

20060015

20060016

ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,)
Plaintiff/Appellee,)
vs.) Supreme Court No. 20060015 &
) 20060016
Sharol Salvesson,) District Court No. 05-K-703 &
Defendant/Appellant.) 05-K-726

APPEAL FROM THE DISTRICT COURT OF WARD COUNTY
NORTHWEST JUDICIAL DISTRICT

DISTRICT COURT NOS. 05-K-703 & 05-K-726
THE HONORABLE GARY H. LEE

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

MAR 21 2006

APPELLEE'S BRIEF

STATE OF NORTH DAKOTA

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ISSUE PRESENTED

- I. The Court did not err in sentencing Salveson to two one-year consecutive sentences.

STATEMENT OF CASE

On April 2, 2005 the defendant, Sherol Salveson, was charged with Driving Under the Influence of Alcohol, [hereinafter DUI] a class A misdemeanor, Aggravated Reckless Driving, [hereinafter ARD] a class A misdemeanor, and Driving While License Privileges were Under Suspension or Revocation, [hereinafter DUS], a class B misdemeanor.

Many pretrial conferences were held in this matter. On December 13, 2005, the defendant changed her plea to the DUI and ARD charges. The DUS charge was dismissed. The Court sentenced the defendant to serve one year incarceration on the ADR, and one year with 3 months suspended on the DUI charge, to be served consecutive to the ADR conviction. The defendant was also placed on supervised probation for 2 years upon release from incarceration or the termination of her parole.

STATEMENT OF FACTS

Counsel for the defendant requested many pretrial conferences and continuances of the same to try to convince the Court that, pursuant to NDCC §12.1-32-11, his client could not be sentence to serve more than one year total. The Court disagreed with the defendant's counsel. The Court relying upon State v. Ulmer, 1995ND 245, 603 ND 865 (ND 1999), sentenced the defendant to serve two one year sentences consecutive, for a total time of two years, less the suspended time.

LAW AND ARGUMENT

I. The Court did not err in sentencing Salveson to two one-year consecutive sentences.

The defendant asserts that the sentencing Court interpreted Ulmer incorrectly. She asserts that the "criminal objective" referred to in NDCC §12.1-32-11(3) refers to the defendant's objective, not the statute, thereby Legislature's, intent. The defendant relies upon Ulmer ¶8 for her position. The defendant's reliance and interpretation of NDCC §12.1-32-11 is wrong.

As the Court stated in Ulmer, under NDCC §12.1-32-11(3), multiple class A misdemeanor offenses may be deemed by the sentencing court to involve substantially different criminal objectives if they do not fall under the following three categories: (1) one offense is an included offense of the other; (2) one offense consists of a conspiracy, attempt, solicitation, or other form of preparation to commit, or facilitation of the other; or (3) the offenses differ only in that one is defined to prohibit a specific instance of such conduct. at ¶10. Clearly the Court, in Ulmer, was looking at Legislative intent, not the intent of the defendant.

In this case the defendant was convicted of two separate and distinct class A misdemeanors, ADR and DUI. Using the analysis in Ulmer, one offense is not included in the other offense, neither offense consists of conspiracy, attempt,

solicitation or other form of preparation to commit or facilitate the other, and they do not differ only in the that one is defined to prohibit a specific instance of conduct. Both offenses have different elements that are not included in the other.

The defendant asserts that because she was driving under the influence, that makes her decision to drive also "reckless" therefore the two conducts are the same. Again the defendant's analysis of Ulmer and NDCC 12.1-32-11(3) is wrong. While factually it may be true that deciding to drive while under the influence is reckless, it is not part of the elements of the offense that the State would have to prove at trial. In fact, a person may be guilty of DUI that did not commit a moving violation. For example a vehicle has some sort of equipment violation that warrants the officer to stop the vehicle, subsequently the driver is arrested for DUI. Using the same analysis, the elements for a person driving recklessly are: (1)disregard to the rights or safety of other, or (2) without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or the property of another. NDCC §39-08-03. Additionally, in this case the defendant is charged with Aggravated Reckless Driving because a person was injured. No where in NDCC §39-08-03 does the State have to prove the person was also driving under the influence of alcohol. The

defendant tries to claim that NDCC 39-08-03 prohibits general conduct, and that NDCC §39-08-01 is the specific instance of conduct. The State agrees that NDCC §39-08-01 does prohibit specific conduct, driving under the influence. However, NDCC §39-08-01 does not specifically prohibit a person from driving without due caution for others safety etc. The State disagrees that NDCC §39-08-03 is the statute prohibiting the conduct of NDCC §39-08-01 "generally". NDCC §39-08-03 prohibits a person from driving without due caution for others safety, or at a speed and manner likely to endanger another person or property. NDCC §39-08-03 further specifically enhances the offense to a class A misdemeanor if there is an injury.


The defendant also asserts that the Court conducted proceedings in such a manner as to result in the perception of bias. The State disagrees. The Court acted within its own discretion when it rejected the two Rule 11 pleas offer. The Court the authority to reject such offers. While the Court did ask the victim's mother questions regarding insurance claims, the issue had been raised by the State in the context of restitution. Restitution and making victims whole is within the Court's province to oversee. It is the State's position the sentence given to the defendant was not illegal. However, should the Court determine otherwise for further proceedings and correction of sentence, it is the State's

position that Judge Lee is capable, professional and ethically able to follow the Court's instructions.

CONCLUSION

For the above reasons the State respectfully requests the Court affirm the trial court's sentence in this matter.

Dated this 21st day of March, 2006.

A handwritten signature in cursive script, appearing to read "Rozanna C. Larson", is written over a horizontal line.

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Sharol Salvesson,)	AFFIDAVIT OF SERVICE BY MAIL
Defendant/Appellant.))	

LeAnn Westereng, being first duly sworn, deposes and says:

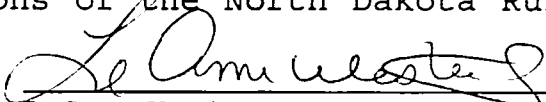
That she is a citizen of the United States of America, over the age of twenty-one years, and is not a party to nor interested in the above entitled action; that on the 21st day of March, 2006, this Affiant deposited in the mailing department of the United States Post Office at Minot, North Dakota, a sealed envelope with postage thereon duly prepaid, containing a true and correct copy of the following document in the above entitled action:

APPELLEE'S BRIEF

That said envelope was addressed to the following person at his address as follows:

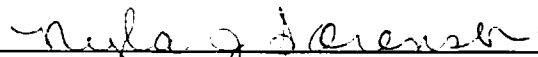
Eric Baumann
Attorney at Law
PO Box 3118
Minot, ND 58702-3118

That the above document was duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.



 LeAnn Westereng

Subscribed and sworn before me this 21st day of March, 2006 by LeAnn Westereng.



 Notary Public

