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SUPREME COURT

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

20080029

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SUPREME COURT NO.: 20080029

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State of North Dakota,

Plaintiff-Appellee,

- vs -

Patti Lou Mastre,

Defendant-Appellant.

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

APR 15 2008

STATE OF NORTH DAKOTA

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APPEAL FROM THE CRIMINAL JUDGMENT  
NORTHEAST JUDICIAL DISTRICT  
GRAND FORKS COUNTY CASE NO. 18-07-K-1250  
THE HONORABLE DEBBIE G. KLEVEN, PRESIDING

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APPELLANT'S BRIEF *and Attachment*

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**TABLE OF CASES, STATUTES AND OTHER AUTHORITIES**

**STATUTES**

Rule 11 . . . . . 1, 7, 9, 10

**ABBREVIATIONS**

Arraignment Transcript - A. Tr.

Page - P.

Line - L.

Transcript - Tr.

Change of Plea Transcript - CP. Tr.

## NATURE OF THE CASE

An Information dated May 25, 2007 was filed on May 29, 2007 charging Defendant, Patti Lou Mastre ("Ms. Mastre") with Terrorizing, a class C felony.

Ms. Mastre was arraigned on this Information on August 13, 2007 and plead not guilty to the charge of terrorizing.

Ms. Mastre's pretrial conference on the terrorizing charge was scheduled for September 20, 2007. That pretrial conference had to be continued to September 28, 2007 because the State made its plea trial offer to Ms. Mastre just before the September 20, 2007 pretrial conference began.

At the September 28, 2007 pretrial conference Ms. Mastre decided not to accept the pretrial offer. A jury trial on the terrorizing charge was set for November 6, 2007.

The State then requested that the jury trial be continued. The trial judge granted the request and the trial date was set for December 4, 2007.

Before December 4, 2007, Ms. Mastre decided to plead guilty to the crime of terrorizing.

On December 3, 2007, Ms. Mastre entered an open plea of guilty to the crime of terrorizing. After Ms. Mastre's plea of guilty and presentence investigation was ordered.

Judgment and Sentence were scheduled for January 11, 2008. Ms. Mastre appeared on that date and was sentenced to 365 days in jail at the Grand Forks County Correctional Center with 335 days suspended for 18 months and 18 months of supervised probation.

After Judgment and Sentence were imposed on January 11, 2007, Ms. Mastre on

January 25, 2007 did the following:

1. Made and filed a Notice of Motion and Order to Stay Judgment Pending Appeal.
2. Made a Notice of Appeal.
3. Made an Order for Transcript.

The trial judge entered an Order dated, February 13, 2008 and filed on February 14, 2008, granting Defendant's Motion to Stay Judgment Pending Appeal and Order Authorizing Conditional Release.

The Notice of Appeal and Order for Transcript have been filed and this matter is now before the North Dakota Supreme Court.

## STATEMENT OF THE FACTS

Patti Lou Mastre ("Ms. Mastre") was arraigned on August 13, 2007 on a charge of Terrorizing, a class C felony. A. Tr. P. 2, L. 1 - 22. At that arraignment, Ms. Mastre was questioned by the trial judge as to whether or not she understood the charge and the penalty. Ms. Mastre was also questioned by the trial judge as to whether or not she had been advised of her rights on the criminal charge of terrorizing by Judge Braaten at the June 1, 2007 court appearance and whether she had any question about her rights and the information. Ms. Mastre's response was that she understood the charge, the penalty and her rights. A. Tr. P. 2, L. 24 - 25 and P. 3, L. 1 - 11.

Ms. Mastre's attorney, Dave Ogren was then asked if Ms. Mastre was prepared to plead to the charge of Terrorizing. His response was, "Yes". Ms. Mastre was then asked by the trial judge what her plea was? Ms. Mastre's response was, "Not guilty". A. Tr., P. 3, L. 13 - 22.

On December 3, 2007, Ms. Mastre appeared in Court and Notified the trial judge she had decided to withdraw her not guilty plea and enter a plea of guilty to the charge of Terrorizing. CP. Tr., P. 3, L. 1 - 13.

The trial judge then said:

THE COURT: Ms Mastre, you had previously appeared back for an arraignment on August 13<sup>th</sup>, and at that time I did go over rights and penalty provisions with you. Do you have any questions about that information, or would you like me to go through that with you again? CP. Tr., P. 3, L. 14 - 19.

Ms. Mastre's response was:

MS. MASTRE: Yes, Your Honor. I would like to apologize for wasting the Court's time. I have court in Walsh County on the 5<sup>th</sup>. so that's why I agreed to settle out of court so I will be able to attend that. So I'm sorry for wasting your time. CP. Tr., P. 3, L. 20 - 24.

The trial judge then asked what is your plea to the charge and Ms. Mastre answered "Not guilty". CP. Tr., P. 4, L. 15.

The Change of Plea Transcript then goes through a discussion about if Ms. Mastre pleads guilty there will be no binding plea agreement on the judge and that the trial judge can sentence Ms. Mastre to anything up to 5 years.

Ms. Mastre then changed her plea to guilty. CP. Tr., P. 11, L. 6. The trial judge then accepted her plea and said:

THE COURT: And is your plea of guilty made freely and voluntarily?

MS. MASTRE: Yes, Your Honor.

THE COURT: Have there been any threats or promises made to you in order to get you to plead guilty?

MS. MASTRE: No. Your Honor.

THE COURT: Do you understand that by pleading guilty you are giving up your right to have a trial and you're giving up your right to face the witnesses the State may have against you?

MS. MASTRE: Yes.

THE COURT: And do you understand there will be no further proceedings on this charge other than for sentencing?

MS. MASTRE: Right.

THE COURT: And that unless – that you can't leave this courtroom today and come back in here and say I want to withdraw my guilty plea? It's done.

MS. MASTRE: Right.

THE COURT: Because otherwise, I have a jury coming in here tomorrow, and it's no problem, we can have a jury trial. In fact, I enjoy those.

MS. MASTRE: I understand. they told me what's going to happen. and I agree to what's going to happen. I get a chance to sit and wait and throw myself on the mercy of the Court.

THE COURT: Okay. Miss Mastre, are you under the influence of any alcohol or drugs at this time?

MS. MASTRE: No.

THE COURT: Okay. Not accusing you of anything, I just have to have that for the record.

MS. MASTRE: I understand. CP. Tr., P. 11, L. 7 - 25 and P. 12, L. 1 - 16.

After that a factual basis for the plea is established. CP. Tr., P. 12, L. 17 - 21, P. 13, L. 1 - 25 and P. 14. L. 1 - 15.

The trial judge then determined the plea by Ms. Mastre was voluntarily and that there was a factual basis for the plea. A presentence investigation was ordered and sentencing was set for 9:30 a.m. on January 11, 2008. CP. Tr., P. 15, L. 3 - 8.

### ARGUMENT

ISSUE I. Before accepting Ms. Mastre's plea of guilty, should the trial judge have



questioned and advised Ms. Mastre to determine whether or not she understood her rights under Rule 11 of the North Dakota Rules of Criminal Procedure?

The failure of the trial judge to follow the requirements of Rule 11, North Dakota Rules of Criminal Procedure after a Defendant enters a guilty plea is the basis for this appeal. Heretoaffixed, marked Exhibit 1 and made a part of this brief is Rule 11.

The Explanatory Note of Rule 11 begins with the following:

“Rule 11 is similar to Fed.R.Crim.P. 11. The rule is designed to accomplish a number of objectives: (1) it prescribes the advice that the court must give to ensure the defendant who pleads guilty has made an informed plea; and (2) it provides for a plea agreement procedure designed to give recognition to the propriety of plea discussions between counsel, to bring the existence of a plea agreement out in open court. and to provide methods for court acceptance or rejection of the plea agreement.” (Emphasis added).

A copy of the Explanatory Note to Rule 11 is heretoaffixed, marked Exhibit 2 and made a part of this brief.

The fact that Ms. Mastre wanted to be given information regarding what was going on at this change of plea hearing is established by the following:

“THE COURT: Miss Mastre, you had previously appeared back for an arraignment on August 13<sup>th</sup>, and at that time I did go over rights and penalty provisions with you. Do you have any questions about the information, or would you like me to go through that with you again?

MS. MASTRE: Yes, Your Honor.” CP. Tr., P. 3, L. 14 - 20.

The fact that Ms. Mastre was confused at the change of plea hearing becomes clear when instead of pleading guilty she plead not guilty. CP. Tr., P. 4, L. 16.

Then before Ms. Mastre changed her plea a recess had to be taken to allow her to consult with her attorney. CP. Tr., P. 8, L. 14 - 15.

Ms. Mastre’s change of plea appears at CP. Tr., P. 11, L. 4 - 6. The following are the questions asked by the trial judge after Ms. Mastre’s guilty plea:

“THE COURT: Have there been any threats or promises made to you in order to get you to plead guilty?

MS. MASTRE: No, Your Honor.

THE COURT: Do you understand that by pleading guilty you are giving up your right to have a trial and you’re giving up your right to face the witnesses the State may have against you?

MS. MASTRE: Yes.

THE COURT: And do you understand there will be no further proceedings on this charge other than for sentencing?

MS. MASTRE: Right.

THE COURT: And that unless – that you can’t leave this courtroom today and come back in here and say I want to withdraw my guilty plea? It’s done.

MS. MASTRE: Right.

THE COURT: Because otherwise, I have a jury coming in here tomorrow, and it’s no problem, we can have a jury trial. In fact, I enjoy those.

MS. MASTRE: I understand. they told me what's going to happen. and I agree to what's going to happen. I get a chance to sit and wait and throw myself on the mercy of the Court.

THE COURT: Okay. Miss Mastre, are you under the influence of any alcohol or drugs at this time?

MS. MASTRE: No.

THE COURT: Okay. Not accusing you of anything, I just have to have that for the record.

MS. MASTRE: I understand." CP. Tr., P. 11, L. 10 - 25 and P. 12, L. 1 - 16.

Comparing what was asked and advised above by the trial judge, and what the North Dakota Rules of Criminal Procedure Rule 11 (b)(1)(a)(b)(c)(d)(e)(f)(g)(h) and (i) require after a guilty plea is entered will show that as to:

(A). Nothing was said nor was any advice given about Ms. Mastre's right to plead not guilty, or having already so pleaded to persist in that plea.

(B). Ms. Mastre was told she was giving up her right to trial.

(C). Nothing was said, nor was any advice given to Ms. Mastre about her right to be represented by counsel at trial and at every stage of the proceeding and if necessary to have the right to counsel provided.

(D). Ms. Mastre was told she was giving up her right to face the State's witnesses, but nothing was said nor was any advice given about her right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence and compel the attendance of witnesses.

(E). The trial rights that Ms. Mastre was waiving weren't explained nor was any advice given to her except for her right to trial and right to face witnesses.

(F). The nature of the charge that Ms. Mastre was pleading to wasn't discussed nor was any advice given.

(G). The maximum possible penalty, including imprisonment, fine and mandatory fee weren't discussed nor was any advice given to Ms. Mastre.

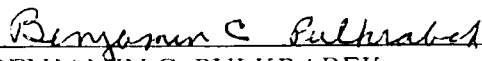
(H). Is not applicable because Terrorizing NDCC 12.1-17-04 has no mandatory minimum penalty.

(I). There was no discussion nor advice given about the Court's authority to order restitution.

### **CONCLUSION**

Rule 11 of the North Dakota Rules of Criminal Procedure is designed to explain and to advise a Defendant so he/she won't have any confusion about what he or she is pleading guilty to. The procedure required to be followed in Rule 11 of the North Dakota Rules of Criminal Procedure before accepting a guilty plea is not discretionary. In the case, the trial judge failed to follow the procedure required in Rule 11 of the North Dakota Rules of Criminal Procedure after Ms. Mastre entered her guilty plea. Therefore, Ms. Mastre's guilty plea must be set aside and the case remanded to the trial court so that all of the advice required by Rule 11 of the North Dakota Rules of Criminal Procedure can be given to Ms. Mastre.

DATED at Mandan, North Dakota, this 15 day of April, 2008.

  
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**CERTIFICATE OF SERVICE BY MAIL**

The undersigned hereby certifies that she is an employee in the office of Pulkrabek Law Firm and is a person of such age and discretion as to be competent to serve papers.

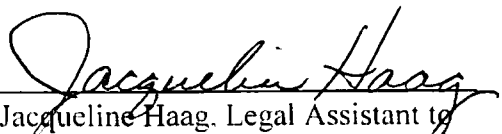
That on April 15<sup>th</sup>, 2008, she served, by mail, a copy of the following:

APPELLANT'S BRIEF

by placing a true and correct copy thereof in an envelope and depositing the same, with postage prepaid, in the U.S. mail at Mandan, North Dakota, addressed as follows:

Faye Jasmer  
Assistant State's Attorney  
P.O. Box 5607  
Grand Forks, ND 58206-5607

The undersigned further certifies that on April 15<sup>th</sup>, 2008, she dispatched to the Clerk of the North Dakota Supreme Court, an original and seven copies of the APPELLANT'S BRIEF and emailed the same containing the full text of the Brief.

  
Jacqueline Haag, Legal Assistant to  
Benjamin C. Pulkrabek