

NORTH DAKOTA SUPREME COURT

Tilmer Everett v. State of North Dakota

Everett, 2020 ND 304 (N.D. 2020) · No. 20200099 · Decided December 17, 2020

SUMMARY

The North Dakota Supreme Court dismissed Tilmer Everett’s appeal from a district court order concerning his application for postconviction relief based on allegedly newly discovered evidence. The Court treated the district court’s disposition as a denial of leave to file additional claims under a prior pre-filing restriction and held that orders denying leave to file are not appealable.

CASE DETAILS

COURT	North Dakota Supreme Court
WRITING FOR THE COURT	Jerod E. Tufte, Justice; Jon J. Jensen, C.J.; Gerald W. VandeWalle; Daniel J. Crothers; Lisa Fair McEvers; Jerod E. Tufte
JURISDICTION	North Dakota
DECIDED	December 17, 2020
DOCKET	20200099
DISPOSITION	dismissed
PROCEDURAL POSTURE	Everett appealed from a district court judgment summarily denying his application for postconviction relief and related motions. The North Dakota Supreme Court treated the district court's order as a denial of leave to file additional postconviction claims and dismissed the appeal.
STANDARD OF REVIEW	The court treated the district court's disposition as a denial of leave to file and applied the rule that orders denying leave to file are not appealable. It also reviewed whether the district court complied with its prefiling order as a matter of law.
PRECEDENTIAL VALUE	Published precedential opinion
PARTIES	Tilmer Everett v. State of North Dakota

TOPICS

- state post-conviction relief
- appellate procedure
- successive petitions
- post-conviction relief
- criminal procedure

PRACTICE AREAS

Post-conviction relief

Appellate procedure

Criminal procedure

QUESTIONS PRESENTED

1. Whether the district court's order should be treated as a denial of leave to file additional postconviction claims under the court's prefiling order.
2. Whether an order denying leave to file additional postconviction pleadings is appealable.
3. Whether the district court could decide the merits of Everett's postconviction claims after determining that he did not satisfy the prefiling order's requirement for leave.

HOLDINGS

1. When a district court has entered a prefiling order requiring leave before additional postconviction filings, a subsequent order denying a filing may be treated as a denial of leave even if the district court also purports to rule on the merits.
2. Orders denying leave to file additional postconviction motions or pleadings are not appealable.
3. The district court should have first determined whether Everett had established the prerequisites for leave to file and should not have proceeded to adjudicate the merits before making that determination.

KEY QUOTATIONS

“Orders denying leave to file are not appealable.” (§ 1)

“If orders limiting abusive filings are to have credibility with litigants, it is incumbent on courts to make the required initial determinations whether a particular litigant’s proffered papers will be filed.” (§ 9)

FACTUAL BACKGROUND

In 2007, a jury found Everett guilty of gross sexual imposition. After filing numerous unsuccessful postconviction applications, Everett was barred in 2015 from filing further motions or pleadings related to his criminal case without prior court approval. In July 2019, he submitted a postconviction application and a motion requesting approval to file, alleging newly discovered evidence. The district court denied the request and application, but the Supreme Court determined that Everett's allegations merely repeated arguments previously rejected and therefore did not satisfy the prefiling order's meritorious-claim requirement.

PROCEDURAL HISTORY

A jury convicted Everett of gross sexual imposition in 2007, and the North Dakota Supreme Court affirmed. After numerous unsuccessful postconviction proceedings, the district court entered an August 2015 prefiling order requiring Everett to obtain leave before filing further documents related to his criminal case. Everett submitted a postconviction application and a request for permission to file, but the district court incorrectly stated that he had not requested permission, reviewed the merits, and summarily denied the application. The Supreme Court concluded the order should be treated as a denial of leave to file and dismissed the appeal because such an order is not appealable.

DISPOSITION

dismissed

CASES CITED

- State v. Everett, 2008 ND 126, 756 N.W.2d 344
- Everett v. State, 2016 ND 78, 877 N.W.2d 796
- Everett v. State, 2015 ND 162, 870 N.W.2d 26
- Everett v. State, 2012 ND 189, 821 N.W.2d 385
- Everett v. State, 2011 ND 221, 806 N.W.2d 438
- Everett v. State, 2010 ND 226, 795 N.W.2d 37
- Everett v. State, 2010 ND 4, 789 N.W.2d 282
- Everett v. State, 2008 ND 199, 757 N.W.2d 530
- State v. Everett, 2014 ND 191, 858 N.W.2d 652
- Everett v. State, 2017 ND 111, 893 N.W.2d 506
- Everett v. State, 2017 ND 93, 892 N.W.2d 898
- Everett v. State, 2018 ND 114, 910 N.W.2d 835

OPINION

PER CURIAM.

FILED

IN THE OFFICE OF THE
CLERK OF SUPREME COURT
DECEMBER 17, 2020
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2020 ND 304

Tilmer Everett, Petitioner and Appellant

v.

State of North Dakota, Respondent and Appellee

No. 20200099

Appeal from the District Court of Burleigh County, South Central Judicial
District, the Honorable Bruce A. Romanick, Judge.

DISMISSED.

Opinion of the Court by Tufte, Justice.

Tilmer Everett, self-represented, Bismarck, N.D., petitioner and appellant; submitted on brief.

Karlei K. Neufeld, Assistant State's Attorney, and Jamie Schaible, under the Rule on Limited Practice of Law by Law Students, Bismarck, N.D., for respondent and appellee; submitted on brief.

Everett v. State

No. 20200099

Tufte, Justice.

[¶1] Tilmer Everett appeals a district court order denying his petition for postconviction relief based on allegedly newly discovered evidence. Everett argues that the court erred in denying his petition and dismissing his related motions. We treat the district court's current order as denying Everett leave to file additional motions. Orders denying leave to file are not appealable. We dismiss Everett's appeal.

I

[¶2] In 2007 a jury found Everett guilty of gross sexual imposition. This Court affirmed the conviction in *State v. Everett*, 2008 ND 126, 756 N.W.2d 344. Everett unsuccessfully filed numerous applications for postconviction relief. *Everett v. State*, 2016 ND 78, ¶ 24, 877 N.W.2d 796, reh'g denied May 26, 2016; *Everett v. State*, 2015 ND 162, 870 N.W.2d 26; *Everett v. State*, 2012 ND 189, 821 N.W.2d 385; *Everett v. State*, 2011 ND 221, 806 N.W.2d 438; *Everett v. State*, 2010 ND 226, 795 N.W.2d 37; *Everett v. State*, 2010 ND 4, 789 N.W.2d 282; *Everett v. State*, 2008 ND 199, ¶ 32, 757 N.W.2d 530, reh'g denied Dec. 16, 2008; see also *State v. Everett*, 2014 ND 191, 858 N.W.2d 652.

[¶3] In August 2015 the district court barred Everett from future filings without leave of the court. The order states in relevant part:

“[Everett] may not file any further motions or pleading[s] in or related to his criminal action 08-06-K-1026 at the district court level, except after seeking and receiving approval of the presiding judge of the South Central Judicial District or her/his designee to file a proper application under [N.D.C.C. §] 29-32.1-04 where Everett succinctly and concisely establishes an exception to the statute of limitation under [N.D.C.C. §] 29-32.1-01(3) and is not

subject to summary disposition under [N.D.C.C. §] 29-32.1-09. The State is relieved from responding to any further motions or pleadings filed in District Court in these cases, unless the District Court reviews the motion or pleading, determines it has merit, and, in writing, permits Everett's filing and requests a response.

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Everett v. State, 2016 ND 78, ¶ 22, 877 N.W.2d 796. This Court affirmed the decision. Id. at ¶ 24. This Court held three subsequent cases were not appealable. Everett v. State, 2017 ND 111, 893 N.W.2d 506; Everett v. State, 2017 ND 93, 892 N.W.2d 898; Everett v. State, 2018 ND 114, 910 N.W.2d 835.

[¶4] Under the terms of the district court's August 2015 order, Everett needed leave of the district court to file any documents relating to his criminal case. On July 10, 2019, Everett sent the court both a postconviction relief application and a motion including a request for "approval to file a proper petition for post-conviction relief under N.D.C.C. 29-32.1-04." Under the August 2015 order, upon receipt of Everett's papers the district court should have determined prior to filing whether "Everett succinctly and concisely establishes an exception to the statute of limitation under [N.D.C.C. §] 29-32.1-01(3) and is not subject to summary disposition under [N.D.C.C. §] 29-32.1-09."

[¶5] In a September 24, 2019 order, the district court stated:

Everett is under the false impression he does not have to ask permission to file anymore. He is wrong. This matter is dismissed for Everett's failure to request permission to file a new action.

The order did not mention Everett's motion for permission, but went on to deny the petition on the merits:

Even with the dismissal in the prior paragraph, the Court did review Everett's new request alleging he has discovered new evidence.....

The Court, in viewing what Everett alleges is new evidence, finds Everett has failed to show there is a reasonable inference that would raise a genuine issue of material fact; therefore, he is not entitled to a hearing....

Everett alleges under N.D.C.C. [§] 29-32.1-01 even though the two years to file post-conviction relief has passed, this new evidence warrants a review of his post-conviction request. The

Court finds this is not new evidence, simply the same argument Everett has consistently used through his appeal and post-conviction efforts.

The petition for post-conviction relief is denied.

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[¶6] On January 23, 2020, the district court entered judgment summarily denying Everett’s application for postconviction relief. Everett now appeals that judgment.

II

[¶7] This case is similar to Everett, 2018 ND 114, 910 N.W.2d 835, which involved a “motion for permission to do petition for relief in pursuant to N.D.C.C. [§] 29-32.1-01(1)(e)” and an application for postconviction relief. The district court’s August 2015 order barring Everett from filing without leave likewise applied to that case. Id. at ¶ 7. There, we treated “the district court’s current order as one denying Everett leave to file additional claims” and dismissed Everett’s appeal because “[o]rders denying leave to file are not appealable.” Id. at ¶ 11. The court’s order in that case was similar to the order at issue here: “The petition for post-conviction relief is denied. All motions brought by Everett to file new evidence with this Court are denied.” Id. at ¶ 7.

[¶8] Everett argues the district court erred in denying his motion for permission to file and dismissing his application for postconviction relief. The court did not follow the procedure set out in its pre-filing order. First, the court erroneously stated that Everett had not requested permission to file. He had. The district court may deny filing without a request for permission to file or a district court determination that the application may have merit by “succinctly and concisely establish[ing] an exception to the statute of limitation under [N.D.C.C. §] 29-32.1-01(3) and is not subject to summary disposition under [N.D.C.C. §] 29-32.1-09.” Everett, 2018 ND 114, ¶ 8, 910 N.W.2d 835.

[¶9] Here, the court should not have ruled on the merits of Everett’s postconviction relief claims. “If orders limiting abusive filings are to have credibility with litigants, it is incumbent on courts to make the required initial determinations whether a particular litigant’s proffered papers will be filed. Without judicial adherence to our orders, we have little reason to believe others will comply.” Id. at ¶ 9 (citation omitted). In this case the district court summarily dismissed Everett’s new postconviction relief claims after

determining that his allegations simply restated arguments that have been rejected in prior proceedings and are not new evidence. On the basis of that

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finding, we can conclude as a matter of law that Everett did not meet the meritorious claim requirement in the August 2015 order. Therefore, we treat the court's disposition as a denial of a request for leave to file. Denial of leave to file is not appealable, and we dismiss Everett's appeal. See Everett, 2018 ND 114, ¶ 10, 910 N.W.2d 835; Everett, 2017 ND 111, ¶ 5, 893 N.W.2d 506.

III

[¶10] Because Everett cannot file new papers or pleadings without leave of court, we treat the district court's current order as one denying Everett leave to file additional claims. Orders denying leave to file are not appealable. We dismiss Everett's appeal.

[¶11] Jon J. Jensen, C.J.

Gerald W. VandeWalle

Daniel J. Crothers

Lisa Fair McEvers

Jerod E. Tufte

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