

**ORIGINAL**

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

20010183

State of North Dakota, )  
)  
Plaintiff - Appellee, )  
)  
vs. )  
)  
Lesla Kensmoe, n/k/a Lesla Benedict, )  
)  
Defendant - Appellant. )

Supreme Court No. 20010183

District Court No. CR-95-04308

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

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STATE OF NORTH DAKOTA

APPELLEE'S BRIEF

APPEAL FROM ORDER DETERMINING RESTITUTION,  
EXTENDING PROBATION, AND SETTING MONTHLY PAYMENTS,  
OF THE DISTRICT COURT OF CASS COUNTY,  
THE HONORABLE CYNTHIA ROTHE-SEEGER PRESIDING

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### **ISSUES PRESENTED**

1. Whether the District Court had authority to extend Appellant's probation for an additional five years and to require additional restitution.
2. Whether the extension violates the Constitutional provision against double jeopardy.
3. Whether N.D.C.C. §29-08-28, which allows the use of money deposited by third parties for a defendant's bail, is constitutional.

## **STATEMENT OF THE CASE AND FACTS**

Appellant Lesa Kensmoe, n/k/a Lesa Benedict, shall hereinafter be referred to as "Benedict". Appellee State of North Dakota shall hereinafter be referred to as "State".

Benedict began her probation on November 22, 1996. Appellant's Appendix at pages 29 - 30. According to the terms of her judgment, the probation was to last for five years, thereby ending on November 22, 2001.

The District Court, the Honorable Ralph Erickson presiding, originally set Benedict's restitution at \$24,000, to be paid at the rate of \$200 per month following release from custody. Appellant's Appendix at page 15 (paragraph xvii). The District Court, the Honorable Cynthia Rothe Seeger presiding, subsequently concluded that although Benedict's attorney was present at the original restitution hearing, Benedict had not been afforded the requisite opportunity to personally attend that hearing and therefore reset a restitution hearing. Appellant's Appendix at pages 25 - 27. At the subsequent restitution hearing, which Benedict personally appeared with counsel, Judge Rothe-Seeger found the victim incurred a financial loss in excess of \$80,000. Appellant's Appendix at pages 29 - 31. The Court further found Benedict had paid \$1665 of restitution during the nearly five-year period of her release (which averages approximately \$30 per month) and that she was capable of paying \$200 per month (same as Judge Erickson found). *Id.* Judge Rother Seeger ordered Benedict to pay a total of \$14,165 restitution, which equals the \$1665 paid up until that time, the \$500 bail posted on Benedict's behalf, and the balance of \$12,000 at \$200 per month for the duration of Benedict's five-year

probation (\$200 X 12 months X 5 years = \$12,000). Id.

Benedict did not order a transcript for this appeal.

Other than these clarifications or additions, the State has no objections or additions to the Statement of the Case and Facts provided by Benedict in her brief.

## **ARGUMENT**

### **I. The District Court had authority to extend Benedict's term of probation and set restitution.**

It appears Benedict's arguments regarding the District Court's authority fall into two categories, namely: (1) the authority to re-set restitution, and (2) the authority to extend her probation for five years.

#### **A. Authority to Re-set Restitution.**

Arguments raised for the first time on appeal generally will not be considered by the Supreme Court. State v. Berlin, 2000 ND 13, ¶20, 604 N.W.2d 437. Where no transcript has been made and there were no contemporaneous objections, any errors are not preserved for appeal. State v. Entzi, 2000 ND 148, ¶7, 615 N.W.2d 145. If a defendant fails to preserve an issue for appeal, then the appellate standard of review requires a showing of "obvious error which affects substantial rights of the defendant." State v. Glass, 2000 ND 212, ¶4, 620 N.W.2d 146. The Supreme Court exercises their power to consider obvious error cautiously and only in exceptional circumstances where the defendant has "suffered a serious injustice." Id.

Benedict did not provide a transcript of the underlying hearings in this appeal. However, in her brief she acknowledges that she did not object to the court re-setting restitution for the remaining few months of her then-ongoing probation. In fact, Benedict submitted a Motion to Vacate Restitution, dated June 29, 2001, in which she specifically requested the District Court to hold a hearing on the amount



of restitution. Appellant's Appendix pages 23 - 24. To the extent Benedict failed to object to issues in the District Court, she has not preserved those issues for appeal. Benedict has not shown an obvious error which affects her substantial rights. She requested a re-hearing on restitution. The request was granted. She availed herself of the opportunity to attend and participate personally and with counsel in the July 2001 restitution hearing held before Judge Rothe-Seeger. As a result, Judge Rothe-Seeger re-set a restitution amount which, in fact, was less than that established by Judge Erickson in 1996 (\$14,165 versus \$24,000). Accordingly, any arguments Benedict makes against re-setting restitution have not preserved for appeal and should be denied on this basis.

B. Authority to Extend Probation for Five Years.

Although Benedict did not provide a transcript of the hearing arguments in this matter, the State understands Benedict did object at the hearing to an extension of her period of probation.

Pursuant to N.D.C.C. §12.1-32-06.1(1), the period of probation imposed in conjunction with a sentence shall not exceed five years for a felony. If the defendant is convicted and the court imposes restitution, the court may impose an additional period of probation not to exceed five years. N.D.C.C. §12.1-32-06.1(2). In felony cases where conditions of probation have been violated, the court may impose an additional probationary period not to exceed five years. N.D.C.C. §12.1-32-06.1(5). A sentence with probation may be subsequently modified or revoked. N.D.C.C. §12.1-32-06(7). 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 of the probation. N.D.C.C. §12.1-32-07(6). A sentencing court has continuing power to modify the conditions of probation. State v. Gates, 540 N.W.2d 134, 138 (ND 1995) (citing N.D.C.C. §12.1-32-06(7) and -07(6)).

Benedict alleges she was penalized and re-sentenced for objecting to what she characterized as an illegally-imposed sentence. Benedict suffers a peculiar misunderstanding of the totality of her situation. She was convicted of the stealing from her employer. The Court found the victim suffered a loss *in excess* of an \$80,000. The original sentencing court ordered her to repay \$24,000. During her nearly five years of probation she actually paid only \$1,665 (about 2% of the loss). The Court granted Benedict the opportunity to attend, and argue, the appropriate restitution owed. Rather than being penalized, she essentially saved herself \$10,000 in restitution through the hearing process.

Given the new restitution amount, Benedict still owed the victim over \$13,000 with a couple of months left in her probation. There is nothing in the record to indicate that she would be able to pay the remaining restitution by the end of her current probationary period. To the contrary, her modest payments over the previous four-plus years, together with her affidavit statements that she had modest means, were a clear indication that she would be unable to do so. See Affidavit of Lesa Benedict, Docket Sheet #47. The District Court did not re-sentence Benedict to more time in jail, but merely extended the period of time over which she should repay the victim. Benedict's argues a distinction between conditions of probation and the term of probation. It would appear that in order to give meaning to the provision of N.D.C.C. §12.1-32-06.1(5), the probation term can be extended when,

among other things, the restitution payments will not be made within the existing probationary period. The District Court had, and continues to have, jurisdiction over this matter.

If the District Court in July 2001 found that no restitution was owing in her case, or that she had paid all restitution that was owing, that may be a different case than we are presented with here.

**II. The District Court's extension of Benedict's probation is constitutional.**

The constitutional guaranty against double jeopardy protects a defendant's legitimate expectation of finality in her sentence. Davis v. State, 2001 ND 85, ¶10, 625 N.W.2d 855; U.S. Constitution, Amend VIII; N.D. Constitution, Art. 1, §11. It ensures the defendant will not be subject to multiple punishments for the same offense. Davis, 2001 ND 85, ¶ 10. All regularly enacted statutes carry a strong presumption of constitutionality. In the Interest of MD, 1999 ND 160, 598 N.W.2d 799. The presumption is conclusive unless the party challenging the statute clearly demonstrates that it contravenes the state or federal constitution. Id. Pursuant to N.D.C.C. § 12.1-32-07(6), the court, upon notice and good cause, may modify or enlarge the conditions of probation at any time prior to the expiration or termination of the period for which probation remains conditional, including when the probationer violates any of the conditions before that period expires or terminates.

Benedict argues, it appears just passingly, that the District Court's Order violates the prohibition against double jeopardy. N.D.C.C. §12.1-32-07 places defendants on notice that any violation of their probationary conditions may lead to imposition of a harsher sentence. In Gefroh this Court stated that given such

notice, a defendant had no legitimate expectation in the finality of a sentence and the court's subsequent imposition of a harsher sentence was not prohibited by the double jeopardy clause. State v. Gefroh, 458 N.W.2d 479 (ND 1990). A defendant's sentence to probation is not final. Davis, 2001 ND 85, ¶11. Even re-sentencing to a harsher sentence pursuant to N.D.C.C. §12.1-32-07(6) does not subject a defendant to multiple punishments for the same offense. Id.

Benedict has no legitimate expectation that a harsher could not be imposed upon her pursuant to her sentence and probation. In one sense, a less harsh sentence was imposed, namely that she pay a total restitution of \$14,165, rather than \$24,000. While the term of her probation was lengthened for an additional five years, that was in response to the minimal restitution payments she made when she had the ability to pay. The State notes that while the District Court did re-hear Benedict's restitution matter, it hardly seems plausible that she was unaware of the original restitution order. She had been making restitution payments, albeit sporadic and small, for several years.

**III. N.D.C.C. §29-08-28 allowing the use of money deposited by third parties for a defendant's bail is constitutional.**

It appears Benedict's arguments regarding use of the bail money for restitution fall into two categories, namely (1) use of any bail money for restitution is itself unconstitutional, and (2) use of bail money provided by third parties is unconstitutional.

A. Use of Bail Money for Restitution is Constitutional.

Pursuant to N.D.C.C. §29-08-28, moneys deposited as bail are the property of the defendant, regardless of whether deposited by the defendant or a third person. If the bail money is deposited by a third person, then that person must be notified at the time of the deposit that such money may be, among other things, applied to any restitution imposed upon the defendant. N.D.C.C. §29-08-28. The third person may direct, subject to further order of the judge, that such moneys be released to the third person upon final disposition of the case. Id.

The 8<sup>th</sup> Circuit interpreted a statute similar in purpose to N.D.C.C. §29-08-28 in United States v. Higgins, 987 F.2d 543 (8<sup>th</sup> Cir. 1993)(applying appearance bond funds deposited *by the defendant* for purposes of restitution). In Higgins the Court interpreted 28 U.S.C. §2044, which authorizes the federal court to order any money belonging to or deposited on behalf of a defendant for bond to be held and applied to the payment of restitution, among other things. 28 U.S.C. §2044. The 8<sup>th</sup> Circuit indicated that the statute is procedural and codified the court's discretion to pay bond to a superior claimant. Higgins, 987 F.2d 546 - 47. The 8<sup>th</sup> Circuit upheld the application of those bond funds for restitution, court costs and special assessments. Id. at 549.

The 8<sup>th</sup> Circuit also rejected Higgin's argument that use of the bond funds for restitution was "excessive bail" and a violation of the 8<sup>th</sup> Amendment. Id. at 547 - 48. The 8<sup>th</sup> Circuit opined that the statute provides a simple procedural mechanism for applying the bail to those with superior claims to the funds once the purpose of the bail has been served. Id. The Court distinguished Cohen v. United States, 82

S.Ct. 526 (1962) and United States v. Rose, 791 F.2d 1477, 1479 (11<sup>th</sup> Cir. 1986) as inapposite and inapplicable to the Higgins' facts. In particular, Cohen and Rose deal with preconditions on the bail which were intended to serve purposes other than to secure the presence of the defendant. Higgins dealt with post-conviction claims to bail. Higgins, 987 F.2d at 547.

Although N.D.C.C. §29-08-28 is not identical in wording to 28 U.S.C. §2044, neither is dealing with preconditions on the bail but rather on post-conviction disposition of the funds. Accordingly, the 8<sup>th</sup> Circuit opinion in Higgins more appropriately relates to our facts than Benedict's references to Cohen or Rose.

Benedict appears to argue that the \$500 bond posted in her case was something other than bond, but rather an attempt to obtain restitution. Pursuant to Rule 46, N.D.R.Cr.P., bond is established for the purpose of helping ensure a defendant will make the required appearances. The amount of bail in this case, namely \$5,000 bond with 10% cash posted and a promise to appear, was stipulated between the parties. Appellant's Appendix at pages 20 - 21. As noted in the stipulation, Benedict was living in the State of Georgia. Considering that the then-existing Judgment (and related conditions) required Benedict to pay restitution of \$24,000, of which she had paid a mere \$1,665, the meager \$500 cash can hardly be characterized as an attempt, up front, to get the restitution owing on the case.

B. Use of Bail Money Provided by Third Persons is Constitutional.

The underlying arguments are similar to those in III.A above. Benedict raises

a distinction in that a third person (apparently Benedict's father)<sup>1</sup> deposited bail money with the Clerk of Court on or about May 24, 2001. See Appellant's Appendix at page 35. Her father signed a notice indicating, in capital letters, that such money was "THE PROPERTY OF THE DEFENDANT" and would be "APPLIED TO ANY FINES, COSTS, RESTITUTION IMPOSED UPON DEFENDANT". Id. To the extent that notice is an issue, Benedict's father had clear notice of what may happen to those funds. He acknowledged that notice. He should not now be heard to claim that such funds should not be used for that purpose.

In addition to the above argument, there would appear to be a matter of standing at issue in this third party claim. Benedict and her father would appear to have adverse interests in this matter. Either the money is hers, in which case she presumably would at least have standing to make some argument about its use. However, in such case, the law is clear that the money may be applied for restitution. Or else the money belongs to her father, which is what she seems to be alleging. If so, then her father would not appear to have standing to assert claims to such money through the vehicle of her criminal appeal. In either case, the State asserts that Benedict's argument is without merit.

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<sup>1</sup>

Although it is difficult to make out the signature of the third party, it clearly is not Benedict. Benedict she alleges in Appellant's Brief and other documentation on file with the Court that the third party was her father. The State, for the purposes of this Brief, assumes that to be true.

### CONCLUSION

For the reasons set forth herein, the State respectfully requests this Honorable Court deny Appellant's requested relief and affirm the District Court's Order Determining Restitution, Extending Probation and Setting Monthly Payments, dated July 13, 2001.

Respectfully submitted this 25<sup>th</sup> day of September, 2001.

A handwritten signature in black ink, appearing to read "Birch P. Burdick". The signature is fluid and cursive, with the first and last names being more prominent.

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