

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20140079

State of North Dakota,

Plaintiff-Appellee

- vs -

Rapheal Jamell Murphy,

Defendant-Appellant

APPEAL FROM THE CRIMINAL JUDGMENTS
EAST CENTRAL JUDICIAL DISTRICT
CASS COUNTY CR. NO. 09-2013-CR-00923
THE HONORABLE STEVEN E. McCULLOUGH PRESIDING

BRIEF

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N.D. State Bar ID No. 02908

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ABBREVIATIONS

Transcript - Tr.
Page - P.
Line - L.

STATEMENT OF THE ISSUES

- [¶1] ISSUE: I. **If a Defendant after he has been convicted in other state courts and/ or federal courts of drug violations commits his first drug violation of NDCC chapter 19-03.1 is that Defendant eligible for a deferred or suspended sentence under NDCC 19-03.1-23.2?**
- [¶2] II. **Did the trial court fail to properly inform Rapheal Jamell Murphy of the mandatory eight years consecutive sentence required by NDCC 19-03.1-23(3) before accepting his guilty plea?**

NATURE OF THE CASE

[¶3] A two count information was filed against Rapheal Jamell Murphy on March 21, 2013

[¶4] The two counts were:

- 1) Delivering of cocaine within one thousand feet of a school;
- 2) Tampering with physical evidence.

[¶5] That information was later amended to charge three counts. The amended information included the above two counts and changed Count 2 to Count 3 and the new Count 2 charged: "Possession of a controlled substance (cocaine) with intent to deliver or manufacture within 1,000 feet of a school".

[¶6] On November 4th, 2013 the Defendant plead to Count 1 and believed in return for that plea the state would dismiss Counts 2 and 3.

[¶7] On March 3rd, 2013 the Defendant had to plead to a new Count 1 and the state dismissed Counts 2 and 3.

[¶8] The Defendant was sentenced to 28 years with credit for 348 days.

[¶9] After the judge imposed the above sentence he said: Tr. March 3, 2014 Page 21, Line 16 to Line 21: "So for purposes of the record, since I assume that this is going to be an issue that will be decided on appeal by the Supreme Court, and that they'll have much more time to look at the issue than I've had, I am going to specifically find that the provision of 19-03.1-23.2 does not allow me to suspend or defer imposition of any portion of the sentence."

[¶10] This case is now before the North Dakota Supreme Court.

STATEMENT OF FACTS

[¶11] Defendant Rapheal Jamell Murphy amended information charged him with 3 counts; Count 1: delivering of cocaine within 1,000 feet of a school, Count 2: possession of a controlled substance (cocaine) with intent to deliver or manufacture within 1,000 feet of a school, and Count 3: tampering with physical evidence; in Cass County.

[¶12] On November 4th, 2013, Mr. Murphy entered an open plea of guilty to Count 1, believing that the State would and at a later time did dismiss Counts 2 and 3. After that Mr. Murphy waived his right to having a jury make a determination about his prior convictions and this waiver resulted in him receiving a mandatory sentence. He also waived his right to have a jury decide if the offense occurred within 1,000 feet of a school by admitting that the sale was within 1,000 feet of a school.

[¶13] The Trial Court then decided to delay the making of any finding on Mr. Murphy's prior drug convictions until the sentencing.

[¶14] Before the sentencing was scheduled, the Trial Court ordered a pre-sentencing investigation and the state filed a motion to amend the information. That amendment had some differences in the underlying language in Count 1. So, the Trial Court at the sentencing on March 3, 2014 decided because of these differences Mr. Murphy had to enter a new plea to Count 1. Before that new plea, the Trial Court decided to have Mr. Murphy withdraw his previous plea to Count 1.

[¶15] Then the Trial Court, prior to accepting Mr. Murphy's plea to the amended Count 1, had Mr. Murphy waive a preliminary hearing on the amended information to

Count 1. Mr. Murphy then waived the reading of the amended information and plead guilty to Count 1 of the amended information.

[¶16] After that plea Mr. Murphy also waived other rights; and then told the court that no one had coerced or threatened him into pleading guilty and that his plea of guilty was truly and voluntarily given.

[¶17] After a factual basis for the plea was given Mr. Murphy admitted he did deliver cocaine within 1,000 feet of a school but with that admission he reserved the right to contest his prior drug offenses. Mr. Murphy's attorney qualified that reservation when he said the contesting wouldn't be about the prior drug offense existing but about a statutory argument that exists because the language in NDCC 19-03.1-23.2 allows for a possibility of deferred or suspended sentence if a defendant's violation is his first drug violation in North Dakota

[¶18] Mr Murphy's second issue is raised because the information and the amended information failed to list in their penalty sections NDCC 19-03.1-23(3). This failure resulted in the court's not properly explaining NDCC 19-03.1-23(3) to Mr. Murphy before accepting the guilty plea.

ARGUMENT

[¶19] **ISSUE I. If a Defendant after he has been convicted in other state courts and/ or federal courts of drug violations commits his first drug violation of NDCC chapter 19-03.1 is that Defendant eligible for a deferred or suspended sentence under NDCC 19-03.1-23.2?**

[¶20] The standard of review in this case raised by issue one requires a statutory interpretation of NDCC 19-03.1-23.2. According to State vs. Bachmeier, 2007 ND 42

¶16 729 NW2d 141 the standard of review of statutory interpretations are question of law and are fully reviewable on appeal.

[¶21] Defendant- Appellant, Rapheal Jamell Murphy, believes that the language in NDCC 19-03.1-23.2 allows him to be sentenced to a deferred or suspended sentence because the drug offense he plead to in this case was his first drug offense in North Dakota.

[¶22] The statute that Mr Murphy relies on for him to being eligible for a deferred or suspended sentence is NDCC 19-03.1-23.2 **“Mandatory terms of imprisonment- Deferred or suspended sentence limited.** Whenever a mandatory term of imprisonment is prescribed as a penalty for violation of this chapter, the court may not defer imposition of sentence, nor may the court suspend any part of a specified mandatory term, either at the time of or after the imposition of the sentence, unless the court first finds that the offense was the defendant’s first violation of this chapter, chapter 19-03.2, or chapter 19-03.4 and that extenuating or mitigating circumstances that justify a suspension. The court shall announce the circumstances that justify a suspension in open court when sentence is imposed and recite these circumstances in the sentence or order suspending part of the sentence.” (Emphasis added)

[¶23] In North Dakota statutes that include prior violations committed and either plead to, or found guilty of in other states and federal courts contain specific language. Examples of such specific language statutes are:

1) NDCC 19-03.1-23(5) A violation of this chapter or a law of another state or the federal government which is equivalent to an offense under this chapter committed while the offender was an adult and which resulted in a plea or finding of guilt must be

considered a prior offense under subsections 1, 3, and 4. The prior offense must be alleged in the complaint, information, or indictment. The plea or finding of guilt for the prior offense must have occurred before the date of the information, or indictment.

(Emphasis added)

2) NDCC 19-03.1-45(1) If a person has pled guilty or has been found guilty of a felony violation of subsection 6 of 19-03.1-23, if that person has not previously pled guilty or been found guilty of any offense involving the use, possession, manufacture, or delivery of a controlled substance or of any other felony offense of this or another state or the federal government, and if the court imposes probation, the court shall impose a period of probation of not less than eighteen months in conjunction with a suspended execution of a sentence of imprisonment, a sentence to probation or an order deferring imposition of sentence. (Emphasis added)

3) NDCC 12.1-32-15(a) “A crime against a child” means a violation of chapter 12.1-16, section 12.1-17-01.1 if the victim is under the age of twelve, 12.1-17-02, 12.1-14.04, subdivision a of subsection 6 of section 12.1-17-07.1, section 12.1-18-01, 12.1-18-02, 12.1-18-05, chapter 12.1-29, or subdivision a of subsection 1 or subsection 2 of section 14-09-22, labor trafficking in violation of chapter 12.1-40, or an equivalent offense from another court in the United States, a tribal court, or court of another country, in which the victim is a minor or is otherwise of the age required for the act to be a crime or an attempt or conspiracy to commit these offenses. (Emphasis added)

4) NDCC 12.1-32-15(e) “Sexual offender” means a person who has plead guilty to or been found guilty, including juvenile delinquent adjudications, of a violation of section 12.1-20-03, 12.1-20-03.1, 12.1-20-04, 12.1-20-05, 12.1-20-05.1, 12.1-20-06, 12.1-20-

06.1, 12.1-20-07 except for subdivision a, 12.1-20-11, 12.1-20-12.1, or 12.1-20-12.2, chapter 12.1-27.2, or subsection 2 of section 12.1-22-03.1, sex trafficking in violation of chapter 12.1-40, or an equivalent offense from another court in the United States, a tribal court, or court of another country, or an attempt or conspiracy to commit these offenses.
(Emphasis added)

[¶24] NDCC 19-03.1-23.2 contains no language referring to including violations of other states or federal courts.

[¶25] The trial transcript indicates the trial judge took a long pause in the court proceeding and researched whether or not he could give Mr. Murphy a deferred or suspended sentence under NDCC 19-03.1-23.2. After that pause he said: Tr. March 3, 2014 Page 21, Line 6 to Page 22, Line 1: “The bigger question is whether or not the Court has the power in this case to suspend or defer any portion of that sentence, based on the reading of the statute – the 23.2 statute. I think that’s a much closer call. However, based on my review of the entirety of the criminal code, I don’t believe that was the intent of the legislature. I haven’t had a great deal of time to look at this since this is the first I’ve heard of it, as well. So I did the best I could to see if I could find any cases from any other states which interpreted their similar statutes.

[¶26] So for purposes of the record, since I assume that this is going to be an issue that will be decided on appeal by the Supreme Court, and that they’ll have much more time to look at the issue than I’ve had, I am going to specifically find that the provision of 19-03.1-23.2 does not allow me to suspend or defer imposition of any portion of the sentence. If I am incorrect on that, then I assume that the case will be sent back down and I will be able to look at that issue in more detail to see whether a suspension or deferral is

warranted in this case. I don't reach the issue of it's warranted because I don't think I can do it in this case."

[¶27] According to the above quote the trial judge has left it up to the North Dakota Supreme Court to decide whether or not Mr. Murphy is a first time offender and eligible for a deferred or suspended sentence. Under NDCC 19-03.1-23.2

[¶28] **ISSUE II. Did the trial court fail to properly inform Rapheal Jamell Murphy of the mandatory eight years consecutive sentence required by NDCC 19-03.1-23(3) before accepting his guilty plea?**

[¶29] In this case neither the information nor the amended information in their penalty sections included NDCC 19-03.2-23(3). Because NDCC 19-03.2-23(3) requires an eight year term of imprisonment to run consecutively to any other sentence imposed, it should have been included in the penalty section of the information, and that the eight year term of imprisonment explained to Mr. Murphy before his guilty plea was accepted in the case now before the court. NDCC 19-03.2-23(3) was not included in the penalty section and this raises the question was it explained to Mr. Murphy before the court accepted his guilty plea. This issue was not raised in the district court. Therefore, the standard of review according to State vs. Tutt 2007 ND 77,732 N.W.2d 382 is "Issues not raised in the district court generally are not reviewable by this Court unless they constitute obvious error under N.D.R.Crim.P.52(b). State v. Lemons, 2004 ND 44, ¶15, 675 N. W.2d 148. Under N.D.R.Crim.P.52(b), we may not reserve a conviction unless the defendant shows error that is plain and affects substantial rights. N.D.R.Crim.P.52(b). This Court exercises the "power to notice obvious error

cautiously and only in exceptional circumstances where the accused has suffered serious injustice.” State v. Mathre, 1999 ND 224, ¶5, 603 N.W.2d 173 (quoting State v. Olander, 1998 ND 50, ¶12, 575 N.W.2d 658)”

[¶30] According to State vs. Loomer 2008 ND 69, 747 N.W.2d 1/3(94) a court must correctly inform a Defendant of the minimum mandatory sentence penalty before accepting a plea of guilty. N.D.R. Crim. P.11(b)(1)(H).

[¶31] Loomer differs from the case now before the court because in Loomer the Defendant entered a not guilty plea and a failure to inform Loomer of a minimum mandatory sentence when a not guilty plea is entered does not constitute reversible error. However, in the case now before the court Mr. Murphy entered a guilty plea. Therefore before that guilty plea could be accepted Loomer required the court to inform Mr. Murphy of the minimum mandatory sentence. Such information was easily omitted in this case because NDCC 19-03.2-23(3) wasn’t even listed in the penalty section of the information or amended information.

CONCLUSION

[¶32] Issue one requires a remand to the District Court so that the District Court can decide whether or not it should defer or suspend any of Mr. Murphy’s sentence.

[¶33] Issue two requires a remand to the District Court so the District Court can properly advise Mr. Murphy of a mandatory 8 year sentence.

DATED this ____ day of April, 2014.

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

CERTIFICATE OF SERVICE BY MAIL

[¶34] 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 ____, 2014, she served, by e-mail and mailed a copy of the following:

APPELLANT'S APPENDIX and BRIEF

to: Tracy Jo Peters
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Mailed to: Rapheal Murphy
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The undersigned further certifies that on April ____, 2014, she served electronically on the Clerk, North Dakota Supreme Court, the APPELLANT'S APPENDIX and BRIEF.

_ /s/ Eva Bouman _____
Eva Bouman