IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff/Appellee, -vs- Joshua Ryan Taylor, Defendant/Appellant.	)	**Supreme Court No. 20190005** Richland Co. No. 39-2017CR064

APPEAL FROM THE ORDER DENYING MOTION FOR NEW TRIAL ENTERED DECEMBER 7, 2018, IN RICHLAND COUNTY DISTRICT COURT, SOUTHEAST JUDICIAL DISTRICT, STATE OF NORTH DAKOTA, THE HONORABLE BRADLEY CRUFF, PRESIDING

APPELLEE'S BRIEF

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STATEMENT OF ISSUES

[¶1] Whether the district court erred in finding that the Appellant's failure to learn about evidence at the time of trial was due to his lack of diligence.

[¶2] Whether the district court erred in finding that the weight and quality of Appellant's newly discovered evidence would likely not result in an acquittal.

STATEMENT OF THE CASE

[¶3] Joshua Ryan Taylor (hereinafter referred to as "Taylor"), appeals from an Order denying his Second Motion for a New Trial in the district court of Richland County.

[¶4] On February 16, 2017, Taylor was charged with Refusal to Submit to a Chemical Test. (Appellee Appendix 2, Index 1). On July 27, 2017, a jury trial was held and the jury returned a verdict of guilty. (Appellee App. 2, Index 16). On August 25, 2017, Taylor's Notice of Appeal for his first appeal to this Court was filed and docketed with the district court in Richland County. (Appellee App. 2, Index 17). On June 29, 2018, this Court affirmed the district court judgment. State v. Taylor, 2018 ND 132, 911 N.W.2d 905.

[¶5] On July 2, 2018, Taylor filed his First Motion for a New Trial. (Appellee App. 3, Index 39). The State submitted a Brief in Response to Defendant's motion on July 13, 2018. (Appellee App. 3, Index 41). On July 30, 2018, a hearing was held in the district court on Taylor's First Motion for a New Trial. (Appellee App. 3). On August 24, 2018, an Order was entered denying Taylor's First Motion for a New Trial. (Appellee App. 3, Index 43).

[¶6] Following the district court's denial of Defendant's motion, the Defendant filed additional motions, including a Motion to Amend Criminal Judgment on October 9, 2018; and a Motion to Extend Criminal Judgment Deadlines on

October 12, 2018. (Appellee App. 3, Index 50). Both motions were denied. (Appellee App. 3, Index 45, 50)

[¶7] Taylor filed his Second Motion for a New Trial on November 2, 2018. (Appellee App. 4, Index 58). The State filed a Brief in Response to Defendant's Second Motion for a New Trial on November 5, 2018. (Appellee App. 4, Index 64). A hearing was held on Taylor's Second Motion for a New Trial on December 6, 2018. (Appellee App. 4). The district court denied Taylor's motion at the conclusion of the hearing and explained the reasoning for the court's ruling on the record. (Appellee App. 28-33, Tr. Ps. 21-26). The district court entered an Order Denying Taylor's Second Motion for a New Trial on December 7, 2018. (Appellee App. 4, Index 69).

[¶8] On January 7, 2019, a Notice of Appeal was filed and docketed with the district court in Richland County for the appeal presently before this Court. (Appellee App. 4, Index 71). This is the appeal currently before this Court. This appeal is Taylor's second appeal to this Court from his criminal conviction in the present case. (Appellee App. 2, Index 17).

[¶9] The original deadline for the filing of Taylor's Brief was February 15, 2019. (Appellee App. 5). On February 14, 2019, Taylor filed a Motion to Extend Time. (Appellee App. 8). On February 14, 2019, Taylor's Motion was granted and the deadline for the filing for his Brief and Appendix was extended to March 12, 2019. (Appellee App. 11).

[¶10] Taylor filed a Second Motion to Extend Time on April 2, 2019. (Appellee App. 13). On April 10, 2019, Taylor's Second Motion to Extend Time was granted and the deadline for the filing of his Brief and Appendix was extended to April 30, 2019. (Appellee App. 18). On May 1, 2019, Taylor filed his Brief but not his Appendix. (Appellee App. 19). The deadline for the payment of a $25 surcharge was set for May 8, 2019, but Taylor did not pay the surcharge on or before May 8, 2019. (Appellee App. 21). The deadline for filing an appropriate Appendix was extended to May 18, 2019, but Taylor missed that deadline as well. (Appellee App. 21).

STATEMENT OF FACTS

[¶11] The facts underlying Taylor's criminal conviction are set forth in State v. Taylor, 2018 ND 132, 911 N.W.2d 905.

[¶12] At an evidentiary hearing for Taylor's Second Motion for New Trial filed in district court, Taylor offered exhibits, including a photograph and an invoice. (Appellee App. 4, Index 60, 63). No witnesses were called at the evidentiary hearing for Taylor's Second Motion for New Trial. (Appellee App. 24, Tr., P. 3, Ls. 15-16). Taylor argued that the photograph and the invoice were proof that the State's witness – Richland County Sheriff's Deputy Steve Gjerdevig ("Deputy Gjerdevig") – lied at trial about whether there was a rear-facing radar on Deputy Gjerdevig's patrol car. (Appellee App. 27, Tr. P. 15, Ls. 5-11). Taylor admitted that it was Taylor's cross-examination question that provoked Deputy Gjerdevig's response about the patrol car's equipment. (Appellee App. 25, Tr. P. 11, Ls. 14-21). Taylor stated that he was surprised by Deputy Gjerdevig's testimony (Appellee App. 26, Tr. P. 12, L. 11-18). Taylor further stated that information about Deputy Gjerdevig's patrol car equipment was newly discovered evidence, only discovered by Taylor after the trial. (Appellee App. 27, Tr. P. 15, Ls. 5-11).

STANDARD OF REVIEW

[¶13] This Court has outlined the standard of review on an appeal of an adverse ruling on a motion for a new trial. "A motion for a new trial because of newly discovered evidence rests in the discretion of the trial court, and we will not reverse a trial court's denial of a motion for a new trial unless the court abused its discretion." State v. VanNatta, 506 N.W.2d 63, 70, citing State v. Garcia, 462 N.W.2d 123 (N.D. 1990). "If the newly discovered evidence is of such a nature that it is not likely to be believed by the jury or to change the results of the original trial, the court's denial of the new trial motion is not an abuse of discretion." Ramsey v. State, 2013 ND 127, ¶ 10, 833 N.W.2d 478, quoting State v. Steinbach, 1998 ND 18, ¶ 22, 575 N.W.2d 193. "A trial court abuses its discretion if it acts arbitrarily, unreasonably, unconscionably, or when its decision is not the product of a rational mental process leading to a reasoned decision." Ramsey at ¶ 10, citing Wheeler v. State, 2008 ND 109, ¶ 15, 750 N.W.2d 446.

LAW AND ARGUMENT

[¶14] The State first argues that Taylor's appeal should be dismissed based on his failure to comply with the Court's deadlines, based on the unintelligible arguments in his Brief and based on his failure to file an Appendix.

[¶15] This Court has the authority to dismiss an appeal under N.D.R.App.P. 3(a)(2) if the appeal fails to provide the Court with the opportunity to meaningfully review alleged errors. State v. Noack, 2007 ND 82, ¶ 10, 732 N.W.2d 389. After Taylor was granted two extensions for the filing of his Brief, he missed deadlines for payment of a $25 surcharge and for the filing of his Appendix.

[¶16] Taylor's appellate brief is short on substance but long on grammatical, punctuation and citation errors. The shortcomings in Taylor's appellate brief can only permit this Court to guess at what Taylor might be attempting to argue. One example of an unintelligible argument is the sentence that begins on the bottom of Page 2 of Taylor's appellate brief and ends on Page 3:

> Referring back to United States v. Reed... prong c of the opinion quoted in defendant's affidavit in support of motion for new trial "(c) The party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial, (quoting United States v. Mazzanti, 925 F.2d 1026, 1029 (7 th Cir.1991)." in contrast of the lower courts opinion of prong 2 or b.

Appellant's Brief, ¶4.

[¶17] The second sentence on Page 4 of Taylor's appellate brief includes three quotation marks but no citations. These are examples of arguments for which it is difficult for the State to respond and nearly impossible for this Court to review.

[¶18] In Noack, this Court addressed a similar appellate filing by a pro se litigant. This Court stated:

> This Court has held '[a] pro se litigant is not granted leniency solely because of his status as such.' State v. Hilgers, 2004 ND 160, ¶ 19, 685 N.W.2d 109; accord Klose v. State, 2005 ND 192, ¶ 13, 705 N.W.2d 809 (concluding an appellant was not entitled to leniency due to his pro se status); Flattum-Riemers v. Flattum-Riemers, 2003 ND 70, ¶ 8, 660 N.W.2d 558. We have stated we are not ferrets and we 'will not consider an argument that is not adequately articulated, supported, and briefed.' E.g., State v. Haibeck, 2006 ND 100, ¶ 9, 714 N.W.2d 52. We will not engage in unassisted searches of the record for evidence to support a litigant's position. State v. Goulet, 1999 ND 80, ¶ 10, 593 N.W.2d 345. Judges are not 'expected to be psychics, with the ability to divine a party's true intentions. ... The parties have the primary duty to bring to the court's attention the proper rules of law applicable to a case.' Id. In Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), the Supreme Court stated: 'The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law.' Id. at 834 n.46.

Noack at ¶ 8.

[¶19] The State respectfully requests that Taylor's appeal be dismissed pursuant to N.D.R.App.P. 3(a)(2).

I. The district court did not err in its determination that Taylor's failure to learn about the evidence at the time of trial was due to his lack of diligence.

[¶20] Pursuant to Rule 33(a), N.D.R.Crim.P., "the court may vacate any judgment and grant a new trial to that defendant if the interest of justice so requires." Rule 33(a), N.D.R.Crim.P. "Any motion for a new trial based on newly

discovered evidence must be filed within three years after the verdict or finding of guilty and be supported by an affidavit." Rule 33(b)(1), N.D.R.Crim.P.

[¶21] Before a new trial may be ordered, the Defendant must prove four elements. In State v. VanNatta, 506 N.W.2d 63, 70, this Court stated:

> Generally, to get a new trial on the ground of newly discovered evidence the defendant must show that (1) the evidence was discovered after trial, (2) failure to learn about the evidence at the time of trial was not the result of the defendant's lack of diligence, (3) the newly discovered evidence is material to the issues at trial, and (4) the weight and quality of the newly discovered evidence would likely result in acquittal.

VanNatta at 70.

[¶22] Taylor argues that the district court incorrectly found that Taylor failed prong No. 2 in the four-part test cited above in VanNatta. However, in his appellate brief, Taylor does little more than make a broad assertion that the district court erred while making a passing reference to United States v. Reed, 986 F.2d 191, 192-193 (7th Cir. 1993).

[¶23] Taylor argued to the district court that he did not expect the State's witness to testify as he did at the jury trial regarding the equipment on the witness' patrol vehicle. The testimony that surprised Taylor was given in response to a question Taylor himself asked the witness. If Taylor was caught off guard by the witness' testimony, he could have either attacked the witness' credibility during trial or he could have moved for a continuance to allow Taylor to request additional discovery. "A continuance is the proper remedy when a party asserts that the

introduction of evidence constitutes unfair surprise." State v. Gross, 351 N.W.2d 428 (N.D. 1984).

[¶24] Taylor had an opportunity to question Deputy Gjerdevig at trial regarding the equipment on Deputy Gjerdevig's vehicle and Taylor did, in fact, question Deputy Gjerdevig on cross-examination. Taylor did not move the court for a continuance at trial.

[¶25] Taylor was charged with Refusal to Submit to a Chemical Test on February 16, 2017, and trial was held on July 27, 2017. Taylor did not file his Second Motion for New Trial, which is the basis for the present appeal, until November 2, 2018. Approximately 15 months after his trial, Taylor finally addressed an alleged issue regarding the testimony of the State's witness that could have been addressed during the trial, either through cross examination or by moving the district court for a continuance. Instead, Taylor conducted an investigation several months after the trial in an attempt to obtain a second "bite at the apple."

[¶26] The district court correctly ruled that Taylor failed Prong No. 2 of the relevant test because the information that Taylor presented to the district court in November 2018 is information available to Taylor either before or during the trial in July 2017. In explaining its reasoning for the denial of Taylor's motion, the district court told Taylor that "you're supposed to be prepared to impeach the witness then and there. Not 15 or 18 months later." (Appellee App. 30, Tr. P. 23, L. 6-7). It's the State's position that the district court's analysis was correct and

that Taylor's surprise at trial was due not to the discovery of new evidence but rather it was due to Taylor's lack of trial preparation.

[¶27] The district court did not abuse its discretion in finding that Taylor failed to meet his burden with regards to Prong No. 2 of the relevant test.

II. The district court did not err in finding that the weight and quality of newly discovered evidence would likely not result in an acquittal.

[¶28] Taylor argues that the district court incorrectly found that Taylor failed prong No. 4 in the four-part test cited above in VanNatta.

[¶29] "To grant a motion for a new trial or post-conviction relief application based on newly discovered evidence, the trial court 'must be satisfied that in all probability a new trial would result in a different verdict.' " Ramsey v. State of North Dakota, 2013 ND 127, ¶ 12, 833 N.W.2d 478, quoting State v. Hegland, 355 N.W.2d 803, 805 (N.D. 1984).

[¶30] In Taylor's Second Motion for New Trial filed in district court, he offered exhibits, including a photograph and an invoice. Taylor argues that the photograph and the invoice are proof that the State's witness, Deputy Gjerdevig, lied at trial about whether there was a rear-facing radar on his patrol car. Taylor further argued that these items were newly discovered evidence, only discovered by Taylor after the trial. Taylor did not call any witnesses at the evidentiary hearing on his Second Motion for New Trial to testify about whether the photograph and/or invoice he offered were in any way related to the specific vehicle that Deputy Gjerdevig was driving on February 16, 2017, when Taylor

was cited by Deputy Gjerdevig for Refusal to Submit to a Chemical Test. Taylor neither explained in his Appellant Brief how these items proved that the State's witness lied nor did he file an Appendix in order to permit appellate review of those items.

[¶31] In State v. Beaulieu, 2016 ND 128, 881 N.W.2d 654, a defendant argued that a district court erred in denying his motion for a new trial because, according to the defendant, the discovery of a new mug shot would have impeached the State's only witness, a police officer. Id. at ¶ 2, 7. This Court affirmed the district court's denial of the motion for a new trial in Beaulieu, stating:

> At trial, the officer testified he instructed Beaulieu to stop multiple times and Beaulieu did not stop. The mug shot does not impeach this material testimony. Rather, the mug shot only concerns tertiary, nonmaterial inconsistencies in the officer and Beaulieu's testimonies, such as when Beaulieu's face was bloodied. ... With only nominal materiality and impeachment value regarding the charge of refusal to halt, we cannot say the outcome of this case likely would have been different had Beaulieu presented the mug shot at trial.

Beaulieu at ¶ 8.

[¶32] Just as in Beaulieu, the issue of radar in the present case is of nominal materiality and impeachment value. Taylor was stopped by Deputy Gjerdevig on February 16, 2017, for failing to stop at a stop sign. State v. Taylor, 2018 ND 132, ¶ 2, 911 N.W.2d 905. He later was cited for a violation of N.D.C.C. §39-08-01(1), Refusal to Submit to a Chemical Test. Id. The existence of radar equipment has no bearing on whether Taylor stopped at a stop sign and has no bearing on whether Taylor refused a requested chemical test.

[¶33] The defendant in VanNatta also made an argument on appeal similar to the argument put forth by Taylor. VanNatta at 70. In VanNatta, this Court held that the newly discovered evidence in that case did not "bear directly on any of the elements of the offense, but may have provided a basis for impeaching" one of the State's witnesses. Id. This Court explained that "[g]enerally, purely impeaching affidavits are insufficient grounds to grant a new trial." Id., citing State v. McLain, 312 N.W.2d 343 (N.D. 1981).

[¶34] Taylor's evidence lacked the foundation to establish that it was related to the vehicle Deputy Gjerdevig was driving on February 16, 2017, and Taylor called no witnesses to testify at the evidentiary hearing regarding the photograph and invoice. At the hearing on Taylor's Second Motion for New Trial, the district court described Taylor's failed attempt to prove that the State's witness had lied, stating: "[T]his is almost throwing some stuff out there and hoping it will stick. ... Again, I don't know how you tie this vehicle, this equipment and stuff to Deputy Gjerdevig that night. You don't have that." (Appellee App. 31, Tr. P. 24, Ls. 1-7).

[¶35] The district court correctly found that Taylor's alleged newly discovered evidence did not successfully impeach the State's witness. The district court explained that it was possible that Taylor could have gathered evidence that might have impeached the State's witness but that the evidence he presented fell short of impeachment. The district court stated:

> You haven't since deposed [Deputy Gjerdevig] to find out the facts – what vehicle he was driving, what equipment it had. You're kind of hoping that

this is the case and what have you and I can't go on hope. I can't make that assumption to give you that benefit of the doubt.

(Appellee App. 31, Tr. P. 24, Ls. 7-11).

[¶36] Near the conclusion of the evidentiary hearing on Taylor's Second Motion for New Trial, the district court addressed the evidence Taylor presented at that hearing, stating: "[Y]ou have to present enough of a case to say Judge this is the evidence available to me and if I present it at trial we're going to have a different result and we're nowhere near that. It's speculation and assumptions and unsupported conclusions."

(Appellee App. 32, Tr. P. 25, Ls. 23-25; P. 26, Ls. 1-2).

[¶37] It is the State's position that the district court correctly found that the evidence presented by Taylor at the evidentiary hearing on Taylor's Second Motion for a New Trial was insufficient to justify the grant of a new trial.

[¶38] The district court did not abuse its discretion in finding that Taylor failed to meet his burden with regards to Prong No. 4 of the relevant test.

CONCLUSION

[¶39] For the foregoing reasons, the State respectfully requests that this Court affirm the district court's Order denying Taylor's Second Motion for a New Trial.

Dated this 30th day of May, 2019.

RESPECTFULLY SUBMITTED:

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STATE OF NORTH DAKOTA)
) SS
COUNTY OF RICHLAND)

IN DISTRICT COURT

SOUTHEAST JUDICIAL DISTRICT

State of North Dakota,

Plaintiff/Appellee,

-vs-

Joshua Ryan Taylor,

Defendant/Appellant.

AFFIDAVIT OF SERVICE BY MAIL

Supreme Court Case No. 20190005
Richland County Case No. 39-2017CR064

Linda Mauer, being duly sworn, deposes and says that she is above the age of eighteen years, not a party to nor interested in the above-entitled action, and that on the 30th day of May, 2019, she served the attached documents:

Appellee's Brief
Appellee's Appendix

upon the following by placing a true and correct copies thereof in a sealed envelope addressed to said party at the last known address as follows:

Joshua Ryan Taylor
604 8th Ave S #201
Wahpeton, ND 58075

and depositing the same, with postage prepaid, in the United States mail at Wahpeton, North Dakota.

Linda Mauer
Linda Mauer

Subscribed and sworn to before me this 30th day of May, 2019.

Megan E Kummer
NOTARY PUBLIC

MEGAN E KUMMER
Notary Public
State of North Dakota
My Commission Expires Apr 25, 2023

20190005
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAY 31, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,

Plaintiff,

-vs-

Joshua Ryan Taylor,

Defendant,

CERTIFICATE OF SERVICE BY EMAIL

Supreme Court No. 2019-0005
Richland Co. No. 39-2017CR064

I here certify that on the 31st day of May, 2019, true and correct copies of the **APPELLEE'S BRIEF AND APPELLEE'S APPENDIX** were served upon the following by emailing true and correct copies thereof to said party as follows:

Joshua Ryan Taylor
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DATED: May 31, 2019.

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