

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

State of North Dakota,)	
)	Supreme Court No. 20160267
Plaintiff/Appellee,)	20160268
)	
v.)	Grand Forks Co. No. 18-07-K-00769
)	
)	18-07-K-00838
Andrew Rodger Moreland,)	
)	
)	
Defendant/Appellant.)	

APPEAL FROM THE ORDER DENYING MOTION TO CORRECT ILLEGAL
SENTENCE ENTERED JUNE 10, 2016, BY THE DISTRICT COURT FOR THE
NORTHEAST CENTRAL JUDICIAL DISTRICT THE HONORABLE JON J. JENSEN,
PRESIDING

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES

[¶1] The trial court erred in denying Andrew Rodger Moreland's Motion to Correct Illegal Sentence.

STATEMENT OF THE CASE

[¶2] This is an appeal from the denial of defendant's motion to correct illegal sentence.

[¶3] On March 23, 2007, in Grand Forks County Court No. 07-K-0769, Andrew Rodger Moreland ("Moreland") was charged with Count I: Possession of Methamphetamine, and Count II: Possession of Drug Paraphernalia (methamphetamine), both Class C felonies. On April 5, 2007, in Grand Forks County Court No. 07-K-0838, Moreland was charged with Count I: Possession of Methamphetamine with Intent to Deliver, a Class A felony; Count II: Possession of Drug Paraphernalia (methamphetamine), a Class C felony; Count III: Ingesting a Controlled Substance (methamphetamine), a Class A misdemeanor; Count IV: Possession of Drug Paraphernalia (marijuana), a Class A misdemeanor; and Count V: Possession of marijuana, less than ½ ounce, a Class B misdemeanor.

[¶4] On July 10, 2007, Moreland pled guilty to all counts. After a presentence investigation, a sentencing hearing was held on September 26, 2007, at which time the Judge did not accept the plea agreement of the parties and the matter was continued. (See Sentencing Hearing transcript, A. 4, D. 59 and A. 11, D. 60, respectively). Eventually, Moreland was sentenced on February 14, 2008 (Sentencing Hearing transcript, A. 4, D. 61 and A. 12, D. 62, respectively). Moreland was sentenced in Grand Forks County Court No. 07-K-0769 and Grand Forks County Court No. 07-K-0838. Criminal Judgments were filed in both cases on February 14, 2008. (A. 3, D. 30, A. 16,17 and A. 10, D. 26, A. 18,20, respectively).

[¶5] On these files, Moreland was sentenced as follows:

Grand Forks County Court No. 18-07-K-00769:

Count I: Possession of Methamphetamine, to a term of five (5) years imprisonment with a term of four (4) years suspended, with a period of five (5) years probation upon release from imprisonment.

Count II: Possession of Drug Paraphernalia, to a term of five (5) years imprisonment with a term of four (4) years suspended, with a period of five (5) years probation upon release from imprisonment.

(These sentences were concurrent to each other but consecutive to sentences in other court files which are not part of this appeal).

Grand Forks County Court No. 18-07-K-00838:

Ten (10) years imprisonment with a term of nine (9) years suspended, with a period of five (5) years probation upon release from imprisonment.

Count II: Possession of Drug Paraphernalia, to a term of five (5) years imprisonment with a term of four (4) years suspended, with a period of five (5) years probation upon release from imprisonment.

(These sentences in 07-K-838 were concurrent to each other, and consecutive to Court No. 18-07-K-00769. Court files 07-K-769 and 07-K-0838 were consecutive to sentences in Grand Forks County Court No. 06-K-2289 and 06-K-2290, which were sentenced on the same date but are not part of this appeal).

(Sentencing Transcript, A. 4, D. 61 and A. 12, D. 62, respectively).

In Grand Forks County Court No. 06-K-2289 and 06-K-2290, which are not part of this appeal, Moreland had also entered guilty pleas and was sentenced to serve the maximum terms of imprisonment permitted.

[¶6] On March 2, 2016, Moreland filed a motion and brief in support of motion to correct illegal sentence in both files. (A. 4, D. 34-35, A. 22 and A. 11, D. 35-36 A. 22, respectively). The State's Response in Opposition to Defendant's Motion to Correct Illegal Sentence was filed March 15, 2016. (A. 11, D. 53, A. 30). A hearing on the Motion to Correct Illegal Sentence was held June 8, 2016 (See Motion Hearing

Transcript (“T”). The District Court Order Denying Motion to Correct Illegal Sentence was filed June 10, 2016. (A. 5, D. 69, A. 32 and A. 12, D. 67, A. 32, respectively).

[¶7] On July 21, 2016, Moreland misfiled an Appeal of the District Court Order (A. 5, D. 71, A. 35, and A. 12, D. 69, respectively). The Supreme Court’s Order Granting Extension of Time to File Notice of Appeal was filed August 29, 2016. (A. 5, D. 86 and A. 12, D. 84, respectively).

FACTS OF CASE

[¶8] On or about July 27, 2006, Moreland was arrested for possessing 19 small bags of methamphetamine and a glass smoking device with residue, with intent to use it for the purpose of ingesting or inhaling methamphetamine, in a hotel room in Grand Forks, North Dakota (Grand Forks County Court No. 07-K-0769). On or about August 5, 2007, Moreland was arrested for possessing four (4) baggies of methamphetamine, which he had in his pants pockets for the purpose of delivering at a Grand Forks, ND address and for possessing a spoon, four syringes, a pen tube, which were all used for ingestion of methamphetamine. At that time, Moreland was also arrested for ingesting methamphetamine, possessing two marijuana pipes, a silver metal one hitter, a multi-colored glass bowl with marijuana residue, silver blue pipe with marijuana residue, a yellow glass pipe with marijuana residue, and a black pipe with marijuana residue, which all could be used for ingestion of marijuana. Moreland was also arrested for possessing less than one-half ounce of marijuana. (Change of Plea (“COP”) transcript p. 9, l. 16 – p. 14, l. 10).

[¶9] On March 28, 2007, in Grand Forks County Court No. 18-07-K-00769, Moreland was charged with Count I: Possession of methamphetamine and Count II: Possession of

Drug Paraphernalia, both class C felonies. On April 5, 2007, in Grand Forks County Court No. 18-07-K-00838, Moreland was charged with Count I: Possession of methamphetamine with intent to deliver, a class A felony and, Count II: Possession of Drug Paraphernalia (methamphetamine), a Class C felony.

[¶10] On July 10, 2007, Moreland pled guilty to all four counts. (See Change of Plea (“COP” transcript, A. 4, D. 58, and A. 11, D. 59, respectively). Moreland pled guilty to all counts. (COP p. 9, l. 16 – p. 14, l. 22).

[¶11] On these files, Moreland was sentenced as follows:

Grand Forks County Court No. 18-07-K-00769:

Count I: Possession of Methamphetamine, to a term of five (5) years imprisonment with a term of four (4) years suspended, a with a period of five (5) years probation upon release from imprisonment.

Count II: Possession of Drug Paraphernalia, to a term of five (5) years imprisonment with a term of four (4) years suspended, with a period of five (5) years probation upon release from imprisonment.

(These sentences were concurrent to each other but consecutive to sentences in other court files which are not part of this appeal).

Grand Forks County Court No. 18-07-K-00838:

years imprisonment with a term of nine (9) years suspended, a with a period of five (5) years probation upon release from imprisonment.

Count II: Possession of Drug Paraphernalia, to a term of five (5) years imprisonment with a term of four (4) years suspended, with a period of five (5) years probation upon release from imprisonment.

(These sentences were concurrent to each other, consecutive to Grand Forks County Court No. 18-07-K-00769, and consecutive to sentences in other court files which are not part of this appeal).

(Sentencing Transcript, A. 4, D. 61 and A. 12, D. 62, respectively).

Moreland had also entered guilty pleas on seven counts (combined) and was sentenced in

Grand Forks County Court No. 06-K-2289 and 06-K-2290. On six counts he received maximum sentences of five (5) years and for the seventh a ten (10) year maximum sentence, with the Department of Corrections and Rehabilitation. As maximum sentences, no probation was ordered. The sentences on appeal, which provided a period of probation, ran consecutive to these sentences (06-K-2289 and 06-K-2290). Sentencing on all files was held the same day with the same judge.

[¶12] Moreland filed a motion to correct illegal sentence(s). (A. 4, D. 34-35 and A. 11, D. 35-36, respectively). A hearing on the motion was held and the District Court denied Moreland's motion. Moreland filed his appeal of the District Court's Order Denying Motion to Correct Illegal Sentence(s).

LAW AND ARGUMENT

[¶13] Jurisdiction. Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provisions, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06, N.D.C.C., which provides as follows:

“An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03. An appeal may be taken by the defendant from:

1. A verdict of guilty;
2. A final judgment of conviction;
3. An order refusing a motion in arrest of judgment;
4. An order denying a motion for new trial; or
5. An order made after judgment affecting any substantial right of the party.”

N.D.C.C. § 29-28-06.

[¶14] N.D.R.Crim.P. Rule 35: Correcting or Reducing a Sentence provides:

- (a) Correction of Sentence.

(1) Illegal Sentence. The sentencing court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided for reduction of sentence in Rule 35(b)(1).

(2) Clear Error. After giving any notice it considers appropriate, the sentencing court may correct a sentence that resulted from arithmetical, technical, or other clear error.

[¶15] The trial court erred in denying Moreland's Motion to Correct Illegal Sentence.

[¶16] Moreland filed a Motion and Brief in Support of Motion to Correct Illegal Sentence(s). A motion hearing was held and the trial court denied his motion.

[¶17] As argued in his brief, Moreland asserts that the sentence he received in Court Files 07-K-769 and 07-K-838, (Count 1 and 2 only) was an illegal sentence. In sentencing an individual, a District Court shall consider the factors set out in N.D.C.C. § 12.1-32-04 which provides:

Factors to be considered in sentencing decision

The following factors, or the converse thereof where appropriate, while not controlling the discretion of the court, shall be accorded weight in making determinations regarding the desirability of sentencing an offender to imprisonment:

1. The defendant's criminal conduct neither caused nor threatened serious harm to another person or his property.
2. The defendant did not plan or expect that his criminal conduct would cause or threaten serious harm to another person or his property.
3. The defendant acted under strong provocation.
4. There were substantial grounds which, though insufficient to establish a legal defense, tend to excuse or justify the defendant's conduct.
5. The victim of the defendant's conduct induced or facilitated its commission.
6. The defendant has made or will make restitution or reparation to the victim of his conduct for the damage or injury which was sustained.
7. The defendant has no history of prior delinquency or criminal activity, or has led a law-abiding life for a substantial period of time before the commission of the present offense.
8. The defendant's conduct was the result of circumstances unlikely to recur.

9. The character, history, and attitudes of the defendant indicate that he is unlikely to commit another crime.

10. The defendant is particularly likely to respond affirmatively to probationary treatment.

11. The imprisonment of the defendant would entail undue hardship to himself or his dependents.

12. The defendant is elderly or in poor health.

13. The defendant did not abuse a public position of responsibility or trust.

14. The defendant cooperated with law enforcement authorities by bringing other offenders to justice, or otherwise cooperated.

Nothing herein shall be deemed to require explicit reference to these factors in a presentence report or by the court at sentencing.

N.D.C.C. § 12.1-32-04

[¶18] Moreland argues that because he was sentenced to the maximum sentence in Grand Forks Court No. 06-K-2289 and 06-K-2290, the sentences imposed in the matters on appeal were illegal as they were consecutive to the maximum sentences and imposed a probationary period to follow the period of incarceration.

[¶19] In his brief to correct an illegal sentence, Moreland points out that a sentence of probation is designed to offer young or first-time unhardened offenders an opportunity to rehabilitate themselves without institutional confinement and to help themselves avoid further crimes and live a productive life. Moreland argues that, when sentencing Moreland in Court File Nos. 06-K-2289 and 06-K-2290, because the court considered the sentencing factors set out in N.D.C.C. § 12.1-32-04, and sentenced Moreland to the maximum sentences with no probation, the district court judge had determined Moreland was a hardened criminal.

[¶20] Moreland argues that, having already determined Moreland was a hardened criminal, the consecutive sentence imposed in Court Files 07-K-769 and 07-K-838 (Cts. 1 and 2), are illegal in that they provided periods of probation following incarceration.

Moreland argues that he should have received either the maximum sentence of imprisonment on all four counts or that he should not have been determined a hardened criminal in the 06-K-2289 and 2290.

[¶21] Moreland did not appeal the sentences in 06-K-2289 and 06-K-2290, which were maximum sentences. When a person is sentenced to the maximum term of imprisonment, he/she cannot then be placed on a period of probation. Because Moreland was imprisoned for the maximum time permitted in 06-K-2289 and 06-K-2290, he argues that the sentence to probation, consecutively to the maximum sentences already imposed is illegal. For the sentences on appeal, the district court judge clearly did not take into consideration all factors that were considered when sentencing Moreland to maximum sentences, indicating Moreland was not particularly likely to respond affirmatively to probationary treatment, as provided in No. 10 of the sentencing factors.

[¶22] Moreland's sentences in 07-K-769 and 07-K-838 (Cts. 1 and 2) ran concurrently with each other but consecutively to maximum sentences in 06-K-2289 and 06-K-2290. The imposition of a probationary period after receiving maximum sentences in other files, was an illegal sentence. Either different factors were considered by the District Court in its sentence of Moreland to probationary periods, indicating he was likely to respond affirmatively to probationary treatment, or all factors previously considered, indicating Moreland was a hardened criminal and not particularly likely to respond affirmatively to probationary treatment, were not considered. It was clear error for the District Court, in the sentences being appealed, to determine Moreland was likely to respond affirmatively to probationary treatment and order probation in these cases immediately after determining he was a hardened criminal, not likely to respond

affirmatively to probationary treatment. Therefore, the sentences of Moreland to probation following maximum sentences in other cases are illegal sentences.

CONCLUSION

[¶23] The trial court erred by denying defendant's motion to correct illegal sentences and Moreland asks this Court to reverse and remand to the District Court with an order to remove that part of the sentences which provide that Moreland serve a period of probation following incarceration.

Respectfully submitted this 3rd day of October, 2016.



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)	18-07-K-00838
Andrew Rodger Moreland,)	
)	CERTIFICATE OF SERVICE
Defendant/Appellant.)	

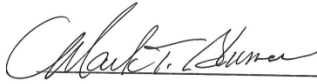
I, Mark T. Blumer, do hereby certify that on October 3, 2016, I served the following documents:

1. Appellant Brief
2. Appellant Appendix
3. Certificate of Service

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on the Grand Forks County State's Attorney at the email addresses shown above and to Mr. Moreland, by first class U.S. Mail, postage prepaid, at the address above.



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