

IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota,)	Supreme Court File No.
)	20170389
)	
Plaintiff and Appellee,)	Ward County Criminal No.
)	51-2014-CR-01616
v.)	
)	
Mark Allen Rogers,)	APPELLEE'S BRIEF
)	
Defendant and Appellant.)	

**APPEAL FROM THE CRIMINAL JUDGMENT IN WARD COUNTY DISTRICT
 COURT, NORTH CENTRAL JUDICIAL DISTRICT, NORTH DAKOTA THE
 HONORABLE STACY J. LOUSER, PRESIDING.**

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Transcript References:

The State will adopt Mr. Rogers' transcript references. Therefore, the transcript from the competency evaluation review and change of plea hearing that occurred on March 28, 2017 will be referred to as [Tr.] in this brief. The transcript from the sentencing hearing conducted on October 23, 2017 will be referred to as [Sent. Tr.] in this brief. Additionally, the State will refer to the transcript from the motion for a competency evaluation conducted on February 1, 2017 as [Comp. Tr.] and the pre-trial status conference conducted on January 23, 2015 as [Pre-trial Tr.] in this brief.

[¶ 2] STATEMENT OF THE ISSUES

- I. Whether Mr. Rogers' Constitutional rights were violated when the District Court closed portions of his competency hearing and sentencing at his request.
- II. Whether the District Court has the authority to set restitution for costs incurred because of Mr. Rogers' failure to appear for trial.

[¶ 3] STATEMENT OF THE CASE

[¶ 4] The State adopts Mr. Rogers' Statement of the Case.

[¶ 5] STATEMENT OF THE FACTS

[¶ 6] On July 22, 2014 Mr. Rogers was charge with a single count of Gross Sexual Imposition (GSI). App. p. A10. Trial was set on the matter for February 10, 2015 with a status conference first to occur January 23, 2014 but Mr. Rogers did not appear. Pre-trial Tr. p. 1-2. Mr. Rogers' failure to appear also resulted in him being charged with a single count of Bail Jumping on February 26, 2015. App. p. A23 (Case # 51-2015-CR-00426). Mr. Rogers was arrested and extradited back from Thailand in November of 2016. App. p. A4. A hearing was held February 1, 2017 wherein Mr. Rogers requested and was granted a competency evaluation at the State Hospital. Comp. Tr. p. 13. The February 1, 2017 competency hearing request was closed to the public. Comp. Tr. p. 1.

[¶ 7] On March 28, 2017, a hearing was held to review the completed competency evaluation and ultimately take the Appellant's guilty plea. Tr. p. 2 & 49. In the hearing Mr. Rogers' counsel raised concerns with the competency evaluation report being discussed in "an open public record." Tr. p. 2. The Court responded by identifying the parties in the courtroom which besides the litigants, court personal and law enforcement, also included a victim witness coordinator and the mother of the minor victim. Tr. p. 3. The Court found protections afforded under the recently enacted Marsy's Law would allow the mother of the victim to remain and allowed the State to proceed with questioning the doctor who conducted Mr. Rogers' evaluation. Tr. p. 4. Although the Court did not specify on the record the hearing was closed to others not previously identified, the Court and parties operated as it was a closed hearing because at some point during the competency hearing another individual was prohibited from entering the hearing. Tr. p. 42.

[¶ 8] After completing the hearing on Mr. Rogers' competency but before moving to the change of plea, Mr. Rogers' counsel inquired whether the hearings were now open to the public which the Court responded "true." Tr. p. 43. The Court further inquired of Mr. Rogers' counsel "are there other individuals that you're seeking be allowed in the courtroom" to which counsel stated "No, Your Honor, just trying to clarify the record about the confidentiality." Tr. p. 43. The Court then found based on the report of the doctor and the colloquy with Mr. Rogers' he was competent to proceed and accepted his guilty pleas in both the GSI and the bail jumping for failure to appear for the scheduled GSI trial. Tr. p. 49-50 & 65 - 69. The Court then indicated a new date would be set for

sentencing upon completion of the Pre-Sentence Investigation (PSI). Tr. p. 73.

[¶ 9] Mr. Rogers' sentencing hearing was held on October 23, 2017 and the Court allowed him to note his objections to portions of the PSI report before the sentencing took place. Sent. Tr. p. 5. At the request of Mr. Rogers' counsel to preserve the confidentiality of the PSI and provide an in-camera hearing, the Court cleared the courtroom of press and other members of the public when discussing his objections to certain elements of the PSI. Sent. Tr. p. 4-5. Besides the usual court and law enforcement personnel, the mother of the minor victim remained in the courtroom. Sent. Tr. p. 4-5. When discussions on the PSI concluded, the Court reopened the sentencing hearing and specifically noted "we are being joined by other individuals at this time." Sent. Tr. p. 16. In addition to sentencing Mr. Rogers to 17 years in the custody of the Department of Corrections with 5 years suspended on the GSI and 3 years straight time on the Bail Jumping charge, restitution for the extradition costs were held open for 90 days for the State to get the information on costs to Ward County. Sent. Tr. p. 54. A restitution hearing was held on January 12, 2018 in which the State, Mr. Rogers and counsel were present with the Court ultimately ordering restitution in the amount of \$2674.90. App. p. A2.

[¶10] **STANDARD OF REVIEW**

[¶11] Based on the failure of Mr. Rogers' to offer any arguments about his Sixth Amendment right to a public trial to the District Court this Court must limit its review to the Obvious Error standard under N.D. R. Crim. P. 52. See Also State v. Miller, 388 N.W.2d 522 (N.D. 1986) (holding generally, issues not raised before the trial court, even

constitutional issues, will not be addressed on appeal).

[¶ 12] **ARGUMENT**

[¶ 13] **I. Mr. Rogers’ constitutional rights were not violated when his competency evaluation and PSI were discussed in closed court during his plea and sentencing hearings.**

[¶ 14] The record is clear that certain portions of Mr. Rogers’ plea and sentencing hearings were indeed closed. However, only such portions of the hearing were closed that were both requested by him and/or were required by statute or Court rule. Mr. Rogers’ hearing was closed to the public at two distinct times. First, **when requested by his counsel** during the objections to certain portions of the competency report and second **when requested by his counsel** during Mr. Roger’s testimony discussion his objections to portions of the PSI report. Tr. p. 2 & Sent. Tr. p. 4.

[¶ 15] Regarding closure of the hearing during the discussion of the competency evaluation, N.D.C.C. § 12.1-04.1-02 is explicitly clear. The law states “upon request by the defendant, the application and the proceedings on the application **must** be ex parte and in camera.” (Emphasis added) Additionally N.D.C.C. § 12.1-04.1-14(1) makes clear “information obtained as a result of examination of the defendant...is not admissible over objection of the defendant in any proceeding against the defendant.” Regarding closure of the hearing when Mr. Rogers’ PSI was being discussed, the law indicates such reports are confidential and “neither the public nor the parties may read or copy the presentence report.” N.D. R. Crim. P. 32. See Also N.D.C.C. §12-47-36.

[¶ 16] To the extent Mr. Rogers is arguing competency hearings SHOULD be

open to the public and N.D.C.C. § 12.1-04.1-02 and § 12.1-04.1-14 contains unconstitutional procedures, his argument should not prevail. To the extent Mr. Rogers is further arguing N.D.C.C. §12-47-36 and N.D. R. Crim. P. 32 contain unconstitutional procedures as applied to him, he also should not prevail. Statutes carry a strong presumption of constitutionality. State v. Holbach, 2009 ND 37, ¶23, 763 N.W.2d 761. (upholding North Dakota’s stalking statute against constitutional challenge) As this Court has previously stated “[i]t is fundamental to the adversary process that each party be afforded an opportunity to bring up its "heavy artillery" in defense of or attack upon an issue, especially if the issue is of a constitutional nature.” State v. Kensmoe, 2001 ND 190, ¶ 18, 636 N.W.2d 183; citing Valley Grain Dealers v. Bd. of Cty. Comm'rs, 257 N.W.2d 425 (N.D. 1977)

[¶ 17] Statutory construction requires courts to presume legislative enactments to be constitutional. N.D.C.C. §1-02-38(1). This presumption is “conclusive unless the party challenging the statute clearly demonstrates that it contravenes the state or federal constitution.” Teigen v. State, 2008 ND 88, ¶7, 749 N.W.2d 505. Further, the North Dakota Supreme Court has exercised its power to declare legislation unconstitutional “with great restraint.” Id. Like the Appellant in Kensmoe, Mr. Rogers in this case filed no objection or brief with the trial court to determine whether the competency hearing should have remained open. 2001 ND 190, ¶20. Nor did Mr. Rogers lodge any objection to the court limiting the public’s attendance when discussing the PSI. In fact, the record is clear and quite to the contrary in that it was **Mr. Rogers who requested** a degree of confidentiality and closure before discussing the competency evaluation and PSI to which

the court granted partial relief. Tr. p. 2. & Sent. Tr. p. 4. This lack of record requires this Court to review this case under the obvious error standard under N.D.R.Crim.P. 52(b).

[¶ 18] The obvious error standard requires an appellant to establish (1) error, (2) that is plain, and (3) that affects substantial rights." Kensmoe, 2001 ND 190, ¶21 (holding an alleged error does not constitute obvious error unless there is a clear deviation from an applicable legal rule under current law) In order to determine whether a clear deviation in constitutional law has occurred one only has to review Mr. Rogers' cited case of Presley v. Georgia, 558 U.S. 209 (2010). In Presley, the U.S. Supreme Court reversed a criminal conviction for cocaine trafficking when the trial court removed a singular lone observer from jury selection after an **objection** from the defendant. Id. at 210. (holding the defendant's Sixth Amendment right to a public trial extends to voir dire of prospective jurors)

[¶ 19] The U.S. Supreme Court has also extended a defendant's Sixth Amendment public trial rights to suppression motions. Waller v. Georgia, 467 U.S. 39, 47 (1984). (stating however, the remedy for public trial guarantee violation would be a new suppression hearing and not a new trial which would be a windfall for the defendant and not in the public interest). In the entire line of public trial cases (under both the Sixth and First Amendment) not one provides a public trial right for competency hearings or review of PSI reports. More importantly, not one case found a public trial right was violated when the defendant (or the media) did not object at trial **or as in this case** the closure was specifically requested by the defendant. Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 503. (holding openness enhances both the basic

fairness of the criminal trial and the appearance of fairness).

[¶ 20] The Appellant's claims of a Constitutional violation must fail because he cannot establish it was in error to close certain portions of his hearings. Nor has he established the laws requiring closure in certain parts of his hearing were in clear contravention of the State or Federal Constitution. Additionally (for sake of argument) if the hearing should have been open to the public, Mr. Rogers waived any such defect by requesting such closure. As the North Dakota Supreme Court has recognized a defendant "may not seek reversal based on an error he invited." State v. Watkins, 2017 ND 165, ¶14, 898 N.W.2d 442.

[¶ 21] **II. The District Court has authority to set restitution for costs incurred because of Appellant's failure to appear for trial.**

[¶ 22] A trial court is exercising its statutory powers when ordering restitution. N.D.C.C. § 12.1-32-08; State v. Vick, 1998 ND 214, ¶4, 587 N.W.2d 567. (upholding restitution for an insurance company as a victim under State law) The North Dakota Supreme Court will limit its review of restitution orders to "whether the district court acted within the limits set by statute." Id. ¶4 (reviewing restitution under the abuse of discretion standard). The abuse of discretion standard requires the trial court to act in an "arbitrary, unreasonable, or unconscionable manner" before its judgement will be overturned. Myer v. Rygg, 2001 ND 123, ¶ 8, 630 N.W.2d 62. For restitution to be applied there does need to be an immediate and intimate causal connection between the crime and the damages. State v. Pippin, 496 N.W.2d 50, 52 (N.D. 1993) (reversing a restitution award because defendant's criminal conviction was not related to the damages)

[¶23] Mr. Rogers was charged with GSI on July 22, 2014. App. p. A10. It is undisputed he did not appear for trial. It is undisputed he fled the country and was found, arrested and extradited from Thailand. Sent. Tr. p. 35-36. It is undisputed the Ward County Sheriff would not have had extradition costs for Mr. Rogers had he appeared for trial. The District Court held a restitution hearing specifically to determine damages to the Ward County Sheriff's office for the costs of returning Mr. Rogers to stand trial for the GSI on January 12, 2018. App. p. A2. It is undisputed the State, Mr. Rogers and his counsel were present for the restitution hearing. Id. In this case there is certainly an immediate and intimate causal connection between Mr. Rogers' conduct and the expenses to Ward County thereby giving the trial court the authority to order restitution.

[¶ 24] **CONCLUSION**

[¶ 25] For the reason above, the State respectfully requests this Court to conclude no error has occurred and the judgement of the District Court shall be Affirmed.

Respectfully submitted this 11th day of June 2018.

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[¶ 26] **CERTIFICATE OF SERVICE**

A copy of this document was e-filed, pursuant to N.D. R. App. P. 25, to the North Dakota Supreme Court and Kiara Kraus-Parr on the 11th of June 2018, served electronically upon:

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