

ORIGINAL (e-filed)

20070147

IN THE SUPREME COURT

**FILED**  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

STATE OF NORTH DAKOTA

OCT - 2 2007

STATE OF NORTH DAKOTA,

Plaintiff/Appellee,

v.

GREGORY EMERY,

Defendant/Appellant.

STATE OF NORTH DAKOTA

Supreme Court No. 20070147

Morton County Case No. 06-K-594

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REPLY BRIEF OF APPELLANT

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Appeal from Order Denying Motion to Correct Sentence

Dated May 2, 2007

Following Sentencing and an Order for Judgment on a Jury Verdict of Guilty

Entered on April 11, 2007

Morton County District Court

South Central Judicial District

The Honorable David E. Reich

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**[¶2] LAW AND ARGUMENT**

[¶3] Judge Reich sentenced Mr. Emery to the mandatory minimum sentence of 5 days in jail under N.D.C.C. § 39-08-01(4)(b) solely because Emery was a second time DUI offender and because Judge Reich felt he had no choice but to enhance the mandatory minimum statutory limit under North Dakota law. In enhancing the statutory minimum and sentencing Mr. Emery to 5 days in jail, Judge Reich improperly relied upon a prior DUI conviction without any proof that Mr. Emery waived his right to counsel on the prior conviction. “[A] DUI conviction cannot be used to enhance the penalty of a subsequent DUI conviction when there is no proof that the defendant waived his right to counsel before pleading guilty to the earlier DUI charge.” *See State v. Johnson*, 376 N.W.2d 15, 16 (N.D. 1985)

[¶4] The State essentially argues that Judge Reich did not enhance Mr. Emery’s sentence because, three weeks after sentencing, Judge Reich issued an Order stating that “the offense in this case was not enhanced.” *See Appellee’s Brief* at 13. However, the sentencing record tells the true tale, not an Order issued one and one-half fortnights later. The sentencing record convincingly shows that, because of the prior DUI conviction within the last five years, the trial court felt compelled by law to enhance the lower statutory limit for the DUI sentence to 5 days and felt equally compelled to sentence Mr. Emery to those 5 days, as follows:

THE COURT: “... As a matter of law, I need to consider the one that occurred within the last five years.” (TT. at 110, L. 14-16) (emphasis added).

...

THE COURT: Okay. I’m not aware of that, but I know that if there was a mandatory minimum if he has a conviction in the last five years, and he’s admitted that. Do you want to -- we can

continue the sentencing to a later date if you prefer that, but I'm not going to give him a lesser sentence if the law says I have to give him a mandatory minimum for a second DUI. (TT. at 112, L. 21 – 113, L. 2) (emphasis added).

...

THE COURT: Okay. Well, he's admitted that he's had a DUI within the past five years, so I think that I have to apply at least the mandatory minimums; do you agree? (TT. at 113, L. 5-7) (emphasis added).

...

THE COURT: Okay. And the State hasn't, but Mr. Emery's admitted that he has a previous violation within the five-year period, and that, as I understand the law, if he has a second DUI conviction in five years, the mandatory minimums apply for a second DUI offense. If you wish to disagree, we can continue the sentencing to a later date." (TT. at 113, L. 11-17) (emphasis added).

After reading the sentencing record, there can be no question that Judge Reich felt compelled, as a matter of law, to apply the mandatory minimum sentence of 5 days in jail, an enhanced sentence under N.D.C.C. § 39-08-01(4)(b), based on consideration of the prior DUI conviction within the last five years. It is more than mere coincidence that Mr. Emery was sentenced to 5 days in jail.

[¶5] Also, Judge Reich improperly applied the mandatory minimum statutory sentence for a second DUI offense within five years and enhanced Mr. Emery's sentence by using an earlier DUI conviction without any evidence that Emery had counsel or waived his right to counsel in the prior proceeding. Judge Reich explained at the sentencing hearing, and not sometime later, that Emery "admitted that he's had a DUI within the past five years, so I think that I have to apply at least the mandatory minimums." (TT. at 113, L. 5-7) (emphasis added). No other evidence was offered at sentencing and nothing establishing counsel or waiver of counsel was proffered. Consequently, Judge Reich enhanced Emery's sentence to the mandatory minimum based

upon Emery's admission that he had a prior DUI within five years, but without proof that the conviction was counseled.

[¶6] Pursuant to *Orr*, Emery's admission, without evidence that Emery had counsel or waived his right to counsel in the prior proceeding, was insufficient to enhance his sentence. *See State v. Orr*, 375 N.W.2d 171 (N.D. 1985). "[A]bsent a valid waiver of the right to counsel the resulting conviction cannot, under art. I, § 12, N.D. Const., be used to enhance a term of imprisonment for a subsequent offense." *See Orr*, 375 N.W.2d at 178-79. Accordingly, Emery's prior DUI conviction is void for enhancement purposes and should not have been used by Judge Reich to enhance Emery's sentence.

[¶7] Yet, the State, for the most part, dismisses the *Orr* case as distinguishable because they argue "*Orr* was challenging a prior guilty plea, while the Defendant in this case was found guilty at a jury trial." *See Appellee's Brief* at 11. Mr. Emery does not understand what the State is arguing, especially considering that both *Orr* and Emery were convicted at trial and both challenged the use of a prior uncounseled DUI conviction improperly used to enhance their sentence.

[¶8] Instead, the State argues on appeal that *State v. Hoverson* is somehow controlling in this case. *See State v. Hoverson*, 2006 ND 49, 710 N.W.2d 890. However, *Hoverson*, a case addressed by neither party below and raised *sua sponte* by the district court well after written and oral argument, is not germane to the Appellant's issue. *See id.* Indeed, an examination of *Hoverson* simply reinforces the fact that *Orr* is controlling in our case and that at Emery's sentencing "the statutory limits were enhanced based upon a prior uncounseled conviction." *See Hoverson*, 2006 ND 49 at ¶36 (citing *Orr* and reiterating the well-established case law that "an uncounseled conviction, without a valid

waiver of the right to an attorney, is too unreliable to base enhancement of a term of imprisonment for a subsequent offense”).

[¶9] Also, it seems the State argues that Judge Reich’s Order on the Motion to Correct Sentence “cures” what he articulated at sentencing. The State concedes that from the sentencing record “it may appear that the charge against the Defendant was enhanced in this case.” *See* Appellee’s Brief at 12. Despite the sentencing record, the State asserts that Judge Reich’s Order on the Motion to Correct Sentence, penned defensively three weeks after sentencing, is dispositive on the enhancement issue because Judge Reich contends that the “offense in this case was not enhanced.” *See id* at 13. If the State’s assertion wasn’t so sadly ridiculous, it would produce laughter.

[¶10] Next, the states argues that Mr. Emery “should have” moved “the trial court to correct the judgment, rather than to correct the sentence.” *See* Appellee’s Brief at 13. Again, Mr. Emery does not understand the State’s argument. A motion seeking a correction of sentence is proper under N.D.R.Crim.P. 35 and “an order denying a motion for correction of an illegal sentence under N.D.R.Crim.P. 35(a) involves a substantial right and is appealable.” *See Rahn v. State*, 2007 ND 121, ¶9, 736 N.W.2d 488. Furthermore, in *State v. Johnson*, this Court granted the Defendant relief on appeal of his motion to correct sentence where his DUI sentence was illegally enhanced, like our case, by using a prior DUI conviction without proof that he waived his right to counsel on the earlier conviction. *See State v. Johnson*, 376 N.W.2d 15 (N.D. 1985).

[¶11] Finally, the State argues now, for the first time, that Morton County disputes that “a standard sentence for a first DUI offense in Morton County does not include jail time, nor does it include supervised probation.” *See* Appellee’s Brief at 5

(emphasis added). However, at the May 1, 2007 hearing on the Motion to Correct Sentence the State did not disagree with Emery's attorney when he informed the Court:

"I would like to state for the record that a standard sentence for a first DUI offense in Morton County does not include jail time, nor does it include supervised probation. That's not what's in dispute here."

(HT. at 2, L. 8-12). Only now is a disagreement lodged.

[¶12] Since Mr. Emery was sentenced to incarceration solely because he was a second DUI offender and because his sentence was enhanced by using an earlier conviction without any evidence that he waived his right to counsel in the prior proceeding, the sentence violated Mr. Emery's rights under the Sixth Amendment to the United States Constitution and Article I, Section 12 of the North Dakota Constitution. Accordingly, Mr. Emery respectfully requests that this Court reverse the trial court's denial of his Motion to Correct Sentence and remand his case back to the trial court with an instruction that his sentence be corrected to reflect no jail time and no supervised probation like other first offenders in Morton County, North Dakota.

[¶13] CONCLUSION

[¶14] For the foregoing reasons, Mr. Emery respectfully requests relief from this Court.

Respectfully submitted  
this 2<sup>nd</sup> day of October, 2007.

*/s/ Dan Herbel*

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[¶15] CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on October 2, 2007, the REPLY BRIEF OF APPELLANT was electronically filed with the Clerk of the North Dakota Supreme Court and was also electronically transmitted to Chris Nyhus, counsel for Appellee, at the following:

Electronic filing TO: "Chris Nyhus" <cnyhus@nd.gov>

Dated this 2<sup>nd</sup> day of October, 2007.

*/s/ Dan Herbel*

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