

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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

APPELLANT’S REPLY BRIEF

APPEAL OF AMENDED CRIMINAL JUDGMENT AND COMMITMENT

DISTRICT COURT OF LAMOURE COUNTY,

THE HONORABLE RICHARD W. GROSZ, PRESIDING.

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## ARGUMENT

### 1. Manifest Injustice.

[¶1] The State argues Mr. Mackey has failed to prove the trial court's thirty-year sentence, in violation of the plea agreement, constitutes a manifest injustice. Under the North Dakota Rules of Criminal Procedure, if the trial court rejects a binding plea agreement, it must inform the defendant it is not bound by the agreement, it 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(c)(5)(C); Peltier v. State, 2003 ND 27, ¶ 10, 657 N.W.2d 238. The trial court may not purport to accept the agreement but sentence a defendant to a term greater than allowed by the agreement. Here, the trial court accepted a binding plea agreement that allowed for a sentencing range of five to fifteen years, but sentenced Mr. Mackey to thirty years imprisonment. The trial court could not do indirectly what it was prohibited from doing directly. Thus, Mr. Mackey has proven a manifest injustice.

[¶2] The State further contends that because the trial court suspended twenty-two years of the sentence, the sentence did not violate the plea agreement. The State fails to note that even the trial court recognized the thirty-year sentence violated the plea agreement. When Mr. Mackey moved to withdraw his plea in the district court, the trial court denied the motion to withdraw but amended the sentence to fifteen years. If the original sentence had not been imposed in violation of the agreement, the trial court would not have felt compelled to amend the thirty-year sentence. Accordingly, the issue on appeal is not whether the trial court's original sentence violated the plea agreement and N. D. R. Crim. P. 11(c)(4); it clearly did. Rather, the issue before this Court

is whether, to avoid a manifest injustice, Mr. Mackey should have been allowed to withdraw his plea. As noted in Mr. Mackey's opening brief, this Court has routinely held that violations of N. D. R. Crim. P. 11 require a defendant be allowed to withdraw a plea of guilty to avoid a manifest injustice.

[¶3] The State also argues Mr. Mackey's motion under N. D. R. Crim. P. 32(d), was untimely. Under the agreement, Mr. Mackey agreed to plead guilty to Count 1 of the first information and receive a pretrial diversion on Count 2 for ten years or until the completion of 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). Following sentencing, Mr. Mackey believed the court had violated the terms of the agreement and refused to sign the documents necessary to implement the pretrial diversion terms. Though made indirectly, Mr. Mackey's objections to the sentence were apparent soon after sentence was imposed.

## 2. Illegal Sentence.

[¶4] The State argues the trial court's thirty-year sentence was not illegal because it suspended twenty-two years of the sentence. This argument has been addressed. The plea agreement promised a sentence between five and fifteen years. The fact that the trial court amended the original sentence to fifteen years demonstrates the court recognized the sentence violated the plea agreement and was illegal.

[¶5] Next, the State argues the trial court's amendment of the original sentence, and denial of Mr. Mackey's motion to withdraw his plea, was proper under State v. Ostafin, 1997 ND 102, ¶ 12, 564 N.W.2d 616, because the amended sentence preserves the intent of the original plea

agreement. The State's argument ignores the fact that the statement it relies on from Ostafin, was dicta and not controlling. The argument explaining that the statement is dicta has been set forth in Mr. Mackey's opening brief and will not be repeated. Mr. Mackey does, however, take this opportunity to urge the Court to adopt the majority rule that: "Where the defendant has entered into a guilty plea pursuant to a plea bargain contemplating a particular sentence, the general rule is that the defendant is entitled to withdraw the plea if it is subsequently determined that the sentence is illegal or unauthorized." State v. Trieb, 533 N.W.2d 678, 680-81 (N.D. 1995). In Trieb, this Court cited, among other cases, Hern v. State, 862 S.W.2d 179, 181 (Tex. Ct. App. 1993), as authority for the general or "majority" rule. Hern, in turn, relied on Shannon v. State, 708 S.W.2d 850, 852 (Tex. Crim. App. 1986), where the court held that in negotiated pleas: "When a defendant attacks the sentence he received, and for which he bargained, he is attacking the entire judgment of conviction. To permit resentencing in this situation is to bind only one party to the agreement. This is neither logical nor fair." The basis for the Shannon court's holding was its recognition that in the context of a negotiated plea, "the conviction is based upon a plea bargain and the punishment assessed is an integral part of the agreement to plead guilty. The idea that error is 'punishment error' only is incompatible with the negotiated plea . . . ." Id. This reasoning recognizes that negotiating plea agreements is a dynamic and multifaceted process. In return for a plea of guilty, the prosecution often agrees to reduce the charge of conviction, to dismiss other charges or forego prosecution, to limit the court's sentencing discretion or to any number of other possible conditions. The defendant, on the other hand, agrees to give up his constitutionally protected right to trial by jury and accompanying rights, to cooperate with the prosecution or to other conditions. When any of those negotiated for terms is violated by the court's sentence or sentencing process, the aggrieved party, whether

the prosecution or defendant, should be allowed to withdraw from the entire agreement.

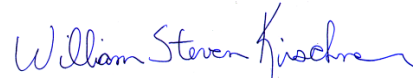
[¶6] The State argues that amending the sentence remedied the violation and withdrawal of the plea is unnecessary. Such reasoning ignores the majority rule that a trial court's violation of one term of a negotiated plea agreement implicates the entire agreement. The agreement here included several terms. Mr. Mackey would plead guilty to Count 1 of the first information, and receive a pretrial diversion on Count 2 for ten years or until the completion of 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). Additionally, the trial court's sentencing discretion would be limited to a sentence between five and fifteen years. The parties did not enter into this binding agreement with the expectation the court would only abide by part of the agreement. If prior to sentencing, the court had indicated it would only follow part of the agreement, Mackey would have been given the opportunity to withdraw his plea. See N. D. R. Crim. P. 11(c)(5)(C). Thus, the majority rule, which comes into consideration after sentencing, embraces the same notions of fairness imposed upon courts prior to sentencing by N. D. R. Crim. P. 11(c)(5)(C). Under that rule, if a court indicates it will not abide by a term or terms of a negotiated binding plea agreement, the defendant is given the option of withdrawing his plea or proceeding to sentencing. If fairness requires a defendant be given this choice *before* sentencing, it is illogical to argue that *after* a court imposes an illegal sentence the defendant should be limited to resentencing. Mackey is asking the Court to return him to the position he would have been in prior to sentencing if the trial court had informed him it would not follow the terms of the agreement.

CONCLUSION

[¶7] 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-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-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 7<sup>th</sup> day of July, 2011.

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