
IN THE SUPREME COURT OF NORTH DAKOTA

Jason James Vogt,)	Supreme Court File No.
)	20220058
)	
Petitioner and Appellant,)	Cass County No.
)	09-2020-CV-03382
v.)	
)	
State of North Dakota,)	APPELLANT'S BRIEF
)	
Respondent and Appellee.)	

**Appeal from the Judgment entered February 2, 2022 in
Cass County district court, east central judicial district,
North Dakota, the Honorable John C. Irby presiding.**

APPELLANT'S BRIEF
ORAL ARGUMENT REQUESTED

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Transcript References:

The Petitioner had a motion hearing on January 21, 2022. The transcript of that hearing is referred to as [Tr] in this brief.

JURISDICTION

[¶ 1] The Petitioner, Jason James Vogt, timely appealed the final judgment arising out of the district court. 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 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 dismissing Mr. Vogt’s petition for post-conviction relief.

ORAL ARGUMENT

[¶ 3] Oral argument has been requested to emphasize and clarify the Appellant's written arguments on their merits.

STATEMENT OF CASE

[¶ 4] This is an appeal from the Cass County Order denying Mr. Vogt's application for post-conviction relief, signed January 31, 2022. R46. This case was before the district court in *Vogt v. State*, 09-2020-CV-03382. The criminal information in the underlying criminal case, 09-2013-CR-3705, was filed with the court on December 9, 2015. R1 cr3705. Mr. Vogt's first appeared on October 21, 2013 regarding the charges of: Count I-gross sexual imposition, class A felony and Count II-gross sexual imposition, class AA felony. Mr. Vogt entered an open plea of guilty on June 30, 2014 to Count I; Count II was dismissed. R22:cr3705. Mr. Vogt was sentenced on September 29, 2014 to twenty years, first serve twelve years, followed by five years of probation, and lifetime registration as a sex offender. *See* R31:cr3705.

[¶ 5] On March 7, 2019 Mr. Vogt filed a motion to vacate judgment and withdraw his guilty plea. R43:cr3705. The State filed an answer asserting affirmative defenses on March 11, 2019, but did not move for summary disposition. R50:cr3705. An order denying the motion and dismissing the case was entered March 13, 2019, before Mr. Vogt had an opportunity to respond. R57:cr3705. A notice of appeal was filed April 17, 2019. R59:cr3705. This Court reversed the order dismissing the application for post-conviction relief and remanded the case for further proceedings. *See*

State v. Vogt, 2019 ND 236, 933 N.W.2d 916 (N.D. 2019). On June 15, 2020 Mr. Vogt voluntarily withdrew his motion to vacate his judgment and withdraw his pleas. R125:cr3705.

[¶ 6] Mr. Vogt submitted his subsequent petition for post-conviction relief seeking to withdraw his guilty plea on October 29, 2020. R1. The State filed an Answer on November 12, 2020. R7. Mr. Vogt, through his attorney, responded to the State's Answer on January 11, 2021. R11. Discovery was conducted in the case. Disclosures were made by the Petitioner to the State. R16. A stipulated motion to continue was filed to give the State more time to review and respond specifically to the Petitioner's expert report. R18. The court granted the motion on that basis and the hearing was rescheduled. R21; R22.

[¶ 7] The State filed a motion to dismiss. A hearing on the State's motion to dismiss was held on January 21, 2022, over the Petitioner's objection. Tr. p. 7. On February 2, 2022 the district court entered an order dismissing Mr. Vogt's petition based on the State's assertion of affirmative defenses. R46.

[¶ 8] The Judgment was filed in this case on February 2, 2022 and Mr. Vogt timely filed a notice of appeal. R50; R53.

STATEMENT OF FACTS

[¶ 9] The facts of the underlying criminal proceeding can be found in *State v. Vogt*, 2019 ND 236, 933 N.W.2d 916 (N.D. 2019).

[¶ 10] In the post-conviction proceeding, the State filed a substitution of counsel on July 13, 2021. R24. On September 1, 2021 the State filed a motion to dismiss. R25. The motion did not comply with notice requirements and the State refiled the motion along with a supporting brief on September 14, 2021, two days before the scheduled evidentiary hearing. R32; R33; R34; R58:3. At the scheduled evidentiary hearing, the Petitioner objected to the State's late motion and to continuing the evidentiary hearing. R58:3, 6, 7. The district court granted a continuance of the evidentiary hearing on Petitioner's application over his objection. R58:8: ln 3-7. Mr. Vogt was not able to have his expert witness testify or properly introduce his new evidence to the court in support of his petition. *See* R58; Tr p. 2.

LAW AND ARGUMENT

I. Whether the district court erred by dismissing Mr. Vogt's petition for post-conviction relief.

Standard of Review

[¶ 11] Post-conviction relief proceedings are civil in nature and governed by the North Dakota Rules of Civil Procedure. *Wacht v. State*, 2015 ND 154, ¶ 6, 864 N.W.2d 740 (N.D. 2015). A guilty plea must be entered knowingly, intelligently, and voluntarily to be valid. *State v. Bates*, 2007 ND 15, ¶ 13, 726 N.W.2d 595. Rule 11, N.D.R.Crim.P., provides a framework for determining whether a plea is knowingly and voluntarily entered into. *Id.* at ¶ 15. 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 (N.D. 2017). 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 (N.D. 2014).

[¶ 12] A summary dismissal of post-conviction relief is reviewed by this Court like an appeal from a summary judgment. 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 (N.D. 2013); *see also* 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).

[¶ 13] The district court dismissed all of Mr. Vogt's claims as untimely, however, the court erred in allowing the State to make a motion for

summary disposition after the time for raising affirmative defenses had expired. *See* R46:3:¶10; R58: Affirmative defenses must be raised within 21 days of a Petitioner filing his application for post-conviction relief. *See* N.D.R.Civ.P. 12. Which was an abuse of discretion. Additionally, Rule 56 requires that the “motion and supporting documents must be filed at least 90 days before the day set for trial and 45 days before the day set for the hearing unless otherwise ordered. An opposing party has 30 days after service of a brief to serve and file an answer brief and supporting documents.” N.D.R.Civ.P. 56(c). The State had waived their affirmative defenses and made no argument as to why there was good cause for the district court to grant an extension to assert them. The district court did not even rule on their untimely assertion although the issue was raised by the Petitioner. R46; R58:7-8.

[¶ 14] The decision to grant or deny a continuance is in the court’s discretion. The court’s decision is reviewed for an abuse of discretion. *Everett v. State*, 2008 ND 199, ¶ 25, 757 N.W.2d 530 (N.D. 2008). A court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when it misinterprets or misapplies the law. *State v. Hinojosa*, 2011 ND 116, ¶ 7, 798 N.W.2d 634. The State filed their motion for summary judgment two days before the scheduled post-conviction hearing. R58:4: In 6-8. They had no good cause for the delay stating “So, procedurally, we’re a little bit behind the ball on this case within the State’s Attorney’s Office.”

R58:5. Petitioner filed a petition for post-conviction relief seeking to withdraw his guilty plea on August 10, 2021. Therefore, the State waived its right to seek summary disposition. And the court made no finding of good cause to allow a late motion. This was an abuse of the court's discretion and a reversible error.

Equitable Estoppel

[¶ 15] The initial State's Attorney on this case induced the Petitioner into a stipulated continuance of the scheduled evidentiary hearing under the pretense that more time was necessary to address the merits of the evidence disclosed to them. See R16; R18; R58:5 ln 12-17.

[¶ 16] This Court has recognized that equitable estoppel may preclude the application of a statute of limitations or to extend or avoid the statute of limitations. See *Burr v. Trinity Medical Center*, 492 N.W.2d 904 (N.D. 1992); *Ellis v. North Dakota State University*, 2009 ND 59 ¶ 17, 764 N.W.2d 192, 196 (N.D. 2009). Mr. Vogt was induced into continuing his May 14, 2021 evidentiary hearing on the basis that the State wanted more time to review the psychological report presented and respond to it. If the State had disclosed they wanted more time to move for summary dismissal Mr. Vogt would not have agreed to continue the matter. Because Mr. Vogt relied on the State's assertions, he essentially forfeited his evidentiary hearing in this matter. The State should not have been allowed to benefit from a fraudulent

inducement for a continuance which prejudiced Mr. Vogt. This Court should reverse the district court's judgment and remand for an evidentiary hearing.

New Evidence

[¶ 17] In the present case, Mr. Vogt raised newly discovered evidence as a basis for his post-conviction petitions. Post-conviction relief may be granted when “[e]vidence, not previously presented and heard, exists requiring vacation of the conviction or sentence in the interest of justice.” N.D.C.C. § 29-32.1-01(1)(e). The general two-year time limitation does not bar the petition if there is newly discovered evidence. N.D.C.C. § 29-32.1-01(3)(a)(1).

[¶ 18] Mr. Vogt's claim that his change of plea was not voluntarily, knowingly, or intelligently made because of the newly discovered evidence supporting his position of coerced statements was a claim that had not been previously alleged. Res judicata did not apply to that claim. Mr. Vogt's claim of actual innocence, thereby showing a manifest injustice requiring the withdrawal of plea was a new claim and res judicata did not apply to it. The district court in its Order dismissing the petition found that Mr. Vogt's change of plea was an intelligent and voluntary decision. R46:3:¶9. However, this is a factual question which his new evidence raised a material dispute. The court did not allow the evidence to be presented and therefore abused its discretion on a motion for summary judgment and did not take the evidence presented in the light most favorable to the Petitioner. Because the district

court abused its discretion and did not view the presented evidence and/or denied the Petitioner an opportunity to present supporting evidence, this Court should reverse the district court's judgment and remand for an evidentiary hearing.

[¶ 19] The Court found that Mr. Vogt's claims were barred because of misuse of process. However, this is an affirmative defense that was not timely raised by the State and misuse of process does not apply to claims when there is newly discovered evidence. This is because part of the analysis of newly discovered evidence discusses why it was not possible to present the evidence prior to the application, thereby addressing why it is not a misuse of process. Therefore the court's Order dismissing the application based on a misuse of process was reversible error.

CONCLUSION

[¶ 20] WHEREFORE the Defendant respectfully requests this Court to reverse the judgment of the district court and remand for an evidentiary hearing on his petition.

Dated this 18th day of April, 2022

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CERTIFICATE OF COMPLIANCE

[¶ 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: April 18, 2022

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)	
State of North Dakota,)	CERTIFICATE 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:

Appellant Brief

And that said copies were served upon:

 SheraLynn Ternes, Assistant State’s Attorney,
 sa-defense-notices@casscountynynd.gov

by electronically filing said documents through the court’s electronic filing system. And a copy of the brief was also served on the appellant at his last know address:

 105 12th St. SE Apt. 108
 Cooperstown, ND 58425

by placing a true and correct copy of said documents in a sealed envelope with USPS.

Dated: April 18, 2022.

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