980163

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,

Plaintiff, Appellee,

vs.

Glenda Jean Jones,

Appellant.

BRIEF OF APPELLEE

APPEAL FROM DISTRICT COURT,
EAST-CENTRAL JUDICIAL DISTRICT
CASS COUNTY, NORTH DAKOTA

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6. The Defendant was not entitled to relief under N.D.C.C. § 19-03.1-23.2 because she was being sentenced on a second offense under which mitigating factors or circumstances could not have justified a deviation from the minimum mandatory sentence.

STATEMENT OF THE CASE

The Defendant, Glenda Jean Jones, plead guilty to two counts of delivery of a controlled substance in violation of N.C.C.C. § 19-03.1-23(1). Each count is a class A felony punishable by 20 years imprisonment each. The district court sentenced the Defendant to serve a year and a day on count one and five years on count two, the sentences to run concurrently. The Defendant appeals from the Criminal Judgment and Conviction entered on May 13, 1998.

The facts of this case are essentially undisputed. On April 13, 1997, the Defendant and her friend, Tanya Peterson, went to the Ramada Suites in Fargo, North Dakota, and sold an "eight ball" of cocaine to a confidential informant for $300. On April 16, 1997, the Defendant and Ms. Peterson sold another "eight ball" of cocaine to the same confidential informant at the same location. On April 24, 1997, the Defendant, herself, sold one gram of cocaine to the same confidential informant for $100. The court issued a warrant for the Defendant and Ms. Peterson's arrest.

The original information charged the Defendant with

three counts of delivery of a controlled substance. Based on the Defendant's cooperation with law enforcement resulting in a number of drug arrests, the State agreed to dismiss count one in exchange for the Defendant's guilty pleas to counts two and three. The district court sentenced the Defendant to serve the minimum mandatory, a year and a day, on count two and the minimum mandatory, five years, on count three. The sentences were to run concurrently. The district court did not order a drug addiction evaluation.

The Defendant appeals, claiming the court erred in failing to order the drug addition evaluation and the district court erred in imposing a second offense minimum mandatory five year sentence on count three.

ARGUMENT

IV. THE DISTRICT COURT CORRECTLY IMPOSED THE MINIMUM MANDATORY SENTENCE FOR A SECOND OFFENSE OF DELIVERY OF A CONTROLLED SUBSTANCE BECAUSE IT IS THE PRIOR OFFENSE, ITSELF, THAT TRIGGERS THE MINIMUM MANDATORY SENTENCE, NOT A PRIOR CONVICTION.

This is an appeal from a guilty plea. "The standard for review of guilty pleas after sentence is 'manifest injustice.'" *State v. Thompson*, 504 N.W.2d 315, 319 (N.D. 1993). "The defendant has the burden of proof, and the

decision is within the trial court's discretion." *Id.* On appeal, this Court decides if there has been an abuse of discretion. *Id.* "A trial court abuses its discretion when it acts in an arbitrary, unreasonable, or capricious manner, or misinterprets or misapplies the law." *State v. Sisson*, 1997 ND 158, ¶7, 567 N.W.2d 839.

In this case, the Defendant argues the trial court misinterpreted N.D.C.C. § 19-03.1-23 by applying the mandatory minimum sentence for a second offense when the Defendant had not yet been convicted of the first offense. "The interpretation of a statute is a question of law which is fully reviewable by this court on appeal." *State v. Schlotman*, 1998 ND 39, ¶10, 575 N.W.2d 208.

A. <u>The Defendant was convicted of a second "offense" as defined by N.D.C.C. § 12.1-01-04(20).</u>

Under N.D.C.C. § 19-03.1-23(1), "it is unlawful for any person to wilfully, as defined in section 12.1-02-02, manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance."

> "Any person who violates this subsection with respect to . . . [a] controlled substance classified in schedule I or II which is a narcotic drug, or methamphetamine, is guilty of a class A felony and must be sentenced: (1)For a first

> offense, to imprisonment for at least a year and a day. (2) For a second offense, to imprisonment for at least five years."

N.D.C.C. § 19-03.1-23(1). The Defendant in the present case delivered cocaine to a confidential informant. Cocaine is a schedule II controlled substance and is a narcotic drug. *State v. Kainz*, 321 N.W.2d 478 (N.D. 1982). Therefore, the penalties contained in N.D.C.C. § 19-03.1-23(1) would apply.

The statute specifically uses the word "offense" to trigger the mandatory penalties. The Defendant argues the statute requires a prior "conviction" before the minimum five years on a second offense could be imposed. Brief of Appellant at 7.

In construing statutes, this Court's primary goal is to determine the intent of the legislature. *State v. Schindele*, 540 N.W.2d 139 (N.D. 1995). To find legislative intent, we look first to the language of the statute itself and its "plain, ordinary, and commonly understood meaning." *Id.*(quoting *State v. Thill*, 468 N.W.2d 643, 646 (N.D. 1991)). "Offense" is not defined in N.D.C.C. chapter 19-03.1. It is, however, defined in chapter 12.1-01, the Criminal Code.

Under N.D.C.C. § 12.1-01-04(20), "'[o]ffense' means conduct for which a term of imprisonment or a fine is authorized by statute after conviction." N.D.C.C. § 12.1-01-04(20). In *State v. Coutts*, this Court recognized "the delivery of a controlled substance constitutes an 'offense' as defined in § 12.1-01-04(20)." *Coutts*, 364 N.W.2d 88 (N.D. 1985). Because the Defendant did, in fact, deliver a controlled substance on at least two occasions, the district court correctly sentenced her to the minimum five years imprisonment.

Furthermore, "[w]henever the meaning of a word or phrase is defined in any statute, such definition is applicable to the same word or phrase wherever it occurs in the same or subsequent statutes, except when a contrary intention plainly appears." N.D.C.C. 1-01-09; *see also State v. Huber*, 555 N.W.2d 791 (N.D. 1996).

The State maintains the North Dakota Legislature clearly meant the definition of "offense" contained in N.D.C.C. § 12.1-01-04(20) to apply to the word "offense" in N.D.C.C. § 19-03.1-23. Nothing in the legislative history of N.D.C.C. § 19-03.1-23 suggests some other definition

would apply. On the contrary, the testimony suggests the sale, itself, is the "offense" triggering the enhanced penalties. *See* Testimony of Senator Maxson of 3/17/93 ("If somebody *sells* a schedule 1 or 2 drug a second or third time" the minimum mandatory penalties apply (emphasis added)).

When the Legislature means "conviction," it says "conviction." *See* N.D.C.C. § 40-18-12.("If a person is *convicted* under an ordinance prohibiting driving or being in physical control of a vehicle while under the influence of an intoxicating liquor or a narcotic drug, the court shall order the person to an appropriate licensed addiction treatment program for addiction evaluation" (emphasis added)). Because the Defendant was being sentenced on a second "offense," the trial court correctly sentenced her to the minimum mandatory five years imprisonment.

B. Other courts have concluded the second offense, itself, triggers the enhanced penalty.

At least one court has addressed whether there must be a conviction on the first offense for purposes of imposing enhanced penalties on the second offense. In *Gargliano v. State*, an undercover narcotics officer purchased cocaine

from the defendant in December of 1989, in January of 1990, and in December of 1990. *Gargliano v. State*, 622 A.2d 767, 768 (Md. Ct. Spec. App. 1993). After the December 1990 sale, the defendant was arrested and charged with all three sales. *Id.* He was convicted of the first two prior to his trial and conviction on the third sale. *Id.* Upon conviction on the third sale, the court sentenced the defendant to the mandatory subsequent offense sentence of ten years imprisonment without parole. *Id.*

The applicable statute states, "[a] person who is convicted [of] . . . distributing a schedule I or II narcotic drug . . . shall be sentenced to imprisonment for not less that (sic) 10 years if the person previously has been convicted [of] . . . manufacturing or distributing a schedule I or II narcotic drug." *Gargliano* at 766-67 (quoting Md. Code Ann. Art. 27 § 286(c)). Because the statute required only a prior "conviction," the court concluded that requirement was clearly met. Therefore, the trial court correctly sentenced the defendant applying the enhanced penalty for a subsequent offense. *Id.* at 771-72. The court explained "[n]one of these statutes requires that

the prior conviction occur before the subsequent offense is committed." *Id.* at 774. The plain meaning of the statute governed the court's decision.

In another case involving enhanced penalties, the Eighth Circuit concluded the enhanced penalty applied even though the two offenses were charged in the same indictment. *See U.S. v. Foote*, 898 F.2d 659 (8th Cir. 1990). "[W]hile the term 'subsequent' means 'following in time, order, or place,' and implies that the second conviction must occur on a later date than the first conviction, the term 'second' merely means 'another or additional conviction,' and may apply to two convictions contained in the same indictment." *Id.* at 667 (quoting *State v. Rawlings*, 821 F.2d 1543 (11th Cir.), *cert. denied*, 484 U.S. 979 (1987)) (interpreting 18 U.S.C. § 924(c) which enhances penalties for a second offense of using a firearm in the commission of a crime of violence or drug trafficking). The statute "does not require separate prosecutions; it is sufficient that the offenses occurred at different times." *Rodriguez v. U.S.*, 17 F.3d 225 (8th Cir. 1994).

C. Public policy mandates repeat offenders be subject to enhanced penalties whether or not the offender

has been convicted of the previous offense before the commission of the subsequent offense.

Finally, as a matter of public policy, enhanced penalties should apply to a second or subsequent offense. The North Dakota Legislature has enhanced penalties for drug dealers who sell drugs within one thousand feet of a school, whether or not the offenders know they are within one thousand feet of a school. *See* N.D.C.C. § 19-03.1-23.1. The Legislature has also enhanced penalties for adults who sell drugs to minors or use minors to sell the drugs. *See id.* There is no indication the adult must be aware the other person is a minor. The laws under the Uniform Controlled Substances Act are clear - North Dakota is tough on drug dealers.

In this case, the Defendant chose to sell cocaine to a confidential informant on three different occasions. Each of these is a criminal act. Therefore, the Defendant should be subject to the mandatory minimum sentence for selling drugs on more than one occasion because that is exactly what she did.

II THE DISTRICT COURT'S FAILURE TO ORDER A DRUG ADDICTION EVALUATION AS REQUIRED BY N.D.C.C. § 19-03.1-23(7) WAS NOT REVERSIBLE ERROR BECAUSE THE DISTRICT COURT IMPOSED THE LEAST POSSIBLE SENTENCE ON THE TWO COUNTS OF DELIVERY OF A CONTROLLED SUBSTANCE.

Under N.D.C.C. § 19-03.1-23(7), a person guilty of delivery of a controlled substance "must undergo a drug addiction evaluation by an appropriate licensed addiction treatment program." The drug addiction evaluation "must be submitted to the court for consideration when imposing punishment." N.D.C.C. § 19-03.1-23(7). The State concedes the district court should have ordered the drug addiction evaluation and did not. We maintain, however, the failure to order the drug addiction evaluation was harmless error because the Defendant received the least possible sentence she could have received.

Under N.D.R.Crim.P. 52(a) "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." While a drug addiction evaluation can provide mitigating or aggravating circumstances for purposes of sentencing, it could not authorize the trial court to deviate from the minimum mandatory. By enacting a statute providing for mandatory prison terms the legislature has removed all discretionary

power from the trial court as to the minimum sentence to be imposed upon an individual whose crime falls within the purview of statute." *State v. Wika*, 1998 ND 33, #16, 574 N.W.2d 831; *see also State v. Clinkscales*, 536 N.W.2d 661,666 (N.D. 1995).

Because the district court could not have given the Defendant less than five years imprisonment, the court's failure to order the drug addiction evaluation was harmless error.

III THE COURT CORRECTLY REFUSED TO CONSIDER A SUSPENDED OR DEFERRED SENTENCE UNDER N.D.C.C. § 19-03.1-24 BECAUSE THE DEFENDANT WAS BEING SENTENCED ON A SECOND OFFENSE.

The district court sentence the Defendant to the minimum mandatory sentence. The only possible deviation from the minimum mandatory sentence is provided under N.D.C.C. § 19-03.1-23.2. "[T]he court may not defer imposition of sentence, nor may the court suspend any part of a specified mandatory term, either at the time of or after the imposition of the sentence, unless the court first finds that the offense was the defendant's first violation of this chapter and that extenuating or mitigating

circumstances exist which justify a suspension." N.D.C.C. § 19-03.1-23.2.

This was not the Defendant's first violation of this chapter. She violated N.D.C.C. chapter 19-03.1 at least two times. Because this was the Defendant's second violation of N.D.C.C. chapter 19-03.1, the trial court could not have deferred or suspended her sentence under N.D.C.C. § 19-03.1-23.2.

Furthermore, nothing in the record suggests there were extenuating or mitigating circumstances justifying a suspension of the minimum mandatory sentence. The district court made it clear: "You understand the minimum mandatory penalty, the state's position, is five years' imprisonment on the second count?" Tr. at 7. The Defendant answered "yes." Tr. at 7.

CONCLUSION

The Defendant was clearly convicted of a second offense of delivery of a controlled substance as defined by North Dakota law. The district court sentenced her to the minimum mandatory sentence of five years imprisonment. The court's failure to order a drug addiction evaluation was harmless

error because it could not have served to reduce her sentence. Because this was her second violation, the court could not have deviated from the minimum mandatory sentence.

Therefore, the State respectfully requests this Court affirm the sentence imposed by the trial court.

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