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JANUARY 29, 2013
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	Supreme Court Nos. 20120391
Plaintiff-Appellee,	)	
	)	
-vs-	)	
	)	Rollette County
Walter Grant,	)	No. 40-2012-CR-251
	)	
Defendant-Appellant.	)	

BRIEF OF APPELLANT

APPEAL FROM CRIMINAL JUDGMENT
DATED OCTOBER 22, 2012
ROLLETTE COUNTY DISTRICT COURT
NORTHEAST JUDICIAL DISTRICT
THE HONORABLE JOHN C. McCLINTOCK, PRESIDING

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WALTER GRANT

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[¶1] Whether the sentence imposed upon the Defendant was an illegal sentence which should be corrected?

[¶2] Whether the trial court abused its discretion in denying the Defendant a request to be represented by an attorney?

STATEMENT OF THE CASE

[¶ 3] **A. Nature of the case, course of the proceedings, and disposition in the trial court.** This is an appeal from a criminal judgment and sentence imposed upon the defendant. Walter Grant (hereinafter "Grant"), dated October 22, 2012, resulting from a guilty plea to the charge of Contact by Bodily Fluids or Excrement, a violation of § 12.1-17-11, N.D.C.C., a Class C Felony. This case is an appeal on State v. Grant, Case No. 40-2012-CR-251 (Rollette County, North Dakota); it is **not** an appeal from State v. Grant, Case No. 40-2012-CR-114. However, there is a certain interlinking and interconnection between these cases, insofar as the issues of this case are concerned. Grant represented himself at the sentencing hearing on the Contact by Bodily Fluids case on October 22, 2012. Grant's previous attorney had filed a motion for permission to withdraw as Grant's counsel on October 1, 2012; a hearing was held that same day; and an order entered, granting the prior attorney permission to withdraw. Although Grant requested the attorney continue representing him, based upon some conditions, or he be granted new counsel, the trial court denied the request and provider Grant with three alternatives: (1) continue the representation with his current attorney; (2) hire an attorney at his own expense; or (3) represent himself. The attorney demurred, based upon specific issues and a lack of communication from the client. The trial court then reduced Grant's options

down to the latter two. Grant also requested access to the local law library, but since there was none available, his request was denied. Grant continued to contact the trial judge, continuing his requests for an attorney to represent him or at least access to law books so he could prepare for his case, and a hearing was held on October 15, 2012, which further elucidated upon the trial judge's order and reasons for denial of these requests. Subsequently, Grant, representing himself, at what was originally scheduled to be a pretrial conference, suddenly pled guilty on this charge. The trial court imposed a sentence of five (5) years imprisonment, with credit for 111 days previously served on the charge; waived the payment of a $400 criminal administration fee and the payment of a $100 defense/facility fee; and required the defendant to seek and obtain appropriate treatment while incarcerated. Grant was given credit for time served since the day he was arrested for this charge, August 20, 2012. At that time, Grant was incarcerated and being held on bond on other unrelated charges in State v. Grant, Case No. 40-2012-CR-114, Rollette County, North Dakota. He had been in custody on those charges from April 2, 2012. Grant promptly gave oral notice to the trial court that he was appealing his sentence on October 22, 2012, which was subsequently placed into writing. On December 22, 2012, Grant pled guilty to Terrorizing, a violation of § 12.1-17-04, N.D.C.C., a Class C Felony; Felonious Restraint, a violation of § 12.1-18-02, N.D.C.C., a Class C Felony; and Simple Assault, a violation of § 12.1-17-01, N.D.C.C., a Class B Misdemeanor. Basically, Grant's sentences all ran concurrently with his sentence in the Contact by Bodily Fluids case. At this sentencing he received credit for 251 days of incarceration. Grant did not appeal this case and has expressed no apparent desire to appeal this latter case despite appropriate inquiry and unilateral communication with him.

STATEMENT OF THE FACTS

[¶ 4] This is an appeal from a criminal judgment and sentence imposed upon the defendant Grant, dated October 22, 2012, resulting from a guilty plea to the charge of Contact by Bodily Fluids or Excrement, a violation of § 12.1-17-11, N.D.C.C., a Class C Felony.

[¶ 5] Grant's previous attorney had filed a motion for permission to withdraw as Grant's counsel on October 1, 2012, which was granted by the trial court. As indicated in the trial attorney's motion for permission to withdraw as counsel for Grant, the attorney-client relationship was apparently a contentious one, in which the communication between the attorney and the client was virtually nil and there was a struggle between the attorney and the client regarding strategy and tactics.

[¶ 6] Although Grant requested the attorney continue representing him, based upon some conditions, or he be granted new counsel, the trial court denied the request and provider Grant with three alternatives: (1) continue the representation with his current attorney; (2) hire an attorney at his own expense; or (3) represent himself. The attorney demurred, based upon specific issues and a lack of communication from the client. The trial court then reduced Grant's options down to the latter two. Grant also requested access to the local law library, but since there was none available, his request was denied. Grant continued to contact the trial judge, continuing his requests for an attorney to represent him or at least access to law books so he could prepare for his case, and a hearing was held on October 15, 2012, which further elucidated upon the trial judge's order and reasons for denial of these requests.

[¶ 7] On October 22, 2012, Grant, representing himself, at what was originally scheduled

to be a pretrial conference, suddenly pled guilty on this charge. Although Grant's prior attorney was in the courtroom at the time of sentencing, the prior attorney did not represent Grant at the sentencing.

[¶ 8] The trial court imposed a sentence of five (5) years imprisonment, with credit for 111 days previously served on the charge; waived the payment of a $400 criminal administration fee and the payment of a $100 defense/facility fee; and required the defendant to seek and obtain appropriate treatment while incarcerated. Grant was given credit for time served since the day he was arrested for this charge, August 20, 2012. At that time, Grant was incarcerated and being held on bond on other unrelated charges in State v. Grant, Case No. 40-2012-CR-114, Rollette County, North Dakota. He had been in custody on those charges from April 2, 2012. Grant promptly gave oral notice to the trial court that he was appealing his sentence on October 22, 2012, which was subsequently placed into writing. Although some of the issues involved in the immediate case have some relevance with reference to State v. Grant, Case No. 40-2012-CR-114, Rollette County, North Dakota, in terms of the date to provide credit for time served, the cases are otherwise unrelated.

[¶ 9] At no time did Grant specifically waive his right to an attorney. At the hearings on October 1, October 15, and October 22, Grant renewed his requests for an attorney on the record. In separate writings to the trial judge, Grant made requests for an attorney, access to a law library, or access to a pen with which to handwrite submissions to the court, which were received by the court on October 8, 2012 (two letters), and October 11, 2012.

[¶ 10] The pretrial hearing on October 22, 2012, at which an issue regarding Grant's requests for approximately 100 subpoenas for witnesses appeared to be denied, Grant

suddenly announced to the trial court that he wished to plead guilty. The offense for which Grant was being sentenced did not fall under the mandatory provisions for a pretrial investigative report of § 12.1-32-02(11), N.D.C.C., so Grant's plea was then taken and Grant was sentenced to the maximum amount of time for incarceration authorized for a Class C Felony.

[¶ 11] Grant requested that he be given credit for time served since he was originally arrested and being unable to post sufficient bond, he had been incarcerated on the charges in Case No. 40-2012-CR-114, since April 2. However, the incident for which Grant had pled guilty occurred on August 20, and the trial court only granted him credit for time served from August 20.

[¶ 12] Grant promptly appealed his sentence.

LAW AND ARGUMENT

[¶ 13] A. Jurisdiction

[¶ 14] 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, N.D.C.C., which provide as follows:

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

N.D.C.C. § 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.

N.D.C.C. § 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.

[¶ 15] While normally this court does not examine the sentences imposed by trial courts, this court will review a sentence which is not authorized by law.

> A trial court has broad discretion in fixing a criminal sentence. State v. Henes, 2009 ND 42, ¶ 6, 763 N.W.2d 502. Within this discretion also lies a trial court's authority to decide whether a sentence should run concurrently or consecutively. State v. Salveson, 2006 ND 169, ¶ 4, 719 N.W.2d 747; but see N.D.C.C. § 12.1-32-11(3) (limiting a trial court's authority to impose consecutive sentences for multiple misdemeanor convictions). We have repeatedly held we have "no power to review the discretion of the sentencing court in fixing a term of imprisonment within the range authorized by statute." State v. Loh, 2010 ND 66, ¶ 19, 780 N.W.2d 719. Rather, our review of a criminal sentence is generally confined to whether the trial court acted within the statutorily prescribed sentencing limits or substantially relied on an impermissible factor. Id. Thus, we will vacate a trial court's sentencing decision only if the trial court acted outside the limits prescribed by statute or substantially relied on an impermissible factor in determining the severity of the sentence. Henes, at ¶ 6.

State v. Gonzalez, 2011 ND 143, 799 N.W.2d 402 [¶ 6].

[¶ 16] The trial court is required to give credit for time served in certain instances when imposing a term of imprisonment.

> 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. The total amount of credit the defendant is entitled to for time spent in custody must be stated in the criminal judgment.

N.D.C.C. § 12.1-32-02(2).

[§ 17] Here, Grant claims that the trial court’s denial of credit for time served is an illegal sentence, as that term is understood under Rule 35(a), NDRCrimP.

[¶ 18] **B. Standard of Review**

[¶ 19] The standard of review on a claim of denial of counsel is *de novo* and based upon whether the trial judge abused his discretion with the denial.

> "A criminal defendant's right to counsel is guaranteed by the Sixth Amendment of the United States Constitution and Article I, Section 12 of the North Dakota Constitution." City of Fargo v. Rockwell, 1999 ND 125, ¶ 7, 597 N.W.2d 406. The right to court-appointed counsel is, however, "neither . . . absolute, [nor] 'free.'" State v. DuPaul, 527 N.W.2d 238, 240-41 (N.D. 1995). Under N.D.R.Crim.P. 44(a), an indigent defendant is entitled to court-appointed counsel in all felony and misdemeanor cases if the potential punishment includes imprisonment. This is a limited right, requiring the defendant to establish indigency and thus entitlement to appointment of counsel. State v. Hilgers, 2004 ND 160, ¶ 7, 685 N.W.2d 109 (citation omitted). "There is no legal reason to appoint counsel for someone who can afford and obtain his own." DuPaul, 527 N.W.2d at 241. "The standard of review on an alleged denial of the constitutional right to counsel is de novo." City of Fargo v. Habiger, 2004 ND 127, ¶ 18, 682 N.W.2d 300. We review a district court's denial of request for appointed counsel under an abuse of discretion standard, inquiring whether the court "acted arbitrarily, unconscionably, or unreasonably." DuPaul, 527 N.W.2d at 240.

City of Grand Forks v. Corman, 2009 ND 125, 767 N.W.2d 847 [¶ 8].

[¶ 20] **Whether the sentence imposed upon the Defendant was an illegal sentence which should be corrected?**

[¶ 21] The standard for review of a criminal sentence is limited to a determination of whether the trial court's sentence was not authorized by statute or substantially relied upon an impermissible factor. Gonzalez, at [¶ 6].

[¶ 22] Grant argues that the trial court's denial of his requests for appointed counsel was an abuse of discretion and that the trial court acted arbitrarily, unconscionably, and unreasonably when it denied him appointed counsel. Here, Grant was incarcerated on an unrelated case and could not make bond on April 2, 2012. The incident leading to the charge in this instant case, Contact by Bodily Fluid, occurred on August 15, 2012. The

trial court gave Grant credit for 111 days when Grant was sentenced on October 22, 2012. The terms for those situations which regard conditions under which credit for time served is determined are contained in N.D.C.C. § 12.1-32-02(2), which would indicate that Grant should be given for time served from the date of the incident and not from the date of original incarceration. However, on the record on October 22, 2012, Grant apparently referred to a previous plea proposal discussed between the state's attorney and prior counsel in which he felt he had been promised credit for time served since the date of his original incarceration. It is unclear on the record whether this proposal had been withdrawn or even made.

[¶ 23] **Whether the trial court abused its discretion in denying the Defendant a request to be represented by an attorney?**

[¶ 24] The issues—and problems—associated with a criminal defendant's right to counsel and to represent himself have been outlined by this court:

> A criminal defendant's right to counsel is guaranteed by N.D.Const. Art. I, § 12 and by the Sixth Amendment of the United States Constitution. State v. Wicks, 1998 ND 76, ¶16; State v. DuPaul, 527 N.W.2d 238, 240 (N.D. 1995). See Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963). In Wicks, 1998 ND 76, ¶17, we described our standard of review of a constitutional right as de novo, and we explained the denial of the right to counsel at trial requires reversal of a defendant's conviction because prejudice is presumed.

State v. Poitra, 1998 ND 88, 578 N.W.2d 121 [¶ 7]. While a criminal defendant is entitled to appointed counsel in the event he cannot afford to retain an attorney himself, the defendant is not entitled to pick and choose his own attorney, but must accept the counsel provided for him.

[¶ 25] If the defendant either cannot or will not cooperate with his counsel, is abusive to counsel, or makes demands upon appointed counsel that he cannot ethically proceed in the manner demanded by the defendant, then the appropriate remedy is to require the defendant to precede *pro se.* This court has set forth the appropriate remedy:

> …Holbach's behavior is indicative of using pretrial motion practice and requesting different lawyers to obstruct the legal process. We have held a request for a new lawyer after the trial court denied an initial request for new counsel constituted the functional equivalent of a voluntary waiver. See Rockwell, 1999 ND 125, ¶ 14, 597 N.W.2d 406; Harmon, 1997 ND 233, ¶ 21, 575 N.W.2d 635. Holbach was represented by at least four different lawyers after the criminal judgment, all of whom either withdrew or were fired before the probation revocation hearing. Holbach also requested several judges recuse themselves from the case, claiming prejudice and judicial bias. The district court noted Holbach has "gone out of [his] way to alienate virtually everyone that represented--appointed to represent [him]." The court said new counsel would likely be faced with the same issues as his current lawyer, and then left Holbach to choose whether he was going to represent himself or have his current lawyer represent him at the hearing. After the court reiterated that the hearing would go on as scheduled and Holbach had the option of having his current lawyer represent him or to represent himself, Holbach fired his lawyer in open court. We conclude the trial court did not err in holding Holbach's conduct constituted the "functional equivalent" of a voluntary waiver of counsel.
>
> [¶12] Second, the Court must determine whether a waiver was knowingly and intelligently made. "A knowing and intelligent waiver requires a defendant be aware of the dangers and disadvantages of self-representation so the record establishes the defendant knows what he is doing and his choice is made with eyes open." Dvorak, 2000 ND 6, ¶ 16, 604 N.W.2d 445 (citing Faretta, 422 U.S. at 835). This inquiry involves a fact-specific determination. See id. However, a specific, on-the-record warning of the dangers of self-representation is not required to establish the defendant had the required knowledge from other sources. Id. "Under our cases, the test is not limited to what the trial court said or understood, the inquiry focuses on what the defendant understood." Id. (citing 3 LaFave et al., Criminal Procedure § 11.5(c), at 578-79 (2d. ed. 1999)).

State v. Holback, 2007 ND 114, [¶¶ 11-12]. *See also* Faretta v. California, 422 U.S. 806, 835 (1975); State v. Hart, 1997 ND 188, 569 N.W.2d 451 (appointment of stand by counsel); State v. Harmon, 1997 ND 233; State v. Wicks, 1998 ND 76.

[¶ 26] In this case, Grant did not wish to proceed representing himself, and he made repeated requests for appointed counsel, both in letter and on the record in three consecutive hearings. Holback can be distinguished on the facts of that case. In that case, the defendant had already had four (4) previous attorneys represent him, and it was well established on the record of the case that the defendant's abusive behavior toward another attorney would continue if he were appointed a subsequent attorney. Here, Grant had only been represented by one previous attorney, and even if the attorney's allegations in his motion were completely true, it is possible that another attorney would be able to communicate effectively with Grant. Also, Grant did not fire his attorney in open court, like Holback did. Instead, he specifically requested that the attorney continue representing him. While he said he would make an effort to get along with his present attorney, if he were to continue representation, or a subsequent attorney, if one were to be appointed, Grant also expressed his concerns about having his issues fairly represented at trial. Nevertheless, the trial judge only gave him three options, none of which included subsequent counsel being appointed. Grant, an indigent who had been incarcerated almost six months on the underlying criminal case, claimed he could not afford an attorney and could not act as his own attorney. When it became apparent the trial court would not continue the previous attorney's representation and would not appoint another attorney, Grant then requested access to a law library, but there was none available. He finally requested a pen with which to write documents to the court, but this was denied and he was allowed a pencil. When the pretrial conference was held on October 22, 2012, Grant indicated he wanted over 100 witnesses subpoenaed for his trial, which was objected to and denied. Grant then quickly told the trial court he wished to change his

plea, which was taken, and Grant was sentenced.

[¶ 27] When Grant realized he would not be granted credit for time served since April 2, 2012, the date on which he was originally incarcerated on the underlying case, but only from August 22, 2012, when the incident involving bodily fluids upon a law enforcement officer occurred, Grant announced his intention to appeal, which was later reduced to writing.

CONCLUSION

[¶ 28] Here, Grant did not voluntarily make the equivalent of a knowing waiver of his right to counsel, and he did not make a knowing and intelligent waiver of his right to counsel. Grant had only had one attorney represent him during the course of this case. That attorney filed a motion for permission to withdraw from representation of Grant, which was granted. The trial court would not appoint a subsequent attorney for Grant. Grant contended he was indigent and could not afford a retained attorney and could not represent himself. Grant offered to work better with any attorney offered to him. Further, Grant made numerous attempts to convince the court to allow his previous counsel continue to represent him or to have another subsequent attorney represent him. It is clear from Grant's spontaneous decision to plead guilty on October 22, 2012, and agree to proceed to sentencing, as well as his misunderstanding about whether he would be given credit for time served from the date of original incarceration on an unrelated case or from the date of occurrence that he did not understand the consequences of representing himself. The trial court did not establish any grounds upon which to deny continued representation or alternative representation, other than the fact Grant and his previous attorney had clearly not been able to communicate effectively.

[¶ 29] This case is distinguishable from Holback, in that Grant only had one previous attorney with which he had had difficulties, or vice versa, whereas the defendant in Holback had had four previous attorneys. Further, Holback had also engaged in other behavior which had the intention of delaying the proceedings by filing motions, alienating virtually everyone involved in the case, and causing situations in which he had been caused appointed counsel to be removed. While Grant may not have been the most ideal client to represent and may have proven himself difficult to work with, there is a vast difference between going through four attorneys by "firing" them and having one attorney move to withdraw because he found the client difficult to work with. While Holback stands for a worthwhile proposition, that appointed counsel do not have to be abused and misused by the clients appointed to them, Holback received several bites off that apple before finally having reached the point of making a constructive waiver of his right to counsel. Grant only received one bite. As a result, Grant made some mistakes in his own representation of himself, including pleading guilty and then promptly appealing the case. Here, this court cannot tell from the record whether any constructive waiver of his right to counsel was made simply because Grant could not get along with one attorney in this case or whether Grant made that waiver knowingly. This case should be reversed and remanded for further proceedings.

Dated this 29th day of January, 2013.

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IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff-Appellee,	)	Supreme Court No. 20120391
-vs-	)	Case No. 40-2012-CR-000251
Walter Grant, Defendant-Appellant.	)	CERTIFICATE OF SERVICE

I, Russell J. Myhre, do hereby certify that on January 29, 2013, 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:

Supreme Clerk of Court
ND Supreme Court
State Capitol
Judicial Wing, 1st Floor
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by Electronic Filing, pursuant to N.D. Sup. Ct. Admin. Order 16.

Dated this 29th day of January, 2013.

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I, Russell J. Myhre, hereby certify that pursuant to Rules 5(b) and 5(f), NDRCivP, that on the 18th Day of September, 2012, I deposited, with postage prepaid by first class mail, in the United States post office at Valley City, North Dakota, a true and correct copy of the following document(s):

1. Appellant's Appendix
2. Appellant's Brief

The copies of the foregoing were securely enclosed in an envelope and addressed as follows:

Walter Grant Jr.
NDSP
P.O. Box 5521
Bismarck, ND 58506-5521

To the best of my knowledge, information, and belief, such address was the last known post office address of the party intended to be so served. These above-referenced documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure, Rule 5.

Dated 29th of January, 2013.

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