IN THE SUPREME COURT

OF THE STATE OF NORTH DAKOTA

The State of North Dakota, Plaintiff/Appellee, -vs- Paul E. Palmer, Defendant/Appellant.	Supreme Court No. 980360

980360

BRIEF FOR APPELLANT

Appeal Taken from Judgment Denying
Motion to Correct Illegal Sentence
Dated November 2, 1998
District Court Case No. 95-K-0890
Williams County District Court
Northwest Judicial District
The Honorable David W. Nelson, Presiding

Submitted by:

Paul E. Palmer
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ISSUES PRESENTED

I. May the District Court constitutionally sentence a Defendant, under NDCC 12.1-32-07 (6), to a term longer than the originally invoked sentence upon the revocation of probation on the suspended execution portion of the original sentence and not be in violation of the constitutionally protected right against Double Jeopardy?

II. Did the appellant have any expectation of the finality of his sentence when it was invoked at the original sentencing?

III. Is NDCC 12.1-32-07 (6) constitutionally void for vagueness and ambiguity?

STATEMENT OF THE CASE

A. Nature of the case.

This case deals with the constitutional question of what constitutes double jeopardy in the sentencing, upon revocation, of suspended execution portion of a convicted person's original sentence.

It also deals with the due process question of whether NDCC 12.1-32-07 (6) is ambiguous or vague to the point that it is unconstitutional.

B. Course of proceedings, and its disposition in the court below and factual basis.

On October 24, 1995, the appellant, Paul E. Palmer, (Hereafter Palmer) entered a plea of guilty to the charge of Theft of Property. The Honorable Gerald Rustad accepted the plea and on October 26, 1995, sentenced Palmer to a term of 2 years in the custody of the Department of Corrections and Rehabilitation. The court then suspended the execution of the last 1½ years, of the imposed sentence, placing Palmer on probation for that period. (See Criminal Judgment at page 3 of the Appendix)

After serving the initial 6 months of his sentence Palmer subsequently violated the conditions of his probation on the suspended portion of his original sentence. On January 3, 1997, a hearing was held and on January 7, 1997, the court, with the Honorable David W. Nelson presiding, ordered Palmer to committed to the Department of Corrections and Rehabilitation

for a period of five (5) years with the last one (1) year suspended for three (3) years. Credit was given for the 6 months previously served on this charge. (See ORDER REVOKING PROBATION at page 7 of the Appendix)

Palmer was then taken to the North Dakota State Penitentiary where he still resides.

On October 21, 1998, Palmer filed a pro se Motion to Correct an Illegal Sentence Pursuant to Rule 35 (a) of the North Dakota Rules of Criminal procedure. (See pages 8-20 of the Appendix)

On October 28, 1998, the State filed its Response to Palmer's motion. (See page 47 of the Appendix)

On November 2, 1998, Palmer filed his reply to the State's Response. (See pages 50 of the Appendix)

On November 3, 1998, the court denied Palmer's Motion. (See page 53 of the Appendix)

It is from that order of denial that his appeal this appeal sprouts.

ARGUMENT

NDCC § 12.1-32-07 (6) states in part that "If the defendant violates a condition of probation at any time before the expiration or termination of the period, the court may continue the defendant on the existing probation, with or without modifying or enlarging the conditions, or may revoke the probation and impose any other sentence that was available at the time of initial sentencing or deferment." thus allowing a defendant sentenced to just probation to have

the length of his probation extended or to have a sentence imposed that fell within the range allowed under the class of felony or misdemeanor which the defendant is charged.

In 1989 the legislature added a sentence to this section. That sentence says:

> "In the 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." [Emphasis added.]

Did the legislature add this sentence just for something to do or was it added for a reason? Palmer asserts that it was added for a reason and that it offers him protection from having a duplicity of penalties imposed upon him in violation of his right to be free from being punished twice for the same conviction.

Since it is axiomatic that the criminal code in North Dakota is modeled on the Federal Criminal Code, lets begin with federal history concerning the theory of double jeopardy and due process guarantees implicit in the constitution of the United States of America.

In Ex parte Lange, 18 Wall. 163-205, 21 L.Ed. 872 (1873), an early U.S. Supreme Court case says at page 876,

> "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense."

and goes further to say at page 878,

> "For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punish-

> ment that would legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had and, on a second conviction, a second punishment inflicted?"

Throughout the history of American Jurisprudence the United States Supreme Court has stressed that the Constitution is to be interpreted as the framers intended. Lange is just as valid today as it was 125 years ago.

In 1930 the U.S. Supreme Court, in United States v. Benz, 282 U.S. 304, 51 S.Ct. 113, 75 L.Ed. 354, said the following:

> "The distinction that the court during the same term may amend a sentence so as to mitigate the punishment, but no so as to increase it, is based not upon the ground that the court has lost control of the judgment in the latter case, but upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment to the Constitution * * This is the basis of the decision in Ex parte Lange, **supra.**" Benz at 114.

Though Benze dealt with the shortening of of a sentence and an appeal by the prosecution upon the granting of same, the findings that it gave are still on point in this argument.

North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2089, is a seperately cited concurring opinion in which Mr. Justice Douglass, with Mr. Justice Marshall joining, said,

> "The theory of double jeopardy is that a person need run the gauntlet only once. The gauntlet is the risk of the range of punishment which the State or Federal Government imposes for that particular conduct. It may be a year to 25 years, or 20 years to life, or death. He risks the maximum permissible punishment when first tried. That risk having been faced once need not be faced again..." Id. at 2089.

Palmer originally pled guilty to the charge of Theft of Property as part of a plea agreement with the State of North Dakota. At that time he had a legitimate expectation of the finality of the sentence imposed.

Pearce goes further and addresses the issue of using information acquired after the original sentence is imposed.

> "To rely on information that has developed after the initial trial gives the Government 'continuing criminal jurisdiction' to supplement its case against the defendant, far beyond the cut-off date set by its original prosecution. Consider the defendant whose sentence on retrial is enlarged because of antisocial acts committed in prison. To increase his sentence on that original offense because of wholly subsequent conduct is indirectly to hold him criminally responsible for that conduct." Id. at 2094, n. 6.

Also cited in Pearce is a case that is used as precedent every Circuit Court of Appeals and at least 29 States. That case is Roberts v. United States, 320 U.S. 264, 64 S.Ct. 113, 88 L.Ed. 41 (1943). The Congress of the United States changed the wording of the United States Probation Act to conform with Roberts.

In Roberts the petitioner pled guilty and was sentenced to a fine of $250 and to serve 2 years in a Federal Penitentiary. Under the Probation Act the court then suspended execution of the sentence conditioned upon payment of the fine. The fine was paid and he was released. Subsequently

the court revoked his probation, set aside the original sentence of 2 years, and imposed a new sentence of 3 years.

The relevant wording in the Probation Act, prior to Roberts, was:

> "At any time within the probation period the probation officer may arrest the probationer * * * or the court which has granted the probation may issue a warrant for his arrest * * * [and] such probationer shall be taken before the court * * * Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed." Id. at 114 n.2.

The Supreme Court went further and also said,

> "Except by strained construction we could not infer from the express grant of power to revoke probation or suspension of sentence the further power to set aside the original sentence." Id. at 115.

Roberts held,

> "...that having exercised its discretion by sentencing an offender to a definite term of imprisonment in advance of probation, a court may not later upon revocation of probation set aside that sentence and increase the term of imprisonment." Id. at 117-118.

Roberts also explained the distinction between suspending the imposition of sentence and suspending the execution of sentence in the following quote:

> "....Section 1 of the Probation act provides the procedural plan for release on probation. After judgment of guilt, the court is authorized "to suspent the **imposition** or **execution** of sentence and to place the defendant upon probation * * *." [emphasis added.] By this language Congress conferred upon the court a choice between imposing sentence before probation is awarded or after probation is revoked. In the first instance the defendant would be sentenced in open court to imprisonment for a definite period; in the second, he would be informed in open court that the imposition of sentence was being postponed. In both instances he would be informed of his release on probation upon conditions fixed by the court. The difference in the alternative methods is plain. Under the first, where execution of sentence is suspended, the defendant leaves the court with knowledge that a fixed sentence for a definite term of

> imprisonment hangs over him; under the second, he made aware that if his probation is revoked the court will at that time fix the term of his imprisonment." Id. at 115.

This quote was cited in State v. Siegel, 404 N.W.2d 469, 471 (N.D.1987), and shows that Roberts was still considered precedent in probation cases in North Dakota until at least 1987. Roberts has not been overruled or superceded .

In State v. Nace, 371 N.W.2d 129 (N.D. 1985), this court foresaw the likelyhood that,

> "There may be constitutional limitations on imposing increased term of imprisonment on resentencing. Under North Carolina v. Pearce, (Citations omitted) certain due process requirements must be met to ensure that a sentencing judge does not retaliate against a defendant who successfully attacks first conviction. Some states flatly prohibit increased sentences upon retrial; State v. Holms, 281 Minn. 294,296, 161 N.W.2d 650,652 (1968). The considerations that apply to sentencing upon retrial would seem to be equally applicable to resentencing upon remand to correct an illegal sentence." Id. 133 n. 4.

In 1988 this court decided two cases that have directly affected longstanding practice and imterpretation of NDCC 12.1-32-07 (4), (Now (6)). They were State v. Miller, 418 N.W.2d 614 (N.D.1988) and State v. Jones, 418 N.W.2d 782 (N.D.1988).

In Miller this court held that miller could have his probation revoked and require him to serve his remaining sentence, but could delay execution of the sentence to allow Miller to complete alcohol and drug treatment. This was clearly within statutory and constitutional limits.

In Jones this court held that after probation revocation, a court had authority to resentence a violator to any sentence

that was available at the time of his original sentencing and would not be in violation of his Fifth Amendment rights against double jeopardy. This may be the specific point at which the train got derailed. Jones' original sentence was 6 years, suspended for 5 years which was to be served on probation. On revocation he was resentenced to only 4 years in prison, with the remaining 2 years of the original sentence [Emphasis added] was suspended for 6 more years. He actually served less prison time but had his probation enlarged. This was perfectly legal, but it set up the appearance that, upon resentencing for all probation violations, anything goes!

In 1989 the North Dakota Legislature restructured our criminal sentencing laws. A great deal of study was done and much of that study is preserved in our legislative history. In that year an Interim Judiciary Committee was formed for the purpose of doing a CRIMINAL SENTENCING STUDY. Its goal was to "...remedy apparent inconsistencies or conflicts in statutory provisions governing sentencing..." (page 136 of the report attached as page 42 of the Appendix.)

On page 139 of the study, Jones is cited using the following quote:

> "Before Jones, it has been a long established practice that a suspended execution of sentence represented a contract between the court and the defendant and if the defendant violated conditions of probation, the defendant would receive the sentence initially imposed. Testimony indicated that Jones, however, in failing to reconcile conflicting statutory provisions represents a potential change in this practice by allowing the court to impose any sentence initially available to the court."

After much deliberation and study House Bill 1052 was

passed, in part to rectify conflicts and to clarify differences in the deferred imposition of a sentence, as compared to suspended execution of sentence. Added to subsection (4), now (6), was the sentence referred to on page 3 of this brief.

During the hearings on HB 1052, Bruce Haskell, now the Honorable Judge Bruce Haskell, represented the North Dakota Attorneys and testified in favor of the bill. He indicated that the bill does many of the ghings that were mentioned as problems and went on to say that it also does a nice job of defining just exactly the difference between deferred imposition of sentence and a suspended sentence. He also says, "Page 9, Section 4, lines 3-5 does not allow for extension of sentence...." (See the minutes of the Judiciary Hearings on House Bill 1052, Tape 1, side B, 1/11/89.) @P6 28 OF APPENDIX

Mr. Charles R. Placek, testifying on HB 1052 by letter, for the North Dakota State Parole Department, also noted,

> "In addition to the above, this new subsection clarifies and returns to the older accepted practice of revoking suspended sentences. Under recent ND Supreme Court rulings the Court held that a court could, if it found the offender in violation of conditions of probation, revoke the defendant's probation, and sentence the defendant to what ever period of time that was afforded the Court at the time of the initial sentencing hearing." (See copy of his letter at page 30-31 of the Appendix.)

Mr. Placek clearly supported the concept that a sentence should not be increased upon revocation of probation. It would also seem that it was his opinion that HB 1052 supported that concept.

It seems clear, from studying the legislative history of HB 1052, that everyone involved, from the State Parole

Office to the North Dakota State Attorneys, that the intention of the Legislature was such as to correct the problems and "return to the older accepted practice' of not increasing the sentence of a defendant that violates his probation on the suspended execution of his original sentence.

Palmer believes, and asserts, that the North Dakota Supreme Court has, for some reason, misperceived the intent of the 1989 Legislative Assembly. In 1990, this court heard State v. Gefroh, 458 N.W. 2nd 479. In that case the court states the following:

> "The construction of a statute by the courts, supported by long acquiescence on the part of the Legislature, by continued use of the same language, or by the failure to amend the statute, is evidence that such construction is in accordance with the legislative intent." Id. at 484.

Uninformed acquiescence would not be supported in the same manner as something that they were made aware was the practice and had approved of. If the legislature were to address this issue now, one would wonder what their opinion would be. Palmer believes that they would be outraged.

In Gefroh the court also held that he had no legitimate expectation in the finality of his sentence. They said in part,

> "Because Section 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." Id at 483.

Palmer, like Gefroh, pled guilty pursuant to a plea agreement. Not only did both have a legitimate expectation of finality, but NDCC § 12.1-32-07, as amedned, gives no

no reason to expect otherwise when a person is placed on probation for the suspended execution portion of his sentence. In fact it is further strengthened when applied with § 12.1-32-06.1 in mind. This section is titled **Length and termination of probation - Additional probation for violation of conditions.** Subsection (7) says:

> "Notwithstanding the fact that a sentence to probation subsequently can be modified or revoked, a judgment that includes such a sentence constitutes a final judgment for all other purposes."

There is no argument that upon violation of conditions of probation a probation may be revoked. In fact when this is done the paperwork specifically says PETITION TO REVOKE PROBATION or ORDER REVOKING PROBATION. It does not say PETITION TO SET ASIDE THE ORIGINAL JUDGMENT AND BEGIN ANEW. To do so would be to violate both the 14th Amendment requiring due process and the 5th Amendment guarantee against double jeopardy.

Gefroh also cites Gagnon v. Scarpelli, 411 U.S. 778, 782, 93 S.Ct. 1756,1759, 36 L.ED. 656, 661-662 n.3 (1979) and says,

> "The commentators have agreed that revocation of probation where sentence has been imposed previously is constitutionally indistinguishable from revocation of parole."

Though the parole system in North Dakota does not allow the automatic credit for time spent on parole to be credited against the sentence of a parole violator it makes no attempt to increase the actual sentence imposed by the court. If Probation and Parole are "constitutionally indistinguishable"

from each other can their applications be so far apart? Gagnon would seem to be nonsupportive of the Court's decision in Gefroh.

In 1992 the court heard and decided State v. Lindgren, 483 N.W.2d 777 (N.D. 1992). In Lindgren we find a defendant resentenced to a longer term of imprisonment than was originally imposed. Basicly the court held with the same reasoning that they did in Gefroh. Lindgren could have no "legitimate expectation" of finality.

Roberts, supra, is still directly on point as precedent to the issues here. Roberts is cited in every Federal Court and the majority, if not all, of the states. See for example United States v. Colvin, 644 F2d 703, 705 (8th Cir. 1981), United States v. Hopson, 39 F3d 795, 802 (7th Cir. 1994), State v. Lange, 775 P2d 213, 215 (Mont. 1989). Also see pages 18-19 of the Appendix for specific quotes from these cases.

Throughout the history of the United States increasing an already imposed sentence has not been acceptable practice. It violates the right of an individual to be free from twice being punished for the same conviction.

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Palmer now addresses his presented issue of whether NDCC 12.1-32-07 (6) is constitutionally void for vagueness and ambiguity.

In the past 10+ years several challenges have been made to this statute. For example those cited in this brief. None of them have challenged the vagueness or ambiguity of the statute.

They have all made the argument that NDCC 12.1-32-07 (6), or its predecessors, violate the right to be free from twice being punished for the same conviction. Palmer agrees with them. Increasing the sentence of a person, upon revocation of probation on the suspended execution portion of their sentence is a violation of the constitution.

So we come to the question of why so many people have brought challenges to this statute. This Court has been consistent in its denial but the challenges keep coming. Is it possible that NDCC 12.1-32-07 (6) could be "..ambiguous if it is susceptible to differing but rational meanings."? Souris River Tel. v. Workers Comp. Bureau, 471 N.W.2d 465 (N.D. 1991); State v. Silkwood, 317 N.W.2d 124 (N.D.1982).

In State's Attorney Laura Gray's Response to Defendant's Rule 35 Motion for Reduction of Sentence, she cites only the part of Section 12.1-32-07 (6) that would support her argument, stopping far short of addressing the part of the motion directed to the last sentence of subsection (6). If you take the entire subsection, and give it its literal meaning, the last sentence "In the 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." can easily give the average person a reasonable expectation that, if he had his probation revoked, he could be made to suffer the penalty of the sentence previously imposed. Palmer asserts that this was his belief.

A challenge to a statute based on vagueness grounds requires the court to consider whether the statute is suf-

ficiently clear so as not to cause persons "'of common intelligence...necessarily [to] guess at its meaning and [to] differ as to its application.'" United States v. Wunsch, 84 F.3d 1110, 1119 (9th Cir.1996)(Quoting Connally v. General Construction Co., 269 U.S. 385,391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). (This entire paragraph is from Humanitarian Law Project v. Reno, 9 F.Supp.2d 1176 at page 1201 ¶ [26].)

Humanitarian Law Project goes further and says that statutes are void for three reasons: "(1) to avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of the laws based on 'arbitrary and discriminatory enforcement' by government officers; (3) to avoid any chilling effect on the exercise of first amendment freedoms." citing Foti v. City of Menlo Park, (Citations omitted) as cited in Grayned v. City of Rockford, (Citations omitted). Humanitarian Law Project Id. at 1201 ¶ [26].

Reason (2) applies here. Not all of the judges in North Dakota resentence defendants to longer terms upon revocation. There is no consistancy in the application of this subsection.

(1) could be construed to apply also. If one were to make the logical assumption that it would also avoid punishment by increasing a term of imprisonment,which violated the protection against double jeopardy, when the statute is easily interpreted to mandate a finality of a sentence imposed and part of which execution is suspended.

United States v. Tabacca, 924 F.2d, 906 (9thCir.1991) clearly tells us that a statute is void for vagueness if it fails "to give adequate notice to people of ordinary intelligence of what conduct is prohibited, or if it invites arbitrary and discriminatory enforcement." Id at 912.(Emphasis added)

There are multitudes of other cites that could be made in support of a void for vagueness argument. What we need to get to here is whether or not § 12.1-32-07 (6) is vague.

As previously stated all of the arguments seem to ignor the last sentence of the subsection. If you were to read the subsection, excluding that sentence, it is much easier to understand that this first part was for the purpose of sentencing people that were on probation and where no specific sentence had been imposed. In Palmer's case, as in the other related cases cited, there was a sentence imposed and part of it was not executed at the time of the original sentencing. That part was suspened but still imposed.

If you read the subsection and include the last sentence, you find that it allows the imposition of the previously imposed sentence when someone violates the conditions of their probation of the unexecuted portion of his sentence.

One would wonder why the courts would not just sentence someone to the maximum term possible and suspend whatever portion that they wanted to, if they wanted to be able to lengthen the term that a person serves if his probation is revoked.

There simply has to be a reason that the last sentence of § 12.1-32-07 (6) was added by the legislature. If you

study the Legislative history, that was provided to Palmer during his research in this matter by Marilyn Guttromson, Research Librarian, and The Honorable Judge Bruce Haskell,[1] it become evident that this court is not following the wishes of the Legislature. If this court would take time to listen to the tapes that are available on HB 1052 and referred to in the Legislative history provided at PAGE 26 of the Appendix, it will find clear and convincing evidence that the last sentence of § 12.1-32-07 (6) was added for a reason and does have a reason for being there. That reason may cause this statute to be vague in its application. Palmer believes that it is if the holdings of this court are to continue.

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1. Marilyn Guttromson, Research Librarian for the Legislative council and The Honorable Bruce Haskell provided great help in the research on this matter. Judge Haskel did not give an opinion one way or the other as to his position on this matter. Nor did he give an opinion as to whether he thought the North Dakota Supreme Court's decisions are correct on the cases that they have decided relating to § 12.1-32-07 (6).

If NDCC 12.1-32-07 (6) is found to be void for vagueness the solution is that it will be found unconstitutional and remedies will ensue. In Palmer's case that remedy would be to release him from confinement.

The last point in this argument is whether NDCC 12.1-32-07 (6) is ambiguous. In State v. Rambousek, 479 N.W.2d 832 (N.D.1992) it addresses the issue of whether the Supreme Court can review construction of a statute in question. It holds that it is a question of law fully reviewable by this court. Rambousek then goes on to address what an ambiguous statute is and cites Souris River Tel. v. Workers Comp. Bureau, supra. "A statute is ambiguous if it is susceptable to differing but rational meanings." Id. at 834.

Rambousek also says in part, "Criminal statutes are strictly construed against the government and in favor of the accused. E.g., State v. Hogie, 424 N.W.2d 630 (N.D.1988)."

Challenges to NDCC 12.1-32-07 (6) have been many. It seems that a lot of the attorneys in North Dakota seem to be of the opinion that it is being applied incorrectly. If that was not the opinion that they held why would they continually challenge it. It is odd that it has not been appealed further.

Palmer believes that this statute has been shown to have many problems and is without doubt ambiguous. It is likely that it is unconstitutional. It is at least being applied unconstitutionally.

CONCLUSION

Palmer was sentenced to a term longer than that originally imposed after his probation was revoked. This practice is a violation of his 5th and 14th Amendment rights under the constitution of the United States and the State of North Dakota in that it violates his due process rights to be free from twice being punished for the same conviction.

Palmer also asserts that § 12.1-32-07 (6) is void for vagueness, and thus not constitutional, because it can be easily read and interpreted differently by normally intelligent men.

The last sentence of § 12.-32-07 (6) does not allow a longer term of imprisonment to be imposed after a sentence has been imposed originally and a part of which goes unexecuted while placing a person on probation for the suspended portion thereof.

Palmer therefore asks this court to set aside the order revoking his probation and release him from confinement.

Dated this 17th day of December, 1998.

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