

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

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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.	)	

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**BRIEF OF APPELLANT  
MATTHEW JEFFERY OVERHOLT**

BREIF OF APPEAL FROM THE CASS COUNTY DISTRICT COURT’S  
DECEMBER 31<sup>ST</sup>, 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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**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES .....	3
STATEMENT OF ISSUES .....	4
	<u>Paragraph</u>
STATEMENT OF CASE .....	1
STATEMENT OF FACTS .....	4
STANDARD OF REVIEW .....	7
LAW AND ARGUMENT .....	9
A. Mr. Overholt’s guilty plea in Case 2 was withdrawn, the case dismissed, and the file should have been sealed. ....	10
B. The Cass County District Court erred in relying on Case 2 to modify its Order Deferring Imposition of Sentence in Case 1. ....	16
CONCLUSION .....	18

**TABLE OF AUTHORITIES**

<u>CASES:</u>	<u>Paragraph:</u>
<u>Carlson v. Workforce Safety &amp; Ins.</u> , 2009 ND 87, ¶ 22, 765 N.W.2d 691. ....	7
<u>State v. Berger</u> , 2004 ND 151, ¶ 8, 683 N.W.2d 897.....	8
<u>State v. Corman</u> , 2009 ND 85, ¶ 15, 765 N.W.2d 530.....	7
<u>State v. Ebertz</u> , 2010 ND 79, ¶ 10, 782 N.W.2d 350. ....	9, 12
<u>State v. Ferrie</u> , 2008 ND 170, ¶ 8, 755 N.W.2d 890. ....	7
 <u>NORTH DAKOTA COURT RULES:</u>	
N.D.R.Crim.P. 32.1. ....	9, 10, 12, 13
 <u>NORTH DAKOTA CENTURY CODE</u>	
N.D.C.C. § 12.1-32-07.1(2) .....	12
 <u>NORTH DAKOTA ADMINISTRATIVE CODE</u>	
N.D. Admin. Code § 10-13-11-04 .....	13
N.D. Admin. Code § 10-13-11-03 .....	13
 <u>SECONDARY SOURCES</u>	
29 Am. Jur. 2d <u>Evidence</u> § 529 (2019) .....	11
22 C.J.S. <u>Criminal Procedure and Rights of Accused</u> § 262 (2019) ....	11
<u>Minutes of the Joint Procedure Comm.</u> 14-15 (Jan. 29 – 30, 1998) ....	9

## **STATEMENT OF THE ISSUES**

1. Mr. Overholt's guilty plea in Case 2 was withdrawn, the case dismissed, and the file should have been sealed.
2. The Cass County District Court erred in relying on Case 2 to modify its Order Deferring Imposition of Sentence in Case 1.

## STATEMENT OF THE CASE

[¶ 1] Matthew Overholt hereby submits this Brief on Appeal from the Cass County District Court's Order Granting the Plaintiff's Motion to Modify Order Deferring Imposition of Sentence, dated December 31, 2018. Doc. ID. 10.

[¶ 2] This matter came before the Cass County District Court on Motion by the Plaintiff (hereinafter the "State") on December 6<sup>th</sup>, 2018 before the Honorable Judge of the District Court Tom Olson. Doc. IDs. 3 – 5. The requested that the Defendant's Deferred Imposition of Sentence be modified; specifically, Mr. Overholt's guilty plea not be withdrawn, the case not be dismissed, and the file not be sealed. Doc. ID. 3. According to its Motion, the State's reason for requesting modification was that the Defendant committed the offense of Minor in Consumption or Possession on April 21, 2018 and pleaded guilty through a deferred imposition of sentence on May 15, 2018 in case number 09-2018-CR-01683. Id. Both case number 09-2017-CR-05095 and case number 09-2018-CR-01683 were prosecuted by the Cass County State's Attorney's Office.

[¶ 3] The Defendant (hereinafter "Mr. Overholt") on December 21, 2018, filed his Answer Brief. Doc. ID. 9. Mr. Overholt contended that the Court could not modify the Order Deferring Imposition of Sentence because the underlying guilty plea relied upon by the State had been withdrawn on October 13, 2018. Id. Mr. Overholt's guilty plea in case number 09-2018-CR-01683, should have been withdrawn, the case automatically dismissed, and the file sealed as of October 13,

2018. Id. The Court granted the State’s Motion to Modify Mr. Overholt’s deferred imposition of sentence. Doc. ID. 5.

### **STATEMENT OF FACTS**

[¶ 4] On November 20, 2017, Mr. Overholt was charged with a misdemeanor Minor in Possession or Consumption of Alcohol in Cass County case number 09-2017-CR-05095 (hereinafter “Case 1”). Doc. ID. 1. On December 5, 2017, Mr. Overholt received an Order Deferring Imposition of Sentence. Doc. ID. 2. The Order placed Mr. Overholt on unsupervised probation with a termination date of November 30, 2018 and ordered him to refrain from violating any criminal laws. Id. Additionally the Court ordered that sixty-one (61) days after termination of Mr. Overholt’s unsupervised probation, Mr. Overholt’s guilty plea would be withdrawn, the case dismissed, and the file sealed. Id.

[¶ 5] On April 23, 2018, Mr. Overholt was charged with a second misdemeanor Minor in Possession or Consumption of Alcohol in Cass County case number 09-2018-CR-01683 (hereinafter “Case 2”). Pursuant to a May 15, 2018 plea agreement, the Court entered a deferred imposition of sentence. Mr. Overholt was placed on unsupervised probation with a termination date of August 13, 2018 and ordered to refrain from violating any criminal laws. The Court further ordered, “[sixty-one] (61) days after expiration or termination of probation, the guilty plea is withdrawn or the guilty verdict set aside, the case dismissed, and the file sealed under North Dakota Century Code section 12.1-32-07.1 and 12.1-

32-07.2, unless otherwise ordered.” Id. As of October 13, 2018, sixty-one (61) days from the termination of Mr. Overholt’s probation in Case 2, Mr. Overholt’s guilty plea should have been withdrawn, the case dismissed, and the file sealed. However, the file was not sealed due to an administrative error.

[¶ 6] On December 6, 2018, the State moved to modify Mr. Overholt’s Order Deferring Imposition of Sentence in Case 1 solely relying on Mr. Overholt’s deferred imposition of sentence in Case 2. Other than the subject of this appeal, no other motions to modify were filed in either Case 1 or Case 2.

### **STANDARD OF REIVEW**

[¶ 7] Appellate review of a criminal sentence is generally confined to whether the [district] court acted within the sentencing limits prescribed by statute, or substantially relied upon an impermissible factor. Statutory interpretation, however, is a question of law fully reviewable on appeal.” State v. Corman, 2009 ND 85, ¶ 15, 765 N.W.2d 530. The interpretation of a court rule, like the interpretation of a statute, is a question of law. Carlson v. Workforce Safety & Ins., 2009 ND 87, ¶ 22, 765 N.W.2d 691. The Court interprets a rule or statue by giving the words their plain, ordinary, and commonly understood meaning and construe the statute or rule as a whole. State v. Ferrie, 2008 ND 170, ¶ 8, 755 N.W.2d 890.

[¶ 8] An order deferring imposition of sentence is not an appealable order as the trial court does not enter a separate judgment of conviction. However, when the 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.

### **LAW AND ARGUMENT**

[¶ 9] The district court may modify an order deferring imposition of sentence no later than sixty (60) days after expiration or termination of probation. N.D.R.Crim.P. 32.1. An order deferring imposition of sentence is not a judgment. N.D.R.Crim.P. 32.1 (explanatory note)(emphasis added). Rule 32.1 provides that an order deferring imposition of a sentence for an infraction or a misdemeanor must require that the plea will be withdrawn and the case automatically dismissed sixty-one (61) days after probation is terminated or expires, unless the court finds the conditions or probation have not been fulfilled and orders the case not be dismissed. N.D.R.Crim.P.32.1; See also, State v. Ebertz, 2010 ND 79, ¶ 10, 782 N.W.2d 350. If a judge finds out about violations two months after the dismissal, the judge is prohibited from going back and undoing the dismissal. Ebertz, 2010 ND 79, ¶ 10; citing Minutes of the Joint Procedure Comm. 14-15 (Jan. 29 – 30, 1998).

**A. Mr. Overholt’s guilty plea in Case 2 was withdrawn, the case dismissed, and the file should have been sealed.**

[¶ 10] An order deferring imposition of sentence requires that three (3) things must occur sixty-one (61) days after expiration or termination of probation. N.D.R.Crim.P. 32.1.



[¶ 11] The first requirement is that the defendant's guilty plea must be withdrawn. Id. On the withdrawal of a plea, the accused merely stands in the same position and with the same rights and privileges as if no plea had been entered. 22 C.J.S. Criminal Procedure and Rights of Accused § 262 (2019). A withdrawn guilty plea is not, except under certain limited circumstances, admissible against the defendant who makes the plea, in any civil or criminal proceeding. 29 Am. Jur. 2d Evidence § 529 (2019). Admission of such pleas would reduce the act of withdrawal to a meaningless gesture. Id.

[¶ 12] The second requirement is that the case be dismissed. N.D.R.Crim.P. 32.1(b). Section 12.1-32-07.1 gives the court authority to dismiss a case when a deferred imposition of sentence has been ordered and the defendant has fulfilled the conditions of probation or has been discharged from probation. State v. Ebertz, 2010 ND 79, ¶ 9, 782 N.W.2d 350. Under section 12.1-32-07.1, the court may dismiss the information or indictment against the defendant. N.D.C.C. § 12.1-32-07.1(2).

[¶ 13] The third requirement is that the file be sealed. N.D.R.Crim. P. 32.1(c). Records may be sealed by removal from the general record file and storage in a separate, secured file. In automated systems, sealing must be accomplished by limiting access to the sealed records. See generally, N.D. Admin. Code § 10-13-11-04. Criminal justice agencies may access sealed records for record management, review by the record subject, authorized research and

statistical purposes, or upon court order from a court of competent jurisdiction. N.D. Admin. Code § 10-13-11-03.

[¶ 14] In Case 2, the Court entered an Order deferring imposition of sentence on May 15, 2018. Pursuant to the Order, Mr. Overholt was placed on unsupervised probation and ordered not to violate any criminal laws. On August 13, 2018, Mr. Overholt successfully completed his unsupervised probation. The State did not make any motion to modify the Order by October 13, 2018 and Mr. Overholt's guilty plea in Case 2 was to be withdrawn, the case automatically dismissed, and the file sealed pursuant to the requirements under N.D.R.Crim.P. 32.1. Therefore, as of October 13, 2018, Mr. Overholt was restored to the same position he had prior to entering a plea in Case 2. To consider Mr. Overholt's withdrawn guilty plea in Case 2 for the purposes of sentencing in Case 1 would reduce the act of the withdrawal meaningless.

[¶ 15] By Rule 32.1, N.D.R.Crim.P., and Court Order, Case 2 was to be sealed. An administrative error had occurred allowing the State to access the record without a court order in December 2018, when Case 2 was ultimately sealed and the dismissal entered. Ultimately, at the time of the State's Motion in December 2018, Case 2 should have been dismissed and sealed.

**B. The Cass County District Court erred in relying on Case 2 to modify its Order Deferring Imposition of Sentence.**

[¶ 16] On December 6<sup>th</sup>, 2018, the State moved to modify Mr. Overholt's Order Deferring Imposition of Sentence in Case 1 relying on Mr. Overholt's guilty

plea pursuant to a deferred imposition of sentence in Case 2. Mr. Overholt's guilty plea in Case 2 was withdrawn on October 13, 2018. Therefore, the State was relying on a guilty plea that did not exist. Both plea agreements were entered into with the Cass County State's Attorney's Office and Case 2 was executed in writing. Case 2 should not have been accessible nor admitted into evidence against Mr. Overholt after the automatic dismissal on October 13, 2018. Not only did the guilty plea not exist as of December 6th, 2018, orders deferring imposition of sentence are not a judgment that can be relied on in future proceedings.

[¶ 17] On October 13, 2018, Case 2 was automatically dismissed pursuant to Rule 32.1, N.D.R.Crim.P.; therefore, no conviction, adjudication of guilt, or factual basis existed at the time the State's motion was made on December 6<sup>th</sup>, 2018. Though the State had access to the Case 2 file and used it for its Motion, no conviction nor guilty plea were entered or remaining on which to base its Motion.

### **CONCLUSION**

[¶ 18] 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.

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Defendant and Appellant,	)	
	)	
vs.	)	Cass County District Court No.
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	)	
State of North Dakota,	)	
	)	
Plaintiff and Appellee.	)	

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**CERTIFICATE OF COMPLIANCE**

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[¶ 1] The undersigned, as attorney for the Appellant, Matthew Jeffery Overholt, in the above-entitled matter, and as the author of the above brief, hereby certify, in compliance with Rule 32(a)(5) and (7)(a) of the North Dakota Rules of Appellate Procedure, that the above Brief of Appellant was prepared with proportional typeface and the total number of words in the above Brief, excluding words in the table of contents, table of authorities, certificate of service and this certificate of compliance, totals 1,738 with a total number of 12 pages.

Dated this 11<sup>th</sup> day of March, 2019.

/s/ Will Budke  
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State of North Dakota,	)	
	)	
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**CERTIFICATE OF SERVICE**

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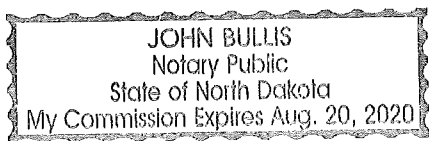
STATE OF NORTH DAKOTA    )  
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COUNTY OF RICHLAND    )

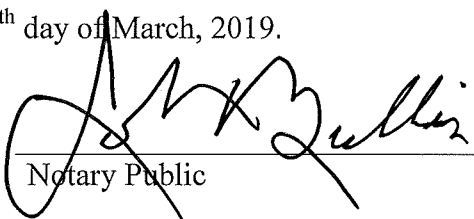
I, Will Budke, being first duly sworn, deposes, and states that on the 11<sup>th</sup> day of March, 2019, she served a true and correct copy of the Defendant/Appellant's **Brief of Appellant Matthew Jeffery Overholt and Certificate of Compliance** by emailing a true and correct copy thereof to:

Cass County State's Attorney, Bruce Burdick, Attorney for Plaintiff and Appellee  
Email: sa-defense-notices@casscountynd.gov

  
\_\_\_\_\_  
Will Budke

Subscribed and sworn to me before this 11<sup>th</sup> day of March, 2019.



  
\_\_\_\_\_  
Notary Public