

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

State of North Dakota,)		
)		
Plaintiff and Appellee,	)	Supreme Court No.	20160267
	)		20160268
vs.)		
)		
Andrew Rodger Moreland,	)	District Court Case No.	18-07-K-00769
	)		18-07-K-00838
Defendant and Appellant.)		
)		

ON APPEAL FROM CRIMINAL JUDGMENT
FROM THE DISTRICT COURT
FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE JON J. JENSON, PRESIDING

BRIEF OF APPELLEE

Faye A. Jasmer (#05428)
Assistant State's Attorney
Grand Forks County
P.O Box 5607
Grand Forks, ND 58206
(701) 780-8281
E-Service Address:
sasupportstaff@gfcounty.org

Ashley Hinds
Third Year Law Student
Certified under the Rule for
Limited Practice of Law by
Law Students

TABLE OF CONTENTS

Table of Authorities ii

Statement of the Issue iii

Statement of the Case..... ¶1

Statement of the Facts ¶4

Standard of Review ¶10

Law and Argument ¶12

 I. The District Court did not err when it denied Appellant’s Motion To Correct
 Illegal Sentence ¶13

Conclusion ¶19

TABLE OF AUTHORITIES

Cases

<u>Holkesvig v. Grove</u> , 2014 ND 57, 844 N.W.2d 557.....	¶10, 11
<u>Holkesvig v. Welte</u> , 2012 ND 142, 818 N.W.2d 760	¶10, 11
<u>Johnson v. Hovland</u> , 2011 ND 64, 795 N.W.2d 294	¶11
<u>State v. Dailey</u> , 2006 ND 184, 721 N.W.2d 29	¶16
<u>State v. Eagleman</u> , 2013 ND 101, 831 N.W.2d 759	¶2, 13
<u>State v. Gonzalez</u> , 2011 ND 143, 799 N.W.2d 402	¶2, 13
<u>State v. Klein</u> , 2014 ND 166, 851 N.W.2d 159	¶2, 13
<u>State v. Manhattan</u> , 453 N.W.2d 758 (N.D. 1990)	¶3, 18
<u>Watts v. Magic 2 x 52 Mgmt., Inc.</u> , 2012 ND 99, 816 N.W.2d 770.....	¶10

Statutes

N.D. Cent. Code § 12.1-32-01 (1997)	¶3, 14, 18
N.D. Cent. Code § 12.1-32-04	¶2, 3, 15, 18

Other

N.D. R. Crim. P. 35(a)(1)	¶1, 12, 13
---------------------------------	------------

STATEMENT OF THE ISSUE

- I. Whether the District Court erred when it denied Appellant's Motion to Correct Illegal Sentence?

STATEMENT OF THE CASE

[¶1] Under N.D.R. Crim. P. Rule 35(a)(1), “[t]he 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).” Appellant argues that he received an illegal sentence on February 14, 2008, when he was ordered to a term of probation on all four counts in Grand Forks County Court No. 18-07-K-00769 and Grand Forks County Court No. 18-07-K-00838. Appellant Br. at pg. 10. Appellant argues that it is illegal to sentence him to a period of probation as part of a sentence that runs consecutive to a sentence that imposed the statutory maximum period of incarceration without probation. Id. Appellant asks this Court to remove the period of supervision as a way to remedy these alleged illegal sentences. Id. Appellant, however, provides no legal basis, neither statutory nor case law authority, to support his position that the sentences are illegal. Without showing that these sentences were illegal and that the District Court abused its discretion, this Court cannot grant Appellant the relief he is seeking under Rule 35(a)(1) of the North Dakota Rules of Criminal Procedure.

[¶2] N.D. Cent. Code § 12.1-32-04 provides for factors to be considered during a sentencing decision. The factors, “. . . while not controlling the discretion of the court, shall be accorded weight in making determinations regarding the desirability of sentencing an offender to imprisonment.” Id. The North Dakota Supreme Court has held that, “. . . a sentence is illegal when it exceeds the maximum term authorized by statute.” State v. Klein, 2014 ND 166, ¶ 7, 851 N.W.2d 159. Additionally, the Court has noted that, “[t]his Court will vacate a District Court’s sentencing decision only if the court acted outside the limits prescribed by statute or substantially relied on an impermissible

factor in determining the severity of the sentence.” Id. (citing Eagleman, 831 N.W.2d at ¶ 6; Gonzalez, 799 N.W.2d at ¶ 6).

[¶3] In the instant case, Appellant plead guilty to several felonies. During sentencing, the District Court considered the factors outlined in N.D. Cent. Code § 12.1-32-04. Sentencing Hr’g Tr. 13:7-24, 21:5-25, Feb. 14, 2008. Relying on permissible factors, the District Court sentenced Appellant accordingly and within the statutory limits afforded in N.D. Cent. Code § 12.1-32-01 (1997). The sentences on each count fall within the accepted statutory range. Appellant has not shown the District Court substantially relied on an impermissible factor or abused its discretion in sentencing him. See State v. Manhattan, 453 N.W.2d 758, 760 (N.D. 1990) (“A trial court has discretion to impose a criminal sentence within the maximum and minimum bounds of the statute. A sentence within the statutory range will not be set aside on appeal unless the trial court substantially relied on an impermissible factor in the sentencing.”). Thus, the District Court did not abuse its discretion in sentencing Appellant.

STATEMENT OF THE FACTS

[¶4] On or about July 27, 2006, Appellant was arrested and charged with Possession of Methamphetamine and Possession of Drug Paraphernalia. (Grand Forks County Court No. 18-07-K-00769).

[¶5] On or about April 5, 2007, Appellant was arrested and charged with Possession of Methamphetamine with Intent to Deliver, Possession of Drug Paraphernalia (Methamphetamine), Ingesting a Controlled Substance, Possession of Drug Paraphernalia (Marijuana), and Possession of Marijuana (Less Than 1/2 Ounce). (Grand Forks County Court No. 18-07-K-00838).

[¶6] On February 14, 2008, the State of North Dakota and the Appellant appeared before the District Court where the Appellant entered a plea of guilty to the charges of Possession of Methamphetamine and Possession of Drug Paraphernalia, as well as Possession of Methamphetamine with Intent to Deliver and Possession of Drug Paraphernalia. Sentencing Hr'g Tr. 3-5, Feb. 14, 2008.

[¶7] Accordingly, Appellant was sentenced as follows:

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

- Count I: Possession of Methamphetamine, a Class C felony, 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, a Class C felony, 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:

- Count I: Possession of Methamphetamine with Intent to Deliver, a Class A felony, to a term of 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, a Class C felony, 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 Grand Forks County No. 18-07-K-00769, and consecutive to sentences in other court files which are not part of this appeal).

Criminal Judgment, Feb. 14, 2008, Grand Forks County Court No. 18-07-K-00769; Criminal Judgment, Feb. 14, 2008, Grand Forks County Court No. 18-07-K-00838.

[¶8] Appellant, who previously entered guilty pleas on seven counts on Grand Forks County Court No. 18-07-K-02289 and Grand Forks County Court No. 18-06-K-02290, was ordered by the District Court to first serve the following sentence:

Grand Forks County Court No. 18-07-K-02289:

- Count I: Burglary, a Class C felony, to a term of five (5) years flat-time.
- Count II: Preventing Arrest and Discharge of Other Duties, a Class C felony, to a term of five (5) years flat-time.

Grand Forks County Court No. 18-07-K-02290:

- Count I: Aggravated Assault, a Class C felony, to a term of five (5) years flat-time.
- Count II: Robbery, a Class B felony, to a term of ten (10) years flat-time.
- Count III: Burglary, a Class B felony, to a term of ten (10) years flat-time.
- Count IV: Felonious Restraint, a Class B felony, to a term of ten (10) years flat-time.
- Count V: Terrorizing, a Class C felony, to a term of five (5) years flat-time.

Criminal Judgement, Feb. 14, 2008, Grand Forks County Court No. 18-07-K-02289; Criminal Judgement, Feb. 14, 2008, Grand Forks County Court No. 18-06-K-02290.

As maximum sentences, no probation was ordered. Id. The sentence on appeal, which provided a period of probation, ran consecutive to these sentences. Id.

[¶9] On February 29, 2016, Appellant filed a Motion to Correct Illegal Sentence. On March 15, 2016, the State filed a response in opposition to Appellant's motion. On June 8, 2016, a hearing on the motion was held. On June 10, 2016, the District Court denied Appellant's motion. On July 12, 2016, Appellant filed his appeal of the District Court's Order Denying Motion to Correct Illegal Sentence.

STANDARD OF REVIEW

[¶10] “The standard of review for post-judgment motions, including a motion for a new trial or a motion for relief from judgment, is reviewed under the abuse of discretion standard.” Holkesvig v. Grove, 2014 ND 57, ¶ 11, 844 N.W.2d 557 (citing Watts v. Magic 2 x 52 Mgmt., Inc., 2012 ND 99, ¶ 11, 816 N.W.2d 770. Orders enjoining future court filings, motions, and pleadings are also reviewed under the abuse of discretion standard. Id. at ¶ 12 (citing Holkesvig v. Welte, 2012 ND 142, ¶ 6, 818 N.W.2d 760.

[¶11] “A trial court abuses its discretion when it acts ‘arbitrarily, unconscionably, or unreasonably, or when its decision is not the product of a rational mental process leading to a reasoned determination.’” Id. at ¶ 13 (quoting Holkesvig v. Welte, 2012 ND 142, ¶ 6, 818 N.W.2d 760; Johnson v. Hovland, 2011 ND 64, ¶ 8, 795 N.W.2d 294.

LAW AND ARGUMENT

[¶12] Appellant’s appeal should be denied as it is not supported by statute, nor case law. Appellant argues that he received an illegal sentence on February 14, 2008, when he was ordered to a term of probation on all four counts in Grand Forks County Court No. 18-07-K-00769 and Grand Forks County Court No. 18-07-K-00838. Appellant Br. at pg. 10. Appellant argues that it is illegal to sentence him to a period of probation as part of a sentence that runs consecutive to a sentence that imposed the statutory maximum period of incarceration without probation. *Id.* Appellant asks this Court to remove the period of supervision as a way to remedy these alleged illegal sentences. *Id.* Appellant, however, provides no legal basis, neither statutory nor case law authority, to support his position that the sentences are illegal. Without showing that these sentences were illegal and that the District Court abused its discretion, this Court cannot grant Appellant the relief he is seeking under Rule 35(a)(1) of the North Dakota Rules of Criminal Procedure.

- I. The District Court did not err when it denied Appellant’s Motion To Correct Illegal Sentence.

[¶13] Under N.D.R. Crim. P. Rule 35(a)(1), “[t]he 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).” The North Dakota Supreme Court has held that, “. . . a sentence is illegal when it exceeds the maximum term authorized by statute.” *Klein*, 851 N.W.2d at ¶ 7. Additionally, the Court has noted that, “[t]his Court will vacate a District Court’s sentencing decision only if the court acted outside the limits prescribed by statute or substantially relied on an impermissible

factor in determining the severity of the sentence.” Id. (citing State v. Eagleman, 2013 ND 101, ¶ 6, 831 N.W.2d 759; State v. Gonzalez, 2011 ND 143, ¶ 6, 799 N.W.2d 402.

[¶14] In 2008, N.D. Cent. Code § 12.1-32-01 (1997) divided offenses into seven classes, which are denominated and subject to maximum penalties. The pertinent classifications are as follows:

Class A felony, for which a maximum penalty of twenty years’ imprisonment, a fine of ten thousand dollars, or both, may be imposed.

Class B felony, for which a maximum penalty of ten years’ imprisonment, a fine of ten thousand dollars, or both, may be imposed.

Class C felony, for which a maximum penalty of five years’ imprisonment, a fine of five thousand dollars, or both, may be imposed.

N.D. Cent. Code § 12.1-32-01 (1997).

[¶15] N.D. Cent. Code § 12.1-32-04 provides for factors to be considered during a sentencing decision. The factors, “. . . while not controlling the discretion of the court, shall be accorded weight in making determinations regarding the desirability of sentencing an offender to imprisonment.” Id. Additionally, “[n]othing herein shall be deemed to require explicit reference to these factors in a presentence report or by the court at sentencing.” Id. The factors are as follows:

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.

Id.

[¶16] In State v. Dailey, the North Dakota Supreme Court reviewed a sentence similar to the instant cases. State v. Dailey, 2006 ND 184, 721 N.W.2d 29. Dailey was sentenced for two offenses: manslaughter and driving under the influence. Id. ¶ 3. Dailey was sentenced to the statutory maximum ten-year period of incarceration for the manslaughter conviction. Id. ¶ 4. Additionally, Dailey was sentenced to a five-year period of incarceration with forty-two months suspended for a period of five years for driving under the influence conviction. Id. Regarding Dailey's sentence, the North Dakota Supreme Court noted:

Dailey was sentenced to ten years in prison and ordered to pay a fine of \$10,000 on the manslaughter count. Under N.D. Cent. Code § 12.1-32-01, the maximum penalty for a class B felony is ten years imprisonment, a fine of ten thousand dollars, or both. On the count of driving under the influence, Dailey was sentenced to five years, with eighteen months in prison and forty-two months suspended for five years starting after the ten year incarceration for manslaughter, and ordered to pay a fine of \$ 1,000. Under N.D. Cent. Code § 12.1-32-01, the maximum penalty for a class C felony is five years imprisonment, a fine of five thousand dollars, or both. Dailey was sentenced within the statutory sentencing limits, and we conclude the court did not abuse its discretion in sentencing him.

Id. ¶ 12 (emphasis added).

[¶17] In the instant cases, the District Court, relying on State v. Dailey, concluded that, “[a]lthough Dailey’s sentences were concurrent rather than consecutive, the result is

the same as the sentence imposed on Moreland in this case; the Defendant first served a sentence equal to a statutory maximum sentence followed by a period of supervised probation as part of the sentence on a second charge.” Order Denying Motion to Correct Illegal Sentence, June 10th, 2016 pg. 2.

[¶18] The State concurs with the District Court’s reasoning. In the instant cases, Appellant plead guilty to a Class A felony and several Class C felonies. Sentencing Hr’g Tr. 3-5, Feb. 14, 2008. During sentencing, the District Court considered the factors outlined in N.D. Cent. Code § 12.1-32-04. Id. at 13:7-24, 21:5-25. Relying on permissible factors, the District Court sentenced Appellant accordingly and within the statutory limits afforded in N.D. Cent. Code § 12.1-32-01 (1997). In 2008, in North Dakota, a Class A felony carried a maximum penalty of twenty years’ imprisonment, a fine of ten thousand dollars, or both. N.D. Cent. Code § 12.1-32-01 (1997). A Class C felony carried a maximum penalty of five years’ imprisonment, a fine of five thousand dollars, or both. Id. In the instant cases, the sentences for each count fall within the accepted statutory range. Appellant has not shown the District Court substantially relied on an impermissible factor or abused its discretion in sentencing him. See Manhattan, 453 N.W.2d at 760. (“A trial court has discretion to impose a criminal sentence within the maximum and minimum bounds of the statute. A sentence within the statutory range will not be set aside on appeal unless the trial court substantially relied on an impermissible factor in the sentencing.”). Thus, the District Court did not abuse its discretion in sentencing Appellant.

CONCLUSION

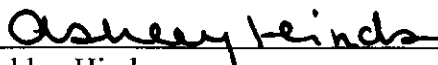
[¶19] For the above-stated reasons the Appellee respectfully requests that this Court deny Appellant's appeal.

Dated this 2nd day of November, 2016.



Faye A. Jasmer (#05428)
Assistant State's Attorney
Grand Forks County
P.O. Box 5607
Grand Forks, ND 58206
(701) 780-8281
E-Service Address:
sasupportstaff@gfcounty.org

Dated this 2nd day of November, 2016.



Ashley Hinds
Third Year Law Student
Grand Forks County
P.O. Box 5607
Grand Forks, ND 58206
(701) 780-8281

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

State of North Dakota,)		
)		
Plaintiff and Appellee,	)	Supreme Court No.	20160267
	)		20160268
vs.)		
)		
Andrew Rodger Moreland,	)	District Court Case No.	18-07-K-00769
	)		18-07-K-00838
Defendant and Appellant.)		
)		

ON APPEAL FROM CRIMINAL JUDGMENT
FROM THE DISTRICT COURT
FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE JON J. JENSON, PRESIDING

AFFIDAVIT OF SERVICE BY E-MAIL

STATE OF NORTH DAKOTA)
) SS
COUNTY OF GRAND FORKS)

The undersigned, being of legal age, being first duly sworn deposes and says that on the 7th day of November, 2016, she served via e-mail true copies of the following documents:

BRIEF OF APPELLEE

and that said email was served via electronic mail to:

Mark T. Blumer
Attorney at Law
P.O. Box 7340
Fargo, ND 5810
mark@marktblumerlaw.com

At the office of the Grand Forks County States Attorney's Office.

Chun Bergal

States Attorney's Office

Subscribed and sworn to before me this 7th day of November, 2016.

Jennifer Alvstad

Notary Public

JENNIFER ALVSTAD
Notary Public
State of North Dakota
My Commission Expires March 26, 2021