

IN THE SUPREME COURT
OF
STATE OF SOUTH DAKOTA

RAPID CITY JOURNAL,

Applicant,

v.

VERIFIED APPLICATION
FOR ALTERNATIVE WRIT OF PROHIBITION

THE HONORABLE CHAD R. CALLAHAN,
South Dakota Fourth Circuit Court Magistrate Judge,

Respondent.

This Application for an Alternative Writ of Prohibition is submitted on the information and belief of Jon E. Arneson, attorney for Applicant, *Rapid City Journal* [“Journal”], in accordance with SDCL Ch. 21-29 and SDCL Ch. 21-30.

Journal’s causes of action stem from the grant of a suspended imposition of sentence [“SIS”] in State of South Dakota v. Gary Lynn Cammack¹ by Respondent, South Dakota Fourth Circuit Magistrate Judge Chad R. Callahan [“Judge Callahan”], on June 29, 2021.

The cause is based on a Judge Callahan order² that purportedly amended the original dispositional order by erasing probation as an SIS condition.³ Journal asserts that a grant of an SIS must be conditioned on a period of probation and asks for a writ of prohibition barring

¹ 46CR120-000031, Meade County, Fourth Circuit.

² Journal does not know the date of this order or if it was filed.

³ This revised order, supposedly, supported the subsequent sealing order of October 1, 2021.

Callahan from granting the SIS without any probation. Further, Journal asks the Court to prohibit Callahan from enforcing the sealing order that is contingent upon an invalid SIS dispositional order.

FACTS

1. On January 18, 2020, Gary Lynn Cammack was arrested in Meade County.
2. Cammack was subsequently charged with speeding and Driving Under the Influence 1st Offense and his case filed and docketed as 46CR-120-000031 in Meade County on January 21, 2020.
3. Because of a conflict of interest, the prosecution of Cammack was handled by the Pennington County States Attorney's Office.⁴
4. Nathaniel Nelson, Sturgis, represented Cammack.
5. Cammack made his initial appearance on February 4, 2020, and pled not guilty.
6. A status hearing was held on May 7, 2020.
7. A pretrial conference was held on November 19, 2020.
8. A jury trial was scheduled for July 1, 2021.
9. A second pretrial conference was held on June 10, 2021.
10. A plea agreement was reached between Weiss and Nelson.
11. Cammack entered a plea of guilty to speeding and careless driving on June 29, 2021, in Deadwood.
12. Magistrate Judge Callahan⁵ granted Cammack a Suspended Imposition of Sentence.
13. The dispositional document recording and reporting the sentencing in Cammack's case on June 29, 2021, shows that the Suspended Imposition of Sentences had two conditions: "1) THAT THE DEFENDANT PAY FINE AND COSTS TODAY; 2) THAT THE DEFENDANT VIOLATE NO LAWS FOR A PERIOD OF 6 MONTHS." [A copy of the dispositional record is attached as Exhibit 1.]

⁴ Mark Vargo is the Pennington County States Attorney. Deputy States Attorney Alexandra Weiss represented the State of South Dakota.

⁵ Although Journal has not received confirmation that Callahan presided over the June 29, 2021, hearing, his later involvement makes it a reasonable assumption.

14. On October 1, 2021, several emails were sent between and among the Cammack's attorney⁶, the Pennington County State's attorneys, the Meade County clerk of court and Judge Callahan. [A copy of the emails is attached as Exhibit 2.]
15. The email exchange resulted in Judge Callahan signing an order sealing the Cammack file on October 1, 2021. [A copy of the order is attached as Exhibit 3.]
16. The October 1, 2021, sealing order, in turn, had to be grounded in the supposition that Cammack was to have been granted an SIS with no probation condition in the first instance on June 29, 2021.
17. On October 15, 2021, Journal's attorney sent a letter to Nelson, Vargo and Weiss, in an attempt to determine the facts and circumstances that allowed a six-month probation period from June 29, 2021, to abruptly terminate in a sealed file on October 1, 2021.
18. After receiving responsive letter from Nelson, Journal's counsel expressed more concerns in an October 18, 2021, email, to which Nelson replied: "The intent of the plea agreement at the time of sentencing was that there would be no obey all laws condition ordered, and the matter would be done and sealed at the time of sentencing. Judge Callahan amended the order via email to remove the obey all laws provision so the case was resolved in the way it was intended in the plea agreement. The agreement was that the matter should have never had an obey all laws provision to begin with."⁷ [A copy of this email is attached as Exhibit 4.]
19. Although Nelson provided Journal with a copy of the arrest documents, the October 1 emails and the Judge Callahan's October 1 sealing order on October 18, subsequent efforts by Journal's attorney to have the participants help him understand the process that led to the *ex post facto* sealing order or what transpired on June 29, 2021, that created this snafu.

⁶ In one of the emails, Nelson sought Weiss's consent to having his client's file sealed, writing: "In the 4th circuit there is an option [to] seal with a suspended imposition of sentence at the time of sentencing and also the wait one year or six months options like in the 7th...."

⁷ This begs several questions. Was there a written record of the plea agreement? Why would Nelson need to explain the purported 4th circuit option to Weiss 3 ½ months after the sentencing hearing? And why do the clerk's notes "show it was just a suspended imposition—no immediate seal" and why does "Odyssey show[] a seal date of 12/29/21." When did Judge Callahan's send an "order via email" and is there a record of it?

20. Journals' attorney's question regarding the existence of the order amending the original dispositional order—of which he was notified by Nelson in the email on October 18, 2021—has also gone unanswered by attorneys for Callahan, the prosecution and Judge Callahan.

ARGUMENT

The grant of a Suspended Imposition of Sentence with no period of probation exceeds of the court's authority conferred by SDCL §23A-27-12.2 and SDCL §23A-27-14, and prohibition is the appropriate remedy to prevent or rectify its occurrence.

. Judge Callahan should be prohibited from granting—whether in the first instance or *nunc pro tunc*—a Suspended Imposition of Sentence without a probation condition. Moreover, Judge Callahan must be prohibited from enforcing any such order, the effect of which allows for the defendant's immediate discharge and immediate sealing of his file at the time the guilty plea is entered. The known facts create a presumption that Judge Callahan amended the defendant's dispositional order in State v. Cammack to retroactively eliminate any probation as a condition for the grant of an SIS pursuant to SDCL §23A-27-12.2 and SDCL §23A-27-14.

SDCL §23A-27-12.2—either alone or in conjunction with SDCL §23A-27-14— is persuasive statutory authority that a judge cannot grant a Suspended Imposition of Sentence that has no term of probation as a condition. The operative word in the law is “suspended.” The court is holding off or postponing the imposition of sentence to a later time. The law does not contemplate the court's acceptance of a guilty plea and immediate discharge of the defendant. Otherwise, South Dakota would have invented a new dispositional option known as “Cancellation of Imposition of Sentence.” Part and parcel of the SIS is to let the defendant prove him/herself worthy of the court's leniency. Attorneys to a plea bargain may have a different intention, but if their interpretation of the court's options is wrong, the court has no authority to deviate from the law.

Notably, the applicable statute, SDCL §23A-27-12.2, is not tossed haphazardly into Sentence and Judgment chapter of the South Dakota Code. This suspended imposition of sentence law is purposefully placed within those pertaining to and explaining probation. It is one of the two provisions connected to the generic introductory probation rule. *See* SDCL §23A-27-12 (Rule 32(e)) Placement on probation--Exception.

In other words, SDCL §23A-27-12.2 *is* a probation law.⁸

23A-27-12.2. Order suspending imposition of misdemeanor sentence and placing defendant on probation--Eligibility--Revocation of suspension.

Upon receiving a verdict or plea of guilty for a misdemeanor, a court having jurisdiction of the defendant, if satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may, without entering a judgment of guilt, and with the consent of the defendant, suspend the imposition of sentence and place the defendant on probation for such period and upon such terms and conditions as the court may deem best. No person who has previously been granted, whether in this state or any other, a suspended imposition of sentence for a misdemeanor, is eligible to be granted a second suspended imposition of sentence for a misdemeanor. A court may revoke such suspension at any time during the probationary period and impose and execute sentence without diminishment or credit for any of the probationary period.

SDCL §23A-27-14 lends further support the argument that probation is a necessary and essential component of any suspended imposition of sentence.

23A-27-14. Discharge and dismissal of probationer on completion of conditions--No judgment entered--Limitation.

Upon completion of the observance of all conditions imposed pursuant to § 23A-27-12.2 or 23A-27-13, the court services officer assigned to the defendant's case or the defendant shall bring the matter to the attention of the court, whereupon the defendant shall be discharged by the court. A formal

⁸ SDCL §2-14-11 provides:

Provisions contained in any title, part, or chapter of the code of laws [] may be construed and considered in the light of such arrangement and such position in any case where such arrangement or such position tends to show the intended purpose and effect thereof.

A version of Rule 32(e), the general probation law, was first codified in 1939. Seventy-seven years later, SDCL §23-27-12.2 was enacted and positioned as ancillary to Rule 32(e).

entry of the discharge shall be entered by the clerk of courts. Discharge and dismissal under this section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime. Discharge and dismissal under this section may occur only once with respect to any person for a suspended imposition of sentence under § 23A-27-13 and only once with respect to any person for a suspended imposition of sentence under § 23A-27-12.2.

Plainly, it was not the legislative intent to create or authorize the grant of a *suspended* imposition of sentence that incorporated an immediate and simultaneous discharge of the defendant.

In the course of dealing with a revocation of probation issue in *State v. Elder*, 95 N.W.2nd 592 (S.D. 1959)⁹ this Court provided a succinct lesson in probationary sentencing:

Our courts are empowered by statute to grant conditionl liberty to first offenders by either suspending the execution of sentence [] or by placing the offender on probation and suspending imposition of sentence....Probation may be granted when the court [] is “satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby” and “when a defendant consents thereto.” [Statutory citation omitted.]

The statutes and case law leave no doubt that probation is not an optional condition of a suspended imposition of sentence. It is, plainly, a mandatory condition that comports with the diction—“suspended”—and accomplishes the logical purpose of allowing a defendant to justify a court’s in later discharge, including a clean criminal slate and a sealed criminal record.

REQUEST FOR RELIEF

Applicant, *Rapid City Journal*, requests the Court to enter an alternative writ of prohibition barring Respondent from entering or enforcing any order in *State of South Dakota v. Gary Lynn Cammack*, the effect of which grants a suspended imposition of sentence without any probationary

⁹ The case predates SDCL 23A-27-12.2, but not suspended imposition of sentence as a judicial dispositional option.

