In The

SUPREME COURT OF THE UNITED STATES

October Term, 2018

No.: 20170185

JAMES G. YAHNKE,

Petitioner,

v.

CHAD PRINGLE, WARDEN, aka NORTH DAKOTA

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

COPY MARVIN
Notary Public
State of North Dakota
My Commission Expires March 30, 2022

PETITIONER'S APPENDIX FOR PETITION FOR WRIT OF CERTIORARI

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This opinion is subject to petition for rehearing

Filed 3/8/18 by Clerk of Supreme Court

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2018 ND 66

James G. Yahnke, Petitioner and Appellant

v.

State of North Dakota, Respondent and Appellee

No. 20170185

Appeal from the District Court of Traill County, East Central Judicial District, the Honorable Steven E. McCullough, Judge.

AFFIRMED.

Per Curiam.

Kiara Costa Kraus-Parr, Grand Forks, ND, for petitioner and appellant.

Charles A. Stock, State's Attorney, Crookston, MN, for respondent and appellee.

Yahnke v. State

No. 20170185

Per Curiam.

[¶1] James Yahnke appeals from a district court order denying his application for post-conviction relief. Yahnke argues the court erred by finding he failed to establish ineffective assistance of counsel. We conclude the court's order is based on findings of fact that are not clearly erroneous. Yahnke further argues the court erred when it did not allow him to withdraw his guilty plea to correct a manifest injustice caused by procedural errors made by the sentencing court, by failing to fully advise him as required by N.D.R.Crim.P. 11. Because Yahnke did not adequately raise this argument at the district court level, we decline to address the issue. *State v. Gray*, 2017 ND 108, ¶ 13, 893 N.W.2d 484 (concluding issues which are not raised before the district court will not be considered for the first time on appeal). We summarily affirm the district court order under N.D.R.App.P. 35.1(a)(2) and (7).

[¶2] Gerald W. VandeWalle, C.J.
Lisa Fair McEvers
Daniel J. Crothers
Jerod E. Tufte
Jon J. Jensen

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF TRAILL	EAST CENTRAL JUDICIAL DISTRICT

James G. Yahnke, Petitioner, vs. State of North Dakota, Respondent.	File No.: 49-2016-CV-00122 **OPINION AND ORDER DENYING PETITIONER'S APPLICATION FOR POST-CONVICTION RELIEF**

[¶1] The above-entitled case comes before the Court on Petitioner's APPLICATION FOR POST-CONVICTION RELIEF, filed October 21, 2016. The State of North Dakota filed an ANSWER/RESPONSE AND MOTION TO DISMISS APPLICATION FOR POST-CONVICTION RELIEF on January 17, 2017. Testimony and argument was heard by the Court on April 6, 2017. Petitioner appeared personally with appointed counsel, Donald R. Krassin. The State of North Dakota appeared by and through Charles A. Stock, Traill County State's Attorney. The issues presented by the Petitioner are now ripe for decision, and are on the basis of the evidentiary hearing, per N.D. Cent. Code § 29-32.1-11(2). The Court, having reviewed the entirety of this file and the underlying criminal case (District Court Criminal No. 09-2014-CR-00112), and now being fully advised in the premises, hereby denies Petitioner's APPLICATION for the reasons set forth below.

FACTUAL BACKGROUND

[¶2] On May 17, 2014, Petitioner James G. Yahnke ("Yahnke") hosted a small gathering and barbeque with friends and co-workers at his residence in Nielsville, Minnesota, near the North Dakota border and Traill County. The gathering began at approximately 6:00 p.m. Yahnke was

celebrating his recent engagement. In attendance was Teja R. Beyer ("Ms. Beyer") and her sister, Mercedes D. Rowley ("Ms. Rowley"). During the afternoon and evening, Yahnke consumed alcohol. Interspersed with alcohol consumption, Yahnke provided rides to partygoers in his 2014 Dodge Challenger (the "Challenger").

[¶3] One such ride in the Challenger was with Yahnke, Ms. Beyer, and Ms. Rowley. Yahnke drove the Challenger around the rural roads near Nielsville and into Traill County. At approximately 9:20 p.m., while driving westbound on Traill County Road 17 at a high rate of speed, Yahnke lost control of the Challenger and crashed into an embankment. At the time of the accident, Yahnke was belted-in in the driver's seat. The two passengers were also in the front seat of the Challenger, one sitting on the others lap. The Challenger's collision with the embankment caused it to flip or rollover multiple times. Ms. Beyer and Ms. Rowley were ejected from the passenger compartment of the vehicle and suffered fatal injuries. Both were pronounced dead at the scene. Yahnke suffered serious injuries during the rollover as well, but remained in the passenger compartment of the Challenger.

[¶4] Traill County Deputy Shawn Skager ("Deputy Skager") was one of the first law enforcement to respond to the accident scene, at approximately 9:35 p.m., following a 911 call seeking assistance. Deputy Skager first secured the scene. After this, he was able to make contact with Yahnke and gave permission to a number of volunteer first responders to remove Yahnke from the damaged Challenger. This process took some time, given Yahnke's known and potentially unknown injuries. Deputy Skager noticed the "strong odor" of alcohol emanating from Yahnke at the scene. At first, Deputy Skager left Yahnke with first responders while he investigated the condition of the females, but he returned to ask Yahnke three questions: (1) his name, (2) how much he had to drink that evening, and (3) if the two females found in the field

due west of the rollover site were also in the Challenger. Yahnke admitted to consuming alcohol. Deputy Skager did not read Yahnke a Miranda warning prior to asking these questions. Later, at approximately 9:53 p.m., Deputy Skager told Yahnke he was under arrest for DUI, as well as read a Miranda warning and the North Dakota Implied Consent Advisory (NDICA) before Yahnke was "life-flighted" from the scene.

[¶5] North Dakota Highway Patrol Trooper Cody Harstad ("Trooper Harstad") was the first Highway Patrol law enforcement to arrive at the scene of the rollover. Trooper Harstad was in contact with deputies at the scene before arriving, and made sure Yahnke was read the NDICA before being transported by helicopter. Trooper Harstad directed Fargo-based Trooper David Erdmann ("Trooper Erdmann") to make contact with Yahnke at Sanford Health. At Sanford Health, Trooper Erdmann again read Yahnke the NDICA. Yahnke testified that at first he refused any blood draw; however, at some point consent was given and no warrant was obtained. Yahnke's blood was drawn by Sanford Health staff at 12:33 a.m., the morning of May 18, 2014; this blood draw was over three hours after the estimated crash time of approximately 9:20 p.m., the night of May 17. Yahnke's Blood Alcohol Concentration (BAC) from this test was .146 mg/dL. At no point after the accident did Yahnke have access to alcohol.

[¶6] On May 18, 2014, Trooper Harstad assisted in an accident reconstruction analysis at the rollover scene. Trooper Harstad, along with other North Dakota Highway Patrol Troopers, estimated that the Challenger was traveling at a high rate of speed moments before Yahnke lost control and struck the embankment, causing the subsequent rollovers. On May 22, 2014, Trooper Harstad executed a search warrant for the "black box" data from the damaged Challenger. The "black box" was removed from the Challenger by Trooper Harstad. Later, the data on the recovered "black box" was downloaded by a Sergeant with the North Dakota

Highway Patrol. The data obtained from the diagnostics confirmed the Challenger was traveling at a high rate of speed (over 140 miles-per-hour) at some point prior to the crash. The diagnostic data also confirmed the Challenger was traveling over 90 miles-per-hour just prior to the crash. Trooper Harstad confirmed that employees of the North Dakota Highway Patrol are available to testify on the downloading and data recovered from a vehicle's "black box."

[¶7] On June 24, 2014, Traill County State's Attorney Stuart A. Larson charged Yahnke with two counts of Criminal Vehicular Homicide, in violation of N.D. Cent. Code § 39-08-01.2. Specifically, the CRIMINAL INFORMATION filed stated: "On [May 17, 2014], the defendant, James G. Yahnke, drove a vehicle in the County of Traill, North Dakota, while at the time the defendant was under the influence of intoxicating liquor, causing the death of . . ." both Ms. Rowley and Ms. Beyer. An arrest warrant for Yahnke was issued the next day.

[¶8] For the underlying criminal case, Yahnke retained Joel F. Arnason ("Mr. Arnason"). At no point did Mr. Arnason file a dispositive motion in the case, and on review of the case file and transcripts, Patrick S. Rosenquist, a fellow attorney at Rosenquist & Arnason, PC, handled a number of the procedural hearings. At the April 6, 2017, hearing on Yahnke's APPLICATION here, he testified at length about his relationship and communications with Mr. Arnason, from retention to plea. Yahnke testified that Mr. Arnason said he would have witnesses questioned and his own expert reconstructionist survey the scene, and Yahnke believes this was never done. Yahnke also testified that at no point did he and Mr. Arnason discuss a motion to suppress (or the admissibility at trial) of his statements to law enforcement, the BAC results of the blood draw, or the "black box" information from the Challenger. Further, Yahnke testified that he had consistent communication issues with Mr. Arnason and was never informed what to expect at any hearing before the district court, or advised on how to contest his case in any manner.

[¶9] The only communication that Yahnke testified at length to was regarding his plea deal, and the negotiations between Mr. Arnason and Mr. Larson. Yahnke testified that he wanted to contact some family members of the two victims, Ms. Beyer and Ms. Rowley, prior to any change of plea or sentencing. Yahnke testified that Mr. Arnason and/or Mr. Rosenquist advised against making any contact with the victims' family. Yahnke believed some contact may have helped with the sentence or the statements offered by family members prior to sentencing.

[¶10] On January 28, 2015, before the Honorable Norman G. Anderson, Yahnke entered a guilty plea on both counts of Criminal Vehicular Homicide as charged in the INFORMATION. The Court took notice of Yahnke's two prior DUI convictions from 1997 and 1999. Yahnke and the State then made a joint recommendation for twenty (20) years of incarceration with ten (10) years suspended, both counts to run concurrently. This period of incarceration was to be followed by ten (10) years of supervised probation. Before the Court sentenced Yahnke, it heard from Byron Mickelson, an uncle to the victims, and considered a letter of Dawn Mickelson, the mother of the victims, who had her prepared statement read by Stephanie Johnson, a family friend. The Court also heard from Mr. Rosenquist about the actions Yahnke had taken after the accident, as well as from Yahnke personally, who addressed the victims' family at length. Yahnke explained that Mr. Arnason and/or Mr. Rosenquist had advised Yahnke to not contact the victims' family, but to wait until the sentencing hearing to do so in open court. Judge Anderson, on the record, agreed with this approach while the case was open and Yahnke's plea remained not guilty. The Court then sentenced Yahnke to fifteen (15) years in the custody of the North Dakota Department of Corrections on each count, to run concurrently, followed by ten (10) years of supervised probation.

[¶11] On October 21, 2016, Yahnke filed an APPLICATION FOR POST-CONVICTION RELIEF. On

March 20, 2017, court-appointed counsel Don Krassin filed a SUPPLEMENTAL BRIEF, outlining the issues presented here. The issues, as discussed below, center around Mr. Arnason's alleged failure to investigate the case thoroughly (i.e., ineffective assistance of counsel), specifically: (1) potential admissibility of Yahnke's statements at the accident scene before a Miranda warning was read; (2) potential admissibility of the test results from Yahnke's blood draw and urinalysis at Sanford Health; and (3) potential admissibility of the Challenger "black box" data. Yahnke argues that Mr. Arnason's failures deprived him of the right to competent counsel under the Sixth Amendment to the United States Constitution. Yahnke argues that, but for Mr. Arnason's failures, he would have not pled guilty and would have exercised his right to trial.

LAW AND ANALYSIS

[¶12] Post-conviction proceedings are civil in nature, and a petitioner bears the burden of establishing grounds for post-conviction relief. Moore v. State, 2007 ND 96, ¶ 8, 734 N.W.2d 336. North Dakota has adopted the Uniform Postconviction Procedure Act (the "Act"), Chapter 29-32.1 of the North Dakota Century Code, outlining the grounds and procedure for post-conviction relief. Grounds for relief under the Act include for a conviction "obtained . . . in violation of the law or the Constitution of the United State or of the law or Constitution of North Dakota . . . ." N.D. Cent. Code § 29-32.1-01(1)(a). A petitioner may also apply for relief when "[a] significant change in substantive or procedural law has occurred which, in the interest of justice, should be applied retrospectively . . . ." N.D. Cent. Code § 29-32.1-01(1)(f).

[¶13] Before this Court can analyze the alleged derelictions by trial counsel, first an analysis of the evidentiary issues must be completed. This was done on the record at the April 6, 2017, hearing. With these evidentiary issues explored to a competent degree, the Court can assess whether Mr. Arnason's representation fell below the expected standard, whether Yahnke has

proven both prongs of the Strickland test (see below), and whether post-conviction relief is warranted.

Admissibility of Yahnke's Statements

[¶14] The first potentially dispositive issue presented to Mr. Arnason involved Yahnke's statements to Deputy Skager before being read a Miranda warning. Deputy Skager asked Yahnke his name, how much alcohol he consumed, and if the bodies found in the field had been in the Challenger. Yahnke admitted to consuming alcohol when questioned about this on the night of May 17, 2014.

[¶15] Prior to a custodial interrogation, a suspect is entitled to a four-part warning, as articulated in Miranda v. Arizona, 384 U.S. 436 (1966). State v. Webster, 2013 ND 119, ¶ 9, 834 N.W.2d 283. "Custodial interrogation is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. (citing State v. Huether, 2010 ND 233, ¶ 14, 790 N.W.2d 901; Miranda, 384 U.S. at 444). The fact that law enforcement may have authority to arrest does not mean an individual is in custody for Miranda purposes. State v. Haibeck, 2004 ND 163, ¶26, 685 N.W.2d 512. Detention during a traffic stop, including at a suspected DUI stop, does not trigger Miranda, as the detention is more analogous to a Terry stop than a finding of the suspect as "in custody." Id. at ¶¶ 26-28; see also State v. Pitman, 427 N.W.2d 337, 340-42 (N.D. 1988) (holding a driver's statements to law enforcement, at the scene of an accident, made before an arrest or Miranda warning, were admissible in a later DUI trial).

[¶16] Here, Deputy Skager's questioning did not occur while Yahnke was in custody. Yahnke was being tended to by volunteer first responders near the scene of the accident, and Deputy Skager had not used force or any other display to make a reasonable person in Yahnke's position

believe they were under arrest or in custody. The primary purpose of keeping Yahnke at the scene (although, again, no force or verbal warning was needed to do so) was for medical attention. Based on the alcohol smell emanating from Yahnke, Deputy Skager may very well have suspected Yahnke to be under the influence, and the argument could be made that probable cause existed for an arrest then and there. This fact is immaterial, per Haibeck. Like in a traffic stop, and similar to the facts in Pitman, Deputy Skager asked routine questions in the ordinary course of any accident investigation. The questioning was in public view and in a less police dominated manner than a custodial interrogation. See Miranda, 384 U.S. at 437-39. Yahnke's statements, including an admission to consuming "too much" alcohol to be driving, would be available in a subsequent prosecution. See N.D.R.Ev. 801(d)(2)(A) & 804(b)(3)(B). To hold that Yahnke was in custody while awaiting the arrival of the helicopter and/or ambulance would require law enforcement to Miranda-ize every driver upon the detection of alcohol emanating from their breath. This is impractical and against the weight of North Dakota authority. Only when Deputy Skager placed Yahnke under arrest and read him the NDICA was a Miranda warning needed.

Admissibility of Test Results from Yahnke's Blood Draw

[¶17] The second potentially dispositive issue presented to Mr. Arnason involved the blood draw and urinalysis conducted at Sanford Health, taken from Yahnke in the early hours of May 18, 2014. Because this case was pled out as an alcohol-based DUI, the analysis will concentrate on the blood draw evidence.

[¶18] The State may charge a driver with two forms of alcohol-based DUI. The first option is a "per se" violation of N.D. Cent. Code § 39-08-01(1)(a), where a chemical test showing a BAC above .08 must be performed within two hours of driving. See e.g., Pavek v. Moore, 1997 ND

77, ¶ 7, 562 N.W.2d 574. The second option is less scientific, and requires the State prove the driver "is under the influence of intoxicating liquor." N.D. Cent. Code § 39-08-01(1)(b); see also NDJI K – 21.12 (describing, for a jury, the phrase "under the influence of an intoxicating liquor" as a flexible term, requiring considerations of the circumstance and effects on a driver "which tends to deprive a driver of that cleanness of intellect or control which the driver would otherwise possess."). "[E]ven if the chemical test was performed outside the two-hour window, the test results may be admitted to show the defendant drove under the influence of intoxicating liquor, but may not be used to demonstrate a per se violation." Pavek, 1997 ND 77, ¶ 7, 562 N.W.2d 574 (holding a test performed 2 hours and 39 minutes after driving "still retained probative value as to the defendant's intoxicated state.").

[¶19] On June 23, 2016, the Supreme Court of the United States issued an Opinion in a group of consolidated drunk driving cases, holding the Fourth Amendment does not permit a warrantless blood test incident to arrest under suspicion of intoxicated driving. Birchfield v. North Dakota, 136 S.Ct. 2160, 2184-85 (2016). Therefore, refusal of a warrantless blood draw cannot be criminalized. The North Dakota Supreme Court has since held that the results of a warrantless blood draw test are still admissible in an administrative adjudication (i.e., not barred by the exclusionary rule), despite the partially inaccurate reading of the NDICA threatening an unlawful search to obtain consent. Beylund v. Levi, 2017 ND 30, ¶ 28, 889 N.W.2d 807. The issue of whether a driver has given voluntary consent to a warrantless blood draw in a criminal case, and whether the exclusionary rule would bar the test results, is still an open question of law. See State v. Harns, 2016 ND 184, 885 N.W.2d 63 (remanding to the district court to decide, under Birchfield, if consent was voluntary by the totality of the circumstances, "given the partial inaccuracy of a law enforcement officer's advisory of the driver's obligation to undergo

chemical testing.") (citing Birchfield, 136 S.Ct. at 2186).

[¶20] Here, Yahnke's arguments on the admissibility of the blood draw fails to conclusively show the test results would have been inadmissible in a criminal trial. First, the CRIMINAL INFORMATION charged that "[o]n [May 17, 2014], the defendant, James G. Yahnke, drove a vehicle in the County of Traill, North Dakota, while at the time the defendant was under the influence of intoxicating liquor, causing the death of . . ." both Ms. Rowley and Ms. Beyer. This language mirrors N.D. Cent. Code § 39-08-01(1)(b), where the State must prove Yahnke was under the influence of an intoxicating liquor. The State would need to prove Yahnke violated N.D. Cent. Code § 39-08-01(1)(b) – driving under the influence of an intoxicating liquor – for a trier of fact to convict Yahnke of Criminal Vehicular Homicide. See N.D. Cent. Code § 39-08-01.2 ("An individual is guilty of criminal vehicular homicide if the individual commits an offense under section 39-08-01 . . . and as a result the individuals causes death of another individual to occur . . . ."). The State did not charge Yahnke with a per se violation, under N.D. Cent. Code § 39-08-01(1)(a), where the blood draw results would not have been admissible. The .146 mg/dL test result, coupled with the nature of the accident and other admissible evidence (including the Challenger's "black box," as seen below), leaves this Court confident a jury could convict Yahnke of both DUI and Criminal Vehicular Homicide.

[¶21] Second, Yahnke's argument as to the Birchfield Opinion is unconvincing. Yahnke pled to the counts here on January 28, 2015, approximately a year and a half before the United States Supreme Court issued the Opinion in Birchfield v. North Dakota. Mr. Arnason cannot be expected to predict or make an argument that the blood draw of Yahnke was unconstitutional, especially when such warrantless blood tests were common-place under well-settled law in North Dakota prior to Birchfield. No decision of the North Dakota Supreme Court has held the

Birchfield decision to be retroactive. Such a hypothetical holding would not serve the purpose of the new standard going forward, would undermine years of law enforcement reliance on the old law, and would have a highly detrimental effect on the administration of justice. See State v. Nagel, 308 N.W.2d 539, 544 (N.D. 1981) (applying the test to determine whether a new constitutional doctrine should be applied retroactively). Further, the North Dakota Supreme Court remanded Harns to the district court to decide the issue of whether a blood draw was voluntary (and admissible) given the new ruling on the NDICA. Yahnke has not shown this Court binding precedent on this vital issue, and thereby this Court would be forced to make an advisory opinion on the subject.

[¶22] Finally, Yahnke argues he was "unconscious and in a comatose state," when law enforcement requested a blood draw and urine sample. If true, this fact would only further support admissibility of the blood draw evidence. See Schmerber v. California, 384 U.S. 757, 770 (1966) (holding a warrantless blood draw from an unconscious, but potentially intoxicated, driver was permissible when an officer "reasonably believed he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence."). In sum, a hypothetical jury hearing Yahnke's case would have heard the results of the May 18, 2015, blood draw when deciding whether Yahnke was driving while intoxicated and whether he was guilty of Criminal Vehicular Homicide.

Admissibility of the Challenger's "Black Box" Data

[¶23] The third potentially dispositive issue presented to Mr. Arnason involved the Challenger's "black box" data, a/k/a/ module evidence, and whether such evidence would be admissible. A vehicle's "black box" is not unlike its aviation counterpart, recording vehicle diagnostics like speed, and airbag deployment, as well as inputs like brake application and

N.W.2d 524. Second, the petitioner must "show his defense was prejudiced by the proven defects." Thompson, 2016 ND 101, ¶ 8, 879 N.W.2d 93 (citing Strickland, 466 U.S. at 687). There is a strong presumption that trial counsel's representation was reasonable, given the "wide range of reasonable professional assistance," and thus, the petitioner carries a "heavy burden of establishing a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." Laib v. State, 2005 ND 187, ¶ 10, 705 N.W.2d 845. "If it is easier [for the court] to dispose of an ineffective assistance of counsel claim on the ground of lack of sufficient prejudice, that course should be followed." Roth v. State, 2007 ND 112, ¶ 9, 735 N.W.2d 882 (citing Wright v. State, 2005 ND 217, ¶ 11, 707 N.W.2d 242).

[¶28] A petitioner may only "attack the voluntary and intelligent character of the guilty plea" when entered on advice of counsel. Lindsey v. State, 2014 ND 174, ¶ 17, 852 N.W.2d 383. A criminal defendant, and petitioner in a post-conviction action, is bound to a guilty plea unless "serious derelictions" on the part of counsel can be conclusively shown. Damron v. State, 2003 ND 102, ¶ 13, 663 N.W.2d 650 (citing McMann v. Richardson, 397 U.S. 759, 774 (1970)). Under the two part Strickland test, the petitioner must again satisfy the "but for" test, showing that absent counsel's errors, the petitioner would have exercised their right to trial. Ernst v. State, 2004 ND 152, ¶ 10, 683 N.W.2d 891. "This requires an examination and prediction of the likely outcome of a possible trial." Thompson, 2004 ND 101, ¶ 33, 879 N.W.2d 93) (Sandstrom, J., concurring and dissenting) (citing Hill v. Lockhart, 474 U.S. 52, 59-60 (1985)).

[¶29] To start, the Court presumes Mr. Arnason's representation was reasonable and within the wide range of acceptable norms; up and until Yahnke conclusively proves otherwise. Yahnke has failed to prove Mr. Arnason's representation was "defective" as to any of the three evidentiary issues addressed above, as adequate testimony and/or legal support has not been

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steering. The "black box" recovered here was obtained by Trooper Harstad with a valid warrant. Yahnke admits that Mr. Arnason prepared a MEMO ON ADMISSIBILITY OF SENSING DIAGNOSTICS MODULE EVIDENCE IN N.D. V. JAMES G. YAHNKE, wherein the decisions of sister jurisdictions are reviewed. Yahnke argues that none of the cases in the MEMO were from North Dakota, the Eighth Circuit, or an opinion of the Supreme Court of the United States. Yahnke makes a generalized argument that, given module evidence is an undecided issue in North Dakota, the district court would not have allowed in the evidence.

[¶24] The general rule is that relevant evidence is admissible, unless specifically outlawed by Constitution, statute, a rule of evidence, or some other rules of this State. N.D.R.Ev. 402. Relevant evidence makes a "fact more or less probable than it would be without the evidence . . . [and] the fact is of consequence in determining the action." N.D.R.Ev. 401. An expert may testify to an opinion based on scientific, technical, or otherwise specialized knowledge, and may testify to the facts and date underlying their opinion. N.D.R.Ev. 702 & 703. Finally, with proper foundation, evidence can be submitted that includes technical data. N.D.R.Ev. 901.

[¶25] As conceded by Yahnke, there does not appear to be a North Dakota case, criminal or civil, analyzing the reliability and admissibility of "black box" evidence from an automobile. Like Mr. Arnason, this Court is forced to look elsewhere, and finds the thorough analysis of the Superior Court of New Jersey, Union County, in State v. Shabazz, 946 A.2d 626 (2005), to be persuasive on this issue. In Shabazz, the New Jersey Court, in a matter of first impression, analyzed both the scientific reliability and the expert testimony necessary to present such module evidence data to a jury. Id. at 630-34. The New Jersey Court also looked at judicial opinions on the subject from Illinois, Florida, and New York, all admitting such evidence. Id. at 633-635. The New Jersey Court concluded that the use of such black box evidence did not violate a

defendant's constitutional right, and that the scientific data was reliable under the Frey standard for admissibility. Id. at 635.

[¶26] Here, Yahnke argues that a North Dakota district court would apply strict standards and exclude the "black box" data under Article 1, Section 8, of the North Dakota Constitution, per Michigan v. DeFillippo, 443 U.S. 31, 38 n. 3 (1979) (exclusionary rule in place to deter unlawful police action). Granted, North Dakota may apply stricter privacy rights than under the Fourth Amendment, but Yahnke fails to cite any case that would be even rationally connected to the evidence argued here. This Court is convinced that if the State put forward the proper experts and laid the necessary foundation for the Challenger's black box, then a jury could hear that evidence. There is also little doubt such evidence would be relevant to the charges at bar. Yahnke driving at over 100 miles-per-hour alone would show the potential for reckless and/or intoxicated driving. Other potential data, from lack of braking before losing control to the yaw of the vehicle, would also shed light on the circumstances for a jury to consider. This would then be compounded by the accident reconstructionist testimony. In short, Yahnke has failed to show how Mr. Arnason could have prevented a jury from hearing the damning evidence recorded on the Challenger's "black box."

Ineffective Assistance of Counsel

[¶27] Ineffective assistance of trial counsel is measured by a two-part test, commonly referred to as the Strickland test, the burden again being on the petitioner. First, the petitioner "must prove his counsel's performance was defective." Thompson v. State, 2016 ND 101, ¶ 8, 879 N.W.2d 93 (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). This is shown when "the petitioner's attorney's performance fell below an objective standard of reasonableness," measured by "the prevailing professional norms." Sambursky v. State, 2006 ND 223, ¶ 13, 723

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presented showing any of the potential rulings would have favored Yahnke going to trial. This Court need not presume Mr. Arnason made the same calculations; unless Yahnke can show the result would have been different than above, he has failed to establish a defect in his representation. Mr. Arnason not raising motions or objections that would likely fail, given the law at the time (and now), is far from "performance below the objective standard of reasonableness." Mr. Arnason's representation was of a degree to secure Yahnke's Sixth Amendment right to court-appointed counsel.

[¶30] Yahnke fails to meet his high burden again when arguing Mr. Arnason lacked diligence and failed to keep him apprised as to the happenings of his case. The Court does not condone such alleged behavior, but notes the only testimony on this issue is offered by Yahnke himself, obviously colored by the bias and his objective behind such testimony. Granted, failing to communicate and diligently investigate may be breaches of the North Dakota Rules of Professional Conduct. This would include Mr. Arnason telling Yahnke he would hire his own accident reconstructionist but failing to follow through. However, even if these actions fell below the objective standard, Yahnke has failed to carry his burden on the "but for" test from Strickland. His general allegations that, had he known there was no secondary opinion, or had he spoken with the family, the sentencing hearing may have gone more favorably, are just that: allegations without offers of proof. For example, no affidavit or other evidence was submitted showing the family members of the two victims would have spoken differently, had they had contact with Yahnke prior to the January 28, 2015, sentencing hearing. This Court will not guess as to a different result; Yahnke bears the burden of sufficiently showing the likelihood of a different result. Yahnke has failed to carry his heavy burden here, and failed to show how even the alleged defects, if presumed with some factual support, prejudiced his case to a degree

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showing a different result was likely.

[¶31] This same analysis guides the Court in determining whether Yahnke's decision to plead guilty was voluntary and rational. First, Yahnke has failed to conclusively show any serious derelictions in Mr. Arnason's representation. This Court has thoroughly analyzed the three evidentiary issues presented by Yahnke, and the likely results were not favorable. Thus, it is difficult to imagine that Yahnke, knowing those results, would have then decided to go to trial as opposed to striking a plea deal with the State. Yahnke has again failed the "but for" test, this time in regards to his plea. This Court, in exercising its judgment here, is left with but one likely outcome had Yahnke exercised his right to trial: Guilty on both counts. This further supports the conclusion that no post-conviction relief is warranted.

Sentencing

[¶32] Yahnke does not squarely address being sentenced to a prison term longer than the joint recommendation. However, this Court does note that the joint recommendation called for twenty (20) years imprisonment with ten (10) years suspended during supervised probation. The district court sentenced Yahnke to fifteen (15) years of imprisonment followed by ten (10) years of supervised probation. Yahnke makes an argument that he should be allowed to withdraw his guilty plea based on Judge Anderson going beyond the joint recommendation. "[T]he trial court may impose a harsher sentence than the [joint recommendation] without allowing the defendant to withdraw his guilty plea." Peltier v. State, 2003 ND 27, ¶ 10, 657 N.W.2d 238. Yahnke is not entitled to withdraw his guilty plea today. Finally, this Court agrees that, as Yahnke is now arguing he wishes he went to trial, any statements to the family (i.e., apologies) would have been a poor idea, and likely used against him. The advice on this topic was sound, and is a clear strategy decision that will not be further questioned by this Court under these circumstances.

CONCLUSION

[¶33] This Court has addressed the arguments as presented by both Yahnke and his court-appointed counsel, Mr. Krassin. Any remaining arguments not specifically addressed above have either been previously disposed of on the record at the April 6, 2017, hearing, or are without merit before this Court.

[¶34] Based on the foregoing, IT IS HEREBY ORDERED that Petitioner's APPLICATION FOR POST-CONVICTION RELIEF is **DENIED** in all parts.

Dated this 24th day of April, 2017.

BY THE COURT:

Honorable Steven E. McCullough
District Judge
East Central Judicial District

Additional material from this filing is available in the Clerk's Office.