

ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

OCT 13 1999

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

STATE OF NORTH DAKOTA

Supreme Court No. 990197

District Court No. CR-98-2729

APPELLEE'S BRIEF

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

DISTRICT COURT NO. CR-98-2729
EAST CENTRAL JUDICIAL DISTRICT
HONORABLE MICHAEL O. McGUIRE

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STATEMENT OF THE ISSUES

- I. The trial court substantially complied with the requirements of Rule 11(c) of the North Dakota Rules of Criminal Procedure.
- II Whether the defendant's guilty plea was voluntary when he was not advised that the court was not bound by the state's sentence recommendation.

STATEMENT OF THE CASE

The state is satisfied with the Appellant's statement of the case and his recitation of the facts.

ARGUMENT

- I. **The trial court substantially complied with the requirements of Rule 11(c) of the North Dakota Rules of Criminal Procedure.**

The defendant asserts that the trial court failed to comply with Rule 11(c) of the North Dakota Rules of Criminal Procedure because the court failed to inquire whether the defendant's guilty plea resulted from previous discussions between his attorney and the prosecutor. Rule 11 of the North Dakota Rules of Criminal Procedure does not require any predetermined, ritualistic form for the trial court's examination of the defendant. *State vs. Boushee*, 459 N.W.2d 552, 555 (N.D. 1990). Instead, the court must substantially comply with the procedural requirements of the rule to ensure the defendant is entering a voluntary guilty plea. *State vs. Beckman*, 1999 ND 54 [¶ 5], 591 N.W.2d 120, 121 (N.D. 1999) (citing *State vs. Hoffarth*, 456 N.W.2d 111, 114 (N.D. 1990)).

Rule 11(c) of the North Dakota Rules of Criminal Procedure requires the court to ask the defendant whether the defendant's guilty plea is the result of previous discussions between the prosecutor and the defendant and/or the defendant's attorney. N.D.R.Crim.

P. 11(c). The purpose of this requirement is for the trial court to ascertain whether the guilty plea is the result of plea negotiations. *State vs. Beckman*, 1999 ND 54 [¶ 11], 591 N.W.2d 120, 122 (N.D. 1999) (citing *State vs. Hoffarth*, 456 N.W.2d 111, 114 (N.D. 1990)).

The state concedes that the trial court did not specifically ask the defendant whether his guilty plea resulted from discussions between his attorney and the prosecutor. In addition, neither the prosecutor nor the defense attorney expressly informed the court there was no plea agreement. Notwithstanding these facts, the court knew there was not a plea agreement because a plea agreement had not been filed with the court prior to the change of plea and sentencing hearing. See Docket at App. 1-3. According to local rule 3 of the East Central Judicial District, plea agreements "shall be filed with the Judge no later than twenty-four hours prior to the time set for consideration of the agreement." Local Court Procedural Rule 3 of the East Central Judicial District. Further evidence the court knew there was not a plea agreement was when the court specifically asked the state for its sentencing recommendation. (6-17-99 Tr. at 5). Thus, the court's knowledge there was no plea agreement provided the information the second inquiry of Rule 11(c) is designed to elicit.

Moreover, the court fully inquired of the defendant whether his guilty plea was the result of any promises, threats, or force against him. (6-17-99 Tr. at 3-4). To this question, the defendant clearly answered in the negative. *Id.* at 4. Additionally, when the court was advising the defendant of his rights, the court implicitly asked the defendant whether he understood that upon a guilty plea he could be sentenced to five years in prison and/or a five thousand dollar fine. *Id.* at 3. To this inquiry, the defendant acknowledged that he

understood the possible sentence that could be imposed. *Id.* Therefore, based on the court's knowledge there was no plea agreement, the defendant's negative response to the court's inquiry of whether his guilty plea was the result of any promises, threats or force, and the defendant's understanding that he could receive a sentence of five years in prison, the court's procedure in accepting the defendant's guilty plea substantially complied with Rule 11(c) of the North Dakota Rules of Criminal Procedure.

II Whether the defendant's guilty plea was voluntary when he was not advised that the court was not bound by the state's sentence recommendation.

The defendant contends the trial court should have advised him that the court was not bound by the state's sentence recommendation. A nonbinding recommendation of sentence and a binding plea agreement under Rule 11(d) of the North Dakota Rules of Criminal Procedure, are not the same. *State vs. Thompson*, 504 N.W.2d 315, 319 (N.D. 1993) (citing *State vs. Werre*, 453 N.W.2d 826 (N.D. 1990)). When there is a plea agreement between the prosecutor and the defendant, and the court rejects the plea agreement, the court shall inform the parties of the rejection and advise the defendant that the court is not bound by the plea agreement. N.D.R.Crim. P. 11(d) (4).

In the present case, there was no plea agreement. Further, although the court did not expressly advise the defendant it was not bound by the state's sentence recommendation, the court implied it was not bound by the recommendation when it informed the defendant that if he pled guilty he could receive the maximum penalty of five years in prison and/or a five thousand dollar fine. (6-17-99 Tr. at 3). The defendant's response to this advisement was an unequivocal "Right," indicating the defendant knew

he could receive the maximum of five years in prison. *Id.* at 3. Thus, the defendant had knowledge the trial court was not bound by the state's sentence recommendation.

Additionally, Rule 11 of the North Dakota Rules of Criminal Procedure only has two requirements for insuring the defendant's plea is voluntary. N.D.R.Crim.P. 11(c). First, the court must determine that the defendant's guilty plea is not the result of force, threats, or promises. *Id.* Second, the court must inquire whether the defendant's guilty plea is the result of previous discussions between the prosecutor and the defendant's attorney. *Id.* In the present case, the court inquired whether the defendant's guilty plea was the result of any promises, threats, or force. (6-17-99 Tr. at 3-4). As the state argued above, the trial court knew there was not a plea agreement in this case, and therefore, the information the second inquiry of Rule 11(c) is designed to elicit was obtained. Because the trial court substantially complied with the two requirements of Rule 11(c) of the North Dakota Rules of Criminal Procedure, the defendant's plea was voluntary.

CONCLUSION

The trial court substantially complied with Rule 11(c) of the North Dakota Rules of Criminal Procedure because the court had knowledge there was no plea agreement, the defendant clearly indicated that his guilty plea did not result from promises, threats or force, and at the time of his change of plea he understood that he could receive a sentence of five years in prison.

Based on the foregoing reasons, the state respectfully requests this Court to affirm the trial court.

Respectfully submitted this 13th day of October, 1999.



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