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CLERK OF THE SUPREME COURT
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

OF THE STATE OF NORTH DAKOTA

State of North Dakota, Petitioner, vs. The Honorable Stacy J. Louser and Misten Lee Schwarz, Respondents.	)	Supreme Court No. Crim. No. 51-2020-CR-564

PETITION FOR SUPERVISORY WRIT

Appeal from a Written Order Entered on November 11, 2020
In District Court, Ward County, State of North Dakota
The Honorable Stacy J. Louser, Presiding

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¶ 1 **STATEMENT OF THE ISSUE**

¶ 2 I. Whether the trial court violated Separation of Powers and infringed upon prosecutorial discretion when it refused to accept a plea agreement to a third offense Driving Under the Influence offense (DUI)?

¶ 3 **STATEMENT OF THE CASE**

¶ 4 By the filing of a criminal Information on April 15, 2020 Misten Lee Schwarz was charged with a C Felony fourth offense DUI and an A Misdemeanor Driving Under Suspension charge. See Appellant's Appendix, hereinafter "(App. __)".

¶ 5 On November 9, 2020, the trial court held a final pretrial conference at which the State and defense informed the trial court the parties had reached a plea agreement to a third offense A Misdemeanor DUI and an A Misdemeanor DUS. (App. 33, lines 17-25; App. 34, lines 1-19) That oral plea agreement outline was then followed up by a written plea agreement being submitted to the trial court. (App. 6) During the hearing the trial court questioned the State on the change in the charge to a third offense DUI because the defendant had three prior DUI convictions. (App. 35, lines 19-25; App. 36, lines 1-25; App. 37, lines 1-3) In the end, the State informed the trial court that if the trial were held later in the week that the State would only be presenting evidence of the lesser included offense (from a fourth DUI to a third DUI) by presenting the jury with two prior convictions. (App. 37, lines 4-7) The trial court did not rule on the accepting the plea agreement as the parties presented it, but instead stated: "Counsel, I think everybody has some obligations here. And I'm not comfortable with this agreement. If it is, in fact, presented I will look at it. There's no guarantee it's going to be approved. So at this point, I'm leaving the trial on the calendar." (App. 37, lines 14-16)

¶ 6 Later on November 9, 2020, the State filed a motion to reduce the fourth offense DUI to a third offense DUI. (App. 11) On November 10, 2020, the trial court issued a written order denying the State's motion to change the charge. (App. 21) It is upon that order that the State first filed a notice of Supervisory Writ and request for transcript, (App. 27 & 29) and now files this Petition for Writ of Supervision.

¶ 7 **STATEMENT OF THE FACTS**

¶ 8 This petition presents legal and constitutional questions in which the Statement of Facts is the same thing as the procedures and events depicted in the Statement of the Case above.

¶ 9 **LAW AND ARGUMENT**

¶ 10 "Prosecutorial discretion refers to the fact that under American law, government prosecuting attorneys have nearly absolute powers. A prosecuting attorney has power on various matters including those relating to choosing whether or not to bring criminal charges, deciding the nature of charges, plea bargaining and sentence recommendation. This discretion of the prosecuting attorney is called prosecutorial discretion."

Prosecutorial Discretion Law and Legal Definition,

https://definitions.uslegal.com/p/prosecutorial-discretion/

> This Court has defined prosecutorial discretion as:
>
> "Prosecutors generally have broad discretion to enforce criminal laws. State v. Loughead, 726 N.W.2d 859, 2007 ND 16 at [¶12] *(cites omitted)* There is a presumption of regularity in prosecutorial conduct and, "'in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'" Id. "In the ordinary case, 'so long as the prosecutor has probable cause to believe . . . the accused committed an offense defined by statute, the decision whether . . . to prosecute, and what charge to file . . . generally rests entirely in [the prosecutor's] discretion.'" Id.

¶ 11 Additionally, the Court has said that a prosecutor cannot effectively repeal a law by categorically refusing to prosecute one kind of crime. Olsen v. Koppy, 593 N.W.2d 762, 1999 ND 87 at [¶20]. However, in declining a request by a prison inmate to prosecute his wife for Adultery, the Court found it was within a prosecutor's discretion to decline prosecution based on limited prosecutory and investigatory resources, a bulging caseload, the dubious nature of the inmate's marriage, the reasonable probability of not obtaining a conviction, and a failure to report the events to law enforcement. Id.

¶ 12 North Dakota's DUI law has offense grades that increase based on the number of prior DUI convictions over time, ultimately reaching a C felony for a fourth conviction in 15 years. N.D.C.C. § 39-08-01(5). A conviction for a felony DUI carries a one year and one day prison sentence. N.D.C.C. § 39-08-01(5)(d). By contrast, a conviction for a third DUI within 7 years carries a 120 jail sentence along with other conditions. N.D.C.C. § 39-08-01(5)(c)

¶ 13 However, the felony DUI mandatory one year and one day prison sentence is in reality just a "paper" sentence wherein the defendant actually does substantially less time in prison than a defendant sentenced to 120 days for a third DUI where they actually sit those days in a county jail.

¶ 14 In its brief supporting the motion to reduce the charge to a third offense A Misdemeanor DUI, the State explained the Department of Corrections and Rehabilitation (DOCR) policy for felony DUI's as: A defendant sentenced to the mandatory felony DUI sentence is assessed for 21 days and then most likely placed in a noncustodial halfway house. (App. 12) The State further explained its belief that the defendant in this case needed a longer than 21 day "dry out" period before beginning treatment and that would

happen with the 120 day mandatory A misdemeanor sentence. Although counter-intuitive, the reality is more jail time is required in practice for the lesser offense of a 3rd DUI than the felony fourth DUI sentence – and the State wanted that longer jail sentence in this case given the defendant's alcohol problem. (App. 12) In addition, the State informed the trial court that the lack of a chemical test in this case could create a greater chance of an acquittal by the jury. (App. 12)

¶ 15 Despite the reasons outlined by the State for exercising prosecutorial discretion to amend the original charge to a third DUI lesser included offense, the trial court denied the State's motion to amend the charge to an A Misdemeanor DUI. That denial set up an awkward situation.

¶ 16 The Court is well aware of the current global pandemic and has taken steps to minimize exposing the court system and people involved in it to the Covid-19 virus. During the November 9, 2020, final pretrial conference the State informed the trial court that at trial the State would only be presenting evidence of the lesser included offense to a fourth DUI of a third DUI by presenting the jury with only two prior DUI conviction Judgments. (App. 37, lines 4-7). Therefore, given all entities involved in the court system are trying to reduce risks to people, it would make no sense to call in a felony pool of jurors just so the State can prove a misdemeanor case which the defendant had already agreed to plead guilty to.

¶ 17 In its order denying the State's motion the trial court mistakenly describes the original felony DUI offense as a "sixth offense" DUI. However, the original criminal Information charges a "4th offense" and lists three prior DUI judgments. (App. 4)

¶ 18 Beyond that, the trial court wrote some statements of concern related the role trial judges play in our criminal justice system. First, the trial court wrote that the "record is clear of its obligation to proceed with a felony level charge against Schwarz." (App. 21) No such "obligation" exists in the law. Instead, trial judges are essentially just supposed to be umpires that call balls and strikes between two contesting parties. As stated in Loughead, "'so long as the prosecutor has probable cause to believe . . . the accused committed an offense defined by statute, the decision whether . . . to prosecute, and what charge to file . . . generally rests entirely in [the prosecutor's] discretion.'" [¶12]

¶ 19 A second trial court statement of concern is: "It is the duty of the Court to enforce the laws as written, not as a judge or the parties may wish the law to be." (App. 21) This statement appears to conflate the proper role of a judge in "interpreting" laws as written, with the improper role of a judge trying to "enforce" laws. Judges cannot enforce any laws because they are in no position to review and present evidence, interview witnesses, or conduct investigations to determine which laws to enforce. Only the prosecutor can "enforce" laws, with the trial judge's role being to ensure prosecutors fairly present sufficient and constitutionally obtained evidence to fact finders - not to become a second prosecutor making charging decisions.

¶ 20 Another trial court statement of concern to which the State believes warrants the Court's supervision is: "For the State to now propose the Court ignore its statutory and ethical obligations merely to circumvent the minimum mandatory sentence is as stunning as it is disturbing." (App. 21) Again, neither party in this case asked the trial court to violate any "statutory" or "ethical obligations." If what the trial court is trying to say is it has looked at the DUI statute and the defendant's record and determined it has the ethical

obligation to charge and try this case as a felony DUI, that is a problematic because the trial court is in no position to review the evidence and consider the lack of a chemical test in this case, for example, on the ability to obtain a conviction – along with other matters that have been left by law to be within a prosecutor's decision making and discretion.

¶ 21 The trial court's statements represent a belief system about the role of a district judge that extends beyond this particular case, but also not supported by laws or rules of conduct. Therefore, the State believes the issuance of a Writ of Supervision is in order.

¶ 22 **WRITS OF SUPERVISION**

¶ 23 Under N.D. Const. art. VI, § 2 and N.D.C.C. § 27-02-04, [the North Dakota Supreme Court] may review a district court decision under [its] supervisory authority." State ex rel. Madden v. Rustad, 2012 ND 242, ¶ 5, 823 N.W.2d 767 (citing State ex rel. Roseland v. Herauf, 2012 ND 151, 819 N.W.2d 546). In the exercise of its general superintending control over inferior courts, the Supreme Court may control the course of litigation in district courts to prevent injustice in cases where there is no appeal. See State ex rel. Lemke v. District Court, 49 N.D. 27, 186 N.W.381 (N.D. 1921); State v. ex rel. Shafer v. District Court of Third Judicial Dist., 49 N.D. 1127, 194 N.W. 745 (N.D. 1923); State ex rel. Johnson v. Broderick, 75 N.D. 340, 27 N.W.2d 849 (N.D. 1947); Patten v. Green, 369 N.W.2d 105 (N.D. 1985). The North Dakota Supreme Court "exercise[s] [its] authority to issue supervisory writs rarely and cautiously on a case-by-case basis and only to rectify errors and prevent injustice in extraordinary cases when no adequate alternative remedy exists." State ex rel. Madden v. Rustad, 2012 ND 242, ¶ 5, 823 N.W.2d 767 (citing State ex rel. Roseland v. Herauf, 2012 ND 151, 819 N.W.2d 546). The State's ability to appeal is limited under N.D.C.C. § 29-28-07, requiring that the actions of the inferior court

in this case be reviewed by the Court under is constitutional and statutory supervision authority.

¶ 24 **CONCLUSION**

¶ 25 The State respectfully requests the Court issue a Writ of Supervision that directs the trial court to grant the state's motion to amend the original fourth offense DUI charge to a third offense DUI charge based on the doctrines of separation of powers and prosecutorial discretion.

¶ 26 Dated this 25th day of November, 2020.

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CERTIFICATE OF SERVICE

¶ 1 I hereby certify that on the 25th day of November, 2020, I served a true and correct copies of the **PETITION FOR SUPERVISORY WRIT** and **APPENDIX** upon the following named party by email as follows:

Ashley Gulke Attorney at Law ashleygulke@gmail.com	Honorable Stacy Louser District Court specka@ndcourts.gov

¶ 2 Respectfully submitted this 25th day of November, 2020.

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