

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

AUG 09 2012

State of North Dakota,)	
)	STATE OF NORTH DAKOTA
Plaintiff-Appellee,)	
)	
-vs-)	
)	
David Jirinzu,)	Supreme Ct. No. 20120247
)	
Defendant-Appellant,)	District Ct. No. 08-2011-CR-02779
.....)	SA File No. F1053-11-12

BRIEF OF PLAINTIFF-APPELLEE

APPEAL FROM REVOCATION OF AMENDED CRIMINAL JUDGMENT
 ENTERED MAY 18, 2012
 Burleigh County District Court
 South Central Judicial District
 The Honorable Gail Hagerty, Presiding

Justin J. Schwarz
 Assistant, Burleigh County State's Attorney
 Courthouse, 514 East Thayer Avenue
 Bismarck, North Dakota 58501
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 BAR ID No: 05784
 Attorney for Plaintiff-Appellee

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STATEMENT OF THE ISSUES

Whether the sentence imposed upon Defendant upon revocation of probation was proper.

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STATEMENT OF THE CASE

The State is in agreement with the Statement of the Case as contained
in Defendant's Brief.

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STATEMENT OF THE FACTS

The State is in agreement with the Statement of the Facts as contained
in Defendant's Brief.

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ARGUMENT

I. Whether the sentence imposed upon Defendant upon revocation of probation was proper.

In this matter, Defendant raises a challenge to the lower court's sentence of the Defendant upon revocation of probation. Defendant concedes in his Brief that Defendant violated his conditions of probation, based on his admission at the revocation hearing to two allegations contained within the petition for revocation, therefore making the Court's determination that Defendant violated his conditions of probation proper. Defendant additionally concedes that the sentence imposed in this matter, which was 18 months to the Department of Corrections, is within the statutory limitations for a Class C Felony. However, Defendant asserts that the Court abused its discretion by not taking into consideration factors of mitigation that were offered to the court.

Factors that a court shall consider in sentencing are listed in North Dakota Century Code 12.1-32-04. This section begins by stating:

"The following factors, or the converse thereof where appropriate, while not controlling the discretion of the court, shall be accorded weight in making determinations regarding the desirability of sentencing an offender to imprisonment..."

The section goes on to list fourteen different factors. The section concludes with:

"Nothing herein shall be deemed to require explicit reference to these factors in a presentence report or by the court at sentencing."

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Defendant asserts that mitigating factors existed that were not taken into consideration by the Court. Defendant presents nothing to show that such factors were not taken into consideration. Although the Court did not specifically articulate during sentencing what aggravating or mitigating factors were considered, such is not required. As specifically stated in N.D.C.C. §12.1-32-04, a court is not required to specifically reference these factors at sentencing, and such factors are not controlling of the discretion of the court.

Here, there were ample factors for the Court to consider that made the sentence of 18 months appropriate. Defendant admitted that he failed to maintain contact with his probation officer and failed to appear for an intake appointment. See Tr. p. 3. Defendant admitted that he committed the new criminal offense of Theft of Property on or about February 25, 2012, and pled guilty to such offense on February 27, 2012. See Id. Information was also presented to the Court that Defendant had no contact, including telephonically, with his probation officer. See Id. at p. 4. Additionally, the criminal law violation occurred approximately one month after he was sentenced in the underlying case, and was a similar criminal offense involving theft. See Id. The State additionally notes that the sentence of 18 months was the same amount of time, minus credit for time served, that the Defendant was originally sentenced to in this matter.

In the case of State v. Toepke, 485 N.W.2d 792 (N.D. 1992), the defendant appealed a matter in which he was revoked and sentenced to two

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years, and ordered to serve six months in jail. See Toepke at 793-794. The defendant claimed the court abused its discretion by sentencing him to six months jail on a deferred sentence, based on the court not having found violations of probation by a preponderance of the evidence. See Id. at 794. The North Dakota Supreme Court found that the sentence of two years with six months to serve was an option available to the court, specifically noting that the trial court had expressed concern regarding the defendant not having taken his probation as serious as he should have done. See Id. at 795. The Supreme Court went on to note that it was apparent from the record that the trial court felt it necessary to impose six months jail time upon the defendant. See Id. The Supreme Court found that the lower court did not abuse its discretion. See Id.

Similarly, in the case of State v. Gates, 540 N.W.2d 134 (N.D. 1995), the defendant challenged a sentence on a revocation of probation. See Gates at 136. The Supreme Court found that the lower court concluded the defendant had not taken his probation seriously, and did not abuse its discretion by revoking and resentencing the defendant. See Id. at 138.

The Court in this matter took into consideration how serious probation was taken by Defendant. Defendant admitted allegations of a new criminal law violation within one month of the sentence in the underlying case, along with Defendant's failure to maintain contact with or appear for an intake appointment with the probation officer. The Court stated that "If, in fact, you have that kind of responsibility for a child, it just floors me that you wouldn't

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even have gone to the initial contact with your probation officer...” Similar to the facts in Toepke and Gates, it is apparent the Court took into consideration how serious Defendant had taken probation in sentencing him.

Also lending guidance to the Court in this matter is State v. Gonzalez, 2011 ND 143 (799 N.W.2d 402 (N.D. 2011)). In Gonzalez, the defendant appealed an order on a revocation of probation under which the defendant was sentenced to twenty years on two counts, to run consecutively. See Gonzalez at ¶1. In its analysis, the North Dakota Supreme Court stated that a trial court has broad discretion in criminal sentencing, and the Supreme Court has no power to review the discretion of the sentencing court when the sentence imposed is within the statutory guidelines. See Id. at ¶6 (citing State v. Henes, 2009 ND 42 (763 N.W.2d 502 (N.D. 2009)); State v. Loh, 2010 ND 66 (780 N.W.2d 719 (N.D. 2010))). The Court went on to state that its review is limited to whether the trial court acted within its statutory limits and whether any impermissible factors were considered, vacating only if the trial court acted outside of those limits or considered impermissible factors. See Id. (citing Loh at ¶19; Henes at ¶6).

The Supreme Court went on to address N.D.C.C. §12.1-32-04, stating that the factors listed therein are entitled to consideration, but do not control the trial court’s discretion. See Id. at ¶8 (citing State v. Steinbach, 1998 ND 18 (575 N.W.2d 193 (N.D. 1998))). The trial court is not required to specifically reference these factors and the factors are not an exclusive list of what a court may consider in sentencing. See Id. (citing State v. Halton, 535

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N.W.2d 734 (N.D. 1995); Steinbach at ¶24). The Supreme Court went on to affirm the sentence, stating that it would not vacate the sentence within the statutory limitations, absent a showing that the trial court substantially relied upon an impermissible factor. See Id. at ¶11.

Defendant includes language in his Brief regarding some factors that are impermissible to consider in regards to sentencing, such as race. Defendant accurately states that the defendant has the burden of proving discrimination occurred in sentencing. See Halton at 738 (citing McCleskey v. Kemp, 481 U.S. 279 (1987)). Defendant provides no evidence of any impermissible factor considered by the Court in this matter.

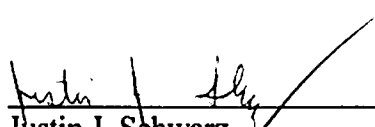
Taking this in conjunction with the Supreme Court’s ruling in Gonzalez, the sentence in this matter should be upheld. The sentence of 18 months is within the statutory limits on a Class C Felony offense. There has been no showing that the Court substantially relied upon any impermissible factor in sentencing; in fact, there is no evidence of any reliance on an impermissible factor. Under the analysis as contained in Gonzalez, the sentence in this matter should not be vacated.

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CONCLUSION

The sentence imposed upon Defendant after revocation of probation was proper. The lower court appropriately revoked Defendant's probation based upon admitted violations of probation. The sentence imposed was within the statutory limitations for the underlying offense. Nothing has been presented by Defendant to show that any impermissible factors were used in determining Defendant's sentence upon revocation. Based upon the foregoing, the State requests that the lower court's sentence of Defendant be affirmed.

Dated this 9th day of August, 2012.


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Defendant-Appellant) District Ct. No. 08-2011-CR-02779
) SA File No. F1053-11-12
.....)
STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

Rhonda Jacobs, being first duly sworn, depose and say that I am a United States citizen over 21 years old, and on the 9 day of August, 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:

**RUSSELL J. MYHRE
ATTORNEY AT LAW
PO BOX 475
VALLEY CITY, ND 58072-0475**

which address is the last known address of the addressee.

Rhonda Jacobs
Rhonda Jacobs

Subscribed and sworn to before me this 9th day of August, 2012.

**GWEN TARDIF
Notary Public
State of North Dakota
My Commission Expires June 11, 2015**

Gwen Tardif
Gwen Tardif, Notary Public
Burleigh County, North Dakota
My Commission Expires: 6-11-2015