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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff/Appellee, vs. Jason Travis O'Neal, Defendant/Appellant	)	Supreme Ct. No. 20220353 District Ct. No. 09-2022-CV-00770

APPELLEE'S BRIEF

Appeal from Order Denying Post-Conviction Relief
entered on December 1, 2022

Cass County District Court
East Central Judicial District
State of North Dakota
The Honorable Stephannie Stiel, Presiding

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JURISDICTIONAL STATEMENT

[¶ 1] Appellate jurisdiction is granted to this Court under the N.D. Const. art. VI, § 2. This Court has jurisdiction over this matter under N.D.C.C. § 29-32.1-14 which provides that a final judgment entered under the Uniform Post-Conviction Procedure Act may be reviewed by the supreme court of this state upon appeal.

STATEMENT OF THE ISSUE

[¶ 2] The State agrees with the Appellant's Statement of the Issue as described in ¶ 1 of Appellant's brief.

STATEMENT OF THE CASE

[¶ 3] This is an appeal from an order denying post-conviction relief by Jason Travis O'Neal (hereinafter referred to as "O'Neal"). On March 25, 2022, O'Neal filed a pro se Application for Post-Conviction Relief. (R1:1-7). A post-conviction evidentiary hearing was held on October 14, 2022. The district court denied O'Neal post-conviction relief on December 1, 2022. (R20:1-9). O'Neal now appeals the district court's order. (R21:1-2).

STATEMENT OF THE FACTS

[¶ 4] On August 24, 2020, O'Neal was charged with Attempted Murder in addition to four other crimes. (09-2020-CR-03639 R1:1-2). That same day, O'Neal applied for court appointed counsel. (3639 R13:1-5). Counsel was assigned. (3639 R40:1). O'Neal pleaded guilty to the Attempted Murder charge on April 19, 2021, and was sentenced. (3639 R53:1-2). The remaining four charges were dismissed. (3639 R53:2-4).

[¶ 5] O'Neal applied for post-conviction relief. (R1:1-7). His trial counsel testified at the post-conviction evidentiary hearing on October 14, 2022. (R31:6:17-20).

Over the course of representation, O'Neal and his trial counsel had extensive conversations regarding the strategy for his case. (R31:8:13-15). O'Neal estimated he spoke with his trial counsel once or twice a month over the phone and three or four times in person. (R31:24:10-15). These conversations included discussing different defenses and evidence the defense would present at trial. (R31:10:4-5). O'Neal and his trial counsel discussed an alternate perpetrator defense. (R31:10:8-15)(R31:19:20-24). Ultimately, the alternate perpetrator defense was not pursued because it was determined to be unviable. (R31:10:21-25). O'Neal's trial counsel believed there was insufficient physical evidence to corroborate an alternate perpetrator claim. (R31:11:23-12:2).

[¶ 6] O'Neal and his trial counsel discussed independent testing of the knife allegedly used during the incident. (R31:16:23). Independent testing was not conducted because the defense was not pursuing the issue of whether the victim was, in fact, injured or whether the blood on the knife belonged to the victim. (R31:17:3-9). O'Neal's trial counsel testified that the State had other evidence implicating O'Neal, including O'Neal living at the apartment at the time of the incident making it very likely that his DNA would have been on items in the apartment. (R31:11:6-15). Furthermore, there was an issue involving the possibility that O'Neal was under the influence of an illicit substance at the time which put the clarity of his recollection into question. (R31:13:12-18).

[¶ 7] O'Neal testified that his trial counsel explained the State had significant evidence against O'Neal even if the knife in question was not admitted into evidence. (R31:21:23-22:1). O'Neal claimed his trial counsel tried to push him into taking the plea agreement offer. (R31:22:13-15). When describing what he meant by "pushing," O'Neal told the court:

> Basically her just saying that it's better that I go to plea bargain and take my plea because there is no – that going to trial would be a more dangerous situation for me to go through trial because I wind up facing more time if I was found guilty, which the way she made it sound, the prosecutor had all of this other evidence against me that puts me at the crime, puts me doing everything, and, you know, basically no chance of me getting –

(R31:22:16-25). O'Neal stated his trial counsel explained the State was attempting to deem O'Neal a habitual offender and what effect that would have on the penalty imposed if O'Neal were found guilty. (R31:22:4-9).

[¶ 8] O'Neal received copies of discovery for his case and read the statements from law enforcement, doctors, and the victim. (R31:29:15-18). He was aware that the victim identified O'Neal as the perpetrator. (R31:20:22-21:1). O'Neal was also aware of other physical evidence collected such as the victim's bloody bathrobe and pictures of the victim's injuries. (R31:28:17-29:12).

[¶ 9] O'Neal's trial counsel testified that O'Neal was made aware of plea negotiations, the terms of those negotiations, and how a plea agreement would affect him. (R31:12:24-14:2). During this time, O'Neal did not persist in asserting his innocence. (R31:13:3-6). O'Neal and his trial counsel identified O'Neal's goal in resolving the case. (R31:15:12-15). The defense's goal was tailored to the consequences faced by O'Neal, namely the length of sentence that may be imposed. (R31:15:21-23). The Attempted Murder charge was subject to the 85-percent rule which was discussed with O'Neal. (R31:16:6-8). O'Neal testified that his trial counsel neither told O'Neal that he did not have a right to go to trial nor that O'Neal had to take the plea agreement offer. (R31:21:17-20).

[¶ 10] When asked if O'Neal's trial counsel would have continued to trial had there not been a change of plea, O'Neal's trial counsel answered, "Absolutely."

(R31:14:15-18). Negotiating to resolve the case and developing trial strategies were tandem goals. (R31:17:10-17). Not going to trial was never an option according to O'Neal's trial counsel and the decision of whether to proceed with trial was O'Neal's. (R31:17:18-20).

[¶ 11] O'Neal's trial counsel found O'Neal "to be a very intelligent client, very involved in his case, very capable of expressing his position on certain matters." (R31:17:22-18:4). O'Neal did not express dissatisfaction with his trial counsel's representation as the change of plea hearing approached. (R31:13:19-24). At the change of plea hearing, O'Neal's trial counsel was under the impression O'Neal was acting knowingly and voluntarily. (R31:17:22-25).

[¶ 12] Following the evidentiary hearing, the district court entered an order denying post-conviction relief. (R20:1-9). In it, the court found that O'Neal failed to present evidence regarding information or specific statements indicating which witnesses were inconsistent or when he learned of such conflicting statements; therefore, O'Neal did not meet his burden for relief based on new evidence. (R20:5-6:¶12). The district court also found O'Neal failed to meet his burden for either prong of his ineffective assistance of counsel claim when the testimony of both O'Neal and his trial counsel (1) indicated his trial counsel was acting with objective reasonableness by explaining the risks of trial and the penalties Mr. O'Neal was facing, (R20:7-8:¶16), and (2) failed to show a reasonable probability the result of the proceeding would have been different. (R20:8:¶18).

STANDARD OF REVIEW

[¶ 13] The State agrees with the Appellant's Standard of Review as laid out in ¶ 8 of the Appellant's brief.

LAW AND ARGUMENT

I. The district court did not error when it denied O'Neal's application for post-conviction relief after O'Neal failed to establish new evidence exists and to meet the two-prong test outlined in Strickland.

[¶ 14] O'Neal argues there was ineffective assistance of counsel because his trial counsel decided against forensic testing of certain evidence, and had such testing been pursued, new evidence would have been discovered. Post-conviction relief proceedings are civil in nature and are governed by the North Dakota Rules of Civil Procedure. Flanagan v. State, 2006 ND 76, ¶ 9, 712 N.W.2d 602. The petitioner has the burden of establishing grounds for post-conviction relief. Tweed v. State, 2010 ND 38, ¶ 15, 779 N.W.2d 667. A trial court's findings of fact in actions for post-conviction relief will not be disturbed unless clearly erroneous. Frey v. State, 509 N.W.2d 261, 263 (N.D. 1993). A finding of fact is clearly erroneous if induced by an erroneous view of the law, no evidence exists to support it, or the reviewing court is left with a definite and firm conviction that a mistake has been made. Bernhardt v. Harrington, 2009 ND 189, ¶ 5, 775 N.W.2d 682. Questions of law are fully reviewable on appeal in post-conviction proceedings. Tweed, at ¶ 15.

A. Newly Discovered Evidence

[¶ 15] Under N.D.C.C. § 29-32.1-01(1)(e), "[a] person who has been convicted of and sentenced for a crime may institute a proceeding applying for relief under this chapter upon the ground that evidence, not previously presented and heard, exists requiring vacation of the conviction or sentence in the interest of justice." This ground is similar to a request for a new trial based on newly discovered evidence under N.D.R.Crim.P. 33 and requires the same showing to obtain a new trial. Breding v. State, 1998 ND 170, ¶ 19, 584 N.W.2d 493. To prevail on a motion for new trial on the basis of newly discovered evidence

under N.D.R.Crim.P. 33, the petitioner must show: (1) the evidence was discovered after trial, (2) the failure to learn about the evidence at the time of trial was not the result of the petitioner's lack of diligence, (3) the newly discovered evidence is material to the issues at trial, and (4) the weight and quality of the newly discovered evidence would likely result in an acquittal. Syvertson v. State, 2005 ND 128, ¶ 9, 699 N.W.2d 855. If the newly discovered evidence is not likely to be believed by a jury or change the result of the original trial, the petitioner has failed to meet the burden of proof. State v. Steinbach, 1998 ND 18, ¶ 22, 575 N.W.2d 193.

[¶ 16] O'Neal argues that his trial counsel failed to have forensic testing conducted on the knife, which would have provided more evidence about how the crime occurred and would have supported an alternate perpetrator defense. (At. Br. at ¶ 11). Addressing the first prong, that the evidence was discovered after trial, O'Neal argues because his trial counsel decided against testing the knife, the evidence was not discovered prior to trial. (App. Br. at ¶ 11). The evidence was, in fact, discoverable before trial but was not pursued because of the trial strategy chosen by O'Neal's trial counsel. The decision to forgo forensic testing on the knife came after discussions O'Neal had with his trial counsel. For that reason, O'Neal fails to meet the first prong.

[¶ 17] Regarding the second prong, which evaluates O'Neal's diligence, O'Neal argues it was his trial counsel's lack of diligence that resulted in the failure to learn of the DNA results that would have come from testing the knife. (App. Br. at ¶ 11). Conversely, it was due to O'Neal's trial counsel's diligence that the knife in question was not tested. As his trial counsel testified, O'Neal had been living at the victim's residence at the time of the incident making it very likely that O'Neal's DNA would have been on items in the

apartment, including the knife in question. (R31:11:6-15). O'Neal's trial counsel evaluated the risk of finding O'Neal's DNA on the knife instead of an alternate perpetrator's. Considering there was no evidence to support an alternate perpetrator theory outside of what could have been found on the knife, the risk outweighed the benefit. (R31:11:23-12:2). O'Neal and his trial counsel discussed the alternate perpetrator theory and O'Neal was aware his trial counsel decided to forgo forensic testing of the knife. Had O'Neal felt so strongly about forensic testing leading to his acquittal, he could have insisted that his trial counsel proceed with the testing. (R31:10:8-15)(R31:19:20-24). He did not do so. O'Neal subsequently fails to meet the second prong.

[¶ 18] In addressing the third prong, Mr. O'Neal asserts the knife was alleged to be the chief implement of the crime, and forensic testing of the knife could have revealed an alternate perpetrator, making the knife material to the issues at trial. (At. Br. at ¶ 11). This specific argument was not addressed before the district court. Instead, the district court found whether the victim was injured is not a material issue. (R20:5:¶11). O'Neal fails to meet the third prong.

[¶ 19] O'Neal argues he meets the fourth and final prong, the weight and quality of the newly discovered evidence would likely result in an acquittal, because had that DNA pointed to an alternate perpetrator, such evidence would be strong enough to result in an acquittal. (App. Br. At ¶ 11). Mere presence of another person's DNA being found on the knife would have been insufficient to result in acquittal. O'Neal's trial counsel testified there was no evidence to support an alternate perpetrator defense without testing the knife. Had another's DNA been found on the knife in question, it would have been the only evidence to support that theory. On the other hand, finding O'Neal's DNA on the knife

would have only strengthened the State's case. The State had substantial evidence pointing to O'Neal as the perpetrator including the victim identifying O'Neal as her attacker.

[¶ 20] O'Neal has failed to establish the requirements for a new trial on grounds of newly-discovered evidence. Even if the Court were to accept that DNA evidence could not have been discovered prior to trial, its admission would not likely result in acquittal because the other evidence of O'Neal's guilt was substantial.

B. Ineffective Assistance of Counsel

[¶ 21] The petitioner raising a post-conviction relief claim for ineffective assistance of counsel has the "heavy burden" set forth in the two-prong Strickland test. Bahtiraj v. State, 2013 ND 240, ¶ 8, 840 N.W.2d 605. In Strickland v. Washington, 466 U.S. 668, 688, 694, 104 S.Ct. 2052, the Supreme Court of the United States held that in order to prevail on such a claim, the petitioner must (1) show that counsel's representation fell below an objective standard of reasonableness and (2) show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A court need not address both prongs of the ineffective assistance of counsel standard if the petitioner clearly fails to meet his burden on one of the prongs. Klose v. State, 2005 ND 192, ¶ 10, 705 N.W.2d 809.

[¶ 22] First, the petitioner must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Flanagan, 2006 ND 76 at ¶ 10. The petitioner must specify how and where trial counsel was incompetent. Id. In determining whether counsel's performance was deficient, the Court must consider all circumstances and decide whether there were errors so serious that the petitioner was not accorded 'counsel' guaranteed by the Sixth Amendment. Lange v. State, 522 N.W.2d

179, 181 (N.D. 1994). In reviewing a claim of ineffective assistance of counsel, the Court is mindful that it is for trial counsel, not the trial court, to determine trial strategy and tactics. State v. Wilson, 488 N.W.2d 618 (N.D. 1992). Consequently, there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. State v. Zeno, 490 N.W.2d 711 (N.D. 1992). The Court will not second guess an unsuccessful defense strategy through the distorting effects of hindsight. State v. Norman, 507 N.W.2d 522, 525 (N.D. 1993). An unsuccessful trial strategy does not make defense counsel's assistance defective. Frey v. State, 509 N.W.2d at 263. Strategic choices by trial counsel made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable. Breding, 1998 ND 170 at ¶ 14.

[¶ 23] O'Neal argues his trial counsel did not test the knife because:

> [S]he feared that O'Neal's DNA could have been discovered on items from the victim's home. (R20:5:¶10). However, to the extent that O'Neal's DNA might have been found, that could have been explained by the fact that O'Neal 'was living at the victim's apartment and his DNA would have inevitably been found at the scene.' (R20:3:¶6).

(App. Br. at ¶ 13). In Frey v. State, Frey's trial counsel considered what evidence had been excluded, the evidence that would be admitted if Frey testified, the risks and benefits of Frey's testimony, the evidence before the jury that arguably supported a self-defense theory, the self-defense instruction the court would provide, the burden of proof, and the presumption of innocence. 509 N.W.2d 261, 265 (N.D. 1993). Trial counsel elected to advise Frey not to take the stand and Frey accepted the advice. Frey, 509 N.W.2d at 265. The Court held it could not conclude that trial counsel's conduct was outside the range of reasonable professional conduct as trial counsel did not provide defective assistance in counseling Frey not to testify. Id.

[¶ 24] Over the course of representation, O'Neal and his trial counsel had extensive conversations regarding the strategy for his case. (R31:8:13-15). These conversations included evidence the defense would present at trial and different defense theories. (R31:10:4-5). O'Neal and his counsel discussed an alternate perpetrator defense that was not pursued because it was determined to be unviable as counsel believed there was insufficient physical evidence to support it. (R31:10:8-15)(R31:10:21-25)(R31:19:20-24)(R31:11:23-12:2). O'Neal admitted to receiving copies of discovery and reading its contents. (R31:29:15-18). O'Neal was aware that the victim identified O'Neal as the perpetrator in addition to the existence of other physical evidence. (R31:20:22-21:1)(R31:28:17-29:12). Furthermore, O'Neal failed to provide any other evidence to support an alternate perpetrator theory, such as the possible identity of the other perpetrator or the circumstances surrounding why he believes there was an alternate perpetrator. O'Neal's counsel also explained the penalties O'Neal was facing were he to be convicted at trial versus joining a plea agreement, including the fact that the State was seeking to deem O'Neal a habitual offender. (R31:22:4-9). O'Neal was well informed of the state of his case. He accepted his trial counsel's advice and changed his plea.

[¶ 25] The decision by O'Neal's trial counsel to forgo DNA testing on the knife was strategic and well-reasoned. This Court must not second guess an unsuccessful defense strategy through the distorting effects of hindsight. State v. Norman, 507 N.W.2d at 525. O'Neal has failed to meet the first prong of Strickland. While a court need not address both prongs if the petitioner clearly fails to meet his burden on one of the prongs, the State would like to briefly address the second prong in the event the Court disagrees with the State's assertion that the first prong was not met.

[¶ 26] Second, the prejudice element requires the petitioner to establish that, but for his counsel's errors, a reasonable probability existed that the result of the proceeding would have been different. Flanagan, at ¶ 10. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Id. "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." Id.

[¶ 27] O'Neal testified that his counsel advised him of the amount of evidence the State had against O'Neal and even if the knife in question was suppressed, the State still had sufficient evidence to prove their case beyond a reasonable doubt. O'Neal accepted this advice and changed his plea. O'Neal has failed to meet the second prong of Strickland; therefore, there has not been ineffective assistance of counsel.

II. The district court did not error when it concluded that no manifest injustice existed.

[¶ 28] An application for post-conviction relief, where the petitioner is seeking to withdraw a guilty plea, is treated as a request under N.D.R.Crim.P. 11(d). Kuntz v. State, 2022 ND 189, ¶ 4, 981 N.W.2d 848. Under N.D.R.Crim.P. 11(d)(2), unless the petitioner proves that withdrawal is necessary to correct a manifest injustice, the petitioner may not withdraw a plea of guilty after the court has imposed sentence. The district court has discretion in finding whether a manifest injustice necessitating the withdrawal of a guilty plea exists, and this Court reviews the district court's decision for abuse of discretion. Kuntz, at ¶ 4. An abuse of discretion under N.D.R.Crim.P. 11(d) occurs when the court's legal discretion is not exercised in the interest of justice. Id. A court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or it misinterprets or misapplies the law. State v. Yost, 2018 ND 157, ¶ 6, 914 N.W.2d 157.

[¶ 29] While there is a preference to liberally allow the petitioner to withdraw a guilty plea, withdrawal is not a matter of right. Id. The petitioner has the burden of proving that a fair and just reason supports withdrawal of a guilty plea. Id. Once the petitioner establishes a fair and just reason, the burden then shifts to the State to establish that it would be prejudiced by granting leave to withdraw. Id. To establish prejudice, the State must show prejudice beyond that found in the ordinary case. Id. Courts do not inquire into the matter of prejudice unless the petitioner first shows a good reason for being allowed to withdraw his plea. Id.

[¶ 30] O'Neal failed to establish a fair and just reason to withdraw his guilty plea through either of his claims. Based upon the record and O'Neal's testimony at the post-conviction hearing, the court did not abuse its discretion when it denied O'Neal's wish to withdraw his guilty plea.

CONCLUSION

[¶ 31] For the foregoing reasons, there has been neither an erroneous view of the law nor an abuse of discretion by the district court. O'Neal failed to meet his burden for both his newly discovered evidence and ineffective assistance of counsel claims. Therefore, the State respectfully requests this Court to **AFFIRM** the district's order denying O'Neal's application for post-conviction relief.

Respectfully submitted this 22nd day of March 2023.

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CERTIFICATE OF COMPLIANCE

[¶ 32] This brief complies with the page limit set forth in North Dakota Rules of Appellate Procedure 32(a) and is 17 pages in length.

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CERTIFICATE OF SERVICE

[¶ 33] A true and correct copy of the foregoing document was sent by e-mail on the 22nd day of March 2023, to Scott Diamond at Scott@scottdiamondlaw.com.

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