

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
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CLERK OF SUPREME COURT
April 6, 2012
STATE OF NORTH DAKOTA

SUPREME COURT NO.'S: 20120052 - 20120056

State of North Dakota

Respondent-Appellee

- vs -

Paul Roy Billings,

Petitioner-Appellant

APPEAL FROM THE CRIMINAL JUDGMENTS
NORTHEAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY CR. NO.'S
18-2011-CR-00819, 18-2011-CR-01072,
18-2011-CR-01369, 18-2011-CR-01632, 18-2011-CR-02218
THE HONORABLE KAREN K. BRAATEN, PRESIDING

BRIEF

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ABBREVIATIONS

Page - P.

Line - L.

Transcript - Tr.

Sentencing/Revocation of Probation Hearing - S/R

Bond Review Hearing - BH

Initial Appearance - IA

Initial Appearance Excerpt of Rights - IA E of R

Pretrial and Revocation - P & R

STATEMENT OF THE ISSUES

[¶1] ISSUE:

I. Prior to Defendant/Appellant Paul Roy Billings pleading guilty to case numbers 18-2011-CR-0819, 18-2011-CR-1072, 18-2011-CR-1369, 18-2011-CR-1632 and 18-2011-CR-2218 was he properly informed by the Court of the advice required in Rule 11(b) of the North Dakota Rules of Criminal Procedure?

NATURE OF THE CASE

[¶2] Defendant/Appellant Paul Roy Billings (Mr. Billings) was charged with several crimes and had probation revocations on three different cases.

[¶3] The crimes charged and the dates of the crimes are as follows:

1. On May 2, 2011 Mr. Billings was charged with a Class C felony Aggravated Assault that occurred on or about the 29th day of April. the number of this case is 18-2011-CR-00819.

2. On May 25, 2011 Mr. Billings was charged with a Class A Misdemeanor, violation of Order Prohibiting Contact that occurred on or about the 16th day of May, 2011 The number of this case is 18-2011-CR-1079.

3. On July 19, 2011 Mr. Billings was charged with a Class A Misdemeanor violation of an Order Prohibiting Contact that occurred on or about the 19th day of July, 2011. The number of this case is 18-2011-CR-1369.

4. On August 3, 2011 Mr. Billings was charged with a Class A Misdemeanor, attempted violation of Order Prohibiting Contact that occurred on or about the 21st day of July, 2011. The number of this case is 18-2011-CR-1477.

5. On August 23, 2011 Mr. Billings was charged with a Class A Misdemeanor, Criminal Mischief that occurred on or about between the 1st day of August, 2011 and the 3rd day of August, 2011. The number of this case is 18-2011-CR-1621

6. On October 25, 2011 Mr. Billings was charged with three counts and each count is alleged to have occurred on the 24th day of October, 2011.

COUNT 1, Possession of drug paraphernalia (Marijuana) is a Class A Misdemeanor;

COUNT 2, Possession of Marijuana by a driver is a Class A
Misdemeanor;

COUNT 3, Driving Under Suspension is a Class B Misdemeanor.

The number of this case is 18-2011-CR-2218.

[¶4] The three revocation of probation cases are numbered 06-K-2939, 06-K-2597
and 06-K-2599.

[¶5] Mr. Billings appealed all of the above criminal cases except 18-2011-CR-
1477 which was dismissed and the three revocation of probation cases.

[¶6] These matters are now before the North Dakota Supreme Court.

ISSUE

[¶7] Prior to Defendant/Appellant Paul Roy Billings pleading guilty to case
numbers 18-2011-CR-0819, 18-2011-CR-1072, 18-2011-CR-1369, 18-2011-CR-1632
and 18-2011-CR-2218 was he properly informed by the Court of the advice required in
Rule 11(b) of the North Dakota Rules of Criminal Procedure?

STATEMENT OF FACTS

[¶8] The initial appearance of Mr. Billings on the Class C felony charge,
aggravated assault, case no. 18-2011-CR-819 was held on May 2, 2011. Prior to the
court discussing this charge with Mr. Billings, the court asked Mr. Billings if he
understood the rights the court just read. Mr. Billing's reply was "yes" Tr. IA May 2,
2011, L.3.

[¶9] The rights that the court had just read to Mr. Billings are found in Tr. IA E of
R May 2, 2011. These rights don't include NDR of Crim Pro 11(b) I the courts authority
to order restitution.

[¶10] The initial appearance of Mr. Billings on the Class A Misdemeanor charge, Violation of an Order Prohibiting Contact in Case No. 18-2011-CR-1072 was held on June 3, 2011. In Tr. IA June 3, 2011 from P.2, L.9 to P.4, L.25. Mr. Billings was informed by the court as to the advice required in NDR of Crim Pro (b). This advice did not include NDR of Crim Pro (b)(I) the court's authority to order restitution.

[¶11] The initial appearance of Mr. Billings on the Class A Misdemeanor charge, Violation of an Order Prohibiting Contact in Case No. 18-2011-CR-1369 was held on July 19, 2011. At that appearance Mr. Billings was informed about the nature of the crime, the maximum penalty and the mandatory court fee. Tr. IA July 19, 2011, P.2, L.8-15. The above advice by the court only gives the advice required by NDR of Crim Pro 11(b)(F)and (G).

[¶12] The A Misdemeanor charged against Mr. Billings in Case No. 18-2011-CR-1477 attempted Violation of Order Prohibiting Contact was dismissed Tr. P & R Hearing September 22, 2011 P.5, L.5-10.

[¶13] The initial appearance of Mr. Billings on the misdemeanor charge of Criminal Mischief in Case NO. 18-2011-CR-1632 was held on August 24, 2011. This is the advice given in Tr. IA August 28, 2011 P. 36, L.14-17 by the court. "It is a Class A Misdemeanor. Maximum one year, a fine of \$2,000 or both. Paul do you understand your constitutional rights from earlier appearances?" Mr. Billings replied "yes your honor".

[¶14] The above advice given by the court only gives the advice required in NDR of Crim Pro 11(b)(D).

[¶15] At any prior hearing to Case No. 18-2011-CR-1632 the court has always

failed to inform Mr. Billings of NDR of Crim Pro 11(b)(I) the court's authority to order restitution.

[¶16] In the Tr.S/R of Probation Hearing on December 14, 2011 at P.33, L.5-7 the court ordered Mr. Billings to pay restitution in the amount of \$533.16 in Case No. 18-2011-CR-1632.

[¶17] The initial appearance of Mr. Billings on the three counts charged in Case No. 18-2011-CR-2218 was held on October 25, 2011. The advice given by the court to Mr. Billings is found in Tr BH October 25, 2011 at P.2, L1 to P.6., L.15. This advice fails to include NDR of Crim Pro (b)(I) the courts authority to order restitution.

ARGUMENT

[¶18] The advice on pleas is set out in NDR of Crim Pro 11(b) Advice to defendant.

(1) the court may not accept a plea of guilty without first, by addressing the defendant personally [except as provided in Rule 43(b)] in open court, informing the defendant of and determining that the defendant understands the following:

(A) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(B) the right to a jury trial;

(C) the right to be represented by counsel at trial and at every other stage of the proceeding and, if necessary, the right to have the counsel provided under Rule 44;

(D) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

- (E) the defendant's waiver of these trial rights if the court accepts a plea of guilty;
- (F) the nature of each charge to which the defendant is pleading;
- (G) any maximum possible penalty, including imprisonment, fine and mandatory fee;
- (H) any mandatory minimum penalty; and
- (I) the court's authority to order restitution.

[¶19] The court in this case accepted guilty pleas in from Mr. Billings in the following cases in the Pretrial and Revocation Hearing Appeal Transcript dated September 22, 2011.

1. 18-2011-CR-819
2. 18-2011-CR-1079
3. 18-2011-CR-1369
4. 18-2011-CR-1632
5. 18-2011-CR-2218

[¶20] In North Dakota there are cases that set out mandatory procedures the court must follow before it can accept a defendant's guilty plea. The first case is Kaiser vs State, 417 NW2d 175 (N.D. 1987). Kaiser requires courts to follow the requirements of NDR of Crim Pro 11(b) because guilty pleas result in the waiver of the privilege of self-incrimination, the right to a jury trial and the right to confront witnesses. The next case is State vs Boushee, 459 NW2d 552 (N.D. 1990). Boushee requires the court to follow the procedure in NDR of Crim Pro 11(b) in order to ensure a record will affirmatively establish a knowing and voluntary decision of a Defendant.

[¶21] Mr. Billings has appeared several times before the court on criminal

charges. The language of NDR of Crim Pro 11(b) indicates the advice required must be given to a Defendant when he appears on each charge. Therefore the court asking Mr. Billings in Case No. 18-2011-CR-1632. Tr. IA August 24, 2011, P.3 L.14-17 about his understanding of his constitutional rights at earlier appearance does not meet the advice requirements of NDR of Crim Pro 11(b).

[¶22] Not in any of Mr. Billings appearances on criminal charges was there even one time he was advised about NDR of Crim Pro 11(b) in the court's authority to order restitution. Such advice was definitely required for Case No. 18-2011-CR-1632 because Mr. Billings payment of restitution was part of that judgment.

[¶23] In Case No. 18-2011-CR-1369 Mr. Billings at the initial appearance was only advised of (F) & (G) in NDR of Crim Pro (b). Such advice falls far short of the requirements of Kaiser and Boushee.

[¶24] In no case was Mr. Billings ever advised of NDR of Crim Pro 11(b)(I). Therefore the question becomes is NDR of Crim Pro 11(B)(I) mandatory advice that must be followed before a Defendant can plead guilty? An argument can be made such advice isn't necessary in any case the court doesn't intend to order restitution. Such an argument doesn't make sense in this case because this case involves a plea agreement on several cases and restitution is a part of the plea bargain. Therefore the question becomes, would Mr. Billings have accepted or rejected the plea agreement if he had been informed about restitution?

CONCLUSION

[¶25] Mandatory advice required in NDR of Crim Pro 11(b) was not given in Case No. 18-2011-CR-1369 and Case No. 18-2011-CR-1632. Therefore these cases

must be remanded and the trial court ordered to give Mr. Billings the mandatory advice required by NDR of Crim Pro 11(b).

[¶26] The plea agreement in this case includes all the criminal charges and three probation revocations. Mr. Billings wasn't given all of the advice required under NDR of Crim Pro 11(b). Therefore the record does not establish a knowing and voluntary decision by Mr. Billings when he accepted the plea agreement. Not until Mr. Billings has been completely advised under NDR of Crim Pro 11(b) on all crimes involved can he accept the plea agreement.

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[¶27]

CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that she is an employee in the office of Pulkrabek Law Firm and is a person of such age and discretion as to be competent to serve papers.

That on April 6, 2012, she served, by e-mail, a copy of the following:

APPELLANT'S BRIEF AND APPENDIX

to:

Meredith H. Larson
Cass County Assistant State's Attorney's Office
Meredith.larson@gfcounty.org

The undersigned further certifies that on April 6, 2012, she served electronically on the Clerk, North Dakota Supreme Court, the APPELLANT'S BRIEF.

/s/ Sharon Renfrow
Sharon Renfrow, Legal Assistant to
Benjamin C. Pulkrabek