

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

State of North Dakota, Plaintiff-Appellee, vs. Cody Michael Atkins, Defendant-Appellant	Supreme Court No. 20180411 Case No. 18-2014-CR-01844
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On appeal from the Order denying the Defendant's motions,
filed October 31, 2018,
Grand Forks County District Court
Northeast Central Judicial District
State of North Dakota
The Honorable John A. Thelen, Presiding

APPELLANT'S REPLY BRIEF

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North Dakota Cases

Paragraph

State v. Gress, 2011 ND 233, 807 N.W.2d 567 ¶ 3, 4, 5

North Dakota Rules

N.D.R.Crim.P. 11 ¶ 5

N.D.R.Crim.P. 33 ¶ 5

[¶1]

Statement of the Issues

- I. Whether the district court erred by not allowing Mr. Atkins to withdraw his guilty plea in response to inaccurate and coercive statements by his attorney and by the district court's failure to comply with Rule 11.
- II. Whether the district court erred by not granting Mr. Atkins a new trial in response to newly discovered evidence.

Statement of the Facts

¶2 The facts are sufficiently laid out in the Appellant's Brief. As it relates to this Reply Brief: In 2015, Mr. Atkins pled guilty to a single charge of Gross Sexual Imposition and was sentenced. (Appellant's App. at 1). On February 2, 2018, Mr. Atkins filed a motion to withdraw his guilty plea and vacate the judgment, pursuant to Rule 11 of the Rules of Criminal Procedure. (Appellant's App. at 16 - 17). On March 21, 2018, Mr. Atkins filed a motion for a new trial, pursuant to Rule 33 of the Rules of Criminal Procedure. (Appellant's App. at 19 - 22). Mr. Atkins now wishes to respond to the State's Brief.

Law and Argument

¶3 Although Mr. Atkins disagrees with many of the arguments made in the State's Appellee Brief, Mr. Atkins wishes to specifically respond to one argument offered by the State. Mr. Atkins believes that it is necessary to respond to the State's arguments regarding the case of State v. Gress and the State's more general argument that Mr. Atkins' case should be considered a post-conviction relief case. The State argues that Mr. Atkins' case is factually similar to State v. Gress and cites the Gress case for the proposition that Mr. Atkins' motions must be considered an application for post-conviction relief and are governed by the Rules of Civil Procedure. Appellee's Brief at ¶ 19 - 24. Your Appellant submits the facts presented in State v. Gress are distinguishable and that State v. Gress does not apply to Mr. Atkins' situation. See State v. Gress, 2011 ND 233, 807 N.W.2d 567. The State fails to recognize one important factual difference regarding the type of motion filed

and the relief requested. Specifically, the motion brought by Gress requested relief under both the civil rules and the criminal rules, while Mr. Atkins' motions were based purely on the criminal rules.

[¶4] In State v. Gress, the defendant filed a motion “to suspend his sentence ‘pursuant to N.D.R.Civ.P. Rule 60(b)(vi),’” or, in the alternative to allow him “to withdraw his unconstitutional plea-agreement.” Gress at ¶ 3. As a result, Gress' motion requested a remedy under both a civil procedure rule and a criminal procedure rule. When faced with this motion arguing both civil and criminal procedure, this Court elected to consider his motion as a second application for post-conviction relief. See id.

[¶5] Mr. Atkins' case is factually different. Mr. Atkins' filed two motions: A motion to withdraw his guilty plea, pursuant to Rule 11 of the Rules of Criminal Procedure, and a motion for a new trial, pursuant to Rule 33 of the Rules of Criminal Procedure. See N.D.R.Crim.P. 11(d), N.D.R.Crim.P. 33. These motions were not seeking relief under any civil rule. As a result, the Court did not need to decide between two different sets of procedural rules. Mr. Atkins' motions were brought in his criminal case, under the Rules of Criminal Procedure. As such, the Gress case simply does not apply and the Court is not required to consider Mr. Atkins' motions as a separate petition for post-conviction relief. Instead, this Court should consider Mr. Atkins' motions under the Rules of Criminal Procedure, as more thoroughly discussed in the Appellants' Brief.

Conclusion

[¶6] For the foregoing reasons and the reasons set out in the Appellant's Brief, Mr. Atkins

respectfully requests that the district court's Order be reversed and remanded for further proceedings.

Dated this 12th day of March, 2019.

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