

**OPINION  
78-186**

April 11, 1978 (OPINION)

Mr. Irvin Riedman, Director  
Parole and Probation Department  
State of North Dakota  
Box 1497  
Bismarck, ND 58505

Dear Mr. Riedman:

This is in response to your letter dated March 9, 1978. In that letter you bring to our attention the following facts and questions:

We seem to be having a lot of problems with the SUSPENDED SENTENCE law. It was changed in 1977 so that the judge has jurisdiction over people on suspended sentences. Many of the courts are sentencing people for 4 to 5 years and suspending 3 years/2 years and advising them they are on probation for the balance.

The problem is not if they violate - as we then return them to the court; but, if they do well for a period of time and either the court or our people feel that it is long enough, how do we get it terminated? Does the court have the power or authority to terminate the sentence?

Some judges do not feel they have that authority - yet I do not see where the Pardon board does either, as if they're on the suspended portion outside, the judge is the only one that can violate, thus can he also terminate? Also, can he change the sentence if it is partially suspended after 120 days. . . .

All this under Section 12-53-06, Chapter 12-53. . . .

We are assuming, for purposes of this response, that your questions concern those persons whose sentences were suspended for conviction of a felony under Section 12-53-06 of the North Dakota Century Code, rather than a misdemeanor as provided for in Section 12-53-03. In addition, we are also assuming that you are not referring to suspended imposition of sentences as provided in Sections 12-53-13 through 12-53-20, N.D.C.C., which are treated somewhat differently than suspended executions of sentence as permitted in Section 12-53-06.

It appears as if the issues you present may be distilled into one question, as follows:

Upon conviction and sentence of a defendant for a felony, and upon the trial court suspending the execution of that sentence pursuant to Section 12-53-06, North Dakota Century Code, who possesses the authority to terminate such suspended sentence and discharge the defendant prior to the expiration of the period of probation imposed by the court?

A general review of Chapters 12-53, 12-55, and 12-59 of the North Dakota Century Code reveals only three persons or agencies under existing state law having any authority to alter the effect of a sentence imposed by a court. Those three include the North Dakota Pardon Board (Chapter 12-55, N.D.C.C.), the North Dakota Parole Board (Chapter 12-59, N.D.C.C.), and the sentencing court itself. Each will be reviewed separately as to its authority in the area of the question presented.

Pursuant to Section 12-53-06, N.D.C.C., the North Dakota District Court, as the general jurisdiction trial court responsible for sentencing persons convicted of felonies, following such a sentence, may suspend the execution of that sentence, place the defendant on probation, and establish terms and conditions of probation. The effect of such an action is to place the defendant under the supervision and management of the Pardon Board. Section 12-53-06, which grants this authority, is quoted herewith as follows:

12-53-06. WHEN SENTENCE FOR FELONY SUSPENDED COURT MUST PLACE DEFENDANT ON PROBATION. When a defendant has been found guilty of a felony for which the sentence may be suspended under this chapter, if the facts set forth in section 12-53-01 appear and the court shall suspend the sentence, the order suspending such sentence shall provide that the defendant shall be placed on probation upon such terms and conditions as the court may determine. The effect of the order suspending the sentence and placing the defendant on probation shall be to place said defendant under the supervision and management of the pardon board, subject to the rules and regulations established by the court. (Emphasis added)

Following the court's imposition of sentence and suspension thereof pursuant to Section 12-53-06, Rule 35 of the North Dakota Rules of Criminal Procedure allows the sentencing court, within 120 days after such sentence, to either correct the sentence if it is determined to be illegal or to reduce the sentence, all within 120 days after sentence is imposed. This rule gives clear authority to the sentencing court to make any reductions in any sentence imposed by that court within the 120-day period, which would necessarily include sentences imposed by the trial court and later suspended pursuant to Section 12-53-06. Rule 35, N.D.R. Crim. P., is quoted herewith as follows:

RULE 35 - Correction or reduction of sentence

The sentencing court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The sentencing court may reduce a sentence within one hundred twenty days after the sentence is imposed, or within one hundred twenty days after receipt by that court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within one hundred twenty days after entry of any order or judgment of the supreme court of the United States denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence

upon revocation of probation as provided by law.

Accordingly, there is clear authority in the trial court, under the factual situations posed above, to reduce a suspended sentence imposed under Section 12-53-06, which would necessarily include a termination of probation and a discharge of the defendant prior to the expiration of his probationary period, as long as this reduction occurs within 120 days after sentence was imposed.

A more difficult question concerns whether the court may likewise discharge a defendant after the 120-day period provided for in Rule 35, N.D.R. Crim. P. has expired. Clearly the court can revoke probation imposed under Section 12-53-06 and order the sentence imposed to be served, pursuant to the authority granted to the court in Section 12-53-11. However, we are able to find no specific statutory authority that grants to the sentencing court, other than Rule 35, N.D.R. Crim. P., the authority to reduce a defendant's sentence imposed under Section 12-53-06.

We call your attention to the North Dakota Supreme Court case of *State v. Rueb*, 249 N.W.2d. 506 (N.D. 1976). In that case the court referred to an annotation found in 168 A.L.R. 706, stating that the weight of authority supports the rule ". . . that when a valid sentence has been put into execution the trial court may not modify, amend, or revise it in any way either during or after the term or session of the court in which the sentence was pronounced. ." *State v. Rueb*, supra at 511.

We are also mindful of certain inherent powers the courts have with respect to sentencing. Nevertheless, again quoting from *State v. Rueb*, supra, the court, at page 511, states as follows:

We see no legal basis to accept the argument presented by the defendant that the North Dakota courts had the inherent power to change the sentence during the term of court. The change or modification of a sentence is permitted in North Dakota now, but only pursuant to Rule 35, N.D.R. Crim. P.

A review of the authority granted to the North Dakota Parole board with respect to the questions presented herein, also leads us to the conclusion that such Board has no statutory authority to reduce a sentence imposed by the trial court under Section 12-53-06, N.D.C.C. Prior to the 1977 legislative session, Section 12-53-06 gave some authority to the Parole Board to control and manage the probationary status of defendants. However, the 1977 Legislative Assembly, in amending Section 12-53-06, granted supervision and management of probationers' sentences under that section to the Pardon Board, rather than the Parole Board.

The North Dakota Parole board, pursuant to Section 12-59-15, a section which was also amended by the 1977 Legislature, is granted authority to maintain custody and control of a defendant placed on probation under Section 12-53-06. The Parole Board, through its agents, may also take such a defendant into custody for violation of existing rules of probation imposed by the court. When this is done, the court, following a hearing, may revoke probation, terminate the suspension of the sentence, and impose the sentence. In addition,

Sections 12-53-09 and 12-53-10 permit the Parole Board to supervise probationers and allow parole officers of the court to cause parole violators to be arrested. Nevertheless, we are able to find no specific authority granted to the Parole Board allowing such Board to terminate a defendant's probation and discharge such defendant any earlier than that originally imposed by the sentencing court.

Finally, the question remains what authority the Parole Board has to accomplish the early discharge of a defendant who has been sentenced under Section 12-53-06. It appears from the legislative history accompanying the amendment to Section 12-53-06 during the 1977 legislative session, that while North Dakota parole agents, who work for both the Parole Board and the Pardon Board, have management and supervisory authority over probationers, and while the Parole Board is granted certain management authority, the 1977 Legislature clearly transferred to the Pardon Board the specific responsibilities set out under Section 12-53-06. A further review of Pardon Board authority indicates that Section 12-55-05 grants exclusive power to the Pardon Board to grant commutations. That section is quoted herewith as follows:

12-55-05. Only board may remit fines and grant pardons, reprieves, or commutations - Seal of board. The board of pardons shall have the sole and exclusive power to remit finds and forfeitures and to grant reprieves, commutations, and pardons after conviction for all offenses except treason or in cases of impeachment. In exercising such powers, the board must act in the manner provided in this chapter. The board shall possess a seal, and every pardon parole, reprieve, or commutation granted by the board shall be attested therewith. (Emphasis added)

Section 12-55-11.1 defines a commutation as ". . . the change of the punishment to which a person is sentenced to a less severe punishment." It seems clear that an early discharge of a defendant prior to the expiration of his period of probation under Section 12-53-06 (presumably due to the defendant's admirable conduct during the period of probation), amounts to a commutation.

Accordingly, it is our opinion, by virtue of Section 12-55-05, granting to the Board of Pardons the exclusive authority to commute sentences, and pursuant to Section 12-53-06, granting supervision and management of a defendant on probation to the Board of Pardons, that only the Board of Pardons, after the 120-day period established by rule 35, N.D.R. Crim. P., may terminate a suspended sentence imposed by the trial court pursuant to Section 12-53-06, and discharge a defendant prior to the expiration of the probationary period imposed by the court.

We trust this adequately responds to your inquiry.

Sincerely,

ALLEN I. OLSON

Attorney General