

RECEIVED BY CLERK SUPREME COURT APR 23 2012

IN THE SUPREME COURT

20110301

STATE OF NORTH DAKOTA

State of North Dakota )  
)  
Plaintiff-Appellee )

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

APR 23 2012

-VS-

John Umuh )  
)  
Defendant-Appellant )  
..... )

STATE OF NORTH DAKOTA

Supreme Ct No. 20110301

District Ct No. 08-10-K-2278

SA File No. F698-10-11

**BRIEF OF PLAINTIFF-APPELLEE**

**APPEAL FROM SECOND THE AMENDED CRIMINAL JUDGMENT  
AND ORDER REVOKING PROBATION**

Burleigh County District Court  
South Central Judicial District  
Honorable David E. Reich

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**STATEMENT OF THE ISSUE**

**Did the court illegally resentence Unruh upon revoking his probation?**

1  
2 **ARGUMENT**

3 Resentencing Unruh after his probation was revoked did not amount to  
4 an illegal sentence, even though the sentence was greater than the plea  
5 agreement presented by the parties at the time he entered his guilty plea.  
6 Unruh relies in part upon statutory interpretation and in part upon two cases.  
7 His statutory construction argument unsoundly suggests the court redefine the  
8 word “may” so that it mean either “must” or “shall” in order to reach his  
9 desired conclusion. Of the two cases Unruh cites, the first, State v. Clark,  
10 2011 ND 194, 636 N.W.2d 600, is limited in application here because of  
11 statutory amendment; the second, State v. Ennis, 464 N.W.2d 378 (N.D.  
12 1990), is inapposite to the extent the court there did not revoke probation.  
13

14 Much of Unruh’s brief is devoted to the false notion that the last  
15 sentence of Section 12.1-32-07(6) of the North Dakota Century Code requires  
16 the district court to act in a certain fashion:  
17

18 6. The court, upon notice to the probationer and with good cause, may  
19 modify or enlarge the conditions of probation at any time prior to the  
20 expiration or termination of the period for which the probation remains  
21 conditional. If the defendant violates a condition of probation at any  
22 time before the expiration or termination of the period, the court may  
23 continue the defendant on the existing probation, with or without  
24 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.

25 N.D.C.C. § 12.1-32-07. He calls it a “specific mandate.” Brief ¶¶ 9, 14-15.  
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In common usage the word “may” is permissive not imperative, and while this court, to fulfill legislative intent, could give “may” the same effect as either of the words “must” or “shall,” it should not do so here. See N.D.C.C. §§ 1-02-02, -03. Unruh surely recognizes how the word is used in this statute since he acknowledges that same section presents the court with options if a defendant violates a condition of his probation; the last sentence is optional too if probation is revoked. Just as the district court is not required to make the defendant suffer the entire penalty of the sentence previously imposed, it may require a stiffer penalty. It is not surplusage for the legislature to include options in one statute that may be found implicitly from another.

An example of what might have been illustrates the State’s position. In this case, if the district court had found that Unruh had only violated his no-alcohol condition of probation when his measured blood alcohol concentration was a 0.20, and not found he committed a new criminal law violation, then the court may have seen fit to cause Unruh to be jailed for less than the balance of 75 un-served days of the 90 initially imposed, perhaps even none at all. Unruh himself had asked below he be sentenced at most to 30 days in jail. *Revocation of Probation* Hr’g Tr. 20, App. 60. Under the rigid view put forth by Unruh, the court would have no discretion to impose the less-time-than-suspended sentence he requested, even if only one of the two allegations had been proven to the court’s satisfaction.

1  
2 In its own full consideration of the statute in question, this Court's  
3 jurisprudence has repeatedly rejected Unruh's argument that the district court  
4 is limited on probation revocation sentencing to imposing only so much  
5 imprisonment as was previously suspended. It has been well established by  
6 this Court that a trial court is allowed to impose a harsher sentence when  
7 probation has been revoked. See, e.g., Peltier v. State, 2003 ND 27, ¶ 13, 657  
8 N.W.2d 238; State v. Vavrosky, 442 N.W.2d 433, 437 (N.D. 1989); State v.  
9 Miller, 418 N.W.2d 614, 616 (N.D. 1988). In fact, the court is left with the  
10 discretion to resentence a defendant upon a revocation of probation to any  
11 sentence that would have been available under law at the original time of  
12 sentencing. State v. Gefroh, 458 N.W.2d 479, 483 (N.D. 1990); State v.  
13 Lindgren, 483 N.W.2d 777, 779 (N.D. 1992).

14  
15 The court was allowed to resentence Unruh to any sentence it deemed  
16 appropriate under the law. "The policy in North Dakota is that a sentence  
17 which includes probation is not final, but is designed to provide a flexible  
18 alternative that allows the trial court to monitor the defendant's conduct while  
19 on probation and to alter the defendant's sentence if the initial sentence of  
20 probation is not effective." Peltier, 2003 ND 27, ¶ 16; citing Davis v. State,  
21 2001 ND 85, ¶ 11, 625 N.W.2d 855. Further, the practice of resentencing  
22 after a revocation of probation is reflective of the court's need to alter an  
23 original sentence as it was not effective. State v. Jones, 418 N.W.2d 782, 784  
24 (N.D. 1988); Davis, 2001 ND 85, ¶ 11; see also, State v. Causer, 2004 ND 75,  
25 ¶ 72, 678 N.W.2d 552.  
26  
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1  
2 Even though when Unruh originally entered a plea of guilty it was  
3 pursuant to a plea agreement, the trial court was no longer bound by that plea  
4 agreement after a revocation of his probation, allowing the court to impose a  
5 harsher sentence. Peltier, 2003 ND 27, ¶ 18. The court did not impose an  
6 illegal sentence on Unruh after a revocation of his probation as the court was  
7 not bound by the original plea agreement and had the discretion to resentence  
8 Unruh to any sentence originally available at the time he entered his guilty  
9 plea.  
10

11 Unruh also claims, although he does not present it as an issue nor was  
12 it raised below, defective notice on the sentencing range at the court's  
13 disposal. Brief ¶¶ 10-11. The issue of whether Unruh had notice of the  
14 sentencing range at the time of the probation revocation, however, is not an  
15 issue properly brought before this court as it is being raised for the first time  
16 on appeal. State v. Brown, 420 N.W.2d 5 (N.D. 1988). A review of the  
17 transcript from the revocation hearing does not indicate Unruh has preserved  
18 this issue for an appeal, therefore this issue cannot be argued on appeal.  
19

20 Should this Court determine the issue be examined nevertheless,  
21 N.D.C.C. § 12.1-32-07(6) gave Unruh "actual notice" of the sentencing  
22 options at the court's disposal. See Peltier, 2003 ND 27, ¶ 19. Unruh has not  
23 claimed he had an expectation about the effect of a plea agreement as it relates  
24 to probation revocation, and the record is devoid of any promise from the  
25 State or any indications from the court that would invalidate the plea  
26 agreement. See, Id. The court's failure to advise at revocation is immaterial.  
27

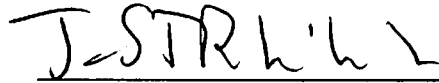


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**CONCLUSION**

Based upon the foregoing, the State requests that the sentence imposed at the revocation hearing be affirmed.

Dated this 23 day of April, 2012.



---

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) SA File No. F698-10-11  
..... )  
STATE OF NORTH DAKOTA )  
) ss  
COUNTY OF BURLEIGH )

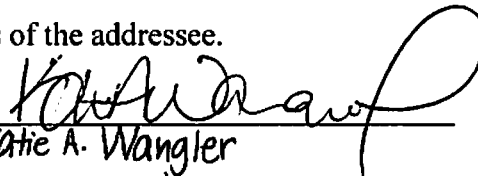
Katie A. Wangler, being first duly sworn, depose and say that I am a United States citizen over 21 years old, and on the 23<sup>rd</sup> day of April, 2012, I deposited in a sealed envelope a true copy of the attached:

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

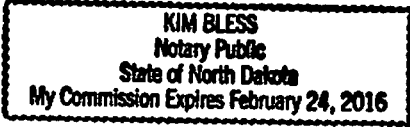
in the United States mail at Bismarck, North Dakota, postage prepaid, addressed to:


Steven Balaban  
Attorney at Law  
200 N. Mandan St.  
Bismarck, ND 58501

which address is the last known address of the addressee.

  
Katie A. Wangler

Subscribed and sworn to before me this 23<sup>rd</sup> day of April, 2012.



  
Kim Bless, Notary Public  
Burleigh County, North Dakota  
My Commission Expires: 02/24/2016