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SEPTEMBER 9, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellee, v. Raynard Leroy Lebeau, Defendant and Appellant.	)	**Supreme Court File No. 20190165** **Cass County No. 09-2018-CV-03345** **APPELLANT'S BRIEF**

Appeal from the Memorandum and Opinion in Cass county district court, east central judicial district, North Dakota, March 29, 2019, the Honorable Steven L. Marquart, presiding.

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

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TABLE OF AUTHORITIES

Cases

Statutes, Rules, Codes

Oral Argument:

Oral argument has been requested to emphasize and clarify the Petitioner's written arguments on their merits.

Transcript References:

The arraignment for this matter was held on April 9, 2018. The transcript of that appearance is referred to as ARR in this brief. The Change of Plea for this matter was held on instead of a Preliminary Hearing in this matter on May 16, 2018. The transcript of that hearing is referred to as CoP in this brief. Mr. Lebeau's post-conviction relief hearing was held on March 27, 2019. The transcript of that hearing is referred to as PCR in this brief.

JURISDICTION

[¶ 1] The district court had jurisdiction under N.D.C.C. § 29-32.1-01. The North Dakota Supreme Court has jurisdiction over the appeal of this matter pursuant to N.D.C.C. § 29-32.1-14 which provides that, "[a] final judgment entered under this chapter may be reviewed by the supreme court of this state upon appeal as provided by rule of the supreme court." Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provision article VI § 6, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06, N.D.C.C., which provides as follows:

"An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03. An appeal may be taken by the defendant from:

1. A verdict of guilty;
2. A final judgment of conviction;
3. An order refusing a motion in arrest of judgment;
4. An order denying a motion for new trial; or
5. An order made after judgment affecting any substantial right of the party."

N.D.C.C. § 29-28-06.

STATEMENT OF THE ISSUES

[¶ 2] I. Whether the district court erred by denying Mr. Lebeau's petition for post-conviction relief.

STATEMENT OF CASE

[¶ 3] This is an appeal from the Cass County Memorandum and Opinion, signed March 29, 2019 (Appendix 8). On April 5, 2018 the criminal information was filed alleging failure to register as a sexual offender, in violation of N.D.C.C. § 12.1-32-15(9) (Index #1). Mr. Lebeau arraignment was held on April 9, 2018. Mr. Lebeau appeared without counsel at that hearing and the Court did not inform him of mandatory minimum or maximum penalties at that time. *See generally* ARR, Index # 14.

[¶4] Attorney Thornton was appointed to represent Mr. Lebeau in April of 2018. CoP p. 7. A preliminary hearing was scheduled for May 16, 2018. Mr. Lebeau waived his preliminary hearing and changed his plea. *See generally* CoP, Index # 15.

[¶ 5] Mr. Lebeau was sentenced to five (5) years with the DOCR first to serve two (2) years, registration as a sexual offender, and one (1) year of supervised probation. On July 18, 2018 Mr. Lebeau wrote to the court asking to withdraw his guilty plea. On October 4, 2018 the district court opened a Post-Conviction proceeding. On October 9, 2018 Attorney Schuman was assigned to represent Mr. Lebeau. The post-conviction hearing was held in this matter on March 27, 2019. The court denied Mr. Lebeau's request to withdraw his plea. Mr. Lebeau timely filed a notice of appeal from that Order.

STATEMENT OF FACTS

[¶ 6] Mr. Lebeau has a conviction out of the State of South Dakota and that the State of North Dakota believes to be an equivalent statue requiring registration for a sexual offense. PCR pp. 11-12.

[¶ 7] Mr. Lebeau appeared without counsel at his arraignment. The State asked if Mr. Lebeau understood the charge and the maximum and minimum penalties of the charge. ARR p. 8. Mr. Lebeau indicated that he did. *Id.* However, MR. Lebeau went on to explain to the Court that he has not "… been sentenced anywhere in the United States at all to register." Mr. Lebeau clearly did not understand the charge or what an equivalent statute was at the time of his arraignment, despite indicating to the prosecutor that he did.

[¶ 8] At the preliminary hearing, Mr. Thornton represented to the court that Mr. Lebeau wished to waive his preliminary hearing and change his plea to guilty. CoP p. 3. Mr. Lebeau, after the court's inquiry stated he did not wish to change his plea to guilty and wanted to have a contested preliminary hearing. CoP pp. 4, 5.

[¶ 9] Mr. Thornton asked to speak with his client before they proceeded any further and the court granted that request. CoP p. 5. After Mr. Thornton spoke with Mr. Lebeau the court again asked if Mr. Lebeau wished to waive his preliminary hearing. Mr. Lebeau stated that he would waive the hearing. CoP p. 6. The trial court then asked Mr. Thornton whether Mr.

Lebeau, "waived any further reading of the charges and the penalties." Cop p. 6 ln.14-16. Mr. Thornton responded for Mr. Lebeau saying that Mr. Lebeau waived the court's reading of that information. The court never asked Mr. Lebeau if he understood the maximum or minimum penalties of the charge. *Id.* Mr. Lebeau ultimately changed his plea to guilty on May 16, 2018. At the post-conviction hearing the district court found that Mr. Thornton explained the maximum and minimum penalties to Mr. Lebeau and he was therefore properly advised. *Memorandum and Opinion*, #09-2018-CV-3345 ¶¶ 5, 8.

LAW AND ARGUMENT

I. Whether the district court erred by denying Mr. Lebeau's petition for post-conviction relief.

Standard of Review

[¶ 10] Post-conviction relief proceedings are civil in nature and governed by the North Dakota Rules of Civil Procedure. *Delvo v. State*, 2010 ND 78, ¶ 10, 782 N.W.2d 72. This Court applies a 'clearly erroneous' standard found in N.D.R.Civ.P. Rule 52(a) when reviewing a district court's findings of fact on an appeal under the Uniform Post-Conviction Procedure Act. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by any evidence, or if, although there is some evidence to support the finding, a reviewing court is left with a definite and firm conviction a mistake has been made. *Roe v. State*, 2017 ND 65, ¶ 5,891 N.W.2d 745.

[¶ 11] A guilty plea "must be entered knowingly, intelligently, and voluntarily to be valid." *Peltier v. State*, 2015 ND 35, ¶ 14, 859 N.W.2d 381. Rule 11, N.D.R.Crim.P., is the framework the court uses to determine if a plea is entered into knowingly, intelligently, and voluntarily. *State v. Wallace*, 2018 ND 225, ¶ 6, 918 N.W.2d 64; *State v. Blurton*, 2009 ND 144, ¶ 10, 770 N.W.2d 231. N.D.R.Crim.P. 11(b)(1) requires the court, "to address the defendant personally in open court, informing the defendant of his rights and determining whether the defendant understands those rights." *State v. Pixler*, 2010 ND 105, ¶ 8, 783 N.W.2d 9. Rule 11(b)(1) states:

> The court may not accept a plea of guilty without first, by addressing the defendant personally…in open court, informing the defendant of and determining that the defendant understands the following:
>
> (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. N.D.R.Crim.P. 11(b)(1).

The "requirement to advise the defendant under N.D.R.Crim.P. 11 is **mandatory and binding upon the court**." *Emphasis added*, *Wallace*, at ¶ 7. After the court has accepted a plea and imposed sentence, the defendant cannot withdraw the plea unless withdrawal is necessary to correct a manifest injustice. A manifest injustice includes procedural errors by a sentencing court. *State v. Gunwall*, 522 N.W.2d 183, 185 (N.D. 1994). This Court has explained that Rule 11 does not require "ritualistic compliance," however, a court must "substantially comply with the rule's procedural requirements to ensure a defendant is entering a voluntary and intelligent

guilty plea." *Id.*; *State v. Murphy*, 2014 ND 202, ¶ 7, 855 N.W.2d 647. The purpose of Rule 11(b) requirements "is to ensure the defendant is aware of the consequences of his guilty plea." *Murphy*, at ¶ 11.

[¶ 12] In the present case, Mr. Lebeau was never advised of the mandatory minimum penalty by the trial court. Mr. Thornton's waiver of the court's explanation of the maximum and minimum penalties is wholly insufficient, because it is the **court's** responsibility to **determine** if the defendant is truly making a voluntary, intelligent, and knowing waiver of his rights before the court accepts his change of plea.

[¶ 13] The district court's finding that Mr. Lebeau's plea was voluntarily made is an erroneous view of the law, specifically the court's obligations under Rule 11. The district court also concludes that Mr. Lebeau was informed of the minimum mandatory penalty at his initial appearance, however he was not. *Memorandum and Opinion*, #09-2018-CV-3345, ¶ 7; *See generally* ARR, Index # 14. The court's conclusion is therefore not supported by any evidence, or if, this Court believes there is some evidence to support the finding that Mr. Lebeau was informed of the minimum and maximum penalties by someone, this Court must be left with a definite and firm conviction a mistake has been made, because prior case law has repeatedly held it is the trial court's responsibility to inform the defendant of minimum and maximum penalties. A review of the arraignment shows the trial court simply did not give Mr. Lebeau the required information.

[¶ 14] The record shows the trial court never discussed the possible maximum or minimum penalties with Mr. Lebeau. "The requirement that the court personally advise and question the defendant is intended to ensure a record that will affirmatively establish a knowing and voluntary decision by the defendant." *State v. Schumacher*, 452 N.W.2d 345, 347 (N.D. 1990). The court's failure to inform Mr. Lebeau of minimum penalties is not acting in substantial compliance with Rule 11 and conflicts with the clear duty of N.D.R.Crim.P. 11. *See State v. Boushee*, 459 N.W.2d 552, 555-56 (N.D. 1990) (reversed and remanded where the district court failed to inform the defendant of the minimum or maximum penalties until after accepting the plea); *see also Wallace*, 2018 ND 225,¶ 10, 918 N.W.2d 64 (reversed and remanded where the record failed to show the defendant was informed of mandatory minimum penalties); *State v. Schweitzer*, 510 N.W.2d 612, 616 (N.D. 1994)(reversed and remanded because the record did not contain an express statement informing the defendant of the mandatory minimum); *Schumacher*, 452 N.W.2d at 346, 348 (reversed and remanded because the court did not advise the defendant of his mandatory minimum sentencing penalty prior to accepting his guilty plea).

[¶ 15] The caselaw is clear and has repeatedly held that the court must informing the defendant of the mandatory minimum, so the court can determine that the defendant's change of plea is knowingly, voluntarily, and intelligently made. If the record does not reflect that advisement then the

court did not substantially comply with Rule 11. However, "[a]t a change of plea hearing, a trial court is not required to readvise a defendant of each of his rights under N.D.R.Crim.P. 11(b), if the court determines the defendant previously was properly advised of those rights and recalls the advice." *Abdi v. State*, 2000 ND 64, ¶ 15, 608N.W.2d 292 (*citing State v. Gunwall*, 522 N.W.2d 183, 185 (N.D. 1994)). Here the court concluded that Mr. Lebeau was informed of the minimum mandatory penalty at his initial appearance, however he was not. Memorandum and Opinion, #09-2018-CV-3345, ¶ 7.

[¶ 16] 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 to correct a manifest injustice. Because Mr. Lebeau was not properly advised by the court before it accepted his change of plea the trial court did not substantially comply with Rule 11's procedural requirements, and therefore did not ensure Mr. Lebeau was entering a voluntary and intelligent guilty plea. Therefore, Mr. Lebeau should be allowed to withdraw his guilty plea.

CONCLUSION

[¶ 17] WHEREFORE, Mr. Lebeau respectfully requests that the district court's order denying his request to withdraw his plea be reversed to correct a manifest injustice.

Dated this 9th day of September, 2019

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IN THE SUPREME COURT OF NORTH DAKOTA

Raynard Lebeau,	)	**Supreme Court File No. 20190165**
Petitioner and Appellant,	)	**Cass County No. 09-2018-CV-3435**
v.	)	
State of North Dakota,	)	**CERTIFICATE OF COMPLIANCE**
Respondent and Appellee.	)	

[¶ 1] This Appellant's Brief and Appendix complies with the page limit of 38 set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure as it only has 13 pages.

Dated: September 9, 2019.

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IN THE SUPREME COURT OF NORTH DAKOTA

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Raynard Lebeau,	)	**20190165**
	)	
Petitioner and Appellant,	)	**Cass County No.**
	)	**09-2018-CV-3435**
v.	)	
	)	
State of North Dakota,	)	**CERTIFICATE OF SERVICE**
	)	
Respondent and Appellee.	)	

[¶1] The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Appellant's Brief with Certificate of Compliance
Appellant's Appendix

[¶2] And that said copies were served upon:

Birch Burdick, State's Attorney, sa-defense-notices@casscountynd.gov

by electronically filing said documents through the court's electronic filing system and upon:

Raynard Lebeau #55651, c/o ND DOCR, PO Box 5521, Bismarck, ND 58506

By placing a copy of said documents in a sealed envelope with USPS, certified mail.

Dated: September 9, 2019.

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