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JANUARY 2, 2015
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	Supreme Court No.
Plaintiff/Appellee,	)	20140349
	)	
vs.	)	
	)	LaMoure County District No.
Brandon Glenn Trimble.,	)	23-09-K-00142
	)	
Defendant/Appellant.	)	

ON APPEAL FROM THE AMENDEDCRIMINAL JUDGMENT
ENTERED SEPTEMBER 4, 2014
FROM THE DISTRICT COURT
FOR THE SOUTHEAST JUDICIAL DISTRICT
LAMOURE COUNTY, NORTH DAKOTA
THE HONORABLE DANIEL NARUM, PRESIDING

BRIEF OF APPELLEE

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[¶ 1] **ARGUMENT**

[¶ 2] As mentioned in the Defendant's brief, this case involves a total of thirteen allegations within the Amended Petition for Revocation of Probation, (hereinafter referred to as "the Amended Petition") in file 23-09-K-0142. (Appellant's App. at 5-8). The district court found that the State had proved allegations numbered two through ten and twelve. (Tr. at 67, ln. 23 – Tr. at 70, ln. 22). The district court found that the State had not proved allegations one, eleven, and thirteen. (Tr. at 67, ln. 23 – Tr. at 70, ln. 22). As such, this appeal is based on allegations seven and eight in the Amended Petition, which the Defendant has denied. (Appellant's App. at 6).

[¶ 3] **The District Court's Finding of Fact Regarding the Use of the Internet Was Not Clearly Erroneous.**

[¶ 4] The eighth allegation of the Amended Petition is that the Defendant had used the internet in violation of his probation. The Appendix A to the Defendant's sentence states, "It is a violation of your probation for you to subscribe to any Internet service provider, by modem, LAN, DSL, or any other manner. You may not use another person's Internet or use Internet through any commercial venue until and unless approved in writing by your parole/probation officer." (Appellee's App. at 13). The district court found that the State had proved this allegation through the testimony of the officer. (Tr. at 68, ln. 22-23). Judge Narum made a series of comments when going through each allegation that all had the same theme: the defiance of logic. Regarding allegation eight, Judge Narum

stated "You are a registered sex offender. You are on supervised probation and, again, it defies logic in my view that you were not using the three different devices that were found in your room, one of them hooked to a television, to access the internet. I think it's more likely than not that you were accessing the internet. There was, based on the officer's testimony, wireless internet available and showing on at least one of the devices, and, again, there's no other explanation than that you were using these items that were in your personal space to access the internet. So I find allegation eight has been proven." (Tr. at 68, ln. 24 – Tr. at 69, ln. 9).

[¶ 5] The Court has held that "A finding of fact is clearly erroneous if […] there is no evidence to support it, or this Court is convinced, on the basis of the entire record, that a mistake has been made." State v. Wetzel, 2011 ND 218, ¶ 5, 806 N.W.2d 193. The Defendant has argued that this finding of fact was clearly erroneous because there was no evidence to support it. The Court held in State v. Toepke, 1992 ND 115, 485 N.W.2d 792, that "As an appellate court, we do not determine witness credibility, but recognize that credibility is to be determined by the trial court. Weiss v. Anderson, 341 N.W.2d 367, 371 (N.D. 1983). On review, we do not substitute our judgment for the trial court when there is testimony to support its findings. State v. Saavedra, 406 N.W.2d at 669. The trial court had the opportunity to observe the demeanor and presence of all the witnesses who testified. That court was in the best position to determine the witnesses' credibility."

[¶ 6] In this case, Judge Narum was able to determine the credibility between the conflicting testimony that came from the Defendant and Mr. Hassebrock. Mr. Hassebrock testified that "The biggest concern was I did find two tablets with internet capability and from looking through his Xbox, which was plugged in and connected to his tv. All he had to do was turn it on. I saw various internet applications that had been downloaded on the Xbox 360." (Tr. at 13, ln. 5-10). Mr. Hassebrock also testified that there were two tablets in the Defendant's room found during the search. Mr. Hassebrock stated these were of concern because (1) they appeared to have internet access, (2) they had an internet browser application, (3) they had a Facebook application on there, and (4) they had a Minecraft application on there. (Tr. at 17, ln. 3, Tr. at 17, ln. 7-9). Mr. Hassebrock explained the concern by stating "Minecraft. The reason I mention that is I am not aware of any tablets that come pre-loaded with Minecraft as an application, so my assumption would be that it would have had to have been downloaded on-line." (Tr. at 17, ln. 12-15). The State inquired as to whether the Defendant had obtained permission to access the internet and Mr. Hassebrock stated the Defendant had not. (Tr. at 17, ln. 21).

[¶ 7] The Defendant later testified that the electronic tablets were not his. (Tr. at 53, ln. 15-17). When the Defendant was asked by his attorney, "And there's an Xbox 360 that was – there was testimony that it was hooked up and all set to go. Is that true?" (Tr. at 54, ln. 15-17). The Defendant admitted this and stated "To

my knowledge, yes." The Defendant then stated that he didn't use it to be on the internet, "it just sat there." (Tr. at 54, ln. 20).

[¶ 8] In applying the preponderance of the evidence standard, as well as determining the credibility of both witnesses testimony, Judge Narum made the correct factual determination that it was more likely than not, that the Defendant had in fact violated condition number 36 of his probation, as alleged in allegation eight of the Amended Petition. The district court's finding of fact regarding the use of the internet was not clearly erroneous.

[¶ 9] **The District Court's Finding of Fact Regarding the Trips to Fargo Was Not Clearly Erroneous.**

[¶ 10] The seventh allegation of the Amended Petition is that the Defendant had stayed approximately twelve nights in Fargo without permission, in violation of his probation. The Appendix A to the Defendant's sentence states, "You may only reside at a place of residence approved by your parole/probation officer. You may not move from your place of residence or sleep elsewhere overnight without your parole/probation officer's knowledge and permission and those with whom you reside must know that you are a sex offender." (Appellee's App. at 13). The district court found that the State had proved this allegation through the testimony of the officer. (Tr. at 68, ln. 19-20).

[¶ 11] Regarding allegation seven, Judge Narum stated "Allegation 7, at least in my view, allegation 7 has been proven by the testimony of the probation officer." (Tr. at 68, ln. 19-20).

[¶ 12] The standard as held in Wetzel, again, applies to this analysis, "A finding of fact is clearly erroneous if […] there is no evidence to support it, or this Court is convinced, on the basis of the entire record, that a mistake has been made." State v. Wetzel, 2011 ND 218, ¶ 5, 806 N.W.2d 193. The Defendant has argued that this finding of fact was clearly erroneous because there was insufficient evidence to support it. The Court held in State v. Toepke, 1992 ND 115, 485 N.W.2d 792, that "As an appellate court, we do not determine witness credibility, but recognize that credibility is to be determined by the trial court. Weiss v. Anderson, 341 N.W.2d 367, 371 (N.D. 1983). On review, we do not substitute our judgment for the trial court when there is testimony to support its findings. State v. Saavedra, 406 N.W.2d at 669. The trial court had the opportunity to observe the demeanor and presence of all the witnesses who testified. That court was in the best position to determine the witnesses' credibility."

[¶ 13] In this case, Judge Narum was, again, able to determine the credibility between the conflicting testimony that came from the Defendant and Mr. Hassebrock. When asked how many nights the Defendant had stayed in Fargo, Mr. Hassebrock testified that "The admission form he admits to 'been going to Fargo a couple three weekends over the past few months without my P.O. permission.' We talked more. He did say that he was there the previous weekend. I estimated about 12 nights." (Tr. at 12, ln. 5-8). The State then inquired as to whether the Defendant had agreed with that assessment and Mr. Hassebrock stated the Defendant had agreed. (Tr. at 12, ln. 9-10).

[¶ 14] The Defendant later testified that he had gone to Fargo but did not stay overnight. (Tr. at 53, ln. 19). When the Defendant was asked by his attorney if he wrote and signed the admission form to this allegation, the Defendant agreed and noted, "It was one of the things I was – because the probation officer to me is I have to write things down. I have to do what my PO says and I didn't – I'm really don't know. But if it says it, yes." (Tr. at 53, ln. 15). The State argues that this is an admission. It appears that the Defendant initially denied this allegation on the stand and then upon further inquiry, admits to it by saying "But if it says it, yes." (Tr. at 53, ln. 15). The admission form that was admitted into evidence is also an admission. (Appellant's App. at 17). The Defendant wrote that he has "…been going to Fargo… without my PO permission and stay at unprove address." (Appellant's App. at 17).

[¶ 15] In this case, it was up to Judge Narum to determine what "stay at unprove address" meant on the Defendant's admission form, the credibility of the Defendant's testimony, the credibility of the probation officer's testimony, and whether he believed that the Defendant had actually stayed overnight in Fargo or just traveled there for the day. Again, as held in State v. Toepke, 1992 ND 115, 485 N.W.2d 792, "As an appellate court, we do not determine witness credibility, but recognize that credibility is to be determined by the trial court." Weiss v. Anderson, 341 N.W.2d 367, 371 (N.D. 1983). Here, Judge Narum determined the probation officer provided more credible testimony than the defendant.

[¶ 16] In applying the preponderance of the evidence standard, as well as determining the credibility of both witnesses testimony, Judge Narum made the correct factual determination that it was more likely than not, that the Defendant had in fact violated condition number 31 of his probation, as alleged in allegation seven of the Amended Petition. The district court's finding of fact regarding the use of the internet was not clearly erroneous.

[¶ 17] **The Defendant's Sentence Was Not Excessive.**

[¶ 18] The defendant's sentence is not excessive based on the punishment allowed by law. The defendant was convicted of one class A felony. The maximum penalty for a class A felony is twenty years' imprisonment, a fine of $10,000, or both. N.D.C.C. § 12.1-32-01(2). Of this possible twenty years, the defendant has served three years, has seventeen years suspended, and was sentenced to eight months on this revocation, with credit for one day served. When broken down, the Defendant received eight months of the potential two hundred and four months available for sentencing. The Defendant was sentenced to less than 4% of the maximum. This is not excessive.

[¶ 19] The district court is afforded wide discretion in sentencing and its decision will only be vacated on appeal if it acted outside the statutory limits or substantially relied on an impermissible factor. State v. Henes, 2009 ND 42, ¶ 6, 763 N.W.2d 502. The district court may make reasonable inferences based upon the evidence before it and those inferences may be a factor in sentencing. State v.

Hoverson, 2006 ND 49, ¶ 39, 710 N.W.2d 890. It is also important to note that, as held in State v. Jacobsen, the Court held "Because the State need show only a single violation to sustain revocation of probation, it is unnecessary to address Jacobsen's challenges to the court's findings of other violations." 2008 ND 52, ¶ 15, 746 N.W.2d 405. The holding in Jacobsen is very analogous to this case. Here, the defendant admitted to eight of the ten allegations in the Amended Petition. As such, the Court would have been more than able to revoke the defendant's probation on those eight allegations alone. Even in the rare event that the Court finds that the district court judge made two findings of fact that were clearly erroneous, which the State clearly does not agree with, but in the rare event that was found, the revocation of probation would still be sufficient on the eight admitted allegations.

[¶ 20] The defendant's sentence is not overly severe or unreasonable. The cornerstones of punishment in the American criminal justice are retribution, deterrence, incapacitation, and rehabilitation. Judge Narum mentioned during the explanation of his sentence that "Frankly, I think 8 months is, if not reasonable, it's light." (Tr. at 76, ln. 25 – Tr. at 77, ln. 1). The State strongly agrees.

[¶ 21] **CONCLUSION**

[¶ 22] There was sufficient evidence to support the findings of fact on allegations seven and eight. With all reasonable inferences granted to the district court judge, a reasonable fact finder could determine that the defendant had

violated those terms of his probation, as alleged in allegations seven and eight of the Amended Petition.

[¶ 23] The sentence imposed by the district court was not excessive or based on clearly erroneous findings. The defendant faced a maximum sentence of seventeen years for the remainder left on his original sentence. He received a sentence of eight months less credit for one day served. The sentencing judge determined the seriousness of the defendant's actions based on fact that the defendant habitually violated the terms of his probation over a period of two years. It is well within reason to note that the defendant has not taken his probation seriously. The defendant's claim that his sentence was based on clearly erroneous findings of fact is incorrect and is not persuasive.

[¶ 24] The State respectfully prays that the Court affirm the findings of fact on allegations seven and eight, and sentence in this matter.

[¶ 25] Dated this 2nd day of January, 2015.

[¶ 26] Respectfully submitted,

/s/ Tonya Duffy

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CERTIFICATE OF SERVICE

I, Tonya Duffy, do hereby certify that on January 2, 2015, I served the following documents:

State v. Trimble, Brief of Appellee; and
Certificate of Service

Were served, via email, upon the following individuals:

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Dated this 2nd day of January, 2015.

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