

IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota,	)	Supreme Court File Nos.
	)	20210342; 20210350
)	
Plaintiff and Appellee,	)	Barnes County Nos.
	)	02-2021-CR-0166;
v.	)	02-2021-CR-0409
)	
Gina Marie Aalgaard Kelly,	)	APPELLANT’S BRIEF
)	
Defendant and Appellant.)	

**Appeal from the criminal judgments entered November
30, 2021 in Barnes County district court, Southeast
Judicial District, North Dakota, the Honorable Jay A.
Schmitz presiding**

APPELLANT’S BRIEF
ORAL ARGUMENT REQUESTED

Kiara C. Kraus-Parr
ND Bar No. 06688
Kraus-Parr Law, pllc
527 Demers Ave
Grand Forks, ND 58201
Office: (701) 772-8991
E-file: service@krausparrlaw.com
Attorney for the Appellant

TABLE OF CONTENTS

JURISDICTION ¶ 1

STATEMENT OF ISSUES ¶ 2

ORAL ARGUMENT ¶ 3

STATEMENT OF CASE ¶ 4

STATEMENT OF FACTS..... ¶ 7

LAW AND ARGUMENT..... ¶ 12

 I. Whether Ms. Kelly’s guilty plea was entered knowingly,
 intelligently, and voluntarily ¶ 12

 II. Whether a violation of Ms. Kelly’s due process created a
 manifest injustice requiring withdrawal of her pleas..... ¶ 13

 III. Whether Ms. Kelly’s sentence was imposed in violation of the
 laws of North Dakota..... ¶ 16

CONCLUSION ¶ 20

TABLE OF AUTHORITIES

Cases

<i>Abdi v. State</i> , 2000 ND 64, 608 N.W.2d 292 (N.D. 2000)	¶ 12
<i>Cleveland Bd. of Educ. v. Loudermill</i> , 470 U.S. 532,	
105 S.Ct. 1487 (1985).....	¶ 14
<i>Cockfield v. City of Fargo</i> , 2019 ND 77, 924 N.W.2d 403 (N.D. 2019).....	¶ 14
<i>Curtiss v. Curtiss</i> , 2016 ND 197, 886 N.W.2d 565 (N.D. 2016).....	¶ 14
<i>DeCoteau v. State</i> , 504 N.W.2d 552 (N.D. 1993).....	¶ 17
<i>Krentz v. Robertson Fire Prot. Dist</i> , 228 F.3d 897 (8th Cir. 2000)	¶ 14
<i>N.D. Legislative Assembly v. Burgum</i> , 2018 ND 189	
916 N.W.2d 83 (N.D. 2018).....	¶ 19
<i>State v. Bates</i> , 2007 ND 15, 726 N.W.2d 595 (N.D. 2007)	¶¶ 12, 13
<i>State v. Clark</i> , 2012 ND 135, 818 N.W.2d 739 (N.D. 2012).....	¶ 16

Statutes, Rules, Codes

N.D. Const. art. VI, § 6	¶ 1
N.D. Const. art. XI, § 26	¶ 19
N.D.C.C. § 12.1-11-03.....	¶ 4
N.D.C.C. § 12.1-08-02.....	¶ 5
N.D.C.C. § 12.1-32-04.....	¶ 18
N.D.C.C. § 19-03.1-23(7)(a).....	¶ 5
N.D.C.C. § 29-28-03	¶ 1
N.D.C.C. § 29-28-06	¶ 1

N.D.C.C. § 39-06-42 ¶¶ 4, 5
N.D.C.C. § 39-08-01 ¶¶ 4, 5
N.D.R.Crim.P 11 ¶¶ 14, 15

Transcript References:

The Defendant had a contested preliminary hearing in cr166 on June 29, 2021. The transcript of that hearing is referred to as [PH] in this brief.

The Defendant Changed her Plea in case cr166 on October 12, 2021. The transcript of that hearing is referred to as [CoP] in this brief.

The Defendant had an initial appearance in cr409 on November 12, 2021. The transcript of that hearing is referred to as [IA] in this brief.

The Defendant’s sentencing hearing in cases cr166 and cr409 was conducted on November 30, 2021. The transcript of that hearing is referred to as [Sent.] in this brief.

JURISDICTION

[¶ 1] The Defendant, Gina Marie Aalgaard Kelly, timely appealed the final criminal judgments arising out of the district court. Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provision article VI, § 6, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06, N.D.C.C., which provides as follows:

“An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03. An appeal may be taken by the defendant from:

1. A verdict of guilty;
2. A final judgment of conviction;
3. An order refusing a motion in arrest of judgment;
4. An order denying a motion for new trial; or
5. An order made after judgment affecting any substantial right of the party.”

N.D.C.C. § 29-28-06.

STATEMENT OF THE ISSUES

- [¶ 2] I. Whether Ms. Kelly’s guilty plea was entered knowingly, intelligently, and voluntarily.
- II. Whether a violation of Ms. Kelly’s due process created a manifest injustice requiring withdrawal of her pleas.
- III. Whether Ms. Kelly’s sentence was imposed in violation of the laws of North Dakota.

ORAL ARGUMENT

[¶ 3] Oral argument has been requested to emphasize and clarify the Appellant's written arguments on their merits.

STATEMENT OF CASE

[¶ 4] This consolidated appeal is a criminal matter on direct appeal from Southeast Judicial District, Barnes County Criminal Judgments. These cases were before the district court in *State v. Kelly*, 02-2021-CR-0166; 02-2021-CR-0409. The initial criminal information in cr166 was filed with the court on April 29, 2021. (R1). The Defendant was charged with Count I: driving under the influence, fourth or greater offense, in violation of N.D.C.C. § 39-08-01, a class C felony; Count II: false information to law enforcement, in violation of N.D.C.C. § 12.1-11-03, a class A misdemeanor; and Count III: driving under revocation in violation of N.D.C.C. § 39-06-42, a class B misdemeanor. PH cr166 pp. 6-8. In cr166, Ms. Kelly was appointed Attorney Douglas.

[¶ 5] The initial criminal information in cr409 was filed with the court on October 22, 2021. (R1). The Defendant was charged with Count I: driving under the influence, fourth or greater offense, in violation of N.D.C.C. § 39-08-01, a class C felony; Count II: preventing arrest, in violation of N.D.C.C. § 12.1-08-02(1), a class C felony; Count III: possession of methamphetamine, in violation of N.D.C.C. § 19-03.1-23(7)(a), a class A misdemeanor; and Count IV: driving under suspension, in violation of

N.D.C.C. § 39-06-42, a class B misdemeanor. IA cr409 pp. 5-7. In cr409, Ms. Kelly was appointed Attorney Bredahl.

[¶ 6] Ms. Kelly changed her plea in case cr166 on October 12, 2021. CoP cr166 pp. 10-13; 16. Ms. Kelly changed her plea in case cr409 and was sentenced for both cases on November 30, 2021. Sent. p. 12. In case cr166, she was sentenced to 18 months in custody of the North Dakota Department of Corrections, followed by two (2) years of supervised probation. In case cr409, Ms. Kelly was sentenced to three (3) years consecutive to case cr166. Sent. p. 32. Ms. Kelly filed a motion for reduction of sentence that was denied by the trial court. Ms. Kelly timely appealed the final criminal judgments in both cases.

STATEMENT OF FACTS

[¶ 7] On the evening of April 27, 2021 Deputy Morten was patrolling on Lake Road. PH cr166 Tr. pp. 5-6. He received a tip that Gina Kelly was driving under revocation. He saw her vehicle cross over the center line two different times, and initiated a traffic stop. *Id.* Ms. Kelly failed field sobriety testing. *Id.* at pp. 8-9. She had a blood alcohol level of .174. CoP cr166 Tr. p. 22.

[¶ 8] Ms. Kelly changed her plea in cr166 to guilty on Count 1, Driving Under the Influence, with the understanding that she would participate in the Drug Court Program, and then the State would dismiss the false information charge. CoP cr166 pp. 10-11. The State told the court, “I

have zero doubt that she's not going to score high enough on the LSI either based on her convictions....so I don't have concerns about her being admitted at all." *Id.* at p. 12. The court explained if Ms. Kelly did not successfully complete the program or if for some reason she did not qualify for drug court, she could not withdraw her plea. *Id.* at p. 16.

[¶ 9] Ms. Kelly was denied access to the drug court program because of a conflict with the Judge participating in the program. The State explained, "So as the court's aware, the State filed a motion to continue this sentencing hearing due to unforeseen circumstances. The gist of it is I expected her to get into our program. **She qualifies at every level.** At basically the ninth hour our drug court judge said she had a conflict with Ms. Kelly and said she would not be able to have her in the program here..." *Emphasis added* IA cr409 p. 10.

[¶ 10] On October 19, 2021, law enforcement was dispatched to an individual who was driving erratically and believe intoxicated. Deputy Morten made contact with Ms. Kelly, who had a warrant out for her arrest. Sent p. 16. She was placed under arrest, but resisted officers. *Id.* She was taken to Mercy Hospital and her blood alcohol was determined to be .353. *Id.* at p. 17. She pleaded guilty to Counts 1, 2, and 4 in exchange for the State dismissing Count 3.

[¶ 11] At sentencing the Court explained a, "consecutive sentence is **necessary to keep the DOCR from simply running you through a**

treatment program and letting you go...but I think I have to use whatever discretion I have to **limit that discretion of the DOCR.**

Emphasis added Sent. p. 31

LAW AND ARGUMENT

I. Whether Ms. Kelly’s guilty plea was entered knowingly, intelligently, and voluntarily.

Standard of Review

[¶ 12] A guilty plea must be entered knowingly, intelligently, and voluntarily to be valid. *State v. Bates*, 2007 ND 15, ¶ 13, 726 N.W.2d 595. As this Court explained in *Abdi*, the purpose of the inquiry by the court regarding plea negotiations is to assess the defendant’s understanding of the terms of any resulting agreements. *Abdi v. State*, 2000 ND 64, ¶ 23, 608 N.W.2d 292 (N.D. 2000). Because Ms. Kelly did not understand that drug court was never an option for her, because of a Judge’s conflict, she did not make a knowing, voluntary, and intelligent waiver of her right to trial. Therefore, this Court should allow the withdrawal of her plea.

II. Whether a violation of Ms. Kelly’s due process created a manifest injustice requiring withdrawal of her pleas.

Standard of Review

[¶ 13] After the court has accepted a plea and imposed sentence, the defendant cannot withdraw the plea unless withdrawal is necessary to correct a manifest injustice. *State v. Bates*, 2007 ND 15, ¶ 6, 726 N.W.2d 595, N.D.R.Crim.P. 11(d)(2).

[¶ 14] This Court has explained “[d]ue process claims require a two-step analysis; the plaintiff must show that the state deprived him of some life, liberty, or property interest and that the state’s deprivation of that interest was done without due process.” *Cockfield v. City of Fargo*, 2019 ND 77, ¶ 9, 924 N.W.2d 403 (citing *Krentz v. Robertson Fire Prot. Dist.*, 228 F.3d 897, 902 (8th Cir. 2000); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538, 105 S.Ct. 1487 (1985)). “[P]rocedural due process requires fundamental fairness...” *Curtiss v. Curtiss*, 2016 ND 197, ¶ 8, 886 N.W.2d 565. It is fundamentally unfair to have a drug Court program available to every similarly situated defendant in Barnes County, but exclude Ms. Kelly as a candidate due to a Judge’s conflict.

[¶ 15] Because a member of the drug court program in Barnes County had a conflict with Ms. Kelly, which she did not initially know nor could do anything to change, she was denied a disposition available to other similarly situated defendants. The county made no attempt to assign alternate personnel to address the conflict, allowing Ms. Kelly to participate in the program for which she otherwise qualified. By not having an alternate in case of conflict the government has violated Ms. Kelly’s right to due process of law. This violation created a manifest injustice to Ms. Kelly which requires the withdrawal of her guilty pleas in both cr166 and cr409.

III. Whether Ms. Kelly’s sentence was imposed in violation of the laws of North Dakota.

Standard of Review

[¶ 16] This Court’s review of a district court’s sentence is generally limited to determining whether the court acted within the sentencing limits prescribed by statute or substantially relied upon an impermissible factor. *State v. Clark*, 2012 ND 135, ¶ 18, 818 N.W.2d 739 (N.D. 2012).

[¶ 17] The court explained to Ms. Kelly in cr166 that if she did not qualify or did not successfully complete drug court she could not withdraw her plea. However, Ms. Kelly did qualify for drug court, therefore when she was not allowed to participate because of a Judge’s conflict with her she should have been allowed to withdraw her plea. “A sentence within statutory limits, but that is contrary to a plea agreement that has been accepted, by the court, is not illegal. It has, however, been imposed in an illegal manner” *DeCoteau v. State*, 504 N.W.2d 552, 556 (N.D. 1993); cf. 3 Wright, § 585 at 398. By not allowing Ms. Kelly to participate in drug court or alternatively withdraw her plea her sentence was imposed in an illegal manner, which is a manifest injustice.

[¶ 18] Finally the Court’s stated reason for ordering consecutive sentences was to limit the discretion of the DOCR. That is an impermissible factor. The sentencing factors are found in the N.D.C.C. § 12.1-32-04. While this is not an exhaustive list, limiting the authority of the DOCR is not reasonably related to any of the factors outlined in the statute. It is also a violation of the doctrine of separation of powers.

[¶ 19] “The North Dakota Constitution creates three branches of government and vests each branch with a distinct type of power.” *N.D. Legislative Assembly v. Burgum*, 2018 ND 189 ¶ 40, 916 N.W.2d 83. The three branches of government (legislative, executive, and judicial) are coequal. N.D. Const. art. XI, § 26. The ND Department of Corrections and Rehabilitation is an agency under the executive branch of government. The Judicial branch cannot limit or attempt to limit the power of the executive branch to make corrections and rehabilitation determinations such as, treatment and/or parole, because they disagree with those decisions. Therefore the Court’s stated purpose for ordering consecutive sentences violated the doctrine of separation of powers and was illegal. The trial court’s sentence should be vacated.

CONCLUSION

[¶ 20] WHEREFORE the Defendant respectfully requests the Court to reverse the judgment of the trial court and allow Ms. Kelly to withdraw her pleas or in the alternative require a sentence consistent with the drug court program.

Dated this 14th day of March, 2022

/s/ Kiara Kraus-Parr
ND Bar No. 06688
Kraus-Parr Law, pllc
527 Demers Avenue
Grand Forks, ND 58201
Office: (701) 772-8991

E-file: service@krausparrlaw.com
Attorney for the Appellant

CERTIFICATE OF COMPLIANCE

[¶ 1] This Appellant's Brief complies with the page limit of 38 set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure.

Dated: March 14, 2022

/s/ Kiara Kraus-Parr
ND #06688
Kraus-Parr Law, pllc
527 Demers Avenue
Grand Forks, ND 58201
(701) 772-8991
service@krausparrlaw.com
Attorney for Appellant

IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota,	)	Supreme Court File Nos.
	)	20210342; 20210350
Plaintiff and Appellee,	)	Barnes County Nos.
	)	02-2021-CR-00166;
v.	)	02-2021-CR-0409
)	
Gina Marie Aalgaard Kelly,)	
	)	DECLARATION OF SERVICE
Defendant and Appellant.)	

[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 Brief

And that said copies were served upon:

Tonya Duffy, State's Attorney, states_attorney@barnescounty.us

by electronically filing said documents through the court's electronic filing system. Also served upon:

Gina Kelly #64937, c/o Dakota Womens Correctional and Rehabilitation Center, 440 Mckenzie Street, New England, ND 58647

by placing a true and correct copy of said items in a sealed envelope with USPS.

Dated: March 14, 2022.

/s/Kiara Kraus-Parr
ND Bar No. 06688
Kraus-Parr Law, pllc
527 Demers Avenue
Grand Forks, ND 58201
P: (701) 772-8991
E: service@krausparrlaw.com
Attorney for Defendant/Appellant