
IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota,

Plaintiff,

v.

Andrew James Glasser,

Defendant.

Supreme Court File Numbers:

20200220

20200221

Burleigh County District Court Numbers:

08-2017-CR-03409

08-2017-CR-03567

AMENDED APPELLANT BRIEF

Appeal from the Criminal Judgment in Burleigh County

District Court, South Central Judicial District, Bismarck, North Dakota

July 31, 2020 the Honorable David E. Reich presiding

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

	Paragraph Number
TABLE OF AUTHORITIES	Page 3
STATEMENT OF ISSUES	¶1
NATURE OF CASE	¶2 - ¶12
STATEMENT OF FACTS	¶13 - ¶19
LAW AND ARGUMENT	¶20 - ¶32
I. In North Dakota is it still the general rule that the District Court loses jurisdiction after the sentence has been pronounced on a Criminal Defendant?	
Standard of Review	¶24
CONCLUSION.....	¶33 - ¶36

TABLE OF AUTHORITIES

<u>STATUTES, RULES, AND CODES</u>	Paragraph Number
N.D. R. Crim. P. 35	¶24, ¶30, ¶33
N.D. R. Crim. P. 35(a)	¶20, ¶27
N.D. R. Crim. P. 35(b)	¶23
North Dakota Constitution, Article 1 § 12	¶32
United States Constitution, 5 th Amendment	¶32

CASES

<u>State v. Allen</u> , 237 N.W.2d 154, 162 (N.D.1975)	¶24
<u>State v. Bucholz</u> , 403 N.W.2d 400 (S.D.1987)	¶20
<u>State v. Carmody</u> , 253 N.W.2d 415 (N.D.1977).....	¶23
<u>Chapman v. California</u> , 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)	¶23
<u>State v. Foster</u> , 484 N.W.2d 113 (N.D. 1992)	¶20, ¶21, ¶25, ¶31
<u>State v. Hilling</u> , 219 N.W.2d 164, 172 (N.D.1974)	¶23
<u>State v. Hutchinson</u> , 2017 ND 160, ¶ 9, 897 N.W.2d 321	¶28
<u>State v. Johnson</u> , 231 N.W.2d 180, 185 (N.D.1975)	¶24
<u>State v. Lyons</u> , 2019 ND 21, ¶ 6, (2018)	¶28
<u>State v. Meier</u> , 440 N.W.2d 700 (N.D.1989)	¶20
<u>State v. Schneider</u> , 270 N.W.2d 787 (N.D. 1978)	¶24

OTHER AUTHORITIES

Wright, Federal Practice and Procedure, Criminal § 851 (1969)	¶23
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Oral Argument:

Oral argument has been requested to emphasize and clarify the Appellant’s written arguments on their merits.

STATEMENT OF THE ISSUE

[¶1] I. **In North Dakota is it still the general rule that the District Court loses jurisdiction after the sentence has been pronounced on a Criminal Defendant?**

NATURE OF THE CASE

[¶2] This appeal involves the appeal from the resentencing in case number 08-2017-CR-03409 and case number 08-2017-CR-03567. The third case that was involved in the resentencing was case number 08-2017-CR-03307 and that resentencing is not a part of this appeal.

[¶3] Mr. Glasser's first sentencing took place on February 24, 2020.

[¶4] The prosecution, after that sentencing of Mr. Glasser, found out that three of the twenty-six (26) letters of support submitted by Mr. Glasser were forged. Because three letters were forged on March 12, 2020 the State made a Motion to Correct Sentence and Prohibit Public Access to documents in case number 08-2017-CR-03409. This Motion was only made in case number 08-2017-CR-03409.

[¶5] The resentencing took place on July 31, 2020. At that resentencing Mr. Glasser plead guilty to the crimes charged all three cases; 08-2017-CR-03307, 08-2017-CR-03409 and 08-2017-CR-03567.

[¶6] The Criminal Judgment was entered on August 4, 2020 for case 08-2017-CR-03307.

[¶7] The Criminal Judgment was entered on August 4, 2020 for case 08-2017-CR-03409.

[¶8] The Criminal Judgment was entered on August 3, 2020 for case 08-2017-CR-03567.

[¶9] The Notice of Appeal and Order for Transcripts in case number 08-2017-CR-03409 and case number 08-2017-CR-03567 were filed on August 20, 2020.

[¶10] The Notice of Filing the Notice of Appeal in case number 08-2017-CR-03409 and case number 08-2017-CR-03567 were filed on August 20, 2020.

[¶11] The Clerk's Certificate of Appeal in case number 08-2017-CR-03409 and case number 08-2017-CR-03567 were filed on September 14, 2020.

[¶12] This matter is now before the North Dakota Supreme Court.

STATEMENT OF FACTS

[¶13] The Defendant/Appellant in these Burleigh County cases was sentenced on February 24, 2020. In case number 08-2017-CR-03409 he was sentenced to ten (10) years incarceration, first serve four (4) years, and the balance suspended for a period of five (5) years during which time he is ordered supervised probation. In case number 08-2017-CR-03307 to ten (10) years incarceration with ten (10) years suspended for a period of three (3) years and during that suspended time he was ordered supervised probation. In case number 08-2017-CR-03567 he was sentenced to five (5) years incarceration with five (5) years suspended for a period of three (3) years and during that suspended time he was ordered (3) years supervised probation. All of the above sentences were ordered to run concurrently.

[¶14] After the above sentencing took place it was discovered that three of the letters the court relied on in sentencing had been forged and that the signature on these letters had also been forged.

¶15] The States Attorney, after learning of the forgery only filed a Motion for resentencing in case number 08-2017-CR-03409. The court however decided resentence in all three cases.

¶16] The attorneys that had originally represented Defendant/Appellant Glasser were no longer the attorney at the resentencing. At the resentencing Defendant/Appellant Glasser was represented by attorney Kent Morrow. On July 31, 2020 Defendant/Appellant Glasser was resented on case number 08-2017-CR-03409, case number 08-2017-CR-03307, and case number 08-2017-CR-03567.

¶17] In case number 08-2017-CR-03409 Mr. Glasser was sentenced to twenty (20) years incarceration, first serve ten (10) years with balance suspended for a period of five (5) years and during that five (5) years he was ordered supervised probation. In case number 08-2017-CR-03307 Mr. Glasser was resented to five (5) years incarceration, first serve three (3) years with balance suspended for a period of three (3) years and during that three (3) years he was ordered supervised probation. This sentence was ordered to run concurrent with all counts in case numbers 08-2017-CR-03567, 08-2020-CR-00868 and consecutive to case 08-2017-CR-03409. In case number 08-2017-CR-03567 Mr. Glasser was sentenced to five (5) years incarceration with five (5) years suspended for a period of three (3) years and during that three (3) years suspended he was ordered supervised probation. This sentence was ordered to run consecutive with case number 08-2017-CR-03409.

¶18] Mr. Glasser only appealed the resentencing in case 08-2017-CR-03409 and case number 08-2017-CR-03567.

[¶19] The court at the resentencing on July 31, 2020, resented Mr. Glasser on case number 08-2017-CR-03307, case number 08-2017-CR-03409, and case number 08-2017-CR-03567.

ISSUE I. In North Dakota is it still the general rule that the District Court loses jurisdiction after the sentence has been pronounced on a Criminal Defendant?

ARGUMENT

[¶20] The case relied on by the District Court was State v. Foster, 484 N.W.2d 113 (N.D. 1992). What the Defendant/Appellant Glasser is relying on in Foster is the following language that appeared in concurring opinion signed by two North Dakota Supreme Court Justices:

“ I have some concern that this decision will be used as a catapult to reopen all kinds of judgments. This case does not, however, support the proposition that every time a defendant “misleads” the court, that defendant’s sentence becomes “illegal” and subject to change when the deception is uncovered. If that were the case, finality would be as scarce as a balanced federal budget. The general rule still is that the court loses jurisdiction after sentence has been pronounced. State v. Meier, 440 N.W.2d 700 (N.D.1989); State v. Bucholz, 403 N.W.2d 400 (S.D.1987)

If Foster had truthfully identified himself but untruthfully described his past record or failed to disclose it, the result would be different. Meier, supra; Bucholz, supra. The trial court would have no jurisdiction under Rule 35(a), NDRCrimP, to “correct” the sentence because the sentence would not be illegal.”

[¶21] In Foster when he was sentenced the court, because of fraudulent identification thought Foster was Robert John Langton and sentenced Robert John Langton. Robert John Langton didn’t commit the crimes charged. William L. Foster did. Because the wrong man was originally sentenced that sentence was illegal and the court had authority to right that wrong. However, this case doesn’t involve the sentencing of the wrong man, it involves forged letters and signatures that supported Defendant/Appellant Glasser

[¶22] In the case now before the Court the constitutional issue Mr. Glasser is now raising on appeal was never raised in the District Court. Therefore Mr. Glasser expects that the State will claim that constitutional issue can't be raised for the first time on this appeal.

[¶23] Should the State raise the above claim Mr. Glasser's response will begin with N.D.R. of Crim. P. 52(b) which states:

“Rule 52, N.D.R of Crim. P., applies only when an error has been made by the trial court. If the trial court has erred,
“ . . . three types of error may be assigned for review by the appellate court. These are (1) harmless error or error not prejudicial to the defendant; (2) reversible error or error that was prejudicial and to which objection was made in the trial court; and (3) obvious error or error so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time.’ Comments to Rule 52, N.D.R. Crim.P. [See Wright, Federal Practice and Procedure, Criminal § 851 (1969)].
In this case, no objection was made at trial to the patrolman's testimony. We must determine whether the error was "(1) harmless error" or "(3) obvious error".

In *State v. Carmody*, 253 N.W.2d 415 (N.D.1977), we reaffirmed *State v. Hilling*, 219 N.W.2d 164, 172 (N.D.1974), in which this court adopted the harmless error test enunciated in *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), *reh. den.* 386 U.S. 987, 87 S. Ct. 1283, 18 L. Ed. 2d 241 (1967). In *Chapman*, *supra* 386 U.S. at 24, 87 S. Ct. 824, 828, it was held that federal constitutional errors do not automatically require reversal if it is shown that they were harmless, and "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt". See *Carmody*, *supra* 253 N.W.2d at 418; *Hilling*, *supra* 219 N.W.2d at 172; and Comments to Rule 52, N.D.R.Crim.P.

The beneficiary of a constitutional error has the heavy burden of proving "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained". *Chapman*, *supra* 386 U.S. at 24, 87 S. Ct. at 828. See *Carmody*, *supra* 253 N.W.2d at 418."

STANDARD OF REVIEW

[¶24] The standard of review of an error affecting constitutional rights, according to State v. Schneider, 270 N.W.2d 787 (N.D. 1978) is:

“To determine the effect of the error on Schneider's constitutional rights we must consider "the entire record and the probable effect of the actions alleged to be error in light of all the evidence". *State v. Allen*, 237 N.W.2d 154, 162 (N.D.1975), citing *State v. Johnson*, 231 N.W.2d 180, 185 (N.D.1975); and Comments to Rule 52, N.D. R.Crim.P.”

[¶25] The District Judge in Mr. Glasser’s case relied on State v. Foster, 484 N.W.2d 113 (1992) for resentencing Mr. Glasser. The facts in Foster are completely different than in Mr. Glasser’s case. In Foster Foster had given the court a factitious name, Robert John Langton, and the court sentenced Foster under the name of Robert John Langton. At a later date Mr. Foster had his probation revoked and was sent to the penitentiary. After arriving at the penitentiary personnel at the penitentiary who knew him notified the District Judge that Robert John Langton was William L. Foster. Mr. Foster was then brought back into the District Court and sentenced. That sentencing was not a resentencing because Mr. Foster had never been sentenced for the crimes and he, not Robert John Langton, was the person who committed the crimes.

[¶26] In the case now before the Court the facts are:

1. Mr. Glasser committed the crimes.
2. Mr. Glasser submitted three forged letters of support to get and did get the District Judge to reduce the sentence he gave Mr. Glasser.
3. The state only made and filed the Motion to resentence in case number 08-2017-CR-03409.

[¶27] According to N.D.R. Crim. P. 35(a)(1) Illegal sentences: “the sentencing court may correct an illegal sentence at any time”.

[¶28] According to State v. Lyons, 2019 ND 21, ¶ 6, (2018):

“A sentence is illegal if it is not authorized by the judgment of conviction. See *State v. Hutchinson*, 2017 ND 160, ¶ 9, 897 N.W.2d 321. A sentence in excess of

a statutory provision or in some other way contrary to an applicable statute is an illegal sentence. See id.”

[¶29] In this case the sentence imposed on Mr. Glasser by the court on the 24th of February, 2020 was not an illegal sentence.

[¶30] Therefore, the sentence the court imposed on the 24th of February, 2020 can't be corrected under N.D. R. Crim. P 35.

[¶31] According to the concurring in result in Foster which appears in [¶20] when Glasser untruthfully described his past record the result would be different because the court loses jurisdiction.

[¶32] From what has been said above Mr. Glasser believes double jeopardy clause of the 5th Amendment to the United States Constitution and Article 1 § 12 of the North Dakota Constitution applies to his case and protect him from being resentenced after he had already begun serving his initial sentence. Therefore, because his issue on appeal involves both the United States and State of North Dakota Constitution the issue in this case is fully reviewable.

CONCLUSION

[¶33] The general rule is the court loses jurisdiction after the sentence has been pronounced. The court has no jurisdiction under Rule 35 of the N.D. R. of Crim. P. to correct the sentence.

[¶34] Mr. Glasser was charged, plead guilty, was sentenced, and was serving time on the crimes he committed.

[¶35] Mr. Glasser was charged with three crimes he committed when he submitted the forged letters into evidence at his sentencing in case 08-2017-CR-03307, 08-2017-CR-

03409, and 08-2017-CR-03567. He has plead guilty to those three cases and will serve the sentences on those crimes.

[¶36] This case should be remanded to the District Court with an order to dismiss the resentencing in case number 08-2017-CR-03409 and case number 08-2017-CR-03567.

Dated this 28th day of September, 2020.

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CERTIFICATE OF COMPLIANCE

[¶1] This Appellant's Brief and Appendix complies with the pages limit of 38 for the Brief and 100 pages for the Appendix set forth in N.D. R. App. P. 32 and N.D. R. App. P. 25, as the Brief consists of 11 pages and Appendix consists of 92 pages.

Dated this 28th day of September, 2020

/S/ Benjamin C. Pulkrabek

Benjamin C. Pulkrabek

ND Bar No. 02908

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CERTIFICATE OF SERVICE

[¶1] The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Appellant's Appendix
Appellant's Brief

By email at the below address upon:

Julie Lawyer
Burleigh County States Attorney
Bc08@nd.gov

North Dakota Supreme Court
supclerkofcourt@ndcourts.gov

And by placing a true and correct copy of said items in a sealed envelope with USPS mail to:

Andrew James Glasser
C/O James River Correctional Center
2521 Circle Drive
Jamestown, ND 58401

Dated this 24th day of September, 2020

/S/ Cassy Larson

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Appellant's Brief

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And by placing a true and correct copy of said items in a sealed envelope with USPS mail to:

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2521 Circle Drive
Jamestown, ND 58401

Dated this 24th day of September, 2020

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Dated this 28th day of September, 2020.

/S/ Cassy Larson

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