

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**  
Supreme Court No. 20120114

State of North Dakota,

Plaintiff, and Appellee,

vs.

Anthony Perales,

Defendant and Appellant.

**BRIEF OF APPELLANT ANTHONY PERALES**

APPEAL FROM JUDGMENT OF THE DISTRICT COURT  
ENTERED FEBRUARY 9, 2012

DISTRICT COURT OF THE SOUTHEAST JUDICIAL DISTRICT  
THE HONORABLE DANIEL D. NARUM PRESIDING  
DISTRICT COURT NO. 37-06-K-67

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1.

**STATEMENT OF THE ISSUES**

2. The trial court exceeded its authority in imposing probation for the third time.

3. The trial court imposed an excessive sentence on the defendant

4.

**STATEMENT OF THE CASE**

5.

This is an appeal by the defendant (hereafter Mr. Perales) from the sentence he received from the court on February 9, 2012.

6.

This matter came before the court on February 9, 2012 which was the time set for the hearing on the second petition to revoke the probation of the defendant.

7.

The defendant contends that:

8.

A. Imposition of a 3<sup>rd</sup> period of supervised probation is beyond the power of the District Court when two prior periods of supervised probation had been previously imposed, AND

9.

B. The District Court's sentence of 14 years in prison is excessive under the circumstances.

10.

**STATEMENT OF THE FACTS**

11.

The Mr. Perales was charged on March 6, 2006 with Gross Sexual Imposition a Class AA felony.

12.

The information alleged Mr. Perales committed the unlawful acts between December 24, 2005 and March 6, 2006.

13.

After his arrest, Mr. Perales served approximately three months in jail. He was then released on bail.

14.

Mr. Perales eventually plead guilty and admitted to voluntary sexual intercourse with a 13 year old female when he was 19 years.

15.

Sentencing took place before District Judge John T. Paulson on August 17, 2007. At that time Mr. Perales's sentence was a 10 year sentence with all of that time suspended except for time Mr. Perales has previously served (approximately 3 months).

16.

Judge Paulson also placed Mr. Perales on 5 years supervised probation.

17.

A petition to revoke Mr. Perales's probation was filed with the District court on June 5, 2008. That petition came on for hearing with Judge Daniel D. Narum on July 28, 2008.

18.

On July 28, 2008 Judge Daniel D. Narum received various admissions of probation violations from Mr. Perales.

19.

Judge Narum again sentenced Mr. Perales to 10 years but suspended 6 ½

years leaving Mr. Perales 3 ½ years to serve with credit for time served. Judge Narum also ordered that upon release Mr. Perales was to be on 5 years supervised probation.

20. Mr. Perales served the 3 ½ year prison sentence and was released by the North Dakota Department of Corrections. Mr. Perales resumed supervised probation.

21. On December 22, 2011, another petition to revoke Mr. Perales's probation was filed with the District Court. Mr. Perales was arrested and placed in custody where he has remained ever since.

22. On February 9, 2012 the District Court received some admissions from Mr. Perales and also took testimony. Judge Narum found Mr. Perales had violated the terms of his probation.

23. Judge Narum sentenced Mr. Perales to 14 years in prison followed by another 5 years of supervised probation.

24. Mr. Perales is now appealing from Judge Narum's sentence imposed February 9, 2012.

25.

**ARGUMENT**

26. Triple Probation: Judge Paulson's sentence of August 17, 2007 imposed 5 years of supervised probation (Probation #1)

27. Judge Narum's sentence of July 28, 2008 following a revocation of probation hearing imposed another 5 years supervised probation after Mr. Perales's release from prison. (Probation #2)

28. Judge Narums' sentence of February 9, 2012 following a 2<sup>nd</sup> revocation of probation hearing imposed another 5 years supervised probation after Mr. Perales's release from prison. (Probation #3)

29. NDCC §12.1-32-06.1(5) provides that upon revocation of probation the court can impose an additional probationary period not to exceed 5 years. Judge Narum did this on July 28, 2008.

30. The District Court does not have authority to impose a 3<sup>rd</sup> period of probation as Judge Narum did on February 9, 2012.

31. In *State v Stavig*, 2006 ND 63, 711 N.W.2d 183, the court has made clear “. . . probation [may] be extended for only one additional period, not to exceed five years.” see ¶15.

32. Thus the “maximum periods” of NDCC §12.1-32-06.1(5) means two probation periods. (See *Stavig* ¶16)

33. In this case the District Court attempted to impose a 3<sup>rd</sup> probationary period. This was beyond the court's authority. The supervised probation portion of the



court's sentence should be remanded to allow the District Court to eliminate from any sentence the provisions for supervised probation of Mr. Perales upon his release from prison.

34. Excess Sentence: The latest District Court sentence (February 9, 2012) gives Mr. Perales 14 years prison.
35. A time line and summary of events is helpful in understanding this case.
36. A. Between December 24, 2005 to March 6, 2006 Mr. Perales age 19 has sexual intercourse with a 13 year old female (the female voluntarily engaged in this activity).
37. B. Mr. Perales serves approximately 3 months in county jail and then is released on bail.[Transcript July 28, 2008 p. 28 L2]
38. C. Mr. Perales pleads guilty and is sentenced on August 17, 2007 (1 year 5 months after being charged) to 10 years with all time suspended except for time served previously (approximately 3 months) plus 5 years supervised probation.
39. D. On July 28, 2008 Mr. Perales appears in District Court on a Petition to Revoke Probation, he admits, among other things voluntary sexual relations with another female under 18 and is again sentenced to 10 years with 6 ½ years suspended leaving 3 ½ years to serve with credit for time served, followed by 5 years supervised probation.
40. E. Mr. Perales is released from prison and begins his second supervised probation.

41. F. Mr. Perales is arrested on a warrant following the filing of a Petition to Revoke filed with the District Court on December 22, 2011. Mr. Perales remains in custody pending a hearing on the probation revocation.
42. G. On February 9, 2012 Mr. Perales appears in court on a Petition to Revoke Probation, he admits, among other things voluntary sexual relations with another female under 18 and is sentenced to 14 years in prison with credit for time previously served to be followed by another 5 years probation.
43. Mr. Perales's is now sitting in prison on a 14 year sentence for a charge that the District Court initially only gave him approximately 3 months in county jail.
44. The District Court, under 2 different District Judges, in its August 17, 2007 and July 28, 2008 sentences, in effect, hinted at 10 years being an appropriate maximum sentence when those sentences were imposed.
45. Now the District Court has imposed a 14 year sentence which is excessive and not justified. I am well aware of this court's opinions that seem to leave extremely wide discretion to the District Court in imposing sentences.
46. But this case calls for this court's intervention to reduce the sentence imposed on Mr. Perales. The 14 year sentence is cruel and unusual punishment as it is grossly disproportionate to the offense. This court has held a sentence can be grossly disproportionate. See *State v Gomez*, 2011 ND 29, 793 N.W.2d 451, ¶s 25 and 26. This is the case this reviewing court should be left with a definite and firm conviction a mistake has been made.

47. The sentence we are dealing with is only in regards to the 2005-2006 incidents.

Those incidents were voluntary sexual acts by my client with this then girl friend.

That activity does not justify a 14 year sentence. It is cruel and unusual.

48. The primary or major reason for revoking Mr. Perales in 2008 and 2012 was additional voluntary sexual activity with females under 18 (although over 15). Those may be separate or additional crimes, but those potential crimes and their punishment is NOT before the court at this time.

49. **CONCLUSION**

50. The District Court sentenced Mr. Perales to a 3<sup>rd</sup> term of supervised probation.

This is beyond the District Court's authority. This Court should remand to eliminate from the sentence any additional supervised probation upon release from prison.

51. The District Court's sentence upon the 2<sup>nd</sup> Petition to Revoke of 14 years prison when the original sentence was approximately 3 months in County Jail is excessive. This court should remand for a sentence in line with the original stated sentence time of 10 years with credit for time served to date.

52. Respectfully submitted this 23<sup>rd</sup> day of April 2012.

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