

SUPREME COURT OF NORTH DAKOTA

20090192

Ronald R. Ernst,  
Appellant,

SUPREME COURT NO. 20090192

vs.

CASS CO. NO. 09-C-0922

State of North Dakota,  
Appellee,

**FILED**  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

JUL 28 2009

STATE OF NORTH DAKOTA

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BRIEF OF APPELLANT

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APPEAL OF DISTRICT'S COURT DENIAL FOR POST-CONVICTION RELIEF

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RONALD R. ERNST 23241  
J.R.C.C.  
2521 CIRCLE DR.  
JAMESTOWN, N.D. 58401

ASSISTANT STATE ATTORNEY  
BIRCH BURDICK  
CASS COUNTY COURTHOUSE  
P.O. BOX 2806  
FARGO, N.D. 58108-2806

APPELLANT PRO SE

ATTORNEY FOR APPELLEE

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STATEMENT OF THE ISSUES

- 1) Can the State Attorney withhold evidence favorable to the defendant, proving that he is innocent?
- 2) Can the Fargo Police file a false affidavit to get a warrant and then search the defendant's residence with an unsigned warrant?
- 3) Can the defendant be charged with a burglary with no proof of theft at alleged burglary location, with the state merely assuming that defendant was present at building?
- 4) Is the burglary charge an overkill charge, whereby the Criminal Trespass charge is appropriate for no further criminal activity at entered building?

## FACTS OF THE CASE

The Appellant has filed for post-conviction in this case before, but has not addressed the newly discovered material that was withheld by the prosecution of the police reports that were not presented until after the appellant pled guilty.

The appellant pled guilty to burglary, two counts of theft, disorderly conduct, stalking, criminal mischief, and a separate charge of indecent exposure.

This plea was entered on October 28, 2002. The appellant received a sentence of 8-years on the burglary, and sentences of 30-days to one year on the misdemeanors. There was a term of three years suspended on the eight year term, and the appellant was to be on probation for five years.

The appellant, (Ernst), was revoked of the probation, before he was ever placed on this probation for not completing sex offender treatment while incarcerated. The Court (Supreme) ruled that the probation started when Ernst was sentenced on October 28, 2002. This five year probation would then end on October 28, 2007. This new sentence of the three years remaining on the burglary was then illegal, as the five years had expired, and there was no probation left to serve.

The district court, then re-sentenced Ernst to serve the three years of the burglary suspended sentence. It seems that the North Dakota Probation and Parole, did not want Ernst on probation in North Dakota.

Now, is the newly discovered evidence that Ernst has acquired on May 4, 2009. This newly discovered evidence was part of the investigation by the Fargo police, but the material was withheld, by the prosecution, that proves that Ernst is innocent of the charges that were lodged against him.

## ARGUMENT

There was trickery in this case, as the police could not tie Ernst to the burglary. The police lied in it's paperwork that it presented to the Court, and District Attorney. This trickery, is illegal, 586 N.W. 2d 133, 600 N.W. 2d 457. The trickery by the State to prove criminality, must be reversed to meet the ends of justice.

The police withheld police reports that showed that Erbst was not guilty of this burglary. The Fargo police issued a false and mis-leading affidavit to the Richfield, Minnesota police, so they would get a warrant to search the residence of Ernst. However, they never got a warrant as the Judge, (Judge Albretch), Hennepin Couty refused to issue one. So, the police, Fargo and Richfield went to the residence of Ernst, who was working at the time, and ordered the landlord, (Ted Russel) to open the premises, or the police would arrest him for obstuction of justice. So, to not go to jail for something that he did not do, he opened the house, and let the police in.

Judge Albretch sent me a letter stating that he never issued a warrant in my name. It was a phony warrant, or the police would not have had to threaten Russel, to get into the residence. A valid warrand would give them access.

Ernst waived extradition to North Dakota to answer to the burglary charges, to get his name clear. But, Ernst would have been convicted by way of the media, as his face and the police reports were given to the televison stations three weeks before Ernst entered the State of North Dakota.

Ernst never saw this so-called warrant that the police claimed that they got from Judge Albretch. There was a copy that was found on the internet by the nephew of Ernst some 17 months after he was sentenced. This (Exhibit No. 1), shows what the police were supposedly looking for. But, later on, the property that was listed as missing, was not stolen at all

In {Exhibit No. 1), it shows that this is the property that was suppose to be taken. However, there were items that were reported taken by the police, that in fact had never been taken. In (EXHIBIT No. 2, there shows property that is listed as belonging to Korslein, but it does not state that the property was taken, or stolen. In (Exhibit No. 3 ), this shows that the property that was recoved, and not from the residence of Ernst does not match up with the items reported to be stolen.

In (Exhibit No. 4), this is a reported statement by the Fargo police who state that they showed a photo lineup of people including Ernst. The report states that no one picked Ernst out of this so-called line-up. It can be highly questionedable who was in the photo line-up, as it does not state that. But, in other police reports, it is stated that these person's who viewed the line-up, said that they saw Ernst on multiple occasions, and still they could not pick him out of the line-up.

The Exhibits that are presented here, were not present, except for exhibit No. 1. That is all that was in the discovery that was given to Steven Mottinger, Ernst's appointed attorney. Ernst saw this report, that looked similar to a warrant, but it only listed property that the police were looking for. It does not state that the property was stolen, but now it seems likely that the implication was that it was stolen.

The burglary charge was filed, as the State Attorney believed that there was a crime comited after the entering of a dwelling. This must fail, as there has to be proof that criminal activity happened after the breakin, of entry of a locked building. The correct charge is Criminal Trespass. Since the State did not have proof that there was any other crime comited after the entry, it must be reversed, State v. Arne 311 N.W. 2d 186 (N.D. 1991). The indictment at most should have been the Criminal Trespass, State v. Smith N.D. 515; 52 N.W. 329, N.D. Lexis 35.

The Court also erred when it charged the theft in connection with the burglary as there was not a theft. Only the being in a locked building, with no legitimate reason for being in the building, as he did not live there. The mere assumption by the police that Ernst was there to steal something, is not a crime,

but the assumption that he might be there to do criminal activity. This is pure speculation, by the police.

Under the Theft Statute; there has to be specific intent, that requires a defendant to deprive the owner of property, Huff v. K.P. 302 N.W. 2d 779 (N.D. 1981). Ernst never exercised control over any property, as there was never a police report that stated that property was stolen. Just mere assumption. However, in later reports, the Fargo police stated that they may have found property that may have been stolen. But they did not state that it was taken from Korslien, or any other person in Fargo, North Dakota.

The sentence that Ernst pled guilty to, did not comply with a promise made in a plea agreement, that makes it an illegal sentence, and affords the defendant to challenge it under post-conviction, Docotau v. State 504 N.W. 2d 552 (N.D. 1993).

The agreement was sent to Judge McGuire three weeks before the sentence date. The Judge sent it back without saying a word of it's content. Upon the sentence, McGuire did sentence Ernst to the five years, with three years suspended, but then stated that, that was not right, and changed the sentence to eight years, with three suspended. This is an illegal sentence, and the Court is not suppose to be involved with any plea agreement, prior to sentencing, State v. Dimmitt 2002 ND 111, 665 N.W. 2d 692 (2003). At most Ernst should be able to reverse his plea to this unconstitutional mis-carriage of justice.

The police reports exonerate Ernst of any criminal activity, as they show that the property that was recovered, was not the alledgedly reported stolen property. And the police did not list any property that may have been seen at the residence of Ernst, as being stolen in any police reports. There was a lack of Probable Cause to charge Ernst with any criminal charges. It was based upon mere assumptions. and the case has to be sent back to the Lower Court to be re-heard, as there has been a major mistake made on the part of the police, by not showing the total police reports, and the violation of the State for withholding Discovery materials, to prove Ernst not guilty.

The indecent exposure charge was also an illegal act on the part of the State, as they only charged Ernst with a statement, saying that the act took place on or about, without putting a specific date on the alledged activity.

In the police reports, where they showed a photo lineup to the alledged victim, she could not identify Ernst as the person who exposed to her. And it was Ernst who walked up to this indivyual on an earlier date to talk to her, trying to get information about a garage sale. If, Ernst would have exposed to her, he difinetly would not go up to her, so she could inden- tify him for arrest.

The biggest mistake by the prosecution is that they with- held Discovery material in violation of State law. These re- ports show that Ernst is innocent, and he is now claiming the "NEWLY DISCOVERED" evidence rule to this post-conviction remedy. The Supreme Court has to send this case back to the lower Court, to clear the record, as Ernst was illegal charged with criminal- ity that he did not comit. Ernst could not challenge this at an earlier hearing of transcript, as he just recieved these held back report from the Assistant State Attorney on May 6, 2009. Ernst never knew that these reports existed.

It is plain to see that in Exhibit No. 1, what the police stated was missing. This is the same listing that was put on the alledged Warrant that the police ststed that they had, which proved to be false. Exhibit No. 2, is property that is lited and not reported stolen, or even recovered. It just shows that there are items listed, and does not show criminal acitivity. Exhibit No. 3, ststes that this is property that was recovered at the residence of the alledged victim, Larissa Korslien. It does not state that the property was stolen, or even ever taken. And it does not line up with the Exhibit No. 1, as property alledged to be stolen.

Exhibit No. 4, shows that these alledged victims did not pick Ernst out of the photo lineup, after alledgedly seeing him on multiple occasions.

In Exhibit No. 5, it clearly shows that the Court did try to abide by the "plea Agreement" but at some point decided to change his mind and got away from the plea agreement.

To sustain a conviction on the burglary, there must be proof that the offender intended to comit a crime in the build-  
ing, or structure which was entered, State v. Arne 311 N.W. 2d  
186 (N.D. 1981). In this instant case, Justice Pederson dis-  
sented, stating that no property was taken to sustain a convict-  
ion of theft, and that the statue calls for the crime to be  
"THEREIN".

The burglary element must be present, and since the defen-  
dent did not knowingly exercise control of any property, it  
cannot be criminal, State v. Woehlhoff 540 N.W. 2d 162 (N.D.  
1981). Ernst was also charged with CRIMINAL MISCHIEF along with  
the burglary. this cannot stand as it is not part of the burg-  
lary, 43 A.L.R. 3d. 1147. There has to be exclusive possession  
for a crime to be comitted, 51 A.L.R. 727. The burglary is a  
breaking and entry, 72 A.L.R. 4th 710.

This whole scenerio amounts to CRIMINAL TRESPASS, under  
NORTH DAKOTA CENTURY CODE: 12.1-22-03. The burglary cannot be  
charged ,as there was not a crime therein, because property  
was not taken from the alledged victim.

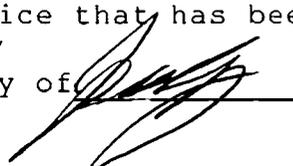
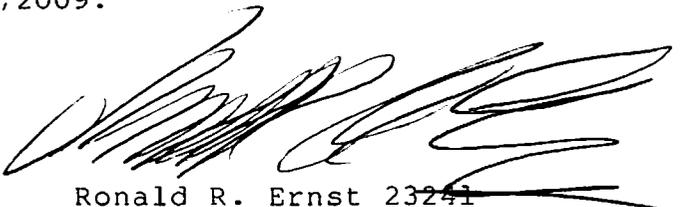
The Remedy Rule, N.D.C.C. 29-32.1-01, is that since there  
was evidence that was not served upon the defense of any pro-  
perty that was alledged to have been stolen, but was not, is  
subject to collateral attack. This evidence not given to the  
defendant prior to trial, or previously presented and heard  
under Rule 33, Breiding v. State 1998 ND 170, 584 N.W. 2d 493  
(1998), must be thrown out as being illegal.

Under Rule 32 (d) N.D.R.CRIM P. 7, withdrawal of guilty  
plea to correct a manifest injustice. defendant was coerced by  
his attorney to plead, but with evidence to prove his innocence  
being withheld by the prosecution, this case must be sent back  
for further review, and re-charging at a lesser criminal vio-  
lation of law, that is more consistant with the Trespass.

This Court must look at all of the evidence that shows that Ernst is not guilty of stealing any property. The mere idea by the police to cast shadow over the case by withholding reports, and putting non-charged cases into the picture, shows that they are trying to cloud the issues, to make it look like Ernst is responsible. But, they have opened up thier hand-by-the listing of alledged stolen property, not being found in the illegal search of Ernst's residence, or the property that was alledged to have been found at the alledged vistim's residence, and none of these meet the descriptions that are listed on any of the police reports. Nothing is the same. but is only listed to show that there is truely a smoke screen, by the police.

So, Ernst prays that this Court will grant this post-conviction relief, and send this case back to the lower court to corrract the injustice that has been done.

Dated this 24th day of Aug, 2009.

  
  
Ronald R. Ernst 23241

SUPREME COURT OF NORTH DAKOTA

Ronald R. Ernst,  
Appellant,  
vs.

SUPREME COURT NO. 20090192  
CASS CO. NO. 09-C0922

State of North Dakota,  
Appellee,

CERTIFICATE OF SERVICE

I hereby swear on the date specified below, true and accurate copies of the following documents;

APPELLANT'S BRIEF  
APPELLANT'S APPENDIX

Was mailed by U.S. Mail, from the James River Correctional Center, in Jamestown, N.D. upon the following;

CLERK OF SUPREME COURT  
600 E. BOULEVARD AV. DEPT. 180  
BISMARCK, N.D. 58505-0530

ASSISTANT STATE ATTORNEY  
BIRCH BURDICK  
CASS COUNTY COURTHOUSE  
P.O. BOX 2806  
FARGO, N.D. 58108-2806

Dated this 27th day of July, 2009.

RONALD R. ERNST

*Brandi J. Netolicky*  
NOTARY

BRANDI J NETOLICKY  
Notary Public  
State of North Dakota  
My Commission Expires June 11, 2015

COMMISSION EXPIRES

Subscribed and sworn before me this 27 day of July, 2009,  
in Stutsman County, North Dakota.