20100235

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
SEPTEMBER 30, 2010
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Clifford Scott Eaton,	)	
	)	
Plaintiff,	)	Supreme Court No.201000235
vs.	)	District Ct. No. 09-2009-CV-04970
	)	
State of North Dakota,	)	
	)	
Defendant.	)	

Appeal from Amended Order of Judgment and Amended Judgment Denying Post-Conviction Relief entered July 21, 2010 in Cass County District Court, East Central Judicial District, State of North Dakota,
The Honorable Georgia Dawson Presiding

APPELLEE'S BRIEF

Tracy J. Peters, NDID #5432
Assistant State's Attorney
Cass County Courthouse
211 Ninth Street South
P.O. Box 2806
Fargo, North Dakota 58108
(701) 241-5850
Attorney for Defendant

Taylor Olson
Third-Year Law Student
(On-Brief)

[¶1] **TABLE OF CONTENTS**

Paragraph No.

Table of Contents ..... ¶ 1

Table of Authorities ..... ¶ 2

Statement of the Issue ..... ¶ 3

Statement of the Case ..... ¶ 5

Statement of Facts ..... ¶ 8

Law and Argument ..... ¶ 11

The district court correctly denied the Defendant's Application for Post-Conviction Relief because the factual basis was sufficient to support a knowing, voluntary, and intelligent plea of guilty under N.D.R.Crim.P. 11, for possession of methamphetamine with intent to deliver ..... ¶ 15

Conclusion ..... ¶ 27

Certificate of Service ..... ¶ 30

[¶2] **TABLE OF AUTHORITIES**

Paragraph No.

United State Cases

U.S. v. Bertling, 370 F.3d 818, (8th Cir. 2004) ¶ 24

U.S. v. Johnson, 977 F.2d 457 (8th Cir. 1992) ¶ 25

U.S. v. Ojeda, 23 F.3d 1473, (8th Cir. 1994) ¶ 23

United States v. Oleson, 310 F.3d 1085 (8th Cir. 2002) ¶ 23

North Dakota State Cases

Delvo v. State, 2010 ND 78, 782 N.W.2d 72 ¶ 12

Heyen v. State, 2001 ND 126, 630 N.W.2d 56 ¶ 12, 13

Johnson v. State, 2006 ND 122, 714 N.W.2d 832 ¶ 12, 13

Laib v. State, 2005 ND 187, 705 N.W.2d 845 ¶ 12

State v. Bates, 2007 ND 15, 726 N.W.2d 595 ¶ 19

State v. Bethke, 2009 ND 47, 763 N.W.2d 492 ¶ 18

State v. Fickert, 2010 ND 61, 180 N.W.2d 670 ¶ 17, 18

State v. Forstad, 2002 ND 52, 641 N.W.2d 86 ¶ 19

State v. Kaiser, 417 N.W.2d at 178 ¶ 16, 25

State v. Klose, 2008 ND 143, 752 N.W.2d 192 ¶ 13

State v. Rodriguez, 454 N.W.2d 726, (N.D.1990) ¶ 22

State v. Smuda, 419 N.W.2d 166, (N.D. 1988) ¶ 18

State v. Steen, 2004 ND 228, 690 N.W.2d 239 ¶ 12

Federal Rules and Regulations

Fines, Penalties, and Forfeitures, 19 C.F.R. § 171.51(b)(6)(G)(2010) ¶ 22

North Dakota Rules

N.D.R.Crim.P. 11 ..... ¶ 4, 6, 10, 14, 15, 16

N.D.R.Crim.P. 52 ..... ¶ 17

North Dakota Century Code

N.D.C.C. § 12.1-02-02 ..... ¶ 21

N.D.C.C. § 19-03.1-23 ..... ¶ 21

N.D.C.C. § 29.32.1-09..... ¶ 12

Other Authorities

28A C.J.S. Drugs and Narcotics § 384 (2010) ..... ¶ 24, 25

A.B.A. Standards for Criminal Justice, Receive and Acting upon a Plea,
Section 1.5-1.6(b), page 14.35 ..... ¶ 16

[¶3] STATEMENT OF THE ISSUE

[¶4] The district court correctly denied the Defendant's post-conviction relief petition and correctly granted the State's motion for summary disposition because the factual basis was sufficient to support a knowing, voluntary, and intelligent plea of guilty under N.D.R.Crim.P. 11, for possession of methamphetamine with the intent to deliver.

[¶5] STATEMENT OF THE CASE

[¶6] On May 24, 2004, the State charged the Defendant, Clifford Scott Eaton, with possession of a controlled substance (methamphetamine) with intent to deliver (AA felony), possession of felony drug paraphernalia (C felony), possession of misdemeanor drug paraphernalia (A misdemeanor), and possession of a small amount of marijuana (B misdemeanor). Appellee's Appendix p.1. (hereinafter App2). On August 30, 2004, the Defendant entered guilty pleas to possession of a controlled substance with intent to deliver and felony possession of drug paraphernalia under Rule 11(b)(3) of the North Dakota Rules of Criminal Procedure. The remaining counts were dismissed. The district court sentenced the Defendant to five (5) years straight time. The Defendant had served his entire sentence by the time the Petition for Post-Conviction Relief was filed.

[¶7] On February 22, 2010, the Defendant filed an Amended Application for Post-Conviction Relief. Appellant's Appendix p. 5

(hereinafter App1). The State filed an Answer on March 23, 2010. (App1 at 10.) The matter came before the district court on June 15, 2010. The district court denied the Defendant's Application for Post-Conviction Relief and granted the State's Motion for Summary Disposition. The district court entered its final order on July 21, 2010. (App1 at 26.)

[¶8] **STATEMENT OF FACTS**

[¶9] On May 21, 2004, law enforcement executed a search warrant at the residence of the Defendant in Fargo, North Dakota. (App1 at 18.) Officer's entered and discovered 80 grams of methamphetamine, marijuana, pay-owe sheets, scales, a number of pieces of methamphetamine paraphernalia, and over $2,000 in cash. (App1 at 18.) Officers also found shipping documents, plane tickets, hotel reservations, a recipe for methamphetamine, and small plastic bags for packaging of drugs. (App2 at 6.)

[¶10] The Defendant made an initial appearance on May 24, 2004. The district court held a contested preliminary hearing on June 24, 2004. On August 30, 2004 the district court scheduled a hearing on a suppression motion filed by the Defendant. The Defendant withdrew his motion and entered a guilty plea under Rule 11(b)(3) of the North Dakota Rules of Criminal Procedure. The district court requested a factual basis from the prosecutor and the following dialogue ensued:

The Court: And I'll need a factual basis from you, Ms. Peters.

Ms. Peters: Your Honor, on May 21st of 2004, a search warrant was executed at the residence of the defendant, Mr. Eaton, that residence at 1405 – 25th Avenue South in Fargo. Officers entered on the search warrant. There was also an arrest warrant connected to it, and there was a gentleman that was arrested who had a federal warrant out for his arrest. His name was Ernest Thomas.

Mr. Thomas was taken into custody by the U.S. Marshal, and the officers proceeded to search the residence for drugs, at which time they found over 80 grams of methamphetamine, which tested positive for methamphetamine. The officers also found pay-owe sheets, scales, number of items of methamphetamine paraphernalia. Mr. Eaton also had over $2,000 in cash in his possession at the time.

The information that they had was that he was going to various locations in Arizona, purchasing methamphetamine, and shipping it back to his residence. The officers also found shipping documents and plane tickets, hotel reservation, that kind of stuff, that would corroborate that that's, in fact, what was going on.

And that is essentially the factual basis.

The Court inquires of the Defendant's attorney whether he takes issue with the factual basis provided.

Mr. Olson: We do, Your Honor.

The Court: -- in any way?

Mr. Olson: Other than the fact that there was drugs found in the – in the apartment that Mr. Eaton was the leaseholder on, we think there would be a sufficient factual basis to say that drugs were found there and that he had possession of those drugs or constructive possession. There's two other situations in there – two other people, excuse me – in the apartment. One was the target of the –

The Court: Federal investigation.

Mr. Olson: -- arrest warrant. The drugs just happened to be found on a computer table where he was arrested while Mr. Eaton was answering the front door, which this Court heard at the preliminary hearing.

> We do believe that there is sufficient facts or sufficient evidence that he would be convicted of at least constructive possession for having that material in his apartment, coupled with the fact that there was paraphernalia there. I think those facts alone the jury could construe that he knew they were there; therefore, he's in possession of it**.** I think that that would be sufficient factual basis for that particular charge as well as the paraphernalia charge.
>
> The Court: You concur, Mr. Eaton?
>
> Defendant: I do.

(App1 at 17-20.) The Honorable Georgia Dawson found the factual basis provided by the State was sufficient for acceptance of the Defendant's guilty plea. The State then moved to dismiss the misdemeanor charges. The State recommended and the court imposed the five year minimum mandatory sentence.

[¶11] **LAW AND ARGUMENT**

[¶12] This is an appeal from an order denying the Defendant's motion for Post-Conviction Relief. "Post-Conviction Relief proceedings are civil in nature and are governed by the North Dakota Rules of Civil Procedure." Laib v. State, 2005 ND 187, ¶ 11, 705 N.W.2d 845. "The petitioner for post-conviction relief has the burden of establishing a basis for relief." State v. Steen, 2004 ND 228, ¶ 9, 690 N.W.2d 239. A court may summarily dismiss an application for post conviction relief if there is "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." N.D.C.C. § 29.32.1-09(1); Johnson v. State, 2006 ND 122, 714 N.W.2d 832;

Heyen v. State, 2001 ND 126, 630 N.W.2d 56. "A genuine issue of material fact exists if reasonable minds could draw different inferences and reach different conclusions from the undisputed facts." Delvo v. State, 2010 ND 78, ¶ 12, 782 N.W.2d 72.

[¶13] On appeal from summary denial of post-conviction relief, this Court reviews the case in the same manner as an appeal from a summary judgment. Johnson, 2006 ND 122, ¶ 12, 714 N.W.2d 832; Heyen, 2001 ND 126, ¶ 6, 630 N.W.2d 56. In reviewing an appeal from summary dismissal, "[t]he party opposing the motion for summary dismissal is entitled to all reasonable inferences to be drawn from the evidence and is entitled to an evidentiary hearing if a reasonable inference raises a genuine issue of material fact." State v. Klose, 2008 ND 143, ¶ 9, 752 N.W.2d 192.

[¶14] The parties in the present case agree there is no genuine issue of material fact. (Appellant's Brief at ¶ 6.) The Defendant argues the district court erred in not granting his motion for summary disposition. (Appellant's Brief at ¶ 6.) The Defendant "requests this Court reverse and remand the matter for entry of judgment in his favor." (Appellant's Brief at ¶ 38.) Specifically, the Defendant argues there was not a sufficient factual basis for the Defendant's plea under N.D.R.Crim.P. 11.

[¶15] **The district court correctly denied the Defendant's application for post-conviction relief because the factual basis was sufficient to support a knowing, voluntary, and intelligent plea of guilty under N.D.R.Crim.P. 11, for possession of methamphetamine with intent to deliver.**

[¶16] North Dakota Rule of Criminal Procedure Rule 11 "outlines the requirements which the Court must follow when accepting a guilty plea." State v. Kaiser, 417 N.W.2d at 178. Specifically, Rule 11(b)(3) states: "[b]efore entering judgment on a guilty plea, the Court must determine that there is a factual basis for the plea." N.D.R.Crim.P. 11(b)(3). This Court has recognized:

> Obtaining a factual basis for the plea serves important purposes. First, it assures that a defendant who seeks to plead guilty is in fact guilty. Persons whose conduct does not fall within the charges brought by a prosecutor should not plead guilty, but unless a factual basis is required, the risk of innocent persons being adjudicated guilty is enhanced.

Kaiser, at 178. "There are several ways to determine the factual basis for the defendant's guilty plea." Id. "First, the Court could inquire directly of the defendant concerning the performance of the acts which constituted the crime." Id. (citing A.B.A. Standards for Criminal Justice, Receive and Acting upon a Plea, Section 1.5-1.6(b), page 14.35). "Secondly, the Court could allow the defendant to describe to the [c]ourt in his own words what had occurred and then the [c]ourt could question the defendant." Id. "Thirdly, the [c]ourt could have the prosecutor make an offer of proof concerning the factual basis for the charge." Id.

[¶17] The State maintains the Defendant did not clearly object to the factual basis for the possession with intent to deliver charge. The defense

attorney merely acknowledged there was a sufficient basis for the possession charge. "If a defendant fails to object, the failure operates as a waiver of the issue on appeal unless the defendant establishes obvious error." State v. Fickert, 2010 ND 61, ¶ 7, 180 N.W.2d 670. "An obvious error or defect that affects substantial rights may be considered even though it was not brought to the [c]ourt's attention." N.D.R.Crim.P. 52(b). "This rule applies to both the trial courts and the appellate courts." N.D.R.Crim.P. 52 (explanatory note).

[¶18] Due to the Defendant's failure to clearly object, this Court should consider this issue only if the Defendant can establish the district court committed obvious error. "To establish obvious error, the defendant must show: (1) error; (2) that is plain; and (3) affects substantial rights." Fickert, 2010 ND 61, ¶ 7, 180 N.W.2d 670 (citations omitted). This Court has recognized its "power to notice obvious error is exercised cautiously and only in exceptional situations where the defendant has suffered serious injustice." Fickert, at ¶ 7 (citing State v. Bethke, 2009 ND 47, ¶ 25, 763 N.W.2d 492 (quoting State v. Smuda, 419 N.W.2d 166, 168 (N.D. 1988)).

[¶19] "To establish a factual basis for the plea, the court must ascertain 'that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pled guilty.'" State v. Bates, 2007 ND 15 ¶ 8, 726 N.W.2d 595 (quoting State v. Forstad, 2002 ND 52, ¶ 19, 641 N.W.2d 86). "The court

accepting the plea should compare the elements of the crime charged to the facts admitted to by the defendant." Id.

[¶20] In this case, the Defendant pled guilty to possession of a controlled substance with the intent to deliver, possession of felony drug paraphernalia (App1. at 17-8). The specific question presented to this Court is whether there was a sufficient factual basis for the "intent to deliver" element of the first count.

[¶21] Under N.D.C.C. § 19-03.1-23 "[i]t is unlawful for any person to willfully, as defined in section 12.1-02-02, manufacture, deliver, or possess with intent to manufacture or deliver**,** a controlled substance." N.D.C.C. §19-03.1-23(1). According to the facts presented at the plea hearing, the Defendant had in his possession eighty (80) grams of methamphetamine, pay-owe sheets, scales, over two thousand dollars ($2,000.00) in U.S. Currency, and a number of items of methamphetamine paraphernalia. (App1. at 18.) Additionally, the prosecutor stated "the information that [the officers] had was that [the Defendant] was going to various locations in Arizona, purchasing methamphetamine and shipping it back to his residence." (App1. at 18.) "Officers also found shipping documents and plane tickets, hotel reservations that kind of stuff that would corroborate that's, in fact, what was going on." (App1. at 18.) Furthermore, the affidavit of probable cause contained in the record indicates officers also found a recipe on how to cook methamphetamine, "unused baggies that looked like they were being repackaged from the larger

quantity for sales," and "small amounts of methamphetamine located throughout the house that looked like they were personal use methamphetamine." (App2 at 6).

[¶22] The quantity of drugs alone established a factual basis for the possession with intent to deliver charge. The Defendant possessed eighty (80) grams of methamphetamine at the time of his arrest. Possession of a controlled substance in a quantity which is larger than would normally be intended for personal use is evidence of intent to sell or deliver the contraband in violation of the law. See State v. Rodriguez, 454 N.W.2d 726, 731 (N.D.1990) (recognizing one ounce of cocaine as a quantity "larger than that intended for personal use"). Also, Title 19 of the Code of Federal Regulations, section 171.51 defines personal use quantities for controlled substances, including methamphetamine. The Regulation states that a quantity of methamphetamine is presumed to be for personal use if the amount possessed does not exceed one gram. Fines, Penalties, and Forfeitures, 19 C.F.R. § 171.51(b)(6)(G)(2010).

[¶23] The State urges the Court to follow the Eight Circuit Court of Appeals ruling in United States v. Oleson, 310 F.3d 1085 (8th Cir. 2002). The defendant in Oleson was convicted of possession of methamphetamine with the intent to deliver. The defendant in Oleson had in his possession 38.15 grams of methamphetamine. Oleson, at 1088. The Eighth Circuit held evidence in that case was sufficient to support possession of methamphetamine with intent to distribute based on quantity and the additional objects found during the

search. The Eighth Circuit held the "intent to distribute may also be inferred solely from possession of large quantities of narcotics." Oleson, at 1088 (quoting U.S. v. Ojeda, 23 F.3d 1473, 1476 (8th Cir. 1994)).

[¶24] The State concedes there was no evidence presented specifically stating over eighty (80) grams of methamphetamine is more than a "personal use" quantity. However:

> an intent to distribute, deliver, or sell controlled substances may be inferred from the surrounding facts and circumstances, such as the possession of a large quantity of a controlled substance. An intent to distribute, deliver, or sell controlled substances may be inferred from the possession of a large quantity of a controlled substance. A reasonable inference of intent to deliver a controlled substance is permitted when the amount possessed cannot be viewed as intended for personal consumption.

28A C.J.S. Drugs and Narcotics § 384 (2010). In this case, it was reasonable for the district court to infer "intent to deliver" from the evidence presented. The district court need not ignore its general knowledge and experience regarding drug quantities. See generally, U.S. v. Bertling, 370 F.3d 818, 820 (8th Cir. 2004) (acknowledging a trial court's reliance on "general knowledge about a subject gained by experience on the bench" is acceptable if it is the type of information about which an experienced trial judge would have such knowledge). Certainly, Judge Dawson, a long-time district court judge, would have had experience with presiding over drug cases and be able to discern whether a quantity of drugs was a "personal use" quantity or a "sale" quantity.

The distinction between "personal use" and "sale" quantity becomes less clear given smaller quantities. However, eighty (80) grams of methamphetamine clearly falls within the "sale" quantity category.

[¶25] In addition to the quantity of drugs in this case, the facts presented to the district court included pay-owe sheets, and scales found at the residence, as well as two thousand dollars ($2000) U.S. Currency. A district court may infer a defendant's "intent to distribute" "from circumstantial evidence such as a large sum of cash, and a quantity of a controlled substance." U.S. v. Johnson, 977 F.2d 457 (8th Cir. 1992) (inferring intent to distribute where the defendant had $10,390 in U.S. currency and 5.98 grams of cocaine). "Whether a controlled substance is possessed with intent to deliver is determined by an examination of all the facts and surrounding circumstances." 28 C.J.S. Drugs and Narcotics § 290 (2010). Some factors the court can consider are:

> A large amount or quantity of a controlled substance . . . an amount inconsistent with personal use . . . the presence of drug paraphernalia. . . possession of weighing scales . . . incriminating evidence indicating some involvement on the drug trade, or unusually large amounts of cash.

Id. The fact that the Defendant "took issue" with some of the facts does not affect the adequacy of the factual basis. See Kaiser, 417 N.W.2d at 178 (stating the court can accept the factual basis from the prosecutor).

[¶26] The State believes the facts recited to the district court at the plea hearing provided an adequate factual basis for accepting the plea to the offenses charged.

[¶27] **CONCLUSION**

[¶28] In this case, officers found over 80 grams of methamphetamine, pay-owe sheets, and scales found at the Defendant's residence. Officers also seized over two thousand dollars ($2000.00) from the Defendant. According to the affidavit of probable case, officers also observed a recipe on how to cook methamphetamine, several small "personal use" amounts of methamphetamine, unused baggies apparently used to repackage methamphetamine for sale, and documents indicating the Defendant was using UPS and Fed Ex to ship controlled substances in the mail. The State believes the facts as contained in the record and recited at the plea hearing establish an adequate factual basis for the Defendant's plea.

[¶29] The district court correctly granted the State's motion for summary disposition. For these reasons, the State respectfully requests this Court to affirm the decision of the district court.

Respectfully submitted this 30th day of September, 2010.

Tracy J. Peters, NDID #5432
Assistant State's Attorney
P.O. Box 2806
Fargo, North Dakota 58108
(701) 241-5850
Attorney for Defendant

_____
Taylor Olson
Third-Year Law Student
P.O. Box 2806
Fargo, ND 58108

[¶30] **CERTIFICATE OF SERVICE**

[¶31] A true and correct copy of the foregoing document was sent by e-mail on the 30th day of September, 2010, to: nithornton@nd.gov

_____
Tracy J. Peters