ORIGINAL

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

980360

State of North Dakota,
Appellee,
vs.
Paul E. Palmer,
Appellant.

Supreme Court No. 980360

APPEAL FROM THE ORDER
REVOKING PROBATION AND CRIMINAL JUDGMENT

WILLIAMS COUNTY DISTRICT COURT

THE HONORABLE DAVID W. NELSON, PRESIDING

BRIEF OF APPELLEE
STATE OF NORTH DAKOTA

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STATEMENT OF THE CASE

On October 24, 1995 Paul Palmer plead guilty in District Court to the offense of Theft of Property, a Class C Felony. The Defendant was sentenced to two years with the Department of Corrections and Rehabilitation, with one and one-half years suspended for two years. He was placed on supervised probation for the two-year period of time. (See Criminal Judgment at page 3 of Appellant's Appendix).

On January 3, 1997 Palmer appeared with counsel on a Petition for Revocation of Probation. Palmer admitted the allegations in the petition and was sentenced on January 7, 1997. On January 7, 1997 the District Court sentenced Palmer to five years with one year suspended for three years. Palmer was also given credit for the six months he had already served. (See Order Revoking Probation at page 7 of Appellant's Appendix).

ARGUMENT

I.

N.D.C.C. § 12.1-32-07(6) DOES NOT VIOLATE PALMER'S DOUBLE JEOPARDY RIGHTS

Palmer argues that the application of N.D.C.C. § 12.1-32-07(6) violates his Constitutional rights against double jeopardy based on Palmer being sentenced at a probation revocation hearing for the same offense. The relevant portion

of the statute states:

> 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 under section 12.1-32-02 or 12.1-32-09 at the time of the initial sentencing or deferment.

N.D.C.C. § 12.1-32-07(6).

Palmer argues that it was error for the trial court to sentence him to anything more than the two years he initially received in the original criminal judgment.

A. THIS COURT HAS PREVIOUSLY RESOLVED THE ISSUE

The North Dakota Supreme Court has been confronted with this issue numerous times and has always determined that the statute authorizes resentencing up to the maximum available at the original sentencing, and that such resentencing is not a double jeopardy violation. See State v. Ennis, 464 N.W.2d 378 (N.D. 1990); State v. Gefroh, 458 N.W.2d 479 (N.D. 1990); State v. Jones, 418 N.W.2d 782 (N.D. 1988).

> The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution says, "nor shall any person be subject to be twice put in jeopardy of life or limb." This clause protects criminal defendants from multiple trials and multiple punishments for the same offense.

State v. Ennis, supra at 381, footnote 2.

When a defendant contends that he received multiple

punishments for the same offense, the appeals court must determine whether the criminal sentence, once pronounced, should have been accorded constitutional finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal. See U.S. v. DiFrancesco, 449 U.S. 117 (1980).

In Williams v. Wainwright, 493 F. Supp. 153 (D.C. Fla. 1980), Williams was sentenced in state court to concurrent terms of four and one-half years on two burglary convictions. He was to serve one and one-half and the rest suspended for a probationary period. Upon revocation of probation, he was sentenced to fifteen years imprisonment. The Federal District Court found that because the new sentence was based on the defendant's intervening conduct, the Constitution did not prohibit the procedure used by the state court. Id. at 154. See also Remer v. Regan, 104 F.2d 704 (9th Cir. 1939) cert. denied, 308 U.S. 553 (1939) (two year suspended sentence increased to three upon revocation.)

In U.S. v. Iversen, 90 F.3d 1340 (8th Cir. 1996), Iversen was sentenced to three months home detention and a period of probation. After she was issued a shoplifting citation, failed to appear for a psychological evaluation, and left South Dakota without permission, her probation was revoked and she was sentenced to six months in prison. The Eighth Circuit

Court of Appeals affirmed this sentence, as it was within the range of sentences available at the time of initial sentencing. Id. at 1345.

In U.S. v. Cawley, 48 F.3d 90 (2nd Cir. 1995), Cawley was sentenced to eight months imprisonment, followed by three years of supervised release. After his imprisonment concluded and he began his supervised release, his probation was revoked for witness intimidation and failure to appear in a state burglary prosecution. He was resentenced to serve twenty-four months and the 2nd Circuit Court of Appeals found that a harsher sentence was justified based on the violations and Cawley's perjury at the revocation hearing. Id. at 93.

The Double Jeopardy clause does not offer Palmer the protection he seeks. The United States Supreme Court has stated:

> Our cases establish that in the multiple punishments context, that interest is limited to ensuring that the total punishment not exceed that authorized by the legislature. The purpose is to ensure that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments.

Jones v. Thomas, 491 U.S. 376 (1989) (citations omitted).

In Palmer's case, the District Court revoked his probation and imposed a sentence that was available at the time of the initial sentencing or deferment on a Class C

Felony. See N.D.C.C. § 12.1-32-01(4). Palmer initially was sentenced to two years with one and one-half years suspended and was resentenced to five years with one suspended, with credit for the six months already served. The District Court clearly stayed within the sentencing provisions as provided in N.D.C.C. § 12.1-32-07(6).

In State v. Klein, 1998 ND 182, which presented an appeal involving a probation revocation and an increase in the length of incarceration, this Court ruled that the appeal was without merit and that a previous controlling decision, State v. Lindgren, 483 N.W.2d 777, 778 (N.D. 1992) was dispositive of the appeal. Because that recent appeal is nearly identical to this one, substantial portions of this brief have been adopted from the brief in State v. Klein, supra.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION

The decision to revoke Palmer's probation and sentence him to any portion of the remaining time available at the time of initial sentencing were options clearly available to the trial judge under the law. N.D.C.C. Section 12.1-32-07(6); N.D.R.Crim.P. Rule 32 (f)(2)(iii). Given the clear language of the statute and the consistent precedent cited above, it was not an abuse of discretion to revoke Palmer's probation and sentence him to five years with one suspended. See State v. Toepke, 485 N.W.2d 792 (N.D. 1992).

II.

PALMER HAD NO LEGITIMATE EXPECTATION OF FINALITY IN HIS SENTENCE ORIGINALLY IMPOSED

The North Dakota Supreme Court has previously addressed the issue of whether or not the Double Jeopardy Clause protects a defendant's legitimate expectation of finality in his sentence. State v. Lindgren, 483 N.W.2d 777, 779 (N.D. 1992).

The North Dakota Supreme Court has repeatedly found that the statute itself gives notice to defendants that a violation of probation conditions could result in the imposition of any sentence that was originally available. State v. Lindgren, supra at 779; State v. Jones, supra at 785-786.

The North Dakota Supreme Court summarized the notice provided to a defendant as follows:

> Section 12.1-32-07(4) gave Jones notice that a violation of the conditions of his probation could result in the imposition of *any* sentence which was originally available. This includes a sentence which is more severe than the sentence originally imposed. Thus Jones should have expected that a violation of the conditions of his probation could result in a harsher sentence.

State v. Jones, supra at 785-786.

Other courts are in agreement with the precedent established by the North Dakota Supreme Court. In State v. Jones, supra at 785, this Court discussed a number of state court decisions which were in agreement. The Court also

looked to U.S. v. DiFrancesco, 449 U.S. at 137 (1980), for the proposition that "the Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will be."

Palmer argues that the last sentence contained in N.D.C.C. § 12.1-32-07(6) limits a sentencing judge to imposition of the suspended portion of the sentence "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."

In State v. Lindgren, supra this Court was presented with exactly the same argument. Lindgren argued that the last sentence of N.D.C.C. § 12.1-32-07(5) [now subsection 6] specifically limited the trial court to making her serve the suspended part of the previously imposed sentence.

The North Dakota Supreme Court disagreed. After reviewing the legislative history of the statute, the Court adhered to previous decisions that had allowed resentencing in excess of the suspended portion of the sentence. Id. at 779. See also State v. Miller, 418 N.W.2d 614, 615-616 (N.D. 1988).

III.

N.D.C.C. § 12.1-32-07(6) IS NOT CONSTITUTIONALLY VOID FOR VAGUENESS AND AMBIGUITY

Palmer challenges N.D.C.C. § 12.1-32-07(6) based on a void-for-vagueness argument. This argument was not raised before the trial court. This Court has made a determination that issues not raised below cannot be raised on appeal. State v. Tweed, 491 N.W.2d 412 (N.D. 1992). The Court has followed the principle that, "Generally, issues not raised in the trial court, even constitutional issues, will not be addressed on appeal." State v. Miller, 388 N.W.2d 522 (N.D. 1986). Palmer did not raise this issue at the trial court level, and he has failed to submit any exception to the principle:

> As noted in Miller, the narrow exception to this principle is found in Rule 52 (b), North Dakota Rules of Criminal Procedure.
> (b) Obvious Error. Obvious errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

State v. Tweed, supra at 418.

Palmer has not articulated any "obvious error" by the trial court. The question of whether a statute violates a constitutional provision is a question of law and the statute will be upheld unless its challenger has demonstrated the statute's constitutional infirmity. Best Products Co., Inc. v. Spaeth, 461 N.W.2d 91 (N.D. 1990). An act of the Legislature is presumed to be correct, valid, and constitutional and any doubt as to its constitutionality must,

where possible, be resolved in favor of its validity. Because of the strong presumption of constitutionality, one who attacks a statute on a constitutional ground must bring up his heavy artillery or forego the attack entirely. The attacker must overcome the strong presumption of constitutionality. So. Valley Grain Dealers Ass'n v. Bd. Of Cty Comm'rs of Richland Cty., 257 N.W.2d 425 (N.D. 1977); State v. Erickson, 534 N.W.2d 804 (N.D. 1995).

Palmer argues in his void-for-vagueness and ambiguity argument that the last sentence of N.D.C.C. § 12.1-32-07(6) "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 imposed." He also argues that legislative history supports his position.

The expectation and notice argument has been addressed earlier in this brief. Also, the North Dakota Supreme Court has reviewed the legislative history of the statute, and the Court continues to maintain its position which allows resentencing in excess of the suspended portion of the sentence. State v. Lindgren, supra at 779. See also State v. Miller, 418 at 615-616.

CONCLUSION

Palmer has not shown that his probation revocation sentence violated his constitutional rights against double

jeopardy. The North Dakota Supreme Court has addressed this issue on numerous occasions and has not been convinced by those double jeopardy arguments.

N.D.C.C. § 12.1-32-07(6) and the cases upholding it do not grant probationers any expectation of finality in their sentence. Palmer's sentence at the probation revocation hearing was within the sentencing guidelines, and the District Court did not abuse its discretion.

Palmer did not raise the void-for-vagueness and ambiguity argument at the trial level, and he has not articulated any "obvious error" that may have occurred at the time of sentencing. In addition, the North Dakota Supreme Court has reviewed the legislative history of N.D.C.C. § 12.1-32-07(6) and has determined that resentencing in excess of the suspended portion is allowed. The sentence issued by the trial court should be affirmed.

Dated this 19th day of January, 1999

RESPECTFULLY SUBMITTED:

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STATE OF NORTH DAKOTA

State of North Dakota, Appellee, vs. Paul E. Palmer, Appellant.	**AFFIDAVIT OF SERVICE BY MAIL** Supreme Court No. 980360

STATE OF NORTH DAKOTA)
) ss
COUNTY OF WILLIAMS)

Shari Erdman, being first duly sworn, deposes and says:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

2. On this 20th day of January, 1999, I served the attached BRIEF OF APPELLEE upon Paul E. Palmer by placing true and correct copies thereof in an envelope addressed as follows:

Paul E. Palmer
Appellant
P.O. Box 5521
Bismarck, ND 58506-5521

and depositing the same, with postage prepaid, in the United States mail at Williston, North Dakota.

Shari Erdman
Shari Erdman

Subscribed and sworn to before me this 20th day of January, 1999.

JANET JOHNSRUD
Notary Public, State of North Dakota
My Commission Expires 11-27-2001
STATE OF NORTH DAKOTA
NOTARY PUBLIC SEAL

Janet Johnsrud
NOTARY PUBLIC