

SUPREME COURT OF NEBRASKA

State v. Kennedy

299 Neb. 362 (2018) · No. No. S-17-703 · Decided March 16, 2018

SUMMARY

The Nebraska Supreme Court held that Neb. Rev. Stat. § 29-2268 does not authorize a probationer to be terminated unsuccessfully from post-release supervision after a violation is found. The court vacated the district court’s excessively lenient sentencing order and remanded for further proceedings, explaining that the court could revoke post-release supervision and impose incarceration or use one of the dispositions enumerated in § 29-2268(3).

CASE DETAILS

COURT	Supreme Court of Nebraska
WRITING FOR THE COURT	Stacy, J.; Heavican, C.J.; Miller-Lerman, J.; Cassel, J.; Kelch, J.; Funke, J.
JURISDICTION	Nebraska
DECIDED	March 16, 2018
DOCKET	No. S-17-703
DISPOSITION	vacated_and_remanded
PROCEDURAL POSTURE	The State appealed from the Sarpy County District Court’s sentencing order, arguing that the court imposed an excessively lenient sentence not authorized by statute and committed plain error by imposing a sentence outside the statutory limits.
STANDARD OF REVIEW	Statutory interpretation is reviewed independently as a question of law. A sentence within statutory limits is reviewed for abuse of discretion, including when the State challenges the sentence as excessively lenient.
PRECEDENTIAL VALUE	Published Nebraska Supreme Court opinion; precedential.
PARTIES	State of Nebraska v. Chad T. Kennedy

TOPICS

- probation
- sentencing
- criminal procedure
- appellate procedure
- statutory interpretation

PRACTICE AREAS

criminal procedure

sentencing

probation and post-release supervision

appellate procedure

statutory interpretation

QUESTIONS PRESENTED

1. Whether Neb. Rev. Stat. § 29-2268 authorizes a district court to terminate post-release supervision "unsatisfactorily" after finding a violation.
2. Whether the district court's order was a sentence subject to the State's appeal from an excessively lenient sentence.
3. Whether the district court's order could be construed as revoking post-release supervision and imposing a term of zero months' imprisonment.
4. What dispositions are authorized when a district court finds a violation of post-release supervision but determines revocation is inappropriate.
5. Whether the hearing procedures and due process protections applicable to probation revocation hearings also apply to revocation of post-release supervision.

HOLDINGS

1. Once the State invokes the revocation process under § 29-2268 and the district court finds a violation of post-release supervision, the court may not use the early-discharge provision of § 29-2263(2) to terminate the supervision unsatisfactorily.
2. After finding a violation of post-release supervision, a district court may either revoke the supervision and impose imprisonment up to the remaining period under § 29-2268(2), or determine revocation is inappropriate and impose one or more dispositions enumerated in § 29-2268(3); it may not impose an unlisted disposition.
3. The district court's order terminating Kennedy's post-release supervision was a sentencing order from which the State could appeal under § 29-2320.
4. The district court's order could not reasonably be construed as revoking post-release supervision and imposing a term of zero months' imprisonment.
5. The hearing procedures and due process protections applicable to probation revocation hearings also apply when a court considers a motion to revoke post-release supervision.

KEY QUOTATIONS

"We thus hold that once the State invoked the revocation process under § 29-2268 and the district court found a violation of post-release supervision, the court was not empowered, at that point, to invoke the early discharge provisions of § 29-2263(2)." (371)

"It could either revoke post-release supervision and impose a term of imprisonment up to the remaining period of post-release supervision under subsection (2), or it could find that revocation was not appropriate and order one or more of the dispositions authorized by subsection (3)." (371)

“We now expressly hold these same hearing procedures and due process protections apply when the court is considering a motion to revoke a term of post-release supervision.” (375-376)

FACTUAL BACKGROUND

Kennedy pleaded guilty to operating a motor vehicle to avoid arrest, a Class IV felony, and was sentenced to 240 days in jail followed by 9 months of post-release supervision. The State later sought revocation after Kennedy failed to attend scheduled probation appointments and failed to provide a valid address or contact information. Kennedy admitted violating the conditions, explaining that he was incarcerated in another county. The district court found a violation but declined to revoke post-release supervision and terminated it "unsatisfactorily."

PROCEDURAL HISTORY

Kennedy pleaded guilty to operating a motor vehicle to avoid arrest and received a sentence of 240 days in jail followed by 9 months of post-release supervision. After Kennedy admitted violating the conditions of post-release supervision, the district court declined to revoke supervision and instead terminated it "unsatisfactorily." The State timely appealed under Nebraska's excessive-leniency sentencing appeal statutes, and the Nebraska Supreme Court vacated the order and remanded for further proceedings.

DISPOSITION

vacated_and_remanded

REMAND INSTRUCTIONS

Vacate the June 20, 2017, sentencing order and conduct further sentencing proceedings consistent with the applicable statutes and Kennedy's due process rights. On remand, apply the procedures and due process protections applicable to probation-revocation hearings when considering revocation of post-release supervision.

CASES CITED

- State v. Carman, 292 Neb. 207, 872 N.W.2d 559 (2015)
- State v. Draper, 289 Neb. 777, 857 N.W.2d 334 (2015)
- State v. Moore, 274 Neb. 790, 743 N.W.2d 375 (2008)
- State v. Phillips, 297 Neb. 469, 900 N.W.2d 522 (2017)
- State v. Hernandez, 283 Neb. 423, 809 N.W.2d 279 (2012)
- Keller v. Tavarone, 265 Neb. 236, 655 N.W.2d 899 (2003)
- Omaha Public Power Dist. v. Nebraska Dept. of Revenue, 248 Neb. 518, 537 N.W.2d 312 (1995)
- In re Estate of Fries, 279 Neb. 887, 782 N.W.2d 596 (2010)
- TracFone Wireless v. Nebraska Pub. Serv. Comm., 279 Neb. 426, 778 N.W.2d 452 (2010)
- State v. Caniglia, 272 Neb. 662, 724 N.W.2d 316 (2006)
- State v. McBride, 252 Neb. 866, 567 N.W.2d 136 (1997)
- State v. Bensing, 249 Neb. 900, 547 N.W.2d 464 (1996)

- State v. Campbell, 247 Neb. 517, 527 N.W.2d 868 (1995)
- State v. Johnson, 287 Neb. 190, 842 N.W.2d 63 (2014)
- State v. Shambley, 281 Neb. 317, 795 N.W.2d 884 (2011)

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