

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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| Joe Michael Johns, |) | |
| |) | |
| Defendant and Appellant, |) | |
| |) | Supreme Court Case No. 20180431 |
| vs. |) | Burleigh County No. 08-2018-CR-02738 |
| |) | |
| State of North Dakota, |) | |
| |) | |
| Plaintiff and Appellee. |) | |

Appeal from the AMENDED JUDGMENT
and ORDER DENYING MOTION TO DISMISS

Burleigh County, North Dakota
South Central Judicial District
Honorable David E. Reich

REPLY BRIEF OF APPELLANT

Erica M. Woehl (ID# 07457)
BORMANN, MYERCHIN,
ESPESETH & EDISON, LLP
P.O. Box 995
Bismarck, ND 58502-0995
Telephone: (701) 250-8968
Email: ewoehl@bmellp.com

Attorneys for the Appellant
Joe Michael Johns

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[¶ 2] TABLE OF AUTHORITIES

North Dakota Cases:

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| <u>Clarys v. Ford Motor Co.,</u> 1999 ND 72, 592 N.W.2d 573 | ¶ 6 |
| <u>Martin v. Stutsman Cnty. Soc. Servs.,</u> 2005 ND 117, 698 N.W.2d 278 | ¶ 5 |
| <u>State ex rel. Dep’t of Human Servs. v. N.D. Ins. Reserve Fund,</u> 2012 ND 216, 822 N.W.2d 38 | ¶ 5 |
| <u>State v. Stegall,</u> 2013 ND 49, 828 N.W.2d 526 | ¶ 6 |
| <u>Thompson v. Thompson,</u> 78 N.W.2d 395 (N.D. 1956)..... | ¶ 6 |
| <u>Trade ‘N Post, L.L.C. v. World Duty Free Americas, Inc.,</u> 2001 ND 116, 628 N.W.2d 707 | ¶ 5 |

North Dakota Statutes:

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|--------------------------------|---------|
| N.D.C.C. § 12.1-32-02(4) | ¶¶ 4, 6 |
| N.D.C.C. § 12.1-32-07.1 | ¶¶ 4, 6 |
| N.D.C.C. § 19-03.4-03(2) | ¶¶ 4, 6 |
| N.D.C.C. § 39-01-01(13) | ¶ 6 |

[¶ 3] ARGUMENT

[¶ 4] The district court erred in denying Mr. Johns' Motion to Dismiss. Mr. Johns argues the State has failed to state an offense rising to the level of a Class C Felony for a second conviction of a drug paraphernalia offense because Mr. Johns does not have a prior conviction as required by statute. The relevant statutes include N.D.C.C. §§ 12.1-32-02(4), 12.1-32-07.1 & 19-03.4-03(2). The State relies solely upon *one* sentence in Section 12.1-32-02(4), namely, "In any subsequent prosecution, for any other offense, the prior conviction for which imposition of sentence is deferred may be pleaded and proved and has the same effect as if probation had not been granted or the information or indictment dismissed under section 12.1-32-07.1." This provision conflicts with the following sentence in Section 12.1-32-07.1: "The defendant must then be released from all penalties and disabilities resulting from the offense or crime of which the defendant has been convicted except as provided by sections 12.1-32-15 and 62.1-02-01."

[¶ 5] The State ignores the canons of statutory construction in reaching its conclusion. "A cardinal rule of statutory construction requires interpretation of related provisions together, if possible, to harmonize and to give meaning to each provision." Martin v. Stutsman Cnty. Soc. Servs., 2005 ND 117, ¶ 13, 698 N.W.2d 278 (citation and quotation marks omitted). "When a general statutory provision conflicts with a specific provision in the same or another statute, 'the two must be construed, if possible, so that effect may be given to both provisions.'" State ex rel.

Dep't of Human Servs. v. N.D. Ins. Reserve Fund, 2012 ND 216, ¶ 12, 822 N.W.2d 38 (quoting N.D.C.C. § 1-02-07). "Statutes should be read in relation to other statutes involving the same or similar subject matter in an attempt to discern legislative intent." Trade 'N Post, L.L.C. v. World Duty Free Americas, Inc., 2001 ND 116, ¶ 21, 628 N.W.2d 707. Sections 12.1-32-02(4) & 12.1-32-07.1 can be read together to give meaning to each provision.

[¶ 6] The legislature has been using this same language since the 1950s. "When the courts have construed a statute, the legislature's long acquiescence in the interpretation, continued use of the same language, or failure to amend the interpreted language is evidence the court's interpretation is in accordance with the legislative intent." Clarys v. Ford Motor Co., 1999 ND 72, ¶ 16, 592 N.W.2d 573; see also State v. Stegall, 2013 ND 49, ¶ 20, 828 N.W.2d 526 ("Therefore, the legislature's failure to amend N.D.C.C. § 19-03.1-22.2 'is evidence the court's interpretation is in accordance with the legislative intent.'" (quoting Clarys, 1999 ND at ¶ 16, 592 N.W.2d 573)). In Thompson v. Thompson, the North Dakota Supreme Court examined the same language found in Sections 12.1-32-02(4), 12.1-32-07.1, 19-03.4-03(2) & 39-01-01(13). 78 N.W.2d 395 (N.D. 1956). The Court reconciled Sections 12.1-32-02(4) & 12.1-32-07.1 based upon this language, and found, *during the period of suspended sentence* the conviction stands. Id. at 399. Since then, the legislature has not modified its language. Therefore, the legislature's long acquiescence of this Court's interpretation of the same language and failure to

amend the interpreted language is evidence that this interpretation is in accordance with legislative intent.

[¶ 7] Based upon the canons of statutory construction, the statutes must be read to exclude a vacated and dismissed prior charge of unlawful possession of drug paraphernalia for the purpose of enhancement under N.D.C.C. § 19-03.4-03(2), including a prior deferred imposition of sentence that has been vacated.

[¶ 8] **CONCLUSION**

[¶ 9] WHEREFORE, Mr. Johns respectfully requests that this Court reverse the district court order denying Mr. Johns' Motion to Dismiss and vacate the underlying criminal conviction.

[¶ 10] Dated the 1st day of April, 2019.

**BORMANN, MYERCHIN,
ESPESETH & EDISON, LLP**
Attorneys for Defendant/ Appellant
P.O. Box 995
Bismarck, ND 58502-0995
Phone: 701-250-8968
Email: ewoehl@bmellp.com

By: /s/ Erica M. Woehl
Erica M. Woehl (ID# 07457)

[¶ 11] CERTIFICATE OF SERVICE

[¶ 12] The undersigned certifies that the foregoing **REPLY BRIEF OF APPELLANT** was served on the following at the last known electronic mail address on the 1st day of April, 2019:

Mindy Lawrence

bc08@nd.gov

[¶ 13] The undersigned further certifies that a copy of the same will be served on the following person who is exempt from electronic service, by depositing the same in the U.S. Mail with the First-Class postage fully prepaid and firmly affixed:

Joe Michael Johns

608 ½ N. 19th St.

Bismarck, ND 58501

By: /s/ Erica M. Woehl
Erica M. Woehl (ID# 07457)