

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

State of North Dakota,)	
)	Supreme Court No. 20170387 and
Plaintiff and Appellee,)	20170388
)	District Court No. 51-2017-CR-00122
)	and 51-2017-CR-00123
vs.)	
)	
)	
James Milton Blue, II,)	
)	
Defendant and Appellant.)	

APPELLEE’S BRIEF

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

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[¶2] STATEMENT OF THE CASE

[¶3] This is a criminal case on direct appeal from the North Central Judicial District, Ward County. On January 17, 2017, Mr. Blue was charged with Attempted Murder, a class A felony, and 17 class C felonies, including Terrorizing, Reckless Endangerment, Simple Assault on Emergency Medical Personnel, Contact by Bodily Fluids, Unlawful Possession of Firearm, and Interference with a Telephone during an Emergency Call in Ward County file 51-2017-CR-00122. Near the same time, he was charged with Aggravated Assault, a class C felony, in file 51-2017-CR-00123. He pleaded guilty to all charges, except one in file 51-2017-CR-00122, which had been dismissed by the district court due to a clerical error in the Information, on an open plea basis on October 27, 2017. He was sentenced to 20 years, with five years suspended, on the class A felony, and five years each on the class C felonies. All sentences were ordered to run concurrently, except two class C felonies which were ordered to run concurrently with each other, but consecutively to the other sentences. He timely appealed.

[¶4] STATEMENT OF FACTS

[¶5] The State concurs in the Statement of Facts presented by Mr. Blue in his brief, but notes several omissions. During the standoff in the street, Mr. Blue advanced toward Officers Mehlhoff and Sundheim with a gun. Tr. p. 15, lines 13-14. Officer Sundheim fired at Mr. Blue when he fired at the officers. Tr. p. 15, lines 16-18.

[¶6] The primary victim in this matter, Aisha Odegaard, reported that she had been involved in an altercation with Mr. Blue the previous evening, during which he smacked a phone from her hand when she tried to call police. Tr. p. 18, lines 17-22. During that altercation, Mr. Blue pointed a pistol at Ms. Odegaard's face and threatened to shoot her and her child. Tr. p. 18, lines 23-25. He also held the gun at a downward angle between

her eyes and said he would shoot her in the head and through her spine, and later threatened to shoot her in front of her son. Tr. p. 19, lines 5-10.

[¶7] The court ordered restitution in the amount of \$2716.13. App. A-26. Mr. Blue stipulated to that amount. Tr. p. 23, lines 20-23. Defense counsel argued that the district court was required to make findings pursuant to N.D.C.C. 12.1-32-08, an argument rejected by the district court in light of N.D.Const. Art. I, §25(1)(n). Tr. p. 26, lines 8-17, p. 28, lines 16-17.

[¶8] Defense counsel put forth several cases which it contended were similar to the case at bar and argued that sentence should be imposed consistent with those cases. Tr. pp. 39-42, p. 56, lines 9-23. The district court rejected that argument, citing the seriousness of the case before it. Tr. p. 58, lines 5-14.

[¶9] The district court sentenced Mr. Blue as outlined in the Statement of the Case above. App. A-18 - A-34, A-56 – A-57.

[¶10] LAW AND ARGUMENT

[¶11] I. The District Court did not abuse its discretion in ordering restitution.

[¶12] In making its sentencing recommendation to the district court, the State asked the court to order restitution in the amount of \$2716.13, which included the cost of disposing of Ms. Odegaard's destroyed mobile home, and reimbursement to WSI and Medicaid for medical expenses paid on behalf of the victims. Tr. p. 22, lines 17-20. Mr. Blue's attorney acknowledged receipt of restitution documents and reviewing the same with Mr. Blue. Tr. p. 22, lines 10-13. Counsel advised the court that Mr. Blue indicated an understanding of what was being requested, then stated, "I'll leave it to him to decide whether he wishes to request a restitution hearing on it as it is an open plea." Tr. p. 23, lines 6-9. The court then inquired of Mr. Blue whether he wanted a hearing on

restitution, to which Mr. Blue agreed to the amount requested and the court found a knowing and intelligent decision to stipulate to restitution. Tr. p. 23, lines 11-23. Defense counsel then argued that the District Court was still required to make findings regarding the defendant's ability to pay restitution. Tr. p. 25, lines 1-2. The District Court ruled that N.D.Const. Art. I, §25(1)(n) abrogated that requirement. Tr. p. 25, lines 4-9, p. 26, lines 8-17, p. 28, lines 16-17.

[¶13] Pursuant to Section 12.1-32-08, N.D.C.C., the trial court shall order restitution for reasonable damages sustained by a victim as a direct result of a defendant's criminal conduct, including actual expenses incurred and services for physical care. N.D.C.C. 12.1-32-08(1)(a). The trial court is also required to consider the ability of the defendant to make restitution and whether imposing restitution "will serve a valid rehabilitative purpose" for the defendant. N.D.C.C. 12.1-32-08(1)(b)(c).

[¶14] This Court ruled in State v. Thorstad, 261 N.W.2d 899 (N.D. 1978), that "the provisions of § 12.1-32-08, N.D.C.C., apply in situations where the defendant either is found guilty or pleaded guilty to a criminal charge and the amounts or the issues of restitution or reparation are uncertain or are in dispute." Thorstad, 261 N.W.2d at 901. This Court went on to say that "[w]hen a defendant agrees to pay for the damage he caused ... he cannot later claim in the absence of fraud, that he was not made aware of the amount or that he did not agree to the amount." Id.

[¶15] Thorstad involved a guilty plea pursuant to a negotiated plea agreement. In the instant case, Mr. Blue was advised of the State's sentencing recommendation and request for restitution. However, he chose to enter an open plea. Tr. p. 1, lines 17-21. Mr. Blue agreed to the restitution requested by the State. Tr. p. 23, lines 20-23. Trial counsel indicated that Mr. Blue would request a hearing if he so desired; no hearing was

requested. Tr. p. 23, lines 6-23. The Court's reasoning in Thorstad is applicable to this case. "After a voluntary agreement has been reached on the issues of restitution and reparation it would be a useless gesture to proceed under § 12.1-32-08." Thorstad, 261 N.W.2d at 901.

[¶16] The district court ruled that pursuant to N.D.Const. Art. I, §25(1)(n), it was required to order restitution. This Court recently addressed an order of restitution in light of N.D.Const. Art. I, §25. State v. Kostelecky, 2018 ND 12, 906 N.W.2d 77. The Court left open the question of whether N.D.Const. Art. I, §25(1)(n) eliminates the requirement of consideration of subsections b and c of N.D.C.C. §12.1-32-08(1). The State submits that it does.

[¶17] Pursuant to N.D.Const. Art. I, §25(1)(n), a victim is entitled to "full and timely restitution in every case and from each offender for all losses suffered by the victim as a result of the criminal or delinquent conduct." That subsection is silent as to an offender's ability to pay. Had the drafters intended to preserve the requirement that the court make findings regarding the offender's ability to pay, it would have done so. N.D.Const. Art. I, §25(1)(f) grants victims the right to privacy and to refuse an interview, deposition, or other discovery request made by the defendant. However, that section specifically provides, "Nothing in this section shall abrogate a defendant's sixth amendment rights under the Constitution of the United States nor diminish the state's disclosure obligations to a defendant." The drafters demonstrated the intent to preserve a defendant's rights to confrontation and the state's obligations to disclose. No such preservation was made in N.D.Const. Art. I, §25(1)(n). The district court used basic "principles of construction" in determining that the preservation language of N.D.Const. Art. I, §25(1)(f) does not apply

to N.D.Const. Art. I, §25(1)(n). Tr. p. 28, lines 4-6. The district court did not abuse its discretion.

[¶18] II. The District Court not did err in imposing sentence.

[¶19] Mr. Blue pleaded guilty to 17 class C felonies and one class A felony. He was sentenced to 20 years, with 5 years suspended, on the class A felony. App. A-32. He was sentenced to five years on each of the class C felonies, all but two of which were concurrent with the A felony. App. A-18 – A-34, A-56. The sentences on the remaining two class C felonies were ordered concurrent with each other, but consecutive to the other counts. App. A-44. The end result is a requirement that Mr. Blue serve 20 years.

Mr Blue relies on Solem v. Helm, for his position that the Eight Amendment to the U.S. Constitution requires sentences that are proportionate to the crime committed. Appellant's brief, ¶20, *citing* Solem v. Helm, 463 U.S. 277 (1983). However, the United States Supreme Court reversed itself and found that the Eighth Amendment contains no proportionality guarantee. Harmelin v. Michigan, 501 U.S. 957, 965 (1991). The Harmelin Court's historical analysis concluded that the Eighth Amendment prohibition against cruel and unusual punishments was directed at methods of punishment, not disproportionate or excessive sentences. Id. at 967-990. In its discussion, the Court essentially rejected the three Solem factors. Id. at 985-990. It went on to review more modern jurisprudence, specifically citing to dictum in several cases to the effect that sentences that fall within statutory limits are not cruel and unusual. Id. at 990-993. Finally, the Harmelin Court seemed to limit the requirement of proportionality to capital cases. Id. at 994.

[¶20] In sentencing Mr. Blue, the district court considered the factors set forth at Section 12.1-32-04, N.D.C.C. Tr. pp. 51-55. The court found that Mr. Blue's actions

threatened serious harm to, not only Ms. Odegaard and her property, but also the community. Tr. p. 51, lines 5-23. The court found Mr. Blue's actions threatened harm to responding law enforcement officers. Tr. p. 52, lines 1-6. The court noted that the actions for which Mr. Blue was charged and to which he ultimately pleaded guilty spanned a period of two days. Tr. p. 52, lines 9-14.

[¶21] In finding no provocation, justification or excuse for Mr. Blue's conduct, the district court again emphasized the threat of harm to persons who were targeted, to law enforcement officers who responded and to the community. Tr. p. 52, line 15 - p. 53, line 6. The court found the victims, Ms. Odegaard, law enforcement officers, and medical personnel did nothing to induce or facilitate Mr. Blue's conduct. Tr. p. 53, lines 7-15. In fact, the court noted that the law enforcements officers and medical personnel were doing nothing more than performing their professional duties. Tr. p. 53, lines 10-13. The district court noted that Ms. Odegaard did not request monetary restitution and expressed doubt about whether Mr. Blue would pay the restitution ordered. Tr. p. 53, lines 16-23. It did not express an opinion about Mr. Blue's ability to pay.

[¶22] The district court considered Mr. Blue's lengthy criminal history, including crimes of violence. Tr. p. 53, line 24 – p. 54, line 14. The court relied on Mr. Blue's history in finding the factors relating to future conduct were not in his favor. Tr. p. 54, line 15 – p. 55, line 5. A district court is certainly entitled to consider a defendant's background in imposing sentence. State v. Eagleman, 2013 ND 101, ¶15, 831 N.W.2d 759. Finally, the district court found that, not only did Mr. Blue not cooperate with law enforcement, he "fought them all the way..." and fought medical personnel attempting to render him aid. Tr. p. 55, lines 11-14. The court concluded that the sentencing factors weighed "extremely heavily against Mr. Blue..." Tr. p. 55, lines 15-17.

[¶23] The district court acknowledged the various comparative cases raised by Mr. Blue, but pointed out that each case has unique facts and circumstances. Tr. p. 57, line 11 – p. 58, line 4. Finally, the district court found “this is an extremely serious matter that endangered dozens and dozens of people, innocent bystanders, next-door neighbors, children. It’s a crime that merits serious attention and serious action on the part of the Court.” Tr. p. 58, lines 11-14.

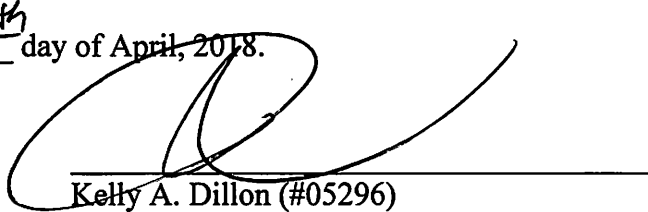
[¶24] The district court sentenced Mr. Blue to 20 years, with five years suspended, on the charge of Attempted Murder, a class A felony. A class A felony is punishable by a maximum of twenty years’ imprisonment. N.D.C.C. 12.1-32-01(2). The sentence is not illegal. The district court sentenced Mr. Blue to five years on each of the 17 class C felonies. A class C felony is punishable by a maximum of five years’ imprisonment. N.D.C.C. 12.1-32-01(4). The sentences were all ordered to run concurrently, with the exception of two class C felonies which were ordered to run concurrently with each other, but consecutively to all the other sentences. A district court has the power to impose consecutive sentences. State v. Mees, 272 N.W.2d 61, 66 (N.D. 1978). Mr. Blue could have been sentenced to 110 years. The sentenced imposed is within the statutory limits.

[¶25] CONCLUSION

[¶26] The district court was not required to consider Mr. Blue's ability to make restitution under N.D.C.C. 12.1-32-08, and did not err in ordering restitution. The Eighth Amendment to the U.S. Constitution does not require the district court to impose sentence proportional to similarly situated defendants and the sentence imposed is within the statutory limits.

WHEREFORE, the State respectfully requests the Court affirm the judgment of the district court.

Respectfully submitted this 18th day of April, 2018.



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AFFIDAVIT OF SERVICE

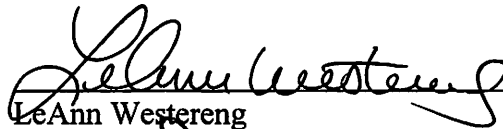
LeAnn Westereng, being first duly sworn, deposes and says:

That she is a citizen of the United States of America, over the age of twenty-one years, and is not a party to nor interested in the above entitled action; that on the 18th day of April, 2018, this Affiant provided a true and correct copy of the following documents in the above entitled action:

APPELLEE'S BRIEF

By ELECTRONIC SERVICE to the following:

KIARA COSTA KRAUS-PARR
kiara@kpmwlaw.com



LeAnn Westereng

Subscribed and sworn to before me this 18th day of April, 2018, by LeAnn Westereng



Notary Public

JENNIFER SCHLECHT
Notary Public
State of North Dakota
My Commission Expires April 14, 2021