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20080113

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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CLERK OF SUPREME COURT

OCT 14 2008

STATE OF NORTH DAKOTA

Anthony Miller,	)	
	)	
Petitioner and Appellant,	)	
	)	
-vs-	)	
	)	
State of North Dakota,	)	Supreme Ct. No. 20080113
	)	
Respondent and Appellee,	)	District Ct. No. 08-08-K-02571
	)	SA File No. F981-05-12

BRIEF OF APPELLEE

APPEAL FROM ORDER DENYING POST CONVICTION RELIEF, DATED MARCH 13, 2008, AND ORDER CONFIRMING CREDIT FOR INCARCERATION, DATED APRIL 28, 2008

Burleigh County District Court
South Central Judicial District
The Honorable Donald L. Jorgenson, Presiding

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BURLEIGH COUNTY
STATE'S ATTORNEY
BISMARCK, N. DAK.

STATEMENT OF THE ISSUES

1. Whether Appellant, given the opportunity to have his guilty pleas withdrawn, he chose to plead guilty at the hearing on December 27, 2007, makes this appeal moot?

2. Whether there was any plea agreement in the Burleigh County case?

3. Whether the trial judge abused his discretion imposing the sentence he did in Burleigh County?

BURLEIGH COUNTY
STATE'S ATTORNEY
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STATEMENT OF THE CASE

On or about December 21, 2005, the State of North Dakota (Appellee) filed a Criminal Complaint with the Burleigh County District Court charging the Appellant with having, during June of 2005, committed the two (2) criminal offenses of Forgery, a class C felony, and Theft of Property, a class B misdemeanor. (Register of Actions, entry #1; Appellant's Appendix 2). The Criminal Complaint was filed in Burleigh County Criminal Case No.: 08-05-K-2571. (Appellant's Appendix 3).

Appellant made his first appearance on the Criminal Complaint on October 11, 2006. (Appellee's Appendix 1). At the initial appearance, the Appellant was advised of the two (2) charges contained in the Criminal Complaint and was advised of the rights he enjoyed as a criminal defendant. (Appellee's Appendix 1-3).

A Preliminary Hearing and Arraignment were held on the Burleigh County case on November 27, 2006. (Register of Actions, Entry # 5; Appellee's Appendix 4). The Appellant waived his right to a Preliminary Hearing and the Information was filed with the Court. (Appellant's Appendix 4; Appellee's Appendix 5, Lns. 4-25; Appellee's Appendix 6, Ln. 1). Following the filing of the Information, the Appellant was advised of the nature of the two charges; the maximum penalty on each charge should he be convicted; his right to counsel; right to remain silent; right to a jury trial; right to confront and to compel the

attendance of witnesses; right to a unanimous verdict; and, the right to give up each of these rights and to plead guilty to each charge. (Appellee's Appendix 6, Lns. 5-25; Appellee's Appendix 7). At the Arraignment, the Appellant plead not guilty to each offense. (Appellee's Appendix 8; Lns. 6, 10).

A final pretrial dispositional conference was held on January 29, 2007. (Appellee's Appendix 10, Lns. 1-3; 6). At the dispositional conference, the Appellant informed the Court that the Appellant wanted to change his pleas of not guilty and requested a PSI, or Pre-sentence Investigation Report, be conducted. (Appellee's Appendix 10, Lns. 11-12). The Appellant did not enter guilty pleas at that time. (Appellee's Appendix 10, Lns. 23-25; Appellee's Appendix 11, Lns. 2-3). The Court ordered that a PSI be prepared and that a Change of Plea hearing be held at a later date in front of the assigned trial judge. (Appellee's Appendix 10, Lns. 23-25; Appellee's Appendix 11, Lns. 2-3).

A Sentencing hearing was scheduled for March 21, 2007. (Appellee's Appendix 12). The Appellant did not personally appear at the March 21 hearing and it was continued.

The continued Sentencing Hearing was set for May 16, 2007, in Burleigh County Case No. 08-05-K-02571. (Appellee's Appendix 13). At the hearing on May 16, 2007, the Appellant simultaneously appeared for Sentencing on Morton County Case No.: 30-05-K-1260 and Burleigh County Case No. 08-05-K-02571. The Trial Court made a finding on the record that Appellant had appeared before

the Court on January 22, 2007, and had withdrawn his pleas of not guilty and entered pleas of guilty to the two charges. (May 16, 2007, Transcript of Sentencing Proceedings, Page 2, Lns. 14-20). Although this was not accurate, no one in attendance disputed the Court's finding.

The Court asked for the Appellee's recommendations. (Id., Page 4, Lns. 17-18). The Appellee, per its letter to Appellant, dated January 2, 2007, recommended a sentence of five (5) years on the felony and thirty (30) days on the misdemeanor at the North Dakota Department of Corrections and Rehabilitation (NDDOCR); concurrent with each other. (Id., at Page 4, Lns. 19-25; Page 5; Page 6, Ln. 1-10; Appellee's Appendix 14). No mention of any plea agreement was made.

Counsel for the Appellant, on the other hand, recommended that the Appellant be sentenced to five (5) years, with three (3) of those five (5) years suspended. (Id., Page 6, Lns. 12-15; Page 7, Lns. 16-17). He also proposed that the Burleigh sentence run concurrent with the Stark County sentences the Appellant was then currently serving. (Id., Page 6, Lns. 15-19; Page 7, Lns. 16-17). Appellant's counsel also asked that the sentence commence December 18, 2005. (Id., Page 7, Lns. 17-19). A plea agreement was not referenced.

The Appellant was then given an opportunity to comment on the sentence he should receive. (Id., Page 17, Lns. 20-21). Following a brief exchange with the Appellant where no mention of an agreement was referenced, the trial court

sentenced the Appellant to the custody of the NDDOCR for five (5) years for the Forgery and for thirty (30) days for the Theft; concurrent with each other and concurrent with any sentence he was then serving. (Id., Page 9, Lns. 5-16). The Court ordered that the sentence commence May 16, 2007. (Id., Page 9, Lns. 13-16; Page 10, Lns. 22-25; Page 11, Ln. 1).

A Criminal Judgment, dated May 17, 2007, incorporating the terms of Appellant's sentence was filed with the Burleigh Clerk of Court on May 17, 2007. (Appellant's Appendix 7).

In both of his Burleigh County and Morton County cases, the Appellant, acting pro se, filed Applications for Post-Conviction Relief, pursuant to Chapter 29-32.1, of the North Dakota Century Code, on or about July 11, 2007. (Appellant's Appendix 9). In his applications, Appellant made no distinction of facts between his Morton case and the Burleigh case. (Id.) In both cases, the Appellant alleged that he plead guilty pursuant to a plea bargain, and that the plea was unlawfully induced or not made voluntarily with a full understanding of the consequences of the plea. (Id.).

Upon order of the court, the Appellee filed its response to Appellant's application on August 27, 2007. (Appellant's Appendix 12). In its response, Appellee asserted that no plea bargain ever existed; that the Appellee had always envisioned seeking the sentence the Court ultimately imposed; that no promises were made to the Appellant to induce a guilty plea; and, that the Appellant had

entered his pleas on an open basis, having been fully advised of his rights under Rule 11 of the North Dakota Rules of Criminal Procedure. (Id.) On November 5, 2007, the Appellant filed an addendum to his application, asserting he was denied effective assistance of counsel at sentencing. (Appellant's Appendix 15).

A hearing was held on the Appellant's Application for Post-Conviction Relief on December 27, 2007. (December 27, 2007, Transcript of Change of Plea and Motion for Post-Conviction Relief). At the commencement of the hearing, Appellee informed the Court that Appellee had recently discovered that the record revealed that Appellant had not yet plead guilty to the charged offenses in Burleigh County. (Id., Pages 4-6). Based thereon, the Appellee urged the Court to vacate the Judgment and reinstate the Information against the Appellant. (Id., Page 6, Lns. 4-11). The Appellant was asked if he wanted to plead guilty or go to trial on the original charges. (Id., Page 7, Lns. 21-23; Page 11, Lns. 13-18). The Appellant chose to plead guilty to the charges. (Id., Page 7, Ln. 24; Page 12, Lns. 15-17; Page 14, Ln. 6). The Court took a factual basis for each of the pleas and inquired of the Appellant if the pleas were knowingly and voluntarily given and made without promises or compulsion. (Id., Page 7, Lns. 12-20, 25; Pages 8-14). The Appellant affirmed that his pleas of guilty were entered without promise or consideration. (Id., Page 7, Ln. 25; Page 8, Lns. 1-6; Page 14, Lns. 20-22; Page 23, Lns. 2-19).

Following the Appellant pleading guilty, the Court reaffirmed its Judgment of May 17, 2007; imposing a sentence of five (5) years on count I, and thirty (30) days on count II. (Id., Page 14, Ln. 25; Page 15, Lns. 1-8).

The Court issued an Order Denying Post Conviction Relief, dated March 11, 2008, and an Order Confirming Credit for Incarceration, dated April 28, 2008. (Appellant's Appendix 17-19). In its Order, dated March 11, 2008, the District Court found that there was no plea agreement. (Appellant's Appendix 18)

On March 19, 2008, the Court issued an Order for Confirmation of Dates of Incarceration, directing the Appellee to file with the Burleigh County Clerk of District Court, with a copy to the NDDOCR, written confirmation of the Appellant's incarceration prior to entry of criminal judgment. (Appellee's Appendix 15). In response thereto, on March 26, 2008, the Appellee filed a Written Confirmation of Incarceration Prior to Judgment, indicating that the Appellant had not been incarcerated in Burleigh County in reference to the Burleigh County charges. (Appellee's Appendix 18-19).

On April 28, 2008, the Court issued its Order of Confirmation of Predisposition Detention, with attachments, finding that the Appellant was not entitled to receive credit for any additional period of pre-judgment credit he had not already received. (Appellee's Appendix 16).

The Appellant filed a Notice of Appeal appealing the Order Denying Post Conviction Relief and the Order Confirming Credit for Incarceration on May 12, 2008. (Appellant's Appendix 20).

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ARGUMENT

1. Whether Appellant, given the opportunity to have his guilty pleas withdrawn, he chose to plead guilty at the hearing on December 27, 2007, makes this appeal moot?

It is well established that the North Dakota Supreme Court will not consider appeals involving questions which are moot because to do so would result in the giving of an advisory opinion. State v. Patten, 366 N.W.2d 359 (N.D. 1985). An appeal becomes moot when by lapse of time or by events occurring prior to our decision this Court is unable to render effective relief. Id. at 459.

In his application for post conviction relief, Appellant claimed he had plead guilty having been unwittingly induced to do so. In his Addendum to his application, Appellant claimed he had received ineffective assistance of sentencing counsel. Subsequent to each of these filings, on December 27, 2007, Appellant was given an opportunity to withdraw his guilty plea and proceed to trial on the two charges. Despite the fact that he had different counsel than he had before, and that he was aware that there was no plea agreement, Appellant willingly plead guilty to each charge. Thus, any claim that his previous counsel's conduct prejudiced him, became moot upon his entry of a guilty plea at the December 27, 2007, hearing.

The effective relief that this Court could have granted, upon a finding that the Appellant had been unlawfully induced to enter his pleas or that he had

ineffective assistance of counsel would have been to allow him to withdraw his pleas. Appellant knowingly pleading guilty to the charges at the December 27 hearing removed the court's ability to provide relief for the complained of conduct; namely, that he had somehow been unlawfully induced to plead guilty or that he had received ineffective representation earlier.

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2. Whether there was any plea agreement in the Burleigh County case?

The District Court, in its Order Denying Post-Conviction Relief, dated March 11, 2008, found that at sentencing "no plea agreement was offered to the Court, and that the parties offered to the Court widely varying recommendations which the Court considered." Further, the Court held that the Appellant, personally present, "offered no evidence or statements suggesting any plea agreement."

There was no plea agreement between the Appellant and Appellee in the Burleigh County case. The transcript from the January 29, 2007, hearing reveals no discussion of a plea agreement. The transcript from the May 16, 2007, reveals no discussion of a plea agreement. The Appellant's trial counsel testified that no plea agreement existed in the Burleigh case. (December 27, 2007, Transcript of Change of Plea and Motion for Post-Conviction Relief; Page 29, Lns. 14-19; Page 30, Lns. 23-25; Page 31, Lns. 1-12). Appellant's trial counsel testified that, in the Burleigh matter, it "was an open plea." (Id. at Page 32, Lns. 21-22). Appellant's trial counsel argued for a substantially different sentence than the one proposed by the prosecutor. (May 16, 2007, Transcript of Sentencing Proceedings, Page 6, Lns. 12-19; Page 7, Lns. 16-17).

In his brief, Appellant asserts that "at a hearing in Mandan on March 19, 2006 {sic}, it was attested to by all counsel to Judge Hagerty that the plea

agreement was intended to be binding." (Appellant's Brief, Page 2). This is an erroneous statement, unsupported by cite or reference. No hearing was held on March 19, 2007, in the instant case. (Register of Actions; Appellant's Appendix #2). 1

All that remains is the Appellant's unsupported allegation that there was an agreement. (Transcript of Change of Plea and Motion for Post-Conviction Relief, Page 18, Lns. 6-18; Page 19, Lns. 13-17). This position, apparently adopted for the first time in Appellant's Application for Post- Conviction relief, is contradictory to everything else noted above and in the record.

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1. Appellant did attend a Preliminary Hearing in his Morton County case on March 19, 2007. However, said hearing was restricted to the Morton County matter. (Appellee's Appendix 25-30) Appellee was not noticed of and did not appear in the Morton County matter. (Id.)

3. Whether the trial judge abused his discretion imposing the sentence he did in Burleigh County?

Appellant asserts that he should have received, and the Court erred when it did not order, credit on the Burleigh case for time that the Appellant was serving on the Stark County Judgments. Appellant bears the burden of showing that he is entitled to additional credit for time served in custody. See, State v. Rodriguez, 2008 ND 157 ¶ 8, 755 N.W. 2d 102. Appellant simply has not carried his burden of showing that he was "in custody" on the Burleigh case commencing December 18, 2005, as alleged in his brief.

The claim that he was arrested on the Burleigh County warrant on December 18, 2005, is unsupported by the record. Appellant was in the custody of Stark County from on or about December 18, 2005, and remained in continuous custody on his Stark County charges until May 16, 2007, when he was sentenced in Burleigh County. [2]

Appellant made his initial appearance in the Burleigh County case on October 11, 2006. Due to Appellant's custodial status with NDDOCR, bond was not addressed. When Appellant was sentenced on May 16, 2007, the District

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2. The judgments from Stark County, 45-04-K-1620, 45-05-K-1016, 45-05-K-1017, and 45-05-K-1018, granted credit to Appellant for 240 days of pretrial detention he served in Stark County from on or about December 18, 2005, (when he was taken into custody on Stark County warrants) through August 15, 2006 (when he was convicted in 45-04-K-1620, and sentenced to NDDOCR). (Appellee's Appendix 31).

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Judge ordered that the sentence commence May 16, 2007, and that it be concurrent to each of his Stark County judgments. Appellant asserts that the sentencing judge erred by not commencing Appellant's sentence December 18, 2005. There is no authority for such a proposition.

In State v. Trudeau, the North Dakota Supreme Court held that where time spent in custody has been credited toward an unrelated charge, a defendant is not entitled to credit for that period of time on any other sentence. 47 N.W.2d 11 (N.D. 1992).

Since Appellant received credit for time spent in custody in Stark County, he is not entitled to credit for that period of time on the Burleigh case. See, Trudeau, at 14. The Judge did not err in imposing the sentence that it did nor did it err in issuing the Order Confirming Credit for Incarceration.

CONCLUSION

Based upon the foregoing, the Appellee requests that the Appellant's Appeal of the Order Denying Post Conviction Relief, dated March 13, 2008, and Order Confirming Credit for Incarceration, dated April 28, 2008, be dismissed.

In the alternative, Appellee asks that the lower courts' Orders be affirmed.

Dated this 14th day of October, 2008.

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