

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, )  
 )  
 Plaintiff and Appellee )  
 )  
 v. )  
 )  
 Adam Schnellbach, )  
 )  
 Defendant and Appellant. )  
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Supreme Court No. 20160342

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**APPELLANT’S BRIEF**

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APPEAL FROM THE ORDER FOR JUDGMENT  
 DATED SEPTEMBER 16, 2016  
 DISTRICT COURT, NORTHEAST JUDICIAL DISTRICT  
 WALSH COUNTY, NORTH DAKOTA  
 50-2015-CR-00325  
 THE HONORABLE M. RICHARD GEIGER

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**STATUTES**

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## **JURISDICTIONAL STATEMENT**

[1] The district court had jurisdiction under N.D. Const. art. VI, § 8, N.D.C.C. § 27-05-06(1). Schnellbach's appeal is timely under N.D.R.App.P. 4(b). This Court has jurisdiction under N.D. Const. art. VI, § 2, and N.D.C.C. § 29-28-06

## **STATEMENT OF THE ISSUES**

[¶2] Whether the Sentence imposed was excessive or based on impermissible factors.

## **STATEMENT OF THE CASE**

[¶3] Adam Schnellbach was arrested on October 13, 2015. Mr. Schnellbach was subsequently charged with three (3) counts of with Gross Sexual Imposition, AA Felony, one (1) count of Gross Sexual Imposition, A Felony, and three (3) counts of Producing A Sexual Performance by a Minor, C Felony. On May 18, 2016, Mr. Schnellbach pled guilty to one count of Gross Sexual Imposition, AA Felony, one count of Gross Sexual Imposition, A Felony, and one count of Producing a Sexual Performance by a Minor , C Felony, pursuant to a plea agreement. Mr. Schnellbach was sentenced on September 16, 2016.

## **STATEMENT OF THE FACTS**

[¶4] Defendant and Appellant, Adam Schnellbach, entered Alford pleas, pursuant to a plea agreement, to Count One (1) of Gross Sexual Imposition AA Felony, Count Four (4) Gross Sexual Imposition, A Felony, and Count Five (5) of Promoting

Sexual Performance by a Minor, C Felony. He received a sentence of Forty (40) years, all suspended except for Sixteen (16) years with credit for 338 days for the Gross Sexual Imposition AA Felony Count One (1), a consecutive sentence of Twenty (20) years, all suspended except for six(6) years for the Gross Sexual Imposition Count Four (4), A Felony, and a sentence of five (5) years for Promoting Sexual Performance by a Minor Count Five (5), C Felony to run concurrent with the sentence imposed on Count Four(4). Counts Two(2) and Three(3) Gross Sexual Imposition AA Felony and Counts Six(6) and Seven(7) Promoting Sexual Performance by a Minor, C Felony were dismissed as part of the plea agreement which called for an open plea on the remaining charges.

#### **STANDARD OF REVIEW**

[¶5] The standard of review is obvious error. State v. Henes, 2009 ND 42, ¶ 7, 763 N.W.2d 502 (citation omitted).” “This Court cautiously exercises its authority to notice obvious error and does so only in exceptional circumstances in which a party has suffered a serious injustice.” “ Id., ¶ 8, citing State v. Kautzman, 2007 ND 133, ¶ 15, 738 N.W.2d 1. “ ‘To establish obvious error, the defendant must show: (1) error; (2) that is plain; and (3) affects substantial rights’ “ Id., State v. Kruckenberg, 2008 ND 212 ¶ 15, 758 N. W.2d 427.

## LAW AND ARGUMENT

[¶6] Mr. Schnellbach contends his sentence in this matter was excessive or based on impermissible factors. N.D.C.C. 12.1-32-04 lists the factors to be considered in sentencing. Those factors are:

1. The defendant's criminal conduct neither caused nor threatened serious harm to another person or his property.
2. The defendant did not plan or expect that his criminal conduct would cause or threaten serious harm to another person or his property.
3. The defendant acted under strong provocation.
4. There were substantial grounds which, although insufficient to establish a legal defense, tend to excuse or justify the defendant's conduct.
5. The victim of the defendant's conduct induced or facilitated its commission.
6. The defendant has made or will make restitution or reparation to the victim of his conduct for the damage or the injury which was sustained.
7. The defendant has no history of prior delinquency or criminal activity, or has led a law abiding life for a substantial period of time before the commission of the offense.
8. The defendant's conduct was the result of circumstances unlikely to recur
9. The character, history, and attitudes of the defendant indicate that he is unlikely to commit another offense.
10. The defendant is particularly likely to respond affirmatively to probationary treatment.
11. The imprisonment of the defendant would entail undue hardship to himself or his dependents.

12. The defendant is elderly or in poor health

13. The defendant did not abuse a public position of responsibility or trust.

14. The defendant cooperated with law enforcement authorities by bringing other offenders to justice, or otherwise cooperated.

In this case, a sentencing hearing was held and arguments made regarding the proper sentence. The District Court, in making its findings, found that none of the factors were in Mr. Schnellbach's favor. Mr. Schnellbach argues that several of the factors in particular did favor him. Mr. Schnellbach voluntarily entered his Alford pleas because he wished to spare the victims the ordeal of trial and because he acknowledged there was sufficient evidence to convict him should he proceed to trial. Thus, factor fourteen (14) of N.D.C.C. 12.1-32-04 was in his favor. Factor twelve (12) of N.D.C.C. 12.1-32-04, which considers a defendant's age or state of health also applies to Mr. Schnellbach. The Trial Court stated, "Likewise, under 12, that you are in poor health, although you have health issues, I am not prepared to say you are in such poor health that incarceration is not an available alternative for dispositions available to me." TR 36: 14-17. Mr. Schnellbach suffers from ongoing health issues related to a brain injury he suffered in a car accident. He requires testosterone injections and has memory issues. See Transcript, 15: 7-25, TR: 16: 1-6. Because of those issues, Factor eleven (11) should also be in his favor. Incarceration with his medical issues would cause undue hardship to himself when there are no guarantees he will receive necessary medical care. These factors were not properly weighed and taken together, constitute

obvious error which will substantially affect Mr. Schnellbach's right to a proper sentence. The sentence therefore should be overturned.

**CONCLUSION**

[¶7] Based on all the foregoing reasons, Adam Schnellbach respectfully requests that the matter be remanded back to the District Court for a proper consideration of sentencing.

Dated this 6th day of February, 2017.

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