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SUPREME COURT NOV 20 2008

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

State of North Dakota,)

Plaintiff-Appellee,)

-vs-)

Jason Huffling,)

Defendant-Appellant,)

.....)

NOV 20 2008

STATE OF NORTH DAKOTA

) Supreme Ct. No. 20080151

) District Ct. No. 08-06-K-1916

) SA File No. R685-06-10

BRIEF OF PLAINTIFF-APPELLEE

**APPEAL FROM SECOND AMENDED JUDGMENT
DATED JUNE 4, 2008**

**Burleigh County District Court
South Central Judicial District
The Honorable Bruce B. Haskell, Presiding**

**Tyrone J. Turner
Assistant, Burleigh County State's Attorney
Courthouse, 514 East Thayer Avenue
Bismarck, North Dakota 58501
Phone No: (701) 222-6672
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Attorney for Plaintiff-Appellee**

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STATEMENT OF THE ISSUES

I: Whether the District Court abused its discretion sentencing the Appellant to ten (10) years following Appellant's second probation revocation on two (2) class C felony offenses?

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STATEMENT OF THE CASE

The State of North Dakota (hereinafter, "Appellee") filed a Criminal Complaint on October 1, 2006, charging Jason Huffling (hereinafter, "Appellant") with Conspiracy to Commit Burglary (Count I) and Conspiracy to Commit Theft of Property (Count II); each a Class C Felony. (Register of Actions; Entry #1)

An Information was filed on December 18, 2006. (Register of Actions; Entry #11). Appellant plead guilty to each of the charged offenses on December 18, 2006. (Register of Actions; Entry #12). An Order Deferring Imposition of Sentence was entered on or about January 11, 2007. (Id.)

A Petition for Revocation of Probation was filed on January 25, 2007. (Register of Actions; Entry #13). On March 1, 2007, a hearing was held on the Petition. (Register of Actions; Entries #16; #19; #20). The Appellant's probation was revoked and a Criminal Judgment, dated March 14, 2007, was entered and filed with the Clerk of Court. (Register of Actions; Entries #19; #20). On June 15, 2007, the Criminal Judgment was amended. (Register of Actions; Entry # 24).

Pursuant to the Criminal Judgment and Amended Criminal Judgment, the Appellant was sentenced to five (5) years with the North Dakota Department of Corrections and Rehabilitation on each count; all but twenty-one (21) days of which was suspended and the Appellant was placed on supervised probation for five (5) years. (Register of Actions; Entries #20; #24).

1 On November 21, 2007, a second Petition for Revocation of Probation
2
3 (hereinafter, "second petition") was filed. (Register of Actions; Entry #25) A
4 hearing on the second petition was held June 3, 2008. (Register of Actions;
5 Entries #28; #29; Appellant's App. p. 9). The Appellant's probation was
6 revoked again and a Second Amended Criminal Judgment, dated June 4,
7 2008, was filed with the Clerk of Court on June 6, 2008. (Register of Actions;
8 Entry #29; Appellant's App. p. 9) .

9
10 Pursuant to the Second Amended Criminal Judgment, the Appellant
11 was sentenced to five (5) years on each of the two (2) counts; said sentences
12 to run consecutive to each other. (Appellant's App. p. 9) .

13 The Appellant filed a Notice of Appeal to the North Dakota Supreme
14 Court on June 24, 2008. (Appellant's App. p. 8).

15 On August 19, 2008, the Appellant filed motions with the District
16 Court asking that his sentence be modified or that, in the alternative, he be
17 granted permission to withdraw his admissions made at the June 3, 2008,
18 hearing. (Appellant's App. p. 7) . The North Dakota Supreme Court issued
19 an Order of Temporary Remand remanding the matter back to the District
20 Court to consider the Appellant's motions. (Appellant's App. p. 6) .

21
22 A hearing was held on the Appellants' motions on September 17,
23 2008. (Register of Actions; Entry #43) . The District Court issued its Order
24 denying the Appellant's motions on September 18, 2008. (Appellant's App. p.
25 4). Appellant has not appealed the September 18 Order denying Appellant's
26 motions. (Register of Actions).
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STATEMENT OF THE FACTS

In the first Petition to Revoke Probation, the sole alleged violation was that Appellant had absconded from his probation. (Register of Actions; Entry #13). At the revocation hearing, Appellant admitted he had ran. (Register of Actions; Entry #19). Appellant's probation was revoked and he was placed back on probation for five (5) years. (Register of Actions; Entries #19; #20). The Judge revoking Appellant's probation advised Appellant that continued probation violations could result in Appellant being revoked and being sent to the penitentiary for at least five (5) years. (Transcript of Revocation of Probation Hearing, June 3, 2008; Page 9, Line 5-7). Appellant failed to heed the advisement and, once again, began violating his probation conditions. (Register of Actions; Entries #25; #26; #29).

A second Petition to Revoke Probation was filed. (Register of Actions; Entry #25). The second petition, as amended, alleged that Appellant had absconded from probation and had failed to maintain contact with his probation officer; had used alcohol to excess on multiple occasions; had used and/or possessed marijuana on multiple occasions; and had committed new criminal offenses on probation. (Register of Actions; Entry #26).

When he made his first appearance on the second petition, Appellant was advised of the allegations in the Petition and was asked whether he wanted to have an attorney represent him on the second Petition to Revoke Probation. (Transcript of Bond Hearing, May 27, 2008; p.1, lns. 7-24; p.3, lns

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5-6). The Appellant declined counsel. (Tr. of Bond Hearing; p.3, lns 5-6: 11-13).

At the second revocation proceeding, Appellant admitted some of the alleged violations and denied others. Following testimony, the Court found that Appellant had violated his probation as alleged in paragraphs 1, 2, 3, 4, 5, 6, 7, and 9 of the amended second petition. (Register of Actions; Entry #29; Tr. of Revocation of Probation Hrg., pp. 1-7). Based thereon, the District Court Judge revoked Appellant's probation. (Register of Actions; Entry #29). After his second revocation, the Appellant was re-sentenced to two (2) consecutive five (5) year terms with the North Dakota Department of Corrections and Rehabilitation. (Appellant's App. p. 9).

The Appellant now appeals the Second Amended Judgment, arguing that the District Court abused its discretion by sentencing Appellant to two (2) consecutive five (5) year terms. Appellant has not appealed the Order denying his Motions to Correct Sentence or to Withdraw Admissions.

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ARGUMENT

I: Whether the District Court abused its discretion sentencing the Appellant to ten (10) years following Appellant's second probation revocation on two (2) class C felony offenses?

NDCC § 12.1-32-07(6) states that:

The court, upon notice to the probationer and with good cause, may modify or enlarge the conditions of probation at any time prior to the expiration or termination of the period for which the probation conditional. If the defendant violates a condition of probation at any time prior to the expiration or termination of the period, the court may continue the defendant on the existing probation, with or without modifying or enlarging the conditions, or may revoke the probation and impose any other sentence that was available under section 12.1-32-02 or 12.-32-09 at the time of initial sentencing or deferment.

In North Dakota, the maximum punishment one can receive upon a conviction of one (1) Class C Felony is five (5) years imprisonment, a \$5,000.00 fine, or both. NDCC § 12.1-32-01(4). The Court may order sentences imposed for multiple convictions to run consecutive with one another. NDCC § 12.1-32-11; State v. Patten, 353 N.W.2d 26 (N.D. 1984)(holding that 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).

Upon his conviction on both counts, absent a dangerous special or a habitual offender designation, the maximum term of imprisonment the Appellant could have received for the two (2) class C felonies was two (2) five (5) year sentences, running consecutively, or ten (10) years. NDCC § 12.1-32-01(4); NDCC § 12.1-32-11; NDCC § 12.1-32-09.

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Therefore, upon his probation being revoked, Appellant could receive a sentence not exceeding the maximum possible term of imprisonment, or ten (10) years. NDCC § 12.1-32-07(6); NDCC § 12.1-32-02; Rule 32(f)(3)(B)(i), North Dakota Rules of Criminal Procedure. The Appellant was in fact sentenced to ten (10) years. As noted, the Appellant's sentence does not exceed the statutory maximum. Therefore, the District Court did not abuse its discretion in ordering the sentence it imposed.

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The crux of Appellant's argument is that he was advised of the specific, particular sentence he would receive upon revocation, and that a sentence to anything other than that is plain error. In this case, the District Court Judge found that Appellant had not been told he would receive a specific and defined sentence; rather, that Appellant had been told he would receive at least a five (5) year sentence, and possibly more, upon a second revocation. (Transcript of Motion to Correct Sentence or in the Alternative Withdraw Admissions Relating to Revocation of Probation hearing, September 17, 2008; p. 7, lns. 23-25; p. 8, lns. 1-2). There is no evidence to dispute the District Court's finding. Appellant could have provided a transcript of the March 1, 2007, hearing if he believed the same contained evidence that the trial judge's finding was wrong. He chose not to do so.

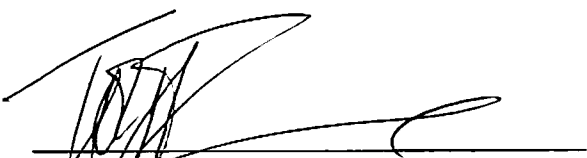
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Appellant also infers that Rule 11 of the North Dakota Rules of Criminal Procedure was somehow not followed. Once again, such a claim is unsubstantiated by the record and the Appellant cites no evidence of the same. Further, Appellant has failed to cite any statutory authority or case law which mandates compliance with Rule 11 in revocation proceedings.

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CONCLUSION

Based upon the foregoing, the Appellee requests that the Second Amended Judgment be affirmed.

Dated this 19th day of November, 2008.



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8	Jason Huffling,)	
)	SA File No. F685-06-10
9	Defendant-Appellant,)	
)	
10	STATE OF NORTH DAKOTA)	
11) ss	
12	COUNTY OF BURLEIGH)	

Shawna Schatz, being first duly sworn, depose and say that I am a United States citizen over 21 years old, and on the 20th day of November, 2008, I deposited in a sealed envelope a true copy of the attached:

- 1. Brief of Plaintiff-Appellee
- 2. Affidavit of Mailing

in the United States mail at Bismarck, North Dakota, postage prepaid, addressed to:

Benjamin C. Pulkrabek
Attorney at Law
402 First Street NW
Mandan, ND 58554

which address is the last known address of the addressee.

Shawna Schatz
Shawna Schatz

Subscribed and sworn to before me this 20th day of November, 2008.

Katherine A. Gross
Katherine A. Gross, Notary Public
Burleigh County, North Dakota
My Commission Expires: 10-7-2014

KATHERINE A GROSS
Notary Public
State of North Dakota
My Commission Expires October 7, 2014