ORIGINAL

20030248

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

City of Fargo,	)	
	)	
Plaintiff-Appellee,	)	SUPREME COURT NO. 20030248
	)	DISTRICT COURT NO. 02-K-02140
vs.	)	
	)	
David Alan Habiger,	)	
	)	
Defendant-Appellant.	)	

APPELLANT'S BRIEF

STEPHEN R. DAWSON
Attorney for Appellee
Assistant City Prosecutor
Solberg, Stewart, Miller,
Johnson & Tjon, Ltd.
1129 5th Avenue South
P.O. Box 1897
Fargo, ND 58107-1897
(701) 237-3166
Attorney Registration
Number - 04638

CASH H. AALAND
Attorney for Appellant
1024 3rd Avenue South
P.O. Box 1817
Fargo, ND 58107-1817
(701) 232-7944
Attorney Registration
Number - 04686

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STATEMENT OF ISSUES

1. Whether the Appellant's conviction should be reversed as the trial judge erred in failing to disqualify himself.
2. Whether the Appellant's conviction should be reversed as Appellant was not afforded his rights to counsel as guaranteed by the Sixth Amendment of the United States Constitution and Article I, Section 12 of the North Dakota Constitution.
3. Whether the Appellant's conviction should be reversed as Defendant was denied opportunity to offer character evidence in his defense.

STATEMENT OF THE CASE

Appellant David Habiger was charged by complaint dated June 6, 2002, with the criminal offense of Disorderly Conduct in violation of Fargo Municipal Ordinance Number 10-0301. (Appendix p. 5). He appeared in Fargo Municipal Court and transferred the case to Cass County District Court for a jury trial. (Appendix p. 6). Appellant appeared in Cass County District Court for arraignment before Judge Michael McGuire on July 17, 2002. Judge McGuire was originally assigned to the case. (Appendix p. 7). At the arraignment Judge McGuire offered to appoint a public defender or standby counsel. (Transcript, July 17, 2002, p. 20). Appellant indicated he wanted to represent himself. (Transcript, July 17, 2002, p. 20).

Thereafter, Appellant Habiger filed with the Clerk of District Court several writings asking Judge McGuire to remove himself. (Appendix p. 8,10,12). Judge McGuire wrote a letter to Appellant on September 6, 2002, urging Appellant to contact an attorney. (Appendix p. 16). The case was assigned to Judge Norman Backes on September 18, 2002, after Judge McGuire recused himself.

Appellant Habiger filed with the Clerk of District Court several writings requesting that Judge Backes be disqualified from presiding over the case. (Appendix p. 18,22,23).

Appellant Habiger also verbally requested Judge Backes to remove himself. (Transcript, February 14, 2003, p. 6). One of the requests filed with the District was considered and denied by Judge McGuire on February 19, 2003. (Appendix p. 24).

A jury trial was held on March 19 and 20, 2003, before Judge Backes. At trial Appellant Habiger called Steven Vogel as a witness. (Trial Transcript, p. 230). Appellant attempted to elicit character evidence from the witness and the Appellee's objection to that evidence was sustained. (Trial Transcript, p. 230-231). The jury returned a verdict of guilty to the crime of disorderly conduct. (Trial Transcript, p. 269, Appendix p. 26).

On March 24, 2003, Appellant filed a Motion for New Trial. (Appendix p. 27). Attorney Alan Sheppard appeared on behalf of Appellant on April 2, 2003, and informed the Court he would be submitting a formal typed Motion for New Trial. (Transcript, April 2, 2003, p. 3). Attorney Sheppard filed with the Court a Motion for New Trial with a certificate of service on April 10, 2003. (Appendix p. 28). After a hearing held August 19, 2003, Judge Backes verbally denied the Appellant's Motion for New Trial. (Transcript, August 19, 2003, p. 7). A formal order denying Appellant's Motion for New Trial was issued September 2, 2003. (Appendix p. 30).

Appellant filed a Notice of Appeal on August 19, 2003, and requested court appointed counsel. (Appendix p. 31). Counsel was appointed on August 20, 2003, and an Amended Notice of Appeal was filed and served September 9, 2003. (Appendix p. 32).

ARGUMENT

1. THE TRIAL JUDGE'S COMMENTS TO THE DEFENDANT WERE SUCH THAT THE TRIAL JUDGE'S IMPARTIALITY AND OBJECTIVITY COULD REASONABLY BE QUESTIONED.

The disqualification provisions of the Rules of Judicial Conduct are mandatory. Baier v. Hampton, 440 N.W.2d 712, 714 (N.D. 1989) citing Matter of Estate of Risovi, 429 N.W.2d 404, 407 n. 3 (N.D. 1988). Rule 3(E)(1) provides, in relevant part: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. . .". Id.

The issue of disqualification was discussed in Baier v. Hampton, 440 N.W.2d 712 (N.D. 1989). In Baier a jury conviction of criminal contempt was reversed for the reason that the trial judge's comments were of a nature that his impartiality and objectivity could reasonably be questioned. Id. The Baier Court stated: "Our primary concern in this kind of case is the preservation of public respect and confidence in the integrity of the judicial system. That respect and confidence can only be maintained if the justice satisfies the appearance of justice." Id. at 715(citations omitted). The Baier Court went on to say that "Even without intentional bias, disqualification can be essential to satisfy the appearance of justice." Id. The jury verdict in Baier was reversed even though the trial judge's conduct did not show

any intentional unethical behavior, but rather because "the appearance of justice was not satisfied". Id. at 716.

In the present case, Appellant Habiger requested the trial judge to disqualify himself several times. (Appendix p. 18,22,23). At a motions hearing held February 14, 2003, the Appellant stated several times that the judge was biased and prejudiced and asked him to disqualify himself. (Transcript, February 14, 2003, p. 4-7). At the end of the hearing the following exchange occurred:

> THE COURT: The subpoenas are quashed.
>
> MR. HABIGER: You're showing your prejudice.
>
> THE COURT: Thank you. See you Tuesday.
>
> MR. HABIGER: No way will I be here Tuesday because you're a tyrant and I'll say it again, no thank you, because you're prejudiced.
>
> THE COURT: Mr. Habiger, are you going to be here on Tuesday?
>
> MR. HABIGER: I will. If you're sittin' on the Bench take me to jail in leg irons because I'm a sending a -- Monday--
>
> THE COURT: Save the taxpayers some money. If you're going to be here on Tuesday and you have no intention of going --
>
> MR. HABIGER: I'll be here. I'll find out --

you'll have to find out, sir. You better make a decision because you're not fit to sit on that Bench. I'll look you in the eye. You know it.

THE COURT: Mr. Habiger, I've had enough. You have backed up my entire misdemeanor calendar. You have cost the county a lot of money.

MR. HABIGER: No, you have because of your tyrancy.

THE COURT: Mr. Habiger, if you refer to me like that one more time, you're correct, you will be taken out of here in chains. You will be kept in a facility up to 30 days until you're ready to act in a civilized manner pursuant to the laws of the State of North Dakota concerning a trial. Which are the same laws that I am going to follow and have followed.

Mr. Habiger, I happened to know your brother. I got along a lot better with your brother than I ever have you. But, Mr. Habiger, if you continue this way I am going to find you in contempt. I've had about enough. All I want to do is try this case and get if off my docket. That's all. . .

(Transcript, February 14, 2003, p. 16-17).

The trial judge's comments gave the appearance of an

opinion by the Court that the costs to the county outweighed the Appellant's rights as a party and a litigant and that the Appellant angered the Court by having the court take time for his case. Further, the trial court's comments regarding his knowledge of Appellant's brother, and how he got along "a lot better with your brother than I ever have with you", gave the appearance of a personal knowledge and prejudice or bias against the Appellant. As such the Trial Court's statements bring these facts and this case within the ruling and rational of Baier v. Hampton, supra. The remarks were of such a nature as to reflect that the trial judge's impartiality could reasonably be questioned. For these reasons the Appellant's conviction should be reversed.

2. APPELLANT DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE HIS RIGHT TO COUNSEL.

> A criminal defendant's right to counsel is guaranteed by N.D. Const. Art. I, § 12 and by the Sixth Amendment of the United States Constitution. State v. Wicks, 1998 ND 76, ¶ 16, 576 N.W.2d 518; State v. DuPaul, 527 N.W.2d 238, 240 (N.D. 1995). See Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). In Wicks, 1998 ND 76, ¶ 17, 576 N.W.2d 518, we described our standard of review of a constitutional right as de novo, and we explained the denial of the right to counsel at trial requires reversal of a defendant's conviction because prejudice is presumed.
>
> A corollary to a defendant's right to counsel is a defendant's constitutional right to self-representation if the defendant knowingly and intelligently waives the right to counsel. Faretta v. California, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975); State v. Hart, 1997 ND 188, ¶ 6, 569 N.W.2d 451. A knowing and intelligent waiver of the right to counsel depends on the facts and circumstances and requires the defendant to be made aware of the dangers and disadvantages of self-representation so the record establishes the defendant knows what he is doing and his choice is made with eyes open. State v. Harmon, 1997 ND 233,¶ 22, 575 N.W.2d 635. In Wicks, 1998 ND 76, ¶ 18, 576 N.W.2d 518, we explained the trial court must establish on the record the defendant knew what he was doing and his waiver of the right to counsel was made with his eyes open.

State v. Poitra, 1998 ND 88, 578 N.W.2d 121, 123.

In State v. Harmon, 1997 ND 233, 575 N.W.2d 635, this court concluded that "the lack of a specific on-the-record determination that Harmon waived his right to court-appointed counsel was not dispositive, because a defendant's conduct

could be the functional equivalent of a waiver of the right to counsel." Poitra at 124, citing Harmon, 1997 ND 233, ¶ 21, 575 N.W.2d 635.

The Poitra Court went on to state:

> Under Harmon, 1997 ND 233, ¶ 23, n. 1, 575 N.W.2d 635, a specific colloquy about the dangers and disadvantages of self-representation is not required, but trial courts should eliminate any ambiguity about functional waivers by making a specific on-the-record determination that the defendant unequivocally, knowingly, and intelligently waived the right to counsel.

Poitra, 578 N.W.2d at 124.

At the Appellant's arraignment, held July 17, 2002, before Judge McGuire, the following discussion of whether the Appellant would be represented by counsel occurred:

> THE COURT: Okay. I'm going to appoint a public defender to represent you, David.
>
> THE DEFENDANT: I don't want -- I want to represent myself because, no offense, but with a public defender, my hands are tied.
>
> THE COURT: Okay.
>
> THE DEFENDANT: As an individual, I have a lot wider way of defending myself because it would be limited --
>
> THE COURT: Okay, that's fine. And that's your right. You defend yourself. But how about having --

THE DEFENDANT: If I do decide, I might get a lawyer on my own, but I'm not sure about that.

THE COURT: Oh, Okay.

THE DEFENDANT: I have to consider that.

THE COURT: Oh, Okay. How about having a public defender to stand by?

THE DEFENDANT: I don't want to be -- I don't want to be held accountable to pay for it.

THE COURT: Okay.

THE DEFENDANT: And I -- no disrespect, but I consider what I make my own business and I'm not going to tell the court that.

THE COURT: Okay.

THE DEFENDANT: I consider what you make and I just -- I'm one that believes in conservatism and independence and if I took -- no disrespect, then I'd be playing the part of someone that's trying to take the State for a ride and I'm not going to do that.

THE COURT: Okay.

THE DEFENDANT: I'll tell you what, I may be emotional, I may be outspoken, but I live up to the words that I talk and I'm not a hypocrite. I think that's entirely important and I tell you what, as

God as my witness, if I had a million dollars to put on it, this jury will not convict me.

THE COURT: Okay.

THE DEFENDANT: And I ask that I might -- I might consider the possibility of having an attorney because I'm going to have the proper paperwork. I would have had the proper paperwork drawn up to dismiss the charges, but when I contacted the Court no one knew where it was at. This was like a cluster. You know, like I say, when it goes before the jury, all these facts, not being charged, thrown in jail, you know, when I just wanted the truth.

The thing is the public sentiment against these hospitals is turning.

THE COURT: Okay.

THE DEFENDANT: They may be big and you know, the truth is there are so many irregularities here --

THE COURT: David, I have to ask you to be courteous to these other people because --

THE DEFENDANT: Thank you.

THE COURT: -- I have to get them through too.

THE DEFENDANT: Yeah, you've got to get going.

THE COURT: They've got work to go to.

THE DEFENDANT: And I want to say this, I want to compliment you on being a gentleman and listening to me.

THE COURT: Well, thank you, David.

THE DEFENDANT: And I truly mean that.

THE COURT: I know you do. I appreciate that.

THE DEFENDANT: And I will not let it stand calling me violent, because I'm not.

THE COURT: Okay. Thanks, David.

THE DEFENDANT: I'm a gentle giant with a big heart and it's not true.

THE COURT: There you go.

THE DEFENDANT: See there are some things that are more important than the money, it's the principles involved in the things.

THE COURT: Thank you, David. David -- David -- how about filling out an information sheet with your address and everything so we now where to send papers to you if you're going to be your attorney.

THE DEFENDANT: I might do that if I knew what was going on because I just reject that when I don't know what's going on.

THE CLERK: Why don't you get a new one?

THE COURT: That one has been written on. Would you do that, David?

THE DEFENDANT: Sure.

THE COURT: Thank you. I appreciate that.

THE DEFENDANT: I rejected that because I will not fill anything out until I know what's going on.

THE COURT: Fair enough.

THE DEFENDANT: It's time we're all held accountable by equal and the rules are applied to all of us. I'm going to be an advocate for the people.

THE COURT: Okay. Have a good day then.

THE DEFENDANT: You too.

(Transcript, July 17, 2002, p. 20-23).

The only other pre-trial communication between Appellant and the Court regarding representation was a letter from Judge McGuire to the Appellant issued September 6, 2002. (Appendix p. 16). Judge McGuire writes:

> . . . I am not allowed to advise you on the law or its procedures. I implore you to contact an attorney and find out exactly how to remove a Judge from your case and how to obtain the tape or a copy of the same or any other materials you wish to discover. You must understand that this charge will not go away and that the case will go to trial. You need to be prepared and so you need to understand the rules of procedure so that you can make proper preparation. It would appear that the only way you are going to be able to do that is to contact an attorney to at least obtain the minimum

> information on how to properly proceed to obtain the things you desire. . . .

(Appendix p. 16).

In his motion for new trial the Appellant argued that he was not sufficiently advised of the dangers of self-representation. (Appendix p. 28). At the hearing held on the motion Judge Backes, in denying the motion, stated:

> . . . I note that sufficiently -- Defendant was not sufficiently advised of the dangers of self representation. I believe the Defendant has a right to self representation and I don't know a law that indicates that the Court has to indicate the dangers of such representation. Although I may have done so anyway. . .

(Transcript, August 19, 2003, p. 7).

Appellant was not advised of the dangers of representing himself. As stated above, a knowing and intelligent waiver "requires the defendant to be made aware of the dangers and disadvantages of self-representation. . .". Poitra, 1998 ND 88 at ¶ 8, 578 N.W.2d at 123.

At his arraignment Appellant was offered a court appointed attorney and was offered court appointed standby counsel. (Transcript, July 17, 2002, p. 20). Appellant declined the public defender because he felt court appointed counsel would limit him or tie his hands. Id. Appellant

indicated he might get an attorney on his own, that he wasn't sure. Id. at 20. Appellant declined a standby public defender on the grounds he did not want to be accountable to pay for it and did not want to disclose his financial information. Id. Other than Judge McGuire's letter of September 6, no further discussion occurred. At no time was defendant warned that, should he represent himself, he would be held to the same standard as an attorney.

The record in this case does not clearly show that Appellant unequivocally, knowingly and intelligently waived his right to counsel. Rather, the trial judge, on the record, specifically found that Appellant had not been warned of the disadvantages and dangers of self-representation, and that the judge knew of no law requiring such a warning. (Transcript, August 19, 2003, p. 7). Consequently, Appellant's conviction should be reversed.

3. THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUDING THE APPELLANT'S CHARACTER EVIDENCE.

Rule 404(a)(1) of the North Dakota Rules of Evidence allows a criminal defendant to offer evidence of a pertinent trait of character. Rule 405, N.D.R.Evid., regulates the methods for proving character:

> (a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
>
> (b) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of the person's conduct.

Id.

In State v. Gonderman, 531 N.W.2d 11 (N.D. 1995) the North Dakota Supreme Court discussed the method by which character is proved:

> Under N.D.R.Evid. 405, a witness's observations of a defendant over a length of time is the recognized foundation for both opinion and reputation testimony. The appropriate means to elicit testimony under that rule is, after appropriate foundation, to inquire directly as to the witness's opinion concerning the relevant character trait, or the reputation of the accused.

Id. at 16(citations omitted).

At trial Appellant called as a witness Steven Vogel and attempted to elicit testimony regarding his character for non-

violence. The following colloquy occurred:

Q. Mr. Vogel, would you please tell the Court how long you've known me?

A. Since probably 1970.

Q. So about --

A. Thirty-three years.

Q. Thirty-three years then. In all the time that you've known me -- we went to school together, didn't we? You were a couple grades ahead of me?

A. Yep.

Q. Do you ever remember me getting in trouble for beating anybody up or even hitting anybody?

A. No.

MR. DAWSON: Your Honor, I'm going to object to this line of questioning.

MR. HABIGER: Building a foundation for character.

MR. DAWSON: It's our position character evidence is not admissible.

MR. HABIGER: Yes, it is. I've been accused of being a liar, being violent. And I'm going to prove that there's no pattern of it my whole entire life. Mr. Dawson, people that do violent things have a pattern of it and this isn't

an isolated incident. It's a continuum of their behavioral patterns. I think I have a right to prove to the Court, to the jury, that I've never been in a fight in my life ever since I was six years old. I never beat people up. I think it's absolutely pertinent to the jury that I show them that I'm honest and I have character. My whole past life has never showed this type of behavior.

THE COURT: Objection is sustained.

Q. (Mr. Habiger continuing) Okay. Do you think I have character, Mr. Vogel?

A. Yes.

MR. DAWSON: Objection, Your Honor, argumentative.

THE COURT: Sustained.

Q. (Mr. Habiger continuing) Can you believe that I would have done these things that I'm accused of?

MR. DAWSON: Objection, relevance.

THE COURT: Sustained.

Q. (Mr. Habiger continuing) Do you think that I'm a violent person?

A. No.

Q. Do you think it's reasonable, Mr. Vogel,

that people that do violent things or react violently have had a pattern in the past of doing those things?

MR. DAWSON: Objection, relevance.

THE COURT: Sustained.

Q. (Mr. Habiger continuing) Do you think I'm an honest person?

A. Yes.

Q. In your honest answer have you ever heard of where I've had a history of lying to people?

A. No, I don't recall any.

Q. Would you agree that people talk about my words and the things that are right?

A. On occasion, yes.

MR. HABIGER: I have no further questions. Thank you, Mr. Vogel.

(Trial Transcript, p. 230-232).

Appellant was not permitted to offer opinion or reputation evidence regarding his character for peaceful or non-violent character. Appellant was charged with disorderly conduct and the Appellee had offered evidence that the Appellant had in fact been violent and assaultive towards Security Officer Gordy Olson. (Trial Transcript, p. 110). Evidence of Appellant's peaceful character was therefore

pertinent and relevant. "A trial court abuses its discretion when it acts in an arbitrary or capricious manner, or misapplies or misinterprets the law." State v. Christensen, 1997 N.D. 57, ¶ 5, 561 N.W.2d 631.

The trial court's refusal to allow this evidence was an abuse of discretion and for this reason Appellant's conviction should be reversed.

CONCLUSION

The trial judge erred in failing to disqualify himself and by excluding the Appellant's character evidence. The record does not clearly show that the Appellant unequivocally, knowingly and intelligently waived his right to counsel. For these reasons the Appellant's conviction on the charge of disorderly conduct should be reversed.

Dated this 14 day of January, 2004.

Cash H. Aaland
Attorney for Appellant
1024 3rd Avenue South
PO Box 1817
Fargo, ND 58107-1817
(701) 232-7944
N.D. ID# 04686

STATE OF NORTH DAKOTA)
)SS. **AFFIDAVIT OF**
COUNTY OF CASS) **SERVICE BY MAIL**

DENISE BRINKMAN being first duly sworn deposes and states that she is of legal age and that on the 14 day of January, 2004, she served the following attached documents:

1. **Appellant's Brief**
2. **Appendix to Appellant's Brief**

RE: City of Fargo vs. David Alan Habiger
Supreme Court No. 20030248
District Court No. 02-K-02140

upon the following person or persons:

Mr. Stephen R. Dawson
City Prosecutor
P.O. Box 1897
Fargo ND 58107-1897

by placing a true and correct copy thereof in an envelope so addressed and depositing the same, with postage prepaid, in the United States mails in Fargo, North Dakota.

Denise Brinkman
DENISE BRINKMAN

Subscribed and sworn to before me this 14 day of January, 2004.

Notary Public
My Commission Expires: 3-20-2009

CASH H AALAND
Notary Public
State of North Dakota
My Commission Expires Mar. 20, 2009
(S E A L)