ORIGINAL 20080308

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Eddy County CASE NO. 14-08-K-0017 ORIGINAL

Supreme Court No. 20080308

STATE OF NORTH DAKOTA,

Plaintiff / Appellee,

v.

PRESTON VANDEHOVEN,

Defendant / Appellant.

Appeal from Judgment of Conviction and Order dated November 10, 2008 Denying Motions for Continuance and/or to Withdraw Guilty Plea

Of the District Court of Eddy County

THE HONORABLE JAMES M. BEKKEN PRESIDING

BRIEF OF DEFENDANT / APPELLANT

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IV. **Whether Mr. Vandehoven received ineffective assistance of counsel.**

STATEMENT OF THE CASE

Nature of the Case

¶ 1 This is an appeal from the Criminal Judgment dated November 12, 2008, specifically the District Court's order dated November 10, 2008, denying motions for a continuance and/or to withdraw Mr. Vandehoven's plea of guilty to the State's charge that he committed a class A misdemeanor offense in violation of N.D.C.C. § 39-08-01. Mr. Vandehoven also asks the Supreme Court to find obvious error based upon the district court's participation in the facilitation of a plea agreement, the district court's failure to properly advise Mr. Vandehoven of his rights prior to accepting the plea, and ineffective assistance of counsel.

Course of the Proceedings

¶ 2 Mr. Vandehoven was arrested on February 10, 2008. A Uniform Complaint and Summons was issued that same day charging Mr. Vandehoven with a violation of N.D.C.C. § 39-08-01, a class B misdemeanor. Mr. Vandehoven made his initial court appearance on February 27, 2008. A criminal complaint was subsequently

filed on March 6, 2008, charging Mr. Vandehoven with a violation of N.D.C.C. § 39-08-01, a class A misdemeanor. (App. 1.) The complainant, Eddy County Sheriff's Deputy Waylon Zieman, alleged this offense constituted Mr. Vandehoven's third offense in a five year period. Soon thereafter, the clerk scheduled a pretrial conference. (App. 2.)

¶ 3 The pretrial conference was held on April 23, 2008. At this conference, the district court participated in the facilitation of a plea agreement wherein Mr. Vandehoven would plead guilty to the charge and the court would delay imposition of the sentence and entry of judgment until October 1, 2008. That date was extended to November 1, 2008.

¶ 4 Mr. Vandehoven retained new counsel who filed a motion for a continuance and/or to withdraw the guilty plea on October 23, 2008. (Dkt. 3.) The State filed a response the same day. (Dkt. 7.) The trial court issued a Letter Order on October 23, 2008, and scheduled an expedited hearing. (Dkt. 9.) The expedited hearing was held on October 29, 2008.

Disposition Below

¶ 5 The court did not grant a continuance. Instead, the court ordered an expedited hearing. At the conclusion of the hearing, the court denied Mr. Vandehoven's motion to withdraw his guilty plea. (Tr. II 42, L. 10.)[1] The court issued a Memorandum Decision and Order Denying Motion to Withdraw Plea on November 10, 2008. (App. 8.) The Criminal Judgment was filed on November 17, 2008. (App. 16.) Mr. Vandehoven filed his Notice of Appeal on November 21, 2008. (App. 18.)

[1] The transcript of the pretrial conference held on April 23, 2008, shall be cited as "Tr." The transcript of the motion hearing held on October 29, 2008, shall be cited as "Tr. II."

STATEMENT OF THE FACTS

¶ 6 At the beginning of the pretrial conference held on April 23, 2008, the court noted that the original charge against Mr. Vandehoven was a class B misdemeanor, but the charge had been amended to a class A misdemeanor.[2] (Tr. 1, L. 5-9.) The court stated, "So, I'm presuming that that's because this is looked at as a *potential* third offense." (Tr. 1, L. 11-12.) The State's Attorney, Mr. Peterson, responded, "That's right, your Honor." (Tr. 1, L. 13.)

¶ 7 The court then inquired whether there was any resolution of criminal case. (Tr. 1, L. 17.) Mr. Peterson responded, "To my knowledge, not yet." (Tr. 1, L. 18.) Immediately thereafter, Mr. Vandehoven's counsel commenced plea discussions with the court. (Tr. 1, L. 19.) The back and forth discussion between Mr. Vandehoven's counsel and the court continued for several minutes and touched upon several aspects of a potential plea agreement. (Tr. 1-8.) Even after Mr. Vandehoven complied with the court's request that he enter his plea, (Tr. 9, L. 4-5), discussions continued over details of the plea agreement. In the midst of these discussions, the court failed to appropriately advise Mr. Vandehoven in accordance with the requirements of Rule 11(b), N.D.R.Crim.P., prior to accepting the plea. (Tr. 9-16.) After the court accepted Mr. Vandehoven's plea, the court inquired about probation. (Tr. 16, L. 5-8.) Without consulting Mr. Vandehoven, who already entered a plea based on his understanding that the sentence would be limited to the mandatory minimum with the possibility of treatment in lieu of incarceration, Mr. Vandehoven's attorney gave the State two years of

[2] The original (uniform) complaint and summons was issued pursuant to N.D.C.C. § 29-05-31. Upon review of the clerk of court's register of actions (App. 1), there is no indication that the original complaint was filed with the court, nor is there any indication that it was amended pursuant to proper procedure set forth in Rule 3(c), N.D.R.Crim.P.

Mr. Vandehoven's life through an additional sentence of probation. (Tr. 16, L. 11).

¶ 8 Several times during the April 23, 2008, conference, it was noted that a sentence was not imposed that day. For instance, after the court accepted Mr. Vandehoven's plea, the court told Mr. Vandehoven: "You understand there's been a plea agreement that if you get sentenced today the Court will not - - I mean, that if you enter your plea today, the Court will *not* enter a final sentence and do sentencing until October 1st. Do you understand that?" (Tr. 9, L. 9-13.) Mr. Vandehoven responded, "Yes sir." (Tr. 9, L. 14.)

¶ 9 Although it was understood that the law required a mandatory minimum for a third offense, the law also required Mr. Vandehoven to undergo an evaluation. (Tr. 2, L. 18-21.) Accordingly, it was contemplated that the ultimate disposition of the matter could be revisited prior to the imposition of sentence and entry of judgment depending on Mr. Vandehoven's need for treatment. (Tr. 2, L.18-23; Tr. 3, L. 2.) Based on the discussion that took place on the record, Mr. Vandehoven could reasonably believe that he had the option of attending a sentencing hearing on October 1, 2008, wherein the Court would consider the evaluation and perhaps impose treatment in lieu of incarceration, or Mr. Vandehoven could waive his appearance and go directly to jail on October 1, 2008, and serve 60 days. Upon the request of Mr. Vandehoven's employer, the sentencing date was extended to November 1, 2008.[3] (App. 5, ¶ 3.)

¶ 10 During the interim period, Mr. Vandehoven completed an alcohol and drug evaluation at Prairie Counseling in Jamestown. (App. 6.) The counselor filed the evaluation with the court on August 14, 2008. Id. The counselor recommended, due to

[3] Because November 1, 2008, fell on a Saturday, the sentencing could not take place until the first business day thereafter, which would be Monday, November 3, 2008.

Mr. Vandehoven's high risk behaviors, that he undergo intensive outpatient treatment. Id. Also during this time, Mr. Vandehoven discovered that his fiancée was pregnant and that their baby was due to arrive in February 2009. (Tr. II 18, L. 2.) Certainly, impending parenthood is a life altering event that causes most people to take stock of their lives, and Mr. Vandehoven was no exception. Mr. Vandehoven reflected upon his life that consisted of partying and drinking with his associates in Carrington, the adverse consequences that he brought upon himself through his use of alcohol, and his desire to provide his budding family with financial stability through higher paying employment. (Tr. II 17-19.)

¶ 11 Wanting a fresh start in life, Mr. Vandehoven turned to his mother who lived in Colorado for her assistance. (Tr. II 18.) She helped him to secure employment at the company where she worked, and Mr. Vandehoven and his fiancée moved to Colorado on or about September 15, 2008. (Tr. II 18-19.) Mr. Vandehoven was aware that he was required to return to North Dakota to finalize this matter and he discussed it with his mother. (Tr. II 19.) Mr. Vandehoven's mother did not think that her son had been adequately represented by his former attorney, and she recommended that her son retain the services of another lawyer to review the case. (Tr. II 19, L. 19-22.) Based on his mother's recommendation, Mr. Vandehoven contacted his present attorney and requested his services.

¶ 12 Counsel understood that Mr. Vandehoven had pled guilty to a third offense DUI, but that he had not yet been sentenced. (Terry Aff., Dkt. 5 ¶ 2.) With respect to his prior offenses, Mr. Vandehoven could not recall if he was advised of his right to counsel, but he did know that he was not represented by an attorney in either

case. Id. ¶ 3. Mr. Vandehoven's present counsel believed that a sentencing hearing was scheduled for November 3, 2008. (Dkt. 5.) Counsel was initially reluctant to take the case because there was little time to review the matter and file motions before the hearing. (Tr. II 23, L. 22-25.) Thus, on October 23, 2008, Mr. Vandehoven's new counsel filed a motion requesting a continuance of at least 30 days in order to prepare motions, in particular, to prepare a motion under State v. Orr, 375 N.W.2d 171 (N.D. 1985) on the basis of two prior uncounseled convictions. (Terry Aff., Dkt. 5 ¶ 3; Mot. for Continuance, Dkt. 4.) Because the sentence had not been finalized, counsel also believed that the court could consider the provisions of N.D.C.C. § 39-08-01(4)(e). (Dkt. 4.) For a third offense, and under certain circumstances, the court may suspend all but 10 days of imprisonment. Id. If the Court would not continue the date of the sentencing in order to provide counsel with time to review the matter and prepare appropriate motions, Mr. Vandehoven moved in the alternative to withdraw his guilty plea. Id.

¶ 13 After reviewing Mr. Vandehoven's motion and the State's response, the court issued a letter order dated October 23, 2008. (App. 4.) The court stated its understanding of the status of the case and its plan on proceeding. Id. It was the court's position that Mr. Vandehoven was sentenced on April 23, 2008, to 60 days in jail with the sentence to commence on October 1, 2008 (later extended to commence on November 1, 2008). (App. 5.) The court stated, "My plan is to still enter that judgment pursuant to the plea, which the defendant gave on April 23, 2008." (App. 6.) The court stated, unless Mr. Vandehoven could show that withdrawal of his guilty plea was necessary to correct a manifest injustice, the court would enter judgment as planned. (App. 6.)

¶ 14 The court did not grant a continuance. Instead, the court ordered an expedited hearing to take place on October 29, 2008. Mr. Vandehoven and his counsel, Faron E. Terry, appeared by telephone. The State's Attorney, Mr. Peterson, appeared in person. At the conclusion of the hearing, the court denied Mr. Vandehoven's motion and announced that the court was "going to enter the judgment on the matter in accordance with what *our* agreement was." (Tr. II 42, L. 9-12.)

ARGUMENT

I. The district court committed obvious error when the court participated in the facilitation of a plea agreement at the pretrial conference held on April 23, 2008.

¶ 15 In preparation of this appeal, a transcript of the April 23, 2008, pretrial conference was secured. Upon review of the record, it is believed that the district court committed obvious error when the court participated in the facilitation of a plea agreement. Because counsel was previously unaware of the court's predominant role in structuring a plea agreement, no objection concerning the court's role was made at the hearing held on October 29, 2008.

A. Standard of Review.

¶ 16 Because no objection was made, the standard of review on appeal requires a showing of obvious error which affects substantial rights of the defendant. See State v. Lee, 2004 ND 176, ¶ 13, 687 N.W.2d 237. "The defendant has the burden of establishing that an error was obvious by 'showing (1) error, (2) that is plain, and (3) that affects substantial rights.'" Id. (citing State v. Hirschkorn, 2002 ND 36, ¶ 6, 640 N.W.2d 439). "An error is not obvious unless there is a 'clear deviation from an applicable legal rule under current law.'" Id. In this matter, the applicable legal rule is set forth in Rule

11(c)(1), N.D.R.Crim.P., which provides the following:

> **Plea Agreement Procedure.**
>
> (1) In General. The prosecuting attorney and the defendant's attorney, or the defendant when acting pro se, may discuss and reach a plea agreement. The court must not participate in these discussions.

B. Discussion.

¶17 Although the State's Attorney, Mr. Peterson, sent a letter setting forth a recommendation that the State would make if Mr. Vandehoven pled guilty, no plea agreement existed prior to the pretrial conference scheduled for April 23, 2008. At the onset of the pretrial conference, the court inquired whether there was any resolution of criminal case. Mr. Peterson responded, "To my knowledge, *not yet*." Immediately thereafter, Mr. Vandehoven's former counsel commenced plea discussions with the court concerning the possibility of an acceptable resolution. (Tr. 1.) Counsel then stated, "And what I'm proposing is - - is that I don't want to charge him [Mr. Vandehoven] any more attorney's fees because we're going to have the thing resolved, if not now, three or four months down the road." (Tr. 2, L. 10-13.) If an acceptable agreement could be reached with the court, counsel indicated that he would allow his client change his plea to guilty that day. (Tr. 2, L. 15-18.) Counsel proposed that the sentence be imposed at a later date in order to allow Mr. Vandehoven to continue his employment and to undergo an evaluation that may possibly show him to be a candidate for treatment—and if so, the Court would have an opportunity thereafter to determine whether Mr. Vandehoven had the option to do treatment and receive credit against the sentence for days spent in treatment. (Tr. 2, L. 18-25; Tr. 3, L. 1.)

¶ 18 A defendant's attorney may engage in plea bargaining with the prosecutor, but not with the judge. Thus, it was improper for Mr. Vandehoven's counsel to inform the court that the case would not be resolved for several more months unless the court was willing to bargain. In other words, he indicated that if the court agreed to his requests, then he would allow his client to plead guilty that day. As an ordinary citizen unfamiliar with court procedure, Mr. Vandehoven was unaware of the impropriety. He was powerless to do anything as his counsel encouraged the court to abandon its role as an impartial judge and become a negotiator.

¶ 19 The State's Attorney is also presumed to know the requirements of Rule 11. Having already informed the court that there was no resolution to the matter, the State's Attorney should have objected to the improper plea discussions between counsel and the court in order to preserve the fairness and the integrity of the proceedings. Instead, the State's Attorney has since relied on the improper plea discussions as a means to oppose Mr. Vandehoven's subsequent motions. (State's Return to Def.'s Mot. for Continuance and Withdrawal of Plea, Dkt. 7.) The State's attorney wrote the following:

> "In this case Defendant did, on April 23, 2008 and with the advice of counsel, waive his right to trial and enter a plea of guilt based upon the parties' plea agreement. Said plea agreement was entered in to by Defendant knowingly and voluntarily and, again, with the advice of counsel."

(Dkt. 7.)

¶ 20 The court should have been aware of the impropriety of plea discussions in the court's presence and should have removed itself from any discussion of a plea agreement that had not yet been agreed to by the parties in open court. The court clearly deviated from established law that commands that court must not participate in these discussions. The record indicates that the court became more and more invested in the

plea discussion as it continued, and Mr. Vandehoven was not apprised of the significance nor the consequences of the subtle changes that the court was making, on an incremental basis, to his counsel's suggested resolution of the case which included the court's consideration of an addiction evaluation, possible treatment, and a delayed sentencing date.

¶ 21 First, the court stated, "I don't necessarily have a problem with having sentencing later if the state doesn't. . . ." (Tr. 4, L. 23-24.)

¶ 22 Next, the court stated, "If he gets picked up on any alcohol related problem or gets any charge and I find out about it then I would request that the sentence be imposed that *we* agree on today, otherwise I'd hold off on saying we'll have the final sentencing date and he can waive his appearance in Court on that date, if you want today, and I can just enter the sentence on whatever day we set and have it finalized, if that will help him work." (Tr. 5, L. 3-10.)

¶ 23 The court stated, "Because then once we set the date, and you can waive your appearance in Court on that date, I'd have the clerk enter the judgment that date." (Tr. 6, L. 3-5.)

¶ 24 Next, the court stated, "So, I mean we can – I can certainly say that the clerk would have this ready to go and we could finalize the thing, you know, say September – or just send it in October 1st and put a commitment up to the jail to have you report and then finalize the judgment the same day." (Tr. 7, L. 15-20.)

¶ 25 After the State's Attorney stated his agreement, the court stated, "Okay so my understanding was he'd plead today. If I finalized it I wouldn't finalize the sentence until October 1st under agreement that he'd waive his appearance on October 1st and the

Court would then enter the judgment October 1st and we'd send a commitment up to the jail that he's going to report on October 1st - - - to serve his sixty days. All right. Is that acceptable to you Mr. Vandehoven?" (Tr. 8, L. 14-22.) Mr. Vandehoven responded, "Yes sir." (Tr. 8, L. 23.)

¶ 26 After Mr. Vandehoven entered his guilty plea, (Tr. 9, L. 5), the Court informed Mr. Vandehoven, "You understand there's been a plea agreement that if you get sentenced today the Court will not - - I mean, that if you enter your plea today, the Court will *not* enter a final sentence and do sentencing until October 1st. Do you understand that?" (Tr. 9, L. 9-13.) Mr. Vandehoven responded, "Yes sir." (Tr. 9, L. 14.)

¶ 27 The Court continued, "So you will not have to come back here. You're going to waive your right to be here personally and we'll have the sentence all set out but we're not going to actually enter the sentence and complete sentencing until October 1st. And that's to accommodate you to work in the seasonal work that you're working. Do you understand that." (Tr. 9, L. 15-20.)

¶ 28 Although Mr. Vandehoven was informed that he was not required to appear, he was not informed that treatment in lieu of incarceration based on the results of an evaluation was no longer a sentencing possibility. Based on the discussion as a whole, Mr. Vandehoven could reasonably believe that he still had the option of attending a sentencing hearing on October 1, 2008, wherein the Court would consider the evaluation and perhaps impose treatment in lieu of incarceration, or Mr. Vandehoven could waive his appearance and go directly to jail on October 1, 2008, and serve 60 days. After all, it makes no sense for the court to order an evaluation if the court does not consider it upon receipt. Mr. Vandehoven's understanding of the discussion as a whole is

consistent with statutory law which provides, if an addiction evaluation indicates that the defendant needs treatment, the court may order the defendant to undergo treatment at an appropriate program and the time spent by the defendant in the treatment must be credited as a portion of a mandatory sentence. N.D.C.C. § 39-08-01(4)(g).

¶ 29 But even if Mr. Vandehoven had perceived that the court may have steered the plea discussions in another direction—away from the possibility of treatment in lieu of incarceration and toward 60 days in jail regardless of the results of the addiction evaluation—Mr. Vandehoven would not feel free to question or challenge the court. The court made it clear to Mr. Vandehoven that the court was facilitating a plea agreement for the purpose of accommodating his need to earn a living. Under the circumstances, Mr. Vandehoven would not want to appear unappreciative of the court's efforts on his behalf by openly questioning the court's understanding of plea discussions in comparison to his own. The explanatory note to Rule 11, N.D.R.Crim.P., explains the untenable position of a defendant who must sit through plea discussions with the judge who will ultimately decide his fate:

> "The court is not permitted to participate in plea discussions because of the possibility that the defendant would believe that the defendant would not receive a fair trial, if no agreement had been reached or the court rejected the agreement, and a subsequent trial ensued before the same judge."

¶ 30 The North Dakota Supreme Court also addressed this issue in State v. Dimmitt, 2003 ND 111, ¶¶ 9-10, 665 N.W.2d 692. The Court stated the following:

> Rule 11(d)(1), N.D.R.Crim.P., provides, "the court shall not participate" in plea agreement discussions. On this point, the federal rule is substantively identical to our rule and prohibits the court from participating in any plea discussions. Fed.R.Crim.P. 11(c)(1). The Ninth Circuit Court of Appeals in United States v. Bruce, 976 F.2d 552, 556-58 (citations omitted), explains the purpose of the rule prohibiting a judge

from participating in plea discussions:

> Rule 11(e)(1) simply commands that the judge not participate in, *and remove him or herself from, any discussion of a plea agreement that has not yet been agreed to by the parties in open court.*
>
> The "bright-line rule" created by Fed.R.Crim.P. 11(e)(1) bars a judge from participating in plea bargaining for three main reasons. First, such participation is prohibited because *judicial involvement in plea negotiations inevitably carries with it the high and unacceptable risk of coercing a defendant to accept the proposed agreement and plead guilty.*
>
> . . . .
>
> Second, Rule 11 protects the integrity of the judicial process. "The Rule is based on the sound principle that *the interests of justice are best served if the judge remains aloof from all discussions preliminary to the determination of guilt or innocence so that his impartiality and objectivity shall not be open to any questions or suspicion when it becomes his duty to impose sentence.*"
>
> . . . .
>
> Finally, *Rule 11 bars judicial participation in plea discussions in order to preserve the judge's impartiality after the negotiations are completed.* Judicial involvement detracts from a judge's objectivity in three ways. First, *"[s]uch involvement makes it difficult for a judge to objectively assess the voluntariness of the plea" eventually entered by the defendant.* . . . Next, judicial participation in plea discussions that ultimately fail inherently risks the loss of a judge's impartiality during trial, not only because he becomes aware of the defendant's possible interest in pleading guilty, but also because he may view unfavorably the defendant's rejection of the proposed agreement. . . . Further, involvement in plea negotiations diminishes the judge's objectivity in post-trial matters such as sentencing and motions for a judgment of acquittal.

This case demonstrates the confusion and uncertainty of the voluntariness of a guilty plea which can arise when the trial court violates the strict prohibition under N.D.R.Crim.P. 11(d)(1) from participating in the negotiation process. Unless and until the rule is changed, our courts may not do what was done in this case.

¶ 31 Applying the above rationale, the court's impartiality or objectively may be reasonably questioned in view of the court's swift reaction to Mr. Vandehoven's

motion for a continuance or to withdraw his guilty plea. In the court's letter order dated October 23, 2008, the court stated the following:

> "The purpose of this letter is to advise each of you what my understanding of the status of this is [sic] case is and how I plan on proceeding. First, there is no sentencing scheduled for November 3, 2008, as indicated in the paperwork submitted by Mr. Terry. Apparently he is not getting the full information from his client."

(App. 5-6.)

¶ 32 Mr. Vandehoven's understanding of the plea discussions that took place at the pretrial conference on April 23, 2008, is simply different from the court's understanding. Yet, the letter order indicates that the court placed the blame for the confusion or misunderstanding on Mr. Vandehoven's shoulders. It becomes clear, however, that the record does not support the court's understanding. For instance, the court claimed that the discussion regarding whether or not to finalize the sentence that day or wait did not occur until after the court accepted the plea. (Letter Order, App. 5.) The transcript shows that the court's memory of the proceeding is faulty. Long before the court accepted Mr. Vandehoven's plea, the court stated, "You understand there's been a plea agreement that if you get sentenced today the Court will not - - I mean, that if you enter your plea today, the Court will *not* enter a final sentence and do sentencing until October 1st." (Tr. 9, L. 9-13.) The court did not accept Mr. Vandehoven's guilty plea until much later in the hearing. (Tr. 16, L. 5.)

¶ 33 As noted above, judicial involvement in plea negotiations carries a high and unacceptable risk of coercing a defendant to accept the proposed agreement and plead guilty. Additionally, judicial involvement makes it difficult for a judge to

objectively assess the voluntariness of the plea eventually entered by the defendant. This difficulty can be discerned from the record of the October 29, 2008, hearing on Mr. Vandehoven's motion to withdraw his guilty plea. The court engaged Mr. Vandehoven in a confrontational manner. Eventually, the court asked, "You don't think I forced you into pleading guilty do you?" (Tr. II 19, L. 22-23.) It does not appear that the court remained aloof or that the court was aware that its participation in the plea discussions affected Mr. Vandehoven's substantial rights. Based upon obvious error committed by the court when it participated in plea discussions which made it difficult for Mr. Vandehoven to do anything other than enter a guilty plea when asked to do so, the judgment of conviction ought to be reversed.

II. The district court committed obvious error when it accepted Mr. Vandehoven's plea without properly advising him of his rights as required by Rule 11, N.D.R.Crim.P.

¶ 34 Before accepting a guilty plea, the trial court must advise the defendant of certain rights. See Rule 11, N.D.R.Crim.P.; State v. Farrell, 2000 ND 26, 606 N.W.2d 524; State v. Magnuson, 1997 ND 228, 571 N.W.2d 642. The advice required by Rule 11, N.D.R.Crim.P., is mandatory and binding on the court. Id. "Although Rule 11 does not require any ritualistic, predetermined formality by the trial court, the court must substantially comply with the procedural requirements of the rule to ensure the defendant is entering a voluntary plea of guilty." Farrel, at ¶ 9.

¶ 35 Rule 11(b)(1), N.D.R.Crim.P., provides that the court must address the defendant personally in open court, informing the defendant of and determining that the defendant understands the following:

> (A) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(B) the right to a jury trial;

(C) the right to be represented by counsel at trial and at every other stage of the proceeding and, if necessary, *the right to have the counsel provided under Rule 44*;

(D) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(E) the defendant's waiver of these trial rights if the court accepts a plea of guilty;

(F) the nature of each charge to which the defendant is pleading;

(G) any maximum possible penalty, including imprisonment, fine, and mandatory fee;

(H) any mandatory minimum penalty; and

(I) the court's authority to order restitution.

¶ 36 Rule 11(b)(2), N.D.R.Crim.P., requires the court to ensure that the defendant's plea is voluntary. The court must address the defendant personally and determine that the plea did not result from force, threats, or promises other than promises in a plea agreement. The court must also inquire whether the defendant's willingness to plead guilty results from discussion between the prosecuting attorney and the defendant or the defendant's attorney. With respect to the foregoing, the court issued a memorandum opinion wherein the court stated:

> "This court recalls that it extensively questioned the defendant regarding the situation regarding the plea being knowingly and voluntarily given that there were minimum ramifications that he was facing. The court remains convinced that I did address the defendant personally in court on April 23, 2008 and informed him of the nature of the charge, including the mandatory minimum and maximum possible punishments and that I substantially complied with the requirements of Rule 11(b) of the N.D.R.Crim.P. and that the defendant's plea of guilty pursuant to the agreement was voluntarily and knowingly made by the defendant. The court finds that there have been no other procedural errors involved in the court imposing the sentence pursuant to the parties' plea agreement and

> considering all the facts and circumstance the court finds that there has not been a manifest injustice which would support the withdrawal of the defendant's guilty plea."

(App. 14.)

¶ 37 The record, however, does not support the court's recollection. This case is unique because Mr. Vandehoven's alleged "willingness" to plead guilty on April 23, 2008, was the product of improper plea discussions between his attorney and the court. Despite the court's reference to the "parties' plea agreement" in the court's memorandum opinion, there was no plea agreement between Mr. Vandehoven and the State. Based on improper plea discussions, the court asked Mr. Vandehoven to enter his plea. (Tr. 8, L. 24-25.) The record of the court's advice to Mr. Vandehoven starts on Page 9 of the transcript. The court asked Mr. Vandehoven if he understood that there would be no jury trial, that there was a plea agreement, and that he would not be sentenced until October 1, 2008. (Tr. 9.) Although Mr. Vandehoven answered in the affirmative, the court made no effort to ascertain whether Mr. Vandehoven's understanding of the plea agreement was consistent with the court's understanding.

¶ 38 The court advised Mr. Vandehoven that he had the option of a jury trial and that he could be represented by hired counsel, but the court did not advise him of his right under Rule 44 to counsel at public expense if he could not afford to hire one himself. (Tr. 10.) A review of the transcript reveals that the court failed to inform Mr. Vandehoven that he had the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses.

¶ 39 The court did not inform Mr. Vandehoven of the *maximum* possible penalty, including imprisonment, fine, and mandatory fee for a class A misdemeanor. Under N.D.C.C. § 12.1-32-01(5), the maximum penalty for a class A misdemeanor is one year's imprisonment, a fine of two thousand dollars, or both. The omission of this advice is especially critical because of the question of probation that arose near the end of the proceeding. (Tr. 16, L. 8.) As a consequence of the belated and cursory discussion concerning probation, the judgment of conviction sentenced Mr. Vandehoven to a combination of 60 days imprisonment and two years of probation. In accordance with N.D.C.C. § 12.1-32-07(6), the final judgment of conviction provides, "A violation of the rules or conditions may result in revocation of the defendant's probation, whereupon the court may impose the maximum penalty allowed by law." (App. 17.)

¶ 40 The court also failed to duly advise Mr. Vandehoven concerning the mandatory minimum penalty. (Tr. 16, L. 3-4.) Although the record reveals that Mr. Vandehoven was aware of a portion of the statutory mandatory minimum for a potential third offense, he was not advised of the statutory mandatory minimum in its entirety. N.D.C.C. § 39-08-01(4)(c) provides, "For a third offense within five years, the sentence must include at least 60 days' imprisonment or placement in a minimum security facility, of which forty-eight hours must be served consecutively; a fine of one thousand dollars; and an order for addiction evaluation by an appropriate licensed addition treatment program." If Mr. Vandehoven had been advised of the possibility of a mandatory minimum sentence that allowed for work release, he may not have agreed to plead guilty based on his understanding of the previous plea discussions. He may have asked for clarification from his attorney. When a court fails to advise a defendant of the

mandatory minimum sentence under Rule 11, the interests of justice require that the defendant be allowed to withdraw his plea of guilty. State v. Schumacher, 452 N.W.2d 345 (ND 1990).

¶ 41 Mr. Vandehoven entered his plea of guilty based on his understanding of the plea agreement which did not include two years of probation. Thereafter, the court brought up the issue of probation. Although the judgment of conviction now includes a sentence of probation for two years as the result of this belated discussion between the court and counsel, the court never asked Mr. Vandehoven if he desired to withdraw his plea on the basis of this new development.

¶ 42 The record demonstrates a clear deviation from the plea agreement procedures required by Rule 11(c). Because of the improper manner in which the plea agreement was orchestrated, the procedural protections of Rule 11(c) were entirely thwarted. The record shows that the court failed to substantially comply with Rule 11(b) before accepting Mr. Vandehoven's plea to ensure that his plea was informed and voluntary. A court's failure to personally advise the defendant under Rule 11 cannot be cured by allegations that the defendant received knowledge of his rights from other sources. State v. Schumacher, 452 N.W.2d 345 (ND 1990). "The error in this case is more than a technical, harmless error and demonstrates a manifestation of injustice." Id. (citing State v. Gustafsont, 278 N.W.2d 358 (N.D. 1979)). Thus, the court committed obvious error that affects Mr. Vandehoven's substantial rights. Accordingly, the judgment of conviction ought to be reversed and Mr. Vandehoven must be allowed to withdraw his guilty plea.

III. The district court abused its discretion when it denied Mr. Vandehoven's motion for a continuance of the sentencing date or, in the alternative, to withdraw his guilty plea.

A. Standard of Review.

¶ 43 "The standard for a plea withdrawal differs depending upon when the motion to withdraw the guilty plea is made." State v. Bates, 2007 ND 16, ¶ 6, 726 N.W.2d 595 (citations omitted). "After a guilty plea is accepted, but before sentencing, the defendant may withdraw a guilty plea if necessary to correct a manifest injustice, or, if allowed in the court's discretion, for any 'fair and just' reason unless the prosecution has been prejudiced by reliance on the plea." Id. "When a court has accepted a plea and imposed sentence, the defendant cannot withdraw the plea unless withdrawal is necessary to correct a manifest injustice." Id. "The decision whether a manifest injustice exists for withdrawal of a guilty plea lies within the trial court's discretion and will not be reversed on appeal except for an abuse of discretion." Id. "An abuse of discretion under N.D.R.Crim.P. 32(d) occurs when the court's legal discretion is not exercised in the interest of justice." Id. "The trial court must exercise sound discretion in determining whether a 'manifest injustice' or a 'fair and just reason' to withdraw a guilty plea exists." Id.

B. Discussion.

¶ 44 The court accepted Mr. Vandehoven's guilty plea on April 23, 2008, but Mr. Vandehoven was not sentenced that day. As previously noted, the court advised Mr. Vandehoven as follows: "You understand there's been a plea agreement that if you get sentenced today the Court will not - - I mean, that if you enter your plea today, the Court will *not* enter a final sentence and do sentencing until October 1st." (Tr. 9, L. 9-13.)

Based on the court's advice to Mr. Vandehoven in open court, it is his position that his motion to withdraw his guilty plea was brought before sentencing. Accordingly, the court was required to exercise sound discretion in determining whether a "fair and just reason" to withdraw the guilty plea existed. Mr. Vandehoven's present counsel made this argument at the motion hearing. (Tr. II 27, L. 12-20; Tr. II 29, 20-25; Tr. II 30, 1-3.) It is believed that the court used the wrong standard based on "manifest injustice." (Memorandum Opinion, App. 12.)

¶ 45 The court's memorandum opinion acknowledges that the "procedural background in this case is somewhat unusual." (App. 10.) The court's perception of what occurred at the pretrial conference, however, is inconsistent with the actual record of that proceeding. For instance, the court wrote, "After the court accepted the plea on April 23, 2008, there was discussion regarding whether or not to actually finalize the sentence that day and enter judgment or wait, on the basis that Mr. Vandehoven was a farm laborer and wanted to continue working and not serve any jail sentence until later in the fall." (App. 10.) But the record clearly demonstrates that the discussion that the court refers to took place before the court accepted the plea. The record clearly shows that that the delayed sentencing date was the product of a plea agreement facilitated by the court itself. But for the plea discussions that preceded Mr. Vandehoven's entry of his guilty plea, Mr. Vandehoven would not have pled guilty. After all, Mr. Vandehoven's counsel informed the court that in the absence of an agreement, the matter probably would not be resolved until three or four months down the road. Thus, the court's ruling on Mr. Vandehoven's motion is based in large part on the court's faulty perception of what actually took place during the pretrial conference held on April 23, 2008.

¶ 46 Mr. Vandehoven reasonably believed, depending on the results of the evaluation that was ordered, that treatment in lieu of incarceration remained a viable sentencing option. Thus, his motion requested a continuance of the sentencing date, or in the alternative, withdrawal of the guilty plea in order to explore treatment options. In its memorandum opinion, the court itself noted that the evaluation was received by the court on August 14, 2008. (App. 11.) The court noted, "Due to his high-risk behavior, the evaluator recommended that he be involved in intensive outpatient treatment for further evaluation and treatment and continue drug testing." Id. The court's awareness of the contents of the evaluation must be considered in conjunction with the legislative purpose that underlies the requirement that DUI offenders undergo an addiction evaluation.

¶ 47 Our system of justice is designed to mete out correctional measures to deal with conduct that may threaten harm and to ensure the public safety through the rehabilitation of those convicted of offenses. See N.D.C.C. § 12.1-01-02. By enacting the sentencing provisions of N.D.C.C. § 39-08-01(4), our state legislature specifically provided for the treatment and rehabilitation of DUI offenders. For a third offense, the law allows the court to suspend the execution or imposition of sentence, except for ten days' imprisonment, on the condition that the defendant first undergo and complete an evaluation. N.D.C.C. § 39-08-01(4)(e). If the defendant is found to be in need of treatment, the court may place the defendant on supervised probation and require the defendant to complete a treatment program. Id. Furthermore, the time spent by the defendant in the treatment must be credited toward any mandated penalty of imprisonment. N.D.C.C. § 39-08-01(4)(g).

¶ 48 At the motion hearing held on October 29, 2008, the court directed questions to Mr. Vandehoven as follows:

> THE COURT: Why did you go to Colorado?
>
> MR. VANDEHOVEN: I moved down here to get away from the people in Carrington and I started a new job where it makes more money.
>
> THE COURT: Why did you want to get away from the the Carrington people?
>
> MR. VANDEHOVEN: Because of all the drinking After this last time I got picked up I decided it's not worth it anymore.
>
> THE COURT: Be careful, there's probably people that drink in Colorado too.
>
> MR. VANDEHOVEN: Right, but I don't know, I moved down here – came down here to start over. I got a better job. Me and my fiancée are having a kid in February.
>
> * * *
>
> THE COURT: Okay. The only other thing I have in the record I guess that we didn't talk about but I think I alluded to it is you did go do an alcohol evaluation, didn't you?
>
> MR. VANDEHOVEN: Yes Sir.
>
> THE COURT: And it said that due to high risk behavior, I'm recommending he be involved in intensive outpatient treatment for further evaluation. *Did you ever go do that*?
>
> MR. VANDEHOVEN: I never received any information on that. I never got a copy of anything.
>
> THE COURT: You never got anything from Kerry Wicks who did your evaluation?
>
> MR. VANDEHOVEN: He did my evaluation. I never received anything from him or from anyone.
>
> THE COURT: So you haven't seen the letter of August 14th that was sent to me."

MR. VANDEHOVEN: No sir.

THE COURT: Hmm. Okay. That's what he recommended, Mr. Vandehoven. Go ahead Mr. Terry. . . .

(Tr. 17-18, 22-23.)

¶ 49 Based on the foregoing, the court was aware that the court-ordered evaluation was received by the court. The court was aware of the contents of the evaluation. The court was aware that the evaluator recommended treatment. The court was aware, despite Mr. Vandehoven's good intentions of moving in order to get away from drinking crowd in Carrington and to start over in Colorado, that Mr. Vandehoven cannot escape the problem because "there's probably people that drink in Colorado too." When faced with a repeat offender whose conduct may be driven by a treatable addiction, it is unreasonable for the court to ignore the contents of the court-ordered evaluation and its recommendation when considering the appropriate sentence. The legislative mandate that DUI offenders undergo an evaluation serves no purpose whatsoever if the evaluation is merely placed in the file and ignored by the sentencing court.

¶ 50 Mr. Vandehoven's present counsel specifically asked the Court to consider the treatment option under N.D.C.C. § 39-08-01(4)(e). (Dkt. 4 & 5; Tr. II 34.; Memorandum Opinion, App. 11.) This was a reasonable request. After all, the legislature enacted a statutory scheme that emphasizes treatment for the purpose of rehabilitating citizens whose addictions may pose a threat to public safety. The legislature structured the sentencing provisions in a manner that encourages the citizen to participate in treatment by crediting days spent in treatment against a term of mandatory imprisonment. It is a court's duty to effectuate the legislative purpose of the statutory scheme even if it may be inconvenient to do so.

¶ 51 Under Rule 32(a)(2), N.D.R.Crim.P., before imposing sentence, the court must provide the defendant and his counsel with an opportunity to review and discuss a presentence investigative report and allow counsel an opportunity to speak on behalf of the defendant. Similarly, under N.D.C.C. § 39-08-01(4), the court must order an addiction evaluation for all convicted offenders. As a matter of law, a court should not impose a sentence until *after* the court receives the court-ordered evaluation, and if the evaluation recommends treatment, the court should not impose sentence until such time as the court duly considers the evaluation and affords the offender an opportunity to review it and argue for or against treatment in lieu of imprisonment. Because courts should not disregard the legislative purpose underlying the law, it is fair and just for a defendant to ask the court to consider the evaluation, which the court was mandated by law to order, when fashioning the appropriate sentence. When a court refuses to do so, the interests of justice are not served, and the court has clearly abused its discretion.

¶ 52 The court also rejected Mr. Vandehoven's argument based on State v. Orr, 375 N.W.2d 171 (N.D. 1985). The statute under which Mr. Vandehoven was charged is clearly an enhancement statute that necessarily focuses on the reliability of the prior conviction, and not on the mere fact of its occurrence. Id. at 177. Uncounseled convictions are too unreliable to support the sanction of imprisonment. Id. at 178. Absent a valid waiver of the right to counsel, an uncounseled conviction cannot be used to enhance a term of imprisonment for a subsequent offense. Id. The court must provide counsel for an indigent DUI defendant at public expense regardless of the penalty to be imposed if enhancement of punishment for a subsequent conviction is not to be precluded. Id. at 179. (It is noteworthy that the court failed in this case to advise Mr.

Vandehoven of his right to counsel at public expense if he could not afford to hire one.) Therefore, if the DUI defendant is not advised of his right to counsel at public expense even though he is not facing possible imprisonment, the court cannot obtain a valid waiver of rights as a matter of law. Id. The State has the burden to establish the validity of a prior uncounseled conviction before the State may use it to enhance punishment. Id.

¶ 53 In this case, the State did not deny that Mr. Vandehoven was unrepresented by counsel in the prior criminal actions. At the motion hearing, the State's Attorney addressed the issue of prior uncounseled convictions as follows:

> "The state is of the opinion that Rule 11 has been complied with, not only in the present case, but also in the prior two cases. I was part of the two most recent cases. I was not a part of the Foster County case, but I believe Rule 11 was also complied with in that case."

(Tr. II 35, L. 4-9.)

¶ 54 A State's Attorney's mere belief or presumption that a defendant was advised of his rights and entered a valid waiver of counsel is not enough to establish the reliability of an uncounseled conviction. At the motion hearing, the court noted that it had presided over both of the prior actions at issue. (Tr. II 5, L. 7-11.) The court also presumed that it had followed Rule 11. The court stated:

> "I can't imagine, it maybe have happened, but Mr. Vandehoven and I were, I presume there, and I can't imagine me not explaining his rights to him regarding his right to counsel and right to a jury trial. I'm usually pretty thorough on those."

(Tr. II 5, L. 11-15.)

¶ 55 This Court rejected the use of such a presumption in Orr. This Court stated:

> "The trial court erred in presuming that Orr had validly waived that right when the record did not affirmatively indicate such a waiver . . . We

> cannot presume a waiver of these three important constitutional rights from a silent record."

Orr, 375 N.W.2d at 174.

¶ 56 The court also informed Mr. Vandehoven's counsel, "I would think your client should be able to enlighten you as to whether I explained his rights to him in those two cases." (Tr. II 5.) However, counsel already consulted with his client and advised the court, "Mr. Vandehoven does not recall if he was advised of his right to counsel but does know he was not represented by an attorney in his prior two offenses." (Terry Aff. ¶ 3; Dkt. 4.) The Orr Court noted, "We do not believe that a defendant should be precluded from challenging the use of a prior conviction for purposes of enhancement solely because he cannot affirmatively state that he did not waive his right to counsel" Orr, at n. 10.

¶ 57 Before sentencing, the court must allow a defendant to withdraw a guilty plea for any fair and just reason. Justice is not served when an enhanced penalty is based upon prior convictions that are presumptively unreliable. The court did not exercise its discretion in the interest of justice when the court denied Mr. Vandehoven's motion. The court should have permitted Mr. Vandehoven to withdraw his plea so he could bring an appropriate motion that would require the State to produce evidence of valid waivers of his right to counsel. The judgment of conviction ought to be reversed and Mr. Vandehoven must be allowed to withdraw his guilty plea.

IV. Whether Mr. Vandehoven received ineffective assistance of counsel.

¶ 58 At the motion hearing, Mr. Vandehoven's present attorney argued that Mr. Vandehoven's former attorney provided ineffective assistance of counsel. (Tr. II at 38-39.) This Court set forth the standard of review for appellate claims of ineffective

assistance of counsel as follows:

> To establish ineffective assistance of counsel, a party must prove (1) counsel's performance was deficient such that it fell below an objective standard of reasonableness; and, (2) counsel's deficient performance prejudiced the defendant. Klose v. State, 2005 ND 192, ¶ 9, 705 N.W.2d 809. This Court prefers an ineffective assistance of counsel claim be made in an application for post-conviction relief so that an evidentiary record can be made that will allow scrutiny of the reasons underlying counsel's conduct. State v. Causer, 2004 ND 75, ¶ 19, 678 N.W.2d 552. Nevertheless, this Court will, on direct appeal, examine the entire record to determine if assistance of counsel was plainly defective. Id. Assistance of counsel is plainly defective when the record affirmatively shows ineffectiveness of constitutional dimensions or the defendant points to some evidence in the record to support the claim. Id. "When the record on direct appeal is inadequate to determine whether the defendant received ineffective assistance, the defendant may pursue the ineffectiveness claim at a post-conviction proceeding where an adequate record can be made." State v. Strutz, 2000 ND 22, ¶ 26, 606 N.W.2d 886.

State v. Klein, 2006 ND 37, 711 N.W.2d 606

¶ 59 As a standard practice, the State's Attorney provided Mr. Vandehoven's defense attorney with discovery of Mr. Vandehoven's prior criminal history. At the pretrial conference held on April 23, 2008, Mr. Vandehoven's counsel stated the following:

> "This is his third offense in five. His first conviction was . . . March 18, 2003 following an offense on March 1, 2003 and that was in District Court in Foster County, so I'm comfortable that it's – there's a record there, so they can use that to enhance. The second one happened on – conviction date of August 3, 2004, following the offense date of July 24, 2004. That's in District Court in Eddy County. Again, there's a record so this is – would be a third offense. Just about got five but he didn't, so this is a third offense in five."

(Tr. 1, L. 20-25; Tr. 2, L. 1-4.)

¶ 60 Based on the attorney's statement on the record, the attorney was aware that both of his client's prior convictions took place within a few days of arrest. It is extremely common for ordinary citizens, upon being issued a uniform complaint and

summons, to simply appear in court as directed without counsel and to enter uncounseled guilty pleas to offenses involving motor vehicles. Although Mr. Vandehoven's attorney may have been "comfortable" with the State's ability to produce records evidencing two prior convictions, it is an entirely different matter to presume that the State has the ability to produce records evidencing two valid waivers of counsel. After all, this Court held that absent a valid waiver of a defendant's right to counsel in the prior proceeding, the prior guilty plea cannot be used as penalty enhancement for a subsequent offense. State v. Orr, 375 N.W.2d 171, 178-79 (N.D. 1985). The Court held that it was obvious error for a trial court to presume that a valid waiver exists in a prior proceeding. Id. at 174. The Court's admonition in Orr that courts may not presume the existence of valid waivers applies with much greater force to defense attorneys.

¶ 61 Our state constitution provides that the accused shall have the right "to appear and defend in person and with counsel." N.D. Const., Article I, § 12. This Court stated, "Underlying our judicial constitutional interpretation that § 12 provides the key to a fair trial is the belief that counsel will, if not guarantee, *then at least facilitate the optimum outcome for a defendant in a given case*." Orr, 275 N.W.2d at 176. A reasonably competent defense attorney knows or ought to know that the Court's holding in Orr has been a matter of established constitutional jurisprudence for more than two decades. Thus, a reasonably competent defense attorney knows or ought to know that this Court placed the burden of proof on the State to establish the validity of a prior uncounseled conviction before the State may use it to enhance punishment. Orr, 375 N.W.2d at 179. In doing so, the Court noted that the State has a similar burden when it seeks to introduce evidence obtained by a warrantless search and seizure. Id. n.11.

"Therefore, in both situations it is presumed that the evidence was acquired by violating the defendant's constitutional rights and thus the State bears the burden to prove that the evidence was obtained constitutionally." Id.

¶ 62 Based on the foregoing, when a defense attorney is representing a client who has two prior uncounseled convictions, a defense attorney has a duty to facilitate the optimum outcome for his client by filing a motion to suppress evidence of prior convictions on the ground that they resulted from uncounseled guilty pleas. See, e.g., State v. Cummings, 386 N.W.2d 468 (N.D. 1986). In the cited case, Mr. Cummings' defense attorney filed a motion to suppress the evidence of his client's two prior convictions. Id. at 469. As a consequence of the motion, the State conceded it could not show that Mr. Cummings had waived his right to counsel in one of the prior cases. Id. By making the motion, defense counsel facilitated the optimum outcome because his client confronted a class B misdemeanor with a maximum sentence of 30 days imprisonment rather than a class A misdemeanor with a maximum sentence of one (1) year imprisonment as originally charged. Thus, it was impermissible for the trial court to consider the uncounseled conviction when the court sentenced Mr. Cummings pursuant to his guilty plea to the class B misdemeanor offense. Id.

¶ 63 Furthermore, as a matter of law, a defendant who enters a counseled guilty plea waives all violations of constitutional rights alleged to have occurred before the guilty plea was entered. See State v. Keyes, 536 N.W.2d 358 (N.D. 1995); State v. Slapnicka, 376 N.W.2d 33 (N.D. 1985). Accordingly, a counseled guilty plea to a third offense constitutes a waiver of the alleged unconstitutionality of using an uncounseled guilty plea to enhance the penalty of a subsequent DUI conviction. Id. Thus, a defense

attorney who advises his client to plead guilty to a third offense without first challenging the validity of prior uncounseled convictions does a great disservice to his client. The attorney not only subjects his client to an enhanced penalty on the basis of a former uncounseled plea of guilt that is presumptively unreliable, the attorney makes it impossible for his client thereafter to ever challenge constitutionality of the uncounseled plea.

¶ 64 Based upon the failure of Mr. Vandehoven's counsel to challenge the uncounseled pleas and his counsel's improper conduct in commencing plea negotiations with the court, (discussed in Section I, *supra.*), the record on appeal demonstrates that assistance of counsel was plainly defective. The record affirmatively shows ineffectiveness of constitutional dimensions. Because counsel's performance fell below an objective standard of reasonableness and Mr. Vandehoven was prejudiced by counsel's deficient performance, the judgment of conviction ought to be reversed.

CONCLUSION

¶ 65 Mr. Vandehoven asks the Court to reverse the judgment of conviction and the district court's order denying his motion to withdraw his guilty plea.

Dated this 27th day of February, 2009.

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