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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20170187

State of North Dakota,)
)
Plaintiff/Appellee,)
)
vs.)
)
Richie Edwin Wilder, Jr.)
)
Defendant/Appellant.)

APPEAL FROM THE CRIMINAL JUDGMENT
NORTH EAST JUDICIAL DISTRICT
WARD COUNTY CRIMINAL. NO. 51-2015-CR-02854
THE HONORABLE GARY LEE PRESIDING

BRIEF

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ABBREVIATIONS

Transcript from the Jury Trial	Tr.Tr.
Transcript from the May 4, 2017 Sentencing Hearing	S.Tr.
Transcript from the September 11, 2017 N.D.R.Crim.P. 35 Motion Hearing	M.Tr.
September 18, 2017 Order Granting Motion to Correct Sentence In Part	O.
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STATEMENT OF THE ISSUES

[¶1] ISSUES I. Whether or not Mr. Wilder's constitutional rights to remain silent were violated by the State's comments during closing and rebuttal statements?

II. Whether or not the Provision of the September 18, 2017 2nd Amended Criminal Judgment prohibiting Mr. Wilder from having any contact whatsoever with A.W., age 12, and N.W., age 6, until each of their respective 18th birthdays is an illegal sentence?

III. Whether or not the district court erred when it prohibited Mr. Wilder from introducing testimony of the guardian ad litem regarding A.W. and N.W.'s desire for contact with Mr. Wilder at the September 11, 2017 hearing on Mr. Wilder's motion to correct his sentence?

NATURE OF THE CASE

[¶ 2] The Complaint and warrant of arrest were filed on December 18, 2015.

[¶ 3] A preliminary hearing and/or arraignment was scheduled before Judge Lee on February 25, 2016.

[¶ 4] The information was filed on March 3, 2016.

[¶ 5] The jury trial in this case began on December 12, 2016 and ended on December 16, 2016.

[¶ 6] The jury rendered its verdict of guilty on December 16, 2016.

[¶ 7] A Request for Transcripts was filed on March 22, 2017.

[¶ 8] A Sentencing Memorandum was filed on April 26, 2017.

[¶ 9] Sentencing took place on May 4, 2017 and a criminal judgment and amended criminal judgment were filed on May 4, 2017.

[¶10] A Notice of Appeal was filed on May 17, 2017 and it was forwarded to the North Dakota Supreme Court as was the Request for Transcript.

[¶ 11] On June 14, 2017 Clerk Certificates of Appeal were mailed to Mr. Wilder's attorney, Benjamin C. Pulkrabek, the prosecuting attorney, Kelly Dillon, and the North Dakota Supreme Court.

[¶ 12] A Motion to correct an illegal sentence was filed on July 31, 2017.

[¶ 13] A Clerk's Supplemental Certificate of Appeal was filed on July 31, 2017.

[¶ 14] A Notice of Hearing on Motion to correct illegal sentence was filed August 15, 2017 along with a Response to Resistance to Motion to Correct Illegal Sentence

[¶15] A Clerk's Supplemental Certificate of Appeal was filed on August 16, 2017.

[¶ 16] The Criminal Judgment was filed on September 19, 2017.

[¶ 17] Defendant, Richie E. Wilder Jr., filed a Second Notice of Appeal on September 25, 2017 along with an Order for Transcript and a Notice of Filing of Notice of Appeal.

STATEMENT OF FACTS

[¶ 18] Angila Wilder (Angila) and her boyfriend Christopher Jackson (Mr. Jackson) were living together in Minot North Dakota in 2015. At about 9:40 PM on November 12, 2015 Angila gave Mr. Jackson a ride to work.

[¶ 19] When Mr. Jackson was at work at Walmart he usually made three phone calls to Angila. The first was at his work break at 12 o'clock. The second was at his lunch break at 2 AM. The third was when his work ended at 5 AM. On the night November 12, 2015 and the morning of November 13, 2015, Mr. Jackson followed the above schedule and made all three calls to Angila. Angila answered the 12 o'clock call and the 2 AM call. She did not answer the 5 AM call so Mr. Jackson sent her a text message.

[¶ 20] On November 13, 2015 at about 4:50 AM Mr. Jackson checked out from his job and went to where Angila usually parks her car when she picks him up. When Mr. Jackson couldn't find Angila or her car in that area he made several phone calls to Angila. Because all the calls were unanswered he took a taxi home.

[¶ 21] When Mr. Jackson got home he banged on the bedroom window, thinking that would wake Angila up and he could tease her about sleeping in. When Angila didn't come to the bedroom window Mr. Jackson banged on the living room window. When the banging on the living room window got no response Mr. Jackson walked around the corner of the house and saw that the front door to the house was broken in. This caused Mr. Jackson to go to the front door

and yell a number of times for Angila. When he got no response to his yelling he called the police. Then he went out on the street to wave the police down when they arrived.

[¶ 22] The police arrived and checked out the house. Angila's body was found in her bedroom containing stab wounds. Officer Goodman testified that when the investigation of stabbing death of Angila began, Mr. Jackson was a subject of focus. This focus ended when the police confirmed by investigation all the things that Mr. Jackson said he did on the night of November 12, 2015 and the morning of November 13, 2015.

[¶ 23] The other person who was a subject of focus on the stabbing of Angila was Richie Wilder Jr. (Mr. Wilder). When Mr. Wilder first met with police he claimed he never went to Angila's home on the night of November 12, 2015 or the morning of November 13, 2015. After that Mr. Wilder and State's witnesses Paul Madriles and

Jeremiah Tallman placed Mr. Wilder at Angila's home at the time when Angila was stabbed to death. Jeremiah Tallman was the only one that claimed Angila was stabbed by Mr. Wilder. Mr. Wilder and Mr. Madriles both told the police that there was another person who stabbed Angila.

[¶ 24] Other evidence presented during the trial that made Mr. Wilder the subject of focus for the Minot police was:

1. The scratch that was on his face when he first came to talk to the Minot police on November 13, 2015;
2. His DNA that was found on the fingernails of Angila;
3. Blood from Angila was found in the Honda owned by Mr. Wilder's wife, Cynthia Wilder

[¶ 25] During the trial, the prosecutor, in her closing and rebuttal statements commented on Mr. Wilder's right to remain silent. In her closing statement the prosecutor said:

> There is a husky Native American, but Richie Wilder never reported that to law enforcement.

T.Tr.P.427, L.13-15.

[¶ 26] In her rebuttal statement the prosecutor said:

> Mr. Rosenquist says he didn't know who this person was, the stranger in Angila's bedroom that killed her. Took him out of the house at knife point. He told Paul Madriles who it was, he was 100% sure it was that husky Native American that was brought into the jail in February. Why didn't he report that to law enforcement? Why didn't he report to law enforcement that somebody else was there? He tells the Chris Jackson story, they prove

> him wrong on that. Why didn't he tell law enforcement about the guy coming out of the closet with the knife? Because it didn't happen. There was no guy with a knife? The only guy with a knife was Richie Wilder.

T.Tr.P.434, L.19-25, P.435, L.1-3.

[¶ 27] The jury found Mr. Wilder guilty of murder, a class AA felony. After that finding of guilt the trial judge ordered a presentence report.

[¶ 28] At the May 4, 2017 sentencing hearing the district court ordered Mr. Wilder to serve a sentence of life without the possibility of parole and ordered that Mr. Wilder was to have no contact whatsoever, with A.W., Mr. Wilder's 12-year-old daughter with Angila, and N.W., Mr. Wilder's 6 year-old-son with Angila. S.Tr. 27, ¶12 – 27, ¶ 11.

[¶ 29] Mr. Wilder filed a Motion to Correct his sentence pursuant to N.D.R.Crim.P. 35 arguing that the no-contact provision in his sentence was illegal. At the September 11, 2017 hearing on Mr. Wilder's motion to correct the illegal sentence, Mr. Wilder presented the testimony of the guardian ad litem that had been court-appointed to represent A.W. and N.W. in guardianship and adoption proceedings. M.Tr. 3, ¶¶ 22-25. The guardian testified that as far as she was aware, the children never asserted rights pursuant to Article I, Section 25. M.Tr. 4, ¶¶ 11-14. The guardian also testified that she had spoken with the children regarding whether they wished to have continued contact with Mr. Wilder. M.Tr. 4, ¶¶ 15-18. However, when the guardian was asked whether the children indicated if they wanted contact with Mr. Wilder, the State objected on hearsay grounds and the court sustained the State's objection. M.Tr. 4, ¶¶ 19-23.

[¶ 30] On September 18, 2017 the court issued an Order granting Mr. Wilder's motion to correct sentence in part. O. 2, ¶ 5. The court amended the no-contact provision with A.W. and N.W. was to expire on their respective 18th birthdays. O. 2, ¶ 6.

LAW AND ARGUMENT

[¶ 31] Mr. Wilder asserts that (I) the State violated Mr. Wilder's constitutional rights

when the prosecutor commented on his right to remain silent and as a result he is entitled to a new trial. Mr. Wilder also argues that even if he is not entitled to a new trial, his sentence should be amended because (II) the provision of the September 18, 2017 2nd Amended Criminal Judgment prohibiting Mr. Wilder from having contact with A.W. or N.W. until each of their 18th birthdays is illegal and, even if the Supreme Court does not amend his sentence outright, it should remand to the district court for a new hearing because (III) the district court erred when it prohibited Mr. Wilder from introducing testimony regarding the children's desire for contact at the September 11, 2017 Motion Hearing.

[¶32] ISSUE I. Whether or not Mr. Wilder's constitutional rights to remain silent were violated by the State's comments during closing and rebuttal statements?

[¶ 33] The two above quotes in [¶24] and [¶25] of the Statement of Facts by the prosecutor were comments made to ensure the jury knew Mr. Wilder remained silent on facts the prosecutor incorrectly believed Mr. Wilder had a duty to report.

[¶ 34] Prosecutors are forbidden from commenting about a defendant's right to remain silent. Accused's right to remain silent is protected by both the 5th Amendment to the United States Constitution and Article I, Section 12 of the North Dakota Constitution.

[¶ 35] Mr. Wilder's constitutional rights to remain silent were violated by the State commenting on his silence to the jury. According to State v. Wicks, 1998 ND 76, ¶ 17 and State v. Messner, 1998 ND 151, ¶ 8, the standard of review for a claimed violation of a constitutional right is de nova.

[¶ 36] The district court gave the following closing instruction to the jury prior to the State's closing and rebuttal statements:

> A defendant has a constitutional right not to testify. You must not draw any inference of guilt from the defendant's silence. The prosecutor cannot mention the defendant's silence, and you must not discuss or consider it.

Tr.day 4, P.407, L.23-25 and P.408, L.1-2.

[¶ 37] After the above jury instruction the prosecutor knew or should have known she was not to comment on Mr. Wilder's silence. Yet the prosecutor ignored the above instruction, the 5th Amendment to the United States Constitution, and Article I, Section 12 of the North Dakota Constitution and commented on Mr. Wilder's silence.

[¶ 38] The State's comments violate Mr. Wilder's rights to remain silent if: according to State v Ball, 2004 SD 9, 675 N.W. 2d 192:

> We next turn to the substantive test to determine whether the prosecutorial comments on a defendant's silence violate the Fifth Amendment. See Butler v. Rose, 686 F2d 1163, 1170 n6 (6thCir 1982) (Discussing "universal application' of the test). "[T]he test is whether the language used [by the prosecutor] was manifestly

> intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." Knowles v. United States, 224 F2d 168, 170 (10thCir 1955). See also United States v. Sanders, 547 F2d 1037, 1042 (8thCir 1976); United States v. Lyon, 397 F2d 505, 509 (7thCir 1968) (citing Knowles), cert. denied, 393 US 846, 89 Sct 131, 21 LEd2d 117. Although the Knowles test has yet to be adopted in South Dakota, many states embrace this rule.[6] Today, we adopt this test.

[¶ 39] The part of the prosecutor's closing statement that referred to Mr. Wilder's silence was:

> but Richie Wilder never reported that to law enforcement.

Tr.P.427.L.13-15. The part of the prosecutors rebuttal statement that referred to Mr. Wilder's silence was:

> Why didn't he report that to law enforcement? Why didn't he report to law enforcement that somebody else was there? Why didn't he tell law enforcement about the guy coming out of the closet with a knife?

[¶40] When the prosecutor used the above language in her closing and rebuttal statements she had to have a reason and purpose. Since all of the above language refers to Mr. Wilder's not talking, the prosecutor's purpose and reason was to be to call the jurors attention to Mr. Wilder's silence and to imply he had a duty to speak.

[¶41] Prosecutors are well aware of a defendant's constitutional rights to remain silent. They also know that they can get away at trial with commenting on a Defendant's right to remain silent because of the following language in State v. Anderson, 2016 ND 28, 875 NW2d 496.

> "A district court has discretion to control closing arguments." State v. Kruckenberg, 2008 ND 212, _27, 758 N.W.2d 427. "We will not reverse a district court's control of closing argument absent a clear abuse of discretion." Id. "If the defendant does not object during closing argument, we will not reverse a decision unless the challenged remarks constitute obvious error affecting a defendant's substantial rights." Id. (quotation marks omitted). "In deciding if there was obvious error, we consider the probable effect of the prosecutor's improper comments on the jury's ability to judge the evidence fairly." Id.
>
> After reviewing the record, we conclude Anderson has not established the State's remarks were improper. As noted above, the State's questions were a legitimate form of impeachment under N.D.R.Evid. 602. Here, the State attacked the veracity of Anderson's testimony that he refused to go through his testimony prior to trial. We conclude the State's remarks in closing argument do not constitute obvious error.

[¶ 42] Prosecutors in North Dakota today have developed an attitude that they can always get away with commenting on defendant's constitutional right to remain silent during a trial. So, there is no reason not to comment. Prosecutors know if their comments on a defendant's silence are objected to the trial judge will sustain the objection and give a jury instruction to try to cure the comment. If the prosecutor's comment on a defendant's silence isn't objected to the best the Defendant can do on appeal is show that the comment was contrary to Defendant's constitutional right to remain silent but that won't be enough to have an adverse effect on the jury's guilty verdict.

[¶43] ISSUE II. Whether or not the Provision of the September 18, 2017 2nd Amended Criminal Judgment prohibiting Mr. Wilder from having any contact

whatsoever with A.W., age 12, and N.W., age 6, until each of their respective 18th birthdays is an illegal sentence?

[¶ 44] Although a district court typically has a wide range of discretion in fixing a criminal sentence, that sentence can be set aside for an abuse of discretion when the sentence imposed exceeds the statutory limits. State v. Ennis, 464 N.W.2d 378, 382 (N.D. 1990) (citations omitted); State v. Rudolph, 260 N.W.2d 13, 16 (N.D. 1977) (citations omitted). The no-contact provision in Mr. Wilder's criminal judgment is illegal and should be set aside because: the court lacked authority to issue the provision from either (A) Article I, Section 25 or (B) Article VI, Section 8 and N.D.C.C. § 27-05-06 and (C) construing Article I, Section 25 and Article VI, Section 8 of the North Dakota Constitution and N.D.C.C. § 27-05-06 as providing authority for the no-contact provision violates Mr. Wilder's constitutional rights.

A. Article I, Section 25 of the North Dakota Constitution Did Not Authorize the No-Contact Provision

[¶ 45] The court found that Article I, Section 25 provided for the rights of victims of

crimes and that these protections would include the imposition of a no-contact provision to protect the victim. O. 6, ¶ 17; 8, ¶ 20. The court was incorrect because: (1) Article I, Section 25 does not grant a "victim" a right to have another individual criminal sentence include a no-contact provision; (2) it was improper for the court to find A.W. and N.W. were victims; and (3) victim rights were not properly asserted.

1. Article I, Section 25 Does Not Grant a "Victim" a Right to Have another Individual's Criminal Sentence Include a No-Contact Provision

[¶ 46] Article I, Section 25(1) provides a list of rights all victims are entitled to. The court found that Article I, Section 25 included "a right of no-contact with the perpetrator of th[e] crime." O. 8, ¶ 23. However, the court did not cite to any actual provisions of Article I, Section 25 that list such a right of no-contact because those provisions do not exist. Article I, Section 25(1) provides nineteen separate paragraphs of rights that a "victim" is entitled to. None of those rights include a right to a no-contact provision as part of a judgment.

2. It Was Improper for the District Court to Find that A.W. and N.W. Were Victims

[¶ 47] Even if a "victim" has a right to a no-contact provision pursuant to Article I, Section 25, the district court erred in its determination that A.W. and N.W. were victims. A "victim" for purposes of Article I, Section 25, is "a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act or against whom the crime or delinquent act is committed." N.D.Const. Art. I, § 25(4). The district court improperly determined that Article I, Section 25 "also defines victims to include the child of the victim if the victim is deceased." O. 8, ¶ 24. Article I, Section 25 does not provide that a child of a deceased victim is also considered a victim. Instead, Article I, Section 25(4)

clearly states that if a victim is deceased, then the victim's child may exercise the victim's rights.

[¶ 48] Not only did the district court make the wrong determination that A.W. and N.W. were considered "victims" because they are the children of a victim, but it was wrong for the court to make any determination about who was a "victim" for purposes of Article I, Section 25 because Mr. Wilder exercised his constitutional right to have a jury determine the facts of his case.

[¶ 49] Constitutional rights to due process and to a jury trial require that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). See also State v. Tutt, 2007 ND 77, ¶ 7 (citations omitted). If the court finding Mr. Wilder's children were victims subjected Mr. Wilder to the additional punishment of a no-contact provision, then the finding that the children are victims increased the penalty for the crime beyond the statutory maximum and must be submitted to the jury.

3. Victims' Rights Were Not Properly Asserted

[¶ 50] Even if Article I, Section 25 authorized a no-contact provision for a victim, and the district court did not err in finding that A.W. and N.W. were victims, the district court did not have the authority to assert Article I, Section 25(1) rights on behalf of either A.W. or N.W.

[¶ 51] N.D.Const. Art. I, § 25(2) explicitly provides that the victim, a lawful representative of the victim, or the attorney for the government upon request of the victim, may assert and seek enforcement of the rights it provides. As discussed above, Section 25(4) provides that a deceased victim's child may exercise the deceased victim's rights. N.D.Const. Art. I, § 25(4). Article I, Section 25(2) then instructs the court that it is to act promptly upon a request for assertion and enforcement of Article I, Section 25 rights.

[¶ 52] Neither the victim, a lawful representative of the victim, an attorney for the government upon request of the victim, or A.W. and N.W. as a representative for their deceased mother ever requested that any Article I, Section 25 rights be asserted or enforced. Instead, the district court "imposed the no-contact provision sua sponte, acting in the role of parens patriae." O. 9, ¶ 27. Not only does Article I, Section 25 not authorize a district court to invoke rights on behalf of a victim, but it is the State, and not the court, that is ever able to assume the rule of *parens patriae*.

[¶ 53] "Parens patriae means literally 'parent of the country.'" Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S. 592, 600 (1982). The doctrine of *parens patriae* is "the idea of a paternal power in the state – a parens patriae—not the king, nor the chancellor, but a power existing somewhere to take care of the sick, the widow, and the orphan. Vidal v. Girard's Ex'rs, 43 U.S. 127, 168 (1844). The doctrine of *parens patriae* forms the foundation for juvenile court systems and gives the State standing to petition the court to have children removed from their parents. It supports North Dakota's

Juvenile Court Act, outlined in Chapter 27-20 of the North Dakota Century Code, which would have authorized the State to file a petition to lawfully terminate Mr. Wilder's parental rights to A.W. and N.W. or to have removed A.W. and N.W. from the care of Mr. Wilder's wife. However, Mr. Wilder is not aware of any authority that allows a district court to act *sua sponte* in the role of *parens patriae*.

[¶ 54] Perhaps the district court intended to use the phrase, "*in loco parentis*," which means "in the place of a parent" to describe its actions. *In loco parentis*, Black's Law Dictionary (10th ed. 2014). However, Mr. Wilder is not aware of any legal precedent that would allow a district court to assert rights pursuant to Article I, Section 25 on behalf of two children that never appeared before the court and whose wishes the court declined to hear testimony from the guardian ad litem about.

B. Article VI, Section 8 and N.D.C.C. § 27-05-06 Did Not Give District Court Authority to Issue No-Contact Provision

[¶ 55] The court found that "Article VI, Section 7, North Dakota Constitution, confers authority on the district court for original jurisdiction over all cases, and provides authority to issue all writs necessary to the proper exercise of that jurisdiction." O. 4, ¶ 12. Article VI, Section 7 of the North Dakota Constitution actually addresses how supreme court justices are to be chosen. Mr. Wilder is operating under the assumption that the district court intended to reference Article VI, Section 8 of the North Dakota Constitution.

[¶ 56] The court determined that N.D.C.C. § 27-05-06 gave it authority to issue the no-contact provision since N.D.C.C. § 27-05-06(1) gives the courts common-law jurisdiction and authority to redress all wrongs committed against the laws of North Dakota affecting persons and N.D.C.C. § 27-05-06(3) gave the court the powers necessary to the complete jurisdiction and administration of justice and to carrying into effect the courts' judgments. O. 4, ¶ 12.

[¶ 57] This Court defines "jurisdiction" as:

> Authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. Jurisdiction is the power to hear and determine a cause of action. It does not depend upon the correctness of the decision made.

Schillerstrom v. Schillerstrom, 32 N.W.2d 106, 122 (N.D. 1948) (citations omitted). "There are, in general, three jurisdictional elements in every valid judgment; namely, jurisdiction of the subject-matter, jurisdiction of the person, and the power or authority to render the particular judgment." Taylor v. Oulie, 212 N.W. 931, 932 (N.D. 1927) (internal quotations and citations omitted). Before either Article VI, Section 8 or N.D.C.C. § 27-05-06 existed, it was recognized that the district court had both personal and subject matter jurisdiction over all persons charged with a criminal offense. State v. Overby, 209 N.W. 552, 554 (N.D. 1926). It is the last jurisdictional element, power or authority to render the particular judgment, which the district court lacked.

[¶ 58] The limits of a court's authority, or a court's jurisdiction, are imposed by the constitution. Schillerstrom, 32 N.W.2d at 122. "All powers of a court must be derived

from the government which created it, and they are limited by the constitutional or statutory provisions which confer the powers." Bryan v. Miller, 16 N.W.2d 275, 282 (N.D. 1944). The district court focused on the clause in Section 8 which stated that it had authority to issue writs, however that authority is conditioned upon those writs being necessary for the *proper* exercise of the district court's jurisdiction. N.D.Const. Art. VI, § 8.

[¶ 59] The court's conclusion that Article VI, Section 8 and N.D.C.C. § 27-05-06 gave it jurisdiction to issue the no-contact provision, despite the plain language of N.D.C.C. § 12.1-32-02(1) providing an exhaustive list of possible sentences, is incorrect because, as will be discussed in the proceeding sections, in issuing the provision, the district court violated Mr. Wilder's constitutional rights.

C. Interpreting Article I, Section 25, Article VI, Section 8, or N.D.C.C. § 27-05-06 as Granting Authority for the No-Contact Provision Results in an Unconstitutional Interpretation

[¶ 60] The Court is to construe statutes in a way that makes them constitutional. Leet v. City of Minot, 2006 ND 191, ¶ 13 (citations omitted). And the Court applies those same principles of statutory construction when it interprets constitutional provisions. Kelsh v. Jaeger, 2002 ND 53, ¶ 7 (citations omitted). Even if Article I, Section 25 or Article VI, Section 8, or N.D.C.C. § 27-05-06, appeared on their face to give the district court authority to include the no-contact provision, interpreting them in that manner results in an unconstitutional interpretation by violating (1) the separation of powers provisions; (2) the prohibitions on *ex post facto* laws; and (3) the due process clauses.

The Court gives a claim of a constitutional rights violation de novo review. State v. Myers, 2006 ND 242, ¶ 7 (citations omitted).

1. No Contact Provision Violated Separation of Powers

[¶ 61] Interpreting Article I, Section 25 or Article VI, Section 8, or N.D.C.C. § 27-05-06, as giving the district court authority to impose the no-contact provision violates the separation of powers provisions of both the United States and North Dakota Constitutions. "[T]he Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts." Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-560 (1992). "[D]efining crimes and fixing penalties are legislative, not judicial, functions." U.S. v. Evans, 333 U.S. 483, 486 (1948). As a sentence for a crime, a court may impose whatever punishment "is authorized by statute for his offense." Chapman v. U.S., 500 U.S. 453, 465 (1991). In enacting N.D.C.C. § 12.1-32-02(1), the legislature gave the courts a clear and exhaustive list of punishments that could be imposed as part of a criminal sentence.

[¶ 62] The district court did not determine that there was any ambiguity in Section 12.1-32-02(1). See U.S. v. Brown, 333 U.S. 18, 26 (1948) (penal statutes are strictly construed.); State v. Beciraj, 2003 ND 173, ¶ 14 ("Criminal statutes are strictly construed in favor of the defendant and against the government.") (citations omitted). Therefore, the district court had a duty to follow the plain language of the statute, and not look to other sources for additional interpretation.

[¶ 63] Instead, the court acknowledged that it did not have statutory authority to issue the no-contact provision as part of a criminal judgment and described itself "a vox clamantis in deserto." O. 3, ¶ 8. The court noted that N.D.C.C. § 12.1-31.2-02 gave it the authority to issue a no-contact order between a defendant and an alleged victim before trial and incorrectly found that N.D.C.C. § 12.1-32-07(2), as interpreted in State v. Aune, 2002 ND 176, and State v. Sahr, 470 N.W.2d 185 (N.D. 1991), gave it authority to impose a no-contact provision as a condition of probation. The court then concluded it should also be able to impose a no-contact provision while an individual was serving a sentence of incarceration. O. 3-4, ¶¶ 9-11. In all its strained reasoning, the district court apparently forgot that "the function of the courts is to interpret law, not to make law" and that "the law is what the Legislature says, not what is unsaid." Doyle ex rel. Doyle v. Sprynczynatyk, 2001 ND 8, ¶ 16; Little v. Tracy, 497 N.W.2d 700, 705 (N.D. 1993).

[¶ 64] The district court explained multiple times that it *should* have the authority to issue the no-contact provision. O. 4, ¶ 12; 8, ¶ 22. The district courts detailed explanation for why it crafted its sentence to include the no-contact provision makes it clear that the district court acted improperly by legislating from the bench. The "court cannot legislate." Lembke v. Unke, 171 N.W.2d 837, 853 (N.D. 1969) (Knudson, J., dissenting). It "cannot change statutory law by judicial decision. If there are any changes to be made in the statute, that is a matter to be left to the legislature, as it is for the legislature to determine policy, not for the courts." Id. (cited by the majority in Trinity Medical Center, Inc. v. Holum, 544 N.W.2d 148, 154 (N.D. 1996)). The legislature, not

the court, is tasked with weighing any policy concerns and deciding whether to amend a statutory provision. Treiber v. Citizens State Bank, 1999 ND 130, ¶ 17. The court cannot "disregard the letter of the statute under the pretext of pursuing its spirit." Trinity Medical Center, Inc., 544 N.W.2d at 154. See also N.D.C.C. § 1-02-05.

2. No Contact Provision Constituted an *Ex Post Facto* Application of Article I, Section 25

[¶ 65] Interpreting Article I, Section 25 or Article VI, Section 8, or N.D.C.C. § 27-05-06, as giving a court authority to impose a no-contact provision violates the prohibitions against ex post facto laws. Article I, Section 18 of North Dakota's Constitution and Article I, Section 10 of the United States Constitution prohibit North Dakota from passing any *ex post facto laws*. An *ex post facto law* is one that inflicts a greater punishment than was affixed to the crime at the time it was committed. State v. Burr, 1999 ND 143, ¶ 10 (citations omitted); Calder v. Bull, 3 U.S. 386, 390 (1798).

[¶ 66] The murder that Mr. Wilder was convicted of took place on or about November 13, 2015. Article I, Section 25 was not approved by voters until November 8, 2016, nearly one year after Mr. Wilder's crime occurred. The court found that imposing the no-contact provision pursuant to Article I, Section 25 did not impose an additional punishment upon Mr. Wilder because the purpose of the provision was to protect victims and therefore was remedial, not punitive. O. 14-15, ¶¶ 45, 47. The court cited to this Court's decisions in Burr and State v. Meador, 2010 ND 139, in reaching its conclusion.

[¶ 67] In Burr, this Court explained that "[a] law imposing a collateral consequence of a conviction may be applied retroactively [without violating the *ex post facto* clause] if the purpose is not to punish the offender but to protect some other legitimate interest." 1999 ND 143, ¶ 11. The distinction is whether the law is regulatory or punitive, "whether the legislature intended to punish an offender for a past act or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation." Burr, 1999 ND 143, ¶ 11 (citations and internal quotations omitted).

[¶ 68] "Collateral consequence" is defined as "the indirect implications of a criminal conviction, esp. as it may affect the defendant's immigration status, property forfeitures, civil-litigation posture, etc" or as "[a] penalty for committing a crime, in addition to the penalties included in the criminal sentence." *Collateral consequence*, Black's Law Dictionary (10th ed. 2014).

[¶ 69] The no-contact provision was not a collateral consequence. It was a direct consequence of Mr. Wilder's conviction imposed in the criminal judgment. If the intention in passing a law that allegedly violates the *ex post facto* clause is to impose punishment, no further analysis is need because the *ex post facto* clause is violated. Smith v. Doe, 538 U.S. 84, 92 -93 (2003) (citations omitted). It is only when the intention is to enact a *civil* regulatory scheme that the court will seek to determine whether that *civil* scheme is so punitive that it negates the regulatory intention. Id.

3. No-Contact Provision Violated Mr. Wilder's Rights to Due Process

[¶ 70] Interpreting Article I, Section 25 or Article VI, Section 8, or N.D.C.C. § 27-05-06, as giving a court authority to impose a no-contact provision violates due process. Both the Fourteenth Amendment to the United States Constitution and Article I, Section 12 of the North Dakota Constitution prohibit North Dakota from depriving Mr. Wilder life, liberty, or property without due process. The imposition of the no-contact provision as part of the criminal judgment violated Mr. Wilder's rights to due process by (a) retroactively applying a judicial interpretation of two constitutional provisions and a statute and (b) serving as a de facto termination of Mr. Wilder's parental rights.

a. Retroactive Application of Judicial Interpretation

[¶ 71] A vague sentencing law violates due process if it does not state with sufficient clarity the consequences of violating a criminal statute. U.S. v. Batchelder, 442 U.S. 114, 123 (1979) (citations omitted). See also Johnson v. U.S., 135 S.Ct. 2551, 2557 (2015) (due process principles apply to the statutes defining the elements of crimes fixing sentences for crimes). The United States Supreme Court explained that:

> an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law. . . If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.

Id. at 353-354. When a judicial interpretation alters a legal principal, that interpretation cannot be given retroactive effect if the interpretation "is unexpected and indefensible by

reference to the law which had been expressed prior to the conduct in issue." Rogers v. Tennessee, 532 U.S. 451, 462 (2001).

[¶ 72] When the court fashioned a sentence based on claimed authority pursuant to Article VI, Section 8 and Article I, Section 25 of the North Dakota Constitution and N.D.C.C. § 27-05-06, the court crafted its own unique penalty that Mr. Wilder could not possibly have had notice he would be exposed to at the time his crime occurred. Imposition of a penalty that was not provided in the sentencing statute violates due process in the same way that a vague sentencing law fails to provide clarity to a potential offender regarding potential consequences of committing a specific crime.

b. De Facto Termination

[¶ 73] Mr. Wilder was sentenced to life imprisonment without the possibility of parole. Allowing the no-contact provision to stand, in conjunction with this life sentence, is akin to allowing the court to terminate Mr. Wilder's rights to his children without going through the statutory requirements for termination or giving him a meaningful hearing.

[¶ 74] Before severing a parental relationship, a court must grant the parent procedural protections afforded by the due process clauses of both the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 12 of the North Dakota Constitution. In re K.J., 2010 ND 46, ¶¶ 16-17 (citations omitted); In re Adoption of S.A.L., 2002 ND 178, ¶ 10; Matthews v. Eldridge, 424 U.S. 319, 332 (1976). "'The fundamental requirement of due process is the opportunity to be heard at a

meaningful time and in a meaningful manner.'" In re K.J., 2010 ND at ¶ 16 (quoting Matthews, 424 U.S. at 333). "The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." Matthews, 424 U.S. at 332 (citations and internal quotations omitted).

[¶ 75] North Dakota law provides two separate avenues for involuntarily terminating a parent's rights to his child: the Uniform Juvenile Court Act (N.D.C.C. § 27-30-45) and the Revised Uniform Adoption Act (N.D.C.C. § 14-15-19). However, there is no indication that either of the procedures set out in those acts were followed. As a result, Mr. Wilder was deprived his right to procedural due process.

[¶ 76] The district court incorrectly concluded that because of Mr. Wilder's lifetime incarceration, it was axiomatic that he "lost all rights of custody to his children without further notice, without hearing, and without further proceeding." O. 11, ¶ 35. This Court has determined that "incarceration alone is not a proper ground for terminating parental rights." Matter of Adoption of Quenette, 341 N.W.2d 619, 622 (N.D. 1983). While one parent's intentional murder of the other parent *may* be sufficient to support the termination of the murderous parent's rights, the murder of the other parent, in and of itself, may also not warrant termination. Matter of Adoption of J.S.P.L., 532 N.W.2d 653, 664-665 (N.D. 1995) (citations omitted). "As long as men live, there are always hopes of a better future. Even convicts hope for pardon and liberty and a long life." State v. Rooney, 95 N.W. 513, 517 (N.D. 1903). "[T]he convicted felon does not forfeit all

constitutional protections by reason of his conviction and confinement in prison. He retains a variety of important rights that the courts must be alert to protect." Meachum v. Fano, 427 U.S. 215, 225 (1976). Even though prisoners generally have diminished constitutional protections while incarcerated, a prisoner may still not be deprived of life, liberty, or property, without due process of law. Kelley v. Powers, 477 N.W.2d 586, 589 (N.D. 1991) (citing Wolff v. McDonnell, 418 U.S. 539, 555-556 (1974)); Jensen v. Satran, 332 N.W.2d 222, 226 (N.D. 1983) (citations omitted) (finding that whether a prisoner is deprived of a liberty interest depends on nature of loss).

[¶ 77] It has already been determined that an inmate does not have a de facto right to be personally present at a termination of parental rights hearing. Walbert v. Walbert, 1997 ND 164, ¶ 8 (citations omitted). Instead, a prisoner's due process rights are generally satisfied if the prisoner is represented by counsel and has an opportunity to appear by deposition, however the trial court has discretion to authorize the prisoner to personally appear. Id. at ¶¶ 8-9 (citations omitted). If an incarcerated individual has a due process right to some form of participation at a termination hearing, that individual must have a due process right to the hearing itself, rather than de facto termination as part of his criminal judgment.

[¶78] ISSUE III. Whether or not the District Court erred when it prohibited Mr. Wilder from introducing testimony of the guardian ad litem regarding A.W. and N.W.'s desire for contact with Mr. Wilder at the September 11, 2017 hearing on Mr. Wilder's Motion to correct his sentence?

[¶ 79] At the hearing on Mr. Wilder's motion to correct his illegal sentence, Mr. Wilder attempted to introduce testimony from the guardian ad litem regarding statements that were made by A.W. and N.W. The State objected based on hearsay grounds and the court erroneously sustained that objection.

[¶ 80] A court has broad discretion in determining whether to admit or exclude evidence. State v. Teggatz, 2017 ND 171, ¶ 8 (citations omitted). As a result, the Supreme Court will not overturn a district court's evidentiary ruling about whether to admit or exclude claimed hearsay unless it determines that the district court abused its discretion. Teggatz, 2017 ND at ¶ 8 (citations omitted); State v. Jaster, 2004 ND 223, ¶ 12 (citations omitted). "A district court abuses its discretion when it misinterprets or misapplies the law, or if it acts in an arbitrary, unreasonable, or unconscionable manner." Teggatz, 2017 ND at ¶ 8 (citations omitted). This Court has explained:

> [a] district court acts in an arbitrary, unreasonable, or unconscionable manner when its decision is not the product of a rational mental process by which the facts and law relied upon are stated and considered together for the propose of achieving a reasoned and reasonable determination.

State v. Gibbs, 2009 ND 44, ¶ 32 (internal quotations and citations omitted).

[¶ 81] Rule 802 of the North Dakota Rules of Evidence prohibits the admission of hearsay unless a statute, another rule of evidence, or another rule prescribed by this Court says otherwise. The general standard is that the rules of evidence are to be applied in all proceedings in North Dakota courts. N.D.R.Ev. 101(a). However, the exceptions to the general rule are listed in N.D.R.Ev. 1101. N.D.R.Ev. 101(a). Pursuant to N.D.R.Ev.

1101(d)(3)(D), the rules of evidence do not apply to sentencing proceedings, so evidence which may not be admissible at trial may still be used at sentencing. City of Dickinson v. Mueller, 261 N.W.2d 787, 794 (N.D. 1977). In State v. Wells, this Court explained that the rationale for admitting more evidence at sentencing was to allow a district judge the "widest possible range of information to assist him in the exercise of his discretion in fixing sentences *within statutory and constitutional limitations*." 265 N.W.2d 239, 243 (N.D. 1978) (referencing Williams v. People of State of N.Y., 337 U.S. 241 (1949)) (emphasis added).

[¶ 82] In Williams the Court solidified modern sentencing practices which allow consideration of outside information about a defendant rather than limiting the record to evidence of the crime for which one was sentenced. The practice has been so widely adopted that North Dakota mandates it in certain situations by requiring courts to order pre-sentence reports be completed before imposing sentence. See N.D.C.C. § 12.1-32-02(11); N.D.C.C. § 19-03.1-45(2); and N.D.C.C. § 12.1-32-09. In Williams, the Court explained:

> Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged. These rules rest in part on a necessity to prevent a time consuming and confusing trial of collateral issues. They were also designed to prevent tribunals concerned solely with the issue of guilt of a particular offense from being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct. A sentencing judge, however, is not confined to the narrow issue of guilt. His task *within fixed statutory or constitutional limits* is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern

concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

337 U.S. at 246-247 (emphasis added).

[¶ 83] Mr. Wilder asked the district court to correct an illegal sentence pursuant to N.D.R.Crim.P. 35(a)(1). The comments to N.D.R.Crim.P. 35 explain that these motions need to be made to the court that issued the sentence, and if that court corrects the illegal sentence, the correction is only to void the illegal portion of the sentence. Since the district court was potentially amending Mr. Wilder's sentence at the Rule 35 hearing, it was a sentencing hearing.

[¶ 84] The court abused its discretion in prohibiting the guardian from testifying about statements the children made about wanting contact with Mr. Wilder because the Court was not prohibited from admitting hearsay into evidence at a sentencing hearing. Failure to allow the testimony was arbitrary, unreasonable, and unconscionable because the court should have been considering as much evidence as possible to reach an informed decision.

[¶ 85] Mr. Wilder sought to introduce testimony of the guardian about statements made by the children rather than direct testimony of the children themselves. The children were 6 and 12 years old and resided outside of the county. 2.A.J. 1-2; M.Tr. 8, ¶¶ 17-18. In prohibiting the guardian from testifying regarding the children's wishes based on hearsay, the district court signaled that Mr. Wilder should have subpoenaed his minor children,

whom he was not allowed to have any contact with even through third parties, and compelled them to come back to Ward County to testify at a televised court hearing.

[¶ 86] Even if the rules of evidence had applied they should have been "construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination." N.D.R.Ev. 102.

CONCLUSION

[¶ 87] The State's comments about Mr. Wilder not reporting information to police violated his rights to remain silent and as a result, he is entitled to a new trial. Even if the Court determines Mr. Wilder is not entitled to a new trial, the Court should amend his sentence because the provision of the September 18, 2017 2nd Amended Criminal Judgment prohibiting Mr. Wilder from having contact with A.W. or N.W. until each of their 18th birthdays is illegal. However, if the Court is not inclined to amend Mr. Wilder's sentence outright, it should remand to the district court for a new sentencing hearing because the district court erred when it prohibited Mr. Wilder from introducing testimony regarding the children's desire for contact at the September 11, 2017 Motion Hearing.

DATED this 20th day of November, 2017.

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

/s/ Raissa R. Carpenter
Raissa R. Carpenter, ID #08494

CERTIFICATE OF SERVICE BY MAIL

[¶88] 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 November 20th, 2017, she served, by e-mail and mailed a copy of the following:

APPELLANTS APPENDIX AND BRIEF

to: Kelly A. Dillon
Assistant State's Attorney
kelly.dillon@co.ward.us

Mailed to: Richie Wilder Jr.
NDSP
P.O. Box 5521
Bismarck, ND 58506

The undersigned further certifies that on November 20th, 2017, she served electronically on the Clerk, North Dakota Supreme Court, the APPELLANTS APPENDIX AND BRIEF.

/s/ Sharon Renfrow
Sharon Renfrow, Admin. Legal Assistant
Pulkrabek Law Office

CERTIFICATE OF SERVICE BY MAIL

[¶88] 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 November 22, 2017, she served, by e-mail and mailed a copy of the following:

APPELLANTS APPENDIX AND BRIEF

to: Kelly A. Dillon
Asst. States Attorney
Kelly.dillon@co.ward.nd.us

Mailed to: Richie Wilder Jr.
NDSP
P.O. Box 5521
Bismarck, ND 58506

The undersigned further certifies that on November 22, 2017, she served electronically on the Clerk, North Dakota Supreme Court, the APPELLANTS (CORRECTED) BRIEF.

/s/ Sharon Renfrow
Sharon Renfrow, Admin. Legal Assistant
Pulkrabek Law Office