

SUPREME COURT OF NORTH DAKOTA

State v. Keener

2008 ND 156 (2008) · No. Nos. 20070252, 20080016, 20070265 · Decided August 28, 2008

SUMMARY

The Supreme Court of North Dakota affirmed the criminal judgments and restitution order against Laurie Marie Keener and Asa Kim Keener. The court held that the record was inadequate to review their ineffective-assistance claims on direct appeal, admission of deposition testimony did not constitute obvious error, the defendants waived a preliminary hearing on the amended felony charge, and the restitution order was not an abuse of discretion.

CASE DETAILS

COURT	Supreme Court of North Dakota
WRITING FOR THE COURT	Gerald W. VandeWalle, Chief Justice; Carol Ronning Kapsner; Mary Muehlen Maring; Daniel J. Crothers; Dale V. Sandstrom
JURISDICTION	North Dakota
DECIDED	August 28, 2008
DOCKET	Nos. 20070252, 20080016, 20070265
DISPOSITION	affirmed
PROCEDURAL POSTURE	Direct appeals from criminal judgments entered after jury convictions for two counts of criminal conspiracy and from an amended judgment ordering Laurie Keener to pay restitution.
STANDARD OF REVIEW	Ineffective-assistance claims raised on direct appeal are reviewed to determine whether counsel was plainly defective; unpreserved trial errors, including evidentiary and confrontation claims, are reviewed for obvious error under N.D.R.Crim.P. 52(b); restitution decisions are reviewed for abuse of discretion or whether the district court acted within the limits of N.D.C.C. § 12.1-32-08.
PRECEDENTIAL VALUE	Published North Dakota Supreme Court opinion; precedential
PARTIES	Laurie Marie Keener, Asa Kim Keener v. State of North Dakota

TOPICS

- criminal procedure
- ineffective assistance
- right to counsel
- preliminary hearing
- restitution criminal

PRACTICE AREAS

criminal procedure

criminal appeals

constitutional criminal procedure

restitution

ineffective assistance of counsel

QUESTIONS PRESENTED

1. Whether the record on direct appeal was sufficient to review the Keeners' ineffective-assistance claims based on alleged conflicts of interest from joint representation.
2. Whether the district court committed obvious error by admitting Florence Whisker's videotaped deposition testimony.
3. Whether admission of Marvin Whisker's deposition testimony violated Laurie Keener's confrontation rights or N.D.R.Crim.P. 15(f).
4. Whether the Keeners waived their right to a preliminary hearing on the amended class B felony charge.
5. Whether the district court abused its discretion by ordering Laurie Keener to pay \$109,921.03 in restitution.

HOLDINGS

1. A defendant who did not object to joint representation must show an actual conflict of interest that adversely affected counsel's performance, but the record on direct appeal was inadequate to decide the Keeners' claims.
2. The admission of Florence Whisker's videotaped deposition was not obvious error affecting the Keeners' substantial rights.
3. The district court did not commit obvious error by admitting Marvin Whisker's deposition testimony; Laurie Keener's attorney's presence and cross-examination at the deposition and her prior opportunity to question him at the preliminary hearing were sufficient under the circumstances to defeat a showing of prejudicial error.
4. The Keeners waived their right to a preliminary hearing on the amended class B felony charge by pleading not guilty without objecting to the amended information or requesting a preliminary hearing.
5. The district court did not abuse its discretion by ordering Laurie Keener to pay \$109,921.03 in restitution.

KEY QUOTATIONS

"We conclude a court's failure to advise co-defendants of the dangers of joint representation, as now required by N.D.R.Crim.P. 44(b)(2), does not, by itself, require reversal; rather there also must be a denial of the Sixth Amendment right the rule was designed to protect." (§12)

"We conclude the Keeners waived their right to a preliminary hearing on the amended charge by pleading not guilty to the amended information, and were tried for a class B felony for conspiracy to exploit a vulnerable adult." (§26)

FACTUAL BACKGROUND

Laurie and Asa Keener were accused of conspiring to take money from Laurie's elderly parents, Marvin and Florence Whisker. The defendants initially shared counsel, and depositions of the Whiskers were taken after the preliminary hearing; at trial, the court found both witnesses unavailable because of physical or mental illness or infirmity and admitted their deposition testimony. The State amended the information to charge conspiracy to exploit a vulnerable adult as a class B felony, and the Keeners pleaded not guilty without objecting or requesting a new preliminary hearing. After conviction, the court ordered Laurie Keener to pay \$109,921.03 in restitution.

PROCEDURAL HISTORY

Laurie and Asa Keener were charged with conspiracy to exploit a vulnerable adult and conspiracy to commit theft of property. After a preliminary hearing, the court found probable cause for a class C felony on the exploitation charge, but the State later amended the information to charge that offense as a class B felony. The Keeners pleaded not guilty to the amended information without objecting or requesting another preliminary hearing, were convicted by a jury, and received judgments that were later amended to include \$109,921.03 in restitution. The Supreme Court of North Dakota affirmed.

DISPOSITION

affirmed

CASES CITED

- Holloway v. Arkansas, 435 U.S. 475, 481 (1978)
- Strickland v. Washington, 466 U.S. 668 (1984)
- State v. Schweitzer, 2007 ND 122, ¶¶23, 25, 28, 735 N.W.2d 873
- Flanagan v. State, 2006 ND 76, ¶10, 712 N.W.2d 602
- Mickens v. Taylor, 535 U.S. 162, 166-68, 173-74 (2002)
- Cuyler v. Sullivan, 446 U.S. 335, 348 (1980)
- In re T.F., 2004 ND 126, ¶8, 681 N.W.2d 786
- In re B.B., 2007 ND 115, ¶7, 735 N.W.2d 855
- United States v. Lachman, 521 F.3d 12, 21 (1st Cir. 2008)
- United States v. Finlay, 55 F.3d 1410, 1415 (9th Cir. 1995)
- United States v. Mooney, 769 F.2d 496, 499 (8th Cir. 1985)
- United States v. Alvarez, 696 F.2d 1307, 1309 (11th Cir. 1983)
- State v. Noorlun, 2005 ND 189, ¶30, 705 N.W.2d 819
- State v. Strutz, 2000 ND 22, ¶26, 606 N.W.2d 886
- State v. Jahner, 2003 ND 36, ¶9, 657 N.W.2d 266
- Leake v. Hagert, 175 N.W.2d 675, 690 (N.D. 1970)
- State v. Austin, 2007 ND 30, ¶19, 727 N.W.2d 790
- Crawford v. Washington, 541 U.S. 36, 59 (2004)

- State v. Palmer, 2002 ND 5, ¶8, 638 N.W.2d 18
- United States v. Vasilakos, 508 F.3d 401, 411 (6th Cir. 2007)
- United States v. Luciano, 414 F.3d 174, 178 (1st Cir. 2005)
- United States v. Chau, 426 F.3d 1318, 1321-22 (11th Cir. 2005)
- State v. Campbell, 2006 ND 168, ¶13, 719 N.W.2d 374
- State v. Blunt, 2008 ND 135, ¶15, 751 N.W.2d 692
- State v. Jensen, 333 N.W.2d 686, 692 (N.D. 1983)
- State v. Bingaman, 2002 ND 210, ¶4, 655 N.W.2d 57
- State v. Kensmoe, 2001 ND 190, ¶7, 636 N.W.2d 183
- Linser v. Office of Attorney Gen., 2003 ND 195, ¶¶7, 11, 672 N.W.2d 643

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