20200006
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAY 20, 2020
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA,	)	
Appellee,	)	**Supreme Court No. 20200006**
vs.	)	
AMY JO VAAGEN,	)	**District Court No. 36-2017-CR-00666**
Appellant.	)	

APPELLANT'S BRIEF

Appeal from Order Revoking Probation Entered on December 18, 2019 by Ramsey County District Court, Northeast Judicial District, State of North Dakota, The Honorable Lonnie Olson Presiding.

ORAL ARGUMENTS REQUESTED

Samuel A. Gereszek (ND Bar ID # 07040)
GERESZEK LAW OFFICE P.L.L.C.
3001 32nd Ave. S., Ste. 1A
Grand Forks, ND 58201
Phone: (701) 786-6068
Eservice: eserve@gereszek.law
ATTORNEY FOR THE APPELLANT

[¶ 1] TABLE OF CONTENTS

[¶ 2] TABLE OF AUTHORITIES

[¶ 3] STATEMENT OF THE ISSUES

[¶ 4] Did the district court improperly modify the conditions of unsupervised probation?

[¶ 5] ORAL ARGUMENT JUSTIFICATION

[¶ 6] The issue before this Court is one of due process. Due process in all its various forms is if critical importance to all lower courts. Thus, the issue addressed herein, could have significant implications on future proceedings.

[¶ 7] STATEMENT OF THE CASE

[¶ 8] Amy Jo Vaagen (hereinafter "Vaagen") appeals from an Order Revoking Unsupervised Probation, dated December 18, 2019. A.A. at 71. Ms. Vaagen was placed 15 months on Unsupervised Probation following a Deferred Imposition of Sentence on June 11, 2018. A.A. at 14. Eleven months later on May 9, 2019 the district court issued an amended Order Deferring Imposition of Sentence, adding the condition, "Defendant will do random UA's up to once per week. Defendant will pay for all UA testings[sic]." A.A. at 19 (see Register of Actions Index # 80 v. # 82).

[¶ 9] On August 14, 2019, the State filed a Petition to Revoke unsupervised probation and deferred sentence. A.A. at 21. The allegations contained therein involved drug testing violations. A.A. at 22. On August 27, 2019, a revocation hearing was held, where the district court extended the unsupervised probation by five-months and increased random drug testing to two-times per week. A.A. at 26.

[¶ 10] On September 24, 2019, the State filed a second Petition to Revoke unsupervised probation and deferred sentence. A.A. at 30. The allegations contained therein, again involved drug testing violations. A.A. at 31. Following an Order to Show

Cause hearing, the district court issued an order on October 24, 2019, which ultimately imposed a sentence on Ms. Vaagen of 30 days, with all 30 days suspended, but credit for 14 days already served, and extended unsupervised probation for another five-months. A.A. at 33.

[¶ 11] Then on November 5, 2019, the State filed a Request for Order to Show Cause for Ms. Vaagen's "disregard for the Court's Order" citing allegations that pre-dated the October 24, 2019 criminal judgment. A.A. at 36. On the 13th of November 2019, Ms. Vaagen filed an Answer Brief along with two exhibits to the State's Request. A.A. at 49, 51, & 68. At the November 14, 2019 scheduled Order to Show Cause hearing, Ms. Vaagen requested court appointed counsel. A.A. at 9. Following the appointment of counsel, an Order to Show Cause hearing was held on December 12, 2019. Id. After the hearing, the district court issued its final judgment and Order Revoking Unsupervised Probation. A.A. at 71. Ms. Vaagen was sentenced to 90-days incarceration with credit for the original 14 days served and $60.00 in unpaid UA fees.

[¶ 12] Ms. Vaagen then filed a timely notice of appeal on January 8, 2020, pursuant to N.D.R.App.P. 4. A.A. at 74. The District Court had jurisdiction under N.D.C.C. § 27-05-06 and N.D. Const. art. VI, § 8. The Supreme Court has jurisdiction under N.D.C.C. § 29-28-06 and N.D. Const. art. VI, § 2.

[¶ 13] STATEMENT OF THE FACTS

[¶ 14] Following a plea of guilty to Preventing Arrest, Possession of Controlled Substance, and Possession of Drug Paraphernalia, in violation of N.D.C.C. §§ 12.1-08-02; 19-03.1-23; & 19-03.4-03 respectfully, the district court deferred the imposition of a sentence on Ms. Vaagen on June 19, 2018. A.A. at 14 (Index # 80). Then less than one

month later, on July 11, 2018, Ms. Vaagen submitted to an Addiction Evaluation with the Heartview Foundation which was submitted to the district court on July 18, 2018. A.A. at 17 (Index # 81).

[¶ 15] Then, eleven months later, with no action by any party, or filing, or notice, or request of any kind, the district court issued an "Amended" Order Deferring Imposition of Sentence. A.A. at 18 (Index # 82). The only modifications to the Amended Order was the inclusion of the "dismissed" Count 1 and another "Additional Conditions and Order of the Court." (Compare A.A. at 14 to 19 "Additional Conditions and Order of the Court" section).

[¶ 16] Following this modification to the conditions, the State began filing Petitions to Revoke Probation and Requests for Order to Show Causes. A.A. at 21, 30, and 36. All allegations contained within every petition and request begin with UA violations commencing ***after*** the May 9, 2019 Amended Order from the district court.

[¶ 17] Since the May 9, 2019 modification to the judgment, the district court held five separate hearings regarding alleged testing violation on August, 6, 27, October 10, November 14, and December 12. No allegation has ever been made, nor any evidence presented that Ms. Vaagen violated any condition of her original unsupervised probation from the June 19, 2018 Order Deferring Imposition of Sentence.

[¶ 18] STANDARD OF REVIEW

[¶ 19] Absent from the record is Ms. Vaagen arguing that this modification to the judgment was improper; thereby, nullifying any and all following revocations, orders, and sentences. For this reason, Ms. Vaagen urges this Court to analyze this case for the obvious error that the district courts actions affected her substantial rights.

[¶ 20] This Court has outlined the analysis for obvious error, as follows:

> To establish obvious error under N.D.R.Crim.P. 52(b), the defendant has the burden to show (1) error, (2) that is plain, and (3) that affects substantial rights. We exercise our power to notice obvious error cautiously, and only in exceptional circumstances where the accused has suffered serious injustice. In determining whether there has been obvious error, we examine the entire record and the probable effect of the alleged error in light of all of the evidence.

City of Fargo v. Lunday, 2009 ND 9, ¶ 5, 760 N.W.2d 136 (citing State v. Yineman, 2002 ND 145, ¶ 14, 651 N.W.2d 648).

[¶ 21] ARGUMENT

[¶ 22] The North Dakota Rules of Criminal Procedure and the North Dakota Century Code mandate that ***notice*** must be given before a sentence, judgment, or probation may be modified. See N.D.R.Crim.P. 35 ("***After giving any notice it considers appropriate***, the sentencing court may correct a sentence that resulted from arithmetical, technical, or other clear error"); N.D.C.C. § 12.1-32-07(6) ("The court, ***upon notice to the probationer*** and with good cause, may modify or enlarge the conditions of probation at any time prior to the expiration or termination of the period for which the probation remains conditional") emphasis added.

[¶ 23] Under the Fourteenth Amendment of the United States Constitution, no state shall "deprive any person of life, liberty, or property, without due process of law...." Article I, section 12 of the North Dakota Constitution also states, "No person shall ... be deprived of life, liberty or property without due process of law."

[¶ 24] In the present case, the district court changed the criminal judgment, eleven months after it was originally issued, and modified the conditions imposed upon Ms. Vaagen without *any* due process of law. The was no notice to any party in this case, most

importantly the party who's liberty was substantially affected, that the judgment was going to be amended, let alone proof that this amended judgment was ever even provided to Ms. Vaagen.

[¶ 25] It can be argued that Ms. Vaagen was somehow alerted to this change since the first alleged missed test came over two-months after the amended order. Therefore, this testing by acquiescence is a sort of "acceptance" of the modified terms of probation. This argument fails in that it completely ignores the precursor that is mandated by law and the due process of law; specifically, "notice." The prerequisite to this modification was not met. To now "bootstrap" Ms. Vaagen's compliance with a court order, as the basis for validating an otherwise illegal order would completely negate the principal of due process. As Justice Tufte noted in his dissent in Cuozzo v. State, "it is the very nature of due process to put form (process) over substance (results). 2019 ND 95, ¶ 23, 925 N.W.2d 752 (Tufte, J., dissenting). "By consistently following the form, the reliability of and confidence in the results is enhanced." Id.

[¶ 26] Sadly, the road from acquiescence and compliance is quickly becoming "acceptance" "consent" and "waiver" in the context of criminal law. The notion that the end results somehow override the means to which we get there is the cornerstone to a judicial system of distrust. Therefore, to argue that compliance with an illegal court order is acceptance and ultimately "waiver" of one's right to contest the order, is the modern equivalent of the "ends justifying the means."

[¶ 27] To place in a similar yet separate context, the failure of a citizen to formally argue with, physically oppose, or verbally defy law enforcement is a "waiver" of that citizen's rights for all time in the future. See State v. West, 2020 ND 74, __ N.W.2d ___

(West's failure to verbalize an objection during a law enforcement raid usurped his later ability to seek suppression of evidence); State v. Gatlin, 2014 ND 162, 851 N.W.2d 178 (a co-occupant who does not object, loses out on his opportunity to seek suppression); State v. Hurt, 2007 ND 192, 743 N.W.2d 102 (housemates failure to object to a probationary search forfeits that housemate's ability to seek suppression).

[¶ 28] Albeit the aforementioned cases deal with a select sub-group of citizens, the writing is on the wall for the future. Such as the case at bar, regardless of Ms. Vaagen's conduct for the eleven months leading up to the judgment modification (i.e. UA testing, Drug and Alcohol Evaluation and follow-through), she was under no court ordered obligation to do so. The district court then acted unilaterally, absent any request by either party, to modify the terms of the order. That act subsequently opened the door for the State to begin filing petitions and requests to revoke and resentence Ms. Vaagen for her failure to comply with the modified terms. Ms. Vaagen had no counsel at the time of the modification, and in fact was not provided counsel until she was brought before the district court seven months later for allegedly violating those modified terms.

[¶ 29] By the logic of the West, Gatlin, and Hurt, Courts, when a citizen is placed in the situation of being given an order, an order to which they are not legally bound to comply, they must immediately decide whether to comply with, or contest the order, sans being informed of any of their rights. The ramifications of that immediate decision have irrevocable effects on that citizen's Constitutional Rights. Moreover, this decision *must* be made without the benefit of legal counsel that can advise the citizen of these effects and ramifications.

[¶ 30] It was the landmark decision in Miranda v. Arizona, that instructed courts and law enforcement that citizens needed to be advised of certain rights *before* the citizen could be deemed to have voluntarily and knowingly "waived" the rights. 384 U.S. 436 (1966). The critical aspect being the knowledge of the right "before" effectively waiving the right. The historical context of the "right" from the Miranda decision ultimately came down to the question; "what *must* I do, versus, what *can* I elect not to do?" Absent that knowledge, anything a citizen said or did could not be used against the citizen.

[¶ 31] This timeline of events being at the central focus of any due process question. Therefore, for any argument regarding Ms. Vaagen's "waiver-by-acquiescence" to prevail, the principle of due process must once again take a back seat to the "ends justifying the means."

[¶ 32] CONCLUSION

[¶ 33] Constitutional due process as well as statutory construction and the rules by which we hold ourselves accountable mandate that before a criminal judgment or probation conditions can be modified, *notice* must be provided. Notice was not provided in the instant case before the district court unilaterally modified the conditions of probation and the criminal judgment.

[¶ 34] The district court committed an obvious error by 1) modifying the conditions of probation without providing due process of law to Ms. Vaagen, 2) that is plainly in violation of the United State and North Dakota Constitutions, North Dakota Century Code, and North Dakota Rules of Criminal Procedure, and 3) in doing so, the district court created a situation wherein it had the power to deprive Ms. Vaagen of her liberties, such a power it did not possess prior to the district court's erroneous act.

[¶ 35] Ms. Vaagen respectfully requests this Court, Vacate the district court's May 9, 2019 Amended Criminal Judgment. Thereby nullifying all subsequent orders pertaining to the testing condition violations. Moreover, Ms. Vaagen respectfully requests this Court remand this case with instructions that the original judgment, deferring imposition of sentence be followed. Thereby resulting in Ms. Vaagen's guilty pleas being withdrawn effective November 11, 2019, and the case being dismissed pursuant to N.D.C.C. §§ 12.1-32-07.1 & 12.1-32-07.2

Respectfully submitted this Wednesday, May 20, 2020.

/s/ Samuel A. Gereszek .
Samuel A. Gereszek (ND Bar ID # 07040)
GERESZEK LAW OFFICE P.L.L.C.
3001 32nd Ave. S., Ste. 1A
Grand Forks, ND 58201
Phone: (701) 786-6068
Eservice: eserve@gereszek.law
ATTORNEY FOR THE APPELLANT

IN THE SUPREME COURT

FOR THE STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA,	)	
	)	
Appellee,	)	**Supreme Court No.: 20200006**
vs.	)	
AMY JO VAAGEN,	)	**District Court No.:**
	)	**36-2017-CR-00666**
Appellant.	)	

N.D.R.App.P. 32(e)
CERTIFICATE OF COMPLIANCE

[¶1] **COMES NOW** Samuel A. Gereszek, attorney for the Appellant, Amy Jo Vaagen, and preparer of documents filed in association with the above captioned case on this day.

[¶2] Pursuant to N.D.R.App.P. 32(e) the documents filed on this day comply with the North Dakota Rules of Appellate Procedure as follows:

a. Appellant's Brief – Word count = 2,508; Page Count = 11 (N.D.R.App.P 32(a)(8))

b. Appellant's Appendix – (N.D.R.App.P.25(a))

[¶3] This Certificate of Compliance is drafted to ensure the filings on this day are in compliance with the rules and specifically pursuant to N.D.R.App.P. 32(e).

Dated this Wednesday, May 20, 2020.

/s/ Samuel A. Gereszek

Samuel A. Gereszek (ND Bar ID # 07040)
GERESZEK LAW OFFICE P.L.L.C.
3001 32nd Ave. S., Ste. 1A
Grand Forks, ND 58201
Telephone: (701) 786-6068
Eservice: eserve@gereszek.law
ATTORNEY FOR DEFENDANT

IN THE SUPREME COURT

FOR THE STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Appellee,	)	**Supreme Court No.: 20200006**
vs.	)	
Amy Jo Charlotte Vaagen,	)	**District Court No.: 36-2017-CR-00666**
	)	
Appellant.	)	

CERTIFICATE OF SERVICE

I, Samuel A. Gereszek, attorney for the Defendant, and officer of the court, hereby certify that a true and correct copy of the following:

1. *Appellant's Brief (.pdf and word)*
2. *Appellant's Appendix*
3. *Certificate of Compliance*

was filed via **electronically through the Court Electronic Filing System** on Wednesday, May 20, 2020, and served upon:

Kari Agotness
Ramsey County State's Attorney
Counsel for Appellee
ramseysa@nd.gov

Amy Jo Vaagen
LRLEC
222 Walnut Street West
Devils Lake, ND 58301

Dated this Wednesday, May 20, 2020

/s/ Samuel A. Gereszek

Samuel A. Gereszek (ND Bar ID # 07040)
GERESZEK LAW OFFICE P.L.L.C.
3001 32nd Ave. S., Ste. 1A
Grand Forks, ND 58201
Telephone: (701) 786-6068
Eservice: eserve@gereszek.law
ATTORNEY FOR THE DEFENDANT