

CASE NO. A-20-0913

IN THE COURT OF APPEALS FOR THE STATE OF NEBRASKA

THE STATE OF NEBRASKA,
APPELLEE

VS.

BRANDON J. WEATHERS,
APPELLANT

FILED

MAR 31 2021

NEBRASKA SUPREME COURT
COURT APPEALS

Appeal from the District Court
of Douglas County, Nebraska

The Honorable Thomas Otepka, District Judge

REPLY BRIEF OF APPELLANT

BRANDON J. WEATHERS, PRO SE

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PROPOSITIONS OF LAW

I. A defendant seeking relief under the Nebraska Postconviction Act, Neb. Rev. Stat. 29-3001 et seq. (Reissue 2016), must show that his or her conviction was obtained in violation of his or her constitutional rights. State v. Robertson, 294 Neb. 29, 881 N.W. 2d 864 (2016).

II. An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution, causing the judgment against the defendant to be void or voidable. State v. Robertson, 294 Neb. 29, 881 N.W. 2d 864 (2016).

ARGUMENT

A defendant seeking relief under the Nebraska Postconviction Act, Neb. Rev. Stat. 29-3001 et seq. (Reissue 2016), must show that his or her conviction was obtained in violation of his or her constitutional rights. State v. Robertson, 294 Neb. 29, 881 N.W. 2d 864 (2016)

The Appellant stands by his original arguments in the Brief of Appellant.

Appellate counsel was ineffective for failing to assign trial counsel's errors. The Appellant concedes that the ineffective claim against trial counsel is barred as the Appellant had different counsel on appeal.

The Appellees' arguments are without merit and will be refuted.

UNVERIFIED POSTCONVICTION PETITION

The State asserts that the Postconviction motion was properly denied because it was not verified. This is false. The State never objected by filing a motion to strike the Petition and instead proceeded to answer the Petition. This issue can not now be brought on appeal for the first time as the State waives the verification by filing an answer. "A motion to strike a petition for want of verification is waived by the filing of an answer before a ruling on the motion." Blodgett v. Swanson Bros. et al., 105 Neb. 191 (1920)

PRIOR VOID CONVICTION

The State says that "Weather's underlying claim was that his trial counsel was ineffective to collaterally attack his

first set of convictions on the ground that they were obtained in violation of his right to counsel at trial.

But even assuming such a collateral attack was permissible, Weather's allegations include the attachments to his amended motion for postconviction relief, which refute his assertion that he did not validly waive counsel." See Brief of Appellee Pg. 7.

The State has not directed this Court to ANYWHERE ON the record or in the transcripts provided by the Appellant, to where such a waiver of counsel exists, even though the district court specifically points to BOE 70:16-18. in the prior conviction, as the waiver.

Second, a collateral attack on a prior conviction obtained without counsel is more than permissible. "Defendant may, in a subsequent proceeding, collaterally attack a prior conviction obtained in violation of the defendant's right to counsel if the prior conviction is used to support guilt or enhance punishment for another offense." State v. Baker, 169 Wis. 2d 49.

The colloquy by the district court was constitutionally deficient as to waiver on November 4TH, 2015 when the

Appellant discharged counsel as the district court NEVER attempted to obtain a waiver in the first place, or simply forgot to conduct its constitutional duty. (T17-T21).

COURT: Do you still want to go forward on your motion to Dismiss Current Counsel?

WEATHERS: Yes.

COURT: One of the things you need to understand, Mr. Weathers, is that you have a public defender appointed to you. So your options going forward at this point-- there's three of them. You can hire your own attorney, which I'm assuming you don't have the funds to do so.

WEATHERS: No, ma'am.

COURT: Okay. Then you get a public defender appointed, which you have, and you don't get to choose which public defender you have. So you go forward with Mr. Marcuzzo; or, three, you represent yourself, which on charges like this, I think it's a really bad idea, but those are your options.

So your options are to hire your own attorney, which you've indicated you don't have the funds to do so; you have a

public defender that's already appointed for you, which he'll remain your attorney; or you can represent yourself. How do you want to proceed?

WEATHERS: I'll represent myself.

COURT: That's a really bad idea, Mr. Weathers, because--

WEATHERS: Mr. Marcuzzo is not trying to help me, ma'am.

COURT: Well, what I am going to tell you right now is that, even if you want to represent yourself, Mr. Marcuzzo is still going to be appointed as your legal advisor.

WEATHERS: That's fine.

COURT: But I think that you need to take the opportunity to speak with Mr. Marcuzzo about this, because it's--

WEATHERS: I've lost my six-month speedy trial, because I've told Mr. Marcuzzo repeatedly of things that need to be done, what we needed, and he's done absolutely nothing. He doesn't even know of any witnesses that I have after 11 months. He doesn't know any of them.

COURT: There's an attorney/client privilege as far as what you and Mr. Marcuzzo have discussed.

WEATHERS: I understand.

COURT: What I can tell you is he's an excellent attorney who has been practicing law here for a long time. If he makes decisions based on what he feels should or shouldn't be addressed, that's between you and him and your discussions, and that's not something that-- I want to tell you that there are a lot of things encompassed in the attorney/client privilege, and I don't think sitting here right now you truly appreciate what that is.

So I don't want to get into discussions that you and Mr. Marcuzzo have had with respect to how you're approaching your defense in this case, but what I'm telling you is that you need to proceed with an attorney.

WEATHERS: I'm not going with Mr. Marcuzzo. I will represent myself. This is-- all this is is a story. And like I said, then, the exact-- the relationship was inappropriate, but the entire--

COURT: I'm going to stop you right there, Mr. Weathers. You're making statements on the record that are not in your best

interest, and based on that and based on--

WEATHERS: I'm not taking--

COURT: I'm going to deny your--

WEATHERS: No. I'm not taking-- I'm not going to talk to him if he comes to see me. I'm not saying anything to him.

COURT: He is your--

WEATHERS: I won't say anything else, but I'm not--

COURT: Mr. Weathers, you're interrupting me, and I don't appreciate that, sir. So you need to stop--

WEATHERS: I apologize.

COURT: -- talking right now.

WEATHERS: Okay.

COURT: These charges are very serious, and if you are convicted, you stand to potentially serve a lengthy amount of time. So there is a lot at stake here, and there's so much at stake here that

you should not proceed without Mr. Marcuzzo as your attorney.

WEATHERS: I don't want him as my attorney. I don't even know--

COURT: The other thing you need to understand, Mr. Weathers, is that there are certain rules of evidence and procedural rules that absolutely must be followed.

WEATHERS: Okay.

COURT: And because you choose to represent yourself, I can't let go of those rules. I can't give you a break that I wouldn't give an attorney.

WEATHERS: I understand.

COURT: And I just want you to understand that-- we just had a gentleman in here last month on very serious charges that carried a whole lot of time, and he chose to represent himself in front of a jury. And I'm telling you, it did not go well for him. So it is not a good idea for you to do so, and I think you need to keep Mr. Marcuzzo on as your attorney and allow him to help you.

WEATHERS: I'm going to represent myself, Your Honor.

COURT: All right.

MR. MARCUZZO: Judge, I suppose, then-- I guess at this point, then, I would make a formal motion to withdraw as his attorney; although, if the Court desires me to remain his-- not counsel, but in an advisory position, certainly our office would be happy to do so.

COURT: And that's what I would do. I'll note that Mr. Weathers wants to proceed self-represented, but I am going to keep you on, Mr. Marcuzzo, as his legal advisor.

No valid waiver of the right to counsel took place. While the Court mentioned very serious charges (T20) and certain procedural rules (T21), these came after the trial court essentially forced the Appellant to proceed pro se.

When the Appellant filed his motion for postconviction relief and argued his waiver of counsel argument, instead of granting relief on the claim, the district court stated the Appellant waived his right to counsel nine days later, as evidenced in the order denying postconviction relief. (T23-T27).

The order denying postconviction relief states (T26), 'appellate counsel was also not ineffective for failing to allege Defendant did not voluntarily waive his right to counsel, as the record supports Defendant waived this right knowing the consequences of the decision. (BOE 70:16-18).

The transcript page from BOE 70:16-18 (T29), the trial court simply asks the Appellant, "Okay. All right. Now, are -- Mr. Weathers, are you still wanting to proceed self-represented?" The Appellant responds "Yes."

This too, does not discuss the necessary constitutional concerns.

The prior conviction is analogous to HANNAN v. State, 732 N.W. 2d 45 (2007). In HANNAN v. State, supra, the Iowa Supreme Court held:

The defendant did not properly waive his right to counsel in the prosecution for second-degree sexual abuse, and thus, his right to counsel under the State and Federal Constitutions was violated. The trial court did not conduct the required colloquy to make sure the defendant properly waived his right to counsel. Additionally, the judges brief explanation

of trial procedures and answers to the defendant's questions during the hearing on the appointed counsel's motion to withdraw were not sufficient to comport with constitutional requirement, since explanations and answers occurred after the judge essentially forced the defendant to represent himself.

Finally, if there was a cognizable colloquy, it fell short of discussing the necessary constitutional concerns, since the court did not address the dangers of self-representation or make any kind of finding that the defendant's waiver of his right to counsel was voluntary. Thus, the defendant's Sixth Amendment rights were violated.

As the Eighth Circuit has explained, "before allowing a defendant to waive his right to counsel, the district court must question the defendant about his knowledge of the right and adequately warn him of the dangers involved in proceeding pro se; the court also must be satisfied that the defendant is competent to waive the right and stand trial." United States v. Luscombe, 950 F.3d 1021 (8th Cir. 2020).

That was not done in the prior case. The Appellant was tried, convicted, and imprisoned without counsel at trial.

Conviction obtained in violation of a defendant's right to counsel at trial is void. State v. Stott, 255 Neb. 438 (1998).

The State's assertion that the Appellant waived his right to counsel in his prior conviction is without merit.

Ineffective Assistance of Appellate Counsel

For purposes of the record, the Appellant's factual claims were that trial counsel was ineffective for failing to collaterally attack the Appellant's prior conviction in CR 14-3306 at any stage of the proceedings, a prior conviction obtained without counsel used to support the Appellant's guilt and to enhance his sentences. (T2).

Appellate counsel was ineffective for failing to assign trial counsel's errors (T9-T15). This was a layered claim, and the State acknowledges this fact. See Brief of Appellee Pg. 7

The State then goes on to add, 'additionally, even if there were some merit to such a collateral attack, it is unclear how that could render the second set of convictions void or voidable; the State does not see

how the exclusionary rule could apply to the DNA sample obtained under the DNA Identification Information Act as a result of the first set of convictions.

The Appellant's position has always been that the prior void conviction was USED TO SUPPORT the Appellant's guilt AND to ENHANCE his current conviction and sentences. Both UNCONSTITUTIONAL under the Sixth Amendment.

Remember it was the State that entered a non-certified copy of the sentencing order at a motion to suppress hearing from CR 14-3306 that was used to support the Appellant's guilt at a hearing March 14, 2018. (TH)(T9). See also Petition to Bypass and Memorandum Brief in Support, Page 2 By appellate counsel.

Four cases decided by the United States Supreme Court provide the focus for the Appellant's attack upon this conviction. The first, and pivotal one, is Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799, where the Court held that a state felony conviction without counsel, and without a valid waiver of counsel, was UNCONSTITUTIONAL under the Sixth and Fourteenth Amendments.

The second case is Burgett v. Texas, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967). There the Court held that a conviction invalid under Gideon could not be used for enhancement of punishment under a states recidivist statute.

The third is United States v. Tucker, 404 U.S. 443, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972), where it was held that such conviction could not be considered by a court in sentencing a defendant after subsequent conviction.

And the fourth is Loper v. Beto, 405 U.S. 473, 92 S. Ct. 1014, 31 L. Ed. 2d 374 (1972), where the Court disallowed the use of the conviction to impeach the general credibility of the defendant. The prior conviction, the plurality opinion said, "lacked reliability." *Id.*, at 484, 92 S. Ct. at 1019, quoting Linkletter v. Walker, 381 U.S. 618, 639, and n. 20, 85 S. Ct. 1731, 1743, and n. 20, 14 L. Ed. 601 (1965).

In Burgett, Tucker, and Loper, the United States Supreme Court found that the SUBSEQUENT CONVICTION or SENTENCE violated the Sixth Amendment because it depended upon the reliability of a past uncounseled conviction. See Lewis v. United States, 445 U.S. 55, 100 S. Ct. 915, 63 L. Ed. 2d 198 (1980).

IN Buggett v. Texas, supra, the United States Supreme Court held that, "under the Sixth Amendment to the United States Constitution, a conviction for a felony in a state court without counsel being present and without a valid waiver of counsel having been obtained may not be used to support guilt or enhance punishment for another offense.

These cases are binding U.S. Supreme Court precedent. "State courts are bound by the decisions of the United States Supreme Court when reviewing Federal statutes or applying the Federal Constitution." Carlson v. State, 34 Misc. 3d 242 (2011)

Where the prior conviction was used to support guilt, the second set of convictions must be vacated.

Having proved the Appellant's prior conviction void under the Sixth and Fourteenth Amendments in the previous argument, and the Brief of Appellant, the States question to how the collateral attack would render the second set of convictions void has been answered.

The convictions and sentences must be vacated because they were used to support the Appellant's guilt.
(first set)

Appellate counsel was constitutionally deficient for failing to argue that trial counsel was ineffective for failing to collaterally attack the prior void conviction at any stage of the proceedings.

Had appellate counsel done so, the second set of convictions (case at Bar) would have been vacated on direct appeal based on United States Supreme Court precedent.

The Appellant is entitled to an evidentiary. an evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or Federal Constitution, causing the judgment against the defendant to be void or voidable. State v. Robertson, 294 Neb. 29, 881 N.W. 2d 864 (2016).

CONCLUSION

Wherefore, the Appellant respectfully requests this Court reverse the decision of the district court and remand

with directions to hold an evidentiary hearing.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one (1) copy of the Appellant's Reply Brief were served upon the Nebraska Attorney General, 2115 State Capitol, Lincoln, Ne, 68509-8920 by prepaid First Class U.S. Mail on this 29 day of March, 2021.

B. Weathers

BRANDON J. WEATHERS, PRO SE

PROOF OF SERVICE

STATE OF NEBRASKA)

) ss.

COUNTY OF LANCASTER)

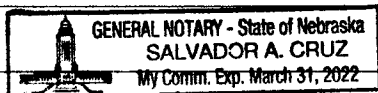
I, Brandon J. Weathers, being first duly sworn, depose and state that one (1) original and one (1) copy of the Appellant's

Reply Brief was mailed to the Clerk of the Nebraska Supreme Court in separate envelopes, 2413 State Capitol, Lincoln, Ne, 68509, and one(1) copy to the Nebraska Attorney Generals Office, 2115 State Capitol Building, Lincoln, Ne, 68509, all through regular United States mail, postage prepaid, this 29 day of March, 2021.

B. Weathers

BRANDON J. WEATHERS, AFFIANT

SUBSCRIBED IN MY PRESENCE AND SWORN TO before me this 29 day of March, 2021.



Salvador A. Cruz
NOTARY PUBLIC

*Lincoln NE
Lancaster Co*