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STATE OF NORTH DAKOTA

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20120447

Tydise Peltier,

Petitioner and Appellant

- vs -

State of North Dakota

Respondents and Appellees

APPEAL FROM THE CRIMINAL JUDGMENT
SOUTHWEST JUDICIAL DISTRICT
CASS COUNTY CR. NO. 09-2012-CV-2263
THE HONORABLE STEVEN L. MARQUART, PRESIDING

BRIEF

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STATUTES

ABBREVIATIONS

T.O.P - Transcript of Proceeding

P. - Page

L. - Line

STATEMENT OF THE ISSUES

[¶1] ISSUE: I. Should the trial court have allowed Mr. Peltier to withdraw his guilty plea to Count Three?

ISSUE: II. Did the trial court err when it amended Count Two a Class C Felony charge to a Class A Misdemeanor and then sentenced Mr. Peltier on the amended Class A Misdemeanor charge without first arraigning him or having him plead to the amended Class A Misdemeanor charge?

ISSUE: III. Should the trial court have allowed Mr. Peltier to withdraw his plea of guilty to count four?

NATURE OF THE CASE

[¶2] A criminal judgment was filed against the Defendant, Tydise Reed Peltier on April 9, 2008. That judgment dismissed Count One - Gross Sexual Imposition, a Class A Felony and sentenced Mr. Peltier on Count Two - Solicitation of Minor, a Class C Felony to 5 years, on Count Three - Sexual Assault, a Class C Felony to 5 years and on Count Four - Failure to Register as Sex Offender, a Class A Misdemeanor to 1 year and 1 year mandatory supervised probation.

[¶3] The three sentences in the criminal judgment were all consecutive so Mr. Peltier would have to serve 11 years and 1 year of probation.

[¶4] Mr. Peltier brought a Petition for Post Conviction Relief Petition (Petition) on July 18, 2012 and filed July 23, 2012.

[¶5] The State responded to Mr. Peltier's Petition for Post Conviction Relief is dated August 17, 2012 and filed August 20, 2012

[¶6] Mr. Peltier brought a Motion, Brief and Notice of Motion to amend Application for Post Conviction Relief on September 10, 2012 and these documents were filed on September 21, 2012. Also on September 10, 2012 Mr. Peltier brought a Motion, Brief and Notice of Motion for Summary Disposition of the Response and the Counter Claim and to be released from prison. Those documents were filed on September 21, 2012.

[¶7] the State filed a Response to Defendant's Amended Application for Post-Conviction Relief on October 2, 2012. The court issued and filed on October 26, 2012 an Order Granting Petitioner's Motion to Amend Application for Post-Conviction Relief.

[¶8] Mr. Peltier on the 5th day of November 2012 filed and Amended Application for Post-Conviction Relief that was dated September 10, 2012.

[¶9] A hearing on the Petition was held on October 31, 2012 and the District judge issued its Memorandum Opinion dated November 13, 2012 and filed November 15, 2012.

[¶10] That Memorandum Opinion required an Amended Judgment dated December 13, 2012 and filed on December 13, 2012. That Amended Judgment reduced Count Two a Class C Felony to a Class A Misdemeanor and the sentence from 5 years to one year. It also amended Count Three with a 5 year sentence to include 5 years of mandatory probation. This reduced Mr. Peltier's penitentiary time from 11 years to 7 years and raised his probation time from 1 year to 6 years.

[¶11] Mr. Peltier's Order of Transcript is dated December 19, 2012 and Notice of Appeal is dated January 7, 2013 and filed on January 9, 2013.

[¶12] The Notice of Filing of the Notice of Appeal is dated January 12, 2013.

[¶13] This matter is now before the North Dakota Supreme Court.

STATEMENT OF FACTS

[¶14] Petitioner-Appellant, Tydise Peltier, (Peltier) pursuant to a plea agreement on the 7th day of April 2008 plead guilty to Count Two - Solicitation of Minors, a Class C Felony, Count Three - Sexual Assault, a Class C Felony and Count Four - Failure to Register as a Sexual Offender, a Class A Misdemeanor. Count One - Gross Sexual Imposition a Class A Felony was dismissed. The sentence on Count Two was 5 years. The sentence on Count Three was 5 years and the sentence on Count Four was 1 year with 1 year of mandatory supervised probation. The three sentences were to run concurrently. Therefore Mr. Peltier was to serve 11 years with 1 year of mandatory probation.

[¶15] Mr. Peltier filed a Petition for Post Conviction Relief (Petition) on July 23, 2012 the State filed its answer on August 20, 2012. A hearing was held on October 31, 2012.

[¶16] The issues raised by Mr. Peltier in his Petition were:

1. Ineffective assistance of counsel;
2. Double jeopardy/due process;
3. Solicitation of minor/Facts don't charge an offense;
4. Withdraw of Guilty Plea;
5. Illegal Sentence;
6. Failure to Register Statute is unconstitutional;
7. Abuse of Process/Slander/Liable

[¶17] The trial court filed its Memorandum Opinion, Findings of Fact, Conclusions of Law and Order for Judgment (Memorandum Opinion) on December 13, 2012.

[¶18] The trial courts Memorandum Opinion denied Mr. Peltier's Petition on the issues of Ineffective Assistance of Counsel, double jeopardy/due process, withdrawal of guilty pleas, illegal sentence, Failure to Register Statute is unconstitutional, and abuse of Process/Slander/Liable.

[¶19] The trial court granted Mr. Peltier Petition on Solicitation of Minors because the facts alleged don't properly charge what is required for a Class C. Felony solicitation of minor.

[¶20] The trial court then amended the Criminal Judgment and commitment in Count Two: Solicitation of Minors in violation of N.D.C.C. § 12.1-20-05(1) a Class A Misdemeanor, occurring on or about December 15, 2006 and August 24, 2007 and

committed the Defendant to the custody of the North Dakota Department of Corrections and Rehabilitation for imprisonment in a State correctional facility for a period of one (1) year commencing on the date of sentencing.

[¶21] The trial court in an amended judgment in the criminal case amended Count Three to include five (5) years of mandatory supervised probation. See T.O.P. P.49, L.6-8.

ARGUMENT

ISSUE I

[¶22] Should the trial court have allowed Mr. Peltier to withdraw his guilty plea to Count Three?

[¶23] When Mr. Peltier plead guilty to Count Three in 2008 no one in the court room was aware that the sentence for Count Three required a mandatory 5 years of supervised probation. This fact was made clear by the following statements of the court in the T.O.P., on October 31, 2012:

> THE COURT: You know, my posture on this, if it is a mandatory sentence, it's a mandatory sentence. You know, the probation. And unfortunately, I had a hunch, but I asked Ms. Clark at the time and she just led me wrong. P.47, L.8-11
>
> THE COURT: I know, you've cited the statute here that you think - - is this a remedy the State has under this statute? Can you be asking for this? I guess it doesn't matter who's asking for it. so, no, I think I can fix that here. The - - changing it from a C felony to an A misdemeanor. The changing the probation, I think though, should be done in the criminal proceeding just because he's not the guy - - the right guy to address that. P.49, L.1-8

[¶24] According to Rule 11 of NDR of Crim Pro (b)(1) H the advice to a Defendant before a Defendant pleads must include a mandatory minimum penalty. In this case Mr. Peltier should have been advised on the 5 years of mandatory supervised probation required by Count Three before he plead guilty in 2008. The fact he was not is made clear by the above quotes form the court on October 31, 2012.

[¶25] In this case the statute involved that allows for sentencing to include mandatory supervised probation is 12.1-32-06.1 (3). In 2006 that statute read: "If the defendant has pled or been found built of a felony sexual offense against a minor in violation of section 12.1-20-02, 12.1-20-03.1, 12.1-20-04, or 12.1-20-11 chapter 12.1-20, the court shall impose a period of supervised probation of five years to be served after sentencing or incarceration. The court may impose an additional period of supervised probation not to exceed five years if the additional period of probation is in conjunction with a commitment to a sexual offender treatment or aftercare program.

[¶26] In 2007 the statute was amended and read: If the defendant has pled or been found guilty of a felony sexual offense in violation of chapter 12.1-20, the court shall impose at least five years but not more than ten years of supervised probation.

[¶27] Either the statute in 2006 or the statute in 2007 could apply to this case. This is because Count Three has the offense occurring on December 15, 2006 or August 24, 2007. Since both statutes require a mandatory 5 years of supervised probation. Mr. Peltier's sentence on Count Three required 5 years of mandatory supervised probation.

[¶28] No one in the courtroom, when Mr. Peltier plead guilty in 2008, would have properly advised him under Rule 11 of NDR of Crim Pro. This fact is apparent because from what the trial judge said above (see above quote, T.O.P. P.47, L.8-11) No one in the

court room when Mr. Peltier was sentenced was aware of the sentencing requirement on mandatory supervised probation. Therefore Mr. Peltier should be allowed to withdraw his plea because he wasn't properly advised according to Rule 11 NDR of Crim Pro before he plead guilty.

[¶29] The amending of Count Three to include 5 years of mandatory supervised probation doesn't appear in the Court's Memorandum Opinion but was done in a criminal proceeding. See T.O.P. P.49, L.6-8.

ISSUE II

[¶30] Did the trial court err when it amended Count Two a Class C Felony charge to a Class A Misdemeanor and then sentenced Mr. Peltier on the amended Class A Misdemeanor charge without first arraigning him or having him plead to the amended Class A Misdemeanor charge?

[¶31] Mr. Peltier plead guilty to Count Two - Solicitation of Minors, a Class C Felony in 2008. In 2012 Mr. Peltier brought a Petition for Post Conviction Relief. The trial judge granted Mr. Peltier post conviction relief on Count Two and reduced Count Two to a Class A Misdemeanor. Then without ever arraigning Mr. Peltier or asking him to plead to the A Misdemeanor sentenced him to a period of 1 year at the North Dakota Department of Corrections and Rehabilitations.

[¶32] According to State vs Wester 204 NW2d 109 (ND 1973)

> It has become obvious to us as we have studied the cases cited by the parties and countless other decisions not referred to use that we are confronted with a unique situation when because of the confusion on the part of all concerned, including trial judge, prosecuting attorney, defense attorney, and defendant, no plea of guilty,

either oral or in writing, was entered by the defendant or his counsel, and no plea was asked for by the judge or the prosecuting attorney. Without at least a request for a plea, it is impossible to presume that a plea has been entered.

We conclude in accord with the view expressed by the California court in Sturdy that when no plea is taken and judgment is pronounced on the theory that a guilty plea has been entered, the judgment is a nullity and, therefore, void. People v. Sturdy, 235 C.A.2d 306, 45 Cal.Rptr. 203 (1965).

[¶33] Therefore on Count Two this case should be remanded to the District court where Mr. Peltier will be required to enter a plea to Count Two, a Class A Misdemeanor.

ISSUE III

[¶34] Should the trial court have allowed Mr. Peltier to withdraw his plea of guilty to count four?

[¶35] When Mr. Peltier was sentenced on Count Four, the sentence included a mandatory 1 year of supervised probation.

[¶36] The statute in 2006 stated "If the defendant has pled or been found guilty of a misdemeanor sexual offense against a minor in violation of section 12.1-20-05, 12.1-20-06 or 12.1-20-07 chapter 12.1-20, the court may impose an additional period of probation not to exceed two years if the additional period of probation is in conjunction with a commitment to a sexual offender treatment or aftercare program.

[¶37] In 2007 the statute was amended to read: If the Defendant has pled or been found guilty of a misdemeanor sexual offense in violation of chapter 12.1-20, the court may impose an additional period of probation not to exceed two years.

[¶38] In both of the above statutes the sentencing to supervised probation is preceded by the word may. The misdemeanor offense alleges in Count Four in this case occurred either on December 15, 2006 or August 24, 2007. Therefore the sentencing of Mr. Peltier whether the trial court uses the 2006 or 2007 statute, supervised probation is not mandatory but is up to the discretion of the judge.

[¶39] The extension of probation sentences beyond the maximum imprison sentence has been allowed in State vs McClean 1998 ND 21, 575 NW2d 200 (1998). Therefore the court could have but didn't have to sentence Mr. Peltier to 1 year of probation after he served his maximum term of one year imprisonment for the class A misdemeanor. This raises the question "if the court knew the sentencing to probation was discretionary and not mandatory, would the court have given any sentence to probation?"

[¶40] As to Count Four the court according to Rule 11(b)(1) H of the NDR of Crim Pro has to advise Defendants of mandatory minimum penalties. If the court when Mr. Peltier plead in 2008 advised Mr. Peltier of mandatory supervised probation as to Count Four that advise was incorrect according to the language of 12.1-32-06.1(3). Also if the trial court when it sentenced Mr. Peltier to a mandatory 1 year of probation in 2008 believed such sentence was mandatory the court had to be confused about the language in 12.1-32-06.1(3).

[¶41] Mr. Peltier before he pled guilty in 2008 was entitled to be correctly informed under Rule 11 of NDR of Crim Pro before he plead. The record in this case is clear the trial court left out the mandatory sentence to 5 years of supervised probation on the class C felony and thought that there was mandatory sentencing to supervised probation on the class A misdemeanor.

[¶42] Because of all of the confusion in this case Mr. Peltier should be allowed to withdraw his plea to Count Four and be properly advised on the class A misdemeanor Count Four before he is asked to plead to that charge.

CONCLUSION

[¶43] This case for the above and foregoing reasons should be remanded to the district court where Mr. Peltier should be allowed to withdraw his pleas as to Count Three and Count Four. Then after the trial court properly advises him under Rule 11 NDR of Crim Pro Mr. Peltier should be asked by the trial court what are his pleas to Counts Three and Four.

[¶44] This case should also be remanded on Count Two with an order requiring Mr. Peltier to be arraigned under Rule 10 of the NDR of Crim P., advised under Rule 11 of the NDR of Crim Pro, before the trial court asks him to plead to Count Two.

Dated this 19th day of March, 2013

/s/ Benjamin C. Pulkrabek
Benjamin C. Pulkrabek, ID #02908

CERTIFICATE OF SERVICE BY MAIL

[¶45] 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 March 19, 2013, she served, by e-mail and mail a copy of the following:

APPELLANT'S BRIEF

to: e-mail

Ryan Younggren
Cass County State's Attorney's Office
Younggrenr@casscountynd.gov

Mailed to:
Tydise Peltier
NDSP
P.O. Box 2501
Bismarck, ND 58506

The undersigned further certifies that on March 19th, 2013, 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