

**IN THE SUPREME COURT**  
**STATE OF NORTH DAKOTA**

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<p>State of North Dakota,</p> <p>Plaintiff-Appellee,</p> <p>vs.</p> <p>Justin Allen Hatcher,</p> <p>Defendant-Appellant.</p>	<p>Supreme Court No.: 20210137</p> <p>District Court No.: 02-2020-CR-00077</p>
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**APPELLANT’S BRIEF**

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APPEAL FROM THE APRIL 28, 2021 JUDGMENT  
THE BARNES COUNTY COURT IN VALLEY CITY, NORTH DAKOTA  
THE HONORABLE JAY A. SCHMITZ PRESIDING

**ORAL ARGUMENT REQUESTED**

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## **STATEMENT OF THE ISSUE PRESENTED**

[¶1] I. Whether Defendant had a fair and just reason to withdraw his guilty plea where he was told the plea offer just two minutes before the start of the Order to Show Cause hearing.

## **STATEMENT OF THE CASE**

[¶2] Defendant-Appellant Justin Allen Hatcher appeals from the April 28, 2021 Judgment. (A-32)<sup>1</sup> Defendant seeks reversal because he had a fair and just ground to withdraw his guilty pleas. The judge abused his discretion in not allowing the withdrawal of his guilty pleas.

[¶3] On April 24, 2020, the State filed a 13 count Amended Information. (A-12) In Court One through Count Eleven, the State charged Defendant with Possession of Certain Materials Prohibited, a Class C Felony, in violation of N.D.C.C. § 12.1-27.2-04.1. On Count Twelve, the State charged Defendant with unlawful possession of controlled substance, Class C Felony, in violation of N.D.C.C. § 19-03.1-23(7)(a), N.D.C.C. § 19-03.1-23(7)(b), and N.D.C.C. § 19-03.1-07(5). On Count Thirteen, the State charged Defendant with Unlawful Possession of Drug Paraphernalia, a Class C Felony, in violation of N.D.C.C. § 19-03.4-03(2). On March 2, 2020, law enforcement executed a search warrant on Defendant's parents' house. In the basement, on Defendant's electronic devices, law enforcement found the images, along with methamphetamine and a methamphetamine pipe. (PT 11-13)<sup>2</sup>

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<sup>1</sup> Appendix

<sup>2</sup> Plea hearing transcript

[¶4] This matter was scheduled for a jury trial on February 9, 2021. (Notice of Hearing, docket sheet No. 56) On January 15, 2021, an Affidavit, claiming a drug patch violation and a proposed Order for a warrant were filed. (Affidavit, docket sheet No. 57; and Proposed Order, docket sheet No. 58)

[¶5] On January 22, 2021, before the start of the Order to Show Cause hearing, a plea offer was communicated to Defendant. Defendant pled guilty to the 13 Counts in the Amended Information. (PT 8-11) A presentence investigation was ordered. The Order to Show Cause hearing was stayed, pending further drug test results. Defendant was allowed to walk out of court. (PT 15-16)

[¶6] On April 25, 2021, two days before sentencing, a Motion to Withdraw Pleas and Motion to Withdraw as Counsel were filed by Defendant's attorney. (Motion, docket sheet No. 76; Motion, docket sheet No. 82.

[¶7] Judge Jay Schmitz denied the Motion to Withdraw Pleas. (A-14) He proceeded to sentence Defendant. He sentenced Defendant to 18 months of imprisonment, three years of supervised probation, mandatory sexual offender registration, and \$560.00 in fees. (A-15) Subsequently, on May 6, 2021, Defendant filed his Notice of Appeal. (A-32)

#### **STATEMENT OF THE FACTS**

[¶8] The facts relevant to the issues are in dispute. On January 22, 2021, the Order to Show Cause hearing was held on the drug patch violation. At the start of the hearing, the court was informed that there was going to be a charge of plea and a request for a presentence investigation. (PT 4)

[¶9] Defendant confirmed to the court that he had spoken to his attorney. (PT 5) The court informed Defendant of the minimum and mandatory penalties on each charge. (PT

5-6) Defendant said he understood the charges and possible penalties. (PT 6) The court informed him of his legal rights and Defendant said he understood his rights. Id. Defendant said he had an adequate time to speak to his attorney. Id.

[¶10] Defendant entered pleas of guilty to all 13 counts in the Amended Information. (PT 8-9) Defendant did express his confusion about his pleas being a plea agreement:

“THE COURT: So no one’s promised you any particular sentence here; is that correct?

THE DEFENDANT: I don’t know. I thought it was, but I guess not.

THE COURT: You understand the State will make a recommendation, your attorney will be making a recommendation, the State of North Dakota, the Department of Corrections, will be conducting a presentence investigation, they’ll provide information, potentially some recommendations about proper sentencing, and the court will make the final decision. Is that your understanding?

THE DEFENDANT: Okay. Yep.” [Plea Transcript pp. 9-10]

[¶11] Defendant told the court he understood the charges and penalties that could apply. He said he understood his rights and that by pleading guilty he was giving up his rights. He said he had spoken to his attorney and was satisfied with his attorney. Defendant believed his plea was voluntarily, knowingly, and intelligently made. (PT 10-11).

[¶12] The court obtained a factual basis for each charge. (PT 11-13) Defendant and his attorney agreed there was a factual basis. (PT 13) The court accepted the pleas. Id. The court order a presentence investigation. (PT 14)

[¶13] On April 27, 2021, at the sentencing hearing, the Court asked Defendant about his motion to withdraw his pleas:

“How do you believe that you were coerced into pleading guilty?”

THE DEFENDANT: Because I was told it was supposed to be an order to show cause hearing. About two minutes before I walked in the door, I was told it was going to be a change of plea.

THE COURT: Who told you what?

THE DEFENDANT: Attorney Thornton told me that we were going to do a change of plea instead of an order to show cause like two minutes before I walked in the door. The day prior I was in the ICU with my father, who’s back here, and had me contact – He tried to contact me, but I was in the ICU with my father.” [Sentencing Hearing Transcript p. 7]

Defendant, once again asserted his confusion about whether the plea was part of a plea agreement. (ST 8-9)<sup>3</sup>

[¶14] The court allowed Defendant’s attorney to make an offer of proof regarding the fair and just reasons for the withdrawal of the pleas. (ST 11) Mr. Thornton indicated that Defendant was claiming his innocence. (ST 13-15). This was consistent with comments that Defendant made in the PSI report. (ST 15) Mr. Thornton also said avoiding an immediate jail sanction was fair and just reason for allowing the plea withdrawals. (ST 16-17) Defendant and he discussed the possibility of an immediate jail sanction in the hallway immediately before court. Id.

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<sup>3</sup> Sentencing Hearing Transcript

[¶15] Mr. Thornton also asserted that Defendant believed he was coerced into pleading guilty because he believed he was facing 110 years in prison if he did not plead guilty. This was based on the C Felony level offenses, the habitual offender application, and the email the State’s Attorney sent Defendant’s attorney just days before the Order to Show Cause Hearing. (ST 16, 36) Mr. Thornton read the email into the record. In part, the email states: “I think your client should be aware that the habitual offender I filed doubles his time potential. Eleven counts times ten years on each count is 110 years. That should be enough to come to an agreement.” (ST 36)

[¶16] The court denied the Motion to Withdraw Guilty Pleas. (A-14; ST 54) However, the court did find that the State would not be substantially prejudiced if Defendant were allowed to withdraw his pleas. (T 51).

### **ARGUMENT**

[¶17] I. Defendant had a fair and just reason to withdraw his plea where he was told the plea offer just two minutes before the start of the Order to Show Cause hearing.

[¶18] Rule 11 (d) of the Rules of Criminal Procedure sets forth the standard for withdrawing a guilty plea:

“(1) In general. A defendant may withdraw a plea of guilty: (A) before the court accepts the plea, for any reason or no reason; or (B) after the court accepts the plea, but before it imposes sentence if: (i) the court rejects a plea agreement under Rule 11 (c)(5); or (ii) the defendant can show a fair and just reason for the withdrawal.



(2) Finality of a guilty plea. Unless the defendant proves the withdrawal is necessary to correct a manifest injustice, the defendant may not withdraw a plea of guilty after the court has imposed sentence.

(3) Prosecution reliance on plea. If the prosecution has been substantially prejudiced by reliance on the defendant's plea, the court may deny a plea withdrawal request." N.D.R.CrimP. 11(d)

[¶19] Before sentencing, there is a preference that the trial judge should liberally allow a defendant to withdraw a plea upon proving a fair and just supporting reason. State v. Lium, 2008 ND 232, ¶ 13, 758 N.W.2d 711. After establishing a fair and just reason to withdraw a plea, the burden shifts to the State to establish it would be prejudiced by granting the motion. Id. The prejudice to the State must be extraordinary. Id.

[¶20] In Lium, the Supreme Court gave a nonexhaustive list of factors to determine a "fair and just" reason for plea withdrawal. The factors are:

"(1) the amount of time that has passed between the entry of the plea and the motion to withdraw; (2) defendant's assertion of innocence or a legally cognizable defense to the charge; (3) prejudice to the government; (4) whether the plea was knowing and voluntary; (5) whether the plea was made in compliance with Rule 11, N.D.R.Crim.P.; (6) whether adequate assistance of counsel was available to the defendant; (7) the plausibility of the reason for seeking to withdraw; (8) whether a plea withdrawal would waste judicial resources; and (9) whether the parties had reached or breached a plea agreement." Id. at ¶ 17.

[¶21] After a plea has been accepted, the review of motion to withdraw the guilty plea is under an abuse of discretion standard. State v. Sisson, 1997 ND 158, ¶ 15, 567 N.W.2d 839. “A court abuses its discretion when it acts arbitrarily, unreasonably, or capriciously, or misinterprets or misapplies the law.” State v. Feist, 2006 ND 21, ¶ 22, 708 N.W.2d 870.

[¶22] Here, Defendant has fair and just reasons for the withdrawal of his guilty pleas. He was expecting an Order to Show Cause hearing. Literally two minutes before the start of the Order to Show Cause hearing, the plea offer is communicated to him. Two minutes is not enough time to intelligently comprehend the ramifications and consequences of a serious felony plea offer. This is particularly true when taken in the context of Defendant’s perception that the State’s Attorney will be asking for 110 years if he does not plead guilty.

[¶23] Moreover, through discussions with his attorney in the hallway immediately before court, Defendant’s expectations was he facing jail time due to the positive drug patch. Criminal defendants do irrational things to avoid going to jail. This cannot be stressed enough. The plea offer presented an increased likelihood to avoid immediate jail time upon pleas and a request for a presentence investigation.

[¶24] Judge Schmitz abused his discretion in not allowing Defendant to withdraw his guilty pleas. Judge Schmitz was unreasonable in not taking into account the last minute nature of the change of pleas. Judge Schmitz acted unreasonably in not analyzing the affect the 110 year prison threat had on Defendant.

[¶25] Here, Defendant indicated he was made aware of the plea offer “two minutes” before the start of the Order to Show Cause hearing. Mr. Thornton did not dispute this claim. Nor did the court ask Mr. Thornton to address this. However, the record does indicate that the change of plea hearing was not noticed per written notice. Hence, by

deduction, the plea offer was not communicated to Defendant until the day of court. Due to the last minute change of pleas, the court acted unreasonably in not inquiring further on whether Defendant had sufficient time to contemplate and reflect on the consequence of the plea offer. Judge Schmitz needed to make sure this was not a “just answer yes to every question the judge asks you” to satisfy Rule 11.

[¶26] Judge Schmitz was unreasonably in discounting Defendant’s perception on avoiding immediate jail sanctions at the Order to Show Cause hearing. He was also unreasonable in discounting Defendant’s perception on the State’s Attorney’s “110 year threat.” In both instances, Judge Schmitz discounted them both because he believed they were unrealistic. (ST 8-9, 17-18, 34) However, Judge Schmitz neglected to analyze the affect both grounds had on the listener—the defendant. Both grounds when coupled with the last minute change of plea were fair and just grounds for withdrawal of his guilty plea.

[¶27] Judge Schmitz already found that the State would not be substantially prejudiced by the withdrawal of the pleas. (ST 51) Hence, based on the aforementioned, Defendant should be allowed to withdraw his pleas.

[¶28] Appellant believes oral argument would be beneficial to the Court as last minute change of pleas will be more common in the future especially in counties with large caseloads.

### **CONCLUSION**

[¶29] WHEREFORE, the reasons stated herein, Appellant respectfully requests that this Honorable Court reverse the April 28, 2021 Judgment, allow Defendant to withdraw his guilty pleas and remand the case to the district court for a jury trial.

Dated this 23<sup>rd</sup> day of August, 2021.

/s/ Richard E. Edinger

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**CERTIFICATE OF COMPLIANCE**

[¶30] The undersigned certifies that the principal brief complies with the page limitations set forth in Rule 32 (a)(8)(B). The brief is only 12 pages in length.

Dated this 23<sup>rd</sup> day of August, 2021.

/s/ Richard E. Edinger

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**STATE OF NORTH DAKOTA**

State of North Dakota,            )  
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    Plaintiff-Appellee,            )  
  ) SUPREME COURT NO. 20210137  
    vs.                                )  
  )  
Justin Hatcher,                    )  
  )  
    Defendant-Appellant.         )

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**CERTIFICATE OF SERVICE**

[¶ 1] On August 18, 2021, I served a copy of Appellant's Brief and Appendix onto Plaintiff-Appellee. I served said copies electronically via the North Dakota Supreme Court web portal by sending copies to Ms. Tonya Duffy, State's Attorney, at her email address of states\_attorney@barnescounty.us.

Dated this 18th day of August, 2021.

/s/ Richard E. Edinger

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## STATE OF NORTH DAKOTA

State of North Dakota,            )  
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  )  
Justin Hatcher,                    )  
  )  
      Defendant-Appellant.        )

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## CERTIFICATE OF SERVICE

[¶ 1] On August 23, 2021, I served a copy of the corrected Appellant's Brief and the corrected Appendix to the Brief onto Plaintiff-Appellee. I served a copy electronically of the aforementioned documents via the North Dakota Supreme Court web portal by sending a copy to Ms. Tonya Duffy, State's Attorney, at her email address of states\_attorney@barnescounty.us.

Dated this 23rd day of August, 2021.

/s/ Richard E. Edinger

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