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NOVEMBER 17, 2021
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2021 ND 206

Lorry Van Chase, Petitioner and Appellant

v.

State of North Dakota, Respondent and Appellee

No. 20200315

Appeal from the District Court of Rolette County, Northeast Judicial District, the Honorable Michael P. Hurly, Judge.

REVERSED AND REMANDED.

Opinion of the Court by Tufte, Justice, in which Chief Justice Jensen and Justice Crothers joined. Justice VandeWalle filed a dissenting opinion. Justice McEvers also filed a dissenting opinion, in which Justice VandeWalle joined.

Lorry Van Chase, self-represented, Bismarck, N.D., petitioner and appellant; submitted on brief.

Brian D. Grosinger, State's Attorney, Rolla, N.D., for respondent and appellee; submitted on brief.

Chase v. State
No. 20200315

Tufte, Justice.

[¶1] Lorry Van Chase appeals from a district court order summarily denying his application for postconviction relief. Chase argues the district court erred by summarily denying his application without requiring the State to file a motion for summary disposition. We conclude the district court erred in treating the State's answer as the motion required by statute and rule, and overrule *Delvo v. State*, 2010 ND 78, 782 N.W.2d 72, and *Chisholm v. State*, 2020 ND 19, 937 N.W.2d 520, which had allowed the State to request summary disposition in its answer. We reverse and remand for further proceedings.

I

[¶2] In 2014, a jury convicted Chase of gross sexual imposition. He appealed and the conviction was affirmed. *State v. Chase*, 2015 ND 234, ¶¶ 1, 13, 869 N.W.2d 733. In March 2020, Chase filed a third application for postconviction relief, alleging ineffective assistance of counsel and newly discovered evidence. The State answered the application, and requested summary dismissal within its answer. The district court scheduled oral argument on the application. No response to the request for summary dismissal was filed by Chase. After oral argument, the court summarily denied the application for postconviction relief.

II

[¶3] Chase argues the district court erred in summarily denying his claim for postconviction relief. Section 29-32.1-09, N.D.C.C., allows the district court to summarily dispose of an application for postconviction relief, providing:

> 1. The court, on its own motion, may enter a judgment denying a meritless application on any and all issues raised in the application before any response by the state. The court also may summarily deny a second or successive application for similar relief on behalf of the same applicant and may summarily deny any application when the issues raised in the application have previously been decided by the appellate court in the same case.

2. The court, on its own motion, may dismiss any grounds of an application which allege ineffective assistance of postconviction counsel. An applicant may not claim constitutionally ineffective assistance of postconviction counsel in proceedings under this chapter.

3. The court may grant a motion by either party for summary disposition if the application, pleadings, any previous proceeding, discovery, or other matters of record show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.

Under N.D.C.C. § 29-32.1-09(1), the district court may only summarily dismiss an application on its own motion before the State responds. *State v. Vogt*, 2019 ND 236, ¶ 8, 933 N.W.2d 916. "If the court grants summary disposition after the State responds, it must do so on the motion of either party under N.D.C.C. § 29-32.1-09(3)." *Id.*

[¶4] In its answer, the State requested "[s]ummary dismissal of the Claim; the State is asking this Answer serve as notice of this request." The State also filed a brief in support of its answer, stating, in part, the facts most favorable to the applicant "do not yield an issue of material fact," and providing the summary judgment standard of review. The district court summarily denied the application, citing N.D.C.C. § 29-32.1-09(1), (2), and (3). The transcript of oral argument and the district court's order make clear that the court was treating the State's request for summary dismissal in the State's answer as a motion for summary disposition.

[¶5] Chase asserts the district court erred by allowing the State in its answer to request summary dismissal of the application, instead of filing a motion for summary disposition as required by N.D.C.C. § 29-32.1-09(3). On appeal from a postconviction proceeding, questions of law are fully reviewable. *Wacht v. State*, 2015 ND 154, ¶ 6, 864 N.W.2d 740. Our review of an appeal from summary denial of postconviction relief is similar to reviewing an appeal from a summary judgment. *Id.* "The party opposing the motion for summary dismissal is entitled to all reasonable inferences to be drawn from the evidence and is entitled to an evidentiary hearing if a reasonable inference raises a genuine issue of material fact." *Id.*

[¶6] In *Delvo v. State*, 2010 ND 78, ¶ 7, the State requested summary dismissal in its answer to the application for postconviction relief, without filing a motion. The district court summarily dismissed the application. *Id.* at ¶ 8. A majority of the Court affirmed, holding the State's request for summary disposition contained in its answer was sufficient to put the applicant on notice that she had been put to her proof. *Id.* at ¶ 13. In *Chisholm*, 2020 ND 19, ¶ 11, we noted the State had requested summary disposition in its answer. Because there had been no request to reconsider *Delvo*, we considered the threshold question to be whether the applicant was on notice of the request. *Id.* Chase asks us to reconsider *Delvo*, asserting that no statute or rule provides for making a request for summary disposition in the answer to an application for postconviction relief.

[¶7] A postconviction relief proceeding is commenced by filing an application. N.D.C.C. § 29-32.1-03(1). The application must "set forth a concise statement of each ground for relief, and specify the relief requested," but "[a]rgument, citations, and discussion of authorities are unnecessary" and "[a]ffidavits or other material supporting the application may be attached, but are unnecessary." N.D.C.C. § 29-32.1-04(1) and (2). The State "shall respond by answer or motion." N.D.C.C. § 29-32.1-06(1). Section 29-32.1-09(3), N.D.C.C., allows the court to grant a *motion* for summary disposition if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.

[¶8] "Post-conviction relief proceedings are civil in nature and governed by the North Dakota Rules of Civil Procedure." *Wacht*, 2015 ND 154, ¶ 6. Rule 5(a)(1)(D), N.D.R.Civ.P., requires "a written motion, except one that may be heard ex parte," to be served on every party. "A request for a court order must be made by motion." N.D.R.Civ.P. 7(b)(1). This motion must: "(A) be in writing, unless made during a hearing or trial"; "(B) state with particularity the grounds for seeking the order"; and "(C) state the relief sought." *Id.* Under N.D.R.Ct. 3.2(a)(1), "Notice must be served and filed with a motion." "Upon serving and filing a motion, the moving party must serve and file a brief and other supporting papers and the opposing party must have 14 days after service of a brief within which to serve and file an answer brief and other

supporting papers." N.D.R.Ct. 3.2(a)(2); *see also* N.D.R.Civ.P. 56(c)(1) (providing opposing party 30 days to respond to a motion for summary judgment); *Burden v. State*, 2019 ND 178, ¶ 19, 930 N.W.2d 619 (applying Rule 56 in the context of an application for postconviction relief).

[¶9] These procedures were not followed in this case. Although the State filed a brief in support of its answer, it did not file a motion for summary disposition, a brief in support of its motion, or a notice of motion. Despite Justice VandeWalle's assertion to the contrary, a change to the title of the State's answer to call it a motion would not have satisfied the requirements of Rule 3.2. Neither dissent defends *Delvo* on its merits. By requiring litigants to follow procedural requirements enacted in statute and adopted in this Court's rules, we enhance predictability and fairness in our courts. Under the plain language of the North Dakota Rules of Civil Procedure and Rules of Court, the State did not properly move for summary disposition.

[¶10] This Court's decision in *Delvo* was not only wrong on the merits, but it seems to have encouraged the State to relax its normal motion practice, confusing applicants and the district court as to when or if to act upon a request for summary disposition, which, as Justice Crothers has pointed out, leads to unnecessary litigation:

> Since the *Delvo* decision, this Court has had many cases where the State has not filed a proper motion, no notice of motion was served and filed under N.D.R.Ct. 3.2, and the district court often ruled prematurely before allowing the post-conviction relief applicant sufficient time to respond. *See, e.g., State v. Jensen*, 2020 ND 31, ¶¶ 4, 6, 939 N.W.2d 1 ("the district court misapplied the law in denying Jensen an opportunity to respond under N.D.R.Ct. 3.2(a)(2)"); *Chisholm v. State*, 2020 ND 19, ¶ 25, 937 N.W.2d 520 (Crothers, J., concurring specially) ("Both before and since *Delvo*, the State's failure in post-conviction relief proceedings to serve and file a separate motion has caused considerable extra work for the litigants, the district courts and this Court. *See, e.g., Burden v. State*, 2019 ND 178, 930 N.W.2d 619 and the cases cited therein. That extra work would be greatly reduced if not eliminated by requiring the State, consistent with all other civil proceedings, to file a motion and brief identifying the grounds for relief and

> citing support for that relief. *Id.* at ¶ 10 ('We have said post-conviction proceedings are civil in nature and the rules and statutes applicable to civil proceedings are applicable to those proceedings.'); N.D.R.Civ.P. 7(b)(1) ('A request for a court order must be made by motion.'); N.D.R.Ct. 3.2(a)(1) [motions] and 3.2(a)(2) [briefs]."); *Burden*, at ¶ 19 (order dismissing post-conviction relief application reversed due to prematurely ruling on State's motion); *State v. Vogt*, 2019 ND 236, ¶¶ 9-10, 933 N.W.2d 916 (district court's dismissal of petitioner's post-conviction relief application on its own motion was inappropriate because he was not provided notice and an opportunity to be heard under N.D.R.Ct. 3.2); *Cody v. State*, 2017 ND 29, ¶ 22, 889 N.W.2d 873 ("I have disagreed with a majority of this Court about what the State must do to put an applicant to his proof. [*See Delvo*, at ¶ 22] (Crothers, J., dissenting) ('Here, the legal effect of the majority's decision is that *Delvo* was put to her proof by nothing more than allegations in the State's answer.')"); *Curtiss v. State*, 2016 ND 62, ¶ 13, 877 N.W.2d 58; ("Curtiss was not allowed seven days, as required by N.D.R.Ct. 3.2, to reply to the State's answer; the district court erred.").

Whetsel v. State, 2021 ND 28, ¶ 11, 955 N.W.2d 57 (Crothers, J., concurring specially).

[¶11] We conclude a motion for summary disposition under N.D.C.C. § 29-32.1-09(3) must be made consistent with our rules for motion practice. A district court may not order summary disposition in response to a request in a pleading, including the State's answer to an application for postconviction relief. We overrule *Delvo v. State*, 2010 ND 78, 782 N.W.2d 72, and *Chisholm v. State*, 2020 ND 19, 937 N.W.2d 520, to the extent they approve of a procedure inconsistent with our discussion here.

III

[¶12] In his dissent, Justice VandeWalle argues precedent should be changed by rule or by case law that applies only prospectively. It is not unfair to a district court when we reverse a decision that relied on a precedent we overrule on appeal. If a precedent has direct application, a district court is bound to follow it, whether or not the district court has doubts about whether the

appellate court may be inclined to correct it. *See Hurst v. Florida*, 577 U.S. 92, 101 (2016). If we were to treat it as somehow unfair to correct an erroneous precedent because the district court followed it, as it was bound to do, we would completely tie our hands. Under this approach, no precedent, no matter how unworkable or analytically flawed, would face a significant prospect of being corrected. Moreover, what advocate would put in time and effort, and ask a client to pay for the same, to persuade this Court to overrule a flawed precedent when the party who appeals the issue will not receive the benefit of correcting the erroneous precedent? Very few, if any. As for the suggestion that we change *Delvo* by amending our rules, the majority opinion in *Delvo* cited not one court rule. It relied on its interpretation of the relevant provisions of statute. It may be appropriate to change a rule to correct our case law interpreting that rule, but we are aware of no authority for the suggestion that a court properly changes its interpretation of a statute through the essentially legislative act of adopting a rule.

[¶13] The order summarily denying Chase's application for postconviction relief is reversed. We remand to the district court for further proceedings.

[¶14] Jon J. Jensen, C.J.
Daniel J. Crothers
Jerod E. Tufte

VandeWalle, Justice, dissenting.

[¶15] I respectfully dissent. The majority reverses this Court's decision in *Delvo v. State*, 2010 ND 78, 782 N.W.2d 72. In *Delvo*, the majority held that a separate motion for summary disposition was not required when it was requested in the response to the application for post-conviction relief. *Id.* at ¶ 13. Here, the majority adopts the dissent in *Delvo* and reverses the district court when the district court relied on the majority opinion in *Delvo*. Presumably, had the response in this case been titled "Response and Motion for Summary Disposition" it would have complied with the majority's

requirement. It is my position that is form over substance. Here, as in *Delvo*, the response contained a request for summary disposition.

[¶16] While precedent is not irreversible, nor should it be, I believe that when a majority of the court decides to reverse precedent, it should be done in a more orderly manner rather than reversing a district court when it had relied on the precedent. Because the issue here involves a procedural rule of this Court, I suggest that the change in precedent should be accomplished by a change in the rule. In other instances, it may be more appropriate to accomplish a change in precedent by case law to be applied prospectively.

[¶17] Gerald W. VandeWalle

McEvers, Justice, dissenting.

[¶18] I respectfully dissent. While I agree with the majority that the State did not strictly follow our rules, under the facts of this case, any error by the State was waived or was harmless.

[¶19] I also find it difficult to reverse a district judge who followed our precedent, but I understand that change in precedent does occur. To his credit, Justice Crothers has been steadfast in repeatedly pointing out his dissent in *Delvo v. State*, 2010 ND 78, ¶¶ 19-35, 782 N.W.2d 72. Unfortunately his shots across the bow have often been ignored by practicing prosecutors. Recently, in *Chisholm v. State*, Justice Crothers specially concurred, requesting "the State be required to serve and file an actual motion to dismiss, rather than to continue being permitted to bury their requested relief in a pleading." 2020 ND 19, ¶¶ 22, 937 N.W.2d 520. In his concurrence, Justice Crothers noted he dissented in *Delvo* because he disagreed with the majority holding that the State's request for dismissal contained only in its answer was adequate to put the applicant on notice that he or she had been put to their proof. *Chisholm,* at ¶ 24.

[¶20] Here, after the State filed its answer containing within it a motion for summary disposition, the district court set the matter for hearing. Chase

attended by telephone and was represented by an attorney. At the hearing, his attorney argued he should be entitled to an evidentiary hearing on the basis there was a genuine issue of material fact. Chase's attorney also argued that there had been no adjudication on his issues so the matter was not res judicata and left it to the court to decide the merits of the case. The court made inquiries to ensure Chase had adequate notice of the issues in the following colloquy:

> THE COURT: Miss Flagstad, a couple of things. First, in looking—I'm assuming you've looked at the—you know, you did a very good job in your brief outlining the history of it. And most—I actually think everyone here, other than Mr. Van Chase, has come in at some point during the life of this case.
>
> With that said, have you looked at the entire file in this current matter?
> MS. FLAGSTAD: I've certainly tried to do my best to get up to speed, Your Honor, but you are aware, I think I'm probably the last one that's been brought on with all of this.
>
> THE COURT: Sure. Yeah, absolutely. Well, you've looked at documents, and I'm actually, more specific the question is, you've looked at all the documents since you've filed the motion, and you've received Mr. Grosinger's answer.
>
> MS. FLAGSTAD: Yes, I did.
>
> THE COURT: Okay. And, so, you understand that Mr. Grosinger is filing notice with the Court, he's asking this Court grant summary dismissal of this matter.
>
> MS. FLAGSTAD: Yes, and—and actually, I did not file any type of response to that because I saw that the Court had only filed this notice as an oral argument. So, I did not put forth any type of motion to the Court with our response to that, just based upon that I knew at this point was not determined to be an evidentiary hearing.
>
> THE COURT: Yes, it was. This is just an or—this is done at my request, just to have oral argument, on the briefs and the motion itself. And it's kind of a unique animal where it's a civil

> matter but it's involving a criminal matter, so I think that there's still some learning. 'Cause I'm looking at—I looked at the State v. Chisholm case and specifically, I looked at Justice Crothers' dissent about what his—what he believes should be done by the State. But with that—okay, so I just wanted to cover that.

[¶21] At no time did Chase or his attorney object to the hearing or object on the basis the State's motion was included in its answer instead of as a separate document. By failing to object to the proceeding, Chase waived this procedural argument. *See State v. Eckroth*, 2015 ND 40, ¶ 18, 858 N.W.2d 908 ("When a party fails to object at the time of the alleged error, such failure 'acts as a waiver of the claim of error.'") (quoting *City of Fargo v. Erickson*, 1999 ND 145, ¶ 22, 598 N.W.2d 787 (Sandstrom, J., concurring)); *see also State v. Bethke*, 2009 ND 47, ¶ 25, 763 N.W.2d 492 ("This Court has held if a party fails to object to a trial court's procedure, it operates as a waiver of the issue on appeal.").

[¶22] Even if Chase had objected, any procedural error was harmless because it is clear from the record he had adequate notice that the purpose of the hearing was to deal with the State's motion for summary disposition. *See* N.D.R.Civ.P. 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."). The court here specifically found that Chase had notice of the State's motion for summary disposition, stating: "At oral argument, Chase, through his attorney, acknowledged the State's intention for summary disposition was known to them through the State's written response to Chase's third application."

[¶23] Regarding the merits, this is Chase's third application for postconviction relief. Majority, at ¶ 2. Chase's conviction was final in 2015. His application is clearly beyond the two-year statute of limitation under N.D.C.C. § 29-32.1-01(2), unless he met one of the exceptions under N.D.C.C. § 29-32.1-01(3). Chase argued below he had newly discovered evidence, a medical record of the victim, seeking an exception under N.D.C.C. § 29-32.1-01(3)(a)(1). The State responded that even if the new evidence existed, it was not the type of evidence that would have altered the result of the trial. *See id.* (requiring "existence of newly discovered evidence . . . which if proved and reviewed in the light of the evidence as a whole, would establish that the petitioner did not engage in the

criminal conduct for which the petitioner was convicted"). The district court noted at the hearing that Chase provided no evidence or details indicating such evidence exists, nor did he provide any explanation for how such evidence would have changed the outcome of the trial. Postconviction relief applicants are only entitled to an evidentiary hearing when they "provide competent evidence" to support their claim. *Davies v. State*, 2018 ND 211, ¶ 10, 917 N.W.2d 8. When given the opportunity, Chase did not meet his burden of providing competent evidence warranting an evidentiary hearing.

[¶24] On appeal, Chase argues the State committed procedural errors, but he does not substantively address the court's conclusion that he provided nothing more than conclusory allegations regarding his alleged newly discovered evidence. There is no need to address any other issues raised below if Chase cannot show the court erred in concluding he did not provide anything to indicate that the alleged newly discovered evidence actually exists.

[¶25] The district court has already held a hearing on the State's motion. Chase has already responded to the motion, and the court has already rejected his arguments. Remanding the case for the State to bring the motion again, albeit in a form that strictly follows procedural rules, is an unnecessary use of our judicial resources. "It would be idle to remand . . . . We should keep in mind 'the time and energies of our courts and the rights of would-be litigants awaiting their turns to have other matters resolved.'" *Dakota Bank & Tr. Co. of Fargo v. Brakke*, 377 N.W.2d 553, 560 (N.D. 1985) (Meschke, J., concurring) (quoting *Von Poppenheim v. Portland Boxing & Wrestling Comm'n*, 442 F.2d 1047, 1054 (9th Cir. 1971)). Rigid adherence to other rules of civil procedure and N.D.R.Ct. 3.2 in this instance ignores the requirements of N.D.R.Civ.P. 61, which requires harmless error be disregarded. For these reasons, I would affirm the order denying Chase's third application for postconviction relief.

[¶26] Lisa Fair McEvers
Gerald W. VandeWalle