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**IN THE SUPREME COURT**

**STATE OF NORTH DAKOTA**

**State of North Dakota,**

**Appellee,**

**v.**

**Dale Barth,**

**Appellant.**

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**Appeal from Criminal Judgments of the District Court  
Entered January 6<sup>th</sup> and 7<sup>th</sup>, 2005  
South Central Judicial District  
Oliver County, North Dakota  
The Honorable Gail Hagerty, presiding**

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**SUPREME COURT NO. 20050015  
OLIVER COUNTY NO. 04-K-1020**

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**BRIEF OF APPELLEE**

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## **I. ISSUES**

1. WHETHER THE DEFENDANT'S CONVICTION FOR DISORDERLY CONDUCT WAS IN VIOLATION OF HIS FIRST AMENDMENT RIGHTS TO FREE SPEECH.
2. WHETHER THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT TO SUPPORT DEFENDANT'S CONVICTIONS FOR DISORDERLY CONDUCT, PREVENTING ARREST, AND ATTEMPTED SIMPLE ASSAULT ON A PEACE OFFICER.

## **II. CONCURRENCE WITH STATEMENT OF THE CASE**

The Appellee is satisfied with the Statement of the Case as set forth in Appellant's Brief.

### III. STATEMENT OF THE FACTS

All of the events relating to the charges in this case took place on land owned by Fanny Kobs ("Kobs"). A portion of the Kobs land was rented to Dale Barth ("Barth") and his father, Otto Barth, and a portion was rented to David Bueligen, who farmed with his father, Roger Bueligen (Tr., p. 28, line 10 through p. 32, line 10; p. 47, line 19 through p. 48, line 2). The Barths rented the cropland and hayland and the Bueligenes rented the pasture land (Tr., p. 49, line 23 through p. 50, line 3).

The Barths were aware that David Bueligen was cutting hay on the Kobs land on July 20, 2004, two days prior to the date of the altercation leading to Barth's arrest, and apparently had no objection to it (Tr., p. 33, line 3 through p. 35, line 6). On the morning of July 22, 2004, Barth was on the Kobs land raking the same hay. Fanny Kobs became alarmed and called the Bueligenes and went down to talk to Barth and tell him about the call. Barth responded by requesting that she call the Sheriff as well (Tr., p. 41, line 25 through p. 42, line 13).

The Roger and David Bueligen drove to the Kobs farm after being called by Fanny. Barth became belligerent and would not allow the Bueligenes to remove their tractor and rake from the Kobs land (Tr., p. 54, lines 4-12; p. 57, lines 9-23). Barth and his father blocked the approach with their tractor and demanded that the Bueligenes pay them \$250.00 before they would let the Bueligenes through with their equipment (Id.).

About ten or fifteen minutes after this confrontation, the Sheriff, David Hilliard ("Hilliard"), arrived (Tr. p. 56, lines 7-15). He stopped and talked with Barth. The conversation got "somewhat heated" (Tr. p. 88, line 14 through p. 89, line 16). Hilliard then went down to the Kobs farm yard to visit with Bueligenes and Fanny Kobs. After talking with them, he went back to the field and talked with the Barths (Tr. p. 56, line 7-15). David Bueligen was present as Barth hollered obscenities,

made obscene gestures, and eventually put up his fists and started swinging at Hilliard. (Tr. p. 58, line 9 through p. 61, line 2; p. 89, line 15 through p 92, line 24). Roger Bueligen was also at the scene the second time Hilliard went to talk to Barth. He testified to basically the same observations. He saw Hilliard have to eventually wrestle Barth to the ground. (Tr. p. 76, line 11 through p. 79, line 13). It took the assistance of another officer to handcuff Barth, who was then arrested and taken to jail (Ibid.)

## ARGUMENT

**A. Whether Barth's conviction for Disorderly Conduct was in violation of his First Amendment rights to free speech.**

Barth relies on *Houston v. Hill*, 482 U.S. 451, in support of his argument that his actions leading up to his arrest for disorderly conduct was protected under the First Amendment constitutional right to free speech. However, unlike the case at bar, the U.S. Supreme Court in *Hill* was considering the constitutionality of a Houston city ordinance. The defendant there was arrested under an ordinance making it unlawful for any person "to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty." *Id.*, at 455. The ordinance was ruled overly broad and unconstitutional.

The U.S. Supreme Court has repeatedly invalidated laws that provide the police with unfettered discretion to arrest individuals for words or conduct that annoys or offend them. The Houston ordinance in *Hill* was found unconstitutional because it was not sufficiently narrow so as to prohibit only disorderly conduct or fighting words. *Hill, supra*, at 364.

The Supreme Court has recognized that control of a broad range of disorderly conduct that may inhibit a policeman in the performance of his official duties may be an area requiring as it does an on-the-spot assessment of the need to keep order. *Smith v. Goguan*, 415 U.S. 566, 581.

In any event, Barth does not challenge North Dakota's disorderly conduct statute, but instead tries to justify his *conduct* that resulted in his arrest. He contends that he only reacted to the offensive actions of the Sheriff. However, he is the one who suggested calling the Sheriff, and his offensive, profane and abusive language began before law enforcement officers were in the picture. It also alarmed and concerned the Bueligens and Kobs. Clearly, the jury was justified in finding that Barth had engaged in "fighting, or in violent, tumultuous, or threatening



behavior”, used “abusive or obscene language, or [made] obscene gesture[s]”, and/or “engage[d] in harassing conduct by means of intrusive or unwanted acts, words, or gestures that are intended to adversely affect the safety, security, or privacy of another person.” N.D.C.C. §12.1-31-01. Further, his speech consisted of “fighting words”, taking beyond to scope of constitutionally protected speech. (see *Colton v. Kentucky*, 407 U.S. 104.)

Likewise, Barth’s reliance on *City of Bismarck v. Schoppert*, 469 N.W.2d 808, is misplaced. The present case is clearly distinguishable from *Schoppert*. In *Schoppert* the profanity and vulgar expressions were directed only at law enforcement officials and no particular breach of peace was caused to the public. In the present case, the profanity and abusive expressions were directed at David Bueligen and adversely affected the safety, security, and privacy of David and Roger Bueligen as well as Fanny Kobs (the landowner who had indicated to Hilliard that “she wanted him [Barth] off” the land (Tr., p. 103, lines 12-15). Hilliard placed Barth under arrest for “the actions that he did to [him], by the profanity he was using, by putting his finger in [his] face, and the profanity being used towards David and Roger [Bueligen] and pointing his finger at them” (Tr. p. 104, lines 17-21).

**B. Whether the evidence presented at trial was sufficient to support Barth’s convictions for Disorderly Conduct, Preventing Arrest, and Simple Assault on a Peace Officer.**

Several people provided consistent testimony indicating that Barth was belligerent, threatening, and he would not leave the land nor allow the Bueligens to remove their equipment. Hilliard attempted to calm Barth down and get him and his father to move their tractor so Bueligens could remove their equipment from the field. Barth was violent, tumultuous, and threatening. He engaged in fighting conduct, was sticking his finger in Hilliard’s face, and finally began swinging and

kicking at him. He continued to swing and kick wildly as the peace officers wrestled him to the ground to effectuate his arrest (Ibid).

Barth admits to the fighting and tumultuous behavior but tries to attribute the blame for the fracas on Hilliard. There is little or no evidence to support such a proposition except for his own testimony. Virtually all the other witnesses to the events (except for his father) gave testimony supporting the verdicts.

## **CONCLUSION**

For the reasons stated above, the Appellee, State of North Dakota, respectfully requests that this Court affirm the judgment of the District Court.

Dated this \_\_\_\_\_ day of May, 2005.

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**CERTIFICATE OF SERVICE**

I hereby certify that true and correct copies of the foregoing APPELLEE'S BRIEF and APPENDIX were on the \_\_\_\_\_ day of May, 2005, mailed to:

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