

ORIGINAL (*e-filed*)

20080135

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

JUL 30 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

BRIEF OF APPELLANT

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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<i>State v. Thill</i> , 2005 ND 13, 691 N.W.2d 230	¶17

[¶2] STATEMENT OF THE CASE

[¶3] On April 26, 2007, Kirby Rudolph was arrested for driving under the influence of an intoxicating liquor in Minot, North Dakota. (Appendix ("App.") at 2). On June 5, 2007, Mr. Rudolph transferred his municipal case to district court for jury trial. (App. 9). On June 11, 2007, a Uniform Traffic Complaint and Summons was filed in the district court informing Mr. Rudolph that he was standing accused of the charge of DUI. (App. 1-2).

[¶4] On August 10, 2007, Mr. Rudolph filed a Motion to Dismiss the Complaint, alleging that the Complaint was defectively instituted for prosecution by the Office of the Ward County State's Attorney, an agency without authority to prosecute municipal offenses. (App. 10). On August 21, 2007, the Office of the Ward County State's Attorney, on behalf of the City of Minot, filed a response brief opposing dismissal. (App. 11-13). Mr. Rudolph then filed a Reply brief on August 27, 2007 (App. 14-29), the State's Attorney subsequently filed an Answer brief on August 30, 2007 (App. 30-35), and Mr. Rudolph thereafter filed another Reply brief on September 10, 2007. (App. 36-38).

[¶5] On October 24, 2007, a hearing was held on the Motion to Suppress Evidence and the Motion to Dismiss, and the Court took the matters under advisement. (Motions Hearing Transcript ("Tr.") at 41, lines ("L.") 15-16). On October 31, 2007, the trial court issued an Order denying Mr. Rudolph's Motion to Suppress Evidence and his Motion to Dismiss. (App. 40-47).

[¶6] On April 15, 2008, Mr. Rudolph changed his plea, by way of a Misdemeanor Petition, and entered a conditional plea of guilty to the charge of DUI.

pursuant to N.D.R.Crim.P. 11 (a)(2), specifically reserving the right to appeal the October 31, 2007. Order denying his Motion to Suppress Evidence and Motion to Dismiss. (App. 48-50). On May 16, 2008, an Amended Criminal Judgment was entered. (App. 51-53).

[¶7] On June 9, 2008, Mr. Rudolph filed a Notice of Appeal to this Court. (App. 54-55). Rudolph appeals and argues that the City of Minot does not have the authority or the power, under its current home rule charter and ordinances, to appoint a special assistant city prosecutor and does not have the power to appoint a non-city agency to prosecute municipal offenses. As such, Rudolph argues that the Complaint in this matter was defectively instituted for prosecution by the Office of the Ward County State's Attorney, an agency without authority to prosecute municipal offenses.

[¶8] Mr. Rudolph asks this court to vacate the Amended Criminal Judgment in this matter, reverse the district court's denial of his Motion to Dismiss, remand to the district court for withdrawal of Mr. Rudolph's conditional guilty plea, and order the dismissal of the Complaint.

[¶9] STATEMENT OF THE ISSUES

- I. Whether the City of Minot has the authority or power, under its home rule charter and ordinances, to appoint the Office of the Ward County State's Attorney to prosecute municipal offenses

[¶10] STATEMENT OF THE FACTS

[¶11] On April 26, 2007, Kirby Rudolph was arrested for driving under the influence of an intoxicating liquor in Minot, North Dakota, and was commanded to appear in Minot Municipal Court. (App. 2). After Rudolph filed a discovery request with the City of Minot, the Minot Police Department disclosed to Mr. Rudolph discovery

materials relayed to the Department from an Assistant Ward County State's Attorney. (App. 3-8).

[¶12] On June 5, 2007, Mr. Rudolph transferred his municipal case to district court for jury trial and thereafter filed a Motion to Dismiss the Complaint, alleging the Complaint was defectively instituted for prosecution by the Office of the Ward County State's Attorney, an agency without authority to prosecute municipal offenses. (App. 9-10). The City of Minot, through another Assistant Ward County State's Attorney, responded to Rudolph's Motion by asserting that N.D.C.C. § 11-16-05(5) provided the City of Minot with the authority to contract out prosecutorial work. (App. 12). The City argued that "[t]he Ward County State Attorney's Office has, by contract between the County and City, been providing prosecution services for the City of Minot since 1987 or for about 20 years" and so the trial court "should take judicial notice of the practice." (App. 12-13).

[¶13] Mr. Rudolph then clarified, by brief, that the issue was not one of taking judicial notice of a prosecutorial arrangement but rather was whether the City of Minot has the authority or power, under its home rule charter and ordinances, to appoint the Office of the Ward County State's Attorney to prosecute municipal offenses. (App. 16-17). Rudolph argued that the City of Minot does not have the authority or the power, under its home rule charter and ordinances, to appoint a special assistant city prosecutor and does not have the power to appoint a non-city agency to prosecute municipal offenses. (App. 15). Rudolph argued that the City of Minot, as an autonomous Home Rule City, passed Ordinance section 2-71 to supersede state law, specifically N.D.C.C.

§ 40-20-02, and in doing so, divested itself of the power to appoint assistant city attorneys to prosecute Minot municipal offenses. (App. 19-20).

[¶14] The City of Minot then abandoned its reliance upon N.D.C.C. § 11-16-05(5) for its purported authority to appoint a special assistant city prosecutor to prosecute municipal offenses and changed its argument to assert that N.D.C.C. Chapter 54-40.3 grants them the Home Rule power to do so. (App. 31-32). The City also argued that the Home Rule Charter and ordinances “were never intended to supercede [sic] state law.” but offered nothing to buttress this assertion. (App. 34).

[¶15] The City of Minot did not offer a Joint Powers Agreement into evidence and one was never made part of the record in this matter. (Tr. at 39. L. 15-19). After the hearing, the trial court determined that “Minot Ordinance 2-71 does not supersede N.D.C.C. § 40-20-02” and denied Rudolph’s Motion to Dismiss. (App. 46-47).

[¶16] STANDARD OF REVIEW

[¶17] The “standard of review for preliminary proceedings, such as a motion to dismiss, in criminal cases at the trial court level,” is “identical to” the “review of a trial court’s denial of a motion to suppress.” *See State v. Berger*, 2001 ND 44, ¶11, 623 N.W.2d 25. Therefore, this Court “will not reverse a trial court’s findings of fact in preliminary criminal proceedings if, after the conflicts in the testimony are resolved in favor of affirmance, there is sufficient competent evidence fairly capable of supporting the findings and if the trial court’s decision is not contrary to the manifest weight of the evidence.” *See State v. Thill*, 2005 ND 13, ¶6, 691 N.W.2d 230. This Court will “evaluate the evidence presented to see, based on the standard of review, if it supports the

findings of fact,” and “[q]uestions of law are fully reviewable.” *See State v. Glaesman*, 545 N.W.2d 178, 181 (N.D. 1996).

[¶18] LAW AND ARGUMENT

- I. Whether the City of Minot has the authority or power, under its home rule charter and ordinances, to appoint the Office of the Ward County State’s Attorney to prosecute municipal offenses

[¶19] “Cities are creatures of statute and possess only those powers and authorities granted by statute or necessarily implied from an express statutory grant.” *See City of Bismarck v. Fettig*, 1999 ND 193, ¶4, 601 N.W.2d 247. “The rule of strict construction applies in defining municipal powers” and “[a]ny 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, 737 N.W.2d 390 (citing *Meyer v. City of Dickinson*, 451 N.W.2d 113, 115 (N.D. 1990); *Dacotah Hotel Co. v. City of Grand Forks*, 111 N.W.2d 513, 515 (N.D. 1961); *Lang v. City of Cavalier*, 59 N.D. 75, 228 N.W. 819, Syll. 3 (1930)) (emphasis added).

[¶20] In *City of Fargo v. Malme*, this Court addressed the issue of “whether Fargo had the authority [under its home rule charter] to create the Administrative Enforcement Board” to adjudicate alleged violations of municipal law. *See City of Fargo v. Malme*, 2007 ND 137, ¶8. In doing so, this court stated that “[t]he Legislature ... has the constitutional authority to provide by law for the establishment and exercise of home rule in counties and cities. N.D. Const. art. VII, § 6. and has provided for home rule cities by enacting N.D.C.C. ch. 40-05.1.” and then noted that “Fargo is a municipal corporation operating under a home rule charter.” *See Malme*, 2007 ND 137 at ¶9 (internal quotations omitted). This Court reminded:

“[H]ome rule charter[s] allow[] cit[ies] to enact laws contrary to those of the state” and “Section 40-05.1-05, N.D.C.C., provides “[t]he charter and the ordinances made pursuant to the charter in such matters supersede within the territorial limits and other jurisdiction of the city any law of the state in conflict with the charter and ordinances and must be liberally construed for such purposes.”

See Malme, 2007 ND 137 at ¶10 (emphasis added).

[¶21] This Court instructed that in addition to examining N.D.C.C. § 40-05.1-06 “to determine what powers ... a home rule city[] may have,” it is “necessary to review the charter to determine if those powers are included in the charter, and if they are it then becomes necessary to determine if they were implemented by an ordinance.” *See id* at ¶11 (citing *Litten v. City of Fargo*, 294 N.W.2d 628, 632 (N.D. 1980)). The *Malme* court declared that if the powers are in the home rule charter and are also implemented by ordinance, then the powers supersede within the city’s territory; however, “if the powers are not stated in the charter, or if they are stated in the charter but are not implemented by ordinance, the home rule city may not avail itself of the powers enumerated in § 40-05.1-06, NDCC.” *See id*.

[¶22] In *Malme*, this Court found no authority within Fargo’s home rule charter to provide the City with “the power to create a layperson administrative adjudicatory board with the responsibility of trying alleged violations of municipal ordinances.” *See Malme*, 2007 ND 137 at ¶14. Accordingly, this Court concluded that such a Board “lacked the authority to adjudicate Malme’s alleged violations of Fargo’s municipal ordinances” and voided the adjudicatory decision against Malme. *See id* at ¶¶15-16.

[¶23] In our case, the issue is whether the City of Minot has the authority or power, under its home rule charter and ordinances, to appoint the Office of the Ward County State’s Attorney to prosecute municipal offenses. Following the direction of

Malme and *Litten*, this Court should employ a three-step test in order to determine whether the City of Minot has such a power.

[¶24] First, this Court should “examine the subsections of § 40-05.1-06, NDCC, to determine what powers the city of [Minot], a home rule city, may have.” *See Malme*, 2007 ND 137 at ¶11 (citing *Litten v. City of Fargo*, 294 N.W.2d 628, 632 (N.D. 1980)). In examining N.D.C.C. § 40-05.1-06(4) and (5), it appears that the City of Minot, a home rule city, does have the following powers relating to its city attorney/ prosecutor:

- “4. To provide for city officers, agencies, and employees, their selection, terms, powers, duties, qualifications, and compensation. To provide for change, selection, or creation of its form and structure of government, including its governing body, executive officer, and city officers.
5. To provide for city courts, their jurisdiction and powers over ordinance violations, duties, administration, and the selection, qualifications, and compensation of their officers; ... ”

See N.D.C.C. § 40-05.1-06(4) and (5).

[¶25] The second step is to “determine if those powers are included in the charter.” *See Malme*, 2007 ND 137 at ¶11. Minot’s Home Rule Charter of 1972 grants to the City of Minot, among other things, the powers:

- “d. To provide for city officers, agencies, and employees, their selection, terms, powers, qualifications, and compensation.
- e. To provide for city courts, their jurisdiction and powers over ordinance violations, duties, administration, and the selection, qualifications, and compensation of their officers. ... ”

(App. 23) (Art. 3(d) and (e)). The powers delineated in Minot’s “home rule charter [for the most part] track the language and powers set forth in N.D.C.C. § 40-05.1-06.” *See Malme*, 2007 ND 137 at ¶12. This broad and very general grant of power, arguably,

permits the ability to implement more specific ordinance language to authorize the appointing of the State's Attorney to prosecute municipal offenses.

[¶26] The third and final step, then, is "to determine if they [the powers] were implemented by an ordinance." *See Malme*, 2007 ND 137 at ¶11. The Minot Municipal Code sets out certain duties and powers possessed by the city attorney in sections 2-70 and 2-71 [Chapter 2, Article III, Division 4] of the Code of Ordinances. (App. 29). This division of the municipal code, and the only two ordinance sections therein, makes a specific state law reference to "City attorney, N.D.C.C., §§ 40-20-01, 40-20-02," and it appears that Ordinance sections 2-70 and 2-71 are intended to supersede the provisions of N.D.C.C. §§ 40-20-01 and 40-20-02. (App. 29) (emphasis added).

[¶27] Section 2-70 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). Section 2-71, 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). 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.

[¶28] Superseding Ordinance section 2-71, which contains no power to appoint assistant city attorneys like N.D.C.C. § 40-20-02 does, reads as follows:

"Sec. 2-71. Conduct of causes and proceedings in the municipal court.

The conduct of all causes and proceedings in the municipal court in which the city is a party shall be handled by the city attorney or the assistant city attorney who shall be fully responsible for all causes so tried

and shall have complete authority to require assistance from other employees of the city as may be necessary in order to properly present any case before the municipal court. The city attorney shall keep himself advised of all causes and proceedings in the municipal court and shall expeditiously prosecute, try, settle, dismiss, or otherwise dispose of them in a manner and at a time to be determined in his discretion.”

(App. 29) (emphasis added). Not only does section 2-71 not contain the power to appoint assistant prosecutors, it also limits the assistance the city attorney may receive to “assistance from other employees of the city,” not county or state employees. (App. 29) (emphasis added). Furthermore, section 2-71 seems to limit the city attorney’s affairs to only “proceedings in the municipal court.” (App. 29). However, even assuming Ordinance section 2-71 doesn’t limit the business of the city attorney to that of municipal court, it still does not vest any sort of power to appoint the Ward County State’s Attorney to prosecute municipal offenses.

[¶29] Home rule charters allow cities to enact laws contrary to those of the state and allow cities the autonomy to uniquely structure their legal code to suit local needs. *See Malme*, 2007 ND 137 at ¶10. Once the city has validly filed a charter with the Secretary of State and has implemented ordinances in furtherance of the powers enumerated in the charter, then “[t]he charter and the ordinances made pursuant to the charter in such matters supersede within the territorial limits” of the city. *See id* (emphasis added). Therefore, municipal law can and does, in home rule cities, supersede state law.

[¶30] In the case at hand, the City of Minot is clearly a Home Rule City with a charter validly filed with the North Dakota Secretary of State. As an autonomous Home Rule City, Minot passed Ordinance section 2-71 to supersede state law, specifically N.D.C.C. § 40-20-02. (App. 29). In doing so, the City of Minot has divested itself of the

power to appoint assistant city attorneys. Without any power to appoint an assistant city attorney, the City of Minot is thusly without authority to appoint the Office of the Ward County State's Attorney to prosecute Minot municipal offenses.

[¶31] “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.

[¶32] CONCLUSION

[¶33] For the foregoing reasons, Mr. Rudolph respectfully requests that this Court vacate the Amended Criminal Judgment in this matter, reverse the district court's denial of his Motion to Dismiss, remand to the district court for withdrawal of Mr. Rudolph's conditional guilty plea, and order the dismissal of the Complaint.

Respectfully submitted
this 30th day of July, 2008.

/s/ Dan Herbel

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Ward Co. No. 07-K-1115

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on July 30, 2008, the BRIEF OF APPELLANT and the APPENDIX TO BRIEF OF APPELLANT were 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 >

Date this 30th day of July, 2008.

/s/ Dan Herbel

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