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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 980163
District Court No. Cr-97-4560

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

AUG 27 1998

STATE OF NORTH DAKOTA

State of North Dakota,

Appellee,

vs.

Glenda Jean Jones,

Appellant.

APPEAL FROM THE DISTRICT COURT
The Honorable Frank L. Racek Presiding

APPELLANT'S BRIEF

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ISSUES

1. Did the trial court commit error by not ordering a drug addiction evaluation pursuant to and as required by NDCC 19-03.1-23 (7).
2. Did the trial court commit error by imposing a second offense minimum mandatory sentence pursuant to and as required by NDCC 19-03.1-23(2) when the Defendant/Appellant had no prior drug related convictions under NDCC 19-03.1-23.
3. Did the trial court commit error by not granting the Defendant/Appellant relief pursuant to and as allowed by NDCC 19-03.1-23.2 when the Defendant/Appellant had no prior drug related convictions under NDCC 19-03.1-23 and there were identified mitigating factors and circumstances that would have justified a partial suspension of the minimum mandatory sentence.

STATEMENT OF THE CASE

This case involves a series of drug deliveries. All of the involved deliveries were instigated by a confidential informant at the request of the government. The Defendant/Appellant, Glenda Jones, was charged in District Court, County of Cass, State of North Dakota, with 3 counts of Delivery of a Controlled Substance, in violation of Section 19-03.1-23, NDCC, a Class A Felony. (Transcript of Sentencing Pg. 3.) The State moved to dismiss the first count in exchange for Ms. Jones's pleas to Counts 2 and 3. The Defendant/Appellant pled guilty to Counts 2 and 3. (Tr. S. at 5.) Judge Frank Racek sentenced the Defendant/Appellant to one year and a day on Count 2 and five years on Count 3 as per the minimum mandatory sentencing guidelines. (Tr.S. at 17.) The sentences were concurrent. (Id.)

The original information indicated there were three separate incidents that took place, April 13, April 16, and April 24, 1997, the first two of which involved both the original co-defendant and Ms. Jones. (Tr.S at 9.)

STATEMENT OF FACTS

On April 13, 1997 the government, through a confidential informant, arranged to buy a quantity of cocaine from the original co-defendant, Tanya Peterson. This transaction took place in the parking lot of the Ramada Suites in Fargo, North Dakota.

Tanya Peterson was driven to the Ramada Suites by Glenda Jones. Prior to this time there was no known indication or information that Glenda Jones was involved in any drug related trafficking. The confidential informant purchased an eight ball of cocaine from Peterson for \$300.00.

On April 16, 1997, the government, again through the confidential informant, initiated a search buy of cocaine from Jones and Peterson. This transaction again took place at the Ramada Suites in Fargo. The confidential informant initially talked to the original co-defendant, Peterson. Peterson was again driven to the Ramada Suites by Jones in Jones's vehicle. The confidential informant purchased an eight ball of cocaine for \$290.00.

On April 24, 1997, the government, again through the same confidential informant, initiated a buy of one gram of cocaine, this time individually from Glenda Jones. Subsequent to this sale a warrant was issued for the arrest of Jones and Peterson; they were originally both charged on the same Information. The charges against Peterson were subsequently dismissed and refiled on a separate Information due to an arrest/booking mistake. The Amended Information Jones was sentenced on was then filed. The cases against Jones and Peterson did not tract together and were ultimately handled by different sentencing Judges.

It should be noted that Jones, upon discovering that there was a warrant, voluntarily turned herself in. Upon her release on bond Jones, cooperated with the government, testified in front of a federal grand jury, unsuccessfully attempted to initiate controlled buys, and ultimately did provide information that led to the seizure of a large amount of marijuana.

Peterson ultimately pled guilty to one count of Delivery of a Controlled Substance, cocaine, and received a

sentence of five years with all but eighteen months suspended. On May 11, 1998 Jones plead guilty to two counts of Delivery of a Controlled Substance, cocaine, and was sentenced to one year and one day on Count Two and five years on Count Three, concurrent with Count Two. (Criminal Judgment Appendix pg 10)

At sentencing the defendant unsuccessfully argued that it was improper for the state to argue for and for the Court to sentence Jones to a second offense minimum mandatory sentence pursuant to NDCC 19-03.1-23 (1) a (2) because she had no priors. The trial court disagreed.

Defendant also argued to the Court that 19-03.1-23.2 was applicable because the Defendant had no prior drug convictions. The trial court disagreed and took the position that the plea to Count Two constituted a prior offense and precluded the trial court from suspending any of the mandatory five year sentence it had imposed on Count Three.

The sentencing judge clearly stated reservations and problems with the statutory language of both 19-03.1-23 and

19-03.1-23.2 (Transcript page 16 line 18- page 18 line 4).

The transcript is also bereft of any mention of the drug addiction evaluation as mandated by NDCC 19-03.1-23(7).

LAW AND ARGUMENT

I. THE TRIAL JUDGE ERRED WHEN HE FAILED TO ORDER A DRUG ADDICTION EVALUATION OF THE PETITIONER AS REQUIRED BY SECTION 19-03.1-23(7).

NDCC Section 19-03.1-23(7) states: "A person who violates this chapter must undergo a drug addiction evaluation by an appropriate licensed addiction treatment program. The evaluation must indicate the prospects for rehabilitation and whether addiction treatment is required. This evaluation must be submitted to the court for consideration when imposing punishment for a violation of this chapter."

When interpreting statutory language, the words contained within the statute are given their plain meaning. The Supreme Court construes statutes to avoid absurd and ludicrous results. State v. Holecek, 545 N.W.2d 800, (1996). When a judge makes a sentencing decision, his decision is to be an informed one. An informed decision requires such information that the judge may make his decision with the best interest of the state, the defendant and justice in mind.

In the present case, the record is bereft of any indication that such a report was presented to the judge or exists. The only factors considered were the recommendations of counsel for the government and the counsel for the defendant, and a plea for lenience from the Defendant/Appellant's husband, Ronnie Senkiew.

The statute requires a report from an appropriate licensed addiction treatment program. None of the previously mentioned people qualify. Therefore, the judge was unable to determine the Defendant/Appellant's probability for rehabilitation. The possibility of rehabilitation is one mitigating factor the judge should take under consideration when passing sentence. Absent such an evaluation the case should be remanded to the trial court.

II. ALTHOUGH SENTENCING UNDER 19-03.1-23 IS ALLEGEDLY MANDATORY, THE PRESENCE OF 19-03.1-23 (7) AND THE PRESENCE OF 19-03.1-23.2 ALLOWS A JUDGE DISCRETION IN PASSING SENTENCE SUCH THAT THE JUDGE MAY TAKE MITIGATING FACTORS UNDER CONSIDERATION.

NDCC Section 19-03.1-23.2 states in relevant part:

The court may not defer imposition of sentence, nor may the court suspend any part of a specified

mandatory term... unless the court first finds that the offense was the defendant's first violation of this chapter and that extenuating or mitigating circumstances exist that justify a suspension.

The Court sentenced the Defendant on the multi count infraction pursuant to NDCC 19-03-23(1)a(1) on Count 2 and 19-03-23(1)a(2) on Count 3. The Court ran these sentences concurrently exposing the Defendant/Appellant to a prison sentence of five years. Defendant/Appellant contends that the Defendant should have been exposed to a minimum mandatory penalty of one year and one day. Although the Court would have sentenced the Defendant for up to twenty years on either count, the minimum mandatory sentence should not have been imposed because the Defendant/Appellant had no prior convictions under 19-03.1-23.

The facts are clear. The government initiated a series of transactions in which the Defendant/Appellant started out as only a minor player. The trial court is the only situation in which the Defendant/Appellant actually acted alone and made a controlled substance delivery.

It is clear that the government could have arrested the Defendant/Appellant after the first controlled buy, however, the government chose to initiate two additional transactions. This conduct amounts to sentence entrapment and is unfair to the Defendant.

To mandate the 19-03.1-23(1)a(2) is applicable in this case creates what might be termed to be a ludicrous result pursuant to the holding in Holecek. The record is clear that the Defendant/Appellant had no prior drug related history, she should have been sentenced pursuant to NDCC 19-03-23(1)a(1) to a minimum mandatory sentence of one year and one day.

It is also important to note and to consider that NDCC 19-03.1 does not specifically define offense as used in the subsequent parts of the chapter. Absent a specific definition the Defendant/Appellant looks to the court for such a definition and interpretation. Absent a specific definition the benefit of statutory interpretation should be given to the Defendant/Appellant.

III. THE TRIAL JUDGE ERRED BY REFUSING TO GIVE CONSIDERATION TO EXERCISING DISCRETION IN REGARD TO A SUSPENSION PURSUANT TO NDCC 19-03.2-23.2.

This statute clearly states that the judge may take mitigating factors under consideration when determining whether or not to suspend all or part of a minimum mandatory sentence pursuant to NDCC 19-03.1-23. Logic dictates that the legislation intended that the court have that discretion when mitigating factors are present.

In the instant fact situation those mitigating factors are present and were brought to the trial court's attention. Specifically that prior to the convictions entered pursuant to the Defendant/Appellant's guilty pleas to Counts 2 and 3 of the Amended Information she had no relevant criminal history in regard to 19-03.1-23. Additionally there was ample and sufficient evidence that the Defendant/Appellant had cooperated in regard to subsequent drug investigations.

The sentencing judge clearly stated that he did not have statutory authority to suspend part of the sentence on Count 3 because it was a second offense, Count 2, being the first offense, under 19-03.1-23. Defendant/Appellant

contends that the Information as a whole, and the counts plead guilty to, should be construed as a first offense pursuant to NDCC 19-03.1-23(2) and that the Court did have the authority to suspend all or part of the minimum mandatory second offense penalty pursuant to NDCC 19-03.1-23(1)a(2).

The rationale alluded to earlier is applicable, that being that the government engaged in sentence entrapment by initiating a series of controlled buys over a very short period of time, thus aggregating the Defendant/Appellants record and exposing Defendant/Appellant to an enhanced sentence.

To prohibit the Court from suspending all or part of the five year sentence is grossly unfair to the Defendant/Appellant and is something in all likelihood intended by the legislature.

The "first offense" language in 19-03-23.2 should be defined as first conviction and the Information should be considered as a whole. To do otherwise would violate the stated rationale in State v. Holecek.

SUMMARY AND CONCLUSION OF ARGUMENT

This case appears to be one of first impression for the Court. Defendant/Appellant was unable to find any decision of this court that dealt with the issues in questions.

This matter should be remanded to the District Court for resentencing for the following reasons:

1. The language of 19-03-1-23(7) is mandatory and it is clear that the drug addiction evaluation was not ordered by the Court as required. It is also clear that the evaluation might well provide the Court with reason to suspend part or all of the sentence pursuant to NDCC 19-03-23(2).

2. The Court erred in imposing a minimum mandatory second offense penalty pursuant to NDCC 19-03.1-23(1)a(2).

3. That the trial court erred in finding that the Defendant was not entitled to the relief allowed by 19-03.1-

23.2, that such relief is discretionary because this is the
Defendant's first conviction pursuant to NDCC 19-03-23.1.

Dated this 26 day of August, 1998.



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