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IN THE SUPREME COURT, STATE OF NORTH DAKOTA

SUPREME COURT NUMBER 20050015
OLIVER COUNTY NUMBER 33-04-K-1020

STATE OF NORTH DAKOTA,

Plaintiff/Appellee,

v.

DALE BARTH,

Defendant/Appellant.

APPELLANT BRIEF

APPEAL TAKEN FROM CRIMINAL JUDGMENTS
ENTERED JANUARY 6TH AND 7TH, 2005
IN DISTRICT COURT
COUNTY OF OLIVER
SOUTH CENTRAL JUDICIAL DISTRICT

THE HONORABLE GAIL HAGERTY, PRESIDING

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ISSUES

- I. WHETHER THE DEFENDANT'S CONVICTION FOR DISORDERLY CONDUCT BASED ON OFFENSIVE WORDS AND FINGER GESTURES DIRECTED AT THE SHERIFF IS IN VIOLATION OF THE FIRST AMENDMENT?
- II. WHETHER THE DEFENDANT'S CONVICTIONS FOR DISORDERLY CONDUCT PREVENTING ARREST AND ATTEMPTED SIMPLE ASSAULT SHOULD BE REVERSED BECAUSE THE STATE FAILED TO MEET ITS BURDEN IN PROVING EACH ELEMENT OF THE OFFENSES CHARGED BEYOND A REASONABLE DOUBT?

STATEMENT OF THE CASE

This is an appeal from the Criminal Judgments entered on January 6 and 7, 2005, by the Court, the Honorable Gail Hagerty, Judge of the District Court, presiding. Appellant Dale Barth (hereinafter Barth) was charged by a Complaint dated July 23, 2004 with disorderly conduct, a Class B Misdemeanor, pursuant to N.D.C.C. §12.1-31-01, convicted, and sentenced to serve 30 days in the Mercer County Detention Center, and pay fines and fees of \$325.00. He was also charged in the Complaint with preventing arrest or discharge of other duties, a Class A Misdemeanor, pursuant to N.D.C.C. §12.1-08-02, convicted and sentenced to serve one year in the North Dakota Department of Corrections, with fines and fees of \$325.00; and attempted simple assault, a Class A Misdemeanor, pursuant to N.D.C.C. §12.1-17-01, and sentenced to serve one year in the North Dakota Department of Corrections, and pay fees of \$325.00. The sentences were to run concurrently.

These convictions were entered after a jury trial held before the Honorable Gail Hagerty, Judge of the District Court, on January 6, 2005 in Oliver County District Court in Center, North Dakota. The Criminal Judgments were signed by the Honorable Judge Hagerty on January 6 and 7, 2005. Barth timely appealed all convictions. Barth also filed a Motion for Stay of Sentence under N.D. R. Crim. Pro. Rule 38 and N.D.R. App. Pro Rule 9(a) to stay execution of the sentences pending his appeal. That motion was denied through a handwritten note on the Motion, signed by the Honorable Judge Hagerty on January 21, 2005, without further explanation. Barth filed a Notice of Appeal to the Supreme Court on January 18, 2005. Barth also made a Motion to the Supreme Court of North Dakota for Release Pending Appeal on February 24, 2005 under N.D. R. App. Proc. Rule 9(B), which was denied. Barth appeals all convictions in this matter,

and requests relief from the same.

STATEMENT OF THE FACTS

Barth had a written lease agreement with his neighbor, Fanny Kobs, to cut certain tracts of hay located on her land. (Tr. at 123, lines 2-25 and at 124, lines 1-22). The lease had been a yearly agreement for several years. (Ibid.) It is alleged that Fanny Kobs then entered into a subsequent oral agreement with a third party, David Bueligan, to cut hay on the same land covered by the prior lease with Barth. (Tr. at 71, lines 9-25). On July 22nd, 2004, Barth and his eighty-five-year-old father, Otto, were preparing to rake and bale hay on the land. (Tr. at 129, lines 7-13). Bueligan showed up at the field and he and Barth had a disagreement as to who owned the hay on the Kobs property.(Tr. at 129, lines 13-25, and at 130, lines 1-5). Bueligan admitted in court that he “didn’t rent that” when asked about that particular field. (Tr. at 82, lines 13-19).

Bueligan went to Kobs’ residence and they called the Oliver County Sheriff, David Hilliard (hereinafter “Hilliard”). (Tr. at 19-22). Hilliard arrived at the field without a warrant for Barth’s arrest, a court order for him to vacate the premises, or probable cause to believe that Barth had committed any crime. (Tr. at lines 2-6, and at 138, lines 6-11). The only thing he did arrive with was back up; in the form of the Center Chief of Police, Wayne Schmitz. (Tr. at 133, lines 12-15). Barth attempted to show Hilliard his written lease for the land, but Hilliard refused to look at it, or to bring it to the State’s Attorney for a determination as to its legality, even after Officer Schmitz pointed out that he thought it was valid. (Tr. at 97, line 22, to page 98, line 25;

page 99, lines 1-9; page 131, lines 4-8, and at page 133, lines 2-7). Instead, he told Barth that his lease “ain’t worth the paper it’s printed on.” (Tr. at 131, lines 6-7).

Hilliard then ordered Barth off the property. (Tr. at 131, lines 2-3). Barth refused to leave, stating again that he had a valid lease and every right to be on the land. (Ibid., at lines 4-8). Hilliard again ordered Barth off the land and ordered Otto to move his tractor, which was sitting in the approach. (Ibid. at lines 16-18). Otto did not move the tractor. (Tr. at 137, lines 5-16). Hilliard again ordered Barth off the land. (Tr. at 137, lines 17-19). Barth finally told Hilliard “Join my f----- church and get your goddamn ass out of here” and made a finger gesture toward Hilliard. (Tr. at 131, lines 10-11). Hilliard informed Barth that if he did not leave the property he would arrest him for disorderly conduct. (Tr. at 104, lines 14-21). Barth gave him another similar response. (Tr. at 134, lines 19-22).

Barth testified that he then turned his back to Hilliard and started to walk back to the tractor he had been on while raking hay before the disagreement. (Tr. at 135, lines 1-3). At that point, Hilliard lunged at him and tackled him to the ground. (Tr. at 105, lines 21-25; Tr. at 135, lines 7-12, 19-24). Barth attempted to defend himself at that point, but Hilliard was a five time state champion wrestler, was much younger than him, and was assisted by Officer Schmitz. (Tr. at 100, lines 4-6; page 109, lines 18-25; and page 110, at lines 1-15).

Barth was charged with disorderly conduct, preventing arrest, and attempted simple assault. (Tr. at page 138, lines 12-20). A jury trial was held on January 6th, 2005, and Barth was found guilty of all three offenses. The Court imposed sentence and immediately took Barth into custody. Barth’s position is that the unlawful arrest was a violation of his first and fourth amendment rights under the United States Constitution and that the trial court made substantive

errors that violated his eighth amendment rights to a fair trial.

ARGUMENT

I. BARTH’S ARREST FOR DISORDERLY CONDUCT BASED ON OFFENSIVE WORDS OR CONDUCT DIRECTED AT THE SHERIFF IS IN VIOLATION OF THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

The United States Supreme Court stated very succinctly in *Houston v. Hill*, 482 U.S. 451:

The Constitution does not allow speech to be made a crime. The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.

Hilliard arrested Barth for verbally, and by way of a gesture, opposing or challenging a police action. That police action was Hilliard repeatedly ordering Barth off of land that he had a legal right to be on under a written lease that was in his possession. Hilliard himself testified that he arrested Barth for “the actions that he did to me, by the profanity that he was using, by putting his finger in my face”. (Tr. at 104, at 17-21)

This Court reversed a conviction of disorderly conduct in a nearly identical factual situation presented by *City of Bismarck v. Schoppert*, 469 N.W. 2d 808. Schoppert was convicted of disorderly conduct for using profanity and abusive expressions toward law enforcement. This Court held that Schoppert’s words directed at the police, even though vulgar and offensive, would not incite well trained and restrained law enforcement officers to an immediate breach of the peace. *Id.* Therefore, the speech was protected by the first amendment and Schoppert was acquitted.

Barth's speech and gesture in this case was arguably more mild than that presented in the *Schoppert* case. And there was no threat of violence to the officer or any attempt to strike the officer which would have removed the protection from the accompanying speech. There was also no profanity or gestures directed toward anyone other than Hilliard. This case cannot be distinguished from *Schoppert*. Barth has the same right to first amendment protection of his speech without risking arrest that Schoppert had.

II. BARTH'S CONVICTIONS FOR DISORDERLY CONDUCT, PREVENTING ARREST AND ATTEMPTED ASSAULT SHOULD BE REVERSED BECAUSE THE STATE FAILED TO MEET ITS BURDEN IN PROVING EACH ELEMENT OF THE OFFENSES CHARGED BEYOND A REASONABLE DOUBT.

Rule 29(a) of the N.D.R.Crim.Pro. provides that "The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment, information, or complaint after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses". Barth made a Rule 29 motion for acquittal at the close of the state's case. It was denied by the trial court. Barth contends that the court erred by failing to grant the Rule 29 motion in respect to each of the charges for the following reasons:

1. The disorderly conduct charged was based totally on speech and conduct protected by the first amendment. The Court erred by not granting the motion for judgment of acquittal.
2. The state failed to meet its burden of proof on the preventing arrest charge by failing to submit any evidence that Hilliard was acting lawfully when he arrested Barth. That is an actual element of the offense. The state failed to introduce any evidence whatsoever that Hilliard was acting lawfully because it did not have any to introduce. Hilliard did not have a warrant for Barth's

arrest. He did not have a court order directing Barth off the land. He did not have probable cause to believe that Barth had committed a criminal offense in his presence. Hilliard had no reason whatsoever to arrest Barth until he himself created one by ordering him off the land without any legal basis or authority for doing so. The Court erred when it denied the motion for acquittal on the preventing arrest charge.

3. The state also failed to meet its burden of proof on the attempted assault charge. It totally failed to prove beyond a reasonable doubt that Barth ever had any intent to cause physical harm to Hilliard. Barth testified that Hilliard tackled him from behind and that he never took a swing at Hilliard. Wayne Schmitz, a witness for the state no less, testified that Hilliard lunged at Barth to arrest him before Barth took any defensive action. Where Hilliard initiated the physical contact between the two, Barth is certainly entitled to use reasonable force to defend himself. The evidence does not show any real physical harm done to Hilliard beyond that which one would sustain in a common, everyday wrestling match, of which he had willingly participated in hundreds of before. Therefore, it certainly cannot be argued that any force that Barth used to defend himself from this unjustified arrest was unreasonable. The Court erred when it denied the motion for acquittal on the attempted assault charge.

CONCLUSION

The Constitution does not allow speech to be made a crime. *Houston, supra*. The Constitution cannot abide by what Hilliard did to Barth. Hilliard made Barth's speech a crime and when he did, he violated the one of the most precious constitutional rights that Barth, and all of the rest of us, have. It cannot be tolerated.

The freedom of individuals verbally to oppose or challenge police action without thereby

risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state. *Id.* Hilliard made an unlawful demand upon Barth to leave land that he had every legal right to be on and Barth opposed it. Hilliard arrested him for it. This case is that simple.

If Hilliard is allowed to make Barth's speech a crime and arrest him for it, then every right that we as citizens enjoy under the first and fourth amendment of the constitution in this state will be gone. They will be nothing but a memory if every single time a law enforcement officer argues with a suspect and manages to incite him to the point that he can arrest him for disorderly conduct, the Court will uphold the resulting disorderly conduct, preventing arrest and assault charges.

The preventing arrest and attempted assault charges in this case would never have come about if not for the unlawful arrest of Barth by Hilliard. They are the product of both Hilliard's unlawful conduct and his conscious decision to violate Barth's constitutional rights. These convictions simply cannot stand. If they do, then we are living in exactly what the Court spoke of in *Houston*. And that is a police state.

Dated at Minot, North Dakota, this 6th day of April, 2005.

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