

IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota,)	Supreme Court File No.
)	20190148
)	
Plaintiff and Appellee,)	Ramsey County Criminal No.
)	36-2014-CR-238
)	
v.)	
)	
John Allen Dubois,)	APPELLANT’S BRIEF
)	
Defendant and Appellant.)	

**Appeal from the Order Revoking Probation in Ramsey County
district court, northeast judicial district, North Dakota, the
Honorable Donovan Foughty presiding.**

**APPELLANT’S BRIEF
ORAL ARGUMENT REQUESTED**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

JURISDICTION..... ¶ 1

STATEMENT OF ISSUES ¶ 2

STATEMENT OF CASE..... ¶ 3

STATEMENT OF FACTS..... ¶ 5

LAW AND ARGUMENT..... ¶ 10

 I. Whether the district court abused its discretion when it
 decided revocation was warranted..... ¶ 10

CONCLUSION..... ¶ 15

TABLE OF AUTHORITIES

Cases

State v. McAvoy, 2007 ND 178, 741 N.W.2d 198 (N.D. 2007) ¶ 10

Statutes, Rules, Codes

N.D. Const. art. VI, § 6 ¶ 1

N.D.C.C. § 12.1-22-02..... ¶ 3

N.D.C.C. § 12.1-32-04..... ¶ 14

N.D.C.C. § 29-28-03 ¶ 1

N.D.C.C. § 29-28-06 ¶ 1

N.D.C.C. § 29-32.1-01..... ¶ 1

N.D.C.C. § 29-32.1-14..... ¶ 1

Oral Argument:

Oral argument has been requested to emphasize and clarify the Petitioner’s written arguments on their merits.

Transcript References:

The hearing on the Defendant’s revocation of probation was conducted April 18, 2019. The transcript of that hearing is referred to as [Tr.] in this brief.

JURISDICTION

[¶ 1] The Defendant, John Allen Dubois, timely appealed the order revoking probation and the resulting final criminal judgment arising out of the district court. Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provision article VI § 6, 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.

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 judicial district, Ramsey County Criminal Judgment. This case was before the district court in *State v. Dubois*, 36-2014-CR-238. The criminal complaint

was filed with the court on May 7, 2014. The Defendant was charged and pleaded guilty to Burglary, in violation of N.D.C.C. § 12.1-22-02, a class C Felony.

[¶ 4] Mr. Dubois was represented by Attorney Coral Mahler. On February 14, 2019, a petition for revocation was filed. The district court ordered the revocation of Mr. Dubois' probation, re-sentenced him, and terminated his supervised probation. Mr. Dubois timely appealed the court's order and amended criminal judgment in this case.

STATEMENT OF FACTS

[¶ 5] On March 5, 2015 Mr. Dubois entered into a plea agreement requiring incarceration with the Department of Corrections and Rehabilitation (DOCR) for a period of two (2) years and three (3) years suspended time with three (3) years of supervised probation.

[¶ 6] On April 18, 2019 a revocation hearing was held. The stipulated allegations were that Mr. Dubois had committed new crimes while on probation, Allegation 1, and did not maintain proper contact with probation and parole as directed, Allegation 2. Tr. pp. 4-6.

[¶ 7] Mr. Dubois admitted to the allegations as they were set forth in the petition for revocation. *Id.* He requested that he be placed back onto probation on the condition that he participate in treatment, aftercare, and maintain employment or education. Tr. pp. 15-17.

[¶ 8] When the district court asked Mr. Dubois for comments before sentencing he stated he did not want to be revoked and resentenced to prison however, “if this plan is not approved...I’m asking the State would recommend or would take into consideration and, if possible, possible release, go to a halfway house. If I may reside at the halfway house, I would be able to seek employment or continue to be sober by attending outpatient treatment, attend NA meetings regular, and still be able to complete the rest of my one-year goals as far as college, employment, and my sobriety.” Tr. p. 18.

[¶ 9] The court ultimately revoked Mr. Dubois’ probation and resentenced him to five (5) years with the DOCR less time previously served. Tr. p. 25. The court explained its decision to revoke and resentence at the hearing by stating, “But just from a time standpoint you’re much better off just going down to the penitentiary because you’ll be done. They’ll be letting you go, you’ll be going out of the system, probably, within about six months and then they’ll be putting you in halfway houses and all that -- all those other things...” *Id.* The court’s written order gave no explanation for the revocation or the sentence imposed.

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. Dubois, 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, “by a preponderance of the evidence that the Defendant had violated probation conditions.” Order Revoking Probation ¶ 3, Appendix p. 15. The court, “having found the Defendant in violation of his suspended sentence, and the Defendant having no legal reason to give why sentence should not be pronounced” imposed five (5) years with credit for 598 days previously served. *Id.* at ¶ 4.

[¶ 13] It was an abuse of discretion for the court, rather than looking at the circumstances of the case before it, to simply revoke and resentence

Mr. Dubois because it could do so, with no factual findings as to why the revocation was warranted. The written order was devoid of all facts to support the need for revocation, which is an abuse of discretion.

[¶ 14] Finally, the court abused its discretion by not giving due weight to the sentencing factors prior to sentencing Mr. Dubois. 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 explicitly reference 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 to revoke Mr. Dubois’ probation without considering if revocation would serve a corrective or rehabilitative purpose or 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 or in accordance with the law.

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

Dated this 12th day of August, 2019

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John Allen Dubois,)	CERTIFICATE OF
)	COMPLIANCE
Defendant and Appellant.)	

[¶ 1] This Appellant’s Brief and Appendix complies with the page limit of 38 set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure as it only has 9 pages.

Dated this 12th day of August, 2019

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Defendant and Appellant.)	

[1] 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:

Kari Agotness, State’s Attorney, ramseysa@nd.gov
Maren Halbach, State’s Attorney, ramseysa@nd.gov

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

John Allen Dubois, Jr #37151
c/o ND DOCR
PO Box 5521
Bismarck, ND 58506

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

Dated: August 12, 2019.

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