

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,)	
)	Supreme Court No. 20050423
Plaintiff and Appellee)	
)	District Court No. 18-03-K-00873
vs.)	
)	
Roy Allen Feist,)	
)	
Defendant and Appellant.)	

ON APPEAL FROM CRIMINAL JUDGMENT
FROM THE DISTRICT COURT
FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY, NORTH DAKOTA
THE HONORABLE LAWRENCE JAHNKE, PRESIDING.

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUE

- I. Whether the District Court erred in denying the Defendant's motion to withdraw his guilty plea to a charge of indecent exposure when he failed to establish a manifest injustice.**

STATEMENT OF THE CASE

[¶1] Roy Allen Feist (Mr. Feist and Defendant herein), appeals from a judgment of criminal conviction in the District Court of Grand Forks County. On April 4, 2003, Mr. Feist was charged with Indecent Exposure (Appellant's App. at 1.) On July 23, 2003, Mr. Feist entered a guilty plea to the charge. (Pretrial Conference Tr., 19, July 23, 2003.) On October 1, 2005, Mr. Feist filed a motion requesting to withdraw his guilty plea after being informed by the Attorney General's Office of the requirement to register with the State of North Dakota as a sex offender. (Appellant's App. at 1,8.) On November 4, 2005, the District Court issued an order denying Mr. Feist's request to withdraw his guilty plea. (Appellant's App. at 1.) Notice of Appeal and an Amended Notice of Appeal were filed on or about December 5, 2005. (Appellant's App. at 1.)

STATEMENT OF THE FACTS

[¶2] On April 3rd, 2003, officers responded to 1006 S. 17th St. in Grand Forks, North Dakota, after receiving a complaint from the resident. The resident reported a vehicle parked in the alley behind his residence with a male occupant inside the vehicle poking at his anus and masturbating up against the rear window. Upon arriving at the scene, officers observed a male, later determined to be Mr. Feist, naked from the waist down in the backseat of the vehicle. The resident completed a citizen's arrest form and statement and Mr. Feist was placed under arrest for indecent exposure. An information was filed on that same day and Mr. Feist was charged with indecent exposure.

(Appellant's App. at 2.) He entered a guilty plea before the Honorable Judge Lawrence E. Jahnke in District Court on July 23, 2003. (Pretrial Conference Tr., 19, July 23, 2003.)

In conjunction with other pending charges at the time, Mr. Feist was sentenced to one (1) year in the Grand Forks County Correctional Center with all but one hundred and thirty-five (135) days suspended for one (1) year, receiving credit for one hundred and thirty-five (135) days already served. (Pretrial Conference Tr., 19, July 23, 2003.)

[¶3] During the summer of 2005, while incarcerated on other charges, Mr. Feist received a letter from Assistant Attorney General Jonathan Byers (Mr. Byers herein), informing him of the requirement to register as a sex offender. (Appellant's App. at 6.) Mr. Byers informed Mr. Feist's attorney that Mr. Feist's indecent exposure conviction mandated registration subsequent to August 1, 2001 and that charge in conjunction with a prior conviction of corruption of a minor mandated him as a lifetime registrant.

(Appellant's App. at 8.) On September 29, 2005, in response to this information, Mr. Feist filed a motion with the Court to withdraw his guilty plea. (Appellant's App. at 1.)

In his affidavit, Mr. Feist indicated he was never informed by the Court of the requirement to register as a sex offender, and he therefore would not have entered a plea of guilty to the indecent exposure charge if he had known of the requirement.

(Appellant's App. at 6-7.) The State resisted the Defendant's motion and filed a brief in opposition on October 20, 2005, stating that the Defendant's motion was procedurally deficient and that the Defendant had failed to establish manifest injustice meriting the withdrawal of his guilty plea. (Appellant's App. at 1.)

[¶4] On November 4, 2005, the court issued an order denying Mr. Feist's request to withdraw his guilty plea, stating that the court was not required to advise a defendant of all possible consequences of a guilty plea. Mr. Feist had been represented by an attorney, indicated his plea was voluntary, and acknowledged that his guilty plea admitted the criminal elements of the charge. (Appellant's App. at 15.)

ARGUMENT

I. THE DISTRICT COURT'S DECISION DENYING THE DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA SHOULD BE AFFIRMED BECAUSE THE DEFENDANT'S MOTION IS UNTIMELY.

[¶5] The Defendant's motion to withdraw his guilty plea was not timely under North Dakota law. North Dakota Rule of Criminal Procedure 32(d)(1) states "The court must allow the defendant to withdraw a plea of guilty whenever the defendant, on a timely motion for withdrawal, proves withdrawal is necessary to correct a manifest injustice." N.D.R.Crim.P., Rule 32(d)(1) (2005). Subsection (d)(2) further states that "A motion for withdrawal is timely if made with due diligence, considering the nature of the allegations, and is not necessarily barred because made subsequent to judgment or sentence." N.D.R.Crim.P., Rule 32(d)(2) (2005).

[¶6] In Gamboa v. State of North Dakota, this Court first addressed the issue of whether a motion to withdraw a guilty plea was timely made. Gamboa v. State of North Dakota, 2005 ND 48 ¶ 9, 693 N.W.2d 21. In that case, the defendant requested to withdraw his guilty plea to a 1996 drug charge, the request occurring over 6 years after the conviction. Id. at ¶ 2. This Court had not previously addressed the issue and therefore consulted decisions of the Minnesota Supreme Court due to the fact that Minnesota's rules governing the withdrawal of a guilty plea are similar to North Dakota's withdrawal statutes. Id. at ¶ 9-11. The Court ultimately held that the defendant's motion to withdraw his guilty plea was not timely under North Dakota Rule of Criminal Procedure 32(d), basing its decision on the precedent of several Minnesota cases. Id. at

13-15; See Spike v. State, 2002 Minn. App. LEXIS 630 at *7 (Minn. Ct. App., June 4, 2002) (the court holding the motion to be untimely when defendant waited for three years); State v. Lopez, 379 N.W.2d 633, 636 (Minn. Ct. App. 1986) (the court holding the request to be untimely when motion was made eleven months after sentencing).

[¶7] Like in Gamboa, the Defendant's motion in the case at hand is untimely. On July 23, 2003, the Defendant entered a guilty plea to the charge of indecent exposure. (Pretrial Conference Tr., 19, July 23, 2003.) His motion to withdraw his guilty plea was not made until October 1, 2005, over twenty-six (26) months later. (Appellant's App. at 1.) The Defendant's motion was made over two (2) years after sentencing and over one (1) year after his one (1) year of unsupervised probation had expired. Id.; (Pretrial Conference Tr., 19-20, July 23, 2003.) It should be noted that under NDCC §12.1-32-01(5), the maximum amount of time that the Defendant could have been sentenced to for the crime of indecent exposure, an A Misdemeanor, is one (1) year, and the maximum amount of unsupervised probation he could have been sentenced to would have been two (2) years. N.D.Cent.Code, 12.1-32-01(5) (2005). Even if the Defendant would have received the maximum sentence allowed under the statute, his motion would have been received after these time periods had also expired. As in Gamboa, the Defendant's motion to withdraw his guilty plea is therefore untimely when made over twenty-six (26) months after sentencing.

II. THE DISTRICT COURT'S DECISION DENYING THE DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA SHOULD BE AFFIRMED BECAUSE THE DEFENDANT FAILED TO ESTABLISH A MANIFEST INJUSTICE

[¶8] North Dakota Rule of Criminal Procedure 32(d)(1) states that “The court must allow the defendant to withdraw a plea of guilty whenever the defendant, on a timely motion for withdrawal, proves withdrawal is necessary to correct a manifest injustice.” N.D.R.Crim.P. 32(d)(1) (2005). Subsection (3) further states that “In the absence of a showing that withdrawal is necessary to correct a manifest injustice, a defendant may not withdraw a plea of guilty as a matter of right once the plea has been accepted by the court.” N.D.R.Crim.P. 32(d)(3) (2005). However, subsection (3) goes on to state that before sentence is given, the court may in its discretion allow the defendant to withdraw a plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant’s plea. Id. The North Dakota Supreme Court has held that after sentencing the defendant holds the burden of proving a manifest injustice in order to withdraw his plea. See State v. Werre, 325 N.W.2d 172, 174 (N.D. 1982), State v. Stai, 335 N.W.2d 798, 800 (N.D. 1983), State v. Millner, 409 N.W.2d 642, 643 (N.D. 1987). This Court has also held that they will reverse a trial court’s denial of the motion only upon a showing that the court abused its discretion. Millner, 409 N.W.2d at 643.

[¶9] In the present case, Defendant filed a motion to withdraw his guilty plea on September 29, 2005, twenty-six (26) months after he was sentenced. (Appellant’s App. at 1.) Due to the fact that this motion was filed after his sentencing on July 23, 2003, Defendant is required to prove a manifest injustice. N.D.R.Crim.P. 32 (2005). He has not done so. The trial court’s decision to deny Defendant’s motion to withdraw his guilty plea should only be reversed upon showing abuse of discretion of the District Court. Millner at 643. Since the Defendant has failed to show an abuse of discretion, his motion must be denied.

A. The Defendant has failed to show that N.D.R.Crim.P. 11(b) was not complied with, and therefore there is no showing of an abuse of discretion causing manifest injustice.

[¶10] Under North Dakota law, a trial court abuses its discretion when it fails to exercise its discretion in the interests of justice. State v. Mortrud, 312 N.W.2d 354, 359 (N.D. 1981). This occurs when a court acts in an arbitrary, unreasonable, or capricious manner, or misinterprets or misapplies the law. State v. Sisson, 1997 ND 158 ¶ 7, 567 N.W.2d 839 (citing State v. Klien, 1997 ND 25, 560 N.W.2d 198.).

[¶11] Rule 11(b) of the North Dakota Rules of Criminal Procedure requires the Court to inform a defendant of the nature of the charge against him, the mandatory minimum and maximum punishments provided by statute, the right to plead not guilty, and the fact that a guilty plea waives the right to a trial. N.D.R.Crim.P. 11(b) (2005). The trial court is required to advise the defendant of these items, although the rule does not require the court to follow ritualistic formality. State v. Abdullahi, 2000 ND 39 ¶ 9, 607 N.W.2d 561; Abdi v. State, 2000 ND 64 ¶ 12, 608 N.W.2d 292. However, the court is required to substantially comply with the procedural requirements of the rule in order to ensure that the defendant's guilty plea is voluntary. Id.; N.D.Crim.P. 11(c) (2005).

[¶12] In Davenport v. State, the defendant appealed a District Court decision denying his request to withdraw his guilty plea to several counts of gross sexual imposition. Davenport v. State, 2000 ND 218 ¶ 1-2, 620 N.W.2d 164. The defendant sought to withdraw his guilty plea after learning he was required to register as a sexual offender. The defendant stated he was not aware of the requirement to register at the time he entered his guilty plea and only became aware of it during sentencing. Id. This Court

affirmed the District Court's decision denying the defendant's motion to withdraw his guilty plea, holding that because the sex offender registration requirement was collateral and not a direct consequence of entering a guilty plea the trial court was not required to advise the defendant of the requirement. Id. at ¶ 10. Further, the Court held there to be no manifest injustice because the trial court complied with N.D.R.Crim.P. 11(b), advising the Defendant of the maximum and minimum possible punishments. Id.

[¶13] As in Davenport, there is no showing of manifest injustice in the case at hand. At the July 23, 2003 pretrial conference the Defendant entered his guilty plea to the indecent exposure charge and because he also had several other charges pending, the indecent exposure charge was handled along with the disposition of all of the pending charges. (Pretrial Conference Tr., 13-20, July 23, 2003.) The Defendant was represented by an attorney at this proceeding. (Pretrial Conference Tr., 2, July 23, 2003.) Before pleading guilty, the Defendant was advised that a guilty plea to the pending misdemeanors, including the indecent exposure charge at issue here, would result in a sentence of one hundred and thirty-five (135) days in the Grand Forks County Correctional Center, but that time would be suspended for one (1) year and he would receive credit for one hundred and thirty-five (135) days already served. In addition, he would be required to report to Northeast Human Services for evaluation within twenty-four (24) hours. (Pretrial Conference Tr., 14-15, July 23, 2003.) The Defendant was also informed that the sentence was not in the form of a plea agreement. (Pretrial Conference Tr., 14, July 23, 2003.) Additionally, the Defendant was advised by the Court that if he pled not guilty there would be a trial. Id. The Court then went through the charges one by one and the Defendant entered a plea to each of them. (Pretrial Conference Tr., 17-20,

July 23, 2003.) The indecent exposure charge was the last charge discussed and when asked how he pled to the allegation, the Defendant responded, “Guilty.” The Court then asked him if the plea was voluntarily made and the Defendant responded, “Yes.” (Pretrial Conference Tr., 19, July 23, 2003.) The Court accepted his voluntary plea and then sentenced him to one hundred and thirty-five (135) days with one hundred and thirty-five (135) days suspended for one (1) year with credit for one hundred and thirty-five (135) days already served. This is the sentence in which the Defendant was advised of before entering his guilty plea. (Pretrial Conference Tr., 15, 19, 20, July 23, 2003.)

[¶14] Defendant argues he was not informed of the fact that he did not have to plead guilty. (Appellant’s Brief at 6.) It is true that the Defendant was not told verbatim that he did not have to plead guilty, but the Defendant was advised by the Court that if he pled not guilty there would be a trial. (Pretrial Conference Tr., 14, July 23, 2003.) The Defendant also made it clear he understood this fact when, at the beginning of the pretrial conference, he stated, “...if I was coming in here and pleading guilty, I would not plead guilty to any—plea agreement. All right? But I will not – I – I – I – I feel I’m going to have to take everything to trial, because....” (Pretrial Conference Tr., 3, July 23, 2003.) This statement shows the Defendant knew he had the right to plead not guilty and take the charges to trial. It should also be noted that the Defendant has an extensive prior record. (Contact card for Feist, Roy A., February 2, 2006.) This is relevant because the Defendant has pled guilty to charges in the past and is therefore familiar with the legal process and the rights afforded him through Rule 11. *Id.* The Defendant’s prior experiences with the court and the Defendant’s statements at the July 23, 2003 proceeding, combined with the information given to him by the court at the proceedings

lead to the logical conclusion that the Defendant was aware of the fact that he had the right to not plead guilty and that a guilty plea would result in no trial.

[¶15] As in Davenport, the Court in this case therefore substantially complied with the requirements of Rule 11(b) and the Defendant has failed to show that the District Court abused its discretion causing a manifest injustice. As in Davenport, a court is not required to inform the defendant of the requirement to register as a sex offender as it is a collateral consequence and therefore failure to do so is also not an abuse of discretion. Davenport, 2000 ND 218 at ¶ 10. Since the burden of proving a manifest injustice is held by the Defendant and this burden has not been met, the District Court's decision denying the Defendant's motion to withdraw his guilty plea should therefore be upheld. State v. Werre, 325 N.W.2d 172, 174 (N.D. 1982).

III. THE DISTRICT COURT'S DECISION DENYING THE DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA SHOULD BE AFFIRMED BECAUSE THE SEX OFFENDER REGISTRATION REQUIREMENT IS A COLLATERAL CONSEQUENCE UPON CONVICTION AND THEREFORE THE DISTRICT COURT WAS NOT REQUIRED TO INFORM THE DEFENDANT OF THE REQUIREMENT BEFORE ENTERING HIS GUILTY PLEA

[¶16] Under North Dakota Law, a trial court is required to inform a defendant of all the direct consequences of a guilty plea before accepting the plea. State v. Dalman, 520 N.W.2d 860, 863 (N.D. 1994). However, a trial court is not required to inform a defendant of the collateral consequences of a guilty plea. Id. This Court has held that the registration of a sex offender is a collateral consequence upon conviction, not direct or punitive. State v. Burr, 1999 ND 143 ¶ 36, 598 N.W.2d 147. The Court reiterated this point by stating that the purpose of the registration requirement was to protect a

legitimate public interest, which imposes a collateral consequence upon conviction, not added punishment. Id. Therefore, because the registration of sex offenders is a collateral consequence, the trial court is not required to inform a defendant of the requirement to register. Dalman, 520 N.W.2d at 863; see also Davenport 2000 ND 218 ¶ 10 (Holding the trial court was not required to advise the defendant of the sex offender registration requirement because it was collateral and not a direct consequence of entering a guilty plea.)

[¶17] As in Davenport, the Defendant in the case at hand asserts he was not informed of the registration requirement before or after entering his guilty plea. (Appellant's Brief at 2.) The transcript of the court proceeding on July 23, 2003 affirms this assertion. (Pretrial Conference Tr., 19, 20, July 23, 2003.) However, the court was not required to inform the Defendant of the sex offender registration requirement because the requirement has been held to be a collateral consequence. Burr, 1999 ND 143 ¶ 36. Since the District Court was not required to inform the Defendant that registration as a sex offender was a collateral consequence of entering a plea of guilty to the indecent exposure charge, the District Court correctly denied the Defendant's motion to withdraw his guilty plea and the District Court's decision should be upheld. Id.

CONCLUSION

[¶18] Therefore, the State respectfully requests this Court to affirm the District Court's decision denying the Defendant's motion to withdraw his guilty plea.

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