

20100377

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

APR 12 2011

State of North Dakota)
)
 Plaintiff and Appellee,)
)
 v.)
)
 Kyle Taft Mackey,)
)
 Defendant and Appellant.)

STATE OF NORTH DAKOTA

Supreme Court No. 20100377

District Court No. 23-09-K-147

APPELLANT'S BRIEF

APPEAL OF AMENDED CRIMINAL JUDGMENT AND COMMITMENT

DISTRICT COURT OF LAMOURE COUNTY,

THE HONORABLE RICHARD W. GROSZ, PRESIDING.

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ISSUES PRESENTED

1. Whether the District Court's Failure to Adhere to the Terms of the Plea Agreement Requires Withdrawal of the Plea to Avoid Manifest Injustice?
2. Whether the District Court's Thirty Year Sentence was Illegal Under the Terms of the Plea Agreement and May Be Withdrawn Under N. D. R. Crim. P. 35(a)?

STATEMENT OF THE CASE

[¶1] This is an appeal from the District Court's denial of a motion to withdraw Defendant's plea of guilty under N. D. R. Crim. P. 32(d), to avoid manifest injustice or alternatively, to withdraw the plea of guilty under to N. D. R. Crim. P. 35(a), because the sentence was illegal. The motion was filed January 28, 2011, and on February 14, 2011, judgment was entered denying the motion. Defendant filed a timely Notice of Appeal on February 22, 2011.

STATEMENT OF THE FACTS

[¶2] The Defendant, Kyle Mackey, was originally charged in a three-count information with Gross Sexual Imposition, Class AA felonies, in LaMoure County, during the period from June 1, 2009 until September 4, 2009. In addition, he was charged in a separate Information with Luring Minors by Computer or Other Electronic Means, a Class B Felony, and Corruption or Solicitation of Minors, a Class C Felony. (Plea Tr. pp. 1-3). On March 24, 2010, a Change of Plea Hearing was held before the Court, the Honorable Richard W. Grosz presiding.

[¶3] At the time of the plea, Defense counsel recited the plea agreement to the Court. (Plea Tr. pp. 9-10). Under the agreement, Mr. Mackey would plead guilty to Count 1 of the first information, and would receive a pretrial diversion pursuant to Rule 32.2 on Count 2 for ten years or until the completion of Mr. Mackey's probation on Count 1. In addition, the three remaining counts in both informations would be dismissed, and the State's Attorney of Ramsey County agreed he would not bring a potential case against the Defendant based upon allegations involving the Defendant and the same minor. (Plea Tr. pp. 9-10).

[¶4] Under the terms of the agreement, Mr. Mackey was subject to a minimum mandatory five (5) years imprisonment. The agreement provided that Mr. Mackey would be arguing for a minimum mandatory sentence, while the State's Attorney would be arguing for a fifteen (15) year sentence. (Plea Tr. 9-10). The Court and the parties understood this was a binding plea agreement. (Plea Tr. p. 11). At the Change of Plea Hearing, the Court explained to Mr. Mackey that if he pled guilty under this agreement he could be sentenced to between five (5) and fifteen (15) years and if the Court did so, Mr. Mackey could not withdraw his plea. (Plea Tr. pp. 11-13). The Court further explained to Mr. Mackey he could not be sentenced to more than fifteen (15) years. Finally, the Court explained that after it reviewed the Pre-Sentence Investigation Report, if the Court decided to sentence Mr. Mackey to more than fifteen (15) years, he could withdraw his plea. (Plea Tr. 12-13).

[¶5] The Court accepted Mr. Mackey's plea after the necessary Rule 11 colloquy, making sure he understood the rights he was waiving and finding that the plea was voluntarily, knowingly and intelligently made. It then ordered the necessary Pre-Sentence Investigation Report. The Court took the agreement under advisement and the case was continued for sentencing. (Plea Tr. pp. 13-16).

[¶6] The parties reconvened on August 10, 2010, for the sentencing of Mr. Mackey. At that time, the Court repeated the terms of the plea agreement, except that the Court indicated for the first time that the above references to minimum and maximum sentences which the Court could give referred to time of imprisonment rather than length of the total sentence. (Sent. Tr. p. 1). The Court indicated it would stay within the boundaries as negotiated by Counsel and it would sentence Defendant to no less than five (5) nor more than fifteen (15) years, and accepted the plea agreement. (Sent. Tr. p. 1).

[¶7] Thereafter, the Court proceeded to sentence Mr. Mackey to thirty (30) years in prison. The Court ordered him to serve eight (8) of those years, suspended the remaining twenty-two (22) years, and placed Mr. Mackey on probation for a period of five (5) years beginning after the period of incarceration. (Sent. Tr. pp. 49-50).

[¶8] Mr. Mackey filed a motion with the Court arguing the Court failed to abide by the terms of the binding plea agreement when it sentenced him to a term of thirty years, and under N. D. R. Crim. P. 32(d), he should be allowed to withdraw his plea of guilty to avoid manifest injustice. Alternatively, Mr. Mackey argued the thirty year sentence violated the terms of the binding plea agreement and he should be allowed to withdraw the plea under N. D. R. Crim. P. 35(a). On February 14, 2011. Judgment was entered denying the motion and this appeal followed.

ARGUMENT

1. The Plea Agreement was Binding on the Court.

[¶9] There is a significant difference between an agreement to make a non-binding recommendation of sentence and a binding plea agreement under N. D. R. Crim. P. 11(d). State v. Thompson, 504 N.W.2d 315, 319 (N.D. 1993). If the parties agree to a non-binding recommendation of sentence, the State fulfills its obligation when it makes the specified non-binding recommendation, and the trial court may impose a harsher sentence than the one recommended without allowing the defendant to withdraw the guilty plea. Id. When presented with a binding plea agreement, the court is limited to three options: the court may accept the agreement, reject the agreement, or defer its decision until receipt of a presentence report. See N. D. R. Crim. P. 11(d)(2). If the court accepts a binding plea agreement, the court may not impose a sentence less favorable than the sentence provided for in the plea agreement. See N. D. R. Crim. P. 11(d)(3). If the court rejects a binding plea agreement, the court must inform the

defendant it is not bound by the agreement, and must allow the defendant to withdraw the plea. and must inform the defendant that if the defendant persists in pleading guilty, the court may impose a sentence less favorable than the one provided for in the plea agreement. See N. D. R. Crim. P. 11(d)(4); Peltier v. State, 2003 ND 27, ¶ 10, 657 N.W.2d 238.

[¶10] In this case, there is no dispute that the plea agreement was binding on the Court. Accordingly, once the Court accepted the agreement, it could not impose a sentence of more than fifteen (15) years. Nevertheless, the Court imposed a thirty-year (30) term of imprisonment. It is immaterial that the Court suspended twenty-two (22) years of the sentence, requiring Mr. Mackey to only serve eight (8) years of actual time. The plea agreement permitted a maximum sentence of fifteen (15) years, thereby limiting the Court’s sentencing discretion. The thirty-year (30) term – twice what was permissible under the agreement – was imposed in direct violation of North Dakota Rule of Criminal Procedure 11(c)(4).

2. The Court’s Failure to Adhere to the Terms of the Plea Agreement Requires Withdrawal of the Plea to Avoid Manifest Injustice.

[¶11] The determination of manifest injustice is ordinarily within the trial court’s discretion, and will be reversed on appeal only for an abuse of discretion. State v. Farrell, 2000 ND 26, ¶ 8, 606 N.W.2d 524. A trial court abuses its discretion when it acts in an arbitrary, unreasonable, or capricious manner, or misinterprets or misapplies the law. Id. The defendant has the burden of proving withdrawal is necessary to correct a manifest injustice. State v. Thompson, 504 N.W.2d at 319.

[¶12] Rule 32(d) of the North Dakota Rules of Criminal Procedure provides: “The court must allow the defendant to withdraw a plea of guilty whenever the defendant, on a timely motion for withdrawal, proves withdrawal is necessary to correct a manifest injustice.” Additionally, a motion to withdraw a plea of guilty “is not necessarily barred because made subsequent to

judgment or sentence.” N. D. R. Crim. P. 32(d)(2).

[¶13] The North Dakota Supreme Court has routinely held that when a trial court fails to follow the strictures of Rule 11, the defendant must be allowed to withdraw a plea of guilty to avoid manifest injustice. In State v. Vandehoven, 2009 ND 165, ¶ 18, ¶ 11, 772 N.W.2d 603, the Court found the trial court “violated N. D. R. Crim. P. 11(c)(1) when it actively participated in plea negotiations” and it was necessary to allow the defendant to withdraw his guilty plea to avoid manifest injustice. Additionally, the trial court failed to properly advise the defendant before accepting his guilty plea as required by N. D. R. Crim. P. 11(b), and withdrawal of the guilty plea was necessary to correct that manifest injustice. Id. at ¶ 30. Similarly, in State v. Feist, 2006 ND 21, ¶ 27, 708 N.W.2d 870, the Court concluded the trial court “did not substantially comply with the requirements of N. D. R. Crim. P. 11(c) and there was ambiguity apparent on the record as to whether a plea agreement existed between the parties, [and] we conclude the withdrawal of [defendant’s] guilty plea is necessary to correct a manifest injustice.” Finally, in State v. Dimmitt, 2003 ND 111, ¶ 8, 665 N.W.2d 692, the Court held “[b]ecause the record shows the trial court did not substantially comply with the requirements of N. D. R. Crim. P. 11(c) and [defendant] did not fully understand the nature of his informal agreement for a nonbinding sentence recommendation from the State, we conclude withdrawal of [defendant’s] guilty plea is necessary to correct a manifest injustice.” See also State v. Farrell, 2000 ND 26, ¶ 18 (holding manifest injustice required allowing the defendant to withdraw guilty plea when it was clear from the record he was confused by court’s imposition of a harsher sentence than that which was requested by the state).

[¶14] In this case, the Court accepted a binding plea agreement that required Defendant be sentenced to no less than five years and no more than fifteen years. Notwithstanding the binding

nature of the agreement, and the Court's apparent acceptance of the agreement. It sentenced Mr. Mackey to a term of thirty years. The Court's failure to follow the agreement as required by N. D. R. Crim. P. 11(c)(4), resulted in a manifest injustice which necessitates allowing Mr. Mackey to withdraw his guilty plea.

[¶15] Additionally, Mr. Mackey acted with due diligence in bringing his motion to withdraw his guilty plea under Rule 32(d). Mr. Mackey was represented by different counsel at the sentencing hearing who failed to call the violation of the plea agreement to the Court's attention. As a result, Mr. Mackey was forced to locate and engage new counsel to review the plea agreement and sentencing proceedings and to determine if a motion to withdraw the guilty plea could be brought. The time expended by Mr. Mackey in his search for substitute counsel, and the time needed to apprise new counsel of the issues involved, has been reasonable and the motion to withdraw is timely.

3. The Court's Thirty Year Sentence was Illegal Under the Terms of the Plea Agreement and May Be Withdrawn Under N. D. R. Crim. P. 35(a).

[¶16] Courts may change sentences pursuant to the authority and limitations of N. D. R. Crim. P. 35. State v. Trieb, 533 N.W.2d 678, 680 (N.D. 1995). "Under Rule 35(a), '[t]he sentencing court may correct an illegal sentence at any time.'" Id. (quoting N. D. R. Crim. P. 35(a)). "[T]he correction of an illegal sentence involves a substantial right and an order denying correction of an illegal sentence is appealable." State v. Ostafin, 1997 ND 102, ¶ 12, 564 N.W.2d 616).

[¶17] The term "illegal sentence" as used in Rule 35(a) applies to a sentence that the judgment of conviction does not authorize.

Examples of illegal sentences include: a sentence in excess of a statutory provision or in some other way contrary to an applicable statute, a sentence which fails to conform to the oral pronouncement of the sentence, or a sentence which is ambiguous with respect to the time and manner in which it is to be served. *In addition, a sentence is illegal if it does not comply with a promise of a plea*

bargain.

State v. Trieb, 516 N.W.2d 287, 292 (N.D. 1994) (emphasis supplied) (internal citations omitted).

[¶18] The majority of states allow a defendant to withdraw his guilty plea if it is determined the sentence was illegal, e.g., did not conform to the promise of a plea agreement. Ostafin, 1997 ND 102, ¶ 11. Conversely, some jurisdictions hold it is unnecessary to allow a defendant to withdraw a guilty plea if the illegal sentence can be reconciled with the plea agreement or otherwise corrected so as to give the defendant the benefit of the bargain. Id. (citations omitted).

In State v. Ostafin, the North Dakota Supreme Court stated that:

[W]hen a defendant brings a motion to correct an illegal sentence under Rule 35(a), N. D. R. Crim. P., the sentencing court should first determine whether the illegal sentence can be corrected in such a manner so as to preserve the intent of the original plea agreement and give the defendant that for which he bargained. Only if such modification of the original sentence cannot be done, should the defendant be given the opportunity to withdraw his guilty plea.

1997 ND 102, ¶ 11.

[¶19] Based on this language, it would appear this Court has joined the minority of jurisdictions which do not allow a defendant to withdraw his plea if the illegal sentence can be corrected to preserve the original intent of the plea agreement. The statement by the Court, however, was not necessary to the holding and is dicta. In Ostafin, the defendant brought a motion under Rule 35(a) to correct an illegal sentence. Id. at ¶ 4. Specifically, the defendant argued his plea agreement, which contained a waiver of any reduction in his sentence for good time or good conduct under N.D.C.C. § 12-54.1-01, was illegal because the trial court lacked the authority to circumvent the statute. Id. As the Court noted, “Ostafin did not move to withdraw his plea of guilty under Rule 32(d), but rather moved to correct an illegal sentence specifically under Rule 35(a). Ostafin did not request he be allowed to withdraw his plea of guilty, but rather asked for a

correction of his sentence so he could ‘collect all back. present and future good time.’” Id. at ¶ 13. Because the defendant never asked to withdraw his plea, it was unnecessary for the Court to decide whether he should have been allowed to withdraw the plea. Inasmuch as the Court’s discussion of when, under Rule 35(a), a defendant should be allowed to withdraw a guilty plea was not necessary to the holding, it is dicta and not binding on this Court.

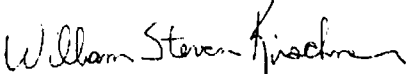
[¶20] Furthermore, this case is clearly distinguishable from Ostafin. Here, Mr. Mackey is asking to withdraw his plea under Rule 32(d) to correct a manifest injustice, and to withdraw his plea under Rule 35(a) because the Court imposed an illegal sentence in contravention of the binding plea agreement. Under either theory, Mr. Mackey must be allowed to withdraw his plea of guilty and return to the position he was in before the Court accepted the guilty plea and imposed a thirty (30) year sentence in violation of the plea agreement and Rule 11(c)(4).

CONCLUSION

[¶21] Wherefore, Mr. Mackey respectfully requests that the Court find the failure to follow the dictates of the plea agreement, and the imposition of a sentence far in excess of the fifteen (15) year maximum allowable under the agreement, resulted in a manifest injustice which can only be corrected by allowing him to withdraw his plea of guilty. Alternatively, Mr. Mackey asks the Court to find the thirty (30) year sentence was illegal because it violated the plea agreement and warrants a withdrawal of the plea under Rule 35(a). Finally, Mr. Mackey requests the Court grant such other and further relief as it deems just and proper.

Respectfully submitted this 11th day of April, 2011.

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State of North Dakota v. Kyle Mackey, *Supreme Court No. 20100377*

The undersigned states that he is an attorney for the Defendant, Kyle Mackey, and that pursuant to Rule 49 of the North Dakota Rules of Criminal Procedure, he has made service of the attached:

Appellant's Brief
Appellant's Appendix
Certificate of Attorney Service by Mail

by mailing a true and correct copy thereof by placing the same in the U.S. mail, first class postage prepaid, addressed to the following:

Mr. Ryan Norrell
P.O. Box 5
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