

ORIGINAL (e-filed)

20080135

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

**FILED**  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

SEP 23 2008

STATE OF NORTH DAKOTA, )  
)  
Plaintiff/Appellee. )  
)  
v. )  
)  
KIRBY RUDOLPH, )  
)  
Defendant/Appellant. )

STATE OF NORTH DAKOTA

Supreme Court No. 20080135

Ward Co. No. 07-K-1115

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REPLY BRIEF OF APPELLANT

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Appeal from Amended Criminal Judgment

dated and filed May 16, 2008

and the adverse determination within the October 31, 2007. Order

Denying Motion to Suppress Evidence and Motion to Dismiss

Ward County District Court

Northwest Judicial District

The Honorable Douglas L. Mattson

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[¶1] TABLE OF AUTHORITIES

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[¶2] STATEMENT OF THE CASE (ADDENDUM)

[¶3] On August 19, 2008, subsequent to the appeal of this matter to this Court, the City of Minot filed a motion with the trial court requesting that the record be supplemented with a document that was never disclosed in response to discovery requests and was not revealed, introduced, admitted or made a part of the proceedings in the district court. (Addendum to Appellant's Appendix ("App.") at 58). On August 22, 2008, without giving Mr. Rudolph an opportunity to respond and object to the City's motion, the trial court granted the motion to supplement and on August 25, 2008, mailed a copy of the signed Order to Rudolph's counsel. (App. 61 and 64).

[¶4] Upon receiving a copy of the court's Order, on August 26, 2008, Rudolph's counsel requested, in letter form, reconsideration of the Order and requested an expedited hearing on reconsideration of the matter, arguing that Rudolph had been denied due process in not be allowed to respond to the City's motion and that it was not proper to supplement the record with a document that was not part of the record in the district court. (App. 62-64). On August 27, 2008, the trial court vacated the August 22, 2008, Order Supplementing Record and ordered oral argument on an expedited basis. (App. 65).

[¶5] Two weeks later, on September 8, 2008, well after both the Appellant and Appellee had filed briefs to this Court, the trial court received oral argument on the City's Motion to Supplement the Record. (App. 66). Four days ago, on September 19, 2008, the trial court set a response brief deadline of September 26, 2008, on the Motion to Supplement Record. (App. 67). The trial court has still not resolved the supplementation issue.

[¶6] LAW AND ARGUMENT

[¶7] The City of Minot, through an assistant Ward County State's Attorney, argues that "[t]he parties stipulated that the contract between the City and Ward County itself was not necessary to the Court's determination" on Mr. Rudolph's Motion to Dismiss. *See* Appellee's Brief at 1. Indeed, another assistant Ward County State's Attorney informed the trial court during the hearing on the Motion to Dismiss:

"I don't really see where the agreement has any relevance to his argument, because he says the city can't enter into the agreement, period. So, based on the argument, you really don't need the agreement to make the decision."

(Motions Hearing Transcript ("Tr.") at 40, lines ("L.") 2-6). No agreement was offered to the trial court and no agreement was provided to Mr. Rudolph in discovery.

[¶8] Yet, on appeal, the City of Minot introduced to this Court, the contents of a supplemental record, particularly a document entitled "Agreement," that was not disclosed, introduced, admitted or made a part of the proceedings in the district court. Consequently, the supplemental record does not accurately represent the record below.

[¶9] Additionally, the document was presented to this Court without any foundation or certification and was made part of this Court's record without Mr. Rudolph being afforded any opportunity to challenge the purported agreement. The City's introduction of purported evidence at the appellate stage is not proper.

[¶10] Rule 10(h), N.D.R.App.P. provides a means for correcting the district court record if the record does not fully and accurately reflect what occurred in the proceedings below. The rule does not, however, provide for supplementing and changing the district court record and altering what was relied upon by the district court in arriving at its determination on a motion below. The "supplemental record" language in Rule 10(h),

N.D.R.App.P. does not refer to introducing evidence after-the-fact and immune from challenge, but instead refers to submitting a corrected record to supplement an incomplete or erroneous record previously forwarded to the supreme court.

[¶11] In our case, though, a correct and complete record of what occurred in the trial court proceedings in this matter was certified to the North Dakota Supreme Court before the district court allowed the Appellee to supplement the record with its Appendix material containing non-record evidence. No extrinsic evidence should be submitted to the district court or this high court at this late stage. Accordingly, the previously-submitted supplemental record (i.e. Appellee's Appendix) should not be considered by this Court.

[¶12] Finally, the City of Minot seems to argue that because the reference source of Ordinance sections 2-70 and 2-71 of the Minot City Code is from the Revised General Ordinances of 1962 that the enactment of sections 2-70 and 2-71 cannot constitute supersession. *See* Appellee's Brief at 2. However, the reference sources of §§ 4-0601 and 4-0602 from 1962 tell us nothing with respect to whether the passage of Ordinance sections 2-70 and 2-71 was meant to supersede N.D.C.C. §§ 40-20-01 and 40-20-02.

[¶13] Section 2-70 of the Minot Municipal Code tracks the language of N.D.C.C. § 40-20-01 identically and serves to implement, by home rule, a section of North Dakota law relating to the duties of a city attorney. (App. 29). There would be no reason to implement section 2-70 of the city code if N.D.C.C. § 40-20-01 was meant to remain applicable to the City of Minot. This tells us that Section 2-70 of the Minot Municipal Code was passed to supersede N.D.C.C. § 40-20-01.

[¶14] Section 2-71 of the Minot Municipal Code, however, specifically references § 40-20-02 but does not implement § 40-20-02, a section of North Dakota law which states that “the city attorney may appoint assistants to do any or all of the acts which the city attorney is required to do.” (App. 29) (compare Ordinance section 2-71 and N.D.C.C. § 40-20-02) (emphasis added). There would be no reason to reference N.D.C.C. § 40-20-02 in implementing section 2-71 of the city code if the City of Minot intended that N.D.C.C. § 40-20-02 remain applicable to the City of Minot. By implementing Ordinance section 2-71 in place of N.D.C.C. § 40-20-02, the City of Minot has enacted home rule legislation superseding § 40-20-02’s power to appoint assistant city attorneys.

[¶15] “Any doubt as to the existence or extent of municipal powers must be resolved against the municipality.” *See City of Fargo v. Malme*, 2007 ND 137, ¶13 (emphasis added). Consequently, any doubt that the City of Minot, through Superseding Ordinance section 2-71, divested itself of the authority to appoint assistant city attorneys “must be resolved against the municipality” of Minot. *See id.* Since the City of Minot divested itself of authority to appoint assistant city attorneys to prosecute municipal offenses, the Office of the Ward County State’s Attorney has no authority to prosecute municipal cases. Therefore, the Complaint against Mr. Rudolph was defectively instituted for prosecution and his Motion to Dismiss should have been granted.

#### [¶16] CONCLUSION

[¶17] For the foregoing reasons, Mr. Rudolph respectfully requests relief from this Court.

Respectfully submitted  
this 23<sup>rd</sup> day of September, 2008.

*/s/ Dan Herbel*

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[¶18] CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 23, 2008, the REPLY BRIEF OF APPELLANT was electronically filed with the Clerk of the North Dakota Supreme Court and were also electronically transmitted to Kelly Dillon, counsel for Appellee, at the following:

Electronic filing TO: "Kelly Dillon" < [Kelly.Dillon@co.ward.nd.us](mailto:Kelly.Dillon@co.ward.nd.us) >

Date this 23<sup>rd</sup> day of September, 2008.

*/s/ Dan Herbel*

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