20220264

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JANUARY 10, 2023
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Jeffrey Scott Krogstad,	)	
	)	
Petitioner / Appellant,	)	Supreme Court No. 20220264
	)	
vs.	)	
	)	
State of North Dakota,	)	Grand Forks County District Court
	)	Case No. 18-2021-CV-01778
Respondent / Appellee.	)	
	)	

BRIEF OF APPELLEE

APPEAL FROM ORDER DISMISSING APPLICATION FOR POST-CONVICTION RELIEF ENTERED ON AUGUST 16, 2022, BY GRAND FORKS COUNTY DISTRICT COURT, NORTHEAST CENTRAL JUDICIAL DISTRICT, STATE OF NORTH DAKOTA, THE HONORABLE JOHN THELEN, PRESIDING

ORAL ARGUMENT REQUESTED

Andrew C. Eyre (#07121)
Assistant State's Attorney
Grand Forks County
P.O Box 5607
Grand Forks, ND 58206
(701) 780-8281
E-Service Address: sasupportstaff@gfcounty.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

North Dakota State Cases

Federal Cases

STATEMENT OF THE ISSUES

1. Trial counsel was not ineffective for deciding not to request a speedy trial
2. Trial counsel was not ineffective for failing to secure independent DNA testing
3. The district court properly analyzed trial counsel's performance under Strickland.

ORAL ARGUMENT JUSTIFICATION

[¶1] The State requests oral argument to expand upon the State's argument and to address any of this Court's concerns.

STATEMENT OF THE CASE

[¶2] The State filed an Information charging Jeffrey Krogstad with AA Felony Gross Sexual Imposition on July 23, 2018. Krogstad waived his preliminary hearing and entered a not guilty plea at the arraignment on September 7, 2018. The parties litigated an 803(24) motion. The district court concluded that the forensic interview at issue would be admitted into evidence at trial.

[¶3] A jury trial was held April 23, 2019 through April 25, 2019. Krogstad was found guilty of one count of Gross Sexual Imposition, a Class AA Felony. The Court ordered a pre-sentence investigation. Krogstad was sentenced on September 18, 2019. Krogstad was sentenced to fifty years with the North Dakota Department of Corrections and Rehabilitation, with ten years suspended.

[¶4] Krogstad appealed his conviction to this Court in case 20190290. Krogstad argued that there was insufficient evidence to sustain a conviction. Krogstad argued that his Sixth Amendment confrontation rights were violated. Krogstad argued that the district court abused its discretion in allowing the forensic interview to be admitted.

[¶5] This Court unanimously affirmed the conviction in State v. Krogstad, 2020 ND 78, 941 N.W.2d 574.

[¶6] Krogstad then sought post-conviction relief in 18-21-CV-1778. Krogstad filed his petition on September 3, 2021. Krogstad's petition included six allegations: (1) trial counsel was ineffective because he filed to file a Rule 412 notice; (2) trial counsel was ineffective because he failed to object to "vouching for credibility of witnesses"; (3) trial counsel was ineffective because he failed to request a speedy trial; (4) trial counsel was ineffective because he failed to obtain an independent DNA analysis; (5) trial

counsel was ineffective because he failed to introduce expert witnesses for the defense; and (6) trial counsel was ineffective because he failed to raise a Fourth Amendment argument to suppress evidence found in Krogstad's phones. The State filed its Answer and response brief on September 22, 2021. A post-conviction hearing was held on May 6, 2022. At that hearing, the district court heard the testimony of trial counsel. The court also heard testimony from Krogstad. The district court received Krogstad's exhibits 1-11. The district court also received State's exhibits 1-40. After the hearing, the district court allowed the parties to submit written closing arguments. Krogstad filed his closing brief on May 23, 2022. The State filed its closing brief on May 26, 2022.

[¶7] On August 16, 2022, the district court dismissed Krogstad's application for post-conviction relief.

[¶8] Krogstad filed his notice of appeal on September 9, 2022, and this appeal follows.

STATEMENT OF THE FACTS

[¶9] Krogstad, a man who was 52 years of age at the time of trial (Jury Trial Tr. p. 135), was charged with gross sexual imposition for sexually exploiting a six-year-old child.

[¶10] This case began on July 19, 2018, with a forensic interview of Jane Doe, a six-year-old girl. Jane Doe was referred to the forensic interview after making a statement that Krogstad "takes her to the middle of nowhere and touches her." (Jury Trial Tr. p. 100). Forensic interviews are conducted in a room with "Play-Doh and . . . markers or crayons and some paper so the children are able to draw or they're able to play with some Play-Doh." (Jury Trial Tr. p. 47). The forensic interview rooms are

designed to "help [children] feel more comfortable in the interview room." (Jury Trial Tr. p. 47).

[¶11] The forensic interview followed a well-defined process designed to elicit the truth from a child. Ms. Spivey, the forensic interviewer, testified that, in the forensic interview, children are told that it is okay to say "I don't know." (Jury Trial Tr. p. 47). Second, children are told that it is okay to say "I don't understand" or "I don't understand the question." (Jury Trial Tr. p. 48). Children are allowed to correct the interviewer. (Jury Trial Tr. p. 48). Children are told to tell the truth. (Jury Trial Tr. p. 48).

[¶12] During the forensic interview Jane Doe disclosed that Krogstad "gives her some touches that she likes." (Jury Trial Tr. p. 55). Jane Doe told the forensic interviewer that "he takes his hand and puts it on her vagina, he asks her to take her pants and underwear off and he plays with her vagina and that she likes that[.]" (Jury Trial Tr. p. 55).

[¶13] A transcript of the forensic interview was offered and received into evidence. (Jury Trial Tr. p. 93) (Ex. 1). The forensic interview was played for the jury. (Jury Trial Tr. p. 94). Jane Doe described, in great detail, her sexual exploitation at the hands of the defendant. After being asked if there were any touches she likes, Jane Doe said she liked to get "inappropriate touches." (Ex.1 p. 19). Jane Doe said, "I go with Jeff in the middle of nowhere and he starts touching me right here." (Ex.1 p. 19). Jane Doe continued, "[a]nd I like it. And he has this like toy, this toy and that buzzes in there." (Ex. 1, p. 19). She described the "toy" as blue with "diamonds" on the bottom. (Ex.1 p. 20). She drew a picture of the toy, and that picture very closely resembled the massager that was later found in Krogstad's van. (Ex. 2, Ex. 20). Jane Doe identified Jeffrey

Krogstad as her abuser. (Ex. 1 p. 20). Jane Doe described watching "inappropriate" videos in Krogstad's van. (Ex. 1 p. 23). Jane Doe described watching women taking their clothes off and "messing with their vaginas." (Ex. 1 p. 24). She also described a video that depicted a woman putting her mouth on a man's penis and "the squirt stuff was in her mouth[.]" (Ex. 1 p. 31-32). While Jane Doe watched these videos, Krogstad was "driving" and "playing with [Jane Doe's] vagina." (Ex, 1 p. 25). Jane Doe described taking her pants and underwear off for Krogstad, and then said, "[y]ou don't have to if you don't want to. But you kind of have to do that if a man wants you to." (Ex. 1 p. 27). Jane Doe told the forensic interviewer that she didn't want Krogstad to go to jail. (Ex. 1 p. 30). Jane Doe told the forensic interviewer that "talking about it is just making my vagina shake." (Ex. 1 p. 33). Jane Doe also disclosed that "[o]ne day, when Jeff gets his camper back . . . he will let me sleep naked, with no underwear on, no clothes on, not even a shirt." (Ex. 1 p. 32).

[¶14] Jane Doe testified at trial, and was subject to cross-examination. (Jury Trial Tr. p. 104-121). At the time of trial, Jane Doe was seven years old. (Jury Trial Tr. p. 109). Jane Doe testified that Krogstad was formerly a friend of her grandmother's, and that she knew him. (Jury Trial Tr. p. 111). Jane Doe testified that she painted rocks and played frisbee with Krogstad. (Jury Trial Tr. p. 112). Jane Doe testified that Krogstad touched her. (Jury Trial Tr. p. 112-113). Jane Doe did not wish to say where Krogstad touched her. (Jury Trial Tr. p. 113-114). On cross-examination, Jane Doe testified that Krogstad took her places. (Jury Trial Tr. p. 116). Jane Doe testified that Krogstad mostly took her, without her brothers. (Jury Trial Tr. p. 117). Again, on cross-examination, Jane Doe testified that she was touched by Krogstad. (Jury Trial Tr. p.

119). Jane Doe said she didn't want to talk about it because "it [made her] feel weird." (Jury Trial Tr. p. 119). The State did not object during cross examination of Jane Doe. The Court did not limit, in any way, defense counsel's ability to cross-examine Jane Doe.

[¶15] Investigator Jake Lanes from the Grand Forks County Sheriff's Office testified at trial. (Jury Trial Tr. p. 131). Lanes set up the forensic interview. (Jury Trial Tr. p. 133-134). After the forensic interview, Investigator Lanes obtained search warrants for Krogstad's vehicle, his home, and his electronic devices. (Jury Trial Tr. p. 134).

[¶16] Law enforcement officers searched Krogstad's home on July 19, 2018. Investigator Lanes left the search to interview Krogstad. (Jury Trial Tr. p. 135). Bureau of Criminal Investigations Special Agent Gilpin and Sheriff's Office Investigator Steve Hamre were also present in the interview. Krogstad was provided his Miranda warning and agreed to the interview. (Jury Trial Tr. p. 135). Krogstad told interviewers that he had a relationship with Jane Doe's grandmother. (Jury Trial Tr. p. 139-140). Krogstad said that he took Jane Doe frisbee golfing and painting rocks. (Jury Trial Tr. p. 141). Krogstad admitted that he was alone with Jane Doe on these outings. (Jury Trial Tr. p. 141).

[¶17] Investigator Lanes testified that he participated in the search of Krogstad's vehicle on July 20, 2018. (Jury Trial Tr. p. 141). Lanes testified that a frisbee with Jane Doe's name on it was found in Krogstad's van. (Jury Trial Tr. p. 159). The vibrating body wand massager that Jane Doe described, and drew a picture of, was found in Krogstad's van. (Jury Trial Tr. p. 161). Krogstad admitted, later in his interview with Special Agent Gilpin that he bought the massager in Grand Forks. (Jury Trial Tr. p. 185).

Special Agent Madsen testified that he used alternative light source equipment to view the massager and located an illuminated "stain at the end of the vibrator." (Jury Trial Tr. p. 202).

[¶18] Investigator Lanes found painted rocks in Krogstad's van. (Jury Trial Tr. p. 161-162). Krogstad admitted to painting rocks with Jane Doe. (Jury Trial Tr. p. 187). Lanes also found painting supplies in the van. (Jury Trial Tr. p. 163). Investigator Lanes found a Rice Krispy wrapper in Krogstad's van. (Jury Trial Tr. p. 162). Jane Doe disclosed in her forensic interview that she and Krogstad had "huge chocolate rice crispy bars" from a gas station on one of their outings. (Appellee's App. p. 20). The frisbee, massager, and Rice Krispy wrapper all corroborated Jane Doe's statements describing the circumstances of her sexual exploitation.

[¶19] The body wand massager was admitted into evidence. (Jury Trial Tr. p.168 – 169). Amy Gebhardt, a forensic scientist from the North Dakota State Crime Lab, testified to the DNA analysis completed on the massager. Ms. Gebhardt was recognized as an expert witness in the field of DNA analysis. (Jury Trial Tr. p. 278-279). Her DNA Lab report was received into evidence. (Jury Trial Tr. p. 292). Ms. Gebhardt testified that she analyzed DNA from the massager seized from Krogstad's van. (Jury Trial Tr. p. 292). Ms. Gebhardt testified that neither Krogstad nor Jane Doe could be excluded as contributors to the DNA profile found on the massager. (Jury Trial Tr. p. 294). There was a 1 in 87 trillion chance that someone, other than the defendant or the victim contributed to the DNA profile on the massager. (Jury Trial Tr. p. 295) (Trial Ex. 37). Ms. Gebhardt testified that other than Krogstad and Jane Doe, "[t]here was no indication of a third contributor" to the DNA profile developed from the head of the massager.

(Jury Trial Tr. p. 316). Ms. Gebhardt also testified that the profile she developed would not likely be from "touch DNA." (Jury Trial Tr. p. 316).

[¶20] Special Agent Gilpin testified that Krogstad's phone was seized during the search of Krogstad's home. (Jury Trial Tr. p. 181). The phone was located next to Krogstad's identification card and the keys to his van. (Jury Trial Tr. p. 182, 196). Special Agent Gilpin turned the phone over to Special Agent Shaw for forensic examination. (Jury Trial Tr. p. 184).

[¶21] Special Agent Shaw testified to the forensic examination of Krogstad's phone. (Jury Trial Tr. p.240-241). There were several indicators within the phone that showed that the phone belonged to Krogstad. (Jury Trial Tr. p. 242). The email account JeffKrogstad@hotmail was connected to this phone. (Id.). Krogstad's internet history was admitted into evidence (Jury Trial Tr. p. 243-246). Krogstad's internet history included websites titled: "Is it normal for a 6 year old to be sexually curious." (Jury Trial Tr. p. 247); "Can a 7 year old girl get pregnant? If yes, how is that possible? Quora." (Id.); "List of youngest birth mothers, Wikipedia." (Jury Trial Tr. p. 248); "I had sex for the first time when I was 8 years old." (Id.); "I was six when a man first touched me. I didn't speak up until I was an adult. . . . (Id.); "How can you tell if your child has been penetrated?" (Jury Trial Tr. p. 249); "Sexuality and relationships for your 6 to 8 year old. . . ." (Id.). Special Agent Shaw also recovered videos from Krogstad's phone. The report of his forensic examination, which showed pornographic videos, including lesbian pornography, saved to Krogstad's phone, was received into evidence. (Jury Trial Tr. p. 251).

[¶22] Jane Doe's grandmother, S.E., testified at trial. She testified that she was the primary caregiver for Jane Doe from February 2018 to July 2018. (Jury Trial Tr. p. 206). S.E. testified that she knew Krogstad for about 25 years. (Id.). S.E. testified that Krogstad favored Jane Doe over her brothers, and "would take her to the park, to shopping, buy her clothes, and it was more her that he took by herself than the boys." (Jury Trial Tr. p. 208). S.E. testified that Krogstad took Jane Doe, alone, "10 [or] 12 times maybe, if not more." (Id.).

STATEMENT OF THE FACTS – TESTIMONY FROM THE POST-CONVICTION HEARING

[¶23] The district court held an evidentiary hearing on May 6, 2022. Prior to the hearing, the parties submitted exhibits for the court to consider. The State's exhibits 1-40 (18-21-CV-1778, Index 21-27 and 33-65) were received by the Court at the evidentiary hearing. (PCR Tr. 61-62). Trial counsel testified at the hearing. (PCR Tr. 8). Trial counsel testified that he has practiced law for 27 years. (PCR Tr. 18). Trial counsel testified that he has conducted 65 jury trials and numerous bench trials. (PCR Tr. 19).

[¶24] Trial counsel testified about the speedy trial issue. Trial counsel testified that he did discuss speedy trial rights with Krogstad. When asked whether he explained the right to Krogstad, trial counsel testified:

> We talked about that, primarily the issue we were having, I believe there was some DNA sampling that had been done and we were waiting on the results for it. Obviously, the results, although unknown, could be very important to us because let's say if it was to come back and not have any

> DNA of him or the alleged victim on it, at that point we've got a very good defense that could be made.

(PCR Tr. 14-15). Trial counsel went further, saying, "I felt that we needed to find out what that actually was for us to make a decision with trial and how that we were going to handle that. We did talk about it, but I believe, if I remember right, I thought we waived speedy trial at some point during the proceedings." (PCR Tr. 15). Trial counsel was asked, "So you fully explained to Mr. Krogstad he had the right to elect that 90 day speedy trial and he declined to do that?" His response was:

> Yes. We did speak about, obviously, anything that involves trial. Obviously, speedy trial is one of those rights that the person has. I also explained to him a lot of times time will play more so in the defendant's favor than it does the prosecution. There are times, like I said, when you do use speedy trial. I didn't feel that this was probably one of them where we wanted to do that on.

(PCR Tr. 15-16).

[¶25] The State then had an opportunity to elicit testimony from trial counsel with regard to the DNA and speedy trial issues. Trial counsel testified that prior to receiving the report, he had no idea whether the DNA testing would be inculpatory or exculpatory. (PCR Tr. 26-27). Trial counsel testified that he agreed to continuances and did not raise the speedy trial issue because he felt it was important to know what the DNA analysis would show. Trial counsel testified:

> I felt it was important for us to see it. That we needed to know what we're dealing with on it because it had the potential to be used by us potentially

> for exoneration. . . . Well, let's say that it was to come back and none of the victim's DNA were to be found on it. Well, she had been testifying and said that this item had been used on her and if there was no DNA at all from her on it, well, then is she telling us the truth or not.

(PCR Tr. 28).

[¶26] Trial counsel testified at the post-conviction hearing that he had reasons for waiting on the DNA testing. He testified, "[t]he primary issue that got this all going was the victim in this case reporting that she had been basically molested through the use of a vibrator. Well, if the DNA did not show, if there was nothing that would be corroborative of that with her, you know, then starts to kind of throw other things into question as well." (PCR Tr. 35-36).

[¶27] Trial counsel also testified that had he done a speedy trial request, the State could have asked the State Lab to expedite their testing. The State asked trial counsel, "[i]s it also possible that upon receiving the request the State could ask the lab to rush their work?" (PCR Tr. 43). Trial counsel responded, "that is a possibility and it's happened before. . . . They have kind of a hierarchy they go on out of their lab. You know, those cases of a high nature such as a AA felony will go to the top of the list if there's a need to." (Id.). Trial counsel agreed that simply making a speedy trial demand would not have necessarily meant that the State would not have had DNA results by the time of trial. (Id.). Trial counsel also testified that if the lab report indicated that Jane Doe's DNA was not on the body wand massager his argument would be better than simply not having a DNA test at all. (PCR Tr. 43-44).

[¶28] Trial counsel also testified to the reasons he did not seek independent DNA testing. Trial counsel explained, "Part of our theory that we were going on there was the item had been in Mr. Krogstad's vehicle for months. There was the potential for all sorts of people to be contributors to that item, including familial people that could be included into that item as well." (PCR Tr. 16). Trial counsel testified, "[a]nd prior when I've talked to DNA experts and they see those high probabilities, they say, hey, don't use me because all I'm going to be doing is confirming what the State has got." (PCR Tr. 17). Trial counsel's strategy was to attempt to point out the fact that there were numerous potential contributors to the DNA profile. (PCR Tr. 17) Exhibit 32 which was entered at trial included results that said, "[t]he profile developed from the massage wand head swab (Item 1A) is a partial profile and a mixture of at least two individuals. The mixture cannot be separated into major and minor profiles. Neither JANE DOE (Item 2) nor Jeffrey Krogstad can be excluded as contributors to this profile. The profile developed from the massage wand handle swab (Item 1B) is a partial profile and a mixture of two or more individuals. The mixture cannot be separated into major and minor profiles. Neither JANE DOE (Item 2) nor Jeffrey Krogstad (item 3) can be excluded as contributors to this profile." Trial counsel testified that his strategy was to argue to the jury that the DNA testing was inconclusive because there were assumptions about how many contributors there were to the DNA profile. Trial counsel testified:

> So we knew that we had an item that had a lot of different potential for DNA on it. That was the route I went on it, I did not want to confirm the high ratio on the one but I'd rather try to point out that this was used by, or not used, but had come into contact with numerous parties and so that she, that

> the alleged victim, could be one, okay, that's fine, but it could also be brothers, it could be Mr. Krogstad, it could be somebody else that we don't even know about.

(PCR Tr. 17).

[¶29] The State then had an opportunity to question trial counsel on the issue of independent testing. He testified

> Well, again, I've had numerous cases that involved DNA. I have not had a problem with our state DNA results that they are an accredited lab. It appears that they get what appears to be a valid result. You know, if I would have had a question on the result and said, well, I don't think that's right, that obviously could have then led me to seek other testing to be done. I just didn't have that question.

(PCR Tr. 36).

[¶30] Krogstad alleged in his petition, "independent DNA testing will result in exoneration." (Application, 18-21-CV-1778, Index 1, Pg. 7). Krogstad filed his petition on September 3, 2021. The post-conviction evidentiary hearing was held on May 6, 2022. The State Lab DNA report was completed on July 25, 2018. (Ex. 32, 18-21-CV-1778, Index 64). Krogstad made a bold claim that independent DNA testing will result in exoneration. He was given an evidentiary hearing and an opportunity to present evidence to support his claim. Krogstad failed to introduce any evidence to support his assertions. Krogstad was asked, "[d]o you have any evidence to support your claim that an independent examiner would exonerate you?" (PCR Tr. 59) Krogstad responded that he did not. (Id.).

[¶31] Krogstad also alleged that trial counsel was ineffective for not calling an expert witness. He was given an evidentiary hearing to present evidence, perhaps from an expert witness that trial counsel should have called. At the evidentiary hearing, he presented no evidence or testimony to support this allegation. (PCR Tr. 59).

[¶32] The district court denied Krogstad's post-conviction relief. The district court recognized, "[a]t the time when the case was continued while the parties waited for DNA results, nobody knew what the DNA results would be." (18-21-CV-1778, Index 103, ¶ 24). The district court continued, in its analysis: "We now know, of course, that the DNA testing was inculpatory. However, this Court must not analyze the situation with that knowledge. Instead, this Court must put itself in trial counsel's shoes prior to the DNA results being known. We cannot second guess trial counsel's decisions made in real time with the benefits of hindsight." (District Ct. Order, 18-21-CV-1778, Index103, ¶ 24). The district court also recognized that Krogstad produced no evidence to show "that the State lab could not have prioritized the testing to meet a speedy trial demand deadline." (District Ct. Order, 18-21-CV-1778, Index103, ¶ 24).

[¶33] The district court also recognized Krogstad's failure to support his assertions with evidence. The district court wrote: "Krogstad argues that trial counsel was ineffective for failing to submit DNA evidence for independent testing. Krogstad argues that 'independent DNA testing will result in exoneration' without any assertion or evidence to show why that would be the case." (District Ct. Order,18-21-CV-1778, Index103, ¶ 24). The district court recognized: "Krogstad did not offer any evidence to show this Court why the State Crime Lab's results were not accurate or why independent

testing would exonerate him. Krogstad's assertions are unsupported, conclusory allegations." (District Ct. Order,18-21-CV-1778, Index103, ¶ 24).

CONTROLLING LEGAL PRINCIPLES

[¶34] The Sixth Amendment and Article I, section 12 of the North Dakota Constitution guarantee a criminal defendant the right to the effective assistance of counsel.

> A criminal defendant has the right to be represented by counsel under the Sixth Amendment to the United States Constitution and Article I, Section 12 of the North Dakota Constitution. State v. Dahl, 2009 ND 204, ¶ 22, 776 N.W.2d 37. The constitutional right to counsel guarantees effective assistance of counsel. Abdi v. State, 2000 ND 64, ¶ 29, 608 N.W.2d 292. When reviewing claims of ineffective assistance of counsel, we apply the United States Supreme Court's two-part test from Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

State v. Garge, 2012 ND 138, ¶ 10, 818 N.W.2d 718.

[¶35] This Court explained the Strickland two-prong test in Everett.

> The first prong of the Strickland test is measured using "prevailing professional norms," and is satisfied if an applicant proves counsel's

> conduct consisted of errors serious enough to result in denial of the counsel guaranteed by the Sixth Amendment. A defendant must overcome a strong presumption that counsel's performance falls within the wide range of reasonable professional assistance and courts must consciously attempt to limit the distorting effect of hindsight. The second prong requires an applicant to show that there is a reasonable probability that, but for his counsel's error, the result of the proceeding would have been different.

Everett v. State, 2015 ND 149, ¶ 8, 864 N.W.2d 450 (citing Sambursky v. State, 2006 ND 223, ¶ 13, 723 N.W.2d 524; Flanagan v. State, 2006 ND 76, ¶ 10, 712 N.W.2d 602 (internal citations omitted).

> Surmounting Strickland 's high bar is never an easy task. An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial or in pretrial proceedings, and so the Strickland standard must be applied with scrupulous care, lest intrusive post-trial inquiry threaten the integrity of the very adversary process the right to counsel is meant to serve. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one.... It is all too tempting to second-guess counsel's assistance after conviction or adverse sentence.

Lindsey v. State, 2014 ND 174, ¶ 19, 852 N.W.2d 383.

ARGUMENT

[¶36] Krogstad raised numerous allegations in his petition for post-conviction relief. Appellate counsel has focused on three issues, and writes, in paragraph 19 of his

brief that the "allegations regarding the suppression of evidence, Rule 412 notice, credibility vouching, and failure to call expert witnesses will not be discussed in this appellate brief." Issues that are not fully briefed are not to be considered. In Hajicek, this Court wrote, "[i]ssues raised on appeal should be fully briefed, with a fair and adequate opportunity for response from opposing parties. Moreover, we will not consider issues not briefed on appeal." State v. Hajicek, 2020 ND 231, ¶ 16, 951 N.W.2d 203 (quoting Roise v. Kurtz, 1998 ND 228, ¶ 10, 587 N.W.2d 573). This Court has also decided that "[i]ssues not briefed by an appellant are deemed abandoned, and thereby become the law of the case and will not be considered on appeal. State v. Duchene, 2007 ND 31, ¶ 10, 727 N.W.2d 769 (citing Lawrence v. Delkamp, 2006 ND 257, ¶ 13, 725 N.W.2d 211; Haugenoe v. Bambrick, 2003 ND 92, ¶ 14, 663 N.W.2d 175; State v. Keilen, 2002 ND 133, ¶ 13 n. 1, 649 N.W.2d 224; Estate of Murphy v. Maus, 2001 ND 87, ¶ 13 n. 1, 626 N.W.2d 281). This Court's review, then, is limited to the three arguments appellate counsel has briefed: (1) the speedy trial issue; (2) the DNA testing issue; and (3) the issue with regard to Strickland's second prong.

1. Trial counsel was not ineffective for deciding not to request a speedy trial

[¶37] Krogstad argues that his counsel was ineffective for failing to assert his right to a speedy trial. Krogstad asserts that he was not informed of his right to a speedy trial. Krogstad testified that he brought up the speedy trial issue "right away when he first, when I saw him." (PCR Tr. 46). Krogstad further testified that trial counsel did not tell him he needed to request a speedy trial within a certain time. (PCR Tr. 46) Trial counsel, however, testified that he did, in fact, discuss the speedy trial matter with Krogstad. Krogstad's post-conviction attorney asked, "[s]o you fully explained to Mr.

Krogstad he had the right to elect that 90 day speedy trial and he declined to do that?" (PCR Tr. 15). Trial counsel responded:

> Yes. We did speak about, obviously, anything that involved trial. Obviously, speedy trial is one of those rights that the person has. I also explained to him a lot of times time will play more so in the defendant's favor than it does the prosecution. There are times, like I said, when you do use speedy trial. I didn't feel that this was probably one of them where we wanted to do that on.

(PCR Tr. 15-16).

[¶38] Krogstad's testimony conflicted with his trial counsel's testimony. This Court has consistently recognized that a district court is better able to weigh conflicting testimony. "Conflicts in testimony [are] resolved in favor of affirmance, as we recognize the trial court is in a superior position to assess credibility of witnesses and weigh the evidence." Dodge v. State, 2020 ND 100, ¶ 17, 942 N.W.2d 478 (quoting State v. Tollefson, 2003 ND 73, ¶ 9, 660 N.W.2d 575 (quoting State v. Heitzmann, 2001 ND 136, ¶ 8, 632 N.W.2d 1) (see also, Isxaaq v. State, 2021 ND 148, ¶ 13, 963 N.W.2d 260; State v. Fischer, 2008 ND 32, ¶ 10, 744 N.W.2d 760). This Court should weigh the conflict in the testimony in favor of affirmance.

[¶39] Krogstad cites to no authority to suggest that failure to file a speedy trial demand is, per se, ineffective assistance of counsel. This Court in Ratliff considered a post-conviction ineffective assistance of counsel claim related to an alleged failure to request a speedy trial. Ratliff argued that his counsel was ineffective for failing to demand a speedy trial. This Court applied the Strickland test, writing, "Ratliff asserts

that had an earlier speedy trial demand been made and an earlier trial held, 'the weight of the evidence would have been less.' On post-conviction, Ratliff has not presented any evidence in support of this contention. Even assuming, without deciding, Ratliff's trial counsel was ineffective in failing to make a demand for speedy trial, Ratliff has not shown how the outcome of his case would have been different, as required by the second prong of the ineffective assistance of counsel standard, were he tried sooner. We conclude Ratliff has not shown he was denied effective assistance of counsel." Ratliff v. State, 2016 ND 129, ¶ 7, 881 N.W.2d 233. This Court's decision in Ratliff shows that there is no per se rule. This Court must analyze the speedy trial argument under Strickland.

[¶40] In analyzing Krogstad's speedy trial argument under Strickland, we must first consider whether trial counsel was ineffective for failing to push for a speedy trial. First, the delay was primarily due to wanting to see the DNA results. On November 2, 2018, the parties stipulated to continue the matter because the parties were waiting for the DNA results. (18-2018-CR-1581, Index 34). At the post-conviction hearing, trial counsel testified that he wanted to see the DNA results from the State laboratory. The State lab results, as trial counsel testified, "had the potential to be used by us potentially for exoneration." (PCR Tr. 28). At the time the parties stipulated to continuances, nobody knew whether the DNA results would be inculpatory or exculpatory. We cannot punish trial counsel for failing to divine what the lab results would be. "Trial counsel's conduct is presumed to be reasonable and courts consciously attempt to limit the distorting effect of hindsight." Heckelsmiller v. State, 2004 ND 191, ¶ 3, 687 N.W.2d 454 (citing Lange v. State, 522 N.W.2d 179, 181 (N.D. 1994)).

[¶41] We must next consider whether the results would have been different if trial counsel *did* push the speedy trial issue. This forces us to engage in a hypothetical exercise. If trial counsel *did* push the speedy trial issue, the State would likely have asked the State laboratory to expedite their testing. In fact, there is a specific form that can be filled out and sent to the State laboratory to request case prioritization, and it is on the Attorney General's website.[1] Trial counsel testified that the State lab can expedite their testing. (PCR Tr. 43). And the district court also recognized that "there has been no showing by Krogstad that the State Lab could not have prioritized the testing to meet a speedy trial demand deadline. [Trial counsel] testified from experience that the State Lab likely would have done so if necessary." (Dist. Ct. Order ¶ 24).

[¶42] The other potential hypothetical scenario would be if the speedy trial demand was made and the trial was held without the benefit of DNA results. There was ample evidence from which a jury could have convicted Krogstad even without the DNA. The jury heard the victim's forensic interview and observed her testimony. The jury heard the victim tell the forensic interviewer that Krogstad "takes his hand and puts it on her vagina, he asks her to take her pants and underwear off and he plays with her vagina and she likes that." (Jury trial tr. P. 55). The jury heard Jane Doe describe the blue body wand massager with diamonds on the bottom. The jury saw her drawing of the body wand massager (Ex. 2), and the jury saw how closely it matched the massager (Ex. 18). The jury heard how Jane Doe described watching "girl on girl" and "butt stuff" videos on Krogstad's phone (Jury Trial Tr. P. 61) and how similar videos were discovered on

[1] https://attorneygeneral.nd.gov/sites/ag/files/documents/Crime-Lab1/3-Information/GeneralForms/RequestCasePriority-SFN60165.pdf

Krogstad's phone. (Ex. 30). The jury saw the extraction report of Krogstad's cell phone. (Ex. 29). The jury saw his internet searches for: "Is it normal for a 6 year old to be sexually curious"; "6 year old daughter masturbating"; "Can a 7 year old girl get pregnant? If yes how is it possible?"; "how can a 7 year old get pregnant"; "I was six when a man first touched me"; "6 totally normal things young girls do when they're discovering their sexuality that no one ever talks about"; "Let's say a 9 year old was raped before she ever had a period/menstruation (like it never happened like ever) would she be a virgin"; "how can u tell if your child has bee[n] penetrated"; and "Sexuality and relationships for your 6- to 8-year old." The jury was given ample evidence, even without the DNA, to convict Krogstad.

[¶43] The district court properly found that trial counsel's performance did not fall below an objective standard of reasonableness. Krogstad failed to show the district court that the results would have been different had trial counsel pushed the speedy trial issue. The district court properly denied Krogstad's speedy trial argument.

2. Trial counsel was not ineffective for failing to secure independent DNA testing

[¶44] Krogstad argues, "once the DNA results were returned, Krogstad was adamant with trial counsel to find some way to discount their results."

[¶45] Trial counsel *did* try to discount the lab's results. However, at this stage, our review is limited to Strickland's two prongs. It is critical to remember that Krogstad bears the burden to show that trial counsel was ineffective in failing to get independent DNA testing *and* that if independent DNA testing was completed, the results would have been different.

[¶46] In this case there was no evidence presented to the district court that independent DNA testing would have made a difference. Krogstad offered no such evidence to the district court, which properly concluded: "No evidence was offered at the May 6, 2022 hearing regarding this allegation. Krogstad relies on his conclusory allegations that [trial counsel] was ineffective because he failed to call expert witnesses simply because the State called expert witnesses. Therefore, Krogstad has failed to overcome the presumption that trial counsel's representation fell within the wide range of reasonable professional assistance." (Dist. Ct. Order ¶ 30).

3. The district court properly analyzed counsel's performance under Strickland.

[¶47] Krogstad argues the district court improperly applied Strickland by focusing on the first prong. The State agrees that the district court based its rulings primarily on the first prong. However, there is no requirement that a district court consider both prongs. In fact, this Court has encouraged district courts to do the opposite.

[¶48] In Booth, this Court wrote:

> Courts need not address both prongs of the Strickland test, and if a court can resolve the case by addressing only one prong it is encouraged to do so. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.

Booth v. State, 2017 ND 97, ¶ 8, 893 N.W.2d 186 (citing Osier v. State, 2014 ND 41, ¶ 11, 843 N.W.2d 277; Broadwell v. State, 2014 ND 6, ¶ 7, 841 N.W.2d 750; Garcia v. State, 2004 ND 81, ¶ 5, 678 N.W.2d 568 (internal citations omitted)).

[¶49] A district court need not analyze both Strickland prongs, and it cannot be reversible error for a district court to follow this Court's advice in Booth.

[¶50] In this case, the district court concluded that trial counsel's performance did not fall below an objective standard of reasonableness. Perhaps the district court did not want to engage in a hypothetical exercise to determine what the results would have been in the alternate universe where trial counsel pushed a speedy trial issue. To do so would require guessing as to whether the State would have requested case prioritization from the lab, and whether the lab would have been able to complete their testing in time for trial. Or, the district court would have had to guess at whether the jury would have convicted Krogstad based on all the other evidence and testimony submitted at the trial, with the exception of the DNA results. Certainly, the DNA results were compelling, but this case did not rest solely on DNA. The district court followed this Court's precedent in Booth and resolved the case based on the reasonable performance prong. The district court did not err in doing so.

CONCLUSION

[¶51] This Court has consistently warned against using the benefit of hindsight to judge an attorney's decisions. "[C]ourts must consciously attempt to limit the distorting effect of hindsight." Brewer v. State, 2019 ND 69, ¶ 6, 924 N.W.2d 87 (quoting Rourke v. State, 2018 ND 137, ¶ 5, 912 N.W.2d 311). In analyzing this case, we must put ourselves in trial counsel's shoes at the time he decided not to press a speedy trial claim. At that moment in time, trial believed it was important to wait for the DNA results. We cannot judge trial counsel's performance with the knowledge that the DNA results were inculpatory.

[¶52] Further, we cannot rely on Krogstad's assertions that he even demanded a speedy trial. There was contradictory evidence on this issue. While Krogstad asserts that he was not advised fully on the speedy trial issue, trial counsel testified that he did fully explain to Mr. Krogstad that he had the right to elect the 90 day speedy trial.

[¶53] In this case, Krogstad failed to meet his heavy burden. The district court properly denied Krogstad's application for post-conviction relief. This Court should affirm the district court.

Respectfully submitted this 11th day of January, 2023.

/s/ Andrew C. Eyre
Andrew C. Eyre (#07121)
Assistant State's Attorney
Grand Forks County
P.O Box 5607
Grand Forks, ND 58206
(701) 780-8281
E-Service Address: sasupportstaff@gfcounty.org

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Jeffrey Scott Krogstad, Petitioner / Appellant, vs. State of North Dakota, Respondent / Appellee.	))))))))))	Supreme Court No. 20220264 Grand Forks County District Court Case No. 18-2021-CV-01778

CERTIFICATE OF COMPLIANCE

[¶1] The State of North, by and through Assistant State's Attorney Andrew C.Eyre hereby certifies that the attached brief complies with the page limitation as set forth in Rule 32 of the North Dakota Rules of Appellate Procedure. The electronically filed brief contains 29 pages.

Dated this 11th day of January, 2023.

/s/ *Andrew C. Eyre*
Andrew C. Eyre (#07121)
Assistant State's Attorney
Grand Forks County
P.O Box 5607
Grand Forks, ND 58206
(701) 780-8281
E-Service Address: sasupportstaff@gfcounty.org

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Jeffrey Scott Krogstad, Petitioner / Appellant, vs. State of North Dakota, Respondent / Appellee.	)))))))))	Supreme Court No. 20220264 Grand Forks County District Court Case No. 18-2021-CV-01778

DECLARATION OF SERVICE BY ELECTRONIC FILING
SA# 147887

The undersigned, being of legal age, declares under penalty of perjury under the law of North Dakota, that the foregoing is true and correct, that on the 11th day of January, 2022, she served true copies of the following documents:

CERTIFICATE OF COMPLIANCE;
BRIEF OF APPELLEE

electronically through the Supreme Court Electronic Filing System to:

Samuel A. Gereszek (ND Bar ID#07040)
Gereszek Law Office, PLLC
3001 32nd Ave S, Ste 1A
Grand Forks, ND 58201
Eservice: eserve@gereszek.law

At the office of the Grand Forks County States Attorney's Office.

Signed on the 11th day of July, 2022, at Grand Forks, North Dakota, United States

/s/ ***Bobbi J Davidson***
Legal Secretary
Grand Forks County
P.O Box 5607
Grand Forks, ND 58206
(701) 780-8281
E-Service Address: sasupportstaff@gfcounty.org