20120247
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JULY 13, 2012
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	Supreme Court Nos. 20120247
Plaintiff-Appellee,	)	
	)	
-vs-	)	
	)	Burleigh County
David Jirinzu,	)	No. 08-2011-CR-02779
	)	
Defendant-Appellant.	)	

BRIEF OF APPELLANT

APPEAL FROM REVOCATION OF AMENDED CRIMINAL JUDGMENT
DATED MAY 18, 2012
BURLEIGH COUNTY DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE GAIL HAGERTY, PRESIDING

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[¶1] Whether the trial court was clearly erroneous when the trial court revoked the defendant's probation?

[¶ 2] Whether the trial court abused its discretion when it sentenced the defendant to eighteen (18) months imprisonment by only considering one factor of aggravation pursuant to Section 12.1-32-04, N.D.C.C.?

STATEMENT OF THE CASE

[¶ 3] A. Nature of the case, course of the proceedings, and disposition in the trial court.

[¶ 4] This is an appeal from the amended criminal judgment and sentence imposed upon the defendant David Jirinzu (hereinafter "Jirinzu"), dated May 18, 2012, resulting from a revocation of probation hearing on May 15, 2012. On January 23, 2012, Jirinzu pled guilty to Theft of Property (Possession), a Class C Felony, in violation of Section 12.1-23-02(3), N.D.C.C., and a sentence was imposed, which included supervised probation. On April 4, 2012, a petition for revocation of probation upon his original sentence was filed on the grounds that Jirinzu had failed to report to his probation officer or maintain contact; had also pled guilty to a Theft of Property in Cass County, North Dakota, on February 27, 2012; and had consumed alcohol on or about February 23, 2012. Jirinzu admitted to the first two allegations of the petition, of failure to report and to conviction of a crime, but denied the latter allegation of consumption of alcohol. The State moved to dismiss the latter allegation. Jirinzu was then re-sentenced to eighteen (18) months of

imprisonment, with credit for time served of seventy-two (72) days and with no probation following serving the sentence; and court fines and fees reduced to a civil judgment.

STATEMENT OF THE FACTS

[¶ 5] This is an appeal from the amended criminal judgment and sentence imposed upon the defendant David Jirinzu (hereinafter "Jirinzu"), dated May 18, 2012, resulting from a revocation of probation hearing on May 15, 2012. The facts in this case are limited, since Jirinzu admitted to two allegations contained in the petition for revocation of probation, the State dismissed the third allegation which Jirinzu denied, and the trial court received recommendations from the State and the defense regarding sentencing. The entire transcript from the Sentencing Hearing is only five and one-half pages in length. The State recommended a straight sentence of eighteen (18) months to the Department of Corrections and to reduce the fines, fees, and restitution due in this case to a civil judgment. The defense recommended a straight sentence of ninety (90) days, with credit for time served, and joined with the State by recommending reducing the fines, fees, and restitution owed in this case to a civil judgment. The State addressed factors of aggravation, which was having no contact with his probation officer, not even a telephone call. Sentencing Transcript, p. 4. Both Jirinzu and his attorney spoke to factors which might potentially mitigate any sentence the trial court could impose, including that Jirinzu had a two-year-old child in the care of another person, had a job at McDonald's when he was arrested on the probation revocation warrant, had recently moved from Atlanta to get a new start in life, had lived in homeless shelters and had been excluded from a shelter. Sentencing Transcript, pp. 4-5. The trial court briefly addressed the factor that Jirinzu had failed to attend his initial meeting with his probation officer,

then sentenced him to eighteen (18) months and reduced the fines, fees, and restitution to a civil judgment, with credit for time served. Sentencing Transcript, p. 5-6.

[¶ 6] Jirinzu properly filed a Notice of Appeal on May 24, 2012.

LAW AND ARGUMENT

[¶ 7] A. Jurisdiction

[¶ 8] 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, N.D.C.C., which provide as follows:

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

N.D.C.C. § 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.

N.D.C.C. § 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.

[¶ 9] B. Standard of Review

[¶ 10] The standard of review of probation revocation proceedings requires a two-step analysis under the clearly erroneous standard. However, it is noted that the clearly erroneous standard is utilized in probation revocation proceedings when the probation revocation has been contested. State v. Olson, 2003 ND 23, 656 N.W.2d 650; *see also* State v. Saavedra, 406 N.W.2d 667, 669 (N.D. 1987):

> First, we must review the trial court's factual determination that the defendant violated the terms of his probation, and then the trial court's discretionary determination that the violation warrants revocation.

Id. Here, Jirinzu did not contest the probation revocation proceedings. Instead, he accepted responsibility for his actions and admitted to two of the three allegations against him. Because Jirinzu did not contest the probation revocation proceedings, the remaining issue became whether the trial court abused its discretion in resentencing Jirinzu to 18 months of imprisonment.

[¶ 11] The standard of review regarding a criminal sentence is the abuse of discretion standard:

> A trial judge is allowed the widest range of discretion in fixing a criminal sentence; this court has no power to review the discretion of the sentencing court in fixing a term of imprisonment within the range authorized by statute. Appellate review of a criminal sentence is generally confined to whether the [district] court acted within the sentencing limits prescribed by statute, or substantially relied upon an impermissible factor. Statutory interpretation, however, is a question of law fully reviewable on appeal.

State v. Shafer-Imhoff 2001 ND 146, ¶ 29, 632 N.W.2d 825 (internal citations and quotation omitted); *see* State v. Ennis, 464 N.W.2d 378, 382 (N.D. 1990) (holding trial judge has widest possible range of discretion in fixing sentences).

[¶ 12] **Whether it was clearly erroneous for the trial court to revoke the defendant's probation?**

[¶ 13] It is a matter of established case law that this court has held that this court has no authority to review a sentence between the minimum and maximum penalties permitted by statute. State v. Joern, 249 N.W.2d 921 (N.D. 1977).

> Where the trial court is given by statute the discretion of imposing a penalty within limitations fixed by the statute, and the trial court, in passing sentence, exercises such discretion within the limitations fixed by statute, this court has no power to review the discretion of the court in fixing the term of imprisonment.

State v. Holte, 87 N.W.2d 47 (N.D. 1957), Syllabus [¶ 7].

[¶ 14] Here, since Jirinzu admitted to two alleged violations of his conditions of probation, with the third being dismissed by the State, it does not appear that the trial court was clearly erroneous in finding that Jirinzu had violated the conditions of his probation.

[¶ 15] **Whether the trial court abused its discretion in imposing sentence upon the defendant when it sentenced the defendant to eighteen (18) months imprisonment by only considering one factor of aggravation pursuant to Section 12.1-32-04, N.D.C.C.?**

[¶ 16] It is undisputed that Jirinzu's sentence for eighteen (18) months for violation of his probation was within "the limitations fixed by the statute" for the crime of Theft of Property, a violation of Section 12.1-23-02(3), N.D.C.C., which is a Class C Felony, punishable by a maximum sentence of five (5) years, a five thousand dollars ($5,000) fine, or both such fine and imprisonment. N.D.C.C. § 12.1-32-01(4).

[¶ 17] However, Jirinzu argues that the trial court abused its discretion by not taking into consideration the factors in mitigation which he offered to the trial court prior to sentencing: (1) that he had a two-year-old child, who was placed temporarily with a third person while he was incarcerated; (2) that he had a job at McDonald's in Fargo when he was arrested and an ability to repay restitution for his offense in Burleigh County; (3) that he had recently moved from Atlanta to get a new start; (4) that he was evicted from a homeless shelter and was unable to find appropriate housing while he was unemployed;

(5) that he acknowledged that he "committed a wrong, which I shouldn't have done"; and (6) that the acquaintance who was caring for his two-year-old child could not care for the child on a long-term basis. Sentencing Transcript, pp. 4-5.

[¶ 18] Factors of aggravation and mitigation, contained in Section 12.1-32-04, N.D.C.C.,

must be considered in re-sentencing for a probation violation:

> Section 12.1-32-04, N.D.C.C., lists a number of factors a trial court must consider in sentencing a criminal defendant to imprisonment. Although entitled to consideration, these sentencing factors do not control the trial court's discretion. N.D.C.C. § 12.1-32-04; State v. Steinbach, 1998 ND 18, ¶ 24, 575 N.W.2d 193. Moreover, we have stated a trial court need not explicitly reference the factors listed under N.D.C.C. § 12.1-32-04 and have explained the factors do not constitute an exclusive list of all a trial court may consider in fixing a criminal sentence. State v. Halton, 535 N.W.2d 734, 739 n.1 (N.D. 1995) (no need for an explicit reference); Steinbach, at ¶ 24 (not an exclusive list).

State v. Gonzalez, 2011 ND 143, 799 N.W.2d 402 [¶ 8].

[¶ 19] Here, the trial court only engaged in the most perfunctory of analyses in referring to factors of aggravation and mitigation prior to handing down Jirinzu's re-sentencing:

> If, in fact, you have that kind of responsibility for a child, it just floors me that you wouldn't even have gone to the initial contact with your probation officer when that's the way you're staying out of jail.
>
> Based on what I have before me, I'm going to adopt the State's recommendation. You'll be sentenced to 18 months with the Department of Corrections. Fines and fees will be reduced to a civil judgment. You'll receive credit for any time served in this matter.

Sentencing Transcript, pp. 5-6.

[¶ 20] Based upon the presentations of the State and by Jirinzu's own admission to two allegations of a violation of the conditions of probation in his original sentence, his statement regarding what led him to violate his probation, and the presentations of the

State and defense counsel, the trial court could have considered the factors of aggravation and mitigation. These would include the crime for which he was convicted in Cass County shortly after his release from Burleigh County under N.D.C.C. § 12.1-32-04(7); his failure to report for his initial contact with his probation officer which would make him more unlikely to be successful on probation under N.D.C.C. § 12.1-32-04(10); or other permissible factors in determining his sentence.

[¶ 21] The trial court had broad discretion in determining the sentence which will be imposed upon a defendant:

> A trial court has broad discretion in fixing a criminal sentence. State v. Henes, 2009 ND 42, ¶ 6, 763 N.W.2d 502. Within this discretion also lies a trial court's authority to decide whether a sentence should run concurrently or consecutively. State v. Salveson, 2006 ND 169, ¶ 4, 719 N.W.2d 747; but see N.D.C.C. § 12.1-32-11(3) (limiting a trial court's authority to impose consecutive sentences for multiple misdemeanor convictions). We have repeatedly held we have "no power to review the discretion of the sentencing court in fixing a term of imprisonment within the range authorized by statute." State v. Loh, 2010 ND 66, ¶ 19, 780 N.W.2d 719. Rather, our review of a criminal sentence is generally confined to whether the trial court acted within the statutorily prescribed sentencing limits or substantially relied on an impermissible factor. Id. Thus, we will vacate a trial court's sentencing decision only if the trial court acted outside the limits prescribed by statute or substantially relied on an impermissible factor in determining the severity of the sentence. Henes, at ¶ 6.

State v. Gonzalez, 2011 ND 143, 799 N.W.2d 402 [¶ 6].

[¶ 22] Some factors of aggravation and mitigation are impermissible.

> A defendant's race is a constitutionally impermissible factor in sentencing. Zant v. Stephens, 462 U.S. 862, 885, 103 S.Ct. 2733, 2747, 77 L.Ed.2d 235, 255 (1983). Sentencing an offender based on race, national origin, or alienate violates the Constitution. United States v. Onwuemene, 933 F.2d 650, 651 (8th Cir. 1991).
>
> The defendant has the burden of proving the existence of purposeful discrimination. McCleskey v. Kemp, 481 U.S. 279, 292, 107 S. Ct. 1756, 1767, 95 L.Ed.2d 262, 278 (1987).

State v. Halton, 535 N.W.2d 734, 738 (N.D. 1995).

[¶ 23] Jirinzu argues that the trial judge's consideration of only a single factor in determining his sentence was impermissible under the circumstances and constituted an abuse of the trial court's discretion in sentencing. While admittedly a trial court's discretion is broad in regard to sentencing, and this court has indicated that it has no power to review a sentence imposed by a trial court which is within the statutory limitations, Jirinzu's position is that the consideration through articulation of only one factor is an impermissible application of Section 12.1-32-04, N.D.C.C.

CONCLUSION

[¶24] In re-sentencing from an uncontested probation revocation, where the trial court only briefly considered one factor in imposing sentence, the trial court abused its discretion in imposing an 18 month sentence on the defendant.

Dated this 13th day of July, 2012.

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IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff-Appellee,	)	Supreme Court No. 20120247
-vs-	)	Case No. 08-2011-CR-02779
David Jirinzu, Defendant-Appellant.	)	CERTIFICATE OF SERVICE

I, Russell J. Myhre, do hereby certify that on July 13, 2012, I served the following documents:

1. Appellant's Appendix (PDF to Opposing Counsel and Supreme Court)
2. Appellant's Brief (PDF to Opposing Counsel and Word to Supreme Court)

On:

Supreme Clerk of Court
ND Supreme Court
State Capitol
Judicial Wing, 1st Floor
600 East Blvd Ave., Dept. 180
Bismarck, ND 58505-0530
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by Electronic Filing, pursuant to N.D. Sup. Ct. Admin. Order 16.

Dated this 13th day of July, 2012.

I, Russell J. Myhre, hereby certify that pursuant to Rules 5(b) and 5(f), NDRCivP, that on the 13th Day of July, 2012, I deposited, with postage prepaid by first class mail, in the United States post office at Valley City, North Dakota, a true and correct copy of the following document(s):

Appellant's Appendix
Appellant's Brief

The copies of the foregoing were securely enclosed in an envelope and addressed as follows:

David Jirinzu
PO Box 5521
Bismarck, ND 58501

To the best of my knowledge, information, and belief, such address was the last known post office address of the party intended to be so served. These above-referenced documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure, Rule 5.

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