

IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota,)	Supreme Court File No.
)	20180108
)	
Plaintiff and Appellee,)	Grand Forks County Criminal No.
)	18-2016-CR-00008
)	
v.)	
)	
Dana Schlieve,)	APPELLANT’S BRIEF
)	
Defendant and Appellant.)	

**APPEAL FROM THE CRIMINAL JUDGMENT IN GRAND
 FORKS COUNTY DISTRICT COURT, NORTHEAST CENTRAL
 JUDICIAL DISTRICT GRAND FORKS, NORTH DAKOTA THE
 HONORABLE LOLITA HARTL ROMANICK, PRESIDING.**

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Transcript References:

The hearing on the Defendant’s revocation of probation was conducted Feb 13, 2018.

The transcript of that hearing is referred to as [Tr.] in this brief.

JURISDICTION

[¶ 1] The Defendant, Dana Schlieve, timely appealed the final criminal judgment 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. § 29-28-06 which states:

“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.”

STATEMENT OF THE ISSUES

[¶ 2] I. Whether the district court abused its discretion when it decided revocation was warranted.

STATEMENT OF CASE

[¶ 3] This is a criminal matter on direct appeal from Northeast Central Judicial District, Grand Forks County Criminal Judgment. This case was before the district court in State v. Schlieve, 18-2016-CR-00008. The information was filed with the court on January 4, 2016. The Defendant was charged and pleaded guilty to Possession of Methamphetamine, in violation of N.D.C.C. §19-03.1-23(7), a class C Felony, at the time of sentencing, Carrying A Concealed Firearm or Weapon, in violation of N.D.C.C. § 62.1-

01-01, a class A misdemeanor, Carrying A Loaded Firearm In Vehicle, in violation of N.D.C.C. § 62.1-02-10, a class B misdemeanor, and Reckless Driving, in violation of N.D.C.C. § 39-08-03, a class B misdemeanor.

[¶ 4] Mr. Schlieve was represented by Attorney David Ogren. On April 20, 2017, the district court executed a corrected order for consequences on a revocation of probation petition resulting in ten (10) days local incarceration and a subsequent return to supervised probation. A petition for revocation was later filed on August 14, 2017. The district court ordered the revocation of Mr. Schlieve's probation, re-sentenced him, and terminated his supervised probation. Mr. Schlieve timely appealed the court's order and amended criminal judgment in this case.

STATEMENT OF FACTS

[¶ 5] Mr. Schlieve entered into a plea agreement requiring incarceration with the Grand Forks County Correctional Center for 365 with 290 days suspended for a period of two (2) years and two (2) years of supervised probation.

[¶ 6] On April 4, 2017 a revocation hearing was held. The stipulated allegation was that Mr. Schlieve did not contact probation and parole as directed. The district court ultimately ordered ten (10) days of local incarceration and a subsequent return to supervised probation rather than revoke Mr. Schlieve's probation.

[¶ 7] On August 14, 2017, the State filed another revocation of probation. The initial petition stated Mr. Schlieve did not contact probation and parole as directed and he tested positive for controlled substances. On January 12, 2018, the State moved to amend his petition to include criminal convictions from Ramsey and Benson Counties based on allegations from the end of July of 2017.

[¶ 8] Mr. Schlieve was pro se during his revocation hearing on the 13th of February 2018. Mr. Schlieve admitted to the allegations as they were set forth in the amended petition for revocation. Tr. p. 9. When the district court asked Mr. Schlieve for comments before sentencing he stated, “Under the new law for the meth possession, wouldn’t that be like a misdemeanor now?” Tr. p. 13. The Assistant State’s Attorney, Ms. Jasmer, indicated to the court that the crimes states at whatever level was in effect when the conviction occurred. Mr. Schlieve then responded, “Could I just get my suspended time and run it concurrent with what I got to do already?” Tr. p. 14.

[¶ 9] Ms. Jasmer explained the five (5) year recommendation to the court, “This is the second time, the Court may recall, I believe it was on April 4th of 2017, there was an order imposing consequence...And quite frankly, I guess I just thought he’s serving five years already on one case...The State certainly could have asked for less time and then run it consecutive, it just seems fair to run it all together.” Tr. p. 15. The Court then revoked Mr. Schlieve’s probation and resentenced him to five (5) years, run concurrent with both the Benson and Ramsey County cases. He was given credit for the 121 days he previously served. Tr. p. 15.

LAW AND ARGUMENT

I. Whether the district court abused its discretion when it decided revocation was warranted.

Standard of Review

[¶ 10] This Court reviews the district court’s decision to revoke probation with a two-part test. State v. McAvoy, 2007 ND 178, ¶ 7, 741 N.W.2d 198. First, this Court examines the district court’s factual findings under the clearly erroneous standard, and then determine whether the district court abused its discretion when it decided revocation was

warranted. Id. at ¶¶ 8, 17. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, there is no evidence to support it, or this Court is convinced, on the basis of the entire record, that a mistake has been made. Id. at ¶ 8. A court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, when it misinterprets or misapplies the law, or when its decision is not the product of a rational mental process leading to a reasoned determination. Id. at ¶ 17.

[¶ 11] The allegations and underlying facts of the revocation were stipulated to by Mr. Schlieve, therefore the first prong of the test is not at issue in the current case. Whether the trial court abused its discretion when it decided revocation was warranted is at issue in the case before the Court.

[¶ 12] The trial court found that, “Probation was not a successful endeavor for [Mr. Schlieve], and the fact of the matter is that is the potential sentence that [he] could have had at the outset, so it is a sentence that is within the law and meets the circumstances of this case.” Tr. p. 15. The basis of the court’s determination was that Mr. Schlieve had new criminal violations while on probation. Tr. p. 15. The court appeared to be swayed by the State’s argument that Mr. Schlieve had already been sentenced to 5 years in another case. Whatever Mr. Schlieve’s sentence was in a prior case outside of the court’s jurisdiction should not be a consideration for the court’s determination that revocation was warranted.

[¶ 13] The trial court’s statement that the five (5) year sentence is within the law and meets the circumstances of this case ignores the legislature’s intention, after the change in the law, that simple possession cases be considered misdemeanors. It is an abuse of discretion for the court to say that a five (5) year sentence meets the circumstances of

this case simply because it is an available sentence. For example, the new criminal cases with the five (5) year imposition of sentence included charges such as, preventing arrest, possession of a firearm or dangerous weapon in a liquor establishment, felony fleeing or attempting to elude a police officer and reckless endangerment, not a simple possession of a controlled substance. Tr. p. 14. Relying on another jurisdiction's sentencing determination for crimes not even before the trial court rather than looking at the circumstances of the charge that was before the court is an abuse of the court's discretion.

[¶ 14] Finally, the court abused its discretion by not giving due weight to the sentencing factors prior to sentencing Mr. Schlieve. N.D.C.C. § 12.1-32-04 states, "The following factors, or the converse thereof where appropriate, while not controlling the discretion of the court, **shall be** accorded weight in making determinations regarding the desirability of sentencing an offender to imprisonment." *emphasis added*, N.D.C.C. § 12.1-32-04. While the court does not need to explicit reference to the fourteen sentencing factors, the court must give those factors due weight. There was no indication that the court gave those factors due weight as required under the law, which is an abuse of discretion.

CONCLUSION

[¶ 15] The district court abused its discretion when it decided revocation was warranted without considering the circumstances surround the case before it or the giving due weight to the sentencing factors. The court's decision was, therefore, not the product of a rational mental process leading to a reasoned determination.

[¶ 16] WHEREFORE the Defendant respectfully requests the Court to reverse the district court's order revoking Mr. Schlieve's probation.

Dated this 21st day of May, 2018

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Dana Schlieve,)	CERTIFICATE OF SERVICE
)	
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The undersigned, being of legal age, being first duly sworn deposes and says that on May 21, she served true copies of the following documents:

Appellant's Brief
Appellant's Appendix

And that said copies were served upon:

Faye Jasmer, Assistant State's Attorney, sasupportstaff@gfcounty.org

by electronically filing said documents via email. Also served upon:

Dana Schlieve #52254, c/o JRCC, 2521 Circle Dr, Jamestown, ND 58401

by placing a true and correct copy of said items in a sealed envelope with USPS.

Dated: May 21, 2018

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