

ORIGINAL

In the Supreme Court
State of North Dakota

20040253

State of North Dakota,)	
)	
)	Supreme Court Nos. 20040253
Plaintiff/Appellee,)	
)	Cass County Nos. 02-K-02938
-vs-)	
)	
Rebecca Jackson-Metcalf,)	
)	
Defendant/Appellant.)	

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STATE OF NORTH DAKOTA

Brief of Defendant/Appellant

Appeal from Order Revoking Probation and Sentence
Entered on August 25, 2004
In District Court, County of Cass, State of North Dakota
The Honorable Georgia Dawson

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Statement of the Case

This matter was commenced with the filing of a Petition for Revocation of Ms. Jackson-Metcalf's Probation.¹ App. 4.² The petition contained eight (8) separate allegations that Ms. Jackson-Metcalf had violated conditions of her probation. Ms. Jackson-Metcalf made a first appearance on the petition and an evidentiary hearing was held on August 16, 2004, before the Honorable Georgia Dawson, Judge of the District Court. The Court found that Ms. Jackson-Metcalf had violated conditions of her probation, revoked Ms. Jackson-Metcalf's Probation, and an Order Revoking Probation and Sentence was entered on August 25, 2004. App. 8. Notice of Appeal was filed on September 3, 2004. App. 17.

Statement of the Issues

1. Whether the Trial Court's Finding that Ms. Jackson-Metcalf Willfully Violated her Probation was Clearly Erroneous.

2. Whether the Trial Court's Determination that the Alleged Violations of Probation Warranted Revocation of Ms. Jackson-Metcalf's Probation was an Abuse of Discretion.

¹Defendant/Appellant will be referred to in this brief as Ms. Jackson-Metcalf.

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

Statement of the Facts

Ms. Jennifer College was Ms. Jackson-Metcalf's Parole and Probation Officer.(T 5).³ Ms. College filed the petition to revoke Ms. Jackson-Metcalf's probation (T 5).

The petition contained eight (8) allegations that Ms. Jackson-Metcalf had violated the conditions of her probation. App. 4. Allegations 1,2 and 3 were that Ms. Jackson-Metcalf tested positive for drug use. She admitted to using methamphetamine on May 31 or June 1, 2004 and on June 10, 2004. Allegations 4, 5 and 6 were that she provided adulterated urine samples at the day reporting center, on June 23, 2004, July 12, 2004, and on July 20, 2004, respectively. App. 4-5. That the samples were adulterated was confirmed by Redwood Toxicology lab. Allegation 7 was that on July 23, 2004, she provided samples which were not acceptable for testing because they were not at or near body temperature. And, Allegation 8 was that she was negatively terminated from the Day Reporting Program on July 23, 2004, for failing to report as required and repeatedly providing adulterated urine samples. App. 5.

Ms. Jackson-Metcalf admitted to allegations 1, 2 and 3. (T 14). The State presented evidence on the remaining allegations.

Ms. College testified that on June 23, 2004, Ms. Jackson-Metcalf provided a urine sample at an office visit that tested abnormal on a test strip for being dilute.

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

It was sent to a lab because Ms. Jackson-Metcalf denied dilution or adulteration. The lab report reflected a dilute sample. (T 6). Ms. Jackson-Metcalf was placed on day reporting, and provided a urine sample on July 12, 2004, which was again abnormal on the adulteration strip, was sent to the lab and came back as dilute. (T 6). As to allegation 6, a urine sample provided by Ms. Jackson-Metcalf came back from the lab positive for alcohol and as dilute. (T 7). As to allegation 7, on July 23, 2004, Ms. Jackson-Metcalf provided a urine sample which registered below body temperature. She was asked to provide another sample, and that one also did not register on the strip. (T 8-9). As to allegation 8, she was terminated from the Day Reporting Program. Ms. Jackson-Metcalf failed to report for both a.m. and p.m. check-in for one week. She provided a doctor's note which showed she missed work due to a back problem, and that was the only reason she gave for not reporting. (T 8). She also provided the adulterated urine samples which were covered in allegations 4, 5, 6, and 7. (T 8-9).

On cross-examination, Defense Counsel asked Ms. College a number of questions about whether the dilute samples could be due to a medical problem. Ms. College could not answer those questions, as she is not medically trained. (T 9-11). She could only say that the lab tests showed that the samples were abnormal. (T 11). Counsel also asked Ms. College about how the samples are collected. Someone witnesses the collection of the sample. Ms. College indicated that they have had people conceal bottles "within" their body and with bottles taped to their body. (T 12). As to allegation 7, Ms. College had an E mail from the person who

observed the test. There was yellow urine in the toilet, but the liquid in the bottle was clear, and had no odor. Ms. Jackson-Metcalf had no explanation for that. (T 13). As to allegation 8, Ms. Jackson-Metcalf provided a note from a doctor that she missed reporting due to a problem with her back. (T 13).

The Court found “a willful violation of the conditions of probation one through eight.” (T 14). The state recommended that the prior sentence be revoked and that she be sentenced to one year, with credit for 80 days, and a recommendation for treatment. (T 14). The state recognized that she has an addiction problem, and that she has medical and mental health issues. The state felt that she has failed to be honest about her addiction problem. (T 15). Defense counsel provided the court with an evaluation which recommended that she talk to a psychologist. Defense counsel recommended that she be given another chance on probation, after a short term in jail. (T 16). Ms. Jackson-Metcalf told the court that she takes prescription drugs for anxiety and panic attacks. (T 16). She admitted to having a relapse with methamphetamine use. (T 17). Ms. Jackson-Metcalf stated that she is willing to go through drug treatment again and see her psychologist. (T 17). The Court decided to follow the state’s recommendation. (T 17-18).

Argument

1. The Trial Court’s Finding that Ms. Jackson-Metcalf Willfully Violated her 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).**

Ms. Jackson-Metcalf respectfully submits that the Trial Court’s factual findings that she violated conditions of her probation were clearly erroneous. 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 a willful violation of all eight allegations without comment. Ms. Jackson-Metcalf admitted to the first three allegations. She admitted to having a relapse with methamphetamine use. As to allegations 4, 5, 6 and 7, the state did not present expert testimony or evidence of the validity of the test results of the “adulterated” samples. The defense raised the possibility that the dilute samples could be explained by Ms. Jackson-Metcalf’s medical problems. The burden of proof is on the state. 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. It is true that Ms. Jackson-Metcalf admitted to having a

relapse of using methamphetamine. She was placed on probation in December, 2002. App. 10. Her violations of probation conditions did not occur until May, 2004. Presumably she was compliant with probation for almost a year and a half. She has had addiction problems and has verified medical issues, both physical and mental health issues. Technical violations of probation conditions are not necessarily "willful" violations. Ms. Jackson-Metcalf has obvious addiction problems. Her medical and addiction issues are the basis for the alleged violations of her probation. Given the state of the record, and the failure of the state to provide any expert testimony concerning the evidence, the findings of a willful violation of probation are clearly erroneous.

This Court should reverse the Order Revoking Probation and Sentence, and reinstate Ms. Jackson-Metcalf's earlier sentence.

2. The Trial Court's Determination that the Alleged Violations of Probation Warranted Revocation of Ms. Jackson-Metcalf's Probation was an Abuse of Discretion.

Should this Court uphold the factual findings by the Trial Court that Ms. Jackson-Metcalf did willfully violate one or more conditions of her probation, this Court should find that the revocation of Ms. Jackson-Metcalf's probation was an abuse of discretion. There was no evidence presented about Ms. Jackson-Metcalf's present compliance with all the other conditions of her probation. The Trial Court was not legally compelled to revoke Ms. Jackson-Metcalf's probation. **N.D.C.C. Section 12.1-32-07(4)**. The Court could have and should have continued Ms.

Jackson-Metcalf on probation under the circumstances, and could have fashioned an appropriate sanction by modifying or enlarging the conditions of her probation, short of the radical step of revoking her and sentencing her to a penitentiary sentence. *Id.* The Court's sentence would be expected if Ms. Jackson-Metcalf had committed new crimes on probation. Instead, you could fairly say that Ms. Jackson-Metcalf's violations were beyond her control due to her medical, mental health and addiction issues.

Conclusion

The Trial Court's actions were both clearly erroneous and an abuse of discretion. This Court should reverse the Order Revoking Probation and Sentence and remand this file, directing the Trial Court to reinstate Ms. Jackson-Metcalf's original sentence, with credit for all time served, and no other penalty, because her total incarceration is more than a sufficient sanction for her alleged violations.

Respectfully submitted this 1ST day of November, 2004.



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