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SUPREME COURT

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SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No. 20010038

City of Fargo,

Plaintiff and Appellee,

vs.

Robbie Del James Roberson,

Defendant and Appellant.

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IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

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STATE OF NORTH DAKOTA

APPEAL FROM JUDGMENT IN A CRIMINAL CASE FROM  
CASS COUNTY DISTRICT COURT

BRIEF OF APPELLANT

*+ Addendum*

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STATE OF NORTH DAKOTA

## **I. STATEMENT OF THE ISSUES**

1. WHETHER OR NOT THE CRIMINAL CHARGE OF UNLAWFULLY RESISTING A POLICE OFFICER SHOULD BE DISMISSED BASED UPON THE EVIDENCE OF POLICE ACTING UNLAWFULLY?
2. WHETHER THERE IS SUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT THE CONVICTION?

## **II. STATEMENT OF THE CASE**

This is a criminal case arising from the District Court, County of Cass, North Dakota. The defendant, Robbie Del James Roberson, was arrested in Fargo, Cass County, North Dakota on or about March 3, 2000. The defendant was subsequently charged with disorderly conduct, in violation of Fargo City Ordinance No. 10-0301, and resisting a police officer, in violation of Fargo City Ordinance No. 10-0317.

The case was tried before the Court on August 7, 2000 and was continued to January 22, 2001. The Court dismissed the disorderly conduct charge, but found the defendant guilty of resisting a police officer pursuant to Fargo City Ordinance No. 10-0317. The defendant was sentenced on January 22, 2001 to time served.

The defendant now takes this appeal to the North Dakota Supreme Court by Notice of Appeal dated January 29, 2001. App. at 12.

## **III. STATEMENT OF THE FACTS**

The relevant facts are disputed between the parties. During the late hours of March 3, 2000, defendant was dropped off by a friend a couple of blocks from

his home and proceeded to walk home. App. at 27. It was fairly cool out that evening and the defendant proceeded to walk at a high rate of speed to get home quickly. App. at 27. As the defendant cut through a parking lot, he noticed a vehicle drive into the parking lot but did not know, at the time, that it was a police vehicle. App. at 27-28. The defendant continued to walk towards his home and was approximately anywhere between 50 and 80 feet past the vehicle when he heard someone yelling "Hey you. Stop." App. at 29. The defendant had noticed a couple of other people walking through and around the parking lot at that time and continued to walk forward until he heard someone again yell "Hey you with the Bulls jacket, get your hands in the air." App. at 29. At that point, the defendant, who was wearing a Bulls jacket, stopped and turned around to see who was yelling at him.

Upon turning around, the defendant noticed Officer Potter of the Fargo Police Department yelling and screaming at him to get his hands in the air. App. at 30. The defendant responded to the officer that all he had on him were his keys and a wallet. App. at 30.

The officer continued to come at the defendant, with his weapon pointed at the defendant, yelling at the defendant to get up against the wall of the building. App. at 31. The officer continued to ask the defendant if he had anything on him, and the defendant repeatedly replied that all he had on him were his keys and his wallet. App. at 31. The defendant complied with the officer's request and leaned up against the wall of the building. The officer approached, kicked the defendant's legs out to the sides and told the defendant

to back up and lay on the ground, which the defendant did. App. at 32. After continuing discussions between the defendant and Officer Potter, defendant started to put his left hand behind his back in order for the officer to handcuff him, when the defendant was hit with an object right under his left eye. App. at 32-33. Once the defendant was struck in the face with an object, which the defendant believes was the butt of the officer's gun, defendant then pulled his hands down over his face. App. at 32. Officer Potter then backed off and waited for backup to arrive. App. at 34. Once backup arrived on the scene, the officers were able to handcuff the defendant. App. at 34.

The facts suggest that the defendant in no way resisted or fought with the officers and rather obeyed all of the officer's commands. App. at 34.

The undisputed facts suggest that once the backup officers arrived on the scene, the area where Officer Potter first spotted the defendant near the vehicles was checked. App. at 22-23. It was determined that none of the vehicles were broken into or that defendant had any type of illegal contraband or stolen property on him prior to his run in with Officer Potter. App. at 22-23. It is also undisputed that defendant, on more than one occasion, indicated to Officer Potter that he hadn't done anything wrong. App. at 23.

Subsequently, defendant was arrested and eventually charged with disorderly conduct and resisting arrest. App. at 21.

The City of Fargo criminal charges against the defendant were eventually removed to Cass County District Court. A court trial was held in District Court on August 7, 2000, and was later continued until January 22, 2001. The Court

dismissed the criminal charge of disorderly conduct, but did find the defendant guilty of resisting arrest pursuant to Fargo Municipal Code 10-0317.

#### **IV. LAW AND ARGUMENT**

1. WHETHER OR NOT THE CRIMINAL CHARGE OF UNLAWFULLY RESISTING A POLICE OFFICER SHOULD BE DISMISSED BASED UPON THE EVIDENCE OF POLICE ACTING UNLAWFULLY?

It is defendant's position that defendant did not resist arrest, however, even if the Court were to find that he did, he was justified in doing so based upon the officer's actions. Not only did the officer make an illegal stop of the defendant, he escalated the entire situation by his overzealous acts and excessive force.

It is clear under North Dakota law that an investigative stop must be "justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." State v. Guthmiller, 499 N.W.2d 590, 592 (N.D. 1993). This protects the citizen's Fourth Amendment right to be free of unreasonable searches and seizures. Wibben v. North Dakota State Highway Com'r, 413 N.W.2d 329, 331 (N.D. 1987). The facts before the Court simply do not support a reasonable belief or objective manifestation that the defendant was, or was about to be, engaged in any criminal activity.

The defendant was simply walking home after being out with some friends for the evening. App. at 27. Officer Potter testified that he saw a male standing between two vehicles, the male turned to look at the squad car, and then ducked down between two cars. App. at 14. It was this behavior alone that led the

officer to follow and eventually stop the defendant. The officer admits that he did not have any reports of any suspicious activity or specific reports on the defendant prior to his encounter with the defendant. App. at 15. The officer did not notice any damage to the vehicles and also did not personally see the defendant damage any of the vehicles. App. at 16-17. Officer Potter further admits that prior to approaching the defendant, he did not have any firm evidence that any crime had been committed. App. at 19.

In City of Minot v. Timothy Johnson, 1999 ND 241, 603 N.W.2d 485, this court affirmed a trial court's order suppressing evidence based upon the fact that the arresting police officer lacked a reasonable and articulable suspicion that the defendant was violating a law. In Johnson, a patrolman was performing security checks in and around the parking lot of a couple of businesses that had been burglarized within the previous three months. Id. at ¶ 2. The officer then observed the defendant enter the parking lot and drive through the sparsely lit parking lot without stopping. Id. The patrolman eventually stopped the defendant approximately three blocks later, and charged and arrested the defendant with driving under the influence. Id. The trial court granted the defendant's motion to suppress the evidence based on the investigatory stop, and this court affirmed. Id. The court held that in determining whether an investigative stop is valid, the court must use an objective standard and look to the totality of the circumstances. Id. at ¶ 6. This court further opined that the facts of the case and the officer's actions and awareness of past burglaries in the area amounted to no more than a vague hunch of illegal activity and are legally

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insufficient to suspect that the defendant was, or was about to be, engaged in unlawful activity. Id. at ¶ 10.

Applying the facts and reasoning in Johnson to the case before the Court, supports defendant's position. Officer Potter's only suspicion was that he noticed the defendant pass between two vehicles and appeared to duck out of sight. App. at 18. The officer was not aware of any suspicious activity in the parking lot that particular evening. App. at 19. Officer Potter additionally testified that he did not see any damage to any more vehicles and admittedly did not have any firm evidence that a crime had been committed. App. at 19. The facts clearly suggest that Officer Potter's actions amount to no more than a vague hunch of illegal activity and, as in Johnson, that alone is legally insufficient to suspect the defendant was or was about to be engaged in any unlawful activity. The defendant suggests that the officer lacked the necessary evidence to stop him on the evening of March 3, 2000.

It was the officer's actions alone that escalated the situation which eventually led to the charges against the defendant. Officer Potter admits that during this entire encounter with the defendant, he felt the affects of tunnel vision kicking in and that the affects of the tunnel vision and adrenaline rush affected his behavior. App. at 20. Additionally, Officer Potter continued to bark out commands to the defendant, which he complied with. The Court again opined in its findings that the defendant did try to comply with all of the officer's orders and ultimately did do everything he was asked to do. App. at 37. Even the Court, which ultimately dismissed the underlying charge of disorderly conduct, noted in

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its findings that there is simply no evidence linking the defendant to any damage to vehicles or any other crime. App. at 37.

It is defendant's position that even if the Court were to find that he resisted arrest and Officer's Potter's lawful commands, that his resistance was justified under § 12.1-08-02 of the North Dakota Century Code which states in part as follows:

"It is a defense to a prosecution under this section that the public servant was not acting lawfully, but it is no defense that the defendant mistakenly believed that the public servant was not acting lawfully. A public servant executing a warrant or other process in good faith and under color of law shall be deemed to be acting lawfully."

N.D.C.C. § 12.1-08-02(2)

Although defendant was charged with violating 10-0317 of the Fargo Municipal Code, defendant still has available to him any defense set forth under the North Dakota Century Code. Defendant did not make a motion at the trial court level to suppress any evidence based upon the officer's actions, but rather, points it out to the Court at this time to support defendant's position that the officer's unlawful conduct, which includes the unlawful stop, is a defense available to the defendant to the prosecution of a charge of preventing resisting arrest. Resistance to "excessive force" by an officer acting under color of law is a factual defense to any criminal charge arising from the resistance. State v. Ritter, 472 N.W.2d 444, 452 (N.D. 1991). This Court has recognized that the courts retain the power to act upon "evidence of flagrant police misconduct such as intentional harassment or the use of excessive force." State v. Saavedra, 396 N.W.2d 304, 305 (N.D. 1986). Additionally, if an accused avoids belligerent and

forceful reactions to overbearing police conduct, the courts will remedy an unlawful arrest or detention by dismissal of charges. See City of Bismarck v. Schoppert, 469 N.W.2d 808, 813 (N.D. 1991).

It should be noted, however, that this court has also held that evidence of an accused's aggressive behavior toward an arresting officer will not be suppressed because of the initial stop or arrest was unlawful, when the accused creates an independent and intervening action. State v. Indvik, 382 N.W.2d 623, 627 (N.D. 1986). In Indvik, this court denied an accused's request to suppress evidence holding that the accuser's independent and intervening actions of engaging the officer in a high-speed chase, running from the police officer into the woods, and drawing a firearm on the police officer, breaks the chain of causation and dissipates the taint of the prior illegality. Id. at 627. Additionally, in State v. Saavedra, 396 N.W.2d 304, this court also ruled that the evidence of an accused's disorderly conduct that caused his arrest need not be suppressed because the crime was independent of the concededly illegal search of his van and his illegal detention in the patrol car. Id. at 305.

In the facts of the case before this Court, the evidence does not suggest that the defendant's acts broke the chain of causation and created an independent intervening action. In Saavedra, the defendant ignored several of the officer's requests, and the court found that the defendant's actions by ignoring the officer is what created a separate independent act on behalf of the defendant. Id. at 305. It is clear, in this case, that the defendant did not ignore the officer's requests but rather ultimately complied with all of the officer's

requests. App. at 37. The trial court ultimately found that defendant did do everything he was asked to do. App. at 37. Nevertheless, the Court did dismiss the disorderly conduct charge. The charge of resisting arrest should be dismissed base upon the officer's overzealous and unlawful conduct.

2. WHETHER THERE IS SUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT THE CONVICTION?

The standard for determining whether there exists sufficient evidence to sustain a conviction is whether the evidence, when viewed in the light most favorable to the verdict, reveals a reasonable inference of guilt. State v. Strutz, 2000 ND 22, 606 N.W.2d 886, 889. The appellate court is to determine only whether there is competent evidence which could have allowed the finder of fact to draw an inference reasonably tending to prove guilt and fairly warranting a conviction. State v. Delaney, 1999 ND 189, 601 N.W.2d 573, 574; See also, State v. McKing, 1999 ND 81, 593 N.W.2d 342, 344; State v. Jones, 557 N.W.2d 375, 377 (N.D. 1996).

The evidence in this case is not sufficient to support defendant's conviction of resisting arrest in violation of Fargo Municipal Code 10-0317. The pertinent ordinance reads, "it shall be unlawful for any person by the use of force, violence, or flight to resist knowingly any police officer in the performance of his duties". See Fargo Municipal Code 10-0317. The evidence suggests that the defendant did follow the officer's orders and lawful commands. App. at 34. Even the Court recognized in its findings that prior to the defendant being handcuffed that the defendant did in fact do everything he was asked to do. App. at 37.

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The City will ultimately argue that it was Officer Hudson's testimony regarding the defendant's attitude and behavior prior to his arrest which led to the Court's finding defendant in violation of resisting arrest. It is defendant's position that this testimony alone in and of itself does not support the Court's findings. Officer Hudson arrived late at the scene when the defendant was already on the ground. App. at 24. Officer Hudson defines the defendant's behavior as uncooperative and that when he arrived on the scene, the defendant was on the ground thrashing and squirming. App. at 25.

Defendant's testified that just prior to the backup officers arriving on the scene, he was struck in the face under his eye by Officer Potter. App. at 32. It is certainly reasonable that after a person is struck in the face that they continue to thrash and squirm while on the ground as defined by Officer Hudson. Defendant clearly testified that he in no way resisted arrest but rather that he was 100 percent cooperative even though he was very scared after just having a gun pulled on him and getting hit in the eye. App. at 36.

The record lacks any evidence that the defendant at any time had attempted to run or flee from the police officers. Rather, all the evidence shows that the defendant had been totally cooperative and had followed all the lawful commands of the officer. It was only after he had been hit in the face that he began to thrash and squirm on the ground. The blow to the face in conjunction with the fact that he was now being handcuffed and restrained when he had done absolutely nothing wrong may possibly have led to the defendant being agitated.

Even though agitated, the defendant still cooperated the entire evening, and his actions do not rise to the level set forth in the City Ordinance.

Additionally, there does not appear to be any evidence that the defendant acted violently or used force prior to being handcuffed. Officer Hudson testified that defendant was thrashing about violently, however, there is no evidence that the defendant in any way struck or attempted to strike any of the officers or that in any way was in a position to flee. App. at 24. There were several officers on the scene and it was inevitable that the defendant was going to be handcuffed and put under control. The record also is void of any evidence that any of the officers were physically in harm or physically threatened by the defendant's actions. It is certainly reasonable that his squirming and thrashing on the ground had something to do with him being struck in the face. This is a situation that escalated due to Officer Potter's actions which could have, and should have, been avoided. The evidence in the record is not sufficient to support the defendant's conviction for resisting arrest.

#### **V. CONCLUSION**

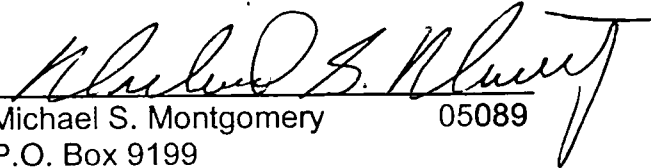
Officer Potter unlawfully stopped and detained the defendant. Additionally, the officer acted in an overzealous manner which escalated the entire situation. The defendant followed the officer's lawful commands. The defendant did not resist his arrest, and even if the Court finds that his conduct does arise to that level, he was justified in his resistance based upon the officer's unlawful conduct. The resisting arrest charge against the defendant should be dismissed.

There is insufficient evidence in the record, after viewing the evidence in the light most favorable to the prosecution, for any rational trier-of-fact to find the essential elements of the crime beyond a reasonable doubt. The defendant requests this Court dismiss the criminal charge as a matter of law.

Dated this 27<sup>th</sup> day of April, 2001.

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