

20150122

SUPREME COURT NO. 20150122
Burleigh County No. 08-2014-CV-00628

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

SEP 23 2015

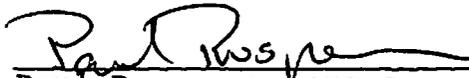
STATE OF NORTH DAKOTA

Paul Rusgrove,
Plaintiff and Appellant,
v.
Wayne Goter,
Defendant and Appellee.

REPLY BRIEF

Appeal from the Memorandum Opinion And Order For Summary Judgment dated March 5, 2015, and Judgment Of Dismissal with Prejudice dated March 9, 2015; the Honorable Michael G. Sturdevant, Presiding.

RESPECTFULLY SUBMITTED this 20 day of September. 2015.



Paul Rusgrove, pro se
James River Correctional Center-#19097
2521 Circle Drive
Jamestown, ND 58401

[¶1] ARGUMENT

[¶2] In this matter Wayne Goter, the above-named Defendant and Appellee ("Goter"), by and through his counsel, Steven Balaban, attorney at Law, filed a Brief Of Defendant And Appellee Goter, stating that Paul Rusgrove, the above-named Plaintiff and Appellant, pro se ("Appellant"), failed to include in his arguments or in his Appendix a potential witnesses affidavit. (See, Brief Of Defendant And Appellee Goter at ¶19, lines 1-5).

[¶3] Goter is mistaken, Appellant did in fact include this affidavit in his arguments. In fact Appellant brings just this issue before the Court. Appellant in his Brief Of Appellant Paul Rusgrove states:

"[¶46] Whether Rebecca S. Thiem, counsel for defendant, during the original proceeding, contacted Plaintiff-Appellant's endorsed witnesses, without the proper approval from the district court.

[¶47] It would seem that Defendant's Counsel had contacted both endorsed witnesses, without any approval of the Court or Appellant. And it would seem they discussed the pending case as the information provided and stated in the REPLY BRIEF OF WAYNE GOTER IN SUPPORT OF SUMMARY JUDGMENT MOTION (App. #70) is both explicit and significant in scope and nature concerning a conversation with both endorsed witnesses, including an Affidavit of J. Jean Delaney, and endorsed witness, as an exhibit. (See, App. #73).

[¶48] Appellant brought this irregularity by Defendant Counsel to the attention of the district court, (See, App. #66 at ¶8). But, it would also seem that the district court just wanted to remove this pro se lawsuit from his docket, because Appellant had "foolishly engaged in criminal conduct," and "now has chosen to relieve the tedium of his imprisonment by representing himself in this frivolous malpractice action against his former lawyer." (See, App. #31 at page 1)."

(See, Brief Of Appellant Paul Rusgrove at #46-#48). Further,

Appellant list's just this issue at ¶1CC), under table of contents, ISSUE, and also at ¶4CC under Statement Of The Issues.

[¶4] Appellant does concede that he did not include the Reply Brief Of Wayne Goter In Support Of Summary Judgment Motion (See, Amended Appendix #70). and Affidavit Of H. Jean Delaney. (See, Amended Appendix #73). But that this oversight was do to the photo-copying process here at the James River Correctional Center and not because Appellant did not want such before the Court.

[¶5] Appellant now corrects this error and included with this Reply Brief are the two missing documents, which have now been located.

[¶6] The Affidavit of H. Jean Delaney (Amended Appendix #73) was prepared at the request of Defendant Goter's trial attorney Rebecca S. Thiem, without any approval by the Court or Appellant to allow Ms. Thiem to contact either endorsed witness.

[¶7] Clearly from the Reply Brief Of Wayne Goter In Support Of Summary Judgment Motion (Amended Appendix #70) Ms. Thiem had an explicit and significant conversation with both endorsed witnesses, without any approval.

[¶8] It is Goter who does not address or argue this issue in

his Brief Of Defendant And Appellee Goter.

[¶9] Further, the District Court and Goter seem to think that it is OK to allow Appellant to be sentenced, pursuant to a Petition For Revocation Of Probation (App. #36) to an illegal sentence of imprisonment, because Appellant has a lengthy criminal record.

[¶10] Appellant was re-sentenced on a AA Felony probation violation, which this Court prior to the re-sentencing hearing on the probation violation, decided was not a cognizable offense under North Dakota statute (See, State v. Dennis, 2007 ND 87, 733 N.W.2d 241).

[¶11] It is undisputed that Appellant's appointed attorney at this re-sentencing hearing was aware of this Court's decision in Dennis. (See, App. #46 at lines 15-20). But yet Defendant Goter chose not to file the proper papers to correct the illegal sentence, and allowed Appellant to be re-sentenced pursuant to an illegal term of probation to a period of imprisonment, for a probation violation which could not be, because of this Court's decision in Dennis.

[¶12] At no time did Defendant Goter explain to Appellant that the original charge in this matter was not cognizable under the North Dakota statute which the state had charged Appellant out under.

[¶13] Now, when Appellant requests his day in Court to bring Defendant Goter face-to-face with his failures in this matter, all the District Court, Defendant Goter's attorneys and Defendant Goter want to argue is that Appellant has a lengthy criminal record.

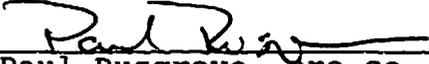
[¶14] CONCLUSION

[¶15] If Appellant was not indigent, Appellant would be able to hire the expert witnesses needed to show that it would be unreasonable for an appointed attorney representing an indigent Appellant to allow Appellant to be re-sentenced to an offense which was no longer cognizable under North Dakota law. But, because Appellant is indigent the District Court, Defendant Goter's attorneys and Defendant Goter argue that Appellant can not proceed.

[¶16] It would seem that an indigent person is only a second class citizen in the State of North Dakota and if you want justice in North Dakota you better have the money to buy it.

[¶17] Appellant's Due Process rights and right to effective assistance of counsel guaranteed under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution have been violated and it would seem that North Dakota thinks that OK if you are indigent.

[¶18] Dated this 20 day of September, 2015.


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[¶19] CERTIFICATE OF SERVICE

[¶20] I hereby certify that I served a true and accurate copy of the foregoing Amended Appendix Table of Contents, Appendix #70-#73, and Reply Brief, by United States Mail, upon:

Steven Balaban
Attorney at Law
Balaban Law Office
200 N. Mandan St.
Bismarck, ND 58501

[¶21] Dated this 20 day of September, 2015.


Paul Rusgrove