

20170094

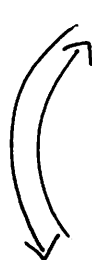
IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

Supreme Court No. 20170094
Burleigh County No.: 08-2011-CR-02739

MAY 22 2017

STATE OF NORTH DAKOTA


 Danny Joseph Myers,)
)
 Defendant and Appellant,)
)
 vs.)
)
 State of North Dakota,)
)
 Plaintiff and Appellee.)

APPEAL FROM ORDER DENYING APPELLANT'S MOTION TO CORRECT
SENTENCE ENTERED ON FEBRUARY 24, 2017

SOUTH CENTRAL JUDICIAL DISTRICT

HONORABLE BRUCE B. HASKELL, PRESIDING

**BRIEF OF APPELLEE
STATE OF NORTH DAKOTA**

Derek K. Steiner, Bar Id # 08124
Burleigh County Assistant State's Attorney
514 E Thayer Ave.
Bismarck, ND 58501
Phone: (701) 222-6672
Email: bc08@nd.gov

TABLE OF CONTENTS

Page/Paragraph No.

Table of Contents.....i

Table of Authorities.....ii

Issue Presented for Review..... ¶ 1

Statement of the Case..... ¶¶ 2-4

Statement of the Facts..... ¶¶ 5-7

Argument..... ¶¶ 8-14

 I. Standard of review..... ¶ 8

 II. The district court was correct in denying Myers’
 Motion to Correct Sentence..... ¶¶ 9-14

Conclusion..... ¶ 15

TABLE OF AUTHORITIES

CASES

Paragraph No.

State v. Iverson,
2006 ND 193, 721 N.W.2d 396¶ 13

State v. Moos,
2008 ND 228, 758 N.W.2d 674¶ 8

State v. Peterson,
2016 ND 192, 886 N.W.2d 71¶¶ 8, 11, 12

State v. Rueb,
249 N.W.2d 506 (ND 1976).....¶ 8

Griffith v. Kentucky,
479 U.S. 314 (1987)¶ 13

North Dakota Statutes and Rules

Paragraph No.

N.D.C.C. § 12.1-17-02.....¶¶ 5, 10

N.D.C.C. § 12.1-22-02(2).....¶¶ 11, 12

N.D.C.C. § 12.1-32.1-09.1.....¶ *passim*

N.D.R.Crim.P 35(a).....¶¶ 7, 9, 10

ISSUE PRESENTED FOR REVIEW

[¶ 1] Whether the district court was correct in denying Danny Myers' Motion to Correct Sentence.

STATEMENT OF THE CASE

[¶ 2] This case comes to this Court from an appeal brought after the district court denied Danny Meyers' (hereinafter "Myers") Motion to Correct Sentence on February 24, 2017. Appellant's Appendix at pages 20-21 (hereinafter "App. 20-21").

[¶ 3] Myers was sentenced on a charge of Aggravated Assault – Domestic Violence, a class C felony on April 24, 2012. App. 1-2. Myers was sentenced to serve five years at the North Dakota Department of Corrections with all of that time suspended for a period of five years of supervised probation. App. 5. On March 26, 2013, the State filed a Petition for Revocation of Probation. App. 2. On April 18, 2013, the State filed an Amended Petition for Revocation of Probation. App. 3. On April 29, 2013, a revocation of probation hearing was held, and Myers was sentenced to serve five years at the North Dakota Department of Corrections and Rehabilitation. App. 3, 11-12.

[¶ 4] On February 10, 2017, Myers filed a Motion to Correct Sentence. App. 3. On February 23, 2017, the State filed its Response to Defendant's Rule 35 Motion. App. 3. On February 24, 2017, the district court issued its Order denying Myers' Motion to Correct Sentence. App. 3, 20. On March 16, 2017, Myers filed a Notice of Appeal. App. 3, 21.

STATEMENT OF THE FACTS

[¶ 5] On December 12, 2011, Myers was charged with Aggravated Assault – Domestic Violence, a class C felony, under N.D.C.C. § 12.1-17-02, in case number 08-2011-CR-02739. App. 2. On April 24, 2012, Myers pled guilty to the Aggravated Assault – Domestic Violence charge. App. 1-2. The Court signed the criminal judgment on April 27, 2012. Myers was sentenced to five years at the Department of Corrections and

Rehabilitation with all five years suspended for a period of five years of supervised probation. App. 44.

[¶ 6] On April 18, 2013, the State filed an Amended Petition for Revocation of Probation in case number 08-2011-CR-02739. App. 3. On April 29, 2013 a revocation of probation hearing was held, and Myers was sentenced to serve five years at the North Dakota Department of Corrections. App. 3, 11-12. The amended criminal judgment did not mention the applicability of the eighty-five percent rule. App. 11-12. The Department of Corrections and Rehabilitation applied the eighty-five percent service requirement to Myers' Aggravated Assault – Domestic Violence sentence.

[¶ 7] On February 10, 2017, Myers filed a Motion to Correct Sentence under N.D.R.Crim.P. 35(a)(2), arguing it was a technical or clear error that the criminal judgment was silent on the applicability of the eighty-five percent rule. App. 16. Myers, also argued that N.D.C.C. § 12.1-32-09.1 should retroactively apply to his case, so he should not be subjected to the eighty-five percent service requirement. App. 15-17. On February 23, 2017, the State filed its Response to Defendant's Rule 35 Motion. App. 3, 18-19. In its response, the State argued that Rule 35(a)(2) of the North Dakota Rules of Criminal Procedure does not apply to this case because Myers' sentence was clearly subject to eighty-five percent rule at the time of sentencing. App. 18. Additionally, the State argued that N.D.C.C. § 12.1-32-09.1 does not apply retroactively to Myers in this case. App. 19. On February 24, 2017, the district court issued its Order denying Myers' Motion to Correct Sentence. App. 20. In its order, the district court stated that it agreed with each of the arguments advanced by the State. App. 20.

ARGUMENT

I. Standard of review

[¶ 8] A district court's decision to amend a criminal judgment is subject to sound judgment and will not be reversed unless the district court abused its discretion. State v. Peterson, 2016 ND 192, ¶ 8, 886 N.W.2d 71. (citing State v. Rueb, 249 N.W.2d 506, 511-512 (N.D. 1976)). "A district court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, if its decision is not the product of a rational mental process leading to a reasoned determination, or if it misinterprets or misapplies the law." Id. (quoting State v. Moos, 2008 ND 228, ¶ 30, 758 N.W.2d 674).

II. The district court was correct in denying Myers' Motion to Correct Sentence.

[¶ 9] Myers filed his Motion to Correct Sentence under N.D.R.Crim.P. 35(a)(2). Rule 35(a)(2) of the North Dakota Rules of Criminal Procedure states "[a]fter giving any notice it considers appropriate, the sentencing court may correct a sentence that resulted from arithmetical, technical, or other clear error." N.D.R.Crim.P. 35. Myers argues two reasons for granting his Motion to Correct Sentence. First, Myers argues that it was a technical or clear error that the criminal judgment was silent on the applicability of the eighty-five percent rule. Second, Myers argues that N.D.C.C. § 12.1-32-09.1 should be retroactively applied to his case, so he should not be subjected to the eighty-five percent service requirement.

[¶ 10] Rule 35(a)(2) of the North Dakota Rules of Criminal Procedure is not applicable to this case. The amended criminal judgement's silence on the applicability of the eighty-five percent service requirement is neither a technical nor clear error. At the time Myers was sentenced for this case, North Dakota Century Code § 12.1-32-09.1 stated "an

offender who is convicted of a crime in violation of section... 12.1-17-02... and who receives a sentence of imprisonment is not eligible for release from confinement on any basis until eighty-five percent of the sentence imposed by the court has been served or the sentence is commuted.” At the time Myers was sentenced, in 2012, N.D.C.C. § 12.1-32-09.1 made the eighty-five percent rule apply to any offender convicted of a crime of aggravated assault. In 2015, the North Dakota Legislature made changes to both N.D.C.C. §§ 12.1-32-09.1 and 12.1-17-02. N.D.C.C. § 12.1-17-02 was divided into two subsections. The first subsection was for aggravated assaults that were class C felonies. The second subsection was for aggravated assaults that were class B felonies. N.D.C.C. § 12.1-32-09.1 was changed to apply the eighty-five percent rule only to aggravated assaults that were class B felonies.

[¶ 11] The eighty-five percent rule is not something that needs to be mentioned in every criminal judgment. Myers cites State v. Peterson to support his argument that the eighty-five percent rule needs to be specifically mentioned in a criminal judgment. 2016 ND 192, 886 N.W. 2d 71. In Peterson, the defendant was convicted of burglary under N.D.C.C. § 12.1-22-02(2). Id. at ¶ 2. The eighty-five percent rule applies only to subsection (b) of N.D.C.C. § 12.1-22-02(2). See N.D.C.C. § 12.1-32-09.1. Therefore, the North Dakota Department of Corrections and Rehabilitation needed the criminal judgment, in that case, clarified to make sure the defendant was convicted under the subsection to which the eighty-five percent rule applied. Id. at ¶ 4. In this case, however, the eighty-five percent rule applied to the entire aggravated assault statute. Myers’ criminal judgment did not need to specifically state that the eighty-five percent rule applied because the rule applied to anyone convicted of aggravated assault.

[¶ 12] The North Dakota Department of Corrections and Rehabilitation had sufficient information from Myers' criminal judgment to know that the eighty-five percent rule applied in this case. This is clear because in Peterson, the North Dakota Department of Corrections and Rehabilitation needed either specific mention to N.D.C.C. § 12.1-22-02(2)(b) or some other indication that the eighty-five percent rule applied. Id. In this case, however, the North Dakota Department of Corrections and Rehabilitation accepted the criminal judgment and applied the eighty-five percent rule to Myers without the need for any additional information.

[¶ 13] Additionally, Myers claims that he is entitled to apply N.D.C.C. § 12.1-32-09.1 retroactively to his case. "Generally, no statutory provision retroactively applies unless the Legislature expressly manifests a contrary intention." State v. Iverson, 2006 ND 193, ¶ 6, 721 N.W.2d 396. Retroactive application is disfavored, however, there is a narrow exception to the general bar to retroactivity to prevent an unjust result. Id. "Laws which confer benefits are often excepted from the general rule against retroactive application." Id. Notwithstanding the general rule against retroactivity and its narrow exception, a statute cannot apply retroactively when it becomes effective after a person has been finally convicted. Id. at ¶ 7. The Supreme Court of the United States has stated that "a final conviction means a case in which a judgment of conviction has been rendered and the availability of appeal has been exhausted." Id. (quoting Griffith v. Kentucky, 479 U.S. 314, 321 n. 6 (1987)) (internal quotation omitted).

[¶ 14] Myers was finally convicted before the before the revised N.D.C.C. § 12.1-32-09.1 was effective, so he is not entitled to have the statute applied retroactively. Myers pled guilty to the aggravated assault charge on April 27, 2012. The revocation hearing for this

case was held on April 29, 2013. Myers originally appealed the sentences, but he later moved to dismiss the appeal, which was granted on August 21, 2013. The updated version of N.D.C.C. § 12.1-32-09.1 was not effective until 2015. Therefore, the revised N.D.C.C. § 12.1-32-09.1 cannot be retroactively applied to Myers because the statute became effective after he was finally convicted.

CONCLUSION

[¶ 15] The district court was correct in denying Myers' Motion to Correct Sentence. Therefore, the State respectfully requests that this Court uphold the district court's Order denying Myers' Motion to Correct Sentence.

RESPECTFULLY SUBMITTED:

Dated this 22th day of May, 2017.



Derek K. Steiner, N.D. Bar I.D. # 08124
Burleigh County Assistant State's Attorney
514 East Thayer Avenue
Bismarck, ND 58501
Phone: (701) 222-6672
Email: bc08@nd.gov

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Danny Joseph Myers,)
)
Defendant-Appellant,)
)
-vs-)
)
State of North Dakota,)
)
Plaintiff-Appellee,)
)

Supreme Ct. No. 20170094
District Ct. No. 08-2011-CR-02739

STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

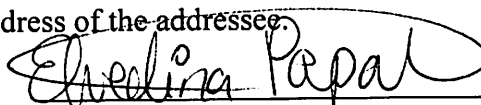
I, Elvedina Papalichev, being first duly sworn, depose and say that I am a Legal Resident over 21 years old, and on the 22 day of May, 2017, I deposited in a sealed envelope a true copy of the attached:

1. Brief of Plaintiff-Appellee
2. Affidavit of Mailing

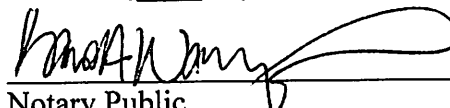
in the United States mail at Bismarck, North Dakota, postage prepaid, addressed to:

Samuel A. Gereszek
Attorney at Law
Hammarback & Scheving, P.L.C.
308 Demers Avenue
East Grand Forks, MN 56721

which address is the last known address of the addressee.


Elvedina Papalichev

Subscribed and sworn to before me this 22nd day of May, 2017.


Notary Public
Burleigh County, North Dakota

KATIE A. WANGLER
Notary Public
State of North Dakota
My Commission Expires November 4, 2020