ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

20040098

State of North Dakota,
Plaintiff-Appellee,

vs.

Tracy Lee Hayek,
Defendant-Appellant.

SUPREME COURT NO. 20040098

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JUN 29 2004
STATE OF NORTH DAKOTA

APPELLANT'S BRIEF

APPEAL FROM THE MARCH 4, 2004 CRIMINAL JUDGMENT
THE CASS COUNTY COURT IN FARGO, NORTH DAKOTA
THE HONORABLE MICHAEL O. McGUIRE PRESIDING

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STATEMENT OF THE ISSUES PRESENTED

I. WHETHER THE RECORD AFFIRMATIVELY SHOWS THAT DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HER ATTORNEY DID NOT STIPULATE TO THE PRIOR DRUG CONVICTION AND WHERE HER ATTORNEY DID NOT OBJECT TO CHARACTER EVIDENCE AGAINST HER?

II. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING EVIDENCE THAT DEFENDANT'S ATTORNEY WAS LIVING WITH HER AND WAS HER BOYFRIEND?

STATEMENT OF THE CASE

Defendant-Appellant Tracy Hayek appeals her criminal judgment. (A-18)[1] Defendant was charged with Possession of a Controlled Substance with Intent to Deliver, a Class A Felony, in violation of N.D.C.C. § 19-03.1-23(1); Possession of Marijuana Paraphernalia, a Class A Misdemeanor, in violation of N.D.C.C. § 19-03.4-03; and Possession of Less Than One-Half Ounce of Marijuana, a Class B Misdemeanor, in violation of N.D.C.C. § 19-03.1-23(6). (A-13) After a two day jury trial, a Cass County jury found Defendant guilty on all three charges. On March 4, 2004, Judge Michael O. McGuire sentenced Defendant to five years' imprisonment, payment of a $1,000.00 legislative fee, and the requirement

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of a chemical dependency evaluation on count one. Defendant was sentenced to one year imprisonment on count two and 30 days in jail on count three. All sentences to run concurrently. (A-15) On March 30, 2004, an Amended Criminal Judgment was filed, correcting a typographical error in count two. Count two was incorrectly labeled as a Class A Felony.

Thereafter, on April 2, 2004,[2] Defendant filed her Notice of Appeal, appealing her judgment of convictions. (A-18).

STATEMENT OF THE FACTS

The facts are not in dispute. On September 9, 2003, probation officers conducted a probation search at Defendant's apartment. Defendant was not present initially at the start of the search. During the execution of the search, Defendant was about to enter the apartment. She was holding a black purse and another tote bag. The officers opened the door. Subsequently, Defendant dropped the bags. Inside the black purse, the officer discovered several small baggies of methamphetamine. The other bag did not contain any drugs. The officers also found marijuana and marijuana paraphernalia inside the apartment. (T 33-39, 58-66, 108-109, 125-128, 170-182,[3] Exhibit #15)

2 The docket sheet incorrectly states that the Notice of Appeal was filed on April 6, 2004. As indicated by the Clerk of District Court's date stamp, the appeal was filed on April 2, 2004.

3 Trial Transcript

At trial, the State presented seven peace officers, an assistant state toxicologist, and introduced several exhibits. Essentially, Defendant did not dispute the facts. However, Defendant claimed that she did not knowingly possess the methamphetamine because they were her sister's drugs and the drugs were found in her sister's purse. (T 267-278) Additionally, Defendant claimed that the marijuana and the marijuana paraphernalia were her mother's drugs. (T 280-282) Defendant presented several witnesses to support her defense.

ARGUMENT

I. THE RECORD AFFIRMATIVELY SHOWS THAT DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HER ATTORNEY DID NOT STIPULATE TO THE PRIOR DRUG CONVICTION AND WHERE HER ATTORNEY DID NOT OBJECT TO CHARACTER EVIDENCE AGAINST HER

The Sixth Amendment of the United States Constitution affords a defendant the right to the effective assistance of counsel. Generally, this Court has repeatedly held that claims of ineffective assistance of counsel should not be brought on direct appeal, but instead through post-conviction relief. "We have repeatedly stated that a claim of ineffective assistance of counsel at trial should not be brought on direct appeal, but rather through a post-conviction relief proceeding under N.D.C.C. chapter 29-32.1." State v. Messner, 1998 ND 151, ¶ 29, 583 N.W.2d 109.

However, if the record affirmatively shows ineffectiveness of constitutional dimensions, the issue can be raised on direct appeal. State v. McDonell, 550 N.W.2d 62, 65 (N.D. 1996). In order to establish ineffective assistance of counsel, defendant must prove that "his counsel's performance was defective and that his defense was prejudiced by the proven defects." State v. Foster, 1997 N.D. 8, ¶ 18, 560 N.W.2d 194.

In State v. Saul, 434 N.W.2d 572, 575 (N.D. 1989), this court held that if a defendant, in an enhanced driving under the influence charge, stipulates to the prior DUI convictions before trial, the convictions are not admissible at trial.

Admission of the priors constitutes reversible error. The court said that "[w]hen a defendant stipulates to the prior convictions, as in this case, he effectively removes that element of the crime from the charge and we do not see any reason why evidence of the prior convictions should be submitted to the jury unless they are relevant to some disputed issue under Rule 404(b), N.D.R.Ev." Id. at 575. The court's holding extends to all enhanced charges where the only difference between the basic crime and the enhanced crime are the priors. Id. at 575.

Here, Saul was applicable to this case. Defendant was charged with Possession of a Controlled Substance with Intent to Deliver in violation of N.D.C.C. § 19-03.1-23(1). The prior conviction of possession of a controlled substance is not an element of the basic crime, but instead is solely used for enhancement purposes under N.D.C.C. § 19-03.1-23(1)(a)(1) for the five year mandatory minimum. Moreover, as required under Rule 404(b), the State did not provide notice of their intent to use the prior conviction for something other than character evidence against the Defendant.

During the State's direct examination of Sergeant Patrick Claus, the following occurred:

"Q. [Ms. McEvers] Continue.

A. I was also aware that the Defendant had prior dealings in drug crimes.

Q. You were aware that she had a prior?

A. Correct.

[THE CLERK]: State's Exhibit 16 has been marked.

[Ms. McEvers]: May I approach, Your Honor?

[THE COURT]: You may.

Q. Sergeant Claus, I'm handing you what's been marked as State's Exhibit No. 16. Certified copy of a criminal judgment. Is that the prior conviction that you're aware of?

A. That was the one that I was aware of, yes, Ma'am.

Q. And what is the conviction for?

A. Possession of a controlled substance, a C felony; and possession of drug paraphernalia, a C felony.

Q. So you were aware of the fact that the Defendant had been convicted of C felony drugs and C felony paraphernalia?

A. Correct.

Q. What does the fact that it's a felony tell you?

A. Based on our knowledge of the case we were aware that she had been involved in methamphetamine use in the past and these were the charges relating from that use.

Q. So your review of the case, you believed the intent is based --the intent to deliver is based on her previous use?

A. Correct." [T 178-179]

The direct examination continued. Subsequently, without

objection, Exhibit 16 was offered and received into evidence. (T 181-182)

Rule 404 of the North Dakota Rules of Evidence forbids evidence of a criminal defendant's character or criminal history to prove circumstantially that a defendant committed the charged offense. The general rule is that the commission of an act cannot be proved by showing the commission of similar acts by the same person. Lange v. Cusey, 379 N.W.2d 775 (N.D. 1985).

Here, Defendant's prior convictions were used as substantive evidence of her guilt on the delivery charge! The State did not even attempt to hide this belief. Claus believed Defendant was guilty "based on her previous use." (T 179) During closing arguments, without objection, the State argued Defendant was guilty because "she has a prior conviction." (T 376-377). The State repeated their belief: "So in this instance, the packaging, the quantity, and he testified that the fact that she had a prior conviction for methamphetamine also lead him to believe that she possessed these items with the intent to deliver." [T 377-378]

Here, under Saul and N.D.R.Ev. 404, it is undisputed and unrefuted that Defendant's counsel was defective and Defendant was prejudiced by her attorney's ineptness! Under Saul, counsel could have prevented Defendant's prior convictions from being introduced as substantive evidence merely by stipulating to them before trial. Due to counsel's

failure to know the Saul holding, Defendant was prejudiced. Defendant was not convicted because of the evidence presented on the current charges. Instead, Defendant was convicted because of the admission of character evidence and her prior convictions. The whole rationale behind Rule 404 is to protect criminal defendants from being convicted solely because of their past conduct and character. Here, the purpose behind Rule 404 was defeated.

Typically, this Court dismisses claims of ineffective assistance of counsel on the grounds that counsel's conduct fell within the broad acceptable range of trial strategy. However, this conduct clearly falls outside the range of acceptable trial strategy. Instead, the conduct represents ineffectiveness of constitutional dimensions. There is no benefit to Defendant only prejudice by having the convictions admitted as substantive evidence. Granted, under N.D.R.Ev. 609, a defendant may be impeached by her prior conviction. However, the jury is instructed that the conviction cannot be used as substantive evidence. See NDJI-Criminal K-5.10.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING EVIDENCE THAT DEFENDANT'S ATTORNEY WAS LIVING WITH HER AND WAS HER BOYFRIEND.

Rule 402 of the North Dakota Rules of Evidence states that irrelevant evidence is inadmissible. "The determination of whether evidence is too remote to be relevant is left to the discretion of the trial court, and its discretion will not be reversed in the absence of clear proof of an abuse of that discretion. State v. Biby, 366 N.W.2d 460, 463 (N.D. 1985). Even if evidence is relevant, it may be excluded on grounds that it inflames the jury. N.D.R.Ev. 403 states:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the dangers of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The appellate standard for Rule 403 is abuse of discretion. State v. Olson, 290 N.W.2d 664, 669 (N.D. 1980).

On cross-examination of Leslie Johnson, the following transpired:

> "Q. (Ms. McEvers) And who lives in that house?
>
> Mr. VARRIANO: Objection. May we approach?
>
> THE COURT: Yes.
>
> (Whereupon, discussion off the record at the Bench, all counsel present.)[4]

4 The contents of the sidebar are discussed on T 366-367 by the court.

Q. (By Ms. McEvers) Ms. Johnson, what family members of Tracy Hayek live with her that you're aware of?
A. That I'm aware of. She's got her daughter Victoria and son Henry and she has a boyfriend, Mr. Varriano, and I don't know for sure if Kelly is living there, the sister. She might have at first when she was released but I can't recall if that's the case or if it continues.
Q. Kelly, are your referring to--
A. To the Defendant's sister.
Q. Bahtiraj?
A. That's correct. And another gentleman who is a friend or a cousin or I can't remember if it's a friend or a relation of Mr. Varriano that was living there, too, the last time I was out there. If there's anybody else." [T 344-345]

At the next recess, Defendant moved for a mistrial: "Mr. Varriano: I want to move for a mistrial. I called a side bar, I told Miss McEvers that she was going into some areas I didn't think were necessary nor were they relevant to this case.
I have now been declared the boyfriend of Miss Hayek in front of the 12 people that are going to judge her. If that's the case I want you to call this a mistrial, or allow me to withdraw and become a witness for Miss Hayek because I could be a hell of a character

witness for her. Believe me." (T 364-365)

The State resisted the motion, claiming it cannot control how a witness answers their question. The State blamed the situation on Mr. Varriano. (T 365)

The Court denied the motion:

"So the situation was that the Court indicated when both counsel were at the Bench for a side bar that Mr. Varriano's name should not be mentioned; but that counselor for the State could go so far to indicate that there was a man living in the household.

I suppose you could make your argument on either side. That it's beneficial on the one hand for an exemplary attorney to be living with this lady. Or on the other hand you might make the argument that Mr. Varriano was setting forth." [T 366-367]

The court ruled that the State could not bring up the issue again, nor argue the issue in closing argument. (T 368)

In hindsight, the court stated:

"THE COURT: The only hindsight that I suggested is that we probably should have had the witness off the stand and cautioned her. And I don't think any of us, including me, thought about that at the--at the moment." [T 368-369]

The court suggested that a jury instruction might cure the problem but Mr. Varriano believed it best not to remind the jury again. (T 369)

The fact that Mr. Varriano is Defendant's live-in boyfriend has no possible relevance to the determination of Defendant's guilt at trial. Even assuming arguendo that the evidence is relevant, clearly under N.D.R.Ev. 403, it should have been excluded because it inherently inflamed and mislead the jury.

At trial, an attorney is suppose to be a zealous advocate for his client while abiding by the rules of the adversary system. At the moment of disclosure, Defendant's attorney lost all credibility with the jury. Because her attorney was also Defendant's boyfriend, the jury could have believed that Mr. Varriano was also using drugs. The jury could have believed that as a boyfriend, Mr. Varriano may have offered false testimony to save her girlfriend. More importantly, although it may not have been a violation of the Rules of Professional Conduct,[5] it just gives the appearance of impropriety. The jury is left with the impression that Mr. Varriano is no longer a zealous advocate following the rules in the adversary system, but instead he has broken these rules and will do whatever is necessary to save his girlfriend. Unfortunately, the jury punished Defendant for this appearance of impropriety.

The Court has no other recourse than to reverse the criminal judgment and remand for a new trial. This court cannot punish a Defendant for her attorney's mistakes or

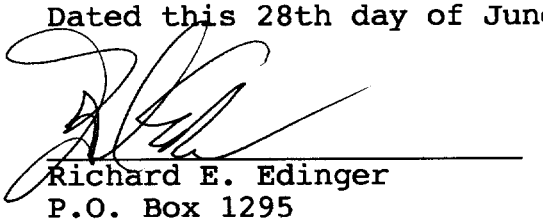
5 There is not enough facts to determine if a violation of 1.7 of the Rules of Professional Conduct occurred.

possible unethical behavior. Moreover, the State, as a justice seeker, cannot argue that the admittance was an unfortunate mistake. It is undeniable that the State intentionally tried to introduce this irrelevant and prejudicial evidence, but Mr. Varriano objected and asked for a sidebar. (T 344)

CONCLUSION

WHEREFORE, the reasons stated herein, Defendant respectfully requests that this Honorable Court grant the relief prayed herein and reverse her March 4, 2004 Judgment and remand for a new trial.

Dated this 28th day of June, 2004.



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