

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

20030075 - 20030077

State of North Dakota,)
)
Plaintiff-Appellee,)
vs.)
Eric Alan Faleide,)
Defendant-Appellant.)
_____)

) Supreme Court Nos. 200375, 200376,
) 200377
) District Court Nos. 02-K-0023,
) 02-K-0148 and 02-K-0627

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CLERK OF SUPREME COURT

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STATE OF NORTH DAKOTA

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

APPELLEE'S BRIEF

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STATEMENT OF ISSUES

- I. The facts support the Trial Court's findings that Mr. Faleide violated his probation.
- II. The Trial Court did not abuse its discretion in revoking Mr. Faleide's probation.

STATEMENT OF THE CASE

On April 22, 2002, Mr. Faleide entered guilty pleas to three separate Informations that all together contained three counts of C felony Possession of Drug Paraphernalia, three counts of C felony Possession of a Controlled Substance, one count of B misdemeanor Possession of a Controlled Substance and one count of Carrying a Loaded Firearm in a Vehicle. See Appellant's Appendix 13, 32, & 50. The District Court imposed sentences of 5 years, on all the felony counts, for which Mr. Faleide would serve one year followed by four years of supervised probation. Id. On the misdemeanor counts Mr. Faleide was sentenced to thirty days straight time. Id. All sentences were to run concurrent. Id.

On February 3, 2003, Ms. Stacy Sanders of Parole and Probation filed a petition for revocation of probation on Mr. Faleide. See Appellant's Appendix 20, 39, & 56. The contested probation revocation hearing was held on March 10, 2003 before the Honorable Frank Racek. After hearing the testimony, the Court found Mr. Faleide had violated two conditions of probation. (T 50).¹ The Court then imposed five years of imprisonment on all felony counts with the defendant receiving one year thirty eight days of credit. All sentences were to run concurrently. (T 52 -53).

¹ The State will refer to the transcript in this matter as T followed by page number(s).

STATEMENT OF THE FACTS

The petition for revocation on Mr. Faleide contained three alleged probation violations. Those three allegations were that the defendant was in possession of stolen property, the defendant committed the offense of fleeing a police officer, and the defendant was associating with a known drug user or trafficker. The allegation of possession of stolen property was dismissed by the Court. (T 31). The State did not, nor does it, contest that dismissal. Therefore, this appeal centers around whether allegations number two and three, which arise out of the same fact pattern, were proved. The facts regarding the events in question are as follows.

On January 31, 2002, the Fargo Narcotics Unit was searching for Adam Berlin who was wanted on a federal warrant. (T 15). Berlin was a convicted felon for drugs and was under indictment in Federal Court for the sale or possession with intent to distribute methamphetamine and being a felon in the possession of firearms. (T 15). Officer Pat Claus of the Fargo Narcotics Unit was one of the officers searching for Berlin. (T 14-15). Officer Claus had previous contact with Berlin when he conducted a probation search of Berlin's residence and Berlin had also been investigated by the patrol division. (T 15). While conducting surveillance, Officer Pat Claus followed a vehicle he believed would either contain Berlin or lead him to where Berlin might be. (T 16).

The vehicle Officer Claus was following turned into the parking lot of Stop-

N-Go in Fargo and pulled up beside a white Cadillac. (T 16) Officer Claus, who was driving an unmarked squad car, pulled up next to the passenger side of the white Cadillac and notice two individuals in the Cadillac. (T 16). Officer Claus noticed Berlin in the passenger seat and Mr. Faleide in the drivers seat. (T 16). At that point, Officer Claus made eye contact with Berlin and Faleide. (T 16 & 23). Berlin then turned as if to say something to the driver and at that point Officer Claus exited his vehicle wearing a police raid jacket and with his firearm drawn. (T 16). At the revocation hearing, Officer Claus described his raid jacket as having on the right side a “four by four – four and a half by four” inch yellow badge identical to the badges on police officer’s winter coats and on the left side in contrasting colors the word “Police” in “inch and a half” lettering. (T 16 & 24).

Once Officer Claus had exited his vehicle he was standing slightly to the front and right (passenger) side of the Cadillac. (T 17). Officer Claus ordered the vehicle to stop by yelling as loud as he could “Police officer, don’t move.” (T 18). The vehicle then began to back up and then accelerate forward fishtailing out of the lot. (T 18). While the vehicle was backing up and pulling out of the parking lot, Officer Claus yelled three or four times that he was a police officer and the vehicle should come to a stop. (T 18 - 25). Officer Claus also struck the vehicle on the side to get the drivers attention. (T 18).

At that point other units were called to give chase to the Cadillac. (T 18).

Deputy Mitch Burris, who was assisting in the surveillance, then chased the fleeing vehicle down 15th Avenue. (T 28). Deputy Burris testified the speed limit on the street he was chasing Faleide on was 25 mile per hour, however, Mr. Faleide's vehicle was traveling approximately 50 mile per hour. (T 29). Mr. Faleide's vehicle was eventually stopped because a number of other units "boxed" him in. (T 29).

Once the two individual were arrested, the vehicle was searched and in it was found a "hide-a-can" which the bottom unscrewed and items of methamphetamine paraphernalia were found as well as a box of 40-caliber ammunition. (T 19). Shortly after the two individuals were arrested, a private citizen contacted law enforcement and advised them a semi-automatic Israeli arms 40-caliber handgun was found along the same path taken by Faleide's vehicle. (T 20). Officer Claus testified the gun "matched the caliber and type ammo of the ammunition" that was found in the car. (T 20).

ARGUMENT

I. The facts support the trial court's findings that Mr. Faleide violated his probation.

Revocation proceedings are to be reviewed under a two step analysis. State v. Saavedra, 406 N.W.2d 667, 669 (N.D. 1987). The first step is to determine whether the factual determinations by the court indicate the defendant has violated his probation. Id. The North Dakota Supreme Court has stated, "we do not re-examine findings of fact decided by the trial court upon conflicting evidence; nor do we appraise the credibility of witnesses." Id. (stating the Court will not substitute its judgment for that of the trial court). Therefore, a trial court's factual finding of a violation of probation will be reviewed under the clearly erroneous standard. Id. Additionally, in a probation revocation proceeding the prosecution carries the burden of establishing a violation only by preponderance of the evidence. State v. Orseth, 359 N.W.2d 852, 854 (N.D.1984).

In this case, the trial Court found the testimony of Mr. Berlin and Mr. Faleide not to be credible. (T 49). Mr. Berlin testified that he was a convicted drug dealer, continued to use drugs, and had drugs and drug paraphernalia in his possession the day in question. (T 35 - 36). There is no question Mr. Berlin was a drug dealer and user. The only question is whether Mr. Faleide was knowingly associating with a known drug user. Mr. Faleide claims he did not know that Mr.

Berlin was involved in illegal activities. (T 40). There is no way of getting inside of Mr. Faleide's mind so the trial court must focus on the circumstances surrounding the event. This is also true when determining whether Mr. Faleide willfully fled from the officers. As the court stated,

[a] lot would have had to been overlooked in this case to not know this was a police officer with police insignia, someone that's know to Mr. Berlin, wearing a badge, having a gun out, identifying himself as a police officer, ordering the Defendant to stop. We'd have to overlook all the items Mr. Berlin had in his possession including the ammunition and the paraphernalia and the narcotics and the gun that more than likely than not based on the evidence that the Court heard, went flying out the window during this case. (T 49).

In this case, the trial court clearly had reasons to doubt the credibility of the defense's witnesses. In light of the evidence and the Supreme Court's statements that determinations of the credibility of witnesses are best determined by the trial court it is clear that the trial court's findings were not clearly erroneous.

II. The Trial Court did not abuse its discretion in revoking Mr. Faleide's probation.

Once a violation is established the court is authorized to revoke an order suspending a sentence or an order suspending the imposition of sentence, or to continue probation on the same or different conditions. N.D.R.Crim.P. Rule 32(f)(2)(C). The decision to revoke or to continue probation is in the discretion of the trial court. State v. Altringer, 388 N.W.2d 864, 865 (N.D. 1986). The standard of review for a probation revocation is abuse of discretion. State v. Gates, 540

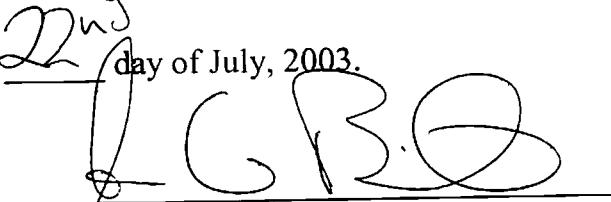
N.W.2d 134, 137 (N.D.1995) (holding the review of sentences imposed in a revocation matter are very limited). Further, the Court's review is "confined to determining whether the judge acted within the limits prescribed by statute, or substantially relied on an impermissible factor." Id.

In this case, there is no evidence the trial court relied on an impermissible factor when it revoked Mr. Faleide's probation. The trial court's reasoning that Mr. Faleide posed, "a risk to society around firearms, around ammunition, around people that are in the business of dealing in meth and with your substantial history" is a legitimate reason for revoking a probationer. (T 52). Additionally, Mr. Faleide was on supervised probation for committing six C felonies. The trial court did not impose a sentence that was outside of what the statutes provided and in fact from a legal perspective the court could have run the sentences consecutive but choose not to do so. Therefore, the trial court did not abuse its discretion.

CONCLUSION

The trial court evaluated the credibility of all the witnesses and found the defense's witnesses not to be credible. Because the trial court did not make a clearly erroneous judgment and did not abuse its discretion in revoking the defendant's probation the trial courts ruling should be affirmed.

Respectfully submitted this 22nd day of July, 2003.

A handwritten signature in black ink, appearing to read 'A.G. Birst', written over a horizontal line.

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