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SUPREME COURT

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SEP 15 '99

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA  
District Court No. CR-99-861  
Supreme Court No. 990250

David C. Berlin,

Petitioner/Appellant,

-vs-

State of North Dakota,

Respondent/Appellee.)

990250

PETITIONER/APPELLANT'S  
BRIEF

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

SEP 14 1999

STATE OF NORTH DAKOTA

APPEAL FROM THE ORDER FOR SUMMARY DISPOSITION

DATED JULY 28, 1999

THE HONORABLE CYNTHIA ROTHE-SEEGER

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## STATEMENT OF THE CASE

The Petition for Post-Conviction Relief dated June 24, 1997, was filed in the office of the Clerk of District Court for Cass County, North Dakota, on June 24, 1999. The Petition for Post-Conviction Relief states, in part: "Defendant contends that the strict requirements of Rule 11, N.D.R.Crim. Procedure were not met and/or complied with at the plea and sentencing hearing held on October 6, 1997." (App. p.3)

In his Brief in Support of Petition for Post-Conviction Relief, Petitioner argues, in part, that: "Petitioner Berlin argues that the trial court erred when it failed to affirmatively determine at his change of plea hearing, that he specifically recalled and intended to waive each of the rights listed in Rule 11(b)." (App. pp. 6-7)

The State of North Dakota responded by filing a pleading entitled State's Notice of Motion and Motion to Dismiss or Motion for Summary Disposition dated July 26, 1999. (App. pp. 9-10)

The Court issued an Order for Summary Disposition dated July 28, 1999, granting the State's Motion for Summary Disposition and ordering the Petition for Post-Conviction Relief to be summarily dismissed. (App. pp. 38-39) The Court mailed copies of the Order for Summary Disposition on the parties on July 28, 1999. (App. p. 40)

The Petitioner personally filed his Notice of Appeal to the Supreme Court of North Dakota dated July 30, 1999, with the Clerk of District Court

on August 5, 1999. (App. p 41) A Judgment of Dismissal dated August 13, 1999, was filed with the court on August 13, 1999. (App. p. 42). There is no indication that the Judgment of Dismissal was served upon the Petitioner or his counsel.

STATEMENT OF THE ISSUE

WHETHER THE TRIAL COURT FAILED TO COMPLY WITH RULE 11 OF THE NORTH DAKOTA RULES OF CRIMINAL PROCEDURE BY FAILING TO PERSONALLY ADVISE THE PETITIONER OF THE MINIMUM PUNISHMENT PROVIDED BY STATUTE FOR WHICH PETITIONER'S PLEA WAS BEING OFFERED.



## ARGUMENT

It is the position of the Petitioner that the trial court failed to comply with Rule 11 of the North Dakota Rules of Criminal Procedure by failing to advise him of the applicable minimum punishment prior to accepting the Petitioner's plea of guilty to the charge of aggravated assault when he was sentenced on October 6, 1997.

The Petitioner appealed from the Order for Summary Disposition dated July 28, 1999, wherein his Petition for Post-Conviction Relief was summarily dismissed. Rule 37(b), N.D.R.Crim.P. and Rule 4(b), N.D.R.App.P., allow a Notice of Appeal to be filed after the announcement of the Order but before Entry of Judgment. *State v. Himmerick*, 499 N.W.2d 568, (N.D. 1993).

Petitioner acknowledges that he has the burden of establishing a basis for post-conviction relief. *State v. Parisien*, 469 N.W.2d 563, 566 (N.D. 1991).

Further, in asking that he be allowed to withdraw his guilty plea as provided by Rule 32(d), N.D.R.Crim.P. on the basis that it is "necessary to correct a manifest injustice", Petitioner appreciates that the determination of manifest injustice is ordinarily within the trial court's discretion, and will be reversed on appeal only for an abuse of discretion. *State v. Gunwall*, 522 N.W.2d 183, 185 (N.D. 1994).

In the present case, at no time did the trial court advise the Petitioner of the minimum punishment provided for on the pending aggravated assault charge that was pending against him.

At the Petitioner's arraignment on October 2, 1997, the Court advised all persons appearing before the Court that day of their general constitutional rights. When the Petitioner then appeared before the Court, the State, through Assistant Cass County State's Attorney Dawson, advised him of the charges and the maximum punishment. Assistant State's Attorney Dawson also advised the Petitioner that both Counts 1 and 2 carry a minimum mandatory period of incarceration of two years.

Later, on October 6, 1997, the Petitioner appeared with appointed counsel to enter a guilty plea to Count 1, aggravated assault. Count 2 was to be dismissed.

In advising the Petitioner pursuant to Rule 11 of the North Dakota Rules of Criminal Procedure, the Court made certain general inquiries of the Petitioner as follows:

THE COURT: Mr. Berlin, you've discussed this matter with your attorney?

MR. BERLIN: Briefly, Your Honor.

THE COURT: Do you wish to have more time?

MR. BERLIN: No, Your Honor.

THE COURT: You are changing your plea today, I understand. You understand, of course, that you are entitled to a jury trial in this matter?

MR. BERLIN: Yes, Your Honor.

THE COURT: Have there been any promises of any type or nature that have led to you changing your plea or are you doing so voluntarily?

MR. BERLIN: Yes, Your Honor. So that I can get sent to Bismarck immediately, the State Penitentiary immediately, so I don't have to wait. ASAP. Two, three days.

THE COURT: I suspect that –

MR. ALBRIGHT: That's correct, Your Honor. I told Mr. Berlin that we would have the order typed and out of our office today.

THE COURT: That's quick, Mr. Berlin. Very well.

Mr. Berlin, if you would stand and face the Court.

It is alleged by the State – I'll allow you to withdraw your previous pleas. I don't think there has been a plea in this. This is a felony matter.

Mr. Berlin, you are entitled, also, to a preliminary hearing in this matter wherein the State must establish probably cause to believe that you committed the crime and probable cause that the crime itself actually occurred.

Tr. P. 3, lines 15-25; Tr. P. 4, lines 1-18.

The Court in *Houle v. State*, 482 N.W.2d 24 (N.D. 1992), noted that the procedures of Rule 11 are mandatory and binding upon the Court. *Id.* at 29.

As set out in the case of *State v. Hendrick*, 543 N.W.2d 217 (N.D. 1996):

Under current law, a trial court may not accept a guilty plea without first addressing the defendant

personally in open court and informing the defendant of the "mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered. N.D.R.Crim.P. 11(b)(2).

*Id.* at 221.

The *Hendrick* court continued by clearly holding that when a trial court does not advise the defendant in accordance with Rule 11(b)(2), the interest of justice require that the defendant be allowed to withdraw his plea of guilty. *Id.* at 221.

This Court has reversed and remanded, in three prior cases when the trial court failed to advise the defendant of the mandatory minimum sentence.

In the case of *State v. Schumacher*, 452 N.W.2d 345 (N.D. 1990), the Court held that the trial court's failure to advise the defendant regarding the mandatory minimum sentence at the time of the guilty plea required that the defendant be allowed to withdraw his plea.

Because a firearm was involved, the defendant in *Schumacher* was subject to the mandatory minimum sentencing provisions of N.D.C.C. 12.1-32-02.1. Similarly, the Petitioner herein was subject to the provisions of § 12.1-32-02.1, N.D.C.C.

Quoting from Rule 11(b)(2) of the North Dakota Rules Criminal Procedure, the *Schumacher* court noted that said rule provides:

(b) **Advice to defendant.** The court may not accept a plea of guilty without first, by addressing the

defendant personally [except as provided in Rule 43(c)] in open court, informing him of and determining that he understands the following:

...

(2) The mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered;

...

*Id.* at 346.

The *Schumacher* court noted that the procedures of Rule 11 are mandatory and binding upon the Court. *Id.* at 346. Further, the Court noted that the requirement that the Court personally advise and question the defendant is intended to ensure a record that will affirmatively establish a knowing and voluntary decision by the defendant. *Id.* at 347. The *Schumacher* court concluded that when the trial court does not advise the defendant of the mandatory minimum sentence in accordance with Rule 11(b)(2), the interests of justice require that the defendant be allowed to withdraw his plea of guilty. *Id.* at 348.

It is inherent upon the trial court to comply with the procedures of Rule 11. In the present case, the Court at no time advised the Petitioner of his rights pursuant to Rule 11 relating to the mandatory minimum punishment.

Here, at the Petitioner's arraignment on October 2, 1997, he was generally advised by the trial court of his constitutional rights. Thereafter, an

Assistant Cass County State's Attorney advised the Petitioner of the two-year mandatory minimum sentence applicable to each of the pending charges. At the sentencing hearing on October 6, 1997, neither the trial court nor the State advised the Petitioner of the applicable mandatory minimum punishment.

Petitioner asserts that it is the strict duty of the trial court, and no one else, including an Assistant Cass County State's Attorney, to comply with Rule 11(b)(2) relating to the mandatory minimum punishment that may apply.

In the case of *State v. Boushee*, 459 N.W.2d 552 (N.D. 1990), the Court again reversed and remanded a case due, in part, to the trial court's failure to inform the defendant of the mandatory minimum or the maximum possible punishments for the offenses to which he pled guilty. Accordingly, the Court allowed the defendant in *Boushee* to withdraw his guilty pleas and be given an opportunity to plead anew. *Id.* at 556.

Likewise, in the case of *State v. Schweitzer*, 510 N.W.2d 612 (N.D. 1994), the Court reversed and remanded the case as a result of the trial court's failure to specifically advise the defendant of the mandatory minimum sentence. The *Schweitzer* court held that the trial judge must personally address the defendant in open court in order to comply with Rule 11. *Id.* at 616.

The trial court's express statement on the record of an applicable mandatory minimum sentence eliminates the inherent danger of misinterpreting

whether the defendant's decision to plead guilty was made with full knowledge of the sentence which must be imposed as a result of that plea.

*Id.* at 616.

### CONCLUSION

When the trial court does not advise a defendant of the mandatory minimum sentence in accordance with Rule 11(b)(2) prior to accepting a guilty plea, the interests of justice require that the defendant be allowed to withdraw his plea of guilty. The trial court in the present case at no time advised the Petitioner personally in open court of the mandatory minimum sentence applicable to Count 1 prior to accepting his plea thereon. Accordingly, the interests of justice require the Petitioner be allowed to withdraw his plea of guilty.

Dated this 13<sup>th</sup> day of September 1999.

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