20120447 &
20130010

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OCTOBER 23, 2013
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Tydise Reed Peltier,	)	
	)	
Appellant,	)	Supreme Court Nos.
	)	20120447 & 20130010
	)	
vs.	)	District Court Nos.
	)	09-2012-CV-02263 & 09-07-K-03407
State of North Dakota,	)	
	)	
Appellee.	)	

Appeal from the Criminal Judgment
Southeast Judicial District Cass County
Cr. No 09-2012-CV-2263
The Honorable Steven L. Marquart, Presiding

APPELLEE'S BRIEF

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[¶2] **TABLE OF AUTHORITIES**

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[¶3] **STATEMENT OF THE FACTS**

[¶4] On or between December 15 2006 and August 24, 2007, the Appellant, a 33 year old registered sex offender, was living with 17 year old E.F., her twin brother A.F. and their mother in rural Page, ND. E.F. was developmentally delayed and her cognitive capability was diagnosed at 10-12 years of age. The victim's brother reported to authorities that the Appellant and his sister had been sharing the same bed and he believed they were engaging in sexual contact.

[¶5] Law enforcement executed a search warrant on August 24, 2007 at the residence and found the Defendant, in his underwear, just getting out of bed with the victim. The search confirmed that the Appellant had been sleeping in the same bedroom with the victim. A notebook was found in the room with a very sexually explicit letter from the Appellant to the victim describing sexual acts they have engaged in and those he will perform on her in the future. The victim stated to police that they had engaged in sex acts and sexual intercourse multiple times. A medical examination revealed the victim was pregnant. Follow-up DNA testing confirmed the Appellant was the father.

[¶6] The Appellant was charged with Gross Sexual Imposition, Solicitation of Minors, Sexual Assault and Failure to Register as a Sexual Offender. A negotiated plea was reached wherein the State dismissed the GSI count in exchange for the Appellant's guilty plea to the remaining felony and misdemeanor counts.

[¶7] STATEMENT OF THE ISSUES

[¶8] **I. Appellant reaffirmed his guilty plea on June 14, 2013 and this matter was resolved. *See* Appellee's Appendix, p. 1.**

[¶9] **II. Was it appropriate for the district court to resentence Mr. Peltier when Count Two, Solicitation of a Minor, was amended from a C felony to an A misdemeanor?**

[¶10] **III. Was one year in prison and one year probation a legal sentence on Count Four, Failure to Register as a Sexual Offender, a class A misdemeanor?**

[¶11] ARGUMENT

[¶12] II. Issue Two: Was it appropriate for the district court to resentence Mr. Peltier when Count Two, Solicitation of a Minor, was amended from a C felony to an A misdemeanor?

[¶13] The Appellant pled guilty on April 7, 2008, inter alia, to original Count Two, Solicitation of Minors, in violation of N.D.C.C. § 12.1-20-05(02), a class C felony. A factual basis was stated by his attorney, Mr. Monty Mertz, to which the Appellant agreed. Several years later, a lengthy post-conviction relief brief was filed by Mr. Peltier. At the evidentiary hearing on October 31, 2012, the State conceded that the crime the Appellant pled guilty to was an A misdemeanor under subsection (1) of 12.1-20-05 and not a C felony under subsection (2). The charge was reduced to an A misdemeanor and he was sentenced accordingly. The district court found no grounds to allow Mr. Peltier to withdraw his guilty plea.

[¶14] The Appellant now mischaracterizes the issue as one in which a guilty plea was not entered. He very clearly entered a guilty plea on April 7, 2008. The elements of the crime and correlating factual basis were admitted by the Appellant, with the assistance of the head of the Fargo Public Defender Office, Mr. Monty Mertz. The fact that the Appellant plead guilty to an A misdemeanor rather than a C felony, and was resentenced accordingly, only inures to his benefit. A similar situation was addressed in State v. Igou, 2005 ND, 16, ¶ 16. In that case, the defendant was convicted of Solicitation of a Minor which was improperly sentenced as a C felony rather than an A misdemeanor. The North Dakota Supreme Court stated, "[t]he jury was correctly instructed and the verdict could not have been prejudicially impacted by this error." Id. The case was remanded for sentencing on an A misdemeanor and the defendant was denied a new trial. This closely mirrors the situation before us. Mr. Peltier knowingly, intelligently and with advice and support of very experienced counsel, entered a guilty plea to Solicitation of a Minor. The crime he plead guilty to turned out to be an A misdemeanor rather than a C felony. The Appellant was granted a full measure of justice on October 31, 2012 when he was resentenced on the A misdemeanor. There are no legal grounds to allow the Appellant to withdraw his guilty plea. Furthermore, the State and victim would be greatly prejudiced by reinstituting this prosecution some five and a half years after the crime and after the Appellant has already served his sentence.

[¶15] **III**. **Issue Three: Was one year in prison and one year probation a legal sentence on Count Four, Failure to Register as a Sexual Offender, a class A misdemeanor?**

[¶16] The district court correctly cited State v. McClean, 1998 ND 21, ¶ 8 which authorizes a sentence to both maximum imprisonment and maximum probation for misdemeanors. "[I]mposing the probational sentence was not an illegal sentence." Appellant's Appendix, p. 129

[¶17] The Appellant mistakenly relies upon N.D.C.C. § 12.1-32-06.1(3) as it existed in 2006 and as amended in 2007 wherein the district court, "*may impose* an additional period of probation not to exceed two years". Emphasis added. However, the Appellant fails to acknowledge N.D.C.C. § 12.1-32-15(9) which mandates a ninety day jail sentence and one year probation.

[¶18] The only change in N.D.C.C. § 12.1-32-06.1(3) between 2005 and 2007 was to increase the penalty for a first offense Failure to Register from an A misdemeanor to a C felony. Upon information and belief, the penalty increase would have gone into effect on August 1, 2007. The dates of offense in this matter were between December 15, 2006 and August 24, 2007. For the crimes after August 1, 2007, the Appellant could have been charged with a C felony. However, the State gave the Appellant the benefit of the doubt and only charged him with one A misdemeanor.

[¶19] In any event, one year probation was mandatory under N.D.C.C. § 12.1-32-15(9). As the Appellant himself points out, the district court had full

discretion to sentence beyond that, up to two years probation on an A misdemeanor. The district court's sentence of one year incarceration and one year probation was a legal sentence.

[¶20] **CONCLUSION**

[¶21] Therefore, the State respectfully requests the North Dakota Supreme Court affirm the decisions of the district court.

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[¶22] **CERTIFICATE OF SERVICE**

[¶23] A true and correct copy of the foregoing document was sent by e-mail on the 23rd day of October, 2013 to: Ben Pulkrabek at pulkrabek@lawyer.com.

Ryan J. Younggren, NDID #6400