

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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MARCH 13, 2012  
STATE OF NORTH DAKOTA

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State of North Dakota,  
Plaintiff/Appellee,

vs.

Juan DeLeon III,  
Defendant/Appellant.

Supreme Court No. 20110350 & 20110351

Grand Forks Co. No. 18-02-K -1572/1573

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APPEAL FROM THE ORDER FOR REVOCATION OF PROBATION AND  
RESENTENCING ENTERED NOVEMBER 17, 2011 BY THE DISTRICT COURT  
FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT THE HONORABLE  
KAREN BRAATEN PRESIDING.

BRIEF OF THE APPELLANT

Jessica J. Ahrendt  
Grand Forks Public Defender Office  
405 Bruce Avenue, Suite 101  
Grand Forks, ND 58201  
(701) 795-3910  
ND ID #06231  
Attorney for Defendant/Appellant Juan DeLeon III

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

- I. Was the trial court's factual finding of a probation violation clearly erroneous when the probationer substantially complied with all conditions of probation and was actively participating in treatment?

## NATURE OF THE CASE AND PROCEDURAL HISTORY

¶1 This is an appeal from a revocation of probation proceeding. On November 17, 2011, the Defendant/Appellant (hereinafter “DeLeon”) was found to be in violation of his supervised probation. App. 35-38.

¶2 On June 11, 2002, the State filed a Delinquency Petition against DeLeon alleging two counts of Gross Sexual Imposition. App. 8-13. DeLeon was fourteen years old at the time the State filed the delinquency petition. App. 8. The cases were transferred to the Grand Forks District Court for prosecution in cases 18-02-K-1572 and 18-02-K—1573. Docket 5.

¶3 On February 12, 2003, DeLeon entered a plea of guilty to two counts of Gross Sexual Imposition, a class A felony, in cases 18-02-K-1572 and 18-02-K-1573. Docket 24 (18-02-K-1572), 23 (18-02-K-1573). DeLeon was sentenced to five years with the North Dakota Department of Corrections with two years suspended for a period of ten years, and ten years supervised probation subject to the supervision of the North Dakota Parole/Probation division and the rules and conditions of Appendix A. App. 20-22. DeLeon began supervised probation in May of 2008. App. 58.

¶4 On February 15, 2011, a Petition for Revocation of Probation was filed alleging four violations of the conditions of probation: (1) failing a polygraph on November 9, 2009; (2) failing a polygraph on May 26, 2010; (3) failing a polygraph on December 27, 2010; and (4) failing to comply with sex offender treatment. App. 16-32.

¶5 On August 4, 2011, a probation revocation hearing was held. At the commencement of the revocation hearing the first three allegations were withdrawn. App. 40. DeLeon denied the allegation against him. App. 41-41.

¶6 The probation revocation hearing was bifurcated due to time constraints in scheduling. *See* Transcript of August 4, 2011 hearing, September 13, 2011 hearing, October 17, 2011 hearing and November 4, 2011 hearing. Dr. Jeff Gregory, DeLeon's treating psychologist, testified at the hearing as well Loralyn Waltz, a corrections agent with the North Dakota Department of Corrections and Probation office.

¶7 At the final hearing on November 8, 2011, DeLeon was found to have violated his probation . App. 59-60. *See* Transcript of November 8, 2011 hearing. DeLeon was re-sentenced to serve ten years at the North Dakota Department of Corrections with two years suspended. App. 35-38.

¶8 DeLeon filed an appeal of the revocation of his probation on November 17, 2011. App. 39.

## STATEMENT OF FACTS

¶9 DeLeon began supervised probation in May of 2008. App. 58. One of the requirements of supervised probation was that he “actively participate, and successfully complete sex offender treatment, follow all program rules and requirements, and remain in such treatment at the direction of your probation officer.” App. 21.

¶10 Dr. Gregory testified that DeLeon was making progress in his treatment. App. 44-45. Dr. Gregory used a point system to track the progress of DeLeon in treatment. App. 43. At the beginning of treatment DeLeon began with a zero. App. 43. From May 2010 through April 2011 DeLeon’s scores were steadily increasing from a forty-one in May 2010 to fifty-three in April 2011. App. 44.

¶11 Dr. Gregory also testified that DeLeon had regularly attended group therapy (App. 56), regularly and willingly participated in group discussions (App. 57), and completed assignments. (App. 47-49).

¶12 In February 2011, the same month the petition for revocation of probation was filed, Dr. Gregory reported DeLeon was receptive of feedback, used feedback, and gave feedback to others. App. 46. Throughout DeLeon’s time in treatment, he was self-reporting to Dr. Gregory treatment difficulties that he was struggling with. App. 51.

¶13 At the November 8, 2011, hearing, DeLeon was found to have violated his probation. App. 59-60.

## STANDARD OF REVIEW

¶14 The burden of proof in a probation revocation proceeding is preponderance of the evidence. N.D.R.Crim.P. 32(f)(3)(B). The interpretation of a condition of probation is a question of law, fully reviewable on appeal. State v. Krous, 2004 ND 136, ¶ 14, 681 N.W.2d 822.

¶15 The North Dakota Supreme Court applies a two-step process when reviewing a revocation of probation. State v. Causer, 2004 ND 75, ¶ 30, 678 N.W.2d 552, cert. denied, 543 U.S. 906 (2004). First, a review is conducted to see whether the defendant violated his or her probation under a clearly erroneous standard. Id. at ¶ 31. “A finding of fact is clearly erroneous if, although there may be some evidence to support it, the reviewing court on the entire evidence, is left with a definite and firm conviction a mistake has been made.” Id.

¶16 Second, a review is completed to see whether the district court abused its discretion by revoking the defendant's probation. Id. at ¶ 32. “A trial court abuses its discretion when it acts in an arbitrary, unreasonable, or capricious manner, or misinterprets or misapplies the law.” Id.

## JURISDICTIONAL STATEMENT

¶17 Pursuant to constitutional provisions, the North Dakota legislature enacted sections 29-28-03 and 29-28-06 which allow appeals from decisions of lower courts to the Supreme Court as a matter of right.

¶18 The district court had jurisdiction under N.D. Const. art. VI, § 8, and N.D.C.C. § 27-05-06. Mr. DeLeon's appeal was timely under N.D.R.App.P. 4(b). This Court has jurisdiction under N.D. Const. art. VI, § 6, and N.D.C.C. § 29-28-06(1).



## LAW AND ARGUMENT

- I. The trial court's factual finding of a probation violation was clearly erroneous when the probationer substantially complied with all conditions of probation and was actively participating in treatment.

¶19 Under North Dakota law, “[a] finding of fact is clearly erroneous if, although there is some evidence to support the finding, we are convinced, on the entire record, a definite mistake has been made.” State v. Gates, 540 N.W.2d 134, 137 (N.D. 1995).

¶20 DeLeon not only met the overall terms and conditions of his probation, but he was doing everything he was supposed to be doing under the terms and conditions of his probation to the best of his ability. Therefore, the trial court's finding of fact that DeLeon violated a condition of his probation by failing to actively participate in treatment as ordered was clearly erroneous.

¶21 DeLeon started supervised probation and treatment in January 2008. Dr. Gregory testified that DeLeon made progress in his treatment. App. 44-45. Through a point system, Dr. Gregory was able to track the progress of DeLeon in treatment. App. 43. DeLeon's scores steadily increased from May 2010 through April 2011 from a forty-one in May 2010 to fifty-three in April 2011. App. 44.

¶22 Further, Dr. Gregory's testimony substantiated that DeLeon was actively participating in treatment. Dr. Gregory testified that DeLeon was regularly attending group therapy. App. 56. Dr. Gregory testified further that in group therapy DeLeon was a willing participant in group discussions (App. 57) and that DeLeon was working on and completing assignments/ (App. 48-49).

¶23 On January 18, 2011, a non-compliance report was filed alleging DeLeon was resistant to treatment feedback, lacking progress in treatment and on treatment assignments, having potential contact with victims, failing to successfully pass three consecutive polygraph examinations, having increases in deviant arousal, lacking ongoing honesty in treatment, and having unlimited sexual objectification of all females. App. 33-34.

¶24 Despite those assertions, the next month, in February 2011, Dr. Gregory reported that DeLeon was receptive of feedback, using feedback, and giving feedback to others. Dr. Gregory's report in February 2011 also shows DeLeon was actively working on a treatment plan at that time. App. 45-46. Further, DeLeon was consistently self-reporting to Dr. Gregory struggles he was facing in treatment. App. 51-55.

¶25 The petition for revocation alleged that DeLeon was not being honest in treatment. However, the evidence does not support that accusation. Dr. Gregory testified that DeLeon was self-reporting increases in fantasies and in arousal. App. 50. The information Dr. Gregory received from DeLeon's self-reporting is the foundation for which the petition for revocation was brought. Therefore, it was DeLeon's honesty in treatment and his willingness to participate and self-report that provided the basis for the petition.

¶26 As a matter of policy, this program creates an impossible dichotomy between impending incarceration and effective treatment. Either an individual in treatment discloses what he is honestly struggling with and risks having his probation revoked as a result or he is dishonest in his disclosure and treatment is not effective. DeLeon was disclosing the difficulties he was struggling with in order to facilitate treatment and

rehabilitation. This illustrates someone who is actively participating in treatment, not someone who is refusing to cooperate.

### CONCLUSION

¶27 Based on the foregoing reasons, the trial court's factual findings that there was a probation violation were clearly erroneous and the trial court abused its discretion when finding there was a probation violation and imposing the sentence.

¶28 Appellant respectfully requests that this Court vacate the District Court's Order for Revocation of Probation and Remand this matter back to the District Court for further proceedings.

Dated this 13<sup>th</sup> day of March, 2012.

Jessica J. Ahrendt  
Grand Forks Public Defender Office  
405 Bruce Avenue, Suite 101  
Grand Forks, ND 58201  
(701) 795-3910  
Attorney ID No. 06231  
Attorney for Appellant.