

**ORIGINAL**

**IN THE SUPREME COURT**

**990197**

**STATE OF NORTH DAKOTA**

**FILED**  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

**SEP 13 1999**

State of North Dakota, )  
)  
)  
Plaintiff/Appellee, )  
)  
-vs- )  
)  
Patrick J. Farrell, )  
)  
Defendant/Appellant.)

**SUPREME COURT NO. 990197** STATE OF NORTH DAKOTA

**DISTRICT COURT NO. CR-98-2729**

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**BRIEF OF DEFENDANT/APPELLANT  
PATRICK J. FARRELL**

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APPEAL FROM CRIMINAL JUDGMENT AND COMMITMENT  
ENTERED ON JUNE 24, 1999  
IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA  
THE HONORABLE MICHAEL O. MCGUIRE

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## STATEMENT OF THE CASE

This is an appeal from a Criminal Judgment and Commitment entered on the 24<sup>th</sup> day of June, 1999, by the Court, the Honorable Michael O. McGuire, Judge of the District Court, presiding, as a result of the Defendant, Patrick J. Farrell's plea of guilty (App. at 6 - 11).<sup>1</sup> (Docket Nos. 21 & 22).

Mr. Farrell was originally charged by information with one count of Forgery, a Class C Felony, in violation of **NDCC Section 12.1-24-01**. (Docket No. 1). An Amended Information was filed, adding the charge of Burglary, a class C Felony, in violation of **NDCC Section 12.1-22-02**. (Docket No.4). A Second Amended Information containing the same charges was filed on September 17, 1998. (Docket No. 7 & Appendix 4).<sup>2</sup> Mr. Farrell was arrested on a warrant, and made his first appearance on May 28, 1999. Bond was set and counsel was appointed. (See the Transcript of the proceeding of May 28, 1999, at pages 1-6, and documents at Docket Nos. 9 - 15).<sup>3</sup>

A preliminary hearing was set for June 17, 1999 at 1:30 p.m. On June 17, 1999, Mr. Farrell appeared with his court-appointed attorney and waived his right to a preliminary hearing and entered a plea of guilty to Count One, the Forgery County of the Second Amended Information, the State having agreed to dismiss

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<sup>1</sup>**Defendant Patrick J. Farrell shall be referred to herein as Mr. Farrell.**

<sup>2</sup>**The Appendix will be referred to herein as App., followed by the page number.**

<sup>3</sup>**There are two transcripts, which will be referred to herein by the date and the page number, such as 5-28-99 Tr. 1-6, or 6-17-99 Tr. 1.**

Count Two, the Burglary Count. (See 6-17-99 Tr. 1-11). On the plea of guilty, the Court sentenced Mr. Farrell to Five Years in prison, to serve three years, and suspending the balance for two years, and placing him on supervised probation for the remaining two years. He was also required to pay restitution of \$1,200, probation costs of \$30 per month, and Attorney fees of \$300 per month. (Docket Nos. 20 -22 and 6-17-99 Tr. 8 - 11). A Notice of Appeal and an Order for transcript were filed on June 30, 1999 (Docket Nos. 23 - 25 & App. 12).

### **STATEMENT OF THE ISSUES**

I. Whether the Trial Court erred by not complying with the Requirements of Rule 11(c), North Dakota Rules of Criminal Procedure, by failing to fully inquire of Patrick J. Farrell as to whether his guilty plea resulted from previous discussions with the prosecuting attorney.

II. Whether Patrick J. Farrell's guilty plea was voluntary when he was not properly advised that the Court was not bound by the State's recommended sentence.

### **STATEMENT OF FACTS**

Mr. Farrell appeared in Court on June 17, 1999, the date set for his preliminary hearing. (Docket No. 20; App. 2). Mr. Farrell had been charged with Burglary and Forgery. (Second Amended Information at App. 4). Fargo Police were dispatched to the State Bank of Fargo to investigate a suspected forgery. (6-17-99 Tr. at 5). The factual basis for Mr. Farrell's plea to the Forgery Count was that a customer's farm had been burglarized, and some checks had been stolen (6-17-99 Tr. 5). Mr. Farrell had come into the bank and attempted to cash one of the

stolen checks, which he had made out to himself in the sum of \$1,200. Mr. Farrell's identity was confirmed by surveillance camera photos, the Minnesota Driver's license he used, and a photo from a Minnesota correctional facility. (6-17-99 Tr. 5).

Mr. Farrell entered a plea of guilty to the Forgery Count, and the Court proceeded to have the following colloquy with Mr. Farrell:

(6-17-99 Tr. 5 - 11)

Court: All right and what plea again do you anticipate, counselor?

Mr. Nordeng: Guilty, Your Honor.

Court: To Count One, Forgery?

Mr. Nordeng: Yes.

Court: Okay. Then Mr. Farrell, I'm going to ask you some questions and ask that you answer them out loud so the microphone will pick up your answer. Okay?

Mr. Farrell: Okay.

Court: All right. First of all, Mr. Farrell, you understand that you have the right to plead guilty or not guilty as you wish to Count One, Forgery?

Mr. Farrell: Yes, I do.

Court: And you understand the nature of this charge? What it's about?

Mr. Farrell: Yes.

Court: Okay. You understand, sir, that if you plead guilty the maximum penalty that you could receive, it being a Class C Felony, is five years in prison and/or a Five Thousand Dollar fine?

Mr. Farrell: Right.

Court: Okay. And did you hear and understand the Constitutional Rights that the Court gave you on an earlier date?

Mr. Farrell: Yes.

Court: And do you understand that if you plead guilty, you'd be waiving your right to any trial proceedings of any kind, including your right to cross-examine those witnesses who would have appeared to testify against you at trial, if you had one?

Mr. Farrell: Right.

Court: And as (sic) anyone promised your (sic) anything or threatened you in any way or attempted to use force against you to get you to enter a guilty plea here today?

Mr. Farrell: No, sir.

Court: Are you satisfied with your attorney's representation to this point in the proceedings?

Mr. Farrell: Yes, I am.

Court: Are you under the influence of any drugs including alcohol at this time?

Mr. Farrell: No.

Court: Is there any legal reason I should not take your client's plea, Mr. Nordeng?

Mr. Nordeng: No.

Court: How say you Patrick John Farrell...guilty or not guilty?

Mr. Farrell: Guilty.

Court: Your guilty plea is on the record. The Court finds it to be voluntary. Can you state an underlying factual basis which would allow the Court to accept the plea, counselor.

Ms. Molick: Yes, Your Honor ... (recites facts).

Court: Okay. All right, thank you. And, sir, as far as you know is that essentially what happened to you?

Mr. Farrell: Yes.

Court: All right. The Court finds there is a sufficient underlying factual basis. The Court accepts the plea. The Defendant stands convicted as charged. And what is the State's recommendation and any priors?

Ms. Molick: Your Honor, the State will be recommending a year and a day on — a year and a day on Count One, to be served concurrent with his sentence that he's serving now....

.... (discussion had of Mr. Farrell's record and current charges in other jurisdictions)....

(6-17-99 Tr. at 7, line 9):

Court: Okay then, Count Two Burglary is ordered dismissed with prejudice. And is there anything that you wish to state, Mr. Nordeng?

Mr. Nordeng: Your Honor, I would ask the Court to impose one year and one day. Basically, what is being accomplished is placing another felony on his record. He is incarcerated in the State of Minnesota....

Court: Anything you wish to state, sir?

Mr. Farrell: No, sir.

Court: How old are you, Mr. Farrell?

Mr. Farrell: 35.

Court: You're not going to stop this, are you?

Mr. Farrell: Oh, I believe I am.

Court: Well, you seem to have quite a habit here. You've got a pretty good record going. By that I mean pretty bad record, actually. And I don't know that we can get the money out of you or not. So it is the order and sentence of the court that, Patrick John Farrell, on Count One, Forgery, a Class C Felony, shall serve five years with the North Dakota Department of Correction and Rehabilitation, all but three of those years are suspended for the rest of the five year period. And you'll serve the suspended period on probation, supervised, and conditions 1 through 23. And you will also pay attorney's fees in the amount of three Hundred Dollars, because I find those



are fair and reasonable based upon my experience with this. Is there any dispute over the restitution or do we need to hold a hearing on that at a later date?

...(discussion had of the restitution amount and the Defendant's custody status)....

(6-17-99 Tr. 10 at line 9):

Mr. Farrell: Now did I plead to a year or to two years?

Court: You pled to Forgery.

Mr. Farrell: Right.

Court: And you got three years to serve and then two years probation. What you did was he got five years. Three years of that will be incarceration and then two years after that will be probation, supervised.

Mr. Nordeng: I think what's confusing to him is that the State recommended a year and I concurred with that recommendation.

Court: And I went beyond the State's recommendation.

Mr. Nordeng: The Court did not follow it.

Court: Because of your record. It was a recommendation. It wasn't a plea bargain.

Mr. Farrell: Well then I have a right to change my plea then also, don't I?

Court: No. Not on a recommendation. On a plea bargain you would. Not on a recommendation.

Mr. Farrell: So I can plead guilty and then you can change the sentence into whatever you want then.

Court: No, a recommendation is like a contractor's estimate. They give you an estimate for the job and, you know, it turns out to be more. This is just a recommendation. It's not a bargain. They say they'll recommend, you know, a year and a day. You and your attorney say, well, that sounds good. We hope the Judge takes it. You come in front of the Judge and the Judge doesn't take it. No problem. The Supreme Court of North Dakota says on

a recommendation that's the way it can be handled. On a plea bargain it would be different. So that's the way it works. So you can finish in Minnesota, then you come over to us. Okay. Thank you. So you'll need another Judgment and Commitment.

Ms. Molick: Yes.

Court: Do you want this one back?

(6-17-99 Tr. 2 - 11). That is how the proceeding ended.

## ARGUMENT

**I. The Trial Court erred by not complying with the Requirements of Rule 11(c), North Dakota Rules of Criminal Procedure, by failing to fully inquire of Patrick J. Farrell as to whether his guilty plea resulted from previous discussions with the prosecuting attorney.**

This Court recently stated in **State v. Beckman, 1999 ND 54, 591 N.W.2d 120 at ¶4**: “Before accepting a guilty plea, the trial court must advise the defendant of certain rights under **Rule 11, N.D.R.Crim.P. State v. Magnuson, 1997 ND 228, ¶16, 571 N.W.2d 642**. This advice is mandatory and binding on the court. **Id. at ¶16**.” The Court went on to state:

**[¶10] Rule 11(c), N.D.R.Crim.P.**, provides:

(c) Insuring that the plea is voluntary. The court shall not accept a plea of guilty without first, by addressing the defendant personally [except as provided in Rule 43(c)] in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. *The court shall also inquire as to whether the defendant's willingness to plead guilty results from previous discussion between the prosecuting attorney and the defendant or the defendant's attorney.* (Emphasis added.)

**[¶11]** The purpose of the inquiry required by the second sentence of **Rule 11(c), N.D.R.Crim.P.**, is for the trial court to ascertain whether the plea of guilty is the result of plea negotiations. **Hoffarth, 456 N.W.2d at 114**.

Beckman, 1999 ND 54 at ¶¶10 & 11. In Beckman, the Court determined specifically that **Rule 11(c), N.D.R.Crim.P.** was complied with. The Trial Court asked whether there was a plea agreement, and whether the Defendant knew he could be sentenced to more or less than what was recommended by the prosecutor. It was clear that the Defendant knew what the situation was. In this case, at no time did the Court ask whether there was a plea agreement, or whether there had been any discussions at all between the prosecutor and the defense, and at no time did the Court ask Mr. Farrell whether he knew that the Court could sentence him to more or less than the sentence recommended by the prosecutor. (6-17-99 Tr. 2 -4). It was only after the Court had pronounced its sentence, and Mr. Farrell interjected after the attorneys and the Court had some technical discussions about his custody status, that the Court explained to Mr. Farrell that the Court was not bound by the State's sentencing recommendation. (6-17-99 Tr. 10 -11). In fact, Mr. Farrell's statements clearly establish that he understood the discussions to constitute a plea agreement. When he figured out that the Court had not followed the agreement he thought existed, he indicated to the Court that he thought he could withdraw his guilty plea. (6-17-99 Tr. 10 -11). The parties had obviously had discussions before the hearing. Both attorneys obviously knew what their joint recommendation was going to be, and that the State would dismiss the burglary count. Yet, the Court made no attempt to ask what the discussions were, and what Mr. Farrell's understanding was of the meaning or significance of those discussions. The Court did say this: "And as (sic) anyone promised your (sic)

anything or threatened you in any way or attempted to use force against you to get you to enter a guilty plea here today?" (6-17-99 Tr. 3 -4). That question does not encompass the specific requirements of **Rule 11(c)**, as to whether there had been any discussions between the parties. Thus, unlike in **Beckman**, the Trial Court in this case did not substantially comply with **Rule 11(c)**. To prevent a clear injustice, this Court should vacate the sentence and remand the case to the Trial Court for re-sentencing.

**II. Patrick J. Farrell's guilty plea was not voluntary when he was not properly advised that the Court was not bound by the State's Recommended Sentence.**

In **State v. Thompson**, 504 N.W.2D 315 (N.D. 1993), the Court stated:

The standard for review of guilty pleas after sentence is "manifest injustice." The defendant has the burden of proof, and the decision is within the trial court's discretion. **State v. Werre**, 325 N.W.2d 172, 174 (N.D. 1982). On appeal, we decide only if the court abused its discretion. Absent an abuse of discretion, the trial court's decision will stand. **State v. Hamann**, 262 N.W.2d 495, 501 (N.D. 1978).

In this case, the State agreed to recommend a particular sentence. It was a nonbinding recommendation only. A nonbinding recommendation of sentence and a binding plea agreement under **Rule 11(d)**, N.D.R.Crim.P., are not the same. **State v. Werre**, 453 N.W.2d 826 (N.D. 1990). The State fulfilled its obligation when it made the specified nonbinding recommendation. **See United States v. Khoury**, 755 F.2d 1071, 1073 (1st Cir. 1985).

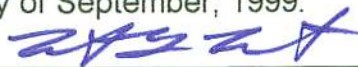
In **Thompson**, the Court found that the Defendant clearly understood that the State's recommendation was not binding on the Court. In **Thompson**, there was an extensive discussion prior to the Court's imposition of sentence, and there

was a pre-sentence report. **Id.** This case is clearly distinguishable. There was no discussion at all about whether the State's recommendation was binding or not, and it was clear that Mr. Farrell thought that the recommendation was binding. (6-17-99 Tr. 10 -11). Here Mr. Farrell was sentenced to three times the length of incarceration recommended by the State and his attorney. He was clearly shocked by what the Court did, and actually tried to withdraw his guilty plea. Only at the end of the hearing did the Court explain what had happened. The correct procedure is to ensure that the Defendant knows what he is facing prior to the pronouncement of the sentence, not afterward. Mr. Farrell should be allowed to withdraw his guilty plea to prevent a manifest injustice. **See N.D.R.Crim.P. 32(d).**

#### CONCLUSION

The sentence should be vacated, and Mr. Farrell should be allowed to withdraw his guilty plea, and this case should be remanded to the trial court for appropriate proceedings.

Respectfully submitted this 13th day of September, 1999.



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