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FEB 17 2015

STATE OF NORTH DAKOTA

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellee, vs. 1986 Collins Fifth Wheel Camper VIN 1C93H2523HA17701 and $1737 U.S. Currnecy, ... Wayne Otto, Defendant, Interested Party and Appellant.	Supreme Court No. 20140406 Burleigh Co. No. 2014-CV-

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BRIEF OF APPELLANT

APPEAL FROM THE AMENDED FINDINGS OF FACT, CONSLUSIONS OF LAW, AND ORDER FOR JUDGMENT DATED NOVEMBER 7th, 2014 AND CORRESPONDING AMENDED JUDGMENT FORFEITING DEFENDANT CAMPER AND DEFENDANT CURRENCY TO THE BISMARCK POLICE DEPARTMENT BY THE DISTRICT COURT FOR THE EAST CENTRAL JUDICIAL DISTRICT, THE HONORABLE THOMAS J. SCHNEIDER PRESIDING, DATED THE 7th, DAY OF NOVEMBER, 2014

Wayne J. Otto, pro se
James River Correctional Center-#22092
2521 Circle Drive
Jamestown, ND 58401

[¶1] TABLE OF CONTENTS

[¶2] TABLE OF AUTHORITIES

The pro se Appellant has not cited any authorities in the Brief of Appellant.

[¶3] STATEMENT OF THE ISSUES

[¶4] **ISSUE NO. 1:** Did the Trial Court err in not allowing the Affidavit of Irene Ann Ferderer into testimony, or allowing Joan Otto to testify from personal knowledge as to the Affidavit of Irene Ann Ferderer?

[¶5] **ISSUE NO. 2:** Did the Trial Court err in finding that probable cause had been established that Defendant and Appellant camper and currency are forfeitable property?

[¶6] STATEMENT OF THE CASE

[¶7] This is an appeal from the Burleigh County Amended Judgment forfeiting Wayne J. Otto's ("Appellant") camper and currency entered by the Honorable Thomas J. Schneider dated November 7th, 2014 (Appendix ("A.") 3, Docket ("D.") 35; A. 38).

[¶8] On July 26th, 2012, Michael Bolme of the Bismarck Police Department conducted a knock and announce search warrant on alleged Appellant's camper ("camper"). (A.8). Controled substances were located during this search. (A.8-9).

[¶9] The camper and $1,737.00 United States Currency were seized by law enforcement officers on or about July 26, 2012, pursuant to the investigation of Appellant, for the criminal offense(s) of Possession of Marijuana with intent to Deliver and Possession of Methamphetamine with intent to Deliver. (A.6, ¶2).

[¶10] The State, by and through Dawn M. Dietz, Burleigh County States Attorney ("State") filed and served a Summons

(A.5) and Complaint (A.6-7) for forfeiture, along with an Affidavit of Michael Bolme (A.8-10), on or about March 26th, 2014. Appellant filed and served an answer (A.11-12) on or about April 17, 2014; a Notice and Endorsement of Witnesses (A.13-14) on or about August 26th, 2014, and Letter to the Honorable Thomas J. Schneider, dated August 26, 2014, (A.15), with an Affidavit of Irene Ann Ferderer (A.16-17). A hearing was held on September 22, 2014, at the Burleigh County Courthouse. (Transcript, ("T")(A.18-36)).

[¶11] The Court's Amended Finding of Fact, Conclusions of Law, and Order for Judgment forfeiting camper and #1737 U.S. Currency was filed November 7th, 2014. (A.3, D.34; A.37). The Judgment was also dated November 7th, 2014 (A.3, D.35; A.38) and entered November 7th, 2014 (A.3, D.35; A.38). The Notice of Appeal was filed November 5, 2014. (A.3, D.31; A.40).

[¶12] STATEMENT OF THE FACTS

[¶13] On or about July 26, 2013, the camper and $1737 United States Currency were seized by law enforcement officers, pursuant to an investigation of Appellant, for the criminal offense(s) of Possession of Marijuana with Intent to Deliver and Possession of Methamphetamine with Intent to Deliver. (A.1, D.1; A.6-7). The camper and U.S. currency were seized pursuant to the information executed in an affidavit from Detective Mike Bolme with the Bismarck Police Department. (A.1, D.1; A.6-7)(A.8-10).

[¶14] The State alleges that the camper is the sole property interest of Appellant pursuant to a notary sticker displayed in the back window of the camper at the time of seizure of the camper. (A.1, D.1; A.6-7).

[¶15] Appellant was charged and entered a conditional plea of guilty, on advice of Counsel, in which the North Dakota Supreme Court affirmed. (See, Burleigh County case 08-2012-CR-1764).

[¶16] The State filed and served a Summons (A.1, D.2; A.5) and a Complaint (A.1, D.1; A.6-7) for forfeiture of the camper and $1737 U.S. currency on or about March 26, 2014. Appellant filed and served his pro se Answer (A.2, D.10; A.11-12) on or about April 17, 2014.

[¶17] On or about August 26, 2014, Appellant filed and served a pro se Notice and Endorsement of Witnesses (A.2, D.20; A.13-14) endorsing Irene Ferderer, and Joan Otto as witnesses, on or about this same day Appellant filed and served an Affidavit of Irene Ann Ferderer (A.2, D.17; A.16-17) along with a letter to the Honorable Thomas J. Schneider, informing the Judge that Appellant planned to enter into evidence the Affidavit of Irene Ann Ferderer (A.2, D.16; A.15), this letter further advised that Appellant had served a copy of this Affidavit upon the State. (A.2, D.16; A.15). The State failed to file a timely objection as to this Affidavit being entered. Appellant entered this Affidavit as Irene Ann Ferderer is elderly and

most likely would not be able to be transported to the hearing on September 22, 2014, because of her illnesses, and the she was "not in any shape to be here" (A.30, line 23; T. at 13, line 23).

[¶18] A hearing was held, Joan Otto testified that she had borrowed the money from her mom (Irene Ann Ferderer) to give to Appellant to pay off the camper. (A.28, lines 6-14; T. at 11, lines 6-14). Joan Otto also brought a copy of the Affidavit of her mom, Irene Ann Ferderer, but the State objected and the Court refused to receive it, because of hearsay. (T. at 12, lines 2-25 and 13, line 1; A.29, lines 2-25 and A.30, line 1). At the end of Joan Otto's testimony the Court asked her if she brought written knowledge or proof, showing that her mother actually lent Joan Otto the money. (T. at 13, lines 14-19; A.30, lines 14-19).

[¶19] The camper and U.S. currency was forfeited (A.3, D.35; A.38). Appellant subsequently filed this appeal.

[¶20] LAW AND ARGUMENT

[¶21] Jurisdiction. Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provisions, the North Dakota legislature enacted.

[¶22] ISSUE-1: Did the trial Court err in not allowing the

Affidavit of Irene Ann Ferderer into testimony, or allowing Joan Otto to testify from personal knowledge as to the Affidavit of Irene Ann Ferderer?

[¶23] During the trial held September 22, 2014, Joan Otto stated, that Irene Ann Ferderer, an endorsed witness was "not in any shape to be here" (A.30, line 23; T. at 13, line 23). The Court should have allowed the Affidavit of Irene Ann Ferderer as testimony for the ailing elderly Irene Ann Ferderer, when Joan Otto attempted to present the Affidavit the Court stated, "The Court can't receive them,..." (A.29, line 25 and A.30, line 1; T. at 12, line 25 and 13, line 1). Had the Court examined the documents and Affidavit, the Court would have discovered that the State was served a copy of this Affidavit on or about August 27, 2014. (A.2, D.17-18; A.15-17), this being almost a month before trial.

[¶24] Clearly the State could have contacted Irene Ann Ferderer, from the address on the Service Document (A.2, D.17; A.15) and discovered that the funds seized and later forfeited belonged to her and had nothing to do with controlled substances.

[¶25] The ourcome of the trial would have been different had not the State objected to the Affidavit of Irene Ann Ferderer and had the court allowed the Affidavit, which was served upon the State and the Court almost a month prior to the trial, and was explained in the Service Document that Appellant planned

"to enter as Defense Exhibit-#50." (A.2, D.18; A.15).

[¶26] Appellant and Irene Ann Ferderer were denied their due process rights.

[¶27] ISSUE-2: Did the trial court err in finding that probable cause had been established that Defendant and Appellant camper and currency are forfeitable property?

[¶28] At trial Detective Mike Bolme of the Bismarck Police Department testified, Appellant was unaware that this witness was to testify as the State never endorsed him as a witness, therefore, Appellant was not properly prepared to question Detective Bolme.

[¶29] The court should not have allowed Detective Mike Bolme to testify at this hearing. Appellant was appearing by I-TV means and pro se and was unaware at the time of the September 22, 2014, hearing that the proper notice was not filed and served by the State to endorse Detective Mike Bolme as a witness. Had Appellant known that this Detective was going to testify, Appellant would have requested written interrogetories of this Detective.

[¶30] The State alleged that the camper is the sole property interest of Appellant pursuant to a notary sticker displayed in the back window of the camper. (A.1, D.1; A.6-7). Had the

State done any checking with the proper State Agency, it would have found out that in-fact the camper belonged to some-one other than Appellant, and that this other person had sold it to Joan Otto and she had a remaining balance of $1500 U.S. dollars to pay before she received legal title of the camper, from this other person. Further, investigation would have discovered that Joan Otto borrowed $1,500 U.D. dollars from her mom, Irene Ann Ferderer, which she gave to Appellant to pay off the camper, which Joan Otto was letting her "tmeporarily separated" (A.28, lines 20-21; T. at 11, lines 20-21), husband use as his home.

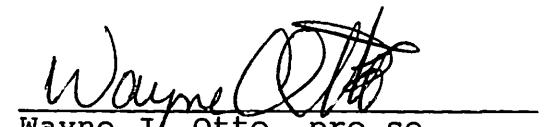
[¶31] Upon further investigation the State would have discovered that Joan Otto was completely unaware of the controlled substances inside the camper, and that Appellant had prepared a blank notary sticker without approval from any State Agency or State Personal and displayed such in the back window of the camper to move it to private property in order to have a place to live during the separation from Joan Otto.

[¶32] Clerarly $1,500 of the $1737 U.S. dollars seized and the camper did not legally belong to Appellant, and the court erred in finding probable cause to forfeit the $1737 U.S. Currency and the camper, and in doing so Joan Otto's, Irene Ann Ferderer and Appellant's Due Process rights have been violated.

[¶33] CONCLUSION

[¶34] For all the reasons stated above, the District Court erred in forfeiting the camper and $1737 U.S. currency. Therefore, Appellant prays this Court reverse the lower court's decision and remand this matter with instructions that the District Court vacate the Amended Judgment in this matter.

[¶35] Dated this 13 day of February, 2015.



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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

AFFIDAVIT OF SERVICE

Supreme Court No. 20140406
Burleigh Co. Court No. 2014-CV-00922

State of North Dakota, Plaintiff and Appellee
vs.
1986 Collins Fifth Wheel Camper
VIN 1C93H2523HA17701 and $1737
US Currency, Defendant

Wayne Otto, Interested Party and Appellant

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF STUTSMAN)

[¶1] Wayne Otto, being duly sworn on oath, deposes and states that he is of legal age and that on February 13, 2015, he served the Brief of Appellant and Appellant Appendix in the above matter by placing one (1) original of the same and seven(7) true and correct copies of the same in envelopes addresed as follows:

Office of the Clerk
North Dakota Supreme Court
600 East Boulevard Ave., Dept. 180
Bismarck, ND 58505-0530

and by placing true and correct copies of the same in envelopes addressed as follows:

Dawn Dietz, Assistant
Office of Burleigh County States Attorney
Burleigh County Courthouse
514 East Thayer Avenue
Bismarck, ND 58501

and depositing the same, with postage prepaid, in the United States Mail (Prison Mail Box System) at Jamestown, North Dakota.

Wayne Otto

Wayne Otto

JRCC-22092
2521 Circle Drive
Jamestown, ND 58401

[¶2] Subscribed and sworn to before me this 13 day of February, 2015, in Stutsman County, North Dakota.

PAULETTE OPDAHL
Notary Public
State of North Dakota
My Commission Expires July 28, 2020

Notary Public

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