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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,

Plaintiff - Appellee,

Supreme Court No. 20140079

vs.

Dist. Ct. No. 09-2013-CR-00923

Rapheal Jamell Murphy,

Defendant - Appellant.

APPELLEE'S BRIEF

Appeal from the Criminal Judgment
East Central Judicial District
Cass County, North Dakota
The Honorable Steven E. McCullough Presiding

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II. The trial court properly informed the Defendant of the mandatory eight year consecutive sentence under 19-03.1-23(3).

[¶4]**STATEMENT OF FACTS**

[¶5]On March 20, 2013, officers from the local Drug Task Force arranged to purchase a quantity of crack cocaine from the Defendant with the assistance of a confidential informant (CI). (Transcript of proceeding of 11/4/2013 "Tr.1" at 8:24-9:5.) The Defendant met the CI at an apartment in north Fargo. (Tr.1 at 9:4-5.) The CI purchased approximately one-half (1/2) gram of crack cocaine from the Defendant for two hundred dollars. (Tr.1 at 9:8-10.) Officers arrested the Defendant as he was leaving the area. (Tr.1 at 9:12-4.) Officers recovered two hundred dollars in buy fund money from the Defendant. (Tr.1 at 9:14-5.) The transaction occurred within 1000 feet of McKinley Elementary School. (Tr.1 at 10:8-12.)

[¶6]On March 21, 2013, the State charged the Defendant with delivery of cocaine within 1000 feet of a school, a class AA felony, and tampering with physical evidence, a class C felony. (Appellant's Appendix "App." at 5.) The second charge stemmed from an incident at the jail. (App. at 5.) The trial court later granted the State's request to amend the information to add a charge of possession of cocaine with intent to deliver within 1000 feet of a school. (App. at 7-8.) On November 4, 2013, the Defendant pleaded guilty to the charge of delivery of cocaine within 1000 feet of a school. (Tr.1 at 7:23.) The offense carried a minimum mandatory sentence of twenty-eight (28) years imprisonment (App. at 7.) The trial court accepted the Defendant's guilty plea and continued sentencing. (Tr.1 at 9:21-23 and 10:24.)

[¶7]On March 3, 2014, the matter came before the trial court for sentencing. (Transcript of Proceeding of 3/3/14 "Tr.2".) The trial court allowed the filing of a second amended information clarifying the prior offenses alleged in count 1. (App. at 12-3.) The trial court allowed the Defendant to withdraw his previously entered plea and the Defendant entered a guilty plea on count 1 of the second amended information. (Tr.2 at 4:22-3 and 6:12.) The offense still carried a minimum mandatory sentence of twenty-eight (28) years imprisonment. (App. at 12-3.) The trial court granted the State's motion to dismiss counts 2 and 3. (Tr.2 at 8:18-22.) The parties then presented arguments on the alleged priors. (Tr.2 at 8:7 – 12:10.)

[¶8]The trial court received certified copies of the three prior offenses into evidence. (Tr.2 at 8:10 – 9:3.) The priors alleged are:

11/03/05 – Controlled Substance Crime 5th Degree Possession, Hennepin County, MN
01/07/09 – Controlled Substance Crime 5th Degree Possession, Hennepin County, MN
08/13/09 – Distribution of a Controlled Substance, US District Court

(App. at 12.) The Defendant argued the Court could defer or suspend any part of the minimum mandatory sentence under N.D.C.C. § 19-03.1-23.2 as long as the prior convictions were not convictions under North Dakota law. (Tr.2 at 8:10 – 9:3.) The trial court opined, "I do not believe that the defense argument concerning it's reading of the mandatory minimum offenses [in] this case is well placed." (Tr.2 at 20:23-5.) The court continued, "I don't believe that was the intent of the legislature. . . 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." (Tr.2 at 21:10-21.) The trial court went on to sentence the Defendant to the custody of the North Dakota Department of Corrections for the minimum mandatory twenty-eight (28) years. (Tr.2 at 21:1-4.) The Defendant appeals from the criminal judgment alleging the trial court incorrectly concluded prior drug convictions from outside of North Dakota would not allow the court to deviate from a minimum mandatory sentence under N.D.C.C. § 19-03.1-23.2. The Defendant further argues the trial court failed to properly inform the Defendant of the mandatory eight (8) year consecutive sentence under N.D.C.C. § 19-03.1-23(3).

[¶9]LAW AND ARGUMENT

I. [¶10]The trial court properly concluded it could not defer imposition of sentence or suspend any part of the minimum mandatory sentence under N.D.C.C. § 19-03.1-23.2 given the Defendant's prior convictions.

[¶11]In this case, the Defendant is subject to a minimum mandatory twenty (20) years imprisonment under N.D.C.C. § 19-03.1-23 (1)(a)(2), because he willfully delivered the controlled substance cocaine to another, and at the time, the Defendant had two or more prior offenses. See N.D.C.C. § 19-03.1-23(1)(a)(2) (mandating a term of imprisonment of twenty years for a "third or subsequent offense"). Furthermore, the Defendant is also subject to an additional eight (8) year term of imprisonment because the delivery took place within one-thousand (1000) feet of a school. See N.D.C.C. § 19-03.1-23(3)(a) (providing an additional eight (8) year consecutive sentence for any "second or subsequent offenders" who

commit the offense within one-thousand (1000) feet of a school). The Defendant does not dispute these minimum mandatory sentence apply in the present case. Rather, the Defendant argues the trial court was authorized to deviate from the minimum mandatory sentence under N.D.C.C. § 19-03.1-23.2.

Section 19-03.1-23.2 – N.D.C.C., provides as follows:

> "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 exist which 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.

N.D.C.C. § 19-03.1-23.2. In this case, the Defendant has prior convictions from Minnesota and from federal court. The statute allows the trial court to deviate from the minimum mandatory sentence if the trial court finds "the offense was the defendant's first violation of this chapter, chapter 19-03.2, or chapter 19-03.4." N.D.C.C. § 19-03.1-23.2. The Defendant argues because his priors are not convictions under N.D.C.C. chapter 19-03.1, chapter 19-03.2, or chapter 3.4, the current offense is his "first violation of this chapter" and the provisions of N.D.C.C. § 19-03.1-23.2 should apply. The State asserts although the statute does not specifically state "first violation of this chapter, chapter 19-03.2, or chapter 19-03.4, or equivalent offense under another state or federal law," this Court should interpret the statute in that manner to avoid an obscure and ludicrous result.

[¶12]The issue in this case is one of statutory interpretation. "The interpretation of a statute is a question of law, which is fully reviewable on appeal." Dominguez v. State, 2013 ND 249, ¶ 11, 840 N.W.2d 596 (quoting State v. Laib, 2002 ND 95, ¶ 13, 644 N.W.2d 878). This Court "look[s] at the language of the statute and give[s] words their plain, ordinary, and commonly understood meaning, unless a contrary intention plainly appears or the words are specifically defined." Dominguez at ¶ 11; see also N.D.C.C. § 1-02-02. Statutes "are to be construed liberally, with a view to effecting its objects and to promoting justice." N.D.C.C. § 1-02-01.

[¶13]Under the plain language of N.D.C.C. § 19-03.1-23.2, the trial court may deviate from the minimum mandatory sentence if the court first finds the current drug offense is the "first violation of this chapter, chapter 19-03.2, or chapter 19-03.4." In the present case, the offense is, in fact, the Defendant's first violation of chapter 19-03.1, chapter 19-03.2, or chapter 19-03.4. The Defendant does, however, have two (2) prior convictions for possession of a controlled substance from Hennepin County MN and one (1) prior conviction for distribution of a controlled substance in Federal Court. Those prior convictions would be violations of N.D.C.C. chapter 19-03.1 if they had been committed in North Dakota. See N.D.C.C. § 19-03.1-23 (7) (possession of a controlled substance); N.D.C.C. § 19-03.1-23 (1) (delivery of a controlled substance). To conclude the phrase "first violation" under N.D.C.C. § 19-03.1-23.2 means "first violation under only North Dakota law" and not "first violation under any state or federal

law" would lead to an absurd and ludicrous result.

[¶14] "When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." State v. Fasteen, 2007 ND 162, ¶ 8, 740 N.W.2d 60 (citing N.D.C.C. § 1-02-05). "If, however, the statue is ambiguous or if adherence to the strict letter of the statute would lead to an absurd or ludicrous result, a court may resort to extrinsic aids, such as legislative history, to interpret the statute. Fasteen, at ¶ 8 (citing Shiek v. North Dakota Workers Comp. Bureau, 2002 ND 85, ¶ 12, 643 N.W.2d 721. This Court "presume[s] the legislature did not intend an absurd or ludicrous result or unjust consequences, and [this Court] construe[s] statutes in a practical manner, giving consideration to the context of the statutes and the purpose for which they were enacted." Fasteen, at ¶ 8 (citing Amerada Hess Corp. v. State ex rel. Tax Comm'r, 2005 ND 155, ¶ 12, 704 N.W.2d 8).

[¶15]In this case, if this Court interpreted N.D.C.C. § 19-03.1-23.2 to give trial courts discretion to deviate from minimum mandatory drug sentences when a defendant has only prior drug convictions outside of North Dakota, the result would be absurd. For example, a trial court would be able to deviate from the minimum mandatory sentence on a defendant facing a drug delivery charge in North Dakota who also has multiple prior drug delivery convictions in any other state or federal jurisdiction. Conversely, a trial court would not be able to deviate from the minimum mandatory sentence on a defendant facing a drug delivery charge in North Dakota who has one prior misdemeanor or felony drug conviction

under North Dakota law. The State believes this result is unfair, unjust, and absurd. Courts "presume the [l]egislature did not intend an absurd or ludicrous result or unjust consequences." Stein v. Workforce Safety and Ins., 2006 ND 34, 710 N.W. 2d 364 (citing N.D.C.C. § 1-02-38(3) and (4)). If "adherence to the strict letter of the statute would lead to an absurd or ludicrous result, a court may resort to extrinsic aids, such as legislative history, to interpret the statute." Fasteen, 2007 ND 162, ¶ 8, 740 N.W.2d 60.

[¶16]In an attempt to ascertain the legislative intent, this Court looks to the legislative history of N.D.C.C. § 19-03.1-23.2. The initial version of N.D.C.C. § 19-03.1-23.2 passed during the 1993 legislative session. N.D.C.C. § 19-03.1-23.2 (1993). At the same time, the legislature passed N.D.C.C. § 19-03.1-23 providing significant minimum mandatory terms of imprisonment for higher level drug crimes, such as delivery of a controlled substance, possession with intent to deliver, and manufacturing a controlled substance. N.D.C.C. § 19-03.1-23.2 (1993). These minimum mandatory terms of imprisonment applied to first, second, third, and subsequent offenses involving any controlled substances other than marijuana. Id. The legislature enacted N.D.C.C. § 19-03.1-23.2 to allow courts to "suspend any part of a specified mandatory term . . . [if] the court first finds that the offense was the defendant's first violation of [N.D.C.C. Chapter 19-03.1] and that extenuating or mitigating circumstances exist which justify a suspension". N.D.C.C. § 19-03.1-23.2 (1993). The 2001 legislature subsequently added language to read "first violation of [N.D.C.C. Chapter 19.-03.1], chapter 19-

03.2 [imitation controlled substances], or chapter 19-03.4 [paraphernalia]." N.D.C.C. § 19-03.1-23.2.

[¶17] In its discussion of N.D.C.C. § 19-03.1-23.2, one senator described the statute as "a tool to take away a mandatory sentence on a first offense." Hearing on H.B. 1062 Before the Senate Judiciary Committee, 53rd N.D. Legis. Sess. (03/08/1993) (testimony of Senator Jim Maxon). Most of the discussion in adopting this bill centered around the new minimum mandatory sentences provided in N.D.C.C. § 19-03.1-23. From the legislative history, it is clear N.D.C.C. § 19-03.1-23.2 was enacted as a safety valve to give judges discretion to "suspend all or part of a mandatory term of imprisonment of a first-time offender." Summary of Second Engrossment of Reengrossed House Bill No. 1062 by Representative Ron Carlisle (1993). There is no discussion in the legislative history to suggest the legislature meant to exclude out-of-state or federal convictions in N.D.C.C. § 19-03.1-23.2.

[¶18]The North Dakota Attorney General has issued an opinion on a question of statutory interpretation similar to the present case. N.D. Op. Att'y Gen. 87-23 (1987). In Opinion No. 87-23, the Attorney General was asked whether a juvenile court or municipal court had jurisdiction to hear a municipal ordinance violation for open container when such violation is committed by a juvenile. Id. Under N.D.C.C. § 27-20-02 (10)(e), a juvenile who violated the state open container statute was deemed to be an "unruly" child and, therefore, was prosecuted in juvenile court. Id. "The language of N.D.C.C. § 27-20-02(10)(e)

does not specifically refer to violations of equivalent municipal ordinances pertaining to an open bottle law." Id. "Literal interpretation of N.D.C.C. § 27-20-02 (10)(e) limiting juvenile court jurisdiction to only those offenses arising out of [state law] and not under equivalent municipal ordinances would cause an unjust, absurd, and unreasonable result." Id. The Attorney General found it clear the legislative intent "was to vest the juvenile court with exclusive and original jurisdiction over all open bottle violations by a child to provide that child with the benefits of the expanded identification, treatment, and rehabilitation services within that system." Id. The Attorney General concluded the legislative intent was to include all open container violations, both municipal ordinance and state law, under the jurisdiction of the juvenile court despite the fact the statute, on its face, included only violations of state law. Id. The State urges this Court to find the Attorney General's reasoning in this opinion persuasive.

II. [¶19]The trial court properly informed the Defendant of the mandatory eight year consecutive sentence under N.D.C.C. § 19-03.1-23(3).

[¶20]In this case, the Defendant pled guilty to delivery of cocaine within one-thousand feet of a school. (App. at 12 (second amended information)). The information alleged the Defendant "willfully delivered a controlled substance, namely cocaine, to another, in or on, or within one thousand feet of the real property comprising a public or private elementary or secondary school, public career and technical education school, or a public or private

college or university." (App. at 12.) The information further alleged the crime took place "within one thousand feet of McKinley Elementary School." (App. at 12.) The penalty section included a "min. mand. 28 years' incarceration). (App at 13 (page 2 of second amended information)).

[¶21]Under N.D.C.C. § 19-03.1-23(3)(a), "in addition to any other penalty imposed under [N.D.C.C. § 19-03.1-23], a person who violates this chapter . . . is subject to, and the court shall impose, the following penalties to run consecutively to any other sentence imposed:

> a. Any person, eighteen years of age or older, who violates this section by willfully manufacturing, delivering, or possessing with intent to manufacture or deliver a controlled substance in or on, or within one thousand feet [300.48 meters] of the real property comprising a public or private elementary or secondary school or a public career and technical education school is subject to an eight-year term of imprisonment.

N.D.C.C. § 19-03.1-23(3)(a). The Defendant argues the information itself does not reference N.D.C.C. § 19-03.1-23(3)(a) specifically and therefore, the Defendant was not properly advised of the eight year minimum mandatory prison term under N.D.C.C. § 19-03.1-23(3)(a). The Defendant concedes this issue was not raised before the trial court. (Appellant's Brief at ¶ 29.) "This Court will not consider issues raised for the first time on appeal." State v. Vondal, 2011 ND 186, ¶ 5, 803 N.W.2d 578. "[A] narrow exception to this rule provides that '[a]n obvious error or defect that affects substantial rights may be considered even though it was not brought to the court's attention.'" Vondal at ¶ 5 (quoting N.D.R.Crim.P. 52).

[¶22]The Defendant first appeared in court on these charges March 22, 2013. (Transcript of proceedings of March 22, 2013 "Tr. 3" at 1.) The State informed the Defendant of the maximum possible penalties and the minimum mandatory penalties applicable to the charges. (Tr. 3 at 8:6 - 9:8.) Specifically, with respect to Count 1, the State advised "[t]here is alleged to be two prior convictions for drug violations which would count for enhancement purposes, and with the – within one thousand feet of a school the minimum mandatory sentence on this case is 28 years' incarceration." (Tr.3 at 8: 12-16). With respect to Count 2, the State advised the Defendant "[t]here is also two prior drug offenses on this charge as well and within a thousand feet of a school . . . the minimum mandatory sentence on this count is also 28 years' incarceration." (Tr.3 at 8:23-9:1.) The trial court asked the Defendant if he understood the charges and the penalties and the Defendant said "yes, sir." (Tr.3 at 9:9-11.)

[¶23]At the hearing on November 4, 2013, the State indicated count 1 carried a "minimum mandatory 28 years" having alleged the offense occurred within one thousand feet of a school and the Defendant had two prior qualifying offenses. (Tr.1 at 4:1-4.) When the trial court asked the Defendant whether he knew of the minimum mandatory penalty involved, the Defendant said "yes, ma'am, Your Honor." (Tr.1 at 6:2-5.) The Defendant specifically admitted the offense took place within one thousand feet of a school. (Tr.1 at 7:1-18.)

[¶24]At the hearing on March 3, 2014, the trial court allowed the Defendant to withdraw his plea and reenter his plea of guilty to count 1. (Tr.2 at 4:22-4.)

The trial court informed the Defendant the charge is "basically the same except for the prior information that is in there." (Tr.2 at 5:8-10.) At that time, the Defendant waived his right to have the charges read to him along with an explanation of any possible penalties. (Tr.2 at 5:21-5 and 6:1-6.) When asked for his plea to the charge of delivery of cocaine within one thousand feet of a school" the Defendant said "I plead guilty." (Tr.2 at 6:7-12.) The trial court imposed the minimum mandatory twenty-eight (28) years. (Tr.2 at 21:1-5.)

[¶25]Under N.D.R. Crim. P. 11(b)(2) "[T]he court may not accept a plea of guilty without first, by addressing the defendant personally . . . in open court, informing the defendant of and determining that the defendant understands the following . . . (H) any mandatory minimum penalty." N.D.R. Crim. P. 11(b)(2). This Court has held "substantial compliance with Rule 11 exists if the record of the arraignment, in conjunction with the record of the change-of-plea hearing, clearly reveals that the trial court informed the defendant of the rights he was waiving by pleading guilty." State v. Schweitzer, 510 N.W.2d 612 (N.D. 1994).

[¶26]Based on the information contained in the transcripts of the three hearings in this case, the Defendant clearly knew the minimum mandatory sentence applicable to this case at the time he entered his plea of guilty.

[¶27]**CONCLUSION**

[¶28]The trial court correctly concluded it could not suspend any portion of the Defendant's sentence under N.D.C.C. § 19-03.1-23.2. The trial court also properly informed the Defendant of any minimum mandatory sentence. For these

reasons, the State respectfully requests this Court affirm the decision of the trial court.

Respectfully submitted this 4th day of June, 2014.

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[¶29] **CERTIFICATE OF SERVICE**

[¶30] A true and correct copy of the foregoing document was sent by e-mail on the 4th day of June, 2014, to: Benjamin Pulkrabek at pulkrabek@lawyer.com.

Tracy J. Peters, NDID# 5432