

20170093

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Nos. 20170093

District Court No. 30-2014-CR-00126

State of North Dakota,)
)
 Plaintiff and Appellee,)
)
 v.)
)
 Donny Wagner,)
)
 Defendant and Appellant.)

FILED
IN THE OFFICE OF THE
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JUN 22 2017

STATE OF NORTH DAKOTA

BRIEF OF THE APPELLEE

APPEAL FROM THE MORTON COUNTY DISTRICT COURT ORDER [FEBRUARY 22, 2017] DENYING DEFENDANT'S RULE 36 [RULE 35(a)] MOTION TO CORRECT SENTENCE

MORTON COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT
HONORABLE BRUCE B. HASKELL, PRESIDING

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STATEMENT OF THE ISSUES

[¶1] Whether the District Court erred in imposing sentence on the Defendant's revocation of probation and denying the Defendant's Motion for Correction of Sentence pursuant to Rule 36 [Rule 35(a)] of the North Dakota Rules of Criminal Procedure?

[¶2] Specifically, whether the District Court imposed a sentence that was legal under North Dakota law on the Defendant's revocation of probation?

[¶3] Secondly, whether the District Court's sentencing of the Defendant on his revocation of probation amounted to "cruel and unusual punishment," as defined by the Eighth Amendment of the Constitution of the United States?

STATEMENT OF THE CASE AND FACTS

[¶4] The Defendant pled guilty to all three counts alleged against him, as contained within the Amended Information. See Register of Actions, Document ID #63. Specifically, the Defendant pled guilty to Count I: Felonious Restraint, a Class C Felony in violation of N.D.C.C. § 12.1-18-02; Count II: Terrorizing, a Class C Felony in violation of N.D.C.C. §12.1-17-04; and Count III: Aggravated Assault, a Class C Felony in violation of N.D.C.C. §12.1-17-02. See Appendix to Brief of Appellant Wagner at pages 14-17; Register of Actions, Document ID #116. The State had specifically pled a mandatory minimum two-year sentence on Count III pursuant to N.D.C.C. §12.1-32-02.1. See Register of Actions, Document ID #63; See also Appendix to Brief of Appellant Wagner at pages 12-13. A factual basis for Counts I, II, and III was provided to the District Court, consistent with the Affidavit of Probable Cause of Detective April Jose filed with the Criminal Complaint. See Register of Actions, Document ID # 1, pages 3-4, Appendix to Brief of Appellant Wagner at pages 10-11.

[¶5] A presentence investigation was ordered, and ultimately, the Defendant was sentenced, on April 14, 2015, to a sentence in each of counts I, II and III of five years with all but six hundred seventy-four (674) days suspended for the period of five years, during which the Defendant was placed on supervised probation subject to the terms and conditions of an Appendix A. See Register of Actions, Document ID#109-110, 116, 113. All sentences in Counts I, II, and III ran concurrently, and the Defendant was given credit of four hundred forty (440) days spent in custody on each count. See Register of Actions, Document ID #116, Appendix to Brief of Appellant Wagner at pages 14-17. This sentence incorporated the terms of a plea

agreement between the parties, in which there was a departure from the mandatory two-year sentence [i.e., the Defendant only had to serve a total of six hundred seventy-four days rather than the mandatory seven hundred thirty].

[¶6] The Defendant was told that a violation of the terms or conditions of his probation could result in his probation being revoked, and the Defendant being sentenced up to the maximum available sentence on each count. See Register of Actions, Document ID #116, at ¶¶2-4. The District Court informed the Defendant that if he came back before him on a revocation he would likely be looking at a maximum sentence based on his history and the offenses to which the Defendant had pled guilty.

[¶7] The Defendant violated the terms and conditions of his probation, and the State of North Dakota filed a Petition to Revoke Probation, alleging those violations. See Register of Actions, Document ID #118, Appendix to Brief of Appellant Wagner at pages 18-21. A hearing was held on the Petition for Revocation of Probation on June 21, 2016. The Defendant admitted the Allegations contained in the Petition for Revocation of Probation, and his probation was revoked. See Register of Actions, Document ID #136, Appendix to Brief of Appellant Wagner at page 22. The State, probation officer, Defendant's counsel and the Defendant made arguments and sentencing recommendations.

[¶8] The District Court inquired of the Defendant whether he recalled the court's warning on his original sentence, and the Defendant responded in the affirmative, that he would be sentenced to the maximum sentence. The District Court agreed he had promised a maximum sentence of fifteen years [counts consecutive] but, on

review of the case, the admitted allegations, and the Defendants' criminal history, chose to impose a five year sentence on each count, to run concurrent with one another and with credit for all prior six hundred seventy-four days served applied to each of Counts I, II and III. The Defendant was required to complete a chemical dependency evaluation and treatment while incarcerated, was ordered not to have contact with the victim or her family, and had remaining fees converted to civil judgment. See Register of Actions, Document ID #134, Appendix to Brief of Appellant Wagner at pages 23-25.

[¶9] The Defendant filed a Motion for Correction of Sentence along with notice, brief, exhibits, affidavit of proof, request for counsel and request for hearing on February 6, 2017. See Register of Actions, Document ID #138-147, Appendix to Brief of Appellant Wagner at pages 26-43. The State of North Dakota filed a Response, resisting the Defendant's Rule 36 Motion [More Properly Considered a Rule 35(a) Motion] on February 20, 2017. See Register of Actions, Document ID #148, Appendix to Brief of Appellant Wagner at pages 44-45. On February 22, 2017, the District Court issued an Order on Motion to Correct Sentence, denying the Defendant's requested relief. See Register of Actions, Document ID #150, Appendix to Brief of Appellant Wagner at page 47.

STANDARD OF REVIEW

[¶10] The Eighth Amendment to the Constitution of the United States, applicable to the State of North Dakota through the Fourteenth Amendment, declares “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. Amend. VIII. The North Dakota Constitution parallels the Eighth Amendment in Article I, §11. N.D. Const. Art. I, §11. This Court reviews *de novo* an alleged violation of a Constitutional right, including the prohibition against “cruel and unusual punishment.” State v. Messner, 1998 ND 151, ¶8, 583 N.W.2d 109.

ARGUMENT

I. The District Court Did Not Err in Imposing Sentence on the Revocation of Defendant's Probation and in Denying the Defendant's Motion for Correction of Sentence.

[¶11] This Court stated in State v. Gomez, 2011ND 29, ¶28, 793 N.W.2d 451, "Generally, a sentence within the statutory sentencing range is neither excessive nor cruel." Gomez at ¶28 (citing United States v. Flores, 572 F.3d 1254, 1268 (11th Cir. 2009)). The District Court, on revocation of the Defendant's probation, imposed an amended sentence of five years, concurrent on all counts and with credit on each count of six hundred seventy-four days spent in custody. The District Court did so after review of the Defendant's extensive criminal history, the drastic facts of the case at hand, and prior efforts towards rehabilitation that were before the Court through the Presentence Investigation, admitted Allegations of the Petition for Revocation of Probation, and statements of Probation Officer John Clemens.

a. The District Court Imposed a Legal Sentence Under North Dakota Law on Revocation of the Defendant's Probation.

[¶12] Pursuant to possible penalties found in North Dakota Century Code §12.1-32-01, the District Court could have sentenced the Defendant up to five years on each count to run consecutive, for a total of fifteen years of incarceration, and still been within the statutory sentencing range for the adjudicated offenses in Counts I-III. The District Court imposed a five year sentence, which ran concurrent on all counts, well within the District Court's discretionary range of sentence. This sentence is not a clerical error, as alleged by the Defendant, nor is it illegal or the product of inaccurate arithmetic or technical error. See N.D.R. Crim.P. 35(a) and 36. Based on

the Defendant's history, the facts of the case, and the violations of probation conditions, the sentence imposed was a legal and deserved sentence.

b. The District Court Did Not Impose a Sentence on Revocation of the Defendant's Probation that Amounted to "Cruel and Unusual Punishment," as defined by the Eighth Amendment of the Constitution of the United States.

[¶13] The Defendant filed a Motion for Correction of Clerical Error pursuant to Rule 36 of the North Dakota Rules of Criminal Procedure, asking for a Correction of Sentence which would more properly fall under Rule 35(a) of the North Dakota Rules of Criminal Procedure. The Defendant argued to the District Court that imposing a five year sentence and the North Dakota Department of Corrections and Rehabilitation not considering the Defendant for parole until he has served at least eighty-five percent of that sentence is cruel and unusual punishment. The Defendant argues the same on appeal, after the District Court rejected his argument. This argument is without merit. The Defendant could be required to serve all five years of his legally-imposed five-year sentence, yet it would not amount to cruel and unusual punishment. See Gomez at ¶28 (citing United States v. Flores, 572 F.3d 1254, 1268 (11th Cir. 2009)).

[¶14] The Defendant argues that he is being required to serve eighty-five percent of his legally-imposed sentence prior to being eligible for parole. The Defendant offers zero evidence that this is true. If this is true, it is not as a result of the District Court's sentence but is the result of the North Dakota Department of Corrections and Rehabilitation's own policies and procedures and determination of eligibility for parole. The Defendant states as much in his Affidavit of Proof by Donny Ron

Wagner. See Register of Actions, Document ID #138, ¶3, Appendix to Brief of Appellant Wagner at page 28, ¶3.

[¶15] The Defendant has not shown in any way that the District Court's sentence on revocation of probation was unjust, illegal, or in error. The Defendant has failed to demonstrate that he is being required to serve 85% of his sentence or that serving 85% of his sentence is cruel and unusual punishment. The Defendant has failed to establish any corollary between the District Court's sentence on revocation of the Defendant's probation, and his ineligibility for parole until completion of 85% of his sentence.

[¶16] The Defendant has a terrible criminal history, as noted in the Presentence Investigation, failed on probation supervision in the community not just in this matter but previous ones, and committed these serious crimes of violence as recited in the Affidavit of Probable Cause of Detective April Jose. Any and all of these factors are considered by the North Dakota Department of Corrections and Rehabilitation in determining eligibility for parole.

[¶17] The parole board and not the District Court determines whether an inmate such as the Defendant is eligible for parole.

"Every inmate's eligibility for parole must be reviewed in accordance with the rules adopted by the parole board. The board shall consider all pertinent information regarding each inmate, including the circumstances of the offense, the presentence report, the inmate's family, educational and social history and criminal record, the inmate's conduct, employment, participation in education and treatment programs while in the custody of the department of corrections and rehabilitation, and the inmate's medical and psychological records." N.D. Cent. Code § 12-59-05.

If an inmate is eligible for parole, the board “may grant parole to an inmate if the board is convinced the inmate will conform to the terms and conditions of parole the board or the department of corrections and rehabilitation may establish for the inmate.” N.D. Cent. Code § 12-59-07. The Defendant’s eligibility for parole, just like that of any other inmate of the Department of Corrections and Rehabilitation, is determined by the rules and regulations of the parole board, not the District Court. The District Court cannot make a legal order which would supercede the statutory authority of the parole board, which is essentially what the Defendant is requesting in this case.

[¶18] Additionally, the Defendant was ordered, as a condition of his sentence to complete a chemical dependency evaluation and treatment prior to his release from custody. There is no evidence that this has been completed or when this will be completed. Again, this is a legal condition of the Defendant’s sentence which has nothing to do with serving percentages, but with the Defendant’s treatment and rehabilitation while under the custody of the North Dakota Department of Corrections and Rehabilitation, which in turn is a factor as to whether the Defendant qualifies for parole. N.D. Cent. Code §§ 12-59-05, 12-59-07.

[¶19] The bottom line is that the District Court imposed a legal and correct sentence for each of the three counts on revocation of the Defendant’s probation. The District Court did not order the Defendant to complete 85% of his sentence before being eligible for parole. Indeed, in accordance with North Dakota Century Code §12.1-32-09.1, even if the District Court wished to, he does not have that

authority. The determination as to when a Defendant (inmate) qualifies for parole is solely within the authority of the state parole board.

[¶20] The Defendant claims that he is being required to serve 85% of his legally-imposed sentence due to the North Dakota Department of Corrections and Rehabilitation applying North Dakota Century Code §12.1-32-09.1. There is no evidence of this. Furthermore, whether true or not, the Defendant's eligibility for parole is determined by the North Dakota Department of Corrections and Rehabilitation, not by the District Court. The North Dakota Department of Corrections and Rehabilitation makes a determination on eligibility for parole as dictated by North Dakota Century Code §§12.1-59-05 and 12.1-59-07 and further determines the applicability of the "85% rule" based on the facts of the case alleged. Finally, even if the Defendant is being required to serve 85% of his sentence before qualifying for parole, it is not cruel and unusual punishment. Serving 85% of a legally imposed sentence cannot be cruel or unusual punishment where serving 100% of the sentence is not.

CONCLUSION

[¶21] The District Court's sentence was not in error, was not illegal and did not amount to cruel and unusual punishment in violation the Eighth Amendment of the Constitution of the United States. For all of the foregoing facts and argument, the State of North Dakota respectfully requests this Court uphold the sentence imposed by the District Court on revocation of the Defendant's probation and uphold the District Court's subsequent denial of the Defendant's Motion for Correction of Sentence.

[¶22] Respectfully submitted this 22nd day of June, 2017.

/s/ Gabrielle J. Goter

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CERTIFICATE OF SERVICE

[¶1] The undersigned hereby certifies that on the 22nd day of June, 2017, a true and correct copy of the **BRIEF OF THE APPELLEE** in PDF and Microsoft Word contained on a disc, seven bound and one unbound copies were filed in person with the Clerk of the North Dakota Supreme Court with a copy served upon the Defendant/Appellant by electronic mail to his counsel of record, Bobbi Weiler to her email address: bweilerjtw@gmail.com.

Dated the 22nd day of June, 2017.

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