

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20190064

Joshua Michael Eshenko,)
) Petitioner/Appellant,)
))
) vs.)
))
State of North Dakota,)
) Respondent/Appellee)

APPEAL FROM THE CIVIL JUDGMENT
EAST CENTRAL JUDICIAL DISTRICT
CASS COUNTY CIVIL. NO. 09-2018-CR-4552
THE HONORABLE STEVEN L. MARQUART PRESIDING

BRIEF

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ABBREVIATIONS

Change of Plea and Sentencing Transcript..... C of PST

STATEMENT OF THE ISSUE

[¶1] ISSUES

I. Does a Defendant in North Dakota who is charged with a Class C Felony have a right to be personally present in a District Courtroom when he pleads guilty and the court accepts his guilty plea?

NATURE OF THE CASE

[¶2] In this case Defendant/Appellant Joshua Michael Eshenko (Eshenko) was charged with 2 felonies (1) unlawful possession of drug paraphernalia – Use – SI, SII, SIII – 2nd offense, (2) Preventing Arrest.

[¶3] On 10/23/2018 the following documents were filed: information, incident report, and arraignment.

[¶4] The arraignment took place on 10/24/2018.

[¶5] On 11/28/2018 there was a preliminary hearing and/or arraignment. At the arraignment Eshenko plead not guilty.

[¶6] Eshenko decided to and did change his plea to guilty on 01/31/2019 and on that date judgment was entered.

[¶7] A notice of appeal and order for transcripts was filed on 02/25/2019.

[¶8] This matter is now before the N.D. Supreme Court.

STATEMENT OF FACTS

[¶9] In Cass County North Dakota the District Judges have recorded on a disc what they have determined are all the rights a criminal defendant needs to be informed in any criminal case.

[¶10] This disc is played to all criminal defendants in a Cass County Courtroom when they make their initial appearance in criminal cases.

[¶11] After the disc is played each defendant is individually brought before a district judge where he or she is informed about additional rights that apply to their case and court procedure that will follow after their initial appearance.

[¶12] The Defendant/Appellant in this case is Joshua Michael Eshenko (Eshenko). Eshenko is charged with Unlawful possession of drug paraphernalia – Use – SI, SII, SIII – 2nd offense, which is a class C Felony. He is also charged with preventing arrest, which is also a Class C Felony. On either Class C Felony Eshenko could have been be sentenced to five (5) years and/or a fine of \$10,000.

[¶13] Eshenko was not personally present in a Cass County District Courtroom when he plead guilty. His appearance was made by interactive television. According to N.D.C.C RULE 11 (b) (2)

“Ensuring that a plea is voluntary. Before accepting a plea of guilty, the court must address the defendant personally in open court, unless the defendant’s presence is not required under Rule 43 (c), and determine that the plea is voluntary and did not result from force, threats, or promises other than promises in a plea agreement. The court must also inquire whether the defendant’s willingness to plead guilty results from discussion between the prosecuting attorney and the defendant’s willingness to plead guilty results from discussion between the prosecuting attorney and the defendant or the defendant’s

attorney.” (Emphasis Added)

[¶14] At no time during Eshenko’s guilty plea and sentencing did the district judge inquire whether Eshenko’s willingness to plead guilty resulted from a discussion between the prosecuting attorney and Eshenko or Eshenko’s attorney.

ISSUES PRESENTED

[¶15] Does a Defendant in North Dakota who is charged with a Class C Felony have a right to be personally present in a District Courtroom when he pleads guilty and the court accepts his guilty plea?

ARGUMENT

[¶16] In this case Eshenko is claiming that the trial court at his change of plea hearing abused its discretion and acted in an arbitrary, unreasonable, or capricious manner and misinterpreted or misapplied the law.

[¶17] According to State vs. Feist 2006 N.D. 21, 708 NW 2d 870

“A trial court abuses its discretion when it acts in an arbitrary, unreasonable, or capricious manner, or misinterprets or misapplies the law. State v. Farrell, 2000 ND 26 ¶8, 606 N.W.2d 524.”

[¶18] Because of the above claim of Eshenko the standard of review in this case is abuse of discretion.

[¶19] In the case now before the court, when Eshenko’s change of plea hearing took place he was not personally present. His appearance was made by interactive television. Eshenko believes that his appearance by interactive television violated his constitutional rights to be personally present in court which is guaranteed by Amendment VI and XIV of the United States Constitution and Article 1 § 12 of the Constitution of N.D.

[¶20] The following language is found in Rule 11(b)(2) of the N.D. Rule of Criminal Procedure:

“Ensuring that a plea is voluntary. Before accepting a plea of guilty, **the court must address the defendant personally in open court**, unless the defendant’s presence is not required under Rule 43(c), and determine that the plea is voluntary and did not result from force, threats, or promises other than promises in a plea agreement. The court must also inquire whether the defendant’s willingness to plead guilty results from discussion between the prosecuting attorney and the defendant or the defendant’s attorney.” (Emphasis added)

[¶21] The only part of Rule 11(b)(2) of the North Dakota Rule of Criminal Procedure that the trial court complied with in Eshenko's case is found in the C of PST is on page 9, line 9-16:

“THE COURT: Do you understand, Mr. Eshenko, that by pleading guilty to these matters it means that you're giving up all those rights that I read to you this afternoon?

THE DEFENDANT: Yes, Your Honor.

THE COURT Has anybody threatened you or coerced you to enter into these guilty peas?

THE DEFENDANT: No, sir.”

[¶22] According to Feist:

“The advice required to be given by Rule 11 is mandatory and binding on the court. *Id.* Although Rule 11 does not require any predetermined formality, the court must substantially comply with the procedural requirements of the rule. *Id.* A district court is required to “inquire as to whether the defendant's willingness to plead guilty results from previous discussion between the prosecuting attorney and the defendant or the defendant's attorney.”

[¶23] In the case now before the Court it is Eshenko's contention that the trial court failed to substantially comply with the procedural requirements of Rule 11 of the North Dakota Rule of Criminal Procedure at his change of plea hearing.

[¶24] Another North Dakota Rule of Criminal Procedure that deals with the Defendant's personal presence during court proceedings is Rule 43. According to Rule 43(a)(1)(A)(B)(C):

“(a) **When required.**

(1) *In general.* Unless this rule provides otherwise, the defendant must be present at:

(A) the initial appearance, the arraignment, and the plea;

(B) every trial stage, including jury impanelment and the return of the verdict; and
(C) sentencing.

[¶25] The exceptions procedure for personal presence at felony hearings language is found in Rule 43 (b)(1):

“(b) **When not required.** If the court permits, a defendant need not be present under any of the following circumstances:
(1) *Felony offense.* The offense is punishable by imprisonment for more than one year, and with a represented defendant’s written consent and written acknowledgement that the defendant was advised of the rights listed in Rules 5(b)(1) and (2) and 5(c), the preliminary hearing, the arraignment, and entry of a not guilty plea may occur in the defendant’s absence. (Emphasis added)

[¶26] In the case now before the court there is no represented Defendant’s written consent or written acknowledgement that the Defense was advised of the rights listed in rules (5)(b)(1) and (2) and 5(c). Even if there was a represented Defendant’s written consent, rule 43 (b)(10) only applies to preliminary hearing arraignment and not guilty pleas. Therefore Eshenko’s interactive television appearance at his change of plea hearing fails to meet the requirements of rule 43 (b)(1) of the N.D. Rules of Criminal Procedure.

[¶27] In this case Eshenko expects the state to claim that a Defendant can and has a right to waive his right to be personally present at his guilty plea of that personal appearance at a guilty plea is not a critical stage of the court proceeding that effects Eshenko’s substantial rights.

[¶28] If the state does raise either of these issues before either issue can be considered the state should be required to present case law that allows a district judge to

disregard established court procedural rules 11 and 43 of the North Dakota rules of criminal procedure.

CONCLUSION

[¶29] Because of the above and forging the trial judge in this case erred when he excepted Eshenko's guilty plea. The only way to correct this error is to remand this case to the district court with an order requiring the district judge to hold a hearing with Eshenko personally present and at that hearing give Eshenko an opportunity to either properly enter his plea of guilty or to withdraw his guilty plea.

DATED this 8th day of April, 2019.

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CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that she is an employee in the office of Pulkrabek Law Firm and is a person of such age and discretion as to be competent to serve papers. That on April 9, 2019, she served, by e-mail a copy of the following:

BRIEF

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The undersigned further certifies that on April 9, 2019, she served electronically on the Clerk, North Dakota Supreme Court, the APPELLANTS BRIEF.

Cassy Larson /S/
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