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**20030365**

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STATE OF NORTH DAKOTA

JUL -1 2004

State of North Dakota,  
Plaintiff-Appellee,  
-vs-  
Grady Jackson,  
Defendant-Appellant.  
.....

STATE OF NORTH DAKOTA

Supreme Court No.  
20030365

District Court No.  
08-03-K-1848

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**BRIEF OF PLAINTIFF-APPELLEE**

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Appeal from Judgment of Conviction  
and Sentence  
Dated September 16, 2003  
Burleigh County District Court  
South Central Judicial District  
The Honorable Benny A. Graff, Presiding

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STATEMENT OF THE ISSUES

Issue I: Whether Jackson received ineffective assistance of counsel at trial?

Issue II: Whether the trial court acted within its discretion in denying Jackson's Motion for Post-Conviction Relief?

Issue III: Whether the trial court committed obvious error in denying Jackson's Motion for Post-Conviction Relief?

STATEMENT OF THE CASE

By a Criminal Citation issued on April 27, 2003, the defendant, Grady Jackson, was charged with one count of Driving Under Suspension, 4th or greater offense in 5 years, a Class A Misdemeanor, in violation of N.D.C.C. § 39-06-42. A six person jury trial was held on September 16, 2003. Jackson was found guilty and by Order dated September 16, 2003 was sentenced to 1 year incarceration with all but 90 days suspended for a period of 2 years.

On September 19, 2003 Jackson submitted a pro-se Application for Post-Conviction Relief, requesting a new trial. On November 18, 2003 the trial court issued an Order denying the request for post-conviction relief. Jackson filed a timely Notice of Appeal dated December 13, 2003.

**STATEMENT OF FACTS**

The defendant, Grady Jackson, was charged by a Criminal Citation dated April 27, 2003 with one count of Driving Under Suspension, 4<sup>th</sup> or greater offense in 5 years, a Class A Misdemeanor, in violation of N.D.C.C. § 39-06-42. (Docket no. 1). The day before trial, which was set for September 16, 2003, Jackson requested a continuance so he could file a motion to suppress evidence from the stop. (Docket no. 15). The request for a continuance was denied. (Docket no. 15).

At trial, Jackson cross examined the arresting officer with respect to Jackson's African American race and its impact on the underlying stop. (Tr. p. 23, line 25; p. 24, lines 1-6). Jackson elected to testify and offered his opinion that he was stopped because of his race rather than a driving violation. (Tr. p. 39, lines 15-25; p. 40, lines 1-10).

During closing arguments, the State refuted Jackson's claim that he was stopped because he was African American. (Tr. p. 47. lines 23-25; p. 48; p. 49, lines 1-12). In his closing arguments, Jackson persisted in his belief that he was stopped due to his being African American. (Tr. p. 50, lines 12-21). The State further refuted Jackson's racial profiling argument in its rebuttal. (Tr. p.

1 51, lines 6-25; p. 52, lines 1-20).

2 The jury convicted Jackson as charged.  
3 (Docket no. 22). By Order dated September 16, 2003  
4 he was sentenced to 1 year incarceration with all  
5 but 90 days suspended for a period of 2 years.  
6 (Docket no. 23).

7 On September 19, 2003 Jackson submitted a  
8 pro-se Application for Post-Conviction Relief,  
9 requesting a new trial. (Docket no. 25). On  
10 November 18, 2003 the trial court issued an Order  
11 denying the request for post-conviction relief.  
12 (Docket no. 38).  
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LAW AND ARGUMENT

I. Whether Jackson received ineffective assistance of counsel at trial?

Jackson argues that he received ineffective assistance of counsel when his trial attorney failed to file a pre-trial motion to suppress evidence alleging racial profiling. A defendant claiming ineffective assistance of counsel must establish two elements: 1) counsel's performance was deficient; and 2) counsel's deficient performance prejudiced the defendant. Eagleman v. State, 2004 ND 6, ¶ 6, 673 N.W.2d 241.

To demonstrate prejudice, the defendant must establish a reasonable probability that but for counsel's unprofessional errors, the outcome of the proceeding would have been different. Eagleman, 2004 ND 6, ¶ 6. The defendant must also specify how and where trial counsel was incompetent and the probable different result. Id.

Here, Jackson has completely failed to establish prejudice. In its November 18, 2003 Order the trial court stated:

It is true that the defendant's counsel failed to file a motion to suppress the evidence obtained as a result of the stop. If he had, I would have been the judge to sit on

1 the matter and would have found the  
2 officer's testimony to be persuasive  
3 and I would have denied the motion to  
4 suppress. (Emphasis added). (App. p.  
5 5, lines 14-17).

6 It is clear from the trial court's November  
7 18, 2003 Order, that had Jackson filed a motion to  
8 suppress before trial, the outcome of the  
9 proceeding would have been the same-the motion  
10 would have been denied and the matter would have  
11 gone on to trial.

12 At trial, undisputed evidence was presented  
13 that Jackson's license was suspended on the date in  
14 question. (Tr. p. 10, lines 23-25; p. 11; p. 12,  
15 lines 1-3). Jackson himself admitted during cross-  
16 examination that he drove his vehicle on the date  
17 in question and that his license was suspended at  
18 the time. (Tr. p. 42, line 25; p. 43, lines 1-4).  
19 There is no reason to believe the evidence  
20 presented at trial would have been any different  
21 had Jackson filed an unsuccessful pre-trial motion  
22 to suppress. Accordingly, he has failed to show any  
23 prejudice and his claim of ineffective assistance  
24 of counsel must be denied.

1 II. Whether the trial court acted within its  
2 discretion in denying Jackson's Motion for  
3 Post-Conviction Relief?

4 Jackson argues that the trial court abused its  
5 discretion in its November 18, 2003 Order denying  
6 the request for a new trial. This Court has held  
7 that it will not reverse a trial court's denial of  
8 a motion for a new trial absent an abuse of  
9 discretion. State v. Lemons, 2004 ND 44, ¶ 18, 675  
10 N.W.2d 148. "A trial court abuses its discretion  
11 only when it acts in an arbitrary, unreasonable, or  
12 capricious manner, or misinterprets or misapplies  
13 the law". State v. Stoppleworth, 2003 ND 137, ¶ 6 ,  
14 667 N.W.2d 586.

15 Jackson argues that the trial court abused its  
16 discretion in denying his request for a continuance  
17 the day before trial so he could file a motion to  
18 suppress. A motion for continuance rests in the  
19 discretion of the trial court and its decision to  
20 grant or deny a continuance will not be set aside  
21 absent an abuse of discretion. State v. Kunkel, 452  
22 N.W.2d 337 (N.D. 1990). In its November 18, 2003  
23 Order the trial court stated:

24 The record shows that on September 15,  
25 2003, counsel for Mr. Jackson made a  
26 motion for continuance of the trial set  
27 for September 16, 2003 so that a motion

1 for suppression could be made on [the  
2 grounds of racial profiling]. The same  
3 was denied as the pretrial conference  
4 order and the order setting trial date  
5 each require counsel to file all pretrial  
6 motions no later than ten days after the  
7 pretrial conference which was held on  
8 July 7, 2003. Although the Court has  
9 granted relief from this rule on  
10 occasions, it has not done it the day  
11 before trial.

12 It was not an abuse of discretion for the  
13 trial court to deny the request for continuance.  
14 The request was untimely, and there was absolutely  
15 no justification provided for its untimeliness.

16 Notwithstanding the denial, it is significant  
17 that the trial court ultimately heard Jackson's  
18 evidence of racial profiling during trial and post-  
19 conviction proceedings anyway and, as previously  
20 noted, would have denied the motion to suppress. It  
21 was not an abuse of discretion for the trial court  
22 to find that the arresting officer's testimony  
23 would have been more persuasive than Jackson's  
24 evidence. Consequently, Jackson's request for a new  
25 trial on this basis should be denied.

26 Jackson also asserts that the jury was not  
27 comprised of his peers, was prejudiced against him

1 as a black person and, based on this, the trial  
2 court abused its discretion by not granting a new  
3 trial. This Court should reject Jackson's argument  
4 to this effect.

5 Although completely uncited by Jackson in his  
6 Brief, the standard for determining whether a  
7 defendant's jury was comprised of a fair cross  
8 section of the community was set out by this Court  
9 in State v. Fredericks, 507 N.W.2d 61 (1993). In  
10 that case, the defendant sought reversal of his  
11 conviction for Actual Physical Control of a Motor  
12 Vehicle on the grounds that the jury panel was not  
13 a fair cross section of the community and,  
14 accordingly, was not comprised of his peers.  
15 Specifically the defendant, who was a Native  
16 American, argued that the jury was not a fair cross  
17 section because there were no Native Americans on  
18 the jury. Fredericks, 507 N.W.2d at 63.

19 In reviewing the defendant's claim, this Court  
20 noted as an initial matter that Article I section  
21 13 of North Dakota's Constitution does not  
22 expressly require that a jury be comprised of a  
23 fair cross section of the community. Id. at 65.  
24 However, such requirements as contained in the  
25 Sixth Amendment of the United States Constitution  
26 are to be read into the North Dakota Constitution.  
27 Id.

1 In determining whether a jury is a fair cross  
2 section of the community, and consequently a jury  
3 of the defendant's peers, the defendant is required  
4 to establish:

5 (1) that the group alleged to be excluded is a  
6 'distinctive' group in the community; (2) that the  
7 representation of this group in venires from which  
8 juries are selected is not fair and reasonable in  
9 relation to the number of such persons in the  
10 community; and (3) that this under-representation  
11 is due to systematic exclusion of the group in the  
12 jury-selection process.

13 Fredericks, 507 N.W.2d at 65 (quoting Duren v.  
14 Missouri, 439 U.S. 357, 364 (1979)).

15 Once the defendant has made this prima facie  
16 showing, the burden shifts to the State to show a  
17 significant interest manifestly and primarily  
18 advanced by the aspects of the jury selection  
19 process that result in the disproportionate  
20 exclusion of a distinct group. Fredericks, 507  
21 N.W.2d at 65 (citing Duren, 439 U.S. 357 at 367-  
22 368).

23 Jackson has cited absolutely no evidence in  
24 the Record that even comes close to satisfying the  
25 prima facie test of Duren. He offered no  
26 statistical or demographic information as to the  
27 percentage of the community made up by African

1 Americans, no information as to the representation  
2 of African Americans in venire panels, and no  
3 evidence that any alleged under-representation is  
4 due to systematic exclusion. He further does not  
5 dispute the trial court's statement in its November  
6 18, 2003 Order that "[T]he jury pool was gathered  
7 in this case as all juries are in Burleigh County.  
8 It was completely random and gathered from the  
9 voting lists and drivers licenses as required by  
10 the legislature." (App. p. 6, lines 12-14).  
11 Jackson's argument that the jury pool was not  
12 comprised of his peers is completely unsupported  
13 and his request for a new trial on that grounds  
14 should be denied.

15 **III. Whether the trial court committed obvious**  
16 **error in denying Jackson's Motion for Post-**  
17 **Conviction Relief?**

18 Jackson argues that the trial court committed  
19 obvious error under Rule 52(b) of the North Dakota  
20 Rules of Criminal Procedure by denying the request  
21 for a new trial. Rule 52(b) provides that "  
22 [o]bvious errors or defects affecting substantial  
23 rights may be noticed although they were not  
24 brought to the attention of the court." The  
25 authority to notice obvious error is exercised  
26 cautiously and only in exceptional circumstances  
27

1 where the defendant has suffered serious injustice.  
2 State v. Beciraj, 2003 ND 171, ¶ 7, 670 N.W.2d 855.

3 To establish "obvious error" under NDRCrimP  
4 52(b), the defendant must show (1) error, (2) that  
5 the error is plain, and (3) that the error affects  
6 substantial rights. State v. Johnson, 2001 ND 184,  
7 ¶ 12, 636 N.W.2d 391. An "error" exists when there  
8 has been a deviation from an applicable legal rule.  
9 State v. Olander, 1998 ND 50, ¶ 14, 575 N.W.2d 658  
10 (citing United States v. Olano, 507 U.S. 725, 732-  
11 33 (1993)). An error is "plain" when it is "clear"  
12 or "obvious". Olano, 509 U.S. at 734. An error  
13 effects the "substantial rights" of the defendant  
14 when it affects the outcome of the proceeding. Id.,  
15 at 734-35.

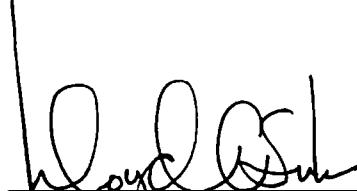
16 Here, the trial court acted well within its  
17 discretion in denying Jackson's request for  
18 continuance so he could file a motion to suppress.  
19 It was not an "error" for the trial court to deny  
20 this under the circumstances. Further, even if  
21 Jackson had been allowed a continuance and a chance  
22 to file his pre-trial motion to suppress, it would  
23 have been denied and the case would have gone to  
24 trial with the evidence ultimately presented. The  
25 outcome of the proceeding would have been the same.  
26 Accordingly, Jackson's request for a new trial on  
27 this ground should be denied.



CONCLUSION

Jackson's request for a new trial on the grounds that he received ineffective assistance of counsel, that the trial court abused its discretion, that the jury was not comprised of his peers, and that obvious error were committed are factually and legally unsupported. Accordingly, the State respectfully requests that the Court affirm the conviction in its entirety.

Respectfully submitted this 1st day of July, 2004.



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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

State of North Dakota, )  
Plaintiff-Appellee, ) AFFIDAVIT OF MAILING  
-vs- ) Supreme Court No.  
Grady Jackson, ) 20030365  
Defendant-Appellant. ) District Court No.  
. . . . . ) 08-03-K-1848

STATE OF NORTH DAKOTA )  
COUNTY OF BURLEIGH ) ss

Ardyth Volesky, being first duly sworn,  
depose and say that I am a United States citizen  
over 21 years old, and on the date of July 1, 2004,  
I deposited in a sealed envelope a true copy of the  
attached:

1. Brief of Plaintiff-Appellee
2. Affidavit of Mailing

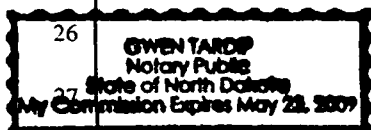
in the United States mail at Bismarck, North  
Dakota, postage prepaid, addressed to:

MARVIN M HAGER  
ATTORNEY AT LAW  
PO BOX 1381  
BISMARCK ND 58502-1381

which address is the last known address of the  
addressee.

Ardyth Volesky  
Ardyth Volesky

Subscribed and sworn to before me this 1st  
day of July, 2004.



Gwen Tardif  
Gwen Tardif, Notary Public  
Burleigh County, North Dakota  
My Commission Expires: 5-23-2009

WYOMING  
COUNTY  
CLERK  
JAN 10 1900