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ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

AUG 23 2001

State of North Dakota,

:

STATE OF NORTH DAKOTA

Plaintiff/Appellee

:

-v-

:

Supreme Court No. 20010183

Lesa Kensmoe, n/k/a Lesa Benedict,

:

District Court No. CR-95-04338

Defendant/Appellant

:

APPELLANT'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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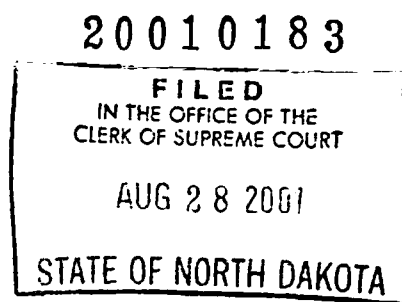
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ISSUES PRESENTED

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



STATEMENT OF THE CASE

This case involves the appeal of a post conviction Order by the District Court, the Honorable Cynthia Rothe Seeger, presiding, which determined restitution, and extended the Defendant's probation and set monthly payments for her restitution obligation [Appendix pp. 29-31]. The Defendant, hereinafter "Lesa," was originally charged and convicted of Theft of Property, a Class B Felony, on her guilty plea on June 3, 1996 before the Honorable Ralph R. Erickson, District Judge [Information at Appendix p. 6, Criminal Judgment at Appendix pp. 7-11]. She was sentenced to serve 10 years incarceration, with 9 of those years suspended for a period of 5 years commencing after the period of incarceration. Thereafter, on July 26, 1996, after a restitution hearing, at which Lesa did not appear, because she was incarcerated, the Court amended the Judgment to provide that she was to pay restitution in the amount of \$24,000.00, to be paid in payments of \$200 per month following her release from custody [App. pp.14-16] In March, 2001, the State sought and received an Order for Apprehension, pursuant to a petition for revocation of Probation, because of Lesa's failure to make the required Restitution payments.[App. pp. 17-19] In order to obtain her release from custody pending a hearing, Lesa's father posted \$500 for bail for her [App. pp. 20-22]. Lesa, had been arrested in Georgia, where she resided with her husband and 3 children. Prior to hearing on the Petition for Revocation, Lesa moved the Court to vacate the underlying Restitution Order because it had been entered in violation of the her right to be present in Court to confront the witnesses against her and to present her

defense [App. pp 23-4]. The District Court, the Honorable Cynthia Rothe Seeger, granted said motion, vacated the Order [App. pp25-27]. Thereafter the matter was set for hearing later in the week. Prior to said hearing, the State filed a Motion to Extend probation [App. p. 28] The District Court heard argument on the Motion and on the Lesa's ability to pay restitution. The parties agreed and the Court found that the loss exceeded \$80,000 and that Lesa had previously paid \$1665 towards the restitution during the period November 22, 1996 through July 13, 2001 and that Lesa had the current ability to pay \$200 per month towards restitution. The Court then found "good cause" to extend Lesa's probation for a period of 5 years from July 13, 2001 and ordered the application of the \$500 posted by the Defendant's father for her bail, applied to her restitution obligation [App. p.29-31]. Lesa objected that the extension of the probation was unlawful, and objected to the forfeiture of the money which had been posted by her father. She made an offer of proof with regard to the ownership of the \$500. She requested a stay of that portion of the sentence which forfeited the \$500, as well as the portion of the Order which required the payment of restitution beyond the expiration of Lesa's previous sentence. The District Court denied the requests. The Defendant then filed this appeal.

FACTS

The Defendant, hereinafter "Lesa," was originally convicted of Theft of Property, a Class B Felony, on her guilty plea on June 3, 1996 before the Honorable Ralph R. Erickson, District Judge. Lesa was sentenced to serve 10 years incarceration, with 9 of those years suspended for a period of 5 years commencing after the period of incarceration (See Judgment, App. p. 7). On July 26, 1996, after sentencing Lesa, the Court convened a restitution hearing. Lesa was not present for the hearing. Her lawyer had not had an opportunity to discuss the matter with her before the hearing (See Clerk's notes of hearing, App. pp. 12-3.). Despite that, the Court went ahead and Ordered restitution. It amended the Judgment to provide that Lesa was to pay restitution in the amount of \$24,000.00, to be paid in payments of \$200 per month following her release from custody(See Amended Exhibit A, App. pp. 14-17). Lesa was released from custody in late November, 1996. She remained on probation, making monetary payments on the restitution through her various probation officers until March, 2001, when the State noting that she had not been paying the Ordered monthly amount filed a petition for revocation of Probation (See Petition for Revocation, Appendix pp. 17-19). Prior to hearing on the Petition for Revocation, Lesa moved the Court to vacate the underlying Restitution Order claiming it had been entered in violation of her right to be present in Court to confront the witnesses against her and to present her defense (Motion to Vacate Restitution Order, Appendix, pp. 23-4) . The District Court, the Honorable Cynthia Rothe Seeger, granted said motion, and vacated the Order (Order on

Motion to Vacate Restitution Order, App. pp. 25-7). The State did not appeal this Order, but instead filed a Motion to Extend probation (App. p.28). The District Court heard argument on the Motion and on the Lesa's ability to pay restitution. The parties agreed and the Court found that the loss exceeded \$80,000 and that Lesa had previously paid \$1665 towards the restitution during the period November 22, 1996 through July 13, 2001 and that Lesa had the current ability to pay \$200 per month towards restitution. The Court then found "good cause" to extend Lesa's probation for a period of 5 years from July 13, 2001 and ordered the application of the \$500 posted by the Defendant's father for her bail, applied to her restitution obligation (Order Determining Restitution, extending probation, and setting monthly payments, App. pp 29-31). Lesa objected that the extension of the probation was unlawful, and objected to the forfeiture of the money which had been posted by her father. She made an offer of proof with regard to the ownership of the \$500. She requested a stay of that portion of the sentence which forfeited the \$500, as well as the portion of the Order which required the payment of restitution beyond the expiration of Lesa's previous sentence. The District Court denied the requests. The Defendant appeals both the extension of the probation, and the forfeiture of the \$500 posted by her father..

ARGUMENT

1. The District Court's did not have authority increase Lesa's sentence .

The initial issue in this case is whether under Rule 35 N.D.R. Criminal Procedure and Section 12.1-32-06.1 N.D.C.C. subsections 1 & 2, the District Court, after vacating the previous restitution Order had the authority to extend Lesa's period of probation for 5 additional years, at the time of the hearing. At the time of the hearing, Lesa maintained that her probation could not be continued beyond the time it was supposed to end, in November of 2001, although she believed that the District Court could set restitution for the remaining few months of her probation. Subsequent review of the law, indicates that she was probably incorrect in thinking that the District Court had the authority to require such payments, however she had not objected to that action in the Court below.

In the last 20 years, the North Dakota Supreme Court has rendered several opinions regarding the ability of a North Dakota District Court to increase a person's sentence after the initial sentencing hearing. Almost uniformly the Court has found such conduct improper. In ***State v. Bryan***, 316 N.W.2d 335 (N.D. 1982), the Court reversed the District Court's attempt to change a defendant's original sentence on three offenses, from the consecutive terms of 6 months apiece, to three concurrent terms of 18 months, when it realized that it's prior oral sentencing would entitle the defendant to have the offenses for which

his term of imprisonment had been imposed, treated as misdemeanors upon successful completion of his term of imprisonment. The Court noted that the provisions of Rule 35 N.D.R.Crim.P. govern the ability of a trial court to change a sentence once it has been imposed. It noted that the trial court could only correct an illegal sentence or correct a sentence imposed in an illegal manner or reduce a sentence. Since the Court's action in **Bryan** was none of these, the District Court was without authority to act, and therefore the case was remanded to the District Court for imposition of the original sentence.

In his appeal, Bryan had argued that the increase of his sentence violated his constitutional guarantee against double jeopardy. Because the decision rested on an interpretation of existing North Dakota law, the Court did not reach a conclusion on the constitutional question, however an extensive footnote to the decision makes clear the Court's opinion that a rule which allowed a sentencing Court to increase a sentence would face significant double jeopardy problems. *Id.* at footnote 3, page 337.

Subsequent to the decision in **Bryan**, the Supreme Court faced a similar issue in **State v. Garvin**, 329 N.W.2d 621 (N.D. 1983). In **Garvin**, the Supreme Court again faced the question of whether a sentencing court could modify and increase a sentence after it's original sentencing decision was rendered. Again, the Court found that any change or modification of sentence had to be made in accordance with Rule 35 to be valid, and that the Rule does not authorize a sentencing court to increase a sentence. A similar decision was reached on

this issue in ***State v. Kunze***, 350 N.W.2d 36 (N.D. 1984).

Appellate Courts in this state have found three situations where there is an exception to this general rule. One is in the situation where a defendant is convicted of multiple counts and is then sentenced under an “aggregate sentencing package,” and some of his convictions are reversed on appeal. ***State v. Hersch***, 467 N.W.2d 463 (N.D. App. 1991). The other situation is where a defendant has violated the terms of his probation, and then is subject to re-sentencing and may receive a harsher sentence than he originally received. Finally, where the Court has imposed an illegal sentence, it may correct that sentence, even if the correction results in a harsher sentence for the defendant. ***State v. Trieb***, 533 N.W.2d 678 (N.D. 1995).

The answer to the issue of whether the District Court had the statutory authority to impose the additional probationary sentence and additional terms of restitution as was imposed is clear. The Court had no authority to do this. This was not a reduction in sentence, where authority under Rule 35 exists for a limited period of time. Since the original sentence of Lesa was not illegal, the Court had no ability to correct the sentence. This was a situation where the sentence was imposed in an illegal manner. The District Court said as much in vacating the previously entered restitution provision, and dismissing the petition for revocation. However, the ability of that same District Court to correct that sentence had expired 120 days after the Order to pay restitution was imposed. Since more than 4 years had passed since that Order was made, the District

Court was without authority to correct the sentence imposed in the illegal manner. It's subsequent Order continuing probation and ordering further restitution must be vacated. While the original Order cannot be enforced, no substitute may be made.

In seeking to justify the Court's action in extending Lesa's probation, and in requiring her to pay the additional restitution, the State claims statutory authorization under two statutes. Firstly, it claims that Section 12.1-32-06.1, subd. 2 N.D.C.C. authorizes the Court, where a sentence of restitution is authorized, to impose an additional period of probation up to 5 years, after the restitution hearing. The State argues that since the Court had previously vacated the earlier restitution Order, and since Lesa had committed an offense where there was a significant pecuniary loss to the victim, that it should be entitled to have her probation continue from the time of this later hearing. The Defendant agrees with the State, that in the typical case, where restitution is ordered Section 12.1-32-06.1, subd. 2 N.D.C.C. appears to allow a Court to add an additional 5 years on to the previously noted probationary period maximum. However, the State's argument fails for two reasons. First Section 12.1-32-08 N.D.C.C., which governs the issue of restitution requires that said hearing be held "Prior to imposing restitution or reparation as a sentence or condition of probation." In this case, the Court did not hold such a hearing prior to sentencing the Defendant, but instead sought to hold the hearing either a month after pronouncing sentence, and in the last instance, almost 5 years after pronouncing sentence. Since the Court has lost jurisdiction to increase the sentence, and

since the Order of restitution is surely an increase in the sentence, then on either occasion it appears that the Order entered after the sentencing would be illegal. ***State v. Bryan***, 316 N.W.2d 335 (N.D. 1982). Secondly, nothing in the statute authorizes a re-sentencing of a defendant many years after the original sentencing, when there has been no violation of probation, nor appeal of the conviction. Nothing in these statutes allow the Court to resentence a defendant at the end of his/her probationary period, and to order a whole new probation term, as was done in this case.

The second authority which is cited by the State is the ability of the Court, upon notice to the probationer and upon good cause to modify or enlarge the "conditions of probation." § 12.1-32-07, subd. 6 N.D.C.C. Here the State is confusing a modification of the "conditions of probation," with a modification of the "length of probation. This section of the law speaks extensively to the various conditions of probation which may be imposed upon a probationer by the Court. However, there is no reasonable way that this section dealing with the conditions of probation can be interpreted to give authority to lengthen the probationary period, especially when Section 12.1-32-06.1 N.D.C.C. so explicitly deals with the issue of length of probation. Perhaps this section can be used to justify adding the restitution obligation which had been illegally imposed earlier, but it cannot be used to enlarge or increase the severity of the sentence, which was done here.

Because the authorities cited by the State do not provide authority for the District Court to impose a new increased sentence over 4 years after the

originally sentencing of the Defendant, the Court's Order Determining Restitution, Extending Probation, and Setting Monthly Payments should be vacated and the matter remanded to the District Court.

2. **Even If Authorized the District Court's Order Violates the Prohibition Against Double Jeopardy.**

As noted earlier, the North Dakota Supreme Court had indicated a concern in ***State v. Bryan***, 316 N.W.2d 335 (N.D. 1982) that any attempt to increase a valid sentence after the defendant had commenced serving the sentence might violate the double jeopardy clause of the United States and North Dakota Constitutions. As noted by the Court in footnote 3, the United States Supreme Court held back in 1873 in ***Ex. Parte Lange***, 85 U.S. 163, 168-170 that the double jeopardy clause of the Eighth Amendment to the United States Constitution is violated when a sentence is increased after the defendant has begun to serve the sentence. It was precisely this double punishment that the Court found violated old settled principles of common law and the double jeopardy clause of the United States Constitution. ***United States v. Benz***, 282 U.S. 304, 307 (1931). Although more recent decisions of the U.S. Supreme Court have backed away from principle laid out in *Lange*, no court has overruled that decision, and none of the justifications which have subsequently been used by the Court to allow increases in sentences after appeals and new trials would apply to this case. Clearly here, the Defendant is being penalized and resentenced for objecting to a portion of her earlier sentence which was imposed in an illegal manner and she is being required to be on probation for almost twice

the statutory maximum amount of time, because she objected. The District Court's action in imposing this additional probationary sentence was as clear a violation of *Lange* as could be found and therefore is unconstitutional, as well as being illegal.

3. Section 29-08-28 N.D.C.C. which allows the use of money deposited by third parties for bail for the Defendant is unconstitutional.

In issuing it's new Order the District Court ordered that the \$500 cash bail which had been posted by Lesa's father be applied to the restitution which it was ordering. The Court did this on the authority of Section 29-08-28 N.D.C.C. and the bond receipt which Lesa's father, as every third party who posts bond is required to sign. Lesa objected that this action was unconstitutional and offered to prove that the bond had been deposited by her father and not by her.

Inasmuch, as this Court's recognition and approval of her earlier arguments may make moot this particular point, because the Court will have already vacated the illegal and unconstitutional Order of the District Court, this argument may be unnecessary. However, inasmuch as the practice of requiring third parties to sign receipts similar to that signed by Lesa's father and to lose the monies which they have posted is likely to recur again, Lesa requests that the Court review this practice and instruct the District Courts so that continuing constitutional violations do not occur.

The Eighth Amendment to the United States Constitution and Article 1, Section 11 of the North Dakota Constitution prohibit excessive bail. In *Cohen v. United States*, ___ U.S. ___, 7 L.Ed.2d 518, 82 S.Ct. 526 (1962) the Supreme

Court reviewed a District Court order rejecting a bail bond because said bond failed to provide that a portion of it could be used to pay a fine. The Supreme Court noted that on 3 previous occasions the appeals courts in the 9th and D.C. circuits had rejected these provisions. It agreed with the Ninth Circuit decision, in **Cain v. United States**, 148 F.2d 182, 183 (1945) , in noting that to the extent that the bail bond contained a provision that it also operate as a supersedeas to a judgment for payment of a fine, this requirement made the bail excessive under the Eighth Amendment. *Id* , 82 S.Ct. at 528. Justice Douglas states so eloquently the problem here. "The imposition of an additional burden upon the bondsman, and upon the accused, would frustrate the purposes for which bail was historically intended..." What was improper in the Federal court in 1962, is no more proper or constitutional today, almost 40 years later, and therefore the provision contained in Section 29-08-28 N.D.C.C. which makes the posted money that of the defendant and therefore liable for his/her fines and restitution obligation is unconstitutional and should be stricken.

In addition to the Ninth Circuit, the Eleventh Circuit also held that imposing a condition on bail monies deposited by the defendant and then assigned prior to trial to his attorney, that it be used to pay the defendant's fines violated the Eighth Amendment prohibition on excessive bail. **United States v. Rose**, 791 F.2d 1477 (1986). Recently, the United States District Court for the Western District of Texas faced the issue of whether to grant the Government's motion to forfeit to it the \$5,000 cash bail posted by the defendant's attorney,

under the federal statute which provides that any money deposited by or on behalf of a defendant with the court for purposes of a criminal appearance bail bond should be paid over to the United States to be applied to the payment of restitution. 28 U.S.C. § 2044, **United States v. Sparger**, 79 F. Supp. 2d 714 (1999). In **Sparger**, the Court reviewed the 5th and 11th Circuit case history which included the **Rose** case, and concluded that the statute was excessive, and in violation of the 8th Amendment because it was being used to serve a purpose for which bail was not intended. It then noted a recent interpretation of the statute by a Pennsylvania District Court which had been asked to determine whether cash bail posted by the defendant's brother, and clearly not the defendant's money could be forfeited to the government. In **United States v. Equere**, 916 F. Supp. 450 (E.D.Pa. 1996) the District Court had determined that the statute only applied to money which clearly belonged to the defendant, and not to monies which belonged to third parties. Thus the Court in **Sparger** reached the same conclusion, and denied the government's motion and returned the money to defense counsel. Upon the record here, the monies were clearly deposited by Lesa's father and never intended as a gift to Lesa. Signature of the bond receipt was required, and was not voluntary, and bail would not have been granted without this condition. Therefore, this Court should interpret Section 29-08-28 N.D.C.C. to avoid an unconstitutional result and determine, as the federal courts have, that this provision only applies to monies which are deposited or owned by the defendant, and not to those which are clearly the property of third parties.

A similar result was reached by the Supreme Court of Ohio in ***State ex. rel. Baker v. Troutman***, 50 Ohio St. 3d 270, 553 N.E.2d 1053 (1990). In ***Baker***, the Court granted mandamus relief to the defendant and ordered the removal of the provision on the bond form notifying the depositor that their money would be used for payment of the fines and costs, because the Court order under which it was authorized violated both the State and Federal constitutional provisions against excessive bail.

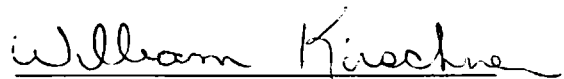
Although Courts have allowed the use of bail money to pay fines when such monies were posted by the defendant, ***United States v. Higgins***, 987 F.2d 543 (8th Cir. 1993), any decision to allow the funds of third parties to be used to pay a defendant's fines and costs, have been subject to harsh criticism because of the underlying constitutional principles, even where the practice has been upheld. ***See dissent of Justice Babitch in State v. Iglesias***, 185 Wis.2d 118, 517 N.W.2d 175, 185 (1994).

Because both the North Dakota and Federal constitutions protect individuals against excessive bail, and because the requirement that bail monies deposited by third parties be used to pay the defendant's fines, costs and restitution violates those provisions, this Court should either interpret Section 29-08-28 N.D.C.C. as not applying to the funds of third parties clearly so deposited, or should find such provision unconstitutional and strike it.

CONCLUSION

The Order issued by Judge Rothe Seeger on July 13, 2001 extending Lesa's probation was in violation of Rule 35 and the Double Jeopardy provisions of the State and Federal Constitutions. The Order forfeiting Lesa's father's money posted as bail for her misreads the intention of Section 29-08-28 N.D.C.C., or violates State and Federal constitutional protections against excessive bail. This Court should issue it's Order vacating the Order of Judge Rothe and remanding this case to the District Court to return all the monies collected under this Order to the Defendant and her father.

Respectfully submitted this 23rd day of August, 2001.



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