

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

| | | |
|--------------------------|---|------------------------------------|
| State of North Dakota, |) | |
| |) | |
| |) | |
| Plaintiff and Appellee, |) | Supreme Court No. 20170093; |
| |) | Criminal Case No. 30-2014-CR-00126 |
| |) | |
| vs. |) | |
| |) | |
| Donny Wagner, |) | |
| |) | |
| |) | |
| Defendant and Appellant. |) | |
| |) | |

APPEAL FROM THE MORTON COUNTY DISTRICT COURT ORDER 02/22/2017
DENYING DEFENDANT’S RULE 36 MOTION TO CORRECT SENTENCE

SOUTH CENTRAL JUDICIAL DISTRICT

BRIEF OF DEFENDANT - APPELLANT,

DONNY WAGNER

Bobbi L. Weiler (NDID 06546)
Jackson, Thomason & Weiler, P.C.
418 East Rosser Avenue Suite 330
Bismarck, ND 58501
Telephone: (701) 751-4847
FAX: (701) 751-4845
Attorney for the Appellant

TABLE OF CONTENTS

| | |
|---|---------|
| Table of Authorities | Page 3 |
| Attorney's Compliance with Rule 3.1, North Dakota Rules of Professional Conduct | ¶2 |
| Statement of the Issues Presented for Review | ¶3 |
| Statement of the Case | ¶¶4-6 |
| Statement of the Facts | ¶¶7-9 |
| Procedural Background | ¶¶10-12 |
| Legal Argument | ¶¶13-17 |
| A. Standard Of Review. | |
| B. Whether the Defendant's Constitutional Right against cruel and unusual punishment has been violated. | |
| Conclusion | ¶18 |
| Certificate of Service | Page 10 |

TABLE OF AUTHORITIES

| <u>Case Law:</u> | <u>Paragraph No:</u> |
|--|--------------------------|
| <u>Rowley v. Cleaver</u> , 1999 N.D. 158, ¶ 8, 598 N.W. 2d 125 | 13 |
| <u>State v. Robertson</u> , 502 NW2d 249, 250 (N.D. 1993) | 2 |
| <u>State v. Treis</u> , 1999 ND 136, ¶ 11, 597 N.W.2d 664 | 13 |
| <u>U.S. Constitutional Provisions:</u> | |
| U.S. Const. Amend. XIII | 13, 17 |
| <u>North Dakota Constitutional Provisions:</u> | |
| N.D. Const. Art. I, § 11 | 13, 17 |
| N.D. Const. Art. VI, § 1 | 1 |
| N.D. Const. Art. VI, § 6 | 1 |
| N.D. Const. Art. VI, § 8 | 1 |
| <u>North Dakota Century Code</u> | |
| N.D.C.C. § 29-32.1-05 | 2 |
| N.D.C.C. § 12.1-18-02 | 4, 7, 10, 16 |
| N.D.C.C. § 12.1-17-04 | 4, 7, 10, 16 |
| N.D.C.C. § 12.1-17-02 | 4, 7, 10, 15, 16 |
| N.D.C.C. § 12.1-32-09.1 | 4, 7, 10, 15, 16, 17, 18 |

I. JURISDICTION STATEMENT.

[1] The District Court had jurisdiction pursuant to N.D. Const. Art. VI, § 8. This Court has jurisdiction under N.D. Const. Art. VI, §§ 1 and 6.

II. ATTORNEY'S COMPLIANCE WITH RULE 3.1, NORTH DAKOTA RULES OF PROFESSIONAL CONDUCT

[2] Mr. Wagner has the right to appeal from an order denying his motion for correction of his sentence. N.D.C.C. § 29-32.1-05. After review of the applicable law, and after further research of possible appealable issues, appellant's attorney does not believe that the record reflects issues with merit for appeal. State v. Robertson, 502 NW2d 249, 250 (N.D. 1993). Nonetheless, Mr. Wagner asks the Court to address his appeal independent of counsel's conclusions.

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW.

[3] Whether the Defendant's Constitutional Right against cruel and unusual punishment has been violated.

IV. STATEMENT OF THE CASE.

[4] Appellant plead guilty to Felonious Restraint, in violation of 12.1-18-02 of the North Dakota Century Code, Terrorizing, in violation of 12.1-17-04 of the North Dakota Century Code, and Aggravated Assault, in violation of 12.1-17-02 of the North Dakota Century Code. The Aggravated Assault Charge carried a two-year mandatory sentence under section 12.1-32-09.1 of the North Dakota Century Code for the use of a weapon. App. 12-13, 14-17. Appellant was sentenced to five years with all but six hundred seventy-

four (674) days suspended for the period of five years on all counts to run concurrently. App. 14-17.

[5] The State of North Dakota filed a Petition to Revoke the Appellant's probation and Appellant's probation was revoked. App. 18-21. The District Court sentenced the Appellant to five years with credit of six hundred seventy-four (674) days on all counts to run concurrently. App. 23-25.

[6] The Appellant filed a Motion to Correct the Sentence along with an Affidavit, Brief, and Exhibits in Support of the Motion. App. 26-43. The Appellant argues that the implication of the eight-five percent rule does not apply to his charges and therefore, it is cruel and unusual punishment for the Defendant to be required to serve eight-five percent of his sentence. App. 28-30, 32-35. The State filed a Response. App. 44-45. The Court denied the Motion. App. 47.

V. STATEMENT OF THE FACTS.

[7] Appellant plead guilty to Felonious Restraint, in violation of 12.1-18-02 of the North Dakota Century Code, Terrorizing, in violation of 12.1-17-04 of the North Dakota Century Code, and Aggravated Assault, in violation of 12.1-17-02 of the North Dakota Century Code. The Aggravated Assault Charge carried a two-year mandatory sentence under section 12.1-32-09.1 of the North Dakota Century Code for the use of a weapon. App. 12-13, 14-17. Appellant was sentenced to five years with all but six hundred seventy-four (674) days suspended for the period of five years on all counts to run concurrently. App. 14-17.

[8] The State of North Dakota filed a Petition to Revoke the Appellant's probation and Appellant's probation was revoked. App. 18-21. The District Court sentenced the

Appellant to five years with credit of six hundred seventy-four (674) days on all counts to run concurrently. App. 23-25.

[9] The Appellant filed a Motion to Correct the Sentence along with an Affidavit, Brief, and Exhibits in Support of the Motion. App. 26-43. The Appellant argues that the implication of the eight-five percent rule does not apply to his charges and therefore, it is cruel and unusual punishment for the Defendant to be required to serve eight-five percent of his sentence. App. 28-30, 32-35. The State filed a Response. App. 44-45. The Court denied the Motion. App. 47.

VI. PROCEDURAL BACKGROUND.

[10] Appellant plead guilty to Felonious Restraint, in violation of 12.1-18-02 of the North Dakota Century Code, Terrorizing, in violation of 12.1-17-04 of the North Dakota Century Code, and Aggravated Assault, in violation of 12.1-17-02 of the North Dakota Century Code. The Aggravated Assault Charge carried a two-year mandatory sentence under section 12.1-32-09.1 of the North Dakota Century Code for the use of a weapon. App. 12-13, 14-17. Appellant was sentenced to five years with all but six hundred seventy-four (674) days suspended for the period of five years on all counts to run concurrently. App. 14-17.

[11] The State of North Dakota filed a Petition to Revoke the Appellant's probation and Appellant's probation was revoked. App. 18-21. The District Court sentenced the Appellant to five years with credit of six hundred seventy-four (674) days on all counts to run concurrently. App. 23-25.

[12] The Appellant filed a Motion to Correct the Sentence along with an Affidavit, Brief, and Exhibits in Support of the Motion. App. 26-43. The State filed a Response. App. 44-45. The Court denied the Motion. App. 47.

VII. LEGAL ARGUMENT.

A. Standard Of Review.

[13] A claimed violation of a constitutional right is reviewed de novo. Rowley v. Cleaver, 1999 N.D. 158, ¶ 8, 598 N.W. 2d 125; State v. Treis, 1999 ND 136, ¶ 11, 597 N.W.2d 664. Under the Eighth Amendment to the United States Constitution, “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 provides the same protections under Article I, § 11. N.D. Const. Art. I, § 11.

B. Whether the Defendant’s Constitutional Right against cruel and unusual punishment has been violated.

[14] Mr. Wagner claims that it is cruel and unusual punishment for him to be required to serve eighty-five percent of his sentence when his crimes do not fall within the statute requirement for the eighty-five percent rule. Mr. Wagner claims that the Court should correct the sentence and Judgment to reflect that his crimes do not fall under the eighty-five percent rule.

[15] North Dakota Century Code Section 12.1-32-09.1 provides the following:

12.1-32-09.1. Sentencing of violent offenders.

1. Except as provided under section 12-48.1-02 and pursuant to rules adopted by the department of corrections and rehabilitation, an offender who is convicted of a crime in violation of section **12.1-16-01**, **12.1-16-02**, **subsection 2 of section 12.1-17-02**, **section 12.1-18-01**, **subdivision a of subsection 1 or subdivision b of subsection 2 of section 12.1-20-03**, **section 12.1-22-01**, **subdivision b of subsection 2 of section 12.1-22-02**, or an attempt to commit the offenses, and who receives a

sentence of imprisonment is not eligible for release from confinement on any basis until eighty-five percent of the sentence imposed by the court has been served or the sentence is commuted.

2. In the case of an offender who is sentenced to a term of life imprisonment with opportunity for parole under subsection 1 of section 12.1-32-01, the term "sentence imposed" means the remaining life expectancy of the offender on the date of sentencing. The remaining life expectancy of the offender must be calculated on the date of sentencing, computed by reference to a recognized mortality table as established by rule by the supreme court.

3. Notwithstanding this section, an offender sentenced under subsection 1 of section 12.1-32-01 may not be eligible for parole until the requirements of that subsection have been met.

N.D.C.C. § 12.1-32-09.1 (emphasis added).

[16] Mr. Wagner was charged and ultimately plead guilty to Felonious Restraint, in violation of 12.1-18-02 of the North Dakota Century Code, Terrorizing, in violation of 12.1-17-04 of the North Dakota Century Code, and Aggravated Assault, in violation of 12.1-17-02 of the North Dakota Century Code. These crimes do not fall under the specific crimes stated in N.D.C.C. 12.1-32-09.1. Therefore, Mr. Wagner's crimes do not fall under the required eighty-five percent rule. However, he has been informed that he is required to serve eighty-five percent of his sentence. App. 28.

[17] Under the Eight Amendment to the United States Constitution, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. XIII. The North Dakota Constitution provides the same protections under Article I, § 11. N.D. Const. Art. I, § 11. Making Mr. Wagner serve eighty-five percent of his sentence when his crimes do not fall under any of the crimes specifically mentioned in N.D.C.C. 12.1-32-09.1, results in Mr. Wagner receiving a sentence that is cruel and unusual in violation of the Eight Amendment.

VIII. CONCLUSION.

[18] For the foregoing reasons, Mr. Wagner, respectfully requests that this matter be remanded back to the District Court to correct the Judgment to specifically state that Mr. Wagner's crimes do not fall under N.D.C.C. 12.1-32-09.1.

Dated this 23rd day of May, 2017.

/s/Bobbi L. Weiler
Jackson, Thomason & Weiler, P.C.
Bobbi L. Weiler (NDID 06546)
Attorney for Appellant
418 E. Rosser Ave., Suite 330
Bismarck, ND 58501
Phone: 701-751-4847
Fax: 701-751-4845
Email: bweilerjtw@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Defendant-Appellant, Donny Wagner, was on the 23rd day of May, 2017, served electronically to the following:

Gabrielle Goter
Attorney at Law
gabrielle.goter@mortonnd.org

and U.S. Mail to the following:

Donny Wagner
Inmate #19416
James River Correctional Center
2521 Circle Drive
Jamestown, ND 58401

/s/Bobbi L. Weiler
Bobbi L. Weiler (NDID 06546)