

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

State of North Dakota,

Plaintiff- Appellee,

vs.

Brandon Glenn Trimble,

Defendant- Appellant.

SUPREME COURT NO. 20140349

Criminal No. 23-09-K-00142

ON APPEAL FROM THE AMENDED CRIMINAL
JUDGMENT, ENTERED SEPTEMBER 4, 2014
LAMOURE COUNTY DISTRICT COURT
SOUTHEAST JUDICIAL DISTRICT
STATE OF NORTH DAKOTA
THE HONORABLE DANIEL NARUM, PRESIDING

APPELLANT'S BRIEF

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[¶1]

STATEMENT OF THE ISSUES

- I. Whether the district court erred by finding that Brandon Trimble violated his probation by accessing the internet.
- II. Whether the district court erred by finding that Brandon Trimble violated his probation by moving or residing overnight without his probation officer's knowledge.
- III. Whether a remand for resentencing is the appropriate remedy.

STATEMENT OF THE CASE

[¶2] This is an appeal of a Criminal Judgment entered after a probation revocation hearing. On June 25, 2014, the State of North Dakota filed a Petition for Revocation of Probation regarding Brandon Trimble (hereinafter referred to as “Mr. Trimble”), in file 23-09-K-0142. Before the probation revocation hearing, the State filed an Amended Petition for Revocation of Probation (hereinafter referred to as “the Amended Petition”), with a total of thirteen allegations. (Appellant’s App. at 5 – 8). On September 4, 2014, a probation revocation hearing was held. At the conclusion of the hearing, the district court found that the State had proved ten of the thirteen allegations contained in the petition and revoked and resented Mr. Trimble to eight months incarceration and imposed an additional five years of unsupervised probation. (Tr. at 67, ln. 23 – 70, ln. 22, 77, ln. 3 – 7). Mr. Trimble appeals from the sentenced imposed on September 4, 2014.

STATEMENT OF THE FACTS

[¶3] On September 21, 2010, Mr. Trimble pled guilty to the charge of Gross Sexual Imposition, a violation of N.D.C.C. § 12.1-20-03. As part of his sentence, Mr. Trimble was placed on supervised probation subject to certain conditions, which were included in the Appendix A to his Criminal Judgment. (Appellant’s App. At 9 – 15).

[¶4] Eric Hassebrock (hereinafter referred to as “Mr. Hassebrock”) is Mr. Trimble’s probation officer (Tr. at 3, ln. 3 – 10). On May 13, 2014, Mr. Hassebrock conducted a search of Mr. Trimble’s home. (Tr. at 13, ln. 2 – 3). During the search, Mr. Hassebrock found two tablets with internet capabilities and an X-box 360 video game system within Mr. Trimble’s bedroom. (Tr. at 13, ln. 4 – 10). Mr. Trimble specifically denied that those electronic devices were his. (Tr. at 33, ln. 18). Mr. Hassebrock could not

determine whether Mr. Trimble had ever used the devices to access the internet. (Tr. at 34, ln. 22 – 25, Tr. at 35, ln. 1).

[¶5] At some unidentified point prior to the filing of the Amended Petition, Mr. Hassebrock “had received reports” that Mr. Trimble was spending time in Fargo, without Mr. Hassebrock’s permission. (Tr. at 10, ln. 23 – 24). On August 26, 2014, Mr. Hassebrock spoke to Mr. Trimble regarding trips that Mr. Trimble had made to Fargo. (Tr. at 10, ln. 23 – 12, ln. 10). During their conversation, Mr. Trimble signed a form stating, “I been going to Fargo a couple 3 weekends over the past few months without my PO permission and stay at unprove address” [sic]. (Appellant’s App. at 18, Tr. at 12, ln 5-8). When Mr. Trimble signed the form, he did not indicate that he had slept overnight at Fargo, but merely that he had went to Fargo. (Tr. at 53, ln 16 – 19).

[¶6] On July 10, 2014 the State filed an Amended Petition for Revocation of Probation, which contained thirteen allegations relating to events which occurred from 2012 to 2014. (Appellant’s App. at 5 – 8). Of importance for this appeal are the allegations numbered seven and eight. Allegation number seven states, “The Defendant has violated condition #31 of the Appendix A in that the Defendant spent approximately twelve (12) nights in Fargo, the most recent being August 23 and/or 24, 2013, without his probation officer’s knowledge or permission.” (Appellant’s App. at 6). Condition thirty-one of 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’s officer knowledge and permission [...]”. (Appellant’s App. at 13). Allegation number eight states: “The Defendant violated condition # 36 of the appendix A in that the

Defendant has been accessing the internet.” (Appellant’s App. at 6). Condition thirty-six of 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.” (Appellant’s App. at 13).

[¶7] On September 4, 2014, the Honorable Judge Daniel D. Narum presided over a hearing on the Amended Petition. During the course of the hearing, Mr. Hassebrock and Mr. Trimble testified. Mr. Trimble admitted some of the allegations, while denying others. Mr. Trimble specifically denied allegations numbered seven and eight. (Tr. at 52, ln 22 – 25, 54, ln. 19 – 20). At the conclusion of the hearing, Judge Narum found the State had proved some of the allegations of the petition and had failed to prove others. (Tr. at 67, ln. 23 – 70, ln 22). Judge Narum found the State had proved allegations numbered 7 and 8. (Tr. at 68, ln. 19- 69, ln. 9). Based on these findings, the Court revoked and resentenced Mr. Trimble to eight months of incarceration and imposed an additional five years of unsupervised probation. (Tr. at 67, ln. 23 – 77, ln. 7).

LAW AND ARGUMENT

[¶8] This is an appeal of a Criminal Judgment entered after a probation revocation hearing. This Court has jurisdiction over this appeal under N.D. Const. art. VI § 6, N.D.C.C. § 29-28-03 and N.D.C.C. § 29-28-06. A criminal defendant’s statutory right to appeal includes the right to appeal after a probation revocation hearing. State v. Causer, 2004 ND 75, ¶ 23, 678 N.W.2d 552.

Standard of Review

[¶9] The North Dakota Supreme Court reviews a revocation of probation under a two-step analysis. Causer at ¶ 30, State v. Jacobsen, 2008 ND 52, ¶ 8, 746 N.W.2d 405. First, the Court will review the district court’s factual findings regarding the probation violation under the clearly erroneous standard. Jacobsen at ¶ 8. “A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, 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. In probation revocation proceedings, the State must prove the defendant violated the conditions of probation by a preponderance of the evidence. See id. at ¶ 8. If a violation is proven, the court will then perform the second step of the analysis, which is to review the trial court’s decision to revoke probation under the abuse of discretion standard. State v. Jacobsen, 2008 ND 52, ¶ 8, 746 N.W.2d 405.

I. THE DISTRICT COURT’S FINDING OF FACT REGARDING THE USE OF THE INTERNET WAS CLEARLY ERRONEOUS.

[¶10] At the outset, it must be noted that Mr. Trimble’s claim of error is limited to two of the factual findings made during the probation revocation hearing. At the probation revocation hearing, the district court made findings of fact regarding all thirteen of the allegations contained in the Amended Petition for Revocation of Probation. At the probation revocation hearing, the district court found that the State had proved allegations numbered two through ten and twelve and had not proved allegations numbered one, eleven and thirteen. (Tr. at 67, ln. 23 – 70, ln 22). To his credit, Mr. Trimble freely

admitted the majority of those allegations. However, Mr. Trimble denied allegations seven and eight. (Tr. at 52, ln 22 – 25, 54, ln. 19 – 20). For purposes of this appeal, Mr. Trimble’s arguments only relate to these specific allegations numbered seven and eight in the Amended Petition.

[¶11] The eighth allegation of the Amended Petition is that Mr. Trimble had used the internet in violation of his probation. The District Court found that the State had proved this allegation. This finding of fact was clearly erroneous. “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 only evidence that the Court heard regarding the use of the internet came from Mr. Hassebrock and Mr. Trimble. Mr. Hassebrock testified that he conducted a probationary search of Mr. Trimble’s bedroom and found two tablets with internet capabilities and an X-box 360 video game system within Mr. Trimble’s bedroom. (Tr. at 13, ln. 4 – 10). Mr. Hassebrock admitted that he could not prove the Mr. Trimble had actually used the devices to access the internet. (Tr. at 34, ln. 22 – 25, Tr. at 35, ln. 1). Mr. Trimble specifically denied that those electronic devices were his. (Tr. at 33, ln. 18). Thus, the only evidence that Mr. Trimble had used the devices was that they were found in his bedroom. (Tr. at 34). This was insufficient evidence to support the district court’s factual finding. The district court’s finding that Mr. Trimble violated his probation by accessing the internet was clearly erroneous.

[¶12] The district court heard evidence that Mr. Trimble possessed certain electronic devices that may have had internet access. However, this was not prohibited by the terms of his probation. The conditions of probation are strictly construed in favor of the

offender. State v. McAvoy, 2007 ND 178, ¶ 11, 741 N.W.2d 198. The Appendix A to Mr. Trimble’s sentences 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.” (Appellant’s App. at 13). This is a prohibition of an action, specifically, the action of accessing the internet. There is no prohibition against possessing electronic devices that have internet access. Because the State chose to write the probation condition that way, the State was then required to prove that action, not possession of an item which made the action possible. However, the only evidence that the State presented to the district court was possession of an electronic device which could access the internet. This is not evidence of use of the internet. The State failed to prove that Mr. Trimble accessed the internet. As a result, the district court’s finding of fact was clearly erroneous.

[¶13] The State may argue that Mr. Trimble possession of these devices led the district court to the inference that they were used by him. Such an inference was not warranted on the facts and would be impermissible. During the probation revocation hearing, the State had the burden of proving the violation by a preponderance of the evidence. Wetzel at ¶ 8. There is a stark difference between the possession of a device which could access the internet and the action of actually accessing the internet. Yet, the only evidence the court heard related to possession of these devices, not actual use of the internet. In fact, Mr. Hassebrock admitted during the hearing that he could not prove Mr. Trimble used the internet. (Tr. at 34, ln. 22 – 25, Tr. at 35, ln. 1). As a result, the finding that Mr. Trimble used the internet, and thereby violated his probation, was clearly erroneous.

II. THE DISTRICT COURT'S FINDING OF FACT REGARDING THE TRIPS TO FARGO WAS CLEARLY ERRONEOUS.

[¶14] The seventh allegation of the Amended Petition was that Mr. Trimble spent approximately twelve nights in Fargo, without his probation officer's permission. (Appellant's App. at 6). The district court also found that the State had proved this allegation. This finding was clearly erroneous, as there was insufficient evidence to prove this violation.

[¶15] Mr. Trimble's probation stated, "You may not move from your place of residence or sleep elsewhere overnight without your parole/probation's officer knowledge and permission and those with whom you reside must know that you are a sex offender." (Appellant's App. at 13). As mentioned, the conditions of probation are strictly construed in favor of the offender. State v. McAvoy, 2007 ND 178, ¶ 11, 741 N.W.2d 198. During the probation violation hearing, the district court heard evidence that Mr. Hassebrock had received "reports that [Mr. Trimble] had been spending multiple nights in Fargo without my knowledge or permission". (Tr. at 10, ln, 23 – 24). The district court also received into evidence a statement, written by Mr. Trimble, which states, "I been going to Fargo a couple 3 weekends over the past few months without my PO permission and stay at unprove address" [sic] (Appellant's App. at 18, Tr. at 12, ln 5-8). When Mr. Trimble signed the form, he did not indicate that he had stayed overnight at Fargo, but merely that he had went to Fargo. (Tr. at 53, ln 16 – 19).

[¶16] Mr. Hassebrock's single statement regarding "reports" was insufficient to find the State had proved this allegation. There was no discussion what these reports were, who they were from or any indication as to their trustworthiness. There was no other evidence

that would have justified relying upon these reports. Instead, it seems that Mr. Hassebrock and the district court relied upon Mr. Trimble's statement to prove this allegation.

[¶17] Mr. Trimble's statement was insufficient to find that the State had proved this allegation. Mr. Trimble's probation did not prohibit him from traveling to Fargo (or anywhere else for that matter), but rather, it prohibited him from moving or sleeping overnight without his probation officer's permission. Mr. Trimble's statement was that he had gone to Fargo a number of times without his probation's officer's permission. His statement did not say that he had moved to Fargo. His statement did not say that he had slept overnight in Fargo. In fact, at the probation violation hearing, Mr. Trimble explained that he had gone to Fargo, but had not stayed overnight in Fargo. (Tr. at 52, ln. 22 – 25, Tr. at 52, ln. 1 – 2). There was no evidence offered that Mr. Trimble had moved to Fargo or had slept overnight. As a result, the district court's finding of fact that Mr. Trimble had stayed overnight in Fargo was clearly erroneous.

III. A REMAND FOR RESENTENCING IS APPROPRIATE.

[¶18] The district court erred by finding that Mr. Trimble violated his probation with regards to the allegations numbered seven and eight in the Amended Petition. Now, the question becomes what is the most appropriate remedy. As stated, this Court reviews a probation revocation under a two-step analysis. State v. Jacobsen, 2008 ND 52, ¶ 8, 746 N.W.2d 405. The second step of that analysis is to review the trial court's decision to revoke probation under the abuse of discretion standard. See id. At the probation violation hearing, Mr. Trimble admitted some allegations, which would have allowed for

the revocation of his probation. The Court considered those admitted allegations, along with the allegations numbered seven and eight, which the court improperly considered. (Tr. at 68, ln. 19- 69, ln. 9). It was an abuse of discretion to consider allegations seven and eight, as they were not supported by the evidence. In addition, while the district court may have still revoked his probation for violations that Mr. Trimble admitted, it is unknown what punishment the district court would have given Mr. Trimble, had the Court not improperly considered the allegations numbered seven and eight. As a result, the only appropriate remedy is to remand the case for resentencing on those allegations which were proved at the prior probation revocation hearing, without regard to the allegations numbered seven and eight in the Amended Petition.

CONCLUSION

[¶19] For the foregoing reasons, the case should be remanded for resentencing on the probation violation, with instructions to disregard the allegations numbered seven and eight in the Amended Petition.

Dated this 3rd day of December, 2014.

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State of North Dakota, Plaintiff- Appellee, vs. Brandon Glenn Trimble, Defendant- Appellant.	SUPREME COURT NO. 20140349 Criminal No. 23-09-K-00142
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[¶1] I hereby certify that on the 3rd day of December, 2014, the following documents:

1. Appellant's Brief;
2. Appellant's Appendix; and
3. Certificate of Service

were served, via email, upon the following individual:

Email: kimrader@radermacherlaw.com
Kimberly Joy Radermacher
27 Center Avenue
PO Box 597
LaMoure, ND 58458

and were served, via regular mail, to the Defendant, as follows:

Brandon Glenn Trimble
c/o Barnes County Correctional Facility
491 2nd Avenue NW
Valley City, ND 58072

Dated this 3rd day of December, 2014.



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Defendant- Appellant.

SUPREME COURT NO. 20140349

Criminal No. 23-09-K-00142

[¶1] I hereby certify that on the 5th day of December, 2014, the following documents:

1. Appellant's Appendix Page 18; and
2. Certificate of Service

were served, via email, upon the following individual:

Email: kimrader@radermacherlaw.com
Kimberly Joy Radermacher
27 Center Avenue
PO Box 597
LaMoure, ND 58458

and were served, via regular mail, to the Defendant, as follows:

Brandon Glenn Trimble
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491 2nd Avenue NW
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Dated this 5th day of December, 2014.



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