ORIGINAL

IN THE SUPREME COURT

OF THE STATE OF NORTH DAKOTA

20000084

JUL 12 '00

The State of North Dakota,	)	Supreme Court No. 20000084
	)	
Plaintiff/Appellee	)	
	)	Burleigh Co. No. 08-99-K-02230
v.	)	
	)	
George Gleeson,	)	
	)	
Defendant/Appellant	)	

BRIEF FOR APPELLANT

Appeal Taken from the Judgment of Conviction
Dated March 23, 2000
Burleigh County District Court Case No. 08-99-K-02230
South Central Judicial District
The Honorable Robert O. Wefald, Presiding

Submitted by:

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ISSUE PRESENTED FOR REVIEW	iii
STATEMENT OF THE CASE	1
ARGUMENT	
I. THE TRIAL COURT COMMITTED AN OBVIOUS ERROR REQUIRING REVERSAL OF GLEESON'S CONVICTION BY FAILING TO INTERRRUPT THE TRIAL TO ORDER A COMPETENCY EVALUATION FOR GLEESON.	5
CONCLUSION	9

TABLE OF AUTHORITIES

	Page
CONSTITUTIONAL PROVISIONS:	
Fifth Amendment to the United States Constitution	7,9,10
Article I, Section 12, North Dakota Constitution	7,9,10
FEDERAL CASES:	
Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966)	6
STATE CASES:	
State v. Guatney, 207 Neb. 501, 299 N.W.2d 538 (1980)	8
State v. Kraft, 413 N.W.2d 303 (N.D. 1987)	9
State v. Miller, 388 N.W.2d 522 (N.D. 1986)	9
State v. Olander, 1998 ND 50, 575 N.W.2d 658 (1998)	10
State v. Smith, 1999 ND 109, 595 N.W.2d 565 (1999)	10
State v. Storbakken, 246 N.W.2d 78 (N.D. 1976)	6
State v. Vannatta, 1993 ND 165, 506 N.W.2d 63 (1993)	7,8
STATUTES:	
Section 12.1-04-04 North Dakota Century Code	7
Section 12.1-04-06 North Dakota Century Code	5,10
COURT RULES	
Rule 12(2)(b)(1) North Dakota Administrative Rules	8-9
Rule 52, North Dakota Rules of Criminal Procedure	9,10

ISSUE FOR REVIEW

I. WHETHER THE TRIAL COURT COMMITED OBVIOUS ERROR REQUIRING REVERSAL OF GLEESON'S CONVICTION BY FAILING TO INTERUPT THE TRIAL TO ORDER A COMPETENCY EXAMINATION FOR GLEESON.

STATEMENT OF THE CASE

The Defendant and Appellant, George Gleeson, "hereinafter referred to as "Gleeson") has filed this appeal from a judgment of conviction entered in the Burleigh County District Court on March 23, 2000, for the offense of Driving While License is Revoked. (See North Dakota Uniform Complaint and Summons No. 3945894, Appendix Page 2, and Order, Appendix Page 5). The only ground raised on appeal by Gleeson's counsel is whether the trial court committed an obvious error in not halting the jury trial and ordering, without request from either party to do so, a competency evaluation for Gleeson.

Gleeson was arrested by Burleigh County Deputy Sheriff Lonnie Quam on July 15, 2000, for the offense of Driving While License Revoked. (Trial Transcript, pages 26-31) At the time of his arrest, Gleeson told Quam that he, Gleeson, had been trying to get his license cleared, but was having problems with the licensing agency. (Trial Transcript, page 31, lines 14-16; page 32, lines 18-20) He made his initial appearance on this charge in the Burleigh County District Court on July 27, 1999. Gleeson indicated some confusion over the charge during his initial appearance. (Initial Appearance Transcript, page 5, lines 13-16). Gleeson also indicated he had recently been evaluated by some doctors. (Initial Appearance Transcript, page 6, lines 9-14).

Gleeson was scheduled to appear in court for a pretrial conference on September 13, 1999, but failed to appear, apparently because he believed his attorney needed more time to prepare Gleeson's defense. (Pretrial Transcript,

page 2, lines 5-9; page 6, line 21 to page 7, line 2). Gleeson did appear for a pretrial conference in this case on October 5, 1999. (See, generally, Pretrial Transcript). The first order of business at the pretrial conference was whether Gleeson's court-appointed attorney should be permitted to withdraw as Gleeson's counsel, apparently because Gleeson had expressed an opinion that his counsel was ineffective and inadequate. (Pretrial Transcript, page 1, line17, to page 2, line 4). In response to this motion, Gleeson was permitted to make a statement to the trial court that made less than perfect sense. (Pretrial Transcript, page 2, line 10, to page 3, line 25). Gleeson indicated he had been in veterans' facilities in Washington, D.C. and Fargo, and that the pending criminal charge was causing him unnecessary stress, a heart condition, and ongoing high blood pressure, not to mention foot problems that were also a consequence of the "bogus charges", and chronic anxiety. (Pretrial Transcript, page 3, lines 14-25; page 6, lines 4-12). When the trial court got things back on track by asking Gleeson whether he wanted his court-appointed counsel to represent him, Gleeson indicated that his attorney would be all right with him, but then Gleeson went on to disparage his court-appointed counsel, both past and present. (Pretrial Transcript, page 4, line 11, to page 5, line 7).

After two postponements, and one reassignment of judge, Gleeson's case went to trial on March 23, 2000. Diane Frafjord, a keeper of records from the Drivers' License Division of the North Dakota Department of Transportation (DOT), testified that the official records of that department indicated Gleeson's driving privileges had been revoked since October 8, 1998. (Trial Transcript, page

36, line 12) In obvious awareness that DOT was seeking to revoke his driving privileges, Gleeson had asked for a DOT hearing for that date, but had failed to appear for the hearing. (Trial Transcript, page 37, lines 6-12) Frafjord further testified that a copy of the order of revocation had been mailed to Gleeson's address and had not been returned. There was no evidence presented during the State's case-in-chief that a notice of the DOT hearing regarding revocation of Gleeson's driving privileges had ever been mailed to or received by Gleeson. (Trial Transcript, page 35, line 1, to page 37, line 23). Gleeson's counsel moved for a judgment of acquittal at the conclusion of the State's case-in-chief. This motion was denied by the trial court. (Trial Transcript, page 43, lines 5-12).

Immediately before the presentation of the defense for Gleeson, his counsel reported to the trial court that Gleeson had apparently filed ethical complaints against the prosecutor and Gleeson's defense counsel. Moreover, Gleeson had also filed judicial complaints against the trial judge and the judge who had conducted Gleeson's initial appearance. (Trial Transcript, page 44, lines 3-13). Gleeson's counsel objected to proceeding with the trial under these circumstances. (Trial Transcript, page 44, lines 12-14). However, the trial court, apparently anxious to conclude the trial and case as soon as possible, ignored the ethical complaints, and ordered that counsel for the State and for Gleeson would remain on the case, as would the trial judge. (Trial Transcript, page 45, lines 1-6, and lines 11-15) The trial court made a summary conclusion that Gleeson's complaints against counsel and the court were "unjustified". (Trial Transcript, page 45, lines 7-10). Gleeson indicated this was all right with him: he wanted a jury decision

before he got "further aggravated". (Trial Transcript, page 45, line 18, to page 46, line 4).

Gleeson testified in his own defense. Gleeson testified that he never received notice of the DOT hearing he had requested. However, on direct examination, Gleeson testified that he had received actual notice, before his July 15, 1999, arrest, that his driving privileges had been revoked. (Trial Transcript, page 48, lines 13-16; page 49, lines 22-23). Gleeson's counsel, apparently dumbfounded by this answer, asked Gleeson how he could claim he had not received notice of his suspension. (Trial Transcript, page 50, line 7). Gleeson gave a long, disjointed answer about the impropriety of the State's revocation of his driving privileges. (Trial Transcript, page 50, lines 11-21). Then, in a remarkable move, and in apparent recognition by the Court, the State, and Gleeson's counsel that Gleeson was not a normal witness, the Court allowed Gleeson to testify in one long narrative. (Trial Transcript, page 50, line 24, to page 61, line 16). The trial court even prompted Gleeson to continue his narrative story when Gleeson lost his train of thought. (Trial Transcript, page 57, line 23, to page 58, line 3). At no time did Gleeson, his counsel, the State, or the Court raise the issue of competency to stand trial or of a continuance of trial to obtain a competency evaluation.

The court gave instructions to the jury, including instructions on the essential elements of the offense, and on an affirmative defense to that offense. The affirmative defense instruction told the jury, "If the defendant can prove that he did not receive notice or have knowledge of the revocation of his driving privileges, then you must find him not guilty." (See Jury Instructions, Appendix,

pages 3-4). The jury returned a guilty verdict. (Trial Transcript, pages 69-70). The court immediately sentenced Gleeson and was thus able to conclude the case that day, as it had earlier indicated it would do. (Trial Transcript, pages 70-72) (See Order, Appendix, Page 5) Gleeson then filed a timely notice of appeal. (See Notice of Filing of Notice of Appeal and Notice of Appeal, Appendix, Pages 6-7).

ARGUMENTS

I. THE TRIAL COURT COMMITTED AN OBVIOUS ERROR REQUIRING REVERSAL OF GLEESON'S CONVICTION, BY FAILING TO INTERRUPT THE TRIAL TO ORDER A COMPETENCY EVALUATION FOR GLEESON.

The issue Gleeson brings before this court is when must a trial judge intervene in a criminal case to order a competency evaluation for a defendant, in the absence of a motion from either party to do so. Gleeson argues that in this case, given the eccentric behavior Gleeson exhibited at all of his court appearances, it was incumbent upon the Court to stop the jury trial proceedings and order an evaluation to determine whether Gleeson was competent to stand trial, and that it was obvious and reversible error to fail to take this action.

Section 12.1-04-06, North Dakota Century Code, provides, in relevant part: "Whenever there is reason to doubt the defendant's fitness to proceed, the court may order the detention of the defendant for the purpose of an examination by a psychiatrist or a licensed psychologist." This provision does not require a motion by the defendant to initiate such action, nor does any other rule, statute or other statement of law. This provision does not require a motion from either party

to a criminal proceeding. It does not even require interruption of criminal proceedings for an evaluation even if there is reason to doubt the defendant's fitness to proceed. However, when there is reason to doubt a defendant's fitness to proceed, or competency, constitutional guarantees of require further inquiry and examination to determine if the defendant is competent to proceed in the criminal case. *State v. Storbakken*, 246 N.W.2d 78 (N.D. 1976).

The Court's decision in *Storbakken, supra,* was based upon the holding of the Court in *Pate v. Robinson,* 383 U.S. 375, 385-386, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), that whenever there was reasonable doubt as to a defendant's competency, a competency hearing is required. In *Storbakken, supra,* the Court found that there had not been a reasonable doubt as to the defendant's fitness to proceed, because the only evidence of this was an oblique reference by the defendant's attorney to a childhood injury rather than observation of the defendant's eccentric or irrational behavior by the court.

This case is markedly different from that presented in *Storbakken, supra.* Here, there was ample evidence from which the court should have found a reason to doubt Gleeson's fitness to proceed. Gleeson was somewhat confused at his initial appearance, and he alluded to having seen some doctors, possibly in reference to mental problems. Gleeson demonstrated further doubtful conduct at his pretrial conference, first by boycotting the pretrial conference because he believed his attorney was inadequately prepared for trial, and second, by statements made during the course of the hearing. Finally, the trial court had been informed that Gleeson had filed what it deemed to be unjustified ethical charges

against the attorneys for the parties, as well as the trial judge. No inquiry was made as to why Gleeson had done this. The trial court had a chance to see Gleeson stun his defense counsel with an admission of knowledge of his revocation of driving privileges. The defense counsel apparently threw in the towel at this point, because he simply asked Gleeson if he had anything else he wanted to tell the jury. The trial court, which normally is required to restrict narrative answers and testimony, allowed and even prompted a very long and senseless narrative by Gleeson. The trial court had to have some cause to be concerned about Gleeson's fitness to proceed. The circumstances dictated that further inquiry, in the nature of a competency evaluation, was in order.

Fitness to proceed is an issue with two facets. A person can be unfit to proceed in a criminal case if he either lacks capacity to understand the proceedings against him, or if he lacks the capacity to assist in his own defense. Section 12.1-04-04 North Dakota Century Code and *State v. Vannatta*, 1993 ND 165, 506 N.W.2d 63 (1993). It is this second prong of competency that concerns Gleeson in this appeal. Some of the factors to consider in determining at the onset if there is reason to doubt the defendant's fitness to proceed include, *inter alia*: That he knows that he will be expected to tell his lawyer all he knows or remembers about the events involved in the alleged crime; That he has established rapport with his lawyer; That he has the ability to meet stresses without his rationality or judgment breaking down; That he has at least minimal contact with reality; That he can confer coherently with some appreciation of proceedings; That he can both give and receive advice from his attorneys; That he can divulge facts without paranoid

distress; *State v. Vannatta, supra,* quoting *State v. Guatney,* 207 Neb. 501, 299 N.W.2d 538, 545 (1980).

Applying the factors set out in *State v. Vannatta, supra,* it appears that many of those facts applied to Gleeson's case and gave rise to a number of reasons to doubt Gleeson's fitness to proceed. It was apparent he had not told his attorney critical facts about prior knowledge of his suspension. He did not have good rapport with his attorney, as evidenced by the earlier motion to withdraw as counsel, and by the ethical complaint filed by Gleeson against his attorney before trial. Gleeson indicated at trial, as he had in earlier proceedings, that he was under considerable stress. He told the court he wanted to have the case resolved that day because he did not want to get further aggravated. Gleeson could not follow or give advice to his attorney as shown by his independent attempt to get a continuance of the pretrial conference. Moreover, Gleeson apparently did not realize the pretrial conference was not his trial, because he believed his attorney had needed more time to prepare his defense for the pretrial conference. All of these things may not be enough for a court to conclude, as a matter of law, that Gleeson was fit to proceed. However, these facts and circumstances certainly should have been enough to make the court aware that there were a number of reasons to doubt Gleeson's fitness to proceed, even in the absence of an appropriate motion from the parties.

We can sympathize with the trial court. The case had been seriously delayed beyond the required 180-day period for conclusion of criminal cases, and now the end of the trial and the case were tantalizingly close. (See, North Dakota

Administrative Rule 12(2)(b)(1)). However, bringing a case home on time is not as important in the scheme of things as seeing the constitutional rights of a defendant in a criminal case upheld.

The Fifth Amendment to the United States Constitution guarantees to all persons, the right to due process of law. The same guarantees are provided by Article I, Section 12, of the North Dakota Constitution. These are the due process guarantees that caused the Court in *Pate v. Robinson, supra,* to hold that a trial court is required to interrupt a criminal proceeding for the purpose of a competency evaluation whenever there is reason to doubt the defendant's fitness to proceed.

Rule 52, North Dakota Rules of Criminal Procedure, separates trial errors into two categories. In one group are the harmless errors, which include "any error, defect, irregularity or variance which does not affect substantial rights." These errors "shall be disregarded". They just don't matter. In the other group are the obvious errors. These are serious errors, "affecting substantial rights", and they may be noticed even though they were not brought to the attention of the court. As this court noted in *State v. Kraft,* 413 N.W.2d 303 (N.D. 1987), "Even though the general rule is that an issue will not be noticed unless raised at trial, an error that infringes upon substantial rights of the defendant is noticeable notwithstanding lack of an objection, or, as in this case, in the absence of a request for a jury instruction." See also, *State v. Miller,* 388 N.W.2d 522 (N.D. 1986). However, this court will exercise its power to notice obvious error cautiously, and only in exceptional circumstances where the defendant has suffered a serious

injustice. *See State v. Smith,* 1999 ND 109, Paragraph 14, 595 N.W.2d 565, (1999). It should do so whenever the obvious error seriously affects the fairness, integrity or public reputation of judicial proceedings, regardless of the defendant's actual innocence. *State v. Olander,* 1998 ND 50, 575 N.W.2d 658, at Paragraph 16.

Gleeson argues that his constitutional right to due process of law, which includes the right to proceed in a criminal case only when fit to proceed, is a substantial right which should be noticed here as an obvious error. Ignoring obvious reasons to doubt a defendant's fitness to proceed is exactly the type of error that affects the fairness, the integrity, and the public reputation of judicial proceedings. Section 12.1-04-06 North Dakota Century Code permits a court to act on its own volition to interrupt a criminal proceeding to order a competency evaluation. Rule 52, North Dakota Rules of Criminal Procedure, and the Due Process Clauses of the Fifth Amendment to the United States Constitution and Article I, Section 12, of the North Dakota Constitution, require it. For these reasons, Gleeson's conviction for the misdemeanor offense of driving while license is revoked should be reversed and the case should be remanded to the trial court for the purpose of conducting a competency evaluation if the trial court determines that there is still reason to doubt Gleeson's fitness to proceed.

CONCLUSION

An obvious error affecting Gleeson's substantial, constitutional rights occurred in the lower court. This court must take notice of that error and correct it by reversing Gleeson's conviction and remanding the case back to the trial court

for further proceedings. This is the only way to protect and uphold the fairness, integrity and public reputation of judicial proceedings. To do otherwise would be to send a message to the public that the person disadvantaged by an unfitness to proceed, can and will be steamrollered in a criminal proceeding because the laws of the trial court and the appellate court allow it to happen.

Dated this 12 day of July, 2000.

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Certificate of Service

I hereby certify that I made service of a copy of the foregoing brief, by mail, on July 12, 2000, upon:

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