

IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota,)	Supreme Court File No.
)	20170279
)	
Plaintiff and Appellee,)	Ward County Criminal No.
)	51-2015-CR-01459
)	
v.)	
)	
Alexander Justin Pittenger,)	Appellant’s Supplemental
)	Brief
Defendant and Appellant.)	

**Appeal from the order denying motion to dismiss in Ward
County district court, north central judicial district,
North Dakota the Honorable Stacy J. Louser, presiding.**

Kiara C. Kraus-Parr
ND Bar No. 06688
Kraus-Parr, Morrow, & Weber
424 Demers Ave
Grand Forks, ND 58201
Office: (701) 772-8991
Fax: (701) 795-1769
kiara@kpmwlaw.com
Attorney for the Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

JURISDICTION..... ¶1

STATEMENT OF ISSUES ¶ 2

STATEMENT OF CASE..... ¶ 3

STATEMENT OF FACTS..... ¶ 5

LAW AND ARGUMENT..... ¶ 6

 I. Whether the district court erred by denying the State’s motion to
 dismiss..... ¶ 13

 a. The new trial motion was not untimely..... ¶ 8

 b. Defendant may show cause against judgment..... ¶ 9

 c. The parties can stipulate to legal errors..... ¶ 10

 d. Findings cannot be made after an improper closure
 occurred..... ¶ 12

 e. N.D.C.C. § 12.1-35-05.2 does not require court closure..... ¶ 13

 f. Trial courts are required to make *Waller* findings. ¶ 14

CONCLUSION..... ¶ 17

TABLE OF AUTHORITIES

Cases

<i>In re Estate of Kimbrel</i> , 2005 ND 107, 697 N.W.2d 315 (N.D. 2005)	¶ 7
<i>Johnson v. Nodak Mut. Ins. Co.</i> , 2005 ND 112, 699 N.W.2d 45 (N.D. 2005)	¶ 7
<i>Pratt v. Altendorf</i> , 2005 ND 32, 692 N.W.2d 115 (N.D. 2005).....	¶ 7
<i>Presley v. Georgia</i> , 558 U.S. 209 (2010).....	¶ 15
<i>Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty.</i> , 464 U.S. 501 (1984)	¶ 15
<i>State v. Simek</i> , 502 N.W.2d 545 (N.D. 1993)	¶ 9
<i>Sullivan v. Louisiana</i> , 508 U.S. 275 (1993)	¶ 13
<i>Waller v. Georgia</i> , 467 U. S. 39 (1984)	¶¶ 13, 14, 15, 16

Statutes, Rules, Codes

N.D. Const. art. VI, § 6	¶ 1
N.D.C.C. § 12.1-35-05.2.....	¶ 3
N.D.C.C. § 29-26-12	¶¶ 6, 7, 10, 11, 16
N.D.C.C. § 29-28-03	¶ 1
N.D.C.C. § 29-28-06	¶ 1
N.D.Civ.P. Rule 60	¶¶ 6, 7
N.D.Crim.P Rule 33	¶¶ 6, 8, 9, 11, 16
N.D.Crim.P. Rule 48	¶¶ 6, 7

Transcript References:

A hearing for the State's motion to dismiss was held on June 7, 2018. The transcript of that hearing is referred to as Tr. in this brief.

JURISDICTION

[¶ 1] The Defendant, Alexander Pittenger, timely appealed the district court's final criminal judgment and order denying motion to dismiss. Appeals shall be allowed from decisions of lower courts to the Supreme Court provided by law. This Court has appellate jurisdiction under N.D. Const. art. VI, § 6, and pursuant to Sections 29-28-03 and 29-28-06, N.D.C.C., which provides as follows:

“An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03. An appeal may be taken by the defendant from:

1. A verdict of guilty;
2. A final judgment of conviction;
3. An order refusing a motion in arrest of judgment;
4. An order denying a motion for new trial; or
5. An order made after judgment affecting any substantial right of the party.”

N.D.C.C. § 29-28-06.

STATEMENT OF THE ISSUES

[¶ 2] I. Whether the district court erred by denying the State's motion to dismiss.

STATEMENT OF CASE

[¶ 3] This is a criminal matter on direct appeal from north central judicial district, Ward County district court final criminal judgment and order denying the State's motion to dismiss. This case was before the district court in State v. Alexander Pittenger, 51-2015-CR-01459. The initial

complaint was filed with the court on June 29, 2015. The case involves one count of Corruption or Solicitation of a Minor. Mr. Pittenger was represented by Attorney Bradshaw and Attorney McMillan during trial.

[¶ 4] Mr. Pittenger timely filed his direct appeal. The State, after reviewing Mr. Pittenger's brief, agreed there was an impermissible court closure. The parties requested a remand to pursue a dismissal of the case. The case was remanded and ultimately the district court denied the requested dismissal of Mr. Pittenger's case. Mr. Pittenger persists in his original appeal and now includes the district court's denial of the State's motion to dismiss in the case before this Court.

STATEMENT OF FACTS

[¶ 5] The State accepted that a structural error had occurred at Mr. Pittenger's trial. The parties agreed to remand the case from the Supreme Court to the district court at which time the State would seek to dismiss the case against Mr. Pittenger.

[¶ 6] The stipulation was filed in the Supreme Court on April 16, 2018. The Supreme Court granted the requested remand so that the district court could consider an appropriate motion in light of the stipulated issue, impermissible court closure. On May 9, 2018 the State filed a motion to dismiss the case against Mr. Pittenger. On May 14, 2018 a hearing was held to determine, "what authority the State's Motion and requested relief was being brought [under]." *Order Denying Motion to Dismiss Charge (Order)*, ¶

12. At the hearing the State argued that the court has an inherent authority to dismiss the case under N.D.Crim.P. Rule 33, N.D.Civ.P. Rule 60, and N.D.C.C. § 29-26-12. Mr. Pittenger, through his counsel, argued that procedurally the parties had agreed to vacating the judgment, because the district court created a structural error by closing the courtroom, at the appellate level. The parties then requested, based on that stipulation, to remand the case back to the district court. As agreed upon, after the remand, the State requested a dismissal of the case rather than pursue a new trial. On June 12, 2018, the district court denied the State's motion to dismiss by written order.

LAW AND ARGUMENT

I. Whether the district court erred by denying the State's motion to dismiss.

Standard of Review

[¶ 7] Interpretation of a statute is a question of law, fully reviewable on appeal. *Johnson v. Nodak Mut. Ins. Co.*, 2005 ND 112, ¶ 13, 699 N.W.2d 45; *In re Estate of Kimbrel*, 2005 ND 107, ¶ 9, 697 N.W.2d 315; *Pratt v. Altendorf*, 2005 ND 32, ¶ 12, 692 N.W.2d 115. The State brought a motion to dismiss under N.D.Crim.P. Rule 48 (Rule 48) and further clarified that the court had the ability to vacate a judgement under N.D.C.C. 29-26-12 and N.D.Civ.P. Rule 60. Mr. Pittenger, through his counsel, agreed that Rule 48 was appropriate because the parties had already agreed to a vacation of the judgment at the Supreme Court level.

[¶ 8] The court said in its order denying the motion to dismiss charge (Order) Mr. Pittenger did not file a motion under N.D.R.Crim.P. Rule 33 (Rule 33). *Order*, ¶ 25. It is true that Mr. Pittenger did not file a written Rule 33 motion to the court, however based on counsel’s statements during the June 7, 2018 hearing it is clear that an oral request was made. Additionally, Mr. Pittenger’s counsel, after remand, stated to the district court, “if the Court wants more clarity we could do [a] Rule 33 stipulation and then the Rule 48.” Tr. p. 5 ln. 14. Counsel was expressing to the court, Mr. Pittenger was requesting a new trial. Also, this statement clearly indicates that Mr. Pittenger would file a written stipulated Rule 33 with the court to clarify any procedural confusion. The Court took the request and the pending Rule 48 motion under advisement and then denied the motion to dismiss explaining, in part, that any Rule 33 motion currently made would be untimely. *Order*, ¶ 25.

a. The new trial motion was not untimely.

[¶ 9] Rule 33, governs motions for new trials. The district court notes that under N.D.R.Crim.P. 33(b)(2), “[a]ny motion for a new trial based on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty.” However, that is not the proper subsection to review timeliness in this case. Under N.D.R.Crim.P. 33(b)(3), “If an appeal is pending, the court may not grant a motion for a new trial until the case is remanded.” The Rule 33 time limitations are jurisdictional,

but the district court does not have jurisdiction while the case is on appeal to the Supreme Court. It is true that a court cannot consider an untimely motion for a new trial, nor can the court extend the time period except as specifically provided in the rule. *State v. Simek*, 502 N.W.2d 545, 546 (N.D. 1993). Here the rule, Rule 33(b)(3), has no time limitation but rather a condition precedent, remand from the Supreme Court. Therefore, the denial of the State's motion to dismiss because the request for a new trial is untimely is a reversible error.

b. Defendant may show cause against judgment.

¶ 10] The State argued to the court that N.D.C.C. § 29-26-12(2) would also allow the court to arrest the judgment in this case. Mr. Pittenger demonstrated, and the State agreed, there was just cause for an order in arrest of judgment because a structural error occurred during his trial.

N.D.C.C § 29-26-12(2) states:

...the defendant has good cause to offer, either in arrest of judgment or for a new trial, in which case the court may order the judgment to be deferred, and may proceed to decide upon the motion in arrest of judgment or for a new trial.

The district court did not specifically address this statute, but it did find that the State “did not provide legal authority to dismiss the charge after a verdict has been rendered and sentence has been imposed and served.” *Order*

¶ 26. The court's finding is incorrect as both the State and defense counsel provided statutory authority on the record that would allow the court to vacate the original judgment and proceed on the State's written motion to

dismiss. Therefore, the district court's order denying the State's motion to dismiss was incorrect and should be reverse.

c. The parties can stipulate to legal errors.

[¶ 11] The district court's incorrect interpretation of Rule 33 and its failure to even consider N.D.C.C. § 29-26-12(2) is an indication that the court does not want to make a finding that would upset a jury verdict. However, that is the role of the judiciary. The court's Order indicates the State and the Defense cannot, or perhaps should not, stipulate that a structural error occurred. *Order* ¶ 18. The court believes that the determination of a structural error should be made by the Supreme Court. However, the court misunderstands the nature of the parties' stipulation and its basic authority to rule on post-conviction matters. Under either Rule 33 or N.D.C.C. § 29-26-12(2) the parties can stipulate that a structural error occurred and as a result the judgement be vacated. It is then the courts job to decide if the motion is meritorious.

[¶ 12] If after the defense raises an error, explicitly presents the facts and law to support their position, and then the opposing party agrees the court's conclusion should be based on that information. In other words, the court must make a determination on a set of stipulated facts and law, as that was what was pleaded to the court. If the court had found that no structural error occurred, which it attempted and then abandoned in its order, then

either party or both could request appellate review of that order. Rather than rule on the substantive issue before it, the district court wrote,

“If in fact, the Court erred in closing the courtroom during Jane Doe’s testimony and in so doing, creating a structural error, it is this Court’s belief that the proper authority to make such a determination is the Supreme Court, not the State and Pittenger.”

Order, ¶ 18. The court reveals that it misunderstands the parties’ stipulation. The parties agree that there was a structural error and that as a result the case should be dismissed. The court is tasked with deciding if a structural error occurred. If the error happened, the court would either proceed with a new trial, which the State would move to dismiss, or allow the State to dismiss the case directly from its determination that the original judgment should be vacated. The court did not make a substantive decision of court closure, but simply stated it lacked the authority to rule on the motion to dismiss. This conclusion by the district court was an error. However, because the case is again brought before the Supreme Court for this exact issue Mr. Pittenger does not seek an order to remand the case again to force the district court to make a proper determination. The district court had an opportunity to make a legal conclusion on the merits of the issue and chose not to do so. Therefore, this Court should determine that both the State and Mr. Pittenger are correct, an impermissible court closure occurred requiring the reversal of his conviction.

d. Findings cannot be made after an improper closure occurred.

[¶ 13] While the court did not make a finding on the ultimate issue in its Order, it did raise new factual and legal arguments not previously before the Supreme Court. Even if the court’s new factual analysis was valid it must occur before the court is closed, not after the error has already happened. The error is structural so making findings after the trial is over and a verdict rendered is an attempt to address whether or not there was prejudice. However, court closure is a structural error. Structural errors have effects that “are simply too hard to measure.” *Sullivan v. Louisiana*, 508 U.S. 275, 281–282 (1993). Therefore, requiring a showing of prejudice would generally deprive a defendant of their right to a public trial. “[F]or it would be difficult to envisage a case in which he would have evidence available of specific injury.” *Waller v. Georgia*, 467 U. S. 39 (1984). This Court should not consider any facts supporting the trial court’s closure after the trial is over.

e. N.D.C.C. § 12.1-35-05.2 does not require court closure.

[¶ 14] The court implied that closing a courtroom is required by N.D.C.C. § 12.1-35-05.2 when any minor testifies. *Order* ¶16. This is an incorrect interpretation of the law. N.D.C.C. § 12.1-35-05.2 states that upon motion of the prosecutor to close the proceedings the court “shall conduct a hearing to determine whether the testimony of and relating to a child may be closed to the public...” The only thing that is required under this statute is a hearing. The seven factors the court is required to address during the hearing are **part of** the factual findings necessary under *Waller* for any court

closure, regardless of the charge or age of the victim. *Waller v. Georgia*, 467 U. S. 39 (1984). The court in its Order said the required hearing under section 12.1-35-05.2 was held on January 9, 2017. The court also implied in its Order that the only necessary analysis to closing the courtroom was the seven factors listed in N.D.C.C. § 12.1-35-05.2. This is an incorrect interpretation of the law. Even if that were true, the court did not address all seven (7) factors required to be considered under the statute.

f. Trial courts are required to make *Waller* findings.

[¶ 15] With regard to the court closure in its Order, the district court stated, “Neither the State nor Pittenger offered other alternative suggestions or requested further findings.” It is not the responsibility of the State or Mr. Pittenger to go through the *Waller* analysis and make the appropriate findings. It is also not required that they proffer alternatives to the court closure. This is squarely the responsibility of the trial court, as the United States Supreme Court held in *Presley v. Georgia*. The Court confirmed, “The conclusion that trial courts are required to consider alternatives to closure even when they are not offered by the parties is clear not only from this Court’s precedents but also from the premise that ‘[t]he process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system.’ The public has a right to be present whether or not any party has asserted the right.” *Presley v. Georgia*, 558 U.S. 209 (2010) quoting *Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty.*, 464

U.S. 501 (1984). Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials. *Id.*

CONCLUSION

[¶ 16] The district court erred by denying the State's motion to dismiss the case after the State and Mr. Pittenger made a request to vacate the original Criminal Judgment under Rule 33 and N.D.C.C. § 29-26-12(2). The court erroneously stated that NDCC § 12.1-35-05.2 required court closure and that the parties were responsible for factual findings under *Waller* and proffering alternatives to the closure.

[¶ 17] WHEREFORE the Defendant respectfully requests the Court to reverse the verdict and judgment of the trial court.

Dated this 12th day of September, 2018

/s/ Kiara Kraus-Parr

ND Bar No. 06688

Kraus-Parr, Morrow, & Weber

424 Demers Avenue

Grand Forks, ND 58201

(701) 772-8991

kiara@kpmwlaw.com

Attorney for the Appellant

IN THE SUPREME COURT
OF NORTH DAKOTA

State of North Dakota,)	
)	#51-2015-CR-1459
Appellee,)	#20170279
)	
VS.)	
)	CERTIFICATE OF SERVICE
Alexander Pittenger,)	
)	
)	
Appellant.)	

The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Supplemental Brief
Supplemental Appendix

And that said copies were served upon:

Marie Ann Miller, Assistant State's Attorney, 51wardsa@wardnd.com

by email at the above address and to

Alexander Pittenger, 3007 11 St SE, Minot, ND 58701

by depositing with USPS, certified mail.

Dated: September 12, 2018

KRAUS-PARR, MORROW, & WEBER

/s/Kiara C. Kraus-Parr
Kiara C. Kraus-Parr
424 Demers Avenue
Grand Forks, ND 58201
ND Attorney No. 06688
Phone: (701) 772-8991
kiara@kpmwlaw.com
Attorney for Appellant