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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	Supreme Court Nos. 20060015 & 20060016
Plaintiff/Appellee,	)	
	)	
vs.	)	
	)	District Court Nos. 05-K-703 & 726
Sharol Salveson,	)	
	)	
Defendant/Appellant.	)	

APPEAL FROM THE DISTRICT COURT OF WARD COUNTY
NORTHWEST JUDICIAL DISTRICT
DISTRICT COURT NOS. 05-K-703 & 726
THE HONORABLE GARY H. LEE

APPELLANT'S BRIEF

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ISSUE PRESENTED

I. Whether the court erred in sentencing Salveson to more than year for the class "A" misdemeanor offenses of DUI and Aggravated Reckless Driving.

STATEMENT OF THE CASE

On April 3, 2005, Complaints were issued against Defendant, Sharol Salveson, hereinafter Salveson, for the class "A" misdemeanor charges of Driving Under the Influence (DUI) and Aggravated Reckless Driving. [Appendix pages 3 - 4; hereinafter A 3 - 4.]

On July 29, 2005, August 26, 2005 and September 9, 2005, Pretrial Conferences were held in the above referenced matter. [Transcript pages 4, 17, hereinafter T 4, 17; A 1(#6), 2(#6).] At the August 26, 2005 and September 9, 2005 Pretrial Conferences, during which the applicability of the "merger doctrine" (referring to N.D.C.C. § 12.1-32-11(3)) was discussed, the Honorable Gary H. Lee rejected proposed Rule 11 Plea Agreements. [T 13 - 15, 18 - 19; A 21 - 22.]

On September 12, 2005, Defendant filed a Motion for Change of Judge which was denied by the Honorable William W. McClees. [A 1(#10 & 11) - 2(#10 & 11).]

On December 8, 2005, the undersigned sent a letter to the court requesting notification on the maximum and minimum penalties faced by Salveson for the class "A" misdemeanor charges of DUI and Aggravated Reckless Driving. [A 5.] On December 9, 2005, the court sent a letter which indicated that it would not make a pre-determination on the "merger doctrine" "until we hear from the State on the issue". [A 6.]

On December 12, 2005, another hearing was held, during which Judge Lee advised the parties that he believed that the "merger doctrine" was inapplicable. [T 26, 29 - 30; A 24, 26 - 27.] On December 13, 2005, Salveson entered pleas of guilty to the

charges of Driving Under the Influence, class "A" misdemeanor, and Aggravated Reckless Driving, class "A" misdemeanor. [T 40; A 28.] On December 14, 2005, Criminal Judgments were entered against Salveson for these charges. [A 8 - 19.]

On January 6, 2006, Defendant filed a Notice of Appeal from the aforementioned Judgments. [A 20.]

STATEMENT OF FACTS

On April 3, 2005, Salveson, struck pedestrians while driving under the influence of alcohol. [T 40 - 41; A 28 - 29.]

As a result of this incident, Salveson was in part charged with Aggravated Reckless Driving, a Class "A" misdemeanor in violation N.D.C.C. § 39-08-03, case no. 05-K-726, and DUI, a Class "A" misdemeanor in violation of N.D.C.C. § 39-08-01, case no. 05-K-703. [A 3 - 4.]

At August 26, 2005 and September 9, 2005 Pretrial Conferences, during which the applicability of the "merger doctrine" (referring to N.D.C.C. § 12.1-32-11(3)), was discussed, the Honorable Gary H. Lee rejected proposed Rule 11 Plea Agreements . [T 13 - 15, 18 - 21; A 21, 22.]

During the August 26, 2005 Pretrial Conference, Judge Lee unsolicitedly advised a witness to contact an attorney to discuss her insurance company suing Salveson under doctrine of subrogation. [T 13; A 21.]

On September 12, 2005, Defendant filed a Motion for Change of Judge which was denied by the Honorable William W. McClees. [A 1(#10 & 11) - 2(#10 & 11).]

Prior to sentencing Salveson, the Court was notified that the State believed that

the "merger doctrine" prohibited the Court from sentencing Salveson to more than one year of incarceration for the above referenced offenses. [T 25, 28, 30; A 5, 23, 25, 27.]

The Court determined that the "merger doctrine" did not apply because "the essential elements of (DUI and Aggravated Reckless Driving) are different" and the "objectives" for having a law prohibiting DUI and a law prohibiting Aggravated Reckless Driving were different. [T 26, 29 - 30; A 24, 26 - 27.]

The court sentenced Salveson to serve 12 months with North Dakota Department of Corrections on the charge of Aggravated Reckless Driving. [A 19.] The Court sentenced Salveson to serve 12 months with the North Dakota Department of Corrections on the DUI charge with 3 months suspended for a period of 2 years of supervised probation. [A 8 - 9.] The court ordered that Salveson serve her sentence on the charge of DUI consecutive to her Aggravated Reckless Driving sentence. [T 50, A 8 - 9, 30.]

LAW AND ARGUMENT

I. SALVESON HAS THE RIGHT OF APPEAL TO SUPREME COURT.

Pursuant to N.D.C.C. § 29-28-03 an appeal may taken as a matter of right from all verdicts, judgments or orders enumerated in N.D.C.C. § 29-28-06. Defendant, Sharol Salveson [hereinafter Salveson], appealed from her Judgments of Conviction.

II. STANDARD OF REVIEW.

The issue in this appeal, whether the Court imposed an illegal sentence, involves a question of law. When reviewing questions of law this Court utilizes the de novo standard of review. **State v. Torgerson**, 2000 ND 105, 611 N.W.2d 182 (N.D. 2000).

III. THE COURT ERRED IN SENTENCING SALVESON TO MORE THAN ONE YEAR OF FOR THE CLASS "A" MISDEMEANOR OFFENSES OF DUI AND AGGRAVATED RECKLESS DRIVING.

As a result of an April 3, 2005 incident, in which Salveson struck pedestrians while driving under the influence of alcohol, the Court sentenced Salveson to serve 12 months with North Dakota Department of Corrections on the charge of Aggravated Reckless Driving and 12 months with the North Dakota Department of Corrections on the class "A" misdemeanor DUI charge with 3 months suspended for a period of 2 years of supervised probation consecutive to her Aggravated Reckless Driving sentence. [T 40 - 42, 50; A 8 - 19; 28 - 30.]

N.D.C.C. § 12.1-32-11(3) states that when being sentenced only for misdemeanors, "a defendant may not be consecutively sentenced to more than one year ... (unless) ... each class A Misdemeanor was committed as part of a different course of conduct or each involved a substantially different criminal objective."

Since Salveson's conduct giving rise to both her DUI and Aggravated Reckless Driving occurred at the same time, the offenses were not "committed as part of a different course of conduct." [T 40 - 41; A 28 - 29.] **State v. Ulmer**, 1999 ND 245 ¶ 7. 575 N.W.2d 865 (N.D. 1999) (finding DUS and DUI which occurred simultaneously to be part of the same course of conduct).

Accordingly, the issue becomes whether DUI and Aggravated Reckless Driving "involve substantially different criminal objectives".

The court determined that § 12.1-32-11(3) did not apply because "the essential elements of (DUI and Aggravated Reckless Driving) are different" and the "objectives"

for having a law prohibiting DUI and a law prohibiting Aggravated Reckless Driving were different. [T 26, 29 - 30; A 24, 26 - 27.]

The court's reasoning was flawed because the "criminal objective" referred to in § 12.1-32-11(3) refers to the "criminal objective" of the defendant, not the "objective" of the Legislature in enacting the laws violated. **Id.**, at ¶ 8.

The court appeared to hold that the § 12.1-32-11(3) is inapplicable solely because "the essential elements of (DUI and Aggravated Reckless Driving) are different." [T 26;] This interpretation of § 12.1-32-11(3) is contrary to the well established principles of statutory construction. To conclude that offenses should not fall within § 12.1-32-11(3) because they are not "included offenses" of each other renders § 12.1-32-11(3) meaningless because the Double Jeopardy Clauses contained in the Fifth Amendment of the United States Constitution and Article I Section 12 of North Dakota Constitution already prohibited multiple punishments for such offenses. As stated by the court in **Kuchenski v. Kramer, Sheet Metal, Inc.**, 377 N.W.2d 133, 136 (N.D. 1985), "statutes must be interpreted to have some meaning, for the law does not perform nor require idle acts".

Further, the Court in **Ulmer**, specifically indicated that under § 12.1-32-11(3) in order for two offenses to involve "substantially different criminal objectives", the offenses must not fall within **any** of the following three categories: (1) one offense is an included offense of the other; (2) one offense consists of a conspiracy, attempt, or facilitation of, the other; (and) (3) the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific

instance of such conduct." 1999 ND 245 ¶ 10.

Salveson's DUI "facilitated" her Aggravated Reckless Driving because the only evidence off her "recklessness" was her level of intoxication. [T 40 - 41: A 28 - 29.] Accordingly, the court erred in holding § 12.-32-11(3) inapplicable under the test set forth in **Ulmer**. **Id.**

Under the **Ulmer** test, the Court also erred in holding § 12.-32-11(3) inapplicable because the charge of Reckless Driving prohibits the generalized conduct of driving recklessly, while the charge of DUI prohibits a specific way in which a person may drive recklessly. **Id.**

Aside from the **Ulmer** test, it should be noted that it is not alleged that Salveson intentionally hit any pedestrians. Accordingly, Salveson's conduct giving rise to her Aggravated Reckless Driving did not contain any "objective". Accordingly, her DUI and Aggravated Reckless Driving did not have separate criminal objectives.

Even if it is argued that Salveson's Aggravated Reckless Driving had an "objective", that "objective" could only be considered a generalized objective to drive recklessly. The same generalized "objective", to drive recklessly, can be attributed to Salveson's DUI, again noting that the only evidence of Salveson's recklessness was her level of intoxication. [T 40 - 41: A 28 - 29.] Accordingly, Salveson's DUI and Aggravated Reckless Driving did not have separate criminal objectives. **People v. Tillery**, 490 N.E.2d 967, 969, 971 (IllApp. 1986) (holding that DUS and Reckless Homicide had different criminal objectives for determining whether statute allowed defendant to be sentenced consecutively for said offenses, but that DUI and Reckless

Homicide had the same criminal objective after the State conceded the point).

Even if it is argued that Salveson's Aggravated Reckless Driving and DUI did not have the same criminal objective, it would require quite a stretch to argue that they have "**substantially**" different criminal objectives. The type of forced logic necessary to classify Salveson's DUI and Aggravated Reckless Driving objectives as being "substantially" different is not permitted under North Dakota's laws of statutory construction which require courts to "construe the words in their plain, ordinary and commonly understood sense." **Id** at ¶ 6.

"It is a well-settled principle of statutory construction that penal statutes should be strictly construed against the government and in favor of the accused." **State v. Rohrich**, 450 N.W.2d 774, 776 (N.D. 1990). A further extension of the holding in **Ulmer** to this case would violate our State's principles of statutory construction. Accordingly, the court erred in holding § 12.1-32-11(3) inapplicable.

Since § 12.1-32-11(3) is applicable, the maximum sentence for Salveson's offenses of Aggravated Reckless Driving, case no. 05-K-726, and DUI, case no. 05-K-703 is **one year total.** Given that Salveson was sentenced to one year with the Department of Corrections in 05-K-726, Defendant requests that this Court reverse the Judgment in 05-K-703 and order any sentence imposed run concurrent with the sentence in 05-K-726.

If 05-K-703 and/or 05-K-726 are remanded for resentencing, Defendant requests that a different judge be assigned due to the manner in which Judge Lee conducted the prior proceedings and the resulting perception of bias or prejudice. **Blomquist v. Clague**, 290 N.W.2d 235, 240 (N.D. 1980).

CONCLUSION

For the aforementioned reasons, Defendant requests that this Court reverse the Judgment in 05-K-703 and order that any sentence imposed run concurrent with the sentence in 05-K-726. If 05-K-703 and/or 05-K-726 are remanded for resentencing, Defendant requests that a different judge be assigned.

Dated this 15th day of March, 2006.

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Appellant's Brief and Appendix was. on the 15th day of March, 2006 delivered to:

Ward County States Attorney
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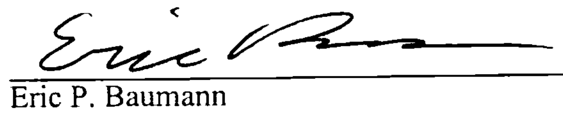

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