

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT  
MAR 23 2006

Tracy Gust,

Petitioner and Appellant,

-VS-

State of North Dakota,

Respondent and Appellee.

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STATE OF NORTH DAKOTA

Supreme Ct. No. 20050381

District Ct. No. 08-04-K-01023

SA No. F 366,367-04-05

## BRIEF OF RESPONDENT-APPELLEE

Appeal Taken from Order Denying  
Application for Post-Conviction Relief  
Dated October 10, 2005  
Burleigh County District Court No. 08-04-K-01023  
South Central Judicial District  
The Honorable Bruce A. Romanick, Presiding

Cynthia M. Feland  
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BAR ID. No: 04804  
Attorney for Respondent and Appellee

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ISSUES PRESENTED FOR REVIEW

I. Gust failed to affirmatively establish that he is entitled to additional credit for time served in connection with another case.

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STATEMENT OF THE CASE

On May 18, 2004, the defendant, Tracy Gust (hereinafter Gust) was charged with Possession with Intent to Manufacture a Controlled Substance (Class A Felony) and one count of Possession of Drug Paraphernalia (Class C Felony). On December 9, 2004, Gust plead guilty to the offense. Gust was sentenced to 5 years at the North Dakota Department of Corrections. Trans. of Sentencing, Pp. 17-18. Gust was given credit for 9 days time served, the period between his arrest and parole revocation on unrelated charges. Trans. of Sentencing, p. 18, line 17-20.

On March 24, 2005, almost 4 months after sentencing, Gust moved the court to reduce his sentence under Rule 35(b) of the North Dakota Rules of Criminal Procedure by increasing his credit for time served to 203 days, the amount of time served on a parole revocation in another case. Appellant's Appendix, p. 10. The district court denied Gust's request. Appellant's Appendix, p. 12.

On May 6, 2005, Gust argued in his post-conviction relief proceedings that he was entitled to 203 days of credit for time served in custody. Appellant's Appendix, Pp. 13-15. The basis of Gust's claim for credit has remained consistent; Gust's parole was revoked as a result of the present charges, thus he should be credited for the time served on the parole revocation in the present case. Appellant's Appendix, Pp. 10, and 13-15.

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ARGUMENT

**I. Gust failed to affirmatively establish that he is entitled to additional credit for time served in connection with another case.**

In post-conviction relief proceedings, a district court's findings of fact will not be disturbed unless they are clearly erroneous. Hill v. State, 2000 ND 143, ¶ 17, 615 N.W.2d 135, citing, DeCoteau v. State, 2000 ND 44, ¶ 10, 608 N.W.2d 240. "A finding is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by any evidence, or if, although there is some evidence to support it, a reviewing court is left with a definite and firm conviction a mistake has been made." *Id.*

N.D.C.C. § 12.1-32-02(2) "requires a court to give a criminal defendant, upon sentencing, credit for all time spent in custody as a result of the criminal charge or conduct for which the sentence is being imposed." State v. Trudeau, 487 N.W.2d 11, 15 (N.D.1992). Section 12.1-32-02(2), N.D.C.C., provides:

"Credit against any sentence to a term of imprisonment must be given by the court to a defendant for all time spent in custody as a result of the criminal charge for which the sentence was imposed or as a result of the conduct on which such charge was based. 'Time spent in custody' includes time spent in custody in a jail or mental institution for the offense charged, whether that time is spent prior to trial, during trial, pending sentence, or pending appeal."

However, a defendant is not entitled to credit for periods of incarceration imposed in connection with prior convictions for crimes completely unrelated to current offenses. State v. Trudeau, 487 N.W.2d 11, 14 (N.D.1992); and State v. Eugene, 340 N.W.2d 18 (N.D. 1983).

1  
2 In this case, the sentencing court imposed a sentence of 5 years straight  
3 time. Trans. of Sentencing, Pp. 17-18. The sentence was ordered to  
4 commence on the date of sentencing, December 9, 2004. Trans. of  
5 Sentencing, p. 18, line 6. The sentencing court further ordered that the  
6 sentence would run concurrent with any other sentence Gust was serving as  
7 of the sentencing date. Trans. of Sentencing, p. 18, lines 7-8. In addressing  
8 the issue of credit for time served, the sentencing court declined to give Gust  
9 credit for the time spent in custody as a result of a parole revocation on an  
10 unrelated charge. However, the sentencing court did credit Gust for the time  
11 spent in custody prior to the parole decision on May 27, 2004, specifically;  
12 9 days. Trans. of Sentencing, p. 18, lines 8-20.

13 At the sentencing hearing, Gust's counsel argued that he should be  
14 given credit for time served on a parole revocation in light of the fact that his  
15 parole was revoked as a result of the charges in the present case. Trans. of  
16 Sentencing, Pp. 18-19. The sentencing court denied the request indicating  
17 that "the decision to revoke his parole would be the other case and not this  
18 case". Trans. of Sentencing, p. 18, lines 17-19. The sentencing court's  
19 rationale for crediting the 9 days served by Gust between his arrest on the  
20 current charges and revocation of his parole was that there was no record to  
21 show the 9 days had been applied in the parole revocation. Trans. of  
22 Sentencing, Pp. 18-19.

23 It is clear that after the parole revocation on May 27, 2004, Gust's  
24 custody was a direct result of his serving an unrelated sentence, and not his  
25 inability to make bail on the current charges. In adhering to this Court's  
26 prior holdings in State v. Trudeau, 487 N.W.2d 11, 14 (N.D.1992) and State  
27 v. Eugene, 340 N.W.2d 18 (N.D. 1983), Gust is not entitled to credit in the



1  
2 present case for the 203 days he served in connection with the parole  
3 revocation on an unrelated sentence.

4 The District Court properly applied the statute in denying Gust's  
5 motion. During the period between May 27, 2004 and December 9, 2004,  
6 Gust was incarcerated pursuant to an order revoking parole and order of  
7 commitment imposed in connection with his prior conviction for crimes  
8 completely unrelated to the possession with intent to manufacture charge in  
9 this case. During the period from May 18, 2004 to May 27, 2004, Gust was  
10 held as a direct result of the possession with intent to manufacture charge.  
11 As the sentencing court could not determine that this time period had been  
12 credited toward Gust's prior sentence, the sentencing court ordered that Gust  
13 be given credit for the 9 days served. Gust has been given appropriate credit  
14 for time served.  
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CONCLUSION

The district court made a finding that Gust's credit for time served was correctly computed. "The presumption is that the district court's rulings were correct, and the burden is upon the appellant to show affirmatively by the record that the rulings were incorrect." Crosby v. Sande, 180 N.W.2d 164, 172 (N.D.1970), quoting, Erickson v. Wiper, 33 N.D. 193, 157 N.W. 592, 602 (1916). Gust has not affirmatively established by the record that he is entitled to additional credit for time served in this case, and the record does not demonstrate that the sentencing court was clearly erroneous.

Based upon the foregoing, the State of North Dakota respectfully requests that this Court AFFIRM the decision of the district court.

Dated this 23<sup>rd</sup> day of March, 2006.



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)  
Petitioner and Appellant, )  
-vs- ) Supreme Ct. No. 20050381  
State of North Dakota, )  
)  
Respondent and Appellee. ) District Ct. No. 08-04-K-1023  
..... ) SA. No. F 366,367-04-05  
  
STATE OF NORTH DAKOTA )  
)ss  
COUNTY OF BURLEIGH )

Ardyth Volesky, being first duly sworn, depose and say that I am a  
United States citizen over 21 years old, and on the date of March 23, 2006,  
I deposited in a sealed envelope a true copy of the attached:

1. Brief of Respondent-Appellee
2. Affidavit of Mailing

in the United States mail at Bismarck, North Dakota, postage prepaid,  
addressed to:

WAYNE D GOTER  
ATTORNEY AT LAW  
PO BOX 1552  
BISMARCK ND 58502-1552

which address is the last known address of the addressee.

Ardyth Volesky  
Ardyth Volesky

Subscribed and sworn to before me this 23rd day of March, 2006.



Gwen Tardif  
Gwen Tardif, Notary Public  
Burleigh County, North Dakota  
My Commission Expires: 5-23-2009