

IN THE SUPREME COURT OF NORTH DAKOTA

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State of North Dakota,	)	<b>Supreme Court File No.</b>
	)	<b>20150211</b>
	)	
Plaintiff and Appellee,	)	<b>Grand Forks County Criminal No.</b>
	)	<b>18-2014-CR-01844</b>
	)	
v.	)	
	)	
Cody Atkins,	)	<b>APPELLANT’S BRIEF</b>
	)	
Defendant and Appellant.	)	

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**APPEAL FROM THE CRIMINAL JUDGMENT IN GRAND  
FORKS COUNTY DISTRICT COURT, NORTHEAST CENTRAL  
JUDICIAL DISTRICT, NORTH DAKOTA THE HONORABLE  
LOLITA HARTL-ROMANICK, PRESIDING.**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

JURISDICTION.....¶1

STATEMENT OF ISSUES .....¶2

STATEMENT OF CASE .....¶3

STATEMENT OF FACTS .....¶4

LAW AND ARGUMENT .....¶7

I. Whether Mr. Morrow Provided Ineffective Assistance of Counsel.....p3

II. Whether the Court Abused Its Discretion by Not Complying With Rule 11 Thereby  
Creating a Manifest Injustice to the Defendant.....p7

CONCLUSION.....¶16

TABLE OF AUTHORITIES

**Cases**

Bahtiraj v. State, 2013 ND 240, 840 N.W.2d 605 (N.D. 2013)..... ¶8

Flanagan v. State, 2006 ND 76, 712 N.W.2d 602 (N.D. 2006)..... ¶8

Froistad v. State, 2002 ND 52, 641 N.W.2d 86 (N.D. 2002)..... ¶12

Hill v. Lockhart, 474 U.S. 52 (1985) ..... ¶8

Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, L. Ed. 158 (1932) ..... ¶10

State v. Causer, 2004 ND 75, 678 N.W.2d 552 (N.D. 2004)..... ¶8

State v. Garge, 2012 ND 138, 818 N.W.2d 718 (N.D. 2012)..... ¶8

State v. Gunwall, 522 N.W.2d 183 (N.D. 1994)..... ¶12

State v. Klein, 1997 ND 25, 560 N.W.2d 198 (N.D. 1997)..... ¶12

Strickland v. Washington, 466 U.S. 668, (1984) ..... ¶8

**Statutes, Rules, Codes**

N.D. Const. art. VI, § 6..... ¶1

N.D. Const. art. I, § 12..... ¶8

U.S. Const. amend. VI ..... ¶¶8,10,15

U.S. Const. amend. XIV ..... ¶8

N.D.C.C. §§ 29-28-06 (1)(2)(4)and(5) ..... ¶1

N.D.C.C. § 29-32.1-01..... ¶1

N.D.C.C. § 29-32.1-14..... ¶1

N.D.R.Crim.P. 11..... ¶¶2,6,7,11,12,13,15

N.D.R. Prof. Conduct Rule 1.2 ..... ¶10

N.D.R. Prof. Conduct Rule 1.4..... ¶10

Transcript References:

The Defendant's Initial Appearance, hereafter IA, was conducted September 10, 2014; Preliminary Hearing, hereafter PH, was on November 7, 2014; Arraignment, hereafter ARRD, was on November 10, 2015; Bond Review, hereafter BR, on February 12, 2015; Pre-Trial Conference, hereafter PTC, on March 19, 2015; and Sentencing, hereafter SENT, on June 29, 2015. The transcripts of these various hearings are referred to as "Tr." in this brief.

## **JURISDICTION**

[¶ 1] The Defendant, Cody Atkins, timely appealed the final criminal judgment arising out of the district court and the North Dakota Supreme Court has jurisdiction over the appeal of this matter pursuant to N.D.C.C. § 29-32.1-14 which provides that, “[a] final judgment entered under this chapter may be reviewed by the supreme court of this state upon appeal as provided by rule of the supreme court.” The district court had jurisdiction under N.D.C.C. § 29-32.1-01. This Court has appellate jurisdiction under N.D. Const. art. VI, § 6, and N.D.C.C. § 29-28-06(1)(2)(4) and (5). Mr. Atkins made an open plea of guilty on March 19, 2015. As a result of his plea, the final criminal judgment was entered in this case on June 29, 2015.

## **STATEMENT OF THE ISSUES**

[¶ 2] I. Whether Mr. Morrow Provided Ineffective Assistance of Counsel.

II. Whether the Court Abused Its Discretion by Not Complying With Rule 11 Thereby Creating a Manifest Injustice to the Defendant.

## **STATEMENT OF CASE**

[¶ 3] This is a criminal matter on direct appeal from Northeast Central Judicial District, Grand Forks County Criminal Judgment. This case was before the district court in State v. Atkins, 18-2014-CR-01844. The complaint was filed with the court on September 8, 2014. The Defendant was charged with Gross Sexual Imposition (GSI) a Class AA Felony. The State filed an Amended Information on November 7, 2014 reducing the GSI to a Class A Felony.

## STATEMENT OF FACTS

[¶ 4] Mr. Atkins was made aware of his rights by the court at the initial appearance held on September 10, 2014. IA Tr. pp. 4-6. Attorney Tyler Morrow was assigned as Mr. Atkins' counsel on September 19, 2015. Doc ID no. 23. Mr. Morrow filed a notice of representation with the court on September 24, 2014. Doc ID no. 25. A probable cause hearing was held before the Honorable John Thelen, on November 7, 2014 and was a combined hearing with Mr. Atkins' co-defendant, Thomas Pinkney. Mr. Pinkney's counsel, Attorney Ted Sandberg, was also present. PH Tr. p. 2.

[¶ 5] At the hearing the State moved to amend the Information reducing the complaint to a Class A Felony and changing the month the offense was alleged to have occurred. No objection to the amended information was made by Mr. Morrow. Additionally, Mr. Morrow did not request a continuance of the probable cause hearing to properly prepare the defense for the change in month the State was alleging the crime occurred. PH Tr. pp.5-6. The court found probable cause at the conclusion of the hearing on November 7, 2014 and held the defendant over for arraignment. PH Tr. p. 51.

[¶ 6] Mr. Atkins made an open plea of guilty. PTC Tr. pp. 2-7. The Court did not inform Mr. Atkins he had "the right to plead not guilty, or having already so pleaded, to persist in that plea," as required by Rule 11. N.D.R.Crim.P. 11(b)(1)(A). Further, the court did not "inquire whether the defendant's willingness to plead guilty result[ed] from discussion between the prosecuting attorney and the defendant or the defendant's attorney." N.D.R.Crim.P. 11(b)(2). The court also informed Mr. Atkins he would not be able to withdraw his plea once it had been accepted by the court. PTC Tr. p. 6.

[¶ 7] Mr. Atkins and his Attorney, Mr. Morrow, were personally present for sentencing on June 29, 2015. SENT Tr. pp. 1-26. At Sentencing, Mr. Morrow informed the court that Mr. Atkins would be making his own sentencing recommendation without the assistance of counsel. SENT Tr. p. 3. Mr. Atkins then told the court that his earlier plea of guilty was false and based on promises made to him by the co-defendant. SENT Tr. pp. 4-5. Mr. Morrow then supplemented this statement by saying, “we have somewhat of a retraction of an admission, so I guess I’m a little hesitant to move forward at this point in time because it appears, to me, he’s attempting to withdraw a guilty plea, Your Honor.” SENT Tr. pp. 5-6. The Court let the State respond to Mr. Atkins verbal withdrawal of his plea and then asked Mr. Morrow if he was requesting a change of plea. SENT Tr. pp. 6-8. Mr. Atkins responded to the court that he wanted to proceed with his plea. *Id.* at p. 8. Without taking a recess, the court asked if the defendant had the opportunity to discuss his decision to persist in his guilty plea with his counsel. *Id.* Mr. Atkins responded that he had an opportunity to discuss withdrawal of his plea with his attorney. However, there is nothing in the record that would indicate that discussion occurred or was even possible. SENT Tr. pp. 2-8. The court, without addressing Mr. Atkins’ assertion that his plea of guilty was coerced from statements and promises made by the co-defendant, proceeded to sentence the defendant in violation of Rule 11. N.D.R.Crim.P. 11(b)(2).

## **LAW AND ARGUMENT**

### **I. Whether Mr. Morrow Provided Ineffective Assistance of Counsel.**

#### **Standard of Review**

[¶ 8] The Sixth Amendment of the United States Constitution, applied through the Fourteenth Amendment to the States, and Article I, Section 12, of the North Dakota Constitution guarantee criminal defendants effective assistance of counsel. State v. Garge, 2012 ND 138, ¶ 10, 818 N.W.2d 718. An ineffective assistance of counsel claim involves a mixed question of law and fact, and is fully reviewable on appeal. Flanagan v. State, 2006 ND 76, ¶ 9, 712 N.W.2d 602. The court in Strickland set forth a two prong test to establish ineffective assistance of counsel. First, Mr. Atkins must show his counsel's performance fell below an objective standard of reasonableness and, second, that performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 687-96, 694 (1984). This Court on a direct appeal examines the entire record to determine if counsel's assistance was plainly defective. State v. Causer, 2004 ND 75, ¶ 19, 678 N.W.2d 552. It is plainly defective when the record affirmatively shows ineffectiveness of constitutional dimensions or if the defendant indicates evidence in the record supporting his claim. Id. The standard for prejudice in a case involving a guilty plea was established in Hill, which held that a defendant must show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985). In Bahtiraj v. State, 2013 ND 240, ¶ 16, 840 N.W.2d 605.

[¶ 9] In the present case, there are multiple times the record shows Mr. Atkins did not receive effective assistance by Mr. Morrow. When the State moved to amend the original information, changing when then crime supposedly took place by a full month, Mr. Morrow did not ask for, even at the court's prompting, a continuance to properly investigate the new allegation. PH Tr. pp. 4-6. The objective minimum action Mr.



Morrow should have taken was to request a continuance. A continuance to prepare a proper defense was necessary because nearly all procedural and affirmative, or notice, defenses often critically turn on the timing of the alleged crime. By proceeding on with a probable cause hearing when the time of the crime had been changed by an entire month, without prior notice to the defense, Mr. Morrow foreclosed any opportunity to investigate an alibi or any other defenses that may have been available to Mr. Atkins at this stage of the proceeding. Mr. Morrow's acquiescence to the drastic change in the allegation left the trial court with only evidence provided by the State to determine if probable cause existed. The defense merely argued there were several versions of events and that all the witness had at some point lied during the investigation. PH Tr. p. 50. However, no actual evidence was submitted to the court to support that Mr. Atkins was not involved in the crime charged. The court subsequently found probable cause.

[¶ 10] At sentencing Mr. Morrow indicated that Mr. Atkins had minutes before the hearing informed him he did not want Mr. Morrow to speak regarding a sentence recommendation. SENT Tr. p. 3. Under Rule 1.2 of the North Dakota Rules of Professional Conduct, "a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued." N.D.R. Prof. Conduct Rule 1.4 (a)(2) states that a lawyer shall, "reasonably consult with the client about the means by which the client's objectives are to be accomplished." While the objectives are solely at the discretion of the client the means of achieving those objectives is the responsibility of the attorney. The reason for that responsibility speaks to the very foundation of a criminal defendant's right to counsel. The entire point of the Sixth Amendment is that a criminal

defendant has an advocate trained and familiar with the legal process effectively advocating for them. As the Supreme Court in Powell v. Alabama explained, “The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law.” Powell v. Alabama, 287 U.S. 45, 69-70 53 S. Ct. 55, 77 L. Ed. 158 (1932). Even if Mr. Atkins wanted to speak for himself at his sentencing, Mr. Morrow should have supplemented his client’s statements with his own prepared arguments. To allow Mr. Atkins to be the only individual advocating the defense’s position completely negated Mr. Atkins’ Sixth Amendment right to have effective assistance of counsel. This inaction by Mr. Morrow negatively impacted Mr. Atkins case, because, as the Court saw it, Mr. Atkins was not taking responsibility for his actions. SENT Tr. pp. 9, 12. This was a significant factor the Court used to determine an appropriate sentence. Id.

[¶ 11] Mr. Morrow did not properly advocated Mr. Atkins’ objectives. If he had, he would have requested a withdrawal of the guilty plea based on his clients statements. At a minimum Mr. Morrow should have requested a continuance to consult with his client to ascertain his client’s objectives by telling the court he was coerced into pleading guilty to a crime he did not commit. The court, before sentencing Mr. Atkins, directly addressed Mr. Morrow in regards to whether his client wanted to persist in his guilty plea. SENT Tr. p. 8. However Mr. Morrow remained silent and let his client respond to the court without explaining the consequences of that decision. Id. The court, without taking a recess, asked Mr. Atkins if he had the ability to discuss his decision with Mr. Morrow. Id. Mr. Atkins stated he had, but based on the record that discussion was not

possible. Id. Mr. Morrow did not intervene at this time either, allowing his client to respond that they had discussed whether or not he wished to withdraw his guilty plea. Id. However moments before this Mr. Morrow indicated to the court that he was unaware the Mr. Atkins was going to deny his guilt of the crime charged and that his co-defendant made him promises in exchange for his guilty plea. SENT Tr. pp. 5-6. The bare minimum standard of counsel would have been to ask for a recess to discuss with Mr. Atkins his right to withdraw his guilty plea. By not explaining to Mr. Atkins that the standard for withdrawal of a guilty plea before being sentenced is less difficult, “a fair and just reason”, rather than after the imposition of sentence, to correct a “manifest injustice,” Mr. Atkins was prejudiced by Mr. Morrow’s inadequate performance. N.D.R.Crim.P. 11. Based upon the information in the record before the Court, Mr. Morrow’s performance in this case fell below an objective standard of reasonableness and that prejudiced Mr. Atkins. Therefore Mr. Atkins case should be remanded back to district court with instructions to withdraw his guilty plea.

**II. Whether the Court Abused Its Discretion by Not Complying With Rule 11 Thereby Creating a Manifest Injustice to the Defendant.**

**Standard of Review**

[¶ 12] North Dakota Rule of Criminal Procedure 11 in relevant part states:

(b) Advice to defendant.

(1) The court may not accept a plea of guilty without first, by addressing the defendant personally . . . open court, informing the defendant of and determining that the defendant understands the following:

(A) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(2) Ensuring That a Plea is Voluntary. Before accepting a plea of guilty, the court must address the defendant personally in open court . . . and determine that the plea is voluntary and did not result from force, threats, or promises other than promises in a plea agreement. The court must also inquire whether the defendant’s willingness to plead guilty results from

discussion between the prosecuting attorney and the defendant or the defendant's attorney.

(d) Withdrawing a Guilty Plea.

(1) In general. A defendant may withdraw a plea of guilty:

(A) before the court accepts the plea, for any reason or no reason;  
or

(B) after the court accepts the plea, but before it imposes sentence  
if:

(i) the court rejects a plea agreement under Rule 11(c)(5);  
or

(ii) the defendant can show a fair and just reason for the  
withdrawal.

(2) Finality of a Guilty Plea. Unless the defendant proves that withdrawal is necessary to correct a manifest injustice, the defendant may not withdraw a plea of guilty after the court has imposed sentence.

(3) Prosecution Reliance on Plea. If the prosecution has been substantially prejudiced by reliance on the defendant's plea, the court may deny a plea withdrawal request.

N.D.R.Crim.P. 11.

The standard for a plea withdrawal differs depending upon when the motion to withdraw is made. Froistad v. State, 2002 ND 52, ¶ 5, 641 N.W.2d 86. A defendant has a right to withdraw a guilty plea before it is accepted by the court. Id. at ¶ 6. ““After a guilty plea is accepted, but before sentencing, the defendant may withdraw a guilty plea if necessary to correct a manifest injustice, or, if allowed in the court’s discretion, for any “fair and just” reason unless the prosecution has been prejudiced by reliance on the plea.”” Id. at ¶ 8 (quoting State v. Klein, 1997 ND 25, ¶ 13, 560 N.W.2d 198). When a court has accepted a plea and imposed sentence, the defendant cannot withdraw the plea unless withdrawal is necessary to correct a manifest injustice. A manifest injustice includes procedural errors by a sentencing court. State v. Gunwall, 522 N.W.2d 183, 185 (N.D. 1994).

[¶ 13] At the pretrial conference Mr. Atkins indicated to the court he wanted to enter an open plea of guilty. The Court did not inform Mr. Atkins he had “the right to

plead not guilty, or having already so pleaded, to persist in that plea,” as required by Rule 11. N.D.R.Crim.P. 11(b)(1)(A). Mr. Atkins was not informed that he had a right to maintain his innocence regardless of what statements had been made by co-defendants or the State’s witnesses. Rule 11 protects a criminal defendant who is not versed in legal procedure or nuances, and must be properly adhered to to achieve a just legal system. Additionally, the court did not “inquire whether the defendant’s willingness to plead guilty result[ed] from discussion between the prosecuting attorney and the defendant or the defendant’s attorney,” as required by Rule 11. N.D.R.Crim.P. 11(b)(2). The court must inquire about this to determine if Mr. Atkins’ plea was voluntary or if it was influenced by discussions with his attorney and or the prosecution. Finally, the court told Mr. Atkins he would not be able to withdraw his plea once it had accepted it. PTC Tr. p. 6. This is a mischaracterization of Mr. Atkins’ rights. Under Rule 11 Mr. Atkins could motion to withdraw his plea after it was accepted if he could show a fair and just reason for the withdrawal or after sentencing to correct a manifest injustice. By telling Mr. Atkins he could not withdraw his plea once it was accepted the defendant was not fully aware of his rights when he attempted to do so at his sentencing, this procedural error by the court created a manifest injustice to Mr. Atkins.

[¶ 14] At sentencing, Mr. Atkins told the court that his earlier plea of guilty was false and based on promises made to him by the co-defendant. SENT Tr. pp. 4-5. Mr. Morrow then supplemented this statement by saying, “we have somewhat of a retraction of an admission, so I guess I’m a little hesitant to move forward at this point in time because it appears, to me, he’s attempting to withdraw a guilty plea, Your Honor.” SENT Tr. pp. 5-6. Instead of addressing the defense’s contention that Mr. Atkins was

attempting to withdraw his plea of guilty, the court let the State respond to Mr. Atkins verbal withdrawal of his plea. The court then asked Mr. Morrow if he was requesting a change of plea. SENT Tr. pp. 6-8. Mr. Morrow did not respond and the court did not pose the question to him again. SENT Tr. p. 8. However, Mr. Atkins responded to the court that he wanted to proceed with his plea. Id. at p. 8. Although prior to sentencing, the court indicated to Mr. Atkins that after it accepted the plea he could not withdraw it. PTC Tr. p. 6. Mr. Atkins therefore was left with no other conclusion that he was unable to do anything but proceed with his guilty plea.

[¶ 15] Without taking a recess, the court asked if the defendant had the opportunity to discuss his decision to persist in his guilty plea with his counsel. SENT Tr. p. 8. Mr. Atkins responded that he had an opportunity to discuss withdrawal of his plea with his attorney. However, there is nothing in the record that would support that a discussion occurred or was even possible. SENT Tr. pp. 2-8. The court did not take a recess and Mr. Morrow's comment on the defendant's verbal withdrawal of his plea was that it came as a surprise to him. SENT Tr. p. 6. The court proceeded, without addressing Mr. Atkins' assertion that his plea of guilty was coerced from statements and promises made by the co-defendant, to sentence the defendant in violation of Rule 11. N.D.R.Crim.P. 11(b)(2). The defendant clearly posed a fair and just reason to withdrawal his plea, that he did not commit the crime and was coerced into pleading guilty by his co-defendant. The court had an obligation under Rule 11 to address whether or not the defendant's earlier plea was voluntary. At the very least, the court should have allowed the defendant to confer with his attorney so that he could make a fully informed decision regarding whether to withdraw his plea or not. By not allowing Mr. Atkins to confer with

his attorney about the implications of proceeding to sentencing the court abused its discretion by denying Mr. Atkins his Sixth Amendment right to assistance of counsel. By not following proper procedure, the court proceeded to sentencing and created a situation where the defendant must meet a higher burden in order to withdraw his guilty plea. By so prejudicing the defendant the court created a manifest injustice, therefore Mr. Atkins should be allowed to remove his coerced plea of guilty and proceed to trial.

### **CONCLUSION**

[¶ 16] WHEREFORE based upon the foregoing law and argument the Defendant respectfully requests this Court to remand the above-entitled case with instructions that Mr. Atkins be allowed to withdraw his guilty plea in case no. 18-2014-CR-01844.

Dated this 29<sup>th</sup> day of October, 2015

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Plaintiff and Appellee,	)	<b>Grand Forks County Criminal No.</b>
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	)	
v.	)	
	)	
	)	
Cody Atkins,	)	<b>ATTORNEY CERTIFICATE</b>
	)	<b>OF SERVICE</b>
Defendant and Appellant.	)	

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The undersigned, being of legal age, being first duly sworn deposes and says that on the 29<sup>th</sup> day of October, 2015, she served true copies of the following document:

Appellant Brief  
Appellant Appendix

And that said copies were served upon:

Jason McCarthy  
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by efile

Dated this 29<sup>th</sup> day of October, 2015.

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Cody Atkins,	)	<b>ATTORNEY CERTIFICATE</b>
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	)	
Defendant and Appellant.	)	

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The undersigned, being of legal age, being first duly sworn deposes and says that on the 6<sup>th</sup> day of November, 2015, she served true copies of the following document(s):

Appellant's Brief and Appendix

And that said copies were served upon:

Cody Michael Atkins, #41930  
North Dakota State Penitentiary  
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by placing in an envelope a true and correct copy of each document and depositing the envelope, with sufficient postage, in the United States Mail.

Dated this 6<sup>th</sup> day of November, 2015.

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