

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Ronald Yellow, Jr)	
)	Supreme Court Nos. 20110309
Petitioner-Appellant,)	and 20110310
)	
-vs-)	
)	Burleigh County Nos.
State of North Dakota,)	02-K-01193 and
)	02-K-01369
Respondent-Appellee.)	

BRIEF OF APPELLANT

APPEAL FROM ORDER DENYING POST-CONVICTION RELIEF
DATED OCTOBER 13, 2011
BURLEIGH COUNTY DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE SONNA ANDERSON, PRESIDING

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STATEMENT OF THE ISSUES

[¶1] Whether the trial court's denial of the Defendant's petition for post-conviction relief on the grounds of Double Jeopardy was clearly erroneous when the trial court, in basing the Defendant's statements on the record at his initial sentencing that he understood that if he violated the terms of his probation to his sentence, failed to determine whether the underlying examination of the Defendant pursuant to Rule 11, N.D.R.Crim.P., at the initial sentencing was legally sufficient to determine whether the Defendant understood the collateral consequences of accepting a plea agreement, when the required inquiries by the sentencing court had not been fully placed upon the record?

[¶2] Whether the trial court's denial of the Defendant's petition for post-conviction relief on the grounds of Ineffective Assistance of Counsel was clearly erroneous when the trial court, in basing the Defendant's statements on the record at his initial sentencing that he understood that if he violated the terms of his probation to his sentence, failed to determine whether the underlying examination of the Defendant pursuant to Rule 11, N.D.R.Crim.P., at the initial sentencing was legally sufficient to determine whether the Defendant understood the collateral consequences of accepting a plea agreement, when the required inquiries by the sentencing court had not been fully placed upon the record?

STATEMENT OF THE CASE

[¶ 3] **A. Nature of the case, course of the proceedings, and disposition in the trial court.**

[¶4] This is an appeal from an Order denying post-conviction relief, dated October 13, 2011. The defendant, Ronald Yellow, Jr., (hereinafter “Yellow”) originally pled guilty, pursuant to a joint plea proposal, to Aggravated Assault with a Deadly Weapon, one Count of Corruption or Solicitation of a Minor, and Failure to Register as a sexual offender on May 16, 2002. On the Corruption or Solicitation offense, Yellow was sentenced to five (5) years imprisonment, with two (2) years suspended, placed on supervised probation for five (5) years, ordered to obtain an evaluation and complete recommended treatment, and register as a sexual offender. On the Failure to Register charge, Yellow was sentenced to one (1) year imprisonment. This sentence was to be served concurrently with the sentence on the Corruption or Solicitation offense. On the Aggravated Assault charge, Yellow was sentenced to five (5) years imprisonment, with three (3) years suspended, placed on supervised probation for five (5) years, and ordered to obtain a chemical dependency evaluation and complete recommended treatment. This sentence was to be served consecutively to the other two sentences and included a two-year minimum mandatory sentence because a weapon was used in the commission of the crime. In all, Yellow was to serve five (5) years imprisonment to be followed by supervised probation for five (5) years. After Yellow was released from imprisonment but while he was still subject to supervised probation, Yellow’s probation was revoked in 2008 and 2009, and Yellow was resentenced in both instances to additional periods of incarceration. Amended Criminal Judgments were entered following both revocations. On November 4, 2010, Yellow filed an application for post-conviction relief, acting *pro se*. An attorney was appointed to represent him, and a hearing was held on September 22, 2011. In the Application for Post-Conviction Relief, Yellow stated three grounds

which he believed qualified him for post-conviction relief: (1) that Yellow was not given credit for twenty-four (24) months in his first revocation in 2008 during which he was on probation prior to the resentencing, which Yellow claimed was not adequately explained to him by either the sentencing court or by his counsel; (2) that Yellow was not given credit for fourteen (14) months in his second revocation in 2009 during which he was on probation prior to his next resentencing, which Yellow claimed was in violation of his Double Jeopardy rights; and (3) that he received Ineffective Assistance of Counsel, which fell below an objective standard of reasonableness and was denied due process of the laws thereby. [Application for Post-Conviction Relief, Appendix 1.] At the hearing on post-conviction relief, these three issues were incorporated into one general argument, basically incorporated into Yellow's testimony, that Yellow's counsel did not adequately explain the collateral consequence of having his probation revoked, that he did not understand he could be resentenced to additional terms of incarceration for probation violations, and that the details of the plea agreement was not explained to him. [Post Conviction Hearing Transcript, pp. 3-5.] Counsel at the post-conviction hearing argued that this failure to adequately explain the collateral consequences of the plea agreement were analogous to Padilla v. Kentucky, 559 U.S. _____, 130 S. Ct. 1473, 176 L.Ed.2d 284 (2010). On October 13, 2011, the trial court issued an Order on Motion for Post Conviction Relief, denying the application in all things. The trial court found Yellow did not argue the first two issues at the hearing and he received credit for all time during which he was incarcerated. Regarding the Ineffective Assistance of Counsel, the trial court ordered that a transcript of the underlying sentencing hearing be prepared, and in making a decision on this issue, the trial court relied upon the questions and responses of

the sentencing court, which included a colloquy between the sentencing judge, the defense attorney, and Yellow, in which Yellow stated he understood that if his probation were revoked, “the court could actually impose up to the maximum sentence.” [Order, at p. 3.] The trial court held that the claim that Yellow’s defense attorney failed to advise him properly of the consequences of a revocation of probation was not supported by the record, and denied the Motion for Post Conviction Relief in all things.

STATEMENT OF THE FACTS

[¶5] This is an appeal from an Order denying post-conviction relief, dated October 13, 2011. The defendant, Ronald Yellow, Jr., (hereinafter “Yellow”) originally pled guilty, pursuant to a joint plea proposal, to Aggravated Assault with a Deadly Weapon, one Count of Corruption or Solicitation of a Minor, and Failure to Register as a sexual offender on May 16, 2002. In all, Yellow was to serve five (5) years imprisonment to be followed by supervised probation for five (5) years, with other conditions attached to his probation. After Yellow was released from imprisonment but while he was still subject to supervised probation, Yellow’s probation was revoked in 2008 and 2009. Yellow was resentenced in both instances to additional periods of incarceration. On November 4, 2010, Yellow filed an application for post-conviction relief, acting *pro se*. An attorney was appointed to represent him, and a hearing was held on September 22, 2011. In the Application for Post-Conviction Relief, Yellow stated three grounds which he believed qualified him for post-conviction relief: (1) that Yellow was not given credit for twenty-four (24) months in his first revocation in 2008 during which he was on probation prior to the resentencing, which Yellow claimed was not adequately explained to him by either the sentencing court or by his counsel; (2) that Yellow was not given credit for fourteen

(14) months in his second revocation in 2009 during which he was on probation prior to his next resentencing, which Yellow claimed was in violation of his Double Jeopardy rights; and (3) that he received Ineffective Assistance of Counsel, which fell below an objective standard of reasonableness and was denied due process of the laws thereby. [Application for Post-Conviction Relief, Appendix 1.] At the hearing on post-conviction relief, Yellow incorporated these arguments into one general argument but only argued the Ineffective Assistance of Counsel on the ground that Yellow's counsel did not adequately explain the collateral consequence of having his probation revoked, that Yellow did not understand he could be resentenced to additional terms of incarceration for probation violations, and that the details of the plea agreement was not explained to Yellow. [Transcript, pp. 3-5.] Counsel at the post-conviction hearing argued that this failure to adequately explain the collateral consequences of the plea agreement were analogous to Padilla. On October 13, 2011, the trial court issued an Order on Motion for Post Conviction Relief, denying the application in all things. The trial court found Yellow did not argue the first two issues at the hearing and he received credit for all time during which he was incarcerated. Regarding the Ineffective Assistance of Counsel, the trial court ordered that a transcript of the underlying sentencing hearing be prepared, and in making a decision on this issue, the trial court relied upon the questions and responses of the sentencing court, which included a colloquy between the sentencing judge, the defense attorney, and Yellow, in which Yellow stated he understood that if his probation were revoked, "the court could actually impose up to the maximum sentence." [Order, at p. 3.] The trial court held that the claim that Yellow's defense attorney failed to advise him properly of the consequences of a revocation of probation was not supported by the

record, and denied the Motion for Post Conviction Relief in all things.

[¶6] Yellow properly filed a Notice of Appeal on October 19, 2011.

LAW AND ARGUMENT

[¶7] A. Jurisdiction

[¶8] Appeals shall be allowed from decisions of lower courts to the supreme court as may be provided by law. Pursuant to constitutional provisions, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06, NDCC, which provide as follows:

An appeal to the supreme court provided for in this chapter may be taken as a matter of right.

NDCC Section 29-28-03.

An appeal may be taken by the defendant from:

1. A verdict of guilty;
2. A final judgment of conviction;
3. An order refusing a motion in arrest of judgment;
4. An order denying a motion for new trial; or
5. An order made after judgment affecting any substantial right of the party.

NDCC Section 29-28-06. State v. Lewis, 291 N.W.2d 735 (N.D. 1980). The Defendant's right to an appeal was reiterated in State v. Vondal, 1998 ND 188, 585 N.W.2d 129.

[¶9] B. Standard of Review

[¶10] The standard of review in a post-conviction proceeding is the clearly erroneous standard. "The district court's findings of fact in a post-conviction proceeding will not be disturbed on appeal unless clearly erroneous under N.D.R.Civ.P., Rule 52(a)." Odom v. State, 2010 ND 65, ¶ 10, 780 N.W.2d 666.

[¶11] Further, "[a] finding of fact 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 the finding, this Court is left with a definite and firm conviction a mistake has been made. Id.

[¶12] "The issue of ineffective assistance of counsel is a mixed question of law and fact which is fully reviewable on appeal. Id.

[¶13] Whether the trial court's denial of the Defendant's petition for post-conviction relief on the grounds of Double Jeopardy was clearly erroneous when the trial court, in basing the Defendant's statements on the record at his underlying sentencing that he understood that if he violated the terms of his probation to his sentence, failed to determine whether the underlying examination of the Defendant pursuant to N.D.R.Crim.P., Rule 11, at the initial sentencing was legally sufficient to determine whether the Defendant understood the collateral consequences of accepting a plea agreement and whether the Defendant's plea was voluntary, the required inquiries by the sentencing court had not been fully placed upon the record?

[¶14] The Double Jeopardy clause provides three separate protections for criminal defendants: protection against prosecution for the same offense after an acquittal, protection against prosecution for the same offense after a conviction, and protection against multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711 (1969). Regarding the argument that resentencing for a probation violation is violative of the Double Jeopardy Clause of the United States Constitution, it should be

noted that Double Jeopardy does not attach when all of the proceedings, including subsequent resentencings for the same underlying criminal case, are related to the same criminal case. If a particular proceeding does not place an individual in jeopardy, then subsequent proceedings against that individual for the same conduct are not prohibited. It has long been settled in the law that if a defendant has been sentenced, which sentence includes a probationary period, serves his sentence and is on probation, and the defendant violates the terms of his probation, he may then be resentenced and reincarcerated without violating the Double Jeopardy Clause. *See e.g., Roberts v. United States*, 320 U.S. 264, 276, 64 S.Ct. 113, 119, 88 L.Ed. 41, 48 (1943).

[¶15] The trial court's right to resentence defendants who have violated probation to the maximum sentence to which the defendant originally faced has been upheld:

We hold that as part of the state sentencing procedure, a part of which incidentally appellant was made fully aware, (citation omitted) the increased sentence does not violate the Fifth and Fourteenth Amendment prohibition against double jeopardy. We would find it inappropriate to strike down a state procedure which has afforded appellant the benefit of a reduced sentence conditioned upon his own efforts to reform. Appellant, it will be recalled, received originally a one and one-half year custodial sentence when his attorney had asked only that he receive no more than three years in prison. It should not be viewed as the fault of the State that appellant did not uphold his part of the bargain.

Williams v. Wainwright, 650 F.2d 58 (5th Cir., 1981). The policy underlying resentencing differs from that which prevents appeal from being taken from an acquittal. "Historically, the pronouncement of sentence has never carried the finality that attaches to an acquittal." United States v. Di Francesco, 449 U.S. 117 at 133-136 (1980).

[¶16] A violation of probation and any new crime with which a defendant may be charged with are two separate matters, even though the new charge may be the reason for the violation. A defendant can be punished as a probation violator even though s/he is

eventually found not guilty of the new offense. When a defendant is violated on probation, the sentence that happens will be a modification of the original sentence. If that defendant is later found guilty of committing the offense which caused the probation violation, a new sentence will be imposed. This does not constitute double jeopardy. *See State v. Gefroh*, 458 N.W.2d 479 (ND 1990). In that case, Gefroh argued:

Gefroh contends that the district court erred in increasing the length of his sentence after revocation of probation because (1) increasing the length of a sentence imposed, but suspended, after revocation of probation is unconstitutional because it violates due process or constitutes double jeopardy; and (2) the district court was not statutorily authorized to increase the length of a sentence imposed, but suspended, after revocation of probation...Relying on United States v. Fogel, 264 App. D.C. 292, 829 F.2d 77 (D.C.Cir. 1987), Gefroh contends: "If a defendant has a legitimate expectation in the finality of his sentence, then that sentence may not be subsequently increased without violating the double jeopardy clause of the fifth amendment to the United States Constitution." Gefroh concedes that "if the defendant knew, or should have known, that the sentence could be later increased, then he had no legitimate expectation of finality and the increase would not be prohibited by the double jeopardy clause."...Because § 12.1-32-07(4), N.D.C.C., gave Gefroh notice that violation of the conditions of his probation could result in the imposition of a harsher sentence upon revocation of his probation, Gefroh had no legitimate expectation in the finality of his sentence and the district court's imposition of a harsher sentence was not prohibited by the double jeopardy clause.

Id.

[¶17] The United States Supreme Court held in Padilla that criminal defense attorneys must advise non-citizen clients about the deportation risks of a guilty plea. However, the case law to this recent case has not necessarily extended this requirement to cases involving the collateral consequences of a possible future probation violation, and this issue of a future, potential violation of probation would not be one of those collateral consequences which would require full discussion, as more fully discussed in the discussion, below:

[T]he fact that a term of imprisonment potentially greater than the term of probation can be imposed upon revocation of probation need not be discussed with a defendant who is planning to plead guilty. As we explained in Kincade, "not all possible variations in time of incarceration amount to direct consequences." 559 F.2d at 909. Clearly, revocation of probation is not an immediate and automatic consequence of pleading guilty. See Cuthrell, 475 F.2d at 1366. Like a subsequent state court conviction, cf. Kincade, 559 F.2d at 908, revocation of probation may or may not occur sometime in the future, and whether it occurs is dependent on the actions of the defendant. A sentence of imprisonment upon revocation of probation is not generated by the plea but by the defendant's own unwillingness or inability to conform to the restrictions imposed as part of probation. Therefore, a term of imprisonment imposed in place of a revoked term of probation would be a direct consequence of violating a condition of probation (here, the condition that Parry not be rearrested), but not of pleading guilty. (Emphasis added.)

Parry v. Rosemyer, 64 F.3d 110 (3rd Cir., 1995).

[¶ 18] The trial court in its Order relied in great part upon the underlying transcript of the original sentencing on May 17, 2002, to base its decision, in which Yellow stated on the record that he understood the sentence:

MR. VINJE: And I understand, and I believe Mr. Yellow understands, that if he was revoked, the court could actually impose up to the maximum.

THE COURT: Yes... You understand all that, Mr. Yellow?...

THE DEFENDANT: Yes.

Order, at 3; Sentencing Transcript at 4-5.

[¶ 19] However, an examination of the underlying sentencing hearing in 2002 reveals that the sentencing court failed to ensure that Yellow understood his rights before entering a plea and whether Yellow's plea was voluntary, were not adhered to at the time of sentencing. The Rule requires the sentencing court to determine the defendant understands his constitutional and statutory rights before accepting a guilty plea and must

ensure that the defendant's plea is voluntary.

(1) The court may not accept a plea of guilty without first, by addressing the defendant personally...in open court, informing the defendant of and determining that the defendant understands [his constitutional and statutory rights, which are enumerated within the Rule]...

(2) Ensuring That a Plea is Voluntary. Before accepting a plea of guilty, the court must address the defendant personally in open court...and determine that the plea is voluntary and did not result from force, threats, or promises other than promises in a plea agreement. The court must also inquire whether the defendant's willingness to plead guilty results from discussion between the prosecuting attorney and the defendant or the defendant's attorney.

Rule 11(b)(1) and (2), NDRCrimP

[¶ 20] While there was substantial compliance with Rule 11 at the sentencing, nowhere within the transcript is it indicated that the sentencing court addressed Yellow directly to determine whether Yellow understood his constitutional and statutory rights or to determine whether Yellow's pleas were voluntary and that his guilty plea did not result from force, threats, or promises other than in the plea agreement, as required by Rule 11.

[¶ 21] Further, there was no presentence investigative report conducted, nor waived, upon the record, as required by Section 12.1-32-02(11), N.D.C.C. *See also* Rule 32(c), NDRCrimP.

[¶ 22] Thus, although the trial court substantially relied upon the transcript of the original sentencing court to use Yellow's statement that he understood the terms of his plea and the collateral consequences of his probation in the event the probation was revoked, the trial court's failure to address whether Yellow truly did understand these consequences was clearly erroneous.

[¶ 23] **Whether the trial court's denial of the Defendant's petition for post-**

conviction relief on the grounds of Ineffective Assistance of Counsel was clearly erroneous when the trial court, in basing the Defendant's statements on the record at his initial sentencing that he understood that if he violated the terms of his probation to his sentence, failed to determine whether the underlying examination of the Defendant pursuant to Rule 11, N.D.R.Crim.P., at the initial sentencing was legally sufficient to determine whether the Defendant understood the collateral consequences of accepting a plea agreement, when the required inquiries by the sentencing court had not been fully placed upon the record?

[¶ 24] As indicated above, at the post conviction hearing Yellow's counsel did not argue the Double Jeopardy argument or the credit for time served argument, although the latter was addressed in the Order. However, the issues about Ineffective Assistance of Counsel are, at least to Yellow, wrapped up in the larger issue of whether he objectively understood that if he violated probation that he could be resentenced to additional incarceration, up to the maximum penalty for his offenses. Here, the crux of the appeal which Yellow is maintaining relates back to the original sentencing, in which the requisite inquiries by the sentencing court were not provided to establish that he truly understood the potential consequences of violating his probation. Therefore, the arguments relating to Double Jeopardy, above, are incorporated herein and reiterated upon this issue.

CONCLUSION

[¶25] The denial of Yellow's Motion for Post Conviction Relief was clearly erroneous and should be reversed and remanded.

Dated this 13th day of January, 2012.



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)	08-02-K-01369
State of North Dakota,)	
)	
Respondent-Appellee.))	

I, Russell J. Myhre, do hereby certify that on January 13, 2012, I served the following documents:

1. Appellant's Appendix (PDF to Opposing Counsel and Supreme Court)
2. Appellant's Brief (PDF to Opposing Counsel and Word to Supreme Court)

On:

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by Electronic Filing, pursuant to N.D. Sup. Ct. Admin. Order 16.

Dated this 13th day of January, 2012.



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