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AUGUST 18, 2017
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

HARUNA MUNTARI GIWA, a.k.a. HARONA MONTARI GIWA,	)	
Petitioner and Appellant,	)	Supreme Court No. 20170168
vs.	)	District Ct. No. 45-2016-CV-00500
State of North Dakota,	)	
Respondent and Appellee.	)	

APPELLEE'S BRIEF

On Appeal from the District Court, County of Stark, State of North Dakota
Southwest Judicial Circuit, the Honorable Rhonda R. Ehlis, Presiding
Memorandum Opinion Dated March 16, 2017
Denying Application for Post Conviction Relief

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[¶3] STATEMENT OF ISSUES

[¶4] Pursuant to Rule 28(c)(2) of the North Dakota Rules of Appellate Procedure, Appellee is satisfied with Appellant's Statement of Issues.

[¶5]STATEMENT OF CASE

[¶6] Pursuant to Rule 28(c)(3) of the North Dakota Rules of Appellate Procedure, Appellee is satisfied with Appellant's Statement of the Case.

[¶7] STANDARD OF REVIEW

[¶8] Pursuant to Rule 28(c)(5) of the North Dakota Rules of Appellate Procedure, Appellee is satisfied with Appellant's Standard of Review.

[¶9] STATEMENT OF FACTS

[¶10] On October 13th, 2015, Haruna Giwa committed the offense Interfering With Telephone Call During Emergency Call. The State issued a Summons for Mr. Giwa on October 19th, 2015. (Appellant's App. 29) Thereafter, on November 16th, 2015, Mr. Giwa met with Assistant State's Attorney Brittany Bornemann to discuss the matter. (Appellant's App. 31-35) At that time, Mr. Giwa was unrepresented by counsel and he chose to waive his right to counsel. (Appellant's App. 33) On November 16, 2015 Mr. Giwa signed a plea agreement wherein he plead guilty to the charge of Interference with 911 Call, a Class A Misdemeanor. (Appellant's App. 33-34) Contained within this plea agreement was an enumeration of Mr. Giwa's rights. (Appellant's App. 31-32) On November 16, 2015, Mr. Giwa signed an acknowledgment of these rights stating that he had personally read and understood them. (Appellant's App. 32) Subsequently, on November 17, 2015, the Criminal Judgment in the matter was signed.

[¶11] On June 21, 2016, Defendant filed a Post Conviction Relief Application. On July 18th, 2016, the State moved for Summary Disposition in the matter. (Appellant's App. 1, 15) In support of his application filed on June 21, 2016, Defendant filed an affidavit on September 29, 2016. (Appellant's Brief ¶7)

[¶12] On March 14th, 2017, this matter was heard before the Honorable Rhonda Ehlis. (Appellant's App. 57-76) At this hearing the Affidavits of Haruna Giwa and Brittney Bornemann were considered, along with the underlying criminal and civil record. Additionally, both sides had an opportunity to orally argue the case and answered questions asked by the Court. (Supra)

[¶13] On March 16th, 2017, the Court issued its Memorandum Opinion finding that:

> "... there is no genuine issue of material fact and that the State is entitled to judgment as a matter of law under N.D.C.C. §29-32.1-09(3)" (Appellant's App. 55, ¶26)

[¶14] On May 4, 2017, Defendant filed his Notice of Appeal, which brings us before the Court here today.

[¶15] LAW AND ARGUMENT

[¶16] While Defendant only lists one statement of the issue in his Brief (Appellant Brief iv), that the

> "District Court erred by finding there was no genuine issue as to any material and that the Respondent Appellee, State of North Dakota, was entitled to judgment as a matter of law under Section 29-32.1-09(3).",

he seems to break this issue into two distinct arguments.

[¶17] On the one hand, Defendant argues that there has been,

"a significant change in procedural law, which in the interest of justice, should be applied retrospectively." (Appellant Brief 7)

[¶18] On the other hand, Defendant goes on to argue that,

"...he did not enter into the guilty plea knowingly, intelligently, and voluntarily." (Appellant Brief 8)

In the interest of being precise, the State will address these issues individually.

[¶19] The second argument raised by Defendant is whether Rule 11(b)(1)(J) of the North Dakota Rules of Criminal Procedure should be applied retroactively. This rule states that before accepting a plea of guilty, a Court must determine whether the Defendant understands,

"that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future."

During oral argument, held on March 14, 2017 before the Honorable Judge Rhonda Ehlis, Defendant conceded that this matter is a matter of law to be decided by the Court. (Appellant's App. 59, ¶3, line 10-13)

[¶20] To this point, Defendant cites Rule 11(b)(1)(J) to support his claim that he was not advised of his rights regarding his immigration status and consequences. Crucially, however, this portion of the Rule was specifically added in March of 2016. See Explanatory Notes of N.D.R.CrimP. 11. The portion of the Rule to which the

Defendant cites did not exist until more than four months after the Defendant pled guilty. The Defendant cites to no authority indicating that this requirement for advisement is or should be applied retroactively, and the State herein asserts that it would be a miscarriage of justice if it were applied retroactively. Thus, not only was this plea agreement and conviction obtained in accordance with the North Dakota Law, but also, the change in law that would apply in this case should not be applied retroactively. At the time of the rule's drafting, the Rules Committee would have been free to include an instruction that the rule was to be applied retroactively. No such instruction exists.

[¶21] More to the point, the rule as it now exists burdens the Court, not the prosecutor, with ensuring that the Defendant has been made aware of the implications on his immigration status. In the case from which this rule stems, Padilla v. Kentucky, 559 U.S. 356, 367, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), the United States Supreme Court held that the defense attorney should be held responsible to inform the Defendant of the implications of his immigration status. In this case, Defendant explicitly waived his right to an attorney and signed a statement to that effect. (Appellant's App. 33)

[¶22] Defendant broadly argues that N.D.C.C. 29-32.1-01 should compel this Court to overturn the District Court's decision because "a significant change in substantive or procedural law has occurred with, in the interest of justice, should be applied retroactively." The "interests of justice" do not occur in a vacuum. In the District Court's Memorandum, signed on March 16, 2017, the Honorable Judge Rhonda Ehlis states,

"Applying this new constitutional interpretation to this case could possibly open up the floodgates to future post-conviction relief claims based on this issue." (Appellant's App. 59, ¶3, line 10-13)

[¶23] If Defendant's rational and argument were to win the day, the floodgates on all Rule 43 plea agreements and accepted guilty pleas would be swung wide open. All Defendants who have plead guilty since Padilla v. Kentucky, 559 U.S. 356, 367, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010) and have not been informed of the possible immigration implications would be free to challenge the validity of their conviction.

[¶24] Additionally, as to the "interests of justice" argument, Defendant's own behavior and criminal record must be considered. While Defendant has been allowed to withdraw his guilty plea in Case No. 45-2015-CR-00974, it is worth noting that between July 30th, 2015 and February 10, 2016 Defendant managed to be charged with two counts of Interference with Telephone During Emergency Call, one count of Stalking, and one count of Violation of a Protection Order. Because of Defendants absence, warrants for his arrest have been issued in all four cases. The State points to these to illustrate the point that in the "interests of justice", this Court is free to take a universal view of the case.

[¶25] In addressing Defendant's second claim, that his plea was not, "...knowingly, intelligently, and voluntarily" (Appellant Brief 8) given, the State argues that the plain facts of the case and the documents in the Court record directly contradict this claim. First of all, the State would point out that the affidavit of Haruna Giwa was submitted to the District Court on September 26th, 2016, which was approximately three

months after filing his application for Post Conviction Relief and over two months after the State's service of its Motion for Summary Disposition. (Appellant's App. 1) Viewed in this light, the claims made by Defendant that his plea was not knowing, intelligent, or volunteer seem to be self serving at best.

[¶26] Additionally, as mentioned before, Defendant had previously signed a plea agreement wherein he pled guilty in Case No. 45-2015-CR-00974. (Appellant's App. 24-28) In this case Defendant was charged with the exact same criminal offence as in the underlying case at issue here. In Case No. 45-2015-CR-00974 Defendant was represented by counsel. The underlying criminal case at issue here was not the Defendant's first exposure to the criminal justice system or the Defendant's enumerated rights.

[¶27] In the underlying criminal case, Defendant signed a plea agreement in which all of his rights were specifically enumerated. (Appellant's App. 31-32) He further signed on the next page that he was specifically waiving his right to counsel in this case. (Appellant's App. 33) The very purpose of these forms is to ensure and preserve for the record the fact that the Defendant is signing the plea agreement and submitting a guilty plea knowingly, intelligently, and voluntarily. The Court should consider his signatures on these documents to serve as prima facie evidence that his plea was knowing, intelligent, and voluntary.

[¶28] In the District Court's memorandum, dated March 16, 2017 by the Honorable Judge Rhonda Ehlis, it is noted that indeed that,

> "The first page and part of the second page set out Giwa's rights." (Appellant's App. 50, pg 2, ¶7)

and

"Giwa signed below these rights, acknowledging that he was the Defendant, he had read the rights given, and he understood those rights." (Appellant's App. 50, pg 2, ¶8)

[¶29] In his brief, Defendant states that the District Court did not even address Mr. Giwa's claim of his plea not being knowingly, intelligently, and voluntarily. However, the State would point to paragraphs 7 and 8 of the Memorandum (cited above) as proof positive that the Court did consider this argument, and dismissed it due to Defendant's signature and waiver in the plea agreement.

[¶30] Finally, in his brief, Defendant suggests that his plea was not knowingly, intelligently, and voluntarily given because he was not provided the information that is now required in N.D.R.Crim.P. 11(b)(1)(J). As discussed before, this part of the advisement was not required at the time. The Defendant could not have been advised of a rule that didn't exist at the time he signed the document and the absence of this advisement did nothing to effect his ability to knowingly, intelligently, and voluntarily enter a plea of guilty to the underlying criminal charge.

[¶31] For these reasons, the State believes that Mr. Giwa's plea of guilty was given knowingly, intelligently, and voluntarily and that, as such, the ruling of the District Court should stand.

[¶32] CONCLUSION

[¶33] The Defendant's arguments fail on both of his argued grounds. First of all, the "interests of justice" do not require that this Court retroactively require an advisement

that went into effect at least 4 months after his plea of guilty. If the committee promulgating the rule had desired that this be applied retroactively, they could have required that. They did not and neither should this Court.

[¶34] Secondly, Defendant's claim that he did not knowingly, intelligently, or voluntarily enter into the plea agreement is not credible. He submitted the affidavit in which this claim was made months after the filing of the Motion for Summary Disposition. Further, Defendant signed an acknowledgment of all of his rights and waived his right to counsel. To claim now that, despite these signatures, his plea could not be knowing, intelligent, or voluntary because he was not made aware of a right which did not yet exist simply does not make sense. He knew what he was signing and what he was doing. Further, the District Court did all that was required of it at the time to ensure that this was the case.

[¶35] For these reasons, the State respectfully request that this Court deny Defendant's petition and affirm the ruling of the District Court.

Respectfully submitted this 18th day of August 2017.

/s/ Aaron Roseland
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[¶36] CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was sent by e-mail on the 18th day of August, 2017 to:

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/s/ Aaron Roseland
Aaron Roseland

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NORTH DAKOTA)
ss
COUNTY OF STARK)

[¶1] Elitza Z. Miltcheva, being first duly sworn, deposes and states that on August 21, 2017, she placed hard copies of the ***Brief for Respondent and Appellee*** in the matter of Haruna Muntari Giwa a.k.a. Harona Montari Giwa v. State of North Dakota, North Dakota Supreme Court Case No. 20170168, an appeal from district court case No. 45-2016-CV-00500, in an envelope addressed to the Petitioner and Appellant as follows, and deposited the same with the United States Postal Service:

addressed to the Petitioner and Appellant as follows, and deposited the same with the United States Postal Service:

Mr. Haruna Giwa
c/o Safiyatu Aliyu
PO Box 12484
Accra, Ghana

Elitza Z. Miltcheva
Elitza Z. Miltcheva

[¶2] Subscribed and sworn to before me on August 21, 2017.

(SEAL)

Toni Van Orman
Toni Van Orman

TONI VAN ORMAN
NOTARY PUBLIC, STATE OF NORTH DAKOTA
MY COMMISSION EXPIRES DEC 22, 2021