

ORIGINAL

20080338-20080340

IN THE SUPREME COURT

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SUPREME COURT APR 9 2009

STATE OF NORTH DAKOTA

FILED  
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CLERK OF SUPREME COURT

State of North Dakota, )  
 )  
 Plaintiff-Appellee, )  
 )  
 -vs- )  
 )  
 Matthew Kurtenbach, )  
 )  
 Defendant-Appellant, )  
 )  
 )

APR - 9 2009

STATE OF NORTH DAKOTA

) Supreme Ct. No. 20080338/339/340  
 ) District Ct. No. 08-08-k-1749, 08-08-  
 ) K-2287, 08-08-K-1555  
 ) SA File No. F311-08-07, F594-08-08,  
 ) F761-08-10  
 )

**BRIEF OF PLAINTIFF-APPELLEE**

**APPEAL FROM CRIMINAL JUDGMENT ON CHANGE OF PLEA AND SENTENCING**

Burleigh County District Court  
 South Central Judicial District  
 The Honorable Thomas J. Schneider, Presiding

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STATEMENT OF THE ISSUES

Issue I: The Defendant waived his right to appeal these issues as they were not raised in District Court.

Issue II: The Defendant should not be allowed to withdraw his guilty plea because no motion was made to the District Court to do so.

Issue III: The Appellant can be properly charged under both N.D.C.C. §§ 12.1-23-11 and 12.1-23-02 in this matter.

Issue IV. There is a sufficient factual basis to support the conviction as to Count I of 08-08-K-1555 and Count II 08-08-K-2287.

Issue V. N.D.R.Crim.Pro. 11 was substantially complied with.

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Statement of the Case

The Appellant was charged in Burleigh County District Court number 08-08-K-2287 with one count of Unauthorized Use of Personal Identifying Information, one count of Theft by Deception, and one count of False Information. He was charged in 08-08-K-1555 with one count of Theft by Deception and one count of Unauthorized Use of Personal Identifying information. He was charged in 08-08-K-1749 with Theft by Deception and Unauthorized Use of Personal Information.

On November 25, 2008, the Appellant plead Guilty to each count. See Transcript at Pg. 7. 8. The Appellant was sentenced to the care, custody, and control of the North Dakota Department of Corrections and Rehabilitation. The Appellant filed his notice of appeal on December 17, 2008 and his brief was filed on March 3, 2009.

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**STATEMENT OF THE FACTS**

At the hearing held on November 25, 2008. the Appellant was advised of his rights pursuant to N.D.R.Crim.Pro. 11. Tr. at 3-8. The Appellant stated that he understood the charges and his rights. Tr. at 2-8. The Appellant did withdraw his not guilty pleas, plead guilty, and stated he did so voluntarily. Tr. at 7-8.

A factual basis was given to the Court for the charges against the Appellant. The State first gave the facts which supported the counts contained in file 08-K-2287. As to the charge of the Unauthorized Use of Personal Identifying Information, the State pointed that checks had been passed by the Appellant in Burleigh County on the appropriate dates by using the name Christopher Muhm. Tr. at 9. The State further stated that amount the checks totaled \$841.44. Id.

The State also gave a factual basis for the count of Theft as well. The Theft was supported by the fact that the businesses were out of the total stated above because the Appellant used deception to receive items. Id.

The State then turned to file 08-K-1749. Once again the State explained that the Appellant had passed checks at businesses in Burleigh County in excess of \$1,000. The State further explained, to support the Theft charge, the Appellant had received goods and services in excess of \$100 and that he did all this by using the identity of Joshua Johnson. Id at 10.

The third file, 08-K-1555, and its charges against the Defendant were then addressed. The State explained that Appellant had passed checks in

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Burleigh County in the amount of \$3524.94. Tr. at 11. The State also explained that the name Treg Cox had been used in this case. Id. The State also gave the dates of when this had transpired. Id.



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**ARGUMENT**

**Issue I: The Defendant should not be allowed to withdraw his guilty plea because no motion was made to the District Court to do so.**

N.D.R.Crim.Pro. 32(d) sets forth when a person may withdraw a plea of guilty. A motion for withdrawal of a guilty plea must be made to the "court". *Id.* "Court" is not defined in this rule, but it can only mean the District Court. Further, the State could find no case in its research that seemed to define "court", but any other definition would lead to a ludicrous outcome. A reading of *State v. Werre*, 325 N.W.2d 172 (N.D. 1982) would suggest that the proper place to make a motion to withdraw a plea of guilty would be the District Court. See also *State v. Feist*, 2006 ND 21, 708 N.W.2d 870 (allowing Defendant to withdraw plea of guilty under N.D.R.Crim.Pro. 32 since *District Court* had not substantially complied with N.D.R.Crim.Pro 11(c)).

**Issue II: The Defendant waived his right to appeal these issues as they were not raised in District Court.**

In his brief, the Appellant raises three issues for this Court to decide. He states that he should only have been charged under N.D.C.C. § 12.1-23-11, that there was not a sufficient factual basis taken for his guilty pleas to Count I of 08-08-K-1555 and Count II of 08-08-K-2287, and that the Trial Court did not comply with Rule 11 of the North Dakota Rules of Criminal Procedure. It is well established that within the jurisdiction of North Dakota, if a party does not raise an issue at the District Court level, then that issue is considered

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waived and is not reviewable by the North Dakota Supreme Court. *State v. Keiper*, 2008 ND 65, ¶16. 747 N.W.2d 497 (quoting *State v. Blumler*, 458 N.W.2d 300, 303 (N.D.1990)). In the record provided to the Court and Appellee, as well as in the Appellant's brief, there is no mention of an objection or statement raised by the Appellant in regards to these issues. They were not raised at the District Court and, therefore, the Appellant should be barred from raising them for the first time on appeal.

**Issue III: The Appellant can be properly charged under both N.D.C.C. §§ 12.1-23-11 and 12.1-23-02 in this matter.**

The Appellant's most basic proposal is that N.D.C.C. §§ 12.1-23-11 and 12.1-23-02 are irreconcilable and that 12.1-23-11, either as a special provision or a later enactment, acts to nullify the effects of 12.1-23-02 in this instance. This argument rests upon the proposition that both acts were meant to punish the same conduct. However, it is the State's position that this is not what the Legislature intended when the later statute was enacted. The question then becomes what did the North Dakota Legislature intend to do in a situation such as the one presented to the Court on this occasion.

Intent of a statute or statutes is to be gleaned, if possible, from the language of the statute as it appears on its face. *Quist v. Best Western Intern., Inc.*, 354 N.W.2d 656, 660 (N.D. 1984). Further a statute is to be construed in such a way so that all portions are given meaning. *Teigen v. State*, 2008 ND 88, ¶ 19. 749 N.W.2d 505, 513. For both statutes to have effect in this

1 situation there must be a reasonable way for both of them to have effect.

2  
3 N.D.C.C. § 1-02-07.

4 The first statute, N.D.C.C. § 12.1-23-02, states, in relevant part:

5 A person is guilty of theft if he knowingly obtains the property  
6 of another by deception or by threat with the intent to deprive  
7 the owner thereof, or intentionally deprives another of his property  
by deception or by threat. N.D.C.C. § 12.1-23-02(2).

8 The language of this statute is clear and unambiguous. It was intended to  
9 punish the act of stealing and to protect people from having items taken from  
10 them. As applied to the facts of this case, it was meant to punish the act of  
11 taking property from the stores.

12 The second statute, N.D.C.C. § 12.1-23-11, states in relevant part:

13 A person is guilty of an offense if the person uses or attempts  
14 to use any personal identifying information of an individual,  
15 living or deceased, to obtain credit, money, goods, services, or  
16 anything else of value without the authorization or consent  
17 of the individual and by representing that person is the individual  
or is acting with the authorization or consent of the individual.  
N.D.C.C. § 12.1-23-11(2)

18  
19 The language of this statute is clear and unambiguous. It was intended to  
20 punish the act of using someone else's identity to procure things of value. It is  
21 also clear that this statute is meant to protect a person's identity and not  
22 property. In the present case it is clear that the act punished is the using of  
23 someone's identity which did not belong to the Appellant to receive goods.  
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25 This analysis clearly refutes the assumption that both statutes are  
26 punishing the same act. After looking at both statutes in this light it is clear  
27 that they were meant to punish two different types of acts. Therefore, the two

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statutes have been reasonably applied to the facts of this case. and it follows that it was reasonable to have charged the Appellant with both counts.

**Issue IV. There is a sufficient factual basis to support the conviction as to Count I of 08-08-K-1555 and Count II 08-08-K-2287.**

In his brief, the Appellant states that there is an insufficient factual basis to support the conviction on Count I of 08-08-K-1555. The Appellant argues that no property was taken from Treg Cox and therefore the State did not proof all of the essential elements of Theft. He argues that the only thing taken was the personal information of Treg Cox. This argument must fail as Count I does not charge the Appellant with the act of using Mr. Cox's personal identify information. rather it charges the fact that he stole property from another while pretending to be Mr. Cox. It was never alleged that the Appellant took property from Mr. Cox, but rather pretended to be Mr. Cox. Tr. 11, L. 5-6. Using Mr. Cox's identity is but one element of Theft by Deception.

As to Count II of 08-08-K-2287, the Appellant seems to state this charge has to do with Mr. Cox when it does not. The person the Appellant pretended to be in this case was Christopher Muhm. In any matter, the factual basis shows that property was taken from another and that deception of pretending to be Mr. Muhm was used to perpetrate this crime. Tr. 8, L 24-5, Tr. 9, L. 1-17.

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2 As can be seen there is a sufficient factual record upon which these  
3 convictions can stand. The Appellant points to no defect in the record that  
4 would counter this position. Therefore, the convictions must stand.

5 **Issue V. N.D.R.Crim.Pro. 11 was substantially complied with.**

6 Rule 11 procedures are "mandatory and binding upon the Court."  
7 *State v. Parisien*, 469 N.W.2d 563, 564 (N.D. 1991). Rule 11's procedures do  
8 not have to be "ritualistically given"; they need only be fully developed on the  
9 record. *State v. Olson*, 544 N.W.2d 144, 147 (N.D. 1996) (citing *State v.*  
10 *Storbakken*, 246 N.W.2d 78, 84 (N.D.1976)). Due Process is obtained when a  
11 person is given his rights and he knowingly waives them. *Id.*

13 The Appellant claims that the Trial Court failed to comply with Rule  
14 11(b)(1)(D) in that the Trial Court did not tell the Appellant of his right to  
15 "testify and present evidence." The Trial Court did do this. The Trial Court  
16 told the Appellant he had the right "... to have your witnesses appear at the  
17 trial and testify on your behalf." Tr. 6, L. 2-3.

19 Though this is not the exact wording of the Rule, it does meet the  
20 requirement that the Trial Court substantially comply with Rule 11,  
21 specifically with the section in question. It does this by making the Appellant  
22 aware that he had to the right to present evidence because testimony from a  
23 witness is evidence presented by the Appellant. It further follows that if he  
24 has the right to call witnesses he himself can testify as he was a witness to  
25 these occurrences.  
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The Appellant states that Rule 11 was not followed based upon the holdings of *State v. Schumacher*, 452 N.W.2d 345 (N.D. 1990), *State v. Hagemann*, 326 N.W.2d 861 (N.D. 1982), and *State v. Mortrud*, 312 N.W.2d 354 (N.D. 1981). Appellee would disagree with this conclusion and state that these holdings all pertain to Rule 11(b)(1)(G) and (H) in that they were deficient in the Judges in those cases did not give minimum and/or maximum sentences. The cases relied upon by the Appellant can be differentiate from the facts of the present case in that the rights contained with Rule 11(b)(1)(D) are not the same rights contained in Rule 11(b)(1)(G) and (H) as the rights in latter rule pertain to the sentencing of the Appellant while Rule 11(b)(1)(D) pertains to what rights the defendant would have at a trial.

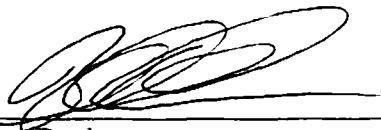
As can be seen from the record, there was substantial compliance within the rule. The Appellant was advised of his rights and any perceived defect therefore cannot form the basis of allowing the Appellant to withdraw his guilty pleas.

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CONCLUSION

Based upon the foregoing, the State would respectfully request that the Appellant's appeal be summarily dismissed or in the alternative deny the request of the Appellant.

Dated this 7<sup>th</sup> day of April, 2009.



---

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STATE OF NORTH DAKOTA )  
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COUNTY OF BURLEIGH )

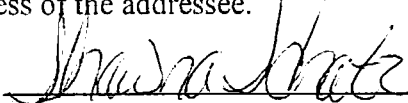
Shawna Schatz, being first duly sworn, depose and say that I am a United States citizen over 21 years old, and on the 9<sup>th</sup> day of April, 2009, I deposited in a sealed envelope a true copy of the attached:

- 1. Brief of Plaintiff-Appellee
- 2. Affidavit of Mailing

in the United States mail at Bismarck, North Dakota, postage prepaid, addressed to:

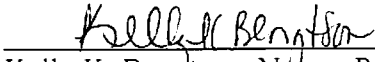
BEN PULKRABEK  
402 FIRST STREET NW  
MANDAN, ND 58554

which address is the last known address of the addressee.

  
Shawna Schatz

Subscribed and sworn to before me this 9<sup>th</sup> day of April, 2009.

**KELLY K BENGTON**  
Notary Public  
State of North Dakota  
My Commission Expires October 8, 2014

  
Kelly K. Bengtson, Notary Public  
Burleigh County, North Dakota  
My Commission Expires: 10/8/2014.