

ORIGINAL

**In the Supreme Court
State of North Dakota**

20030075 — 20030077

State of North Dakota,)

)

) Supreme Court Nos. 20030075, 20030076, 20030077

Plaintiff/Appellee,)

) Cass County Nos. 02-K-0023, 02-K-0148, 02-K-0627

-vs-)

)

Eric Alan Faleide,)

)

Defendant/Appellant.)

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

JUN 24 2003

STATE OF NORTH DAKOTA

Brief of Defendant/Appellant

Appeals from Orders Revoking Probation and Sentence
Entered on March 17, 2003
In District Court, County of Cass, State of North Dakota
The Honorable Frank L. Racek

Monty G. Mertz (#03778)
Attorney at Law
1308 23rd Street South
P.O. Box 10396
Fargo, ND 58106-0396
Phone (701) 293-7788
Fax (701) 293-7269
Attorney for Defendant/
Appellant Eric Alan Faleide

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Statement of the Case

These three separate matters were commenced with the filing of Petitions for Revocation of Mr. Faleide's Probation.¹ App. 20, 39, & 56.² All three petitions contained exactly the same allegations that Mr. Faleide had violated conditions of his probation. Mr. Faleide made a first appearance on the petitions on February 3, 2003, and a hearing was scheduled. Mr. Faleide denied violating his conditions of probation, and an evidentiary hearing was held on March 10, 2003, before the Honorable Frank L. Racek, Judge of the District Court. The Court found that Mr. Faleide had violated conditions of his probation, revoked Mr. Faleide's Probation, and Orders Revoking Probation and Sentence were entered on March 17, 2003. App. 23, 42, & 59. Notices of Appeal were filed in all three cases on March 19, 2003. App. 25, 44, & 61.

Statement of the Issues

- 1. Whether the Trial Court's Finding that Mr. Faleide Violated his Probation was Clearly Erroneous.**
- 2. Whether the Trial Court's Determination that the Alleged Violations of Probation Warranted Revocation of Mr. Faleide's Probation was an Abuse of Discretion.**

¹Defendant/Appellant Eric Alan Faleide will be referred to in this brief as Mr. Faleide.

²The Appendix will be referred to as App. in the brief.

Statement of the Facts

Ms. Stacy Sanders was Mr. Faleide's Parole and Probation Officer. (T 5-6).³ Ms. Sanders filed the petitions to revoke Mr. Faleide's probation (T 6).

All three petitions contained the same allegations that Mr. Faleide had violated the conditions of his probation, as follows:

Allegation #1: The Defendant violated Condition #1 of the Appendix A in that on 01/27/03 the Defendant was in possession of stolen property.

Allegation #2: The Defendant violated Condition #1 of the Appendix A in that on 01/31/03 the Defendant committed the criminal offense of fleeing a police officer.

Allegation #3: The Defendant violated Condition #14 of the Appendix A in that he associated with known drug users or traffickers. On 01/31/03 the Defendant was with Adam Berlin, a known drug user or trafficker, with an active warrant. There were controlled substances and ammunition in the defendant's car, but Mr. Berlin claimed possession of the items.

App. 20, 39 & 56. The first allegation was that Mr. Faleide was found to be in possession of a stolen cellular phone. Mr. Faleide told Ms. Sanders he had been given the phone, and when he went to the store to activate it, was told that it was stolen. (T 6-7).

Allegation number two was that Mr. Faleide had committed the offense of fleeing a police officer. Ms. Sanders received a call from the Fargo police that Mr. Faleide was in a vehicle on January 31, and a police officer identified himself and tried to stop the vehicle, and Mr. Faleide fled, and was later arrested. (T 7-8). The last allegation was that when Mr. Faleide fled the officer he was with another individual who was a known drug trafficker or user. (T 8).

³The single transcript in this case will be referred to in this brief as T followed by the page number(s).

Ms. Sanders testified that Mr. Faleide had been paroled to a community corrections facility and had numerous violations, so his parole was revoked. Then he was released on probation and reconnected with known drug users and traffickers. (T 8). Ms. Sanders acknowledged that Mr. Faleide had received the cell phone in question from his mother. (T 9). She also acknowledged that no criminal charges had been filed with respect to the cell phone at the time of the hearing. (T 10). Also, there was only one other person who was a drug user identified, that being one Adam Berlin. (T 10). Ms. Sanders had received information that Mr. Berlin had been trafficking in drugs since his release from Centre, Inc. (T 10). Mr. Faleide did tell Ms. Sanders that he did not know the cell phone was stolen. (T 11). Mr. Faleide was in the penitentiary on May 8, 2002, the day the phone was reported stolen. (T 13.)

Sergeant Pat Claus is the head of Fargo narcotics and gangs unit. (T 14). The unit was looking for Adam Berlin on January 31, 2003. Mr. Berlin is a convicted felon who had fled from pre-trial release on Federal drug and weapons charges. (T 15). Sergeant Claus located a vehicle and saw that Mr. Berlin was the passenger. He exited his vehicle, and was wearing a "police raid jacket" which had a large yellow badge and the word "police" in large letters. He drew his gun and ordered the vehicle to stop. (T 16). Sergeant Claus also identified Mr. Faleide as the driver of the vehicle. Mr. Berlin turned toward Mr. Faleide and said something. Mr. Faleide put the car in reverse and began backing up. Sergeant Claus yelled and pounded on the vehicle with his hand to get the vehicle to stop. Sergeant Claus fell down on the slippery surface and was almost struck by the car which was fish-tailing. (T 17).

Sergeant Claus contacted other officers, who were able to stop the car. (T 19). Mr. Faleide was arrested for fleeing and Mr. Berlin was arrested on the warrant. (T 19). A search incident to the arrest revealed drug paraphernalia and ammunition. (T 19). Both individuals are convicted felons and prohibited from possessing ammunition. (T 19). A handgun was found in a driveway along the route taken by the vehicle as it had fled. (T 20). The handgun matched the type of ammunition found in the vehicle, both .40 caliber. (T 20). Mr. Faleide was questioned and denied knowing Mr. Berlin was on the run, and denied knowing anything about the drug paraphernalia, the gun, or the ammunition. (T 21). Mr. Berlin admitted and confessed that all the items found in the vehicle were his. (T 22). Officer Claus was not in a marked police car and he was not in a police uniform. (T 22). Detective Mitch Burris was one of the other officers at the scene and assisted in arresting both individuals. (T 29). He identified Mr. Faleide as the driver of the Cadillac on the day in question.

The Court dismissed allegation number one, with respect to the cell phone, as not proven. (T 31).

Mr. Berlin testified that he met Eric Faleide at Centre and they became friends. (T 31). He never told Mr. Faleide that he had escaped from Centre or that he had used or sold drugs after leaving Centre. (T 31-32). Mr. Berlin admitted the ammunition and drug paraphernalia found in the vehicle on the night in question were his, and Mr. Faleide knew nothing about them. (T 32). Mr. Faleide knew Mr. Berlin was a former drug user. (T 32). He never told Mr. Faleide that he was doing anything illegal. (T 33). Mr. Berlin stated that he did not know the person who approached the car was a police officer, and didn't think Mr.

Faleide did either. (T 33). Mr. Berlin is a convicted drug dealer. (T 33). Mr. Faleide knew Mr. Berlin was a convicted drug dealer. (T 35). Mr. Berlin continued to use drugs himself. (T 36). He had a meth pipe and marijuana in his pocket when he was with Mr. Faleide. (T 36). He did not use drugs in Mr. Faleide's presence. (T 36). Mr. Berlin stated he had not seen Sergeant Claus on a prior occasion at his house. Mr. Berlin stated that Sergeant Claus came up to his window and pounded on it. (T 37). He told Eric Faleide to drive away because he didn't know who the person was. (T 37.)

Mr. Faleide met Mr. Berlin at Centre. He had no knowledge Mr. Berlin had escaped from Centre. (T 39). Mr. Berlin never used drugs in his presence. (T 39-40). Mr. Faleide had no knowledge of the items found in the vehicle. (T 40). A car pulled up beside them and Adam Berlin told him to go, the guy was running after the car and pounding on the window. (T 41). He stated that he could not hear what the person was saying and did not recognize that he had a gun. (T 41). The stereo was on in his car. (T 41). He was looking to the rear as he was backing up. (T 42). Mr. Berlin just said "go, go" because someone was after them. (T 42). Mr. Faleide had no idea what the person wanted. (T 42). When he saw the marked squad cars he stopped his vehicle. (T 46).

Argument

1. The Trial Court's Finding that Mr. Faleide Violated his Probation was Clearly Erroneous.

This Court has very recently stated the standards it uses in reviewing an appeal of a probation revocation in ***State v. Olson*, 2003 ND 23, 656 N.W.2d 650**, as follows:

[¶15] If an alleged probation violation is contested, the prosecution must establish the violation by a preponderance of the evidence. **N.D.R.Crim.P.**

32(f)(2). We apply a two-step analysis in reviewing a probation revocation—first reviewing the trial court’s factual finding of a probation violation under the clearly erroneous standard, and then reviewing the trial court’s determination the violation warranted revocation of probation under an abuse of discretion standard. *State v. Gates*, 540 N.W.2d 134, 137 (N.D. 1995); *State v. Monson*, 518 N.W.2d 171, 173 (N.D. 1994); *State v. Saavedra*, 406 N.W.2d 667, 669 (N.D. 1987).

Mr. Faleide respectfully submits that the Trial Court’s factual findings that he violated conditions of his probation were clearly erroneous. With the dismissal of the first allegation about a stolen cell phone, the entire revocation proceeding was based upon an incident which did occur on January 31, 2003. Some of the facts are not in dispute. Mr. Faleide was driving a car in which Mr. Adam Berlin was a passenger. There was a warrant outstanding for Mr. Berlin and .40 caliber ammunition and drug paraphernalia were found in the car. Mr. Faleide and Mr. Berlin are both convicted felons, and met at Centre, Inc., in Fargo. Mr. Berlin was a convicted drug user and dealer. (T 31-46). Mr. Faleide did drive away when the car was approached by Officer Claus. (T 41-42). The Officer was not in a marked squad car, and he was not wearing a police uniform. (T 22).

What is in dispute is whether there was any proof that any of these known facts constituted a violation of any conditions of Mr. Faleide’s probation. Both Mr. Faleide and Mr. Berlin testified under oath that they did not recognize Officer Claus as a police officer, and drove away because they did not know who the person was. Mr. Faleide did stop when approached by marked squad cars. Any proof that Mr. Faleide did, in fact, commit the criminal act of fleeing a police officer as alleged in allegation number two is purely circumstantial. Mr. Faleide was sitting a parked car. Another car pulled up, which was not a marked police car. A person, not in police uniform, got out and approached the car. Mr.

Berlin told Mr. Faleide to take off, and he did. The individual ran after the car and pounded on the window. The stereo was on in the car, and Mr. Faleide could not hear what the person was saying.

Both Mr. Berlin and Mr. Faleide testified under oath that Mr. Faleide did not know about any of the items of paraphernalia or ammunition that were found in the car. They both testified that Mr. Berlin had never used or possessed drugs in Mr. Faleide's presence at any time. There was no evidence presented that Mr. Faleide knew on the day in question that Berlin was indeed a drug user or trafficker as alleged. Mr. Berlin's past convictions should not be considered in this analysis. Is it fair to argue that "once a drug user or trafficker, always a drug user or trafficker?" That is actually what the State was advocating in this matter, by discussing Mr. Berlin's prior record. The probation condition is stated in the present tense, "drug user or trafficker" in Appendix A, condition number 14. (App. 36). By the plain language, the condition is read in the present tense. Conditions of probation are strictly construed in the favor of the offender. ***State v. Monson*, 518 N.W.2d 171, 173 (N.D. 1994).**

The Trial Court found the testimony of Mr. Berlin and Mr. Faleide as not being credible. (T 49). The Trial Court seemed to rely on Mr. Berlin's conduct and knowledge and extrapolated that to Mr. Faleide. Considering all of the evidence of record those findings are clearly erroneous, even considering that the burden of proof is only a preponderance of the evidence. It seems as if the Court gave every favorable inference to the State's evidence in this matter. The State does, after all, actually have a burden of proof.

This Court should reverse the Orders Revoking Probation and Sentence, and reinstate Mr. Faleide's earlier sentences.

2. The Trial Court's Determination that the Alleged Violations of Probation Warranted Revocation of Mr. Faleide's Probation was an Abuse of Discretion.

Should this Court uphold the factual findings by the Trial Court that Mr. Faleide did violate one or more conditions of his probation, this Court should find that the revocation of Mr. Faleide's probation was an abuse of discretion. One of the allegations in the petition was dismissed due to lack of evidence. The second allegation was based upon an alleged criminal offense of fleeing. When Mr. Faleide was confronted with marked police cars, he did stop. (T 29). Finally, the allegation that he was associating with a drug user or trafficker was thin at best. There is no evidence that Mr. Faleide had used drugs himself. There was no evidence presented about Mr. Faleide's present compliance with all the other conditions of his probation. The Trial Court was not legally compelled to revoke Mr. Faleide's probation. **N.D.C.C. Section 12.1-32-07(4)**. The Court could have and should have continued Mr. Faleide on probation under the circumstances, and could have fashioned an appropriate sanction by modifying or enlarging the conditions of his probation, short of the radical step of revoking him and sentencing him to a penitentiary sentence. *Id.* The Court made the quantum leap from what was a one-year prison sentence to a five-year prison sentence, for what could be fairly characterized as minor violations of his probation conditions, all on one day. The Court's sentence of five years on the C felonies is a maximum sentence, albeit concurrent, and would be expected if Mr.

Faleide had committed a new felony crime on probation. Instead, you could fairly say that Mr. Faleide was literally in the wrong place at the wrong time on the day in question.

Conclusion

The Trial Court's actions were both clearly erroneous and an abuse of discretion. This Court should reverse the Orders Revoking Probation and Sentence and remand these files, directing the Trial Court to reinstate Mr. Faleide's original sentences, with credit for all time served since his arrest on the petitions, and no other penalty, because his incarceration on the petitions is more than a sufficient sanction for his alleged violations.

Respectfully submitted this 24th day of June, 2003.



Monty G. Mertz
ND Bar ID #03778
1308 23rd Street South
P.O. Box 2806
Fargo, ND 58106-0396
Tele. (701) 293-7788
Fax (701) 293-7269
Attorney for Defendant
and Appellant