

20100377

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Supreme Court No. 2010037

State of North Dakota	)	
Plaintiff,	)	
	)	Supreme Court No. 20100377
	)	
v.	)	
	)	
	)	District Court No. 23-09-K-147
Kyle Mackey,	)	
Defendant	)	

.....  
APPEAL OF AMENDED CRIMINAL JUDGMENT

**FILED**  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

LAMOURE COUNTY DISTRICT COURT

JUN 23 2011

THE HONORABLE RICHARD W. GROSZ, PRESIDING

STATE OF NORTH DAKOTA

**BRIEF OF APPELLEE**

Ryan Norrell #06582  
State's Attorney  
P.O. Box 5  
LaMoure, ND 5858458  
(701) 883-5600

Attorney for the State of North Dakota, Appellee

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## FACTS AND PROCEEDINGS

[¶1] Kyle Mackey's statement of the facts is essentially correct. There is no dispute as to whether the plea agreement was binding. However, of significance is that the trial court did opine as to whether the plea agreement presented to the court referred to the length of the total sentence or to the time Mackey would actually serve on page one of the Transcript of Sentencing Hearing (hereinafter, S.H.) where the trial court stated "the plea agreement provided that the state could argue for no more than fifteen (15) years of served imprisonment." (S.H. 1). Neither attorney objected to this statement by the trial court, thus it is reasonable to conclude that the time referred to by both attorneys is time actually served by Defendant and not the total sentence. In this matter, Appellant was sentenced to eight (8) years of actual imprisonment plus twenty-two (22) years imprisonment for a period of five (5) years during which Appellant was to be on probation. Measuring by the Court's statement of "served imprisonment" the eight (8) years ordered by the Court did "not exceed those guidelines without violating the agreement." (S.H. 1)

[¶2] Mackey glosses over the course of proceedings, and they may be of some importance to this appeal. Failure to timely bring a motion to withdraw a guilty plea raises questions about the motion's legitimacy. Gamboa v. State, 2005 ND 48, ¶ 14, 693 N.W.2d 21. Appellant was given ample opportunity in court on the day of the Sentencing hearing to object to the sentence. After the Court issued its sentence and explained it to Mackey, the defendant was asked "Do you understand that?" to which he replied, "Yes, your Honor." (S.H. 50). Later, the Court asked for "any other comments" (S.H. 66), and in an address to Appellant gave pause for him to offer thoughts (S.H. 67). Appellant even

interjected to request that his family be permitted to drop him off at the Barnes County Correctional facility (S.H. 64). Yet at none of these points did either Mackey or his Counsel raise the issue of the Court's sentence being illegal or improper. Mackey did not file an appeal of the original judgment. The issue wasn't raised until January 28<sup>th</sup>, 2011, over five months after the original judgment was issued, when Appellant filed a motion to withdraw his plea. Appellant asserted that while the term of incarceration was within the terms of the plea agreement, the actual sentence exceeded the maximum agreed-upon sentence. The trial court issued a memorandum on January 31<sup>st</sup>, 2010, denying the motion to withdraw the guilty plea and ordering that the criminal judgment be amended. The trial court indicated that although the record seemed to support that the plea agreement referred to "initial served incarceration," rather than overall sentence, it was a distinction without a legal difference. Since the defendant could be resentenced to the maximum upon a violation of probation, the court ordered that the criminal judgment be amended to conform to Mackey's version of the plea agreement. An amended criminal judgment was then filed on February 11<sup>th</sup>, 2011, sentencing Mackey to serve 15 years with 7 years suspended for a period of five years.

[¶3] Mackey's notice of appeal indicates he is appealing the amended criminal judgment, not the court's memorandum denying the motion to withdraw the guilty plea. Mackey's brief is also captioned as an appeal of the amended criminal judgment, which provides for a sentence within the range provided for in the plea agreement. Resolution of the true intent of the plea agreement is not necessary for the disposition of this appeal. Assuming that the parties intended that the sentence provided for in the plea agreement

referred to the total sentence the court could give. Mackey still is unable to show a manifest injustice that would have allowed withdrawal of his guilty plea.

## ARGUMENT

### **I. STANDARD OF REVIEW**

[¶4] A defendant seeking to withdraw his guilty plea has the burden of proving a manifest injustice, and adjudication of the issue is solely within the trial court's discretion. State v. Werre, 325 N.W.2d 172, 174 (N.D. 1982).

[¶5] In order for a sentence to be deemed illegal the sentence must be in excess of or contrary to a statutory provision, or it must not conform with the letter of the authorizing criminal statute. State v. Wika, 1998 ND 33, ¶15, 574 N.W.2d 831. A sentence may be illegal if it fails to comply with the promise of a plea bargain, or be inconsistent with the oral pronouncement of the sentence. State v. Edwards, 2007 ND 113, ¶ 5, 736 N.W.2d 449. State v. Raulston, 2005 ND 212, ¶7, 707 N.W.2d 464. Thus a defendant must show that the sentence is illegal upon appeal.

### **II. MANIFEST INJUSTICE HAS NOT BEEN SHOWN**

[¶6] The determination of manifest injustice lies within the trial court's discretion. State v. Farrell, 2000, ND 26, ¶8, 606 N.W.2d 524. A determination will be reversed on appeal only for an abuse of discretion, which occurs when a trial court acts in an arbitrary, unreasonable, or capricious manner. Id. In the matter at hand, the trial court received a motion to withdraw and appropriately denied such motion absent a showing of manifest injustice. Appellant fails to raise any allegations of manifest injustice in his brief and any

such determination is made at the trial court level, thus it would be inappropriate for this Court to consider manifest injustice.

[¶7] Further, the appellant fails to raise any claims of arbitrary, unreasonable or capricious actions on the behalf of the trial court, which constitute an abuse of discretion and are the only grounds for appeal of a determination of manifest injustice. Id. Thus, this Court cannot find an abuse of discretion at the trial court level.

[¶8] All Rule 11 provisions were followed in this case, and this case is easily distinguished from Vandehoven, Fiest, and Dimmitt, cited by Appellant (Appellant's Brief ¶3). The court did not actively participate in plea negotiations in violation of N.D.R. Crim. P. 11(c)(1) and the defendant was properly advised before the court accepted the plea, thus no violation of N.D.R. Crim. P. 11(b) occurred. See State v. Vandehoven 2009 ND 165, 722 N.W.2d 603. There was no ambiguity as to the existence of a plea agreement in the case at hand. See State v. Feist, 2006 N.D. 21, 708 N.W.2d 870. Finally, the defendant stated he understood the nature of his agreement. See. State v. Dimmitt, 2003 ND 11, 665 N.W.2d 692.

[¶9] Appellant alleges a violation of N.D.R. Crim. P. 11(c)(4) but no manifest injustice can be shown by Appellant. The court accepted the binding plea agreement and sentenced Appellant to an initial term of served imprisonment within the bounds of the sentencing range contemplated in the plea agreement.

### **III. THE TRIAL COURT'S SENTENCE WAS NOT ILLEGAL**

[¶10] Defendant also fails to show how the sentence ordered was illegal. The sentence was not in excess of a statutory provision, was not contrary to an applicable statute, it did not fail to conform to the oral pronouncement of the sentence, nor was it ambiguous to

time and manner in which it was to be served, as stated in State v. Trieb, 516 N.W.2d 287, 292 (N.D. 1994). Appellant asks this court to consider that the sentence was illegal because it did “not comply with the promise of a plea bargain.” Id. As stated in the facts above, the trial court stated to the defendant on the record that the time referenced to in the plea agreement referred to “served imprisonment” and thus the trial court’s imposition of eight years of served imprisonment is in compliance with the plea agreement.

[¶11] North Dakota Rules of Criminal Procedure Rule 35(a)(1) states that “the sentencing court may correct an illegal sentence at any time.” The sentencing court must “determine whether the illegal sentence can be corrected in such a manner so as to preserve the intent of the original plea.” State v. Ostafin, 564 N.W.2d 616, 619 (1997). Only if this is impossible then the defendant may be given the opportunity to withdraw his plea. Id.

[¶12] Upon the trial court’s receipt of Defendant’s motion to withdraw his plea, the trial court ordered an amended criminal judgment, correcting the original sentence, though it was not illegal. The amended criminal judgment sentenced Appellant to a period of 15 years imprisonment, with eight years served imprisonment, and seven years suspend for a period of five years. (Page 8, Appellant’s Appendix). Of course, the court is authorized to impose a sentence up to the maximum sentence permitted by law should Appellant violate the terms of his sentence. See N.D.C.C. § 12.1-32-07.

[¶13] Appellant argues that the original imposition of 30 years imprisonment with 22 years suspended for five years a total of eight years served imprisonment is not in compliance with the plea agreement because the State agreed to argue for no more than fifteen years and Defendant for no more than five years. The trial court settled for an eight



year period of served imprisonment with five years of probation. Appellant fails to acknowledge that a violation of the initial sentence during the five year probationary period, could result in the imposition the maximum sentence permitted by law for a AA felony, which would be life in prison. See N.D.C.C. 12.1-32-07, 12.1-32-02, and 12.1-32-01. Thus the original sentence has no practical difference from the amended sentence issued by the trial court, since under both sentences Appellant is sentenced to eight years of served imprisonment and five years of probation, a violation of which could result in a sentence of up to the maximum permitted by law. When the trial court amended the sentence, it preserved the intent of the original plea as mandated by law, and thus corrected any perceived error in its original sentence.

#### **CONCLUSION**

[¶14] Appellant has failed to show manifest injustice due to an abuse of discretion on the trial court's denial of his motion to withdraw his plea. Appellant has also failed to demonstrate how the original sentence was illegal and that the amended sentence did not maintain the intent of the original plea. The State of North Dakota respectfully requests that the Court deny Appellant's requests to find manifest injustice so as to permit a withdrawal of the plea. The State of North Dakota also asks that the Court deny Appellant's request to find the original plea illegal. Finally, the State of North Dakota requests that the Court finds intent of the original plea was preserved in the amended sentence and affirms the trial court's action.

Respectfully submitted this 23<sup>rd</sup> day of June, 2011.

STATE OF NORTH DAKOTA

A handwritten signature in black ink, appearing to read "Norrell", written over a horizontal line.

Ryan Norrell #06582  
State's Attorney  
P.O. Box 5  
LaMoure, ND 58458  
(701) 883-5600