RECEIVED BY
SUPREME
2007

ORIGINAL

20060297

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

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

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

MAY 14 2007

STATE OF NORTH DAKOTA

APPELLEE'S BRIEF

Timothy C. Wilhelm
Assistant State's Attorney
ID #03449
PO Box 5005
Minot ND 58702-5005
(701) 857-6480
Attorney for Appellee

Kent M. Morrow
Attorney at Law
ID #03503
411 North 4th Street #6
Bismarck ND 58501
(701) 255-1344
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

MAY 21 2007

STATE OF NORTH DAKOTA

Cases:

Other Authorities:

STATEMENT OF THE ISSUES

I. The trial court did not commit reversible error when it concluded that Holbach had made a voluntary, knowing and intelligent waiver of his right to counsel.

II. The trial court did not error issuing an order partially revoking Holbach's probation based upon testimony and evidence received at the revocation hearing of October 16, 2006.

III. The trial court did not error in denying Holbach's motion to withdraw his guilty plea, motion for new counsel, and motion for continuance of the revocation hearing.

STATEMENT OF PROCEEDINGS

The Appellant in this matter agrees with the Statement of Proceedings laid out by Holbach in his Brief and Supplemental Brief filed in this matter.

STATEMENT OF FACTS

Mitchell Holbach (hereinafter Holbach) was charged with the class A misdemeanor offense of stalking based upon engaging in a course of conduct of harassing, frightening and unwanted contact with a female living in the Minot community. (See Appellant's Supplemental Appendix, p. 6). Holbach entered a guilty plea to the offense on July 17, 2006, and at that time the court sentenced the defendant to a one year term in the Ward County Jail with 227 days suspended for a period of two years and the defendant receiving credit for 138 days of previous custody time. (See Appellant's Supplemental Appendix, p. 10). The defendant at that time was further made subject to conditions of probation which included keeping his probation officer notified of his residence, employment, and other pertinent activities, as well as meeting with the probation officer as directed and allowing her to visit him at his place of employment. (Appellant's Supplemental Appendix, p. 12, No. 9). Additionally, the defendant's criminal judgment and probation conditions barred the defendant from being within 500 feet of the victim of his offense or her children or mother. He was specifically directed to not be within 500 feet of the schools attended by the children. (See Appellant's Supplemental Appendix, p. 10 and 14).

A petition for revocation of probation was brought based upon allegations that Holbach had violated his probation by not complying with probation conditions relating to contact or cooperation with his probation officer as well as ongoing contacts with the victim of his crime in violation of the judgment and conditions of probation. The allegations dealt with an ongoing course of conduct by the defendant that commenced within a month of his release from incarceration.

On October 16, 2006, a probation revocation hearing was held. Prior to the commencement of the hearing Holbach "fired" his current court-appointed counsel and was directed to proceed pro se. The court specifically directed Holbach's "fired" counsel to remain in court in a standby capacity, if necessary, and directed that Holbach, by his own behavior, had effectively waived counsel and would be proceeding pro se. (See transcript of October 13, 2006, proceedings, p. 18, lines 7, 8, and 22, 23). Subsequent to the probation revocation hearing the court found all six allegations had been established by a preponderance of the evidence and that partial revocation of the defendant's suspended sentence was warranted with the defendant immediately ordered to serve a term of 167 days at the Ward County Jail. (See Appellant's Supplemental Appendix, p. 17 - 20).

Subsequent to the revocation proceeding, the defendant filed several pro se motions including a motion to withdraw his original guilty plea, a motion for new counsel and to withdraw guilty plea; motion for continuance; and a motion for return of seized property. The court, on October 19, 2006, issued an order denying Holbach's request to withdraw his guilty plea, noting that the request for newly appointed counsel had already been addressed at the hearing of October 13, 2006, noting that Holbach's motion for continuance was moot in that the hearing had already been held and the court had determined at the hearing that the matter would go on as scheduled based upon it's feeling that Holbach's motion for continuance was necessitated by his own obstruction as to actions, his failure to cooperate with counsel and in fairness to the State and it's witnesses. (See Appellant's Supplemental Appendix, p. 22 - 26).

Holbach filed a notice of appeal of the court's order partially revoking his probation on October 20, 2006.

LAW AND ARGUMENT

I. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR WHEN IT CONCLUDED THAT HOLBACH HAD MADE A VOLUNTARY, KNOWING AND INTELLIGENT WAIVER OF HIS RIGHT TO COUNSEL.

In his introductory comments to the revocation proceedings of October 13, 2006, Judge Lee enumerated the attorneys that had been appointed for Holbach during the course of the case that was culminating in the hearing of October 13, 2006. They included Richard Thomas, Jeffrey Sheets, Eric Baumann, Richard Hagar, and Carl Flagstad. Additionally, Judge Lee noted that two previous district judges, Judge Holte and Judge McLees, who had heard proceedings in this matter, had taken themselves off the case. At the hearing Holbach was again expressing dis-satisfaction with his attorney, Carl Flagstad, and Judge Lee alluded to a letter from Holbach to Judge McLees indicating Holbach felt Flagstad was prejudiced against him. (See October 13, 2006, Tr. page 8, line 2). In noting Holbach's complaint of Flagstad being prejudiced against him, Judge Lee found the allegation simply didn't add up. (See October 13, 2006, Tr. page 9 at line 23 and 24). Judge Lee gave Holbach two options to represent himself with Flagstad as standby counsel or for Holbach to proceed with Flagstad representing him. Ultimately Holbach indicated to Flagstad "you are fired." (See Tr. of

October 13, 2006, page 18 at line 5). Judge Lee found that Holbach, by his own behavior, had effectively waived counsel and was going to be proceeding pro se. (Tr. October 13, 2006, page 18 at lines 20 through 23). The court went on to indicate it found Holbach's claims of not understanding the proceedings to be a sham indicating as follows:

> "THE COURT: Well, you seem to have a working knowledge of the constitution. You seem to have a working knowledge of the law. You certainly seem to have knowledge of how the system works through your various filings and your motions. And I am not going to accept "I don't understand any of it," as an answer. (See Tr. of October 13, 2006, proceeding, page 20, lines 15 through 20).

Holbach proceeded through the hearing in a pro se status and exhaustively and aggressively cross-examined the two witnesses that were called by the State of North Dakota. The transcript in this matter reflects that the State's direct examination of the two witnesses totaled thirty one pages as opposed to Holbach's cross-examination which totaled ninety three pages of transcript.

A criminal defendant's fundamental right to counsel is guaranteed by the Sixth Amendment to the U.S. Constitution and by the North Dakota Constitution at Article I, §12 (See City of Fargo v. Rockwell, 1999 N.D. 125, ¶7, 597 N.W. 2d 406). In Feretta v. California, 422 U.S. 806, 818 - 821

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

MAY 21 2007

STATE OF NORTH DAKOTA

(1975), the United States Supreme Court held that criminal defendant's have a corollary right under the Sixth Amendment to conduct their own defense. In Rockwell, this court indicated that in order to proceed pro se, a defendant must voluntarily, knowingly and intelligently relinquish the benefits of counsel. As such, this court essentially identifies and applies a two-step inquiry to analyze a criminal defendant's waiver of the right to counsel and decision to proceed pro se: (1) Whether the defendant's waiver of the right to counsel was voluntary; and (2) Whether the defendant's waiver was knowing and intelligent. (See Rockwell, 1999 N.D. 125, ¶¶14, 15, 597 N.W. 2d 406. The record clearly establishes that the actions of Holbach indicate the functional equivalent of a voluntary waiver of his right to counsel. In State v. Harmon, 1997 N.D. 223, ¶¶15-21, 575 N.W. 2d 635, the court rejected an argument that the record must show an unequivocal statement indicating the defendant's desire to proceed pro se, and concluded that the defendant's conduct may be the functional equivalent of a voluntary waiver of the right to counsel. The court indicated a defendant's continued request for new court-appointed attorneys after the trial court clearly denied it in an initial request was the functional equivalent of a voluntary waiver of the right to counsel. Occasionally, as is evident in this case the actions

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

MAY 21 2007

STATE OF NORTH DAKOTA

of a defendant can reveal a pattern that clearly shows an attempt to use substitution of counsel as a means of delaying or obstructing proceedings. In State v. Dvorak, 2000 N.D. 6, ¶14, 604 N.W. 2d 445, the court found Dvorak's record revealed a pattern of conduct that can best be described as an attempt to avoid the trial of the charge against him. The court went on to indicate although it is preferred to have the waiver of counsel expressed on the record, where there is a pattern of obstructing the legal process, that waiver will seldom be acknowledged by the defendant. As this court pointed out in State v, DuPaul, 527 N.W. 2d 238 (N.D. 1995), in a situation in which a new counsel would be faced with the same unreasonable expectations of a disagreeable defendant, it was appropriate for the trial court to deny repetitious and frivolous requests for appointments of substitute counsel. Further, that the trial court was under no duty to appoint specific counsel, or to continually seek new counsel for a capricious and difficult defendant. Clearly, the actions of Holbach demonstrate that he has exhibited the functional equivalent of a "voluntary" waiver of his right to counsel as contemplated in North Dakota law.

Having shown Holbach's functional equivalent of "voluntary" waiver of the right to counsel, it is important to

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

MAY 21 2007

STATE OF NORTH DAKOTA

look to the second prong which look to whether Holbach's waiver knowing and intelligent. This court has indicated that determining whether a defendant knowingly and intelligently waives the right to counsel requires an examination of the record and the facts and circumstances of each case. The court has indicated a specific on the record warning is not an absolute necessity if the record shows the defendant had the required knowledge from other sources, and the inquiry focuses essentially on what the defendant understood. (State v. Dvorak, 2000 N.D. 6, ¶16, 604 N.W. 2d 445). In Harmon, (Id at ¶23), the court looked to several factors, including the defendant's previous contacts with the criminal justice system, the defendant's familiarity with court rules in the criminal code, the explanation of the procedures and that no special consideration would be given to the defendant, the defendant's involvement with his case, the defendant's ability to communicate and his having communicated direct correspondence to the court as well as the presence of standby counsel. In Harmon the court concluded that the criteria established a knowing and intelligent waiver of the right to counsel. In Holbach's case, each of these criteria are present. Holbach's familiarity with the criminal justice system was exemplified in Judge Lee's comments relating to Holbach filing complaints against Judge Holte with the

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

MAY 21 2007

STATE OF NORTH DAKOTA

North Dakota Judicial Commission, Holbach filing pro se motions with the court, including to have his most recent attorney taken off the case. The court further noted Holbach exhibited a working knowledge of the Constitution and the law and certainly seemed to have knowledge of how the system works through his various pro se filings and motions. (See transcript October 13, 2006, page 20 at lines 15 - 18). The court exhaustively explained defendant's rights and procedures to the defendant as well as detailing the allegations against him. (Tr. October 13, 2006, pages 18 - 22). At the conclusion of that recitation by the court Holbach indicated "I enter a general denial to all the allegations and request the petitioners approve all complaints". (Tr. October 13, 2006, page 22 at lines 22 and 23). Additionally, the defendant was clearly very involved in his case taking up three-quarters of the transcript of proceedings with his cross-examination of the State's witnesses. Additionally, the court appointed stand-by counsel who was present throughout the proceedings. In Dvorak, (Id at ¶25) the court found the defendant not to be a stranger to the criminal justice system and indicated as an experienced criminal defendant and based on his prior contacts with the legal system they were sufficient to make him aware of the benefits of counsel and the dangers and disadvantages of self-representation.

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

MAY 21 2007

STATE OF NORTH DAKOTA

The court went on to conclude that the defendant's pre-trial conduct and manipulative pattern of delay, his prior experience with the criminal justice system, and his awareness of the benefits of counsel and the dangers of self-representation indicate he decided to proceed pro se with eyes open and understood the dangers and disadvantages of self-representation. Those criteria all apply to Holbach and lead to the conclusion that his functional waiver of the right to counsel was knowingly and intelligently made.

In summary of this issue, the record reflects that Holbach's actions constitute the functional equivalent of a voluntary waiver of the right to counsel and that although a specific colloquy of the dangers and disadvantages of self-representation is not in the record, an examination of the facts and circumstances of the case show Holbach to be aware of the implications of self-representation and further show he is a person with much familiarity with the justice system, including rules and the law and that he was very involved in his own case which he aggressively pursued through cross-examination.

II. THE TRIAL COURT DID NOT ERROR ISSUING AN ORDER PARTIALLY REVOKING HOLBACH'S PROBATION UPON TESTIMONY AND EVIDENCE RECEIVED AT THE REVOCATION HEARING OF OCTOBER 16, 2006.

It is clear the prosecution bears the burden of proving

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

MAY 23 2007

STATE OF NORTH DAKOTA

probation violations by a preponderance of evidence in a probation revocation proceeding. State v. Toupke, 485 N.W. 2d, 792 (N.D. 1992). Following a determination the defendant has violated the terms of his probation the courts discretionary determination comes into play as to whether or not the violations warrant revocation. (State v. Saavedra, 406 N.W. 2d 667, 669 (N.D. 1987). The courts determination that probation violations warrant revocation is reviewed under the clearly erroneous standard and 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). On review, the Supreme Court will not substitute it's judgment for the trial court when there is testimony to support it's findings. (Saavedra, 406 N.W. 2d at 669).

In this case, the court found each of six allegations of violations of probation had been established by a preponderance of the evidence. The court spoke of each of the six and it's reasons for finding that they constituted violations of probation.

With regard to the first allegation, the court found that the probation officer's testimony that Holbach had refused to tell the probation officer where he was staying, refused her

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

MAY 23 2007

STATE OF NORTH DAKOTA

request to come to his place of employment, and refused to maintain contact with her as directed. (See Tr. October 13, 2006, page 163, lines 12 - 19).

With regard to the second allegation the court found that eight contacts with the victim in which he was within 500 feet of her were indicative of a pattern of activity by Holbach which was in violation of the order requiring that he stay at least 500 feet away from her. Additionally, in support of that allegation, the court referenced an exhibit containing Holbach's own handwritten comments which established that he was, in fact, following the victim and attempting to maintain contact with her. Holbach, in his argument, attempts to imply that the court described the contacts as "eight unintentional contacts you had with the victim". It is clear from the court's comments that the court was not characterizing the contacts as unintentional but merely paraphrasing Holbach's argument. The court, on the contrary, found they established a pattern of activity by Holbach in violation of the order. (Tr. October 13, 2006, pages 163, 164, lines 19 - 25, 1 - 8).

The court found the third allegation to be established relating to contact within 500 feet by the defendant's own admissions to his probation officer.

The fourth allegation dealt with the defendant abruptly driving up to an intersection to ensure contact with the

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

MAY 23 2007

STATE OF NORTH DAKOTA

victim who was passing the intersection at that time. The court indicated in and of itself it might not indicate a willful violation of probation but indicated that added to all the other contacts and the continuing contacts, it was indicative of a pattern of activity by the defendant which the court found to establish a violation of his probation conditions. (Tr. October 13, 2006, page 164, lines 19 - 25).

With relation to allegation No. 5, the court found a violation of probation in the defendant's own admission to his probation officer that he had driven up to an intersection to take a picture of the victim as she passed through the intersection and that he was clearly within 500 feet of her at the time.

With relation to the sixth allegation, the court noted the defendant's presence within 500 feet of the elementary school of one of the victim's children. Clearly, the defendant was barred from coming within 500 feet of the school and as the court noted, the condition was not part of a game to be tested by the defendant to attempt to "ruffle somebody's feathers." (Tr. October 13, 2006, page 165, lines 18 - 21).

Based upon the established violations the court did find that they warranted action on the defendant's probation. (Tr. October 13, 2006, page 166, lines 3 - 5).

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAY 23 2007
STATE OF NORTH DAKOTA

In sum, the court found, based upon testimony and exhibits received, "that the defendant's actions clearly show a course of conduct that is not inadvertent and represents violations of his probation. The court specifically finds that the defendant has repeatedly violated terms of his probation and has refused to cooperate with his assigned probation officer." (See VI of court's order partially revoking probation).

III. THE TRIAL COURT DID NOT ERROR IN DENYING HOLBACH'S MOTION TO WITHDRAW HIS GUILTY PLEA, MOTION FOR NEW COUNSEL, AND MOTION FOR CONTINUANCE OF THE REVOCATION HEARING.

The court's ruling on motions of October 19, 2006, was not erroneous.

As an initial matter, Holbach, following his revocation of probation, made a motion to withdraw his original guilty plea. The motion was predicated solely on generalized allegations of prior representation. In context, it is clear the motion to withdraw the guilty plea was predicated solely upon the fact his probation had been recently revoked. That hearing had nothing to do with the defendant's initial decision to plead guilty to the offense. Rule 32(d) of the North Dakota Rules of Criminal Procedure governs plea withdrawal. 32(d)(1) indicates that a plea withdrawal must be allowed when it is necessary to correct a manifest injustice.

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAY 23 2007
STATE OF NORTH DAKOTA

Holbach has done nothing to show a manifest injustice relating to his initial plea of guilty in this case. Rule 32(d)(2) indicates that a motion for withdrawal is timely if it is made with due diligence considering the nature of the allegations. In this case, the motion to withdraw guilty plea occurred over three months after he entered his plea of guilty and only subsequent to a revocation based on continuing conduct that had preceded the motion to withdraw his original guilty plea. The motion was not timely.

With regard to Holbach's motion for new counsel, the matter is discussed in detail earlier in this Brief. With regard to his appeal, it is instructive to note that Holbach has been appointed two lawyers since the hearing on the probation revocation of October 13, 2006.

With regard to Holbach's motion for a continuance as is laid out in the court's order denying that motion, the hearing had already occurred and the motion was moot.

In sum, the motions filed by Holbach, acting pro se, appear to present an ongoing attempt to merely flood the court with frivolous paperwork which reflect his unwillingness to accept the authority and rulings of the court with relation to this case.

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

MAY 23 2007

STATE OF NORTH DAKOTA

CONCLUSION

Justice Meschke had described another defendant's continuous jousting with the legal system as pursuing his "quixotic quest for his personalized conception of justice." State v. DuPaul, 527 N.W. 2d 239 (N.D. 1995). Holbach's frivolous litigiousness as well as his unwillingness to accept the authority of the court resulted in his committing ongoing violations of probation commencing shortly after his release from incarceration. His unwillingness to accept offered legal counsel constitutes the functional equivalent of a voluntary waiver of counsel. The record reflects, given the facts and circumstances of his case, that the waiver was knowing and intelligent. The record of the revocation hearing further establishes that all six alleged violations of probation were established to the court's satisfaction and the court's decision that it warranted a partial revocation of Holbach's probation was appropriate. Finally, the pro se motions filed by Holbach subsequent to the revocation proceeding were frivolous.

For the foregoing reasons, the State of North Dakota respectfully requests the court affirm the actions of the District Court.

Respectfully submitted this 14th day of May, 2007.

Timothy C. Wilhelm #03935
Assistant State's Attorney
PO Box 5005
Minot ND 58702-5005
(701)857-6480
Attorney for Appellee

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No. 22060235

State of North Dakota, Plaintiff-Appellee,	)	
vs.	)	CERTIFICATE OF SERVICE
Mitchell Holbach, Defendant/Appellant.	)	

Nyla J. Sorensen, being first duly sworn, deposes and says:

That she is a citizen of the United States of America, over the age of twenty-one years, and is not a party to nor interested in the above-entitled action; that on the 14th day of May, 2007, this affiant deposited in the mailing department of the United States Post Office at Minot, North Dakota, a sealed envelope with postage thereon duly prepaid, containing a true and correct copy of the following document in the above-entitled action:

APPELLEE'S BRIEF

That said envelope was addressed to the following persons at addresses as follows:

Kent M. Morrow
attorney at Law
411 North 4th Street #6
Bismarck ND 58501

That the above document was duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

Nyla J. Sorensen

Subscribed and sworn to before me this 14th day of May, 2007.

Notary Public

LYNNAE RUDLAND
Notary Public
State of North Dakota
My commission expires Feb 5, 2010