

**SUPREME COURT OF NORTH DAKOTA**

**Palmer v. State, 2012 ND 237**

824 N.W.2d 406 (N.D. 2012) · Decided November 27, 2012

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**OPINION**

CROTHERS, J.

CROTHERS, Justice. [¶ 1] Mark Palmer appeals from a district court order denying his N.D.R.Civ.P. 60(b) motion for relief from an order denying his application for post-conviction relief. We affirm, concluding the district court did not abuse its discretion by denying Palmer’s motion. I [¶ 2] In 2001, Palmer was convicted of four counts of gross sexual imposition.

Palmer appealed, and this Court affirmed his convictions. *State v. Palmer*, 2002 ND 5, 638 N.W.2d 18. In February 2011, Palmer applied for post-conviction relief, and an attorney was appointed to represent him. On March 1, 2011, the State responded to Palmer’s application and moved for summary dismissal. Palmer did not respond to the State’s motion.

On May 18, 2011, the district court denied Palmer’s application. [¶ 3] On May 23, 2011, Palmer moved under N.D.R.Civ.P. 60(b)(1) for relief from the order denying his post-conviction application, arguing he was entitled to relief from the order because of his attorney’s mistake or inadvertence.

In the motion, Palmer’s attorney alleged she was under extreme duress in her personal life, her husband was ill and later passed away, she believed she had requested more time to respond to the State’s motion and she mistakenly failed to request additional time.

On June 9, 2011, the State responded to the motion for relief. On October 5, 2011, the district court denied the motion. The court’s order stated, “The motion for relief, pursuant to Rule 60(b) (1) of the North Dakota Rules of Criminal [sic] Procedure and dated May 23, 2011, is in all things SUMMARILY DENIED.” [¶ 4] On December 1, 2011, Palmer appealed the district court’s one-sentence denial of his motion for relief from the order denying his post-conviction application.

On May 17, 2012, we remanded for the district court to sufficiently explain the rationale for its decision. *Palmer v. State*, 2012 ND 98, 816 N.W.2d 807. On October 5, 2012 the district court provided a three-page memorandum opinion explaining the basis for denying Palmer’s motion for relief from the order. II [¶ 5] Palmer argues the district court abused its discretion in denying his N.D.R.CivP.

60(b) motion for relief from the order denying his application for post-conviction relief because of mistake, inadvertence or excusable neglect. [¶ 6] Rule 60(b)(1), N.D.R.Civ. P., permits a court to

grant a party relief from a judgment or order' if it was the product of "mistake, inadvertence, surprise, or excusable neglect." We will not reverse a court's decision on a motion for relief unless the court abused its discretion in deciding whether the party established sufficient grounds for disturbing the judgment or order.

See *American Bank Ctr. v. Schuh*, 2010 ND 124, ¶9, 784 N.W.2d 468. A court "abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when it misinterprets or misapplies the law." *Id.* (quoting \*408 *Shull v. Walcker*, 2009 ND 142, ¶ 13, 770 N.W.2d 274). [¶ 7] Palmer argued to the district court that his counsel's failure to request additional time to respond to the State's motion for summary dismissal was mistake or inadvertence.

When a party moves for relief under N.D.R.Civ.P. 60(b), "[t]he moving party bears the burden of establishing sufficient grounds for disturbing the finality of the judgment, and relief should be granted only in exceptional circumstances." *American Bank Ctr.*, 2010 ND 124, ¶ 9, 784 N.W.2d 468 (quoting *Shull*, 2009 ND 142, ¶ 14, 770 N.W.2d 274).

The moving party must show "why he was justified in failing to avoid [the] mistake or inadvertence." *American Bank Ctr.*, at ¶ 10 (quotation omitted). A party has a duty to protect his own interests, and a party's mere misjudgment or careless failure to evaluate is not sufficient to establish grounds for relief. *Follman v. Upper Valley Special Educ. Unit*, 2000 ND 72, ¶ 11, 609 N.W.2d 90. [¶ 8] On remand, the district court found Palmer's counsel's husband was ill before she began representing Palmer and she did not indicate that she was absent from work for any length of time after she began representing Palmer.

The court found that Palmer's counsel received this case about ten years after the criminal trial and that she was attempting to become familiar with it. The court noted counsel continued to provide legal services on this and other cases during the period in question.

On that basis, the court found "it does not appear that [counsel] just forgot about this case or otherwise did not attend to it." The court ruled counsel's failure to respond to the State's motion for dismissal did not warrant relief under N.D.R.Civ.P. 60(b)(1). [¶ 9] The district court did not abuse its discretion by denying Palmer's N.D.R.Civ.P. 60(b) motion, and we affirm.

[1110] MARY MUEHLEN MARING and CAROL RONNING KAPSNER, JJ., concur.