

IN THE SUPREME COURT, STATE OF NORTH DAKOTA

SUPREME COURT NO. 20060033  
WARD COUNTY CRIMINAL NOS. 51-04-K-02690/001 and 002

**State of North Dakota,**

Plaintiff/Appellee,

v.

**Al LaMonte Davis,**

Defendant/Appellant.

**REVISED  
APPELLANT BRIEF**  

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**AFTER DENIAL OF MOTION TO SUPPLEMENT RECORD**  
**APPEAL TAKEN FROM CRIMINAL JUDGMENTS**  
**ENTERED**  
**IN DISTRICT COURT**  
**COUNTY OF WARD**  
**NORTHWEST JUDICIAL DISTRICT**

THE HONORABLE GARY H. LEE, PRESIDING

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## ISSUES

- I. WHETHER THERE WAS INEFFECTIVE ASSISTANCE OF COUNSEL AT DAVIS' JURY TRIAL?
- II. WHETHER DAVIS SHOULD HAVE BEEN READ HIS MIRANDA RIGHTS DURING INTERROGATION BY LAW ENFORCEMENT?  
WHETHER INEFFECTIVE ASSISTANCE OF COUNSEL COMPOUNDED THAT ERROR OF LAW BY ALLOWING DAVIS' RESULTING STATEMENT INTO EVIDENCE AT THE TRIAL?
- III. WHETHER THE RESULTING FRUITS OF THE POISONOUS TREE FROM THE FAILURE TO GIVE THE MIRANDA WARNING STOPPED DAVIS FROM OBTAINING A FAIR AND IMPARTIAL TRIAL?

## STATEMENT OF THE CASE

Davis appeals his convictions for possession of a short-barreled shotgun, a class C felony, under N.D.C.C. § 62.1-02-03, and carrying a concealed firearm in a motor vehicle (a pistol), a class A misdemeanor, under N.D.C.C. § 62.1-04-02. (Appendix 87, 88 [hereinafter A.]). He was sentenced to serve one year and one day, with credit for time served, and the remainder suspended for three years; as well as being placed on supervised probation for three years. He was also required to pay court fines and fees, and had other conditions associated with probation. (Ibid.)

## COURSE OF THE PROCEEDINGS

The State brought a criminal complaint charging Davis with the Class C Felony offense of Possession of a Short-Barreled Shotgun, in violation of N.D.C.C. § 62.1-02-3, in count 1. He was also charged with possession of a concealed weapon when not licensed to do so, a Class A Misdemeanor, in violation of N.D.C.C. § 62.1-04-02. The complaint was dated December 15, 2004, and alleged a violation date of November 13, 2004. (A. 4).

Davis had already pled guilty to somewhat similar charges, possession of a loaded firearm, involving the same pistol, in municipal court. (A. 17). He entered his plea of not guilty to the possession of a short-barreled shotgun charges, and his attorney requested that the charges involving the pistol be dismissed, based on the prior guilty plea in municipal court. (Transcript [hereinafter Tr.], 9, lines 4-17; A. 13). His court-appointed attorney's Motion to Withdraw as Defendant's Counsel was denied. (A. 6-9). A jury trial was held on November 7, 2005, and the sentencing hearing was held on January 10, 2006.

Davis was found guilty, and his Notice of Appeal was duly filed, along with a clarification of the same. (A . 90-91).

## STATEMENT OF THE FACTS

[NOTE: The Facts are in Dispute]

On or about the evening of November 13, 2004, Davis, who was a student at Minot State University (MSU) on a football scholarship, was the passenger in a vehicle driven by Zerrick Shanks, who was stationed at the Minot Air Force Base. (Tr. 65, lines 9-20 [A. 31]; Tr. 75, lines 12-21 [A. 40]; 110, line 25 [A. 63]; 111 [A. 64], lines 1-16). Shanks and Davis were at a local Mini-Mart when police requested a search of Shanks' vehicle; Shanks agreed to the search. (Tr. 72, lines 17-19 [A. 37]). Davis was inside the Mini-Mart at the time, and when he came out and saw the police, he voluntarily admitted ownership of "gunz" (ethnic vernacular for one gun {Tr. 126, lines 12-14}[A. 76]) in the vehicle. Unfortunately, Davis was not aware that there was a short-barreled shotgun in the trunk of the car, which was not his, and in fact, which he had never seen, and that his pistol had been removed from the trunk without his knowledge and placed in the glove box of Shanks' vehicle. Police stated in their testimony at the trial that the focus of their efforts was to find a person who had been firing shots in the vicinity of the Blind Duck bar. (Tr. 83, lines 16-18 [A. 42]).

Even though the prosecution explained to the jury at the outset of the trial "the defendant was not charged with anything related to the incident but it leads up to why the police officer had contact with him," there were constant references to that incident throughout the trial as though Davis were involved in a direct way, and the references to the statement given without Miranda warnings were used during the trial. (Tr. 48 [A. 19], lines 4-9).

In an Abbott and Costello “who’s-on-first” fashion, conflicting testimony was introduced at trial as to how or when the short-barreled shotgun ended up in Shanks’ trunk, whether it was enclosed in a duct-taped box or “open,” in the trunk of Shanks’ car, and how Davis’ possession of the gun was allegedly established. Chris Soler, an acquaintance of Davis’, alleged that he received the gun from someone known only as “Jason,” that Davis gave Soler \$20 for the gun; and further, that Davis gave Soler keys to Shanks’ vehicle. (Tr. 53 [A. 21], lines 6-25, 54 [A. 22], lines 1-13, 56 [A. 24], lines 5-8; Tr. 58 [A. 26], lines 8-24). Soler also testified that he and “Jason” put the duct-taped box containing the short-barreled shotgun into Shanks’ trunk. Soler claimed that he never actually saw the short-barreled shotgun. Soler testified that Davis never said anything about the gun being “sawed-off.” (Tr. 53 [A. 21], lines 6-25, 54 [A. 22], lines 1-13, 56 [A. 24], lines 1-14; Tr. 57 [A. 25], lines 8-24; Tr. 60 [A. 28], lines 2-25; Tr. 61 [A. 29], lines 1-8; Tr. 62 [A. 30], lines 9-19). Soler then added that “Jason” told him to wait till later to give him the money for the gun, even though he allegedly already had the \$20 from Davis. Soler testified that at a later date, he allegedly gave the \$20 back to Davis. (Tr. 58 [A. 26], line 19). “Jason” was never called to testify at trial, and apparently no one knows or discovered his last name. Soler’s written statement was not obtained by law enforcement until almost a year after the event. (Tr. 55 [A. 23], lines 4-13).

Davis testified that he was at work on the day that Soler alleged he gave Davis back the money for the gun, so he couldn’t have been available to receive the money, and further testified that he never gave anyone money for the gun. (Tr. 58 [A. 26], line 24; Tr. 117 [A.70], lines 16-23). Davis testified that he never saw the shotgun, whether in a box

or not, being put into the trunk of Shanks' vehicle, and that he had no knowledge of it being there, or that it was a short-barreled shotgun. (Tr. 118 [A. 71], lines 1-9; 20-25; Tr. 119 [A. 72], line 1).

Zerrick Shanks (Shanks) testified that he picked up Davis and Germaine, Davis' cousin (who was not called to testify) in his vehicle at the Blind Duck after Davis had come to Shanks' surprise birthday party at Miranda LaFloe's (Shanks' fiancée's) home. (Tr. 65 [A. 31], lines 21-25, Tr. 66 [A. 32], lines 1-11). Shanks and Davis went to drop off LaFloe, then over to the Archer's for a party, and eventually they ended up at the Mini Mart near the Original Bar, approximately three miles from the Blind Duck, where police approached them. (Tr. 68 [A. 34], lines 11-12, 16-25; 69 [A. 35], lines 1-7). Shanks testified that he gave the officers permission to search his vehicle. (Tr. 70 [A. 36], lines 17-19). A pistol was found in the glove box, and the short-barreled shotgun was found in the trunk. (Tr. 70 [A. 36], lines 20-25). Shanks testified that he basically just sat in his vehicle that evening and didn't observe anyone putting anything in his trunk. (Tr. 73 [A. 38], lines 2-24). Shanks did not recall anyone else having access to his car keys, in contradiction to Soler's testimony that Davis had given him Shanks' keys. (Tr. 74 [A. 39], lines 7-16).

Davis testified that LaFloe had invited him to Shanks' surprise birthday party, and that she came to pick him up in Shanks's vehicle on or about November 12, 2004, around 4:30 p.m. (Tr. 111 [A. 64], lines 20-25). They then went to the Blind Duck about 11:30 p.m., and left there at approximately 12:15 a.m.; Davis then went to the Vegas Hotel, then back to the Blind Duck, after he called Shanks on his cell phone to come and get him. (Tr.

112 [A. 65], lines 3-25). They “rode around” for awhile, then went to the home of Rachel Archer. (Tr. 113 [A. 66], lines 4-19). Davis testified that Soler came up to him and said he had found a shotgun for him, and Davis replied “okay, I am not in my vehicle right now so I can’t do nothing about it,” and that this was the total extent of his conversation with Soler. (Tr. 113 [A. 66], lines 21-23; repeated again on 114 [A.67], lines 7-9). Nowhere in the trial transcript does Davis admit that he knew anything about the features of the gun, or that he bought a gun on that day, or that it was short-barreled.

When questioned, Davis stated bluntly that he didn’t know how the shotgun made it into Shanks’s trunk, and he even stated in court “that shotgun that is on the table right now, I know that’s not mine.” He denied any sort of possession of it. (Tr. 114 [A. 67], lines 10-11; lines 24-25; 115 [A. 68] at 20-22; 116 [A. 69], lines 14-18). Davis also stated that Shanks’ testimony was not correct. (Tr. 114 [A.67], lines 19-20).

Davis testified about going target shooting up at a practice range near the Minot Air Force Base, and how “everybody just put their guns in there [Shanks’ trunk]” (Tr. 115 A. 68], lines 6-10, 22-25; 116 [A. 69], line 1). Davis stated that on or about November 13, 2004, there was no mention of money changing hands for a shotgun or any other type of gun. (Tr. 116 [A. 69], lines 2-18).

Officer Whitesell somewhat contradicted Shanks’ testimony regarding being in the vehicle, stating that both Davis and Shanks were standing in the parking lot at the Mini-Mart when he first noticed them; shortly after that, Whitesell stated that they were both in the car. (Tr. 83 [A. 42], lines 19-22; Tr. 84 [A. 43], lines 13-22). Whitesell acknowledged that Davis didn’t exactly match the description of the person he was looking for, but

decided to “talk” to Davis and Shanks nonetheless. (Tr. 84 [A.43], lines 3-11). Shanks gave him permission to search Shanks’ vehicle, while Davis was in the Mini-Mart. (Tr. 85 A. 44], lines 9-18). The short-barreled shotgun went from being in a duct-taped box, according to testimony from Soler, to being “in the open” in the trunk according to Officer Whitesell. (Tr. 86 [A. 45], lines 21-24). Officer Whitesell testified that Davis “admitted the guns were his.” (Tr. 87 [A. 46], line 7). There was no actual identification which ties Davis to the short-barreled shotgun, whether by fingerprint testing or otherwise. Officer Whitesell identified both guns during the trial, but only the shotgun was introduced into evidence, over Davis’ objections as to foundation. (Tr. 87 [A. 46], lines 13-25, 88 [A. 47], lines 1-23).

Officer Wheeler of the Minot Police Department testified that he was called to the Mini-Mart after Officer Whitesell was there, and that Davis was not under arrest at that point, so he wasn’t Mirandized. (Tr. 94-95 [A. 49-50], lines 24-25, 1-10). The officer testified that Davis admitted all the guns were his, and the shotgun in particular, “in a run-around about way.” (Tr. 95 [A. 50], lines 9-14). He testified that Davis did tell him about the fact that he liked to target practice with the guns, and that was why he had them in the vehicle. (Tr. 97 [A. 51], lines 5-7). He failed to Mirandize Davis, stating that he didn’t consider him a suspect in spite of the fact that he was interrogating Davis regarding possession of the guns, and that he obtained a 34-page statement from him, in which there were constant references which would indicate that he was a suspect, and despite the fact that it was Davis’ brother who eventually took responsibility for the shooting for which Davis was being investigated. (Tr. 101 [A. 55], lines 7-16; 107 [A. 61], 17-19). Officer

Wheeler testified that he never found the box referred to by Soler, in which the short-barreled shotgun was allegedly duct taped and securely contained. (Tr. 107 [A. 61], lines 9-16.)

Davis testified that the first time he heard anything about the short-barreled shotgun was when Officer Wheeler came onto the Minot Air Force Base to tell him about the charges, roughly a month after he had pled guilty in municipal court to the charges involving the pistol. (Tr. 127 [A. 77], lines 7-20).

Mr. Faron Terry, the attorney that Davis retained for the sentencing hearing, had Davis' employer, Bradley Lambert, testify that Davis was a good employee who "just came in and did his job;" (Tr. 172 [A. 85], lines 6-11); Davis' girlfriend, Patricia Adkins, testified that Davis was "a great guy. I wouldn't be with him if he wasn't." (Tr. 175 [A. 86], line 8). In spite of the character witnesses, (and the fact that Davis' brother, who was convicted on the charges relating to the shooting incident, ended up with only a misdemeanor conviction), the Court sentenced Davis to a year and a day, three years of probation and various fines and fees, on the charges of possession of a short-barreled shotgun and the concealed weapon charge for the pistol found in the glove box. (A. 87-88). This ended any chance that Davis would have had to exercise his football scholarship at MSU, because he had been sentenced as a felon.

## ARGUMENT

Davis was convicted of a class C felony on the charge of possession of a short-barreled shotgun, pursuant to N.D.C.C. § 62.1-02-03, which states:

***62.1-02-03 Possession or sale of short-barreled rifle or shotgun - Penalty - Application.*** *A person who possesses, obtains, receives, sells, or uses a short-barreled rifle or a short-barreled shotgun is guilty of a class C felony. (Unrelated sentence omitted, italics added).*

He was also convicted pursuant to N.D.C.C. § 62.1-04-02, on the charge of carrying a concealed weapon, a class A misdemeanor, which states:

***62.1-04-02 Carrying concealed firearms or dangerous weapons prohibited.*** *No person, other than a law enforcement officer, may carry any firearm or dangerous weapon concealed unless the person is licensed to do so or exempted pursuant to this chapter. (Unrelated sentence omitted, italics added).*

### I. WHETHER THERE WAS INEFFECTIVE ASSISTANCE OF COUNSEL AT DAVIS' JURY TRIAL?

In order to argue ineffective assistance of counsel, the judicial scrutiny of that attorney's performance must be highly deferential. U.S.C. A. Const. Amend. 6, *Roe v. Flores-Ortega*, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (U.S. 2000). Here, there were several errors by counsel that made it impossible for Davis to obtain a fair and impartial trial, and he requests a new trial.

It is the defense attorney's duty, as an officer of the Court, to put the prosecution's case through careful, thoughtful analysis, with the standard of proof beyond a reasonable doubt as the guiding light. In the instant case, the jury did not hear anything from Davis or his counsel until page 110 of the trial transcript. The trial counsel failed to present either an opening or a closing statement to the jury, (Tr. 50, line 7 [A. 20]; Tr.149, line 18). See

U.S.C.A. Const. Amend. 6 and *Yarborough v. Gentry*, 124 S.Ct. 1, 157 L.Ed. 2d 1 (U.S. 2003), regarding the fact that the right to effective assistance of counsel extends to closing arguments.

Davis was never given the opportunity to put his requested witnesses on the stand to corroborate his testimony during the jury trial, in regard to whether he ever possessed or in any way actually exercised ownership of the short-barreled shotgun. There were two days set aside for the trial, so there was ample time to hear additional witnesses. Davis had requested that Miranda LaFloe, Shanks' girlfriend who originally picked him up to take him to Shanks' birthday party, be allowed to testify; (Tr. 66, [A.32] lines 1-5); he also requested the testimony of Germaine, Davis' cousin; (Tr. 67,[A.33] line 25, 68, [A.34] lines 1-7, during which defense counsel asked **who Germaine was**); Germaine could have testified as to what happened in the car when he was there with Davis; and for the testimony of Sam and Rachel Archer (Tr. 68, [A.34] lines 16-25); who were the hosts of a party where he was at; unfortunately, since these persons were never called, it is difficult to tell what they would have testified to on Davis' behalf, but they should have been able to help with establishing a time line for various events and locations, and they might have been able to elucidate the issues surrounding possession of the short-barreled shotgun.

II. WHETHER DAVIS SHOULD HAVE BEEN READ HIS MIRANDA RIGHTS DURING INTERROGATION BY LAW ENFORCEMENT?  
WHETHER INEFFECTIVE ASSISTANCE OF COUNSEL COMPOUNDED THAT ERROR OF LAW BY ALLOWING DAVIS' RESULTING STATEMENT INTO EVIDENCE AT THE TRIAL?

Davis' counsel never made a motion to suppress or to dismiss the charges against Davis due to law enforcement's failure to give the Miranda warning, despite the 34-page statement his client gave to law enforcement, in which, beginning at page 11, the officer begins to address Davis as a suspect, and tells Davis that he matches the description of the person they are looking for, and that a felony did occur. (Tr. 107, [A. 61]). Since this document was quoted in the trial (Tr. 107, [A.61] lines 17-22), trial counsel should have made an offer of proof to show why the statement should have been included for purposes of appeal to show the Court exactly what was stated and why the failure to give the Miranda warning was crucial to Davis' defense in both pretrial and trial phases. (Tr. 105, [A. 59] )

Davis was not read his Miranda rights, despite being "identified as matching the description of the shooter of the Blind Duck," according to Officer Wheeler. (Tr. 105, lines 7-10, 106, lines 7-10; [A.59-60]). From the testimony given by law enforcement at trial, it is clear that in their investigation, the police were planning to use whatever Davis said against him, so he should have been given the appropriate warnings, especially since the officers did not encounter any problems with questioning him which would merit a public safety exception. *Miranda v. Arizona*, 384 U.S. 436 (1966); *State v. Anderson*, 710

N.W.2d 392, 2006 ND 44. As stated in *Anderson*:

The Fifth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, and N.D. Const. art. 1, § 12 require that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself." Exculpatory or inculpatory statements resulting from a custodial interrogation may not be used as evidence against the individual who made the statements unless procedural safeguards, such as a *Miranda* warning, are used to secure the privilege against self-incrimination. *State v. Fasching*, 453 N.W.2d 761, 762-63 (N.D. 1990). Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *State v. Connery*, 441 N.W.2d 651, 654 (N.D. 1989) [quoting *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)].

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Here, as in *Miranda*, Davis was interrogated at length by law enforcement, with no opportunity to consult with legal counsel. The 34-page statement taken by law enforcement at 2:49 a.m. on November 13, 2004 was not introduced into evidence at the trial, although it was mentioned and discussed. (A.59) Unfortunately, defense counsel did not request that the statement be suppressed, make any objections to it, add any offers of proof, or use any number of other pretrial tools which would have helped Davis in his defense. The prosecution did not offer the statement into evidence directly, although they did force Davis to read parts of his unprotected statement back to the jury during the trial. (Tr. 107, [A.61] lines 17-22; Tr. 128, [A. 78] 1-13; 130, [A.79], lines 25; 131, [A.80] lines 1-9).

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Davis admitted that he had a few drinks as well, which should have been notice enough to the police to at the very least give him the *Miranda* warning as a precautionary measure before taking advantage of his inebriated state. (Tr. at 104, [A. 58] line 25; 105, [A.59] lines 1-3; 107, [A.61] lines 17-22; 108, [A.62] lines 3-21). Law enforcement took

advantage of the inebriated admissions and statements by Davis, made without being Mirandized, with those admissions being “in a run-around about way”, (Tr. 87, [A.46] line 7; 95, [A. 50] line 12) to investigate the matter, to harass Davis, and to lead them to other witnesses against Davis, including Soler, and eventually, handing the whole package over to the prosecution with a tidy red bow to use in the jury trial against him, which resulted in his conviction. None of that would have been possible without Davis’ statement. The statement given by Davis, from page 11 onward, as mentioned in the trial, and everything thereafter is “fruit of the poisonous tree” and therefore should have been the subject of a motion to dismiss, or a motion to suppress, or other pretrial motions by defense counsel. None of those motions or arguments were made, other than a brief taste, a whiff, and a puff of smoke during the jury trial, on page 106 [A.60] of the trial transcript, at lines 5-6:

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Thomas:        *Getting as much information without having to warn him about his rights, is that correct?*

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But for the statement that Davis gave to law enforcement, the prosecution would have been forced to find independent sources of the information relating to the possession of the short-barreled shotgun and the pistol, which would have severely limited their ability to prosecute, thus making it much less likely that this charge would have resulted in a felony conviction. In fact, without the statement, there would also have been, frankly, less confusion about the various “gunz” and guns, where they were acquired, and the prices paid for each, as well, which would have lessened the likelihood that the prosecution could show possession of this particular short-barreled shotgun on the part of Davis.

III. WHETHER THE RESULTING “FRUITS OF THE POISONOUS TREE” FROM  
THE FAILURE TO GIVE THE MIRANDA WARNING STOPPED DAVIS  
FROM OBTAINING A FAIR AND IMPARTIAL TRIAL?

Based on the fact that Davis’ statement was used against him even though no Miranda warnings were given, the resulting bias and prejudicial effect upon the jury must be considered. See, E.g. *Johnson v. Armontrout*, 961 F.2d 748, 752, C.A.8 (Mo. 1992), for the general proposition that:

*“Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.”*

Davis’ trial attorney did make a motion to dismiss the pistol charges, which was denied. (Tr. 7 [A. 11], 14, [A.16] 37-38 [A. 17-18]). He requested that the pistol itself be produced at the trial, which was also denied. (Tr. 11 [A. 14], lines 22-23). The attorney did state on the record that the bias and prejudicial effect of including the pistol charge [would outweigh any probative value] and further suggested that the prosecution just take a nibble, rather than the whole apple from this poisoned tree, by using the guilty plea from municipal court for impeachment purposes when Davis took the stand, rather than continuing with the class A misdemeanor charges in the trial. (Tr. 8 [A. 12], lines 6-25, 9 [A. 13], lines 1-4). The entry of the conclusory, “free bite at the apple” class A misdemeanor charges definitely made a guilty verdict in regard to the felony charges of the short barreled shotgun much more likely, in fact, probably a surety. By including the class

A misdemeanor charges, Davis was not even given that simple benefit of the doubt, because the jury was shown that he had already pled guilty to a very similar charge in municipal court; in fact, they might not have even known that the two charges were different at all, especially after listening to the entry of the judgment from municipal court and the cross-examination of Davis' counsel involving the pistol. (Tr. 102 [A. 56], lines 21-25; 103 [A. 57], lines 1-25, 104 [A. 58], lines 1-24). The prosecution didn't even have to work that hard to get their "free bites;" they failed to direct the Court to exactly which rule of evidence they were relying upon for the proposition that the pistol should be neither offered nor entered into evidence, despite the Court's requests, and the Court's statement that it was "not the defense's job to produce the evidence in Court." (Tr. 13 [A. 15], lines 10-12; lines 18-22). The Court never did get any guidance from the prosecution, and denied Davis' motions anyway. (Tr. 139 [A.82] , lines 13-21).

Throughout the trial, the prosecution continued to enjoy "free bites" at Davis' expense. Davis' attorney stated presciently to the Court: "It is not going to affect the sentence. If this man is convicted we are going to have an issue. This is going to end up going to the Supreme Court. There is going to be an appeal on this." (Tr. 9 [A. 13], lines 4-7). He was correct. But the bias created by the admission of the previous conviction in municipal court involving the pistol was not nearly as damning as the bias created by the failure of defense counsel to make motions to suppress or dismiss based on the lack of Miranda warnings given, and the use of Davis' statement against him at trial before the jury.

A basic rule of criminal law is that everyone is entitled to be considered innocent till proven guilty, and that the State must prove the defendant guilty beyond a reasonable doubt. *State v. Layer*, 184 N.W. 666, 671 (1921). Davis' trial was peppered with constant references to the shooting incident at the Blind Duck, even though the prosecution stated to the jury in opening that Davis was not being "charged with anything relating to the incident." (Tr. 48, [A. 19] lines 7-8). Unfortunately, since the defense never gave an opening statement, this advisement may not have stuck with the jury for very long, as the prosecution also described Davis as matching the description of the shooter. (Tr. 48, [A.19] lines 7-23). In fact, the prosecution had the pistol identified as State's Exhibit 2, but never offered it nor entered it into evidence, even though it was referred to as being sent to Bismarck for a ballistics test in relation to the shooting at the Blind Duck, another not-so-subtle hint that there was an agenda behind Davis' trial. (Tr. 87, [A. 46], lines 17-19; 88, [A. 47], lines 15-18).

The "bites at the apple" of this poisonous tree continued to press their way into the jury's minds every time a subtle reference was made between the acts of "shooting" and the Blind Duck, enlisting a connection between the possession of the guns and the incident there anyway. There were no less than nineteen pages of the trial transcript with various references to the Blind Duck and/or the shooting that occurred there. (Tr. 48,[A.19], lines 5-11; Tr. 59, [A.27], lines 3-5; Tr. 66, [A. 32] lines 16, 17, 25; Tr. 67, [A.33] lines 9-22; Tr.76, [A. 41], line 22; Tr. 83, [A.42] lines 16-18, 25; Tr. 84, [A.43], lines 1-11; Tr. 85, [A.44], lines 6-8; Tr. 88, [A.47] lines 15-18; Tr. 93, [A. 48], lines 11-23; Tr. 98, [A.52], lines 2-6; 10, 17, 19-21; Tr. 99, [A.53] lines 1-2; Tr. 100, [A.54], lines 1-6; Tr.101,

[A.55], lines 4-5; Tr.105, [A.59], lines 16-17; Tr. 122, [A.73], line 6; Tr.124, [A.74], lines 17-19; Tr.125, [A.75], lines 1-2, 6-7; Tr.126, [A.76], lines 3, 5, 10).

Defense counsel did at one point make an objection to this constant barrage, stating that the testimony was repetitious, and that “he is attempting to... reemphasize the testimony,” but the damage had been done by that time, and the apple thoroughly eaten and swallowed, including the worm. (Tr. 101, [A.55] lines 23-25). It would be difficult to continue to object under these circumstances, because that would only serve to even further jell the concept in the minds of the jury, which compounds the question of whether Davis was given a fair and impartial trial with the resultant and combined impact of the forgone “free bite” pistol charge, and the constant references to the shooting incident, some or many of which (it is hard to tell exactly how many) were the result of Davis’ un-Mirandized statement to law enforcement. To compound the problem, the Court misstated the instruction to the jury regarding “if the jury believes Mr. Davis’ side of the story that they are not his **weapons**.” Davis had already pled guilty to possession of the pistol in municipal court, and that conviction had been entered into evidence without objection. (Tr. 133, [A.81] line 18). This simple misstep gave the prosecution yet another “free bite,” even though it was likely unintentionally stated.

During the sentencing hearing, the prosecution referred at length to “a companion case” regarding Davis’ brother, and made other inappropriate references to alleged facts that were not in evidence at the trial, adding more “bite” to the “apple” previously given during trial. (Tr. 167, [A.83], lines 25, Tr.168, [A.84] lines 1-20).

Without Davis' initial statement given without the benefit of the Miranda warning, there would have been no evidence available to show that the defendant exercised control over the short-barreled shotgun, constructive or actual. According to *Staples v. United States*, 511 U.S. 600, 128 L. Ed. 2d 608, 114 S. Ct. 1793 (1994), for a conviction, the accused must be shown to have known of the peculiar characteristics of the item that would make it subject to the requirements of 26 U.S.C. § 5861(4)(b)(b). Davis testified that the first time he saw the shotgun was in the courtroom. (Tr. 114, [A.67] lines 10-11, 24-25; Tr.115, [A.68] lines 20-22; Tr.116, [A. 69] lines 14-18). Without Davis' earlier un-Mirandized statement, the prosecution would not have had anyone available to testify that Davis ever saw the shotgun, or that they ever saw Davis with the shotgun, let alone exercising control over it. Other persons also had access to Shanks' trunk that evening; in fact, Shanks testified that "he wasn't paying attention." (Tr. 73, [A.38] lines 2-24, in particular, lines 9, 11, and 23).

Yet another bite at the apple is the element of obtaining the short-barreled shotgun. In fact, if the prosecution hadn't had access to Davis' un-Mirandized statement, Shanks and Soler, or the mysterious "Jason" were "more" in possession or in the act of obtaining the gun than Davis was, since they actually put the shotgun into the trunk of Shanks' vehicle, and Shanks allowed the shotgun to be placed there. (Tr. 53, [A. 21] lines 6-25; Tr. 54, [A. 22], lines 1-13; Tr. 56, [A.24], lines 1-14; Tr. 57, [A. 25], lines 8-24; Tr. 60, [A.28], lines 2-25; Tr. 61, [A.29], lines 1-8; Tr. 62,[A.30], lines 9-19; Tr. 74, [A. 39] lines 13-16). Even though courts have held that it doesn't take a lengthy duration of time to show possession, there is a requirement that there be a least a showing of "momentary or

transitory” control. 26 U.S.C. 5861, quoted in 133 A.L.R. Fed. 347, § 10, which also cites that the “classic example” of “constructive” possession involves the person who operates as a broker selling such a firearm, even though they may never in fact touch the gun. In the instant case, the only persons fitting that description are Soler and the elusive “Jason,” especially once the un-Mirandized statement of Davis is withdrawn from consideration. (Tr. 53, [A.21] lines 19-22).

*Conclusion*

Al LaMonte Davis respectfully appeals all judgments in this matter, and requests reversal of the same, a new trial, or other relief as the Court believes appropriate, for the reasons stated above, in the interests of justice.

Respectfully submitted at Minot, North Dakota, this 8<sup>th</sup> day of August, 2006.

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