
 IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota,)	Supreme Court File No.
)	20180223
)	
Plaintiff and Appellee,)	Grand Forks County
)	Criminal No.
)	18-2017-CR-01417
v.)	
)	
)	
Shane L. Simundson,)	APPELLANT'S BRIEF
)	
Defendant and Appellant.)	

Appeal from the criminal judgment in Grand Forks
County district court, northeast central judicial district
Grand Forks, North Dakota the Honorable Donald Hager,
presiding.

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Statutes, Rules, Codes

N.D. Const. art. VI, § 6	¶ 1
N.D.C.C. § 29-28-03	¶ 1
N.D.C.C. § 29-28-06	¶ 1
N.D.C.C. § 39-08-01	¶¶ 3, 11, 12

Transcript References:

A jury trial was conducted on May 1, 2018. The transcript of that proceeding is referred to as [Tr.] in this brief.

JURISDICTION

[¶ 1] The Defendant, Shane L. Simundson, timely appealed the final criminal judgment arising out of the district court. This Court has appellate jurisdiction under N.D. Const. art. VI, § 6, and N.D.C.C. § 29-28-06 which states:

“An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03. An appeal may be taken by the defendant from:

1. A verdict of guilty;
2. A final judgment of conviction;
3. An order refusing a motion in arrest of judgment;
4. An order denying a motion for new trial; or
5. An order made after judgment affecting any substantial right of the party.”

STATEMENT OF THE ISSUES

[¶ 2] I. Whether the district court abused its discretion when it decided revocation was warranted.

STATEMENT OF CASE

[¶ 3] This is a criminal matter on direct appeal from northeast central judicial district, Grand Forks County criminal judgment. This case was before the district court in *State v. Simundson*, 18-2017-CR-01417. The information was filed with the court on July 10, 2017. The Defendant was charged and found guilty of having drove or been in actual physical control (APC) of a motor vehicle, in violation of N.D.C.C. § 39-08-01, a class B misdemeanor.

[¶ 4] Mr. Simundson was represented by Attorney Darla Schuman. On May 1, 2018, a jury trial was held in Grand Forks County. Mr. Simundson was found guilty of APC. He was sentenced to ten (10) days in the Grand Forks County Correctional Center, with one (1) day credit, 360 days of unsupervised probation, a chemical dependency evaluation, a fine of \$1,500.00, participation in the 24/7 monitoring program, and pre-trial 24/7 credit from March 28, 2017. Mr. Simundson timely appealed the district court's final judgment in this case.

STATEMENT OF FACTS

[¶ 5] On June 30, 2017, around noon, Mr. Simundson's dog got loose. Tr. p. 125. Mr. Simundson left his camper to look for his dog. *Id.* He was told that his dog was seen near his camper, at the gas station in Manvel, North Dakota. Tr. p. 126. Mr. Simundson spoke to an employee at the gas station and learned that his dog was at the humane society in Grand Forks, North Dakota. Tr. p. 127.

[¶ 6] Mr. Simundson arrived at the Humane Society in Grand Forks at some time after noon. Tr. p. 67. He argued with the staff, but eventually was given his dog. Tr. pp. 64-65. He drove back to his camper in Manvel and took a nap. Tr. p. 129. Mr. Simundson drank some alcohol in his home and then remembered he had left his lunch in his car. *Id.* About two hours after he got home, Mr. Simundson left his camper with his dog and walked over to where his car was parked, roughly 300 feet away, on privately owned land.

Tr. pp. 56-57, 129-130. Mr. Simundson's car was parked near where Dub Construction dumps dirt and gravel. Tr. p. 55. The area was not navigable by a sedan, such as Mr. Simundson's car, at that time. Tr. p. 58.

[¶ 7] Less than a minute after Mr. Simundson had entered his vehicle Dustin Dub approached his car. Tr. p. 131. Mr. Dub was concerned about Mr. Simundson and called the police after they spoke. Deputy Lee Mewes received a dispatch call at roughly 4:12 p.m. to Mr. Simundson's location. Tr. p. 75. Deputy Mewes indicated that the dispatch call was for a welfare check and he arrive about ten minutes after receiving the call. Tr. pp. 75, 109.

[¶ 8] Deputy Mewes approached Mr. Simundson in his car and knocked on the window. Tr. p. 79. He asked Mr. Simundson if he was alright. *Id.* Deputy Mewes then asked Mr. Simundson to get out of his car. Mr. Simundson got out of the car. Tr. p. 80. Deputy Mewes stated that he smelled an odor of an alcoholic beverage coming from Mr. Simundson. He then asked Mr. Simundson to perform field sobriety tests. Tr. p. 82.

[¶ 9] Deputy Mewes only performed one standardized field sobriety test, the horizontal gaze nystagmus. *Id.* The result of that test was inconclusive because Mr. Simundson did not move his eyes and Deputy Lee was not sure if he understood the directions for performing the test. Tr. p. 85. Mr. Simundson was eventually placed under arrest and taken to Grand Forks County Correction Center. Tr. p. 90. He was given an intoxilyzer

breath test which resulted in a reported blood alcohol concentration of .242 at 5:36 p.m.

LAW AND ARGUMENT

I. Whether the evidence was sufficient to convict Shane Simundson of driving under the influence.

Standard of Review

[¶ 10] The appellate standard of review regarding a claim of insufficiency of evidence is well-established. In *State v. Schmeets*, 2007 ND 197, ¶ 8, 742 N.W.2d 513, the court stated: “When the sufficiency of evidence to support a criminal conviction is challenged, this Court merely reviews the record to determine if there is competent evidence allowing the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction.” *State v. Igou*, 2005 ND 16, ¶ 5, 691 N.W.2d 213. The defendant bears the burden of showing the evidence reveals no reasonable inference of guilt when viewed in the light most favorable to the verdict. *Id.* “A conviction rests upon insufficient evidence only when no rational fact finder could have found the defendant guilty beyond a reasonable doubt after viewing the evidence in a light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor.” *State v. Knowels*, 2003 ND 180, ¶ 6, 671 N.W.2d 816.

[¶ 11] N.D.C.C. § 39-08-01 states:

A person may not drive or be in actual physical control of any vehicle upon a highway or upon public or private areas to which the public

has a right of access for vehicular use in this state if any of the following apply:

- a. That person has an alcohol concentration of at least eight one-hundredths of one percent by weight at the time of the performance of a chemical test within two hours after the driving or being in actual physical control of a vehicle.
- b. That person is under the influence of intoxicating liquor.

Mr. Simundson was in a private area, owned by Dub Construction, near his leased RV site, owned by Manvel Oil Co-Op. The public had no right of access for vehicular use in that area. The evidence the State presented at trial was that Mr. Simundson was parked where Mr. Dub generally dumps dirt for his construction business. Mr. Simundson was in fact parked where Mr. Dub intended to drop black dirt. Mr. Dub indicated Mr. Simundson's vehicle was in his way and should not have been parked there. Mr. Dub also explained that where Mr. Simundson was parked was not drivable by a sedan and that he would not take his commercial vehicle further into that area for fear of becoming stuck. The area Mr. Simundson was parked was not just private land but an area the public did not have a right to access.

[¶ 12] The public's right of access, in the context of N.D.C.C. § 39-08-01 does not exclude areas such as a private driveway or farmland, for example. Right of public access in section 39-08 is not comparable to a public easement. To the degree that a private parking lot is open to the general public for use to make deliveries or conduct business and a private driveway is open to the public to visit the owner, both examples achieve the meaning of

a public right of access. *State v. Mayland*, 2017 ND 244, ¶ 13, 902 N.W.2d 762. However, Mr. Simundson was parked in a private area that specifically was not open to the general public and did not receive deliveries or visitors. This was a private area that Mr. Dub conducted his business upon. It was not on the way to the main office of Dub Construction and was not even passable on June 30, 2017. Because this essential element of APC is not present there was not sufficient evidence to convict Mr. Simundson of APC.

CONCLUSION

[¶ 13] After looking at the evidence presented by the State in the light most favorable to the prosecution there was not sufficient evidence to convict Mr. Simundson of APC. The Defendant respectfully requests the Court to reverse his conviction and the judgment of the district court.

Dated this 10th day of September, 2018

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Shane L. Simundson,)	CERTIFICATE OF SERVICE
)	
Defendant and Appellant.)	

The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Appellant's Brief
Appellant's Appendix

And that said copies were served upon:

Carmell Mattison, Assistant State's Attorney, sasupportstaff@gfcounty.org
by electronically filing said documents through the court's electronic filing system.

Dated: September 10, 2018 KRAUS-PARR, MORROW, & WEBER

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The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Appellant's Brief
Appellant's Appendix

And that said copies were served upon:

Shane Simundson
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Grand Forks, ND 58201

by placing said documents with USPS, certified mail.

Dated: September 12, 2018 KRAUS-PARR, MORROW, & WEBER

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