

20100204

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
AUGUST 13, 2010
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,

Plaintiff/Appellee

v.

Supreme Court No. 20100204

Carl Martin,

Defendant/Appellant.

BRIEF OF APPELLANT

Appeal from Order Deferring Imposition of Sentence

McLean County District Court

South Central Judicial District

McLean Co. No. 10-K-00015

Carl Martin, Appellant

PO Box 41

348 NE 3rd St.

Garrison, ND 58540

701-460-0635

Table of Contents

	Page
Table of Citations	3
Issue	5
Does the North Dakota Public Nuisance statute in North Dakota Century Code Chapter 42-01 allow the State to pursue both a civil action and a criminal action simultaneously against the same defendant concerning the same nuisance.	
Statement of the Case	5
Statement of the Facts	5
Argument	6
Addendum of Statutes	15

Table of Citations

Cases:

<u>Becker v. Becker</u> , 262 N.W.2d 478	11
<u>Flahive v City of Dana Point</u> , 72 Cal App 4 th 241, (1995)	11
<u>Glatt v. Bank of Kirkwood Plaza</u> , 383 N.W.2d 473	11
<u>Schaaf v N.D. Department of Transportation</u> , 771 N.W.2d 237	6
<u>State v. Robinson</u> , 35 N.D. 410, 160 N.W. 512, 516 (1916)	7

Statutes:

California Civil Code §3491	10
California Civil Code §3492	10
Compiled Laws of the Territory of Dakota, 1887, §4688	9
Compiled Laws of the Territory of Dakota, 1887, §4689	9
Compiled Laws of the Territory of Dakota, 1887, §6634	6
Montana Code Annotated § 27-30-202	8
Montana Code Annotated § 45-8-111	8
Montana Code Annotated § 45-8-112	8
N.D.C.C. §1-02-02	4
N.D.C.C. §1-02-07	4
N.D.C.C. §42-01-03	4
N.D.C.C. §42-01-07	4

N.D.C.C. §42-01-15	4
North Dakota Revised Code §42-0107	7
North Dakota Revised Code §42-0115	7

¶1 Issue

¶2 Does the North Dakota Public Nuisance statute in North Dakota Century Code Chapter 42-01 allow the State to pursue both a civil action and a criminal action simultaneously against the same defendant concerning the same nuisance.

¶3 Statement of the Case

¶4 This is an appeal of an Order Deferring Imposition of Sentence following a conditional plea of guilty to a charge of maintaining a public nuisance. Defendant moved to dismiss the misdemeanor charge, arguing the State could not pursue both a civil action and a criminal action. The District Court denied the motion.

¶5 Statement of the Facts

¶6 Defendant owned and maintained a property at 348 NE 3rd St, Garrison, ND that was a public nuisance. The State commenced this action and a civil action (McLean County Cr #28-10-C-008) to remedy this public nuisance. These actions were initiated by service of process on January 13, 2010. The first hearing in this case and the accompanying civil case was on February 17, 2010.

¶7 Argument

¶8 *The plain, ordinary and commonly understood meaning of N.D.C.C. ch. 42-01 is that the remedies for public nuisance are either criminal or civil not both criminal and civil.*

¶9 The North Dakota nuisance statute clearly states in N.D.C.C. §42-01-07 that the remedies for public nuisance are indictment; filing an information; bringing a criminal action before a district judge; a civil action; or abatement. The state brought both a criminal prosecution and a civil action, contrary to the law. The list of remedies in §42-01-07 has to be interpreted as an 'or' list. Each semicolon in the list represents the word 'or'. Similarly, N.D.C.C. §42-01-03 states the remedies against a private nuisance are a civil action; or abatement. N.D.C.C. §42-01-07 has to be interpreted in the same fashion; one of the items on the list may be used as a remedy for a public nuisance. Since the statute clearly intends a criminal action or a civil action, this misdemeanor charge must be dismissed.

¶10 In [Schaaf v N.D. Department of Transportation](#), 2009 ND 145, ¶ 11, 771 N.W.2d 237, the Court outlined the rules of statutory interpretation: "Statutory interpretation is a question of law... Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears. N.D.C.C. § 1-02-02. Statutes are construed as a whole and are harmonized to give meaning to related provisions. See N.D.C.C. § 1-02-07. ..."

¶11 Bringing both a civil action and a criminal action for the same public nuisance against the same defendant is not permitted by the plain reading of N.D.C.C. §42-01-07. Allowing the State to bring a misdemeanor charge under N.D.C.C. §42-01-

15 in addition to a civil action implicitly repeals a portion of N.D.C.C. §42-01-07. The statutory construction rules require all sections of the statute to be harmonized.

¶12 “In the case of all written laws it is the intent of the lawgiver that is to be enforced, but this intent is to be found in the instrument itself. The whole instrument is to be examined. Every such instrument is adopted as a whole, and a clause which, standing by itself, might seem of doubtful import, may yet be made plain by comparison with other clauses or portions of the same law. It is therefore a very proper rule of construction that the whole is to be examined with a view to arriving at the true intention of each part. The rule is that effect is to be given, if possible, to the whole instrument, and to every sections and clause. If different portions seem to conflict, the courts must harmonize them, if practicable, and must lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory.” State v. Robinson, 35 N.D. 410, 160 N.W. 512, 516 (1916).

¶13 Section 42-01-15 must be read to harmonize with N.D.C.C. §42-01-07. Section 42-01-15 defines the class of criminal action if the government chooses to bring a criminal action. Reading N.D.C.C. §42-01-15 as independent of N.D.C.C. §42-01-07 implicitly repeals a part of N.D.C.C. §42-01-07.

¶14 Some jurisdictions explicitly give the government attorney the prerogative to make the criminal charge in addition to the civil injunction or abatement case. Chapter 42-01 does not, it allows the government attorney to choose the best option for the particular case, either criminal, or civil injunction or abatement.

¶15 *History of the language of N.D.C.C. ch. 42-01 and its processors in the Draft of a Civil Code for the State of New York, the Compiled Laws of the Territory of Dakota, 1887, the Revised Codes of 1895, 1899 and 1905, the Compiled laws of North Dakota (1913), and the North Dakota Revised Code (1943) indicate the intent of the drafters that the remedies for public nuisance are either criminal or civil not both criminal and civil.*

¶16 Draft of a Civil Code for the State of New York, 1862:

¶17 The earliest version of the Field Code describes the remedies for a public nuisance as “Indictment; Action; Abatement. “ No ‘ands’ or ‘ors’.

Draft of a Civil Code for the State of New York:

“Section 1577. The remedies against a public nuisance are:

1. *Indictment;*
2. *Action;*
- 3 *Abatement.*

The remedy by indictment is regulated by the Penal Code, and the Code of Criminal Procedure.”

Draft of a Civil Code for the State of New York, by New York State Commissioners of the Code, David Dudley Field, 1862, page 394.

[1862 Field Code.](#)

¶18 Compiled Laws of the Territory of Dakota, 1887:

¶19 The code of the Dakota Territory was based on the Field code. The equivalent sections on nuisance in that code were similar except the semicolon after Indictment was changed to a period and the 'or' was added. The section of the territorial code similar to the Section 42-01-07 is Section 4688 followed by section 4689 which directs the criminal action to the Penal Code.

“§4688. The remedies against a public nuisance are

1. *Indictment.*
2. *A civil action; or,*
3. *Abatement.*

§ 4689. The remedy by indictment is regulated by the penal code, and the code of criminal procedure.”

Compiled Laws of the Territory of Dakota, 1887,
<http://home.sodaklive.com/edocs/CompiledCodifiedLaws1887/05-CivilCode.pdf>

¶20 The penal code contains section 6634 which is similar to Section 42-01-15 of the Century Code.

“§6634. Every person who maintains or commits any public nuisance, the punishment for which is not otherwise prescribed, or who wilfully omits to perform any legal duty relating to the removal of a public nuisance, is guilty of a misdemeanor.” Ibid.
<http://home.sodaklive.com/edocs/CompiledCodifiedLaws1887/09-PenalCode.pdf>

¶21 These statutes remained the same through subsequent compilations of the North Dakota code until the 1943 Revised Code in which they were reformulated as follows:

“42-0107. Public nuisance - Remedies against. The remedies against a public nuisance are:

1. *Indictment;*
2. *Filing an information;*
3. *Bringing a criminal action before a justice of the peace, who shall have authority to bind the defendant over to the district court;*

4. A civil action; or
5. Abatement.

42-0115. *Maintaining public nuisance - Penalty. Every person who maintains or commits any public nuisance, the punishment for which is not otherwise prescribed, or who willfully omits to perform any legal duty relating to the removal of a public nuisance, is guilty of a class A misdemeanor.*”

¶22 In their report the Committee made only one comment on this section. The comment was on the removal of the cross reference to the penal code which was no longer needed. Code Revision Report Covering Work of the Code Revision Commission.

¶23 By adding the options of Filing an information and Bringing a criminal action the revisers of the code made it more clear the government can use only one of the optional remedies. The first three options are all criminal actions and only one of them could possibly be used.

¶23 No North Dakota cases were found construing NDCC 42-01-07 or its predecessor statutes. California Civil Code 3491 is essentially the same statute as NDCC 42-01-07. Its wording is the same as the Field Code sections 4688 and 4689.

“Sec. 3491 *The remedies against a public nuisance are:*

1. *Indictment or information;*
2. *A civil action; or,*
3. *Abatement.*”

<http://law.onecle.com/california/civil/3491.html>

“Sec. 3492 *The remedy by indictment or information is regulated by the Penal Code.*”

<http://law.onecle.com/california/civil/3492.html>

¶24 Section 3491 was explained by a California appellate court. California decisions are generally considered by the North Dakota courts. "Because of this common derivation, California court decisions construing Field Code sections, while not binding, are entitled to respectful consideration, and may be 'persuasive and should not be ignored.'" Glatt v. Bank of Kirkwood Plaza, 383 N.W.2d 473, 477 n.4 (N.D. 1986) quoting Becker v. Becker, 262 N.W.2d 478, 483 (N.D. 1978).

¶25 The California Court was considering the case of Lydia Flahive versus the City of Dana Point. Ms. Flahive sued the City for damages caused when the City removed a public nuisance from her property. The Court explained the City had authority to use the abatement procedure:

“Civil Code section 3491 provides three remedies for a public nuisance: (1) a criminal proceeding; (2) a civil action; or (3) abatement. Except for instances implicating certain constitutional considerations, such as nuisances involving purported obscenity, the public entity is free to choose any of the three options. (*People ex rel. Camil v. Buena Vista Cinema* (1976) 57 Cal.App.3d 497, 501-503 [129 Cal.Rptr. 315] [purported obscenity nuisance **[72 Cal.App.4th 245]** required prior judicial determination]; and see *Selma Pressure Treating Co. v. Osmose Wood Preserving Co.* (1990) 221 Cal.App.3d 1601, 1616 [271 Cal.Rptr. 596] [public entity, like individuals, should be able to pursue full panoply of remedies for nuisance].)

The City chose the third option, abatement...

Flahive v City of Dana Point, 72 Cal App 4th 241, (1995).

<http://caselaw.lp.findlaw.com/data2/californiastatecases/g022514.pdf>

¶26 It does not appear from the Flahive case that California courts assume the government has the prerogative to choose two of the three optional remedies described in the nuisance statute.

¶27 *Statutes must unambiguously allow both criminal and civil remedies against a public nuisance*

¶28 If the State of North Dakota wishes to use both criminal and civil remedies against a public nuisance it should make that desire clear and unambiguous as Montana did in 1973. In 1973 Montana enacted two sections of its criminal code to specifically allow both criminal prosecution and abatement. These statutes are Montana Code Annotated Section 45-8-111 and Section 45-8-112. Montana still retains in its code the Field code section similar to N.D.C.C. 47-01-07. It is Montana Code Annotated Section 27-30-202.

¶29 Many other jurisdictions do specifically allow the government to pursue both a criminal remedy and a civil remedy as the State has attempted to do in this instance. But as in Montana these statutes are generally clear and unambiguous. Even if the Field code derived N.D.C.C. Section 47-01-07 is construed to intend to allow both civil and criminal remedies be pursued at the same time, it is ambiguous. Ambiguous criminal statutes construed against the government. *State v Corman*, 2009 ND 85; *State v Geiser*, 2009 ND 36; *State v Dennis*, 2007 ND 87.

¶30 *The history of public nuisance law indicates the criminal penalty provided in N.D.C.C. 47-01-15 is intended as a remedy for public nuisance not as an ordinary criminal statute.*

¶31 The common law misdemeanor of public nuisance was intended as remedy for public nuisance rather than as a crime as such.

“The common law of public nuisance arose in twelfth century England as a criminal writ, brought by a sovereign to protect the exercise of rights common to his subjects. Over the centuries, the criminal writ evolved into a civil cause of action aimed at protecting from “unreasonable interference” rights common to the public.”

State Common Law of Public Nuisance in the Modern Administrative State,

F. William Brownell, Natural Resources & Environment, Volume 24, Number 4, Spring 2010.

http://www.hunton.com/files/tbl_s47Details%5CFileUpload265%5C2860%5CCommon_Law_Public_Nuisance_4.10.pdf

“1.12 The term “public nuisance” has historically been used in two senses. In a narrow sense, it referred to activities which affect the safety or amenity of an area. In a wide sense it referred to a family of public order offences, including public nuisance proper, outraging public decency and keeping a disorderly house, and several offences now abolished such as being a nightwalker or a common scold. In recent years the tendency has been to confine public nuisance more closely around the environmental category of activities and to treat outraging public decency and keeping a disorderly house as separate offences.³ All these offences were developed by the King’s Bench in the seventeenth and eighteenth centuries in reaction to perceived social evils, though public nuisance proper also has older roots. They had in common a vagueness of outline and a reluctance to define a fault element, as the purpose was to remove the nuisance rather than to reform the offender.” (emphasis added)

SIMPLIFICATION OF CRIMINAL LAW: PUBLIC NUISANCE AND

OUTRAGING PUBLIC DECENCY, A Consultation Paper, THE LAW COMMISSION, p.

2.

<http://www.lawcom.gov.uk/docs/cp193.pdf>

¶32 The authors of the Field Code by listing the remedies for public nuisance as criminal, civil or abatement intended the public nuisance misdemeanor as a method of remedying the nuisance, not as a simple criminal misdemeanor to be charged in all circumstances. The listing of the three remedies to a public nuisance gives the prerogative to the government to select one of the remedies. If it was intended for the

government to prosecute a misdemeanor in every case in addition to the civil remedy or abatement, the statute would have been drafted differently.

¶33 CONCLUSION

Appellant requests the order deferring imposition of sentence be reversed and the case remanded to McLean County District Court for a dismissal of the case.

Carl Martin, Appellant
PO Box 41, 348 NE 3rd St
Garrison, ND 58540
701-460-0635