

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

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| State of North Dakota, |) | |
| |) | |
| |) | Supreme Court No. |
| Plaintiff/Appellee, |) | 20180265 and 20180266 |
| |) | |
| vs. |) | |
| |) | Burleigh County District No. |
| Daniel Lynn Goldsack, |) | 08-2015-CR-02250 and |
| |) | 08-2015-CR-03460 |
| Defendant/Appellant. |) | |

ON APPEAL FROM SECOND AMENDED CRIMINAL JUDGMENT AND
SENTENCE ENTERED ON JUNE 29, 2018
FROM THE DISTRICT COURT
FOR THE SOUTHDCENTRAL JUDICIAL DISTRICT
BURLEIGH COUNTY, NORTH DAKOTA
THE HONORABLE SONIA ANDERSON, PRESIDING

BRIEF OF APPELLANT

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[¶ 1] STATEMENT OF THE ISSUES

[¶ 2] There are two issues presented in this case, which involves a probation revocation and resentencing:

1. Whether the trial court's factual findings regarding the probation violation was clearly erroneous.
2. Whether the State proved by a preponderance of the evidence that the defendant violated the conditions of the evidence.

[¶ 3] STATEMENT OF THE CASE

[¶ 4] This is an appeal arising from a second amended criminal judgement entered after a probation revocation hearing.

[¶ 5] The defendant (hereinafter "Goldsack") had previously pled guilty on March 22, 2016, in State v. Goldsack, Case No. 08-2015-CR-02250, to two counts, specifically Conspiracy to Deliver Methamphetamine within 1,000 Feet of a School, a Class AA Felony in violation of Section 12.1-06-04, N.D.C.C.; and to Delivery Within 1,000 Feet of a School, a Class AA Felony in violation of Section 19-03.1-23.1, N.D.C.C. Goldsack also pled guilty on March 22, 2016, in State v. Goldsack, Case No. 08-2015-CR-03460. Subsequently, while on supervised probation as a part of his criminal sentence in both cases, a revocation petition for both cases was presented to the trial court, and following a revocation hearing on November 26, 2017, an Amended Criminal Judgment was entered on December 18, 2017.

[¶ 6] A second petition for revocation of probation was filed on January 22, 2018, and an Order to Apprehend Warrant was issued by the trial court on January 23, 2018. A

Sheriff's Return that the warrant had been served was filed on May 16, 2018, by the Ward County Sheriff.

[¶ 7] The Petition for Revocation of Probation in both cases contain a single allegation:

Allegation 1: The Defendant violated Condition #9 of the Appendix A in that the Defendant failed to report his change of address to the probation office and his whereabouts are unknown. Evidence used to support this allegation is DOCR records.

Register of Actions, Case No. 08-2015-CR-02250, Index # 61; Case No. 08-2015-CR-03460, Index # 59.

[¶ 8] A revocation hearing in both cases was held on June 18, 2018.

[¶ 9] At the conclusion of the hearing, the trial court found that the State had met its burden of proof. Revocation Hearing Transcript (hereinafter "Tr." or "transcript"). 26:24-25.

[¶ 10] The trial judge resentenced Goldsack as follows:

1. Incarceration for a period of six (6) years.
2. Credit for eighty-seven (87) days previously served.
3. Granted good time for any time spend in custody, as allowed by statute.
4. The sentences in Case No. 08-2015-CR-02250 and 08-2015-CR-03460 to run concurrently.
5. To complete treatment while incarcerated.
6. Reduce remaining fines and fees to civil judgment.

Register of Actions, Case No. 08-2015-CR-02250, Index # 79; Case No. 08-2015-CR-03460, Index # 76. *See also* Tr. 29:25, 30:1-6.

[¶ 11] Goldsack filed a timely filed a notice of appeal on July 2, 2018. Appendix, Register of Actions, Case No. 08-2015-CR-02250, Index #80; Case No. 08-2015-CR-03460, Index #77. Goldsack argues the probation violation was clearly erroneous and the State failed to prove by a preponderance of the evidence that the defendant violated the

conditions of probation contained in Condition #9 of the Appendix A of his criminal judgment.

[12] STATEMENT OF THE FACTS

[¶ 13] At the probation revocation hearing on July 18, 2018, Department of Corrections Parole and Probation Officer Jennifer Goetzfried testified that she was Goldsack's supervising officer in both cases. She testified that Goldsack did come to see her on two (2) occasions. Tr. 6:24-25. She testified that on January 13, 2018, surveillance officer Dan Glarum went to Goldsack's residence. He spoke to a female at the residence who reported that Goldsack had been "kicked out" of the residence along with his wife about five (5) days prior to January 13th due to conflict occurring at the residence. Tr. 7:1-8.

[¶ 14] Goetzfried testified that she was subsequently contacted by Jess Wertz from Morton County Social Services on January 16, 2018, that she had received information from a third party that Goldsack was living in a home near the TP Motel in Mandan, that he and his wife were in possession of a vehicle, and that they "may or may not" be staying in the vehicle. Tr. 7:17-23.

[¶ 15] Goetzfried testified that she staffed the case with her supervisor and filed a petition for revocation on or about January 22, 2018. Tr. 8:1.

[¶ 16] Goetzfried testified that Goldsack was required to provide any new address to Goetzfried within twenty-four (24) hours. Tr. 8:7-9.

[¶ 17] Goetzfried testified that she had one (1) telephone conversation with Goldsack's wife on January 23, 2018—a day after the Petition for Revocation had been filed with the court. Goldsack's wife "argued with me about him [Goldsack] staying at

his reported address. Goldsack then got on the phone, and he argued with Goetzfried about them staying at his reported address. She testified that the last comment by Goldsack to her was “Fuck you, bitch”, whereupon Goldsack hung up the phone. Tr. 8:18-25, 9:1-9.

[¶18] Goetzfried testified that Goldsack was required to meet with her monthly. He did not meet with her in January of 2018 after the petition was filed. She further testified that Goldsack was required to continue to report to her even after a petition is filed. Tr. 9:13-25. She testified that the next contact she had with Goldsack was after he was arrested in Minot, North Dakota, in May, 2018. Tr. 10:1-6.

[¶19] On cross-examination, Goetzfried testified that she did have one or two office meetings with Goldsack in November and on December 28, 2017. At those meetings, Goldsack reported his address at 603 Third Avenue Northeast, No. 6, Mandan, North Dakota. She testified that the next meeting with Goldsack was to be a home visit in January. Tr. 13-25. However, she later testified she could not specifically recall she would do a home visit or if a home visit was set up between her and Goldsack. Tr. 11:1-3.

[¶20] Goetzfried testified that Goldsack was living at that address with his ex, Kayla, at that address. She testified that Glarum had met with a female who may have been Kayla’s sister, who had reported that Goldsack was not residing at the address. In the January 23 telephone conversation, Goldsack stated that the female was Kayla’s sister. However, she testified there was no further effort to verify whether Goldsack was residing at that address. Tr. 11:13-25. She also testified that such a verification would be “redundant” and did not personally verify whether Goldsack was residing at that address.

She testified there was no effort to verify who the female was. She testified that in the telephone conversation on January 26, she informed Goldsack that a warrant had been issued. Tr. 12.

[¶21] The State then rested. Tr. 6-7.

[¶22] Kayla Veitz, who resided at 603 Third Avenue Northeast, No. 6, Mandan, North Dakota, testified she had a child with Goldsack, and he lived with her in December of 2017 and January of 2018. He helped watch their son while she worked. She testified that she did not have a sister, but she did have a nanny (also referred to as a “babysitter”) who was staying with her while Goldsack sought employment. On January 13, 2018, the nanny reported to Veitz that a person had stopped by to verify Goldsack’s residence, and she told Veitz that she had told the person he was not living at that address. Tr. 14:16-25.

[¶ 23] Veitz testified that the nanny, or babysitter, was Danny Jo McKeen, and on cross-examination said that McKeen did not get along and told her she “talked a lot of bad things about [Goldsack].” Tr. 15-19.

[¶24] Veitz also testified on redirect examination that during the time period of time involved, Goldsack did not have a working phone because he was “out of minutes.” Tr. 17:12-15.

[¶25] Jessica Goldsack testified that she was Goldsack’s wife and was also staying at Veitz’s apartment during the period of time in question. Tr. 18:1-23. She testified that she and Goldsack shared a phone at that period of time, and that due to finances the phone was disconnected. Tr. 19:7-16.

[¶26] Goldsack testified that he was living with Veitz and his wife Jessica, together with their children, at 306 Third Street Northeast, No. 6, Mandan, North Dakota, during the period in question. Tr. 20:7-14.

[¶27] Goldsack testified that he had made all previous appointments with Goetzfried, had called her, and was attempting to set up a home visit, as Goetzfried had requested at the December meeting. However, he learned that a warrant had been issued for him and contacted Goetzfried on January 23, 2018. He testified Goetzfried told him she had issued a warrant for him because he was not living at his stated address. He testified that Goetzfried called him a liar when he said he was still living there, and they got into an argument. Tr. 22:12-16. Goldsack testified he was not aware that the surveillance officer, Glarum, had been to the residence until after the conversation with Goetzfried. Tr. 22: 17-22. He also testified he told Goetzfried he was not going to turn himself in “when I did nothing wrong.” Tr. 23: 7-8.

[¶28] On cross-examination, Goldsack testified that after the telephone call with Goetzfried, he did not attempt to contact her, and he moved to Minot for work. Tr. 24:4-15.

[¶29] At the conclusion of the hearing, the trial court found that the State had met its burden of proof, found Goldsack in violation of the terms of his supervised probation, and resentenced Goldsack. Tr. 26:24-25.

[¶30] Goldsack filed a timely filed a notice of appeal on July 2, 2018.

[¶31] JURISDICTION

[¶32] Appeals are allowed from lower district courts to the Supreme Court as provided by law. N.D. Const. art. VI, § 6. A defendant may appeal from a verdict of

guilty and final judgment of conviction. N.D.C.C. § 29-28-06. A criminal defendant's statutory right to appeal includes the right to appeal after a probation revocation hearing. State v. Causer, 2004 ND 75, ¶ 23, 678 N.W.2d 552.

[¶33] STANDARD OF REVIEW

[¶34] The North Dakota Supreme Court reviews a revocation of probation under a two-step analysis. Causer at ¶ 30; State v. Jacobsen, 2008 ND 52, ¶ 8, 746 N.W.2d 405. First, the Court will review the district court's factual findings regarding the probation violation under the clearly erroneous standard. Jacobsen at ¶ 8. "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, there is no evidence to support it, or this Court is convinced, on the basis of the entire record, that a mistake has been made." State v. Wetzel, 2011 ND 218, ¶ 5, 806 N.W.2d 193. In probation revocation proceedings, the State must prove the defendant violated the conditions of probation by a preponderance of the evidence. *See Id.* at ¶ 8. If a violation is proven, the court will then perform the second step of the analysis, which is to review the trial court's decision to revoke probation under the abuse of discretion standard. Jacobsen, at ¶ 8.

[¶35] ARGUMENT

[¶36] Whether the trial court's factual findings regarding the probation violation was clearly erroneous.

[¶ 37] The trial court's factual findings were as follows:

I find that the State has met its burden of proof. Mr. Goldsack could've certainly showed up in person and verified that with her as soon as he knew about it. And then he absconded at the end of the month, didn't report. There's no excuse for that. He's got three – he's got A felonies.

What is the State's recommendation? This is the second revocation.

Tr. 26:24-25, 27:1-6.

[¶38] The conditions of probation are strictly construed in favor of the offender.

Interpretation of a condition of probation is a question of law, fully reviewable on appeal. Wardner, 2006 ND 256, ¶ 22, 725 N.W.2d 215. Conditions of probation are strictly construed in favor of the offender; however, the conditions are construed as mandatory because of the duty to regulate a probationer's activities to help in his or her rehabilitation and at the same time to guard against continued criminal behavior. Id.

State v. McAvoy, 2007 ND 178, ¶ 11, 741 N.W.2d 198.

[¶39] Goldsack's attorney argued that the trial court should focus on what occurred between November 16, 2017, when Goldsack was placed on probation, and January 16, 2018, when the petition was filed. He stated that "I think it's a narrow window." He argued that since on January 13, 2018, a person told the surveillance officer that Goldsack did not live at the stated residence, but testimony from Goldsack's witnesses was that "in fact, [he was] living there and that was his residence and that was where he could be found." Tr. 26:12-13. He faulted Goetzfried for not verifying that the information she had received was accurate before filing the Petition for Revocation. Tr. 26:14-20.

[¶40] The State argued that it had proven Allegation No. 1. The State said Goldsack did have a change of address, did not report that fact, and his whereabouts were unknown. The State also argued that Goldsack did not have a meeting with his probation officer in January or thereafter. Tr. 25:12-25, 26:1.

[¶41] Goldsack argues that the trial court's finding that he had violated the terms of his probation, specifically Condition #9 of the Appendix A to his Criminal Judgment, was clearly erroneous. He argues that the trial court erred in considering testimony and statements from the State's attorney—which did not constitute sworn testimony—

regarding actions from and after January 13, 2018. There was only a single allegation to the Petition, and that allegation only applied to the specific allegations which were contained in that allegation, not to facts or allegations which occurred after the Petition was filed and the Warrant was issued.

[¶42] Whether the State proved by a preponderance of the evidence that the defendant violated the conditions of the evidence.

[¶43] The arguments outlined above in Paragraphs 36-41, inclusive, are incorporated herein and made a part of the argument upon this issue.

[¶44] Here, the State's evidence consisted of Goetzfried's testimony that the only information she had to consider before filing a petition for revocation of Goldsack's probation was a report from surveillance officer Glarum based upon a third party report, and an unconfirmed report from Morton County Social Services that Goldsack and his wife were living in a car. However, the testimony of Veitz, Jessica Goldsack, and Daniel Goldsack was that he had continued to reside at the stated address. Goldsack testified that he did call Goetzfried immediately after he learned that a warrant had been issued for him, and that when he attempted to straighten out the misinformation, Goetzfried called him a "liar." Tr. 22:16. Goetzfried testified that Goldsack made an obscene statement to her, hung up on her, and did not report after that until he was arrested in May, 2018.

[¶45] Goldsack argues that the State did not meet its "fairly lenient" burden of proof. Tr. 26:4. He argues that Goetzfried merely took the word of surveillance officer Glarum, who in turn took the word of Danny Jo McKeen, who apparently did not like Goldsack. In essence, Goldsack argues, this was hearsay upon unverified hearsay, and this did not constitute sufficient evidence to establish a preponderance of the evidence in

his case. Goldsack further argues that the report from Morton County Social Services was not verified, either. He faults Goetzfried for not making an attempt to at least verify this information. This would have been a fairly simple process—there could have been a phone call to Goldsack, or if nothing else, it could have been a visit to his residence. Instead, when Goldsack attempted to straighten the matter out with Goetzfried, he was called a “liar.” Tr. 22:16.

[¶46] Goldsack argues that this very evident animosity between himself and Goetzfried unreasonably colored the decision to file a petition for revocation and to issue a warrant. He further argues that the State failed to sustain its burden of proof within this “narrow window” that was the basis for Allegation No. 1.

[¶47] CONCLUSION

[¶48] Goldsack argues that the trial court’s factual findings regarding the probation violation was clearly erroneous, and that the State failed proved by a preponderance of the evidence that the defendant violated the conditions of the evidence.

[¶49] The Appellant respectfully prays that the Court grant the relief requested.

Dated this 5th day of October, 2018.

Respectfully submitted,

/s/ Russell J. Myhre

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| |) | CERTIFICATE OF SERVICE |
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| Daniel Lynn Goldsack, |) | Burleigh County District No. |
| |) | 08-2015-CR-02250 and |
| Defendant/Appellant. |) | 08-2015-CR-03460 |

I, Russell J. Myhre, do hereby certify that on October 5, 2018, I served the following documents:

1. Brief of Appellant
2. Appendix of Appellant

On:

Julie Lawyer
Attorney at Law
Burleigh County Assistant State's Attorney
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Supreme Clerk of Court
ND Supreme Court
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I, Russell J. Myhre, hereby certify that pursuant to Rules 5(b) and 5(f), NDR CivP, that on the 5th day of October, 2018, 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. Appendix of Appellant
2. Brief of Appellant

To the defendant, listed at the following address:

Daniel Lynn Goldsack
c/o JRCC 2521 Circle Dr
Jamestown, ND 58401

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 this 5th day of October, 2018.

/s/ Russell J. Myhre

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| |) | 08-2015-CR-02250 and |
| Defendant/Appellant. |) | 08-2015-CR-03460 |

I, Russell J. Myhre, do hereby certify that on October 10, 2018, I served the following documents:

1. Brief of Appellant
2. Appendix of Appellant

On:

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Dated this 10th day of October, 2018.

/s/ Russell J. Myhre

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