

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,)	
)	Supreme Court No. _____
Plaintiff-Appellee,)	
)	
-vs-)	
)	McHenry County Nos.
Mark Christian Palmer,)	25-00-K-00035 &
)	25-00-K-00036
Defendant-Appellant.)	

BRIEF OF APPELLANT

**APPEAL FROM ORDER DENYING MOTION TO DISMISS
PETITION FOR REVOCATION OF PROBATION
AND REVOCATION OF PROBATION
DATED JANUARY 11, 2012
MCHENRY COUNTY DISTRICT COURT
NORTHEAST JUDICIAL DISTRICT
THE HONORABLE JOHN C. MCCLINTOCK, JR., PRESIDING**

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STATEMENT OF THE ISSUES

¶1 Whether the trial court's denial of the defendant's motion to dismiss a petition for revocation of probation and subsequent revocation of probation was clearly erroneous because the Defendant was still incarcerated when the petition for revocation of probation was filed?

STATEMENT OF THE CASE

¶2 **A. Nature of the case, course of the proceedings, and disposition in the trial court.**

¶3 This is an appeal from an Order revoking the defendant's probation, dated January 11, 2012. Order of Revocation and Sentence, Appendix 1. The defendant, Mark Christian Palmer, (hereinafter "Palmer") was found guilty by a jury on four counts of gross sexual imposition for engaging in sexual contact with a minor female in the spring of 1999. Palmer was originally convicted on May 3, 2001, of four (4) counts of Gross Sexual Imposition, Class B Felonies, and was sentenced to ten (10) years imprisonment on each count with seven (7) years suspended on each count, to be served consecutively, with five (5) years of supervised probation following incarceration; fines, fees, and restitution in the amount of \$741.14; and with credit of seventy-eight (78) days for time previously served. He was also ordered to register as a sex offender. Criminal Judgment and Sentence, Appendix 2. Condition #12 of Appendix "A" states required Palmer to "[a]ttend, participate in, cooperate with and successfully complete the following rehabilitation or treatment program(s): Intensive Sex Offender Treatment at NDSP." Appendix 3. In addition, the sentencing court stated to Palmer at the Sentencing Hearing that he was to "attend, participate in, cooperate in, and successfully complete the

intensive sex offender treatment program at the North Dakota Department of Corrections.” Id. Palmer served his sentence and was to be released from the North Dakota Department of Corrections on November 2, 2011. Prior to Palmer’s release, a petition to revoke probation was filed on October 26, 2011, setting out the allegation that Palmer to complete Condition #12 and had refused sex offender education on August 9, 2001, and continued to be non-compliant with this condition up to the time of his scheduled release. Petition for Revocation, Appendix 4. On December 24, 2011, Palmer filed a motion to dismiss the petition to revoke probation on the ground that Palmer was not yet on probation when the petition to revoke probation was filed, together with an Affidavit and Brief. Motion to Dismiss Petition to Revoke Probation, Appendix 5; Affidavit in Support of Motion to Dismiss Petition to Revoke Probation, Appendix 6 The State filed a response, opposing Palmer’s motion to dismiss. Answer to Motion to Dismiss Petition to Revoke Probation, Appendix 7. At the revocation hearing on January 11, 2012, the trial judge dismissed Palmer’s motion to dismiss, conducted the hearing, and found Palmer in violation of Condition #12 for failing to attend, participate in, cooperate in, and successfully complete the intensive sex offender treatment program. The court then resentenced Palmer to ten (10) years of imprisonment, with two (2) years suspended to be followed by two (2) years of supervised probation, with credit for three (3) years previously served at the North Dakota Department of Corrections and credit for seventy (70) days previously served. He was placed on supervised probation for a period of five (5) years following his release from incarceration or termination of parole, whichever is later. Palmer was further to comply with all conditions of his original Appendix A and in his Order Revoking Probation and Sentence. Transcript, Appendix 8.

He was specifically ordered “to successfully complete the sexual offenders program at the North Dakota Department of Corrections and Rehabilitation.” Id. The sentence was to run concurrently with Case No. 25-00-K-035. Id. Previously, Palmer had appealed his conviction, and his conviction was affirmed. State v. Palmer, 2002 ND 5, 638 N.W.2d 18. On February 2, 2011, Palmer, acting *pro se*, filed an Application for Post-Conviction Relief, alleging six grounds. A Memorandum Opinion and Order Denying Petitioner’s Application for Post-Conviction Relief was entered on May 16, 2011, denying Petitioner’s application on all grounds. This case is currently on appeal and awaiting a decision. *See Palmer v. State*, Supreme Court Nos. 20110344, 20110346, 20110347, and 20110348 (argued April 5, 2012).

STATEMENT OF THE FACTS

[¶ 4] This is an appeal from a denial of the Palmer’s Motion to Dismiss Probation Revocation and from an Order of Revocation and Sentence, dated January 11, 2012. Appendix 1. Palmer has steadfastly maintained his innocence throughout these proceedings, which has caused him to come to this particular situation. Because Palmer continues to maintain his innocence, he was not permitted to participate in the intensive sexual offender treatment program, since admitting to the criminal act is a requisite to participating in this program.

[¶ 5] Palmer was found guilty by a jury on four counts of gross sexual imposition, Class B Felonies, for engaging in sexual contact with a minor female in the spring of 1999 and was sentenced on May 3, 2001. The sentence, referred to above, essentially required Palmer to serve twelve (12) years of incarceration. Condition #12 of Appendix “A” required Palmer to “[a]ttend, participate in, cooperate with and successfully complete the

following rehabilitation or treatment program(s): Intensive Sex Offender Treatment at NDSP.” Criminal Judgment and Sentence, Appendix 2. In addition, the sentencing court stated to Palmer at the Sentencing Hearing that he was to “attend, participate in, cooperate in, and successfully complete the intensive sex offender treatment program at the North Dakota Department of Corrections.” Transcript, p. 11, ll. 6-10, Appendix 8. Palmer served his sentence and was to be released from the North Dakota Department of Corrections on November 2, 2011. However, prior to Palmer’s release, a petition to revoke probation was filed on October 26, 2011, setting out the allegation that Palmer to complete Condition #12 and had refused sex offender education on August 9, 2001, and continued to be non-compliant with this condition up to the time of his scheduled release. Petition for Revocation, Appendix 4. Palmer filed a motion to dismiss the petition to revoke probation on the ground that Palmer was not yet on probation when the petition to revoke probation was filed. The State filed a response, opposing Palmer’s motion to dismiss. Appendices 5-6. At the revocation hearing on January 11, 2012, the trial judge dismissed Palmer’s motion to dismiss, conducted the hearing, and found Palmer in violation of Condition #12 for failing to attend, participate in, cooperate in, and successfully complete the intensive sex offender treatment program. The court then resentenced Palmer to ten (10) years of imprisonment, with two (2) years suspended to be followed by two (2) years of supervised probation, with credit for three (3) years previously served at the North Dakota Department of Corrections and credit for seventy (70) days previously served. He was placed on supervised probation for a period of five (5) years following his release from incarceration or termination of parole, whichever is later. Palmer was further to comply with all conditions of his original Appendix A and in

his Order Revoking Probation and Sentence. Transcript, pp. 24-25, Appendix 8. He was specifically ordered “to successfully complete the sexual offenders program at the North Dakota Department of Corrections and Rehabilitation.” Id. The sentence was to run concurrently with Case No. 25-00-K-035.

LAW AND ARGUMENT

¶6] A. Jurisdiction

¶7] Appeals shall be allowed from decisions of lower courts to the supreme court as may be provided by law. Pursuant to constitutional provisions, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06, NDCC, which provide as follows:

An appeal to the supreme court provided for in this chapter may be taken as a matter of right.

NDCC Section 29-28-03.

An appeal may be taken by the defendant from:

1. A verdict of guilty;
2. A final judgment of conviction;
3. An order refusing a motion in arrest of judgment;
4. An order denying a motion for new trial; or
5. An order made after judgment affecting any substantial right of the party.

NDCC Section 29-28-06. State v. Lewis, 291 N.W.2d 735 (N.D. 1980). The Defendant's right to an appeal was reiterated in State v. Vondal, 1998 ND 188, 585 N.W.2d 129.

¶8] B. Standard of Review

¶9] This Court applies an abuse of discretion standard when reviewing a District Court's determination to revoke probation. State v. Wardner, 2006 ND 256, ¶ 26, 725 N.W.2d 215. "A district court abuses its discretion when it acts in an arbitrary, unreasonable, unconscionable, or capricious manner, or if its decision is not the product of a rational

mental process leading to a reasoned determination, or if it misinterprets or misapplies the law." Id. Additionally, where there have been findings of fact made by the District Court, those findings are reviewed under the "clearly erroneous" standard of review. Id. Further, "[a] finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by any evidence, or if, although there is some evidence to support the finding, this Court is left with a definite and firm conviction a mistake has been made." Id.

[¶10] Whether the trial court abused its discretion when it denied the Defendant's motion to dismiss the petition for probation revocation because the Defendant was still incarcerated under his sentence, had not commenced his supervised probation, and could not violate the conditions of probation prior to the time his probationary period commenced?

[¶11] Section 12.1-32-07, N.D.C.C., governs the district court's authority to impose conditions when placing a defendant on probation. State v. Bender, 1998 ND 72, ¶9, 576 N.W.2d 210 (citing State v. Shepherd, 554 N.W.2d 821, 823 (N.D.1996); State v. Sahr, 470 N.W.2d 185, 193 (N.D.1991)). Palmer argued on brief and at the hearing upon his motion to dismiss that since he had not commenced his probation, he could not have violated a condition of probation (hereafter referred to as "Appendix A"); that the terms of his probation were not established as prior conditions of probation to be imposed during incarceration; and that he was not given sufficient actual notice, as required by the Due Process provisions of the State and United States Constitutions, regarding what non-criminal conduct would lead to revocation of his probation. Palmer relied upon the

holding in State v. Ballensky, 1998 ND 197, 586 N.W.2d 163, to support his claim that revocation was not applicable in his case. Palmer also contended that since he was not represented by counsel at his underlying Sentencing Hearing in 2001, although he was represented at trial, and he did not fully understand Condition #12 and that the sexual offender treatment program was to be completed while he was incarcerated. Affidavit & Brief in Support of Motion to Dismiss Petition to Revoke Probation, pp. 2-3.

[¶12] The State contended on brief and at hearing that Ballensky could be distinguished from the immediate factual situation because Ballensky was revoked for a criminal offense that was committed before a criminal judgment was entered and Ballensky was placed on probation. The State also contended that Condition #12, requiring Palmer to complete sex offender treatment while incarcerated, was clearly stated in Appendix A, but the trial judge also clearly stated on the record at sentencing that Palmer was to complete sex offender treatment while incarcerated. Answer to Motion to Dismiss Petition to Revoke Probation, pp. 2-3, Appendix 7.

[¶13] In ruling in the State's favor upon Palmer's Motion to Dismiss Petition to Revoke Probation, the trial court relied upon the ruling in Bender. Transcript, pp. 10-11, Appendix 8.

[¶14] Based upon this ruling on Palmer's Motion, the revocation hearing continued. Palmer's parole officer, Kristin Plessas, a sex offender specialist with the North Dakota Department of Corrections and Parole, testified that Palmer had been noncompliant with treatment because he continued to maintain his innocence upon the underlying convictions. Because of his maintenance of innocence, Palmer was denied most of his good time during his incarceration, from and after August 9, 2001, when he was first

requested to accept responsibility for purposes of entering the sex offender treatment program. She also testified that Palmer had reported that once he was released from prison, no one would know where to find him, even if he were on supervised probation. He refused to provide potential residential addresses for a parole plan. Plessas testified it would be difficult, if not impossible, to place him in a residential setting because he is a high risk sex offender, and a trailer at the Department of Corrections facility in Bismarck or in a mission in Grand Forks might not be possible because of demand for other homeless sex offenders. She also expressed concerns that Palmer might be a flight risk because he had no significant ties to North Dakota, coupled with his lack of compliance. She recommended an additional five (5) years of incarceration so Palmer could complete the sex offender program. On cross-examination, Plessas stated that it was a precondition of sex offender treatment that the defendant had to admit his offenses, and since Palmer had maintained his innocence and contended he was wrongly convicted, he did not qualify for the sex offender treatment program. Palmer did not present any witnesses. Transcript, pp. 13-21.

[¶15] Palmer contends upon appeal that the trial court abused its discretion in denying his Motion and in revoking his probation because he was invoking his Fifth Amendment right not to incriminate himself, and that because of invoking this right, his probation was revoked. This is exemplified by the following colloquy between his counsel and Plessas:

Q. [by counsel] And as far as the that the treatment scheme works at the state penitentiary, are admissions to those allegations [of sexual contact in the underlying case] part of the scheme as far as being able to complete that [intensive sexual offender] treatment?

A. [by Plessas] Well, they always start off in some kind of denial but they do want some form of admission. There's a reason they're there, something to that degree, because you can't treat somebody that didn't do anything wrong.

Transcript, p. 20, ll. 16-23.

[¶16] Palmer's position, although not directly argued upon the instant motion, is that he retains a right against self-incrimination, even after conviction. By requiring Palmer to make an admission of guilt, this would violate his privilege against self-incrimination under the Fifth and Fourteenth Amendments to the United States Constitution. Further, in situations whereby a defendant has testified as to his innocence at trial, such a forced admission could subject the defendant to the crime of perjury, which would obviously be a violation, since it could subject a criminal defendant to admit to other criminal activity. Some courts have held that it is a violation of a convicted defendant's right against self-incrimination to punish him or withhold a benefit because he refuses to admit his guilt by invoking his privilege against self-incrimination in a situation where he might incriminate himself. *See e.g., Minnesota v. Murphy*, 465 U.S. 420 (1984); *State v. Imlay*, 249 Mont. 82, 813 P.2d 979, 983-85 (1991), cert. granted, 503 U.S. 905, 112 S.Ct. 1260, 117 L.Ed.2d 489, and cert. dismissed as improvidently granted, 506 U.S. 5, 113 S.Ct. 444, 121 L.Ed.2d 310 (1992); *United States v. Wright*, 533 F.2d 214, 216-17 (5th Cir.1976) (per curiam); *United States v. Laca*, 499 F.2d 922, 927-28 (5th Cir.1974). Other courts, however, have held that such conduct is not a constitutional violation. *See State v. Gleason*, 154 Vt. 205, 576 A.2d 1246, 1250-51 (1990); *Gollaher v. United States*, 419 F.2d 520, 530-31 (9th Cir.), cert. denied, 396 U.S. 960, 90 S.Ct. 434, 24 L.Ed.2d 424 (1969). Other courts have held that withholding a benefit when a convicted defendant refuses to admit his guilt by invoking his privilege against self-incrimination is constitutional because the defendant is not compelled to waive his privilege and simply forgoes a benefit by asserting his privilege. *See Russell v. Eaves*, 722 F.Supp. 558, 560

(E.D.Mo.1989), appeal dismissed, 902 F.2d 1574 (8th Cir.1990); Henderson v. State, 543 So.2d 344, 346 (Fla.Dist.Ct.App.1989). See also Asherman v. Meachum, 957 F.2d 978, 982-83 (2d Cir.1992) (en banc); *contra* McMorrow v. Little et. al., 103 F.3d 704 (8th Cir. 1997).

CONCLUSION

[¶17] The denial of Palmer's Motion to Dismiss the petition for probation revocation because the Defendant was still incarcerated under his sentence, had not commenced his supervised probation, and could not violate the conditions of probation prior to the time his probationary period commenced, merely because Palmer did not admit guilt for the crimes upon which he was originally convicted was an abuse of the trial court's discretion, and should be reversed and remanded.

Dated this 13th day of April, 2012.



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