

20080060

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
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State of North Dakota,

Plaintiff/Appellee,

VS.

Todd Roth,

Defendant/Appellant.)

STATE OF NORTH DAKOTA

Supreme Court No. 20080060

APPELLANT'S BRIEF

APPEAL FROM THE FEBRUARY 1, 2008 ORDER REVOKING
PROBATION FROM THE BURLEIGH COUNTY DISTRICT COURT
IN BISMARCK, NORTH DAKOTA
THE HONORABLE BENNY GRAFF PRESIDING

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ISSUES PRESENTED

- I. THE DEFENDANT HAS THE RIGHT TO APPEAL TO THE SUPREME COURT.
- II. WHETHER THE DEFENDANT WAS ON PROBATION AT THE TIME THE STATE FILED A PETITION TO REVOKE PROBATION.

STATEMENT OF THE CASE

[¶1] Appellant, Todd Roth, appeals his Order Revoking Probation entered on February 1, 2008 in the Burleigh County District Court. A Second Amended Criminal Judgment and an Order Revoking Probation was entered as a result in this matter on February 1, 2008 [Appendix pages 19-21; hereinafter A 19-21.]

[¶2] On February 7, 2003, the Defendant appeared before the District Court for Sentencing and a Criminal Judgment was entered on February 10, 2003 [A 5.] The conditions of probation were attached as part of the Judgment [A 6-7.] The Defendant did not sign the conditions of probation [A 6-7.] On February 24, 2003, an Amended Criminal Judgment was filed with the attached conditions of probation [A 8-10.] The Defendant did not sign the conditions of probation [A 9-10.] On November 7, 2007, the State filed a Petition for Revocation of Probation on 5 allegations all occurring on July 27, 2007, while the Defendant was on parole from the North Dakota Department of Corrections [A 11-15.] Upon the Defendant's release from the North Dakota Department of Corrections the Parole and Probation Office informed the Defendant of his conditions of probation. The Defendant signed in acknowledgement and agreement on those conditions of probation on December 13, 2007 [A 17-18.]

[¶3] A subsequent revocation of probation hearing was held on February 1, 2008, and Judge Benny Graff revoked the Defendant's probation [A 21.] A Second Amended Criminal Judgment and an Order Revoking Probation was filed in District Court on February 1, 2008 [A 19-21.] Consequently, the Defendant filed a Notice of Appeal on February 28, 2008 [A 3.]

STATEMENT OF THE FACTS

[¶4] On February 7, 2003, the Defendant was sentenced to the North Dakota Department of Corrections for: Possession of Marijuana with Intent to Deliver (Count I), a Class B Felony; Possession of Methamphetamine (Count II), a Class C Felony; Possession of Drug Paraphernalia (Count III), a Class C Felony; and Possession of Drug Paraphernalia, a Class A Misdemeanor [A 5-7.] On Count I the Defendant received a 10 year sentence with 7 years suspended; on Counts II and III the Defendant received 5 years on each count with 2 years suspended; and on Count IV the Defendant received 1 year straight time [A 5-6.] All counts were to be served concurrently for a total of 3 years to be served at the North Dakota Department of Corrections [A 7.] As part of the Criminal Judgment the Defendant was to be placed within the North Dakota Division of Parole & Probation for 5 years following his release from the North Dakota Department of Corrections, or termination of his parole, whichever is later [A 6.] The Court did not have the Defendant sign in agreement or acknowledgment of the conditions of probation [A 6-7.] The Criminal Judgment was filed on February 10, 2003 [A 5.] On February 24, 2003, an Amended Criminal Judgment was filed with the same language that the Defendant was to be placed within the North Dakota Division of Parole & Probation for 5 years following his release from the North Dakota Department of Corrections, or termination of his parole, whichever is later [A 9.]

[¶5] In May of 2007 the Defendant was released on parole from the North Dakota Department of Corrections [Transcript 4-5; hereinafter T 4-5.] The Defendant was not informed that he was probation as well as parole at the time of

his release. The defendant was convicted of 4 new crimes while on parole and sent back to the North Dakota Department of Corrections to serve the rest of his sentence [T 4.] On November 7, 2007, the State filed a Petition for Revocation of Probation on the Defendant [A 11-15.] On December 13, 2007, the Defendant's assigned Probation Officer, Camilla Jensen, had the defendant sign in agreement and acknowledgment his conditions of probation [A 17-18; T 5.] The probation officer had the Defendant initial each probation condition and then sign and date the Amended Criminal Judgment from February 24, 2003 [A 16-18.] This was the first time that the Defendant was told that he as on probation and he signed in agreement and acknowledgement of the conditions of probation [T 6.]

[¶6] Consequently, a Revocation of Probation hearing was held on February 1, 2008, at which time the District Judge revoked the Defendant's probation [A 21.] A Second Amended Criminal Judgment was filed on February 1, 2008 [A 19-20.] Subsequently, the Defendant filed a Notice of Appeal on February 28, 2008 [A 3.]

LAW AND ARGUMENT

I. THE DEFENDANT HAS THE RIGHT TO APPEAL TO THE SUPREME COURT.

[¶7] Pursuant to NDCC § 29-28-03, a defendant may appeal from any or all verdicts, judgments, or orders enumerated in NDCC § 29-28-06. See also N.D.R.Crim.P. Rule 37. Accordingly, the Defendant's appeal of the Second Amended criminal Judgment and Order Revoking Probation are appropriately before the Court. State v. Jenkins, 339 N.W.2d 567 (N.D. 1983).

II. WHETHER THE DEFENDANT WAS ON PROBATION AT THE TIME THE STATE FILED A PETITION TO REVOKE PROBATION.

[¶8] A revocation of probation is reviewed in two steps: First, we review a trial court's factual finding that a condition of probation was violated under a clearly erroneous standard. State v. Monson, 518 N.W.2d 171, 173 (N.D. 1994).

Second, we review a trial court's determination that the violation warrants revocation under an abuse of discretion standard. Id. The District Court finding that the Defendant's probation was violated and should be revoked was clearly erroneous. Under N.D.C.C. § 12.1-32-07(2) it clearly states:

The Court shall provide as an explicit condition of every probation that the defendant not commit another offense during the period for which the probation remains subject to revocation.

[¶9] The Amended Judgment from February 24, 2003, clearly advises the Defendant that he is to be placed within the custody and control of the North Dakota Division of Parole & Probation, for a period of five (5) years following his release from the North Dakota Department of Corrections, or termination of his parole, whichever is the later [A 8-10.] The Defendant was released from the North Dakota Department of Corrections (NDDOC) in May of 2007 and was placed on parole [T 4-5.] His parole was not due to expire until December of 2007. In July of 2007 the Defendant's parole was revoked and he was sent back to the NDDOC to serve out the rest of his sentence [T 4.]

[¶10] The allegations brought by the State in the Petition for Revocation of Probation occurred in July of 2007 [A 12.] At the time of the allegations put forth by the State the Defendant was on clearly on parole and not probation. The

Amended Judgment specifically indicates that probation was not to begin until the Defendant is released from the North Dakota Department of Corrections or termination of his parole, whichever is later [A 9.] The Defendant was not released from his parole when the State filed a Petition to Revoke Probation on November 7, 2007.

[¶11] The Defendant understood his probation to begin when his parole terminated as stated in the Amended Criminal Judgment [T 6.] The fact that the probation officer did not have the Defendant initial the conditions of probation and sign in acknowledgement of the conditions of probation until December 13, 2007 is indicative that this was the case [A 17-18.] Conditions of probation are to strictly construed in favor of the offender. State v. Ballensky, 1998 ND 197, ¶ 10, 586 N.W.2d 163. The accused should be given the benefit of the doubt as to a sentence which is not certain, definite, or free from ambiguity, and serious uncertainty in the sentence should be resolved in favor of liberty. State v. Drader, 432 N.W.2d 553, 554 (N.D. 1988). If a condition of probation is capable of two reasonable constructions, we will construe in favor of the offender. Morstad v. State, 518 N.W.2d 191, 193 (N.D. 1994).

[¶12] The Defendant's Amended Criminal Judgment indicates that the probation conditions were not in place until the parole was terminated. The State filed its Petition for Revocation of Probation on November 2007 while the defendant was in the NDDOC for violating his parole and not while the Defendant was subject to probation. The allegations listed in the petition all occurred in July of 2007 while the Defendant was on parole. As a result of the allegations the Defendant had his

parole revoked and he was sent back to the NDDOC until his release in December 2007. The Defendant was not subject to probation until December 2007 when he was released from the NDDOC after serving his full sentence. After being released from the NDDOC the Defendant met with his probation officer and initialed and signed his conditions of probation on December 13, 2007. The Defendant had no violations of his probation while he was placed on probation prior to having his probation revoked on February 1, 2008.

CONCLUSION

[¶13] WHEREFORE, for the reasons stated herein, the Appellant respectfully prays that the Court finds that probation of the Defendant had not been violated and reverse and remand for further proceedings consistent with that finding.

Respectfully submitted this 27th day of August, 2008.

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