SUPREME COURT NO.: 20140295
Burleigh County No.: 08-2013-CV-01935

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Daniel Joseph Myers,

Petitioner and Appellant,

v.

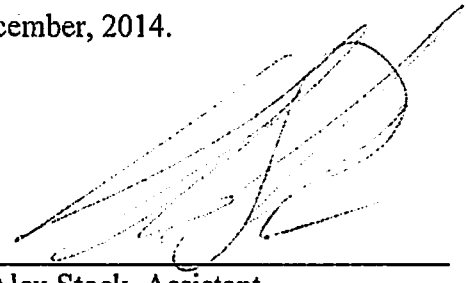
State of North Dakota,

Respondent and Appellee.

BRIEF OF APPELLEE

Appeal from the Post-Conviction Relief Hearing Held July 28, 2014, and the Order Denying Petitioner's Application for Post-Conviction Relief, Entered on July 29, 2014. The Honorable Bruce B. Haskell, Presiding.

Submitted this 16th day of December, 2014.



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STATEMENT OF THE ISSUE

[¶1] I. Whether the District Court erred in denying Petitioner's application for post-conviction relief?

STATEMENT OF THE CASE

[¶2] The State largely agrees with Myers's statement of the case. Myers had four separate cases pending before the district court. On April 27, 2012, Myers was sentenced in case 08-2011-CR-02739 to five years with all five years suspended for five years of supervised probation. Appellant's Appendix ("App.") 61. Next, on August 22, 2012, Myers was sentenced on three separate cases to five years with all five years suspended for three years of supervised probation. App. 66-75. The sentences on these three later cases were to run concurrently with each other. Id. Logically, due to the suspended nature of the sentences, there was no mention of Myers's second five-year suspended sentence running concurrently to his first five-year suspended sentence.

[¶3] On March 25, a petition to revoke Myers's probation was filed. Doc. ID #26 (Case No. 08-2012-CR-00335). On April 22, 2013, an amended petition to revoke Myers's probation was filed. App. 76. Then, on April 29, 2013, a revocation of probation hearing was held, and Myers's probation was revoked on all cases. App. 88-93. Ultimately, Myers was sentenced to five years on Case No. 08-2011-CR-02739, running consecutive to a five year sentence on the three later cases, for a total of ten years to serve. App. 82-88.

[¶4] Myers then applied for post-conviction relief, and a hearing was held. App. 1, 3. After the hearing, Myers's application for post-conviction relief was denied. App. 54. Myers then timely filed a notice of appeal. App. 55.

STATEMENT OF FACTS

[¶5] The State agrees with Myers's statement of the facts.

LAW AND ARGUMENT

[¶6] I. The District Court did not err in denying Petitioner's application for post-conviction relief.

[¶7] On appeal, Myers puts forth three arguments. First, he alleges the district court may not impose a sentence at a revocation of probation hearing greater than the originally imposed suspended sentence. Appellant's Brief, ¶ 23. Additionally, he argues the judge who handled the revocation should give deference to the sentence the original sentencing judge ordered, although in Myers's situation, the Honorable Bruce Haskell handled both proceedings. Appellant's Brief, ¶ 33. Third, Myers argues the denial of his application for post-conviction relief is erroneous because it is based on findings not supported by evidence. Appellant's Brief, ¶ 37.

[¶8] This Court's standard of review for post-conviction proceedings is well-established. "A trial court's findings of fact in a post-conviction proceeding will not be disturbed on appeal unless clearly erroneous under N.D.R.Civ.P. 52(a)." Broadwell v. State, 2014 ND 6, ¶ 5, 841 N.W.2d 750 (internal citations and quotations omitted). "A finding is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by *any* evidence, or if, although there is some evidence to support it, a reviewing court is left with a definite and firm conviction a mistake has been made." Id. (emphasis added) (internal citations and quotations omitted). "Questions of law are fully reviewable on appeal of a post-conviction proceeding." Id. (citing Ellis v. State, 2003 ND 72, ¶ 6, 660 N.W.2d 63).

a. Myers did not raise the issue of the legality of his sentence at the trial court level, and he cannot raise it for the first time on this appeal.

[¶9] Myers alleges his ten-year sentence is illegal under N.D.C.C. § 12.1-32-07(6), and he argues the district court did not address the legality of the sentence imposed at his post-conviction relief hearing. Appellant's Brief, ¶ 16. He also alleges the district court did not address the legality of the sentence in its subsequent written order. Id.; see also App. 54. Myers, however, never asked the district court to address the legality of his sentence in any of his post-conviction applications. See App. 18-22, 34-38, 45-49. He simply alleged he was not informed of the minimum and maximum sentences, the possibility of consecutive sentences, or that revocation of his probation could lead to additional time. Id. "It is well established, an issue not raised in the trial court cannot be raised for the first time on appeal." Murchison v. State, 1998 ND 96, ¶ 15, 578 N.W.2d 514 (citing Cermak v. Cermak, 1997 ND 187, ¶ 15, 569 N.W.2d 280; Mahoney v. Mahoney, 1997 ND 149, ¶ 13, 567 N.W.2d 206). Because Myers failed to raise this issue at the trial court level, and because Myers has provided no reason why he was unable to raise this issue at the trial court level, Myers cannot raise this issue for the first time on this appeal.

b. Myers's sentence is legal.

[¶10] Additionally, this Court has addressed the legality of a sentence under N.D.C.C. § 12.1-32-07 multiple times. N.D.C.C. § 12.1-32-07(6) states

> The court, upon notice to the probationer and with good cause, may modify or enlarge the conditions of probation at any time prior to the expiration or termination of the period for which the probation remains conditional. If the defendant violates a condition of probation at any time before the expiration or termination of the period, the court may continue

> the defendant on the existing probation, with or without modifying or enlarging the conditions, or may revoke the probation and impose *any other sentence that was available under section 12.1-32-02 or 12.1-32-09 at the time of initial sentencing* or deferment. In the case of suspended execution of sentence, the court may revoke the probation and cause the defendant to suffer the penalty of the sentence previously imposed upon the defendant.

N.D.C.C. § 12.1-32-07(6) (emphasis added). Myers argues only the last sentence of this statute, regarding suspended execution of sentences, is applicable. As a result, he argues Judge Haskell was not authorized to change the suspended execution of Myers's sentence from concurrent to consecutive. Myers is incorrect.

[¶11] In his brief, Myers concedes a district court is authorized to "increase the length of [a] sentence imposed, but suspended, upon . . . revocation of his probation." State v. Gefroh, 458 N.W.2d 479, 484 (N.D. 1990); see also Appellant's Brief, ¶ 27. This Court reached this conclusion by analyzing the legislative intent of the statute, and future decisions have elaborated on the subject. Gefroh, 458 N.W.2d at 483-84. N.D.C.C. § 12.1-32-07(6) gives a defendant "actual notice a violation of the conditions of his probation could result in the imposition of any other sentence that was initially available, *including a sentence that is more severe than his originally imposed sentence.*" Davis v. State, 2001 ND 85, ¶ 13, 625 N.W.2d 855 (internal citations omitted). After violating probation, a defendant can expect to receive a harsher sentence than his original sentence. Id. at ¶ 14.

[¶12] Additionally, this Court has rejected the argument that a trial court may not increase the length of a sentence imposed, but suspended, after revocation of probation. N.D.C.C. § 12.1-32-07 "was obviously intended to be the paramount legislation not only in defining criminal offenses but also in the area of sentencing and probation. . . .

Therefore, in accordance with State v. Miller, 418 N.W.2d 614 (N.D. 1988), the trial court . . . was authorized . . . to resentence [a defendant] to any sentence available *at the time of the initial sentence* . . . ." State v. Lindgren, 483 N.W.2d 777, 779 (N.D. 1992) (citing Gefroh, 458 N.W.2d at 483; State v. Vavrosky, 442 N.W.2d 433, 437 (N.D. 1989)). No logical argument can be made that "any sentence available at the time of the initial sentence" does not include the possibility of consecutive sentences, and Myers has put forth no case law in support of this contention. As a result, Myers's argument is without merit.

[¶13] Furthermore, from a practical standpoint, this statute "reflects the policy that a sentence which includes probation is not final, but is designed to provide a flexible alternative which allows the court to monitor the defendant's conduct while on probation." State v. Jones, 418 N.W.2d 782, 784 (N.D. 1988) (internal citations omitted). "[T]his practice reflects the need to alter the defendant's sentence in light of the fact that the court's initial sentence of probation was not effective and must be altered." Id.

[¶14] Myers also argues the original sentencing judge's sentence should be given deference by the reviewing judge during revocation of probation proceedings. Appellant's Brief, ¶ 33. This argument fails for several reasons. First, in Myers's situation, Judge Haskell handled sentencing at both sentencing hearings as well as the subsequent sentencing at Myers's revocation proceedings. Myers states a sentencing judge is in the best possible position to ascertain an appropriate sentence. Appellant's Brief, ¶ 34. Since Judge Haskell handled all sentencing proceedings, including sentencing at revocation, it would not be logical to suggest Judge Haskell did not make a well-informed sentencing decision. Further, in his brief, Myers clearly establishes Judge

Haskell was indeed deferential to his own sentencing orders. See Appellant's Brief, ¶ 11; see also Doc. ID #57 (Case No. 08-2012-CR-00335), p. 9, ll. 21-23 (stating "if you violate, you're going to get the whole five years"); Doc. ID #43 (Case No. 08-2011-CR-02739), p. 8, ll. 12-14 (stating "if you're back on a probation revocation, it's going to be the full five years"). At the April 29, 2013 revocation of probation hearing, Judge Haskell states

> I'm going to base my decision basically on three things. The first one is that the last time Mr. Myers was in front [of] me, he basically convinced me that he was serious about treatment this time, that he was ready to make some changes in his life, that he was ready to put the lifestyle he'd been living behind him. Obviously he successfully convinced me of that, and that was not the case, as he is back here again. I'm also considering the fact that he has a significant criminal record, some of which does include violent offenses, and I am considering the fact that when he appeared in front of me on August 21st [2012], I told him it would be a minimum of five years if he violated, regardless of what the violations were.

Doc. ID #58 (Case No. 08-2012-CR-00335), p. 23, ll. 5-15. Later, during the same hearing, Judge Haskell states

> I've seen you numerous times over the years Mr. Myers, and other than the details, I hear the same thing over and over again about how you're doing wonderful and then one little thing happens and kicks you off the rails and that you're really trying hard. Like I said, you fooled me last time, but not this time.

Doc. ID #58 (Case No. 08-2012-CR-00335), p. 26, ll. 16-21. Although Myers cites no relevant case law establishing a judge handling a probation revocation sentence should be deferential to the original sentencing judge, Judge Haskell was extremely logical, reasonable, and deferential with regard to his original sentencing decisions.

[¶15] In addition, this Court has held

> [t]he freedom of a sentencing judge to consider the defendant's conduct *subsequent to the first conviction* in imposing a new sentence is no more

> than consonant with the principle . . . that a State may adopt the prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime.

Jones, 418 N.W.2d at 785 (citing North Carolina v. Pearce, 395 U.S. 711, 723 (1969)). In Jones, much like in Myers's situation, the defendant was on probation and was on notice a violation of the conditions of his probation could result in the imposition of *any* sentence originally available. 418 N.W.2d at 785 (emphasis in original). This includes a sentence which is more severe than the sentence originally imposed, and the defendant should have expected a violation of his probation conditions could result in a harsher sentence. Id. at 786.

[¶16] For these reasons, Myers was fully aware of the possibility of consecutive sentences, the consecutive sentences he was given were indeed legal, and Judge Haskell's sentencing decision at the revocation of probation was reasonable and deferential to his original sentencing decision.

c. The denial of Myers's application for post-conviction relief is adequately supported by evidence and is not clearly erroneous.

[¶17] Myers also argues the denial of his application for post-conviction relief was based on findings not supported by evidence, rendering the denial clearly erroneous. On appeal, Myers does not argue ineffective assistance of counsel. He simply argues he was not made aware of the possibility of consecutive sentences, and he alleges Judge Haskell's order is not supported by evidence. Judge Haskell's order, however, is adequately supported by evidence. Once again, "a trial court's findings of fact in a post-conviction proceeding will not be disturbed on appeal unless clearly erroneous under N.D.R.Civ.P. 52(a)." Broadwell, 2014 ND 6, ¶ 5, 841 N.W.2d 750 (internal citations and quotations omitted). "A finding is clearly erroneous if it is induced by an erroneous view

of the law, if it is not supported by *any* evidence, or if, although there is some evidence to support it, a reviewing court is left with a definite and firm conviction a mistake has been made." Id. (emphasis added) (internal citations and quotations omitted).

[¶18] Judge Haskell's order is adequately supported by evidence. Myers's attorney, Steve Balaban, testified at the post-conviction hearing. When asked if he explained to Myers the possibility of consecutive sentences, Mr. Balaban explained he usually does so unless there is a plea agreement. Post-Conviction Tr., p. 3, ll. 9-25. There was no such plea agreement. See Doc. ID #56 (Case No. 08-2012-CR-00335), p. 1, ll. 19-20. Later, Mr. Balaban also stated he advised Myers of the potential consequences of admitting the allegations. Post-Conviction Tr., p. 9, ll. 14-25. Mr. Balaban testified Myers "wanted the five years. He knew he was probably looking at five years, and he wanted them all to run concurrent. And he was not happy when the judge ran them consecutive." Post-Conviction Tr., p. 11, ll. 18-23.

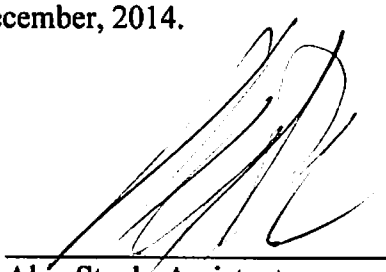
[¶19] Moreover, Judge Haskell explained to Myers the severity of the possible sentences at both sentencing hearings. "In *each of the felony files [and] underlying convictions*, the judge told Mr. Myers he's going to receive a full five year sentence if revoked regardless of the reason for that revocation." Post-Conviction Tr., p. 5, ll. 21-24 (emphasis added). Specifically, on April 24, 2012, Myers was told "if you're back on a probation revocation, it's going to be the full five years." Doc. ID #43 (Case No. 08-2011-CR-02739), p. 8, ll. 12-14. Then, on August 21, 2012, without any regard to, and completely separate from, Myers's previous five-year sentence, Myers was again told "if you violate, you're going to get the whole five years." Doc. ID #57 (Case No. 08-2012-CR-00335), p. 9, ll. 21-23. In short, Myers had two separate sentencing hearings, each

yielding a five-year suspended sentence. At each hearing, Myers was told if he did not comply with the terms of probation, he would be receiving the full five years. The denial of Myers's application for post-conviction relief is supported by ample evidence Myers indeed understood the possible sentences he could receive and is not clearly erroneous.

CONCLUSION

[¶20] Based on the above, the District Court's Order denying Appellant's application for post-conviction relief should be affirmed.

Respectfully submitted this 16th day of December, 2014.



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STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

Katie A. Wangler, being first duly sworn, depose and say that I am a United States citizen over 21 years old, and on the 16th day of December, 2014, I deposited in a sealed envelope a true copy of the attached:

1. Brief of Respondent-Appellee
2. Affidavit of Mailing

in the United States mail at Bismarck, North Dakota, postage prepaid, addressed to:

SAMUEL GERESZEK
ATTORNEY AT LAW
PO BOX 4
EAST GRAND FORKS, MN 56721

which address is the last known address of the addressee.

Katie A. Wangler

Subscribed and sworn to before me this 16th day of December, 2014.

Notary Public
Burleigh County, North Dakota

GWEN TARDIF
Notary Public
State of North Dakota
My Commission Expires June 11, 2019