

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff/Appellee,)	Supreme Court No. 20110301
vs.)	
)	District Court No. 08-10-K-02278
John Unruh,)	
)	
Defendant/Appellant.)	

BRIEF OF APPELLANT UNRUH

APPEAL FROM THE DISTRICT COURT'S SENTENCE IMPOSED UPON THE
DEFENDANT UPON REVOCATION OF PROBATION AFTER HEARING ON
SEPTEMBER 27, 2011 AND THE SUBSEQUENTLY ENTERED
2ND AMENDED CRIMINAL JUDGMENT OF SEPTEMBER 27, 2011
BURLEIGH COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT
HONORABLE DAVID REICH

STEVEN BALABAN (ND BAR ID# 05204)
200 N. Mandan St.
Bismarck, ND 58501
(701) 224-0977

Attorney for Defendant/Appellant Unruh

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STATEMENT OF THE ISSUES

[¶1] The District Court improperly sentenced the defendant under NDCC 12.1-32-07 after revoking his probation.

STATEMENT OF THE CASE

[¶2] Defendant and Appellant John Unruh (Unruh) was charged in Burleigh County with the offenses of Theft of Property, Criminal Mischief and Tampering With Evidence, all class C Felonies, to have occurred on or about October 27, 2010. After a Preliminary Hearing on January 18, 2011, the first and third counts were dismissed, and probable cause was found only for the charge of Criminal Mischief, a class C Felony. App. 6. On February 14, 2011, Unruh entered into a plea agreement with Plaintiff State of North Dakota, in which the charge of Criminal Mischief was reduced to a class A Misdemeanor and Unruh would receive a sentence of 90 days incarceration, with all but 15 days suspended for a period of 2 years of supervised probation. App. 9. An Amended Information was filed reflecting the change of charge. App. 8. An Amended Judgment was entered on February 15, 2011. App. 12.

[¶3] It was alleged that Unruh violated the terms of his probation, and his probation was revoked after a hearing on September 27, 2011. App. 15. Unruh was resentenced by the district court in a 2nd Amended Judgment to a period of incarceration of 1 year, with all but 120 days suspended for a period of two years of supervised probation. App. 14. Unruh appeals the sentence imposed by the district court in the 2nd Amended Judgment.

STATEMENT OF THE FACTS

[¶4] Defendant and Appellant John Unruh (Unruh) was charged in Burleigh County with the offenses of Theft of Property, Criminal Mischief and Tampering With Evidence, all class C Felonies, to have occurred on or about October 27, 2010. After a Preliminary Hearing on January 18, 2011, the first and third counts were dismissed, and probable cause was found only for the charge of Criminal Mischief, a class C Felony. App. 6. On February 14, 2011, Unruh entered into a plea agreement with Plaintiff State of North Dakota, in which the charge of Criminal Mischief was reduced to a class A Misdemeanor and Unruh would receive a sentence of 90 days incarceration, with all but 15 days suspended for a period of 2 years of supervised probation. App. 9. An Amended Information was filed reflecting the change of charge. App. 8. An Amended Judgment was entered on February 15, 2011. App. 12.

[¶5] Unruh was never notified by the district court that, upon revocation, he could be sentenced to more than the plea agreement contemplated. At the Guilty Plea and Sentence Hearing, the district court simply stated “Mr. Unruh, if there is a plea agreement that’s been reached, and if for any reason I do not accept that agreement, I would allow you to withdraw your guilty plea.” Guilty Plea and Sent. Tr. 1, App. 22. The district court reviewed the maximum penalty and fees for the offense. Guilty Plea and Sent. Tr. 1-2, App. 22-23. Upon realizing the plea agreement contemplated a change of charge, the district court again advised, “Mr. Unruh, before I ask if you’re prepared to enter a plea to the amended charge, and again, if I – for any reason I do not accept this plea agreement after hearing the facts and circumstances of the case, I would allow you to withdraw your guilty plea.” Guilty Plea and Sent. Tr. 3, App. 24. The district court went

on to explain the maximum penalties to Mr. Unruh. Guilty Plea and Sent. Tr. 3-4, App. 24-25. After reviewing Unruh's rights, the district court then allowed Unruh to enter a plea, with the district court acknowledging the promise of a plea agreement for the plea of guilty. Guilty Plea and Sent. Tr. 5, App. 26. Again, importantly, the district court informed Unruh it would be bound by the plea agreement but never informed Unruh that Unruh could be sentenced beyond the confines of the plea agreement should his probation be revoked. The district court specifically accepted the plea agreement. Guilty Plea and Sent. Tr. 8, 11, App. 29, 32. Finally, the district court reviewed the terms of supervised probation, but still never informed Unruh of the possibilities of sentencing should his probation be revoked. Guilty Plea and Sent. Tr. 13-16, App. 34-37.

[¶6] Unruh violated the terms of his probation and appeared before the district court regarding revocation. After hearing testimony at the Revocation Hearing, the district court revoked Unruh's probation. Revocation of Probation Hearing Tr. 15-16, App. 55-56, 15. At no time during the hearing did the district court advise Unruh that he could be sentenced beyond the auspices of the plea agreement. Plaintiff State of North Dakota requested a sentence above that of the plea agreement. Revocation of Probation Hearing Tr. 16-18, App. 56-58. Counsel for Unruh specifically informed the district court of the limitations of sentencing upon revocation under NDCC 12.1-32-07(6). Revocation of Probation Hearing Tr. 18, App. 58. Without comment on the plea agreement or NDCC 12.1-32-07(6), the district court imposed a sentence of 1 year with all but 120 days suspended for a period of 2 years, a sentence in excess of the plea agreement and in excess of the mandates of NDCC 12.1-32-07(6). Revocation of Probation Hearing Tr. 22, App. 62, 14.

ARGUMENT

STANDARD OF REVIEW

[¶7] This Court has jurisdiction under N.D. Const. Art. VI, §§ 2 and 6, to have appellate jurisdiction and act as a court of appeals, and under N.D.C.C. § 29-28-06 to review an order made after judgment affecting any substantial right of the party. The North Dakota Supreme Court has limited review of a sentencing decision from the District Court:

A trial judge is ordinarily allowed the widest range of discretion in fixing a criminal sentence. *State v. Wells*, 265 N.W.2d 239 (N.D.1978). On appeal of a claim that a sentence is excessive or incorrect, this court has no power to review the discretion of a sentencing court in fixing a term of imprisonment within the range authorized by statute. *State v. Joern*, 249 N.W.2d 921, 923 (N.D.1977); *State v. Holte*, 87 N.W.2d 47, 50 (N.D.1957). Appellate review of a criminal sentence is confined to determining whether the judge acted within the limits prescribed by statute, or substantially relied on an impermissible factor. *State v. Cummings*, 386 N.W.2d 468 (N.D.1986); *State v. Kaufman*, 310 N.W.2d 709, 714 (N.D.1981); *State v. Berger*, 285 N.W.2d 533 (N.D.1979); *State v. Rudolph*, 260 N.W.2d 13 (N.D.1977). Our appellate review of a criminal sentence is very limited.

State v. Ennis, 464 N.W.2d 378, 382 (N.D. 1990).

LAW AND ARGUMENT

[¶8] The District Court improperly sentenced the defendant under NDCC 12.1-32-07 after revoking his probation.

[¶9] Notwithstanding judicial interpretation, North Dakota law plainly delineates the ground rules for imposing probation upon individuals. NDCC 12.1-32-07. That law also specifically directs the district courts as to the procedure for amending probation terms or revoking probation and imposing sentence after that revocation:

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 remains conditional. If the defendant violates a condition of probation at any time before 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 12.1-32-09 at the time of initial sentencing or deferment. In the case of suspended execution of sentence, the court may revoke the probation and cause the defendant to suffer the penalty of the sentence previously imposed upon the defendant.

NDCC 12.1-32-07(6). From the plain language of the above subsection, it appears that the district court only has limited options when faced with the prospect of revocation of a probationer. If a condition of probation is violated during the period of probation, the district court has the option of continuing the existing probation and may modify the terms of that probation, or the district court has the option of revoking probation and imposing any sentence that was available under NDCC 12.1-32-02 or NDCC 12.1-32-09. A specific mandate is given to the district court if the district court had originally imposed a suspended sentence.

[¶10] In the present case, Unruh pled guilty to the offense of Class A Misdemeanor Criminal Mischief and entered a plea agreement with the State for his sentence. Guilty Plea and Sent. Tr. 2, App. 23. The district court accepted the plea agreement and sentenced Unruh to a period of incarceration of 90 days, with all but 15 days suspended for a period of two years on supervised probation. Guilty Plea and Sent. Tr. 11, App. 32. At sentencing, the district court advised Unruh of the maximum penalty he could face for this offense, but never advised Unruh that if his probation was revoked, Unruh could face a more severe penalty than what was imposed and suspended. In reviewing each of the transcripts from each of Unruh's appearances in this matter, the district court never

informed Unruh of the potential of a maximum sentence upon revocation. In fact, at sentencing, the district court informed Unruh that the district court could only accept or reject the plea agreement. Guilty Plea and Sent. Tr. 3, App. 24.

[¶11] Unruh violated the terms of his probation and appeared before the district court for a revocation of his probation. The district court revoked Unruh's probation and resentenced him to a period of incarceration of 1 year, with all but 120 days suspended for a period of two years on supervised probation. Revocation of Probation Hearing Tr. 22, App. 62. At the revocation hearing, the district court never informed Unruh of the maximum penalty that could be imposed or the status of the plea agreement.

[¶12] Notwithstanding the plea agreement entered into with Unruh, the State had requested a sentence upon revocation for a period of incarceration of 364 days with credit for the 15 days Unruh had served. Revocation of Probation Hearing Tr. 16, App. 56. Prior to the district court resentencing Unruh, counsel for Unruh specifically directed the district court to NDCC 12.1-32-07(6), and read the language regarding the imposition of the previously imposed sentence into the record. Revocation of Probation Hearing Tr. 18, App. 58. However, without reference to NDCC 12.1-32-07(6), the district court imposed its resentence upon revocation in direct contravention to the statute. NDCC 12.1-32-07(6) directs that Unruh should have been resentenced upon revocation to a period of incarceration of 90 days, with credit for the 15 days he had served. There should not have been any additional incarceration and there should not have been any further probation imposed, as the district court took the specific step of revoking probation and was then statutorily left with the only alternative of "caus[ing] the defendant to suffer the penalty of the sentence previously imposed upon the defendant."

NDCC 12.1-32-07(6).

[¶13] If the district court was to revoke probation in any other scenario, NDCC 12.1-32-07(6) refers to NDCC 12.1-32-02, which offers the district court a plethora of sentencing alternatives, including court costs, probation, imprisonment, fine, restitution or restoration, chemical dependency treatment and sex offender treatment. NDCC 12.1-32-02(1). In addition, the district court must give credit for time served, and may suspend all or a part of the sentence or defer imposition of sentence, and may order testing prior to sentencing. NDCC 12.1-32-02(2)-(5). The remainder of this statute guides the district court as to other specifics for probation terms and outcomes of specific sentencing schemes. NDCC 12.1-32-02(6)-(11). The other available options available to the district court under NDCC 12.1-32-09 deal specifically with special dangerous offenders.

[¶14] The referral by NDCC 12.1-32-07(6) to NDCC 12.1-32-02 for sentencing options upon revocation would seemingly give the district court unbridled authority, within statutory limits, to resentence an individual found to have violated his or her probation. However, the statutory scheme adds one specific wrinkle: “In the case of suspended execution of sentence, the court may revoke the probation and cause the defendant to suffer the penalty of the sentence previously imposed upon the defendant NDCC 12.1-32-07(6).” This specific mandate, applicable to the specific instance where the district court originally imposed a suspended sentence, allows that if such a suspended sentence was imposed and if the district court revokes probation, the district court is then limited to imposing the penalty previously imposed, namely, the portion of the sentence that was suspended. To read this sentence in NDCC 12.1-32-07(6) in any other fashion would render it as surplus language, as, under the referral to NDCC 12.1-32-02 for sentencing

options upon revocation, the district court would already have this power.

[¶15] Thus, under the letter of the law dealing with revocation of probation, the district court must first decide whether to continue probation and possibly modify conditions of probation, or revoke probation and resentence the individual. Upon revocation, the district court may impose any sentence that it could have originally, except in the specific instance where a suspended sentence was imposed, and then the district court is limited to simply giving the individual the penalty previously imposed, namely, the balance of time suspended. To avoid imposing the penalty previously imposed in the instance of a suspended sentence, the district court would then be directed not to revoke probation, but simply to continue the probation with the option to modify the terms of probation. Reading NDCC 12.1-32-07(6) in this matter is the only way to reconcile the language of the entirety of NDCC 12.1-32-07 along with NDCC 12.1-32-02.

[¶16] The North Dakota Supreme Court affirmed the district court's interpretation of this mandate in declining to revoke probation and choosing to extend probation to avoid imprisoning a probationer who owed a large amount of restitution. State v. Clark, 2001 ND 194, 636 N.W.2d 660. Clark was sentenced to a period of five years imprisonment, with the entire five years suspended. The Clark Court specifically found that "the trial court modified rather than revoked Clark's probation; consequently, it was not necessary for the trial court to find that Clark had willfully failed to make restitution payments. N.D.C.C. § 12.1-32-07(6) (allowing a court to modify or enlarge the conditions of probation for "good cause")." Clark at ¶10, p. 663.

[¶17] In an older case, cited by Clark, dealing with revocation of probation, the North Dakota Supreme Court affirmed the district court's imposition of sentence that was

greater than the amount suspended. State v. Ennis, 464 N.W.2d 378 (N.D. 1990). Ennis was convicted of several felonies and sentenced to a period of incarceration of seven years with four years suspended upon certain conditions of probation. Ennis at 379. Ennis violated his probation, the district court revoked his probation, and sentenced him to a period of incarceration of 5 years and nine months, with credit for time served. Ennis at 380. In affirming both the revocation of Ennis' probation and the resentencing to incarceration in an amount greater than his original sentence, the Court reasoned that:

The statutes authorize Ennis's resentencing. As it read in 1982 when Ennis was first sentenced, NDCC 12.1-32-07(4) ^[1], says that, when probation is revoked, the court may continue probation or "may impose any other sentence that was available under section 12.1-32-02 or 12.1-32-09 at the time of initial sentencing." Ennis was convicted of four Class B felonies, each with a maximum penalty of ten years imprisonment, a ten thousand dollar fine, or both. NDCC 12.1-32-01(3). Initially, Ennis could have been sentenced to at least ten years on concurrent sentences. After credit for the year that Ennis was imprisoned, NDCC 12.1-32-07(4) made available at least nine years of imprisonment for Ennis when his probation was revoked. See *State v. Gefroh*, 458 N.W.2d 479 (N.D.1990) and *State v. Jones*, 418 N.W.2d 782 (N.D.1988). Ennis's resentencing was within the range authorized by law.

Ennis at 380-381. However, at the time of Ennis' sentencing and thus in the Court's reasoning, the present language of "suffer[ing] the penalty of the sentence previously imposed" was not enacted and not part of the statutory scheme. NDCC 12.1-32-07(6).

[¶18] Thus, Ennis does not regulate the resentencing of a probationer after revocation when the district court imposed a suspended sentence as Ennis did not contemplate that specific language. As such, the Clark holding is binding precedent for this issue, as it comports with that specific language.

[¶19] Because the district court originally imposed a suspended sentence upon Unruh, and because the district court revoked that suspended sentence, the district court was

required to comply with NDCC 12.1-32-07(6) and simply sentence Unruh to that sentence previously imposed, the balance of time of 75 days incarceration (90 days with credit for the 15 days served). The district court ignored that statutory mandate and imposed an illegal sentence upon Unruh, in excess of the original suspended sentence.

[¶20] Unruh contends that the District Court erroneously acted outside the limits allowed by statute in resentencing him after revoking his probation. Unruh requests that this Court overturn the District Court's 2nd Amended Judgment and remand for the district court to sentence him in accordance with NDCC 12.1-32-07(6).

CONCLUSION

[¶21] From the arguments set forth above, and from the Record in this matter, Unruh requests that this Court overturn the District Court's 2nd Amended Judgment and remand for the district court to sentence him in accordance with NDCC 12.1-32-07(6). Specifically, Unruh's sentence should not be greater than from the plea agreement and from the original sentence of the district court.

Dated this Monday, March 12, 2012.

/s/ _____
STEVEN BALABAN (ND BAR ID# 05204)
200 N. Mandan St.
Bismarck, ND 58501
(701) 224-0977
Attorney for Defendant/Appellant Unruh

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John Unruh,)	
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Steven Balaban, the attorney for Appellant in the above action, hereby certifies under N.D.R.Civ.P. 5(f), that on Friday, July 1, 2011, he served the attached:

BRIEF OF APPELLANT UNRUH
and **APPENDIX TO BRIEF OF APPELLANT UNRUH**

upon Jacob Rodenbiker, Burleigh County Assistant States Attorney, attorney for Plaintiff and Appellee, State of North Dakota, by e-mail to the address jarodenbiker@nd.gov as listed on the North Dakota Supreme Court Website on March 8, 2012.

/s/ _____
Steven Balaban