

STATE OF NORTH DAKOTA,  
PLAINTIFF  
~~Respondent~~ / Appellee,  
  
vs.  
  
JESSICA DAWN NELSON,  
DEFENDANT  
~~Petitioner~~ / Appellant.

**Appeal from Amended Criminal Judgment Entered on October 15, 2018 by Cass County District Court, East Central Judicial District, State of North Dakota, The Honorable Stephanie N. Stiel Presiding.**

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**[¶ 3] STATEMENT OF THE ISSUES**

[¶ 4] Whether the district court should have permitted Jessica Dawn Nelson (hereinafter “Nelson”) to withdraw her guilty plea prior to sentencing?

[¶ 5] Whether the district court committed reversible error by imposing a minimum mandatory sentence without being adequately informed on the issues presented?

**[¶ 6] STATEMENT OF THE CASE**

[¶ 7] Nelson appeals from an Amended Criminal Judgment, dated October 15, 2018. (A.A. at 27.) Nelson plead guilty on an Alford basis on July 16, 2018 to possession with intent to manufacture or deliver methamphetamine in violation of N.D.C.C. § 19-03.1-23(1)(a)(1), a Class B Felony. A.A. at 10-11. Sentencing was then set for September 17, 2018. (A.A. at 14.)

[¶ 8] At Sentencing, Nelson’s original counsel motioned to withdraw as counsel of record. A.A. at 15, ln. 14-21. Counsel was permitted to withdraw, new counsel was appointed, and sentencing was reset for October 15, 2018. A.A. at 4 & 25. At the October 15, 2018 sentencing hearing, Nelson’s new counsel had requested the district court order a Pre-Sentence Investigation (“PSI”), a continuance of the sentencing hearing, and that Nelson be permitted to withdraw her guilty plea. Oct. 15 Tr. 3; ln. 18-20, 5; ln. 9, 6: ln. 6-11.

[¶ 9] The district court denied the requests for a PSI, a continuance, and the withdraw of the defendant’s guilty plea. Oct. 15 Tr. 20; ln. 18-20, 23; ln. 18-19. Nelson was then sentenced to three years with the North Dakota Department of Corrections, with credit for time served of 36 days. A.A. at 27.

[¶ 10] Nelson then filed a timely notice of appeal on November 12, 2018, pursuant to N.D.R.App.P. 4. A.A. at 30. The District Court had jurisdiction under N.D.C.C. § 27-05-06 and N.D. Const. art. VI, § 8. The Supreme Court has jurisdiction under N.D.C.C. § 29-28-06 and N.D. Const. art. VI, § 2.

### [¶ 11] **STATEMENT OF THE FACTS**

[¶ 12] On July 16, 2018, Nelson entered an Alford plea, on an open basis, to one count of possession with intent, while three other counts were dismissed. A.A. at 8-11. Nelson consented to possessing the methamphetamine for personal use, but admitted that there is a reasonable likelihood that a jury could convict her for the intent aspect. See Alford v. North Carolina, 400 U.S. 25 (1970). The district court accepted the Alford plea and set sentencing for September 17, 2018. A.A. at 4.

[¶ 13] Sentencing was set for a different date as there was going to be an argument regarding the sentence to be imposed; specifically, the issue of whether any mandatory minimums apply. A.A. at 9; ln. 14-21. Between the July 16, change of plea hearing and the September 17, sentencing hearing, the attorney-client relationship between Nelson and her counsel became irreparably damaged. Therefore, at the September 17, hearing, Nelson's original counsel, who advised her through the change of plea, was permitted to withdraw, and Nelson was given one month to obtain new counsel for an October 15 sentencing hearing. A.A. at 15-19.

[¶ 14] At the October 15 sentencing hearing, Nelson's new counsel, who had received the discovery file four days prior, argued that sentencing at that time was unjust for a multitude of reasons. Primarily, counsel had just recently received the file for review, the fact that Nelson's "prior conviction" which was being used to trigger the minimum

mandatory, was dismissed, and a full PSI had not been completed to properly advise the district court on an appropriate sentence. See Generally Oct. 15 Tr. Despite these arguments, the district court went forward with sentencing on October 15, 2018 without being fully briefed and informed on the issues. Oct. 15 Tr. 23; ln. 18-19.

[¶ 15] The district court based its rulings on the lack of a formal motion to withdraw the defendant's guilty plea, Oct. 15 Tr. 6; ln. 4-5, as well as the lack of the "manifest injustice" standard to allow such a withdraw. Id. at 11; 12-18, & 21; 23-24. The district court then went ahead with the sentencing hearing, and any oral arguments regarding the ability to deviate from a minimum mandatory. Id. at 23; ln. 18-19. It is worth noting that the district court made this decision to proceed when both counsel stated numerous times, they were unprepared for such an argument and did not have the necessary statutes and/or case law available. See Id.:

Ms. Bredahl: I just haven't had a chance to review it yet,....  
Pg. 5; ln 8;

Ms. Bredahl: I've been researching all week, and Ms. Peters can provide me with case law that I have been unable to find.  
Pg. 5; ln. 19-21;

Ms. Peters: I don't. I didn't know that was going to be an issue today or I would have. But, I don't. If, you know, if the court wants to take this up – I'm kind of at a loss right here.  
Pg. 7; ln. 15-18;

Ms. Peters: You know, if we need to brief that issue, we can certainly do that, but I, that's – I've given you what I have to offer you today on it.  
Pg. 16; ln. 11-13;

Ms. Peters: ...if the court wants briefs, we can certainly do that. And, we would just need time to do that and we would have to continue sentencing, I think, again.  
Pg. 16; ln. 21-24;

Ms. Bredahl: However, if the court is leaning that way, perhaps we could brief it...  
Pg. 18; ln 5-6;

Ms. Bredahl: ...if I had the opportunity to file a motion to withdraw, I certainly would have done that.  
Pg. 18; ln. 23-24.

[¶ 16] Both parties were continually telling the district court, the issues before it were not properly briefed, neither party was prepared to argue the issues. To place the issues in context, Nelson's first attorney planned on attacking the mandatory minimum application at sentencing. A.A. at 9; ln. 18-21. Then, by the time the October 15, sentencing hearing came around, Nelson's new counsel had discovered the charge itself, alleging the second offense, was the appropriate challenge to the mandatory minimum instead of at sentencing. It is this question of, how to challenge the mandatory minimum, from the prior charge aspect, that has both the State and the Defense at odds, and explaining to the district court, neither were prepared to address the issue.

[¶ 17] This question is what leads defense counsel to assert the potential for a withdrawal of Nelson's guilty plea. Oct. 15 Tr. 6; ln. 6-11. The district court then imposed the "manifest injustice" standard upon Nelson in order to withdraw her guilty plea. Id. at 12; ln. 18-21, & 21; ln. 23-25. Based on that standard, the district court denied Nelson's request to withdraw her guilty plea. Id. at 20; ln. 18-20.

#### [¶ 18] ARGUMENT

[¶ 19] The procedure for a defendant to withdraw their guilty plea lies in N.D.R.Crim.P. 11(d). The ability to withdraw a guilty plea depends upon which actions the court has taken after the entry of the plea. Before the court has accepted the guilty plea, a defendant may withdraw their plea for any reason. N.D.R.Crim.P. 11(d)(1)(A). If the court has accepted the plea, but not yet imposed a sentence, the defendant may withdraw their plea if the court has rejected a plea agreement or a defendant can show a "fair and just

reason for the withdrawal.” N.D.R.Crim.P. 11(d)(1)(B)(i)&(ii). It is not until after the court imposes a sentence that the question of “manifest injustice” is even raised. N.D.R.Crim.P. 11(d)(2). Therefore, the district court imposed the erroneous standard upon Nelson to allow her to withdraw her guilty plea, and in doing so committed a clear error.

[¶ 20] The clearly erroneous standard of review is well established by this Court, “[a] finding is clearly erroneous if it induced by an erroneous view of law....” Broadwell v. State, 2014 ND 6, ¶ 5, 841 N.W.2d 750 (internal citations and quotations omitted).

[¶ 21] **A. The District Court Erred By Failing To Allow The Defendant To Withdraw Her Guilty Plea Prior to Sentencing.**

[¶ 22] In the present case, Nelson had pled guilty, the court had accepted the guilty plea after a factual basis was provided, and sentencing was scheduled for a later date. At that later date, the issue of withdrawal of the guilty plea was raised. Pursuant to N.D.R.Crim.P. 11(d)(1)(B)(ii), Nelson is allowed to withdraw her guilty plea if she had shown a “fair and just reason for the withdrawal.”

[¶ 23] However, the district court denied the withdrawal on the basis of no “manifest injustice” shown by the defense. Oct 15 Tr. 12; ln. 18-21, & 21; ln. 23-25. The “manifest injustice” standard for withdrawal of a guilty plea comes into effect after the defendant has been sentenced. N.D.R.Crim.P. 11(d)(2). Therefore, the district court applied the erroneous standard to its decision in denying Nelson’s request to withdraw her guilty plea.

[¶ 24] Moreover, the district court and the State go to great lengths to argue the lack of a formal motion to withdraw the guilty plea. Id. at 6; ln. 4-5, 11; ln. 2-3, 15; ln. 6-7, & 20; ln. 21. However, the North Dakota Rules of Criminal Procedure do not require a formal motion to withdraw a guilty plea. Pursuant to N.D.R.Crim.P. 47, the only formal



motion mandate comes when a party is seeking an order. The withdrawal of guilty plea, is simply requesting leave of the court for an action; akin to the State dismissing charges pursuant to a plea agreement. These types of requests are routinely done in open court, on the record, and absent a formal filing of a motion.

[¶ 25] Additionally, the district court here reasoned that Nelson entered her guilty plea knowingly and voluntarily. Oct. 15 Tr. 21; ln. 1-3. Although a plea must be knowingly, intelligently, and voluntarily made for the court to accept the plea (see N.D.R.Crim.P. 11(b)), the withdrawal of the plea requires a completely separate analysis. N.D.R.Crim.P. 11(d). In fact, in the case at bar, for Nelson's guilty plea to have existed at all, in its given state, the district court had already accepted the plea, meaning the district court would have already determined the plea to be knowing, intelligent, and voluntary. Therefore, to deny the withdrawal of a guilty plea because it was knowing, intelligent, and voluntary, would essentially nullify N.D.R.Crim.P. 11(d)(1)(B).

[¶ 26] Consequently, by the district court applying the erroneous standard to Nelson's request to withdraw her guilty plea, by incorrectly reasoning a withdrawal request must be done by formal motion only, and finally, by inadvertently nullifying N.D.R.Crim.P. 11(d)(1)(B), the district court committed a clear error in denying Nelson's request to withdraw her guilty plea.

[¶ 27] **B. The District Court Erred By Imposing a Minimum Mandatory Sentence.**

[¶ 28] This question is not ripe for review on this appeal. Although, the district court addressed this question, both the State and Defense counsel repeatedly notified the district court, they were ill prepared to properly address the legal arguments associated with this issue. See Ibid. ¶ 15. To properly and adequately appreciate the premature nature of

this argument, this Court need only look at the exact words of the district court below at the October 15, 2018 sentencing hearing. The district court explicitly asks the State on this issue, “[a]re you aware of any North Dakota cases?” Tr. 16; ln. 6. The State and Defense respond to that question in kind with acknowledgment that neither are prepared to argue that issue on that date. Not a single case is offered to the district court throughout the transcript regarding this issue, because neither party is prepared to address the issue.

[¶ 29] Thus, the district court and parties commence with reading the statutes on their face, which the parties and the district court each read differently. Id. at 17; ln 19-25 – 18; ln. 1-6. The district court then goes further to reference legislative history in its analysis, despite neither party arguing, briefing, or prepared to address legislative history. Id. at 23; ln. 5-6. Therefore, this issue was not fully adjudicated in the lower court, leaving questions unanswered, caselaw unapplied, and statutes improperly analyzed. Addressing this issue here and now would render this Court in the position of authoring an advisory opinion on the subject. This Court has routinely, and continues to maintain its position, against the authoring of advisory opinions. See State v. Hammer, 2010 ND 152, ¶ 32, 787 N.W.2d 716 (referencing a string citation supporting North Dakota Supreme Court’s position against the issuance of advisory opinions regarding potential error, but rather to address actual error).

[¶ 30] For this reason, Nelson explicitly requests this Court not address the issue of whether deferred imposition of sentences can trigger minimum mandatory sentences in subsequent prosecutions, and reserve this analysis for a later date.

**[¶ 31] CONCLUSION**

[¶ 32] For the foregoing reasons, Nelson respectfully requests this Court reverse the district court's decision denying Nelson's request to withdraw her guilty plea. Then remand her case with instructions that Nelson be permitted to withdraw her guilty plea, because at the time and place of her request, she had established a "fair and just reason for the withdrawal." In the alternative, remand with instructions to the district court to analyze her request under the proper paradigm of "fair and just." Ultimately, failure to do so, leaves the first and foremost basis for Nelson's plea of guilty left unaddressed, unanalyzed, and denies the true spirit of justice, which is fairness at all costs. See A.A. at 9, Change of Plea Transcript Excerpt, ln. 18-21, "Count one does have a mandatory minimum that I know the State is going to be seeking to have imposed. We are going to be arguing that the court should not impose that pursuant to 12.1-32-02.1" (effectively placing everyone on notice of the fundamental basis for the guilty plea on July 16, 2018, three months before the October 15, 2018 sentencing hearing.)

Respectfully submitted this Friday, January 25, 2019.

/s/ Samuel A. Gereszek  
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**ATTORNEY FOR THE APPELLANT**

**IN THE SUPREME COURT  
FOR THE STATE OF NORTH DAKOTA**

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<b>State of North Dakota,</b>	)	
	)	
<b>vs.</b>	)	<b>Supreme Court No.: 20180406</b>
<b>Jessica Dawn Nelson,</b>	)	<b>District Court No.: 09-2017-CR-04749</b>
	)	
<b>Appellant.</b>	)	

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**N.D.R.App.P. 32(e)  
CERTIFICATE OF COMPLIANCE**

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[¶1] **COMES NOW** Samuel A. Gereszek, attorney for the Appellant, Jessica Dawn Nelson, and preparer of documents filed in association with the above captioned case on this day.

[¶2] Pursuant to N.D.R.App.P. 32(e) the documents filed on this day comply with the North Dakota Rules of Appellate Procedure as follows:

- a. Appellant's Brief – Word count = 2675; Page Count = 11 (N.D.R.App.P 32(a)(8))
- b. Appellant's Appendix – (N.D.R.App.P.25(a))

[¶3] This Certificate of Compliance is drafted to ensure the filings on this day are in compliance with the rules and specifically pursuant to N.D.R.App.P. 32(e).

Dated this Friday, January 25, 2019.

/s/ Samuel A. Gereszek  
Samuel A. Gereszek (ND Bar ID # 07040)  
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**IN THE SUPREME COURT  
FOR THE STATE OF NORTH DAKOTA**

<b>State of North Dakota,</b>	)	
Plaintiff	)	
<del>Respondent</del> Appellee,	)	<b>Supreme Court No.: 20180406</b>
	)	
vs.	)	
	)	<b>District Court No.: 09-2017-CR-04749</b>
<b>Jessica Dawn Nelson,</b>	)	
Defendant	)	
<del>Petitioner</del> Appellant.	)	
	)	

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**CERTIFICATE OF SERVICE**

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I, Samuel A. Gereszek, attorney for the Petitioner / Appellant, and officer of the court, hereby certify that I served a true and correct copy of the following:

1. *Appellant's Brief (.pdf and word via email);*
2. *Appellant's Appendix; and,*
3. *Certificate of Compliance*

On the following:

<b>Clerk of the Supreme Court</b>	<b>Tracy Jo Peters</b>	Ms. Jessica Nelson, #54541
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All done by Electronic Filing pursuant to N.D. Sup. Ct. Admin. Order 14.

Dated this Friday, January 25, 2019.

**HAMMARBACK & SCHEVING, P.L.C.**

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