Original

890274

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA,

Plaintiff and Appellee,

-vs-

GERALD GEFROH,

Defendant and Appellant.

Supreme Court No.
890274

Appeal from the Judgment and Order of the District Court
Northeast Judicial District
McHenry County, North Dakota
The Honorable William A. Neumann, presiding

APPELLANT'S PETITION FOR REHEARING

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA,	)	
	)	
Plaintiff and Appellee	)	
	)	
-vs-	)	S.Ct. No. 890274
	)	
GERALD GEFROH	)	PETITION FOR REHEARING
	)	
Defendant and Appellant.	)	

The Defendant/Apellant in this case respectfully requests that the Court reconsider its opinion issued July 3, 1990. Accordingly, the Defendant/Appellant files this petition for rehearing with the court, pursuant to Rule 40 of the North Dakota Rules of Appellate Procedure.

Rule 40 of the North Dakota Rules of Appellate Procedure provides that the movant shall state with particularity points of fact and law overlooked or misapprehended by the Court. In this case, the petitioner is particularly concerned with the Court's disposition of the third issue raised (whether the district court erred in increasing the length of his sentence after revocation of probation because it violated due process or constituted double jeopardy), and also with the court's construction of section 12.1-32-07.

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DUE PROCESS

The Court dismisses this argument, stating that the due process issue was not raised in the district court, and that Gefroh "specifically excluded reliance on any due process argument." This misapprehends the record. As the Court notes, the Appellant stated in his Brief to the District Court that he was relying on a construction of statutory law. Taken in context, however, the Court must see that this issue was raised to the district court:

> The North Dakota Supreme Court has not specifically ruled on this issue [of whether the court may increase a suspended sentence following revocation of probation], although State v. Jones initially appears to support the court's ability to resentence the defendant to any term it so chooses, up to the maximum term allowed by law. State v. Jones, 418 N.W.2d 782 (N.D. 1988). The defendant submits, however, that Jones is an anomaly, and cannot support this interpretation. The defendant in that case was not represented by counsel, and relied upon a double jeopardy argument, which the court rejected. In so doing, the supreme court relied on language of the United States Supreme Court which at least inferred that a final sentence -- such as we have here -- cannot be increased after revocation of probation. See 418 N.W.2d at 785 (quoting United States v. DiFrancesco, 449 U.S. 117, 137, 101 S.Ct. 426, 437 (1980) ("these criminal sanctions do not involve the increase of a final sentence...."). This defendant relies on construction of statutory law. If a constitutional argument was raised, however, it seems apparent that due process requirements would prohibit a court from modifying a sentence which has been imposed, but whose execution has been suspended. ... Finally, in Jones the trial court suspended execution of the entire sentence; in this case, the defendant was required to serve the first six months of his sentence before being placed

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> on probation; modifying a partially served sentence would certainly implicate due process considerations.

Brief of Defendant/Appellant to District Court at 5 (June 19, 1989). Additionally, all of the cases cited by the Defendant to the District Court in preceding pages raised due process concerns. It was clear from the context of the Brief that due process issues were implicated in the case, and that the Defendant was raising those issues.

Also, as the Court is aware from review of the initial sentencing transcript, the district court at the time of sentencing repeatedly instructed the Defendant that the penalty for violating his probation would be having to serve the remaining eighteen months of his sentence.[1] The

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1. The district court made the following statements:

> And, Mr. Gefroh, I want you to listen to these [conditions of probation] very carefully because it is following these rules and conditions that is going to keep you out of the Penitentiary for the suspended 18 months of your sentence.

Appellant's Appendix 7 at 9-10 (Transcript of Sentencing, Feb. 4, 1987)

> I strongly recommend to you that you take advantage of your probation officer and make use of all of the help that he's able to give you because, as I say, if you do a good probation in this matter, you will never have to serve that 18 months that's been suspended. At the end of two years, that will just be gone. ...
> ... And so, if you fail to do a good probation, if you violate any of these terms that I've just read to you, you will be brought back before this Court. The order suspended execution of 18 months of your sentence will be revoked. The order putting you on probation will be

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initial sentencing court was the same judge who presided over the probation revocation proceedings. It may be presumed that the judge would be aware of statements and promises made. The written and oral references to due process and also to the court's inability to increase a sentence already imposed, along with the history of the case, were enough to bring the matter before the court. Consideration by this Court of these issues should not now be barred.

In any event, if the Court finds that the Defendant was not specific enough in raising those concerns, it seems only just that the case, rather than being affirmed, should be remanded to the district court for consideration of the due process issues. Under the Court's interpretation, to do otherwise would cause the Defendant to be imprisoned without having had full consideration of the issues arising from his case. To do otherwise would be unjust.

> revoked and you will be returned to the State Penitentiary to serve the balance of your sentence.

Id. at 13.

> On the other hand, as I told you, if you don't do that, if you don't get things straightened out for yourself, if you don't settle down, then there's 18 months in the Penitentiary that you'll end up having to serve. I don't think you should have to, but that's going to be up to you.

Id. at 18-19.

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DOUBLE JEOPARDY

In ruling on the issue of double jeopardy, the Court finds that the Defendant/Appellant had no reasonable expectation in the finality of his sentence, because section 12.1-32-07(4) provided notice of the possibility of a more severe sentence upon revocation of probation:

> Because § 12.1-32-07(4), N.D.C.C., gave Gefroh notice that violation of the conditions of his probation could result in the imposition of a harsher sentence upon revocation of his probation, Gefroh had no legitimate expectation in the finality of his sentence and the district court's imposition of a harsher sentence was not prohibited by the double jeopardy clause.

Opinion of the Court at 8. This statement ignores the evidence presented to the Court that shows that Gefroh did not have notice that his sentence would be increased. As was pointed out in Appellant's Brief, Gefroh was told by the district court at sentencing, on three separate occasions, that if he violated his probation, he would be required to serve the remainder of his two-year sentence.[2] State v. Jones was the first real indication that a suspended sentence could be increased after all. State v. Jones, 418 N.W.2d 782 (N.D. 1988). But Jones was not issued until over one year after the Defendant was sentenced. Survey results of North Dakota judges indicates

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2. See supra note 1 for text of statements made to Mr. Gefroh.

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that virtually no one interpreted section 12.1-32-07(4) to allow an increase of a suspended sentence upon revocation. See, also Appellant's Appendix at 13, page 139, par. 1 (Report of N.D. Legislative Council, Judiciary Committee)(Jones represented significant change in sentencing practices in state in that it allowed court to impose any sentence initially available). If the sentencing judges did not have the understanding imputed to the Defendant, how can the Defendant be held to that knowledge? To require him to be more knowledgeable, and especially in the face of the assurances made to him by the sentencing judge -- assurances made prior to this Court's definitive ruling -- would be patently unfair and unreasonable. The court is urged to reconsider its decision in light of the district court's statements to Gefroh at the time of sentencing, the survey of North Dakota judges, and the timing of its decisions in relation to Gefroh's sentencing.

Statutory Construction

In 1989, the North Dakota State Legislature amended section 12.1-32-07 to incorporate standards for suspended sentences, and specifically adding the line: "In case of suspended execution of sentence, the court may revoke the probation and cause the defendant to suffer the penalty of the sentence previously imposed upon the defendant." N.D.

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Cent. Code § 12.1-32-07(5)(Supp. 1989). At page 10 of the Court's Opinion, the Court indicates that it believes that the Legislature's recent amendment incorporates the Court's decisions that a suspended sentence may be increased upon revocation of probation. The Defendant/Appellant would urge the Court to reconsider this finding in light of the legislative history of that amendment, specifically comments by Committee members that indicate the contrary view. See, e.g., Comment of the Honorable Thomas Metelmann, Judiciary Committee (Appellant's Appendix at 11-2). As Charles Placek, State Probation and Parole Department testified to the Judiciary Committee on June 28-29, there was a question as to whether the new amendment to section 12.1-32-07 would negate the effect of recent North Dakota Supreme Court decisions finding that a court could resentence upon revoking probation resulting from a suspended sentence. Appellant's Appdx at 12, page 3. This question was addressed to the Honorable Thomas Metelmann at the Committee's August 24, 1988 meeting:

> Regarding Mr. Placek's third comment, concerning whether language on page nine, lines 13 through 16, was intended to negate recent Supreme Court decisions, Judge Metelmann said the language would negate a recent Supreme Court decision which appears inconsistent with practice as well as inconsistent with the application of current statutes.

Minutes of Judiciary Committee at page 4, August 24,

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1988. The clear language of the amendment shows the Legislature's intent that in this situation the court's only option is to impose the previously suspended sentence.

Based on the foregoing, the Court is respectfully urged to grant the Defendant's petition for rehearing and overturn the Order of the district court.

Respectfully submitted this 16th day of July, 1990.

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NORTH DAKOTA

COUNTY OF CAVALIER, ss

Ryan S. Lindtwed, being first duly sworn, deposes and says that on the 16 day of July, 1990, he served the attached **Petition for Rehearing** upon Lyle Witham, attorney for the above named Plaintiff and Appellee by placing a true and correct copy thereof in an envelope addressed as follows:

Lyle Witham
State's Attorney
P.O. Box 390
Towner, N.D. 58788

and depositing the same with postage prepaid, by first class mail (or certified or registered mail, if applicable) in the United States Mails at Langdon, North Dakota.

Ryan S. Lindtwed
Ryan S. Lindtwed

Subscribed and sworn to before me this 16 day of July, 1990.

(S E A L)

Laura J. Wetsch, Notary Public
Cavalier County, North Dakota
My Comm. Exp.: 5/18/95

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