

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,
Plaintiff/Appellee,

vs.

Jason Bradley Benefiel,
Defendant/Appellant.

Supreme Court No. 20120274

Burleigh Co. Nos. 08-07-K -2810 &
08-08-K-0987

APPEAL FROM THE ORDER FOR REVOKING PROBATION ENTERED MAY 25,
2012 BY THE DISTRICT COURT FOR THE SOUTH CENTRAL JUDICIAL
DISTRICT THE HONORABLE SONNA M. ANDERSON PRESIDING.

BRIEF OF THE APPELLANT

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

I. Was the trial court's factual finding that there was a probation violation clearly erroneous when the probationer substantially complied with his conditions of probation?

II. Did the trial court abuse its discretion when finding that the probation violations warranted revocation?

NATURE OF THE CASE AND PROCEDURAL HISTORY

¶1 This is an appeal from two criminal cases. On May 25, 2012, the Defendant/Appellant (hereinafter “Benefiel”) was found to be in violation of the conditions of his probation. App. 28-31.

¶2 On September 9, 2008, Benefiel entered a plea of guilty to the offenses of Assault on a Peace Officer, Class C Felony, (08-07-K-2810, Count 1), Escape, Class C Felony, (08-07-K-2810, Count 2), Simple Assault, Class C Felony, (08-08-K-0987, Count 1), and Simple Assault, Class C Felony, (08-08-K-0987, Count 2). App. 14-23. Benefiel was sentenced to five years, with all but one year suspended for three years, and three years supervised probation subject to the supervision of the North Dakota Parole/Probation division and the rules and conditions of Appendix A. App. 14-23.

¶3 On March 12, 2012, a Petition for Revocation of Probation was filed alleging five violations of the conditions of probation: (1) that Benefiel committed the new offenses of resisting arrest, possession of cocaine with intent to deliver, possession of marijuana, and obstruction of an officer in Wisconsin, (2) that Benefiel left the State of North Dakota without permission, (3) that Benefiel committed a new offense of disorderly conduct in Burleigh County, North Dakota, (4) that Benefiel used or possessed a controlled substance, and (5) that Benefiel failed to pay restitution to the Burleigh County State’s Attorney’s Office. App. 24-27.

¶4 A probation revocation hearing was held on May 24, 2012. At the commencement of the revocation hearing allegation three was withdrawn and the Court dismissed the allegation. Tr. 17.

¶5Darin Ferderer, a North Dakota Parole and Probation Officer, was the only person to testify at the hearing. Tr. 7-22. At the conclusion of the hearing, Benefiel was found to have violated allegations one, two, four and five. Tr. 26-27. The Court dismissed allegation three in the Petition. Tr. 17.

¶6 As a result of the violations, Benefiel was re-sentenced to five years, with credit given for one year and seventy-five days previously served; and the restitution and court fees were reduced to civil judgment. App. 32-35. No further probation was ordered as part of his sentence. App. 32-35.

¶7 Benefiel filed a notice of appeal of the order revoking his probation on June 5, 2012. App. 36.

STATEMENT OF FACTS

¶8 Benefiel's probation began on October 28, 2011 and was initially assigned to probation officer Darin Ferderer [hereinafter Ferderer]. Tr. 7. Benefiel first met with Ferderer on November 2, 2011 and had several subsequent meetings. Tr. 8. Benefiel later moved to Crosby, ND and continued his probation with a new officer, Officer Helgeson [hereinafter Helgeson]. Benefiel met with Helgeson until March 2012, when a petition for revocation of probation was filed. Tr. 9.

¶9 At the time Benefiel was arrested on March 10, 2012, he was being supervised by Helgeson. Once Helgeson took over supervising Benefiel, Benefiel did not continue to maintain contact with Ferderer. Tr. 9-10. At the hearing, Ferderer testified that he did not know of discussions Helgeson had with Benefiel regarding traveling outside of the state of North Dakota and did not have any discussion with Benefiel regarding travel to Wisconsin. Tr. 19.

¶10 Benefiel was arrested in Manitowoc County Wisconsin for possession of cocaine with intent to deliver, possession of THC, resisting an officer, and obstructing an officer. Tr. 11, 13. The weapons search of Benefiel exceeded the police's authority (Tr. 18-19) and the District Attorney in Manitowoc County elected not to file charges. Tr. 17. Benefiel was then held for extradition back into North Dakota. Tr. 17.

¶11 Although the substance found on Benefiel was field tested by officers on the scene, this substance was not re-tested by a state lab to confirm what the substance was and no follow-up tests were conducted. Tr. 20. Additionally, no testimony or evidence was given by any officer on the scene regarding how the substance was field tested, procedures used, or details of the arrest. *See* Transcript of Revocation Hearing.

¶12 Lastly, at the beginning of Benefiel's probation, Ferderer set up a payment plan for repaying restitution. Tr. 20. At the time the payment plan was set up, Benefiel was not asked about his sources of income or his financial situation. Tr. 21. Ferderer had no knowledge that Benefiel was on social security disability or that Benefiel had a limited ability to repay the restitution. Tr. 21.

¶13 A probation revocation hearing was held on May 24, 2012. *See* transcript of hearing. Benefiel denied the five allegations against him and did not provide additional evidence. (Tr. 5-6). At the conclusions of the hearing, Benefiel was found to have violated his probation Tr. 26-27.

JURISDICTIONAL STATEMENT

¶14 Pursuant to constitutional provisions, the North Dakota legislature enacted sections 29-28-03 and 29-28-06 which allow appeals from decisions of lower courts to the Supreme Court as a matter of right.

¶15 The district court had jurisdiction under N.D. Const. art. VI, § 8, and N.D.C.C. § 27-05-06. Mr. Benefiel's appeal was timely under N.D.R.App.P. 4(b). This Court has jurisdiction under N.D. Const. art. VI, § 6, and N.D.C.C. § 29-28-06(1).

STANDARD OF REVIEW

¶16 The burden of proof in a probation revocation proceeding is preponderance of the evidence. N.D.R.Crim.P. 32(f)(3)(B). The interpretation of a condition of probation is a question of law, fully reviewable on appeal. State v. Krous, 2004 ND 136, ¶ 14, 681 N.W.2d 822.

¶17 The North Dakota Supreme Court applies a two-step process when reviewing a revocation of probation. State v. Causer, 2004 ND 75, ¶ 30, 678 N.W.2d 552, cert. denied, 543 U.S. 906 (2004). First, a review is conducted to see whether the defendant violated his or her probation under a clearly erroneous standard. Id. at ¶ 31. "A finding of fact is clearly erroneous if, although there may be some evidence to support it, the reviewing court on the entire evidence, is left with a definite and firm conviction a mistake has been made." Id.

¶18 Second, a review is completed to see whether the district court abused its discretion by revoking the defendant's probation. Id. at ¶ 32. "A trial court abuses its discretion when it acts in an arbitrary, unreasonable, or capricious manner, or misinterprets or misapplies the law." Id.

LAW AND ARGUMENT

I. The trial court's factual finding of a probation violation was clearly erroneous when the probationer substantially complied with all conditions of probation.

¶19 The trial court's finding that Benefiel violated probation by committing the new offenses of resisting arrest, possession of cocaine with intent to deliver, possession of marijuana, and obstruction of an officer in Wisconsin was clearly erroneous. The search of Benefiel, which resulted in Benefiel's arrest, was determined to have violated Benefiel's constitutional rights when the officers conducting the search did not follow proper procedures and violated Benefiel's rights. The State did not call any of the officers that were on the scene in Wisconsin to testify regarding Benefiel's arrest.

¶20 Two of the four alleged charges were for resisting an officer and obstructing an officer. No charges were filed, none of the officers testified, and there was not any opportunity for confronting the evidence or cross-examination. An opportunity to cross-examine the officers on the scene was vital since the officers exceeded their authority during the arrest and failed to follow proper procedures. The only supporting evidence offered regarding the charges of obstructing an officer was a police report.

¶21 The remaining two alleged charges relate to substances that were not tested. The substances were field tested by an officer but were never sent to the state laboratory for confirmation testing. A field test only tests for the "possible presence or absence of a particular molecular grouping." A Test Of A Different Color: The Limited Value Of Presumptive Field Drug Tests And Why That Value Demands Their Exclusion From Trial, 40 Southwestern Law Review 531, 532 (2011). Because the field tests have a high rate of false positives, the field tests are useful in establishing probable cause and

necessitate further identification tests done at a state laboratory. *Id.* Without any testimony or tests confirming what the substances are, it is mere speculation and is not enough to show a violation of probation especially without any testimony from the officers that were on the scene and a confirmation test presented.

¶22 The trial court's finding that Benefiel violated probation by leaving the state of North Dakota without permission was clearly erroneous. At the time Benefiel left the state of North Dakota he was under the supervision of Helgeson, who did not testify at the revocation hearing. The only testimony given at the hearing was from Ferderer who stated that he did not know whether Helgeson and Benefiel ever talked about leaving the State of North Dakota. Ferderer testified that he did not give Benefiel permission to go to Wisconsin. However, Ferderer was not Benefiel's current probation officer and there was no need for Benefiel to check in with Ferderer. Without testimony from Benefiel's current probation officer, there is no way of knowing what was said between Benefiel and Helgeson or whether Helgeson knew Benefiel was leaving the State. The evidence does not support a violation of the condition of probation for leaving the state of North Dakota without permission.

¶23 The trial court's finding that Benefiel violated probation by possessing a controlled substance was clearly erroneous. As stated above, the substances were not sent to a state laboratory and confirmation tests were never conducted. Additionally, field tests have been determined to be very unreliable. Without any testimony or tests confirming what the substances are, it is mere speculation. The evidence does not support a violation of probation by possessing controlled substance without further testing of those substances to confirm their identity.

¶24 The trial court's finding that Benefiel violated probation by failing to pay restitution was clearly erroneous. Ferderer testified that he never asked Benefiel about his financial situation or if he had any income. Ferderer further testified that he was unaware that Benefiel was on social security disability or that he suffers from paranoid schizophrenia. The appropriate inquiry into Benefiel's ability to pay was never conducted and there was never testimony or evidence that Benefiel willfully failed to pay the restitution.

¶25 An inability to pay restitution does not make the failure to pay willful. This is not a case where Benefiel was refusing to pay and Benefiel did not willfully fail to pay the restitution. Benefiel simply did not have the means to make payments. The evidence does not support a willful violation of the condition of probation requiring him to repay restitution.

¶26 Based on the foregoing reasons, the trial court's factual findings that there was a probation violation were clearly erroneous because Benefiel was substantially complying with the conditions of probation.

II. The Trial Court Abused Its Discretion When It Determined The Alleged Violations Warranted Revocation

¶27 The trial court also abused its discretion when it failed to consider adequate alternative methods of punishment. In Bearden v. Georgia, the United States Supreme Court stated:

[I]n revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts

to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.

Bearden v. Georgia, 461 U.S. 660, 672-673, 103 S.Ct. 2064, 2073 (U.S. 1983).

¶28 The court in *Bearden*, stated that in a probation revocation, the sentencing court must focus on "whether non-imprisonment alternatives are adequate to satisfy the State's interest in punishment and deterrence." *Bearden* at 2073. It appears that in the case at hand, the court focused on imprisonment from the onset and did not consider non-imprisonment alternatives.

¶29 Benefiel's arrest in Wisconsin was determined to be based upon an illegal search that violated Benefiel's constitutional rights. The Wisconsin District Attorney spoke with Ferderer and based on their conversation Ferderer, Benefiel's initial probation officer, decided to proceed with a petition to revoke Benefiel's probation. It is quite clear that the reason the petition was filed was based largely upon the District Attorney's inability to go forward with Wisconsin charges because of the illegal search. This case should have remained with Benefiel's current probation officer and been handled with intermediate measures, not with an automatic revocation.

¶30 Lastly, the Court found that Benefiel failed to pay restitution. The Court did not find that Benefiel frivolously spent his income, that he had purchased large items or expensive gifts, or that he had in any other way squandered his earnings away. It was not that Benefiel was refusing to pay restitution; he was unable to pay based upon his limited income.

¶31 Benefiel was on social security disability and had a very limited income. Ferderer, testified that he never asked Benefiel about his financial situation or if he had any income. There was no evidence presented that Benefiel had willfully failed to pay the restitution. It is unjust to revoke Benefiel for failing to pay restitution when he was unable to pay due to his limited social security disability income and when there was never an inquiry into his ability to pay.

¶32 Because Benefiel's allegations arose from a violation of Benefiel's rights and an inability to pay, the allegations do not warrant revocation of probation. This is a case that should have been handled with various intermediate measures. The trial court abused its discretion when it held that this violation warranted revocation.

CONCLUSION

¶33 Based on the foregoing reasons, the trial court's factual findings that there was a probation violation were clearly erroneous and the trial court abused its discretion when finding there was a probation violation and imposing the sentence.

¶34 Appellant respectfully requests that this Court reverse the District Court's Order for Revocation of Probation and Remand this matter back to the District Court for further proceedings.

Dated this 24th day of September, 2012.

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Supreme Court No. 20120274

The undersigned, being of legal age, being first duly sworn deposes and says that on the 24th day of September, 2012, she served true copies of the following documents:

Appellant's Brief
Appendix of the Appellant

And that said copies were served upon:

Jeffrey R. Ubben
Burleigh County
Assistant State's Attorney
Email: jubben@nd.gov

by email.

Dated this 24th day of September, 2012.

Holly Bicker

Subscribe and sworn to before me this 24th day of
September, 2012.

Notary Public
County of Grand Forks
State of North Dakota

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Jason Benefiel
ND State Penitentiary
3100 E Railroad Ave
Bismarck ND 58506

by mail.

Dated this 24th day of September, 2012.

Holly Bicker

Subscribe and sworn to before me this 24th day of
September, 2012.

Notary Public
County of Grand Forks
State of North Dakota