

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Supreme Court No. 20180397  
District Court No. 08-06-K-01051

State of North Dakota,	)
	)
Respondent and Appellee,	)
	)
vs.	)
	)
Russell Frank Craig,	)
	)
Petitioner and Appellant.	)

APPEAL FROM AMENDED ORDER DENYING MOTION TO WITHDRAW  
GUILTY PLEA ENTERED ON OCTOBER 26, 2018

SOUTH CENTRAL JUDICIAL DISTRICT

HONORABLE BRUCE A. ROMANICK, PRESIDING

**BRIEF OF APPELLEE**  
**STATE OF NORTH DAKOTA**

Tessa M. Vaagen # 07828  
Burleigh County Assistant State's Attorney  
514 E Thayer Ave.  
Bismarck, ND 58501  
(701) 222-6672

## TABLE OF CONTENTS

## Page/Paragraph No.

TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	ii
ISSUES PRESENTED FOR REVIEW .....	¶ 1
STATEMENT OF THE CASE. ....	¶¶ 2-8
STATEMENT OF FACTS .....	¶¶ 9-16
ARGUMENT .....	¶¶ 17-46
I.    THE DISTRICT COURT DID NOT ERR IN DENYING CRAIG’S REQUEST TO WITHDRAW GUILTY PLEA.....	¶ 17
A. Standard of Review .....	¶ 18
B. The Appellant’s arguments should not be considered because they were not raised in the proceedings below. ....	¶¶ 19-21
C. The district court did not err in allowing the State additional time to respond to the Craig’s Motion to Withdraw Guilty Plea. ....	¶¶ 22-42
D. The district court did not fail to comply with the oral argument provision of Rule 3.2, N.D.R.Ct. ....	¶¶ 43-46
CONCLUSION .....	¶ 47

## TABLE OF AUTHORITIES

### CASES

### Paragraph No.

<u>State v. Chacano,</u> 2012 ND 113, 817 N.W.2d 369 .....	¶ 18
<u>State v. Goehring,</u> 374 N.W.2d 882 (N.D. 1985) .....	¶ 27
<u>State v. Tweed,</u> 491 N.W.2d 412 (N.D. 1992) .....	¶ 21
<u>State v. Yost,</u> 2018 N.D. 157, 914 N.W.2d 508 .....	¶ 35

### North Dakota Century Code

### Paragraph No.

N.D.C.C. § 12.1-32-01 .....	¶ 36
N.D.C.C. § 12.1-32-09.1 .....	¶¶ 36, 39

### North Dakota Rules

### Paragraph No.

N.D.R.Crim.P. 11(d) .....	¶ 34
N.D.R.Crim.P. 52(b) .....	¶ 21
N.D.R.Ct. 3.2(a) .....	¶¶ 23, 29, 44, 45
N.D.R.Ct. 3.2(c) .....	¶¶ 24, 31
N.D.R.Ct. 3.2(d) .....	¶¶ 25, 26

**ISSUE PRESENTED FOR REVIEW**

[¶1] Whether the district court erred by violating Rule 3.2 of the North Dakota Rules of Court.

## STATEMENT OF THE CASE

[¶2] On June 5, 2006, the State of North Dakota charged the Appellant and Defendant below, Russell Frank Craig (hereinafter “Craig”), with Murder, a Class AA Felony. Appendix at page 2 (hereinafter “App. 2”). The Defendant pled guilty to the offense in January 2007 and was sentenced on March 2, 2007. App. 3. The Defendant was sentenced to life with the possibility of parole. App. 7.

[¶3] On November 27, 2017, the Clerk of District Court in Burleigh County sent a letter to Craig. App. 9. Craig applied for counsel on December 6, 2017. App. 4. Mr. Todd Ewell was appointed as Craig’s counsel on December 6, 2017. App. 4.

[¶4] On August 17, 2018, Craig filed a Motion to Withdraw Guilty Plea. App. 10-19. On September 14, 2018, the district court issued a notice to the State, inquiring whether a response was forthcoming. App. 20.

[¶5] On October 4, 2018, the Calendar Control Clerk issued a Notice to Appear for a Motion Hearing on October 16, 2018. App. 21.

[¶6] On October 5, 2018, the State filed a Motion for Extension of Response Time with a proposed order. App. 4, 22-24. The district court granted that request by written order on October 9, 2018. App. 24. The State filed its Response on October 12, 2018. App. 25-28. Craig did not file a Reply.

[¶7] The district court entered an Order Denying Motion to Withdraw Guilty Plea on October 24, 2018. App. 29-32. The district court entered an Amended Order Denying Motion to Withdraw Guilty Plea on October 26, 2018. App. 33-36.

[¶8] Craig filed a timely Notice of Appeal on October 31, 2018. App. 37.

### STATEMENT OF THE FACTS

[¶9] The relevant facts for this appeal are largely procedure based and start with the letter sent to Craig by the Clerk of District Court in Burleigh County.

[¶10] That letter informed Craig, "A statutory change from the last legislative session may impact the sentence in your case. Life sentences which include the possibility of parole must now include a calculation of 85% life expectancy." App. 9.

[¶11] On August 17, 2018, Craig filed a Motion to Withdraw Guilty Plea, arguing his reliance on a twenty (20) year life expectancy calculation, when he was actually going to be required to serve approximately thirty (30) years, was a manifest injustice that required a new trial. App. 16.

[¶12] The district court issued a Notice on September 14, 2018, indicating,

To date the State has not responded.

Prior to issuing an order I this matter the Court desires to determine if the State's failure to respond was an oversight or intentional.

The State shall notify the Court if it has waived a response or respond immediately to the motion or request additional time to respond if unable to do so immediately.

App. 20.

[¶13] On October 4, 2018, the State filed a Motion for Extension of Response Time, indicating the undersigned attorney had just received the Notice of Hearing after being assigned as the attorney of record on the case in Odyssey on October 4, 2018. App. 22. The State acknowledged the presence of Craig's Motion and the district court's Notice that had been filed prior to October 4, 2018. App. 22. The State indicated the lack of response was inadvertent, again explaining that the undersigned attorney had not been assigned as the attorney of record in the Odyssey case when the Motion and Notice were filed. App. 22. The State asked for an extension of time with a proposed deadline of October 12, 2018.

App. 22. At that time, the hearing was still set for October 16, 2018. App. 22. The district court granted the State's request, setting the response deadline for October 12, 2018. App. 24.

[¶14] The State filed its Response to Defendant's Motion to Withdraw Guilty Plea on October 12, 2018. App. 25-28. The State argued Craig could not prove a manifest injustice had occurred under Rule 11(d), N.D.R.Crim.P. because 1) he changed his plea on an open plea basis, 2) a different statute required him to serve at least thirty (30) years, 3) the requirement that he serve thirty (30) years was put on the record at the sentencing hearing, and 4) any miscalculation of life expectancy was done by the Department of Corrections and not the district court. App. 25-28. The State also argued it would be substantially prejudiced if the district court allowed Craig to withdraw his guilty plea. App. 28.

[¶15] On October 24, 2018, the district court issued an Order Denying Motion to Withdraw Guilty Plea. App. 29-32. The court determined Craig had not met his burden of proving a manifest injustice because the court had informed Craig his sentence was life with the possibility of parole and the prosecutor had informed Craig and the court he would be required to serve at least thirty (30) years before being eligible for parole. App. 30. The district court further found it was not even required to inform Craig of the eighty-five percent (85%) rule. App. 31. The court also acknowledged the statutory requirement that a person convicted of a Class AA felony is required to serve at least thirty (30) years before consideration by the parole board. App. 31.

[¶16] On October 26, 2018, the district court issued an Amended Order Denying Motion to Withdraw Guilty Plea. App. 33-36. That Order changed the language in the first

paragraph from “The State did not respond to Craig’s Motion.” to “The State resisted the motion.” App. 29, 33. The remainder of the original order remained unchanged.



## ARGUMENT

[¶17] I. THE DISTRICT COURT DID NOT ERR IN DENYING CRAIG'S MOTION TO WITHDRAW GUILTY PLEA.

### **A. Standard of Review**

[¶18] Whether the district court erred in denying Craig's Motion to Withdraw Guilty Plea is a question of law because the court's action was based on the court's application of Rule 3.2 of the North Dakota Rules of Court. "The interpretation of a court rule . . . is a question of law that [this Court] reviews de novo." State v. Chacano, 2012 ND 113, ¶ 10, 817 N.W.2d 369.

### **B. The Appellant's arguments should not be considered because they were not raised in the proceedings below.**

[¶19] Craig failed to raise any of his arguments on appeal in the proceedings below, therefore they should not be addressed for the first time in this appeal.

[¶20] Craig had plenty of time to file a reply in between when the State filed its response on October 12, 2018 and when the district court issued its order on October 24, 2018. He failed to do so.

[¶21] "It is a well-established principle in this state that issues not raised below cannot be raised on appeal." State v. Tweed, 491 N.W.2d 412, 417 (N.D. 1992). The narrow exception to that rule is found at Rule 52(b) of the North Dakota Rules of Criminal Procedure, which provides, "Obvious errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Craig fails to demonstrate how any of the alleged errors by the district court amount to "obvious error" and fails to identify which "substantial rights" were affected by the alleged error.

Therefore, his arguments should be rejected and the district court's Order should be affirmed.

**C. The district court did not err in allowing the State additional time to respond to Craig's Motion to Withdraw Guilty Plea.**

[¶22] While Rule 3.2, N.D.R.Ct., does set forth the time frames for filing motions and responses, there is no rule preventing the district court from granting additional time to the parties for such filings. The district court did not err in granting the State an extension in the proceedings below and the court's order should not be remanded on that ground.

[¶23] Rule 3.2, N.D.R.Ct. provides, in relevant part, "Upon serving and filing a motion, the moving party must serve and file a brief and other supporting papers and the opposing party must have 14 days after service of a brief within which to serve and file and answer brief and other supporting papers." N.D.R.Ct. 3.2(a)(2). "Upon the filing of briefs, or upon expiration of the time for filing, the motion is considered submitted to the court, unless counsel for any party requests oral argument on the motion." Id.

[¶24] Rule 3.2, N.D.R.Ct., also addresses the failure to file a brief.

Failure to file a brief by the moving party may be deemed an admission that, in the opinion of party or counsel, the motion is without merit. Failure to file a brief by the opposing party may be deemed an admission that, in the opinion of party or counsel, the motion is meritorious. Even if an answer brief is not filed, the moving party must still demonstrate to the court that it is entitled to the relief requested."

N.D.R.Ct. 3.2(c).

[¶25] Rule 3.2, N.D.R.Ct., allows for extensions of filing time.

Extensions of time for filing briefs and other supporting papers, or for continuance of the hearing on a motion, may be granted only by written order of court. All requests for extension of time or continuance, whether written or oral, must be accompanied by an appropriate order form.

N.D.R.Ct. 3.2(d).

[¶26] The State concedes its response was filed outside of the fourteen (14) day timeframe set forth by Rule 3.2. However, that time lapse was addressed as soon as the undersigned attorney had become aware of the Motion and the district court's notice. In fact, the State took the appropriate steps under Rule 3.2 and filed a request for an extension with a proposed order. See N.D.R.Ct. 3.2(d). The district court signed the proposed written order, giving the State until October 12, 2018 to file the response. App. 24. Under the circumstances, granting that extension was not an error.

[¶27] In State v. Goehring, 374 N.W.2d 882 (N.D. 1985), this Court reviewed a case in which the defendant had raised a motion to suppress in an untimely manner. In that case, the defendant had raised his motion just prior to the commencement of trial. Id. at 884. The State argued the motion should have been denied on the grounds of untimeliness. Id. This Court ruled, "to deny the motion for this reason would elevate form over substance would result in an unreasonably stringent interpretation of the rules and would ignore the underlying policy behind the rules." Id. at 885-86. The case at bar is similar to Goehring in that the timeframes set by Rule 3.2, N.D.R.Ct., were not strictly followed. However, the case at bar is favorably dissimilar from Goehring in that the State followed the appropriate methods to secure an extension and still had a response filed four (4) days prior to the time set for the hearing on Craig's motion. The district court's ruling should not be reversed on the ground that the State's response was initially untimely filed. The State provided the reasons for the untimeliness in its request for an extension. App. 22-23. The district court granted that extension. To reverse the district court's ruling under the circumstances would "result in an unreasonably stringent interpretation of the rules" and "would ignore the underlying policy behind the rules."

[¶28] It is worth noting Craig did not object to the State's request for an extension in the proceedings below. Therefore, his argument regarding timeliness in this appeal should be rejected.

[¶29] It is also worth noting the following language from Rule 3.2, N.D.R.Ct.: "Upon the filing of briefs, or upon expiration of the time for filing, the motion is considered submitted to the court, *unless counsel for any party requests oral argument on the motion.*" N.D.R.Ct. 3.2(a)(2) (emphasis added). In this case, Craig had requested a hearing on the motion. App. 10. Therefore, the matter was not considered submitted to the court at the end of the fourteen (14) day deadline for the State's response. The State's response was timely in that it was filed before the hearing date, and thereby before the matter had been deemed "submitted to the court."

[¶30] Further, the district court's order does not appear to place any weight on any of the arguments raised by the State. See App. 29-32, 33-36. The court at no point mentions the any of the arguments raised by the State. The ruling does not directly mirror any of the State's arguments. In fact, the court's first order said the State did not respond. App. 29. The court issued an amended order correcting that language, but that did not change any of the court's analysis. App. 33-36. Any error caused by allowing the State additional time to respond to Craig's motion would be harmless under these circumstances.

[¶31] Finally, Rule 3.2, N.D.R.Ct., requires the moving party to prove to the court that he is entitled to the relief requested, regardless of any answers being filed. N.D.R.Ct. 3.2(c). Craig did not do so.

[¶32] Craig pled guilty to the charge of Murder at his change of plea hearing on January 17, 2007. App. 2. At that hearing, the district court was informed Craig would be changing

his plea after having received a recommendation from the State. See Transcript of Change of Plea Hearing at page 3 (hereinafter “COP Tr. 3.”). The district court followed up with Craig, informing him that because it was a recommendation, the district court could sentence him from zero to the maximum penalty, which would be life without parole. COP Tr. 3. Craig indicated he understood. COP Tr. 3.

[¶33] At the sentencing hearing on March 2, 2007, the State gave its recommendation for life with the possibility of parole. While giving the recommendation, the State said, “He would be required to serve at least 30 years before he would even be eligible for parole.” See Transcript of Sentencing Hearing at page 13 (hereinafter “Sentencing Tr. 13.”). Craig asked for a sentence of thirty (30) years with all but twenty (20) years suspended. Sentencing Tr. 15. The district court adopted the recommendation from the State, sentencing Craig to life with the possibility of parole. Sentencing Tr. 15.

[¶34] A defendant’s motion to withdraw his guilty plea is governed by Rule 11(d) of the North Dakota Rules of Criminal Procedure. It provides:

- (1) In general. A defendant may withdraw a plea of guilty:
  - (A) before the court accepts the plea, for any reason or no reason; or
  - (B) after the court accepts the plea, but before it imposes sentence if:
    - (i) the court rejects a plea agreement under Rule 11(c)(5); or
    - (ii) the defendant can show a fair and just reason for the withdrawal.
- (2) Finality of a Guilty Plea. Unless the defendant proves that withdrawal is necessary to correct a manifest injustice, the defendant may not withdraw a plea of guilty after the court has imposed sentence.
- (3) Prosecution Reliance on Plea. If the prosecution has been substantially prejudiced by reliance on the defendant’s plea, the court may deny a plea withdrawal request.

N.D.R.Crim.P. 11(d).

[¶35] “[A] defendant has the burden of proving that a fair and just reason supports withdrawal of a guilty plea. 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.” State v. Yost, 2018 ND 157, ¶ 6, 914 N.W.2d 508. “Courts do not inquire into the matter of prejudice unless the defendant first shows a good reason for being allowed to withdraw his plea.” Id. This Court has indicated, “Without evidence that suggests the defendant did not understand the nature of any agreement or sentencing recommendation vis-à-vis this charge, we will not order the guilty plea withdrawn to correct a manifest injustice.” Id. at ¶ 15.

[¶36] First, the statutory requirement in section 12.1-32-01(1), N.D.C.C., renders Craig’s argument irrelevant. Regardless of what the prosecutor informed defense counsel at the pretrial conference, her recommendation remained the same: life with the possibility of parole. Section 12.1-32-01(1), N.D.C.C., requires anyone who pleads to a Class AA Felony to serve thirty years before they can be considered by the parole board. That statutory requirement reads the same today as it did in 2007. Craig pled to a Class AA Felony. He was required to serve thirty (30) years under that statute. The eighty-five percent (85%) rule located at section 12.1-32-09.1 is irrelevant in this case because he is required to serve more time, i.e., thirty (30) years, than he would under the eighty-five percent (85%) rule. Therefore, Craig’s argument fails and he is not entitled to the relief he seeks.

[¶37] Moreover, the prosecutor mentioned the thirty-year requirement while she was giving the State’s recommendation at the sentencing hearing. Sentencing Tr. 13. The time to make the attempt to withdraw his guilty plea was at that time, not eleven (11) years later.

Therefore, Craig could not now claim prejudice about the amount of time he has to serve because it was mentioned during his sentencing hearing.

[¶38] Second, Craig could not feasibly argue he changed his plea relying on a twenty (20) year calculation when he entered an open plea. The district court warned Craig that he could be sentenced up to the maximum because there was no plea agreement in place. COP Tr. 3. That meant Craig was facing way more than twenty (20) years when he entered his plea, even with the State's recommendation that he was presumably relying on. Furthermore, Craig was able to ask the district court for a twenty (20) years to serve sentence. Therefore, Craig cannot show a manifest injustice.

[¶39] Third, the statutory language at section 12.1-32-09.1, N.D.C.C., that includes the eighty-five percent (85%) rule has not changed. So when Craig was sentenced back in 2007, the amount of time Craig would have to serve before seeing parole was the same as it is today. Therefore, because there is no difference between that calculation today and back in 2007, there is no manifest injustice.

[¶40] Lastly, Craig's argument below largely rested on an alleged miscalculation of what eighty-five percent (85%) of his sentence is supposed to be. It is worth noting that Craig's Exhibit 1 indicates he is scheduled to see the parole board in 2027, which is twenty (20) years from the date of his sentence. Even if that was a miscalculation, that calculation was performed by the North Dakota Department of Corrections, not the district court. The calculation is, under statute, within the purview of the Department of Corrections, not the district court. The district court did not mention how many years Craig would be serving. Therefore, Craig could not prove a manifest injustice in this case.

[¶41] Even if this Court determines Craig had proved the manifest injustice, the State re-raises the claim it would be substantially prejudicial to allow Craig to withdraw his plea. The murder case is twelve (12) years old. There are potentially over fifty (50) witnesses that would be called at trial. Locating that many witnesses for trial would be extremely difficult because many of them have changed positions since that time. The State is uncertain whether all of them are still alive. The State is uncertain about their location. Moreover, requiring them to testify to an event that took place twelve years ago would be substantially prejudicial to the State because their memories of the event will not be as good as they would have been back in 2007. The State is also uncertain as to the status of the evidence for this case. Therefore, it would be substantially prejudicial to the State to allow Craig to withdraw his guilty plea.

[¶42] Therefore, because Craig could not prove he was entitled to the relief he sought in the court below, the order of the district court should be affirmed.

**D. The district court did not fail to comply with the oral argument provision of Rule 3.2, N.D.R.Ct.**

[¶43] Craig did not comply with the rule for requesting oral argument on a motion, therefore, the district court was not required to hold a hearing.

[¶44] Rule 3.2, N.D.R.Ct., sets forth the requirements for requesting a hearing on a motion. It provides, in relevant part,

If any party who has timely served and filed a brief requests oral argument, the request must be granted. . . . The party requesting oral argument must secure a time for the argument and serve notice upon all other parties. Requests for oral argument or the taking of evidence must be made not later than seven days after the expiration of the time for filing the answer brief. If the party requesting oral argument fails within 14 days of the request to secure a time for the argument, the request is waived and the matter is considered submitted for decision on the briefs. . . .



N.D.R.Ct. 3.2(a)(3).

[¶45] In the case at bar, the record is completely devoid of any efforts by Craig to secure a time for the hearing he requested. The record only shows the hearing was apparently set by the Calendar Control Clerk on October 4, 2018. App. 21. That is well after fourteen (14) days after the time for the filing of the response in this case, which would have been August 31, 2018. Craig cannot claim the Calendar Control Clerk beat him to satisfying the requirements of the rule. The record is devoid of any efforts Craig made to satisfy the requirements of the rule. Therefore, because Craig failed to secure a hearing time within fourteen (14) days of his request for a hearing, his request was considered waived. See N.D.R.Ct. 3.2(a)(3). Since Craig waived his request for a hearing, the district court did not err in issuing an order without first holding a hearing. The district court's order should be affirmed.

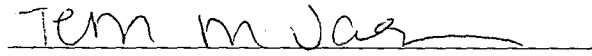
[¶46] The State does not believe the case should be remanded and therefore does not take a stance on which district court judge should handle the case below. However, the State does believe Craig's request on the matter is premature and should be denied.

### **CONCLUSION**

[¶47] For these reasons, the State respectfully requests that this Court affirm the district court's Amended Order Denying Craig's Motion to Withdraw Guilty Plea.

RESPECTFULLY SUBMITTED:

Dated this 7<sup>th</sup> day of February, 2019.

A handwritten signature in cursive script, appearing to read "Tessa M. Vaagen", is written over a horizontal line.

Tessa M. Vaagen  
Burleigh County Assistant State's Attorney  
ND Bar ID# 07828  
514 E Thayer Ave.  
Bismarck, ND 58501  
Office (701) 222-6672

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

State of North Dakota, )

)

Respondent - Appellee, )

)

-vs- )

)

Russell Frank Craig, )

)

Petitioner-Appellant, )

)

Supreme Ct. No. 20180397

District Ct. No. 08-06-K-01051

STATE OF NORTH DAKOTA )

) ss

COUNTY OF BURLEIGH )

I, Elvedina Papalichev, being first duly sworn, depose and say that I am a Legal Resident over 21 years old, and on the 7 day of February, 2019, I deposited in a sealed envelope a true copy of the attached:

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

in the United States mail at Bismarck, North Dakota, postage prepaid, addressed to:

Samuel A. Gereszek  
Hammarback & Scheving, P.L.C.  
608 DeMers Avenue  
East Grand Forks, MN 56721  
Phone: (218) 773-6841  
sam@egflawyer.com

which address is the last known address of the addressee.

Elvedina Papalichev  
Elvedina Papalichev

Subscribed and sworn to before me this 7 day of February, 2019.

Mandy M. Pitcher  
Mandy Pitcher, Notary Public  
Burleigh County, North Dakota

MANDY M PITCHER  
Notary Public, State of North Dakota  
My Commission Expires  
January 25, 2023