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IN THE SUPREME COURT
STATE OF NORTH DAKOTA
Supreme Court No. 20060297
Ward County District Court No. 06-K-00110

20060297

State of North Dakota,)
)
Plaintiff/Appellee,)
)
vs.)
)
Mitchell Holbach,)
)
Defendant/Appellant.)

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STATE OF NORTH DAKOTA

APPELLANT'S SUPPLEMENTAL BRIEF

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STATEMENT OF FACTS

Mitchell Holbach ("Holbach") and Joy Marie Dixon ("Dixon") had a relationship. Due to deterioration in the relationship, Dixon sought and received a domestic violence restraining order against Holbach. Due to actions of Holbach, the Ward County States Attorney charged Holbach with Stalking. On July 17, 2006, he entered a plea of guilty to the Stalking charge. He was sentenced to serve time in jail and placed on probation.

When released, Holbach complied with his conditions of probation, except he was unable to secure a residence where his probation officer could locate him. Ms. Dixon also made several allegations that Holbach had violated the probation conditions by driving within the restricted safe zones around her, her children, and the children's school. On October 13, 2006, a probation revocation hearing was held. Holbach contended that any contacts with Dixon, caused by driving past or near her on a public street, were inadvertent and not intentional. The Court found that the violations of probation had been proven by a preponderance of the evidence and revoked his probation.

On August 29, 2006, Holbach was charged with criminal trespass on the Minot State University Campus. On March 1, 2006, Dr. Richard Jenkins, Vice President, had issued a letter to Holbach advising him that he was prohibited from being on the MSU Campus. Prior to the trial, the City of Minot endorsed only the names of Dan Strandberg, of Minot Police, and Twyla Llewelyn of North Dakota Parole and Probation as the only witnesses. On January 3, 2007, the City filed a Notice to Endorse Additional Witnesses, and added Kristin Plessas as a witness. They alleged that Ms. Plessas found the original

March 1, 2006, letter from Dr. Jenkins in Holbach's vehicle when she arrested him in September, 2006, on the petition for revocation of probation. Holbach objected prior to the January 5, 2007, jury trial. The Court ruled that Ms. Plessas could only testify as "to chain of custody of the letter." Following trial, Holbach was convicted of Criminal Trespass.

STATEMENT OF PROCEEDINGS

On July 17, 2006, Mitchell Holbach ("Holbach") was convicted by a plea of guilty to Stalking. He was placed on probation. On October 13, 2006, a Petition for Revocation of Probation was heard. The Ward County District Court, Honorable Gary H. Lee, presiding, heard the petition and entered an Order Partially Revoking Probation. Holbach filed a Notice of Appeal to the North Dakota State Supreme Court on October 17, 2006.

Holbach filed various and numerous motions following the revocation of his probation. On October 19, 2006, the Court issued an Order on Motions. On October 24, 2006, Holbach filed a Notice of Appeal.

On January 24, 2007, Holbach filed a Notice of Appeal.

On August 29, 2006, Holbach was charged by the City of Minot with Criminal Trespass. On January 5, 2007, trial was held. A jury convicted Holbach of the charge. On January 26, 2007, Holbach was sentenced to 15 days in jail. On February 5, 2007, Holbach filed a Notice of Appeal.

ISSUES

1. DID THE TRIAL COURT ERR WHEN IT ISSUED THE ORDER PARTIALLY REVOKING PROBATION?
2. DID THE TRIAL COURT ERR IN ITS ORDER ON MOTIONS?

LAW AND ARGUMENT

1. The trial court erred when it ordered Holbach's probation be revoked.

The prosecution bears the burden of proving probation violation by a preponderance of evidence in revocation proceedings. *State v. Toepke*, 485 N.W.2d 792 (N.D. 1992). *State v. Drader*, 432 N.W.2d 553, 554 (N.D. 1988). The standard of review of probation revocation proceedings requires a two step analysis. *State v. Saavedra*, 406 N.W.2d 667, 669 (N.D. 1987).

“First we must review the trial court’s factual determination that the defendant violated the terms of his probation, and then the trial court’s discretionary determination that the violation warrants revocation.” *Id.*

The Supreme Court reviews the trial court’s findings of fact in probation revocation proceedings under the clearly erroneous standard. *Id.* Although there is some evidence supporting it, a finding of fact is only clearly erroneous when, on the entire record, the reviewing court is convinced that a definite mistake has been made. *State v. Morrison*, 447 N.W.2d 272, 275 (N.D. 1989); *Saavedra*, 406 N.W. 2d at 669. As an appellate court they do not determine witness credibility, but recognize that credibility is to be determined by the trial court. *Weiss v. Anderson*, 341 N.W.2d 367, 371 (N.D. 1983). On review, they do not substitute their own judgment for the trial court when there is testimony to support its findings. *Saavedra*, 406 N.W.2d at 669.

The State alleged six separate violations of several probation conditions. The initial allegation was that Holbach “refused to cooperate with his probation officer by not revealing where he slept at night and failing to meet with the probation officer as directed and refusing to allow her to visit him at his place of employment.” Holbach checked into the probation office on July 17, 2006, and advised them “that he is homeless and lived out of his vehicle.” (Tr.p. 25, ll. 21-23). He further and later advised that he alternated staying at several truck stops. (Tr.p. 26, ll. 5-8). Holbach eventually refused to permit Ms. Plessas to come to his place of employment. He did advise on September 15, 2006, that he would drop off a monthly report. (Tr.p. 26, ll. 4-15). It was an abuse of the court’s discretion to find that Holbach was not cooperative. He was cooperative. He did permit supervision by Ms. Plessas.

The second allegation was that he was within 500’ of the victim on several occasions between July 18 and August 1, 2006. Ms. Plessas testified that “Mr. Holbach had in his car a list of different contacts he had with the victim.” (Tr.p. 29, ll. 22-24). The Court did refer to three contacts as “eight unintentional contacts you [Holbach] had with the victim.” One of the alleged contacts was “seeing [the victim] at the Target four-way stop then going in the opposite direction.” Inadvertente, unintentional contacts in public places on public streets do not constitute violations of a no-contact order. The finding by the Court to the contrary was clearly erroneous.

The third allegation was another allegation that Holbach was once again within 500’ of the victim between August 29, 2006, through September 4, 2006. Ms. Plessas testified that, in a meeting with Holbach on September 7, 2006, he admitted to her that

“he did see her driving on Broadway and thinks he seen her in a park a couple of times this week-end.” (Tr.p. 36, ll. 10-13). Once again, the Court referred to any contacts as unintentional. (Tr.p. 82, ll. 6-11). Holbach agreed that he had inadvertent contacts driving by in opposite directions in a City the size of Minot. (Tr.p. 83, ll. 4-15). The Court agreed. (Tr.p. 83, ll. 21-24). The Court’s finding of a violation under these circumstances was clearly erroneous.

Allegation no. 4 referred to an incident on September 13, 2006, where Holbach “drove up to an intersection within 500” of the victim. . .”. The Court found that it was not an inadvertent contact.

The fifth allegation involved taking a picture of the victim at a public street intersection. Holbach advised Ms. Plessas that he took the photo in a defensive manner, i.e., to show that “she comes around him.” (Tr.p. 39, ll. 8-10). Once again, a contact on a public street is not the type of contact intended to be prohibited. The Court’s ruling to the contrary was clearly erroneous.

The final allegation involves Holbach being within 500' of Edison School in Minot, North Dakota. The only “evidence” offered by the State was the statement of Ms. Plessas that “it is a personal observation of Sergeant Strandberg and I do have a report from him.” (Tr.p. 41, ll. 22-23). There was testimony by Dan Strandberg that Holbach was “like a block north of the north side of the school.” (Tr.p. 116, ll. 20-21). Officer Strandberg testified that only at one point in his travels - at 7th Street and 18th Avenue – was Holbach within 500' of the Edison School. (Tr.p. 124, ll. 18-20). He did not identify the date of the alleged contact. The evidence was not sufficient to show any intentional violations of

the restraining order. The court's findings to the contrary were clearly erroneous and should be reversed.

2. The trial court erred when it issued its October 19, 2006, Order on Motions.

Holbach, acting *pro se*, filed several motions following the October 13, 2006, probation revocation hearing. The motions consisted of a (1) Motion to Withdraw Guilty Plea; (2) Motion for New Counsel; (3) Motion for Continuance; (4) Motion for Return of Seized Property. On October 19, 2006, the Ward County District Court, the Honorable Gary H. Lee, presiding, issued an Order Denying Motions.

Each of the Motions will be discussed individually. The Motion to Withdraw Guilty Plea was based upon an allegation of ineffective assistance of three previous counsel. Holbach had earlier been provided with court appointed counsel. They all received permission from the court to withdraw, citing Holbach's interference with their representation or refusal to cooperate. He was then forced to represent himself at the October 13, 2006, probation revocation hearing.

The refusal of the court to reappoint Carl Flagstad as Holbach's counsel at the October 13, 2006, probation revocation hearing, that precipitated the Motion to Withdraw Plea, was discussed in length in a previous brief.

The other motions identified above were all involved with the October 13, 2006, hearing and are related to the Court's failure to reappoint Carl Flagstad. They were

adequately addressed in the previous Brief of Appellant.

CONCLUSION

The trial court erred when it issued the order partially revoking probation.

The trial court erred in its Order on Motions.

The Court should reverse and remand on all issues.

Dated this 3rd day of April, 2007.

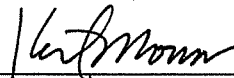


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CERTIFICATE OF SERVICE

On the 9th day of April, 2007, a copy of the Appellant's Second Supplemental Brief and Second Supplemental Appendix was mailed to:

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