

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff and Appellee,)	
)	Supreme Court No. 20050278
vs.)	
)	Burleigh County Case No. 96-K-01859
David L. Stavig,)	
)	
Defendant and Appellant.)	

Appeal from the Second Amended Judgment dated July 13, 2005,
of the Burleigh County District Court,
South Central Judicial District,
Honorable Sonna M. Anderson

Brief of Appellant

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Statement of Issues

3

Was the trial court's factual finding that there was a probation violation clearly erroneous?

4

Did the trial court abuse its discretion by ordering an additional five years of probation?

5

Statement of Case

6 This is an appeal of a Second Amended Criminal Judgment dated July 13, 2005, in
which the trial court revoked the probation of David Stavig [hereinafter Stavig], and
sentenced him to an additional five years.

7 On December 30, 2004, the State filed a Petition for Revocation of Probation.
Appendix [hereinafter A] at 3.

8 Stavig filed a Return to Petition for Revocation on January 26, 2005. A at 6. The
State responded to the Return on February 3, 2005. A at 8.

9 On February 18, 2005, the trial court issued an Order denying the Return to Petition
for Revocation.

10 The hearing on the Petition for Revocation was held on March 24, 2005. The trial
court issued an Order on June 17, 2005, revoking Stavig's probation and sentencing him to
an additional five years of probation. A at 10.

11 The Second Amended Criminal Judgment based upon the June 17, 2005, Order was
entered on July 12, 2005. A at 13.

12 Stavig's Notice of Appeal was filed on July 12, 2005. A at 16.

13

Statement of Facts

14 Stavig was convicted of Theft of Property, a Class C Felony, on October 21, 1996, pursuant to a guilty plea. A at 13. The sentence included five years probation with restitution in the amount of \$22,700 “with monthly payments to be determined by [Stavig’s] probation officer based upon [his] ability to pay. Record on Appeal (Criminal Judgment entered on 10/28/96).

15 Stavig’s probation was revoked on March 17, 2005, and he sentenced to five years incarceration with two years suspended with three years probation. A at 3. The provision concerning restitution remained the same. Record on Appeal (Criminal Judgment entered on March 19, 1997).

16 On January 8, 2002, Stavig signed a Petition for Extension for Probation. A at 3. This Petition was approved by the trial court and provided for an additional two years of supervised probation. A at 3. The Petition did not modify the provision concerning restitution. Record on Appeal (Order dated January 8, 2003).

17 The sole allegation in the State’s Petition for Revocation of Probation filed on December 30, 2004, is as follows:

“Allegation #1: The Defendant has violated Condition #K of the Court Order in that as of 12/16/04, the balance owed on restitution for this case was \$19,616.11.”

A at 3.

18 Stavig responded to Allegation #1 in his Return to Petition to Revoke in part by stating that he made payments in accordance with his probation officer’s determination of his ability to pay. A at 7.

19 The trial court issued an order prior to the revocation hearing based upon Stavig's Return. A at 10. The trial court found that as follows:

“Upon a review of the Petition, the Return and the Response to the Return, it appears that one of the critical issues is whether Mr. Stavig did make the payments according to the plan set up by his probation officer or not. It appears there is a discrepancy in that regard, and the Court will hear evidence on that issue.”

A at 10.

20 At the hearing on March 24, 2005, the State stipulated on the record with Stavig to the fact that Stavig did make monthly payments in accordance with what was requested by the probation office according to his ability to pay and that the only issue was that the balance had not been paid in full. Transcript [hereinafter T] at 1, ls. 14-21; T at 7-9, ls. 19-3. The trial court indicated its understanding of this stipulated fact. Id.

21 Stavig did not present any evidence of this stipulated fact because of the stipulation and the apparent understanding of the trial court. T at 8-9, ls. 22-5.

22 In its Order revoking probation dated June 17, 2005, the only violation the trial court determined was that “the Defendant has violated the terms of his probation by failing to make the payments as requested by his Probation officer.” A at 12.

23

Law and Argument

24 A. Was the trial court's factual finding that there was a probation violation clearly erroneous?

25 Probation revocation proceedings are brought under Rule 32 of the North Dakota Rules of Criminal Procedure, NDCC § 12.1-32-06.1, and NDCC § 12.1-32-07. The State has the burden of proving a violation of probation by the preponderance of the evidence. NDRCrimP 32(f); State v. Altringer, 388 N.W.2d 864, 865 (N.D. 1986).

26 The North Dakota Supreme Court reviews the factual finding by the trial court of a probation violation under the clearly erroneous standard. State v. Gates, 540 N.W.2d 134, 137 (N.D. 1995). A finding is clearly erroneous if even there is some evidence to support the finding, based upon the entire record, a mistake has been made. Id.

27 The trial court clearly understood that the State and Stavig stipulated on the record that Stavig did make monthly payments in accordance with what was requested by the probation office according to his ability to pay and that the only issue was that the balance had not been paid in full. Transcript [hereinafter T] at 1, ls. 14-21; T at 7-9, ls. 19-3.

28 Despite this stipulation on the record, the trial court revoked probation solely based upon the fact that "the Defendant has violated the terms of his probation by failing to make the payments as requested by his Probation officer." A at 12.

29 Based upon the transcript, a mistake has been made and the trial court's finding of this violation of probation is clearly erroneous.

30 B. Did the trial court abuse its discretion by ordering an additional five years of probation?

31 The North Dakota Supreme Court reviews the trial court's sentencing decision

imposed after revoking probation under the abuse of discretion standard. Gates, 540 N.W.2d at 137. The trial court abuses its discretion if it fails to act within the limits prescribed by statute, or substantially relies upon an impermissible factor. Id.

32 Stavig was originally convicted of a Class C felony on October 26, 1996, punishable by five years incarceration and five years probation. Under the trial court's order, Stavig will be either incarcerated or on probation from October 21, 1996, through June 17, 2010, and on probation for more than nine years after his release from incarceration. This sentence exceeds what is permissible under NDCC § 12.1-32-06.1(1) and (5), and is an abuse of discretion.

33 **Conclusion**

34 The trial court's determination that there was a probation violation was clearly erroneous. Further, the sentence imposed by the trial court after revoking probation exceeded what is permitted by statute. Therefore, Stavig asks that the Second Criminal Judgment revoking his probation be reversed.

Dated this 2nd day of November, 2005.

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Certificate of Service

Loren McCray certifies that on the 2nd day of November, 2005, he served the following document:

1. Brief of Appellant
2. Appendix to Brief of Appellant

upon: Justin Schwarz
Assistant State's Attorney
Courthouse, 514 E. Thayer Ave.
Bismarck, ND 58501-4413
Email: jjschwarz@state.nd.us

in the following manner:

- by handing a true and correct copy to the attorney personally.
- by leaving a true and correct copy at the office of the attorney with a clerk or other individual in charge thereof.
- by leaving a true and correct copy at the office of the attorney in a conspicuous place therein.
- by placing a true and correct copy thereof in an envelope so addressed and depositing the same, with postage prepaid, in the United State mail at Bismarck, North Dakota.
- by facsimile transmission to the attorney at the facsimile number at m. (CT).
- electronically by electronically filing the same with the United States Bankruptcy Court, District of North Dakota.
- electronically by emailing the same by 11:59 p.m. (CT.)

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