent And Appellee

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<u>Victor v. Nebraska</u> , 511 U.S. 1 (1994)	[¶ 17]
<u>Whetsel v. State</u> , 2019 ND 237, 933 N.W.2d 466	[¶ 1]
<u>Whetsel v. State</u> , 2021 ND 28, 955 N.W.2d 57	[¶ 1]

STATUTES AND RULES

¶ Nos.

28 U.S.C. § 2101(c)	[¶¶ 8,25]
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STATEMENT OF THE FACTS

UNDERLYING FACTS

[¶1] The underlying jury trial facts are outlined in the State's Briefs for the Appellee found in Supreme Court Case Numbers 20170141 and 20190034. Mr. Whetsel's direct appeal from the conviction resulted in the conviction being affirmed. State v. Whetsel, 2017 ND 237, 902 N.W.2d 924. Mr. Whetsel's appeal in Supreme Court No. 20190034 relating to his first post-conviction relief application was unsuccessful and this Court affirmed the dismissal. Whetsel v. State, 2019 ND 237, 933 N.W.2d 466. Mr. Whetsel's appeal in Supreme Court No. 20200262 relating to his first appeal of his second post-conviction relief application was successful and the matter was remanded for further proceedings to allow Mr. Whetsel adequate time under the rules to reply to the State's Motion to Dismiss. Whetsel v. State, 2021 ND 28, ¶ 9, 955 N.W.2d 57. Pending the first appeal from Civil No. 37-2020-CV-00066 and prior to the Supreme Court Opinion in Whetsel v. State, 2021 ND 28, 955 N.W.2d 57, Mr. Whetsel filed another application for post-conviction relief (See Docket No. 1 in Civil No. 37-2020-CV-00092) and on remand following the decision in Whetsel v. State, 2021 ND 28, 955 N.W.2d 57, the district court consolidated the two then-pending applications for post-conviction relief in cases 37-2020-CV-00066 and 37-2020-CV-00092. See Docket No. 25 in Civil No. 37-2020-CV-00092.

[¶2] The district court held a hearing on June 11, 2021 (App. at p. 4) regarding the State's motion to dismiss the consolidated application for post-conviction relief. A Judgment and Order of Dismissal was entered in the consolidated cases on June 17, 2021

(App. at p. 59) and Mr. Whetsel is now appealing that second dismissal in this proceeding in Supreme Court File Nos. 20210180 and 20210181.

[¶3] In this appeal, Mr. Whetsel argues that the statute of limitations does not apply or that it should be disregarded to afford him a constitutional due process right to effective post-conviction relief counsel. Mr. Whetsel makes these arguments despite N.D.C.C. Section 29-32.1-09(2), which states in part “[a]n applicant may not claim constitutionally ineffective assistance of postconviction counsel in proceedings under this chapter.” Throughout this Brief, reference to the “statute of limitations” shall be reference to N.D.C.C. § 29-32.1-01(2) with no exception under N.D.C.C. § 29-32.1-01(3).

[¶4] Mr. Whetsel’s September 1, 2020 Application for Post-Conviction Relief (App. at p. 6) states in part that he “makes application for post-conviction relief, pursuant to Chapter 29-32.1 of the North Dakota Century Code” He only alleged improper jury instructions as a grounds for the application. App. at p. 7. In Mr. Whetsel’s April 14, 2021 Response to State’s Brief’s (sic) Motion to Dismiss, he stated in part “Whetsel isn’t arguing that he has a constitutional right, he is arguing that he has a statutory right to counsel. See 29-32.1-05.” App. at p. 37. At the June 11, 2021 hearing, Mr. Whetsel’s counsel argued for a due process right. Appellant’s Brief at ¶ 26. Now on appeal, Mr. Whetsel announced his position and argues that he is in fact arguing for a constitutional right and that he is not arguing for a statutory right. Appellant’s Brief at ¶¶ 27-28. The State affirmatively raised the issue of the statute of limitations. App. at p. 13, L. 44-46.

[¶5] A hearing on the State’s Motion to Dismiss was held via Zoom on June 11, 2021. At that hearing Mr. Whetsel testified that:

- a. he wanted to have his aunt Shirley and his mother and father testify at the criminal trial to clarify statements (Tr. p. 18, L. 18-25),
- b. he wanted an officer Josh Marvig to testify at the criminal trial to clarify statements (Tr. p. 20, L. 13-20),
- c. he wanted the criminal trial counsel to submit a medical report involving emergency responders (Tr. p. 22, L. 4-17),
- d. he wanted to call a certified nurse expert at the criminal trial (Tr. p. 22, L. 15-17),
- e. his initial Post-Conviction Relief counsel Ms. Schuman failed to raise the issues of the criminal trial attorney not raising issues regarding the jury instructions and issues regarding the aforementioned witnesses (Tr. p. 6, L. 9-12), and
- f. his Post-Conviction Relief counsel Ms. Schuman failed to raise the issue of improper jury instructions and lack of definition of “extreme indifference of human life” for the jury to consider (Tr. p. 26, L. 19-25).

[¶6] The district court found that the foregoing testimony from Mr. Whetsel did not allege existence of any newly discovered evidence that would establish that Mr. Whetsel did not engage in the criminal conduct for which he was convicted. Tr. p. 41, L. 15-25; Tr. p. 42, L. 1-11.

[¶7] The district court judge presided over the underlying criminal case and has presided over all the post-conviction relief applications at the district court level. That same district court judge made a decision that had the practical and legal effect of finding that all of the facts raised by Mr. Whetsel’s testimony at the June 11, 2021 hearing were

available at the time of the underlying criminal trial and were also available at the time of his first post-conviction relief application because the judge found there was no newly discovered evidence. Tr. p. 41, L. 15-25; Tr. p. 42, L. 1-11. (“because the evidence raised at this proceeding is not newly discovered evidence.” Tr. p. 42, L. 9-10).

DISTRICT COURT’S DISMISSAL

[¶8] The North Dakota Supreme Court’s judgment on Mr. Whetsel’s direct appeal in the criminal case was entered on October 17, 2017. App. at p. 52, ¶ 11. See also Docket No. 115 in Criminal Case Number 37-2015-CR-00180; and see also State v. Whetsel, 2017 ND 237, 902 N.W.2d 924. In dismissing Mr. Whetsel’s Application for Post-Conviction Relief, the district court reasoned that Mr. Whetsel’s time to file the pending Application for Post-Conviction Relief expired on or about January 15, 2018. App. at p. 52, ¶ 11 (citing to 28 U.S.C. § 2101(c)). Mr. Whetsel did not file this Application for Post-Conviction Relief until September 8, 2020. App. at p. 52, ¶ 11. See also App. at p. 3, L. 6-11. The district court’s reasoning for dismissal of Mr. Whetsel’s Application for Post-Conviction Relief, therefore, was founded primarily on application of the statute of limitations. App. at p. 53, ¶ 13.

[¶9] The district court additionally found that the Ineffective Assistance of Post-Conviction Relief Counsel argument raised Mr. Whetsel was a misuse of process under N.D.C.C. Section 29-32.1-12(2)(b) (lacking in legal basis so as to be frivolous) in addition to being barred by the statute of limitations. App. at pp. 65-66, ¶¶ 16-17. The Court decided that N.D.C.C. Section 29-32.1-09(2) applied and that Mr. Whetsel has provided no exception to its application. App. at p. 66, ¶ 17. The court outlined additional other foundations for its dismissal. App. at pp. 65-69.

ARGUMENT

I. The District Court Correctly Dismissed Appellant's Application For Post-Conviction Relief.

[¶10] During the June 11, 2021 hearing on the State's Motion to Dismiss, Mr. Whetsel did not produce any witness other than himself nor did he provide any affidavits of third parties. See generally Tr. Mr. Whetsel has not alleged existence of any newly discovered evidence that would establish that Mr. Whetsel did not engage in the criminal conduct for which he was convicted. Tr. p. 41, L. 23-25; Tr. p. 42, L. 1-11. Mr. Whetsel provided no details as to what any of the his referenced witnesses would have said under oath and instead he generally asserted through his own testimony that those referenced witnesses or evidence would clarify the facts. Tr. p. 19, L. 3-7; Tr. p. 19, L. 22-25; Tr. p. 20, L. 1-12; Tr. p. 20, L. 13-24; Tr. p. 21, L. 3-6.

[¶11] Pursuant to N.D.C.C. § 29-32.1-01(3), Mr. Whetsel failed to produce any newly discovered evidence that would establish he did not engage in the conduct for which he was convicted. Mr. Whetsel was the only witness and his testimony was the only evidence presented at the June 11, 2021 hearing. See generally Tr. Since Mr. Whetsel's June 11, 2021 testimony establishes no newly discovered evidence, then he did not allege any relief set forth within N.D.C.C. § 29-32.1-01(3).

[¶12] Section 29-32.1-01(3)(a) provides the only exceptions to the two-year statute of limitations set forth in N.D.C.C. § 29-32.1-01(2). The exceptions found in § 29-32.1-01(3)(a) are (1) newly discovered evidence, (2) physical disability or mental disease that

precluded timely assertion, or (3) a new interpretation of federal or state constitutional or statutory law that is retroactively applicable.

[¶13] There was no newly discovered evidence presented. There was no disability or disease that precluded timely assertion. The State argues that Mr. Whetsel has not established a foundation for a new interpretation of federal or state constitutional or statutory law, nor that such should be retroactively applicable.

[¶14] Mr. Whetsel appears to be arguing a new interpretation of federal or state constitutional or statutory law that is retroactively applicable. Mr. Whetsel is asking the Court to overturn statute and case law precedence. Mr. Whetsel argues that N.D.C.C. Chapter 29-32.1 read as a whole and in conjunction with Section 29-32.1-01(1)(e) creates a due process right to effective post-conviction relief counsel. Mr. Whetsel argues that the state statutory right to post-conviction relief counsel necessarily gives rise to a due process right to effective/competent post-conviction relief counsel. However, this argument would render meaningless N.D.C.C. Section 29-32.1-09(2), which states in part “[a]n applicant may not claim constitutionally ineffective assistance of postconviction counsel in proceedings under this chapter.”

[¶15] Mr. Whetsel’s argument also has the practical effect of asking the Court to ignore N.D.C.C. § 29-32.1-12(2)(a) & (b). Mr. Whetsel inexcusably failed to raise these arguments/issues in a previous proceeding leading to conviction or in a post-conviction proceeding and is so lacking in factual support or legal basis as to be frivolous when one reviews cases like Clark v. State, 1999 ND 78, 593 N.W.2d 329 and Silvesan v. State, 1999 ND 62, 591 N.W.2d 131 (which held it was misuse of process to raise an issue that could

have been raised at the prior proceeding leading to conviction or in the prior post-conviction relief proceeding).

[¶16] If the Court adopted Mr. Whetsel's constitutional due process argument, the Court would be declaring void and/or overturning these statutory and case law frameworks for res judicata. A new precedence would be established that would permit second-guessing past attorneys' performance without time limits. The State is not arguing that res judicata supersedes all other considerations. The State is not arguing against the other established exceptions to the statute of limitations. Due process has its limits and Defendant has had multiple opportunities through multiple attorneys to avail himself of due process within reasonable limits.

[¶17] Various case law holds that there is no constitutional due process right to effective counsel in post-conviction proceedings. See Pennsylvania v. Finley, 481 U.S. 551 (1987); Robinson v. State, 295 Ark. 693 (Ark. 1988), 751 S.W.2d 335 (1988); Rameta v. Dugger, 622 So.2nd 452 (Fla. 1993); Murray v. Giarratano, 492 U.S. 1 (1989); Victor v. Nebraska, 511 U.S. 1 (1994); and Sanchez v. State, 816 N.W.2d 550 (Minn. 2012).

[¶18] Since there is no constitutional due process right to effective post-conviction relief counsel, Mr. Whetsel's argument must fail. Mr. Whetsel argues that the North Dakota Statute provides for court appointed counsel in the post-conviction relief process. Mr. Whetsel therefore argues that a due process right is created by the current North Dakota statutory framework in N.D.C.C. Chapter 29-32.1. However, his argument would render the statute internally contradictory and would render meaningless the plain language of N.D.C.C. § 29-32.1-09(2), which reads in part "[a]n applicant may not claim

constitutionally ineffective assistance of postconviction counsel in proceedings under this chapter.”

[¶19] Mr. Whetsel’s argument would also render toothless the power of a district court—without presentation of newly discovered evidence—to dismiss cases that result from misuse of process pursuant to N.D.C.C. § 29-32.1-12(2) for failing to raise an issue in a previous postconviction proceeding or for filing multiple applications containing claims lacking in factual or legal basis.

[¶20] A holding consistent with Mr. Whetsel’s argument would allow a flood of future defendants. Such a holding would permit such defendants to circumvent the statutory limits by simply alleging their post-conviction counsel was ineffective and therefore they were denied due process. They would be permitted to do this even if they had previously tried unsuccessfully to establish ineffective assistance of the criminal trial attorney. The public policy of repose would be upset without a competing interest of justice founded on newly discovered evidence.

[¶21] Mr. Whetsel has presented no valid argument for a new interpretation of law creating a due process right to effective counsel in post-conviction relief proceedings. Therefore, the statute of limitations and misuse of process *stare decisis* standards remain applicable.

[¶22] This Court has affirmed summary dismissal of post-conviction relief applications when brought outside the two-year statute of limitations. Lehman v. State, 2014 ND 103, 847 N.W.2d 119.

[¶23] As discussed above, Mr. Whetsel has not raised a valid or cognizable due process exception to the statute of limitations. In Keller v. State, 2015 ND 228, ¶ 25, 869 N.W.2d 424, this Court stated:

Because Keller has not shown a new constitutional or statutory interpretation applies to his case, we need not address part two of the two-part analysis under N.D.C.C. § 29–32.1–01(3)(a)(3)—whether the interpretations can be applied retroactively. Keller has failed to satisfy the requirements under N.D.C.C. § 29–32.1–01(3)(a)(3) to show an exception to the two-year filing limit. While the district court dismissed Keller's application for post-conviction relief on a different basis, we will not set aside a correct result merely because the district court dismissed for a different reason. See Guardianship of P.T., 2014 ND 223, ¶ 12, 857 N.W.2d 367 (citing Investors Title Insurance Co. v. Herzig, 2010 ND 169, ¶ 40, 788 N.W.2d 312).

[¶24] Mr. Whetsel is not arguing that a new constitutional or statutory interpretation applies to this case other than to argue that the statute should be allowed to contravene itself. Contrary to the facts in Keller, the State in this case did previously allege application of the statute of limitations set forth in N.D.C.C. § 29-32.1-01(2). See e.g. App. pp. 13-14.

[¶25] Pursuant to N.D.C.C. § 29-32.1-01(2), Mr. Whetsel had two years from the date the conviction became final to bring this post-conviction relief application. Since Mr. Whetsel has already previously appealed the conviction, his conviction became final when his time for petitioning the United States Supreme Court for review became final. N.D.C.C. § 29-32.1-01(2)(b). The North Dakota Supreme Court's judgment on Mr. Whetsel's direct appeal in the criminal case was entered on October 17, 2017 and filed with the District Court on November 8, 2017. See Docket No. 114 and Docket No. 115 in Case Number 37-2015-CR-180. See also State v. Whetsel, 2017 ND 237, 902 N.W.2d 924. Therefore, Mr. Whetsel's time to file a petition to the United States Supreme Court for review expired 90 days later, on or about January 15, 2018. 28 U.S.C. § 2101(c) (a party has 90 days from entry of a judgment from an appeal to petition the United States Supreme Court for review).

Mr. Whetsel did not file this Application for Post-Conviction Relief until September 8, 2020 (See Docket No. 1 in Case Number 37-2020-CV-66), which is more than two years after his conviction became final on January 15, 2018.

[¶26] The statute of limitations in N.D.C.C. § 29-32.1-01(2) applies to bar Mr. Whetsel's Application for Post-Conviction Relief and there is no exception under N.D.C.C. § 29-32.1-01(3)(a).

[¶27] Since Mr. Whetsel's Application for Post-Conviction Relief is barred by the statute of limitations, a decision on the other issues is unnecessary. However, even if Mr. Whetsel's Application was not barred by the statute of limitations, his misuse of process also supports affirmation of the district court's dismissal of Mr. Whetsel's Application.

[¶28] Mr. Whetsel's Application and hearing testimony and counsel's arguments listed various grounds, which included, in part:

- a. his initial Post-Conviction Relief counsel Ms. Schuman failed to raise the issues of the criminal trial attorney not raising issues regarding the jury instructions and issues regarding the aforementioned witnesses. App. at p. 7; Tr. p. 11, L. 1-7.
- b. his Post-Conviction Relief counsel Ms. Schuman failed to raise the issue of improper jury instructions and lack of definition of "extreme indifference of human life" for the jury to consider. App. at p. 7; Tr. p. 11, L. 1-7; Tr. p. 26, L. 1-19. At the hearing in this matter, Mr. Whetsel's appellate counsel for the underlying criminal conviction appeal stated that this issue on the lack of definition of "extreme indifference of human life" could have been raised on direct appeal. Tr. pp. 28-29 and specifically at Tr. p. 29, L. 25.

[¶29] The time for Mr. Whetsel to allege improper jury instructions or to raise the issue of wanting more testimony from witnesses was at the time of the criminal trial, appeal of the criminal trial, or as part of his first Application for Post-Conviction Relief. Mr. Whetsel's attempt to re-litigate those issues here is a misuse of process under N.D.C.C. Section 29-32.1-12(2)(a) & (b) (he inexcusably failed to raise in a previous proceeding leading to conviction or in a postconviction proceeding and his allegations were so lacking in factual support or legal basis as to be frivolous). See also Clark v. State, 1999 ND 78, 593 N.W.2d 329; Silvesan v. State, 1999 ND 62, 591 N.W.2d 131 (misuse of process to raise an issue that could have been raised at the prior proceeding leading to conviction or in the prior post-conviction relief proceeding).

CONCLUSION

[¶30] Mr. Whetsel has been unable to establish an exception to the two-year statute of limitations. The Appellee, State of North Dakota, therefore respectfully asks this Court to AFFIRM the lower court's Judgment of Dismissal of Mr. Whetsel's consolidated Application for Post-Conviction Relief in District Court File Numbers 37-2020-CV-00066 and 37-2020-CV-00092.

[¶31] Oral Argument is requested to be able to orally argue technical issues raised by the Appellant's raised issues that ask for a new interpretation of statutory or case law. This is also the undersigned attorney's notice of intent to appear and participate in oral argument.

Dated this 9th day of September, 2021.

Fallon Kelly

Fallon M. Kelly
ND ID# 05966
Ransom County State's Attorney
316 Main Street
P.O. Box 391
Lisbon, ND 58054
Telephone: (701) 683-4123
EMAIL: fkelly@drtel.net
Attorney for Appellee, State of North Dakota

CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for Appellee, State of North Dakota, hereby certifies that Appellee Brief was prepared with proportional typeface and that Appellant's Brief does not exceed 38 pages.

Dated this 9th day of September, 2021.

Fallon Kelly

Fallon M. Kelly
ND ID# 05966
Ransom County State's Attorney
316 Main Street
P.O. Box 391
Lisbon, ND 58054
Telephone: (701) 683-4123
EMAIL: fkelly@drtel.net
Attorney for Appellee, State of North Dakota

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STATE OF NORTH DAKOTA,)	37-2020-CV-00092
)	
Respondent and Appellee,)	CERTIFICATE OF
)	ELECTRONIC SERVICE

[¶1] I certify that a true and correct copy of the following documents:

1. Brief for the Appellee, State of North Dakota with Certificate of Compliance and
2. Certificate of Electronic Service

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North Dakota Supreme Court Clerk of Court
supclerkofcourt@ndcourts.gov

Benjamin C. Pulkrabek, Attorney for the Appellant
pulkrabek@lawyer.com

Dated this 13th day of September, 2021.

Fallon Kelly

Fallon M. Kelly
ND ID#05966
Ransom County State's Attorney
316 Main Street
PO Box 391
Lisbon, ND 58054
Telephone: (701) 683-4123
EMAIL: fkelly@drtel.net
Attorney for the Appellee, State of North Dakota