ORIGINAL

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Ismail Abdi,

Defendant-Appellant,

S. Ct. Case No. 990239

vs.

State of North Dakota,

Cass Co. Nos. CR-98-2982
CV-99-01707

Plaintiff-Appellee.

BRIEF OF APPELLEE

Appeal from Denial of Petition for Post-Conviction Relief and Grant of Summary Disposition for State

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STATEMENT OF THE CASE AND FACTS

On August 7, 1998, at 3:37 am, Fargo Police officers were dispatched to Dakota Hospital Emergency Room to take a report from two men who stated they were stabbed. (App. 94, 95, 100). The victims of the assault, Kamal Arten (a.k.a.: Ahamn Munen) and James Fremond, told Fargo Police Officers James Shaw and Richard Griffin, at Dakota Hospital, that Ismail Abdi, the defendant, had cut them with a knife. (App. 95, 100). Officer Shaw took photographs of the victims' injuries. (App. 95). The officers proceeded to defendant's apartment building. From the outside, the officers saw and followed a trail of blood to defendant's apartment. (App. 96, 100).

The officers then knocked on the door, secured the defendant when he told the officers his name, and proceeded inside defendant's apartment, where the officers noticed blood on the apartment's walls and carpet. (App. 100, 101). The officers, after securing the apartment, asked the defendant about the incident. (App. 100). Defendant said he was sleeping in his apartment when the victims arrived there. (App. 101). Defendant stated he was pushed around and then the victims left. (Id.) When the officers asked defendant about the blood in his apartment, defendant stated "What blood?" (Id.) After defendant was shown the blood he stated it was probably chicken blood. (Id.) However, Officer Griffin stated in his report that there was no doubt in his mind that the blood was not chicken blood, but more than likely human blood. (Id.) Officer Shaw took photographs of the blood marks on the walls and carpet from the inside and outside of defendant's apartment. (App. 3). Officer Shaw and Griffin confiscated a kitchen knife, towel, dish sponge, and defendant's pants, all with blood on them. Defendant was taken to Cass County jail. (App. 96, 97).

On August 7, 1998, at Cass County Jail, Fargo Police Sargent Todd Dahle met with

defendant and read defendant his Miranda rights. (App. 103). Defendant stated he understood, waived his Miranda rights and agreed to talk to Sgt. Dahle. (Id.) Defendant gave Sgt. Dahle the same version of events that he gave Officers' Shaw and Griffin, except that defendant now admitted that he struck Fremond with an ashtray. (Id.) Defendant vehemently denied picking up a knife, denied knowing how the victims were cut, and had no explanation about the blood on the walls and carpet of his apartment. (Id.)

On the afternoon of August 7, defendant was charged with two counts of aggravated assault, both Class C felonies, in violation of N.D.C.C. 12.1-17-02. District Court file number CR-98-02982. On the above mentioned date, defendant made a first appearance before the Honorable Judge Michael O. McGuire, District Judge of the East Central Judicial District of North Dakota. Judge McGuire apprised the defendant of his rights. (App. 31-33). The defendant said he understood a little English, but wanted an interpreter. (App. 35). Judge McGuire granted this desire and set bail. (App. at 36).

On August 27, 1998, the defendant appeared in court with his attorney, Gordon Dexheimer, and an interpreter. (App. 183). Mr. Dexheimer stated, on the record, that the defendant understands a lot of English, but there may be some words he does not pick up. (App. 185). Defendant was read the information charging him with two counts of Aggravated Assault, both C felonies, and was also read the maximum and minimum penalties of both. (App. 187). The defendant plead not guilty, waived preliminary hearing, and requested a jury trial. (App. 188-189).

On October 7, 1998, a hearing was held where defendant gave the court notice of his desire to change his plea from not guilty to guilty. (App. 194). The defendant, with the aid of an interpreter and counsel, stated that he understood what was going on at that time. (Id.)

On November 9, 1998, the defendant was arraigned, with the aid of an interpreter and an attorney, by an amended information, charging one count of assault, a Class A Misdemeanor. (App. 83). All of the following occurred with the aid of an interpreter. (Id.) Judge McGuire asked defendant if he understood the rights that were read to him in the prior proceeding. (App. 85). The defendant answered "Yes". (Id.) Defendant plead guilty to the amended information and Judge McGuire asked defendant questions, following North Dakota Rules of Criminal Procedure 11(c), to determine whether the plea of guilty was voluntarily made. (App. 85-87). Judge McGuire found that defendant's plea was voluntary and intelligently made and proceeded with defendant's sentencing. (App. 87).

On July 17, 1999, a Post-Conviction Relief Hearing was held before Judge Cynthia Rothe-Seeger. (App. 129-173). Judge Rothe-Seeger denied the Petition for Post-Conviction Relief and granted Summary Disposition to the State. (App. 174-175). This appeal followed. (App. 180).

ARGUMENT

I. Standard of review.

Defendant bears the burden of establishing the basis for post-conviction relief. State v. Parisien, 469 N.W.2d 563, 566 (N.D. 1991). If defendant, as here, asks to withdraw his guilty plea, then the action is treated as a Motion under Rule 32(d), N.D.R.Crim.P. State v. Hendrick, 543 N.W.2d 217, 218-19 (N.D. 1996). In that case, the plea may be withdrawn to correct a manifest injustice. Rule 32(d), N.D.R.Crim.P. The determination of manifest injustice is in the discretion of the trial court, and will be reversed on appeal only for an abuse of discretion. State v. Gunwall, 522 N.W.2d 183, 185 (N.D. 1994).

II Defendant knowingly and intelligently waived his constitutional rights.

A. District Court substantially complied with Rule 11(b).

Rule 11(b) of the North Dakota Rules of Criminal Procedure requires that the court personally address the defendant and inform and determine defendant understands: (1) the nature of the charge; (2) the related mandatory minimum and maximum punishments; (3) defendant may plead not guilty or guilty; (4) if defendant pleads not guilty, then there will not be a trial and defendant will not confront adverse witnesses; and (5) defendant has the right to be represented by an attorney, whether appointed or otherwise. Id. The related Explanatory Note states that Rule 11 is intended to codify the relevant requirements of Boykin v. Alabama, 395 N.W.2d 238 (1969). See Rule 11, Explanatory Note, N.D.R.Crim.P.

In State v. Gunwall, the North Dakota Supreme Court held a trial court is not required to re-advise the defendant of each of his rights at a proceeding, as long as the court determines the defendant was properly advised of his rights at the prior proceeding and now recalls that advice. See State v. Gunwall, 522 N.W.2d 183, 185 (N.D. 1994) (stating court specifically

reminded Gunwall at his change of plea hearing that he was read his rights at his arraignment and Gunwall stated he did recollect). This Court determined due process is satisfied when the defendant's knowledge of his rights is clearly reflected from the whole record. Id.

Under State v. Parisien, group explanation of rights informing defendants of their rights will comply with Rule 11 of N.D.R.Crim.P. in determining whether a guilty plea is voluntarily made. See State v. Parisien, 469 N.W.2d 563, 566 (N.D. 1991) (stating each defendant must then individually respond to satisfy the "addressing the defendant personally" requirement).

In State v. Olson, the North Dakota Supreme Court stated a trial court is not required to state by name every right which the defendant waives by pleading guilty to an offense. State v. Olson, 544 N.W.2d 144, 147 (N.D. 1996). This Court held when a defendant is aware of his constitutional rights and pleads guilty to an offense, the voluntary guilty plea waives any constitutional violations alleged to have occurred prior to the plea. Id. Due Process is satisfied when, looking at the court record as a whole, the record shows that defendant knew his rights when he plead guilty. Id.

Defendant herein appears to claim that the court failed to abide by Rule 11(b) regarding his privilege against self-incrimination. Appellant's Brief, pp.8-12. The State asserts the Court substantially complied with Rule 11 (b). First of all, Rule 11 (b) does not specifically require the trial court to inform the defendant of his privilege against self-incrimination. Secondly, on the afternoon of August 7, 1998, defendant herein, together with a group of other defendants, was apprised of his rights by Judge McGuire in accordance with Rule 5 of the North Dakota Rules of Criminal Procedure. (App. 31-33). These rights included the Fifth and Sixth Amendment rights. (Id.) In the November 9, 1998 hearing, in

advance of pleading guilty. Judge McGuire asked defendant if he understood the rights read to him during the prior proceeding. (App. 85). Defendant responded with an unequivocal "Yes." (Id.) Defendant's knowledge of his rights is clearly reflected by the record. See State v. Gunwall, 522 N.W.2d 183, 185 (N.D. 1994).

Although defendant has not alleged a Miranda violation on appeal, it is worth noting that on August 7, 1998, defendant was read Miranda rights by Sgt. Dahle. (App. 103). According to the referenced police report, the defendant indicated that he understood those rights, waived those rights and agreed to talk with Sgt. Dahle. It may be inferred from that report that such rights included his right to remain silent. Defendant did not appear to need the aid of an interpreter to carry on a conversation with officers at that time.

B. Court substantially complied with Rule 11(c).

Rule 11(c) of the North Dakota Rules of Criminal Procedure requires that the court personally address the defendant and determine that the plea is voluntary and not the result of force, threats or promises apart from a plea agreement. Rule 11(c), N.D.R.Crim.P. It further states that the court shall inquire whether defendant's willingness to plead guilty results from previous discussions between the prosecutor, and the defendant or defendant's attorney. Id.

Defendant alleges that the court did not adequately inquire into the negotiations between the prosecutor and defense counsel. In State v. Hoffarth, the North Dakota Supreme Court held that rigid compliance with N.D.R.Crim.P. 11 is not required, but to ensure the plea of guilty is voluntary, the trial court must substantially comply with the procedural rules. State v. Hoffarth, 456 N.W.2d 111, 114 (N.D. 1990). In the present case, Judge McGuire may not have given a rigid reading of Rule 11. However, Judge McGuire's approach fit the

circumstances of the case, substantially complied with N.D.R.Crim.P. 11 and determined that defendant's plea was voluntary. Id.; see also State v. Parisien, 469 N.W.2d 563 (N.D. 1991); State v. Gunwall, 522 N.W.2d 183 (N.D. 1994); State v. Olson, 544 N.W.2d 144 (N.D. 1996); State v. Beckman, 1999 ND 54, 591 N.W.2d 120 (N.D. 1999). Before accepting defendant's plea of guilty, Judge McGuire asked defendant numerous questions. Judge McGuire asked defendant, among other things, whether anyone had promised him anything, threatened him, or attempted to force him to plead guilty. (App. 86-87) To each of those questions defendant responded "No.". (Id.) Judge McGuire also asked defendant, among other things, whether he was satisfied with the his attorney's representation and whether he understood the proceedings. To each of these questions defendant responded "Yes.". (Id.)

The State then gave its sentencing recommendation of one year, all but 95 days suspended for two years and credit for time served. (App. 90). Gordon Dexheimer, attorney for the defendant, then gave his support for the state's recommendation. (App. 90-91). Mr. Dexheimer stated:

> "I believe, from my conversations with Mr. Webb, the reason for the vast departure from the original charge was not only because of the difficulty with the victims in this case, but also because Mr. Webb understood in similar fashion to me what my client was saying here."
>
> (App. 91).

From this statement, Judge McGuire was informed of the conversations that took place between Mr. Webb and Mr. Dexheimer. (Id.); See State v. Beckman, 1999 ND 54, ¶ 14, 591 N.W.2d 120, 122 (N.D. 1999) (stating it was sufficient that trial court asked defendant if she plead because of threats and promises and trial attorneys told the court there was not a plea

agreement). Judge McGuire did not need to inquire any further because the defendant stated he was not promised anything for his plea of guilty. (App. 86). Mr. Dexheimer's statement, together with the Court's own inquiry, revealed everything Judge McGuire needed to know to determine that defendant's plea was voluntary. (App. 86, 87, 91); Beckman, 1999 ND 54, 591 N.W.2d 120.

However, even if this Court were to find that Judge McGuire failed to adequately inquire about the conversations, as required by Rule 11, that took place between Mr. Webb and Mr. Dexheimer, then the error was nevertheless harmless. Mr. Dexheimer informed the court of the conversations and Judge McGuire sentenced the defendant to one year, all but 95 days suspended for one year (one year less than the State recommended) and was given credit for time served. (App. 92); State v. Beckman, 1999 ND 54, 591 N.W.2d 120 (N.D. 1999).

The trial court's record of the November 9, 1998, proceeding establishes that Judge McGuire's finding that defendant voluntarily plead guilty was based on a 'reliable determination on the voluntariness issue which satisfies the constitutional rights of the defendant.' Boykin v. Alabama, 395 U.S. 238, 242 (1969)(citing Jackson v. Denno, 378 U.S. 368, 387).

C. The record does not support defendant's allegation that he did not understand his interpreter or the proceeding.

Defendant, on the record, admitted he understood his interpreter and the proceedings. (App. 85, 87, 186, 194-95). There is no mention in the record, from the defendant, his attorney, the interpreter, or the court that the defendant could not understand the interpreter. (App. 83, 183, 192). There was a minor misunderstanding that occurred on August 27, 1998.

At that time, Ms. Adan had been requested to interpret in Swahili. However, the defendant did not want to speak Swahili, but Somali. (App. 185-186). Ms. Adan stated that she spoke both Swahili and Somali, and proceeded with the translations. (App. 186). Ms. Adan stated, on the record, that she and the defendant were communicating. (Id.) Nothing else on the record supports defendant's claim of not being able to understand the interpreter. (App. 83, 183, 192). In addition to the court transcripts, the interpreter subsequently filed an affidavit stating that she translated everything correctly and that defendant understood what was going on. (App. 127).

Based upon the above, defendant's subsequent claim that he did not understand the proceedings appears to be a self-serving afterthought and should be denied.

D. Judge Rothe-Seeger did not abuse her discretion because her decision was based on an indepth review of the record.

This Court allows a trial court's decision denying a defendant's petition to withdraw a guilty plea to stand, absent an abuse of discretion. State v. Werre, 325 N.W.2d 172, 174 (N.D. 1982). This Court regards the questions asked by the trial court and the defendant's responses as significant in determining whether there was an abuse of discretion. Id. Here, Judge McGuire asked the defendant three questions: whether defendant was promised anything, if he was threatened, and if force was used in order to get him to plead guilty. (App. 86). The defendant answered "No." to each. (App. 86-87). The Werre Court stated, "When a court has made specific inquires as to any threats or promises, a defendant's burden of proving a "manifest injustice" will be increased." See State v. Werre, 325 N.W.2d 172, 175 (N.D. 1982) (citing ABA Standard for Criminal Justice, Vol. 3, 14.56 (2d ed. 1980)).

The defendant has failed to show that Judge Rothe-Seeger abused her discretion. Id.;

State v. Trieb, 516 N.W.2d 287, 291 (N.D. 1994) (stating district court's finding will not be overturned absent an abuse of discretion). Judge Rothe-Seeger found that although the proceedings were not perfect, Judge McGuire did substantially comply with the law of the United States, the law of the State of North Dakota and its rules. (App. 170); State v. Hoffarth, 456 N.W.2d 111, 114 (N.D. 1990). Judge Rothe-Seeger based her decision on an in-depth review of the record. (App. 170). The defendant has failed to show how relying on the record is an abuse of discretion. State v. Werre, 325 N.W.2d 172 (N.D. 1982).

III. Defendant's Sixth Amendment Right Was Not Violated Because Defendant's Attorney Reasonably Represented Him.

In order to prove ineffective assistance of counsel, defendant must satisfy a two-prong test. Defendant must prove that his trial counsel's representation "fell below an objective standard of reasonableness," and establish that his trial counsel's conduct prejudiced him in court. See State v. Bowers, 426 N.W.2d 293, 295 (N.D. 1988) (citing petitioner must prove that without trial counsel's errors, there would have been a different result from the proceeding).

Looking at the facts, defendant's allegations are without merit and his trial counsel's conduct "falls within the wide range of reasonable professional assistance." Strickland v. Washington, 466 U.S. 668, 689 (1984). First, there was a competent interpreter present who states, both on the record and through an affidavit, that defendant understood what was going on in court. (App.87, 127). Second, defendant stated on November 9, 1998, on the record, that he understood the rights Judge McGuire read to him during the August 7 proceeding, which included the instruction that if convicted of a crime a non-citizen could be deported. Note, this court does not require a deportation notification. See State v. Dalman, 520 N.W.2d

860, 863-64 (N.D. 1994) (stating no requirement for either trial court or defense counsel to inform defendant of every conceivable consequence from pleading guilty). Third, defendant's trial counsel reasonably represented defendant at all stages, attained an interpreter for the proceeding and presumably advised his client to plead guilty to single amended count of assault, a class A Misdemeanor with a recommendation of no additional jail time. (App.83). Fourth, the defendant stated, on the record, that he was satisfied with his attorney's representation. (App. 87). A review of the entire record shows that the conduct of defendant's attorney was more than "reasonable". Strickland v. Washington, 466 U.S. 668, 689 (1984).

The State chose to amend defendant's charges from two class C felonies to a class A misdemeanor, made a recommendation of time served and probation (no minimum mandatory sentence applied). (App. 84-85, 90). Considering all the evidence and the record of this matter, the defendant's change of plea to a class A misdemeanor, noting the State's recommendation, was "reasonable." Defense counsel's conduct does not fall out of the "wide range of reasonable professional assistance." State v. Bowers, 426 N.W.2d 293, 295 (N.D. 1988). Therefore, the conduct of defendant's attorney did not fall below an objective standard of reasonableness and did not prejudice defendant. Id.

Kamal Arten's signed affidavit conflicts not only with what he told to Officers Shaw and Griffin, but with what James Fremond and defendant told Officers Shaw and Griffin, what defendant later told Sgt. Dahle after waiving his Miranda rights and then what defendant stipulated to in court. (App. 89, 95, 100, 103). Based on the facts of this case, any trial counsel could reasonably advise their client to plead guilty to a lesser, amended charge, as occurred in this case. Defendant's attorney did not prejudice his client by his actions, noting

the evidence and proceedings in this case. State v. Bowers, 426 N.W.2d 293, 295 (N.D. 1988).

Defendant's counsel conducted himself within the "wide range of reasonable professional assistance" required by law. Id. Additionally, even if defendant could prove that his counsel's representation was unreasonable, then the defendant fails to show this Court, in any significant manner, that but for counsel's alleged unreasonable representation, there would have been a different result to the underlying proceedings. Id. The State respectfully requests that the Court rule defendant's claim of ineffective assistance of counsel is without merit and affirm the lower court's finding.

IV. Whether Detention Without Possibility of Bail, and/or Deportation, is Cruel and Unusual Punishment has Not Been Properly Raised and is Without Merit.

A. Defendant did not properly preserve his Eighth Amendment issue for appeal.

An issue cannot be raised on appeal that was not raised in the trial court. Owens v. State, 1998 ND 106, ¶ 50, 578 N.W.2d 542, 552 (N.D. 1998). However, an issue can be raised in a post conviction relief proceeding if it relates to one of the selected conditions set forth in N.D.C.C. § 29-32.1-01. Id. at ¶ 47. Defendant claims, for the first time in his appellate brief, that his detention is punishment that is disproportionate to the crime to which he plead guilty. See Appellant's Brief, p. 21-22. Defendant did not raise this argument in the related Post-Conviction relief matters. Therefore, the State asserts that this issue was not properly preserved for appeal. Owens v. State, 1998 ND 106, ¶ 48, 578 N.W.2d 542, 552 (N.D. 1998). The State respectfully requests that this Court not consider defendant's fourth issue for argument. Id.

B. Defendant's detention and possible deportation does not violate the Eighth Amendment.

If defendant has properly preserved the Eighth Amendment issue for appeal, then his conviction, and subsequent detention and possible deportation does not violate the Eighth Amendment.

Defendant alleges he was unaware of the potential for deportation proceedings, that such proceedings and the related detention are a direct consequence of his plea, and therefore his plea was not intelligently and voluntarily made. Appellant's Brief, p.21. Defendant's allegation is contrary to prior decisions of this Court. In State v. Dalman, the Court found that potential deportation was a collateral consequence to a conviction. State v. Dalman, 520 N.W.2d 860, 863. Furthermore, defendants need not be informed of all collateral consequences of their pleas, including deportation. Id. Accordingly, failure of a Court to mention that consequence is not a violation of Rule 11. Id. Nonetheless, in this case defendant was present in the courtroom at arraignment on August 7, 1998, when Judge McGuire stated that those who were not citizens of the United States may face deportation if convicted of a crime. (App. 33).

Defendant further alleges that such deportation proceedings would inflict upon him a punishment that is disproportionate to the severity of the crime to which he plead guilty. The Federal Government has exclusive and paramount control over immigration issues. See De Canas v. Bica, 424 U.S. 351, 354 (1976). The power to expel or exclude aliens is a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control. Fiallo v. Bell, 430 U.S. 787, 792 (1977). It is settled law that Congress has the power to exclude aliens altogether from the Unites States, or to prescribe

the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced through the executive officers without judicial intervention. Kleindienst v. Mendel, 408 U.S. 753, 766-67 (1972). The 10th Circuit Court stated that immigration laws are not considered penal. See Basset v. U.S. Immigration and Naturalization Service, 581 F.2d 1385, 1387-88 (10th Cir. 1978) (stating that Congress' power to enforce deportable offenses did not allow that court to use the Eighth Amendment to set aside a deportation order). Defendant's detention and possible deportation are not cruel and unusual and do not violate his Eighth Amendment rights. Id.

The defendant relies on Ingraham v. Wright, to support his claim that his detention and possibility of deportation is disproportionate and that triggers an Eighth Amendment violation. See Ingraham v. Wrigth, 430 U.S. 651, 97 S.Ct. 1401 (1977); Appellant's Brief, p. 21. However, Ingraham is distinguishable from defendant's case, because Ingraham deals with school discipline and not immigration law. Ingraham, 430 U.S. 651.

The defendant also relies on Ortega v. Rowe, a case dealing with illegal alien claims that the poor jail conditions they were kept in violated the Eighth Amendment. Ortega v. Rowe, 796 F.2d 765 (5th Cir. 1986). That case is also distinguishable because the parties seeking relief were illegal aliens, where the defendant here is not. Id. at 765. The appellants in Ortega were not confined because they committed any crimes in the United States, but because they were soon to be deported for being an illegal alien found in the U.S. See Ortega v. Rowe, 796 F.2d 765, 767 (5th Cir. 1986) (stating the cruel and unusual punishment prohibition is not applicable to this case). The State asserts that the cases defendant uses are distinguishable to the point that they do not apply to the same situation that defendant uses them for in his argument and should not be considered.

CONCLUSION

Based upon the above and foregoing, the State of North Dakota asserts that the defendant's appeal is without merit, and respectfully requests that the Rulings, Orders and Sentence and Judgment of the Hon. Michael O. McGuire and Hon. Cynthia Rothe-Seeger, District Judges, be, in all things, affirmed.

Respectfully submitted this 29th day of November, 1999.

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