IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20180335

Ricky James Rodriguez,)
)
Petitioner/Appellant,)
)
vs.)
)
North Dakota State Penitentiary,)
Robyn Schmalenberger, Warden)
)
Respondents/Appellees.)

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JAN 18 2019
STATE OF NORTH DAKOTA

APPEAL FROM THE ORDER DENYING PETITION
FOR WRIT OF MANDAMUS

GRAND FORKS COUNTY DISTRICT COURT
NO. 18-2018-CV-01259

THE HONORABLE LAWRENCE E. JAHNKE, PRESIDING

BRIEF OF RESPONDENTS AND APPELLEES NORTH DAKOTA STATE PENITENTIARY AND ROBYN SCHMALENBERGER, WARDEN

Lori S. Mickelson #05188
Assistant Attorney General
Ken R. Sorenson #03621
Assistant Attorney General
Office of Attorney General
600 East Boulevard Avenue, Dept. 125
Bismarck, ND 58505-0040
Tele. No. (701) 328-2210
Fax (701) 328-3535

Attorneys for the North Dakota State Penitentiary and Robyn Schmalenberger
Respondents and Appellees

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

LAW AND ARGUMENT 5

I. Rodriguez failed to demonstrate he has a clear legal right to be eligible for release on parole before he has served 85% of his sentence in confinement as required by N.D.C.C. § 12.1-32-09.1 5

A. Standard of review 5

B. Rodriguez is not entitled to a writ of mandamus 5

C. The language of N.D.C.C. § 12.1-32-09.1 is unambiguous. Rodriguez must serve 85% of his sentence in confinement before he is eligible for release on parole 10

D. The Grand Forks County District Court did not abuse its discretion in denying the petition for mandamus 11

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Flattum-Riemers v. Flattum-Riemers,
1999 ND 146, 598 N.W.2d 499 12

Frank v. Traynor,
1999 ND 183, 600 N.W.2d 516 5

Gottbreht v. State,
1999 ND 159, 598 N.W.2d 794 .... 5, 6

Kadlec v. Greendale Township Bd. of Township Supervisors,
1998 ND 165, 583 N.W.2d 817 6

Krabseth v. Moore,
1997 ND 224, 571 N.W.2d 146 6

Mini Mart, Inc. v. City of Minot,
347 N.W.2d 131 (N.D. 1984) 6

Robot Aided Mfg., Inc. v. Moore,
1999 ND 14, 589 N.W.2d 187 6

State v. Hafner,
1998 ND 220, 587 N.W.2d 177 .... 10, 11

State v. Jeliff,
251 N.W.2d 1 (N.D. 1977) 11, 14

State v. Krous,
2004 ND 136, 681 N.W.2d 822 12

State v. Laib,
2002 ND 95, 644 N.W.2d 878 10

State v. Mackey,
2011 ND 203, 805 N.W.2d 98 12

State v. Wetzel,
2008 ND 186, 756 N.W.2d 775 10

Tooley v. Alm,
515 N.W.2d 137 (N.D. 1994) 6

STATUTES

N.D.C.C. § 1-02-02 10

N.D.C.C. § 1-02-05 10

N.D.C.C. § 1-02-07 10

N.D.C.C. § 12.1-17-02 7

N.D.C.C. § 12.1-32-09.1 .... 1, 5, 7, 8, 9, 10, 11, 12, 13, 14

N.D.C.C. § 12-55.1-04 12

N.D.C.C. § 32-34-01 5

STATEMENT OF THE ISSUES

[¶1] Rodriguez failed to demonstrate he has a clear legal right to be eligible for release on parole before he has served 85% of his sentence in confinement as required by N.D.C.C. § 12.1-32-09.1.

STATEMENT OF THE CASE

[¶2] On December 17, 2008, the Grand Forks County District Court, the Honorable Sonja Clapp presiding, sentenced Rodriguez to serve five years in the custody of the North Dakota Department of Corrections and Rehabilitation ("DOCR"), with two years of the sentence to be suspended, subject to supervised probation for the crime of aggravated assault. See State v. Rodriguez, Grand Forks County District Court No. 18-08-K-01715. The sentence was consecutive to the Grand Forks County District Court's sentence in State v. Rodriguez, No. 18-08-K-01756.

[¶3] On September 4, 2012, the Grand Forks County District Court ordered Rodriguez' probation be revoked and re-sentenced Rodriguez to serve five years' imprisonment, with credit for three years previously served, and thirty-nine days' credit for jail time, in State v. Rodriguez, Grand Forks County District Court No. 18-08-K-01715. App. at 24-26.

[¶4] The district court also revoked Rodriguez' probation in his sentence for violation of a protection order in State v. Rodriguez, No. 18-08-K-01756, and re-sentenced Rodriguez to serve three years' imprisonment with credit for one year previously served, and thirty-nine days' credit for jail time. App. at 24-26.

[¶5] Rodriguez filed a Petition for Writ of Mandamus on August 22, 2013, requesting the Court to order the North Dakota State Penitentiary to recalculate the date that Rodriguez will be eligible for parole. App. at 3-6. The Respondents and Appellees, North Dakota State Penitentiary and Robyn Schmalenberger, Warden (referred to collectively as the "NDSP"), objected to Rodriguez' petition.

App. at 8-17. The NDSP submitted an affidavit with a sentence calculation from Cathy Jensen, the North Dakota Department of Corrections and Rehabilitation records custodian, in support of the NDSP's objection to the petition. App. at 18-20.

[¶6] A hearing was held before the Honorable Lawrence E. Jahnke on October 9, 2013. Supp. App. The Court entered an Order Denying Petition for Writ of Mandamus on October 21, 2013. App. at 21-22. Rodriguez filed this appeal.

STATEMENT OF THE FACTS

[¶7] The NDSP generally concurs with Rodriguez' statement of the facts in ¶¶ 3 and 4 of his Appellant's brief. The NDSP sets out a different sentence calculation than what Rodriguez states in ¶ 5 of his brief.

[¶8] Applicable time periods for Rodriguez' initial three-year sentence on the aggravated assault charge are as follows:

1) Rodriguez was sentenced on December 17, 2008, to 5 years' imprisonment, with 2 years suspended, or a total of 1,095 days (three years x 365 days = 1,095).

2) Rodriguez received two hundred and fifty-one (251) days of credit for time spent in custody ("jail time credit"). Therefore, Rodriguez had 844 days left to serve in the custody of the DOCR to complete three years (1,095 days less 251 days for time spent in custody = 844 days).

3) Rodriguez' maximum release date, after receiving credit for 251 days for time spent in custody, became April 10, 2011.

4) Rodriguez' initial projected good time release date was November 26, 2010, but he failed to earn 25 days of performance based sentence reduction ("good time") for not working, which resulted in an actual good time release date of December 21, 2010.

5) The time period Rodriguez was in DOCR custody from Wednesday, December 17, 2008, his sentencing date, until Tuesday, December 21, 2010, his sentence expiration date with credit for good time, was 734 days.

6) Out of the three-year sentence imposed by the court prior to Rodriguez' release to probation and subsequent revocation of probation, Rodriguez had served 251 days of jail time custody, and 734 days in DOCR custody, for a total of 985 days in confinement.

7) After the Grand Forks County District Court revoked Rodriguez' probation and re-sentenced him, he had to serve 1,551 days in confinement to reach 85% of a five-year sentence. He had already been in confinement 985 days, and he was entitled to credit of 39 days for time spent in custody pending revocation of probation, leaving 527 days that he was required to spend in confinement until he was eligible for parole under the 85% rule.

Affidavit of Cathy Jensen, App. at 18-20.

LAW AND ARGUMENT

I. RODRIGUEZ FAILED TO DEMONSTRATE HE HAS A CLEAR LEGAL RIGHT TO BE ELIGIBLE FOR RELEASE ON PAROLE BEFORE HE HAS SERVED 85% OF HIS SENTENCE IN CONFINEMENT AS REQUIRED BY N.D.C.C. § 12.1-32-09.1.

A. Standard of review.

[¶9] Issuance of a writ of mandamus is left to the sound discretion of the district court. Frank v. Traynor, 1999 ND 183, ¶ 9, 600 N.W.2d 516. A trial court's denial of a writ of mandamus will not be reversed by the Supreme Court absent an abuse of discretion. Gottbreht v. State, 1999 ND 159, ¶ 10, 598 N.W.2d 794. The trial court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner. Id.

B. Rodriguez is not entitled to a writ of mandamus.

[¶10] The Grand Forks County District Court determined Rodriguez failed to show he had a clear legal right to release on parole prior to the parole eligibility date determined by the NDSP. The Grand Forks County District Court did not act in an arbitrary, unreasonable, or unconscionable manner when it denied Rodriguez' request for a writ of mandamus. The district court did not abuse its discretion.

[¶11] Section 32-34-01, N.D.C.C., governs the issuance of writs of mandamus:

> The writ of mandamus may be issued by the supreme and district courts to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled and from which the party is precluded unlawfully by such inferior tribunal, corporation, board, or person.

[¶12] "Mandamus may be used to compel performance of a ministerial duty, but may not be used to compel performance of discretionary acts." Tooley v. Alm, 515 N.W.2d 137, 139 (N.D. 1994). "Mandamus is not available to compel performance of a discretionary act." Gottbreht, supra at ¶ 10. See also Mini Mart, Inc. v. City of Minot, 347 N.W.2d 131, 136 (N.D. 1984) (stating the law must require, not just authorize, the act to be done).

[¶13] Rodriguez must satisfy two requirements. First, he "must demonstrate a clear legal right to the performance of the act." Kadlec v. Greendale Township Bd. of Township Supervisors, 1998 ND 165, ¶ 8, 583 N.W.2d 817. "A writ of mandamus will not lie unless the petitioner's legal right to the performance of the particular acts sought to be compelled is clear and complete." Krabseth v. Moore, 1997 ND 224, ¶ 6, 571 N.W.2d 146. Second, Rodriguez "must have no other plain, speedy and adequate remedy in the ordinary course of law." Kadlec, supra at ¶ 8.

[¶14] With regard to the first requirement, this Court stated the burden of proof Rodriguez must satisfy as follows:

> "A party seeking a writ of mandamus bears the burden of demonstrating a clear legal right to the performance of the particular acts sought to be compelled by the writ." Krabseth v. Moore, Director, North Dakota Dep't of Transp., 1997 ND 224, ¶ 6, 571 N.W.2d 146. The petitioner must demonstrate a clear and complete legal right to the performance of particular acts sought to be compelled.

Robot Aided Mfg., Inc. v. Moore, 1999 ND 14, ¶ 10, 589 N.W.2d 187 (emphasis added).

[¶15] Rodriguez had entered a plea of guilty to the crime of aggravated assault in State v. Rodriguez, Grand Forks County District Court No. 18-08-K-01715. His

sentence is therefore subject to the requirement in N.D.C.C. § 12.1-32-09.1. Rodriguez does not dispute that his sentence for aggravated assault is subject to the requirements of N.D.C.C. § 12.1-32-09.1, referred to as the "truth-in-sentencing" or "85%" statute.

[¶16] Section 12.1-32-09.1 provides in part: "an offender who is convicted of a crime in violation of section . . . 12.1-17-02 . . . and who receives a sentence of imprisonment <u>is not eligible for release from confinement on any basis</u> until eighty-five percent of the sentence imposed by the court has been served or the sentence is commuted." (Emphasis added.)

[¶17] On September 4, 2012, the district court revoked Rodriguez' probation and re-sentenced him to serve five years, with credit for the previous three-year sentence, and for thirty-nine days spent in custody. Five years amounts to 1,825 days. Eighty-five percent of 1,825 days is 1,551.25 days. Therefore, for a five-year sentence subject to section 12.1-32-09.1, Rodriguez must serve a minimum of 1,551 days in confinement before he would be eligible for release on any basis, including parole.

[¶18] Rodriguez stated in his petition for mandamus:

> N.D.C.C. § 12.1-32-09.1 is unambiguous and should be given it (sic) plain and ordinary meaning. Any offender who is convicted of a crime for which the 85% rule applies, they ". . . [are] not eligible for release from confinement on any basis until eighty-five percent of the sentence imposed by the court has been served or the sentence is commuted . . ."
>
> In the present case, the District Court resentenced Mr. Rodriguez to 5 years imprisonment. Taking into consideration N.D.C.C. § 12.1-32-09.1, Mr. Rodriguez should be eligible for parole when 85% of his sentence has been completed which is 4 years, 3 months.

App. at 5.

[¶19] If translated into days, Rodriguez' argument in his petition is that he should be eligible for parole in 1,551 days. App. at 19, ¶ 10. The DOCR does not have any disagreement with Rodriguez' assertion in his petition for mandamus - it is consistent with the statutory language of N.D.C.C. § 12.1-32-09.1 and the DOCR's application of the statute. Four years and three months, or 1,551 days, is the same amount of time calculated by the NDSP that Rodriguez must serve in confinement before he is eligible for parole. Rodriguez must serve four years and three months, or 1,551 days, in confinement before he is eligible for parole.

[¶20] At the October 9, 2013, hearing, Rodriguez made a different argument than what he had presented in his petition for mandamus. At the hearing, he stated, "[i]t appears from what I read in the brief from the State, that they do not include time if somebody is paroled previously underneath the first sentence towards the 85% date and that's why we come up with this idea of having 85% being put on the two years of the person being sentenced to." Supp. App. at 4. He next argued he should receive credit for three years and 39 days against the 85% requirement. Supp. App. at 4. His support for his argument was that "[t]here is no indication either under the North Dakota Century Code or under the previous order that we are suppose (sic) to eliminate any time not actually spent in confinement." Supp. App. at 8. In fact, Rodriguez had only served a total of 985 days in confinement under his original three-year sentence before he was released to probation. App. at 19, ¶ 9.

[¶21] The following example illustrates the difficulty of Rodriguez' argument. If the trial court sentenced Rodriguez to serve a straight five-year sentence for aggravated assault, his maximum sentence when calculated in days would be 1,825 days. He would have to serve 1,551 days (1,825 x 85% = 1,551.25) before he would be eligible for parole under section 12.1-32-09.1. If the district court sentenced Rodriguez to serve five years, with two years suspended, then he would have to serve a minimum of 931 days (1,095 days x 85% = 930.75 (rounded to 931)) in confinement before he would be eligible for parole. Then, if he served 931 days in confinement and was released to supervised probation, but he violated his probation and the district court revoked his probation and re-sentenced him to serve the remaining two years, he would have to serve a minimum of 620 days (730 days x 85% = 620.5 (rounded to 620)) in confinement before he would be eligible for parole. This would total 1,551 days (931 + 620 = 1,551). Rodriguez would have served the same number of days in confinement as if he had a straight five-year sentence before he would be eligible for parole under the 85% rule. But under his argument, he should be credited with a full three years, or 1,095 days, instead of the 931 days he actually served in confinement on the initial three-year sentence. His argument reduces the time he must serve in confinement by 164 days before he would become eligible for parole.

[¶22] The effect of his argument is that under a five-year sentence subject to section 12.1-32-09.1 that includes probation, if the defendant violates probation, the defendant will, in most cases, serve a shorter period of time in confinement

before becoming eligible for parole under the 85% rule than a criminal defendant whose sentence is subject to the 85% rule and who has been sentenced to serve a straight five-year sentence. Under Rodriguez' argument, the probation violator is rewarded for violating probation.

C. The language of N.D.C.C. § 12.1-32-09.1 is unambiguous. Rodriguez must serve 85% of his sentence in confinement before he is eligible for release on parole.

[¶23] A court's primary objective in interpreting a statute is to ascertain legislative intent. State v. Wetzel, 2008 ND 186, ¶ 4, 756 N.W.2d 775. "In ascertaining legislative intent, we first look to the statutory language and give the language its plain, ordinary and commonly understood meaning." State v. Laib, 2002 ND 95, ¶ 13, 644 N.W.2d 878. If the language of a statute is unambiguous, then the Court applies the plain language of the statute. State v. Hafner, 1998 ND 220, ¶ 10, 587 N.W.2d 177.

> [¶24] Words of a statute are given their plain, ordinary, and commonly understood meaning unless a contrary intention plainly appears. N.D.C.C. § 1-02-02. Statutes are construed as a whole and are harmonized to give meaning to related provisions. N.D.C.C. § 1-02-07. If the language of a statute is clear and unambiguous, "the letter of [the statute] is not to be disregarded under the pretext of pursuing its spirit." N.D.C.C. § 1-02-05.

Wetzel, supra at ¶ 4.

[¶25] "We interpret statutes to give meaning and effect to every word, phrase, and sentence, and do not adopt a construction which would render part of the statute mere surplusage." Laib, 2002 ND 95, ¶ 13, 644 N.W.2d 878.

[¶26] "We have held repeatedly that statutes must be construed to avoid ludicrous and absurd results, and that courts endeavor to construe statutes so as

to effectuate the legislative purposes which prompted their enactment. *Certainly a construction of a criminal statute which nullifies its punitive provisions contravenes the purpose of the enactment and leads to illogical and absurd results."* State v. Jelliff, 251 N.W.2d 1, 7 (N.D. 1977) (citations omitted) (emphasis added).

[¶27] If the language of a statute is unambiguous, then this Court must apply the plain language of the statute. State v. Hafner, 1998 ND 220, ¶ 10, 587 N.W.2d 177. N.D.C.C. § 12.1-32-09.1 is not ambiguous. Rodriguez acknowledged the statute is not ambiguous. (Rodriguez Brief at ¶ 11.) Therefore, he "is not eligible for release from confinement on any basis until eighty-five percent of the sentence imposed by the [Grand Forks County District Court] has been served or the sentence is commuted." Id.

D. The Grand Forks County District Court did not abuse its discretion in denying the petition for mandamus.

[¶28] Rodriguez' argument he must be given credit for 1,095 days (3 years x 365 days = 1,095 days) as time spent in confinement for purposes of the 85% calculation, when he was actually confined for 985 days, would require this Court to ignore the plain meaning of the statutory language that a defendant "who receives a sentence of imprisonment is not eligible for release from confinement on any basis until eighty-five percent of the sentence imposed by the court has been served . . . ." N.D.C.C. § 12.1-32-09.1.

[¶29] Rodriguez' construction of N.D.C.C. § 12.1-32-09.1 "nullifies its punitive provisions" and "contravenes the purpose of the enactment" and "leads to illogical and absurd results." Jelliff, 251 N.W.2d at 7. In the above example,

based on Rodriguez' argument at the hearing, the defendant with the straight sentence would have to serve five months more in confinement than the probation violator who ended up with a five-year sentence after revocation of probation because the probation violator would be getting credit against a sentence for time not spent in confinement.

[¶30] Rodriguez may only serve a shorter period of time under the 85% statute if his sentence has been commuted by the Governor under N.D.C.C. § 12-55.1-04. Absent a commutation from the Governor, Rodriguez must serve at least 85% of a sentence for an offense subject to section 12.1-32-09.1 in confinement.

[¶31] Rodriguez makes the argument to this Court that the trial court's revocation order is erroneous, but it was up to NDSP to go back to the trial court and have the order modified. (Rodriguez Brief at ¶ 13.) He cites Flattum-Riemers v. Flattum-Riemers, 1999 ND 146, 598 N.W.2d 499, in support of his argument. (Rodriguez Brief at ¶¶ 12-13.)

[¶32] Rodriguez did not make this argument in his Petition for Writ of Mandamus, and he failed to present it to the district court at the hearing on October 9, 2013. It is well-settled that issues not raised in the district court may not be raised for the first time on appeal. State v. Mackey, 2011 ND 203, ¶ 17, 805 N.W.2d 98, 103. If an appellant fails to raise an argument to the trial court, this Court has repeatedly stated it will not address arguments raised for the first time on appeal. State v. Krous, 2004 ND 136, ¶ 22, 681 N.W.2d 822, 827.

[¶33] Even if this Court chooses to address Rodriguez' newly raised argument that the DOCR is effectively stuck with an erroneous sentence, he is still not

entitled to the relief he seeks. The NDSP is not calculating Rodriguez' release date from prison but, instead, the NDSP calculated the date Rodriguez may be eligible for parole under section 12.1-32-09.1.

[¶34] Rodriguez must serve, out of the five-year sentence imposed by the district court, a total of 1,551 days (1,825 x 85% = 1,551 days) in confinement. Out of the initial three-year sentence imposed by the district court, Rodriguez served 251 days of jail time and 734 days at the DOCR, for a total of 985 days actually served in confinement, before he was released to probation. App. at 19, ¶ 9. Therefore, after the district court revoked his probation and sentenced him to serve five years, Rodriguez must serve 527 days in confinement before he is eligible for parole (1,551 days minus 985 days in jail and DOCR custody, and minus 39 days for time spent in jail custody during the probation revocation proceedings = 527 days). App. at 19-20, ¶ 11. Rodriguez' 85% parole eligibility date under section 12.1-32-09.1 is February 13, 2014. App. at 20, ¶ 12.

[¶35] The district court stated in its order:

> The plain language of the statute requires an offender to serve 85% of the sentence imposed. In this case, that sentence was five years (1825 days) with DOC. Following his initial sentencing in December 2008, it appears that the Petitioner served a total of 985 days, at which time he was released on probation. Eighty-five percent of the five year re-sentencing is 1551 days of confinement. In this particular case, since he had already served 985 days, he is still subject to confinement for 527 days (1551 days minus 985 days previously served, and then minus an additional 39 days he spent in jail while awaiting his revocation hearing.)
>
> The Petitioner has failed to establish that he has a clear legal right to a release from DOC prior to serving 527 days as a result of his re-sentencing on September 6, 2012. The applicable statute is clear and unambiguous in this regard.

App. at 22, ¶¶ 7, 8.

[¶36] Any other sentence calculation by the DOCR that allows Rodriguez to serve less than a total of 1,551 days in confinement out of a five-year sentence before he is eligible for parole is contrary to the plain and unambiguous requirements of N.D.C.C. § 12.1-32-09.1. This is the "illogical and absurd" result this Court must avoid. Jelliff, 251 N.W.2d at 7. The district court's denial of Rodriguez' petition for writ of mandamus was not an abuse of discretion.

CONCLUSION

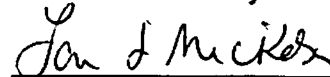
[¶37] Rodriguez has not met his burden to show that the district court's denial of the writ of mandamus was an abuse of discretion. The order denying Rodriguez' request for a writ of mandamus should be affirmed.

Dated this 13th day of January, 2014.

RESPECTFULLY SUBMITTED:

State of North Dakota
Wayne Stenehjem
Attorney General

By:
Ken R. Sorenson #03621
Assistant Attorney General

By: 
Lori S. Mickelson #05188
Assistant Attorney General

Office of Attorney General
600 East Boulevard Avenue, Dept. 125
Bismarck, ND 58505-0040
Tele. (701) 328-2210
Fax (701) 328-3535

Attorneys for the North Dakota State Penitentiary and
Robyn Schmalenberger, Respondents and Appellees

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20130335

Ricky James Rodriguez, Petitioner/Appellant, vs. North Dakota State Penitentiary, Robyn Schmalenberger, Warden, Respondents/Appellees.	))))))))))	**AFFIDAVIT OF SERVICE BY MAIL**

. . . .

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Peggy A. Brunelle states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

2. I am of legal age and on the 13th day of January, 2014, I served the attached BRIEF OF RESPONDENTS AND APPELLEES NORTH DAKOTA STATE PENITENTIARY AND ROBYN SCHMALENBERGER, WARDEN upon David N. Ogren by placing a true and correct copy thereof in an envelope addressed as follows:

MR DAVID N OGREN
ATTORNEY AT LAW
405 BRUCE AVE STE 101
GRAND FORKS ND 58201-4642

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

Peggy A. Brunelle

Subscribed and sworn to before me this 13 day of January, 2014.

NOTARY PUBLIC