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(e-filed)

20080120

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

CCT 03 2008

State of North Dakota,)

)

Plaintiff/Appellee,)

)

vs.)

)

Michelle Geiser a/k/a,)

Michelle Behles)

)

Defendant/Appellant.)

STATE OF NORTH DAKOTA

Supreme Court No. 20080120

APPELLANT'S BRIEF

APPEAL FROM THE FEBRUARY 4, 2008 ORDER DENYING THE
DEFENDANT'S MOTION TO DISMISS FROM THE
MCLEAN COUNTY DISTRICT COURT
IN WASHBURN, NORTH DAKOTA
THE HONORABLE THOMAS J. SCHNEIDER PRESIDING

ATTORNEY FOR APPELLANT

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ISSUES PRESENTED

- I. THE DEFENDANT HAS THE RIGHT TO APPEAL TO THE SUPREME COURT.
- II. WHETHER THE CHARGE OF ENDANGERMENT OF A CHILD OR VULNERABLE ADULT APPLIES TO AN UNBORN CHILD.

STATEMENT OF THE CASE

[¶1] Appellant, Michelle Geiser, appeals the Memorandum Opinion and Order denying motion to dismiss entered on February 4, 2008 in the McLean County District Court [Appendix pages 14-15; hereinafter A 14-15]. Consequently, the Defendant entered a Rule 11(a)(2) Conditional Plea on February 22, 2008 preserving her right to appeal the Memorandum Opinion and Order denying motion to dismiss [A 16-17]. Criminal Judgment was entered April 29, 2008 [A 18]. Notice of Appeal was filed on May 21, 2008 [A 19].

[¶2] On October 5, 2007 the State filed a Criminal Complaint for the charge of Endangerment of a Child or Vulnerable Adult [A 2-3]. A preliminary hearing was held on November 21, 2007 and the Honorable Sonna Anderson found probable cause for the charge of Endangerment of a Child or Vulnerable Adult and a Criminal Information was filed on the charge [A 4-5].

[¶3] Subsequently, a Motion to Dismiss was filed on December 18, 2007 [A 6-10]. The State filed a Motion Resisting the Motion to Dismiss on December 28, 2007 [A 11-13]. Without a hearing on the Motions the Court filed a Memorandum Opinion and Order on February 4, 2008 denying the Motion to Dismiss [A 14-15].

STATEMENT OF THE FACTS

[¶4] On or about September 24, 2007 the Defendant allegedly overdosed on prescription drugs. At the time of the alleged overdose the Defendant was approximately 29 weeks pregnant. A criminal investigation ensued and the State contends that the alleged overdose resulted in the demise of the fetus or unborn

child. On or about the October 5, 2007 the State filed a Criminal Complaint charging the Defendant with Endangerment of a Child or Vulnerable Adult in violation of NDCC § 19-03.1-22.2 [A 2-3]. On November 21, 2007 a preliminary hearing was heard before the Honorable Judge Anderson who found that probable cause existed to bound the Defendant over for trial on the charge. Consequently, the State filed a Criminal Information and formally charged the Defendant with Endangerment of a Child or Vulnerable adult in violation of NDCC § 19-03.1-22.2 [A 4-5].

[¶5] On December 18, 2007 the Defendant filed a Motion to Dismiss the Endangerment of a child or Vulnerable Adult charge [A 6-10]. On December 28, 2007 the State filed a Motion Resisting the Defendant's Motion to Dismiss [A 11-13]. On February 4, 2008 the Court entered Memorandum Opinion and Order denying motion to dismiss.

[¶6] Consequently, the Defendant entered a Rule 11(a)(2) Conditional Plea on February 22, 2008 preserving her right to appeal the Memorandum Opinion and Order denying the motion to dismiss [A 16-17]. Criminal Judgment was entered April 29, 2008 [A 18]. Notice of Appeal was filed on May 21, 2008 [A 19].

LAW AND ARGUMENT

I. THE DEFENDANT HAS THE RIGHT TO APPEAL TO THE SUPREME COURT.

[¶7] Pursuant to NDCC § 29-28-03, a defendant may appeal from any or all verdicts, judgments, or orders enumerated in NDCC § 29-28-06. See also N.D.R.Crim.P. Rule 37. Accordingly, the Defendant's appeal of the

Memorandum Opinion and Order denying the motion to dismiss by the District Court are appropriately before the Court. State v. Jenkins, 339 N.W.2d 567 (N.D. 1983).

II. WHETHER THE CHARGE OF ENDANGERMENT OF A CHILD OR VULNERABLE ADULT APPLIES TO AN UNBORN CHILD.

[¶8] The State relies on NDCC § 19-03.1-22.2. Endangerment of a Child or Vulnerable Adult, to charge the Defendant with the demise of the fetus or unborn child. NDCC § 19-03.1-22.2 provides:

“Unless a greater penalty is otherwise provided by law, a person who violates subsection 2, and a child or vulnerable adult actually suffers bodily injury by exposure to, ingestion of, inhalation of, or contact with a controlled substance, chemical substance, or drug paraphernalia, is guilty of a class B felony unless the exposure, ingestion, inhalation, or contact results in the death of the child or vulnerable adult, in which case the person guilty of a class A felony.”

[¶9] Commission of this offense requires that a person knowingly or intentionally causes or permits a child or vulnerable adult to be exposed to, ingest, or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia, and the exposure to the child caused death. The offense requires that a “child” or “vulnerable adult” is the victim. “Child” means an individual who is under the age of eighteen years. Clearly, the term “child” does not include a fetus or unborn child. If the State Legislature wanted to include a fetus or unborn child in the definition they would have stated such. In the legislative history of the statute there is no mention of including a fetus or unborn child within the definition of “child” as it pertains to this NDCC § 19-03.1-22.2, leaving us to speculate as to what their intention was.

[¶10] As stated in Rydberg v. Johnson, 1998 ND 160, ¶ 6, 583 N.W.2d 631, statutory interpretation is a question of law. In construing a statute, our duty is to ascertain the intent of the legislature. See, e.g., Singha v. State Bd. of Medical Examiners, 1998 ND 42, ¶ 16, 574 N.W.2d 838. To ascertain the legislative intent, we look first to the language of the statute as a whole. Id. We construe a statute's words in their plain, ordinary and commonly understood sense. Id.; NDCC § 1-02-02. If a statute's language is clear and unambiguous, we do not disregard that language under the pretext of pursuing the legislative intent, NDCC § 1-02-05, because the intent is presumed clear from the face of the statute. Id. However, if the statutory language is ambiguous, or if adherence to the strict letter of the statute produces an absurd or ludicrous result, NDCC § 1-02-38(3), we may use extrinsic aids to interpret the statute. Id.

[¶11] In addition, the North Dakota Supreme Court has stated, “We construe ambiguous criminal statutes against government and in favor of the defendant.” State v. Ruby, 2000 ND 119, ¶16, 611 N.W.2d 888; State v. Bossart, 1997 ND 119, ¶ 14, 565 N.W.2d 752; State v. Larson, 479 N.W.2d 472, 473 (N.D. 1992). The rule of lenity “requires ambiguous criminal statutes to be construed in defendant’s favor.” State v. Laib, 2002 ND 95, ¶ 15, 644 N.W.2d 878.

[¶12] NDCC § 14-10-01 makes it clear that “child” means a person who is a “minor”, whose existence and age is reckoned from the first minute of the day on which the person is born. Before birth, a child is only a “viable fetus” and only once it is born alive, does it become a child. NDCC § 14-02.1-08.

CONCLUSION

[¶13] WHEREFORE, for the reasons stated herein, the Appellant respectfully prays that the Court finds that NDCC § 19-03.1-22.2 does not apply in this particular case because there was no “child” at the time of the alleged offense and reverse and remand for further proceedings consistent with that finding.

Respectfully submitted this 3rd day of October, 2008.

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IN THE SUPREME COURT
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State of North Dakota,)	Supreme Court No. 20080120
)	
Plaintiff/Appellee,)	District Court No. 28-07-K-357
)	
vs.)	CERTIFICATE OF SERVICE
)	
Michelle Geiser a/k/a,)	
Michelle Behles,)	
)	
Defendant/Appellant.)	
STATE OF NORTH DAKOTA)	
) ss.	
COUNTY OF BURLEIGH)	

Thomas Glass, the attorney for Defendant/Appellant in the above action, hereby certifies under N.D.R.Civ.P. 5(f), that on Friday, October 03, 2008, he served the attached:

Appellant's Brief and Appellant's Appendix

upon the following person(s) by emailing a copy of the same to:

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