

IN THE SUPREME COURT OF NORTH DAKOTA

Cliffton T. Fourth,

Petitioner and Appellant,

v.

State of North Dakota,

Respondent and Appellee.

Supreme Court File No.

20210285

Burleigh County District Court No.

08-2021-CV-00236

APPELLANT BRIEF-----
BRIEF OF PETITIONER-APPELLANT, CLIFFTON T. FOURTH

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

Entered on the 1st day of October, 2021.

In District Court, Burleigh County, State of North Dakota

The Honorable James S. Hill

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TABLE OF AUTHORITIES

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CASES

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) ¶16

Abbreviations:

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Line L.

Transcript of proceedings Tr.

STATEMENT OF THE ISSUES

[¶1] ISSUE I: Did the Trial Judge err when he denied Petitioner Clifton T. Fourth post-conviction petition on the issue about his legal counsel at his first post-conviction hearing being ineffective?

ISSUE II: Did attorney Arthurs' failure to bring up all of the mitigating factors cause Mr. Fourth to receive the maximum sentence?

NATURE OF THE CASE

[¶2] The post-conviction relief application was filed by Clifton T. Fourth (Mr. Fourth) on February 8, 2021. The petition seeks relief from is Burleigh County case number 08-2017-CR-01449.

[¶3] The state filed an answer to Mr. Fourth's application for post-conviction relief on March 9, 2021.

[¶4] A hearing via 'zoom' was held on post-conviction relief was held on September 27, 2021.

[¶5] The closing brief of the petitioner was filed by Mr. Fourth's post-conviction attorney Kyle Craig on September 30, 2021.

[¶6] An order denying the application of post-conviction relief was entered on October 1, 2021.

[¶7] A notice of appeal of that denial order was filed by Mr. Fourth on October 13, 2021.

[¶8] The order for transcript was filed on October 13, 2021 along with the notice of the filing of the notice of appeal.

[¶9] Clerk's certificate of appeal was filed in both cases on November 8, 2021.

[¶10] This matter is now before the North Dakota Supreme Court.

STATEMENT OF FACTS

[¶11] On September 22, 2017 Petitioner/Appellant Clifton Thomas Fourth (Mr. Fourth) in the district court of Burleigh County plead guilty to the offense of luring a minor by electronic means. The case number for the above offense is 08-2017-CR-01449. Mr. Fourth was sentenced on the above offense on February 7, 2018. Therefore, the two-year statute of limitations for post-conviction application expired on February 7, 2020.

[¶12] Normally a post-conviction petition relates to the underlying crime which is case number 08-2017-CR-01449. However, that isn't the situation in the case now before the Court because of Tr. p. 4 L. 6 – L. 16:

“THE COURT: Very good. All right. What we're going to do is, I'm going to go to the attorneys at this point before we get going. Mr. Craig, is there anything I need to know before we get going here this morning?

MR. CRAIG: Just that the primary focus of Mr. Fourth's argument is going to be related to the recent revocation of probation sentence that he received. I understand that he's made a number of different claims regarding the underlying criminal matter; however, in the State's answer they did raise the statute of limitations and that I believe ran out in early 2020. So we'll just be focusing on that, that's why Mr. Arthurs is here under subpoena. I'll be calling him as my first witness.”

[¶13] Because of the above quote Mr. Fourth's post-conviction petition deals with what occurred at a revocation of probation hearing and not what occurred at the trial of the underlying case.

[¶14] At the revocation of probation hearing Mr. Fourth was represented by attorney Matthew Arthurs. According to Mr. Fourth he and attorney Arthurs agreed what attorney Arthurs would bring up at Mr. Fourth's revocation hearing. They also agreed that Mr. Fourth shouldn't be given the maximum sentence allowed at his revocation hearing

because there were better alternatives based on Mr. Fourth's improvements in his living conditions and the steps Mr. Fourth had taken to maintain his sobriety.

[¶15] At Mr. Fourth's revocation hearing attorney Arthurs claims he brought up and argued all of the mitigating factors as to why Mr. Fourth should not be sentenced to the maximum sentence allowed by law. Mr. Fourth claims attorney Arthurs didn't bring up all of the mitigating factors and as a result he was sentenced to the maximum sentence allowed by law.

[¶16] At the conclusion of the revocation hearing Mr. Fourth's attorney elected to give a written argument of what was proven at Fourth's hearing didn't include known mitigating factors and because mitigating factors were left out Attorney Arthurs was incompetent. The state elected to and did give an oral argument at the end of the hearing.

[¶17] The Court after it received a written argument from Mr. Fourth's attorney on October 1st, 2021 entered an order denying Mr. Fourth's post-conviction petition.

ARGUMENT

ISSUE I: Did Attorney Arthurs fail to present all of the mitigating factors in Mr. Fourth's case as to why he should not be given the maximum sentence?

ISSUE II: Did attorney Arthurs' failure to bring up all of the mitigating factors cause Mr. Fourth to receive the maximum sentence?

STANDARD OF REVIEW

[¶18] The standard used in determining whether or not a post-conviction applicant is found in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The standard is that the petitioner for post-conviction relief must establish their attorney's performance at the post-conviction hearing was below a wide range of acceptable

professional standards and that the Defendant was prejudiced because all mitigating factors were brought up by attorney Arthurs.

[¶19] It is Mr. Fourth's opinion that attorney Arthurs' performance fell below any standard of reasonableness because attorney Arthurs did not articulate fully all the mitigating factors as to why he shouldn't have been given the maximum sentence allowed by law. The end result of these mitigating factors not being fully articulated by attorney Arthurs is that the court gave Mr. Fourth the maximum sentence allowed by law.

[¶20] Mr. Fourth further believes attorney Arthurs' failure to fully articulate all his mitigating factors to the court prejudiced his case. Therefore, because of attorney Arthurs' failure to fully articulate all of Mr. Fourth's mitigating factors his representation of Mr. Fourth fell before the wide range of acceptable professional standards for an attorney, then this failure of Mr. Arthurs prejudiced Mr. Fourth's case.

CONCLUSION

[¶21] The end result of what Mr. Fourth established above is sufficient to meet the requirement of Strickland, supra. Therefore, this case should be remanded to the district court with an Order to give Mr. Fourth another resentencing hearing.

Dated this 30th day of December, 2021.

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**CERTIFICATE OF
COMPLIANCE**

[¶1] I certify that 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 N.D. R. App. P. 32(a)(8)(A). The brief in this matter consists of 7 pages and appendix consists of 31 pages.

Dated this 30th day of December, 2021.

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

1. Appellant Brief
2. Appellant Appendix
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:

North Dakota Supreme Court
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and by U.S. postal service with proper postage affixed to:

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Dated this 30th day of December, 2021.

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