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FEBRUARY 16, 2011
STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA

IN THE SUPREME COURT

State of North Dakota	)
Plaintiff-Appellee,	) Sup. Crt. No.: 20100380
vs.	)
Donald Beane,	) Dist. Crt. No.: 53-07-K-0980
Defendant-Appellant.	)

BRIEF OF APPELLEE
State of North Dakota

APPEAL FROM ORDER DENYING MOTION IN LIMINE DATED MAY 24, 2010, AND CRIMINAL JUDGMENT ENTERED NOVEMBER 17, 2010 THE HONORABLE GERALD RUSTAD PRESIDING,

Nathan Kirke Madden #06518
Assistant State's Attorney
Williams County
P.O. Box 2047
Williston, ND 58802-2047
(701) – 577 – 4577

Attorney for Appellee,
State of North Dakota

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Statement of the Issues

[¶1] I. BEANE FAILED TO PRESERVE ANY ISSUES FOR APPEAL THROUGH FAILURE TO COMPLY WITH N.D.R.CRIM.P. 11(a)(2).

[¶2] II. BEANE FAILED TO PRESERVE THE ILLEGAL SEARCH ARGUMENT FOR APPEAL.

[¶3] III. BEANE FAILED TO PRESERVE THE DENIAL OF HIS MOTION IN LIMINE FOR APPEAL.

[¶4] IV. BEANE'S CLAIM REGARDING AN ILLEGAL SEARCH BY PAROLE AND PROBATION IS BARRED BY *RES JUDICATA*.

[¶5] V. THE DISTRICT COURT PROPERLY DENIED BEANE'S MOTION IN LIMINE TO EXCLUDE EVIDENCE.

[¶6] VI. THE USE OF BOND SEARCH CONTRABAND AS A BASIS FOR NEW CHARGES WAS NEVER MENTIONED IN BEANE'S MOTION IN LIMINE.

[¶7] VIII. BEANE HAS FAILED TO ADEQUATELY BRIEF THE QUESTION OF BOND SEARCHES.

Statement of the Case

[¶8] In a November 12, 2008 order, the District Court denied Beane's motion to suppress in 07-K-0980, and granted it in 07-K-0914 and 915. The State successfully appealed from the grant of the motion to suppress in 07-K-0914 and 915. State v. Beane, 2009 ND 146, 770 N.W.2d 283.

[¶9] All of the 2007 cases were set for a November 4, 2009 pretrial conference date. (R.O.A. #62). Beane waited until the pretrial conference date to apply for court-appointed counsel. (R.O.A. #65). Another pretrial conference was set for January 6, 2010, at which time Beane claimed to be unable to get to the courthouse due to weather.

[¶10] On January 21, 2010 Beane filed a motion to continue seeking to file a Petition for Rehearing in this Court. (R.O.A ##70-71). The State responded noting delay tactics, the passage of time after this Court's decision, and the meritless claim of denial of counsel under Causer, because Beane had never applied for court appointed counsel during the appeal process. (R.O.A. #72). The District Court ultimately granted Beane's motion to continue. (R.O.A. #74).

[¶11] Beane subsequently attempted to file a Petition for Rehearing with this Court on approximately March 5, 2010. This Petition was so untimely that filing was refused for lack of jurisdiction.

[¶12] After the Petition for Rehearing was effectively denied, Beane demanded that his counsel file a Motion in Limine to exclude all evidence, and to essentially overrule this Court's decision in Beane. Attorney Douglas, Beane's counsel, attempted to withdraw citing break down of the attorney-client relationship. (R.O.A. #77). The State responded to the motion to withdraw, and the District Court denied Attorney Douglas' motion. (R.O.A. ##79 & 81).

[¶13] Beane subsequently filed his Motion in Limine to exclude the evidence covered in Beane, along with all other evidence in all cases, alleging the remaining evidence to be "fruit of the poisonous tree" from the original "illegal" law enforcement conduct. (R.O.A. #82). The State responded noting the *res judicata* effect of this Court's decision, and the District Court denied Beane's motion. (R.O.A. ##84 & 85).

[¶14] On November 17, 2010, Beane entered a conditional guilty plea to Possession of Drug Paraphernalia, Class-C Felony in 53-10-K-0980. Beane never

reserved a specific issue for appeal at the change of plea hearing, instead claiming that the issue noted by the District Court could be one issue.

[¶15] Beane currently seeks to attack the District Court's denial of his May 20, 2010 Motion in Limine based on this Court's decision in Beane. This is entirely different from what was contemplated by the District Court and the State.

Statement of the Facts

[¶16] During a bond search of Beane's residence on the North side of Williston, North Dakota, suspected methamphetamine paraphernalia was found in the crawl space storage area. Defendant was subsequently charged in what became 07-K-0980.

[¶17] At the Change of Plea hearing, the Court and the State attempted to solidify what Beane wanted to appeal from in the conditional guilty plea.

> **[Mr. Madden]:** … The Court here denied the suppression motion on 980, 981, and 982 that came out of the search of Donald Beane's residence. It is my understanding, Your Honor, that that[sic] denial of the suppression motion dated November 12, 2008, is what the Defendant seeks to retain the right to appeal. That is my understanding. I don't know if I'm correct, but that's what I think we've got.
>
> **Mr. Douglas:** Your Honor, I've discussed this with Mr. Beane yesterday and that is what he would like to reserve the right to appeal.
>
> **The Court:** As I understand it, the suppression issue would be whether a search provision in a bond can be utilized for anything other than revoking bond, is that - - is that the argument?
>
> **Mr. Douglas:** That - - that could be one issue.

> **The Court:** In this case, the fruits of that search pursuant to the bond provisions was the basis for the charge in 0980 - - the paraphernalia?
>
> **Mr. Douglas:** Yes, sir.
>
> **The Court:** And that's what we're basically talking about?
>
> **Mr. Douglas:** Yes, Your Honor.
>
> **The Court:** Is that your understanding as well, Mr. Beane?
>
> **The Defendant:** Yeah. (C.O.P. 7-8)

[¶18] For the sake of brevity, a more complete presentation of the facts can be found in Beane, 2009 ND 146, 770 N.W.2d 283.

Law and Argument

[¶19] The State notes that the caption of Beane's Appellant's Brief is incorrect. The Order of May 24, 2010 was not from a "Motion to Suppress," it was from a Motion in Limine seeking to have the District Court overrule this Court's decision in Beane, 2009 ND 146, 770 N.W.2d 283.

[¶20] Conditional guilty pleas are governed by N.D.R.Crim.P. 11(a)(2), which requires the defendant to reserve "in writing the right to have an appellate court review an adverse determination of a specified pre-trial motion." N.D.R.Crim.P. 11(a)(2).

I. BEANE FAILED TO PRESERVE ANY ISSUES FOR APPEAL THROUGH FAILURE TO COMPLY WITH N.D.R.CRIM.P. 11(a)(2).

[¶21] The State notes that Beane failed to comply with N.D.R.Crim.P. 11(a)(2), in that he did not reserve a specific issue. As Beane failed to comply with the requirements of N.D.R.Crim.P. 11(a)(2), Beane's arguments are not properly

before this Court. Compare. State v. Byzewski, 2010 ND 30, ¶5, 778 N.W.2d 551. A review of the record show no specific request by Beane to preserve the right to appeal a previous unfavorable decision on a pre-trial motion. Instead, Beane attempted to equivocate orally as to what decision he wished reviewed. When the Court attempted to get the specific pre-trial decision on the record, Beane kept evading the issue.

[¶22] The purpose of N.D.R.Crim.P. 11(a)(2)'s specificity requirement is to firmly establish which matter is preserved for appeal. Here, when the Court attempted to get at least something on the record, Beane attempted to claim that other unspecified issues were also contemplated by Beane for appeal. (C.O.P. 7:6-10). Beane never specified what the issue for appeal was, closest language is: "That - - that could be one issue." Id. The State submits that such equivocating language as to what Beane wanted to preserve is simply insufficient to save an issue for appeal, particularly as N.D.R.Crim.P. 11(a)(2) requires that a specific pretrial motion be mentioned. See. State v. Kraft, 539 N.W.2d 56, 57-58 (N.D. 1995); United States v. Simmons, 763 F.2d 529, 533 (2nd Cir. 1985)(preservation only of specified issues); United States v. Pinto-Mejia, 720 F.2d 248, 255 (2nd Cir. 1983)(internal citations omitted); United States v. Ryan, 894 F.2d 355, 360-361(10th Cir. 1990).

[¶23] This intentional lack of specificity by Beane is shown in the "shotgun" approach he has taken to the appeal in this case, in which he even attacks an entirely different decision than what was contemplated by the State and District Court. The State submits that Beane's intentional vagueness fails to comply with the specificity requirement of N.D.R.Crim.P. 11(a)(2) and results in Beane's failure to preserve any issues for appeal. To allow vagueness in conditional guilty pleas would allow

defendants, such as Beane, the opportunity to escape failure to preserve an issue for appeal by merely claiming "that could be one issue" for appeal.

II. BEANE FAILED TO PRESERVE THE ILLEGAL SEARCH ARGUMENT FOR APPEAL.

[¶24] The issue contemplated by the State and the District Court was a question of whether items found during a bond search could result in new charges. The issue contemplated was not a continued rehashing of a Terry pat-down of Beane by Parole and Probation Officers.

[¶25] As noted above, the failure to specify an issue for appeal in the entry of a conditional guilty plea results in a failure to preserve the issue. E.g. State v. Burr, 1999 ND 143, ¶¶29-30, 598 N.W.2d 147; Kraft, 539 N.W.2d 56. Because Beane failed to preserve this issue for appeal, the issue is not properly before this Court.

III. BEANE FAILED TO PRESERVE THE DENIAL OF HIS MOTION IN LIMINE FOR APPEAL.

[¶26] Even a brief view of the Change of Plea transcript shows that the May 20, 2010 order was not contemplated by either the State or the District Court. To use a cliché, these claims came from out of leftfield. Beane clearly failed to preserve the May 20, 2010 order issue for appeal. As such, these claims are barred. E.g. Burr, 1999 ND 143, ¶¶29-30, 598 N.W.2d 147.

[¶27] Beane's Appellant's Brief is little more than a repetition of his original Motion in Limine. Indeed, whole pages of the brief are copied verbatim from his Motion in Limine, and have nothing to do with the issue for appeal contemplated by the District Court and the State.

IV. BEANE'S CLAIM REGARDING AN ILLEGAL SEARCH BY PAROLE AND PROBATION IS BARRED BY *RES JUDICATA*.

[¶28] The Parole and Probation Officer's Terry pat-down of Beane has already been finally and fully litigated in Beane, 2009 ND 146, 770 N.W.2d 283. After this Court's decision was announced, Beane delayed filing a Petition for Rehearing until several months after this Court issued its Mandate. Beane's own failure to act within the required time resulted in his loss of an opportunity to petition for rehearing.

[¶29] Beane is attempting an end-run around his utter and complete failure to timely file a Petition for Rehearing. By rule, a Petition for Rehearing must be filed within fourteen (14) days unless there is an order of this Court shortening or extending the time to file. N.D.R.App.P. 40(a)(1). In this case, this Court's Mandate came down August 12, 2009. Beane did not file his Petition until March 5, 2010. The Petition was so untimely, it was not even filed due to this Court lacking jurisdiction.

[¶30] The State notes that this matter has already been fully and finally litigated, and Beane's own actions caused him to miss the deadline for filing a Petition for Rehearing. Thus *res judicata* operates to bar Beane's illegal search claims. See. Cridland v. North Dakota Workers Compensation Bureau, 1997 ND 223, ¶¶13-14, 571 N.W.2d 351 (general description of *res judicata*); Jensen v. State, 2004 ND 200, ¶¶9-11, 688 N.W.2d 374 (*res judicata* in post-conviction environment).

V. THE DISTRICT COURT PROPERLY DENIED BEANE'S MOTION IN LIMINE TO EXCLUDE EVIDENCE.

[¶31] The facts cited in Beane's motion in limine, and essentially repeated verbatim in his Appellant's brief, had large and convenient gaps in coverage. For example, in both documents, Beane completely omits that Officers Cote and Haagenson had prior contact with Beane about Tanner Wold, and that Beane had informed the officers he had driven Wold around Williston. The contact outside Beane's residence did not occur in a vacuum with just a tip, as Beane attempts to claim. Beane, 2009 ND 146, ¶2, 770 N.W.2d 283.

[¶32] The case law cited by Beane in the motion in limine attacking the actions of Officers Cote and Haagenson did not support the exclusion of evidence seized in each case. Blumler related to warrantless searches of a house, and had nothing to do with a Terry type stop. State v. Blumler, 458 N.W.2d 300 (N.D. 1990). Similarly, Segura related to an illegal entry into a residence. Segura v. United States, 468 U.S. 796 (1984). On September 3, 2007, no entry was made into Beane's residence on the North side of Williston.

[¶33] As noted above, the underlying primary claim of illegal action by Officers Cote and Haagenson had been finally and fully litigated on appeal. E.g. Cridland, 1997 ND 223, ¶¶13-14, 571 N.W.2d 351; Jensen, 2004 ND 200, ¶¶9-11, 688 N.W.2d 374. After Beane utterly failed in his Petition for Rehearing, he filed a motion in limine to exclude all evidence in this case. The primary basis of this motion was the claim of an illegal "search" of Beane, which supposedly turned all evidence into fruit of the poisonous tree. This issue had already been decided in Beane, 2009 ND 146, 770 N.W.2d 283.

[¶34] Therefore, the District Court was correct in denying Beane's motion in limine.

VI. THE USE OF BOND SEARCH CONTRABAND AS A BASIS FOR NEW CHARGES WAS NEVER MENTIONED IN BEANE'S MOTION IN LIMINE.

[¶35] Beane's entire statement of issues is: "Whether the district court erroneously denied Donald Bean's Motion in Limine to suppress evidence." It appears that Beane is attempting to appeal purely from that motion.

[¶36] Beane never raised the issue of the State's use of the contraband found other than to claim it as fruit of the poisonous tree based on claimed improprieties by law enforcement. Nowhere in the motion in limine is there a claim that contraband found during a bond search could not be used for new charges.

[¶37] Indeed, Beane's motion in limine ends at what would be paragraph 20 of Beane's Appellant's Brief. The motion in limine does not include paragraph 21's claim that "evidence could only be used for the purpose of revoking bond."

[¶38] The State submits that since Beane has chosen the motion in limine as the matter to appeal from, Beane is attempting to raise new issues on appeal, which were not presented to the District Court. E.g. State v. Manhattan, 453 N.W.2d 758 (N.D. 1990); State v. Curtis, 2008 ND 93, 748 N.W.2d 709; Berlin v. State, 2000 ND 206, 619 N.W.2d 623.

[¶39] Here Beane has presenting nothing which shows an obvious error on the part of the District Court in not addressing the issue in the Motion in Limine. See. Curtis, 2008 ND 93, ¶9, 748 N.W.2d 709.

VII. BEANE HAS FAILED TO ADEQUATELY BRIEF THE QUESTION OF BOND SEARCHES.

[¶40] This Court has routinely held that it will not address matters where a party has failed to adequately brief. Darby v. Swenson, Inc., 2009 ND 103, ¶22-23, 767 N.W.2d 147 (failure to adequately brief contract issue). In criminal matters, this Court has specifically noted: "We have warned, 'a party waives an issue by not providing supporting argument, and without supportive reasoning or citations to relevant authorities, an argument is without merit.'" Leftbear v. State, 2007 ND 14, ¶7, 727 N.W.2d 252 quoting Riemers v. City of Grand Forks, 2006 ND 224, ¶9, 723 N.W.2d 518.

[¶41] Here, Beane has presented only the most rudimentary of briefing on the question of bond searches in paragraphs 14 and 21 (i.e. one line), and has utterly failed to present any case law or other supporting authority. See. State v. Witzke, 2009 ND 169, 776 N.W.2d 232.

[¶42] Beane's failings result in a waiver of the issue on appeal. State v. Causer, 2004 ND 75, 678 N.W.2d 552.

Conclusion

[¶43] As Beane's claims are barred by any of the following: 1) failure to preserve in conditional guilty plea; 2) failure to raise below; and/or 3) failure to adequately brief, the State respectfully requests this Court affirm Beane's conviction and deny his appeal.

Dated this 15th day of February, 2011.

/s/ Nathan Kirke Madden
Nathan K. Madden #06518
Assistant State's Attorney
Williams County
P.O. Box 2047
Williston, ND 58802-2047
(701) – 577 – 4577

Certificate of Service

Certificate of Service

[¶44] I, Nathan Kirke Madden, hereby certify that on February 15, 2011, a true and accurate copy of the State's Appellee's brief in the above-captioned cases was served on Attorney Mark Blumer at his last known email address of mark_myhrelaw@qwestoffice.net.

Dated this 15th day of February, 2011.

/s/ Nathan Kirke Madden
Nathan K. Madden #06518
Assistant State's Attorney
Williams County
P.O. Box 2047
Williston, ND 58802-2047
(701) – 577 – 4577