

ORIGINAL (e-filed)

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

20070105

State of North Dakota,)	
Plaintiff/ Appellee,)	Supreme Court No. 20070105
)	
-vs-)	Benson County No. 06-K-001
)	
Pete Jacobsen.)	
Defendant/ Appellant.)	

FILED
IN THE OFFICE OF THE
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SEP 21 2007

BRIEF OF APPELLANT

STATE OF NORTH DAKOTA

APPEAL FROM ORDER FOR REVOCATION OF PROBATION
DATED APRIL 12, 2006.
FILED APRIL 16, 2007 OF
BENSON COUNTY DISTRICT COURT
NORTHEAST JUDICIAL DISTRICT
THE HONORABLE LEE A. CHRISTOFFERSON, PRESIDING

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TABLE OF CONTENTS

Table of Contents	p. ii-iii
Table of Authorities	p. iv
Statement of the Issues	
I. Was the trial court’s factual finding that there was a probation violation clearly erroneous when the probationer substantially complied with all conditions of probation and the restitution was paid in full approximately six months before required under the conditions of probation, the defendant was seeking employment or self employed with a measurable income. and there was no enumerated probation condition requiring equity from a home sale to be used to repay the restitution?	p. 1
II. Did the trial court abuse its discretion when finding there were probation violations without conducting the requisite inquiry into the reason for failure to pay and consideration of adequate alternative methods for punishment?	p. 1
Statement of the Case	
A. Nature of the case, course of the proceedings. and disposition in the trial court.	¶1
B. Statement of facts	¶8
Law and Argument	
A. Jurisdiction	¶16
B. Standard of Review	¶17
C. Was the trial court’s factual findings that there was a probation violation clearly erroneous when the probationer substantially complied with all	

conditions of probation and the restitution was paid in full approximately six months before required under the conditions of probation, the defendant was seeking employment or self employed with a measurable income. and there was no enumerated probation condition requiring equity from a home sale to be used to repay the restitution? ¶19

- 1) The trial court's findings of fact that Defendant violated probation conditions by willfully failing to pay restitution as ordered by the Court was clearly erroneous. ¶21
- 2) The trial court's findings of fact that Defendant had violated probation conditions by failing to maintain suitable employment as order by the Court was clearly erroneous. ¶29
- 3) The trial court's findings of fact that Defendant violated probation conditions by willfully failing to apply approximately \$27,000 in equity from the home sale in Grand Forks, North Dakota, towards his restitution was clearly erroneous. ¶34

D. Did the trial court abuse its discretion when finding there were probation violations without the requisite inquiry into the reason for failure to pay and consideration of adequate alternative methods for punishment? ¶42

Conclusion ¶47

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TABLE OF AUTHORITIES

Cases

<i>Bearden v. Georgia</i> , 461 U.S. 660, 672-673, 103 S.Ct. 2064, 2073 (U.S. 1983).	¶43. 46
<i>State v. Clark</i> , 2001 ND 194, ¶ 7. 636 N.W.2d 660, 662 (N.D. 2001).	¶17. 42
<i>State v. Drader</i> , 432 N.W.2d 553, 554 (N.D. 1988).	¶32
<i>State v. Gates</i> , 540 N.W.2d 134, 137 (N.D. 1995).	¶17. 19
<i>State v. Toepke</i> , 485 N.W.2d 792, 794 (N.D. 1992).	¶18

Statutes

N.D.C.C. § 12.1-02-02	¶22
N.D.C.C. § 29-28-03	¶16
N.D.C.C. § 29-28-06	¶16
N.D.R. Crim. P. 32(f)	¶18

Other Material

Black’s Law Dictionary	¶41
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)	Benson County No. 06-K-001
-vs-)	
)	APPELLANT’S BRIEF
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STATEMENT OF THE ISSUES

- I. Was the trial court’s factual finding that there was a probation violation clearly erroneous when the probationer substantially complied with all conditions of probation and the restitution was paid in full approximately six months before required under the conditions of probation, the defendant was seeking employment or self employed with a measurable income, and there was no enumerated probation condition requiring equity from a home sale to be used to repay the restitution?
- II. Did the trial court abuse its discretion when finding there were probation violations without conducting the requisite inquiry into the reason for failure to pay and consideration of adequate alternative methods for punishment?

STATEMENT OF THE CASE

A. Nature of the case, course of the proceedings, and disposition in the trial court.

[¶1] This is an appeal from a criminal case. On April 12, 2007, the Defendant/Appellant (hereinafter “Jacobsen”) was found to be in violation of his

suspended sentence. (App. 19-21) As a result of the violations, Jacobsen was sentenced to serve seven month and eight days, with credit given for thirty-seven days previously served; the Deferred Imposition of Sentence was revoked; and the \$2,500.00 suspended NSF fee was re-imposed. (App. 19-21) These punishments were imposed even after Jacobsen had repaid the entire amount of restitution, \$37,000, by January 2007, almost four months before revocation hearing and almost six months before the end of his one year probation.

[¶2] On June 7, 2006, Jacobsen entered a plea of guilty to the offense of Issuing Checks with Insufficient Funds, Class C Felony, as part of a plea agreement with the Benson County State's Attorney. (Transcript of June 7, 2006 (hereinafter T1.) p. 2-3). Jacobsen was given a deferred imposition of sentence for a period of one year and supervised probation for one year subject to the supervision of the North Dakota Parole/Probation division and the rules and conditions of Appendix A. (App. 7-9).

[¶3] On December 12, 2006, a Petition for Revocation of Probation was filed alleging four violations of the conditions of probation. (App. 10-11).

[¶4] A probation revocation hearing was held on April 3, 2007. At the hearing, testimony was given by Tammy Vanyo, Grand Forks Parole and Probation Office. (Transcript of April 3, 2007 (hereinafter T2.) p. 13 - p. 24). The hearing was continued until April 12, 2007, when the Parole and Probation case manager could be present following a leave of absence. (T2 p. 23-24).

[¶5] The State of North Dakota filed a Motion to Amend Petition for Revocation of Probation on April 5, 2007. The State sought to include two additional allegations to

the Petition. (App. 12). The Motion was granted resulting in a total of six allegations of probation violations. (Transcript of April 12, 2007 (hereinafter T3) p. 2).

[¶6] The probation revocation hearing was continued on April 12, 2007. Testimony was given by Sandy Parent, a corrections agent with the North Dakota Department of Corrections and Probation office. (T3. p. 4. ln 24). At the hearing, Jacobsen was found to have violated allegations one, four, and five. (T3 p. 61. ln 1-3: ln 14-16). The Court dismissed allegations two, three, and six in the Petition. (T3 p. 58. ln 4-16). As a result of the violations, Jacobsen was re-sentenced to serve seven month and eight days, with credit given for thirty-seven days previously served; the Deferred Imposition of Sentence was revoked; and the \$2,500.00 suspended NSF fee was re-imposed. No further probation was ordered as part of his sentence. (App. 20-21).

[¶7] Jacobsen appeals the order finding he violated conditions of his probation.

B. Statement of facts.

[¶8] On June 7, 2007, Jacobsen entered a plea of guilty to the offense of Issuing Checks with Insufficient Funds as part of a plea agreement. (T1 p. 2-3). Jacobsen was given a deferred imposition for one year during which he was placed on supervised probation through the North Dakota Probation/Parole office. (App. 7-9). The supervised probation for one year was designed to allow Jacobsen time to pay back the restitution. (T1, p. 3. ln. 15-16). Jacobsen told the court he believed he would be able to pay restitution, \$37,000, within the one year period of supervised probation. (T1 p. 3, ln. 20-22). Jacobsen told the court he and his wife were in the process of selling their house in Grand Forks, North Dakota and he had job opportunities in Florida which would allow him to pay the restitution. (T1 p. 3. ln. 23-25 – p. 4, ln. 1-4).

[¶9] At the June 7th hearing, Jacobsen stated that he intended to move out of North Dakota to Florida where he had family and planned to join them in the commercial fishing business and possibly engage in carpentry. (T1 p. 6. ln. 25 – p. 7. ln. 9). Jacobsen signed paperwork to allow him to be transferred to Florida (T3 p. 6. ln. 17-18) and began meeting with a probation officer in Florida. (T3 p. 9, ln. 8-12). Upon moving to Florida, Jacobsen began seeking employment (App. 13) and shortly thereafter became self employed. (App. 14-17). While self employed, Jacobsen reported making between \$2,000 and \$5,000 per month. (App. 14-17).

[¶10] Jacobsen's restitution payments were ordered to begin August 1, 2006. (App. 9). Jacobsen made a payment of \$3,000 in August and another in September. Jacobsen began having trouble with the payments, but he kept in contact with the Florida probation office. (T3. p. 50, ln. 4-16). Due to family expenses, including the birth of his sixth child, moving expenses, and slow income, Jacobsen was unable to make the October restitution payment. (App. 16). Jacobsen stated to the probation officer intended to make the October and November restitution payments by November 30th. (App. 16). Jacobsen was trying to fulfill his obligation and repay the restitution: he had gone so far as to contact an attorney in North Dakota, DeWayne Johnston, to assist with his case. (T3 p. 51. ln. 6-9). Despite Jacobsen's efforts, no payment was made in November. Jacobsen made a payment of \$12,000 towards restitution in December 2006 and another payment of \$19,000 towards restitution in January 2007. (T3 p. 9. ln. 23 – p. 10. ln. 2). The entire \$37,000 in restitution was paid in full approximately four months before the date of the revocation hearing and approximately six months before it was to be repaid under the Order. (T3 p. 49. ln. 5-7).

[¶11] On December 12, 2006, a Petition for Revocation of Probation was filed alleging four violations of the conditions of probation: (1) failure to pay restitution as ordered by the court; (2) failure to pay administrative fees as ordered by the court; (3) failure to pay the NSF fee as ordered by the court; and (4) failure to maintain suitable employment as ordered by the court. (App. 10-11). On April 5, 2007, a motion was brought, and later granted, to amend the Petition to include two additional allegations: (5) failure to apply any equity from his home sale in Grand Forks, North Dakota, toward the restitution, fines, and costs in the case and (6) failure to care for and support his dependents. (App. 12).

[¶12] On April 3, 2007, a probation revocation hearing was held. Jacobsen denied the four allegations against him. (T2, p. 12, ln 18 – p. 13, ln 13). The only testimony given at the hearing was that of Tammy Vanyo from Grand Forks Parole and Probation office. (T2 p. 13, ln 19 – p. 24, ln 3). Because the parole and probation officer was unfamiliar with the case, the court continued the hearing until April 12, 2007, when the case manager would be present to testify. (T2 p. 23, ln 22- 24, ln 2).

[¶13] The probation revocation hearing continued on April 12, 2007. Jacobsen denied the two additional allegations added since the April 3rd hearing. (T3 p. 3, ln 22 – p. 4, ln 10). Testimony was given by Sandy Parent, a corrections agent with the North Dakota Department of Corrections and Probation office. (T3 p. 4, ln 24). Sandy Parent's testimony focused on the information provided to her by the Department of Corrections in Florida, since the North Dakota offices did not continue contact with Jacobsen after his transfer was received by Florida. (T3 p. 8, ln 24- p. 9, ln 5). No witness from the Department of Corrections in Florida was called to testify.

[¶14] At the April 12, 2007, hearing, Jacobsen was found to have violated three allegations, numbers one, four, and five. (T3 p. 61. ln 1-3; ln. 14-16). The Court dismissed allegations two, three, and six. (T3 p. 58. ln 4- 16). As a result of the violations, Jacobsen was sentenced to serve seven months and eight days with credit give for thirty-seven days previously served; the Deferred Imposition of Sentence was revoked; and the \$2,500.00 suspended NSF fee was re-imposed. (App 20-21). No further probation was ordered as part of his sentence. (App. 19-21).

[¶15] Jacobsen filed an appeal of the revocation of his probation on April 13, 2006.

LAW AND ARGUMENT

A. Jurisdiction

[¶16] Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provisions, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06. N.D.C.C., which provide as follows:

An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03

An appeal may be taken by the defendant from:

1. A verdict of guilty;
2. A final judgment of conviction;
3. An order refusing a motion in arrest of judgment;
4. An order denying a motion for new trial; or
5. An order made after judgment affecting any substantial right of the party.

N.D.C.C. § 29-28-06.

B. Standard of Review

[¶17] Revocation of probation of deferred imposition of sentence is reviewed under North Dakota law in a two-step analysis. *See State v. Gates*, 540 N.W.2d 134, 137

(N.D. 1995); *State v. Clark*, 2001 ND 194, ¶ 7, 636 N.W.2d 660, 662 (N.D. 2001). The first step is review of the trial court's factual findings on the probation violation under a clearly erroneous standard. *Clark* at ¶ 7. The second step in the analysis is review of the trial court's decision to revoke probation under an abuse of discretion standard. *Id.*

[¶18] Under Rule 32(f) of the North Dakota Rules of Criminal Procedure, “[i]f the probationer contests the violation, the prosecution must establish the violation by a preponderance of the evidence.” Accordingly, the prosecution bears the burden in revocation proceedings. *State v. Toepke*, 485 N.W.2d 792, 794 (N.D. 1992).

C. Was the trial court's factual findings that there was a probation violation clearly erroneous when the probationer substantially complied with all conditions of probation and the restitution was paid in full approximately six months before required under the conditions of probation, the defendant was seeking employment or self employed with a measurable income, and there was no enumerated probation condition requiring equity from a home sale to be used to repay the restitution?

[¶19] Under North Dakota law, “[a] finding of fact is clearly erroneous if, although there is some evidence to support the finding, we are convinced, on the entire record, a definite mistake has been made.” *Gates* at 137.

[¶20] Jacobsen substantially complied with all of the conditions of probation as set forth in Appendix A of the June 7, 2006 Order. Jacobsen not only met the overall terms and conditions of his probation, but he exceeded those terms and conditions. He paid the entire restitution within approximately six months, sought and maintained employment, and maintained contact with his probation officer. Jacobsen was doing

everything that he was supposed to be doing under the terms and conditions of his probation to the best of his ability.

1. The trial court's finding of fact that Defendant violated probation conditions by willfully failing to pay restitution as ordered by the Court was clearly erroneous.

[¶21] The trial court's finding of fact that Jacobsen violated a condition of his probation by willfully failing to pay restitution as ordered was clearly erroneous.

[¶22] An inability to pay a large sum of restitution does not by itself make the failure to pay willful. Jacobsen did not willfully fail to pay the restitution. The North Dakota Century Code defines willful as "engag[ing] in the conduct intentionally, knowingly, or recklessly." N.D.C.C. § 12.1-02-02. Under the statute, intentionally is defined as "when he engages in the conduct, it is his purpose to do so"; knowingly is defined as "when he engages in the conduct, he knows or has a firm belief, unaccompanied by substantial doubt, that he is doing so, whether or not it is his purpose to do so"; and recklessly is defined as when "he engages in the conduct in conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct..." N.D.C.C. § 12.1-02-02.

[¶23] It was Jacobsen's intent to pay the restitution back in full and to do so quickly. (T1 p. 4. ln 24-25). Jacobsen had a plan of action to allow him to pay the restitution and followed through with that plan of action to the best of his ability. At the June 7th hearing. Jacobsen stated that he intended to move to Florida where he had family and could join them in the commercial fishing business and also possibly engage in carpentry while there. (T1 p. 6. ln. 25 – p. 7, ln. 9). Jacobsen signed paperwork to allow

him to be transferred to Florida (T3 p. 6, ln. 17-18) and began meeting with a probation officer there. (T3 p. 9, ln. 8-12). Jacobsen made a decision to relocate his family to a place where he had the support of his extended family and where he had prudently planned to have two different potential sources of income.

[¶24] In August, shortly after relocating to Florida, Jacobsen reported he was looking for employment and did not have any reported income. (App. 13) Despite a move with his family of five children and being unemployed, Jacobsen made the August payment of \$3,000. (App. 13). Within approximately one month of relocating, Jacobsen had secured employment and had a reported income of \$3,000. (App. 14). In September, despite the additional expense of a newborn daughter and reported income equaling the amount of restitution to be paid, Jacobsen made the required \$3,000 restitution payment. (App. 14). Due to family expenses, moving expenses, and slow income, Jacobsen was unable to make the October restitution payment. (App. 16). Jacobsen stated he intended to make the October and November restitution payments by November 30th. (App. 16). Jacobsen made a payment of \$12,000 towards restitution in December 2006 and \$19,000 towards restitution in January 2007. (T3 p. 9, ln. 23 – p. 10, ln. 2). The payment in January completely fulfilled the restitution obligation, which was paid in full within approximately six months of the restitution being ordered rather than the more than twelve months it would have required under the Order.

[¶25] Jacobsen put forth a good faith effort to make the restitution payments. He was in contact with his probation officer in Florida and notified them that he was experiencing difficulty in paying the October and November restitution payments, but that he intended to have the arrearages paid by the end of November. (App. 16).

Jacobsen had even gone so far as to contact an attorney in North Dakota, DeWayne Johnston, to assist in the case. (T3 p. 51, ln 6-9). Mr. Johnston, on Jacobsen's behalf, attempted to negotiate a date to pay the amount owed while Jacobsen continued to stay in contact with his probation officer in Florida. (T3 p. 63. ln 22-24).

[¶26] It is clear that Jacobsen made bona fide efforts to repay the money. Jacobsen reported he was self employed and had a reported income of \$3,000 on September 5, 2006, \$5,000 on October 3, 2006, \$3,000 on November 6, and \$2,000 in December. (App. 14-17). Therefore, Jacobsen's income from August through December totaled \$13,000. (App. 13-17). He made payments totaling \$37,000, the full amount of the restitution, from August 2006, through January 2007. Clearly, Jacobsen made payments above and beyond even his income.

[¶27] Jacobsen was struggling to make the large restitution payments but was nevertheless working with his probation officer to rectify the situation. The court, during the June 7, 2006 hearing, permitted and agreed to use intermediate measures. (T1 p. 17, ln. 7-8). Despite Jacobsen's efforts though, no intermediate measures were used. He was not even afforded the normal leeway given to most probationers. (T3 p. 46, ln. 4-6). Instead of someone extending a helping hand, Jacobsen was served with a petition to revoke his probation. There is nothing to indicate that any assistance was offered to Jacobsen, the only evidence is of a swift move to revoke Jacobsen's probation at the first sign that he may be having difficulty in paying the monthly restitution payments on time.

[¶28] There was no evidence presented that Jacobsen had willfully failed to pay the restitution. It was not shown that he had frivolously spent his income, that he had purchased large items or expensive gifts, or that he had in any other way squandered his

earnings away. There was no willful refusal to pay; Jacobsen made payments above and beyond his income even when he ran into hard times. When he was not able to make the payments, he continued to work with his probation officer in Florida on a plan for repayment. When he was able to resume the large payments, after only missing two months, he did so, making even larger lump sum payments and repaying the restitution in full before he was required to do so under the terms of his probation.

2. The trial court's findings of fact that Defendant had violated probation conditions by failing to maintain suitable employment as ordered by the Court was clearly erroneous.

[¶29] The trial court's finding of fact that Jacobsen violated probation conditions by failing to maintain suitable employment was clearly erroneous. Jacobsen obtained and maintained suitable employment as ordered by the court.

[¶30] In Appendix "A" of the June 7, 2006 Order Deferring Imposition of Sentence. Jacobsen was ordered to "continue your present employment or seek and maintain suitable employment; you may pursue a vocational or educational course of study which will lead to future or better employment." (App. 8) Jacobsen fulfilled this probation condition.

[¶31] At the June 7, 2006. hearing. Jacobsen was anticipating a move with his family to southern Florida to pursue work in the charter boat and commercial fishing business with family members as well as work as a carpenter because of a shortage of carpenters in southern Florida due to the hurricanes. (T1 p. 7, ln 6-11). Jacobsen moved to Florida and reported as directed to the parole office. (T3 p. 9. ln. 10-12). At that time, Jacobsen reported he was seeking employment. (App. 17). It is perfectly reasonable that

Jacobsen having just moved may still be seeking employment. According to testimony from Sandy Parent, it was not a violation for Jacobsen to not have a job when he first moved to Florida. (T3 p. 39, ln 20-11) By September 5, 2006, however, Jacobsen was self employed with a monthly income of \$3,000. (App. 14). In September, October, November, and December, Jacobsen was self employed and had an income between \$2,000 and \$3,000 per month. It stands to reason that if Jacobsen was engaged in the charter boat and commercial fishing business with his family or engaging in carpentry work as anticipated that he would likely be self employed: these are fields where it is common to be self employed.

[¶32] The North Dakota Supreme Court has stated that “[t]here is great value in making all conditions of release clear and capable of being understood by the offender in order that he knows exactly what is expected of him.” *State v. Drader*, 432 N.W.2d 553, 554 (N.D. 1988). There is no indication that Jacobsen was told at anytime that self employment was not a suitable form of employment. Rather, there was testimony at the April 12, 2006, hearing from Sandy Parent that as a trained officer, someone making two or three thousand dollars a month is gainfully employed. (T3 p. 46, ln. 7-10).

[¶33] Jacobsen did not violate the condition of probation requiring him to maintain suitable employment. Jacobsen sought employment upon moving to Florida which is permissible under the conditions for probation. Within a month of the move, Jacobsen was employed and had earnings of \$3,000. (App. 17). His employment continued through at least December with an income totaling \$13,000. (App. 13-17). There is no prohibition on self employment under the conditions of probation and Jacobsen was clearly engaging in suitable employment resulting in an income between

\$2,000 and \$5,000 per month.

3. The trial court's findings of fact that Defendant violated probation conditions by willfully failing to apply approximately \$27,000 in equity from the home sale in Grand Forks, North Dakota, towards his restitution was clearly erroneous.

[¶34] The trial court was clearly erroneous in finding that Jacobsen violated a probation condition by willfully failing to apply proceeds from the same of his home towards restitution. Jacobsen cannot violation a condition of probation when such a condition does not exist.

[¶35] There was no enumerated condition requiring the payment of the equity from the sale of the house to the restitution. The plea agreement Jacobsen entered into did not include a provision whereby Jacobsen agreed that any portion of the proceeds from the home sale would specifically be used to pay the restitution; in fact, it made no mention whatsoever of the home or the sale thereof. (T1 p.3, ln. 9-19). Likewise, the Order Deferring Imposition of Sentence did not include any such provision. The Order made no mention of the house and no mention of the source to be used to repay the restitution. (App. 7-9). Moreover, during the June 7, 2006 hearing, Jacobsen did not make a promise to the court to apply \$27,000, his share, or any portion of the proceeds from the sale of the home towards his restitution. Jacobsen only expressed his intention to use part of the proceeds to fulfill his restitution obligation and he understood that the full restitution would need to be paid within the one year period provided in the plea agreement. (T1 p. 3, ln 20-22; p.4. ln 5-10, 17-20).

[¶36] The Judge commented during the June 7, 2006 hearing that he expected if Jacobsen had the money from the home sale that he would pay the restitution off. (T1 p.

16, in 24-25). Unquestionably, such a comment does not create a condition of probation. There is no enumerated condition in any court order requiring Jacobsen to pay \$27,000 or any other amount, from the sale of his home towards the restitution. It certainly would have been desirable and arguably in Jacobsen's best interest to do so, but it was definitely not required.

[¶37] The subject of selling the Grand Forks house came about after Jacobsen was asked if he was in a position to pay \$37,000 within one year after pleading guilty under the plea agreement. (T1 p. 3, ln. 20-25 – p. 4, ln. 4). During the June 7, 2006, hearing, the sale of Jacobsen's Grand Forks home was mentioned as a potential source for payment of the restitution. (T1 p. 3, ln. 23-24). During the hearing, the Judge asked if Jacobsen would be in a position to pay the restitution within one year as indicated in the plea agreement. (T1 p. 3, ln. 20-21). Jacobsen stated he and his wife were in the process of selling their residence in Grand Forks and he had job opportunities elsewhere, in Florida, which would allow him to support his family and pay back the restitution. (T1 p. 3, ln. 23- p. 4, ln. 4). Jacobsen stated that "the plan that my wife and I talked about is that we obviously will take some of that [money from the sale of the house] and put it into savings and take a chunk of that and apply it to this matter." (T1 p. 4, ln. 17-20). Additionally, Jacobsen stated it was his "total intention to pay this off as soon as possible. Mr. Wang has been gracious enough to allow one year if I have the ability to do it in three or four months, that's my intention.(sic)" (T1 p. 4, ln. 25- p. 5, ln. 3).

[¶38] Jacobsen and his wife eventually sold the house in Grand Forks and received the proceeds from the home which were substantially less than anticipated, receiving \$15,000 less from the sale of the house than expected. (T1 p. 4, ln. 11-13; T3 p.

35. In 7).

[¶39] Shortly after selling their residence in Grand Forks, Jacobsen, his wife, and their five children moved to Florida to follow job opportunities. Jacobsen began making the required restitution payments in August 2006, and the entire \$37,000 in restitution was paid in full by January, almost four months before the date of the revocation hearing. (T3 p. 49, ln. 5-7). These restitution payments were made despite a total monthly income of \$13,000 for the five month period between August and December 2006. (App. 13-17). It is apparent that the \$24,000 paid towards restitution in excess of Jacobsen's income came from another source, likely the proceeds from the sale of the house.

[¶40] There was no condition of probation requiring that the restitution be paid using the proceeds from the sale of Jacobsen's home. Nevertheless, Jacobsen did make several large payments towards restitution, realizing the importance of the restitution to the victim. Jacobsen cannot violate a condition of probation where one does not exist.

[¶41] Jacobsen substantially complied with all of the conditions of probation enumerated to him. *Black's Law Dictionary* defines substantial compliance as "[c]ompliance with the essential requirement, whether of a contract or of a statute." *Black's Law Dictionary*, 1428 (6th ed. 1990). That is exactly what occurred in this case; Jacobsen complied with all of the essential requirements of his probation. He worked with his probation officer, kept out of trouble, found and maintained a well paying job, and paid back all of the restitution.

D. Did the trial court abuse its discretion when finding there were probation violations without the requisite inquiry into the reason for failure to pay and consideration of adequate alternative methods for punishment?

[¶42] A trial court “abuses its discretion when it acts in an arbitrary, unreasonable, or capricious manner, or misinterprets or misapplies the law.” *Clark*. at ¶ 8 (citations omitted).

[¶43] In the case at hand. the trial court abused its discretion when it failed to inquire as to the reason that Jacobsen failed to pay and when it failed to consider adequate alternative methods of punishment. In *Bearden v. Georgia*, the United States Supreme Court stated:

[I]n revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.

Bearden v. Georgia, 461 U.S. 660, 672-673, 103 S.Ct. 2064, 2073 (U.S. 1983).

[¶44] At no time during the hearing on April 3, 2006, nor April 12, 2006, did the trial court inquire of Jacobsen why he failed to pay the restitution as required. The court instead focused on the process used when a probationer moves to another state. When the court was not focused on the move to Florida, the court was focused on the sale of Jacobsen's home in Grand Forks. In all of their inquiries into the where, when, and how regarding the sale of the home, the court never stopped to inquire what, if anything, the proceeds had been used for or why Jacobsen was unable to make every payment on time.

The trial court seemingly glossed over the requirement to inquire why the payments were not made and instead turned its focus elsewhere.

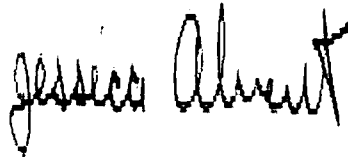
[¶45] In the span of approximately one year, Jacobsen was forced to close his business, faced serious criminal charges, sold his house, moved his family of six children to Florida, and began new employment, all of which would have taken considerable expense. (T1 p. 9, ln 22-23; T3 p. 30, ln. 15-18; p. 6, ln. 17-18) While some of the events were admittedly of his own creation, the record shows that Jacobsen was attempting to do the best that he could under the circumstances; he was clearly making an effort to pay the restitution and to maintain all of the conditions of probation. The trial court however did not inquire into any of these matters and did not inquire as to the reasons Jacobsen failed to pay the restitution when they were required to do.

[¶46] The trial court also abused its discretion when they failed to consider adequate alternative methods of punishment. The court in *Bearden*, stated that in a probation revocation, the sentencing court must focus on “whether non-imprisonment alternatives are adequate to satisfy the State’s interest in punishment and deterrence.” *Bearden* at 2073. It appears that the court focused on imprisonment from the onset and did not consider non-imprisonment alternatives to replace the imprisonment imposed in this case. (T3 p. 70, ln. 16-p. 71, ln. 13) Jacobsen substantially complied with all of the conditions for probation. Jacobsen had already served thirty days in jail for the offense, (T3 p. 65, ln 6-7) the entire amount of restitution had been paid, and he had continued to meet and work with his probation officers in both North Dakota and Florida. Despite all of this, the court seemed intent on imprisonment as a punishment in lieu of additional probation, community service work, or other alternatives.

CONCLUSION

[¶47] Based on the foregoing reasons, the trial court's factual findings that there was a probation violation were clearly erroneous and the trial court abused its discretion when finding there was a probation violation and imposing the sentence.

Dated this 21st day of September, 2007.



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IN DISTRICT COURT, COUNTY OF BARNES, NORTH DAKOTA

State of North Dakota,)
)
 Plaintiff/Appellee,)
)
 vs.)
)
 Pete Jacobsen,)
)
 Defendant/Appellant.)

Supreme Court No. 20070105

Benson County No. 06-K-001

20070105

Certificate of Service

I, Jessica J. Ahrendt, do hereby certify that on September 21, 2007, I served the following documents:

Brief of Appellant
Appendix

On:

North Dakota Supreme Court
Clerk of Courts
supclerkofcourt@ndcourts.com

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STATE OF NORTH DAKOTA

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Dated this 21st day of September, 2007.

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