

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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| State of North Dakota, |) | Supreme Court No. 20170178 |
| |) | |
| Plaintiff and Appellee, |) | District Court No. 09-2016-CR-00148 |
| |) | |
| -vs- |) | |
| |) | |
| Abdirahman Pashir Sahel, |) | |
| |) | |
| Defendant and Appellant. |) | |

BRIEF OF APPELLANT ABDIRAHMAN PASHIR SAHEL

Appeal from the District Court Judgment of Conviction and Sentence of April 10, 2017

In and for the County of Cass, State of North Dakota, Southeast Judicial District

Honorable Steven L. Marquart, Judge of the District Court, Presiding

Kevin McCabe, ND Bar ID #05743
Attorney for Appellant
North Dakota Public Defender's Office
135 Sims St., Ste. 221
Dickinson, ND 58601
dickinsonpublicdefender@nd.gov
(701) 227-7460

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Rules:

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|--|------------------------------------|
| Rule 11 of the North Dakota Rules of Criminal Procedure..... | ¶10, ¶11, ¶13, ¶14, ¶16-18, ¶20 |
| Rule 52 (b) of the North Dakota Rules of Criminal Procedure..... | ¶15 |

[¶1] STATEMENT OF THE ISSUE

[¶2] Whether the Defendant should be allowed to withdraw his guilty plea because the Court, when accepting Appellant's guilty plea, failed to comply with the requirements of N.D.R.Crim.P. 11.

[¶3] STATEMENT OF THE CASE

[¶4] This matter comes before the Court on direct appeal of the Appellant's guilty plea taken on 1/09/2017 and sentencing date of 4/10/2017.

[¶5] A timely Order for Transcripts and Notice of Appeal, dated May 09, 2017, were filed with the Clerk of the District Court in and for Cass County on May 10, 2017 (ROA #100, 101, App. 5, 54).

[¶6] STATEMENT OF FACTS

[¶7] Pursuant to an Information dated January 11, 2016, Mr. Sahel was charged with Gross Sexual Imposition and Terrorizing for allegedly pointing a gun at a woman's head and ordering her to perform oral sex on him on August 3, 2013. (App. 6).

[¶8] On January 9, 2017, Appellant, Mr. Sahel appeared with his attorney for a Change of Plea Hearing before the Honorable Steven L. Marquart. (App. 25). Following a brief recitation from Judge Marquart of some constitutional rights, Mr. Sahel's case was called and he pled guilty to both counts contained in the Information. (App. at 6, lines 1-16).

During the hearing, Judge Marquart only addressed Mr. Sahel very briefly. The first time occurred at the very beginning of the hearing whereby the judge asked:

THE COURT: Mr. Sahel, you've had a chance to talk with your lawyer?

THE DEFENDANT: Yes, Your Honor.

Once, following Mr. Sahel's guilty pleas to the two counts the court interacted directly with Mr. Sahel when it was stated:

THE COURT: Do you understand, Mr. Sahel, that by pleading guilty to these matters it means that you're giving up not only those rights I read to you today, but those rights that you heard in other times you've been in court?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Has anybody threatened you or coerced you to enter into this guilty plea?

THE DEFENDANT: Nope.

(App. at 26, lines 8-25).

The next time occurred when the court asked Mr. Sahel if he agreed with the factual basis for the plea as outlined by the prosecutor when it was stated:

THE COURT: Mr. Sahel, do you agree with all of that, what the prosecutor said?

THE DEFENDANT: Yes, Your Honor.

THE COURT: The Court finds then that there is a sufficient factual basis for this plea of guilty, and the plea is freely and voluntarily made.

(App. at 28, lines 17-22)

Other than a brief question regarding Mr. Sahel's immigration status, the court did not address Mr. Sahel directly to find out whether he understood what he was pleading to, whether this was a voluntary plea on his part, or if Mr. Sahel willingly entered a guilty plea following discussions between the prosecutor and Mr. Sahel's attorney.

[¶9] LAW AND ARGUMENT

[¶10] A. A substantial compliance with N.D.R.Crim.P. 11 requiring the defendant be advised of his rights in open court by the trial judge is mandatory.

[¶11] Pursuant to N.D.R.Crim.P. 11, a person can only enter into a guilty plea if it is entered into knowingly, intelligently, and voluntarily. State v. Blurton, 2009 ND 144, ¶10, 770 N.W.2d 231 (citations omitted). Rule 11, N.D.R.Crim.P., provides a framework for determining whether a plea is knowingly and voluntarily entered into. Id. at ¶ 15. When accepting a guilty plea, N.D.R.Crim.P. 11(b)(1) requires a court to address the defendant and advise him of 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.

The rule does not require ritualistic compliance, but a court must substantially comply with the rule's procedural requirements to insure the defendant is entering a voluntary and intelligent guilty plea. Abdi v. State, 2000 ND 64, ¶ 12, 608 N.W.2d 292.

[¶12] In the instant case, the court's addressing of Mr. Sahel personally to determine if he understood the rights as stated above, was sparse at best. The court completely failed to discuss maximum possible penalties or any mandatory minimum penalties. It is well settled that when the district court does not properly advise a defendant of the mandatory minimum sentence, the interests of justice require the defendant to be allowed to withdraw his guilty plea. State v. Magnuson, 1997 ND 228, ¶18, 571 N.W.2d 642; State v. Schweitzer, 510 N.W.2d at 616, (N.D. 1994); State v. Boushee, 459 N.W.2d, at 566 (N.D. 1990); State v. Schumacher, 452 N.W.2d at 348.

[¶13] Furthermore, the court's feeble attempt to determine whether Mr. Sahel's guilty plea was voluntary or not, does not justify the court's finding that the guilty plea was freely and voluntarily made, thus the court failed to comply with N.D.R.Crim.P. 11(b)(2) which reads:

(2) Ensuring That a Plea is Voluntary. Before accepting a plea of guilty, the court must address the defendant personally in open court, unless the defendant's presence is not required under Rule 43(c), and determine that the plea is voluntary and 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.

In State v. Farrell, 2000 ND 26, 606 N.W.2d 524 (N.D. 2000) this Court discussed the reasons for the rule when it is stated "[t]he requirement that the court inquire whether the

defendant's willingness to plead guilty resulted from previous discussions between the prosecuting attorney and the defendant is intended to facilitate examination of the voluntariness of the defendant's guilty plea, not merely to satisfy the trial court's curiosity...The plea must, of course, be voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be known. The information sought to be elicited by the rule is intended to alert the trial court about plea negotiations so the court can further inquire about the negotiation process to assess the defendant's understanding of the terms of any resulting agreements." Id. at ¶17 (citations omitted). In this case, there was absolutely no inquiry whether this plea was voluntary, intelligently and knowingly entered into by Mr. Sahel. There is absolutely nothing in the record to indicate that Mr. Sahel knew the consequences of entering his guilty plea at the hearing. Therefore, he should be allowed to withdraw his guilty plea.

[¶14] B. The district court's failure to properly advise the defendant of his rights under N.D.R.Crim.P. 11 is obvious error and defendant should be allowed to withdraw his guilty plea.

[¶15] Because this issue was not raised at the district court level, Mr. Sahel needs to prove there has been obvious error. N.D.R.Crim.P. 52 (b). To establish obvious error, Mr. Sahel needs to demonstrate (1) error, (2) that is plain, and (3) that affects substantial rights. An alleged error must be a clear deviation from an applicable legal rule under current law to constitute obvious error. State v. Vandehoven, 2009 ND 165, ¶8, 772, N.W.2d 603 (citations omitted).

[¶16] As previously discussed, failure to comply with the mandates of Rule 11 is error. The Rule must be complied with before the court can accept a guilty plea. The error is obvious. The Rule dictates the court address the defendant personally and discuss all of the factors mandated in N.D.R.Crim.P 11 (b) (1) and (b)(2). This did not happen. The only arguable attempt in satisfying the Rule was when the judge asked Mr. Sahel if he discussed the matter with his attorney, whether he had been threatened or coerced and if he understood the factual basis for the plea.

[¶17] This is not a minor deviation from the Rules which may be considered as complied with. This Court has indicated, Rule 11 establishes clear legal guidelines for acceptance of a guilty plea. The record in this case demonstrates a clear deviation from an applicable legal rule under current law. Vandehoven, 2009 ND 165 at ¶ 18. The court failed to inquire as to what, if any, understanding Mr. Sahel had about pleading guilty or what the consequences of pleading guilty would be. Furthermore, the court failed to address any mandatory minimum or maximum sentences that may be imposed. The effects on Mr. Sahel's substantial rights are obvious. For example, he faced life in prison with a minimum of twenty years to be served and was not so advised before giving up his right to a trial that he must register as a sex offender.

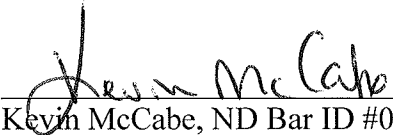
[¶18] Because the district court failed to fully advise Mr. Sahel of mandates of Rule 11, there was obvious error, which was a clear deviation from a legal rule under current law effecting Mr. Sahel's rights. As such, Mr. Sahel should be allowed to withdraw his guilty plea to correct a manifest injustice that occurred.

[¶19] CONCLUSION

[¶20] Based upon the failure of the trial court to substantially comply with the mandates of N.D.R.Crim.P. 11, Mr. Sahel should be allowed to withdraw his plea of guilty to correct a manifest injustice.

[¶21] Respectfully submitted this 9th day of August, 2017.

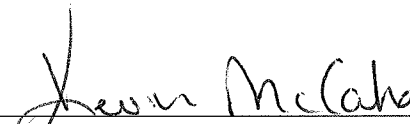
[¶22]


Kevin McCabe, ND Bar ID #05743
Attorney for Appellant
ND Public Defender's Office
135 Sims St., Ste. 221
Dickinson, ND 58601
dickinsonpublicdefender@nd.gov
(701) 227-7460

[¶23] ATTORNEY'S CERTIFICATE OF SERVICE

[¶24] The undersigned hereby certifies that a true and correct copy of the foregoing document was on the 9th day of August, 2017, emailed to:

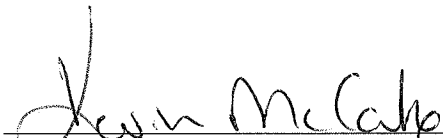
Reid Brady
Assistant Cass County State's Attorney
Cass County Courthouse
P.O. Box 2806
Fargo, ND 58108-2806
bradyr@casscountynd.gov



Kevin McCabe, ND Bar ID #05743

[¶25] The undersigned hereby certifies that a true and correct copy of the foregoing document was on the 9th day of August, 2017, electronically filed with and served upon:

Ms. Penny L. Miller
Clerk of the Supreme Court
Supreme Court
Judicial Wing, 1st Floor
600 E. Boulevard Ave., Dept. 180
Bismarck, ND 58505-0530
supclerkofcourt@ndcourts.gov



Kevin McCabe, ND Bar ID #05743

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| |) | AFFIDAVIT OF SERVICE BY MAIL |
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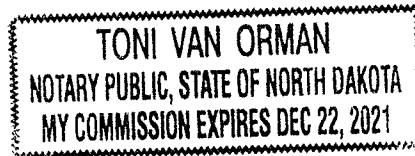
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Abdirahman Sahel
Inmate #48448
c/o NDSP
PO Box 5521
Bismarck, ND 58506-5521

Elitza Z. Miltcheva
Elitza Z. Miltcheva

[¶2] Subscribed and sworn to before me on August 16, 2017.

(SEAL)



Toni Van Orman
Toni Van Orman