

**ORIGINAL**

20070105

**FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT**

**IN THE SUPREME COURT  
OF THE STATE OF NORTH DAKOTA**

**OCT 23 2007**

**STATE OF NORTH DAKOTA**

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State of North Dakota  
Plaintiff/ Appellee,

Supreme Court No. 20070105

Benson County Ct. 06-K-001

vs.

Pete Jacobsen a.k.a. Peter Jacobsen,  
Defendant/Appellant.

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**RESPONSE TO APPEAL FROM  
ORDER FOR REVOCATION OF PROBATION  
DATED APRIL 12, 2006  
FILED APRIL 16, 2007 OF  
Northeast Judicial District,  
Benson County District Court, North Dakota,  
The Honorable Lee A. Christofferson, Presiding**

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**BRIEF OF APPELLEE**

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### Statement of Facts

On June 7<sup>th</sup> 2006, the Defendant/Appellant Pete Jacobsen pleaded guilty to the offense of issuing checks with insufficient funds, a Class C Felony. as part of a plea agreement. (Transcript of June 7, 2006 (hereinafter T1.) p. 2-3). The Defendant was given a deferred imposition of sentence for a period of one year subject to the supervision of the North Dakota Parole and Probation Division, the rules and conditions of Appendix A. (Appellant's Appendices 7-9), and the conditions further set forth and found in the Transcript of the June 7, 2006 sentencing hearing. (T1 p. 15-19)

The deferred imposition of sentence of one year was contingent on the Defendant paying all of the restitution (\$37,000.00) within that 12-month period of time. The plan of restitution repayment was painstakingly gone over with the Defendant by the District court Judge at the June 7, 2006 hearing. (T1 p.16 ln 21-24). Simple math concluded the Defendant would necessarily need to pay \$3,000.00 per month. The Defendant also offered the equity in the potential sale of his home. towards the payment of the restitution. (T1 p. 3 ln 22-25. p. 4 ln 17-20 ). If the sale of the home did not occur, and the equity was not available to pay restitution, than at the minimum, the Court was expecting restitution to be paid at the rate of \$3,000.00 per month. (T1 p. 16 ln 22)

The Defendant chose to relocate from the State of North Dakota to Key Largo, Florida. where he was then supervised pursuant to the interstate compact with the North Dakota parole agent Sandy Parent of Grand Forks. (Transcript of April 12 2007 (hereinafter T4) p. 5 ln 13) During the months of October and November 2006 the \$3,000.00 per month restitution was not forthcoming when due. (T4 p. 41 ln 20-24) A Petition for Revocation of Probation was prepared by petitioner Kristin Thelan on the 12<sup>th</sup> day of December 2006. (Appellant's Appendix A p. 10-11)

Following the filing of the petition, the Defendant remitted \$12,000.00 to the Benson County District Court and was received by the District court on December 26<sup>th</sup> 2006. (T4 p. 53 ln 14)

On January 3<sup>rd</sup> 2007 the Defendant was arrested in the Key Largo Florida area pursuant to the order to apprehend accompanying the Petition for Revocation of Probation. The conditions of release from the Florida incarceration were established in a hearing before the Honorable Lee A. Christofferson on the 25<sup>th</sup> day of January 2007 in Devils Lake, North Dakota. (Transcript of January 25 2007. (hereinafter T2) p. 6 ln 18-19) The conditions of release for the Defendant, Peter Jacobsen, was that he would have to post the balance of the restitution, \$21,000.00, and in addition, deposit with the Court \$8,000.00 as and for cash bail. Upon those two conditions being met, the Defendant would be released. (T2)

On the January 31<sup>st</sup> 2007, an Order for Release and a hearing date was set on the Petition for Revocation. Peter Jacobsen posted the \$29,000.00 cash. A hearing date in Minnewaukan, Benson County North Dakota, for February 26<sup>th</sup> 2007 at 3:00 o'clock p.m. was set. The Petition for Revocation hearing on February 26<sup>th</sup> 2007 would be continued at the request of the Defendants Attorney because of his scheduling conflicts, and being out of the Country in Belize.

An attempt at the Probation Revocation Hearing was held on April 3<sup>rd</sup> 2007. The supervising agent from the probation office was unavailable and the Court continued the hearing until the supervising agent for interstate transfers could be available. (Transcript of April 3, 2007 (hereinafter T3) p. 23 ln 9) This hearing was continued until April 12<sup>th</sup> 2007 when the parole and probation case manager could be present following a leave of absence. (T3 p. 25 ln 20)

The State of North Dakota filed a Motion to Amend the Petition on April 5<sup>th</sup> 2007. The State sought to include two additional allegations. (Appellants Appendix p. 12). The motion was granted resulting in a total of six allegations of probation violations. (T4 p. 3)

The probation revocation hearing took place on April 12<sup>th</sup> 2007, testimony was given by Sandy Parent a corrections agent of the North Dakota Department of Corrections Probation Office. (T4 p. 5-52) At the conclusion of the hearing, the Defendant was found, by a preponderance of the evidence to have violated allegations 1.4. and 5. (T4 p. 59-61) The Court dismissed allegation 2.3 and 6 of the petition. ( T4 p. 58, ln 4-15) As a result of the violations. Jacobsen's probation was revoked and Pete Jacobsen was re-sentenced to serve 7months and 8 days. with credit given for 37 days with the North Dakota Department of Corrections. The \$2,500.00 suspended NSF Fee was re-imposed. and there would be no supervised probation upon the Defendant's release from incarceration. (Appellant's Appendix 20-21)

The Defendant appeals from the Order of the District Court, Benson County, Northeast Judicial District, Lee A. Christofferson, Judge, which revoked an order deferring imposition of sentence on an NSF check charge and imposed sentence of seven months and eight days and credit for time served.

STATEMENT OF THE CASE

The State accepts the statement of the case presented in the Brief of the Defendant/ Appellant.

## ISSUES

- I. Was the district court's factual finding of probation violation clearly erroneous?
- II. Was the district court's decision to revoke or modify probation an abuse of discretion?

## LAW AND ARGUMENT

- I. Was the district court's factual finding of probation violation clearly erroneous? No.**

The Supreme Court reviews probation revocation proceedings in two steps. *State v. Nordahl*, 2004 ND 106 ¶11, 680 N.W.2d 247, citing *State v. Clark*, 2001 ND 194 ¶7, 636 N.W. 2d 660; First, the Court determines whether the district court's factual findings are clearly erroneous. *Id.* Second, the Court determines whether the district court's decision to revoke or modify probation was an abuse of discretion. *State v. Nordahl*, 2004 ND 106, 680 N.W.2d 247 ¶11, citing *State v. Clark*, 2001 ND 194 ¶7, 636 N.W. 2d 660.

The district court found Jacobsen had failed to make restitution payments in the months of October and November 2006. (T4 p. 42 ln 20).

Jacobsen agreed to pay restitution as part of his plea agreement, which specifically set out the amount to be paid, and the time in which to make the payments in order to get the benefit of the plea agreement. i.e. a reduction from a felony to a misdemeanor. (T1 p. 13-14).

Jacobsen argues he substantially complied with paying restitution and the Court is abusing its discretion in concluding he did not.

The Defendant, Pete Jacobsen, paid \$12,000.00 on December 26<sup>th</sup> 2006, to the district court after the Petition for Revocation had signed by the district court.



Jacobsen relies on *Beardon v Georgia*, 461 U.S. 660. (1983) 103 S Ct. 2064, 76 L. Ed. 2d 221 1093, to argue the Court never made inquiry as to why Jacobsen never made restitution and never took in the circumstances surrounding his financial situation once he chose to relocate in Key Largo, Florida. *Beardon*. does not appear to be applicable in this case because the *Beardon* case is not a case where there was an agreement between the State and the Defendant.

In *Beardon*, the Supreme Court decided the issue of whether a Court can revoke a Defendant's probation for failure to pay restitution without evidence and findings the Defendant was responsible for the failure. or that alternative forms of punishment were inadequate. *Id.* 665 103 Supreme Court 2064. *State v. Nordahl*, 2004 ND 106, 680 N.W.2d 247 ¶11.citing *State v. Clark*, 2001 ND 194 ¶7, 636 N.W. 2d 660.

In *Beardon*, the Defendant pleaded guilty to burglary and to receiving stolen property. *Beardon's* sentence, imposed by the court, required him to pay \$550.00 in restitution. *Beardon* was able to partly satisfy the restitution obligation. but thereafter. lost his job and was unable to find a new job, despite continuing efforts. When *Beardon* was unable to satisfy the remainder of the restitution, the trial court revoked his probation and sentenced him to serve the remainder of his probation period in prison. *State v. Nordahl*, . *Id.*

Like *Nordahl's* situation. Jacobsen's case is distinguishable from the *Beardon* case. In *Beardon*, the Defendant did not agree to the restitution as part of the plea agreement, rather the restitution was imposed by the court as part of *Beardon's* sentence. In this case, as in *Nordahl*, Jacobsen agreed to the restitution amounts and agreed to the due dates in a plea agreement. (T1 p.13 ln 4) At the June 7<sup>th</sup> 2006 sentencing hearing, Jacobsen represented to the Court, he would be able to make the \$3,000.00 per month payments for restitution. (T1 p. 14 ln 11-12) He represented to the District court he had or would have adequate assets to satisfy the restitution portion of the judgment.

Prior to entering into the plea agreement, Jacobsen knew of his earning potential in the State of Florida. (T1 p. 7 ln 2-11 ) Jacobsen argues, his inability to pay his restitution for October and November 2007, in a timely manner was through no fault of his own. He simply was unemployed and/or underemployed.

The restitution order did not mandate substantial compliance, rather, it was a minimum of \$3,000.00 per month, more if it became available. (Appellant's Appendix p. 7-9)

At the June 7, 2006 hearing, Jacobsen also promised to pledge the equity from the potential sale of his house if it sold, to the court, as and for restitution in this case. Jacobsen now argues applying equity towards restitution was not a condition for probation as set forth in allegation #5 in the Petition for Revocation. (Appellant's Appendix p. 12). The State argues Jacobsen did pledge the equity asset of his potential house sale towards restitution. (T1 p. 3-4.16 ln 24-25. p. 19-20) An exhaustive inquiry was made by the District court as to the potential house sale, equity and availability of this towards the restitution. (T1 p. 3-4) In outlining the conditions of Appendix A, the District court again discussed the Court's expectations that if the house sold, the monies would be used for restitution. (T1 p. 16 ln 24-2, p. 19-20).

The district court did not force Mr. Jacobsen to bring about the sale of his house. Rather, only the equity assets, as identified by Jacobsen, would be used towards restitution. The sale of the house took place in the month of July 2006. (T4 p. 33 ln 9) The equity in the house was \$55,177.71. (T4 p. 35 ln 6) If half of this equity was to go to Mr. Jacobsen, \$27,500.00 would be available for restitution. The court did not monitor whether or not the house sold until after the Petition for Revocation was signed and the Order for Apprehension executed. The State moved to amend the Petition for Revocation to include an allegation of failure to apply the equity from the house sale. Jacobsen contends it was never a

condition of his probation that the house proceeds were to be used for restitution. The State disagrees.

Jacobsen told the district court he would apply to proceeds towards restitution, and then chose not to, and subsequently fell behind in his restitution payments for the months of October and November 2006.

Jacobsen failed to make the payments. Jacobsen failed to follow through on his promise to apply equity dollars from the sale of his home (which ultimately did occur in the month of June).

**II. Was the district court's decision to revoke or modify probation an abuse of discretion? No.**

The Defendant, as part of a plea agreement, did agree that he would pay \$3,000.00 a month in restitution and apply equity monies from the sale of his home towards the restitution. He failed to comply with these two obligations to the Court. The District court should not be found as being clearly erroneous, nor should it be found to have made a mistake in reaching that conclusion, based on the entire record.

The plea agreement made was that: if the Defendant paid the restitution within a 12 month period of time, the Felony offense would be reduced to a Misdemeanor offense. Jacobsen seems to argue the non-payment and subsequent un-timely payment of restitution still merits his receiving a deferred imposition of sentence. Upon finding, by a preponderance of evidence, that conditions of the probation had been violated, the Court revoked his suspended sentence. (T4 p. 61 ln 17) The Court could have entered yet another deferred imposition of sentence, but chose not to. Had the Court made that decision, the Court would have in effect been rewarding Mr. Jacobsen for not making his restitution payments as he promised to do. Jacobsen further argues that because he paid restitution in full, well in advance of the 12 months set out in the plea agreement, his the decision of the court for his sentence, is abusive, and the Court is abusing its discretion in

sentencing Jacobsen as it did. Jacobsen only paid the \$12,000.00 in late restitution after the Petition for Revocation was filed. The State further points out. Jacobsen paid the balance of the restitution as a condition to get out of jail in the State of Florida, to return to North Dakota on his own.

The court concluded Jacobsen violated the court's Order as to the payment of restitution. The district court in *Nordahl*, concluded the Defendant had violated the court order, "the consequence of violating the court's order, is that the court will revoke his sentence and impose a new sentence" *State v. Nordahl*, 2004 ND 106, 680 N.W.2d 247 ¶7.

The district court sentenced Jacobsen as it did, and set forth the reasons as to why the Court was sentencing Jacobsen as it did. The Court set forth the Defendant violated 3 of the 6 allegations in the Petition for Revocation.

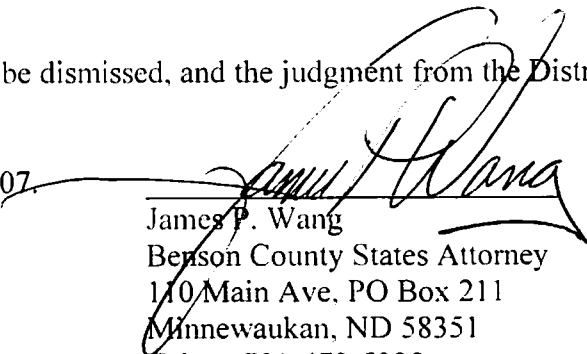
Jacobsen made a promise to the court pursuant to a plea agreement and broke that promise.

### CONCLUSION

In reviewing the entire record, the district court was not in error in revoking the deferred imposition of sentence. The sentence imposed by the Court upon revocation of a deferred imposition of sentence was explained, justified and appropriate in this case.

The State asks the appeal be dismissed, and the judgment from the District court be affirmed in its entirety.

Dated this 23<sup>rd</sup> day of October 2007.



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Plaintiff/Appellee.

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**CERTIFICATE OF SERVICE BY MAIL**

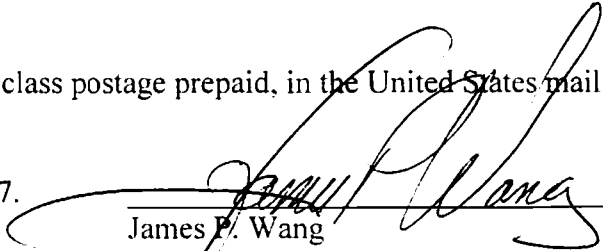
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James P. Wang certified that he is an attorney for a party herein and on October 23, 2007, he served the attached original BRIEF OF PLAINTIFF/APPELLEE, and 7 copies, and a 3 ½" diskette containing the full text of the brief, upon Penny Miller, Clerk, and by placing a true and correct copy in an envelope addressed as follows:

**Penny Miller, Clerk  
North Dakota Supreme Court  
Office of the Clerk  
600 East Boulevard Ave. Dept 180  
Bismarck, ND 58505-0530**

and depositing the same, with first class postage prepaid, in the United States mail at Devils Lake, North Dakota.

Dated this 23<sup>rd</sup> day of October 2007.

  
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