

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.)	

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 19th day of July, 2018.

/s/ Deanna F. Longtin
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[¶1.] Statement of Issues Presented for Review

[¶2.] 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.

[¶3.] Statement of the Case

[¶4.] This is an appeal from an order of the Northwest District Court dated October 18, 2017 denying a motion to dismiss and to suppress evidence. Appendix of Appellant (App.) 31.

[¶5.] The Defendant, Falesteni Ali Abuhamda, was charged with a seven count information as follows: Count 1: Delivery of a controlled substance analog based on the allegations that he delivered products containing CBD, Delta 9 and THC; Count 2: Possession of Tetrahydrocannabinols based on the allegations that he possessed numerous items of CBD and/or Delta 9, THC products held out for sale at his stores; Count 3: Possession of a controlled substance based on the allegations that he possessed Hashish; Count 4: Unlawful delivery, possession with intent to deliver, or manufacture with intent to deliver drug paraphernalia based on allegations that he sold vape pens for use with CBD and/or Delta 9, THC products; Count 5 : Unlawful advertisement of drug paraphernalia based on allegations that he advertised on Facebook various items for use of marijuana, CBD and/or Delta 9, THC; Count 6: Unlawful possession of drug paraphernalia based on the allegations that he possessed marijuana paraphernalia for storage, concealment and used marijuana himself; and Count 7: Possession of marijuana based on the allegations that he possessed just under 1 ounce of marijuana for his personal use. App. 17-19.

[¶6.] A preliminary hearing was held on July 20, 2017. The court found probable cause to hold the case over for trial. A Motion to Dismiss the counts alleging the illegality of CBD and Delta-9/THC products, specifically Count 1, 2, 4, and 5, and

to Suppress Evidence alleged in Count 3, 6, and 7, was filed on September 12, 2017. App. 20. A Response was filed on October 3, 2017. App. 29. A hearing was held on October 11, 2017. The court denied the Motion to Dismiss and filed its Order Denying Motion to Dismiss and Suppress Evidence on October 18, 2017. App. 31. The court did not specifically address the motion to suppress evidence or make findings.

[¶7.] A change of plea hearing was held on March 2, 2018 where the Defendant entered into two agreements with the state, a Pretrial Diversion Agreement on Counts 1, 2 and 5 and a plea agreement on Counts 3, 4, 6, and 7, both were conditioned on the right to appeal. App. 34. The court entered its Order Accepting Pretrial Diversion Agreement and Oder Deferring Imposition of Sentence on March 2, 2018. App. 33, 38.

[¶8.] The Defendant filed his Notice of Appeal with the Supreme Court of North Dakota on April 2, 2018. App. 47.

[¶9.] Statement of the Facts

[¶10.] The Defendant, Falesteni Ali Abuhamda (hereinafter “Phil”) is the owner of two locations of stores called the Tobacco Depot. One store is located in Watford City, ND and the other is located in Alexander, ND. On March 31, 2017, a search warrant was executed under the direction of then McKenzie County Assistant State’s Attorney Todd Schwarz, drafted by Ryan Chaffee of Northwest Narcotics Task Force, and signed by District Court Judge Robin A. Schmidt. The Warrant allowed peace officers of the state to search both above named properties, including digital evidence located within the premises.

[¶11.] On April 5, 2017, law enforcement executed the Warrant and seized all items from the shop that contained cannabinoids, specifically cannabidiol (hereinafter “CBD”) products, under the assumption that they were controlled substances, and therefore allegedly illegal substances. App. 6.

[¶12.] Cannabinoids are naturally-occurring compounds found in the cannabis plant. Docket Id. 20, 26. Two of these compounds are the subject of the Warrant, specifically CBD and Tetrahydrocannabinol (hereinafter “THC”) also known as THC. THC is the primary psychoactive component of marijuana. In contrast, CBD is non-psychoactive and, rather, produces an antagonistic effect. Id. THC is also referred to as “Delta-9” pursuant to N.D.C.C. § 19-03.1-05(5)(n)(1).

[¶13.] CBD is extracted from the stalks of mature plants. Docket Id. 20, 26, 28, 29. It is found on plant trichomes, which are epidermal outgrowths of various kinds, on the plant, similar to hairs. Id.

[¶14.] During the execution of the Warrant, law enforcement confiscated several products from Phil's stores, including items alleged to contain CBD, Delta 9 and THC, and items referred to as vape pens. App. 9. Other alleged illegal items were found in his private living quarters, but they are not subject of this appeal.

[¶15.] Phil was subsequently charged with several counts on May 15, 2017 as follows:

- a. Count 1: Delivery of a controlled substance analog based on the allegations that he delivered products containing CBD, Delta 9 and THC.
- b. Count 2: Possession of Tetrahydrocannabinols based on the allegations that he possessed numerous items of CBD and/or Delta 9, THC products held out for sale at his stores.
- c. Count 3: Possession of a controlled substance based on the allegations that he possessed Hashish.
- d. Count 4: Unlawful delivery, possession with intent to deliver, or manufacture with intent to deliver drug paraphernalia based on allegations that he sold vape pens for use with CBD and/or Delta 9, THC products.
- e. Count 5: Unlawful advertisement of drug paraphernalia based on allegations that he advertised on Facebook various items for use of marijuana, CBD and/or Delta 9, THC.
- f. Count 6: Unlawful possession of drug paraphernalia based on the allegations that he possessed marijuana paraphernalia for storage, concealment and used marijuana himself.

g. Count 7: Possession of marijuana based on the allegations that he possessed just under 1 ounce of marijuana for his personal use.

App. 6-8, 9-16.

[¶16.] The preliminary hearing was held on July 20, 2017. The District Court found there was probable cause to hold the charges over for trial.

[¶17.] Phil then filed a Motion to Dismiss and Suppress Evidence on September 12, 2017. App. 20. The Motion to Dismiss pertained to Counts 1, 2, 4, and 5 alleging the illegality of Phil's actions and CBD and/or Delta 9, THC. Phil's Motion alleged the State could not prove its case based on legal analysis of the facts alleged in the information and pursuant to statements made by law enforcement during the preliminary hearing, the statutes that the charges were brought under, and evidence including scientific explanations, Opinion of the United States Court of Appeals for the Ninth Circuit, DEA Clarification, and lab results. Docket Id. 26-33.

[¶18.] Phil argued specifically that during the preliminary hearing, Task Force Officer Ryan Chaffee testified that it was possible that the THC could possibly come from the legal parts of the marijuana plant. Docket Id. 31, p. 23, l. 20-21.

[¶19.] The State responded and provided a letter from the U.S. Department of Justice addressed to Charlene Rittenbach, a forensic scientist with the North Dakota Office of Attorney General Crime Laboratory Division, dated May 24, 2017. App. 29 and Docket Id. 41. The State also provided an article from the Food and Drug Administration website title "FDA and Marijuana: Questions and Answers" that was relied upon by the State as the law. App. 42.

[¶20.] A hearing was held on October 11, 2017. During the hearing, the state's witness Mr. LaMonte Jacobson, forensic scientist from the North Dakota office of the Attorney General Crime Laboratory Division, stated very clearly that the State could not prove what part of the plant the CBD or THC came from. App. 50-51.

Attorney Longtin: And in that letter that was received by – I believe it was to Mrs. Rittenbach -- they actually didn't include the entire law with the exception part, did they?

Mr. Jacobson: May I look at it please? Do you have a copy?

Attorney Longtin: Yes.

Court: MS. LONGTIN: Do you have a copy for him? (The witness is provided with a copy)

Mr. Jacobson: Well, it appears to me that they have some codes of -- of Title 21 CFR which, I mean, are the Controlled Substances Act.

Attorney Longtin: Okay. They didn't include the wording that says that there are items to be excluded, like the mature stalks and products from the mature stalks, did they?

Mr. Jacobson: No.

Attorney Longtin: So under that exception to the law isn't it possible that THC could come from products from that exclusion?

Mr. Jacobson: It's possible.

Attorney Longtin: Is there any way at your lab that you can decipher where or what part of that plant, that marijuana, the THC came from?

Mr. Jacobson: No.

Attorney Longtin: Is it possible to decipher what part of the plant the CBD came from?

Mr. Jacobson: No.

Attorney Longtin: Is it possible to determine if the CBD compound is either synthetic or naturally occurring?

Mr. Jacobson: No.

App. 50-51.

[¶21.] The district court took the issue under advisement and issues its Order on October 18, 2017 denying the motion to dismiss. The Order did not address the suppression issue.

[¶22.] On March 2, 2017, Phil entered into two separate conditional agreements with the State as follows:

- h. Pretrial Diversion Agreement: Suspending prosecution of Count 1, 2, and 5 for a period of thirty (30) months on the following conditions:
 - i. That the Defendant be placed on supervised probation with the conditions of the Appendix A attached.
 - ii. That the Defendant not commit a felony, or misdemeanor during the period.
 - iii. That the Defendant pay to the Watford City Public School the amount of \$2,500 to be used for drug addiction/use education within thirty (30) months of the order accepting this agreement.
 - iv. That the Defendant reserved his right to appeal from the Order Denying the Motion to Dismiss and Suppress Evidence based on the following:

- v. If the Defendant prevails on appeal, he shall be allowed to terminate the Pretrial Diversion Agreement and the State shall make a motion to dismiss the charges.
- vi. If the Defendant does not prevail on appeal, the disposition would be effective pursuant to the terms, as though the order accepting the agreement was entered on the date of the N.D. Supreme Court Opinion.
- vii. If no appeal is take, the disposition would be entered effective thirty (30) days from the date of entry of the order accepting the agreement.

App. 34-36.

[¶2] The second agreement deferred imposition of sentence for Count 3, 4, 6, and 7 for a period of two years, based on the highest C felony charge of Count 4 and was put on the record orally. The remaining charges were entered or amended to misdemeanors. This plea agreement was also based on the following conditions for appeal as stated above.

[¶3] As part of the plea agreement for Count 4, since Phil plead guilty to possession of the vape pens as drug paraphernalia, the State would return to him the vape pens confiscated from his stores.

[¶23.] The recommended agreements were presented to the District Court and accepted. App. 33, 38.

[¶24.] Phil filed his Notice of Appeal on April 2, 2018. App. 47.

[¶25.] Argument

[¶26.] a. **The District Court erred when it denied the Motion to Dismiss because the information was insufficient due to its inaccurate allegations about the illegality of the CBD and THC products possessed by the Defendant.**

[¶27.] This Court has held that it will not reverse preliminary findings of the trial court, “if after resolving conflicts in the evidence in favor of affirmance, sufficient competent evidence exists that is fairly capable of supporting the court’s findings and the decision is not contrary to the manifest weight of the evidence.” State v. Smith, 2010 ND 89, ¶6, 781 N.W.2d 650 (citing State v. Blunt, 2008 ND 135, 751 N.W.2d 692). Pursuant to N.D.R.Crim.P. 12(b)(3)(B), a motion to dismiss must allege “a defect in the indictment, information, or complaint.” “The purpose of a motion to dismiss is to test the sufficiency of the information or indictment. It is not a device for summary trial of the evidence, and facts not appearing on the face of the information cannot be considered.” State v. Bornhoeft, 2009 ND 138, ¶8, 770 N.W.2d 270 (citing State v. Howe, 247 N.W.2d 647, 652 (N.D. 1976)).

[¶28.] The Order Denying Motion to Dismiss and Suppress Evidence (hereinafter “Order”) should be reversed because it failed to consider the sufficiency of the information and instead weighed the evidence. In addition, the court’s decision is contrary to the manifest weight of evidence because the state’s own evidence raised a material legal issue that required dismissal of Count 1, 2, 4, and 5. Phil did not allege factual discrepancies his Motion to Dismiss and Suppress Evidence (hereinafter Motion). Phil alleged that there were legal issues surrounding each count, specifically any counts regarding CBD and products to be used with CBD, as well as THC.

[¶29.] The district court erred because it weighed the evidence presented by the State against the evidence presented by Phil. The Order stated that it was not

convinced that Phil’s argument that CBD and THC could not be proven to be legal substances under North Dakota Law. The court goes on to state that it “finds Mr. Jacobson’s testimony credible and reliable on these matters.” App. 31.

[¶30.] However, the issue before the court was not to determine a factual analysis about each of the counts. Phil raised legitimate legal issues about whether the State could prove that CBD and THC came from the illegal part of the marijuana plant. Phil’s argument essentially was that even if the State proved the allegations, there was no illegal activity. The allegations of Count 1, 2, 4, and 5 of the information were insufficient on their face.

[¶31.] North Dakota Rules of Criminal Procedure 7(c)(1) states,

“Nature and Contents.

(1) In General. The indictment or the information must name or otherwise identify the defendant, and must be a plain, concise, and definite written statement of the **essential facts** constituting the elements of the offense charged.” (emphasis added).

[¶32.] Under N.D.C.C. 19-03.1-01(18), the definition of marijuana is:

“ ‘[m]arijuana’ means all parts of the plant cannabis whether growing or not; the seeds thereof; the resinous product of the combustion of the plant cannabis; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds. The term does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of mature stalks, fiber,

oil, or cake, or the sterilized seed of the plant which is incapable of germination.”

[¶33.] Under federal law, specifically Title 21 U.S.C. Section 802(16) the definition of marijuana states,

“[t]he term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.”

[¶34.] The state and federal law has an exception to the illegality of marijuana which clearly states that the mature stalks of the marijuana plant, fiber produced from such stalks, oil or cake made from the seeds, and any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks, fiber, oil, or cake, or sterilized seed is NOT illegal.

COUNT 1:

[¶35.] Count 1 states that Phil “willfully delivered a controlled substance analog . . .” App. 17. The issue is not whether Phil delivered an item. The issue is whether the product the State is alleging Phil delivered falls under the definition of a

controlled substance analog. In this count, the State alleged that Phil delivered products containing CBD, Delta 9 and THC.

[¶36.] First, Delta 9 is another name for a form of THC. N.D.C.C. § 19-03.1-05(5)(n)(1). It is not a different substance than THC.

[¶37.] Second, CBD does not fall under any North Dakota statute as an illegal substance, and certainly not the statutes cited by the State in the information. Phil argued this in his Motion reasoning that CBD is not an illegal substance in North Dakota because it simply does not fall under any statute. N.D.C.C. refers to synthetic cannabinoids, but it does not refer to natural. N.D.C.C. § 19-03.1-05(5)(o).

[¶38.] Phil argues that CBD is a component of marijuana that should be exempted by the statute, or at the very least, that it cannot be proven that CBD is a component of the illegal part of the marijuana plant.

[¶39.] During the hearing on the Motion, Phil's argument was supported by the State's own witness, Mr. Jacobson, during the hearing. App. 50-51. Mr. Jacobson's testimony stated that it could not be proven which part of the marijuana plant the CBD came from. *Id.* He stated that it could not be proven which part of the plant the THC came from. *Id.*

[¶40.] In addition, the allegations of Count 1 are impossible to defend at trial because it does not state specifically which products Phil allegedly possessed. There were several items seized by law enforcement, and some of those items did NOT contain CBD, or Delta-9, or THC. App. 9-15.

[¶41.] Therefore, Count 1 should have been dismissed because the allegations of the information are insufficient because the legal analysis of the State cannot be proven.

COUNT 2:

[¶42.] Count 2 charges Phil with possession of tetrahydrocannabinols (THC).

However, the allegations of the information allege Phil “possessed numerous items of CBD and/or Delta 9, THC products . . .” App. 17. Again, this is an insufficient charge because CBD is not tetrahydrocannabinols. N.D.C.C. § 19-03.1-05(5)(n)(1). CBD and THC are completely different cannabinoids of the marijuana plant. CBD and Delta-9 are completely different cannabinoids of the marijuana plant. It is not legally possible to charge possession of CBD under the law regarding THC. In addition, the facts of Count 2 are based on a statement of possessing CBD “*and/or*” THC, which is insufficient for a factual basis of an information because it is vague and ambiguous. App. 17. It is unclear if Phil is being charged under Count 2 for CBD, THC, or Delta-9 or all of the above.

Again, several items were confiscated and not all the items contained any of these substances.

[¶43.] This was not an issue of credibility of the weight of the evidence or factual dispute that was brought before the court in the Motion. This is an issue regarding the State’s legal analysis and the insufficiency of Count 2 of the information.

[¶44.] Furthermore, pursuant to Mr. Jacobson’s testimony, the substances listed in this count cannot be proven to come from the illegal part of the marijuana plant. App. 50-51.

[¶45.] CBD is not listed as an illegal substance under North Dakota law. CBD is not a form of THC and should not have been charged under this statute. Count 2 should have been dismissed as it is insufficient on its face because it incorrectly alleges CBD is illegal under the law for THC when clearly CBD and THC are not the same substance.

COUNT 4:

[¶46.] Count 4 charges Phil with unlawful delivery of drug paraphernalia alleging the he knew or should have reasonably known the vape pens he sells in his tobacco shop would be used to ingest or inhale a controlled substance; therefore, making them drug paraphernalia. App. 18. The factual basis of this charge is that “on 3/8/7, the defendant sold vape pens for use with CBD and/or Delta 9,THC products that he also sold to an undercover agent at some time.” Id. There is no factual basis to these allegations. It is pure speculation that the undercover agent may use the vape pens for inhaling or ingesting the products purchased some time before that. This analogy creates an absurd result and injustice that was improperly upheld by the court. As argued in the Motion, Phil owns a tobacco shop where he sells legal products that use vape pens to ingest or inhale. Once a customer leaves Phil’s shop, he has no knowledge of what that customer might use the product for. The district court erred when it found that it was a matter for a jury to determine whether the vape pens were drug paraphernalia. The facts alleged in the information were that the vape pens and the allegedly illegal substances were not even purchased. The court’s decision is not based on the facts appearing on the face of the information and the decision is contrary to the manifest weight of the evidence. Therefore, Count 4 was clearly insufficient in its factual basis and should have been dismissed.

COUNT 5:

[¶47.] Count 5 charges Phil with unlawful advertisement of drug paraphernalia stating “the defendant knew or reasonably should have known that the purpose of the advertisement, in whole or in part, was to promote the sale of objects designed or intended for use as drug paraphernalia . . .” App. 18. The factual allegations of

Count 5 are “from January, 2017 to 4/5/17, the defendant advertised (on Facebook) *various items* for use of Marijuana, CBD and/or Delta 9 TEC, that he also admitted he used himself for ingesting marijuana.” *Id.* (emphasis added). These facts again are speculative as to what the items were intended to be used for and what items the count refers to. There is no factual basis alleged that if proven would find Phil guilty of this charge. Again, Phil owns and operates a tobacco shop. Count 5 does not allege any factual basis to prove illegal activity occurred. The information is insufficient as to Count 5 as it speculates what the advertised “various items” could be used. The district court erred when it failed to dismiss Count 5 as requested in the Motion.

[¶48.] The State has the burden to prove each and every count in the information, and by its own evidence presented at the hearing on October 11, 2017, it could not prove the illegality of the products alleged in the information, specifically Count 1, 2, 4, and 5.

[¶49.] Furthermore, Phil offered evidence of the technical and scientific information provided by the Drug Enforcement Agency, the same agency the State had been relying on for direction, to explain the differences in CBD and THC, and that it is scientifically impossible to prove the origination of the substance. Docket Id. 29.

[¶50.] The State cannot prove its case as to Count 1, 2, 4, and 5 because the information is insufficient. It is technically and scientifically impossible for the State to prove its case pursuant to the laws of North Dakota, the information as charged, and the evidence presented to the district court by the State and Phil. Counts 1, 2, 4, and 5 should be dismissed.

[¶51.] The burden of proof is on the State to prove that the Defendant acted in an illegal manner in a criminal action. This is not a new burden. The state's own witness admitted that it could not be proven if the CBD and THC came from the legal or illegal part of the marijuana plant.

[¶52.] The court did not look at the legal analysis and failed to analyze the legal issue at hand for Count 1, 2, 4, and 5. Instead the court took Mr. Jacobson's testimony as law and based its decision on his testimony that CBD found in the items tested were illegal, even though it could not be proven.

Public policy:

[¶53.] The DEA has attempted to give law enforcement and government clarity by issuing several statements, one specifically as the Final Rule. Docket Id. 29. However, the DEA has unintentionally misled the law enforcement community by issuing these confusing directives. These directives have been the subject of several lawsuits in the Circuit Court of Appeals for the Ninth Circuit in which Hemp Industries Association has brought action against the Drug Enforcement Agency regarding these confusing directives. Docket Id. 28.

[¶54.] In a more recent case, Hemp Industries Association, et al., v. U.S. Drug Enforcement Administration, Case No. 17-70162, during oral argument on February 15, 2018, the Circuit Court of Appeals referenced law enforcement in North Dakota and asked the DEA about the prejudicial effect that the DEA's statements have had on innocent people being charged wrongfully. The DEA indicated that they have let law enforcement know what is to be done with these products. However, that statement appeared to be in direct contradiction of what has actually occurred in this case.

[¶55.] The issue before this Court is one that has profound effect on people throughout our country that have any involvement with CBD or CBD products, including business owners, growers, buyers, sellers, customers, doctors and the medical profession, manufacturers and children that may be benefitting from the use of these products.

[¶56.] This issue appears to be one that our United States Congress should be reviewing, not a district court in North Dakota, and should never have had to be put before this Court, but it is.

[¶57.] **Conclusion**

[¶58.] 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 19th day of July, 2018.

/s/ Deanna F. Longtin

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**ATTORNEY FOR DEFENDANT/
APPELLANT**

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Plaintiff and Appellee,)
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Falesteni Ali Abuhamda,)
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Defendant and Appellant.)

CERTIFICATE OF SERVICE

Deanna F. Longtin, attorney at law, being of legal age, being first duly sworn certifies that on the 19th day of July, 2018, she served true and correct copies of the following documents:

- 1. BRIEF OF APPELLANT**
- 2. APPENDIX OF APPELLANT (in 3 parts)**

Electronically through email to:

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

Dated this 19th day of July, 2018.

/s/ Deanna F. Longtin

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