IN THE SUPREME COURT

STATE OF NORTH DAKOTA

20040118

State of North Dakota, Plaintiff-Appellant, vs. Paul John Buchholz, Defendant-Appellee.	)	SUPREME COURT NO. 20040118

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

JUL 19 2004

STATE OF NORTH DAKOTA

APPELLEE'S BRIEF

APPEAL FROM THE APRIL 2, 2004 DISCHARGE ORDER
THE BARNES COUNTY COURT IN VALLEY CITY, NORTH DAKOTA
THE HONORABLE MIKAL SIMONSON PRESIDING

ATTORNEY FOR APPELLANT

H. JEAN DELANEY
Assistant State's Attorney
230 4th Street NW
Valley City, ND 58072
(701) 845-8526
ND No. 04866

ATTORNEY FOR APPELLEE

RICHARD E. EDINGER
Attorney at Law
P.O. Box 1295
Fargo, ND 58107
(701) 298-0764
ND No. 05488

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NORTH DAKOTA RULES OF CRIMINAL PROCEDURE

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STATEMENT OF THE ISSUES PRESENTED

I. WHETHER THE COURT HAS JURISDICTION TO HEAR THE APPEAL?

II. WHETHER THE DISTRICT COURT CORRECTLY INTERPRETED THE STATUTE?

III. WHETHER MISTAKE OF LAW APPLIES WHERE DEFENDANT RELIED ON JUDGE GOODMAN'S JUDICIAL DECISION AND OPINION?

ARGUMENT

I. THE COURT HAS JURISDICTION TO HEAR THE APPEAL.

Pursuant to State v. Foley, 2000 ND 91, 610 N.W.2d 49, Defendant concedes that this Court has jurisdiction to hear the appeal.

II. THE DISTRICT COURT CORRECTLY INTERPRETED THE STATUTE.

N.D.C.C. § 62.1-02-01, in part, states:

"A person who violates subsection 1 or 2 is guilty of a class C felony, and a person who violates subsection 3 or 4 is guilty of a class A misdemeanor. For the purposes of this section, "conviction" means determination by a jury or court that a person committed one of the above-mentioned crimes even though the court suspended execution of sentence in accordance with subsection 3 of section 12.1-32-02 or deferred imposition of sentence in accordance with subsection 4 of section 12.1-32-02, placed the defendant on probation, granted a conditional discharge in accordance with section 19-03.1-30, **the defendant's conviction has been reduced in accordance with subsection 9 of section 12.1-32-02** . . . ." [emphasis added].

The issue is whether Judge Simonson correctly interpreted the possession of a firearm statute. Statutory interpretation is a question of law fully reviewable on appeal. Ralston v. Ralston, 2003 ND 160, ¶ 5, 670 N.W.2d 334. This Court's "primary objective is to ascertain legislative intent, which must be sought initially from the language of the statute." Id. at ¶ 5. In interpreting a statute, words are to be understood in their ordinary meaning. N.D.C.C. § 1-02-02, Id. at ¶ 5. "When the wording

of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." N.D.C.C. § 1-02-05, Id. at ¶ 5.

Here, the statute is clear and free of ambiguity. The relevant section requires that the conviction be reduced in accordance with § 12.1-32-02(9) in order to fall within the statute.

Judge Simonson correctly interpreted the statute. The conviction was never reduced from a felony to a misdemeanor. Instead, pursuant to a plea agreement, Defendant pled guilty to a misdemeanor and he was sentenced and convicted of a misdemeanor.

On September 27, 2002, pursuant to a written plea agreement, Defendant pled guilty to the underlying charge of issuing a check without sufficient funds or credit. (A-8)[1] The plea agreement envisioned that Defendant would be sentenced to 60 days in the Barnes County jail with all time suspended for one year, one year of unsupervised probation, and payment of restitution. Judge Goodman accepted the plea agreement. (A-11) Defendant was sentenced in accordance with the plea agreement. (A-3, A-11 to A-12)

N.D.C.C. § 12.1-32-02(9) states that:

"A person who is convicted of a felony and sentenced to imprisonment for not more than one year is deemed to have been convicted of a misdemeanor. However, if an order is entered revoking a probation imposed

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> as a part of the sentence, the person is deemed to have been convicted of a felony. . . ."

Here, Defendant was deemed to have been convicted of a misdemeanor. Judge Goodman acknowledged at sentencing that Defendant was deemed to have been convicted of a misdemeanor. (A-16)

Judge Simonson was correct in his interpretation of both statutes. Upon Judge Goodman's acceptance of the plea agreement, Defendant was deemed convicted of a misdemeanor "instaneously." (A-19) N.D.R.Crim.P. 11 d(3) states that:

> "If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement or another disposition more favorable to the defendant than that provided for in the plea agreement."

Pursuant to the written Rule 11 plea agreement and the sentencing statute, the parties agreed that Defendant would be deemed convicted of a misdemeanor. Clearly, the district court was correct in its Discharge Order because the conviction was not reduced as required under N.D.C.C. § 62.1-02-01. Instead, the parties bargained and agreed to a misdemeanor, which the court accepted and sentenced accordingly.

The State's argument is flawed and ignores the essence of Rule 11. Here, the <u>parties</u> <u>not</u> the judge determined that

Defendant was convicted of a misdemeanor! Under Rule 11(d), the court either has to accept the misdemeanor plea or reject the Rule 11 plea agreement and afford Defendant an opportunity to withdraw his plea.

The plea agreement made the check charge a misdemeanor. It has the same legal effect as if the State had filed an amended information, charging Defendant with a class A misdemeanor NSF check and a subsequent plea to the amended charge had occurred.

A clear reading of the possession of a firearm statute, the sentencing statute, and Rule 11 show that the conviction was not reduced to a misdemeanor. Instead, it was a bargained for disposition made by the parties. As such, Judge Simonson's Discharge Order was correct because probable cause was lacking to believe Defendant's conduct violated N.D.C.C. § 62.1-02-01.

III. MISTAKE OF LAW APPLIES WHERE DEFENDANT RELIED ON JUDGE GOODMAN'S JUDICIAL DECISION AND OPINION.

At sentencing on the underlying charge, the following occurred:

"[THE COURT]: We're back on record.

While we were off record, the Court looked at the-code section and Mr. Edinger is right. Mr. Buchholz is deemed to have committed a misdemeanor since he is sentence to less than 365 days, however, if he breaks probation, he will be deemed to have committed a felony. Okay.

Any other conditions of probation. I still feel there is a restriction as far as possession of a firearm.

[Ms. Huseby]: Yes, there always is with probation. You can't possess a firearm-

[THE COURT]:-yes. So that is something - you cannot possess a firearm for a period of one year than. So, if you're a hunter, you hunting period - you're hunting privileges are basically suspended for a period of one year.

Any other conditions of probation you wish to add?

[MR. EDINGER]: No, Your Honor." (A-16)

An alternative basis for affirming the district court's Discharge Order is mistake of law. Generally, issues not raised in the trial court will not be addressed on appeal.

State v. Slapnicka, 376 N.W.2d 33 (N.D. 1985). At the preliminary hearing, Defendant raised the issue of mistake of law. (T 12,14-16, 21-22,[2] Defendant's Exhibit #2). Therefore, the issue is reviewable by this Court.

N.D.C.C. § 12.1-05-09 states:

"Except as otherwise expressly provided, a person's good faith belief that conduct does not constitute a crime is an affirmative defense if he acted in reasonable reliance upon a statement of the law contained in:

1. A statute or other enactment.
2. A judicial decision, opinion, order, or judgment.
3. An administrative order or grant of permission.
4. An official interpretation of the public servant or body charged by law with responsibility for the interpretation, administration, or enforcement of the law defining the crime."

Here, even assuming arguendo that Defendant's conviction was covered under the possession of the firearm statute, Defendant reasonably relied on Judge Goodman's judicial decision and opinion that he could possess a firearm after one year from the date of sentencing. At the preliminary hearing, Special Agent Mark Sayler admitted that Defendant told the officer that he thought he could possess firearms after one year:

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"[MR. EDINGER]: He also --Isn't it true he also told the officer who talked to him that it must be a mistake, that a year had elapsed, that, that he could possess firearms? Isn't that what Mr. Buchholz told the officer?

A. He said that he thought it was a mistake. He thought he was only prohibited from possessing them for a year while he was on probation, yes." [T 12]

Mistake of law defense is not ordinarily applicable where the governing statute does not contain a culpability requirement. State v. Eldred, 1997 ND 112,¶ 29, 564 N.W.2d 283. However, strict liability does not always preclude the defense. Id. at ¶ 30. In Eldred, this Court held that N.D.C.C. § 62.1-02-01 does not have a culpability requirement. Id. at ¶ 31. In that case, the defendant argued that only crimes of violence or intimidation are covered under the statute. Id. at ¶ 17. This Court rejected that argument and held that a mistake of law defense was not applicable. Id. at ¶ 31.

Eldred is distinguishable on several grounds. First, none of the requirements under N.D.C.C. § 12.1-05-09 were present. Second, the defendant argued against the plain meaning of the statute. And finally, most importantly, the defendant was not relying on a district court's judicial decision and opinion on the law.

Here, at the September 27, 2002 Sentence hearing, Judge

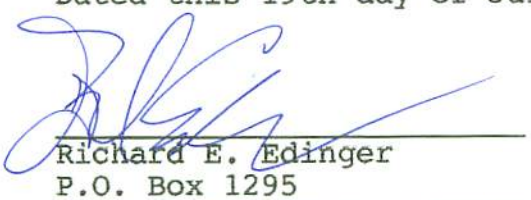
Goodman gave Defendant his judicial opinion regarding the lawful possession of a firearm after one year. One could reasonably interpret Judge Goodman's opinion as his interpretation of the possession of a firearm statute.

This is a case of first impression for this Court. There are no known cases where the Defendant asserts mistake of law based on a judge's opinion. However, the plain language of the statute clearly states that relying on a judicial decision or opinion constitutes mistake of law. It would defy logic to come to a contrary result or holding. If a criminal defendant cannot rely on a district court's opinion at sentencing, it puts the entire criminal justice system in disarray. A criminal defendant, on his own, would have to ferret out what parts of the sentencing court's sentence he has to follow and what parts of the sentence he is free to ignore.

CONCLUSION

WHEREFORE, the reasons stated herein, Defendant respectfully requests that this Honorable Court affirm the district court's March 30, 2004 Order and April 2, 2004 Discharge Order.

Dated this 19th day of July, 2004.



Richard E. Edinger
P.O. Box 1295
Fargo, North Dakota 58107
(701) 298-0764
ND No. 05488
Attorney for Defendant-Appellee