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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff and Appellant,	)	
	)	
-vs-	)	
	)	
Bradley Neilan,	)	Supreme Ct. No. 20210065
	)	
Defendant and Appellee.	)	Dist. Ct. No. 08-2019-CR-03416

REPLY BRIEF OF PLAINTIFF AND APPELLANT STATE OF NORTH DAKOTA

Appeal from Rule 35 Order and Amended Criminal Judgment Entered February 12, 2021

South Central Judicial District, Burleigh County
The Honorable Bobbi Weiler, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

[¶ 1] Neilan argues the Rule 35 order unilaterally reducing his sentence is not appealable by the State. This Court should reject that argument because, with respect to a binding plea agreement, the State's right to receive the benefit of its bargain is a substantial right and, under N.D.C.C. § 29-28-07(4), the State may appeal from a post-judgment order that affects any substantial right of the State. Where, as here, the State agrees to a specific sentence and the district court accepts the plea agreement, a unilateral reduction of the agreed-upon sentence by the district court deprives the State of its bargain and thereby affects a substantial right of the State. The order is therefore appealable under N.D.C.C. § 29-28-07(4).

[¶ 2] Neilan also argues that the district court's post-judgment rejection of the plea agreement does not violate Rules 11 and 35 of the North Dakota Rules of Criminal Procedure. But by unilaterally reducing Neilan's sentence over the State's objection, the district court did under Rule 35(b) what it could not do under Rule 11(c)(3)(A)—accept Neilan's guilty plea and impose a sentence more favorable than that bargained for by Neilan and the State. That violates Rule 11, which was amended in 2006 to remove the district court's authority to accept a plea agreement but sentence a defendant to a disposition more favorable to the defendant than that called for in the agreement. Nonetheless, the district court accepted the parties' binding plea

agreement and, the next day, used Rule 35 to do what it could not do under Rule 11. This Court should therefore reverse.

ARGUMENT

[¶ 3] Neilan argues that the State cannot appeal the Rule 35 order unilaterally reducing his sentence. The State's right to appeal a post-judgment order is limited to those orders affecting a substantial right of the State. N.D.C.C. § 29-28-07(4). In the context of a binding plea agreement, the State's right to receive the benefit of its bargain—particularly when the State dismisses or amends charges in exchange for a guilty plea and a specific sentence—is a substantial right. With respect to plea agreements, the State and the defendant are entitled to the benefit of their bargain. *United States v. Young*, 223 F.3d 905, 911 (8th Cir. 2000) (holding that, in the context of a plea agreement, "the government is entitled to the benefit of its bargain"); *INS v. St. Cyr*, 533 U.S. 289, 321-22 (2001) ("Plea agreements involve a quid pro quo between a criminal defendant and the government."). As such, this Court should hold that the State has a substantial right to the benefit of its bargain if the plea agreement is made under N.D.R.Crim.P. 11(c)(1)(C).

[¶ 4] "A district court which unilaterally reduces the sentence provided for in an accepted plea agreement deprives the prosecutor of the 'benefit of [the] bargain,' whether or not the reduction occurs at the time of the initial sentencing or later." *United States v. Semler*, 883 F.2d 832, 834 (9th Cir.

1989). Here, the State amended the charge to remove a minimum-mandatory sentence and agreed to a specific sentence in exchange for Neilan's guilty plea. Because the district court unilaterally reduced Neilan's sentence, it deprived the State of the benefit of its bargain. The order reducing Neilan's sentence is therefore appealable under N.D.C.C. § 29-28-07(4).

[¶ 5] Neilan argues that, under *State v. Jefferson Park Books, Inc.*, 314 N.W.2d 73 (N.D. 1981), the State lacks standing to appeal a post-judgment order unilaterally reducing a sentence imposed under a binding plea agreement if the State receives notice of the proposed reduction. It is true that this Court wrote in *Jefferson Park Books* that, in the context of Rule 35, "[a] substantial right is the right to notice and the opportunity to be heard." 314 N.W.2d at 76. And it is true that, in this case, the district court gave the State one day to file a brief in response to the district court's motion to reduce Neilan's sentence. But that does not limit the State's right to appeal because a substantial right "does not contemplate that certain action will be taken, nor does it relate to the action taken, *unless the action taken is not authorized*[.]" *Id*. (emphasis added).

[¶ 6] Here, the district court's order reducing Neilan's bargained-for sentence was not authorized under Rule 11 or Rule 35. In 2006, Rule 11 was amended to remove the district court's authority to accept a binding plea agreement but impose a disposition more favorable than that called for by the agreement. In the version of Rule 11 in effect until 2006, the district court

could accept a plea agreement and then sentence the defendant to "another disposition more favorable to the defendant than that provided for in the plea agreement." N.D.R.Crim.P. 11(d)(3) (1990). But in 2006, Rule 11 was amended to make clear that, if the district court is presented with a plea agreement in which the prosecutor "agree[s] that a specific sentence or sentencing range is the appropriate disposition of the case[,]" then the district court has three options: "the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report." N.D.R.Crim.P. 11(c)(1)(C); N.D.R.Crim.P. 11(c)(3)(A).

[¶ 7] That change in the rule marked a change in what the district court could do when presented with a binding plea agreement. After the 2006 amendment, the district court may no longer accept a binding plea agreement and impose a more favorable disposition than that called for in the agreement. *Compare* N.D.R.Crim.P. 11(c)(4) ("If the court accepts the plea agreement, it must inform the defendant that, to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.") *with* N.D.R.Crim.P. 11(d)(3) (1990) ("If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement or another disposition more favorable to the defendant than that provided for in the plea agreement."). As such, the district court could not impose a probationary sentence in this case because

that disposition was more favorable to Neilan than the disposition in the parties' plea agreement.

[¶ 8] But the district court did so here by using Rule 35(b) to sidestep Rule 11. Neilan argues that this is not a violation of the rules of criminal procedure because there are no limitations on what a district court may do under Rule 35(b) following a binding plea agreement. And Neilan argues that there is no conflict between Rule 35(b) and Rule 11, despite that Rule 35 could be used—as it was here—to undercut a plea agreement whenever the district court disagrees with its terms. There is obvious conflict between the two rules, as at least two federal courts of appeals have recognized. *United States v. McDowell Contractors, Inc.*, 668 F.2d 256, 257 (6th Cir. 1982) (noting that appellate courts "may one day be required to harmonize these two rules"); *Semler*, 883 F.2d at 835. As such, this Court must resolve that conflict, and in doing so the Court views as "highly persuasive" the federal courts' interpretations of corresponding federal rules. *State v. Valgren*, 411 N.W.2d 390, 393 (N.D. 1987).

[¶ 9] One such case is the court of appeals' decision in *Semler*, and the logic of *Semler* is sound. As the court noted there, "since nothing in the rules permits the district court to withdraw its acceptance of a plea after sentencing, the only way the district court can 'reject' a Rule 11[c][1][C] sentence after sentencing is to reduce the sentence unilaterally pursuant to Rule 35(b)." *Semler*, 883 F.2d at 835. Such a rejection is improper under

Rule 11. That rule was amended "to protect prosecutors' bargains" because it is "unfair for a district court to require the government to abide by all of its obligations under a plea agreement while unilaterally reducing the defendant's obligations under that agreement." *Id*. at 834-35. Thus, for Rule 11(c)(3)(A) to have meaning, Rule 35 must be interpreted to limit the district court's authority to reduce a sentence entered pursuant to a Rule 11(c)(1)(C) plea agreement to exceptional cases. *Id*. at 835.

[¶ 10] Interpreting Rules 11 and 35 to protect prosecutors' bargains in cases involving Rule 11(c)(1)(C) agreements, while allowing the district court to grant Rule 35(b) relief to defendants in extraordinary cases, harmonizes those rules and gives effect to each. This Court "construe[s] rules to harmonize related provisions to give meaning to each provision if possible." *Desert Partners IV, L.P. v. Benson*, 2014 ND 192, ¶ 9, 855 N.W.2d 608 (internal citations and quotations omitted). Neilan's interpretation of Rule 35(b) renders Rule 11(c)(3)(A) meaningless because Rule 11(c)(3)(A) gives the district court only three options when faced with a binding plea agreement: accept the agreement, reject it, or defer ruling until after a presentence investigation. Neilan's interpretation of Rule 35(b) gives the district court a fourth option under Rule 11(c)(3)(A): accept the plea agreement and, shortly thereafter, unilaterally reduce the agreed-upon sentence over the State's objection. This Court should reject that argument

and hold that Rule 35(b) relief is limited to exceptional circumstances if the plea is made under a Rule 11(c)(1)(C) agreement.

CONCLUSION

[¶ 11] For the foregoing reasons, the State respectfully requests that the Court reverse the amended judgment and remand the case for imposition of the sentence imposed by the district court under the binding plea agreement.

Dated this 20th day of July, 2021.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellant in the above matter, and as the author of this reply brief, hereby certifies that this brief complies with the page limitation in N.D.R.App.P. 32(a)(8)(A). This brief is ten pages in length.

Dated this 20th day of July, 2021.

/s/ Dennis H. Ingold

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	) ss	
COUNTY OF BURLEIGH	)	

I, Mandy M. Pitcher, declare that I am a United States citizen over 21 years of age, and on the 20th day of July, 2021, I served the following:

1. Reply Brief of Plaintiff and Appellant
2. Certificate of Compliance
3. Unsworn Declaration of Service by Electronic Filing

via electronic service through Odyssey to the following:

Philip Becher
Defense Attorney
Admin@SandLawND.com

Which is the last reasonable ascertainable email address of the addressee.

I declare, under penalty of perjury under the law of North Dakota, that the foregoing is true and correct.

Signed on the 20th day of July, 2021 at Bismarck, North Dakota.

/s/ Mandy M. Pitcher
Mandy M. Pitcher