

**IN THE SUPREME COURT  
OF THE STATE OF NORTH DAKOTA**

<b>State of North Dakota,</b>	)	
	)	<b>Supreme Court Nos. 20120077/20120078</b>
<b>Respondent/Appellee,</b>	)	<b>(McHenry Co. No. 00-K-00035)</b>
	)	<b>(McHenry Co. No. 00-K-00036)</b>
	)	
	)	
<b>vs.</b>	)	
	)	
<b>Mark Christian Palmer,</b>	)	
	)	<b>APPELLEE’S BRIEF</b>
<b>Defendant/Appellant.</b>	)	

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**BRIEF OF APPELLEE**

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**APPEAL FROM ORDER DENYING MOTION TO DIMISS  
PETITION FOR 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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## **TABLE OF CONTENTS**

TABLE OF CONTENTS	p. 2
TABLE OF AUTHORITIES	p. 3
STATEMENT OF THE ISSUE	p. 4
STATEMENT OF THE CASE	¶1-7
STATEMENT OF THE FACTS	¶8-15
LAW AND ARGUMENT	¶16-30
CONCLUSION	¶31

## TABLE OF AUTHORITIES

<u>Statutes and Rules</u>	<u>Paragraph</u>
North Dakota Century Code 12.1-32-02(3)	¶17
North Dakota Century Code 12.1-32-07(4)	¶17
North Dakota Century Code 12.1-32-07(6)	¶17, 26
North Dakota Century Code 12.1-32-09	¶17
North Dakota Rule of Criminal Procedure 32(f)(3)(B)	¶22

<u>Cases</u>	<u>Paragraph</u>
American State Bank and Trust Co. of Williston v. Sorenson, 539 N.W.2d 59 (N.D. 1995)	¶29
Eastburn v. B.E., 545 N.W.2d 767 (N.D. 1996)	¶29
Kraft v. State Bd. Of Nursing, 2001 ND 131, 631 N.W.2d 572	¶22
Messer v. Bender, 1997 ND 103, 564 N.W.2d 291	¶29
Palmer v. State, 2012 ND 98	¶3
State v. Bender, 1998 ND 72, 576 N.W.2d 210	¶17
State v. McAvoy, 2007 ND 178, 741 N.W.2d 198	¶16, 25
State v. McAvay, 2008 ND 204, 757 N.W.2d 394	¶22
State v. Palmer, 2002 ND 5, 638 N.W.2d 18	¶2, 8
State v. Wetzal, 2011 ND 218, 806 N.W.2d 193	¶16, 22, 25, 26

<u>Publications</u>	<u>Paragraph</u>
Am.Jur.2d Appellate Review § 690 (1995)	¶29

## STATEMENT OF THE ISSUE

- I. **Whether the trial court erred in denying the defendant's motion to dismiss a petition for revocation of probation and subsequently decided revocation was warranted?**

## STATEMENT OF THE CASE

[¶ 1] Mark Palmer (hereinafter "Palmer") was found guilty of four counts of Gross Sexual Imposition for engaging in sexual contact with a minor in the Spring of 1999. On May 3, 2001, the Northeast Judicial District Court sentenced Palmer to ten (10) years in jail on each count to run consecutively, with seven (7) years suspended on each count for five (5) years, subject to supervised probation with sex offender specific Appendix "A." See Criminal Judgment and Commitment, p. 17 of the Appellant's Appendix.

[¶ 2] Palmer appealed the judgment of conviction to the Supreme Court of North Dakota. On January 15, 2002, the Supreme Court of North Dakota affirmed the judgment of conviction in the Northeast Judicial District. State v. Palmer, 2002 ND 5, 638 N.W.2d 18.

[¶ 3] On February 2, 2011, Palmer filed a Motion for Post-Conviction Relief. On May 16, 2011, the trial court entered a Memorandum Opinion and Order Denying Palmer's application for post-conviction relief. On May 23, 2011, Palmer filed a Motion for Relief Per N.D.R.Civ.P. 60. The Motion for Relief was denied by the trial court on October 5, 2011. Palmer appealed the denial of relief to the Supreme Court of North Dakota. On May 17, 2012, the Supreme Court of North Dakota remanded to the district court for an explanation of its decision. Palmer v. State, 2012 ND 98.

[¶ 4] Palmer was to be released from the North Dakota Department of Corrections on November 2, 2011. A Petition to Revoke Probation was filed on October 26, 2011. See

Petition for Revocation of Probation, p. 22 of the Appellant's Appendix. On December 24, 2011, Palmer, through his attorney, filed a Motion to Dismiss the Petition to Revoke Probation for the reason that the Defendant was not yet on probation when the Petition to Revoke was filed. See Motion to Dismiss Petition to Revoke Probation, p. 25-28 of the Appellant's Appendix. The State filed a response on January 11, 2012, requesting that the trial court deny Palmer's Motion to Dismiss the Petition to Revoke Probation. See Answer to Motion to Dismiss Petition to Revoke Probation, p. 29-32 of the Appellant's Appendix.

[¶ 5] Oral argument on the Motion to Dismiss the Petition to Revoke Probation was held on January 11, 2012. On the same date, the trial court denied Palmer's Motion to Dismiss Petition to Revoke Probation. See Transcript of Motion to Dismiss Petition and Probation Revocation, p. 42-43 of the Appellant's Appendix.

[¶ 6] The hearing on the Petition to Revoke Probation was held January 11, 2012. The trial court found that there was no factual dispute that Palmer had not completed the sex offender treatment program as required, and that therefore, Palmer had violated the terms of his probation. See Transcript of Motion to Dismiss Petition and Probation Revocation, p. 44-45 of the Appellant's Appendix. The trial court issued an Order of Revocation and Sentence on January 11, 2012. See Order of Revocation and Sentence, p. 16 of the Appellant's Appendix.

[¶ 7] Palmer filed a timely Notice of Appeal from said Order of Revocation and Sentence.

## STATEMENT OF THE FACTS

[¶ 8] Palmer was originally convicted in 2001, following a jury trial, upon four (4) charges of Gross Sexual Imposition.

[¶ 9] On May 3, 2001, the Northeast Judicial District Court sentenced Palmer to ten (10) years in jail on each of four (4) counts of Gross Sexual Imposition. See Criminal Judgment and Commitment, p. 17 of the Appellant’s Appendix. All four (4) counts were ordered to run consecutively, with seven (7) years suspended on each count for five (5) years, subject to supervised probation with sex offender specific Appendix “A.” Id.

[¶ 10] In the Appendix “A”/Conditions for Sentence to Probation attached to and made part of the Criminal Judgment, Palmer was ordered to “[a]ttend, participate in, cooperate with and successfully complete the following rehabilitative or treatment program(s): Intensive Sex Offender Treatment at NDSP.” See Appendix “A” Conditions for Sentence to Probation, p. 18 of the Appellant’s Appendix. In addition, the sentencing court stated to Palmer at the Sentencing Hearing that Palmer was to “attend, participate in, cooperate in, and successfully complete the intensive sex offender treatment program at the North Dakota Department of Corrections.” See Appellant’s Brief, ¶ 2.

[¶ 11] Palmer was to be released from the North Dakota Department of Corrections on November 2, 2011. A Petition to Revoke Probation was filed on October 26, 2011. See Petition for Revocation of Probation, p. 22 of the Appellant’s Appendix. The Petition for Revocation of Probation set out the allegation that Palmer violated Condition #12 of the Criminal Judgment/Appendix A, in that Palmer was ordered to “[a]ttend, participate in, cooperate with and successfully complete the following rehabilitative or treatment program(s): Intensive Sex Offender Treatment at NDSP,” and that Palmer had “refused

Sex Offender Education on 08/09/2001 and continue[d] to be non-compliant with this recommendation.” See Petition for Revocation of Probation, p. 22 of the Appellant’s Appendix.

[¶ 12] On December 24, 2011, Palmer, through his attorney, filed a Motion to Dismiss the Petition to Revoke Probation for the reason that the Defendant was not yet on probation when the Petition to Revoke was filed. See Motion to Dismiss Petition to Revoke Probation, p. 25-28 of the Appellant’s Appendix. The State filed a response on January 11, 2012, requesting that the trial court deny Palmer’s Motion to Dismiss the Petition to Revoke Probation as Palmer violated a pre-condition of probation subsequent to the imposition of that condition. See Answer to Motion to Dismiss Petition to Revoke Probation, p. 29-32 of the Appellant’s Appendix.

[¶ 13] Oral argument on the Motion to Dismiss the Petition to Revoke Probation was held on January 11, 2012. The trial court found that statute and case law explicitly allow revocation at any time before the period of probation expires, and does not prohibit revocation of subsequent probation while still incarcerated. See Transcript of Motion to Dismiss Petition and Probation Revocation, p. 42-43 of the Appellant’s Appendix. The trial court, therefore, denied Palmer’s motion to dismiss. Id.

[¶ 14] The hearing on the Petition to Revoke Probation was held January 11, 2012. The trial court found that there was no factual dispute that Palmer had not completed the sex offender treatment program as required, and that Palmer had violated the terms of his probation. See Transcript of Motion to Dismiss Petition and Probation Revocation, p. 44-45 of the Appellant’s Appendix.

[¶ 15] The trial court issued an Order of Revocation and Sentence on January 11, 2012.

## LAW AND ARGUMENT

### **II. Whether the trial court erred in denying the defendant’s motion to dismiss a petition for revocation of probation and subsequently decided revocation was warranted?**

#### **A. Standard of Review.**

[¶ 16] This Court applies a two-step analysis when reviewing a district court’s decision to revoke probation. State v. Wetzel, 2011 ND 218, ¶ 5, 806 N.W.2d 193 *citing* State v. McAvoy, 2007 ND 178, ¶ 7, 741 N.W.2d 198. “First, we review the district court’s factual findings under the clearly erroneous standard, and second, we decide whether the court abused its discretion when it decided revocation was warranted.” Id. “A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, there is no evidence to support it, or this Court is convinced, on the basis of the entire record, that a mistake has been made.” Id. “A court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, when it misinterprets or misapplies the law, or when its decision is not the product of a rational mental process leading to a reasoned determination.” Id.

#### **B. The trial court did not err when it denied Palmer’s motion to dismiss a petition for revocation of probation, and subsequently decided revocation of Palmer’s probation was warranted.**

##### **a. The trial court did not err in dismissing Palmer’s Motion to Dismiss Petition to Revoke Probation.**

[¶ 17] N.D.C.C. § 12.1-32-02(3) permits the sentencing court to sentence a defendant to a term of imprisonment with a portion of that term suspended. “The court must place the defendant on probation during the term of suspension, and is authorized to specify conditions of the probation.” State v. Bender, 1998 ND 72, ¶ 15, 576 N.W.2d 210 *citing* N.D.C.C. §§ 12.1-32-02(3), 12.1-32-07(4). “Probation may be revoked for violation of



any condition of probation.” State v. Bender, at ¶ 15. “If the defendant violates a condition of probation *at any time before the expiration or termination of the period*, the court 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.” State v. Bender, at ¶ 15 *citing* N.D.C.C. § 12.1-32-07(6) (emphasis added). The statute explicitly allows revocation at any time before the period of probation expires, and does not prohibit revocation of subsequent probation if the defendant violates the conditions of probation while still incarcerated.” State v. Bender, at ¶ 15.

[¶ 18] Palmer was originally convicted in 2001, following a jury trial, upon four (4) charges of Gross Sexual Imposition. The trial court sentenced Palmer to ten (10) years in jail on each of four (4) counts of Gross Sexual Imposition. See Criminal Judgment and Commitment, p. 17 of the Appellant’s Appendix. All four (4) counts were ordered to run consecutively, with seven (7) years suspended on each count for five (5) years, subject to supervised probation with sex offender specific Appendix “A.” Id. In the Appendix “A”/Conditions for Sentence to Probation, Palmer was ordered to “[a]ttend, participate in, cooperate with and successfully complete the following rehabilitative or treatment program(s): Intensive Sex Offender Treatment at NDSP.” See Appendix “A” Conditions for Sentence to Probation, p. 18 of the Appellant’s Appendix. In addition, the trial court informed Palmer that he would be subject to the terms and conditions of the Appendix “A,” a condition of which was that Palmer was to “attend, participate in, cooperate in, and successfully complete the intensive sex offender treatment program at the North Dakota Department of Corrections.” See Appellant’s Brief, ¶ 2.

[¶ 19] While incarcerated with the North Dakota Department of Corrections, Palmer has been noncompliant since August 9, 2001 in regards to any attendance, participation, or cooperation in the intensive sex offender treatment program. See Transcript of Motion to Dismiss Petition and Probation Revocation, p. 45-47 of the Appellant’s Appendix. Palmer was repeatedly offered opportunities to comply with the order of the trial court to participate in the intensive sex offender treatment program, however, during the duration of his sentence, Palmer refused every opportunity afforded him. Id.

[¶ 20] Upon the filing of the petition to revoke Palmer’s probation, Palmer claimed that he did not know that attendance and participation in the sex offender treatment program was a pre-condition of his probation. The sentencing court clearly intended that Palmer would be required to attend intensive sex offender treatment at the North Dakota State Penitentiary. Not only was it explicitly state in Appendix “A,” but the sentencing court clearly stated on the record as well that Palmer was “to attend, participate in, cooperate in, and successfully complete the intensive sex offender treatment program at the North Dakota Department of Corrections.”

[¶ 21] For Palmer to believe that he would serve his sentence with the North Dakota Department of Corrections, be released, and then check back in, eleven (11) years later, to begin intensive sex offender treatment is nonsensical. The condition of probation imposed upon Palmer to attend and participate in the intensive sex offender treatment program while at the North Dakota State Penitentiary was, and is, an unambiguous pre-condition and term of the Criminal Judgment and Palmer’s probation. As such, the trial court did not err in dismissing Palmer’s Motion to Dismiss the Petition to Revoke Probation.

**b. The trial court's findings of fact were not clearly erroneous.**

[¶ 22] “In probation revocation proceedings, the State must prove a probationer violated the conditions of his probation by a preponderance of the evidence.” State v. Wetzel, at ¶ 8, *citing* N.D.R.Crim.P.32(f)(3)(B). “The State has proven a violation by preponderance of the evidence when ‘a reasoning mind reasonably could have determined factual conclusions reached were proved by the weight of the evidence from the entire record.’” State v. Wetzel, at ¶ 8, *citing* State v. McAvay, 2008 ND 204, 757 N.W.2d 394 (*quoting* Kraft v. State Bd. Of Nursing, 2001 ND 131, 631 N.W.2d 572).

[¶ 23] The trial court stated, “I do find that based on what [...] the arguments were here this morning, that Mr. Palmer has violated the terms of probation, and that I [...] don’t think there’s any factual dispute that Mr. Palmer has not completed the sex offenders treatment program.” See Transcript of Motion to Dismiss Petition and Probation Revocation, p. 44 of the Appellant’s Appendix. The trial court expressly asked Palmer’s counsel if he was disputing the factual finding, and Palmer’s counsel stated, “I don’t believe there is any dispute as to his participation or completion of [the sex offenders treatment program].” Id.

[¶ 24] Due to the fact that there was no factual dispute as to whether Palmer violated the pre-condition of probation the State met its burden of proving a violation by preponderance of the evidence. See Appendix “A” Conditions for Sentence to Probation, p. 18 of the Appellant’s Appendix. As such, the trial court’s findings of facts were not clearly erroneous.

**c. The trial court did not abuse its discretion when it decided revocation was warranted.**

[¶ 25] “A court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, when it misinterprets or misapplies the law, or when its decision is not the product of a rational mental process leading to a reasoned determination.” State v. Wetzel, at ¶ 5, *citing* State v. McAvoy, 2007 ND 178, ¶ 7, 741 N.W.2d 198.

[¶ 26] “Probation may be revoked for violation of any condition of probation.” State v. Bender, at ¶ 15. “If the defendant violates a condition of probation *at any time before the expiration or termination of the period*, the court 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.” State v. Bender, at ¶ 15, *citing* N.D.C.C. § 12.1-32-07(6) (emphasis added). “The statute explicitly allows revocation at any time before the period of probation expires, and does not prohibit revocation of subsequent probation if the defendant violates the conditions of probation while still incarcerated.” State v. Bender, 1998 ND 72, at ¶ 15.

[¶ 27] At the close of the revocation hearing, the trial court stated, “the major [...] concern for the court in regards to this revocation of probation is the issue that Mr. Palmer has not participated in, cooperated with, or completed any sexual offender treatment program at the Department of Corrections.” See Transcript of Motion to Dismiss Petition and Probation Revocation, p. 55-56 of the Appellant’s Appendix. The trial court stated earlier at the hearing on the motion to dismiss the petition to revoke that, “I agree with the ruling in State v. Bender. I think that’s a controlling case in this matter [...] the Supreme court [...] found that the statute explicitly allows revocation at any time before the period of probation expires, and does not prohibit revocation of subsequent

probation while still incarcerated.” Id. The trial court further explained, “Mr. Palmer, when I made my judgment originally and I ordered the Appendix A, it was in the Appendix A, and I [...] stated on the record that you were to complete sex offender’s treatment while incarcerated at the North Dakota Department of Corrections.” Id.

[¶ 28] The trial court’s decision to revoke Palmer’s probation was based on the fact that Palmer violated a pre-condition of his probation subsequent to the imposition of that condition. Palmer was ordered, to attend and participate in intensive sex offender treatment while at the North Dakota State Penitentiary. Palmer refused and failed to do so. The trial court, through application of statutes and North Dakota Supreme Court case law rationally and systematically determined that Palmer’s probation could and should be revoked. As such, the trial court did not abuse its discretion when it decided to revoke Palmer’s probation.

**C. In determining whether the district court abused its discretion, only issues raised in the motion to the district court are considered.**

[¶ 29] This court “do[es] not consider questions that were not presented to the trial court and that are raised for the first time on appeal.” Messer v. Bender, 1997 N.D. 103, ¶ 5, 564 N.W.2d 291, *citing* Eastburn v. B.E., 545 N.W.2d 767 (ND 1996) (*quoting* American State Bank and Trust Co. of Williston v. Sorenson, 539 N.W.2d 59 (N.D. 1995)). “The rule limiting appeal to issues raised at the trial court stems from the principle: ‘It is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider.’” Messer v. Bender, at, ¶ 5, (*quoting* 5 Am.Jur.2d Appellate Review § 690 (1995)).

[¶ 30] Palmer argues for the first time on appeal that he retained a right against self-incrimination, even after conviction. Palmer asserts that by requiring him to make an

admission of guilt, his privilege against self-incrimination under the Fifth and Fourteenth Amendments to the United States Constitution would be violated. Palmer further asserts that he could be subject to the charge of perjury if he would admit guilt at this time. As these issues are being raised for the first time on appeal, consideration would be inappropriate at this time.

### **Conclusion**

[¶ 31] Palmer has not demonstrated that the trial court's factual findings were clearly erroneous and Palmer has also failed to demonstrate that the trial court abused its discretion when it decided revocation was warranted. The State respectfully requests that the trial court's Order for Revocation of Probation be affirmed.

Dated this 20<sup>th</sup> day of May, 2012.

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