

IN THE SUPREME COURT OF NORTH DAKOTA

The State of North Dakota,

Plaintiff and Appellee,

v.

Matthew Howard Walsh

Defendant and Appellant;

Supreme Court File No.

20220327

Nelson County File No.

32-2021-CR-00002

APPELLANT BRIEF

Appeal from the Second Amended Criminal Judgment entered in Nelson County District

Court, Northeast Central Judicial District, North Dakota, entered on

October 25th 2022, the Honorable Lolita G. Hartl Romanick presiding

ORAL ARGUMENT REQUESTED

APPELLANT'S BRIEF

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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] ISSUE I: Did the District Judge err when she failed to advise Defendant/Appellant Matthew Walsh about the Court's authority to order restitution?

NATURE OF THE CASE

[¶2] This is an appeal from a guilty plea on April 8, 2022 and a restitution proceeding on July 29, 2022.

[¶3] A second restitution hearing was set and cancelled because the state and the Defendant/Appellant Matthew Walsh (Mr. Walsh) stipulated to the amount of restitution being \$3,000. That stipulation reserved Mr. Walsh's right to appeal.

[¶4] A second amended judgment (R109) was entered that included the \$3,000 restitution.

[¶5] Mr. Walsh filed a Notice of Appeal (R110) and an Order for Transcript (R111) on November 8, 2022.

[¶6] The Notice of Filing Notice of Appeal (R112) was filed on November 8, 2022.

[¶7] The Transcripts (R116 and R117) were filed on November 29, 2022.

[¶8] The Clerk's Certificate of Appeal (R118) was filed on December 5, 2022.

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

STATEMENT OF FACTS

[¶10] There are two criminal cases involved in the April 8, 2022 sentencing transcript (R117). They are case number 32-2021-CR-00001 and case number 32-2021-CR-00002. Case number 32-2021-CR-00001 involves a theft charge in North Dakota that is a class B Misdemeanor. Case number 32-2021-CR-00002 involves a theft charge that in North Dakota is a class C Felony.

[¶11] Both case number 32-2021-CR-00001 and case number 32-2021-CR-00002 are involved in the April 8, 2022 sentencing transcript (R116). At the Sentencing Hearing Mr. Walsh entered open pleas of guilty to both charges. Prior to Mr. Walsh's guilty pleas the judge advised him of his rights under N.D.R. of Crim P. 11(b)(1). The right that the judge didn't advise Mr. Walsh of was N.D.R. of Crim. P. 11(b)(1)(I), the Court's authority to order restitution. N.D.R. of Crim. P. 11 (b)(1)(I) should have been given because case number 32-2021-CR-00002 involved restitution.

[¶12] In the July 29, 2022 Transcript (R117) the issue is restitution and the only case involved is case number 32-2021-CR-00002. At that restitution hearing only one witness was called by the state, Troy VanRaden. The prosecutor was told Mr. VanRaden was the owner of the four sets of tires and rims that were taken in the theft. However, Mr. VanRaden when he testified said the four sets of tires and rims belonged to a corporation that he was a share holder of. When the prosecutor heard Mr. VanRaden wasn't the owner, he asked for an was granted a continuance. A date was then set for a second restitution hearing.

[¶13] The second restitution hearing was canceled because the parties stipulated to a restitution amount of \$3,000. After the stipulation a second amended judgment was entered that included the \$3,000 restitution.

ISSUE I: Did the District Judge err when she failed to advise Defendant/Appellant Matthew Walsh about the Court's authority to order restitution?

ARGUMENT

I. Standard of Review.

[¶14] This case involves constitutional rights a defendant must be advised of before the judge can accept his guilty plea. Because constitutional rights are involved Issue I is fully reviewable.

[¶15] In this case Defendant/Appellant Matthew Walsh's (Mr. Walsh) guilty pleas were entered in the Sentencing Transcript (R117: page 12 Lines 18 – 23):

“THE COURT: To the charge in case ending in 02, theft of property, a C felony, how do you plead?

THE DEFENDANT: Guilty.

THE COURT: And in the case ending in 01, theft of property, B misdemeanor, how do you plead?

THE DEFENDANT: Guilty.”

[¶16] Prior to the above pleas, restitution was mentioned by the prosecutor. Sentencing Transcript (R117: page 9, line 18 to page 10, line 1):

“Mr. TENNESON: Any fine would be waived because there's going to be a significant restitution coming after a restitution hearing or an agreement, Your Honor. The \$525 in court fees, I believe that's what they should be, and then restitution –

THE COURT: I'm sorry, I missed what you said after the fees.

MR. TENNESON: I believe that's what they should be, is \$525, and then restitution should be open for 60 days.”

[¶17] It was also mentioned by Mr. Walsh's defense attorney at the Sentencing Transcript (R117: page 10 line 13 – 23):

“MS. BRAINARD: Your Honor, it's going to be a joint recommendation. I think I am asking for a waiver of fines and fees, and anything imposed. The 2 information does allege \$150 or less in one file, and the other file is approximately \$8,600. Mr. Tenneson and I spoke yesterday, he thought it might be significantly more than that once he actually collected the affidavits. So we anticipate a significant amount of restitution, and we're talking about approximately two

years of supervised probation and I think throwing fees in there might just bring us back in front of the Court if we're not able to pay those fees on a two-year schedule."

[¶18] The judge also mentioned restitution in the Sentencing Hearing Transcript (R117: page 12, lines 3 through 12):

"THE COURT: All right. Mr. Walsh, in case 32-2021-CR-02, that is the theft of property, C felony charge that carries maximum penalties of 5 years, \$525 in court fees, \$1,000 in – or excuse me, \$10,000 in fines potentially as maximum penalties, and the restitution. And that in the other case, 32-2021-CR-1, that is theft of property, B misdemeanor, which varies maximum penalties of 30 days, \$1,500 in fines, or a combination of those; \$250 in court fees, and restitution. Any question about the nature of the charge of the maximum penalties that could be assessed?"

[¶19] The Court accepted Mr. Walsh's guilty pleas in Sentencing Hearing Transcript (R117: page 14, lines 22 through page 15, line 3):

"THE COURT: I find that the Defendant's plea of guilty to the charge theft of property, a C felony in case 32-2021-CR-02, and his plea of guilty to the charged theft of property, a B misdemeanor in 32-2021-CR-01, each have been freely, knowingly, and voluntarily given. I also find that there is a sufficient factual basis to support each of these charges and the guilty pleas to these charges."

[¶20] After the acceptance of the plea, Mr. Walsh's attorney mentioned restitution in the Sentencing Hearing Transcript (R117: page 15 line 23 to page 16 line 5):

"(MS. BRAINARD): For those reasons I would ask the Court to impose, as we suggested, I would ask for two years' of supervised probation at this time. As IU mentioned previously, when we come back to the Court with restitution on the file ending in 0002, we may ask to amend the criminal judgment to include additional time for payment at that time. But I think two years will be sufficient given the steps that Mr. Walsh is taking to support his recovery and treatment.

[¶21] The Court also referred to restitution after the acceptance of the guilty plea in the Sentencing Transcript (R117: page 22 line 5 to line 21):

“THE COURT: I will waive any fines because of the significant restitution that is at issue. In case 32-2021-CR-02 you are assessed \$525 in court fees. I think there is a responsibility to the community, and you need to take that responsibility even though restitution is being imposed as well. I do order restitution, but you have a responsibility to the community and to your victim. So both of those will be imposed in 2021-CR-02. Restitution will remain open – did you say 60 days, Mr. Tenneson?

MR. TENNESON: Yes, Your Honor.

THE COURT: -- for 60 days. What that means, Mr. Walsh, is there will be another hearing if you disagree with the amounts that are claimed for restitution.

On case 2021-CR-01, you are sentenced to 30 days; you have credit for those 30 days., There is no probation imposed on that, and I am going to waive all fees and fines in that case.

[¶22] North Dakota Rules of Criminal Procedure 11(b)(1)(I) states “the courts authority to order restitution.” None of the above transcript quotes mention authority to order restitution.

[¶23] North Dakota Rules of Criminal Procedure 11(b)(1)(I) is not a collateral consequence. It is part of North Dakota Rules of Criminal Procedure.

[¶24] The procedure to advise a defendant under North Dakota Rules of Criminal Procedure 11(b)(1)(I) is mandatory and that the advise must include all of the parts of the rule applicable to a Defendant’s case. Mr. Walsh’s case involved restitution. Therefore North Dakota Rules of Criminal Procedure 11(b)(1)(I) includes part of the advise a judge must give to Mr. Walsh before he can plead guilty.

[¶25] According to Kaiser vs. State, 417 N.W.2d 175 (N.D. 1987), “Before accepting a guilty plea, the court must follow the requirements of this rule; these procedures are mandatory and binding upon the court, because guilty pleas result in a waiver of the privilege of self-incrimination, the right to a jury trial and the right to confront witnesses.”

[¶26] According to the State vs. Boushee, 459 N.W.2d 552 (N.D. 1990), “This rule requires trial court to carry out the procedures outlined in subsections (b), (c) and (e) personally in order to ensure a record that will affirmatively establish a knowing and voluntary decision by the defendant.

[¶27] The State has two arguments against the above issue:

1. Restitution doesn’t involve constitutional rights.
2. What the judge advised Mr. Walsh of substantially complies with restitution.

[¶28] Neither of the above arguments meets the requirements of Boushee id. which says the procedure of North Dakota Rules of Criminal Procedure 11(b)(1)(I) are to be followed to affirmatively establish a knowing and voluntary decision by a defendant.

CONCLUSION

[¶29] In this case before Mr. Walsh plead guilty the trial judge failed to advise him about North Dakota Rule of Criminal Procedure 11(b)(1)(I). Such advise is required to affirmatively establish a knowing and voluntary decision by a defendant to plead guilty.

[¶30] This case must be remanded to the district judge. The remand must order the judge to allow Mr. Walsh to plead again, but before he pleads again he has to be advised of all of his rights that are contained in North Dakota Rules of Criminal Procedure 11(b)(1)(I).

Dated this 27th day of December 2022.

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**CERTIFICATE OF COMPLIANCE
AND
CERTIFICATE OF SERVICE**

[¶1] The undersigned certifies that the Appellant Brief contains 10 pages consisting of the cover page through the conclusion and signature block and complies with the page limits outlined in North Dakota Rules of Appellate Procedure Rule 32(a)(8)(A).

[¶2] True and correct copies of BRIEF OF APPELLANT were emailed via North Dakota Supreme Court E-filing Portal and mailed to the following on this 22nd day of December 2022:

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Dated this 22nd day of December 2022

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