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STATEMENT OF THE ISSUE

- I. Whether the District Court's Order should be vacated that allowed defendant to withdraw guilty plea?**

JURISDICTION

[¶1] The Supreme Court’s authority to issue supervisory writs is derived under N.D.Const. Art. VI, § 2, and N.D.C.C. § 27-02-04. A district court’s decision may be reviewed by the Supreme Court under its supervisory authority. State v. Rustad, 2012 ND 242, ¶5, 823 N.W.2d 767, *citing* State, ex rel. Roseland v. Herauf, 2012 ND 151, ¶3, 819 N.W.2d 546. “We exercise our authority to issue supervisory writs rarely and cautiously on a case-by-case basis and only to rectify errors and prevent injustice in extraordinary cases when no adequate alternative remedy exists.” Rustad at ¶5. “Our authority to issue a supervisory writ is discretionary. Id. “We generally will not exercise our supervisory jurisdiction where the proper remedy is an appeal.” Id.

STATEMENT OF THE FACTS

[¶2] On March 19, 2015, Matthew John Olson (hereinafter Olson), pled guilty to all counts in Case No. 18-2014-CR-01652. Petitioner's App. p. 2, at ¶4 & ¶7. The trial court accepted the guilty pleas and set the case ahead for sentencing on Monday, April 20, 2015. Id. at ¶4 & ¶8.

[¶3] On Friday, April 17, Olson filed a motion to withdraw his guilty pleas. Petitioner's App. pp. 8-9. On April 27, the State filed a motion opposing the withdrawal of the pleas. Petitioner's App. pp. 12-18. Olson filed a reply to the State's brief on May 11, 2015. Petitioner's App. pp. 19-20.

[¶4] On May 15, 2015, a motion hearing was held before the Honorable Don Hager, Judge of the District Court, Northeast Central Judicial District. The trial court issued its Order Granting Defendant's Motion to Withdraw Guilty Pleas on May 21, 2015. Petitioner's App. pp. 1-7.

ARGUMENT

[¶5] The State petitions this Court to issue a supervisory writ concluding that the trial court erred by holding that a fair and just reason exists to withdraw guilty plea when a defendant is charged in another jurisdiction.

[¶6] This case is appropriate for review under N.D.C.C. § 27-02-04, as the State has no adequate alternative remedy. Just like in Dvorak, for all practical purposes, there is little likelihood this issue would be raised on direct appeal following a trial. See State v. Dvorak, 2001 ND 133, ¶6, 631 N.W.2d 595. If Olson was found guilty, there would be no reason for him to raise this issue on appeal. If Olson was acquitted, the State could not appeal. See State v. Flohr, 259 N.W.2d 293 (N.D. 1997).

[¶7] “The effect of a defendant’s voluntary plea of guilty to an offense is well established.” State v. Sisson, 1997 ND 158, ¶9, 567 N.W.2d 839. “A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.” Id.

[¶8] The trial courts current ruling in Grand Forks County allows a defendant to withdraw a guilty plea if he is charged in another jurisdiction prior to sentencing. In this case, the defendant was federally charged after he pled guilty. This standard would allow convictions in Grand Forks County be reversed at the discretion of other jurisdictions or as an unintended collateral consequence of another jurisdiction filing charges against a Grand Forks defendant. The defendant has the unfettered power and ability to have his conviction reversed just by committing a new offense in another jurisdiction. The State and victims of a crime could not rely on a defendant’s plea of guilty as it is possible that another jurisdiction may bring charges prior to the sentencing date. This would result in

serious prejudice to the victims and witnesses of a crime as well as the proper administration of justice.

[¶9] The defendant's sole basis for requesting that his guilty plea be withdrawn is predicated upon him being federally charged subsequent to his plea. Petitioner's App. pp. 8-11 & pp. 19-20.

[¶10] The Supreme Court set forth various factors a trial court may consider when determining whether a fair and just reason has been established by the defendant. See State v. Lium, 2008 ND 232, ¶17, 758 N.W.2d 711. "These factors are not intended to be an exclusive list and other factors based on the specific case may be relevant to a district court's determination of a fair and just reason." Id.

[¶11] In Lium, this Court listed the following: (1) the amount of time that has passed between the entry of the plea and the motion to withdraw; (2) defendant's assertion of innocence or a legally cognizable defense to the charge; (3) prejudice to the government; (4) whether the plea was knowing and voluntary; (5) whether the plea was made in compliance with Rule 11, N.D.R.CrimP.; (6) whether adequate assistance of counsel was available to the defendant; (7) the plausibility of the reason for seeking to withdraw; (8) whether the plea withdrawal would waste judicial resources; and (9) whether the parties had reached or breached a plea agreement. Id.

[¶12] With these factors in mind, the trial court ruled that a fair and just reason existed pursuant to (7) of the listed factors above. Although not an argument by the defendant, the Court found substantial compliance with Rule 11 as it applies to acceptance of a guilty plea. The conditions prerequisite are set forth under Rule 11(b) (1) and (2) of the N.D.R.Crim.P. The trial court's Order states "[t]he defendant entered open

guilty pleas to all charges on March 19, 2015 before the Honorable Lolita Hartl-Romanick, Judge of the District court, who accepted the pleas and set sentencing for April 20, 2015.” Petitioner’s App. p. 2.

[¶13] Since the guilty plea was accepted, the defendant may withdraw a plea of guilty after the court accepts the plea, but before it imposes sentence if the defendant can show a fair and just reason for the withdrawal. Rule 11(d)(1)(B)(ii) N.D.R.Crim.P.

[¶14] Rule 11 further sets forth the procedure required before a court can enter judgment. Rule 11(b)(3), N.D.R.Crim.P. “Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.” Rule 11(b)(3). In this case, judgment had not been entered; therefore, this subsection would not be applicable at this point. The sentencing date in this case was set for April 20, 2015. The defendant filed his motion to withdraw on April 17, 2015. The trial court also cited to Rule 11(4)(A) which states “if the court accepts the plea agreement, it must inform the defendant that, to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.” This section is not applicable to the case at hand as there was not a plea agreement. In any event, the defendant does not assert that there was not compliance with Rule 11 of the N.D.R.Crim.P.

[¶15] Therefore, what we are left with is the trial courts rationale set forth under the “plausibility of the reason for seeking to withdraw” on page 7 of the court’s order. The order states that “the court finds that withdrawal of the pleas to first address the federal charges, which being “tactical”, is intelligent representation, and represents a believable argument for the defendants request here.” The trial court allowed withdrawal

because the reason set forth was a believable argument, albeit tactical. The “plausibility of the reason for seeking to withdraw” is listed as one of the factors the court may consider in deciding whether a defendant has set forth a fair and just reason. See Lium at ¶17.

[¶16] The State asserts that the trial court misinterpreted this factor. The trial court should have first determined that the basis for the withdrawal was a fair and just reason and then considered whether the reason was credible or believable. For example, in Lium, the defendant asserted that he was coerced into pleading guilty. If this were true, this would be a fair and just reason for a defendant to withdraw his guilty plea. However, another factor the court may consider is whether this argument was truthful or believable (the plausibility of the reason for seeking to withdraw).

[¶17] In the present case, the trial court ruled that as long as the defendants argument was believable or plausible, that in and of itself, made it a fair and just reason to withdraw a guilty plea. This would essentially allow all guilty pleas to be withdrawn as long as the defendant asserted anything believable – regardless of whether it was a fair and just reason. Even allowing withdrawal for tactical reasons as held in this case.

[¶18] In Sisson, this court has opined that “were withdrawal automatic in every case where the defendant decided to alter his tactics or present his theory of the case to the jury, the guilty plea would become a mere gesture, a temporary and meaningless formality reversible at the defendant’s whim”. State v. Sisson, 1997 ND 158, ¶17, 567 N.W.2d 839.

[¶19] The trial court’s ruling in this case is far more reaching than just allowing a defendant to withdraw a guilty plea as a tactical decision. The holding in this case allows

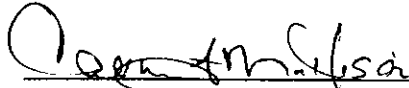
every guilty plea subject to withdrawal in the event the defendant is charged in another jurisdiction. Furthermore, the standard for a fair and just reason to withdraw a guilty plea is practically standardless if the minimum needed is a “believable argument.” The State asserts that the trial court misinterpreted or misapplied the law and standard necessary for withdrawal of a guilty plea. Additionally, the trial court’s ruling will have a detrimental impact on the administration of justice in criminal proceedings.

[¶20] The defendant has the burden in showing a fair and just reason. State v. Millner, 409 N.W.2d 642, 643, (N.D.1987). “While there is a preference to liberally allow a defendant to withdraw a guilty plea, withdrawal is not a matter of right.” State v. Lium, 2008 ND 232, ¶13, 758 N.W.2d 711. “Given the great care with which pleas are taken under the revised Rule 11, there is no reason to view pleas so taken as merely “tentative”, subject to withdrawal before sentence whenever the government cannot establish prejudice.” Id. “The plea of guilty is a solemn act not to be disregarded because of belated misgivings about the wisdom of the same.” U.S. v. Osei, 679 F.3d 742, 747 (8th Cir. 2012).

CONCLUSION

[¶21] The State respectfully requests that this court vacate the trial courts order allowing withdrawal of Olson's guilty plea as a fair and just reason was not established and the trial court erred in applying the Lium factors.

DATED this 29 day of May, 2015.



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