

IN THE SUPREME COURT
 STATE OF NORTH DAKOTA
 SUPREME COURT NO. 20180225

State of North Dakota,)
)
Plaintiff and Appellee,)
 vs.)
)
 Jonathan James Guthmiller,)
)
Defendant and Appellants.)

APPELLANT'S BRIEF

State v. Johnathan J. Guthmiller, Appeal from the Order Denying
 Defendant's Motion with Withdraw Guilty Plea entered on May 10, 2018,
 and Criminal Judgment entered on May 14, 2018, the Honorable John
 Thelen, Presiding

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¶ 1] TABLE OF CONTENTS

Paragraph No.

Table of Contents	¶ 1
Table of Authorities	¶ 2
Statement of the Issues.....	¶ 3
Statement of Case	¶ 4
Statement of Facts	¶ 6
Standard of Review.....	¶ 10
Law and Argument	¶ 12
I. The district court abused its discretion when it denied Mr. Guthmiller’s motion to withdraw his guilty plea. 	¶ 12.
Conclusion	¶ 18
Certificate of Service	¶ 20

[¶ 2] **TABLE OF AUTHORITIES**

Paragraph No.

North Dakota Cases

<u>Froistad v. State</u> , 2002 ND 52, ¶ 8, 641 N.W.2d 86.....	¶ 13
<u>Medd v. Fonder</u> , 543 N.W.2d 483, 487 (N.D. 1996).....	¶ 15
<u>State v. Dimmitt</u> , 2003 ND 111, ¶ 6, 665 N.W.2d 692.....	¶ 13
<u>State v. Feist</u> , 2006 ND 21, ¶ 22, 708 N.W.2d 870	¶ 11, 13
<u>State v. Lium</u> , 2008 ND 232, ¶ 17, 758 N.W.2d 711	¶ 14, 16
<u>State v. Millner</u> , 409 N.W.2d 642, 644 (N.D. 1987).....	¶ 13, 16

Statutes

N.D.C.C. 12.1-20-05.1	¶ 5, 8
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Rules

N.D.R.CrimP. 11.....	¶ 13, 14, 16
----------------------	--------------

¶ 3] STATEMENT OF THE ISSUES

- I. **The district court abused its discretion when it denied Mr. Guthmiller's motion to withdraw his guilty plea.**

[¶ 4] **STATEMENT OF CASE**

[¶ 5] The case against Jonathan James Guthmiller was commenced with the State's filing of an Information charging Luring Minors by Computer in violation of N.D.C.C. § 12.1-20-05.1 on or about April 28, 2017. (Appx. 1). Mr. Guthmiller entered a guilty plea (via Alford) on September 26, 2017. (Appx. 3); Change of Plea Transcript p. 14, ll. 20-24. Mr. Guthmiller subsequently moved to withdraw that plea on March 28, 2018. (Appx. 3). The motion was made prior to sentencing. (Appx. 3). A hearing on the motion to withdraw guilty plea was held on April 27, 2018. (Appx. 3). The court took the matter under advisement and issued its Order Denying Defendant's Motion to Withdraw Guilty Plea on May 10, 2018. (Appx. 3-4). Mr. Guthmiller was sentenced on May 14, 2018. (Appx. 4). A notice of appeal was filed on June 6, 2018.

[¶ 6] STATEMENT OF FACTS

[¶ 7] Mr. Guthmiller was charged with Luring Minors by Computer in violation of N.D.C.C. § 12.1-20-05.1 on or about April 28, 2017. (Appx. 1). It was generally alleged that Mr. Guthmiller, who was over the age of twenty-two, communicated with a minor between the age of fifteen and seventeen by electronic means. (Appx. 5). It was further alleged that Mr. Guthmiller sent electronic communications to the minor which depicted nudity and invited or importuned the minor to have sexual contact, to engage in sexual conduct, or to engage in any sexual performance, obscene sexual performance, or sexual conduct for Mr. Guthmiller's benefit, satisfaction, lust, passions, or sexual desires. (Appx. 5). Mr. Guthmiller pled guilty on September 26, 2017. (Appx. 3); Change of Plea Transcript p. 9, ll. 9. At the change of plea hearing, the State provided the following factual basis:

Between the months of November of 2016 through March of 2017, Jonathan Guthmiller engaged in a text message conversation with his niece, juvenile A.K., who was 15 years old during most of their communications. From reviewing the conversation, it was apparent that Guthmiller was aware that juvenile A.K. was 15 years old. A.K. made frequent references to being at school, having cheer practice after school, and riding a school bus. It was apparent that Guthmiller knew juvenile A.K. was, in fact, 15 years old.

At some point in March of this year, juvenile A.K.'s mother became aware of the conversations and alerted law enforcement. Deputy Mike LaMee of the Big Stone County Sheriff's Office responded and took photographs of the messages on juvenile A.K.'s phone. The investigation was then transferred to Grand Forks Police Department, Detective Caitlin Stromberg, after it was learned that Guthmiller was in Grand Forks.

The messages between Guthmiller and the juvenile started out relatively benign, and they became more and more sexual and more and more explicit as time went on. The messages began with things like "I'm being a perv" and "I'm hard", coming from Guthmiller. They then became more sexual with Guthmiller stating things like "I'm thinking about you in the tub". At one point Guthmiller told A.K. to masturbate.

Guthmiller and A.K. began exchanging photographs of themselves over Snapchat which is a mobile application for cell phones. A.K. sent photographs of herself including nude or partially nude images. Guthmiller sent photos of his face and his body including his penis.

The messages continued to become more graphic and intense. Guthmiller began asking for sex saying things like “want to sit on my lap” and then he would say “just like this with no panties on, bounce on my lap”. The sexually graphic discussion continued.

Toward the end of the conversation, Guthmiller and A.K. were making plans to, it appeared that Guthmiller and A.K. were making plans to meet each other. A.K. indicated that she had her driver’s permit and she was planning to travel to Grand Forks to visit Guthmiller. A.K. said “I got my permit so now I can drive mom to Grand Forks and she can go to the casino and I can go to your house”. A.K. then said “get your bed ready”.

Toward the end of the conversation, Guthmiller and juvenile A.K. set up, began arranging a camping trip. A.K. asked if there would be hunting and fishing involved. Guthmiller said, “yes, but there would be”, quote, “naked nighttime, though”.

After Detective Stromberg took over the investigation, she and Special Agent Litzinger from Homeland Security began on the tech side of things. They secured search warrants, preservation letters, and subpoena duces tecum for Snapchat records. The records did come back. Snapchat doesn’t save images or messages for longer than a pretty short period of time but the messages that we were able to recover from Snapchat were consistent with the messages that were saved on juvenile A.K.’s phone.

Detective Stromberg then did interview Mr. Guthmiller. Mr. Guthmiller did admit to communicating with juvenile A.K. over Snapchat during that time period.

Change of Plea Tr. pp. 12-14. Mr. Guthmiller did not dispute the factual basis provided at the change of plea hearing. Change of Plea Tr. p. 14, l. 19. After the change of plea hearing, sentencing was set several months out so that a Presentence Investigation report could be completed. Change of Plea Tr. p. 15, l. 12.

[¶ 8] Mr. Guthmiller moved to withdraw his guilty plea prior to sentencing. (Appx. 3). A hearing was held on April 27, 2018. Appx. 3. At the motion to withdraw hearing, Mr.

Guthmiller, through counsel, requested the court consider the briefs as evidence and allow the parties to make argument based on those briefs. Motion Hearing Tr. p. 2, l. 20. The State resisted and moved to dismiss the motion based on lack of evidence submitted at the hearing. Motion Hearing Tr. p. 3, ll. 1-7. Pursuant to the State's motion, Mr. Guthmiller testified. Motion Hearing Tr. p. 4, l. 5. Mr. Guthmiller was the only witness who testified at the hearing. Motion Hearing Tr. At the hearing, Mr. Guthmiller testified to the reasons for moving to withdraw his guilty plea. His testimony included:

There were questions on the Snapchat account that was linked to this. When my older brother tried sending, like, in your office he sent a friend request to it and then it was somewhat responded to and he appeared to be blocked. I don't know exactly how that works on that kind of manner but it looked like to me and it appeared that somebody else had control of it.

Motion Hearing Tr. p. 5, ll. 3-9. Mr. Guthmiller further explained that it appeared someone had control of his Snapchat account after he was instructed by the courts not to access it. Motion Hearing Tr. p. 9, l. 12-25. Mr. Guthmiller believed this because when his brother sent the request to the Snapchat account, the request was denied and then deleted. Motion Hearing Tr. p. 17, ll. 5-6. There was no screenshot of the incident because the information disappeared quickly. Motion Hearing Tr. p. 17, ll. 17-19. In addition, Mr. Guthmiller testified that a phone that had been left behind by his roommate was turned over to his attorney. Motion Hearing Tr. p. 5, l. 17. Mr. Guthmiller was concerned as his former roommate was extremely untrustworthy and had left the phone while he lived with his sister. Motion Hearing Tr. p. 5, ll. 19-25, p. 6, ll. 1-4. The court interpreted Mr. Guthmiller's statements to mean he was hinting his roommate may have been using his phone or account to communicate with the juvenile. (Appx. p. 12). While Mr. Guthmiller did admit to talking to his niece over Snapchat, there was no admission to the detective

about discussion of sexually explicit material. Motion Hearing Tr. p. 12, l. 25; Motion Hearing Tr. p. 15, l. 9.

[¶ 9] The State presented no evidence at the hearing. The court took the matter under advisement and issued its Order Denying Defendant's Request to Withdraw Guilty Plea on May 10, 2018. (Appx. 4 and 7). In its Order, the court determined Mr. Guthmiller failed to show a "fair and just reason" to withdraw his guilty plea. (Appx. 14). In addition, despite the State submitting no evidence at the hearing, the court found the State would be prejudiced had Mr. Guthmiller proved a fair and just reason to withdraw his guilty plea. (Appx. 19).

[¶ 10] STANDARD OF REVIEW

[¶ 11] A district court's determination of the occurrence of a fair and just reason to withdraw a guilty plea is within the court's discretion and will not be reversed on appeal absent an abuse of discretion. State v. Feist, 2006 ND 21, ¶ 22, 708 N.W.2d 870. A district court abuses its discretion when it acts in an arbitrary, unreasonable, or capricious manner, or misinterprets or misapplies the law. Id.

[¶ 12] LAW AND ARGUMENT

I. The district court abused its discretion when it denied Mr. Guthmiller's motion to withdraw his guilty plea.

[¶ 13] A defendant may withdraw a guilty plea after the plea is accepted, but before sentencing, 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 the plea. Froistad v. State, 2002 ND 52, ¶ 8, 641 N.W.2d 86; N.D.R.CrimP. 11(d). The rules to withdraw a guilty plea should be liberally construed in favor of the defendant and leave to withdraw a guilty plea before sentencing should be freely granted. State v. Feist, 2006 ND 21, ¶ 21, 708 N.W.2d 870. "Before sentencing, the inconvenience to court and prosecution resulting from a change of plea is ordinarily slight as compared with the public interest in protecting the right of the accused to trial by jury." State v. Millner, 409 N.W.2d 642, 644 (N.D. 1987). The defendant bears the burden of proving a fair and just reason to withdraw a guilty plea. State v. Dimmitt, 2003 ND 111, ¶ 6, 665 N.W.2d 692. However, a court may deny a motion to withdraw a guilty plea if the prosecution has been substantially prejudiced by reliance on the plea. N.D.R.Crim.P. 11(d)(3). Here, the district court determined Mr. Guthmiller did not provide evidence of a fair and just reason to withdraw his guilty plea. (Appx. p. 19). A district court's determination whether a fair and just reason exists will not be reversed absent an abuse of discretion. Feist, 2006 ND 21, ¶ 22, 708 N.W.2d 870. A district court abuses its discretion when it misapplies a law. Id. The district court in this case abused its discretion by considering matters not in the record in denying Mr. Guthmiller's motion to withdraw his guilty plea. Thus, the court abused its discretion and the court's order denying the motion to withdraw must be

reversed.

A. The court abused its discretion when it considered matters not in record in its order denying Mr. Guthmiller's motion to withdraw his guilty plea.

[¶ 14] In its decision, the court analyzed nine “fair and just” factors outlined in State v. Lium, 2008 ND 232, ¶ 17, 758 N.W.2d 711. Those factors include (1) the amount of time that has passed between the entry of the plea and the motion to withdraw; (2) defendant's assertion of innocence or a legally cognizable defense to the charge; (3) prejudice to the government; (4) whether the plea was knowing and voluntary; (5) whether the plea was made in compliance with Rule 11, N.D.R.Crim.P.; (6) whether adequate assistance of counsel was available to the defendant; (7) the plausibility of the reason for seeking with withdraw; (8) whether a plea withdrawal would waste judicial resources; and (9) whether the parties had reached or breached a plea agreement. (App. p. 14); Lium, ¶ 17. The district court reviewed all factors and determined each favored the State. (Appx. p. 19). However, in doing so, the court considered matters not in record in at least three of the factors. Those matters include:

1. Factor 1 (The amount of time passed between entry of the plea and motion to withdraw): The “defendant sat on his heels for 160+ days before noticing the court of his desire to withdraw his guilty plea; allowing evidence to go stale and allowing witnesses' memories to degrade.” (Appx. p. 15). This is nothing more than an assumption made by the court. There was no evidence submitted by the court that it was in a position where any of the witnesses' memories or that evidence went stale. Assuming such facts was an abuse of discretion.
2. Factor 3 (Prejudice to the government): The fact that the plea agreement was signed close to the date of the scheduled trial “would indicate that the State had

gone through all aspects of trial preparation including issuing subpoenas and, preparing witnesses for testimony and such establishes prejudice to the State.” (Appx. pp. 15-16). The court further provided: “In this case, the State has a juvenile victim. The State argues that they went through trial preparation with the victim and a CVIC victim/witness advocate. The State discussed this case with the victim and went through witness preparation. The State asked the victim to discuss, with the mother on the line, how she and her uncle engaged in sexually charged communications. The State had to ask the victim to explain why she would be engaging in these kinds of discussions with her uncle. It was an incredibly uncomfortable discussion for the victim to be forced to have. When defendant pled guilty on September 16, 2017, the State was able to tell the victim that she could put this event behind her and move on with her life. The victim has had several months of repose. The victim has had several months of healing. The victim has had several months where she didn’t have to worry about coming to district court and explaining to the court, to the jury, and to whomever else wants to be in the courtroom that day, how she engaged in sexually charged communications with her uncle. Now, after all this time, Defendant wants to destroy that repose, throw the victim back into the courtroom, and force her to relive this again. The State and the victim would certainly be prejudiced by such a delayed withdrawal of defendant’s guilty plea.” (Appx. p. 10). Again, the court assumed facts not in record and replaced factual evidence with perceived emotional arguments about why a victim, who has never testified in court or otherwise provided input, might be harmed by the

withdrawal. The court's reliance on matters not in record was an abuse of discretion.

3. Factor 8 (Whether a plea would waste judicial resources): The court here found judicial resources were outweighed by Mr. Guthmiller's request to assert his Constitutional right to a trial. (Appx. p. 18). While the court may think Mr. Guthmiller's potential defense was flimsy, that determination should come from a jury and not from a view that the court may be inconvenienced by the trial. See *Millner*, 409 N.W.2d at 644 ("Before sentencing, the inconvenience to the court and prosecution resulting from a change of plea is ordinarily slight as compared with the public interest in protecting the right of the accused to trial by jury.") The court abused its discretion by refusing to acknowledge Mr. Guthmiller's request to trial.

[¶ 15] In addition, the court included a narrative of an apparent interview between a detective and Mr. Guthmiller where Mr. Guthmiller acknowledged chatting with the juvenile on Snapchat. (Appx. p. 13-14). The conversation was not included in the affidavit of probable cause nor was it included in testimony. It likely came from the State's brief. However, allegations in a pleading or statements in a motion or brief are not evidence. *Medd v. Fonder*, 543 N.W.2d 483, 487 (N.D. 1996). The court's bias here was apparent. Instead of weighing the evidence liberally in favor of withdrawal, the court instead supplanted itself in the State's position and drew up its own facts to deny the motion. The court's decision was arbitrary and unreasonable. The court further abused its discretion when it misapplied the law and considered facts outside the record. The order denying the

motion to withdraw the guilty plea must be reversed.

[¶ 16] Even though it determined Mr. Guthmiller did not prove a fair and just reason for withdrawal, the court continued its analysis and determined that the State would be substantially prejudiced by withdrawal and the motion would nonetheless be denied. (Appx. p. 19). See Lium, 2008, ND 232, ¶ 13, 758 N.W.2d 711 (Once a defendant establishes a fair and just reason, the burden then shifts to the State to establish that it would be prejudiced by granting leave to withdraw). The court again considered matters entirely outside the record in its analysis including the fact victims forgot details of the events (Appx. p. 19); the state subpoenaed witnesses including three from out of state (Appx. p. 20); the State “dismantled” its trial preparation (Appx. p. 20); and victim would be forced to relive something she certainly would rather forget (Appx. p. 22). In addition, the State – and not the defendant - has the burden to show it would be substantially prejudiced by withdrawal. Id. The State submitted no evidence at the hearing and thus submitted no evidence that it would be substantially prejudiced. The court abused its discretion by acting arbitrarily and unreasonably in determining the State met its burden. Further, the facts relied on by the court do not show substantial prejudice. N.D.R.Crim.P. 11(d)(3). Substantial prejudice requires “a showing by the State that there are specific factors present which demonstrate the withdrawal of the plea will be more prejudicial to it than in the ordinary case. Failure to require such a specific showing would create an exception which would swallow the rule.” Millner, 409 N.W.2d at 644. The reasons proffered by the court merely show facts which would be present in every motion to withdraw a guilty plea before sentencing. Examples of substantial prejudice include “vital physical evidence has been discarded, that a chief government witness has died, or that fifty-two witnesses who have

come from all over the United States and from overseas naval bases have been dismissed.”

Lium, ¶ 13. Certainly the court’s reliance on assumptions that a witness may have forgot facts, that the witnesses were previously subpoenaed, and that the State “dismantled” its trial preparation do not amount to substantial prejudice.

[¶ 17] The court’s bias was evident when it concluded the State met its burden for substantial prejudice when it did nothing to prove that burden. The decision that the State met that burden was arbitrary and unreasonable. The court further abused its discretion by considering matters outside of the record in refusing to allow Mr. Guthmiller to withdraw his guilty plea. The court’s order must be reversed.

[¶ 18] **CONCLUSION**

[¶ 19] The court acted arbitrarily and unreasonably when it determined Mr. Guthmiller failed to meet his burden to withdraw his guilty plea. Further, the court’s determination that the State met its burden for substantial prejudice - when it submitted no evidence to prove such - was arbitrary and unreasonable. The court further abused its discretion when it misapplied the law and considered matters outside the record. The court’s order denying the motion to withdraw guilty plea must be reversed and the case remanded.

Dated this 28th day of August, 2018.

/s/ Charles Sheeley

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[¶ 20] **CERTIFICATE OF SERVICE**

[¶ 21] A true and correct copy of the foregoing document was sent by e-mail to the Attorney of Record for Grand Forks County, Andrew Eyre, on 28th day of August, 2018, to: sasupportstaff@gfcounty.org

/s Charles J. Sheeley
Charles J. Sheeley