

ORIGINAL

20080338

IN THE SUPREME COURT

MAR 3 2009

STATE OF NORTH DAKOTA

20080339

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SUPREME COURT NO.: 20080338/339/340

State of North Dakota,

Plaintiff-Appellee,

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

- vs -

MAR 3 2009

Matthew Kurtenbach,

STATE OF NORTH DAKOTA

Defendant-Appellant.

APPEAL FROM A CRIMINAL JUDGMENT  
ON CHANGE OF PLEA AND SENTENCING  
SOUTH CENTRAL JUDICIAL DISTRICT  
BURLEIGH COUNTY CR. NO. 08-K-1749, 08-K-2287 and 08-K-1555  
THE HONORABLE THOMAS J. SCHNEIDER, PRESIDING

BRIEF w/ attached addendum

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## ABBREVIATIONS

Page - P.

Line - L.

Transcript - Tr

## STATEMENT OF THE ISSUE

- ISSUE:
- I. Should Matthew C. Kurtenbach in State vs Kurtenbach 08-K-1555, 08-K-1749 and 08-K-2287 only been charged under 12.1-23-11 N.D.C.C.?
  - II. Did the Court follow all of the procedure under Rule 11 NDR of Crim P and properly advise Matthew C. Kurtenbach before accepting his guilty pleas?
  - III. Whether the factual basis in this case established acts committed by Matthew C. Kurtenbach sufficient to prove all of the essential elements required for a violation of Section 12.1-23-02(2) N.D.C.C.?

**NATURE OF THE CASE**

Matthew C. Kurtenbach was charged with the following crimes in Burleigh County, North Dakota:

Cr. No. 08-K-1555

Roger W. Marks III, being first duly sworn, says that on or about the 1<sup>st</sup> day of April, 2008 through 28<sup>th</sup> day of July, 2008, in said county, the above named defendant, Matthew C. Kurtenbach, did commit the crimes of **Theft by Deception (Count 1)** and **Unauthorized Use of Personal Identifying Information (Count 2)**, committed as follows:

**COUNT 1:** The defendant knowingly obtained the property of another by deception or by threat with intent to deprive the owner thereof, or intentionally deprived another of his property by deception or by threat and the value of the property exceeded \$500.00; specifically, the defendant passed checks on an account bearing the name of Treg Cox,

N.D.C.C. 12.1-23-02

12.1-23-05

12.1-32-01(4) CLASS C FELONY

**COUNT 2:** The defendant used or attempted to use any personal identifying information of an individual to obtain credit, money, goods, services, or anything else of value without the authorization or consent of the individual and by representing that person is the individual or was acting with the authorization or consent of the individual; specifically, the defendant used personal identifying information of Treg Cox consent of without his authorization or consent to obtain credit, money, goods, services or anything

else of value;

N.D.C.C. 12.1-23-11

12.1-32-01(4) CLASS C FELONY

this contrary to the statute in such cases made and provided and against the peace and dignity of the State of North Dakota.

Cr. No. 08-K-2287

Roger W. Marks III, being first duly sworn, says that on or about the 16<sup>th</sup> day of June, 2008 through 2<sup>nd</sup> day of July, 2008, in said county, the above named defendant, Matthew Christopher Kurtenbach, did commit the crimes of **Unauthorized Use of Personal Identifying Information (Count 1), Theft of Property (Count 2) and False Information to Law Enforcement (Count 3)**, committed as follows:

**Count 1:** The defendant used or attempted to use any personal identifying information of an individual to obtain credit, money, goods, services, or anything else of value without the authorization or consent of the individual and by representing that person is the individual or was acting with the authorization or consent of the individual; specifically, the defendant used personal identifying information of Christopher Muhm without his authorization of Christopher Muhm without his authorization or consent to obtain credit, money, goods, services or anything else of value;

N.D.C.C. 12.1-23-11

12.1-32-01(3) CLASS C FELONY

**COUNT 2:** The defendant knowingly obtained the property of another by deception or by threat with intent to deprive the owner thereof, or intentionally deprived another of his

property by deception or by threat and the value of the property exceeded \$500.00:  
specifically, the defendant passed checks on an account bearing the name Christopher  
Muhm.

N.D.C.C. 12.1-23-02

12.1-23.05

12.1-32-01(4) CLASS C FELONY

**COUNT 3:** The defendant willfully gave false information to a law enforcement officer  
which he knew to be false, and the information may have interfered with an investigation  
or may have materially misled a law enforcement officer: specifically, the defendant gave  
a false name of Christopher Muhm;

N.D.C.C. 12.1-11-03

12.1-32-01(5) CLASS A MISDEMEANOR

this contrary to the statute in such cases made and provided and against the peace and  
dignity of the State of North Dakota.

Cr. No. 08-K-1749

Roger W. Marks III, being first duly sworn, says that on or about the 21<sup>st</sup> through  
28<sup>th</sup> day of July, 2008, in said county, the above named defendant, Matthew Christopher  
Kurtenbach, did commit the crimes of **Unauthorized use of Personal Identifying  
Information (Count 1) and Forgery (Count 2)**, committed as follows:

**COUNT 1:** The defendant used or attempted to use any personal identifying information  
of an individual to obtain credit, money, goods, services, or anything else of value  
without the authorization or consent of the individual and by representing that person is



the individual or was acting with the authorization or consent of the individual;  
specifically, the defendant used personal identifying information of Joshua Johnson  
without his authorization or consent to obtain credit, money, goods, services or anything  
else of value, and the amount received by the defendant exceeded \$1,000;

N.D.C.C. 12.1-23-11

12.1-32-01(3) CLASS B FELONY

**COUNT 2:** The defendant, with intent to deceive or harm the government or another  
person, or with knowledge that he or she is facilitating such deception or harm by another  
person, knowingly and falsely made, completed, or altered any writing pursuant to a  
scheme to defraud another or others of money or property of a value in excess of \$100;  
specifically, the defendant did complete and/or passed checks when he was not authorized  
to do so;

N.D.C.C. 12.1-24-01

12.1-32-01(4) CLASS C FELONY

this contrary to the statute in such cases made and provided and against the peace and  
dignity of the State of North Dakota.

Mr. Kurtenbach plead guilty to all of the above crimes on November 25, 2008.

Judgment was entered on November 28, 2008.

Notice of Appeal was filed on December 15, 2008.

This matter is now before the North Dakota Supreme Court.

## STATEMENT OF FACTS

Defendant Appellant Matthew C. Kurtenbach had three Criminal matters pending against him in Burleigh County, North Dakota Case Number 08-K-1555 had 2 felony counts, Case Number 08-K-1749 had 2 felony counts and Case Number 08-K-2287 had 2 felony counts and 1 misdemeanor count.

On November 25, 2008, Mr. Kurtenbach plead guilty to the 6 felony counts and 1 misdemeanor.

On December 15, 2008 Mr. Kurtenbach decided to file an appeal. The reasons he filed an appeal were:

- 1) That as to Count I in 08-K-1555 and Count II in 08-K-2287, there was not a factual basis to prove the essential elements required for a violation of Section 12.1-23-02-(2) N.D.C.C.
- 2) That Mr. Kurtenbach should have only been charged under 12.1-23-11 N.D.C.C.
- 3) The Court did not follow all of the procedures under Rule 11 NDR of Crim P, so Defendant was not properly advised when the Court accepted his guilty pleas.

## ARGUMENT

**ISSUE: I. Should Matthew C. Kurtenbach in State vs Kurtenbach 08-K-1555, 08-K-1749 and 08-K-2287 only been charged under 12.1-23-11 N.D.C.C.?**

In both Cr. No. 08-K-1555 and Cr. No. 08-K-2287 there are only two counts alleged. These counts in both cases involve 12.1-23-02 NDCC. Theft and Related

Offenses and 12.1-23-11 NDCC Unauthorized Use of personal Identifying Information.

Both statutes are in Section 12.1-23 Theft and Related Offenses. 12.1-23-02 was enacted in 1973. It is a general statute dealing with all types of thefts. 12.1-23-11 NDCC was enacted in 1999 and is a special statute dealing with unauthorized use of personal identifying information.

In this case the criminal conduct of Mr. Kurtenbach is a violation of 12.1-23-11 NDCC. The charges under 12.1-23-02 NDCC and 12.1-23-11 NDCC are for the same or substantially the same offences.

When general and special statutes are in conflict 1-02-07 NDCC applies

1-02-07 NDCC - **Particular controls general.** Whenever a general provision in a statute is in conflict with a special provision in the same or in another statute, the two must be construed, if possible, so that effect may be given to both provisions, but if the conflict between the two provisions is irreconcilable the special provision must prevail and must be construed as an exception to the general provision, unless the general provision is enacted later and it is the manifest legislative intent that such general provision shall prevail.

In IA Sutherland Statutory Construction (C. Dallas Sands, 4<sup>th</sup> Ed. 1972). § 23.09, at pages 223-224, Professor Sands states:

“When a subsequent enactment covering a field of operation coterminous with a Prior statute cannot by any reasonable construction be given effect while the prior law remains in operative existence because of irreconcilable conflict between the two acts, the latest legislative expression prevails, and the prior law yields to the

extent of the conflict.”

The punishment imposed under 12.1-23-11 NDCC is found in 2. A person is guilty of an offense if the person uses or attempts to use any personal identifying information of an individual, living or deceased, to obtain credit, money, goods, services, or anything else of value without the authorization or consent of the individual and by representing that person is the individual or is acting with the authorization or consent of the individual. The offense is a class B felony if the credit, money, goods, services, or anything else of value exceeds one thousand dollars in value. otherwise the offense is a class C felony. A second or subsequent offense is a class A felony.

The punishment under 12.1-23-02 NDCC is found in 12.1-23-05(1)(2)(3) & (4)

**12.1-23-05. Grading of theft offenses.**

1. Notwithstanding the provisions of subsection 2, theft under this chapter is a class B felony if the property or services stolen exceed ten thousand dollars in value or are acquired or retained by a threat to commit a class A or class B felony or to inflict serious bodily injury on the person threatened or on any other person.

2. Theft under this chapter is a class C felony if:

- a. The property or services stolen exceed five hundred dollars in value;
- b. The property or services stolen are acquired or retained by threat and
  - (1) are acquired or retained by a public servant by a threat to take or withhold official action, or
  - (2) exceed fifty dollars in value;
- c. The property or services stolen exceed fifty dollars in value and are acquired or retained by a public servant in the course of official duties;

- d. The property stolen is a firearm, ammunition, explosive or destructive device, or an automobile, aircraft, or other motor-propelled vehicle;
- e. The property consists of any government file, record, document, or other government paper stolen from any government office or from any public-servant;
- f. The defendant is in the business of buying or selling stolen property and the defendant receives, retains, or disposes of the property in the course of that business;
- g. The property stolen consists of any implement, paper, or other thing uniquely associated with the preparation of any money, stamp, bond, or other document, instrument, or obligation of this state;
- h. The property stolen consists of livestock taken from the premises of the owner;
- i. The property stolen consists of a key or other implement uniquely suited to provide access to property the theft of which would be a felony and it was stolen to gain such access; or
- j. The property stolen is a card, plate, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit, or is a debit card, electronic fund transfer card, code, or other means of access to an account for the purposes of initiating electronic fund transfers.

3. All other theft under this chapter is a class A misdemeanor, unless the requirements of subsection 4 are met.

4. Theft under this chapter of property or services of a value not exceeding two hundred fifty dollars shall be a class B misdemeanor if:

- a. The theft was not committed by threat;
- b. The theft was not committed by deception by one who stood in a confidential or fiduciary relationship to the victim of the theft; and
- c. The defendant was not a public servant or an officer or employee of a financial institution who committed the theft in the course of official duties.

The special classification provided in this subsection shall apply if the offense is classified under this subsection in the charge or if, at sentencing, the required factors are established by a preponderance of the evidence.

The above sentencing shows that the punishment for a violation is much more severe for a lesser amount of money under 12.1-23-11 NDCC than it is for a violation under 12.1-23-02. As a result... Mr. Kurtenbach should have only been charged under 12.1-23-11.

According to State v. Hagge 224 N.W.2d 560 (ND 1974) where a later statute imposes a different punishment, either more or less severe, for the same or substantially the same offense, the later statute is ordinarily held to repeal the earlier one. State v. London, 156 Me. 123, 162 A.2d 150 (1960). See State v. Davidson, 78 Idaho 553, 309 P.2d 211 (1957).

**ISSUE: II. Did the Court follow all of the procedure under Rule 11 NDR of Crim P and properly advise Matthew C. Kurtenbach before accepting his guilty**

**pleas?**

The advice the court gave Mr. Kurtenbach prior to accepting his guilty pleas is found in the transcript as follows:

THE COURT: Okay. As I said, I'll go over your rights with you. I'm going to go over your rights and as I said, if you have any questions, feel free to ask or turn and talk to your attorney. Now as to these charges against you, you have the right to remain silent. Any statements made by you could later be used against you. You have the right to the assistance of an attorney before making any statements or answering any questions. You have the right to have an attorney present at each and every stage of the proceedings. If you cannot afford an attorney without undue financial hardship, you have the right to have an attorney appointed for you and represent you at public expense. Do you understand so far?

DEFENDANT: Yes Your Honor.

THE COURT: You do have the right to plead not guilty to these charges. You have the right to persist in not guilty plea's. You have the right to a jury trial. At the trial you have the right come and defend yourself in person or by counsel. You are presumed innocent. The State has the burden of proving you guilty by proof beyond a reasonable doubt. At the trial you have the right to face and cross examine in open court all witnesses against you. In other words, you have the right to question those witnesses face to face in open court. You have the right to have your witnesses appear at the trial and testify on your behalf. You have the right to have witnesses subpoenaed in order to force them or compel them to attend the trial, and you do have the right to be released on

bail while the charges are pending against you. Any questions so far?

DEFENDANT: No Your Honor.

THE COURT: Now you also have the right to plead guilty to these charges, but if you do plead guilty there would not be a trial of any kind. In other words, you'd be waiving – giving up your right to a jury trial or any kind of trial if you plead guilty. Do you understand that?

DEFENDANT: Yes Your Honor.

THE COURT: If you plead guilty you'd also be giving up your right to face and cross examine the witnesses against you. You'd be giving up your right to remain silent and pleading guilty means you're admitting to each and every material fact of the charge against you. Any questions at all so far?

DEFENDANT: No Your Honor.

THE COURT: Do you think you understand everything?

DEFENDANT: Yes Your Honor. Tr. P.5, L9-25, P.6, L1-19.

The advice the court is required to give prior to accepting a Defendant guilty plea is set out in Rule 11 NDR of Crim P. A copy of said rule is heretoaffixed, marked Exhibit #3 and made a part of this brief.

The particular advice the court is required to give and which it did not give, is found in Rule 11(b)(1)(D)... “to testify and present evidence...” According to State vs. Schumacher 452 N.W.2d 345 (ND 1990) The procedures of Rule 11 are mandatory and binding upon the court. State v. Hagemann, 326 N.W.2d 861 (ND 1982); State v. Mortrud, 312 N.W.2d 354 (ND 1981). Since the record does not show substantial



compliance with this rule, the Defendant should be allowed to withdraw his guilty plea.

**ISSUE: III. Whether the factual basis in this case established acts committed by Matthew C. Kurtenbach sufficient to prove all of the essential elements required for a violation of Section 12.1-23-02(2) N.D.C.C.?**

Count I in 08-K-1555 and Count II in 08-K-2287 were charged out under 12.1-23-02(2) NDCC. A copy of 12.1-23-02(2) NDCC is heretoaffixed, marked Exhibit #1 and made a part of this brief.

The factual basis setting out the acts committed by Mr. Kurtenbach that were a violation of Count I in 08-K-1555 are set out in the Tr. P.10, L25, P.11, L1-8 as follows:

“MR. DENHAM: Yes Your Honor. I apologize. On this one, Your Honor, there was a third ID which belonged to Treg Cox. Once again Your Honor, an account was opened using the identification of Mr. Cox. Mr. Cox did not give permission for the defendant to open a checking account, nor to use his identity to do this. Several checks were passed using checks that identified Mr. Kurtenbach as – Mr. Kurtenbach identified himself as Treg Cox when he passed these checks. The total amount for that was \$3,524.94, Your Honor. This is well in excess of the \$500 for the theft by deception, which would make it a C felony.”

The factual basis setting out the acts committed by Mr. Kurtenbach that were a violation of Count I in 08-K-2287 are set out in the Tr.P.8, L24-25, P.9, L1-17 as follows:

“MR. DENHAM: July 28, 2008, the defendant was pulled over here in Burleigh County, Your Honor. The defendant was found with three – when he was pulled over here in Burleigh County, he was staying at the Doublewood Inn here in Bismarck in room

number 281, and at that time. Your Honor. he had three ID's on him that were not his. They were Joshua Johnson, Treg Cox, and Christopher Muhm, Your Honor. When the defendant was pulled over. he was asked for his name and identifying information. He gave the name of Christopher Muhm when his name is in fact Matthew Kurtenbach. That would be the basis for the Count 3 for the false information to a law enforcement officer. As to the facts underlying the theft by deception and unauthorized use of personal identifying information, Your Honor, the defendant did in July pass several checks using the name Christopher Muhm, Your Honor. He did not have permission to do so from Mr. Muhm, Your Honor. He did not have permission to do so from Mr. Muhm, who is in fact a real person. He had opened a checking account and done so with false information. Also when he passed the checks, Your Honor, he purported himself to be Christopher Muhm using, I believe the ID. The total amount that he wrote the checks for on Christopher Muhm was \$841.44. The theft, he knowingly did that, Your Honor, by passing the checks. That would be the businesses who out the money for that (sic)".

In the above counts. Mr. Kurtenbach didn't take any property from Treg Cox. Mr. Kurtenbach only used the personal identifying information of Treg Cox to open the checking accounts. Personal identification information is defined at 12.1-23-11(1) NDCC. A copy of 12.1-23-11(1) is heretoaffixed, marked Exhibit #2 and made a part of this brief. Therefore according to factual basis stated above, Mr. Kurtenbach didn't take any property from Treg Cox.

The fact the court accepted the above factual basis is found in the Tr.P.11, L25, P.12. L1.

THE COURT: All right. There is a factual basis to accept the plea's of guilty. As a sentencing, are the parties ready to proceed today?

In the case now before the court, Mr. Kurtenbach didn't raise the above issue with the trial court. He asserts he can raise this issue on appeal because it is obvious error that affects his substantial rights.

According to State vs. Hersh, 445 N.W.2d 626 (ND 1989), an issue such as the failure to give a jury instruction, or the absence of a request for such an instruction, will not be noticed for the first time on appeal unless it is obvious error which infringes upon substantial rights of the defendant. In State v. Kraft, 413 N.W.2d 303 (ND 1987). This Court noted: "Our power to notice obvious error is exercised cautiously and only in exceptional circumstances where a serious injustice has been suffered by the defendant. E.g., State v. Haverluk, 432 N.W.2d 871 (ND 1988). In assessing the possibility of error affecting substantial rights under Rule 52(b), N.D.R.Crim.P., we must examine the entire record and the probable effect of the actions alleged to be error in light of all the evidence. Id."

There is no factual basis to accept Mr. Kurtenbach's guilty plea to Count I in 08-K-1555.

### **CONCLUSION**

The only criminal charges that should have been brought against Mr. Kurtenbach are under 12.1-23-11.

The factual basis does not include anyone who had property their property taken by Mr. Kurtenbach. Therefore the court erred in accepting Guilty Pleas to those counts.

Mr. Kurtenbach should have the opportunity to withdraw his 6 felony guilty pleas and misdemeanor guilty pleas because he was not properly advised of his rights.

DATED at Mandan, North Dakota, this 3 day of March, 2009.

Benjamin C. Pulkrabek  
BENJAMIN C. PULKRABEK  
402 - 1<sup>st</sup> Street NW  
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Attorney for Defendant - Appellant

**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.

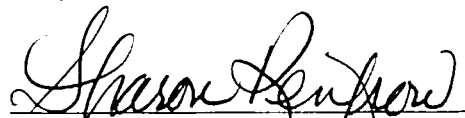
That on March 3<sup>rd</sup>, 2009, she served, by mail, a copy of the following:

APPELLANT'S BRIEF

by placing a true and correct copy thereof in an envelope and depositing the same, with

Bryan D. Denham  
Assistant State's Attorney  
514 E. Thayer Ave.  
Bismarck, ND 58501

The undersigned further certifies that on March 3<sup>rd</sup>, 2009, she dispatched to the Clerk, 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.

  
Sharon Renfrow, Legal Assistant to  
Benjamin C. Pulkrabek