

IN THE SUPREME COURT OF NORTH DAKOTA

STATE OF NORTH DAKOTA
PLAINTIFF AND APPELLEE,
v.
RICHARD RICHARDSON
Defendant and Appellant,

Supreme Court
20220291
Grand Forks County District Court
18-2021-CV-02241

BRIEF

BRIEF OF APPELLANT, RICHARD RICHARDSON III

Appeal from the Criminal Judgment

Entered on May 27th, 2021

In District Court, Grand Forks County, State of North Dakota

The Honorable Jason McCarthy

ORAL ARGUMENT REQUESTED

|s| Benjamin C. Pulkrabek
Benjamin C. Pulkrabek
ND Bar No. 02908
Pulkrabek Law Office
402 First Street NW
Mandan, ND 58554
Office: 701-663-1929
Pulkrabek@lawyer.com
Attorney for the Appellant

TABLE OF CONTENTS

Paragraph Number

TABLE OF CONTENTSPage 2

TABLE OF AUTHORITIES.....Page 3

STATEMENT OF ISSUEPage 4

NATURE OF CASE..... ¶ 1

STATEMENT OF FACTS.....¶ 11

STANDARD OF REVIEW ¶ 19

ARGUMENT.....¶ 22

CONCLUSION¶ 40

ORAL ARGUMENT¶ 43

TABLE OF AUTHORITIES

CASES	Paragraph Number
State v. Richardson 2020 ND 246 950 N.W.2d 761.....	¶ 12
State v. Johnson, 379 N.W.2d 291 (N.D. 1986).....	¶ 20
State vs. Lemons 2004 ND 44 675 N.W.2d 148.....	¶ 30
<u>North Dakota District Court Case:</u>	
State v. Richardson case number 18-2019-CR-02197.....	¶11
<u>Rule:</u>	
Rule 52b.....	¶ 19
<u>Statue:</u>	
NDCC 29-19-06.....	¶ 22, 23, 25, 26, 27
N.D.R.Ev. 103(a)(2).....	¶ 30
<u>Amendments:</u>	
Sixth Amendment the United States Constitution.....	¶ 32
North Dakota Constitution Article 12.....	¶ 32
<u>Abbreviations:</u>	
Page	pg
Line	L
Paragraph	¶

STATEMENT OF THE ISSUE

- **Issue I: Is Richardson’s attorney Patricia Castro giving ineffective assistance of counsel when she only asked the trial judge for a continuance after a witness she had subpoenaed for the trial, Shawnqase Perry, failed to obey the subpoena?**

NATURE OF THE CASE

[¶1] Petitioner Richard Richards III (Richardson) filed a Post- Conviction Relief application on 11/16/2021.

[¶2] The State filed an answer to Richardson’s Post-Convictions application on 11/30/2021.

[¶3] The State filed a Motion with a Brief for Summary Dismissal of Richardson’s application for Post-Conviction Relief on 11/30/2021.

[¶4] Richardson responded to the State Motion on 12/29/2021.

[¶5] The Post- Conviction hearing on Richardson’s application for Post- Conviction Relief was held on 05/27/2022.

[¶6] An Order denying Richardson’s Petition for Post-Conviction Relief was entered on 09/08/2022.

[¶7] The Order for Judgment and Judgment was filed on 09/19/2022.

[¶8] The Notice of Appeal, Order for Transcript, and Notice of Filing. Notice of Appeal was filed on 09/29/2022.

[¶9] The Clerk Certificate of Appeal was filed on 10/18/2022, and the Clerk’s Supplemental Certificate of Appeal was filed on 11/04/2022.

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

STATEMENT OF FACTS

[¶11] This is an appeal from the denial of Richard Richardson III's (Richardson) post-conviction petition. The underlying criminal case is State v. Richardson case number 18-2019-CR-02197.

[¶12] The charge, in this case, was reckless endangerment, a class C felony. The underlying case was appealed to the North Dakota Supreme Court, State v. Richardson 2020 ND 246 (N.W), and was affirmed.

[¶13] The facts in the underlying case occurred on 10/12/2019 in Grand Forks, North Dakota. At about 17:38 hours on the above date, Richardson was parked in a car in front of Orton's South Town Tesoro. The street address of Orton's South Town Tesoro is 2002 South. Washington Street Grand Forks, North Dakota.

[¶14] At about the above time, a car with Texas license plate KRR 3798 drove northbound on the frontage road in front of Otons South Town Tesoro. In that car was a driver and a front-seat passenger. According to Richardson's testimony, the passenger was hanging out the window, leaning over the car, and pointed a firearm at him. He responded by walking towards the car and firing seven rounds from a 45-caliber handgun in the direction of the vehicle. According to Richardson, this firing was done in self-defense.

[¶15] A witness that was with Richardson on 10/07/2019 was Shawnqase Perry (Perry). Mr. Perry is Richardson's cousin Appeal Transcript P. 21 L 17-24.

21 thinking we was going to fight, and one guy was hanging out the
22 windows with something in his hand, and me seeing and not having
23 better visual than Richard, I said, they hanging out the
24 windows with a gun," and Richard fired in self-defense.

[¶16] Before the jury trial Perry was served with a subpoena requiring him to appear at trial. He talked to Patricia Castro (Attorney Castro), Richardson's attorney, about appearing at trial, and

he said he would appear at the trial. However, when the trial time came, Perry forgot about the trial and went to work instead.

[¶17] Defendant's attorney Castro when Perry didn't appear for trial, only asked the trial judge for a continuance. The things she didn't do or ask for are set out in the Appeal Transcripts pg. 18 L 19 to PG 19 L6:

19. Q. And when you were making that request for a
20. continuance you did not convey to the Court or provide the
21. Court with an offer of proof as to what Mr. Perry's anticipated
22. testimonies would be; right?
23. A. I didn't, no.
24. Q. So, you didn't explain to the Court that
25. Mr. Perry would corroborate Mr. Richardson's claim of
 1. self-defense that a firearm was brandished at them; right?
 2. A. That's correct.
 3. Q. And you didn't provide any information for the Court
 4. to really know that this was a crucial witness for the defense.
 5. You didn't provide anything?
 6. A. No.

[¶18] The above paragraph sets out reasons why Mr. Perry's testimony was necessary for Mr. Richardson's claims of self-defense.

STANDARD OF REVIEW

[¶19] In this case, Richardson is claiming the trial courts error is a 52b error:

- (b) Obvious Error. An obvious error or defect that affects substantial rights may be considered even though it was not brought to the court's attention.

[¶20] According to State v. Johnson, 379 N.W.2d 291 (N.D. 1986) in assessing the possibility of error concerning substantial rights under subdivision (b) of this rule, the court examines the entire record and the probable effect of the actions alleged to be an error in light of all the evidence.

ISSUE

[¶21] Is Richardson's attorney Patricia Castro giving ineffective assistance of counsel when she only asked the trial judge for a continuance after a witness she had subpoenaed for the trial, Shawnqase Perry, failed to obey the subpoena?

ARGUMENT

[¶22] The North Dakota statute that applies when a witness fails to obey a subpoena is NDCC 29-19-06.

[¶23] **NDCC 29-19-06. Application for continuance on ground of absent witness.**

[¶24] An application for a continuance on the ground that a witness is absent must show:

1. That the applicant has used due diligence to prepare for the trial;
2. The nature of the diligence used;
3. The name and residence of the absent witness;
4. What the applicant expects or believes such witness would testify were that witness present and orally examined in court;
5. That the testimony of the witness is material;
6. The nature of any document wanted and where the same may be found;
7. That the same facts cannot be satisfactorily shown by other evidence; and
8. That the witness is not absent through the connivance or counsel of the applicant.

[¶25] As to the above statute NDCC 29-19-06, Richardson's attorney Castro testified at the post-conviction hearing and indicated that she complied with NDCC 29-19-06 (1)(2).

[¶26] When it came to NDCC 29-19-06.3, she only disclosed the witness's name and not his residence.

[¶27] The requirements of 29-19-06-(4)(5)(6)(7)(8) were not even mentioned by attorney Castro in her motion for continuance.

[¶28] At Richardson's trial, attorney Castro only called two witnesses, Mr. Richardson and Christopher Richardson, during the defense's case. She had planned to call three witnesses. The third witness was Shawngase Perry (Perry). Mr. Perry. Although he was subpoenaed, he failed to obey that subpoena and went to work. Instead, when Perry didn't appear for trial, all she did was ask the trial judge for a continuance.

[¶29] Christopher Richardson was not present when that shooting took place. Therefore, there was no witness to support Mr. Richardson's testimony that the passenger in the car with the

Texas plates was hanging out the passenger window and had a firearm. The following is what Mr. Perry testified to in Appeal Transcript P21 L17- L24:

17 Q. Okay. Now I want to just talk about what you
18 observed when Mr. Richardson and the alleged victims made
19 contacts. What did you observe the alleged victims do?
20 A. They pulled around. We hopped out of the car
21 thinking we was going to fight, and one guy was hanging out the
22 windows with something in his hand, and me seeing and not having
23 better visual than Richard, I said, they hanging out the
24 windows with a gun," and Richard fired in self-defense.

[¶30] According to State vs. Lemons 2004 ND 44 [13] (14):

“[¶13] After the trial court denied Lemons’ telephonic testimony request, Lemons moved for a continuance to allow time to procure J.R., asserting J.R.’s testimony was essential to Lemons’ case and J.R. could provide exculpatory evidence. The State objected, and the trial court denied Lemons’ motion. Lemons’ counsel failed to make an offer of proof as to the substance of J.R.’s testimony.” (Emphasis added)

“[¶14] This issue is not preserved for appeal, due to Lemons’ failure to make an offer of proof regarding J.R.’s testimony. See N.D.R.Ev. 103(a)(2). “Error cannot be predicated upon a ruling which excludes evidence unless the party offering the evidence makes an offer of proof, or the substance of the evidence is apparent from the context in which the question was asked.””

[¶31] The above quote clearly states that an issue is not preserved for an appeal unless there is an offer of proof or the substance of the evidence is apparent from the context in which the question was asked. In this case, there was no offer of proof or the substance of the evidence that is apparent from the question asked.

[¶32] Richardson's application alleges ineffective assistance of counsel under the Sixth Amendment. The Sixth Amendment and Article 1, 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. The constitutional right to counsel guarantees effective assistance of counsel.

[¶33] The above paragraph sounds like a criminal defendant has a chance of winning an incompetent counsel claim. However, after the above paragraph, there are always cites from case law by the State that makes it almost impossible to win an incompetency of counsel claim. In all incompetency of counsel claims I have ever read, the defendant never wins because the burden of proof is so great that it seems if the defendant's counsel was licensed and was warm and breathing at trial, the defendant loses.

[¶34] In this case, the witness subpoenaed was Mr. Perry. He is an essential witness for Richardson because he is the only other witness to believe Richardson saw the firearm. Richardson is the one charged. If he is found guilty, he goes to prison. Perry has no interest in the case. He has nothing to gain or lose when he testifies that he saw a firearm in the passenger's hand.

[¶35] Perry was at work during the trial. A call to him by attorney Castro would have gotten him to court. If it didn't, the sheriff could have gone and got him. Getting Mr. Perry to court wouldn't have delayed the trial by more than two hours.

[¶36] There is no doubt that attorney Castro did a good job talking to and subpoenaing Perry before the trial. At trial, there is no good reason she couldn't have done more than just asking for a continuance.

[¶37] Of course, the State will argue, so what if she could have done more? Mr. Perry's testimony wouldn't have changed the jury's verdict. That is a good argument, but it is no proof that Perry's testimony wouldn't have changed the verdict.

[¶38] Attorneys don't subpoena witnesses for no reason. Attorney Castro subpoenaed Perry for a good reason. She knew when she did it that he was an essential witness, and she needed him for Richardson's defense.

[¶39] Attorney Castro's doing nothing more at trial than asking for a continuance falls short of proper representation of Perry.

CONCLUSION

[¶40] Attorneys don't subpoena trial witnesses that they don't believe are essential for the defense of a defendant. Mr. Perry was the only witness who could support Mr. Richardson's claim that the passengers in the car had a firearm in his hand.

[¶41] The witnesses for the State testified that the passenger in the vehicle had no firearm in his hand. Their witnesses' testimony was supported by the fact that no firearm was ever found.

[¶42] Mr. Perry's testimony was essential for Richardson's defense. His attorney should have made that clear to the trial judge that his testimony was an essential part of Richardson's defense.

[¶43] Therefore, this case must be remanded to the District Court with an order requiring that the trial Judge hereby grant Mr. Richardson a new trial at which Mr. Perry must be called as a witness.

ORAL ARGUMENT

[¶44] We are requesting an oral argument to better explain the issues that are listed above.

EXHIBIT 1

Dated this 12th day of December 2022.

|s| Benjamin C. Pulkrabek

Benjamin C. Pulkrabek

ND Bar No. 02908

Pulkrabek Law Office

1102 2nd AVE NW

Mandan, ND 58554

Office: 701-663-1929

Pulkrabek@lawyer.com

Attorney for the Appellant

EXHIBIT 2

Dated this 14TH day of December 2022.

|s| Benjamin C. Pulkrabek

Benjamin C. Pulkrabek

ND Bar No. 02908

Pulkrabek Law Office

1102 2nd AVE NW

Mandan, ND 58554

Office: 701-663-1929

Pulkrabek@lawyer.com

Attorney for the Appellant

Dated this 6TH day of January 2023.

|s| Benjamin C. Pulkrabek

Benjamin C. Pulkrabek

ND Bar No. 02908

Pulkrabek Law Office

1102 2nd AVE NW

Mandan, ND 58554

Office: 701-663-1929

Pulkrabek@lawyer.com

Attorney for the Appellant

IN THE SUPREME COURT OF NORTH DAKOTA

STATE OF NORTH DAKOTA
PLAINTIFF AND APPELLEE,

v.

RICHARD RICHARDSON
Defendant and Appellant,

Supreme Court

20220291

Grand Forks County District Court

18-2021-CV-02241

**CERTIFICATE OF
COMPLIANCE**

[¶1] I certify that this appellant's and complies with the page limit of 38 for the brief set forth in N.D. R. App. P. 32(a)(8)(A). The brief in this matter consists of THIRTEEN (13) pages.

Dated this 6th day of January 2023.

/S/ Benjamin C. Pulkrabek

Benjamin C. Pulkrabek

ND Bar No. 02908

Pulkrabek Law Office

402 First Street NW

Mandan, ND 58554

(701) 663-1929

pulkrabek@lawyer.com

Attorney for Appellant

IN THE SUPREME COURT OF NORTH DAKOTA

STATE OF NORTH DAKOTA
PLAINTIFF AND APPELLEE,
v.

RICHARD RICHARDSON
Defendant and Appellant,

Supreme Court
20220291
Grand Forks County District Court
18-2021-CV-02241

CERTIFICATE OF SERVICE

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

1. Brief
2. Certificate of Compliance
3. 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
supclerkofcourt@ndcourts.gov

Andrew C. Eyre #07121
Grand Forks County State's Attorney's Office
124 S. Fourth St.
P.O. Box 5607
Grand Forks, ND 58206-5607

Dated this 6th of January 2023.

/s/ Benjamin C. Pulkrabek
Benjamin C. Pulkrabek, # 02908
Pulkrabek Law Office
1102 2ND AVE NW
Mandan, ND 58554
Office: 701-663-1929
Email: Pulkrabek@lawyer.com
Attorney for the Appellant