

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,
Plaintiff/Appellee,

Vs.

David Eugene Tully,
Defendant/Appellant.

Supreme Court No. 20220214

Griggs Co. No. 32-2022-CR-00029

Appeal of Northeast Central District Court Criminal Judgment dated June 30, 2022, the
Honorable Jason McCarthy, Presiding.

BRIEF OF APPELLEE**ORAL ARGUMENT REQUESTED**

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TABLE OF CONTENTS

Table of Contents.....	p. 2
Table of Authorities.....	p.3
Oral Argument Justification.....	¶1
Statement of the Case.....	¶2
Statement of the Facts.....	¶3
Law and Argument.....	¶6
Issues:	
I. The District Court did follow the required procedure in Rule 11(b)(1) of the North Dakota Rules of Criminal Procedure at Defendant David Eugene Tully’s sentencing.....	¶6
Conclusion.....	¶11

TABLE OF AUTHORITIES

CASES

State v. Awad, 2020 ND 66 ¶3, 940 N.W.2d 613.....¶8

State v. Mortrud, 312 N.W.2d 354 (N.D. 1981).....¶8

State v. Yost, 2018 ND 157, ¶ 20, 914 N.W.2d 508.....¶10

RULES

N.D.R.Crime.P. 11(b)(1).....¶6, 8, 11

ORAL ARGUMENT JUSTIFICATION

[¶1] Oral Argument has been requested to emphasize and clarify the Appellee's written arguments on their merits.

STATEMENT OF ISSUES

[¶2] **The District Court did follow the required procedure in Rule 11(b)(1) of the North Dakota Rules of Criminal Procedure at Defendant David Eugene Tully's sentencing.**

STATEMENT OF THE FACTS

[¶3] On March 31, 2022 Defendant, David Eugene Tully, committed the crime of Terrorizing, a Class C Felony. He was charged, on April 1, 2022, in Nelson County District Court by Information accompanied by an Affidavit of Probable Cause.

[¶4] On May 20, 2022, Mr. Tully appeared in district court with his attorney, Jessica Ahrendt. The Court informed Mr. Tully of the charges. Mr. Tully, with the assistance of his court appointed counsel did waive his preliminary hearing, shown in Trial Transcript of May 20th. 2022 pg. 2 L 19-25, pg 3 L 1-15:

THE COURT: Mr. Tully, this is the time and place set for our preliminary hearing and arraignment if necessary on a charge of terrorizing. You're appearing with your court-appointed attorney, Ms. Ahrendt. As we have previously told you, terrorizing is a C felony. It carries a maximum of five years in prison, a \$10,000 fine or both. Previously the judge went through – a judge went through your rights and what you're charged with. Do you have any questions about that information, sir?

THE DEFENDANT: I do have a question, Your Honor.

THE COURT: Okay.

THE DEFENDANT: I was offered a plea deal and I -- I've reviewed it, but I was hoping the prosecution could explain it a little bit more closely --

THE COURT: Okay. Well, first just --

MS. AHRENDT: Nope. That's a question for me and not for the State's attorney.

THE DEFENDANT: I understand.

THE COURT: Okay. My question was do you have any questions about your rights?

THE DEFENDANT: Not my rights. No, Your Honor.

[¶5]On June 30th, 2022, Mr. Tully plead guilty to Terrorizing a Class C Felony and was sentenced by Judge McCarthy in district court. During sentencing, Mr. Tully acknowledged that he didn't have any questions regarding his rights in the Trial

Transcript of June 30th· 2022 pg. 2 L 16-25:

Mr. Tully, your attorney indicated that you wish to enter an open plea. Previously, we went over your rights

DEFENDANT: Yes, we did, Your Honor.

THE COURT: -- and we went over what you're charged with. It's a Class C felony, terrorizing. Carries a maximum of five years in prison, a \$10,000 fine or both. Do you have any questions about any of that information?

DEFENDANT: No, no questions.

LAW AND ARGUMENT

The District Court did follow the required procedure in Rule 11(b)(1) of the North Dakota Rules of Criminal Procedure at Defendant David Eugene Tully's sentencing.

[¶6]The Court must inform a defendant of his rights and of the charges against him in accordance with N.D.R.Crime.P. 11(b)(1)(A)-(J). The rule is as follows:

b) Advice to defendant.

(1) The court may not accept a plea of guilty without first, by addressing the defendant personally [except as provided in Rule 43(b)] in open court, informing the defendant of and determining that the defendant understands 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;

(I) the court's authority to order restitution; and

(J) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

[¶6-A]Mr. Tully, first acknowledged his right on the date of his preliminary hearing. The Court informed Mr. Tully of the charges. Mr. Tully, with the assistance of his court appointed counsel did waive his preliminary hearing, shown in Trial Transcript of May 20th· 2022 pg. 2 L 19-25, pg 3 L 1-15:

THE COURT: Mr. Tully, this is the time and place set for our preliminary hearing and arraignment if necessary on a charge of terrorizing. You're appearing with your court-appointed attorney, Ms. Ahrendt. As we have previously told you, terrorizing is a C felony. It carries a maximum of five years in prison, a \$10,000 fine or both. Previously the judge went through – a judge went through your rights and what you're charged with. Do you have any questions about that information, sir?

THE DEFENDANT: I do have a question, Your Honor.

THE COURT: Okay.

THE DEFENDANT: I was offered a plea deal and I -- I've reviewed it, but I was hoping the prosecution could explain it a little bit more closely --

THE COURT: Okay. Well, first just --

MS. AHRENDT: Nope. That's a question for me and not for the State's attorney.

THE DEFENDANT: I understand.

THE COURT: Okay. My question was do you have any questions about your rights?

THE DEFENDANT: Not my rights. No, Your Honor.

[¶7]At his change of plea and sentencing, Mr. Tully further acknowledged the Court's previous recitation of his rights. The Court further inquired after informing him of the charge and the punishment, Mr. Tully acknowledged that he didn't have any questions regarding his rights in the Trial Transcript of June 30th· 2022 pg. 2 L 16-25:

Mr. Tully, your attorney indicated that you wish to enter an open plea. Previously, we went over your rights

DEFENDANT: Yes, we did, Your Honor.

THE COURT: -- and we went over what you're charged with. It's a Class C felony, terrorizing. Carries a maximum of five years in prison, a \$10,000 fine or both. Do you have any questions about any of that information?

DEFENDANT: No, no questions.

THE COURT: Okay.

[¶8]The Court previously went through Mr. Tully's rights at least one occasion prior to his waiver of Preliminary Hearing. Mr. Tully acknowledged that the rights were recited. Mr. Tully's situation is similar to *State v. Awad*, 2020 ND 66 ¶3, 940 N.W.2d 613. In *Awad*, the defendant was read his rights during his initial appearance and acknowledged that the rights had been read during his entry of plea.

The required advisory about possible immigration consequences, like the other advisories in N.D.R.Crim.P. 11(b)(1), need not be repeated immediately prior to entry of a guilty plea if the advisory was given at an earlier hearing and the record reflects the defendant's knowledge of his rights.

Id. See *State v. Yost*, 2018 ND 157, ¶ 20, 914 N.W.2d 508. In *Awad*, the court asked,

"Do you have any questions about the rights that we went over earlier, sir?" *Awad* responded, "No, Your Honor." We conclude the district court did not misapply the law by failing to read *Awad* under Rule 11(b)(1) at the change of plea hearing and thus it did not abuse its discretion..."

State v. Awad, 2020 ND 66 at ¶3. Here, the trial Court treated the defendant in a similar manner in advising the Defendant of his rights during previous court sessions and receiving the affirmative acknowledgement that the Defendant didn't have any questions about his rights.

[¶9]Mr. Tully argues that the court did not make an appropriate finding of factual basis to convict Mr. Tully. In this instance, the court did make a finding of factual basis and Mr. Tully did agree with the court's factual basis as shown in the Trial Transcript of June 30· 2022 pg. 3 L 21-25, pg 4 L 1-12:

MS. AHRENDT: It would be under the Alford basis which is subsection (b) now essentially that is a plea guilty. He does not agree to all of the factual basis, but does believe that there's a substantial likelihood if he went to trial he would be convicted of the charges.

THE COURT: Okay. So you're pleading guilty pursuant -- you're entering an Alford plea of guilty, Mr. Tully?

DEFENDANT: Yes, Your Honor.

THE COURT: Have any threats or promises been made to get you to enter this plea?

DEFENDANT: No threats, no promises, Your Honor.

THE COURT: Okay. This is a voluntary plea on your part?

DEFENDANT: It is.

THE COURT: And you understand that by pleading guilty, Mr. Tully, you're giving up your right to trial and your right to confront witnesses?

DEFENDANT: I'm also saving the county some money. Yes, Your Honor.

THE COURT: Okay. And you further admit or agree that if this case were to go to trial, there would be -- and presented to a finder of fact -- there would be a substantial likelihood that you would be convicted?

DEFENDANT: Also exposure to further embarrassment, Your Honor, yes.

THE COURT: You agree? Okay. The Court will accept your plea, find that it's been voluntarily and knowingly made and find that there's a sufficient factual basis for it.

[¶10]This Court has previously found that Rule 11 requires the court to address the defendant personally in order to determine the factual basis for the guilty plea and to assure that it is knowingly and voluntarily made. *State v. Mortrud*, 312 N.W.2d 354 (N.D. 1981). Here, the court specifically asked if his guilty plea was freely and voluntarily made and if Mr. Tully agreed with the factual basis.

CONCLUSION

[¶11]The State respectfully requests that this Court affirm the district court's sentence.

Respectfully submitted this 30th day of September, 2022.

/s/ Jayme Tenneson_____
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CERTIFICATE OF COMPLIANCE

[¶1]The undersigned, hereby certifies, in compliance with Rule 32(e) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with the proportional type face and the total number of pages in the above brief totals 10 pages.

[¶2]This Certificate of Compliance is drafted to ensure the filings on this day are in compliance with the rules and specifically pursuant to N.D.R.App.P. 32(e).

Respectfully submitted this 30th day of September, 2021.

/s/Jayme Tenneson

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[¶1] I, Jayme Tenneson, a duly licensed attorney in the State of North Dakota, hereby certify that on the 30th day of September, 2022, I provided true and correct copies of the following:

- Appellee's Brief
- Certificate of Compliance
- Service Document

by electronic means through the court's electronic filing system, upon Benjamin C. Pulkrabek, Attorney for Appellant, at pulkrabek@lawyer.com. The Supreme Court of North Dakota at supclerkofcourt@ndcourts.gov.

[¶3]Respectfully submitted this 30th Day of September.

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