

ORIGINAL

IN THE SUPREME COURT

20040253

STATE OF NORTH DAKOTA

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SUPREME COURT DEC 1 2004

State of North Dakota,)
)
 Plaintiff-Appellee.)
)
 vs.)
)
 Rebecca Jackson-Metcalf.)
)
 Defendant-Appellant.)
)
 _____)

) Supreme Court No. 20040253
) District Court No. 09-02-K-02938

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

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STATE OF NORTH DAKOTA

APPEAL FROM THE ORDER REVOKING PROBATION AND SENTENCE
 ENTERED ON AUGUST 25, 2004
 CASS COUNTY DISTRICT COURT
 EAST CENTRAL JUDICIAL DISTRICT
 THE HONORABLE GEORGIA DAWSON, PRESIDING

APPELLEE'S BRIEF

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ISSUES PRESENTED

- I. The trial court properly concluded the Defendant had willfully violated the conditions of probation.
- II. The trial court appropriately revoked the Defendant's probation based on its finding the Defendant willfully violated the terms of probation.

STATEMENT OF THE CASE AND FACTS

On August 27, 2002, the State charged the Defendant with one count of possessing a controlled substance with intent to deliver (a class A felony) in violation of N.D.C.C. § 19-03.1-23. On December 30, 2002, the Defendant pled guilty to an amended charge of possession of a controlled substance (a class C felony) in violation of N.D.C.C § 19-03.1-23. (Appendix of Appellant (App.) at 16). The trial court sentenced the Defendant to two (2) years of supervised probation. (App. at 10-16.) On July 23, 2004, the Defendant's probation officer, Jennifer College, filed a petition to revoke the Defendant's probation alleging eight (8) violations of the conditions of the Defendant's probation. (App. at 4-7.)

On August 16, 2004, the trial court held a hearing on the petition to revoke probation. The Defendant admitted to using methamphetamine and subsequently testing positive three times for methamphetamine while on probation. (Transcript of 08/16/04 (Tr.) at 14, lines 6-14.) The Defendant denied the following allegations:

Allegation #4: The Defendant has violated Condition #15 of the Appendix "A" in that on 07/12/04, the Defendant provided a urine sample at the Day Reporting Center that tested positive for probable adulteration on an adulteration test strip. Redwood Toxicology Lab later confirmed the sample was abnormally dilute and essentially water.

Allegation #5: The Defendant has violated Condition #15 of the Appendix "A" in that on 07/12/04, the Defendant provided a urine sample at the Day Reporting Center that tested positive for probable adulteration on an adulteration test strip. Redwood Toxicology Lab later confirmed the sample was abnormally dilute and essentially water.

Allegation #6: The Defendant has violated Condition #15 of the Appendix "A" in that on 07/20/04, the Defendant provided a urine sample at the Day Reporting Center that tested positive for probable adulteration on an adulteration test strip. Results from Redwood Toxicology Lab are pending.

Allegation #7: The Defendant has violated Condition #15 of the Appendix "A" in that on 07/23/04, the Defendant provided two urine samples at the Day Reporting Center that were unacceptable for testing. Neither sample registered on a temperature strip as at or near body temperature.

Allegation #8: The Defendant has violated Condition #19 of the Appendix "A" by failing to comply with and successfully complete the Intermediate Measure of Day Reporting. On 07/23/04, the Defendant was negatively terminated from the Day Reporting Program after failing to report as required from 07/06/04 - 07/11/04,

and repeatedly providing adulterated urine samples.

The Defendant's probation officer, Jennifer College, testified at the hearing. The trial court found the Defendant willfully violated the conditions of probation and re-sentenced the Defendant "to the custody of the North Dakota Department of Corrections and Rehabilitation for a period of one (1) year." (Tr. at 14.) lines 15-16, and App. at 8.) The trial court further recommended "placement at the Tompkins Rehabilitation Correctional Unit." (App. at 9.)

The Defendant appeals claiming first, the trial courts finding the Defendant willfully violated the conditions of probation was clearly erroneous. Second, the Defendant claims the trial court abused its discretion by revoking the Defendant's probation. The State asserts the trial court properly found the Defendant had violated the terms of probation and the trial court appropriately revoked the Defendant's probation based on those violations.

ARGUMENT

I. The trial court properly concluded the Defendant had willfully violated the conditions of probation.

This is an appeal from a probation revocation. "This Court reviews probation revocation proceedings under a two-step analysis." State v. Nordahl, 2004 ND 106, ¶ 11, 680 N.W.2d 247; State v. Olson, 2003 ND 23, ¶ 15, 656 N.W.2d 650. "First, this Court determines whether the district court's factual findings were clearly erroneous." Nordahl at ¶ 11. "A finding of fact is clearly

erroneous if, although there is some evidence to support the finding. [the Court is] convinced, on the entire record, a definite mistake has been made.” Nordahl at ¶ 11.

In this case, the Defendant admitted to allegations one (1), two (2), and three (3) of the petition. (Tr. at 14, lines 6-14.) Specifically, the Defendant admitted using methamphetamine on three separate occasions while on probation. (Tr. at 14, lines 6-14.) The trial court could have found the Defendant willfully violated probation and subsequently revoked her probation based on those admissions alone.

In addition to the Defendant’s admissions to allegations one (1), two (2), and three (3), the trial court found the Defendant willfully violated probation by providing adulterated urine samples. (Tr. at 14, lines 15-16.) At a probation hearing, the State “must establish a violation by a preponderance of the evidence.” N.D.R.Crim.P.32 (f)(2)(C). At the hearing in this case, Probation Officer Jennifer College testified the Defendant’s urine sample “tested abnormal . . . for dilution.” (Tr. at 6, line 4.) College also testified the laboratory reports confirmed the Defendant’s urine had been diluted. (Tr. at 6-13.)

On at least one occasion the urine sample the Defendant provided did not register properly on a temperature strip. (Tr. at 7, line 21-25 and Tr. at 8, lines 1-3.) During cross examination, the Defendant attempted to establish the abnormal test results could have been the result of certain medical conditions. (Tr. at 9-11.)

The Defendant, however, did not produce any evidence she had any medical condition which would dilute her urine sample. In fact, the Defendant didn't produce any evidence at all. (Tr. at p. 13 line 14.)

The State believes it did establish the violation by a preponderance of the evidence. The Defendant was on probation for possession of methamphetamine. (App at 10-16.) The defendant admitted to using methamphetamine while on probation. (Tr. at 14, lines 6-14.) The defendant's urine samples tested abnormal for dilution. At least one sample did not register properly for temperature. The trial court logically concluded the Defendant probably tampered with her urine sample in an attempt to conceal her methamphetamine usage. Based on the evidence presented at the hearing, the State believes the trial court's findings were not clearly erroneous.

II. The trial court appropriately revoked the Defendant's probation based on its finding the Defendant willfully violated the terms of probation.

The second part of the analysis in reviewing revocation proceedings is determining "whether the district court's decision to revoke or modify probation was an abuse of discretion." Nordahl at ¶ 11. "A trial court 'abuses its discretion only when it acts in an arbitrary, unreasonable, or unconscionable manner, or when its decision is not the product of a rational mental process leading to a reasoned determination.'" State v. Hilgers, 2004 ND 160, ¶ 4, 684 N.W.2d 109 (citations omitted). "An abuse of discretion by the trial court is never assumed, and the


burden is on the party seeking relief to affirmatively establish it.” Hilgers at ¶ 4.

In this case, the Defendant violated the conditions of her probation by using methamphetamine and tampering with or diluting urine samples in an attempt to continue using controlled substances while on probation. The Defendant was on probation for possessing methamphetamine which is a class C felony. The Defendant could have been re-sentenced to 5 years imprisonment. See N.D.C.C. 12.1-32-01(4) (providing a maximum penalty of five years incarceration, a \$5,000.00 fine or both for a class C felony). The trial court sentenced the Defendant to one (1) year imprisonment. Under the circumstances, the State believes this was not an abuse of discretion.

CONCLUSION

The trial court properly found the Defendant had willfully violated the conditions of her probation by her admissions and by testimony presented at the revocation hearing. Re-sentencing the Defendant to one (1) year imprisonment was not an abuse of discretion. For these reasons, the State respectfully requests the Court affirm the decision of the trial court.

Dated this 30th day of November, 2004.



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