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20170388
FILED

IN THE SUPREME COURT OF NORTH DAKOTA

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CLERK OF SUPREME COURT
MARCH 20, 2018
STATE OF NORTH DAKOTA

State of North Dakota,)	Supreme Court File Nos.
	)	20170387;
	)	20170388
Plaintiff and Appellee,)	
	)	Ward County Criminal Nos.
	)	51-2017-CR-00122
v.	)	51-2017-CR-00123
)	
)	
James Milton Blue II,	)	APPELLANT’S BRIEF
)	
Defendant and Appellant.)	

**APPEAL FROM THE CRIMINAL JUDGMENT IN WARD
COUNTY DISTRICT COURT, NORTH CENTRAL JUDICIAL
DISTRICT, NORTH DAKOTA THE HONORABLE GARY H. LEE,
PRESIDING.**

Kiara C. Kraus-Parr
ND Bar No. 06688
Kraus-Parr, Morrow, & Weber
424 Demers Ave
Grand Forks, ND 58201
Office: (701) 772-8991
Fax: (701) 795-1769
kiara@kpmwlaw.com
Attorney for the Appellant

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Transcript References:

The Change of Plea Hearing for this matter was conducted on October 27, 2017. The transcript of that hearing is referred to as [Tr.] in this brief.

JURISDICTION

[¶ 1] The Defendant, James Milton Blue II, timely appealed the final criminal judgments arising out of the district court and the North Dakota Supreme Court has jurisdiction over the appeal of this matter pursuant to N.D.C.C. § 29-32.1-14 which provides that, “[a] final judgment entered under this chapter may be reviewed by the supreme court of this state upon appeal as provided by rule of the supreme court.” The district court had jurisdiction under N.D.C.C. § 29-32.1-01. This Court has appellate jurisdiction under N.D. Const. art. VI, § 6, and N.D.C.C. §§ 29-28-03; 06(1)(2)(4) and (5). The final amended criminal judgments were filed in this case on November 21, 2017.

STATEMENT OF THE ISSUES

- [¶ 2] I. Whether the district court abused its discretion when ordering restitution without properly complying with N.D.C.C. § 12.1-32-08.
- II. Whether Mr. Blue’s sentence conforms with the Eighth Amendment’s requirement of proportionality.

STATEMENT OF CASE

[¶ 3] This is a criminal matter on direct appeal from South Central Judicial District, Burleigh County Criminal Judgment. These cases were before the district court in State v. Blue, 51-2017-CR-00122 and 51-2017-CR-00122. The complaint and citations were filed with the court on January 19, 2017. Mr. Blue made open Alford pleas of guilt to:

<u>Case 51-2017-CR-123:</u>		
Count 1 Terrorizing,	12.1-17-04,	Felony C
Count 2 Reckless Endangerment,	12.1-17-03,	Felony C
Count 3 Reckless Endangerment,	12.1-17-03,	Felony C
Count 4 Reckless Endangerment,	12.1-17-03,	Felony C
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Count 8 Reckless Endangerment,	12.1-17-03,	Felony C
Count 9 Simple Assault,	12.1-17-01,	Felony C
Count 10 Simple Assault,	12.1-17-01,	Felony C
Count 11 Contact By Bodily Fluids,	12.1-17-11,	Felony C
Count 13 Contact By Bodily Fluids,	12.1-17-11,	Felony C
Count 14 Contact By Bodily Fluids,	12.1-17-11,	Felony C
Count 15 Prohibited/Possess Firearm ,	62.1-02-01,	Felony C
Count 16 Attempted Murder,	12.1-16-01,	Felony A
Count 17 Terrorizing,	12.1-17-04,	Felony C
Count 18 Interference/Telephone During Emergency Call,	12.1-21-06.1,	Felony C
<u>Case 51-2017-CR-122:</u>		
Count 1 Aggravated Assault,	12.1-17-02,	Felony C

[¶ 4] The Amended Criminal Judgment was filed on November 21, 2017.

Mr. Blue was sentenced as follows:

With respect to count 16 in file cr122: Mr. Blue is to be committed to the Department of Corrections and Rehabilitation for 20 years, first to serve 15 with the balance suspended for a period of five (5) years of supervised probation and credit for 283 days previously served; Counts 1 through 6 in file cr122, five years, concurrent with Count 16, committed to the Department of Corrections and Rehabilitation and credit for 283 days previously served; counts 9 through 18, less number 12, which was dismissed, five years, concurrent with Count 16, committed to the Department of Corrections and Rehabilitation and credit for 283 days previously served. Restitution in case cr122 order in the amount of \$2,716.13; Counts 7 and 8 five years committed to the Department of Corrections and Rehabilitation, consecutive to all other counts and credit for 283 days previously served.

With respect to count 1 in file cr123: Mr. Blue was sentenced to five years, concurrent with case cr122, committed to the Department of Corrections and Rehabilitation and credit for 283 days previously served.

STATEMENT OF FACTS

[¶ 5] Mr. Blue has no recollection of the alleged facts in this case however they are presented as follows: On December 8, 2016, Minot Police Department was dispatched to the emergency room at Trinity Hospital to meet with an assault victim, Ms. Odegaard. Ms. Odegaard stated she was in a domestic relationship with her attacker, Mr. Blue. She stated that Mr. Blue hit her and strangled her, causing her to lose consciousness. Mr. Blue was subsequently charged with aggravated assault in case 51-2017-CR-122. Tr. pp. 8-9.

[¶ 6] On January 17, 2017 at approximately 1:56 p.m., Minot Central Dispatch (Dispatch) received a call from Ms. Odegaard, reporting that Mr. Blue was in her home and she wanted him removed. She later reported that she heard Mr. Blue coming down the hall to the bedroom. She said that he fired shots towards the master bedroom, this was later charged as count 2. During the call, Ms. Odegaard yelled, “Don’t shoot me.” Ms. Odegaard stated that Mr. Blue tried to get her son away from her. She said that Mr. Blue put a gun to her forehead, this was the basis for counts 1 and 2. Tr. pp. 14, 17-18.

[¶ 7] Ms. Odegaard’s friend Ms. Graham stated that Mr. Bell, Mr. Blue’s friend, attempted to stop Mr. Blue. Ms. Graham stated that she, Mr. Bell, and Ms. Colleaux were in the trailer when Mr. Blue fired shots towards the back bedroom. She further stated that she heard more shots from inside the residence after she went outside. These facts were the basis of counts 4, 5, and 6. Tr. p. 17.

[¶ 8] Another call was made to Dispatch to report hearing gunshots. Officers Andrew Mehlhoff, Joshua Lund, and Jessica Sundheim responded to the initial call.

Officers positioned their patrol vehicles to block the entrance and exit of the trailer park. Another call was received by dispatch stating that there was a man shooting a handgun outside of Ms. Odegaard's trailer. Officers Mehlhoff and Sundheim armed themselves and approach the trailer. Mr. Blue left the trailer, walking into the roadway with a handgun. He stopped in the road, fired multiple times in the direction of the trailer. He pointed a firearm at Officers Mehlhoff and Sundheim, which was charged as counts 7 and 8. Mr. Blue was not responsive to verbal commands by police officers. Tr. pp. 14-15.

[¶ 9] Mr. Blue walked between the officers and the trailer several times. Officer Sundheim fired her weapon at Mr. Blue. Mr. Blue returned to the trailer and destroyed property in the trailer. Officer Mehlhoff helped an individual leave the area for her safety. Mr. Blue left the trailer again and SWAT Team Officers took him into custody at that time. Mr. Blue was bleeding from an injury to his hand. Officer Sundheim had an open cut on her hand, and Mr. Blue's blood and saliva came in contact with that cut, which was charged out under count 11. Tr. pp. 15-16.

[¶ 10] Community Ambulance employees, James Rossiter and Daniel Henke arrived on scene. Mr. Blue spit at Officer Shane Johnson and that bodily fluid came in contact with his right cheek and chest. Mr. Blue grabbed Mr. Rossiter and Mr. Henke arms or wrists at different points, applying enough force for both of them to sustain injury, which was charged as counts 9 and 10. Mr. Blue spit at Officer Mehlhoff, which was charged as count 13. Mr. Blue spit landed on Mr. Rossiter's face, in Mr. Henke's eye and mouth, and on Officer Krista Cousins, which was charged as count 14. Mr. Blue was sedated at that point. Tr. p. 16. Mr. Blue has a prior felony conviction and was therefore a felon in possession of a firearm, charged as count 15. Id.

[¶ 11] At sentencing Attorney Waters objected to the Court’s application of Marsy’s law, N.D. Const. art. VI, § 25(1)(n), instead of N.D.C.C. § 12.1-32-08. Tr. p. 25. The lower court stated that Mr. Blue would most likely not pay back any restitution, but that it had to be ordered anyway. Tr. pp. 25, 53. Further Attorney Waters recounted to the court sentences for similar crimes with more severe facts, but the court declined to sentence Mr. Blue in light of those cases.

LAW AND ARGUMENT

I. Whether the district court abused its discretion when ordering restitution without properly complying with N.D.C.C. § 12.1-32-08.

Standard of Review

[¶ 12] 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.

[¶ 13] When reviewing a trial court’s restitution order, this Court is limited to whether the district court acted within the limits set by statute, which is similar to an abuse of discretion standard. State v Bingaman, 2002 ND 210, ¶4, 655 N.W.2d 57. A district

court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, if its decision is not the product of a rational mental process leading to a reasoned determination, or if it misinterprets or misapplies the law. Id. In determining if a court abused its discretion in coming to a reasonable restitution order, “[T]he factual situation at hand must be examined to determine whether the trial judge acted according to reason.” State v. Tupa, 2005 ND 25, ¶9, 691 N.W.2d 579.

[¶ 14] Under the recently passed Marsy’s Law, Article 1 Section 25 of the North Dakota Constitution, crime victims have, “The right to full and timely restitution from each offender for all losses suffered by the victim as a result of the criminal or delinquent conduct.” N.D. Const. Art. 1 Sec 25(1)(n). However, that law in no way negates the constitutional rights of a criminal defendant.

[¶ 15] Along with N.D. Const. Art. 1 Sec 25(1)(n) court must still comply with N.D.C.C. § 12.1-32-08, which states, “Before imposing restitution or reparation as a sentence or condition of probation the court... [i]n determining whether to order restitution...shall take into account: The ability of the defendant to restore the fruits of the criminal action or to pay monetary reparations, or to otherwise take action to restore the victim’s property.”

[¶ 16] This Court recently held in State v. Kostelecky, that N.D. Const. art. I, § 25(1)(n) does not conflict with or change the meaning of restitution as provided by N.D.C.C. §§ 12.1-32-08(1). State v. Kostelecky, 2018 ND 12, ¶16, 906 N.W.2d 77. While the Court did not address if the new constitutional provision would not affect the district court’s consideration of restitution under subsections b and c of N.D.C.C. § 12.1-32-08(1),

the adoption of such a position would be logically consistent with the Court's prior reasoning.

[¶ 17] Simply put, the district court must not order restitution "without considering other evidence presented," as required in Kostelecky. The evidence that must be presented is the defendant's ability to pay and the likelihood that a condition of restitution or reparation will serve a rehabilitative purpose. Without such a provision the ordering of restitution becomes a penalty above and beyond the currently defined statutory scheme found in N.D.C.C. § 12.1-32-01, and in violation of a defendant's due process and prohibition against ex post facto laws. See U.S. Const. art. 1, sec. 10; N.D. Const. art. I, sec. 18.

[¶ 18] The district court ordered \$2,716.13 in restitution without assessing if Mr. Blue could pay it. Tr. pp. 23-26. The court stated, "I've ordered full restitution as requested by the State...I'm not naive enough to think that that's going to get paid any time in the future, if at all." Tr. p. 53 ln. 19-22. The court clearly doesn't believe the defendant will have the ability to pay restitution, but orders it anyway, in violation of N.D.C.C. § 12.1-32-08. Blindly ordering restitutions is a de facto greater punishment than what is prescribed by statute. For instance: if an individual was found guilty of a Class B Misdemeanor the maximum fine, or penalty, is \$1,500.00. N.D.C.C. § 12.1-32-01(6). If a defendant was then ordered to pay restitution above the \$1,500.00 or even in addition to a lesser fine, without assessing their ability to pay and the likelihood that it would serve a rehabilitative purpose, the court is increasing the legislature's maximum possible punishment without giving proper notice to the defendant. Additionally, proper notice could never be given because of the uncertain nature of restitution. Therefore, the district court must make reasonable

factual findings consistent with that in N.D.C.C. § 12.1-32-08, and nothing in N.D. Const. art. I, § 25(1)(n) would change that. Because the court did not comply with N.D.C.C. § 12.1-32-08 the court abused its discretion when order restitution in this case.

II. Whether Mr. Blue’s sentence conforms with the Eighth Amendment’s requirement of proportionality

[¶ 19] This Court uses a de novo standard of review to a claim of a constitutional violation. State v. Aguero, 2010 ND 210, ¶ 16, 791 N.W.2d 1; see State v. Pena Garcia, 2012 ND 11, ¶ 6, 812 N.W.2d 328 (“A de novo standard of review applies to whether facts rise to the level of a constitutional violation...”). The Eighth Amendment to the United States Constitution, as it applies to the states through the Fourteenth Amendment, says: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” When a court is considering whether a punishment is cruel and unusual, courts must look beyond historical conceptions to “the evolving standards of decency that mark the progress of a maturing society.” Estelle v. Gamble, 429 U. S. 97, 102 (1976) (quoting Trop v. Dulles, 356 U. S. 86, 101 (1958)). Further, represented in the Constitution’s ban on cruel and unusual punishments is the “precept of justice that punishment for crime should be graduated and proportioned to [the] offense.” Weems v. United States, 217 U. S. 349, 367 (1910).

[¶ 20] The U.S. Supreme Court in Solem v. Helm, held that the Eighth Amendment’s prohibition of cruel and unusual punishments forbids not only barbaric punishments, but also sentences that are disproportionate to the crime committed. Solem v. Helm, 463 U.S. 277, 284-286 (1983). The Court explained that the principle of proportionality applies to felony prison sentences and no penalty is per se constitutional. Id. at 288-290.

[¶ 21] To determine if a sentence complies with the principle of proportionality the Court in Helm listed 3 guiding criteria 1) the gravity of the offense and the harshness of the penalty; 2) the sentences imposed on other criminals in the same jurisdiction, that is, whether more serious crimes are subject to the same penalty or to less serious penalties; and 3) the sentences imposed for commission of the same crime in other jurisdictions. Id. at 290-292.

[¶ 22] The gravity of the crimes before the court was serious; specifically, the discharge of a firearm, and the threats to the safety of individuals in the area. However, when assessed in conjunction with the sentences imposed on other criminals in the same jurisdiction Mr. Blue's sentence does not appear to be proportional. Tr. pp. 39-43, 56-57. Finally, Mr. Waters indicates cases in other jurisdictions in the State of North Dakota where sentences imposed for commission of the same crime were sentenced to less time or had greater damage to victims for a similar sentence as that of Mr. Blue. Id. The court did not wish to consider other cases therefore, it did not follow the proportionality criteria set out in Helm. Therefore, Mr. Blue's sentence was not proportional to similarly situated criminal defendants as required by the Eight Amendment.

CONCLUSION

[¶ 23] Because the district court did not comply with N.D.C.C. § 12.1-32-08 the court abused its discretion when it order restitution in this case, and Mr. Blue's sentence was not proportional to similarly situated criminal defendants as required by the Eight Amendment.

[¶ 24] WHEREFORE the Defendant respectfully requests the Court to reverse the judgment of the trial court.

Dated this 20th day of March 2018

/s/ Kiara Kraus-Parr

ND Bar No. 06688

Kraus-Parr, Morrow, & Weber

424 Demers Avenue

Grand Forks, ND 58201

(701) 772-8526

kiara@kpmwlaw.com

Attorney for the Appellant

**IN THE SUPREME COURT
OF NORTH DAKOTA**

State of North Dakota,)	
)	
vs.	)	CERTIFICATE OF SERVICE
)	
James Blue,	)	#51-2017-CR-122; 123
	)	#20170387; 20170388
Appellant.)	

The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Appellant's Brief
Appellant's Appendix

And that said copies were served upon:

Ashlei Neufeld, State's Attorney, 51wardsa@wardnd.com

by e-file.

Dated: March 20, 2018

KRAUS-PARR, MORROW, & WEBER

/s/Kiara C. Kraus-Parr
Kiara C. Kraus-Parr
424 Demers Avenue
Grand Forks, ND 58201
ND Attorney No. 06688
Phone: (701) 772-8991
kiara@kpmwlaw.com
Attorney for Appellant

**IN THE SUPREME COURT
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State of North Dakota,)	
)	
vs.)	CERTIFICATE OF SERVICE
)	
James Blue,)	#51-2017-CR-122; 123
Appellant.	)	#20170387; 20170388

The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Appellant's Brief
Appellant's Appendix

And that said copies were served upon:

James Milton Blue II
c/o NDSP
3100 E. Railroad Ave.
Bismarck, ND 58506

by USPS certified mail

Dated: March 21, 2018

KRAUS-PARR, MORROW, & WEBER

/s/Kiara C. Kraus-Parr
Kiara C. Kraus-Parr
424 Demers Avenue
Grand Forks, ND 58201
ND Attorney No. 06688
Phone: (701) 772-8991
kiara@kpmwlaw.com
Attorney for Appellant