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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Spencer Kerry Curtiss, Petitioner and Appellant, v. State of North Dakota, Respondent and Appellee.	**Supreme Ct. No. 20200175** **District Ct. No. 08-2020-CV-00514**

**APPEAL FROM THE APRIL 21, 2020
ORDER GRANTING MOTION TO DISMISS
AND
THE JUNE 16, 2020 ORDER DENYING MOTION FOR RECONSIDERATION
BURLEIGH COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT**

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STATEMENT OF ISSUES

[¶1] Whether the District Court correctly found that Spencer Kerry Curtiss' Complaint was an impermissible collateral attack on the criminal judgment against him in Burleigh County Case No. 08-10-K-1650.

[¶2] Whether the District Court correctly found Spencer Kerry Curtiss failed to show he had a right to reconsideration under N.D.R.Civ.P. Rules 52(b), 59(j), and 60(b) and that his motion was yet another attempt to collaterally attack his criminal conviction which the court previously dismissed.

STATEMENT OF CASE

[¶3] Appellant Spencer Kerry Curtiss ("Curtiss") initiated this lawsuit as an attempt to collaterally attack his 2010 criminal conviction for gross sexual imposition with a minor ("GSI Conviction").

[¶4] In lieu of an answer, Appellee filed a Motion To Dismiss, Appendix to Brief of Appellant ("App.") at 12-13, seeking dismissal of Curtiss' Complaint on the grounds: 1) the Complaint was an impermissible collateral attack on a Judgment in a criminal case and failed to state a claim upon which relief can be granted, and (2) the court lacked subject matter jurisdiction because the court didn't impose the conditions of probation as required by N.D.C.C. § 12.1-32-07.

[¶5] On April 21, 2020, the District Court issued its Order Granting Motion for Dismissal, stating "Curtiss' motion in this case is clearly an impermissible collateral attack on the criminal judgment against him in Burleigh County Case No. 08-10-K-1650." App. at 23, ¶ 5. The case was dismissed with prejudice. Id.

[¶6] After the Notice of Entry of Order on April 22, 2020 (Index #45), on May 1, 2020, Curtiss filed an improper Addendum in Support of Complaint. Index # 48. On May 14, 2020, Curtiss filed a Motion for Reconsideration "pursuant to NDRCivP [sic] 52(b), NDRCivP [sic] 59(j), and NDRCivP [sic] (60(b)" Index # 53, ¶ 2.

[¶7] On May 28, 2020, Appellee filed an Opposition to Motion for Reconsideration asserting Curtiss was unable to demonstrate he was entitled to reconsideration under the rules he stated. Index #60.

[¶8] On June 16, 2020, the District Court Issued an Order Denying Motion for Reconsideration, stating Curtiss' motion "appears to be yet another attempt to raise the same arguments collaterally attacking his criminal conviction which the court previously dismissed." The District Court found Curtiss failed to show he was entitled to reconsideration under the rules stated. App. at 26, ¶ 4.

[¶9] On July 7, 2020, Curtiss filed a Notice of Appeal, appealing the April 21, 2020 Order Granting Motion to Dismiss, and the June 16, 2020 Order Denying Motion for Reconsideration. App. 48.

STATEMENT OF FACTS

[¶10] Curtiss served the Office of Attorney General with a Summons and Complaint naming the State of North Dakota ("State") as the Defendant. Curtiss' Complaint was a new challenge to his 2010 criminal conviction for gross sexual imposition ("GSI Conviction"). App. at 8, ¶ 6.

[¶11] Curtiss' Complaint represented the fifth challenge to his GSI Conviction. Curtiss v. State, 2015 ND 83, 865 N.W.2d 124; Curtiss v. State, 2015 ND 159, 870

N.W.2d 26; Curtiss v. State, 2016 ND 62, 877 N.W.2d 58; Curtiss v. Braun, No. 1:16-cv-00049, 2018 WL 10701612, (D.N.D. 2018).

[¶12] Various relevant documents from Curtiss' prior challenges were submitted to and considered by the District Court in the underlying action, and are now in the record on appeal in this case. See Index # 10-12, 25-25-27. "Courts have the power to judicially recognize their own records of prior litigation closely related to the present case." Bender v. Beverly Anne, Inc., 2002 ND 146, ¶ 5, 651 N.W.2d 642 (quoting 1 Weinstein's Fed. Evid., § 201.12[3], p. 201–29 (2d ed.2002)).

[¶13] Judge Reich noted in his Order Granting Motion to Dismiss, "Curtiss' efforts to appeal his conviction and two subsequent petitions for post-conviction relief and a motion for Rule 60 Relief were all unsuccessful. His petition for a writ of habeas corpus in U.S. District court was also denied." App. at 22, ¶ 1. Judge Reich further noted that Curtis "recently . . . filed a motion to amend his probation in his criminal case" but that was denied since his period of probation has not yet commenced as he is still in custody. Id.

[¶14] After Curtiss was served with Appellee's Motion to Dismiss, he attempted to revise his argument and began asserting it was an "independent action in equity" rather than a declaratory judgment, despite initially arguing he was entitled to relief under the Declaratory Judgment Act, N.D.C.C. ch. 32-33. Index # 16.

[¶15] The Motion to Dismiss was granted and the case was dismissed with prejudice on April 21, 2020. App. 22-24.

[¶16] Curtiss filed numerous documents with the District Court after the Order was entered, including a Motion for Reconsideration. Index # 54. Curtiss was

unsuccessful in his Motion for Reconsideration because the District Court properly determined that the motion "appears to be yet another attempt to raise the same arguments collaterally attacking his criminal conviction which the court previously dismissed." App. at 26 ¶ 4.

STANDARD OF REVIEW

[¶17] The District Court granted Appellee's Motion To Dismiss under North Dakota Rule of Civil Procedure 12(b)(6) due to Curtiss' failure to state a claim upon which relief can be granted. App. 12-13.

[¶18] This Court "reviews a district court's decision granting a motion to dismiss under N.D.R.Civ.P. 12(b)(6) de novo." Nandan, LLP v. City of Fargo, 2015 ND 37, ¶ 11, 858 N.W.2d 892 (citing Brandvold v. Lewis & Clark Pub. Sch. Dist. No. 161, 2011 ND 185, ¶ 6, 803 N.W.2d 827; Bala v. State, 2010 ND 164, ¶ 7, 787 N.W.2d 761). In such cases, this Court has summarized its standard of review as follows:

> A motion to dismiss a complaint under N.D.R.Civ.P. 12(b)(vi) tests the legal sufficiency of the claim presented in the complaint. On appeal from a dismissal under N.D.R.Civ.P. 12(b)(vi), we construe the complaint in the light most favorable to the plaintiff and accept as true the well-pleaded allegations in the complaint. Under N.D.R.Civ.P. 12(b)(vi), a complaint should not be dismissed unless it is disclosed with certainty the impossibility of proving a claim upon which relief can be granted. We will affirm a judgment dismissing a complaint for failure to state a claim if we cannot discern a potential for proof to support it.

Id. (quoting Brandvold, 2011 ND 185, ¶ 6, 803 N.W.2d 827(citations omitted); Vandall v. Trinity Hosps., 2004 ND 47, ¶ 5, 676 N.W.2d 88).

LAW AND ARGUMENT

[¶19] In large part, Appellant's Brief simply restates the allegations in the Complaint, without explaining any alleged errors in the Order Granting Motion to Dismiss and Order Denying Motion for Reconsideration under appeal. Curtiss is attempting to litigate his entire criminal case before this Court, rather than focusing on the District Court's order and his appeal of it. As this Court has noted on numerous occasions, the Justices of this Court "are not ferrets," and they are not required to "search through the record to find a party's argument for them." State v. Rourke, 2017 ND 102, ¶ 8, 893 N.W.2d 176 (See Jury v. Barnes County Municipal Airport Authority, 2016 ND 106, ¶ 12, 881 N.W.2d 10 (citing State v. Noack, 2007 ND 82, ¶ 8, 732 N.W.2d 389). Curtiss continues to collaterally attack his criminal judgment as nearly every paragraph in his Brief of Appellant refers to or relates to his GSI Conviction. Appellant's Brief ¶¶ 6-7, 9-10, 12-15, 21-22, 27, 34, 38-39, 44, 46-59, 63, 65, 67, 70, 73-78.

[¶20] Curtiss' issues are not proper before this Court. As one example, Curtiss' second issue "[w]hether all statues listed on the Information, and considered essential elements by Legislature, with corresponding language must be given to the jury in which to make finding beyond a reasonable doubt before a defendant has 'been found guilty'" further shows he clearly does not understand what a collateral attack is, and that his appeal is yet another attempt to relitigate his prior criminal conviction. Appellant's Brief p. 6.

[¶21] Curtiss incorrectly states the standard of review, and cites to the Rules of Criminal Procedure despite this being a civil case. Appellant's Brief ¶ 12. Curtiss

was unable to show he had a right to reconsideration under the rules, and characterizes that as fraud on behalf of the state. Appellant's Brief ¶¶ 17-20. Curtiss continues to allege there was a "Demand for Change of Judge," despite the record reflecting no such demand. Appellant's Brief ¶ 17, 31; Index #52 ¶ 13. The docket sheet contains every document filed with the clerk of court and the State properly served Curtiss with every document filed on behalf of the Defendant. Curtiss further alleges the case was "submitted before the sentencing court, Judge Reich, thereby negating the ground for dismissal." Appellant's Brief ¶ 36. The case before the District Court was a civil action, and no such sentencing court exists. The record does not reflect any such submission. Curtiss' lack of understanding of a lawsuit does not entitle him to reconsideration.

I. The Complaint fails to state a claim upon which relief can be granted.

[¶22] The District Court properly dismissed Curtiss' Complaint under Rule 12(b)(6) of the North Dakota Rules of Civil Procedure because the Complaint failed to state a claim. As found by the District Court, the Complaint constitutes an impermissible collateral attack on the criminal judgment against Curtiss in Burleigh County Case No. 08-10-K-1650. App. 22-24.

A. The Complaint constitutes an impermissible collateral attack on a prior criminal judgment through a declaratory judgment action.

[¶23] The substance of Curtiss' Complaint was a thinly veiled collateral attack on his criminal conviction. For instance, he alleges "[t]his transaction is not a post-conviction nor any collateral attack upon the conviction, as the statute of limitations has expired and many doctrines prohibit such." App. at 7, ¶ 2. However, in the

next paragraph, he states "[t]he obligatory statute [sic] language of 'been found guilty' appears uncertain in this case [his criminal conviction]" Id. at ¶ 3. Curtiss further relies upon a quotation from a Report and Recommendation issued in Case No. 1:16-cv-00049, to address an evidentiary issue relating to his conviction. Id. at ¶ 4-5. Nearly every paragraph in his Complaint refers or relates to his GSI Conviction:

> ¶6 The State unequivocally intended to prosecute under statutes listed upon Third Amended Information . . .
> ¶7 Motion for Rule 29 was brought fourth [sic] twice during trial . . .
> ¶8 Here, Curtiss has been convicted of a single offense . . .
> ¶9 The verdict finding is completely void of a finding . . .
> . . .
> ¶11 The listed statutes on the Third Amended Information are the controlling law.
> ¶12 The mandatory language in statutes §§ 12.01-3(1)(a) & (1)(b) has a liberty interest that of being innocent until all essential element proven beyond a reasonable doubt, which was not put to proof through § 12.1-20-02(2) to be convicted of the single offense . . .
> ¶13 Condition precedent uncertain as Curtiss has not been found guilty of essential element in attendant circumstances . . .

Id. at 8-9, ¶¶ 6-9, 11-13 (internal quotations omitted). Curtiss further alleges he hasn't been found guilty of all elements. App. at 9, ¶ 14.

[¶24] Curtiss alleges he is entitled to relief under Declaratory Judgments, N.D.C.C. ch. 32-23, Preventive Relief, N.D.C.C. ch. 32-05, and the Criminal Code, N.D.C.C. tit. 12.1. App. 10, ¶ 16, 21. He further claims the Court had the power to modify the conditions of probation under N.D.C.C. 12.1-32-06.1 and 12.1.32-07(6). Id. ¶ 16. Curtiss also demands relief including:

- The State be restrained from enforcement of registry;

- The State be restrained from enforcement of minimum of five years of probation;
- The State remove all conditions of probation in the interest of justice; and
- And such further relief as he may be entitled to.

Id. at 23-28.

[¶25] A complaint should be dismissed under Rule 12(b)(6) of the North Dakota Rules of Civil Procedure if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. See Vandall, 2004 ND 47, ¶ 5, 676 N.W.2d 88; Ziegelmann v. DaimlerChrysler Corp., 2002 ND 134, ¶ 5, 649 N.W.2d 556. When considering a motion to dismiss, a court construes the complaint in the light most favorable to the plaintiff, the allegations in the complaint being taken as true. See Vandall, 2004 ND 47, ¶ 5, 676 N.W2d 88; Ziegelmann, 2002 ND 134, ¶ 5, 649 N.W.2d 556. Conclusory statements unsupported by allegations of factual circumstances, however, are disregarded when ruling on a motion to dismiss. See Brakke v. Rudnick, 409 N.W.2d 326, 333 (N.D. 1987).

[¶26] This Court has explained that "[t]o support a declaratory judgment action . . . a justiciable controversy must exist, ripe for a judicial determination." Kuntz v. State, 2019 ND 46, ¶ 55, 923 N.W.2d 513 (citing Denault v. State, 2017 ND 167, ¶ 7, 898 N.W.2d 452). "'The Uniform Declaratory Judgments Act does not give a court the power to render advisory opinions or determine questions not essential to the decision of an actual controversy.'" Kuntz, 2019 ND 46, ¶ 55, 923 N.W.2d 513 (citations omitted). See also Brandvold, 2011 ND 185, ¶ 8, 803 N.W.2d 827;

Ramsey Cty. Farm Bureau v. Ramsey Cty., 2008 ND 175, ¶ 22, 755 N.W.2d 920. Thus, the primary and preliminary question that this Court must address is whether Curtiss' collateral attack on his criminal convictions created a justiciable controversy.

[¶27] Applications for post-conviction relief are authorized pursuant to Chapter 29-32.1 of the North Dakota Century Code. Under N.D.C.C. § 29-32.1-01(1), a "person who has been convicted of and sentenced for a crime may institute a proceeding applying for relief under this chapter [Uniform Post-Conviction Relief Procedure Act]." The law specifically requires that an application contain specific contents such as identifying the proceedings in which the applicant was convicted, the identification of all previous post-conviction proceedings, the grounds asserted, and the orders or judgments entered. N.D.C.C. § 29-32.1-04. A person has two years to bring such an application, unless the person meets certain statutory exceptions. N.D.C.C. § 29-32.1-01(2). Curtiss is not relying upon this law as a basis for his request for relief, therefore his attack on his conviction is not based upon any law or rule.

[¶28] "It is axiomatic that a judgment imports absolute verity and is not subject to collateral attack so long as it stands. . . . Any attempt to avoid, defeat or evade a judgment, or to deny its force and effect, in some incidental proceeding *not provided by law*, with the express purpose of obtaining relief from that judgment is a collateral attack." Hamilton v. Hamilton, 410 N.W.2d 508, 519-20 (N.D. 1987) (emphasis in original; citations omitted); see also Harchenko v. Harchenko, 77 N.D. 289, 293, 43 N.W.2d 200, 201-02 (1950); 47 Am. Jur. 2d Judgments §§ 698, 701

(2020). Thus, a collateral attack "is an attempt to avoid the binding force of a judgment in a proceeding" brought for some other purpose. "[I]t is an attempt to avoid, evade, or deny the force and effect of a judgment in an indirect manner and not in a direct proceeding as prescribed by law . . . ." 47 Am. Jur. 2d Judgments § 704 (2020). "An attack upon a judgment is regarded as collateral if it is made when the judgment is offered as the basis of an opponent's claim." Id. "A collateral attack on a judgment may be any attack made in a proceeding that has an independent purpose other than to impeach or overturn the judgment, even if impeaching or overturning the judgment is necessary to the success of the action." Id.

[¶29] "A judgment may not be collaterally attacked by a party to the action in which it was rendered." State v. Mertz, 514 N.W.2d 662, 666 (N.D. 1994); see also Gruebele v. Gruebele, 338 N.W.2d 805, 810 (N.D. 1983); Harchenko, 77 N.D. at 293, 43 N.W.2d at 201; 47 Am. Jur. 2d Judgments § 702 (2020). Collateral attacks on judgments are disallowed "because it is the policy of the law to give finality to the judgments of the courts, and to avoid endless litigation, recognizing the public interest in the final adjudication of controversies." 47 Am. Jur. 2d Judgments § 699 (2020). "The rule against collateral attacks on prior judgments is also based upon the doctrine of res judicata." Id.

[¶30] "Res judicata prevents the relitigation of claims that were raised, or could have been raised, in a prior action between the same parties or their privies and were resolved by a final judgment in a court of competent jurisdiction." Williams Cty. v.

Don Sorenson Investments, LLC, 2017 ND 193, ¶ 9, 900 N.W.2d 223 (citing Cridland v. N.D. Workers Comp. Bureau, 1997 ND 223, ¶ 17, 571 N.W.2d 351).

[¶31] Application of the doctrine of res judicata to Curtiss' claim against the State is appropriate. Curtiss wrongly claims his Complaint is neither a post-conviction relief nor a collateral attack, but, in reality, it is. There should be no dispute that Curtiss is challenging his GSI Conviction and the Court's post-conviction relief decisions in an incidental or separate proceeding. Curtiss cannot, nor should he be able to, collaterally attack the judicial decisions made in those proceedings, unless authorized by law. Curtiss' Complaint is not authorized by law, and therefore constitutes an impermissible collateral attack.

[¶32] After receiving Appellee's Motion to Dismiss, Curtiss attempted to change his theory and avoid finding that this lawsuit was an impermissible collateral attack by claiming his Complaint was now an independent action in equity. Index # 16, at ¶ 5. Curtiss argued "N.D.C.C. Title 29 Post-conviction proceedings is the default for remedy only because the N.D. Bar Association says such." Index # 17, at ¶ 4. The State Bar Association of North Dakota does not have authority to determine remedies. The North Dakota Century Code provides for applications for post-conviction relief pursuant to Chapter 29.32.1. Curtiss admits the Complaint was initiated as a request for declaratory judgment with injunctive relief. Appellant's Brief ¶ 5. He further states "[l]anguage was clarified in later pleading as an independent action in equity to obtain relief from a judgment. Id. N.D.R.Civ.P. 15(a) allows for amended and supplemental pleadings before a response to the initial complaint, or within 21 days after serving the pleading. If neither of those are

possible, a party may amend its pleadings only with the opposing party's written consent or the court's leave. The State did not consent to Curtiss' amended pleadings, nor did Curtiss seek the Court's leave to amend his pleadings regarding his new theory of an "independent action in equity." Therefore the District Court properly determined it was an improper collateral attack.

[¶33] The policy behind prohibiting collateral attacks supported application of the rule, and the court properly granted the Appellee's motion to dismiss. The Court properly determined it was in the interests of the public, the courts, and all individuals directly or indirectly involved in Curtiss' criminal case, to see an end to the litigation. The issues had been adjudicated; the decisions were final; the litigation was over. See Peters-Riemers v. Riemers, 2002 ND 49, ¶ 4, 641 N.W.2d 83 (Riemers' claim the court violated his homestead rights by evicting him was an impermissible collateral attack on the divorce judgment); State v. Dvorak, 2000 ND 6, ¶ 31, 604 N.W.2d 445 (argument a protection order was invalid was an impermissible collateral attack on the order itself when raised in an appeal from a conviction for violating the order); Interest of R.A., 551 N.W.2d 800, 802. (it was an improper collateral attack to raise validity of prior commitment order in appeal of subsequent commitment order); Gruebele, 338 N.W.2d at 810 (quiet title action to ascertain validity of ex-wife's adverse claim of mineral interests precluded as collateral attack); Harchenko, 77 N.D. at 294, 43 N.W.2d at 202 (action for damages was a collateral attack on the divorce decree).

[¶34] The Court properly determined that Curtiss' Complaint constituted an impermissible collateral attack and appropriately ordered dismissal of his Complaint for failure to state a claim

II. The Court lacks subject matter jurisdiction over the Complaint.

[¶35] Prior to serving a responsive pleading, a defendant may move to dismiss the action for lack of jurisdiction over the subject matter. N.D.R.Civ.P. 12(b)(1). If a court determines that it does not have subject matter jurisdiction, it must dismiss the action. N.D.R.Civ.P. 12(h)(3). In this case, the Court properly determined it lacked subject matter jurisdiction over the Complaint because the Court did not impose the conditions Curtiss was appealing, as required by N.D.C.C. § 12.1-32-07.

A. Only the sentencing Court can modify conditions of probation unless jurisdiction has been transferred.

[¶36] N.D.C.C. § 12.1-32-07 provides for conditions of modification or revocation of probation. However, the Legislature gave the sentencing court the authority to impose conditions of probation. State v. Saavedra, 406 N.W.2d 667, 671 (N.D. 1987). "A sentencing court has continuing power to modify conditions of probation." State v. Clark, 2001 ND 194, ¶ 10, 636 N.W.2d 660 (citing State v. Gates, 540 N.W.2d 134, 138 (N.D. 1995)). Curtiss attempted to challenge his criminal conviction by bringing a new civil action but the Court was not the sentencing court and therefore did not have jurisdiction to modify the probation.

[¶37] N.D.C.C. § 12.1-32-07(8) provides in relevant part, "[j]urisdiction over a probationer may be transferred from the court that imposed the sentence to another court of this state with the concurrence of both courts." Here, jurisdiction from the

criminal court had not been transferred, and therefore no concurrence had occurred. The Court was not able to modify the conditions placed on Curtiss by the criminal court.

[¶38] Under Rule 35 of the North Dakota Rules of Appellate Procedure, an appellate court has no authority to change the sentence directly. A a sentencing court may change or modify a sentence, but it must be in accordance with the provisions of N.D.R.Crim.P. 35. State v. Bryan, 316 N.W.2d 335, 338 (N.D.1982); ("The change or modification of a sentence is permitted in North Dakota now, but only pursuant to Rule 35, NDRCrimP." (citations omitted)). "Upon an appeal from a judgment or order, the court may reverse, affirm, or modify the judgment or order as to any party." N.D.R.App.P. 35(a)(1). There has been no determination that a lower court has erred, so the District Court was not allowed to modify the conditions placed on Curtiss in a prior case.

[¶39] Rule 35 of the North Dakota Rules of Criminal Procedure provides for correction of a sentence only if the sentence was illegal. "The sentencing court shall correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner . . . " N.D.R.Crim.P. 35(a)(1). Once a judgment is final, the district court generally "loses jurisdiction to alter, amend, or modify that judgment." State v. Meier, 440 N.W.2d 700, 702 (N.D. 1989). See also State v. Vollrath, 2018 ND 269, ¶ 4, 920 N.W.2d 746. The District Court did not have the jurisdiction to alter, amend, or modify Curtiss' prior judgment

III. Curtiss has failed to show he has a right to reconsideration under Rules 52(b), 59(j), and 60(b) and is ambiguous in his motion.

[¶40] Curtis was ambiguous in his authority for his Motion For Reconsideration. Curtiss stated his motion was "pursuant to NDRCivP [sic] 52(b), NDRCivP [sic] 59(j), and NDRCivP [sic] (60(b)" but was unable to show how any of those applied to his motion. Index # 53. N.D.R.Civ.P. 52(b) relates to motions for amended findings. No such motion has been brought before the Court. Therefore N.D.R.Civ.P. 52(b) was inapplicable. Accordingly, it was unclear whether Curtiss was relying on Rule 59(j) or Rule 60(b) of the North Dakota Rules of Civil Procedure. See Vanderscoff v. Vanderscoff, 2010 ND 202, ¶ 7, 790 N.W.2d 470 (noting "a motion for reconsideration may be treated as a motion to alter or amend a judgment under N.D.R.Civ.P. 59(j) or as a motion for relief from a judgment under N.D.R.Civ.P. 60(b)"). However, irrespective of what rule Curtiss relied on, the motion lacked merit and his Complaint had already dismissed with prejudice. The District Court was correct when it denied Curtiss' Motion for Reconsideration because Curtiss failed to show he was entitled to reconsideration under the rules stated. App. 26, at ¶ 4.

A. Rule 59(j) does not authorize Curtiss' requested relief.

(a) Rule 59(j) motions should be granted sparingly and should not be used to relitigate losing arguments.

[¶41] In discussing Fed. R. Civ. P. 59(e), the federal counterpart to N.D.R.Civ.P. 59(j), the court explained the rule "provides a mechanism for an aggrieved party to petition the Court to alter or amend a judgment under certain limited circumstances. Rouse v. Nielson, 851 F. Supp. 717, 734 (D.S.C. 1994). "Because of the interests in

finality and conservation of judicial resources, Rule 59(e) motions should be granted sparingly." Id. In particular, "[a] motion for reconsideration is not to be used as a vehicle for the losing party to rehash arguments previously considered and rejected." Torre v. Federated Mut. Ins. Co., 906 F. Supp 616, 618 (D. Kan. 1995), aff'd, 124 F.3d 218 (10th Cir. 1997).

Wright and Miller states:

> Since specific grounds for a motion to amend or alter are not listed in [Rule 59], the district court enjoys considerable discretion in granting or denying the motion. However, reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly. There are four basic grounds upon which a Rule 59(e) motion may be granted. First, the movant may demonstrate that the motion is necessary to correct manifest errors of law or fact upon which the judgment is based. . . . Second, the motion may be granted so that the moving party may present newly discovered or previously unavailable evidence. Third, the motion will be granted if necessary to prevent manifest injustice. . . . Fourth, a Rule 59(e) motion may be justified by an intervening change in controlling law.
>
> The Rule 59(e) motion may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.

11 Charles A. Wright et al., Federal Practice and Procedure § 2810.1 (3d ed. 2020) (footnotes omitted); see also Diebitz v. Arreola, 834 F. Supp. 298, 302 (E.D. Wis. 1993) ("a court may alter or amend a judgment pursuant to Rule 59(e) only if the movant 'clearly establish[es] either a manifest error of law or fact' or 'present[s] newly discovered evidence'") (quoting Fed. Deposit Ins. Corp. v. Meyer, 781 F.2d 1260, 1268 (7th Cir. 1986)).

(b) Curtiss' motion raises arguments the Court previously heard and rejected.

[¶42] Curtiss' motion simply reasserted the arguments he unsuccessfully made in his Brief in Support of Response and Opposition to Motion to Dismiss. Curtiss' reconsideration motion, accordingly, raised no new substantive issues for the Court to decide. The Court already rejected the arguments made in his motion for reconsideration by issuing its April 21, 2020, Order Granting Motion for Dismissal with prejudice, App. 26-27.

(c) The Order Granting Motion for Dismissal properly concluded Curtiss' motion was an impermissible collateral attack.

[¶43] In its April 21, 2020, Order Granting Motion for Dismissal, App. 26-27, the District Court correctly found Curtiss' complaint to be an "impermissible collateral attack on the criminal judgment against him in Burleigh County Case No. 08-10-K-1650." Id. at 23, ¶ 5. "Curtiss contends his complaint is not a claim for post-conviction relief or a collateral attack on the criminal judgment against him." Id. at 22, ¶ 2. "Nevertheless, the complaint goes on to challenge the guilty verdict asserting that the State failed to prove all of the essential elements of the offense by proof beyond reasonable doubt." Id. "Any attempt to avoid, defeat or evade a judgment, or to deny its force and effect, in some incidental proceeding *not provided by law*, with the express purpose of obtaining relief from that judgment is a collateral attack." Hamilton, 410 N.W.2d at 519-20 (emphasis in original). It is clear, based on the Court's analysis and citation to Hamilton that the District Court properly found this is an incidental proceeding attempting to avoid, defeat or evade a judgment, or to deny its force and effect. The District Court's finding was correct.

B. Rule 60(b) does not authorize Curtiss' requested relief.

[¶44] Relief under Rule 60(b) "is extraordinary relief, to be granted only in exceptional circumstances." Dvorak v. Dvorak, 2001 ND 178, ¶ 10, 635 N.W.2d 135 (quoting Gajewski v. Bratcher, 240 N.W.2d 871, 889 (N.D. 1976)). "[T]he burden is on [the moving party] to establish" a Rule 60(b) motion should be granted. Id. Curtiss has not met this burden.

[¶45] Curtiss' Motion For Reconsideration (Index # 53) did not adequately show that any of the Rule 60(b) requirements were met. There was no excusable neglect, newly discovered evidence, fraud, or any other fact justifying relief under Rule 60(b). There were no exceptional circumstance here. Rather, Curtiss simply disagreed with the Court's Order Granting Motion for Dismissal. That, however, is not a basis for a Rule 60(b) motion. Curtiss burdened the District Court with a factually and legally unsupported Motion for Reconsideration.

CONCLUSION

[¶46] For the above reasons, the District Court properly dismissed the Complaint against the Defendant and properly denied the Motion for Reconsideration. The Complaint failed to state a claim because it was an impermissible collateral attack on the prior criminal judgment in Burleigh County Case No. 08-10-K-1620. In addition, the District Court lacked subject matter jurisdiction because the District Court was not the sentencing court, and did not have the jurisdiction to modify Curtiss' probation conditions. Further, Curtiss failed to show he was entitled to reconsideration under N.D.R.Civ.P. Rules 52(b), 59(j), and 60(b).

Dated this 14th day of September, 2020.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Spencer Kerry Curtiss, Petitioner and Appellant, v. State of North Dakota, Respondent and Appellee.	**CERTIFICATE OF COMPLIANCE** **Supreme Ct. No. 20200175** **District Ct. No. 08-2020-CV-00514**

[¶1] The undersigned certifies pursuant to N.D. R. App. P. 32(a)(8)(A), that the Appellee's Brief contains 27 pages.

[¶2] This brief has been prepared in a proportionally spaced typeface using Microsoft Office 365 word processing software in Arial 12 point font.

Dated this 14th day of September, 2020.

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[¶1] I hereby certify that on September 14, 2020, the following documents: **BRIEF OF APPELLEE and CERTIFICATE OF COMPLIANCE** were filed electronically with the Supreme Court through the E-Filing Portal.

[¶2] I further certify that the foregoing documents were served upon the following by mailing true and correct copies thereof in an envelope addressed as follows:

Spencer Kerry Curtiss #36987
Centre, Inc.
100 6th Ave SE
Mandan ND 58554

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota, this 14th day of September, 2020.

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