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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No. 20100349

State of North Dakota,

Plaintiff/Appellee,

vs.

Margie Ann McElya,

Defendant/Appellant.

APPEAL FROM THE CRIMINAL JUDGMENT
SOUTH CENTRAL JUDICIAL DISTRICT
BURLEIGH COUNTY CASE NO. 30-09–K-1162
THE HONORABLE ROBERT O. WEFALD, PRESIDING

DEFENDANT-APPELLANTS BRIEF

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ABBREVIATIONS

Tr. Transcript
P. Page
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STATUTES

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CASES

[¶1] STATEMENT OF THE ISSUES

ISSUE I: Was Margie Ann McElya improperly convicted and sentenced on multiplicious courts?

NATURE OF THE CASE

[¶2] On October 23, 2009 the Morton County States Attorney, in a Criminal Complaint, charged Margie Ann McElya with one count of theft of property, a class C felony and one count of theft of property , a class A misdemeanor. Both of these theft of property counts were filed as violations under NDCC 12.1-23-02. The class C felony was punishable under NDCC as 12.1-23-05(2)(j) and the class A misdemeanor was punishable under NDCC 12.1-23-05(3).

[¶3] A preliminary hearing was held on the class C felony charge on December 14, 2009. At the end of that hearing the Court found probable cause to believe that Ms. McElya committed the class C felony and bound her over to the District Court.

[¶4] An information was then filed charging Ms. McElya with a class C felony theft of property and a class A misdemeanor theft of property. To each of these charges Ms. McElya entered a plea of not guilty.

[¶5] A jury trial on both counts was held on July 27, 2010. The jury found Ms. McElya guilty on both counts.

[¶6] The Criminal Judgment and Commitment was signed by the trial court on October 18, 2010 sentencing Ms. McElya to two years on the class C felony and one year on the class A misdemeanor. These sentences both commenced on October 18, 2010 and run concurrently.

[¶7] On October 22, 2010 Ms. McElya's trial counsel appealed the Judgment

and Commitment and ordered a transcript of the sentencing.

[¶8] Notice of filing the appeal was filed on October 25, 2010.

[¶9] On January 11, 2011 a trial transcript was ordered.

[¶10] This case is now before the North Dakota Supreme Court.

STATEMENT OF FACTS

[¶11] On August 7, 2009 Sarah Messmer and her boy friend went to the Westside Bar in Mandan, North Dakota. Tr.P.15, L. 18-25, P. 16, L. l-2. Ms. Messmer brought her pocketbook (also in transcript called purse or wallet) with her. In the pocketbook she had approximately $400 in cash and credit cards. Tr. P. 16, L4-25, P. 17, L. l-19. When Ms. Messmer got home she couldn't find her pocketbook. After talking to her boyfriend about the pocketbook, she decided she left it at the Westside Bar. So she called Gina Leingang the Westside Bar manager and told her about the pocketbook. Tr. P.18, L.16-25, P. 19, L. 1-19. Ms. Messmer's pocketbook was never found. Tr. P.22. L. 9-11.

[¶12] Ms. Leingang was bartending on August 7, 2009. Tr. P.26, L. 4-5. The next day she got a phone call from Ms. Messmer during which Ms. Messmer described the pocketbook. Tr. P.26, L.13-18. Ms. Leingang remembered seeing the pocketbook setting on the bar counter top on the night of August 7, 2009. Tr. P.26, L.18-24. Ms. Leingang on the night of August 7, 2009 saw a Native American couple leave the blackjack table and walk up to the bar where the pocketbook was. Tr. P.27, L. 10-25. Ms. Leingang identified the Native Americans in Court as Quenton Lincoln and Margie McElya. Tr. P.28, L.1-13. Ms. Leingang saw Ms. McElya put her hands on the pocketbook and assumed that it was Ms. McElya's. After that Ms. Leingang noticed the

pocketbook was gone. Tr. P.28, L.24-25, P.29, L.1-14.

[¶13] Ms. Leingang then told of a video given by her to the Mandan Police that showed the pocketbook being taken. Tr. P.29., L.25, P. 30, L.1-4. That video was played for the jury. Tr. P.30., L.12-15.

[¶14] The day after the pocketbook was taken Ms. Leingang testified Mr. Lincoln and Ms. McElya returned to the Westside Bar. Tr. P. 33., L.18-24. Ms. Leingang recognized Mr. Lincoln and Ms. McElya and called the Mandan Police. When the police arrived at the Westside Bar Ms. Leingang pointed out Mr. Lincoln and Ms. McElya to the Mandan Police. Tr. P. 34, L.6-14.

[¶15] Mandan Police Officer Lori Stack was one of the Mandan Police Officers who responded to Ms. Leingang's call. When Officer Stack arrived at the bar she was told that a pocketbook was stolen from the bar the night before and the people who did it were at the bar again. These people were identified for Officer Stack by Ms. Leingang. Tr. P.26, L.6-18.

[¶16] Officer Stack questioned Ms. McElya about being in the Westside Bar on August 7, 2009 and her taking the pocketbook. Ms. McElya admitted being in the Westside Bar but denied taking the pocketbook. Tr. P.37, L.10-25, P. 38, L. 1-2.

[¶17]Officer Stack checked an area outside the bar for the pocketbook but didn't find it. Tr. P.38. L.12-19. Officer Stack also testified the credit cards in the pocketbook were never used and that the pocketbook was never found. Tr. P. 39., L.3-12.

[¶18] Ms. McElya testified and denied taking the pocketbook. Tr. P. 43, L.22-23. She did admit that she and Mr. Lincoln were in the Westside Bar on August 7, 2009 and that they played black jack. Tr. P. 47, L.3-8.

[¶19] Mr. Lincoln also testified and he admitted being at the Westside Bar on August 7, 2009 with Ms. McElya. Tr. P.49, L.15-20. Mr. Lincoln denied ever seeing the pocketbook on August 7, 2009 and on that night Ms. McElya didn't leave with the pocketbook. Tr. P.51., L.8-17.

ARGUMENT

[¶20] ISSUE: Was Margie McElya improperly convicted and sentenced on multiplicious counts?

[¶21] In the case now before the Court the thing taken was a pocketbook. That taking involved a single act. Inside the pocketbook were $400.00 and 3 credit cards. The prosecutor was able to charge Ms. McElya with two crimes under NDCC 12.1-23-02 because under NDCC 12.1-23-05 Grading of Theft Offenses NDCC 12.1-23-05(j) allows credit cards to be charged as a class C felony and NDCC 12.1-23-05(3) allows taking of less than $500.00 and more than $250.00 to be charged as class A misdemeanors.

[¶22] Ms. McElya contends her multiple conviction for a single act violates the double jeopardy clause of Article 5 of the United States Constitution and Article I Section 12 of the Constitution of North Dakota.

[¶23] Article 5 of the United States Constitution:

Article 5. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against

himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation. (Emphasis added)

[¶24] Article I Section 12 of the North Dakota Constitution:

Section 12. In criminal prosecutions in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf; and to appear and defend in person and with counsel. No person shall be twice put in jeopardy for the same offense, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law. (Emphasis added)

[¶25] State vs Moss, 2008 ND22d, 758 NW2d 674 [¶13]. [¶13] The constitutional guarantee against double jeopardy encompasses three separate protections: protection against a second prosecution for the same offense after acquittal, protection against a second prosecution for the same offense after conviction, and protection against multiple punishments for the same offense. Department of Revenue v. Kurth Ranch, 511 U.S. 767, 769 n.1 (1994); North Carolina v. Pearce, 395 U.S. 711, 717 (1969). When the same conduct violates more than one statutory provision, the first step in the double jeopardy analysis is to determine whether the legislature intended that each violation be a separate offense. Garrett v. United States, 471 U.S. 773, 778 (1985). The "question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized." Whalen v. United States, 445 U.S. 684, 688 (1980). The question is ultimately one of the

Legislative intent, and if the "legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under Blockburger [v. United States, 284 U.S. 299 (1932)], a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such states in a single trial." Missouri v. Hunter, 459 U.S. 359, 368-69 (1983). If, however, the legislature "intended that there be only one offense–that is, a defendant could be convicted under either statutory provision for a single act, but not both–there would be no statutory authorization for" multiple convictions or punishments "and that would end the double jeopardy analysis." Garrett, at 778.

[¶26] One of the criminal statutes involved in Moos was NDCC 12.1-23-02. Theft of Property. 12.1-23-02. Theft of property. A person is guilty of theft if he:

. . . .

2. Knowingly obtains the property of another by deception or by threat with intent to deprive the owner thereof, or intentionally deprives another of his property by deception or by threat . . . .

[¶27]The above statute was enacted in 1973 as part of the comprehensive revision of the criminal code. Said statute was an adoption from the corresponding provision of the proposed Federal Criminal Code. Therefore Moos searched the official commentaries of the drafters contained in the Working Papers of the National Commission on Reform of Federal Criminal Laws to determine the legislative intent and purpose underlying our statutory provision.

[¶28] From the search Moos decided [¶21] The legislative history of these

various criminal provisions clearly indicates an intent to prohibit multiple convictions and punishments for a single act. Throughout the discussions in the Working Papers the drafters repeatedly express the idea that each of these offenses reaches an equally culpable level of criminal conduct, and that each offense should carry an equal degree of punishment, irrespective of which single offense is charged. The drafters clearly expressed their belief that any overlap among the statutory offenses should be ameliorated by strict limitations on multiple charging and punishments. Accordingly, we conclude that the legislative history expresses the legislature's intent that multiple convictions and punishments are not permitted for the same conduct under the theft by deception, forgery or counterfeiting, and deceptive writings statutes.

[¶29] In Moos the Defendant was sentenced to identical five-year terms on each of the six convictions. In the case now before the court Ms McElya was sentenced to 2 years on count I and that sentence was concurred with a one year sentence for count II. Moos was ... "remanded to the the district court for vacation of the multiple convictions which violate double jeopardy. The appropriate remedy is outlined in Rutledge, 517 U.S. at 301-02:

> [¶30][I]n Ball v. United States, 470 U.S. 856 (1985)[,] . . . we concluded that Congress did not intend to allow punishment for both illegally "receiving " and illegally "possessing" a firearm. Id., at 861-864. In light of that conclusion, we held that "the only remedy consistent with the congressional intent is for the District Court . . . to exercise its discretion to vacate one of the underlying convictions" as well as the concurrent sentence based upon it. Id., at 864. We explained further:

> "The second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence. The separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may dely the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction. See Benton v. Maryland, 395 U.S. 784, 790-791 (1969); Sibron v. New York, 392 U.S. 40, 54-56 (1968). Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment." Id. at 864-865.

[¶31] Under Ball, the collateral consequences of a second conviction make it as presumptively impermissible to impose as it would be to impose any other unauthorized cumulative sentence.

CONCLUSION

[¶32] Ms. McElya's case should also be remanded to the district court for vacation of the multiple convictions which violate double jeopardy.

Dated this 25th day of March, 2011.

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CERTIFICATE OF SERVICE

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 25th, 20111, she served, by e-mail, a copy of the following:

DEFENDANT-APPELLANTS BRIEF

The undersigned further certifies that on March 25th, 2011, she electronically filed with the Clerk of the North Dakota Supreme Court, DEFENDANT-APPELLANT'S BRIEF and emailed the same containing the full text of the Brief to:

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