ORIGINAL (e-filed) 20080029

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,	Supreme Court No. 20080029
Plaintiff-Appellee,	District Court No. 18-07-K-1250
vs.	
Patti Lou Mastre,	
Defendant and Appellant.	

ON APPEAL FROM CRIMINAL JUDGMENT
FROM THE DISTRICT COURT
FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY, NORTH DAKOTA
THE HONORABLE DEBBIE G. KLEVEN PRESIDING.

AMENDED BRIEF OF APPELLEE

Faye Jasmer (05428)
Assistant States Attorney
Grand Forks County
P.O. Box 5607
Grand Forks, ND 58206
(701) 780-8281

Stephanie A. Weis
Senior Legal Intern
P.O. Box 5607
Grand Forks, ND 58206
(701) 780-8281

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

U.S. Supreme Court Cases

ND State Cases

Other Circuit Cases

Rules

[¶1] STATEMENT OF THE ISSUES

[¶2] ISSUE I: The Defendant Failed To Properly Preserve Any Issue For Appeal When She Did Not Enter A Conditional Plea Of Guilty As Required By Rule 11(a)(2) Of The North Dakota Rules Of Criminal Procedure.

[¶3] ISSUE II: The Defendant Was Not Denied Due Process Rights.

A. [¶4] The Trial Court Did Not Err When It Failed To Read The Defendant Her Rights Verbatim From Rule 11 Of The North Dakota Rules Of Criminal Procedure.

B. [¶5] The Trial Court Satisfied The Requirements Of N.D.R.Crim.P. 11(b)(1).

[¶6] STATEMENT OF THE CASE

[¶7] The Appellee hereby incorporates the statement of the case of the Appellant.

[¶8] STATEMENT OF THE FACTS

[¶9] On May 17, 2007, Diane Gerard, a Walsh County social worker, attempted to remove a minor child from the custody of Stephanie Aune at her residence under a Walsh County court order. Ch. of Plea Tr. Page 12, line 20-25 through page 13, line 1. Aune's mother, Patti Mastre (hereinafter "the Defendant"), was present. Ch. of Plea Tr. Page 13, lines 2-4. During that removal Gerard called 911 because the Defendant had become very angry and defensive and forced Gerard out of the apartment causing her to be afraid. Ch. of Plea Tr. Page 13, lines 8-16. Upon the arrival of officers Gerard stayed in the hallway. When the Defendant saw that Gerard stayed in the hallway she rushed past the officers and went toward Gerard making statements that she would kill her and hitting her in the face and leg until they both went to the ground. Ch. of Plea Tr. Page 13, lines 21-25 through page 14. lines 9. The Defendant had to be restrained by a police officer. Ch. of Plea Tr. Page 14, lines 1-2. The encounter ended with the Defendant being arrested for simple assault charges and transported to the Grand Forks County Correctional Center. The simple assault charge was assigned to municipal court.

[¶10] An affidavit of probable cause was forwarded to the Grand Forks County States Attorney's office to determine if a charge of terrorizing would be appropriate. An Information was filed for the terrorizing charge on May 25, 2007 in district court and a warrant was issued for The Defendant's arrest. The Defendant was picked up on the warrant and had an initial appearance from the jail on June 1, 2007. Appellant App. at 1. The Defendant plead not guilty at that hearing and it was set for a preliminary hearing on June 27, 2007. Id.

[¶11] Next, the Defendant had an arraignment on August 13, 2007 and a pretrial hearing on September 20, 2007 and then again on September 28, 2007. Id. At the pretrial hearing the case was set for a jury trial and then continued until December 4, 2007. Id. A change of plea hearing was held on December 3, 2007 where the Defendant changed her plea from not guilty to guilty. Ch. of Plea Tr. Page 11, line 6. The court found her plea was made voluntarily and that there was a factual basis for the plea. Ch. of Plea Tr. Page 15, lines 3-5. The court ordered a presentence investigation and set a sentencing date for January 11, 2008. Appellant App. at 1.

[¶12] **LAW AND ARGUMENT**

[¶13] **STANDARD OF REVIEW**

[¶14] After a court has accepted a guilty plea and imposed a sentence, a defendant cannot withdraw the plea unless withdrawal is necessary to correct a manifest injustice. State v. Farrell, 2000 ND 26, ¶ 8, 606 N.W.2d 524 (internal citation omitted). The determination of a manifest injustice may result from procedural errors by the sentencing court. Id. The determination of a manifest injustice is ordinarily within the trial court's discretion, and will be reversed on appeal only for an abuse of discretion. Id. A trial court abuses its discretion when it acts in an arbitrary, unreasonable, or capricious manner, or misinterprets or misapplies the law. Id.

I. [¶15] The Defendant Failed To Properly Preserve Any Issue For Appeal When She Did Not Enter A Conditional Plea Of Guilty As Required By Rule 11(a)(2) Of The North Dakota Rules Of Criminal Procedure.

[¶16] The Defendant in this case entered into an open plea agreement presented to the court on December 3, 2007. Ch. of Plea Tr. Page 1. At the time the Defendant entered the guilty plea, neither she nor her attorney made any statement indicating that

the Defendant wished to preserve any issues for appeal or that they believed that the Defendant was entering into a conditional plea under N.D.R.Crim.P 11.

[¶17] In Eaton v. State, the North Dakota Supreme Court stated:

> [¶18] This Court has repeatedly held that defendants who voluntarily plead guilty waive the right to challenge defects occurring before the entry of the guilty plea. In *State v. Burr*, 1999 ND 143, ¶ 29, 598 N.W.2d 147, quoting *State v. Krafi*, 539 N.W.2d 56, 58 (N.D.1995), a majority of this Court stated: Persons who voluntarily plead guilty to an offense waive their right to challenge on appeal nonjurisdictional defects that occur before the entry of the guilty plea, including alleged violations of constitutional rights. *State v. Slapnicka*, 376 N.W.2d 33 (N.D.1985); *see Tollett v. Henderson*, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973). Under Rule 11(a)(2), N.D.R.Crim.P., a defendant may preserve the right to appeal "the adverse determination of any specified pretrial motion." A defendant who enters a conditional plea agreement, but fails to preserve issues for review in the agreement, cannot raise those issues on appeal. *See United States v. Ramos*, 961 F.2d 1003 (1st Cir.1992); *United States v. Ryan*, 894 F.2d 355 (10th Cir.1990).
>
> [¶19] 2001 ND 97, ¶ 7, 626 N.W.2d 676, 678.

[¶20] In Eaton, the Defendant entered an unconditional plea of guilty, without preservation of issues for appeal, and therefore waived any nonjurisdictional defects occurring before his plea of guilty. Eaton v. State, 2001 ND 97, ¶ 9, 626 N.W.2d 676, 678 -679. The Defendant in Eaton was appealing from a denial of his application for post-conviction relief and argued that because there were Detainers Act defects, they deprived the district court of jurisdiction and therefore his guilty plea was ineffective. Id. at ¶ 1. The Court found that the Defendant had entered into an unconditional plea of guilty and waived any defect by entering a plea of guilty. Id.

[¶21] Here, the Defendant entered into an open plea agreement with the State. On December 3, 2007, she changed her plea from not guilty to guilty the day before her case was set to go to trial. Ch. of Plea Tr. Page 11, line 6. The court noted that this was

long past the September 20, 2007, date proscribed by the court which binding plea agreements would be accepted. Ch. of Plea Tr. Page 4, lines 22-25. Both the State and Defendant would make a joint recommendation regarding sentencing depending on the pre-sentence investigation report findings if the Defendant entered a guilty plea before trial. Ch. of Plea Tr. Page 5, lines 7-18. The Defendant understood she was entering into an open plea and not a conditional plea under N.D.R.Crim.P. 11. Ch. of Plea Tr. Page 10, lines 6-19.

[¶22] As referenced above, this Court stated in Eaton that "[p]ersons who voluntarily plead guilty to an offense waive their right to challenge on appeal nonjurisdictional defects that occur before the entry of the guilty plea, including alleged violations of constitutional rights." The Court went on to say that "[a] defendant who enters a conditional plea agreement, but fails to preserve issues for review in the agreement, cannot raise those issues on appeal." 2001 ND 97, ¶ 7, 626 N.W.2d 676, 678. A conditional plea must be done in writing. N.D.R.Crim.P. 11.

[¶23] In the case at hand the district court found the Defendant entered a guilty plea voluntarily. Ch. of Plea Tr. Page 15, lines 3-5. This plea cannot be considered conditional as it was not presented to the district court in writing, as required by Rule 11, nor mentioned at the time she entered her guilty plea and was past the time formal plea agreements would be accepted by the court. Therefore, because it was an unconditional plea, the Defendant waived her right to challenge on appeal defects that occur before the entry of the guilty plea, including alleged violations of constitutional rights. See, Eaton v. State, 2001 ND 97, ¶ 7, 626 N.W.2d 676, 678. Additionally, the Defendant failed to

preserve any issues for appeal by objection or motion and therefore no issue should be considered.

II. [¶24] The Defendant Was Not Denied Due Process Rights.

A. [¶25] The Trial Court Did Not Err When It Failed To Read The Defendant Her Rights Verbatim From Rule 11 Of The North Dakota Rules Of Criminal Procedure.

[¶26] The U.S. Supreme Court in Boykin ruled that "[i]t was error. plain on the face of the record. for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary." Boykin v. Alabama. 395 U.S. 238, 242, 89 S.Ct. 1709, 1711 (1969). In that case. the Court found that "... the record show[ed] the judge asked no questions of petitioner concerning his plea, and petitioner did not address the court." Boykin v. Alabama, 395 U.S. 238, 239, 89 S.Ct. 1709, 1710 (1969).

[¶27] This Court stated in Storbakken that "Neither Rule 11 nor compliance with Boykin due process standards states that the trial judge must specifically inform a defendant, Eo nominee, of his rights he waives by pleading guilty. It is sufficient to satisfy due process that such knowledge on the part of the defendant is clearly reflected from the whole record not just the interrogation of the defendant by the trial court." State v. Storbakken, 246 N.W.2d 78, 83 (ND 1976).

[¶28] The Defendant had been informed of her rights on numerous occasions. At her first appearance from the jail on June 1. 2007. the court advised the Defendant of her rights. Arr. Tr. Page 3, lines 2-6. At her arraignment on August 13. 2007, the court again asked if she "had questions about those rights or would she like [the court] to go through that information with her again". to which the Defendant responded that she did not. Arr.

Tr. Page 3, lines 7-10. The court continued to ask her if she understood her rights and she replied that she did. Arr. Tr. Page 3, lines 11-12.

[¶29] At the change-of-plea hearing on December 3, 2007, the court stated that the Defendant had previously appeared at an arraignment hearing on August 13, 2007, and that at that time the court had gone over rights and penalty provisions with the Defendant and then went on to ask if the Defendant had any questions about that information or if she would like the court to go through that information with her again. Ch. of Plea Tr. Page 3, lines 14-19. It was then that the Defendant stated "Yes, Your Honor. I would like to apologize for wasting the Court's time. I have court in Walsh County on the 5th, 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. Ch. of Plea Tr. Page 3, lines 20-24. The court went on to say that "as long as you let us know in advance like you did so we don't call in a jury. It just gets real expensive to bring in a jury." Ch. of Plea Tr. Page 3, line 25 through page 4, lines 1-2. The Defendant responded "I just wanted to apologize for it, but it was 'cause of family reasons is why I did this." Ch. of Plea Tr. Page 4, lines 3-5.

[¶30] "At a change of plea hearing, a trial court is not required to readvise a defendant of each of his rights under N.D.R.Crim.P. 11(b), if the court determines the defendant previously was properly advised of those rights and recalls the advice." Abdi v. State, 2000 ND 64, ¶ 15, 608 N.W.2d 292, 298 (citing State v. Gunwall, 522 N.W.2d 183, 185 (ND1994). Here, the Defendant had been read her rights at her initial appearance and then was asked about them at her arraignment. She stated at the arraignment that she did understand them. When the Defendant was asked is she wanted her rights read again at her change-of-plea hearing she begins apologizing to the court

and talking about not having the upcoming trial. It is apparent from the record that no one in the room heard that statement as a request for an additional reading of her rights. The court had read the Defendant her rights on numerous occasions before the change of plea hearing and each time the Defendant answered that she understood her rights. Additionally, even if the statement was a request by the Defendant for her rights to be read again, those rights she would be giving up by pleading guilty were discussed later in the hearing.

B. [¶31] The Trial Court Satisfied The Requirements Of N.D.R.Crim.P. 11(b)(1).

[¶32] Even if this Court finds that the Defendant was asking to be readvised of her rights it was merely harmless error that the court did not recite them at that time in the hearing as the court goes through the rights again at a later time in the hearing to determine that the guilty plea was made voluntarily. This Court has held that there can be substantial compliance with [Rule 11] in cases because the very information the rule was designed to elicit had nevertheless been discussed during the guilty plea hearing. State v. Farrell, 2000 ND 26, ¶ 11, 606 N.W.2d 524, 528 (internal citations omitted).

[¶33] In State v. Storbakken, the Defendant "challenged a guilty plea solely because the trial judge did not restate Storbakken's constitutional rights Eo nominee (by name) at the time he accepted the plea, and because the trial judge did not follow the exact format of questioning spelled out in Rule 11 of the North Dakota Rules of Criminal Procedure." 246 N.W.2d 78, 83 (ND 1976). The defendant alleged only a failure to follow a specific legal ritual. Id. In Storbakken, this Court took into consideration all

appearances that the defendant had made when determining if he had sufficient knowledge of his rights. Id.

[¶34] The Court went on to quote Brady v. U.S. stating "It is sufficient to satisfy due process that such knowledge on the part of the defendant is clearly reflected from the whole record, not just the interrogation of the defendant by the trial court. Id. (citing, 397 U.S. 742. 747-748. n.4). When viewing the record as a whole as it pertains to this appeal it could be read that the Defendant's response to the court's question of whether she would like to go over her rights again was not intended to illicit an additional reading of her rights and penalty provisions but instead was using that opportunity to be able to start a conversation with the court. It can be inferred from the record that neither the judge nor the Defendant's counsel viewed her response as an inquiry as to her rights. There was no comment made by counsel that the rights had not been read which would indicate that her own counsel heard her response as a request to hear her rights.

[¶35] The Storbakken Court also stated that "...inquiry must be fully developed on the record, it need not assume any predetermined, ritualistic form to conform with Rule 11, but rather the (proper scope of the examination) of the defendant will in each case depend upon the complexity of the charge as well as all of the surrounding circumstances." Id. at 84 (citing Sappington v. U.S., 468 F.2d 1378). In the case at hand the trial court does not go through each requirement of Rule 11(b)(1) in its form in the statute but the judge does discuss each requirement with the defendant to ensure that her plea of guilty is voluntary and intelligently made. The Court in Storbakken stated that "[r]equiring a specific waiver of every constitutional right foreclosed by the entry of a

guilty plea would only sow the seeds for later collateral attack. 246 N.W.2d at 84 (citing Boykin v. Alabama, 395 U.S. at 244).

[¶36] This Court in State v. Hagemann found substantial compliance with Rule 11 in a case with facts similar to those in this case. 326 N.W.2d 861 (ND 1982). In that case the defendant argued that there was not substantial compliance with Rule 11 because he was not readvised of his constitutional rights at his arraignment and that the defendant was confused and was not aware of the rights he was waiving and of the consequences of his plea of guilty. Id. at 864. The Court in that case stated that the defendant in that case did not claim that he did not understand all applicable rights at the time of his arraignment but that the district court erred in not re-advising him of those rights at the time he entered his plea of guilty. Id. at 865. The Court, upon a review of the record of the defendant's arraignment proceedings, found the defendant was informed of all his necessary rights and that the district court did determine that he understood those rights and the charge brought against him. Id. at 865-66.

[¶37] The Court in Hagemann noted that the defense counsel indicated that he believed that the defendant understood the consequences of his guilty plea because defense counsel had discussed the situation with the defendant immediately prior to the change-of-plea hearing and on previous occasions. This Court in State v. Schumacher stated that "[t]he purpose of the procedure outlined in Rule 11(b) is to ensure that the defendant is fully aware of the consequences of a guilty plea before he enters his plea." 452 N.W.2d 345 (ND 1990). In the case at bar, a recess was taken during the change-of-plea hearing by the court, to allow the Defendant to speak with her attorney on the matter of changing her plea from not guilty to guilty. Defense counsel explained to the court

what was discussed with the Defendant during the recess and what exactly she would be pleading to and the possible consequences of that plea. It was after the recess and after defense counsel's statements to the court when the Defendant changed her plea to guilty. Ch. of Plea Tr. Page 8, line 8 through page 9, line 21. It is clear that the Defendant in this case had a clear knowledge of the charge she was pleading guilty to.

[¶38] The Defendant in her brief is misleading this Court in the discussion about the requirements of Rule 11 and their applicability to this case. As is referenced in Storbakken above this Court has stated that a trial court is not required to advise a Defendant verbatim of her right to persist in her not guilty plea under 11(b)(1)(A). However, at the change of plea hearing the court does go to great lengths to inform her of her right to go to trial as required by 11(b)(1)(B). These two requirements go hand in hand though. The court took the time to thoroughly inform the Defendant that if she plead guilty and the plea was accepted that she would not be able to change her plea back to not guilty. The court stated to the Defendant "and if you plead guilty today, and I take that guilty plea, you can't come in next week and say, oh, I want to have a trial because you are going to make me serve some jail time." Ch. of Plea Tr. Page 10, lines 6-9.

[¶39] Further, the court stated that "you understand there will be no further proceedings on this charge other than for sentencing?" The Defendant said "Right." The court went on to say "you can't leave this courtroom today and come back in here and say I want to withdraw my guilty plea? It's done." To which the Defendant replied "Right." The court stated "[b]ecause 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." The Defendant then said "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." Ch. of Plea Tr. Page 11, lines 19-25 through page 12, lines 1-9. This exchange between the Defendant and the court clearly shows that the Defendant understood she was pleading guilty and that she is now waiving her right to plead not guilty and her right to a jury trial. The trial judge satisfies 11(b)(1)(E) by asking the Defendant if she understands each right proscribed by the rule and in the form of her questioning that by pleading guilty that she gives up these rights.

[¶40] The court asked the Defendant "...do you feel you've had sufficient time to discuss this case with your attorney" and "[a]re you satisfied with the representation that you've received from Mr. Ogren, and then Mr. Borgan has been filling in for him today?" The Defendant answered both questions in the affirmative. Ch. of Plea Tr. Page 10, lines 20-25 through page 11, lines 1-3. These questions would be enough to satisfy 11(b)(1)(C). Additionally, the Defendant had been represented by court appointed counsel at every hearing. This fact would indicate that she understood her right to have court appointed counsel and her right to be represented by counsel at every hearing. Seeking to satisfy 11(b)(1)(C.) the court asks "do you understand that by pleading guilty you are giving up your right to face the witnesses the State may have against you?" Ch. of Plea Tr. Page 11, lines 14-18. Again, the Defendant replied in the affirmative. Ch. of Plea Tr. Page 11, line 19.

[¶41] The judge also satisfies 11(b)(1)(F) when she informs the Defendant that the charge brought against her is terrorism. The court stated, "Miss Mastre, the allegation in this case is that on May 17th at 8:39 in the morning, you committed the offense of Terrorizing when you verbally threatened to kill Diane Gerrard with the intent to place

her in fear for her safety, this taking place at or near 506 North 48th Street, Apartment 201 in Grand Forks." Ch. of Plea Tr. Page 3, lines 2-6. Later the court asked, "Miss Mastre, again, what is your plea to the charge of Terrorizing?" to which the Defendant replied "Guilty". Ch. of Plea Tr. Page 11, lines 3-5. There can be no question as to what charge the Defendant was pleading guilty to as it was phrased clearly in the question preceding the plea of guilty.

[¶42] The court goes through the maximum possible penalty as well as different possibilities with the Defendant in accordance with 11(b)(1)(G). After going through the charge and allegations the court stated, "It's a Class C Felony with a maximum penalty of five years in prison and/or a fine of $5,000." Ch. of Plea Tr. Page 4, lines 13-14. Later in the hearing, the court again goes over possible sentencing and states "...the Court can defer imposition of sentence. I can give you 60 days, or I could give you anything up to five years in prison." Ch. of Plea Tr. Page 10, lines 1-4. The court went on to say "so it may very well be that either a suspended sentence or a deferred imposition of sentence is ordered, but there is just nothing binding." Ch. of Plea Tr. Page 10, lines 14-17.

[¶43] The Defendant has stated that the purpose of Rule 11 is to explain and to advise a Defendant so she will not have any confusion about what she is pleading guilty to. Upon a review of the record there can be no question as to what charge she was pleading to. The court went to great lengths to ensure that she knew what charge she was pleading to and that she knew what she was giving up by pleading guilty. Upon a review of the record in its entirety, it is apparent that the Defendant had been well informed on the charge before her and her rights pertaining thereto.

[¶44] CONCLUSION

[¶45] For the above-mentioned reasons the State respectfully requests that this Court find that the trial court proceeded in substantial compliance with Rule 11 of the North Dakota Rules of Criminal Procedure and did not err in finding that the guilty plea was voluntarily and intelligently made.

Respectfully submitted this 19th day of May, 2008.

/s/_____
Faye A. Jasmer
Assistant States Attorney (05428)
Grand Forks County
P.O. Box 5607
Grand Forks, ND 58206
(701) 780-8281

/s/_____
Stephanie A. Weis
Senior Legal Intern/Certified Law Student
Grand Forks County
P.O. Box 5607
Grand Forks, ND 58206
(701) 780-8281