

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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

APPELLANT'S BRIEF

APPEAL FROM SECOND AMENDED CRIMINAL JUDGMENT
DATED SEPTEMBER 19, 2018

HONORABLE CYNTHIA M. FELAND, PRESIDING,
SOUTH CENTRAL JUDICIAL DISTRICT

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1. STATEMENT OF THE ISSUES

2. Whether the Court abused its discretion in imposing its revised sentence?

3. STATEMENT OF THE CASE

4. On September 5, 2006, Joshua Gomez (“Gomez”) was charged with Burglary, a Class B Felony, Stalking, a Class A Misdemeanor, and Violation of Domestic Violence Restraining Order, a Class A Misdemeanor. On October 16, 2006, he was also charged with Gross Sexual Imposition, a Class AA Felony in Burleigh County District Court, by way of an Amended Complaint.

5. On March 1, 2007, Gomez entered pleas of guilty to all of the above charges, including an amended charge of Criminal Trespass, in place of Burglary.

6. He was sentenced to twenty (20) years at the Department of Corrections on the Gross Sexual Imposition charge, with all but 10 days suspended for five (5) years of supervised probation.

7. On August 3, 2018, the State filed a Petition for Revocation of Probation. It contained four (4) alleged violations of the conditions of Probation, all alleging usage of drugs. On September 7, 2018, an Amended Petition for Revocation of Probation, adding allegations of failure to report for supervision and failure to complete the outpatient sex offender treatment program at STAND.

8. On September 18, 2018, a hearing was held before the Honorable Cynthia Feland, on the Amended Petition.

9. On September 20, 2018, a Second Amended Judgment was entered, sentencing Gomez to fifty (50) years on count IV, with all but 20 years suspended.

10. On October 2, 2018, Gomez filed a Notice of Appeal to the North Dakota Supreme Court.

11. STATEMENT OF THE FACTS

12. Joshua John Gomez ("Gomez) was originally convicted of Gross Sexual Imposition in 2007. He was ordered to serve a 10 year sentence, with an additional 10 years suspended.

13. Once his probation began in 2015, he was released and placed in the North Dakota State Hospital as a sexually dangerous individual. He was released on community civil placement on May 9, 2018. (Tr. p. 10, ln. 24-25; p. 11, ln. 1-2).

14. Between May 9, 2018 and August 2, 2018, Gomez committed sexual violations of his probation conditions, primarily involving usage of controlled substances. (Tr. p. 12, ln. 1-6).

15. On August 2, 2018, the North Dakota State Hospital returned Gomez to its sex offender treatment program for violations of the community placement program. (Tr. p. 12, ln. 13-18). The violations involved not reporting sexual activity and substance abuse. (Tr. p. 14, ln. 22-25; p. 15, ln. 1-2).

16. Gomez was not terminated from the STAND program for new sexual offenses. His sexual activity was being in a consensual relationship with an age appropriate adult. (Tr. p. 16, ln. 24-25; p. 17, ln. 1-3). His victim in the underlying sexual offense was a juvenile. There was no allegation that his relationship with the older woman was connected to the drug usage. (Tr. p. 20, ln. 21-24).

17. **LAW AND ARGUMENT**

18. Whether the Court abused its discretion in imposing its revised sentence?

19. Standards of Review

20. The Supreme Court's review of the trial court's decision requires a two (2) step analysis. First the Court must review the trial court's factual determination that the defendant violated the terms of his probation, and then the trial court's discretionary determination that the violation warrants revocation. State v. Saavedra, 406 N.W.2d 667, 669 (N.D. 1987).

21. The review of the trial court's findings of fact in probation revocation proceedings are under the clearly erroneous standard. *Id.*

22. Once a violation has been proven, the trial court's subsequent decision to revoke probation is reviewed under the abuse of discretion standard. Saavedra 406, 406 N.W.2d at 669; State v. Altringer, 388 N.W.2d 864, 865 (N.D. 1986); State v. Lesmeister, 293 N.W.2d 875, 877 (N.D. 1980).

23. The law regarding what is considered as clearly erroneous is as follows:

24. "A finding of fact is clearly erroneous when it is induced by an erroneous view of the law, when there is no evidence to support it, or if, although there is some evidence to support it, on the entire evidence, the court is left with a definite and firm conviction that a mistake has been made." State v. Oien, 2006 ND 138, 11, 717 N.W.2d 593 (citing State v. Nelson, 2005 ND 59, 4, 693 N.W.2d 910).

25. Prior to imposing sentence, the Court identified her concerns about the behavior of Gomez.

26. THE COURT: Well, I have to tell you this is probably the most unusual of revocation proceedings that I've ever been involved in and I say that because I've never had one where somebody, following their release from doing a 10-year sentence, is civilly committed and within two months of being placed back in the community under joint civil commitment conditions and probation conditions has violated.
27. And while I understand that there are no allegations pertaining to that you have reoffended sexually, quite frankly, I don't know whether or not that's happened. What I know is based on the allegations and the admissions that there have been controlled substance usage issues, which, based on everything I see in the PSI and by your repeated admissions, is a trigger for your reoffending.
28. That gives the Court some great concern because the Court has multiple roles in imposing a sentence. I've got to look at protecting the community, I've got to look at your rehabilitation and treatment, I've got to look at what we've tried, what worked, what didn't work. You got a ten-year sentence. That clearly wasn't sufficient to get the job accomplished.
29. Now, the Court has the ability to sentence you with life without the possibility of parole and I guess at that point the Court doesn't need to be concerned because you will live the rest of your natural life at the Department of Corrections and I could easily do that here today.
30. I'm not going to do that here today but I am going to give you a sentence that I hope will give you sufficient times to get these things addressed. I am very surprised at the short period of time that you were out considering the long period of time you've been in a confined setting and that you immediately go back to the thing that led you to offend in the first place.
31. And so I'm going to resentence you to 50 years and I'm going to suspend 30 and I'm going to give you credit for time served. You're going to do another 10. And then

you're going to be on probation for five under the same terms and conditions of the original sentence.

(Tr. p. 37, ln. 2-25, p. 38, ln. 1-14).

32. The Court was most concerned with Gomez reoffending sexually and how it might be triggered by substance abuse.

33. This "conclusion" was not buttressed or supported by any evidence presented by the State or any admissions by Gomez.

34. The Court was speculating that because Gomez was relapsing in his struggles with addiction, he would, of necessity, reoffend sexually. The evidence showed that Gomez had successfully completed sex offender treatment while incarcerated, again did well in sex offender treatment while civilly committed as a sexually dangerous individual in less than 3 years, and he was released to the community supervision under the auspices of STAND and still he did not reoffend sexually. Therefore, the Court's concern was speculative only and not supported by the evidence. It was an abuse of discretion by the Court.

35. CONCLUSION

36. The Court abused its discretion by finding that Gomez was likely to reoffend sexually unless incarcerated for an additional twenty years.

Dated this 11th day of December, 2018.

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CERTIFICATE OF SERVICE

On the 11th day of December, 2018, a copy of the foregoing Appellant's Brief and Appellant's Appendix was served by e-mail upon the following:

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