

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 PETITION FOR REHEARING
 APPEAL OF CRIMINAL JUDGMENT AND COMMITMENT
 DISTRICT COURT OF LAMOURE COUNTY,
 THE HONORABLE RICHARD W. GROSZ, PRESIDING.

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TABLE OF AUTHORITIES

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North Dakota Rules

N. D. R. Crim. P. 11(c) (5)[4]

ISSUE PRESENTED

1. Whether this Court erred in treating this appeal as an appeal from the Amended Judgment, rather than an appeal from the original illegal sentence, because the district court lacked jurisdiction to amend the judgment while this case was on appeal?

STATEMENT OF THE CASE

[¶1] This is a Petition for rehearing regarding this Court's affirmation of an amended judgment, which the district court entered after the Defendant had already filed his appeal in this case. Petitioner requests that this Court recognize that the district court did not have jurisdiction to enter the amended judgment since the matter was on appeal at the time it amended the judgment.

STATEMENT OF THE FACTS

[¶2] This Court's opinion issued on October 18, 2011 sufficiently sets for the facts in this case. As noted in *State v. Mackey*, 2011 ND 203, ¶4, the Defendant filed his original notice of appeal on September 9, 2010. During the pendency of that appeal, the Defendant filed a motion to withdraw his guilty plea claiming that the court had imposed a sentence greater than the maximum contained in the plea agreement. Although the matter was on appeal, the District Court filed an Amended criminal judgment on February 14, 2011, and the defendant subsequently appealed that judgment as well.

ARGUMENT

1. This Court failed to recognize that the District Court lacked jurisdiction to amend the original illegal sentence.

[3] In the opinion written by this Court, the Court noted that the defendant's argument that the original sentence was illegal and in violation of the plea agreement was supported by the language used in the colloquy between the defendant and the Judge prior to the defendant entering his guilty plea. *State v. Mackey*, 2011 ND 203 ¶7. Indeed, the Court specifically disagreed with the State's argument that "[B]y ordering Mackey to serve only eight years of his

sentence, the State claims the original sentence as within the fifteen-year maximum term of the plea agreement.” Thus this Court seems to be agreeing with the district court that its original sentence was illegal. *Id.* at ¶9.

[4] In rejecting Mackey’s argument that the not allowing Mackey to withdraw his plea would allow the trial court to purportedly accept the agreement, but sentence a defendant to a term greater than allowed by the agreement, thus doing indirectly what it was prohibited from doing directly, this Court distinguishes N.D.R.Crim.P 11(c) (5) by claiming that in this case, “the court accepted Mackey’s plea agreement but imposed an illegal sentence...”*Id.* at ¶15

[5] However, rather than determining whether the district court had jurisdiction to correct this illegal sentence, this Court finds the dispositive issue on appeal to be whether a “manifest injustice” required this Court to allow Mr. Mackey to withdraw his plea. *Id.* at ¶9.

[6] This Court concluded that because “the district court corrected any injustice within the guidelines of the plea agreement, Mackey is therefore no longer entitled to withdraw his plea, because the district court already corrected the error.” *Id.* at ¶13.

[7] What this Court fails to note is that the district court was without jurisdiction to correct its earlier sentence, because the defendant had filed a notice of appeal prior to filing his motion for correction of his sentence. *Id.* at ¶9.

[8] In *State v. Meier*, 422 N.W.2d 381 (N.D. 1988), the current Chief Justice wrote for this Court, that, [I]t is well recognized that unless otherwise provided by law, the trial court loses jurisdiction over a matter once an appeal is filed in that matter. Indeed, the *Meier* case is controlling on the issue of whether the district court, in this case, retained jurisdiction to correct an illegal sentence once the defendant had filed his notice of appeal in this case. In *Meier* this Court held that “it becomes apparent that the provision in subsection (a) [of then Rule 35]

permitting the court to correct an illegal sentence ‘at any time’ means only that the authority of the court to correct an illegal sentence is not limited by a number of days, as is the case with a reduction of sentence. The term ‘at any time’ was not used to vest the sentencing court with jurisdiction it lost when the appeal was taken. Thus we conclude that the trial court lacked jurisdiction to correct the sentence once the notice of appeal was filed, and therefore we reverse the order for correction of sentence.” *Id.* at ____.

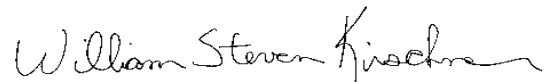
[9] Thus it is clear under this Court’s own precedent, that the district court retained no jurisdiction to entertain the defendant’s motion for correction of sentence, and that the order correcting the sentence was void for lack of jurisdiction. Therefore, since this Court has already concluded that the original sentence in this case was illegal, this Court must vacate the original sentence, and remand this case to the district court, where the Court can then consider the defendant’s motion to withdraw his plea.

CONCLUSION

[10] Wherefore, Mr. Mackey respectfully requests that the Court reconsider its earlier opinion in this case, and enter a Judgment finding that the district court’s original sentence was illegal, and vacating that sentence and remanding the case to the district court for action on Mr. Mackey’s motion to withdraw his previously entered plea.

Respectfully submitted this 24th day of October, 2011.

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