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FEB 04 2013

STATE OF NORTH DAKOTA

**APPEAL FROM THE SEPTEMBER 19, 2012 DISMISSAL OF A CLASS B FELONY  
THEFT OF PROPERTY CHARGE AGAINST STEVEN GOLDMANN, THE  
HONORABLE DAVID W. NELSON PRESIDING**

**BRIEF OF DEFENDANT-APPELLEE,  
Steven Goldmann**

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**STATEMENT OF THE ISSUES:**

1. Whether the District Court erred when it dismissed the Class B Felony Theft charge without prejudice.
2. Whether the District Court's finding of fact that the State did not prove probable cause that Steven committed Class B Felony Theft is clearly erroneous.
3. Whether the District Court abused its discretion in dismissing the Class B Felony Theft charge without prejudice.

**STATEMENT OF THE FACTS:**

On or about May 29, 2012 Steven was shopping for a new 2012 Ford F-250 at Select Ford in Williston, ND. (T. At 14). The agreed upon payment method was direct wire transfer of payment. (T. At 14-16). Steven had full permission from Select Ford to take the Ford F-250 off the lot. (T. At 16). The wire transfer, however, did not go through. (T. At 15). Steven returned the Ford F-250 upon Select Ford's request to do so. (T. At 15-16).

Select Ford was not claiming that the F-250 was stolen or that any theft of property occurred. (T. At 17). Select Ford was only claiming depreciation damages of \$3,630.25. (T. At 18).

The District Court, the Honorable David W. Nelson, determined that based upon the entire circumstances presented to him, there was no probable cause to bind the case over for Class B Felony theft, and dismissed the charge without prejudice. (T. At 24-25). The State thereafter brought this timely appeal.

**LEGAL ARGUMENT:**

1. JUDGE NELSON’S DECISION TO DISMISS THE FELONY CHARGE  
WITHOUT PREJUDICE MUST BE AFFIRMED.

“NDCC Section 12.1-23-02. Theft of Property. A person is guilty of theft if he:

1) Knowingly takes or exercises unauthorized control over, or makes an unauthorized transfer of an interest in, the property of another with intent to deprive the owner thereof;

2) Knowingly obtains the property of another by deception or by threat with intent to deprive the owner thereof, or intentionally deprives another of his property by deception or by threat; or

3) Knowing receives, retains, or disposes of property of another which has been stolen, with intent to deprive the owner thereof.”

NDCC Section 12.1-23-02 (2012).

“Knowingly” is defined to mean “when he engages in the conduct, he knows or has a firm belief, unaccompanied by substantial doubt, that he is doing so, whether or not it is his purpose to do so.” NDCC Section 12.1-20-02(1)(b).

North Dakota Rule of Criminal Procedure, Rule 5.1(a) provides that a felony case can only go forward if the “magistrate finds probable cause to believe an offense has been committed and the defendant committed the offense.” NDRCrim.P., Rule 5.1 (2012-2013). If the magistrate does not find probable cause, then the Defendant must be discharged. NDRCrim.P., Rule 5.1(b).

“Probable Cause” is defined to mean having more evidence for than against; a reasonable ground for belief in certain alleged facts. Black’s Law Dictionary (Sixth Edition). As stated by the United States District Court, Southern Division of Ohio in United States v. Riemer, 392 F.Supp. 1291 (S.D. Ohio 1975), probable cause “is set of probabilities ground in the factual and practical considerations which govern the decisions of reasonable and prudent men. (Citations omitted). It is more than bare suspicion, but less evidence than required for conviction. Id. At 1294.

The State brought the charge against Steven Goldmann under subsection 2 of NDCC Section 12.1-23-02.

The Honorable David W. Nelson, after listening to the evidence presented at the preliminary hearing, and without weighing any conflicting evidence, determined that the State had not shown probable cause evidence that Steven knowingly obtained the Ford F-250 by deception or by threat with intent to deprive the owner thereof, or that Steven intentionally deprived another of his property by deception or by threat. This is a finding of fact that should not be overturned unless it is clearly erroneous.

“A finding of fact is clearly erroneous when it is induced by an erroneous view of the law, there is no evidence to support it, or when, although there is some evidence to support it, after a review of the entirety of the evidence, this Court is left with a definite and firm conviction a mistake has been made.” Konzak v. Hitz, 2008 ND 58, 746 NW2d 732 (ND 2008) (citations omitted) (emphasis added). Furthermore, the Supreme Court views the evidence in the light most favorable to the findings, and the district court’s

findings of fact are presumptively correct. Id. (emphasis added).

In this case, it was clear from the undisputed testimony of the law enforcement officer that Select Ford was not claiming that Steven committed Theft; rather, they were only seeking damages for depreciation value. The State could have elected to present some additional evidence on that issue, but elected not to. Furthermore, it was clear from the testimony that once Select Ford notified Steven that the wire transfer did not come through, that Steven returned the Ford F-150.

Under these circumstances, Judge Nelson's decision that there wasn't sufficient probable cause evidence that Steven committed the offense of Class B Felony Theft is supported by the undisputed facts stated in the Record, is supported by the law of probable cause and theft, and is not reversible under any applicable standard of review cited by the State.

2. THE STATE'S APPEAL IS MUCH ADO ABOUT NOTHING AND A WASTE OF TAXPAYER MONEY.

An order of dismissal without prejudice is typically not appealable, unless the party cannot cure the defect that led to the dismissal, or if the dismissal has the practical effect of foreclosing the litigation. Rodenburg v. Fargo-Moorhead, 2001 ND 139, 632 NW2d 407, 413 (ND 2001) (citations omitted). Judge Nelson dismissed the felony charge at the preliminary hearing stage without prejudice. The State can re-charge the Defendant for the same crime within the applicable statute of limitations for felony offenses without any binding consequences or prejudice to the merits of the State's case.

The State, in its brief, has not argued any prejudice to the State and has not explained why it did not simply re-charge the case and bring in better evidence, if possible.

Technically, the State may be allowed to appeal an order of dismissal of a criminal charge without prejudice under NDCC Section 29-28-07(1), since it is an order that effectively quashes an information, and the statute does not specify whether the quashing needs to be with or without prejudice. NDCC Section 29-28-07(1) (2005). The statute does not specify whether the quashing occurs at trial after evidence is presented, or at the preliminary hearing stage.

This court likely has jurisdiction to hear the State's appeal. However, in cases such as this where the dismissal is without prejudice at the preliminary hearing stage, and has caused no prejudice to the State, and none has been argued, then there is no point in allowing the appeal and it should be dismissed. Regardless of this court's decision on the appeal, the State can re-charge the same crime against the Defendant within the applicable statute of limitations, making the State's appeal much to do about nothing and a complete waste of judicial time and resources as well as taxpayer money.

#### **CONCLUSION:**

For the foregoing reasons, the Defendant requests that this Court affirm the District Court decision, or alternatively, to dismiss the appeal.



Dated this 4 day of February, 2013.

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**CERTIFICATE OF COMPLIANCE:**

Pursuant to North Dakota Rules of Appellate Procedure, Rule 28, I certify that this Brief complies with the requirements.

Dated this 4 day of February, 2013.

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**CERTIFICATE OF SERVICE:**

I hereby certify that a true and correct copy of the foregoing document, was served by US First Class Mail on the 4 day of February, 2013, and addressed to:

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