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20080308

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff/Appellee	)	
	)	District Court Case No. 14-08-C-017
v.	)	Supreme Court No. 20080308
	)	
Preston Vandeheoven,	)	
	)	
Defendant/Appellant	)	

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STATE OF NORTH DAKOTA

APPEAL FROM JUDGEMENT OF CONVICTION AND ORDER
DATED NOVEMBER 10, 2008
DENYING MOTIONS FOR CONTINUANCE AND TO WITHDRAW GUILTY PLEA
SOUTHEAST JUDICIAL DISTRICT
THE HONORABLE JAMES M. BEKKEN, PRESIDING

BRIEF OF APPELLEE

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(701) 947-2442
Attorney for Appellee

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TABLE OF CONTENTS

[¶1] TABLE OF AUTHORITIES

Paragraph No.

United States Supreme Court Cases

State Cases

Rules

Other Authorities

[¶2] STATEMENT OF THE ISSUES

I. [¶3] DID THE DISTRICT COURT SUBSTANTIALLY COMPLY WITH THE REQUIREMENTS OF RULE 11 OF THE NORTH DAKOTA RULES OF CRIMINAL PROCEDURE?

II. [¶4] DID THE DISTRICT COURT PROPERLY EXERCISE ITS DISCRETION IN DENYING DEFENDANT/APPELLANT'S MOTION FOR CONTINUANCE AND MOTION TO WITHDRAW HIS KNOWING AND VOLUNTARY GUILTY PLEA AFTER ACCEPTING A FACTUAL BASIS AND ABSENT ANY BASIS FOR MANIFEST INJUSTICE?

III. [¶5] HAS THE DEFENDANT/APPELLANT MET HIS BURDEN OF SHOWING THAT THE REPRESENTATION OF HIS RETAINED ATTORNEY FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS AND THAT THE OUTCOME OF THE PROCEEDING LIKELY WOULD HAVE BEEN DIFFERENT BUT FOR THE ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL?

[¶6] STATEMENT OF THE CASE

[¶7] On April 23, 2008, Preston Vandehoven ("Vandehoven") entered a verbal plea of guilty to operating or in actual physical control of a vehicle while under the influence of intoxicating liquor, a third offense within a five year period, a class A misdemeanor. Vandehoven subsequently moved to withdraw his plea. On November 10, 2008, the district court issued its Memorandum Decision and Order Denying Motion to Withdraw Plea.

[¶8] Vandehoven appeals to this Court alleging the district court committed obvious error in the facilitation of a plea agreement and by failing to comply with N.D.R.Crim.P. 11; the district court abused its discretion in denying Vandehoven's motion for continuance; the district court abused its discretion in denying Vandehoven's motion to withdraw plea; and ineffective assistance of counsel.

[¶9] STATEMENT OF FACTS

[¶10] By a North Dakota Uniform Complaint and Summons dated February 11, 2008, Vandehoven was charged with actual physical control of a motor vehicle while under the influence of alcohol in violation of North Dakota Century Code 39-08-01. After reviewing the Eddy County Sheriff Deputy's narrative report and Vandehoven's driving record abstract, the State filed a criminal complaint that replaced the North Dakota Uniform Complaint and Summons and charged Vandehoven with operating or in actual physical control of a vehicle while under the influence of intoxicating liquor, a Class A misdemeanor, alleging the offense was a third offense within a five year period.

(Appendix ("App.") at 2.) Vandehoven thereafter retained defense counsel and a pretrial conference was scheduled for April 23, 2008. (App. at 3.)

[¶11] Prior to the pretrial conference the State advised defense counsel that it would recommend the mandatory minimum sentence as provided for in N.D.C.C. 39-08-01 and two (2) years of unsupervised probation. (Pretrial Conference Transcript ("Tr.") at 8, lines ("ll.") 7-9; Tr. at 16, ll. 8-11.)

[¶12] On April 23, 2008 the State, Vandehoven and defense counsel appeared in person for the pretrial conference. (Tr. at 1.) The district court asked the State whether the matter had been resolved. (Tr. at 1, ll. 17.) The State responded "To my knowledge, not yet." (Tr. at 1, ll. 18.) Immediately thereafter defense counsel indicated to the court that Vandehoven would like to resolve the matter; change his plea to guilty; have the court impose the mandatory minimum sentence; and let Vandehoven report to jail on October 1, 2008. (Tr. at 2, ll. 12-18.) Defense counsel stated that Vandehoven was employed by a farmer and worked ten to eleven hours a day. (Tr. at 2, ll. 8-9.) Defense counsel further stated that if Vandehoven reported to jail immediately and lost his driver's license then Vandehoven would lose his job because he would not be able to get back and forth from the jail in Devils Lake to work in Sykeston. (Tr. at 3, ll. 5-7.) Vandehoven claimed he discussed the possibility of going to jail with his employer and, according to Vandehoven, the employer preferred Vandehoven to report to jail later in the summer. (Tr. at 6, ll. 23-25.) Vandehoven indicated the farm operation was really busy around wheat harvest. (Tr. at 7, ll. 5-6.) In response, the State indicted that it did not have any objection to an October 1, 2008 report date if, on April 23, 2008, Vandehoven entered a plea of guilty to

the class A misdemeanor charge of operating or in actual physical control of a vehicle while under the influence of intoxicating liquor, a third offense within five years. (Tr. at 5, ll. 20-23.)

[¶13] During the pretrial conference the district court indicated that, in order for Vandehoven to remain employed and to delay suspension of Vandehoven's driver's license, it would be acceptable to the court if Vandehoven to entered his plea and then have the sentencing done and finalized by entry of judgment on a later date. (Tr. at 3, ll. 10-14; Tr. at 6, ll. 5; Tr. at 7, ll. 15-21.) The district court summarized its understanding of Vandehoven's proposal. (Tr. at 8, ll. 14-19.) Defense counsel confirmed that the district court's understanding was correct. (Tr. at 8, ll. 20.) Vandehoven indicated he agreed. (Tr. at 8, ll. 23.)

[¶14] The district court then asked Vandehoven to formally enter his plea on the class A misdemeanor charge of operating or in actual physical control of a vehicle while under the influence of intoxicating liquor, a third offense within five years. (Tr. at 8, ll. 24-25; Tr. at 9, ll. 1-4.) The district court reminded Vandehoven of the rights he would be waiving by entering a guilty plea (Tr. at 9, ll. 6-7; Tr. at 9, ll. 25; Tr. at 10, ll. 4.) and advised Vandehoven of the nature of the charge (Tr. at 1, ll. 7-8; Tr. at 9, ll. 1-4.) and the minimum mandatory sentence. (Tr. at 16, ll. 4-8; Tr. at 16, ll. 14-18.) The district court determined that there was a factual basis (Tr. at 1 , ll. 21-25; Tr. at 2, ll. 1-3; Tr. at 10, ll. 13-24; Tr. at 11, ll. 1-9; Tr. at 13, ll. 11-22; Tr. at 16, ll. 4-5.) and Vandehoven's plea was voluntary. (Tr. at 9, ll. 22-23; Tr. at 16, ll. 6.) The district court accepted Vandehoven's guilty plea (Tr. at 16, ll. 5.) and sentenced him as follows: sixty (60) days jail; one

thousand dollar ($1,000.00) fine; two hundred dollar ($200.00) court administration fee; one hundred dollar ($100.00) indigent defense/facility improvement fee; alcohol evaluation; turn in license plates for a 1993 GMC pickup on October 1, 2008; and two (2) years unsupervised probation. (Tr. at 16 , ll. 7-8; Tr. at 16, ll. 12; Tr. at 15, ll. 24-25; Tr. at 16, ll. 14-18.)

[¶15] Accordingly, the matter was to be finalized and judgment entered and Vandehoven's sixty (60) day jail term was to commence on October 1, 2008 with no further proceedings. (Tr. at 8, ll. 14-23; Tr. at 9, ll. 15-21; Tr. at 16, ll. 6-8.)

[¶16] On April 25, 2008 Vandehoven's employer called the district court chambers and stated that he learned second-hand that Vandehoven was to report to jail on October 1, 2008. Vandehoven's employer was concerned that the 2008 havest would not be substantially finished by October 1, 2008. Vandehoven's employer inquired whether the district court might permit Vandehoven to report to jail on November 1, 2008. District court staff forwarded this information to the State. On April 30, 2008 the State informed the district court that it had no objection to Vandehoven reporting to jail on November 1, 2008.

[¶17] Vandehoven meanwhile retained different defense counsel and on October 23, 2008, more than six (6) months after the pretrial conference and sentencing, defense counsel filed a motion for continuance of sentencing and/or withdraw of plea. (App. at 1; Docket entry No. 4.) By Letter Order dated October 23, 2008 the district court informed defense counsel that there was no sentencing hearing scheduled as Vandehoven entered his guilty plea and was sentenced on April 23, 2008. (App. at 4-5.) Although the Letter Order

did not provide Vandehoven a continuance, it did schedule a hearing for October 29, 2008 at which time the district court would hear argument on Vandehoven's motion to withdraw plea. (App. at 6.)

[¶18] A hearing on Vandehoven's motion to withdraw plea took place on October 29, 2008. Vandehoven testified: "I didn't think that I was represented." (Motion Hearing Transcript ("Tr. II.") at 19, ll. 21.) However, Vandehoven further testified that defense counsel tried to get the charge "knocked down" to a reckless driving (Tr. II. at 9, ll. 9-10) and that it was defense counsel's idea to try to get an "extension" so Vandehoven could keep his license until the first of October. (Tr. II. at 11, ll. 6-7; Tr. II. at 15, ll. 11-23.) Vandehoven testified that he entered his plea voluntarily. (Tr. II. at 14, ll. 13-20; Tr. II. at 19, ll. 22-25; Tr. II. at 20, ll. 1-3; Tr. II. at 20, ll. 15-25.) Vandehoven testified that he recalled the district court going through his rights. (Tr. II. at 14, ll. 21-23.) As for his reason to seek a withdrawal of plea, Vandehoven testified "I came down to Colorado to start over and the job and if I have to come back – the sixty days in jail and lose my license it will jeopardize my job." (Tr. II. at 21, ll. 4-10.)

[¶19] Emphasizing the fact that Vandehoven failed to present any evidence or case law which established that Vandehoven was not sentenced on April 23, 2008, the district court determined that Vandehoven was sentenced on April 23, 2008. (Tr. II. at 40, ll. 1-5; App. at 12.) Thus, the issues before the district court were whether Vandehoven's motion for withdrawal was timely under N.D.R.Crim.P. 32(d)(2) (App. at 12) and whether the district court must permit withdrawal of plea to correct a manifest injustice. (Tr. II. at 41, ll. 16-17.)

[¶20] The district court ruled Vandehoven's motion was timely. (Tr. II. at 40, ll. 24-25; App. at 13)

[¶21] The district court then addressed Vandehoven's assertion that withdrawal was necessary to correct a manifest injustice. (Tr. II. at 41, ll. 16-17; App. at 13.) The district court again emphasized that Vandehoven failed to present evidence that established his guilty plea was uncounseled or that he received ineffective assistance of counsel. (Tr. II. at 41, ll. 21-24; Tr. II. at 42, ll. 1-6; App. at 13; App. at 14.) The district court found it was presented no evidence or information to establish a manifest injustice which supported the withdrawal of Vandehoven's guilty plea. (App. at 14.) Vandehoven's motion to withdraw guilty plea was denied. (Tr. II. at 42, ll. 9-10; App. At 14.)

[¶22] LAW AND ARGUMENT

[¶23] I. The district court substantially complied with the requirements of Rule 11 of the North Dakota Rules of Criminal Procedure.

[¶24] A. Vandehoven has failed to establish that the district court committed obvious error by alleging the district court participated in the facilitation of a plea agreemnt.

[¶25] When a defendant fails to object to a district court's procedure, the standard of review is obvious error under N.D.R.Crim.P. 52(b). State v. Clark, 2004 ND 85 ¶ 6, 678 N.W.2d 765. The Court shall exercise its power to notice obvious error only in exceptional situations in which a defendant has suffered serious injustice. State v. Entzi, 2000 ND 148, ¶ 12, 615 N.W.2d 145. To establish obvious error one must show (1) error,

(2) that is plain, and (3) that affects substantial rights. State v. Knowels, 2002 ND 62, ¶ 7, 643 N.W.2d 20. To affect substantial rights, a plain error must have been prejudicial, or have affected the outcome of the proceeding. State v. Hirschkorn, 2002 ND 36, ¶ 20, 640 N.W.2d 439. Analyzing obvious error requires examination of the entire record and the probable effect of the alleged error in light of all the evidence. Id. An alleged error does not constitute obvious error unless it is a clear deviation from an applicable legal rule under current law. State v. Olander, 1998 ND 50, ¶ 14, 575 N.W.2d 658. Even if a defendant establishes obvious error affecting substantial rights, the decision to correct the error lies within this Court's discretion and will be done only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. State v. Wegley, 2008 ND 4, ¶ 14, 744 N.W.2d 284.

[¶26] Vandehoven asserts obvious error when the district court allegedly participated in the facilitation of a plea agreement.

[¶27] The State concedes there was discussion between the district court and the parties concerning the timing of entry of judgment and the date Vandehoven was to report to jail. The state is also mindful of State v. Dimmitt (2003 ND 111 ¶ 7, 665 N.W.2d 692.) wherein the North Dakota Supreme Court found a manifest injustice because a guilty plea resulted from the influence or confusion caused by a trial court's involvement in plea negotiations.

[¶28] This case is distinguishable from Dimmitt. In Dimmitt the defendant believed he had an agreement with the State concerning the State's sentencing recommendation. The defendant further believed the court would impose a particular

sentence if a certain condition was met. At sentencing the State recommended a significantly more harsh sentence than previously agreed upon and the court imposed a significantly more harsh sentence, despite the fact that the condition was met. In Vandehoven's case the State provided defense counsel a written sentencing recommendation. No agreement was reached prior to the pretrial conference. At the pretrial conference defense counsel indicated that Vandehoven would like to resolve the matter and initiated a discussion regarding the timing of entry of judgment and the date Vandehoven was to report to jail. Neither the State nor the district court had any objections to Vandehoven's proposal and sentence was imposed accordingly.

[¶29] The State submits that discussion of these issues does not constitute participation in plea agreement discussions and does not constitute plain error. The State further submits that even if the Court does determine this to be plain error, any such error was not prejudicial and it did not affect the outcome of the proceeding. Further, Vandehoven has not suffered serious injustice.

[¶30] It is also a well settled and a time-honored rule established by North Dakota case law that a party to a criminal proceeding cannot complain of errors which he invited upon the Court, nor may he avail himself of probable errors which he helped to perpetuate or cause. State v. Austin, 520 N.W.2d 564, (N.D. 1994); State v. Robideaux, 493 N.W.2d 210, 214 (N.D. 1992); State v. Frey, 441 N.W.2d 668, 670-671 (N.D. 1989); State v. Stoppleworth, 442 N.W.2d 415, 416-417 (N.D. 1989); and State v. Sheldon, 301 N.W.2d 604, 611 (N.D. 1980).

[¶31] Vandehoven cannot, in good faith, have grounds for error which are based upon something which he argues is improper conduct, but which the his attorney initiated.

[¶32] B. Vandehoven has failed to establish obvious error with regard to the district court's N.D.R.Crim.P. 11 advice.

[¶33] The obvious error standard of review set forth above applies also to this analysis.

[¶34] Rule 11 of the North Dakota Rules of Criminal Procedure does not require any predetermined, ritualistic form for the trial court's examination of the defendant. State vs. Boushee, 459 N.W.2d 552, 555 (N.D. 1990). Instead, the court must substantially comply with the procedural requirements of the rule to ensure the defendant is entering a voluntary guilty plea. State vs. Beckman, 1999 ND 54, ¶ 5, 591 N.W.2d 120, 121 (citing State vs. Hoffarth, 456 N.W.2d 111, 114 (N.D. 1990)).

[¶35] Further, a guilty plea given upon the advice of counsel may only be attacked for the "voluntary and intelligent character of the guilty plea." McMorrow v. State, 2003 ND 134, ¶ 5, 667 N.W.2d 577 (citing Eaton v. State, 2001 ND 97, ¶ 6, 626 N.W.2d 676.) When determining the validity of a guilty plea, "[t]he longstanding test...is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" Ernst v. State, 2004 ND 152, ¶ 7, 683 N.W.2d 891 (quoting Houle v. State, 482 N.W.2d 24, 26 (N.D. 1992) and Hill v. Lockhart, 474 U.S. 52, 56 (1985)).

[¶36] In order to meet his burden, Vandehoven must show that the district court did not make adequate inquiries to determine that his decision to plead guilty was a

voluntary. intelligent, and rational choice and that failure to do so constituted plain error which was prejudical or affected the outcome of the proceeding.

[¶37] The court fully inquired of Vandehoven whether his guilty plea was the result of any promises, threats, or force against him. To these inquiries Vandehoven clearly answered in the negative. The court's procedure in accepting the defendant's guilty plea substantially complied with Rule 11 of the North Dakota Rules of Criminal Procedure. There does not exist plain error. There is no clear deviation from an applicable legal rule under current law. Vandehoven has not suffered serious injustice. Vandehoven fails to meet his burden to establish obvious error with regard to the district court's North Dakota Rules of Criminal Procedure Rule 11 advice.

[¶38] II. The district court properly exercised its discretion in denying Vandehoven's motion for continuance and motion to withdraw guilty plea.

[¶39] A. A motion for continuance will be granted only for good cause shown.

[¶40] "Motions for continuance shall be promptly filed as soon as the grounds therefor are known and will be granted only for good cause shown..." N.D.R.Ct. 6.1(b).

[¶41] Vandehoven appeared for a pretrial conference. entered his guilty plea. and was sentenced on April 23, 2008. He was scheduled to report to jail on October 1, 2008. With the agreement of the State. the district court delayed Vandehoven's incarceration date until November 1, 2008. Meanwhile, Vandehoven retained different counsel. On October 23. 2008. eight days prior to his scheduled incarceration. Vandehoven's counsel filed a motion for continuance. The motion requested "continuance of the 'sentencing'

scheduled for November 3, 2008." (Defendant's Motion at 1, ll. 9-10.) In fact, no "sentencing" was scheduled.

[¶42] A district court abuses its discretion when it acts in an arbitrary, unreasonable, unconscionable, or capricious manner, or if its decision is not the product of a rational mental process leading to a reasoned determination, or if it misinterprets or misapplies the law. State v. Clark, 2001 ND 194, ¶ 8, 636 N.W.2d 660; State v. Kensmoe, 2001 ND 190, ¶ 7, 636N.W.2d 183.

[¶43] There was no hearing scheduled which the district court could continue. Further, six months elapsed between Vandehoven's entry of plea and the filing of his motion for continuance. Vandehoven failed to show good cause for the continuance. The district court did not abuse its discretion by denying Vandehoven's motion for continuance.

[¶44] B. The district court properly determined that withdrawal of Vandehoven's guilty plea was not necessary to correct a manifest injustice

[¶45] Vandehoven contends the district court abused its discretion in denying his motion to withdraw his plea.

[¶46] The standard for a plea withdrawal differs depending upon when the motion to withdraw the guilty plea is made. Froistad v. State, 2002 ND 52, ¶ 5, 641 N.W.2d 86. A defendant has a right to withdraw a guilty plea before it is accepted by the court. Id. at ¶ 6. "After a guilty plea is accepted, but before sentencing, the defendant may withdraw a guilty plea if necessary to correct a manifest injustice, or, if allowed in the court's discretion, for any "fair and just" reason unless the prosecution has been prejudiced

by reliance on the plea." Id. at ¶ 8 (quoting State v. Klein, 1997 ND 25, ¶ 13, 560 N.W.2d 198). When a court has accepted a plea and imposed sentence, the defendant cannot withdraw the plea unless withdrawal is necessary to correct a manifest injustice. Id. at ¶ 9. "The decision whether a manifest injustice exists for withdrawal of a guilty plea lies within the trial court's discretion and will not be reversed on appeal except for an abuse of discretion." State v. Abdullahi, 2000 ND 39, ¶ 7, 607 N.W.2d 561 (citing State v. Hendrick, 543 N.W.2d 217, 219 (N.D.1996)). An abuse of discretion under N.D.R.Crim.P. 32(d) occurs when the court's legal discretion is not exercised in the interest of justice. Abdullahi, at ¶ 7 (citing State v. Dalman, 520 N.W.2d 860, 862 (N.D.1994)). The trial court must exercise its sound discretion in determining whether a "manifest injustice" or a "fair and just reason" to withdraw a guilty plea exists. See Froistad, at ¶ 9; Abdi v. State, 2000 ND 64, ¶ 10, 608 N.W.2d 292.

[¶47] "Sentencing" is "the determination of the sentence."1 LaFave, Israel & King, Criminal Procedure § 1.3(r) (2d ed. 1999). In ordinary terms, "sentencing" means "to pronounce judgment or punishment upon (a convicted person); condemn (to a specified punishment)." Webster's New World Dictionary 1297 (2d ed.1980). State v. Wardner, 2006 ND 256, ¶ 10, 725 N.W.2d 215. "Pronounce" means to utter formally, officially, and solemnly; to declare of affirm; to declare alound and in a formal manner. Black's Law Dictionary 1215 (6th ed. 1990).

[¶48] The details of Vandehoven's sentence were formally and officially determined and placed on the record on April 23, 2008. Thus, Vandehoven was "sentenced" on April 23, 2008. Vandehoven's motion to withdraw plea was filed October

23, 2008. Vandehoven moved the district court to withdraw his plea after sentencing. Therefore, as determined by the district court, the appropriate analysis is whether withdrawal is required to correct a manifest injustice.

[¶49] To satisfy Rule 11 of the North Dakota Rules of Criminal Procedure the court must be satisfied that the defendant understands the nature of the charge and the rights he is waiving upon entering a plea of guilty, that the plea is knowingly and voluntarily given and must also affirmatively determine that a factual basis for the charge does indeed exist. Kaiser v. State, 417 N.W.2d 175 at 178 (N.D. 1987).

[¶50] Rule 11 of the North Dakota Rules of Criminal Procedure does not require any predetermined, ritualistic form for the trial court's examination of the defendant. State vs. Boushec, 459 N.W.2d 552, 555 (N.D. 1990). Instead, the court must substantially comply with the procedural requirements of the rule to ensure the defendant is entering a voluntary guilty plea. State vs. Beckman, 1999 ND 54, ¶ 5, 591 N.W.2d 120, 121 (N.D. 1999) (citing State vs. Hoffarth, 456 N.W.2d 111, 114 (N.D. 1990)).

[¶51] A guilty plea given upon the advice of counsel may only be attacked for the "voluntary and intelligent character of the guilty plea." McMorrow v. State, 2003 ND 134, ¶ 5, 667 N.W.2d 577 (citing Eaton v. State, 2001 ND 97, ¶ 6, 626 N.W.2d 676.) When determining the validity of a guilty plea, "[t]he longstanding test...is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" Ernst v. State, 2004 ND 152, ¶ 7, 683 N.W.2d 891 (quoting Houle v. State, 482 N.W.2d 24, 26 (N.D. 1992) and Hill v. Lockhart, 474 U.S. 52, 56 (1985)).

[¶52] Here, the district court substantially complied with Rule 11 to determine that Vandehoven's guilty plea was voluntary and intelligent. The court informed Vandehoven of the allegations against him. The court inquired whether Vandehoven understood he had the right to be represented by counsel; whether he was threatened or forced into making a plea; whether he was promised anything by anyone to encourage him to enter the plea: whether he understood he could persist in his not guilty plea: whether he understood that, by pleading guilty, he waived his right to a jury trial.

[¶53] The district court determined it was simply not provided any information to support a decision that a manifest injustice existed that required withdrawal of Vandehoven's guilty plea. There was no abuse of discretion on the part of the district court in denying Vandehoven's motion to withdraw his guilty plea.

[¶54] III. Vandehoven has failed to demonstrate that he received ineffective assistance of counsel during the course of his representation.

[¶55] In order to prevail on a perceived claim of ineffective assistance of counsel, a defendant must generally establish two elements: (1) counsel's representation was deficient, in that it fell below an objective standard of reasonableness, and (2) the defendant was prejudiced by the deficient representation, i.e, it is likely that the outcome of the proceeding would have been different but for the errors of counsel. Strickland v. Washington, 466 U.S. 668, 687 (1984); Klose v. State, 2005 ND 192, ¶ 9, 705 N.W.2d 809. Although claims of ineffective assistance are better suited for applications for post-conviction relief, this Court will examine the record for evidence of representation that is plainly defective. State v. Causer. 2004 ND 75, ¶ 19, 678 N.W.2d 552.

[¶56] Vandehoven must meet the burden of showing both prongs in order to gain relief under a theory of ineffective assistance of counsel. In this case Vandehoven does not even meet the requirements of the first prong.

[¶57] The record fails to establish that defense counsel's representation fell below an objective standard of reasonableness. Vandehoven's own testimony indicates that defense counsel's attempted to get the charge reduced and that defense counsel suggested that entry of judgment be delayed in order for Vandehoven to retain his job and driver's license. Except for Vandehoven's unsupported claim that he didn't think he was represented, the record lacks evidence that defense counsel provided ineffective assistance of counsel

[¶58] Finally, even if Vandehoven did provide testimony that defense counsel did not ask Vandehoven certain questions about the incident, Vandehoven failed to prove that defense counsel's representation fell below an objective standard of reasonableness or in fact somehow prejudiced him.

[¶59] CONCLUSION

[¶60] For the foregoing reasons, the State respectfully requests that this Court affirm the judgment of conviction and order denying the motions for continuance and withdrawal of the guilty plea of the Southeast Judicial District Court and further deny the Appellant's claims of obvious error and ineffective assistance of counsel.

Respectfully submitted, this 16th day of March, 2009.

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[¶61] CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was served by first class mail on this 16th day of March, 2009, upon:

Faron E. Terry
Attorney at Law
P.O. Box 717
Minot, ND 58702