20180431
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
FEBRUARY 22, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Joe Michael Johns,	)	
	)	
Defendant and Appellant,	)	
	)	**Supreme Court Case No. 20180431**
vs.	)	Burleigh County No. 08-2018-CR-02738
	)	
State of North Dakota,	)	
	)	
Plaintiff and Appellee.	)	

Appeal from the AMENDED JUDGMENT
and ORDER DENYING MOTION TO DISMISS

Burleigh County, North Dakota
South Central Judicial District
Honorable David E. Reich

BRIEF OF APPELLANT

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[¶ 3] **STATEMENT OF THE ISSUES**

[¶ 4] I. Whether the district court erred in denying Mr. Johns' Motion to Dismiss.

[¶ 5] STATEMENT OF THE CASE

[¶ 6] This is an appeal from an order denying Joe Michael Johns' ("Mr. Johns") Motion to Dismiss. (App. at 32.) Mr. Johns was charged with Unlawful Possession of Drug Paraphernalia as a "second offense" in violation of N.D.C.C. § 19-03.4-03(2), a class C Felony. (App. at 4.) Mr. Johns moved the district court for an order of dismissal pursuant to N.D.R.Crim. P. 12(b)(3)(B)(v), arguing the State failed to state an offense rising to the level of a class C Felony under N.D.C.C. § 19-03.4-03(2) because Mr. Johns does not have a prior unlawful possession of drug paraphernalia conviction as a matter of law. (App. at 5.) The State responded in opposition. (App. at 14.) Mr. Johns replied. (App. at 18.) The district court denied Mr. Johns' Motion to Dismiss. (App. at 22.) Mr. Johns entered a conditional plea of guilt, reserving his right to appeal the district court order denying his Motion to Dismiss. (App. at 24.)

[¶ 7] Mr. Johns was sentenced to three-hundred and sixty (360) days imprisonment with all but twenty (20) days suspended for a period of eighteen (18) months. (App. at 26 & 30.) He was placed on supervised probation for eighteen (18) months. (Id.) Mr. Johns now appeals. (App. at 32.)

[¶ 8] **STATEMENT OF THE FACTS**

[¶ 9] Mr. Johns was charged by Information with Unlawful Possession of Drug Paraphernalia in violation of N.D.C.C. § 19-03.4-03(2) as a class C Felony. (App. at 4.) The Information specifically alleges that on or about August 29, 2018, Mr. Johns "used or possessed with intent to use a glass smoking device, for use with methamphetamine, and has a prior conviction in case no. 08-2016-CR-00295." (App. at 22 ¶¶ 1 -2.)

[¶ 10] In the prior case, Criminal Case No. 08-2016-CR-00295, Mr. Johns was charged with Unlawful Possession of Drug Paraphernalia (1st offense). As the result of a guilty plea to the charge of Unlawful Possession of Drug Paraphernalia (1st offense), an order deferring imposition of sentence for a period of twelve (12) months was entered on March 14, 2016. After termination of the probationary term, the plea and verdict of guilty were vacated and the action was dismissed. The public record of Case No. 08-2016-CR-00295 has been deleted.

[¶ 11] In this case, Mr. Johns moved the district court for an order of dismissal pursuant to N.D.R.Crim. P. 12(b)(3)(B)(v), arguing the State failed to state an offense rising to the level of a class C Felony under N.D.C.C. § 19-03.4-03(2) because Mr. Johns does not have a prior unlawful possession of drug paraphernalia conviction as a matter of law. (App. at 5.) The district court denied Mr. Johns' Motion to Dismiss. (App. at 22.) Mr. Johns entered a conditional plea of guilty reserving his right to appeal the district court order denying his Motion to

Dismiss. (App. at 24.) Mr. Johns was sentenced and was placed on supervised probation. (App. at 30.)

[¶ 12] Judgment was entered on December 12, 2018. (App. at 30.) Mr. Johns now appeals. (App. at 32.)

[¶ 13] **ARGUMENT**

[¶ 14] The district court erred in denying Mr. Johns' Motion to Dismiss. Mr. Johns' entered a conditional plea pursuant to N.D.R.Crim. P. 11(a)(2), reserving his right to appeal the court's denial of his Motion to Dismiss. Under Rule 11(a)(2), N.D.R.Crim. P., a defendant may preserve the right to appeal "the adverse determination of any specified pretrial motion." See also State v. Kraft, 539 N.W.2d 56, 58 (N.D. 1995). Mr. Johns moved to dismiss the Information pursuant to N.D.R.Crim. P. 12(b)(3)(B)(v) because the State failed to state an offense rising to the level of a class C Felony for an Unlawful Possession of Drug Paraphernalia offense under N.D.C.C. § 19-03.4-03(2) because Mr. Johns does not have a prior unlawful possession of drug paraphernalia conviction as a matter of law.

[¶ 15] "The Information alleges that Johns has a prior conviction in Burleigh County case number 08-2016-CR-295. . . . He received a deferred imposition of sentence. . . . Following the completion of his amended sentence, the judgment was dismissed on March 17, 2016, pursuant to Rule 32.1 N.D.R.Crim.P." (App. at 22 ¶ 1.) The district court found that "N.D.C.C. § 12.1-32-02(4) permits the State to use Johns['] prior conviction to enhance the offense in this case." (App. at 22 ¶ 5.) The district court misinterpreted the statute. The interpretation of a statute is a question of law that this Court reviews de novo. State v. Ebertz, 2010 ND 79, ¶ 8, 782 N.W.2d 350.

[¶ 16] "Statutes must be construed as a whole and harmonized to give meaning to related provisions, and are interpreted in context to give meaning and effect to every word, phrase, and sentence." Herring v. Lisbon Partners Credit Fund, Ltd. P'ship, 2012 ND 226, ¶ 15, 823 N.W.2d 493. "In construing statutes, we consider the context of the statutes and the purposes for which they were enacted." Nelson v. Johnson, 2010 ND 23, ¶ 12, 778 N.W.2d 773. "When a general statutory provision conflicts with a specific provision in the same or another statute, 'the two must be construed, if possible, so that effect may be given to both provisions.'" State ex rel. Dep't of Human Servs. v. N.D. Ins. Reserve Fund, 2012 ND 216, ¶ 12, 822 N.W.2d 38 (quoting N.D.C.C. § 1–02–07). When statutes relate to the same subject matter, courts make every effort to harmonize and give meaningful effect to each statute. Id.

[¶ 17] In harmonizing statutes relating to the same subject matter, we give meaningful effect to each statute, when possible, "without rendering one or the other useless." State v. Brown, 2009 ND 150, ¶ 15, 771 N.W.2d 267 (quoting Public Serv. Comm'n v. Minnesota Grain, Inc., 2008 ND 184, ¶ 20, 756 N.W.2d 763). "When a statute is clear and unambiguous, it will not be 'interpret[ed] . . . as though language not present should have been added.'" Ralston v. Ralston, 2003 ND 160, ¶ 7, 670 N.W.2d 334 (quoting Bouchard v. Johnson, 555 N.W.2d 81, 83 (N.D. 1996)).

[¶ 18] Courts strictly construe penal statutes against the government. State v. Corman, 2009 ND 85, ¶ 15, 765 N.W.2d 530. Moreover, the rule of lenity defined by Black's Law Dictionary 1332 (7th ed. 1999) as "[t]he judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment." See State v. Murphy, 2014 ND 202, ¶ 38, 855 N.W.2d 647 (Vandewalle, C.J., concurring).

[¶ 19] Section 19-03.4-03(2), N.D.C.C., provides:

> A person may not use or possess with the intent to use drug paraphernalia to inject, ingest, inhale, or otherwise induce into the human body a controlled substance, other than marijuana, classified in schedule I, II, or III of chapter 19-03.1. A person violating this subsection is guilty of a class A misdemeanor. If a person previously has been convicted of an offense under this title, other than an offense related to marijuana, or an equivalent offense from another court in the United States, a violation of this subsection is a class C felony.

(Emphasis added). The State relies upon Case No. 08-2016-CR-00295 as the basis for enhancement to a class C Felony. Proof of the prior conviction is an element of the offense charged. State v. Edinger, 331 N.W.2d 553, 554 (N.D. 1983). Therefore, absent the prior conviction, a class C Felony cannot stand.

[¶ 20] Chapter 19-03.4, N.D.C.C., does not define "conviction." Title 19, N.D.C.C., does not define "conviction." The Criminal Code, Title 12.1, N.D.C.C., does not define "conviction." Chapter 39-01 defines "conviction" and is instructive here. State v. Skarsgard, 2007 ND 159, ¶ 7, 740 N.W.2d 64 ("We hold the definition

of 'offense' in N.D.C.C. § 12.1-01-04(20) applies to N.D.C.C. §§ 39-08-01 and 39-06-42. Title 39 does not provide its own definition of 'offense' and there is no expressed intent to use a different definition for N.D.C.C. §§ 39-08-01 or 39-06-42."); see also N.D.C.C. § 1-02-39 ("If a statute is ambiguous, the court, in determining the intention of legislation, may consider . . . common law or former statutory provisions, including laws upon the same or similar subjects."). Chapter 39, N.D.C.C., provides:

> 'Conviction' means a final order or judgment or conviction by the North Dakota supreme court, any lower court having jurisdiction, a tribal court, or a court in another state if an appeal is not pending and the time for filing a notice of appeal has elapsed. Subject to the filing of an appeal, the term includes:
>
> > a. An imposed and suspended sentence;
> > b. A deferred imposition of sentence under subsection 4 of section 12.1-32-02; or
> > c. A forfeiture of bail or collateral deposited to secure a defendant's appearance in court and the forfeiture has not been vacated.

N.D.C.C. § 39-01-01(13) (emphasis added). Section 39-06.2-02(8), N.D.C.C., further states:

> 'Conviction' means an unvacated adjudication of guilt, or a determination that an individual has violated or failed to comply with the law in a court of original jurisdiction or an authorized administrative tribunal, an unvacated forfeiture of bail or collateral deposited to secure the individual's appearance in court, the payment of a fine or court cost, or violation of a condition of release without bail, regardless of whether or not the penalty is rebated, suspended, or probated.

(Emphasis added).

[¶ 21] The definition of "conviction" includes (1) an imposed sentence (2) the term of a deferred imposition of sentence or (3) the term prior to sentence if bail has been forfeited. Section 39-06.2-02(8) further clarifies the significance of the *unvacated* requirement of those terms. Specifically, a sentence or determination of a violation of law (such as an order deferring imposition of sentence), *if not vacated*, or a bail forfeiture, *if not vacated*, constitutes a "conviction". The State's interpretation of the deferred imposition statute ignores the significance of the *vacated* determination of guilt.

[¶ 22] Section 12.1-32-02(4), N.D.C.C., provides:

> A court, upon application or its own motion, may defer imposition of sentence. The court must place the defendant on probation during the period of deferment. An order deferring imposition of sentence is reviewable upon appeal from a verdict or judgment. In any subsequent prosecution, for any other offense, the prior conviction for which imposition of sentence is deferred may be pleaded and proved, and has the same effect as if probation had not been granted or the information or indictment dismissed under section 12.1-32-07.1.

[¶ 23] "Under N.D.C.C. § 12.1–32–02(4), a court may defer imposition of a sentence and place a defendant on probation during the deferment period." State v. Ebertz, 2010 ND 79, ¶ 6, 782 N.W.2d 350. This Section authorizes the court to defer imposition of sentence. This Section further dictates how an order deferring imposition of sentence is to be treated. Specifically, the order is reviewable upon appeal. See State v. Berger, 2004 ND 151, ¶ 8, 683 N.W.2d 897 ("the order serves as the judgment of conviction and is appealable").

[¶ 24] Secondly, the order deferring imposition of sentence may be treated as a "prior conviction." "The word 'may' is usually used to imply permissive, optional or discretional, and not mandatory action or conduct." State v. Glaser, 2015 ND 31, ¶ 18, 858 N.W.2d 920 (citation and internal quotation marks omitted). The State relies upon this permissive sentence as the definitive determination that any order deferring imposition of sentence may be treated as a prior conviction regardless if the conviction is later vacated. However, the State's interpretation renders Section 12.1–32–07.1 useless.

[¶ 25] The analysis of whether an order deferring imposition of sentence constitutes a prior conviction does not end with Section 12.1–32–02(4). Instead, N.D.C.C. § 12.1–32–07.1 is determinative. Section 12.1–32–07.1, N.D.C.C., provides:

> Whenever a person has been placed on probation pursuant to subsection 4 of section 12.1-32-02, the court at any time, when the ends of justice will be served, and when reformation of the probationer warrants, may terminate the period of probation and discharge the person so held. . . . Every defendant who has fulfilled the conditions of probation for the entire period, or who has been discharged from probation prior to termination of the probation period, may at any time be permitted in the discretion of the court to withdraw the defendant's plea of guilty. The court may in its discretion set aside the verdict of guilty. In either case, the court may dismiss the information or indictment against the defendant. . . . The defendant must then be released from all penalties and disabilities resulting from the offense or crime of which the defendant has been convicted except as provided by sections 12.1-32-15 and 62.1-02-01.

(Emphasis added).

[¶ 26] The North Dakota Supreme Court examined the purpose of this statute in State v. Ebertz, 2010 ND 79, 782 N.W.2d 350. The Court explained:

> Section 12.1–32–07.1, N.D.C.C., gives a court the authority to dismiss a case when a deferred imposition of sentence has been ordered and the defendant has fulfilled the conditions of probation or has been discharged from probation. Under the plain language of the statute, the court has discretion to allow a defendant to withdraw a guilty plea at any time after the conditions of his probation have been fulfilled or after his probation has been discharged. The withdrawal of the plea and dismissal of the case are not automatic under the terms of the statute, and the court has discretion in deciding whether to allow a defendant to withdraw his plea.

State v. Ebertz, 2010 ND 79, ¶ 9, 782 N.W.2d 350. The vacation is discretionary, not mandatory. Therefore, if not vacated and dismissed then the order deferring imposition of sentence continues. If the order deferring imposition continues then the last sentence of Section 12.1-32-02(4) continues.

[¶ 27] Alternatively, if the court vacates the guilty plea and dismisses the case, then the "defendant must then be released from all penalties and disabilities resulting from the offense or crime of which the defendant has been convicted except as provided by sections 12.1-32-15 and 62.1-02-01." N.D.C.C. § 12.1–32–07.1. The release from all penalties and disabilities is very clear. The only exceptions to being release from all penalties or disabilities are specifically stated in Section 12.1–32–07.1. These exceptions are only for registration of sex offenders (N.D.C.C. § 12.1-32-15) and prohibition on possession of firearms (N.D.C.C. § 62.1-02-01). Section 12.1–32–07.1 says nothing about an exception for enhancements to drug related crimes such as those contemplated in N.D.C.C. ch. 19-03.4.

[¶ 28] The exceptions in Section 12.1-32-07.1 are consistent with the language in their governing statute. Chapter 62.1-02 provides its own definition of "conviction" that specifically includes, "[t]he person's conviction has been reduced in accordance with subsection 9 of section 12.1-32-02 or section 12.1-32-07." N.D.C.C. § 62.1-02-01(2)(d). Section 12.1-32-15, governing registration of sex offenders, does not rely upon the term "conviction." Instead Section 12.1-32-15 clearly requires registration if an individual "pled guilty or nolo contendere to, or been found guilty of a crime . . .", which encompasses a deferred imposition of sentence later vacated. Chapter 19-03.4 does not contain similar, consistent language.

[¶ 29] This interpretation is consistent with the North Dakota Supreme Court's interpretation of the same language in Thompson v. Thompson, 78 N.W.2d 395 (N.D. 1956). At that time, deferred imposition of sentences were governed by Section 12-5319 NDRC 1953 Supp. which provided, "In any subsequent prosecution, for any other offense, such prior conviction may be pleaded and proved, and shall have the same effect as if probation had not been granted, or information or indictment dismissed." Thompson, at 399. The Court, analyzing this language and harmonizing it with the same language as the language now found in N.D.C.C. § 12.1-32-02(4), specifically found, "In so providing the legislature must have intended that the conviction stands during the period of suspension of sentence and is subject to the same rules of finality as any other

conviction." Thompson v. Thompson, 78 N.W.2d 395, 399 (N.D. 1956) (emphasis added).

[¶ 30] Sections 12.1–32–02(4) and 12.1–32–07.1, and the statutory definition of conviction, dictate that Mr. Johns' deferred imposition of sentence, later vacated by the court, is not a prior "conviction." The State's interpretation ignores the purpose of Section 12.1-32-07.1(2), and the statutory definition of "conviction." The State's interpretation renders Section 12.1-32-07.1(2) useless. "When a general statutory provision conflicts with a specific provision in the same or another statute, 'the two must be construed, if possible, so that effect may be given to both provisions.' " State ex rel. Dep't of Human Servs. v. N.D. Ins. Reserve Fund, 2012 ND 216, ¶ 12, 822 N.W.2d 38 (quoting N.D.C.C. § 1–02–07). Moreover, the statutes should be construed in favor of the more lenient punishment. State v. Corman, 2009 ND 85, ¶ 15, 765 N.W.2d 530. Therefore, the statutes must be read to exclude a vacated and dismissed prior deferred imposition of sentence of unlawful possession of drug paraphernalia for the purpose of enhancement to a C Felony in this situation. The district court's order denying Mr. Johns' Motion to Dismiss must be reversed.

[¶ 31] **CONCLUSION**

[¶ 32] WHEREFORE, Mr. Johns respectfully requests that this Court reverse the district court order denying Mr. Johns' Motion to Dismiss and vacate the underlying criminal conviction.

[¶ 33] Dated the 22nd day of February, 2019.

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STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

[¶ 1] The undersigned, being first duly sworn, deposes and says that on the 22nd day of February, 2019, a true and correct copy of the **BRIEF OF APPELLANT** and **APPENDIX** were filed and served by electronic mail with the Supreme Clerk of Court and e-mailed to the following:

Julie Lawyer
bc08@nd.gov

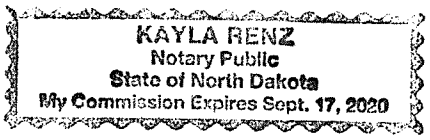
[¶ 2] The undersigned further certifies that a copy of the same will be served on the following person who is exempt from electronic service, by depositing the same in the U.S. Mail with the First-Class postage fully prepaid and firmly affixed:

Joe Michael Johns
General Delivery
Bismarck, ND 58501

Nicole M. Volk

Nicole M. Volk

[¶ 3] Subscribed and sworn to before me this 22nd day of February, 2019.



(SEAL)

Kayla Renz

Notary Public
Burleigh County, North Dakota