

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

State of North Dakota,)	
)	
Plaintiff and Appellee,)	Supreme Court No. 20190033
)	
vs.)	
)	District Court No. 09-2017-CR-05095
Matthew Jeffrey Overholt,)	
)	
Defendant and Appellant.)	

Appeal from ORDER Granting Motion to Modify Order Deferring Imposition of Sentence
Dated December 31, 2018

CASS COUNTY DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE THOMAS R. OLSON, PRESIDING

APPELLEE’S BRIEF

Ryan J. Younggren, #06400
Assistant State’s Attorney
Cass County Courthouse
P.O. Box 2806
Fargo, North Dakota 58108
(701) 241-5850
sa-defense-notices@casscountynd.gov
Attorney for Plaintiff/Appellee

Nicholas S. Samuelson
Law Clerk
Certified under R. Ltd.
Practice of Law by Law Students

TABLE OF CONTENTS

	<u>Page/Paragraph No.</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUES	¶ 1
STATEMENT OF THE CASE	¶ 3
STATEMENT OF FACTS	¶ 5
STANDARD OF REVIEW	¶ 8
LAW AND ARGUMENT	¶ 9
I. THIS COURT LACKS JURISDICTION TO ENTERTAIN THIS APPEAL BECAUSE THE ORDER AT ISSUE IS NOT APPEALABLE	¶ 9
II. THE DISTRICT COURT PROPERLY CONSIDERED CASE TWO IN MODIFYING ITS ORDER DEFERRING IMPOSITION OF SENTENCE	¶ 15
CONCLUSION	¶ 18
CERTIFICATE OF SERVICE	¶ 19

TABLE OF AUTHORITIES

Paragraph No.

Cases

State v. Adams,
2009 ND 168, 772 N.W.2d 878 ¶ 13

State v. Jorgenson,
2018 ND 169, 914 N.W.2d 485 ¶ 9

State v. Kenner,
1997 ND 1, 559 N.W.2d 538 ¶ 8

State v. Kopp,
419 N.W.2d 169 (N.D. 1988) ¶ 17

State v. Nace,
371 N.W.2d 129 (N.D. 1985) ¶ 11

State v. Owens,
1997 ND 212, 570 N.W.2d 212 ¶¶ 11, 13

State v. Parisen,
2005 ND 152, 703 N.W.2d 306 ¶ 17

Statutes

N.D.C.C. § 12.1-32-07.1 ¶ 16

N.D.C.C. § 12.1-32-02 ¶ 16

N.D.C.C. § 29-28-06 *passim*

Rules

N.D.R.Crim.P. 32.1 ¶ 16

N.D.R.Crim.P. 52 ¶ 17

Other Authorities

BLACK’S LAW DICTIONARY ¶ 12

STATEMENT OF THE ISSUES

[¶ 1] Whether this Court has jurisdiction to entertain this appeal.

[¶ 2] Whether the district court properly considered Overholt’s guilty plea in 09-2018-CR-01683 in modifying its Order Deferring Imposition of Sentence.

STATEMENT OF THE CASE

[¶ 3] Matthew Overholt appeals from an Order modifying an Order Deferring Imposition of Sentence. Overholt argues that the district court improperly considered an offense he committed during the term of the unsupervised probation because at the time of the modification, the file in the second case had been sealed.

[¶ 4] The State argues that this Court does not have jurisdiction to entertain this appeal because the challenged order is not appealable. In the alternative, the State argues that it was proper for the district court to consider Overholt’s guilty plea in the second case in modifying its Order Deferring Imposition of Sentence.

STATEMENT OF FACTS

[¶ 5] On November 19, 2017, Matthew Overholt (“Overholt”) was cited for minor in possession of alcohol in case number 09-2017-CR-05095 (hereinafter, “Case One”). (Appendix “App.” at 5.) Overholt pled guilty in Case One on December 5, 2017. (App. at 6.) The district court entered an Order Deferring Imposition of Sentence for a period of 360 days, during which Overholt was placed on unsupervised probation with the condition that he violate no criminal laws during the term of probation. (App. at 6.)

[¶ 6] On April 21, 2018, Overholt was again cited for minor in possession of alcohol in case number 09-2018-CR-01683 (hereinafter, “Case Two”). Overholt pled guilty in Case Two on May 15, 2018. The district court entered an Order Deferring Imposition of

Sentence for a period of three months. Overholt completed the term of unsupervised probation for Case Two. Per the Order Deferring Imposition of Sentence, Case Two was dismissed.

[¶ 7] The period of unsupervised probation in Case One ended on November 30, 2018. (App. at 6.) On December 4, 2018, the State moved the district court for modification of its Order Deferring Imposition of Sentence in Case One. (App. at 8.) The State requested that Overholt’s guilty plea not be withdrawn, the case not be dismissed, and the file not be sealed because he committed the offense of minor in possession of alcohol charged in Case Two during his probation in Case One. (App. at 8.) The district court granted the motion and entered an Order modifying the Order Deferring Imposition of Sentence on December 31, 2018. (App. at 11.)

STANDARD OF REVIEW

[¶ 8] The facts of this case are not in dispute. Questions of law are fully reviewable on appeal. State v. Kenner, 1997 ND 1, ¶ 7, 559 N.W.2d 538.

LAW AND ARGUMENT

I. This Court lacks jurisdiction to entertain the appeal because the order at issue is not appealable.

[¶ 9] “The right of appeal in North Dakota is governed purely by statute, and an order is appealable only if it comes within the provisions of a specific statute.” State v. Jorgenson, 2018 ND 169, ¶ 3, 914 N.W.2d 485. Section 29-28-06, N.D.C.C., allows a defendant in a criminal case to appeal:

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 a new trial; or
5. An order made after judgment affecting any substantial right of the party.

[¶ 10] Overholt’s appeal does not fall within subsections 1 through 4 of N.D.C.C. § 29-28-06. For Overholt’s appeal to come within the statute, this Court would have to conclude that the district court’s Order Modifying its Order Deferring Imposition of Sentence affects Overholt’s substantial rights under N.D.C.C. § 29-28-06(5).

[¶ 11] In criminal cases, this Court has considered rights such as property interests and correction of an illegal sentence as “substantial rights” for the purpose of determining whether an order is appealable. See e.g., State v. Owens, 1997 ND 212, ¶ 11, 570 N.W.2d 212 (“Owens’ property interest in the five hundred dollars bond . . . constitutes a substantial right. Therefore, the district court’s order is appealable.”); State v. Nace, 371 N.W.2d 129, 131 (N.D. 1985) (“[W]e must determine whether an order denying correction of a sentence claimed to be illegal, affects ‘any substantial right’ of the defendant, thereby authorizing appeal. We hold that such an order . . . is appealable under subsection 5 of § 29-28-06.”). The Order at issue is dissimilar from the types of orders this Court has found to affect substantial rights.

[¶ 12] A right is “[s]omething that is due to a person by just claim, legal guarantee, or moral principle.” Right, BLACK’S LAW DICTIONARY (10th ed. 2014). By contrast, the Order Deferring Imposition of sentence did not guarantee withdrawal of the guilty plea, dismissal, and sealing at the end of its term. Rather, it was encumbered by the condition that Overholt remain law abiding during the term of probation. (App. at 6.) The conditional nature of a deferred imposition of sentence suggests that post-probation withdrawal of a guilty plea, dismissal, and sealing are not rights. Accordingly, the Order modifying the

Order Deferring Imposition of Sentence did not affect Overholt’s substantial rights, and the order is not appealable under N.D.C.C. § 29-28-06.

[¶ 13] Without a judgment of conviction or other final order required by N.D.C.C. § 29-28-06, this court has no jurisdiction to entertain an appeal. State v. Adams, 2009 ND 168, ¶ 5, 772 N.W.2d 878. This Court must have jurisdiction to consider the merits of an appeal and, if there is no right to appeal, this Court must dismiss. Owens, 1997 ND 212, ¶ 6, 570 N.W.2d 217.

[¶ 14] The Order modifying the Order Deferring Imposition of Sentence in this case is not an appealable order because it does not fall within subsections 1 through 4 of N.D.C.C. § 29-28-06, nor is it a post-judgment order affecting a substantial right. Because the Order is not appealable, this Court lacks jurisdiction to entertain this appeal. Accordingly, the appeal should be dismissed.

II. The district court properly considered Case Two in modifying its Order Deferring Imposition of Sentence in Case One.

[¶ 15] Overholt argues that the district court improperly considered Case Two in modifying its Order Deferring Imposition of Sentence in Case One. Essentially, he argues that because his guilty plea was withdrawn, the case dismissed, and the record sealed in Case Two following the period of deferral, Case Two effectively did not happen and the district court erred by considering it.

[¶ 16] Overholt’s position is inconsistent with Chapter 12.1-32 of the North Dakota Century Code. Section 12.1-32-02(4), N.D.C.C. provides, “In any subsequent prosecution, for any other offense, the prior conviction for which imposition of sentence is deferred may be pleaded and proved, and has the same effect as if probation had not been granted or the information or indictment dismissed under section 12.1-32-07.1.” The fact

that the State can plead and prove a case in which the sentence was deferred as a prior conviction in another case shows that the effect of the dismissal pursuant to N.D.R.Crim.P. 32.1 is not to prevent its use in future court proceedings.

[¶ 17] Overholt also cites N.D. Admin Code § 10-13-11-03, arguing that the State improperly accessed his sealed criminal record for Case Two without a court order. This issue was not raised below so this Court should not address it unless it rises to the level of obvious error under N.D.R.Crim.P. 52. See State v. Parisen, 2005 ND 152, ¶ 17, 703 N.W.2d 306. This Court exercises its authority to notice obvious error cautiously and “only in exceptional circumstances where the defendant has suffered serious injustice.” State v. Kopp, 419 N.W.2d 169, 173 (N.D. 1988). The party raising an obvious error has the burden of establishing it was plain error that affects substantial rights. Parisen, 2005 ND 152, ¶ 17, 703 N.W.2d 306. Overholt has not broached the question of whether the error was obvious. This argument further fails because Article 10-13 of the North Dakota Administrative Code pertains to Bureau of Criminal Investigation (“BCI”) records. There is no evidence that the State inspected a BCI record rather than its own case file for Case Two.

CONCLUSION

[¶ 18] For the foregoing reasons, the State respectfully requests this Court **DISMISS** the appeal for lack of jurisdiction. In the alternative, the State requests this Court **AFFIRM** the district court's Order granting the State's Motion to Modify Order Deferring Sentence entered on December 31, 2018.

Ryan J. Younggren, #06400
Assistant State's Attorney
Cass County Courthouse
P.O. Box 2806
Fargo, North Dakota 58108
(701) 241-5850
sa-defense-notices@casscountynd.gov
Attorney for Plaintiff-Appellee

Nicholas S. Samuelson
Law Clerk
Certified under R. Ltd. Practice
of Law by Law Students.

CERTIFICATE OF SERVICE

[¶ 19] A true and correct copy of the foregoing document was sent by email on the 8th day of April, 2019, to: wbudke@liesandbullis.com.

Ryan J. Younggren