

ORIGINAL

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SUPREME COURT OCT 22 2008

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20080151

State of North Dakota,

Plaintiff-Appellee.

- vs -

Jason Huffling,

Defendant-Appellant.

APPEAL FROM A SECOND AMENDED
CRIMINAL JUDGMENT
SOUTH CENTRAL JUDICIAL DISTRICT
BURLEIGH COUNTY CR. NO. 08-06-K-1916
THE HONORABLE BRUCE B. HASKELL, PRESIDING

BRIEF

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ABBREVIATIONS

Page - P.

Line - L.

Transcript - Tr

Tr of M - Transcript of Motion to Correct Sentence or in the Alternative Withdraw Admissions Relating to Revocation of Probation

Tr of B - Transcript of Bond Hearing

Tr of R - Transcript of Revocation of Probation Hearing

STATEMENT OF THE ISSUE

- ISSUE:
- I. When a judge, during a revocation hearing, advises a defendant that if that defendant appears before him again at a future revocation hearing he will be sentenced to a minimum five year Department of Correction sentence, has that judge limited the sentence he can impose on that defendant at a future revocation hearing to five years?

NATURE OF THE CASE

This is an appeal to the North Dakota Supreme Court by Defendant Appellant Jason Huffling (Mr. Huffling) from the sentence he received at a probation revocation hearing. Tr. of R. P.1 L. 8-9. The reason for Mr. Huffling's appeal is he believes because of the advise the judge gave him prior to sentencing he would received a five year sentence. Tr. of M. P.2 L. 10-15.

At the revocation hearing the sentence the judge imposed was five years on each charge and the sentences were to run concurrently. Therefore, Mr. Huffling ended up receiving a ten year sentence.

From the Judgment and Sentence, Mr. Huffling has timely appealed and this matter is now before the North Dakota Supreme Court.

STATEMENT OF FACTS

Mr. Huffling was on probation after having plead guilty to the following crimes:

- 1) Conspiracy to Commit Burglary a Class C Felony;
- 2) Conspiracy to Commit Theft of Property a Class C Felony.

At a revocation hearing, prior to the one held on June 3, 2008, Judge Bruce B. Haskell advised Mr. Huffling that if he appeared before him again, at a future revocation hearing, he would have a minimum five-year Department of Corrections Sentence. Tr of B. P.3 L. 11-16, Tr. of M. P.2 L.10-15.

Based upon the Judge's statement Mr. Huffling believed he would receive a five-year sentence from Judge Haskell if he appeared before Judge Haskell at a future revocation hearing. Tr of M. P.2 L.10-15. Mr. Huffling, as a result of this belief waived his right to an attorney. Tr of B. P.3 L. 11-16.

When Judge Haskell sentenced Mr. Huffling at the conclusion of the revocation hearing, he sentenced Mr. Huffling to five years on each charge with the sentences running consecutively. Tr of R. P.10 L. 8-14. Therefore Mr. Huffling's sentence was for ten years not five.

ARGUMENT

ISSUE 1. When a judge, during a revocation hearing, advises a defendant that, if that defendant appears before him again at a future revocation hearing he will be sentenced to a minimum five year Department of Correction sentence, has that judge limited the sentence he can impose on that defendant at a future revocation hearing to five years?

The crimes that Mr. Huffling plead guilty to were:

- 1) Conspiracy to Commit Burglary a Class C Felony;
- 2) Conspiracy to Commit Theft of Property a Class C Felony.

Each of these crimes is a class C felony. Neither of these crimes has a minimum sentence. According to NDCC 12.1-32-04(4) Classification of Offenses - Penalties Offenses are divided into seven classes, which are denominated and subject to maximum penalties as follows: (4) Class C felony for which a maximum penalty of five years imprisonment, a fine of five thousand dollars, or both may be imposed.

Judge Haskell could impose a five year sentence on each of the class C felonies and then run the sentences consecutively. However, he advised Mr. Huffling, that if he appeared before him again, he would have a minimum five year Department of Corrections Sentence. This statement was misleading.

Judge Haskell in his advise to Mr. Huffling about sentencing chose to use the words "minimum sentence" for two class C felonies that only have maximum sentences. When Judge Haskell used the words "minimum five year sentence", he knew he could impose five years on each crime, and run the sentences consecutively, therefore a minimum five year sentence has to have a different meaning. A reasonable interpretation of the words "minimum five year sentence" is that the sentence will be for only five years. This is what Mr. Huffling believed when we waived his right to an attorney.

North Dakota has crimes that have a minimum sentence. An example of the statute that provides for minimum sentencing is NDCC 39-08-01. The part of that statute that deals with minimum sentence is NDCC 39-08-01(4)(a)(b)(c) and (d).

- a. For a first offense, the sentence must include both a fine of at least two hundred fifty dollars and an order for addiction evaluation by an appropriate licensed addiction treatment program.
- b. For a second offense within five years, the sentence must include at least five days' imprisonment or placement in a minimum security facility, of which forty-eight hours must be served consecutively, or thirty days' Community service; a fine of at least five hundred dollars; and an order for addiction evaluation by an appropriate licensed addiction treatment Program.
- c. For a third offense within five years, the sentence must include at least Sixty days' imprisonment or placement in a minimum security facility, of which forty-eight hours must be served consecutively; a fine of one thousand dollars; and an order for addiction evaluation by an appropriate licensed addiction treatment program.
- d. For a fourth or subsequent offense within seven years, the sentence must include one hundred eighty days' imprisonment or placement in a minimum security facility, of which forty-eight hours must be served consecutively; a fine of one thousand dollars; and an order for addiction evaluation by an appropriate licensed treatment program.

The minimum sentencing provisions under NDCC 39-08-01 (4)(a)(b)(c) and (d) are not applicable to the criminal statutes in Mr. Huffling's case because his case involves class C felonies without any minimum sentencing provisions.

North Dakota Rule of Criminal Procedure Rule 11(b) requires the judge to explain the possible sentence before a sentence can be imposed. There is no similar rule mandating what a judge must tell a defendant at sentencing at a revocation hearing. In Mr. Huffling's case, Judge Haskell at a prior revocation hearing, took it upon himself to advise Mr. Huffling he would receive a minimum five year sentence. A defendant should be able to rely upon such statements whether or not they are required by the North Dakota Rules of Criminal Procedure.

In North Dakota a trial judge's ability to impose a sentence can be limited by the

plea agreement procedure set out in 11(c)(4) of the North Dakota Rules of Criminal Procedure. *Accepting a Plea Agreement.* If the court accepts the plea agreement, it must inform the defendant that, to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment. A trial judge's ability to sentence should also be limited when that judge advises of the limits of sentence he will impose.

In this case Mr. Huffling relied on Judge Haskell's statements and waived his right to an attorney. Mr. Huffling's right to an attorney are set out in NDCC 29-01-06(1)

Rights of defendant. In all criminal prosecutions the party accused has the right:

1. To appear and defend in person and with counsel;

Right to counsel are also set out in the North Dakota Rules of Criminal Procedure 44(a)(1) **Right to counsel.** (1) **Felony Cases.** An indigent defendant facing a felony charge in state court is entitled to have counsel provided at public expense to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right. If Judge Haskell had not limited a future sentence, to a minimum five year sentence, Mr. Huffling would have asked for an attorney at the bond hearing.

Mr. Huffling concedes that Judge Haskell could have imposed consecutive sentences. The fact Judge Haskell could impose such sentences is set out in *State v. Patten* 353 NW2d26 (N.D. 1984) "Absent a statute to the contrary it is within the trial court's discretion to determine if a sentence should run concurrently with or consecutively to another sentence. Mr. Huffling acknowledges that the law generally

allows the sentence Judge Haskell gave him but in his case, it is Mr. Huffling's position that Judge Haskell should be limited in the sentence he could impose because he advised Mr. Huffling, the sentence would only be of five years.

In *Kaiser v State* 417 NW2d 175 (ND) the Supreme Court ruled it was reversible error when a trial judge did not substantially comply with the advise that is required to be given under Rule 11 North Dakota Rules of Criminal Procedure to a defendant when he pleads guilty. When a trial judge does not substantially comply with Rule 11 North Dakota Rules of Criminal Procedure this is reversible error.

In Huffling the trial judge, although not required to, decided to advise Mr. Huffling on sentencing. Such advise has to follow Rule 11 North Dakota Rules of Criminal Procedure. When Judge Haskell sentenced Mr. Huffling, the sentence he gave exceeded the sentence he had advised Mr. Huffling he would get. This excessive sentence should be reviewed under a reversible error standard.

CONCLUSION

When a judge, while court is in session, advises a Defendant of a particular legal sentence he will receive if he appears before him in the future, the judge must impose that sentence when the Defendant appears before him in the future.

This case should be remanded to the trial court with an order directing that Mr. Huffling's sentence be changed to five years.

DATED at Mandan, North Dakota, this 22 day of October, 2008.

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CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that she is an employee in the office of Pulkrabek Law Firm and is a person of such age and discretion as to be competent to serve papers.

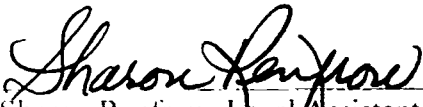
That on October 22nd, 2008, she served, by mail, a copy of the following:

APPELLANT'S BRIEF

by placing a true and correct copy thereof in an envelope and depositing the same, with

Tyrone Turner
Assistant State's Attorney
514 E. Thayer Ave.
Bismarck, ND 58501

The undersigned further certifies that on October 22nd, 2008, she dispatched to the Clerk, North Dakota Supreme Court, an original and seven copies of the APPELLANT'S BRIEF and emailed the same containing the full text of the Brief.


Sharon Renfrow, Legal Assistant to
Benjamin C. Pulkrabek