

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JANUARY 18, 2012
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff-Appellee,)	
)	
vs.)	SUPREME COURT NOS. 20110263-
)	20110269
)	
Kenneth Eide,)	
)	
Defendant-Appellant.)	

REPLY BRIEF

APPEAL FROM THE SEPTEMBER 9, 2011 ORDER
DENYING RULE 35(A) MOTION
THE PEMBINA COUNTY COURT IN CAVALIER, NORTH DAKOTA
THE HONORABLE LAURIE A. FONTAINE PRESIDING

ATTORNEY FOR APPELLANT

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ARGUMENT

- I. The State is precluded from raising new issues on appeal when the State failed to respond to the Rule 35(a) Motion at the district court.

The State, in its Brief of Appellee, omits from their Statement of the Case the important facts that the State did not respond to the Rule 35(a) Motion, nor the Reply Brief and the proposed Order granting the Rule 35(a) Motion. (A-43¹ and Reply Brief, docket sheet, No. 23 and Certificate of Service, docket sheet, No. 24) It is unfortunate that the State's Attorney did not address the issue at the district court. However, in his email to this Court, the State's Attorney finally conceded that he agreed with Defendant's position.²

Issues not raised at the district court level cannot be raised for the first time on appeal. State v. Vondal, 2011 ND 186, ¶ 15, 803 N.W.2d 578. It is perplexing why the State attempts to invoke the Vondal holding twice in their brief with their unclean hands. The State did not raise any issues at the district court, nor did Judge Fontaine cite any legal authority for amending the criminal judgments sua sponte nine years after they were entered. Hence, under Vondal, the Brief of Appellee should be stricken and the State should be precluded from participating at oral argument

¹ Appendix

² A deputy clerk of the Supreme Court informed the undersigned via the telephone that the email was part of the record.

because their entire argument is based on issues not raised in the district court.

II. The State blatantly ignores the plain language of N.D.C.C. § 12.1-32-07(6) that requires "notice to the probationer."

The undersigned respectfully argues that the State's argument is without merit. The State's argument is flawed on several grounds.

First, good cause to amend probation did not exist. Defendant did not violate a single condition of his probation. Obviously, winning a sexually dangerous individual trial on the merits does not establish good cause.

The State apparently argues that good cause exists because Defendant did not complete sex offender treatment. This argument is a red herring. Dr. Stacey Benson, Defendant's independent expert at the sexually dangerous individual trial, testified that Defendant has made several attempts to comply and progress with treatment. But the North Dakota State Hospital claimed his work was unsatisfactory for unexplained reasons and would not let him progress with treatment. (A-47 to A-48) Judge Fontaine agreed with Dr. Benson on this issue: "He has participated in treatment, however, he was terminated from treatment. Based on his testimony that was not refuted, he has made several attempts to do the written homework to comply with

what's required for treatment and he has been told the work is not satisfactory but no explanation has been given as to why." (A-50) Good cause to modify probation does not exist when the State prevents Defendant from completing treatment.

However, the most obvious reason why the State's argument is without merit is the first seven words of the subsection the State cites in passim. N.D.C.C. § 12.1-32-07(6) provides:

"The court, upon notice to the probationer and with good cause, may modify or enlarge the conditions of probation at any time prior to the expiration or termination of the period for which the probation remains conditional. If the defendant violates a condition of probation at any time before the expiration or termination of the period, the court may continue the defendant on the existing probation, with or without modifying or enlarging the conditions, or may revoke the probation and impose any other sentence that was available under section 12.1-32-02 or 12.1-32-09 at the time of initial sentencing or deferment. In the case of suspended execution of sentence, the court may revoke the probation and cause the defendant to suffer the penalty of the sentence previously imposed upon the defendant."

The State blatantly ignores the notice language in their argument. Why? Because no notice was ever afforded to

Defendant! Judge Fontaine sua sponte amended the criminal judgments during a sexually dangerous individual case. Even the State's own "plain language" argument of the statute mandates reversal. That is why the notice requirement is ignored and not addressed in their brief.

CONCLUSION

WHEREFORE, the reasons stated herein and for the reasons set forth in Appellant's Brief, Appellant respectfully requests that this Honorable Court reverse the Order denying Rule 35(a) Motion; correct the illegal sentences promulgated in each and every Amended Judgment and in each and every case in which the district court failed to enter an Amended Judgment, but changed the sentence via the docket sheets; vacate the Amended Judgments in each and every case; and reinstate the original terms of the Judgments in each and every case. Moreover, the Defendant respectfully requests that this Honorable Court terminate Defendant's supervised probation on each and every case forthwith since the period of supervised probation expired in June 2011.

Dated this 18th day of January, 2012.



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