

ORIGINAL

IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA

State of North Dakota,)	20040002 20040003
)	
Plaintiff - Appellee,)	Supreme Court No.'s 20040002 &
)	20040003
vs.)	
)	
Tracy Reimche,)	District Court No.'s 03-K-186 & 03-K-187
)	
Defendant - Appellant.)	

APPEAL FROM THE CRIMINAL JUDGMENTS
ENTERED UPON A GUILTY PLEA TO THE DISTRICT COURT
NORTHEAST JUDICIAL DISTRICT

BRIEF OF APPELLANT

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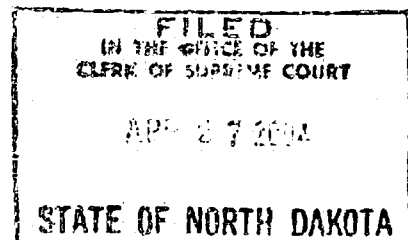


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I. STATEMENT OF CASE

This is an appeal from a guilty plea to two counts of Aggravated Assault in violation of North Dakota Century Code Section 12.1-17-02. On December 3, 2003 the Defendant Tracy Reimche (Reimche) appeared for sentencing before the district court for McHenry County, North Dakota. On December 4, 2003, the district court entered an Amended Criminal Judgment without Reimche's presence which Judgment specified that Reimche had been found to be a special dangerous offender under North Dakota Century Code 12.1-32-09(1)(e). On December 18, 2003, the district court entered a Second Amended Judgment without Reimche's presence which Judgment further required Reimche to provide a DNA sample. Notice of appeal was filed December 29, 2003. (App. 11)¹.

II. STATEMENT OF FACTS

Reimche was charged with two counts of Aggravated Assault in violation of North Dakota Century Code 12.1-17-02 for allegedly willfully causing serious bodily injury to Clifford Beesley (Beesley) and to Dustin Frounfelter, or in the alternative, with regard to Dustin Frounfelter, one count of Attempted Murder in violation of North Dakota Century Code 12.1-16-01, for allegedly engaging in conduct which constitutes a substantial step toward intentionally or knowingly causing the death of Dustin Frounfelter. (Complaint, App. 3).

¹The Appendix to Appellant's brief will be abbreviated "App."

On December 3, 2003, Reimche appeared in front of the McHenry County District Court with his counsel, William R. Hartl, and plead guilty to two counts of Aggravated Assault. (December 3, 2003, Tr. 11)². The State and Reimche's counsel then outlined the factual basis for the charges as follows: On August 3, 2003, Reimche was at his girlfriend, Nikki Remy's (Remy) home in Granville, North Dakota around 2:00 or 2:30 a.m. when Dustin Frounfelter and Dustin Seright drove into Remy's yard and flashed the lights on their vehicle. (December 3, 2003, Tr. 13 & 14). Mr. Frounfelter had previously been involved in a relationship with Remy. (December 3, 2003, Tr. 14). Reimche and Remy went outside, a discussion or fight occurred and Reimche believed that he saw a shotgun. (December 3, 2003, Tr. 13 & 14). Reimche went into the residence while Remy remained outside with Frounfelter and Seright. Id. Reimche heard Remy scream and Reimche exited the residence with a knife. Id. Upon exiting the residence, Reimche observed Beesley holding Remy while other people were standing around Remy. (December 3, 2003, Tr. 13 - 15). Reimche stabbed Frounfelter and Beesley with the knife.

The State moved to have Reimche found to be a dangerous special offender under North Dakota Century Code 12.1-32-09(1)(e) since Reimche used a knife. (December 3, 2003, Tr. 15). Reimche's counsel objected to the dangerous special offender finding. (December 3, 2003, Tr. 16 & 17; 18 - 20).

²The transcripts will be referred to by the date of the hearing, and "Tr."

The district court found Reimche to be dangerous special offender because Reimche used a knife in committing the offenses. (December 3, 2003, Tr. 17 & 20). The knife used was never admitted into evidence. The Court then sentenced Reimche to 8 years on each count with 3 years suspended on each, to run concurrent, (December 3, 2003, Tr. 33), and outlined the terms and conditions of Appendix A. (December 3, 2003, Tr. 33 - 35).

On December 4, 2003, outside of Reimche's presence, the district court amended the Criminal Judgment to include language relating to Mr. Reimche having been found to be a dangerous special offender. (Amended Criminal Judgment, App. 8). This language was not contained within the December 3, 2003 Criminal Judgment.

On December 18, 2003, outside of Reimche's presence, the district court again amended the Criminal Judgment to require Reimche to submit a DNA sample. (Second Amended Criminal Judgment, App. 10). This language was not contained within the December 3, 2003 Criminal Judgment.

IV. ISSUES

I. THE SECTION 12.1-32-09 NOTICE FILED BY THE STATE DID NOT COMPLY WITH THE REQUIREMENTS OF NORTH DAKOTA CENTURY CODE SECTION 12.1-32-09(3) AND THE TRIAL COURT'S DANGEROUS SPECIAL OFFENDER FINDING IS CLEARLY ERRONEOUS.

V. LAW AND ARGUMENT

I. THE SECTION 12.1-32-09 NOTICE FILED BY THE STATE DID NOT

COMPLY WITH THE REQUIREMENTS OF NORTH DAKOTA CENTURY
CODE SECTION 12.1-32-09(3) AND THE TRIAL COURT'S DANGEROUS
SPECIAL OFFENDER FINDING IS CLEARLY ERRONEOUS.

North Dakota Century Code § 12.1-32-09(3) mandates that whenever an
attorney prosecuting a defendant for a felony

has reason to believe that the defendant is a dangerous special
offender . . . the attorney . . . may sign and file with the court . . . a
notice specifying that the defendant is a dangerous special
offender . . . who upon conviction for the felony is subject to the
imposition of sentence under subsection 2

North Dakota Century Code § 12.1-32-09(3) (Supp. 2003) (emphasis added).

North Dakota Century Code § 12.1-32-09(4)(a) further specifies that "if the notice
alleges that the defendant is a dangerous special offender under
subdivision . . . e of subsection 1," that a hearing must be held in accordance
with North Dakota Century Code § 12.1-32-09(4) before sentence is imposed.

North Dakota Century Code § 12.1-32-09(4)(a) (Supp. 2003) (emphasis added).

The Section 12.1-32-09, N.D.C.C. Notice filed by the State, (App. 5), fails
to meet the mandate of North Dakota Century Code Section 12.1-32-09(3). The
Section 12.1-32-09 notice filed by the State does not specify "that the defendant
is a dangerous special offender . . . who upon conviction is subject to the
imposition of a sentence under subsection 2. . . ." North Dakota Century Code §
12.1-32-09(3) (emphasis added). Rather, the Section 12.1-32-09, N.D.C.C. Notice

filed by the State "provides notice that the State is requesting a finding that the defendant is a dangerous special offender who upon conviction should be subject to the imposition of sentence stated in section 12.1-32-09(2). . . ." (App. 5, emphasis added). North Dakota Century Code Section 12.1-32-09(3) expressly provides that the notice must specify that the defendant is a dangerous special offender; however, the Notice filed by the State herein requests that the court find Reimche to be a dangerous special offender. (App. 5). Furthermore, North Dakota Century Code Section 12.1-32-09(3) expressly provides that the notice delineate that the defendant is subject to the sentencing provided under North Dakota Century Code 12.1-32-09(2); however, the Notice filed by the State herein provides that Reimche "should be subject to." (App. 5). The language used by the State in the Section 12.1-32-09 Notice fails to meet the express requirements required for the trial court to find the defendant a dangerous special offender and therefore subject to extended sentences.

"[P]enal statutes should be strictly construed against the government" State v. Sheldon, 312 NW2d 367, 369 (N.D. 1981), and any doubt resolved in favor of the defendant. State v. Hogue, 424 NW2d 630, 635 (N.D. 1988). The express language of North Dakota Century Code §12.1-32-09(3) mandates that the notice filed by a prosecuting attorney specify that the defendant "is a dangerous special offender . . . who is subject to the imposition of sentence. . . ."

North Dakota Century Code §12.1-32-09(3) (Supp. 2003) (emphasis added). The 12.1.32-09(3) notice must contain a statement, that the defendant is a dangerous offender, and it must notify the defendant that the defendant is subject to enhanced sentencing under section 12.1-32-09(2). It is not sufficient for the notice to ask for a finding and it is not sufficient to argue in the notice that the defendant should be sentenced under North Dakota Century Code §12.1-32-09(2).

The 12.1.32-09(3) notice pertains to matters of pleading, not to matters of proof or findings that the trial court is being requested to make. Section 12.1-32-09(3) requires a definite written statement which informs both the court and the defendant that the defendant is a dangerous special offender and that he is subject to an enhanced sentence under 12.1-32-09(2). North Dakota Century Code §12.1-32-09(3) deals with the state giving notice to the court and to the defendant. The State's failure to comply with the express requirement of section 12.1-32-09(3) is a jurisdictional defect with constitutional underpinnings. State v. Mora, 2000 ND 179, ¶11, 617 NW2d 478, citing State v. Gahner, 413 NW2d 359 (N.D. 1987).

Reimche knew that the State wanted the court to amend the charge of aggravated assault to include reference to the weapon. (December 3, 2003, Tr. 22). Reimche did not know, and the Section 12.1-32-09 Notice filed by the State does not inform him, that he is a dangerous special offender, and that he is

subject to sentencing under North Dakota Century Code §12.1-32-09(2). Since Reimche did not know that he was a dangerous special offender who was subject to enhanced sentencing under section 12.1-32-09(2), the State's variance from the express mandate of section 12.1-32-09(3) constitutes a defect which affects Mr. Reimche's substantial rights. Contra, State v. Mora, 2000 ND 179, ¶15, 617 NW2d 478.

Dangerous weapons are defined under North Dakota Century Code §12.1-01-04(6) to include, "but is not limited to, any switchblade or gravity knife, machete, scimitar, stiletto, sword, or dagger. . . ." North Dakota Century Code § 12.1-01-04(6) (Supp. 2003). The court found that the knife used by Mr. Reimche constituted a dangerous weapon. (December 3, 2003, Tr. 17). However, the knife involved in this incident was never introduced into evidence. How can the court determine that the knife constituted a dangerous weapon when the court never even saw the knife? The knife in question may have fit the statutory definition of a dangerous weapon, or it may not. The record contains no evidence or testimony regarding the kind or style of knife involved, nor does the record mention any characteristics of the knife. Therefore, the court abused its discretion when it determined that since Mr. Reimche used a knife, that the knife was a dangerous weapon. (December 3, 2003, Tr. 17).

VI. CONCLUSION

Mr. Reimche asserts that the 12.1-32-09 Notice filed by the State failed to

comply with the express and mandatory requirements of North Dakota Century Code § 12.1-32-09(3) since the State's Notice requested a finding and a sentencing argument. Mr. Reimche further asserts that the deficient 12.1-32-09 Notice is jurisdictional in nature since the 12.1-32-09(3) Notice requires specific language which substantially affects and determines the sentence a defendant faces.

Furthermore, the knife was never introduced into evidence, nor even described on the record, and Mr. Reimche asserts that the court abused its discretion when it found that the knife was a dangerous weapon without first having the knife admitted into evidence, or without first conducting an evidentiary hearing.

Therefore, the Court should reverse and remand Mr. Reimche's case for further evidentiary hearings, and for re-sentencing on two class "C" felonies, without the extended sentence enhancement under 12.1-32-09(2).

Respectfully submitted this 26th day of April, 2004.



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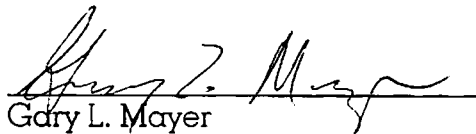
Affidavit of Service by Mail

20040003

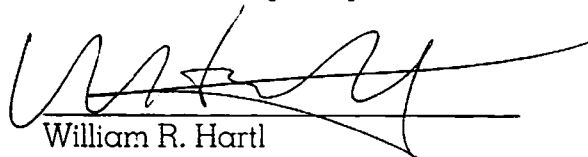
Gary L. Mayer, being duly sworn, on oath deposes and says: That he is a citizen of the United States, over 18 years of age, and that on the 27th day of APRIL, 2004, this affiant served the attached Brief of Appellant and Appendix of Appellant upon Robin Gordon, McHenry County States Attorney, by placing a true and correct copy thereof in an envelope addressed to the last reasonably ascertainable post office address as follows:

Robin Gordon
McHenry County States Attorney
P.O. Box 52
Drake, North Dakota 58736-0052

and depositing said envelope with postage prepaid in the United States Mail at Rugby, North Dakota.


Gary L. Mayer

Subscribed and sworn to before me this 27th day of April, 2004.


William R. Hartl
Notary Public, North Dakota
My Commission Expires 1-25-2007.

