

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
Supreme Court No. 20110051
Burleigh County 08-03-K-2928

State of North Dakota,)
)
 Plaintiff/Appellee,)
)
 vs.)
)
Garron Gonzalez,)
)
 Defendant/Appellant.)

APPELLANT’S BRIEF

APPEAL FROM SECOND AMENDED CRIMINAL JUDGMENT
DATED FEBRUARY 9, 2011, BEFORE HON. BRUCE B. HASKELL

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Century Code:

Section 12.1-32-04	17,18,20,21,25
Section 12.1-32-04(1)	25

1. STATEMENT OF FACTS

2. The relevant facts are contained within the Law and Argument section.

3. STATEMENT OF PROCEEDINGS

4. On September 9, 2003, Garron Gonzalez (“Gonzalez”) was charged with Gross Sexual Imposition. On January 13, 2004, Gonzalez entered a plea of guilty. He was sentenced to five (5) years, with the Department of Corrections, with all but one hundred thirty (130) days suspended.

5. On February 1, 2005, Gonzalez was revoked on probation. He was re-sentenced to five (5) years, with all but thirty (30) months suspended.

6. On February 8, 2011, Gonzalez was again revoked on probation. He was re-sentenced to forty (40) years at the Department of Corrections.

7. On February 15, 2011, a Notice of Appeal was filed with the North Dakota Supreme Court.

8. ISSUE

9. Did the court rely upon impermissible sentencing factors in imposing sentence upon Gonzalez?

10. LAW AND ARGUMENT

11. The trial court improperly and illegally relied upon impermissible sentencing factors when it sentenced Gonzalez.

12. On April 16, 2004, Garron Gonzalez (“Gonzalez”) pled guilty to two counts of Gross Sexual Imposition in Burleigh County, North Dakota.

13. On February 1, 2005, Gonzalez was sentenced to a term of five (5) years with the

North Dakota Department of Corrections, with all but thirty (30) months suspended for five years of supervised probation.

14. On February 8, 2011, Gonzalez admitted certain allegations of violations of probation conditions. The Honorable Bruce B. Haskell, District Judge, revoked Gonzalez's probation and re-sentenced him to twenty (20) years on each count, to be served *consecutively*. The State had advocated and recommended a sentence of twenty (20) years on each count, but to run *concurrently*.
15. During the Court's pronouncement of sentence, the Court stated:
16. **"THE COURT:** Thank you. Well, I guess with all due respect, Mr. Morrow, I disagree that Mr. Johnson and Mr. Rodenbiker engaged in speculation. I think what they are instead doing is seeing a pattern of grooming in this case. And while it hadn't yet risen to the level of actual sexual contact or sexual assault, I have no doubt that that would have been the eventual result. I believe - - and I realize that there isn't evidence presented, but first of all I note that sentencings and revocations are not the within the rules of evidence, and secondly, I think there's been enough literature and study on this sort of behavior, this predatory behavior, that the Court could almost take judicial notice of it. I think this is just classic. I also note that the defendant took steps to conceal his activity by using his middle name as opposed to his first name. He also apparently misrepresented his age to at least one person, so, you know, in addition just to the contact itself, that is a violation of a condition of probation. We're also dealing with deceptive behavior. I don't think I have any choice but to agree with Mr. Rodenbiker that

this defendant is a dangerous person. I also note that this is the second revocation and with all due respect to my predecessor Judge Wefald, I am actually surprised - - maybe not at the initial sentencing, but at the course of sentencing - - that Judge Wefald chose in terms of the revocation, but I guess I wasn't there at those hearings, so I can't really criticize him without knowing everything he did. But for all those reasons I think that the Court is that the point where it needs to protect society for as long as possible. The defendant will be resentenced on each of the counts to 20 years in the custody of the Department of Corrections. Those sentences will run consecutive to each other. The defendant will be entitled to any credit for time served.”

17. The issue on appeal is whether the Court abused its discretion in imposing sentence by relying upon an impermissible sentencing factor under Section 12.1-32-04, N.D.Cent.Code.

18. Section 12.1-32-04 provides:

“Factors to be considered in sentencing decision. The following factors, or the converse thereof where appropriate, while not controlling the discretion of the court, shall be accorded weight in making determinations regarding the desirability of sentencing an offender to imprisonment.

1. The defendant’s criminal conduct neither caused nor threatened serious harm to another person or his property.
2. The defendant did not plan or expect that his criminal conduct would cause or threaten serious harm to another person or his property.

3. The defendant acted under strong provocation.
4. There were substantial grounds which, though insufficient to establish a legal defense, tend to excuse or justify the defendant's conduct.
5. The victim of the defendant's conduct induced or facilitated its commission.
6. The defendant has made or will make restitution or reparation to the victim of his conduct for the damage or injury which was sustained.
7. The defendant has no history of prior delinquency or criminal activity, or has led a law-abiding life for a substantial period of time before the commission of the present offense.
8. The defendant's conduct was the result of circumstances unlikely to recur.
9. The character, history, and attitudes of the defendant indicates that he is unlikely to commit another crime.
10. The defendant is particularly likely to respond affirmatively to probationary treatment.
11. The imprisonment of the defendant would entail undue hardship to himself or his dependents.
12. The defendant is elderly or in poor health.
13. The defendant did not abuse a public position of responsibility or trust.
14. Thee defendant cooperated with law enforcement authorities by brining other offenders to justice, or otherwise cooperated.

Nothing herein shall be deemed to require explicit reference to these factors in a presentence report or by the court at sentencing.”

19. A district court is offered a wide discretion in sentencing. *State v. Hoverson*, 2006 ND 49, 710 N.W.2d 890. The Supreme Court will vacate a district court’s sentencing decision only if the court acted outside the limits prescribed by statute or substantially relied upon an impermissible factor in determining the sentence. *State v. Emery*, 2008 ND 3, 743 N.W.2d 815.
20. The trial court substantially relied upon an impermissible factor when it sentenced Gonzalez to a sentence of 40 years. During the sentencing colloquy, the Court did not address any of the statutory sentencing factors under Section 12.1-32-04, N.D.Cent.Code.
21. The trial court substantially, and almost exclusively, relied upon a factor not found in 12.1-32-04, i.e., that, if not sentenced to the maximum sentences in consecutive fashion, thereby effectively imposing a life sentence, Gonzalez was going to offend sexually again. The Court stated that:

“I think what they are instead of doing is seeing a pattern of grooming in this case. And while it hadn’t yet risen to the level of actual sexual contact or sexual assault, I have no doubt that that would have been the eventual result.”
22. The court further stated, in counterpoint, that, “I realize that there isn’t evidence presented . . . “. Emphasis added.
23. Therefore, the Court admitted that he had heard no evidence to support his

“theory” of Gonzalez re-offending sexually in the future.

24. The court can only rely upon evidence presented to support a sentencing decision.

The court cannot speculate as to what may happen in the future.

25. The State may claim that the Court relied upon subsection 1 of Section 12.1-32-04, N.D.Cent.Code by finding that “the defendants criminal conduct neither caused nor threatened serious harm to another person or his property.” The emphasis must be placed upon the defendant’s criminal conduct. None of the allegations in the revocation petition constituted either criminal conduct nor constitutions a criminal conviction. Gonzalez had no subsequent convictions for a sexual offense. No sexual offender risk assessments were conducted to demonstrate any level of future risk. The Court simply decided, without the benefit of supporting evidence, that Gonzalez was too big a risk to release him at any point during the rest of his life.

26. The Court substantially relied upon an impermissible sentencing factor in its sentencing decision.

27. **CONCLUSION**

28. The Second Amended Judgment and Order Revoking Probation must be reversed and remanded to re-sentencing.

Dated this 28th day of March, 2011.

/s/ Kent M. Morrow

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CERTIFICATE OF SERVICE BY MAIL

On the 28th day of March, 2011, a copy of the foregoing Brief and Appendix to Brief of Appellant was served by e-mail upon Jacob Rodenbiker at jarodenbiker@nd.gov

/s/ Kent M. Morrow

Kent M. Morrow