

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

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

**REPLY BRIEF OF APPELLANT
MATTHEW JEFFERY OVERHOLT**

REPLY BREIF TO APPELLEE’S BRIEF ON APPEAL FROM THE CASS COUNTY
DISTRICT COURT’S DECEMBER 31ST, 2018 ORDER GRANTING PLAINTIFF’S
MOTION TO MODIFY ORDER DEFERRING IMPOSITION OF SENTENCE

DISTRICT COURT OF THE EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE TOM OLSON PRESIDING

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INTRODUCTION

[¶ 1] COMES NOW, the Defendant and Appellant, Matthew J. Overholt, by and through his attorney of record, Will Budke of Lies, Bullis, and Hatting, PLLP hereby submits the following in response to the Appellee's Brief. All Supporting Facts have been pleaded in Appellant's Brief.

LAW AND ARGUMENT

A. The North Dakota Supreme Court has Jurisdiction over this Appeal.

[¶ 2] Appellee argues that the appeal is not allowable under N.D.C.C. § 29-28-06 subsections one through four. Appellee's Brief ¶ 10. N.D.C.C. § 29-28-06(2) provides, an appeal may be taken by the defendant from a final judgment of conviction. An order deferring imposition of sentence is not an appealable order. State v. Bernstein, 2005 ND 6, ¶ 9, 697 N.W.2d 371. When an order deferring imposition of sentence complies with the requirements of North Dakota Rules of Criminal Procedure 32(b) for criminal judgments and no separate judgment of conviction has been entered, the order serves as the judgment of conviction. State v. Berger, 2004 ND 151, ¶ 8, 683 N.W.2d 897. "A judgment of conviction must include the plea, the verdict, and the sentence imposed." N.D.R.Crim.P. 32(b).

[¶ 3] The Order modifying the Mr. Overholt's Deferred Imposition of Sentence reinstated his guilty plea entered December 5, 2017. By reinstating Mr. Overholt's guilty plea, the verdict of guilty was entered, and a sentence was imposed. The sentence in this matter was that the file remain available to the public. No separate judgment of conviction has been entered in this matter. Therefore, this matter is properly on appeal.

[¶ 4] The Appellee contends that the order did not affect Mr. Overholt's substantial rights under N.D.C.C. § 29-28-06(5). Appellee Brief ¶ 11. An order revoking a suspended sentence is appealable as it affects the substantial rights of a defendant. State v. Lesmeister, 288 N.W.2d 57, 59-60 (N.D. 1980). "Defer" means to delay; put off; remand; postpone to a future time. Black's Law Dictionary 509 (Rev. 4th ed. 1968). Similarly, "suspend" means to interrupt; to cause to cease for a time; to postpone; to stay, delay, or hinder. Id. at 1615. The Order at issue affects the substantial rights of a defendant as the Order modified and revoked Mr. Overholt's deferred of in other terms suspended imposition of sentence. Therefore, this matter is properly on appeal.

B. Mr. Overholt's deferred imposition of sentence was not a prior conviction.

[¶ 5] Without a prior conviction, the State's reliance on section 12.1-32-02(4) is misplaced. The State cites to N.D.C.C. § 12.1-32-02(4) which requires a prior conviction for which imposition of sentence is deferred. Under N.D.R.Crim.P. 32.1, Mr. Overholt's guilty plea was withdrawn, the case dismissed, and the file was to be sealed resulting in no conviction. On the withdrawal of the plea, Mr. Overholt stands in the same position and with the same rights and privileges as if no plea had been entered. See 22 C.J.S. Criminal Procedure and Rights of Accused § 262 (2019). Without Mr. Overholt's guilty plea, no verdict of guilt has been entered, or sentence imposed thus no conviction has taken place.

C. Failure to seal record was obvious error.

[¶ 6] Sixty-one days after expiration or termination of probation the file must be sealed. N.D.R.Crim.P. 32.1(c). More than sixty-one days have passed since the expiration or termination of probation in Case 2 when the State moved to modify the Order Deferring Imposition of Sentence. Therefore, it is obvious error that the file remained accessible to be plead as a prior conviction in this matter.

CONCLUSION

[¶ 7] Mr. Overholt requests this Court reverse the District Court's Order granting the State's Motion to Modify Order Deferring Imposition of Sentence in file 09-2017-CR-05095; specifically, instructing Mr. Overholt's guilty plea be withdrawn, the case dismissed, and the file sealed in accordance with Rule 32.1 of the North Dakota Rules of Criminal Procedure.

