

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff and Appellee,)	Supreme Court No. 20190064
)	
vs.)	
)	
Joshua Michael Eshenko,)	District Court No. 09-2018-CR-04552
)	
Defendant and Appellant.)	

APPEAL FROM CRIMINAL JUDGMENT
ENTERED JANUARY 31, 2019

CASS COUNTY DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE STEVEN L. MARQUART, PRESIDING

APPELLEE'S BRIEF

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Cases

State v. Austin,
2007 ND 30, 727 N.W.2d 790 ¶¶ 5, 9, 13

State v. Kruckenberg,
2008 ND 212, 758 N.W.2d 427 ¶ 7

State v. Murphy,
2014 ND 202, 855 N.W.2d 647 ¶¶ 5, 7, 10, 11

State v. Pixler,
2010 ND 105, 783 N.W.2d 9 ¶ 11

Rules

N.D.R.Crim.P. 11 ¶¶ 10, 11

N.D.R.Crim.P. 43 ¶¶ 6, 8

N.D.R.Crim.P. 52 ¶ 5

N.D. Sup. Ct. Admin. R. 52 ¶ 8

STATEMENT OF THE ISSUES

[¶ 1] Whether the district court obviously erred in allowing Eshenko to plead guilty via interactive television when he consented to appear in that manner.

[¶ 2] Whether the district court obviously erred in omitting questioning regarding whether Eshenko's guilty plea was the result of an agreement between the parties.

STATEMENT OF THE CASE

[¶ 3] Joshua Eshenko was charged with unlawful possession of drug paraphernalia and preventing arrest. During the change of plea hearing, Eshenko appeared remotely from the Cass County Jail via interactive television. Eshenko pled guilty to both charges. He now appeals, arguing the district court erred in accepting his guilty pleas because he was not personally present in the courtroom.

STATEMENT OF FACTS

[¶ 4] Joshua Michael Eshenko was charged with unlawful possession of drug paraphernalia and preventing arrest. (Appellant's Appendix "App." at 3.) A change of plea hearing was held on January 31, 2019. (Change of Plea Transcript "COP Tr." at 1.) Eshenko appeared via interactive television from the Cass County Jail. (COP Tr. 8:7-9.) The Court informed Eshenko that he had the right to be personally present in the courtroom for his change of plea. (COP Tr. 8:7-9.) Eshenko waived his right to be personally present. (COP Tr. 8:10.) Eshenko then pled guilty to both charges. (COP Tr. 9:3-8.)

STANDARD OF REVIEW

[¶ 5] When a criminal defendant fails to raise an issue below, this Court will not address the issue unless an obvious error affecting substantial rights exists. State v. Murphy, 2014 ND 202, ¶ 6, 855 N.W.2d 647 (citing N.D.R.Crim.P. 52(b)). The defendant

bears the burden of establishing an obvious error. *Id.* at ¶¶ 11-12. This Court notices obvious error only in exceptional circumstances when the defendant has suffered a serious injustice. *State v. Austin*, 2007 ND 30, ¶ 19, 727 N.W.2d 790.

LAW AND ARGUMENT

I. The district court did not commit obvious error in allowing Eshenko to plead guilty via interactive television.

[¶ 6] Eshenko argues that the district erred by failing to require his presence in the courtroom at his felony change of plea in accordance with N.D.R.Crim.P. 43. Subdivision (a)(1)(A) of N.D.R.Crim.P. 43 requires a defendant to be present at a plea hearing.

[¶ 7] The issue of whether the district court erred in allowing Eshenko to plead guilty to a felony via interactive television was not raised below. Eshenko did not object to his appearance via interactive television or move to withdraw his plea. Rather, when the district court informed Eshenko that he had a right to be present in the courtroom, Eshenko affirmatively stated he was waiving that right. (COP Tr. 8:7-10.) Because the issue is before this Court for the first time on appeal, review is limited to obvious error. *Murphy*, 2014 ND 202, ¶ 6, 855 N.W.2d 647. “To establish obvious error, the defendant must show: (1) error; (2) that is plain; and (3) affects substantial rights.” *State v. Kruckenberg*, 2008 ND 212, ¶ 15, 758 N.W.2d 427.

a. The district court did not clearly deviate from the presence requirement of N.D.R.Crim.P. 43.

[¶ 8] Eshenko’s appearance via interactive television constitutes his presence for purposes of N.D.R.Crim.P. 43. Under N.D.R.Crim.P. 43(a)(2), a defendant’s presence “permitted by contemporaneous audiovisual transmission by reliable electronic means is

presence” for purposes of the Rule. North Dakota Supreme Court Administrative Rule 52 provides a framework for the use of contemporaneous audiovisual transmission by reliable electronic means. Under N.D. Sup. Ct. Admin. R. 52(4)(B)(1), “[a] defendant may not plead guilty or be sentenced by reliable electronic means unless the parties consent.” Here, Eshenko consented to his appearance via interactive television. (COP Tr. 8:7-10.) Because a defendant is permitted to plead guilty from outside the courtroom via contemporaneous audiovisual transmission by reliable electronic means with the consent of the parties, and here, Eshenko did consent to appearance by interactive television, there was no clear deviation from N.D.R.Crim.P. 43’s presence requirement. Therefore, the district court did not err in allowing Eshenko to plead guilty via interactive television.

b. Eshenko has not established that he suffered a serious injustice.

[¶ 9] Should this Court decide that the district court did err by allowing Eshenko to plead guilty via interactive television, it should still affirm the judgment of the district court because Eshenko has not established that he suffered a serious injustice. This Court acts to correct obvious error “only in exceptional circumstances when the defendant has suffered a serious injustice.” Austin, 2007 ND 30, ¶ 19, 727 N.W.2d 790. Eshenko has not established a serious injustice. He has not even argued how the outcome might have been different had he pled guilty in person rather than via interactive television. Accordingly, the Court should not find obvious error.

II. The district court did not obviously err by omitting inquiry about plea discussions.

[¶ 10] Eshenko also suggests in the Statement of Facts section of his brief that the district court failed to inquire whether the guilty plea was the result of plea negotiations. (Appellant Brief at ¶ 14.) The State construes this suggestion as an argument that the

district court erred in regard to N.D.R.Crim.P. 11(b)(2), which requires that the court inquire whether the defendant's willingness to plead guilty is the result of discussion between the prosecuting attorney and the defendant or defendant's attorney. Like the issue of pleading guilty via interactive television, this issue was not raised below in the form of an objection or a motion to withdraw the guilty plea. As such, the alleged error should be analyzed under the obvious error standard. Murphy, 2014 ND 202, ¶ 6, 855 N.W.2d 647.

[¶ 11] The State concedes that the district court's N.D.R.Crim.P. 11(b)(2) inquiry at the record of the change of plea hearing did not include questioning as to whether Eshenko's plea was the result of an agreement with the prosecutor. However, this Court has explained that "[Rule 11] does not require ritualistic compliance, but a court must substantially comply with the rule's procedural requirements." Murphy, 2014 ND 202, ¶ 7, 855 N.W.2d 647 (internal quotation omitted). This Court has further explained "[t]he purpose of the rule's requirements is to ensure the defendant is fully aware of the consequences of pleading guilty before he enters his plea." State v. Pixler, 2010 ND 105, ¶ 8, 783 N.W.2d 9.

[¶ 12] Statements on the record support a conclusion that Eshenko's plea was voluntary. The Court inquired whether Eshenko had been threatened or coerced into pleading guilty. (COP Tr. 9:14-16.) Also, despite no direct inquiry, circumstances indicate that the plea was not the result of an agreement between the prosecutor and defense counsel because there was not a joint recommendation for sentencing. Rather, the State and Eshenko presented different recommendations to the Court. (COP Tr. 10:12-17, 10:23-11:11.) Additionally, there was no discussion on the record about the State capping its recommendation in exchange for a guilty plea.

[¶ 13] Moreover, Eshenko has not established that he has suffered a serious injustice by this alleged error. See Austin, 2007 ND 30, ¶ 19, 727 N.W.2d 790 (“The Court will notice obvious error only in exceptional circumstances when the defendant has suffered a serious injustice.”) Eshenko has not established any probability that the outcome here would have been different had the district court directly asked whether the plea was the result of an agreement between the parties. As such, any error or injustice does not rise to the level of seriousness for this Court to intervene under the obvious error standard.

CONCLUSION

[¶ 14] Because Eshenko has not established that the district court committed obvious error by allowing him to plead guilty via interactive television or by omitting questioning as to whether his guilty plea was the result of an agreement, the State respectfully requests this Court **AFFIRM** the Criminal Judgment entered January 31, 2019.

Submitted this 3rd day of May, 2019.

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CERTIFICATE OF SERVICE

[¶ 15] A true and correct copy of the foregoing document was sent by email on the 3rd day of May, 2019, to: pulkrabek@lawyer.com.

Kara Schmitz Olson