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JUN 02 2007

STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF NORTH DAKOTA

June 5, 2007

State of North Dakota,	)	
Plaintiff/Appellee,	)	Supreme Court No. 20070082
-vs-	)	Burleigh Co. No. 06-C-01812
Two Thousand Nine Hundred Ninety Six Dollars ($2,996) United States Currency, and Shane Voigt,	)	
Defendant/Apellant.	)	

APPEAL FROM THE DISTRICT COURT, BURLEIGH COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE BRUCE B. HASKELL, PRESIDING

APPELLANT'S BRIEF

Shane Voigt
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Appellant, pro se
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STATE OF NORTH DAKOTA

STATEMENT OF ISSUES

Issue Number 1. Was the Plaintiff's prima facie case sufficient to meet the standard of evidence needed for forfeiture of $2,996?

Issue Number 2. Was uncontested testimony by the Appellant, Shane Voigt, sufficient to overcome the Plaintiff's prima facie case in meeting the preponderance of evidence standard stopping the forfeiture of the $2,996?

Issue Number 3. Should have sworn statement by Appellant's mother carried any evidential weight in bolstering her son's testimony, since she could not attend hearing?

Issue Number 4. Did Judge Haskell abuse his discretionary powers by granting forfeiture of $2,996 based completely on Plaintiff's prima facie case of speculation, and no rebuttal evidence to the Appellant's testimony as to the use of money?

STATEMENT OF CASE

On October 10, 2005 during a probation search of Shane Voigt's (the Appellant) residence in which 7.01 grams of methamphetamine was found along with 73.41, approximately 2 3/4 of an ounce, of marijuana. The Appellant was charged with possession with intent to deliver methamphetamine within 1000 ft. of a school, and possession with intent to deliver marijuana within 1000 ft. of a school. Also found separate from the illegal drugs was found Two Thousand Nine Hundred Ninety Six Dollars in U.S. Currency ($2,996).

The Appellant plead guilty to the two counts of possession with intent to deliver drugs within 1000 ft. of a school because the State of North Dakota (the Plaintiff) offered him a good deal. It should be noted that the drug charges were for possession only, delivery of, or manufacture of, or sale of, and that the only reason he was charged with intent to deliver was because of the amounts of drugs. No evidence ever existed that the Appellant intended to deliver or sell any portion of the drugs found. The amounts dictated the charges, not any actions by the Appellant.

The Plaintiff filed for forfeiture of the money found during the probation search under N.D.C.C. § 19-3.1-36(h), the Appellant answered, and a hearing was scheduled. After two other attempts a hearing was held on January 25, 2007, at 1:30pm at the Burleigh County Courthouse in Bismarck, ND. Present at the hearing were Burleigh County Assistant State's Attorney Lloyd Suhr representing the Plaintiff, and the Appellant as legal owner of the $2,996 in question.

The Plaintiff only called one witness, Cory Schlinger, the

Appellant's probation officer and a member of the Metro Area Safe Trails Task Force, who offered no testimony or evidence that the Appellant was planning on purchasing more drugs with the $2,996 that was found during the October 10, 2005 search.

Also giving testimony was the Appellant, who testified that the intended use of the $2,996 was to hire an attorney for some other criminal charges that he was facing. To support this testimony the Appellant was going to have his mother, Bernadine Voigt, testify that to retain an attorney was the intended reason she had cashed a check on her son's behalf for that purpose, but because she had been present for the two previously scheduled hearing dates, but was unable to be present on January 10th, 2007, hearing.

After a lengthy discussion with the Assistant State's Attorney Judge Haskell found that there was probable cause that the cash was intended to be furnished in exchange for a controlled substance, based purely on speculation and no evidence. The State did make a prima facie case that the $2,996 was subject to forfeiture, the Appellant then offered his testimony as evidence of his intent to retain an attorney with the $2,996, the prima facie case was not evidence. By the standard that Judge Haskell then had to make his decision that of the preponderance of the evidence, the only evidence presented was the Appellant's testimony, the money should have been returned to the Appellant.

The Plaintiff then drafted a Proposed Set of Findings and Order Granting Forfeiture dated January 26, 2007 and sent a copy to the Appellant, and a copy for Judge Haskell to sign. On the 3rd day of February the Appellant submitted an Objection to Proposed Set of Finding and Order Stemming from January 25, 2007 Forfeigture Hearing. Along with

the Objection the Appellant included a notarized statement by his mother, Bernadine Voigt stating that she had cashed the check for her son from A.G. Edwards for the intended purpose of him hiring an attorney. Judge Haskell denied this Objection after he had already signed the Findings and Order Granting Forfeiture on February 7, 2007. The Appellant wanting to make sure that Judge Haskell would have the opportunity to rule on his mothers sworn statement then filed a Motion to Amend Judgment with Notice of Motion on the 15th of February, 2007, in again included his mother's notarized statement. Judge Haskell denied the Motion on March 8, 2007.

The Appellant then filed a Notice of Appeal dated March 20th, 2007.

STATEMENT OF FACTS

The facts in dispute are whether the Plaintiff offered sufficient evidence in which to infer that the Appellant was going to use the $2,996 for the purchase of illegal drugs making the money forfeitable under N.D.C.C. § 19-03.1-36(h). Also whether by the preponderance of the evidence the Appellant's unchallenged testimony along with his mother's notarized statement sufficiently demonstrated that the $2,996 was intended to be using for hiring an attorney and not forfeitable under N.D.C.C. § 19-03.1-36(h). Finally whether Judge Haskell abused his discretionary powers in finding by the preponderance of the evidence that the $2,996 was forfeitable under N.D.C.C. § 19-03.1-36(h) and § 19-03.1-36.2.

ARGUMENT

Issue Number 1. Was the Plaintiff's prima facie case sufficient to meet

the standard of evidence needed for forfeiture of $2,996? The Appellant contends that the prima facie case presented by the Plaintiff, while sufficient to be used as probable cause to bring the forfeiture action under N.D.C.C. § 19-03.1-36, that after his answer and subsequent forfeiture hearing, was insufficient by itself to meet the preponderance of evidence standard required in N.D.C.C. § 19-03.1-36.2.

According to Lagro v. Lagro, 703 N.W.2d 322 (N.D. 2005) which cites Black's Law Dictionary 598, 1228, (8th ed. 2004), "Prima facie evidence that, if uncontradicted, would be sufficient to justify a judgment in the presenting party's favor." In this case the prima facie evidence was contradicted by the Appellant's direct testimony to which the Plaintiff could not refute. The Plaintiff offered no other evidence to the contrary at the forfeiture hearing on January 25th, 2007. The notarized statement by the Appellant's mother, presented twice for the Court's consideration, because she had no motive to be anything but truthful, only strengthens the Appellant's testimony.

The Plaintiff's only witness at the January 25th, 2007 forfeiture hearing, Officer Schlinger, did not give an opinion as to whether or not the $2,996 was to be used for future drug purchases. The Appellant already had drugs. There was no evidence presented that the Appellant was going to do anything with the drugs found than take them, any other ideas are the results of an active imagination. The only reason that the Appellant plead guilty to possession with intent to deliver was based on the quantity of drugs found, there was no informant used to pick up drugs from him, nor anyone saying he was delivering them as part of a drug sales operation as the Plaintiff would have the Court believe.

Issue Number 2. Was uncontested testimony by the Appellant sufficient to

overcome the Plaintiff's prima facie case in meeting the preponderance of evidence standard stopping the forfeiture of the $2,996? N.D.C.C. 19-03.1-36.2. Forfeiture proceeding as civil action - Standard of proof. "Forfeiture proceedings are civil actions against property to be forfeited and the standard of proof is the preponderance of evidence." The Appellant has demonstrated that the $2,996 was not derived from drug sales, and his testimony shows that it was not intended for any future drug purchases, the $2,996 was not found with the drugs. No evidence exists that the Appellant planned on purchasing any other drugs, let alone that the $2,996 in particular was to be used to purchase any drugs.

Just saying that there was a ongoing drug operation by the Appellant can not be sufficient evidence that this particular money was to be used for purchasing drugs. For evidence of an ongoing drug operation it would seem that the Plaintiff should have to provide at the very least a witness, or witness report saying that someone had bought drugs from the Appellant, otherwise all you have is a drug addict taking a lot of drugs. Likewise, evidence that the $2,996 was to be used for the very specific purpose of purchasing drugs should include someone saying they were going to sell the Appellant drugs.

The scenario presented by the Plaintiff simply is not supported by the facts and evidence in this case. The Appellant already had drugs, and the quantities would have lasted him awhile since no evidence exists that he was going to do anything but take the drugs himself.

Issue Number 3. Should have sworn statement by Appellant's mother carried any evidential weight in bolstering her son's testimony? Bernadine Voigt was unable to attend the January 25th, 2007, forfeiture hearing, she had been present at the two other forfeiture hearing that had been scheduled

for November 14, 2006, and December 14, 2006. A work related conflict of time came up on January 25th, 2007. To try and have Judge Haskell at least know that her testimony would have backed up his own the Appellant attempted to have it admitted as part of his Objection to the Plaintiff's Proposed Set of Findings and Order Stemming from January 25, 2007 Forfeiture Hearing, which he submitted on February 3, 2007. Judge Haskell had already signed the Findings and Order on the 26th of January, 2007, although the Appellant didn't find out until after he had sent in his Objection, which Judge Haskell denied on February 7, 2007. Wanting to make sure that Judge Haskell ruled on his mother's statement as evidence so as to preserve it for review on appeal to this Court, the Appellant then included her notarized statement as an exhibit in his Motion to Amend Judgment dated and submitted on February 15th, 2007. Judge Haskell denied the Motion on March 8, 2007.

Bernadine Voigt's notarized statement is identical to what her testimony would have been should she been able to attend the January 25th, 2007, Forfeiture Hearing. Bernadine Voigt has no criminal record involving drugs, and has no reason to be untruthful about the intent of what the money she furnished her son with, she thought it was to be used for hiring an attorney, the Appellant testified that it was to be used for hiring an attorney. Either Judge Haskell should have amended his Findings and Order, or should have had another hearing that Ms. Voigt could have attended so he could hear her testimony prior to issuing his Findings and Order. Ms. Voigt's statement should have carried enough evidential weight to swing the preponderance of the evidence in the Appellant's favor, requiring the return of the $2,996.

Issue Number 4. Did Judge Haskell abuse his dicretionary powers by

granting forfeiture of $2,996 based completely on Plaintiff's prima facie case of speculation, and no rebuttal evidence to the Appellant's testimony as to the use of the money? N.D.C.C. § 19-03.1-36.2 requires the standard of proof in forfeiture actions to meet the preponderance of evidence standard. In this case the Appellant answered the Plaintiff's prima facie case with unchallenged testimony claiming the $2,996 was to be used for hiring an attorney, The Appellant's mother signed a notarized statement bolstering this testimony. The Plaintiff offered no rebuttal evidence. In State v. Ronngren, 356 N.W.2d 903 (N.D. 1984) "Where state, by a preponderance of evidence, connected seized money to illegal drug sales and there by establishing a prima facie case for forfeiture of money as being profits from illegal drug sales," in this case the Plaintiff could not claim the $2,996 was gained by drug sales, so the only way to make the seized money forfeitable would be to prove that it was intended to be used for a future drug buy. The Plaintiff failed to meet this burden. No evidence exists that any future drug purchases were planned, and no evidence exists that this specific $2,996 was to be used to purchase any drugs. The Appellant already had drugs at the time of the seizure.

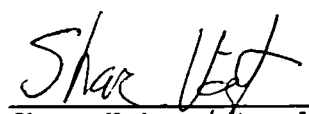
Judge Haskell abused his discretionary power by finding that by the preponderance of the evidence the $2,996 was to be used for a future drug purchase. There is nothing but the Plaintiff's speculation that connects the $2,996 to draw a preponderance of evidence from or derive that the money was to be used for anything other than to hire an attorney as the Appellant testified to.

CONCLUSION

In conclusion the Appellant, Shane Voigt, believes that for the foregoing reasons and the Forfeiture Hearing Transcript of January 25, 2007, pages 17, line 12; page 18, line 16; pgae 19, lines 2 and 6; and page 20, line 3, that the $2,996 should be returned to him. He was not going to buy any more drugs with the $2,996, he already had drugs, and no evidence exists that the $2,996 was intended to buy more drugs.

Should this Court find that the Appellant's mother's testimony should have been heard by the Burleigh County District Court before making it's decision on the forfeiture then the matter should be remanded for another forfeiture hearing.

Signed and submitted this 5th day of June, 2007.



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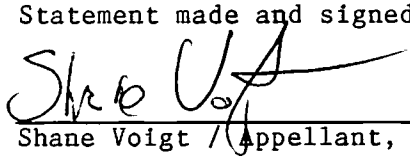
STATEMENT OF NON-COMPLIANCE

The Appellant, Shane Voigt, pro se, is unable to comply with Rule 31(c) of the N.D.R.App.P. because of his incarceration at the North Dakota State Penitentiary makes it impossible to provide the North Dakota Supreme Court with a 3.5 inch diskette containing a copy of the Appellant's Brief.

Statement made and signed this 5th day of June, 2007.



Shane Voigt / Appellant, pro se