IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff-Appellant, -vs- Paul R. Frankfurth, Defendant-Appellee.	Supreme Ct. No. 20050112 District Ct. No. 08-04-K-0217

PLAINTIFF-APPELLANT'S BRIEF

Appeal from the
March 3, 2005 Amended Order Dismissing the
Information with Prejudice and the March 15, 2005
Order Denying the State's Motion to Reinstate the Verdict of Guilty

Burleigh County District Court
South Central Judicial District
The Honorable Donald L. Jorgensen, Presiding

Cynthia M. Feland
Assistant Burleigh County State's Attorney
Courthouse, 514 East Thayer Avenue
Bismarck, North Dakota 58501
Phone No: (701) 222-6672
BAR ID. No: 04804
Attorney for Plaintiff-Appellant

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STATEMENT OF THE CASE

This case raises the issue as to whether a defendant may strategically delay raising objections to a criminal information, invoke the hidden objection in the event of a guilty verdict, and gain a new trial that will employ the exact same facts, law, and jury instructions.

Paul R. Frankfurth (hereinafter Frankfurth) was arraigned on March 24th, 2002, on an Information charging him with the offense of gross sexual imposition in violation of N.D.C.C. Section 12.1-20-03. The Information recited the statutory language for gross sexual imposition involving an unaware victim:

> On or about the 13th day of January, 2004, in Burleigh County, the defendant, Paul R. Frankfurth, committed the crime of Gross Sexual Imposition committed as follows: The defendant engaged in a sexual act at a time when the victim was unaware that a sexual act was being committed on her;

The criminal information did not mention the word "willfully", and did not specify that Frankfurth "knew" the victim was unaware that a sexual act was being committed on her. (Appendix page 2). Frankfurth made no pretrial objection to the form of the information, and did not request a bill of particulars.

At Frankfurth's trial, the jury was instructed that the State was required to prove that Frankfurth engaged in the conduct willfully, and that he knew that the victim was unaware that a sexual act was being committed on her. (Appendix page 18). Frankfurth was convicted by the jury on December 3, 2004, of one count of Gross Sexual Imposition.

On December 7, 2004, Frankfurth filed a motion for arrest of judgment, alleging that the criminal information failed to charge an offense by failing to include a culpability level. (Appendix pp. 33-46). After response by the State, the trial court issued an order on January 26,

2005, granting Frankfurth's motion to arrest judgment, stating the "conviction and verdict of guilty is hereby dismissed *with prejudice*." (Appendix page 57).

The State filed a motion to reconsider on February 4, 2005, requesting that the court reinstate the jury verdict, or in the alternative, that the case should not be dismissed with prejudice. (Appendix page 58). Frankfurth did not respond to the motion, and on March 3, 2005, the trial court issued an order granting the State's motion to amend the dismissal to be without prejudice. The Court's amended order was silent as to the motion to reinstate the verdict. (Appendix page 64).

On March 7, 2005, the State filed a request for clarification of the amended order, requesting that the court address the issue of reinstatement of the verdict. (Appendix page 65). On March 15, 2005, the court issued its final order denying the motion to reinstate the verdict. (Appendix page 71).

The State filed a notice of appeal on March 23, 2005. The State appeals the March 3, 2005 amended order arresting the judgment and the March 15, 2005 order denying the motion to reinstate the jury verdict.

ARGUMENT

I. THE APPEAL IS AUTHORIZED BY STATUTE

The right to appeal is statutory in nature. State v. Owens, 1997 ND 212, ¶ 6, 570 N.W.2d 217. The State may only appeal from orders designated under N.D.C.C. § 29-28-07. The North Dakota Century Code authorizes the State to appeal "an order quashing an information or indictment or any count thereof." N.D.C.C. § 29-28-07(1). The North Dakota Supreme Court has consistently held that an order dismissing a criminal complaint, information, or indictment is the equivalent of an order quashing an information or indictment and is therefore appealable under the statute. State v. Baumgartner, 2001 ND 202, ¶ 6, 637 N.W.2d 14; State v. Gwyther, 1999 ND 15, ¶ 11, 589 N.W.2d 575.

In this case, the amended order granting the defendant's motion to vacate the judgment has the effect of quashing the information. The final sentence of the amended order states, "IT IS THEREFOR THE ORDER OF THE COURT that the motion to amend the order of the Court **so as to dismiss the above-entitled charge** without prejudice is herewith granted." (Appendix page 64).

The State may also appeal from "an order arresting judgment." N.D.C.C. § 29-28-07(3). The amended order granting the defendant's motion to vacate the judgment, and the order denying the State's motion to reinstate the verdict are both orders having the affect of arresting the judgment. The effect of the orders is to vacate a verdict of guilty rendered by a jury of Frankfurth's peers and force the State to recharge and retry the case using

exactly the same jury instructions already used to obtain the defendant's conviction.

II. THE CRIMINAL INFORMATION SUFFICIENTLY ADVISED FRANKFURTH OF THE CHARGES AGAINST HIM

For over twenty-five years, the North Dakota Supreme Court has recognized the informal nature of modern criminal pleadings:

> "In these days of broadening pretrial discovery in criminal cases, open or almost completely open prosecutorial files, and availability of omnibus hearings and pretrial conferences, it would almost be anachronistic to reverse a conviction because the language of the information or indictment is insufficiently detailed."

State v. Motsko, 261 N.W.2d 860, 864 (N.D. 1978)

An information is sufficient if it gives the name of the offense and sufficient particulars thereof to give the court and defendant notice of the offense intended to be charged so that the defendant can prepare his defense and plead the result in bar of a subsequent prosecution for the same offense. State v. Tjaden, 69 N.W.2d 272, 276 (N.D. 1955). In considering the sufficiency of a criminal pleading, technicalities have been abolished and it is only necessary to plead an offense in its usually designated name and in plain, ordinary, language. State v. Mederaris, 165 N.W.2d 688, 693 (N.D. 1969).

Rule 12(b) of the North Dakota Rules of Criminal Procedure requires certain motions to be made before trial or they are waived. See, State v. Neset, 462 N.W.2d 175 (N.D. 1990). Defenses and objections based on defects in the indictment, information, or complaint are required to be made

before trial, unless the defense or objection is that it fails to show jurisdiction in the court or to charge an offense. See, Rule 12(b)(2), N.D.R.Crim.P.

Failure of an indictment to state an offense is a fundamental defect which can be raised at any time. See, e.g., U.S. v. Clark, 412 F.2d 885, 888 (5th Cir. 1969); Chappell v. U.S., 270 F.2d 274, 276 (9th Cir. 1959). However, the very limited resources of our judicial system require that such challenges be made at the earliest possible moment in order to avoid needless waste. Consequently, although such defects are never waived, indictments which are tardily challenged are liberally construed in favor of validity. See, e.g., U.S. v. Pheaster, 544 F.2d 353, 361 (9th Cir. 1976); State v. McNair, 108 P.3d 410 (Idaho 2005). When an indictment is not challenged before the verdict, it is to be upheld on appeal if the necessary facts appear in any form or by fair construction can be found within the terms of the indictment. See, Hagner v. U.S. 285 U.S. 427, 433 (1932).

In State v. Sohm, 95 P.3d 76 (Idaho 1994), the criminal information had omitted the willful or intentional element of a domestic battery charge. The defendant did not challenge the sufficiency of the information until after a jury verdict. The Idaho court determined that the information reasonably implied the willful or intentional element by use of the word "strike," which had a commonly understood meaning as intentional rather than accidental. Id. at 77-78.

In State v. Patton, 1997 WL 742514 (Tenn. Crim. App.), the defendant did not challenge the sufficiency of the indictment until after a

jury conviction. The Tennessee court cited an earlier decision and held that the culpable mental state for rape of a child can be logically inferred from the conduct alleged. Id.

In State v. Hendrick, 164 N.W.2d 57 (N.D. 1969), the defendant made a motion in arrest of judgment after a jury verdict, contending that the information did not charge an offense, in that the phrase "with intent" was omitted from the information. The North Dakota Supreme court noted that no motion for a bill of particulars had been made, and stated:

> "We conclude, in light of 1) the fact that inherent in the word escape is the meaning that departure is with intent to avoid lawful confinement and custody, and 2) the fact that the trial court's instructions required the jury to find that the defendant escaped with intent to escape, that the trial court properly denied Mr. Hendrick's motion in arrest of judgment."

Id. at 64.

N.D.C.C. § 12.1-20-03 does not include the word "willfully" in the statutory definition of Gross Sexual Imposition. Contending that the information does not charge a crime without the word willfully is like saying that N.D.C.C. § 12.1-20-03 does not define an offense. A liberal reading of the language of the information, as in the above cases, would infer a willful culpability from the words "committed" and "engaged," words that in their ordinary sense do not infer accidental conduct.

If the Information did charge an offense, Frankfurth waived any objection to the Information by not filing a motion prior to trial. Rule 12(h), North Dakota Rules of Criminal Procedure. The only other exception to the

rule requiring a pretrial motion is if the information fails to show jurisdiction in the court. Rule 12(b)(2), N.D.R.Crim.P. As set forth in U.S. v. Cotton, 535 U.S. 625 (2002), the notion that a defective indictment deprives a court of jurisdiction has been overruled. Frankfurth's objection was not timely, and the relief from the waiver was improperly granted when no good cause was shown for the failure to object prior to trial. State v. Neset, 462 N.W.2d 175 (N.D. 1990).

Even if it is determined that the criminal information was defective, that does not end the inquiry. Frankfurth's failure to object prior to trial means that he is entitled to dismissal only if he is able to show that the error affected a substantial right, and that error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

III. IF THE CRIMINAL INFORMATION WAS DEFECTIVE, SETTING ASIDE THE JURY VERDICT AND DISMISSING THE INFORMATION WAS NOT THE APPROPRIATE REMEDY.

A. Contrary to Frankfurth's assertions in the motion to arrest judgment, failure to charge a crime does not deprive the court of jurisdiction.

Frankfurth cited several state court opinions to support his argument that a missing element in the charging document deprives a court of jurisdiction. In Lamar v. U.S., 240 U.S. 60, 64 (1916), the court rejected the claim that the court had no jurisdiction because the indictment does not charge a crime against the United States. Justice Holmes explained that a district court "has jurisdiction of all crimes cognizable under the authority of the United States...[and] [t]he objection that the indictment does not charge

a crime against the United States goes only to the merits of the case." Id. at 65.

Similarly, U.S. v. Williams, 341 U.S. 58, 66 (1951), held that a ruling "that the indictment is defective does not affect the jurisdiction of the trial court to determine the case presented by the indictment." Thus, the Supreme Court departed some time ago from the Ex parte Bain, 121 U.S. 1 (1887) view that indictment defects are jurisdictional. U.S. v. Cotton, 535 U.S. 625, 631 (2002).

In U.S. v. Cotton, 535 U.S. 625 (2002), a superseding indictment failed to allege the element of threshold levels of drug quantities that lead to enhanced penalties. The jury instructions also failed to instruct the jury to make findings as to the threshold levels. After the district court sentenced the defendants under the enhanced penalty provisions, the Fourth Circuit Court of Appeals vacated the sentences on the ground that " because an indictment setting forth all essential elements is both mandatory and jurisdictional...a court is without jurisdiction to...impose a sentence for an offense not charged in the indictment." Id. at 629.

After overruling Bain insofar as it held that a defective indictment deprives a court of jurisdiction, the United States Supreme court applied the plain-error test of Federal Rule of Criminal Procedure 52(b) to respondents' "forfeited" claim:

> "Under that test, before an appellate court can correct an error not raised at trial, there must be 1) error, 2) that is plain, 3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a

> forfeited error, but only if 4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings."

U.S. v. Cotton, 535 U.S. 625, 631 (2002).

In Cotton, the respondents argued that an indictment error falls within the limited class of structural errors that can be corrected regardless of their effect on the outcome. The Court did not need to resolve that prong, as the Court determined that the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. The Court noted that the evidence that the conspiracy involved more than threshold levels of cocaine was overwhelming and essentially uncontroverted. Id. at 633. The unanimous Court concluded that the real threat to the fairness, integrity, and public reputation of the judicial proceedings would be if respondents, despite the overwhelming and uncontroverted evidence that they were involved in a vast drug conspiracy, were to receive a sentence prescribed for those committing less substantial drug offenses because of an error that was never objected to at trial. Id. at 634.

B. The trial court failed to distinguish between pre-trial and post trial objections to a criminal information.

Relying almost exclusively on State v. Gwyther, 1999 ND 15, 589 N.W.2d 575, the trial court granted the motion to arrest judgment and dismissed the criminal information. In Gwyther, the defendant moved to dismiss a criminal information prior to trial. The information failed to allege

the element of an overt act in furtherance of a conspiracy, and the information was dismissed without prejudice. Id. at ¶ 4.

Gwyther does not answer the question whether a verdict must be set aside and an information dismissed when the defendant does not object to the information until after the verdict. In setting aside Frankfurth's guilty verdict, the trial court failed to distinguish between those cases where an objection to a charging document is made prior to trial and the cases where the objection is made post-verdict.

Frankfurth's motion for arrest of judgment relied on U.S. v. Russell, 369 U.S. 749 (1962), and U.S. v. Fischetti, 450 F.2d 34 (5th Cir. 1971). In both of these cases, the defendants objected before trial to the sufficiency of the indictment or an amendment to the indictment. See U.S. v. Russell, 369 U.S. 749, 753 (1962), and U.S. v. Fischetti, 450 F.2d 34, 38 (5th Cir. 1971).

In U.S. v. Hagner, 285 U.S. 427 (1932), the defendants were found guilty of mail fraud by a jury and moved to arrest judgment upon the ground that the indictment failed to charge an offense. More specifically, they alleged that the indictment failed to charge the element that the letter was delivered by mail. After assuming that the element was submitted under appropriate instructions of the jury, the court ruled,

> "The indictment in the particular complained of is loosely and artificially drawn and is not to be commended, but, upon the record before us, and *without deciding that the indictment would not have been open to some form of challenge at an earlier stage of the case*, we are of the opinion that after verdict it is not vulnerable to the attack here made upon it."

Id. at 420.

The Supreme Court in U.S. v. Cotton, 535 U.S. 625 (2002), also distinguished between cases where defendants objected to indictments before trial, and those, like Cotton, who objected only after a jury trial:

> "Bain has been cited in later cases such as Stirone v. U.S., 361 U.S. 212 (1960), and Russell v. U.S., 369 U.S. 749 (1962), for the proposition that 'an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form.' *But in each of these cases proper objection had been made in the District Court to the sufficiency of the indictment.* We need not retreat from this settled proposition of law decided in Bain to say that the analysis of that issue in terms of 'jurisdiction' was mistaken in light of later cases such as Lamar and Williams. Insofar as it held that a defective indictment deprives the court of jurisdiction, Bain is overruled."

Id. at 631.

A challenge to the sufficiency of an indictment is not a game in which the lawyer with the sharpest eye or cleverest argument can gain reversal for his client. U.S. v. Pheaster, 544 F.2d 353, 360 (9th Cir. 1976). Such a long delay in raising the issue suggests a purely tactical motivation of incorporating a convenient ground of appeal in the event the jury verdict went against the defendant. Furthermore, the fact of the delay tends to negate the possibility of prejudice in the preparation of the defense. Id. at 361.

C. Cases that have required dismissal due to a missing element in the charging document are based on the Fifth Amendment's indictment clause, which does not apply in a state court criminal prosecution.

The failure to allege mental culpability and aggravating factors in a capital defendant's indictment violates the Fifth Amendment's indictment

clause. United States v. Allen, 357 F.3d 745 (8th Cir. 2004). The specific reason for the requirement that a [federal criminal] indictment contain all of the essential elements of the crime charged in a case is that there could be no assurance that the grand jury would indict if it had not considered all of the essential elements of the crime. U.S. v. Denmon, 483 F.2d 1093, 1095 (8th Cir. 1973). The defendant's Fifth Amendment protection of being called to answer only upon a grand jury indictment would be eroded by allowing the courts to supply missing elements of the charged offense. Id.

However, the requirement of a grand jury indictment set forth in the Fifth Amendment is not applicable to the states. Hurtado v. California, 110 U.S. 516, 538 (1884). See also Moeller v. Weber, 2004 SD 110, 689 N.W.2d 1, 21 (2004). (Although aggravating factors operate as a "functional equivalent" of an element, actual notice of aggravating factors outside of the indictment is permissible, so long as the jury has the ultimate decision on whether those factors have been proved.)

The Denmon opinion demonstrates why a federal criminal indictment lacking an element is not saved by an appropriate instruction to the jury, when that is not the case in a state criminal pleading:

> "The major constitutional reason why the indictment was defective in this case is the Fifth Amendment's requirement that the defendant has a right to be tried upon charges found by a grand jury. We cannot say that the grand jury would have returned a true bill against the defendant if the essential element of criminal intent would have been included in the indictment. Of course, the instructions to the jury at trial could not have had any effect upon the prior grand jury indictment or supply missing elements thereof.

> The defendant also suggests that the insufficient indictment violated the Sixth Amendment's right to be informed of the nature and cause of the accusation in order to prepare a proper defense and the Fifth Amendment's restriction against double jeopardy. Although these constitutional provisions are commonly argued by defendants and cited by courts in similar cases, this 'essential elements' case more precisely raises the issue of the Fifth Amendment's grand jury requirement. Therefore, we only hold that the indictment was legally insufficient to comply with the grand jury indictment clause of the Fifth Amendment. *The indictment here was sufficient to generally charge on the nature of the offense and provide protection against double jeopardy."*

Denmon, 483 F.2d 1093, 1097-1098 (8th Cir. 1973).

Out from under the protective umbrella of the indictment clause, the only requirements for a state criminal information is that it inform the defendant of the nature of the offense and provide protection against double jeopardy. As noted above, this criminal information was sufficient to accomplish that, and the jury decided the case after being fully instructed on the elements of the offense, including culpability.

IV. APPLYING THE FOUR-PRONG TEST SET FORTH IN U.S. v. COTTON, DISMISSAL OF THE INFORMATION WAS IMPROPER

Rule 52 of the North Dakota Rules of Criminal procedure differs from its federal counterpart only in the substitution of the word "obvious" error for "plain" error. *Explanatory Notes*, Rule 52, N.D.R.Crim.P. Rule 52 applies to both the trial court and appellate courts. *Explanatory Notes*, Rule 52. The trial court should have applied Rule 52 when Frankfurth alleged in his Motion for Arrest of Judgment that it was error to convict Frankfurth without a culpability level spelled out in the Information.

When the U.S. v. Cotton four-prong test is applied to Frankfurth's jury verdict, he may be able to argue that there was 1) error in the omission of a culpability level from the information; and 2) that such error is plain or obvious. However, he has never alleged that the omitted language in the information prejudiced him in any way. Frankfurth's counsel, a former prosecutor and experienced defense counsel, is well aware of the willful culpability standard for criminal offenses that do not specify a culpability level. See, State v. Bower, 442 N.W.2d 438 (N.D. 1989) (Frankfurth's counsel was attempting a similar argument over 15 years ago.) See e.g., U.S. v. Pheaster, 544 F.2d 353 (9th Cir. 1976):

> "Pheaster has not claimed that the language of Count One has in any way prejudiced the preparation of his defense. If such a claim had been made, the facts of this case would tend to believe it. Pheaster was represented by unusually competent and experienced counsel; yet, the challenge to the indictment came only at the end of the trial, after all evidence had been received."

Id. at 363.

As noted by the trial court in its order arresting judgment, the jury was properly instructed on all essential elements of the offense. (Appendix pages 4, 18 and 54-55). Frankfurth is unable to show how he was prejudiced or how the error affected his substantial rights. Pursuant to U.S. v. Cotton, 535 U.S. 625 (2002), Frankfurth's claim fails on prong three of the test.

There was even less reason to set aside this verdict than there was in State v. Flanagan, 2004 ND 112, 680 N.W.2d 241, where the omission of a gross sexual imposition element in the jury instructions affected substantial

rights, but failed under prong four. The North Dakota Supreme Court determined that *reversal of the conviction* would seriously affect the fairness, integrity, or public reputation of the judicial proceeding. Id. at ¶10. The same situation applies here.

CONCLUSION

The real threat to the fairness, integrity, and public reputation of these proceedings is to let Frankfurth hide an assignment of error in his pocket, only to reveal his ace when the jury verdict went against him. A new trial using the same jury instructions will accomplish no remedial purpose and is a needless waste of judicial resources.

The trial court's dismissal of the information should be overturned, and the jury verdict reinstated.

Dated this 27th day of May, 2005.

RESPECTFULLY SUBMITTED:

By: _____

Cynthia M. Feland
Assistant Burleigh County State's Attorney
Courthouse, 514 E. Thayer Avenue
Bismarck ND 58501
BAR ID No. 04804
(701)222-6672
Attorney for State of North Dakota
Plaintiff-Appellant

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff-Appellant, -vs- Paul R. Frankfurth, Defendant-Appellee.	AFFIDAVIT OF MAILING Supreme Ct. No. 20050112 District Ct. No. 08-04-K-0217

STATE OF NORTH DAKOTA)
)ss
COUNTY OF BURLEIGH)

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 May 27, 2005, I deposited in a sealed envelope a true copy of the attached:

1. Plaintiff-Appellant's Brief
2. Appendix to Plaintiff-Appellant's Brief
3. Affidavit of Mailing

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

TOM TUNTLAND
ATTORNEY AT LAW
PO BOX 1315
MANDAN ND 58554-1315

which address is the last known address of the addressee.

Ardyth Volesky

Subscribed and sworn to before me this 27th day of May, 2005.

Jeanie Nolz, Notary Public
Burleigh County, North Dakota
My Commission Expires: 2-15-2007

JEANIE NOLZ
Notary Public
State of North Dakota
My Commission Expires Feb. 15, 2007

IN THE SUPREME COURT

STATE OF NORTH DAKOTA 20050112

State of North Dakota,
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-vs-
Paul R. Frankfurth,
Defendant-Appellee.

AFFIDAVIT OF MAILING

Supreme Ct. No. 20050112

District Ct. No. 08-04-K-0217

STATE OF NORTH DAKOTA)
)ss
COUNTY OF BURLEIGH)

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 June 28, 2005, I deposited in a sealed envelope a true copy of the attached:

1. Statement of the Issues (Corrected) of Plaintiff-Appellant's Brief
2. Affidavit of Mailing

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

TOM TUNTLAND
ATTORNEY AT LAW
PO BOX 1315
MANDAN ND 58554-1315

which address is the last known address of the addressee.

Ardyth Volesky

Subscribed and sworn to before me this 28th day of June, 2005.

Jeanie Nolz, Notary Public
Burleigh County, North Dakota
My Commission Expires: 2-15-2007

JEANIE NOLZ
Notary Public
State of North Dakota
My Commission Expires Feb. 15, 2007