

20110008

STATE OF NORTH DAKOTA

APR 25 2011

Plaintiff-Appellee;

-VS-

LONNIE A. HOWARD,

Defendant-Appellee.

STATE OF NORTH DAKOTA

Supreme Court No. 20110008

District Court No. 08-09-K-48

SA File No. F16-09-01

BRIEF OF PLAINTIFF-APPELLEE

APPEAL FROM DENIAL OF MOTION TO WITHDRAW GUILTY PLEA

**Burleigh County District Court
South Central Judicial District
Honorable Thomas J. Schneider**

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STATEMENT OF THE ISSUE

Whether the district court erred in finding the facts admitted by Howard constitute a sufficient factual basis for his guilty plea to delivery of methamphetamine?

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ARGUMENT

[¶1] Howard asks this Court to consider whether there is sufficient evidence that his conduct constituted delivery of methamphetamine. His argument turns largely on the facts he has admitted under oath before the district court. In doing so, Howard is compelled to acknowledge that under existing North Dakota law his admitted conduct, which includes making available the methamphetamine for delivery by both finding a source for the substance as well as being the one to physically move it, with full knowledge of its presence, in his vehicle for supplier to buyer, quite squarely prohibits his conduct as constructive delivery. State v. Helton, 2007 ND 61 ¶ 7, 730 N.W.2d 610, citing Valladares v. State, 800 S.W.2d 274, 277 (Tex.App. 1990). See also, Appellant's Brief at ¶¶ 28-29.

[¶2] Recognizing his position before this Court under its own precedent, Howard asks the Court to look outside its cases for sister-state examples that might be more favorable to his argument. In doing so, however, Howard overlooks two things: first, that the lower court already exercised this circumspection in reaching its conclusion that Howard's conduct constituted constructive delivery of methamphetamine; and second, that even under the cases he cites, which are only persuasive at best, Howard's conduct is either sufficient on its own terms or distinguishably so. Howard's argument, therefore, that manifest injustice resulted from his guilty plea to delivery of methamphetamine is untenable.

1 [¶3] In asking this Court to examine precedent from other states,
2 Howard glosses over the fact that the order of the court below from which he
3 appeals already did so. See Order, p. 3. The district court then found, even in
4 light of the persuasive precedent from beyond North Dakota's courts, that
5 "...the delivery element was sufficiently supported by the admitted facts
6 because the transfer may have occurred while the drugs were under Howard's
7 control or the transfer may have been consummated at his direction." Id. The
8 district court was plainly not satisfied in its discretion that Howard's conduct
9 was innocent of the charge to which he pled guilty, and that no manifest
10 injustice existed to be corrected.
11

12 [¶4] The court below soundly refused to segregate Howard's conduct
13 from the class of delivery, and Howard does not indicate in what way his
14 admitted conduct was indistinguishable from that conduct at issue in the other
15 states' cases he cites. The fact remains here that Howard performed every act
16 to actually deliver methamphetamine aside from hand over the substance and
17 accept the money in return. It matters not whether he profited from it. Indeed,
18 he is no different than the local delivery person who works in tandem with
19 another: the one drives the car with the object of delivery to the place of
20 delivery, and the other simply hands the object of delivery over to the
21 recipient. Here, Howard made it available; he didn't simply tell somebody
22 where it could be found but brought the meth to the person, exercising control
23 over the physical progress of the meth along the road from supplier to buyer.
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[¶5] Howard's ultimate argument, that he should rightly stand convicted of accomplice to delivery of methamphetamine rather than delivery of methamphetamine, casts doubt on his claim that manifest injustice lurks in the shadows of his 2009 guilty plea. Because Howard has now admitted by sworn testimony facts sufficient to convict him of accomplice to delivery of methamphetamine, and because he agrees that his conduct constituted that offense rather than delivery itself, there is little claim here that he has suffered hardship when North Dakota law classifies the two offenses at the same level. Balancing his interest then against the state's, as suggested in Berkow v. State, 573 N.W.2d 91, 97 et seq., (Minn.App. 1997), there is little claim of hardship that weighs against the state's burden in having to start anew, but within the limitations period, by filing a new criminal complaint for the behavior to which he has fully and on the record confessed.

CONCLUSION

[¶6] Howard suffered no hardship that constitutes manifest injustice by his guilty plea to delivery of methamphetamine. There is a sufficient factual basis to support his guilty plea; therefore the District Court appropriately denied his motion to withdraw the same. This Court should affirm that decision as the court below did not abuse its discretion.

1 Dated this 25th day of April, 2011.
2

3 Respectfully submitted,
4

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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Plaintiff-Appellee,)

-vs-)

LONNIE A. HOWARD,)

Defendant-Appellant,)

.....)

AFFIDAVIT OF MAILING

Supreme Ct. No. 20110008

District Ct. No. 08-09-K-48

SA File No. F16-09-01

STATE OF NORTH DAKOTA)

COUNTY OF BURLEIGH)

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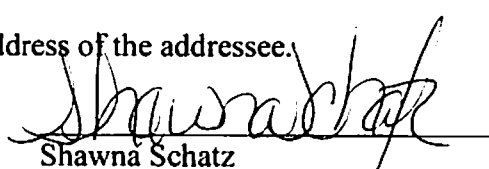
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1. Brief of Plaintiff-Appellee
2. Affidavit of Mailing

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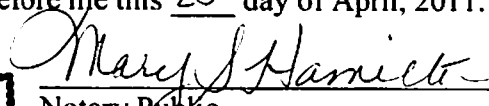
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which address is the last known address of the addressee.


Shawna Schatz

Subscribed and sworn to before me this 25th day of April, 2011.

MARY S HAMILTON
Notary Public
State of North Dakota
My Commission Expires April 14, 2016


Notary Public
Burleigh County, North Dakota