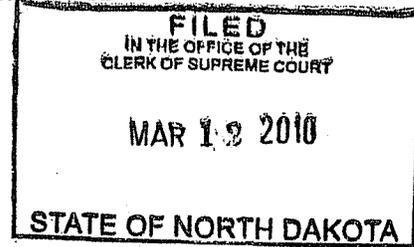


20100063

IN THE SUPREME COURT OF NORTH DAKOTA



DAVID L. MEADOR,

Appellant/Defendant

Vs.

Case No. _____

STATE OF NORTH DAKOTA,

Appellee/Plaintiff.

BRIEF FOR APPELLANT

APPEAL FROM THE BARNES DISTRICT COURT
CASE NO. 2:08-K-291
HONORABLE RICHARD M. GROSZ
DISTRICT COURT JUDGE

Certificate of Service

This is to certify that a true and correct copy of the foregoing Brief for appellant has this day been placed in the U.S. Mail, prepaid postage unto Lee M. Grossman, States Attorney, 230 4th Street NW, Room 301, Valley City, ND 58072, on this ~~10th~~ day of March 2010.

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Statement of Issues Presented

1. WHETHER THE APPELLANT'S FUNDAMENTAL RIGHT TO BE FREE FROM EX POST FACTO LAWS WAS VIOLATED BY THE RETROSPECTIVE APPLICATION OF N.D.C.C. SECTION 12.1-32-15 TO APPELLANT'S 1994 KENTUCKY CHARGES?

2. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION OR AUTHORITY IN DENYING A MOTION TO DISMISS WHERE THE APPELLANT DID NOT MOVE TO A NEW RESIDENCE FOR THREE DAYS UNDER N.S.C.C. SEC. 12.1-32-15 (2007 ED.)?

3. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION OR AUTHORITY IN ITS COUNTING THREE DAYS TO INCLUDE WEEKENDS AND HOLLIDAYS?

Statement of the Case and Facts

This is a case where the appellant first appeared in North Dakota in July 2008. The appellant arrived in North Dakota for the purpose of completing work on the Wind Towers in Barnes County. After appellant was present in North Dakota 13 days, he registered with the valley city police department under 12.1-32-15 as requested by city police. Thereafter, the Barnes County Sheriffs Office appeared at the appellant's workplace and arrested the appellant for failure to register within three days. The appellant was terminated from his workplace and was forced to reside at a local truck-stop. At the hearing, the Court dismissed the charge where the appellant was not yet a

temporary domiciled person. The Sheriff's Department made several stops each day at the truck stop and made inquiries with the attendants about the appellant. It was not long before the truck stop asked the appellant to leave through the local police. The following day, the appellant was ordered by city police to leave a City Park and informed that he could not stay there. The police suggested that the appellant seek a place to stay at the State Park in Barnes County. The following day, a friend of the appellant assisted the appellant with the necessary funds to pay for a two-day stay at the State Park. On the fourth day, the appellant found a place to live in Cass County and registered that residence with the Cass County Sheriffs Office. Again, the sheriff arrested the appellant for failure to register a residence within three days. The appellant left valley city before the two-day period and went to a Barnes County State Park for two days. While at the state park, the appellant notified the valley city police department that he was at the State Park, via telephone. The appellant was not in Valley City for a three-days period after the police orders to leave the Truck-Stop and the City Park. The appellant is now convicted for his failure to find a residence within three days and register it with law enforcement. This appeal is the result of that conviction.

Jurisdictional Statement:

Jurisdiction is hereby invoked pursuant to North Dakota Constitution.
The Appellant has timely filed a Notice of Appeal and an Amended
Notice of Appeal with the trial court.

Notice of Appeal was timely filed on March 12, 2010 in the
Barnes District Court of the Courts Final orders.

Law and Argument

1. WHETHER THE APPELLANT'S FUNDAMENTAL RIGHT TO BE FREE FROM EX POST FACTO LAWS WAS VIOLATED BY THE RETROSPECTIVE APPLICATION OF N.D.C.C. SECTION 12.1-32-15 TO APPELLANT'S 1994 KENTUCKY CHARGES?

The case controlling ex post facto laws is the case of Weaver v. Graham, 450 U.S. 24 (1981). In Weaver, the full United States Supreme Court held that:

" (a) For a criminal or penal law to be *ex post facto*, it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it. *Lindsey v. Washington*, 301 U. S. 397, 301 U. S. 401; 3 U. S. 390. *It need not impair a "vested right." Even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Ex Post Facto@ Clause if it is both retrospective and more onerous than the law in effect on the date of the offense. Pp. 450 U. S. 28-31.*" AND

" (b) The effect, not the form, of the law determines whether it is *ex post facto*."

This Court has further defined an ex post facto law as:

"1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2. Every law that aggravates a crime, or makes it greater than it was, when committed. 3. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4. Every law that alters the legal rules of evidence and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender."

See State v. Jensen, 333 N.W.2d 686, 693-94 (N.D. 1983) (quoting State v. Pleason, 218 N.W. 154, 155 (N.D. 1928) (quoting Calder v. Bull, 1 U.S. 269, 273 (1798))). No statute can be an ex post facto law prohibited by the United States Constitution unless it makes previously legal conduct criminal or increases the punishment for an existing crime. Dobbert v. Florida, 432 U.S. 282, 293 (1977) (citing Hopt v. Utah, 110 U.S. 574 (1884)).

North Dakota Penal Code Chapter 12.1-32,
PENALTIES AND SENTENCING

N.D.C.C. Sec. 12.1-32-15 is:

- 1). Is a criminal-penal Statute;
- 2). Was applied retrospectively to the appellant; and
- 3). Has disadvantaged the Appellant.

N.D.C.C. Sec. 12.1-32-15, a criminal statute, was applied to the appellant's 1994 offense and has disadvantaged the appellant. The appellant's date of offense occurred before May 9, 1994. The appellant has never resided in the State of North Dakota before August 2008.

The 1995 amendment to N.D.C.C. Sec. 12.1-32-15 is an ex post facto law, as the amendment violates the State and Federal Constitutional provisions prohibiting ex post facto laws. See U.S. Const. art. 1, sec. 10; N.D. Const. art. I, sec. 18.

N.D.C.C. Sec. 12.1-32-15, (1995 amendment) a criminal statute, was applied to the appellant's 1994 offense and such application has disadvantaged him.

HISTORY OF STATUTE

The North Dakota Legislature first enacted 12.1-32-15 in 1991. (1991 N.D. Sess. Laws, chs. 124, 136). The statute applied to offenders convicted **after** the effective date.

In 1993, offenders against children were combined into one statute. (1993 N.D. Sess. Laws, ch 129 Sec.3).

In 1995, three categories of offenders were added to register **1).** a person who is incarcerated or on probation or parole on the effective date of the law for a crime against a child or as a sexual offender; **2).** a person who had pled guilty or nolo contendere to, or

been found guilty of, equivalent sex offenses or crime against children **in a court of another state** or the federal government; **3).** a person who has pled to, or has been found guilty of, a crime against a child or as a sexual offender within **ten years** prior to the effective date of the act. (1995 N.D. Sess. Laws, ch. 131, Sec. 1).

The 1995 amendment is retrospective, is an ex post facto law, has resulted in the disadvantage of the appellant and does not comply with the constitutional requirements set forth in Weaver v. Graham, 450 U.S. 24 (1981).

There is no question that N.D.C.C 12.1-32-15 is a criminal-penal statute. There is no question that the statute was applied retrospectively to the appellant's 1994 offense. And, there is no question that the appellant has been disadvantaged by the retrospective application of the statute to him resulting in the loss of his employment, housing, being arrested, convicted, and now sentenced.

The appellant was convicted for his Kentucky charges on November 1, 1994. Applying the 1995 Amendment to the appellant's 1994 charges constitute an ex post facto law and violate the state and federal constitutions.

The appellant was not required to register in North Dakota under the state and federal constitutions prohibition and such only took place as the result of police order by the Valley City Police Department. This case should have been dismissed by the district court and failure to enter an order of dismissal was an abuse of discretion and/or authority of the trial court. The appellant is entitled to an ordered dismissal by this court directed to the district court.

2. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION OR AUTHORITY IN DENYING A MOTION TO DISMISS WHERE THE APPELLANT DID NOT MOVE TO A NEW RESIDENCE FOR THREE DAYS UNDER N.S.C.C. SEC. 12.1-32-15 (2007 Ed.)? OR,
3. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION OR AUTHORITY IN ITS COUNTING THREE DAYS TO INCLUDE WEEKENDS AND HOLLIDAYS?

The trial court held that N.C.C.C. Sec. 12.1-32-15 requires an offender to locate and register a new residence within three days. There is no language in the statute that mandate an offender to locate a residence within three days. The statute requires an offender to register a new residence with local authorities within three days. The appellant was ordered to the streets by the Valley City Police Department. The appellant had no place to live. The appellant located a residence within four days of leaving the truck-stop and registered that residence with local authorities in Cass County. The appellant notified the Valley City Police within the three days that he was staying at a State Park and had not located a residence. The appellant also notified the police that he had located a residence in Cass County on the fourth day and completed the necessary forms required by the Valley City Police Department. The trial court abused its discretion and authority by allowing this case to go to trial and violated the appellant's substantial due process right to fair notice through the court or statute. U.S. Const. Amend. 14.

In 2007, the Legislative Assembly amended 12.1-32-15 to comply with the Adam Walsh Child Protection and Safety Act of 2006 (P.L. 109-248). The amendment changed the registration requirements from ten days to three days.

42 U.S.C. § 16913. Registry requirements for sex offenders

(b) Initial registration

- (1)** before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or
- (2)** not later than **3 business days** after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment

(c) Keeping the registration current

A sex offender shall, not later than **3 business days** after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

The state of North Dakota adopted the registration requirements set forth in the Adam Walsh Act in 2007. The act counts days as business days.

Business days are defined as:

A business day is a term used to compute time for deadlines in filing papers, making payments, deliveries, etc. The precise definition varies by area and entity. Typically a business day is Monday through Friday. Hours and excluded holidays vary, but typically the day covers the period from 9 a.m. to 5 p.m.

"BUSINESS DAY" means "Monday through Friday, except for federal or state holidays..." The term is used (1) under procedural safeguards, related to pre-hearing disclosure of evidence and evaluations (§300.509(a)(2) and (b)); and (2) in the discipline procedures (§§300.520(b) and 300.528(a)(1)). In addition, the phrase "business days (including any holiday that falls on a business day)" is used under §300.403(d)(1)(ii)."

__ On August 9, 2008, the appellant registered with the Valley City Police showing a residence at a truck stop in Valley City. See attachment No. 1.; transcript p.11, n. 12-20.

On August 14, 2008, at 8:00 p.m., the appellant was ordered from the truck stop by the Valley City Police Department. See attachment No. 2, six-telephone-contacts., and; transcript p.11, n.21-25; p.12, n.1-12.

On August 15, 2008, appellant was ordered from the to leave a city park by the Valley City Police Department. See telephone records attached. Five telephone contacts. See transcript p.12, n. 13-25; p.13, n. 1-25. Five telephone contacts with police. See also transcript p.12, n.13-17.

On August 19, 2008, appellant contacted the Valley City Police. See transcript p.12, n. 21-25; p.13, n.1-25; telephone records p.14-15; Valley Police telephone Records.

On August 20, 2008, appellant filed written notice to the valley city police department of his change of address to Cass County. Five telephone contacts with police. See telephone records.

In counting days Monday through Friday, 8:00 a.m. until 5:00 p.m., the following days should have been counted only;

1. The appellant was ordered to leave the truck-stop at or about 8:00 p.m. on Thursday August 14, 2008.
2. According to 42 USC Sec. 16913(c), the first business day started on August 15, 2008 at 8:00 a.m. and ended at 5:00 p.m.
3. The second day began Monday August 18, 2008 at 8:00 a.m. and ended at 5:00 p.m.
4. The third day began on Tuesday August 19, 2008 at 8:00 a.m. and ended at 5:00 p.m.

See 1998 Calendar attached.

The appellant was in contact with authorities between August 14, 2008 and August 19, 2008. The appellant did not have a place to live during this time and should not have been charged with failure to comply with 12.1-32-15. The trial court abused its discretion in denying the appellant's motion to dismiss on this issue.

CONCLUSION

Wherefore, for the above stated reasons, the appellant prays this Court overturn his conviction and cause his release from his restraint under this conviction.

Respectfully Submitted:

David S. Meador
David Meador, pro se, Appellant