20180127
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
SEPTEMBER 4, 2018
STATE OF NORTH DAKOTA

IN SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff and Appellee,	)	
	)	Supreme Court No. 20180127
v	)	District Court No. 27-2017-CR-00673
	)	
Falesteni Ali Abuhamda,	)	
	)	
Defendant and Appellant.	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM DISTRICT COURT ORDER DENYING MOTION TO DISMISS AND SUPPRESS EVIDENCE ENTERED ON OCTOBER 18, 2017
MCKENZIE COUNTY JUDICIAL DISTRICT
THE HONORABLE ROBIN A. SCHMIDT, PRESIDING

Dated this 4th day of September, 2018.

/s/ *Deanna F. Longtin*
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ATTORNEY FOR DEFENDANT/ APPELLANT

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[¶1.] Statement of Issues Presented for Review

[¶2.] Whether this Court has jurisdiction to hear this appeal regarding Counts 1, 2, and 5.

[¶3.] Whether the District Court erred when it denied the Defendant's Motion to Dismiss and Suppress Evidence by failing to consider the sufficiency of the information and instead weighed the evidence.

[¶4.] Argument

[¶5.] a. This Court should exercise its supervisory jurisdiction to review this matter as requested by the Defendant because denial of his motion to dismiss had direct correlation on the end result of this matter.

[¶6.] The State's argument regarding the inability to appeal the pretrial diversion agreement (PTD) is accurate regarding the North Dakota Century Code 29-28-06. However, as the State further indicates, this Court does have supervisory jurisdiction to review the orders. "We issue supervisory writs only to rectify errors and prevent injustice when no adequate alternative remedies exist." State v. Jorgenson, 2018 ND 169, ¶ 4 (citing Holbach v. City of Minot, 2012 ND 117, ¶12, 817 N.W.2d 340).

[¶7.] In this case, Phil is requesting that the Court exercise that authority because of the direct effect the denial of the motion to dismiss had upon the end result of his case. If the Court denies his ability to appeal the Order denying his motion to dismiss, because he was able to arrange a PTD, it would result in punishing a Defendant for entering into a more satisfactory agreement than an actual plea of guilty. One of the terms of the PTD was that if the motion to dismiss was reversed, then the charges contained in the PTD would be dismissed. This was the written agreement between the State and Phil, and the intended result of the agreement was to allow Phil to appeal the Order related to the PTD.

[¶8.] As to the State's argument that there was no written agreement regarding the plea agreement, there was a written agreement, and the state should be aware of that agreement. However, at the change of plea hearing, it was decided that there was no need for the written agreement to be filed with the court, as the court

indicated putting it on the record orally was sufficient. Therefore, the terms of the written agreement were read verbatim from the terms of the written agreement.

[¶9.] b. This Court should reverse the Order denying Phil's motion to dismiss because the State could not prove the illegality of the substances at issue.

[¶10.] The State continues to rely on the state crime lab's assessment of what is illegal and the DEA's directive. As to the State's argument regarding the DEA's recommendations and indications about the status or categorization of CBD or any substance for that matter, again Phil argues the DEA does not make the laws. They enforce the laws as they are written. The document referred to by the state is nothing more than a clarification which unfortunately for Phil was misconstrued by law enforcement and the State. App. NO laws were changed, amended or revised. The article was describing where to place CBD coding and actually has nothing to do with charges that the Defendant was facing. During oral argument on February 15, 2018, the U.S. Court of Appeals for the 9th Circuit actually questioned the DEA about this clarification as the 9th Circuit Court believed that Phil had been prejudiced by this unclear clarification. Hemp Industries Association, et al v. USDEA, et al, 720 Fed. Appx. 886, 2018 WL 2000098. The DEA gave no explanation except that law enforcement in North Dakota was made aware of the purpose of this clarification.

[¶11.] The State continues to inaccurately state the indication by the state crime lab witness Lamont Jacobson. The State wants this Court to believe that Mr. Jacobson's statement was not to say that it was impossible to determine which portion of the plant the CBD comes from. However, the actual language of the line of questioning was very clear regarding whether it was possible to determine

if the CBD or THC came from the legal or illegal part of the plant. Mr. Lamont's statement strongly indicated that it was not possible to determine. The issue for the district court to determine at the motion to dismiss was whether the State had the ability to prove its case at trial. The evidence proved that the State could not do so.

[¶12.] The State further argues that the CBD is illegal under the federal law that automatically is adopted by state law. Again, just because the DEA classifies a substance does not make it an illegal substance under federal or state law. Even if this Court finds that CBD is illegal, the real issue is that the state cannot prove whether or not the substances in question in this matter come from the illegal or legal part of the plant.

[¶13.] Since the State continues to rely on the DEA, this Court should be apprised of the recent issuance of an additional directive that is material to this matter. Diversion Control Division, "Marijuana", May 22, 2018, https://www.deadiversion.usdoj.gov/schedules/marijuana/dea_internal_directive_cannabinoids_05222018.html. In this directive, the DEA clearly states that "[t]he mere presence of cannabinoids is not itself dispositive as to whether a substance is within the scope of the CSA; the dispositive question is whether the substance falls within the CSA definition of marijuana." Id. This essentially has been the Defendant's argument throughout this entire matter and in his motion to dismiss.

[¶14.] Therefore, the Defendant argues and reiterates that the State has the burden to prove its case and in this matter, the State could not. There is no scientific way to determine what part of the plant the CBD or THC came from that was in the confiscated products. In addition, as previously argued, the State's

own witness made it clear that it could not be proven that the CBD or THC came from the illegal part of the marijuana plant.

[¶15.] As to the vape pens, the Defendant reiterates his argument from his Brief, that the State's basis for their argument is pure speculation and not based on any fact. The paraphernalia items in question did not have any residue on them, they were packaged, unused items being sold at a vape shop. If this Court was to adopt the State's speculative argument, then almost any item could be identified as paraphernalia for use of ingesting illegal substance. For example, possession of a straw could be charged as paraphernalia because it can be used for ingesting narcotics of various types.

[¶16.] The vape pens are exactly that, vape pens. The pens were being sold in a store with several vape items that do not contain CBD or THC. Holding that these items were paraphernalia would create an absurd result.

[¶17.] The State further argued that since Epidiolex contained CBD and was a controlled substance under the CSA, that therefore, CBD was also a controlled substance. Transcript, p. 14-16. Again, since the State continues to rely on the state crime lab's legal analysis as law, this Court should also be made aware that the FDA has recently approved Epidiolex as a drug for epilepsy. U.S. Food and Drug, "FDA approves first drug comprised of an active ingredient derived from marijuana to treat rare, severe forms of epilepsy," June 25, 2018, https://www.fda.gov/newsevents/newsroom/pressannouncements/ucm611046.htm

[¶18.] Therefore, Phil contends he is innocent because as the DEA stated, the "mere presence of cannabinoids" in any product or derivative does not render it a controlled substance. Id., "Marijuana", May 22, 2018.

[¶19.] The State could not prove the illegality of the THC and CBD which was the basis for Count 1, 2, 4 and 5. Even the state crime lab admitted that the origination of the THC or CBD could not be proven.

[¶20.] Conclusion

[¶21.] As per the foregoing law and argument, Phil respectfully requests the Court reverse the decision of the District Court denying his motion to dismiss Count 1, 2, 4, and 5. The district court did not address the issue of the motion to suppress evidence in its Order. It simply dismissed it by title of the Motion and made no findings. Therefore, the issue of the motion to suppress evidence is not on appeal.

Respectfully submitted, this 4th day of September, 2018.

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CERTIFICATE OF SERVICE

Deanna F. Longtin, attorney at law, being of legal age, being first duly sworn certifies that on the 4th day of September, 2018, she served true and correct copies of the following documents:

1. **REPLY BRIEF OF APPELLANT**

Electronically through email to:

Charles Burke Neff
mcsa@co.mckenzie.nd.us

Dated this 4th day of September, 2018.

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