

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20160357

State of North Dakota,

Plaintiff and Appellee

-vs-

Wesley Alan Cody,

Defendant and Appellant.

APPEAL FROM THE CRIMINAL JUDGMENT
SOUTH EAST JUDICIAL DISTRICT
STUTSMAN COUNTY CIVIL. NO. 47-2016-CR-00261
THE HONORABLE THOMAS E. MERRICK PRESIDING

PETITION FOR REHEARING

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STATEMENT OF THE ISSUE

[¶1] ISSUE:

I. Did the Supreme Court err when it gave no consideration to the fact that Defendant, Wesley Alan Cody's trial attorney stated on the record that the defense at a restitution hearing had no burden to bring up any evidence on the Defendant's ability to pay?

NATURE OF THE CASE

[¶2] This is a petition to rehear the North Dakota Supreme Courts opinion in the above matter that was filed on January 26, 2017.

ARGUMENT

[¶3] In this case at trial the trial judge said: Tr. P.37, L.1-11.

THE COURT: Well, there is a reason because you've been rude this entire hearing. You're getting a fair shake here. The numbers are what they are. I assumed what you were going to do is put in some evidence about his ability to pay. Apparently, he's not arguing that he can't pay this, he just doesn't want to pay it. I understand that that's the tactic you decided to take. I find it hard to believe that he's got the ability to pay that much, but you haven't brought it up. But again, that was your burden, and you didn't bring up any evidence on it.

[¶4] Defendant, Wesley Alan Cody's attorney, Scott Brand replied: Tr.P.39, L.12-13.

MR. BRAND: Well, that, your Honor, again, there's no burden on the defense for this hearing.

[¶5] The above quote by the trial judge made it clear that the trial judge didn't believe the Defendant had the ability to pay the total judgment and it was the defenses burden to bring up what the Defendant had the ability to pay. When a trial judge makes such a statement and the Defendants trial attorney responds "there is no burden on the defenses for this hearing" the trial attorneys response makes it clear that he doesn't believe it is the defenses burden to bring up not only the ability to pay but any other issue.

[¶6] In the Supreme Courts decision that was filed on June 15, 2017 it appears that the defendants attorney has to be asked at a post-conviction hearing why he didn't produce evidence on the Defendant's ability to pay. In cases at trial where the Defendants attorney has clearly stated why he did not do something during that trial that fact should be a sufficient admission to explain why he didn't do produce evidence on Defendant's ability to pay.

CONCLUSION

[¶7] In this case Defendant's trial attorney during trial states that the Defendant, Wesley Alan Cody didn't have any burden of proof during his restitution hearing. Such a statement was made after the trial judge told him that it was the Defendant's burden to show his ability to pay at a restitution hearing. Therefore because Defendant's attorney stated during the trial that he didn't have any proof during a restitution hearing there is no need to require another court hearing on court proceeding to find out why Mr. Cody's defense attorney didn't put on any evidence or testimony about Mr. Cody's ability to pay at the restitution hearing.

[¶8] The following statement during the trial by Defendant's attorney, Scott Brand says it all: Tr. 37, L.12-15.

MR. BRAND: Well, that, your Honor, again, THERE'S NO BURDEN ON THE DEFENSE FOR THIS HEARING. (Emphasis added)

[¶9] Defendant, Wesley Alan Cody's Petition for Rehearing should be granted.

DATED this 28th day of June, 2017.

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

CERTIFICATE OF SERVICE BY MAIL

[¶10] 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 June 28, 2017, she served, by e-mail and mailed a copy of the following:

APPELLANTS PETITION FOR REHEARING

to: Frederick Russell Fremgen
Stutsman Co. States Attorneys Office
47sa@nd.gov

Mailed to: Wesley Alan Cody
NDSP
P.O. Box 5521
Bismarck, ND 58506

The undersigned further certifies that on June 28, 2017, she served electronically on the Clerk, North Dakota Supreme Court, the APPELLANTS PETITION FOR REHEARING



Sharon Renfrow, Admin. Legal Assistant
Pulkrabek Law Office