

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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)	
State of North Dakota,)	
)	
Plaintiff and Appellee,)	
)	
vs.)	Supreme Ct. No. 20210356
)	Dist. Ct. No. 09-2020-CR-05117
Josiah Edward Dale Koval,)	
)	
Defendant and Appellant.)	

APPELLEE'S BRIEF

Appeal from the Amended Criminal Judgment entered on November 26, 2021,
and from the Denial of Defendant's Motion to Dismiss entered September 30,
2021

East Central Judicial District, Cass County, North Dakota
The Honorable Tristan J. Van de Streek, Presiding

ORAL ARGUMENT REQUESTED

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[¶ 3] ORAL ARGUMENT REQUESTED

[¶ 4] Oral argument is requested so that Appellee has an opportunity to emphasize its written arguments and respond to any rebuttal arguments presented by Appellant.

[¶ 5] STATEMENT OF ISSUES

[¶ 6] I. Whether the sentencing court's Order was statutorily authorized.

[¶ 7] II. Whether Koval's arguments constitute impermissible collateral attacks.

[¶ 8] STATEMENT OF FACTS

[¶ 9] On November 18, 2019, the Appellant, Josiah Koval, having pleaded guilty to a charge of stalking, was sentenced in Cass County File No. 09-2019-CR-03505. (Appellant's Appendix, "A.A.", at 21.) Koval was sentenced to serve 360 days in the custody of the North Dakota Department of Corrections, first to serve 74 days, with the balance suspended for one year of supervised probation. (A.A. at 21.) Koval was given credit for 74 days served. (A.A. at 21.) The sentencing court outlined the terms of Koval's probation in an attached Appendix A or Certificate to the Criminal Judgment. (A.A. at 22.) The sentencing court issued an order captioned Post-Disposition Order Prohibiting Contact. (A.A. at 26.) The Order was issued "pursuant to N.D.C.C. 12.1-31.2-02." (A.A. at 26.) The Order prohibited Koval from having contact with the victim of the stalking offense. (A.A. at 26.) The Order was signed by Koval and the sentencing judge. (A.A. at 27.)

[¶ 10] On October 23, 2020, the State charged Koval by way of an Information with harassment, in violation of N.D.C.C. § 12.1-17-07(1)(c), and violation of an order prohibiting contact, in violation of N.D.C.C. § 12.1-31.2-02(4). (A.A. at 7.) The State alleged that on or about September 16, 2020 to October 9, 2020, Koval sent repeated electronic communications to the victim with intent to frighten or harass the victim and that Koval contacted the victim in violation of the Order Prohibiting Contact issued in File No. 09-2019-CR-03505. (A.A. at 7.)

[¶ 11] On August 20, 2021, Koval filed a Motion to Dismiss the charge of violation of an order prohibiting contact and asserted that the sentencing court in File No. 09-2019-CR-03505 lacked authority to issue such an order. (A.A. at 8-15.) The State resisted the motion and argued the Order Prohibiting Contact was statutorily authorized, Koval's motion constituted an impermissible collateral attack, and the order could be construed as a condition of probation. (A.A. at 16-20.)

[¶ 12] At a hearing on September 28, 2021, the district court heard argument from the parties and denied Koval's Motion to Dismiss. The district court ruled Koval's argument was an impermissible collateral attack on the Order Prohibiting Contact and denied his Motion to Dismiss. (A.A. at 29, 30.)

[¶ 13] **LAW AND ARGUMENT**

[¶ 14] Koval argues on appeal that the sentencing court which imposed the Order Prohibiting Contact in File No. 09-2019-CR-03505 lacked jurisdiction to issue the Order. (Appellant’s Brief, “App. Br.”, at ¶ 18.) He argues that N.D.R.Cr.P. 35 was not an appropriate vehicle for correcting the sentencing court’s Order Prohibiting Contact because it would not have resulted in the dismissal of charges. (App. Br. at ¶ 22.) Finally, he argues the State should have alleged contempt of court, rather than violation of N.D.C.C. § 12.1-31.2-02. (App. Br. at ¶¶ 23, 24.) Each of these arguments is based upon the assertion that, because he believed the sentencing court in File No. 09-2019-CR-03505 lacked authority to issue the Order Prohibiting Contact under N.D.C.C. § 12.1-31.2-02, Koval should not be subject to prosecution for violating the Order. This claim is inconsistent with this Court’s precedence and with the decisions of courts in other states. This Court should hold that the sentencing court’s Order Prohibiting Contact was statutorily authorized or, in the alternative, employ the collateral bar rule and affirm Judge Van de Streek’s Order Denying Defendant’s Motion to Suppress.

[¶ 15] **I. The sentencing court’s Order was statutorily authorized.**

[¶ 16] The sentencing court in File No. 09-2019-CR-03505 issued an Order Prohibiting Contact under N.D.C.C. § 12.1-31.2-02(1). Koval argues that the sentencing court lacked authority under the statute to issue the order and, therefore, he should not be subject to prosecution for having violated its terms.

[¶ 17] “Statutory interpretation is a question of law, fully reviewable on appeal.” Agri Indus., Inc. v. Franson, 2018 ND 156, ¶ 6, 915 N.W.2d 146. The primary purpose of statutory interpretation is to determine legislative intent. Estate of Elken, 2007 ND 107, ¶ 7, 735 N.W.2d 842. Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears. N.D.C.C. § 1-02-02.

[¶ 18] Section 12.1-31.2-02(1) of N.D.C.C. provides that “[i]f an individual who is charged with or arrested for a crime of violence or threat of violence, stalking, harassment, or a sex offense, is released from custody before arraignment or trial, the court authorizing the release of the individual shall consider and may issue an order prohibiting the individual from having contact with the victim.” (Emphasis added.) Koval was charged with, and convicted of, stalking in File No. 09-2019-CR-03505. (A.A. at 21.) He pleaded guilty to the charge, was sentenced to a term of supervised probation, and was released from custody. (A.A. at 21.) Because Koval was released from custody before a trial, the statute authorized the court to issue an order prohibiting contact.

[¶ 19] **II. Koval’s arguments constitute impermissible collateral attacks.**

[¶ 20] This Court has long recognized that a judgment may not be collaterally attacked by a party to the action in which it was rendered. Lerfald v. Lerfald, 2021 ND 150, ¶ 10, 963 N.W.2d 244; State v. Metz, 514 N.W.2d 662, 666 (N.D. 1994); Harchenko v. Harchenko, 77 N.D. 289, 293, 42 N.W.2d 200, 201 (1950). “A collateral attack is an attempt to avoid, defeat, or evade a judgment or order, or to

deny its force and effect, in some incidental proceeding not provided for by law, with the express purpose of obtaining relief from that judgment or order.” Guthmiller v. North Dakota Dep’t of Human Servs., 421 N.W.2d 469, 473 (N.D. 1988). The prohibition on collaterally attacking an order is known as the collateral bar rule. Whether a subsequent action constitutes an impermissible attack on a judgment is a question of law and is fully reviewable by this Court on appeal. Fahlsing v. Teters, 552 N.W. 2d 87, 89 (N.D. 1996).

[¶ 21] This Court has not yet applied the collateral bar rule to orders issued under N.D.C.C. § 12.1-31.2-02. It has applied the rule in similar cases. This Court has rejected arguments which collaterally attack the validity of court orders in the context of domestic violence protection orders. In State v. Zahn, this Court has held protection orders may not be collaterally challenged “without first raising the issue in the court that issued the order.” 2007 ND 2, ¶ 14, 725 N.W.2d 894. In Zahn, this Court recognized Zahn had opportunity to present his argument to the court that issued the protection orders, failed to contest the issuance of the orders, and made no showing the order was invalid. Therefore, this Court reasoned, Zahn could not “merely claim he was not subject to criminal liability because the order he violated was invalid.” Id. at ¶ 7. Similarly, in State v. Dvorak, this Court held the remedy available to a person who believes a protection order is invalid is to timely appeal the order and rejected Dvorak’s collateral attack that a protection order was invalid. 2000 ND 6, ¶ 31, 604 N.W.2d 445. In both cases, this Court rejected collateral attacks on the validity of domestic violence protection orders because the Appellant

did not challenge the validity of the orders in the court that issued the order. As this Court recognized in Dvorak, the appropriate avenue for challenging the validity of an order is to “timely appeal that order.” Id.

[¶ 22] This Court has rejected collateral attacks on driver’s license suspensions in criminal cases. In State v. Lang, a Defendant contended that he should have been allowed to introduce evidence concerning the basis for his license’s suspension. 463 N.W.2d 648, 649 (N.D. 1990). This Court barred Lang’s argument because the proper forum to contest the suspension was at an administrative hearing and not during the criminal prosecution for driving under suspension. Id. at 650. In State v. Larson, this Court would not entertain a challenge to the constitutionality of a license suspension when the Defendant failed to challenge the suspension in the license suspension process and elected to raise the argument in his prosecution for driving with a suspended license. 419 N.W.2d 897, 898 (N.D. 1988). By barring attacks upon the legitimacy of a license suspension in prosecutions for disregarding that suspension, this Court has recognized that efforts to circumvent prior orders by violating such orders should be rejected, even when the collateral attack is based upon constitutional claims.

[¶ 23] Like the Appellants in the above-cited cases, Koval never directly attacked the sentencing court’s Order Prohibiting Contact. Though the record in this case is not particularly clear, Koval did not appeal the sentencing court’s Order Prohibiting Contact in File No. 09-2019-CR-03505, he did not file a motion under N.D.R.Cr.P. 35 to correct judgment; and he did not file an application for post-

conviction relief. (A.A. at 29.) Instead, Koval chose to disregard the sentencing court's Order by contacting the victim of his stalking offense and inundating her with harassing messages. On appeal and in the district court, Koval never raised an argument about lack of notice or any factual defense to the charge. Instead, his claims focus solely on the validity of the sentencing court's Order. By raising such an argument only after he violated the Order, Koval has denied this Court the opportunity to fully and completely review the record and decision of the sentencing court; prevented the sentencing court from benefiting from appellate review; and attempted to render the sentencing court's order without force and effect.

[¶ 24] Moreover, by collaterally attacking the sentencing court's Order after his term of probation lapsed, Koval attempted to prevent the sentencing court from amending or altering its sentence. This Court has recognized that sentencing courts have authority to issue post-disposition orders prohibiting contact with specified individuals as a condition of probation. State v. Mohamud, 2019 ND 101, ¶ 24, 925 N.W.2d 396. ("If the no-contact order is part of the conditions of probation, it is proper and expires ... when the probationary period ceases.") In State v. Mohamud, this Court reviewed a challenge to the validity of an order prohibiting contact which appeared in a criminal judgment. 2019 ND 101, ¶ 24, 925 N.W.2d 396. In interpreting the judgment, this Court recognized that it would not "place an interpretation on a judgment that permits it to be rendered ineffective and unenforceable." Id. (quoting Zent v. Zent, 281 N.W.2d 41, 47 (N.D. 1979)). On

this basis, this Court interpreted the no contact provision in Mohamud to be a term of probation and affirmed the criminal judgment. Id. at ¶ 25.

[¶ 25] The sentencing court's Criminal Judgment in File No. 09-2019-CR-03505 provides that the probationary conditions are "either set forth below or in an attached Appendix A or Certificate to this Criminal Judgment." (A.A. at 22.) The Post-Disposition Order Prohibiting Contact which forms the basis of this case was issued and filed along with the Criminal Judgment and Appendix A. (A.A. 21-26.) Koval was placed on supervised probation for one year and the Post-Disposition Order Prohibiting Contact was given a one-year term. Had Koval directly attacked the Order Prohibiting Contact, and if this Court rejected the Order Prohibiting Contact on appeal, this Court may have attempted to harmonize the terms of the sentencing court's Order with the terms of the Criminal Judgment in order give the Judgment force and effect as a term of probation. By challenging the Order only after his probation expired and after he violated its terms, Koval has made such an outcome impossible. Koval should not be rewarded for circumventing the appropriate channels for review with his collateral attack of the sentencing court's order.

[¶ 26] Applying the collateral attack doctrine in this case is consistent with this Court's prior decisions which stress the importance of orderly judicial procedure. In State v. Heath, this Court reviewed a collateral challenge to the validity of a district court's restraining order. 177 N.W.2d 751 (N.D. 1970). This Court recognized that any if "every defendant were held to have the right to disobey

any court order which is not to his liking, orderly legal procedure would cease to exist and chaos would result.” Id. at 755. This Court reasoned that “[a]n orderly, free society cannot exist if each person is to be permitted to determine for himself which court orders he shall obey and which court order he shall disobey, regardless of the justification which an individual, in his own mind, may feel that he has for such disobedience.” Id. This principle is particularly clear in cases involving orders prohibiting contact, such as Koval’s. If litigants can disregard the orders of a sentencing court with impunity and challenge such orders after they have expired, the victims of these litigants are left unprotected by the sentencing court’s orders and may become more vulnerable under the assumption that the sentencing court’s orders have force and effect.

[¶ 27] This line of reasoning has led courts in other jurisdictions to reject collateral attacks upon orders prohibiting contact. Truesdell v. State, 304 P.3d 396, 399 (Nev. 2013) (holding a party may not collaterally attack the validity of a protective order in a subsequent criminal proceeding based on violation of the protective order); State v. Baize, 2019 UT App, 456 P.3d 770 (“the collateral bar rule applies to situations in which a defendant seeks to attack the validity of a protective order in a criminal proceeding for addressing a violation of that same protective order”); Wood v. Com., 178 S.W.3d 500, 513 (Ky. 2005) as modified (Dec. 1, 2005) (holding an appellant may not launch a collateral attack on the validity of an emergency protective order in a subsequent prosecution for violation of that order); State v. Wright, 870 A.2d 1039, 1044 (Conn. 2005) (recognizing the

collateral bar rule is justified on the ground that it advances important societal interests, respect for judicial process and the rule of law, and the preservation of civil order and holding an Appellant may not seek to avoid his conviction for violating that order by challenging the factual basis of its issuance).

[¶ 28] In this case, the district court embraced the reasoning of the Washington Supreme Court in City of Seattle v. May. (A.A. at 30.) In May, the Washington Supreme Court held the collateral bar rule prohibited an Appellant's challenge to the validity of an underlying protection order. 256 P.3d 1161, 1165 (Wash. 2011). In reaching this conclusion, the Washington Court recognized that the collateral bar rule provides an exception for challenging orders which are void. Id. at 1163. The Washington Court acknowledged that an order is void only if there is an absence of jurisdiction to issue the type of order, to address the subject matter, or to bind the defendant. Id. (citing Mead Sch. Dist. No. 354 v. Mead Educ. Ass'n, 534 P.2d 561, 565 (Wash. 1975)). The Washington Court held that, for an order to be void, the court must lack the power to issue the type of order complained of. Id. In this case, the sentencing court had jurisdiction to issue the Order Prohibiting Contact under N.D. Const. Art. VI § 8, N.D.C.C. § 27-05-06, and N.D.C.C. § 12.1-31.2-02. The sentencing court also had authority to impose no-contact provisions as a part of probation under N.D.C.C. § 12.1-32-07(2). Because the sentencing court had the power to issue the type of order prohibiting contact which forms the basis of this case, Koval's arguments should be rejected under the collateral bar rule.

[¶ 29] CONCLUSION

[¶ 30] Because the crux of Koval's argument in this appeal centers on the validity of the Order Prohibiting Contact rather than Koval's disregard of such Order, and because the Order Prohibiting Contact is statutorily authorized, this Court should not avail Koval's improper collateral attacks. This Court should affirm Judge Van de Streek's Order Deny Defendant's Motion to Dismiss.

[¶ 31] Respectfully submitted this 1st day of April 2022.

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[¶ 32] CERTIFICATE OF COMPLIANCE

[¶ 33] I hereby certify that this brief complies with N.D.R.App.P. 32(a)(8). The page count is sixteen pages.

[¶ 34] Dated this 1st day of April 2022.

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[¶ 35] CERTIFICATE OF SERVICE

[¶ 36] A true and correct copy of the foregoing document was sent by e-mail on the 1st day of April 2022, to Elizabeth Brainard Brandt at fargopublicdefender@nd.gov.