

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff-Appellant,)	
)	
-vs-)	
)	
Joshua John Gomez,)	Supreme Ct. No. 20180364
)	
Defendant-Appellee)	District Ct. No. 08-06-K-01735

BRIEF OF PLAINTIFF-APPELLEE

APPEAL FROM SECOND AMENDED CRIMINAL JUDGMENT

Burleigh County District Court
South Central Judicial District
The Honorable Cynthia M. Feland, Presiding

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Cases

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STATEMENT OF THE ISSUES

[¶1] Whether the district court abused its discretion in imposing its revised sentence.

STATEMENT OF THE CASE

[¶2] On September 5, 2006, Joshua Gomez (hereinafter “Gomez”) was charged with the offenses of Burglary, a class B felony (Count 1); Stalking, a class A misdemeanor (Count 2); and Violation of a Domestic Violence Restraining Order, a class A misdemeanor (Count 3). On October 16, 2006, an amended complaint was filed also charging Gomez with Gross Sexual Imposition, a class AA felony (Count 4).

[¶3] On December 14, 2006, the Burglary charge was amended to Criminal Trespass, a class C felony, and Gomez entered pleas of guilty to all charges. On February 26, 2007, he was sentenced to two (2) years on Count 1, one (1) year on Counts 2 and 3, and twenty (20) years with all but ten (10) years suspended for five (5) years of supervised probation on Count 4.

[¶4] On March 1, 2007, a Criminal Judgment was filed setting forth the district court’s judgment but erroneously indicating that all but ten (10) days were suspended on Count 4. On March 14, 2007, an Amended Criminal Judgment correcting the error was filed.

[¶5] On August 3, 2018, a petition for revocation of probation was filed. An amended petition was filed on September 7, 2018. A hearing was held on September 18, 2018. Gomez’s probation was revoked and he was resentenced to two (2) years on Count 1, 360 days on Counts 2 and 3, and fifty (50) years with all but twenty (20) years suspended for five (5) years of supervised probation on Count 4.

[¶6] Gomez timely filed a notice of appeal.

STATEMENT OF THE FACTS

[¶7] Gomez was charged with and pled guilty to four offenses. Appellant's Appendix ("App.") p. 10. On February 26, 2007, he was sentenced to serve ten (10) years of incarceration with five (5) years of supervised probation to follow. App. pp. 2-3.

[¶8] Gomez served was released from incarceration on July 14, 2015 at which time his probation began. Probation Revocation Transcript ("Tr.") p. 10. Gomez was released from incarceration directly to the North Dakota State Hospital under an order of commitment as a sexually dangerous individual. Tr. pp. 10-11. He was released from the State Hospital on an order for post-commitment community placement on May 9, 2018. Tr. p. 11.

[¶9] The probation violations that formed the basis for the original petition for revocation occurred while Gomez was in the community on probation from May 9 to August 2, 2018. Tr. pp. 3-4, 12. An amended petition for revocation of probation was filed on August 31, 2018 alleging three more violations of probation conditions that occurred between August 15-28, 2018. Tr. pp. 5, 7-8. Gomez admitted all the allegations in the amended petition, which included usage of methamphetamine on at least five different occasions; usage of marijuana on at least one occasion, failing to meet with his probation officer as directed, and failing to complete the STAND sex offender treatment program due to his termination from the program for not reporting sexual activity and the substance abuse. Tr. pp. 4-5, 7-8, 14-15.

[¶10] The State and the district court both mentioned Gomez's admissions from the presentence investigation and letters to the sentencing judge that the underlying offenses took place because Gomez was using drugs. Tr. pp. 9-10, 28. Gomez admitted that substance abuse was his big problem and that it was an "unbelievably serious issue". Tr. p. 30.

[¶11] Considering all the factors and that substance abuse precipitated Gomez's underlying offense, and that substance abuse is a trigger for reoffending, the district court sentenced Gomez on the class AA felony to a sentence of fifty (50) years with thirty (30) suspended for five (5) years of supervised probation. Tr. pp. 37-38.

ARGUMENT

[¶12] Whether the district court abused its discretion in imposing its revised sentence.

[¶13] When reviewing an appeal on a revocation of probation, this Court applies a two-step process – the review of whether a defendant violated probation conditions is under a clearly erroneous standard and then this Court reviews whether the district court abused its discretion when the probation was revoked. State v. Stavig, 2006 ND 63, ¶ 6, 711 N.W.2d 183. In this matter, Gomez is not requesting review of whether he violated his probation conditions, as he admitted the violations. Therefore, this Court is being asked to review whether the district court abused its discretion in revoking the probation and imposing its sentence.

[¶14] Regarding proceedings on a revocation of probation, this Court has said, “[o]nce a violation has been proven, the trial court has discretion under Rule 32(f)(2)(iii) to “revoke an order suspending a sentence or an order suspending the imposition of sentence, or continue probation on the same or different conditions, as the circumstances warrant.” State v. Toepke, 485 N.W.2d 792, 795 (N.D. 1992). Rule 32, North Dakota Rules of Criminal Procedure has been modified since that time, but the same discretion is still allowed under Rule 32(f)(3)(B). “A trial court abuses its discretion when it acts in an arbitrary, unreasonable, or capricious manner, or misinterprets or misapplies the law.” State v. Sisson, 1997 ND 158, ¶ 7, 567 N.W.2d 839.

[¶15] The district court judge indicated on the record what factors it considered when it revoked Gomez's probation and imposed the sentence. Tr. pp. 37-39. The district court also took into consideration that after twelve (12) years of confinement, Gomez was in the community a mere three (3) months before he started abusing controlled substances, the very actions which led him to commit his underlying offenses. Tr. pp. 3-4, 12.

[¶16] Upon a revocation of probation, the district court is authorized to resentence a defendant "to any sentence available at the initial time of sentencing". State v. Gefroh, 458 N.W.2d 479, 483 (N.D.1990). Gomez was convicted of Gross Sexual Imposition, a class AA felony, with a maximum sentence of life imprisonment without parole. N.D.C.C. § 12.1-32-01(1).

[¶17] Given the short amount of time Gomez was in the community before he began violating his conditions of probation by engaging in the same behavior that, by his own admission, precipitated the underlying crime of Gross Sexual Imposition, the district court did not abuse its discretion when it revoked Gomez's probation upon his admissions of the violations. The sentence imposed was based upon the severity of the underlying charge, Gomez's violations of probation, and the short amount of time between his release to the community and his re-engagement of risky behavior that had previously led to sexual reoffending. The sentence was within the statutory maximum sentence the district court could impose.

[¶18] Gomez argues that the district court was speculating that he would reoffend sexually given the probation violations and there was no

evidence to support that conclusion. However, the district court, in referencing Gomez's statements in the presentence investigation and his letters to the sentencing judge, had ample evidence upon which to base its conclusion. The district court was not required to wait for Gomez to commit another sexual offense before being concerned about the behaviors leading up to it.

CONCLUSION

[¶19] Because the district court did not abuse its discretion when it revoked Gomez's probation and imposed a sentence within the statutory guidelines, the State respectfully requests that the Second Amended Criminal Judgment be affirmed.

Dated this 17th day of January, 2019.



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 COUNTY OF BURLEIGH)

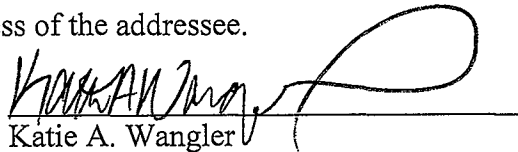
Katie A. Wangler, being first duly sworn, depose and say that I am a United States citizen over 21 years old, and on the 17th day of January, 2019, I deposited in a sealed envelope a true copy of the attached:

1. Brief of Plaintiff-Appellee
2. Affidavit of Mailing

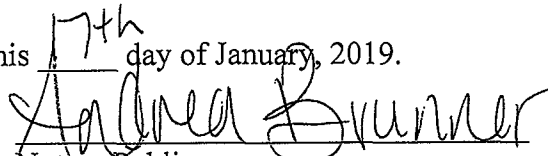
on the following by electronic transmission to the listed email address:

KENT MORROW
ATTORNEY AT LAW
MORROW@MIDCONETWORK.COM

which address is the last known address of the addressee.


Katie A. Wangler

Subscribed and sworn to before me this 17th day of January, 2019.


Notary Public,
Burleigh County, North Dakota

