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20010038

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

JUL 4 2001

STATE OF NORTH DAKOTA

City of Fargo,

Plaintiff/Appellee,

Supreme Court No. 20010038

v.

Court File No. 00-01063

Robbie Del James Roberson,

Defendant/Appellant.

BRIEF OF APPELLEE CITY OF FARGO

Appeal by Defendant from a criminal conviction entered January 22, 2001, by the Cass County District Court, Fargo, North Dakota, the Honorable Georgia Dawson, presiding

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STATEMENT OF THE ISSUES

- I. Whether the Defendant's conviction of resisting a police officer should be dismissed when the arresting police officer stopped the Defendant on suspicion of criminal activity and it was subsequently determined that there was no other criminal activity.
 - A. Whether Officer Potter's actions were lawful considering the Defendant's suspicious activity and alarming behavior.
 - B. Whether the Defendant's resistance was justified.
 - C. Whether there is sufficient evidence to support the conviction of resisting a police officer when the Defendant used force and violence to resist being handcuffed by police officers who were attempting to secure their safety and arrest the Defendant for what they believed to be disorderly conduct.

STATEMENT OF THE CASE

The above-entitled matter results from a criminal charge set forth by a long form complaint and charging the Defendant with violating Fargo Municipal Code §10-0317, resisting a police officer. (App. p. 8) The offense occurred on or about March 3, 2000. The Defendant was also charged with a violation of Fargo Municipal Code §10-0301, disorderly conduct. (App. p. 7) The Defendant transferred the case to District Court on April 5, 2000 for jury trial. (App. p. 1 No. 11) The Defendant waived the jury and a bench trial was set. (App. p. 1 No. 14) On August 7, 2000, a bench trial was commenced before the Honorable Georgia Dawson of the District Court, County of Cass, State of North Dakota. (App. p. 5 No. 58) The trial was concluded on January 22, 2001, at which time the Defendant was found not guilty of the charge of disorderly conduct and guilty of the charge of resisting a police officer. The Defendant was sentenced on January 22, 2001, to time served. A copy of a Notice of Appeal was received by the Cass County District Court on January 30, 2001. (App. p. 12)

STATEMENT OF THE FACTS

The facts considered by the Court in this case are in dispute. Called as witnesses on behalf of the City of Fargo were Officer Chris Potter and Officer Daniel Hudson. (Tr. 8/7/00 at p. 9 and p. 36) The Defendant called Lt. Keith Ternes and the Defendant testified. (Tr. 1/22/01 at p. 7 and p. 15)

Officer Potter testified that shortly before one o'clock in the morning on March 3, 2000, he was on routine patrol in the City of Fargo in approximately the 600 block of NP Avenue. (Tr. 8/7/00 at p. 10) At that time, Officer Potter observed a white male standing between two vehicles. The individual looked at Officer Potter in the squad car and quickly ducked down between the two cars. The officer testified articulating his suspicion about a person who sees a police car and immediately ducks down as if hiding from the officer. (Id. at 11) Officer Potter also testified that there were numerous incidents of car break-ins in the City of Fargo during the months preceding this occurrence. Suspecting there may be criminal activity, Officer Potter pulled into the parking lot and observed the Defendant walk past his squad car, refusing to look at Officer Potter and refusing to acknowledge the officer when spoken to. (Id. at pp. 12-14)

Officer Potter opted to attempt to stop the Defendant rather than checking for vandalism or theft from the automobiles, as the officer was worried about this individual leaving the area. (Id. at p. 13) Eventually the Defendant stopped, turned toward the officer and "jammed his hands down inside his pants pockets". (Id. at p. 14) The Defendant did not dispute having his hands in his pockets, nor did he dispute the officer making several demands to put his hands in the air. (Tr. 1/22/01 pp. 38-40) The officer found this behavior unusual and threatening as he did not know what the Defendant may or may not have in his pockets. Additionally, the officer felt this individual was under

the influence of alcohol and when the individual refused to cooperate, it alarmed the officer. (Tr. 8/7/00 at p. 15) Officer Potter eventually drew his weapon on the Defendant as the Defendant turned away from the officer again jamming his hands inside of his pockets.

Officer Potter's testimony outlined a pattern of the officer requesting the Defendant to show his hands and the Defendant refusing to comply.

After a few minutes, the Defendant eventually complied with Officer Potter's orders and laid on the ground, again jamming his hands beneath his body, where Officer Potter and Officer Sullivan of the Fargo Police Department, a back-up officer on the scene, were able to secure and frisk the Defendant for weapons. (Id. at p. 18) While the officers, approximately eight officers at this point, were attempting to secure the Defendant, the Defendant began kicking. (Id. at p. 19)

Officer Potter did not find any damage to vehicles, however, he did arrest the Defendant for resisting arrest and disorderly conduct.

Confirming this uncooperative behavior of the Defendant, Officer Daniel Hudson testified that upon arriving at the scene he could observe the Defendant, not handcuffed, resisting the officers actions, yelling and kicking in what appeared to be an attempt to get up off the ground. (Id. at p. 38) Officer Hudson testified that he attempted to cross the Defendant's legs to prevent him from kicking anyone else while continuing to order the Defendant to stop resisting. Officer Hudson further testified that the Defendant was uncooperative that evening as he thrashed about violently while yelling and trying to keep his arms underneath his body. The Defendant was observed by Officer Hudson as threatening Officer Potter up until the time he went to the Cass County Jail.

Lt. Ternes testified that he investigated the incident and did not find anything to

suggest that “Officer Potter or any of the other officers acted inappropriately or used excessive force”. (Tr. 1/22/01 at p. 10) Lt. Ternes also testified as to the inconsistencies in the Defendant’s statements regarding how he sustained his injuries. (Id. at p. 11) Further, Lt. Ternes testified that none of the officers recall observing any injuries on the Defendant. (Id.)

The Defendant testified that he did not resist the officers actions. (Tr. 1/22/01 at p. 24) Further, his testimony completely contradicts the testimony of Officer Potter, claiming to have been assaulted by the officer and denying he struggled to prevent his arrest. The Defendant was arrested and charged with disorderly conduct and resisting arrest. In a court trial before Judge Dawson in District Court on August 7, 2000, and concluded January 22, 2001, the Defendant was found not guilty of disorderly conduct and guilty of resisting a police officer in violation of Fargo Municipal Code §10-0317.

LEGAL ARGUMENT

I. **Whether the Defendant's conviction of resisting a police officer should be dismissed when the arresting police officer stopped the Defendant on suspicion of criminal activity and it was subsequently determined that there was no other criminal activity.**

Defendant, Robbie Del James Roberson, was charged with disorderly conduct and resisting a police officer. In viewing the facts most favorable towards the verdict, the charge of disorderly conduct stemmed from an interaction with Officer Potter of the Fargo Police Department, wherein Officer Potter attempted to stop and question the Defendant based on a suspicion of criminal activity. During that attempted investigation, the Defendant acted as if he may have a weapon in his possession. Officer Potter attempted to secure the Defendant to conduct a pat down search for weapons. The officer was unable to immediately gain the cooperation of the Defendant. The Defendant's refusal to show his hands and prolonged activity in ignoring the officer was alarming to Officer Potter. Eventually, the Defendant was subdued and no weapons were found, nor was there any evidence found of the Defendant attempting to break into vehicles or breaking into vehicles.

Subsequent to Officer Potter's investigation and Mr. Roberson's alarming behavior, several Fargo Police Officer's attempted to arrest and detain the Defendant. It was during the subsequent attempt to restrain and arrest that the Defendant committed the offense of resisting a police officer. The Defendant now appears to argue that as a result of his acquittal of disorderly conduct and no finding of criminal activity, the Court cannot find him guilty of the subsequent offense of resisting. At a minimum, he argues being justified in resisting. The City argues the conviction should be affirmed as the evidence showed an unjustified resistance to the lawful performance of the police officers duties.

A. **Whether Officer Potter's actions were lawful considering the Defendant's suspicious activity and alarming behavior.**

Officer Potter's conduct and attempt to question and detain the Defendant were lawful. "In limited circumstances, police may stop and pat down an individual, checking for weapons without probable cause to arrest." State v. Zearly, 444 N.W.2d 353, 355 (N.D. 1989), citing Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1967).

On the night in question, Officer Potter was on routine patrol. He testified that the parking lot he was near was subject to a rash of recent vandalism and break-ins. Officer Potter articulated to the Court that, at approximately 1:00 a.m., he observed the Defendant "standing in between two vehicles in that parking lot. I saw the male look at me in the squad car and then duck down quickly between the two cars." (App. p. 14) The officer articulated that the numerous incidences of car break-ins, coupled with the Defendant's suspicious activity of ducking the police officer, lead him to investigate further the activities in that parking lot. The officer went on to describe further unusual activities of the Defendant and his refusal to acknowledge the officer's presence.

Officer Potter made a decision to stay with the Defendant and not look for vandalism or other evidence that a crime may or may not have been committed in that parking lot, and instead made an attempt to investigate or identify that individual, the Defendant, for fear of losing the Defendant. Eventually, the Defendant did voluntarily engage the officer by facing the officer and then "jamming" his hands inside his pockets. The officer articulated the threatening and alarming nature of this type of activity. From that point forward, the officer feared for his safety, as the Defendant acted as if he may have a weapon. The behavior was so alarming that Officer Potter was forced to pull his own weapon in order to protect himself.

Applying the Zearly and Terry rules, Officer Potter was justified in engaging the Defendant and attempting to determine whether or not the Defendant was armed. When a police officer observes unusual conduct which leads him reasonably to conclude that criminal activity may be afoot, and when that feeling is not dispelled, the officer is justified in conducting a limited search of the person. Zearly at 356. Officer Potter explained that he believed the Defendant may have been breaking into the cars in the parking lot and went into detail of his reasoning. Reasonably believing criminal activity may be occurring in his presence, Officer Potter attempted to question the Defendant. When that attempted questioning turned to fear for his safety, Officer Potter reasonably attempted to secure the situation. The Defendant, with his delayed behavior, did not give the officer any indication that could have dispelled his fear. Instead the Defendant jammed his hands into his pockets or turned away hiding his hands. It was only when the Defendant was subdued that a pat down could take place to dispel the officers' fears.

The Defendant asserts that Officer Potter had no more than a vague hunch of illegal activity and therefore lacked the necessary evidence to stop the Defendant for further investigation. The Defendant relies on the case of City of Minot v. Johnson, 1999 ND 241, ¶ 3, 603 N.W.2d 485, where a patrol officer conducted a traffic stop on a vehicle he observed drive through a parking lot of some recently vandalized businesses without stopping. In that case, the Court held that the officer's actions were unlawful in that he had no more than a vague hunch of illegal activity rather than a reasonable and articulable suspicion that the Defendant was about to be engaged in or was engaged in criminal activity. Johnson at ¶ 11.

The case is distinguishable from the Johnson case in that Officer Potter was conducting a much less intrusive stop of the Defendant, as the Defendant was not in a

vehicle. Additionally, Officer Potter articulated a greater scope of suspicious activity than was observed by the officer in the Johnson case, giving Officer Potter reasonable suspicion that criminal activity was afoot. The officer was not only aware of recent break-ins, but was able to observe the Defendant actually “duck down” between two vehicles. He also described the Defendant’s avoidance of acknowledging the officer and then walking in the opposite direction along the lines of the historical case of Terry. The officer observed suspicious activity, which would justify a stop of the Defendant. In Johnson, the officer conducted a much more invasive stop and seizure of the Defendant. In this case, the Defendant upon his own free will stopped to acknowledge the officer’s request. It was only after that point that the Defendant’s actions caused the officer to feel alarmed by the Defendant’s threatening behavior.

Considering the activity observed by Officer Potter, and the facts most favorable to the verdict, Officer Potter acted lawfully in his attempts to secure his safety.

B. Whether the Defendant’s resistance was justified.

Even if the Court found the officer’s actions unlawful, the Defendant’s actions were not justified because the police officer’s use of force was not excessive. “As a matter of law, official misconduct does not excuse forceful resistance.” State v. Ritter, 472 N.W.2d 444, 451 (N.D. 1991). However, resistance may be justified if an officer uses excessive force. Id. Nonetheless, in cases where alleged disorderly conduct resulted in an individual’s arrest, evidence of that disorderly conduct should not be suppressed when considering the independent charge of resisting arrest even though the police action in investigating and arresting the Defendant for disorderly conduct was unlawful. See, e.g., State v. Saavedra, 396 N.W.2d 304 (N.D. 1986); See also, State v. Kunkel, 406 N.W.2d 681 (N.D. 1987); State v. Indevik, 382 N.W.2d 623 (N.D. 1986).

Fargo Municipal Code §10-0317, Unlawful to Resist Police Officer, states: “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.” (Emphasis added)

The Court found after the bench trial that “there is case law that provides that even if the underlying charge or cause is not supported by the evidence, that it is unlawful to resist an officers commands.”

The judge appropriately considered that although there was insufficient evidence to convict the Defendant of disorderly conduct, the Court is not excluded from considering that evidence in conjunction with the Defendant’s subsequent behavior. The Court pointed out that the Defendant took an unordinary amount of time in complying with the Officer’s request.

The question is not so much whether the police conduct was unlawful, as much as was the conduct excessive, or did the officer use excessive force in carrying out the unlawful conduct. The only evidence relating to flagrant misconduct or excess force being used by the officer was from the testimony of the Defendant himself. The Court weighed that evidence against the testimony of two officers and an internal affairs officer. Officer Potter, while possibly over cautious, (See Tr. 1/22/01, p. 13) was nonetheless acting in a cautionary manner to avoid harm to himself. Officer Potter and Officer Hudson described the Defendant as forcing his hands under his body and making attempts to avoid being detained by the police. Officer Potter articulated his step by step actions in ordering the Defendant to the ground and his verbal attempts, not physical, to place the Defendant in a position that handcuffs could be easily applied. It was the Defendant’s flailing and kicking that lead to numerous officers attempting to restrain the Defendant and possibly causing the Defendant some type of injury.

Therefore, the Defendant's only defense to his resisting behavior is an argument that he was justified to partake in self-defense under North Dakota Century Code §12.1-08-02 wherein subparagraph 2 of the statute states as follows:

"It is a defense to the 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."

The Defendant claims that he did not ignore the officer's request, but ultimately complied with the officer's request. While this may be true, the officers felt a need to restrain this Defendant because of his alarming behavior. There is no evidence however that the officers acted with "excessive force" or committed "flagrant police misconduct."

While an officer's conduct in conducting a search without a warrant or violating in some way a Defendant's constitutional rights may be unlawful, it should not result necessarily in the exclusion of evidence of his attack or physical resistance to the police officers. State v. Kunkel, 406 N.W.2d 681, 682 (N.D. 1987). Forceful resistance to unlawful arrest is not automatically excused, but dismissal of charges may be warranted if the police conduct is flagrant, constitutes excessive force, or is the result of intentional harassment. Ritter at 452.

While the court ultimately ruled that the officers arrest of the Defendant for disorderly conduct was unsupported by the evidence, the Court appropriately considered the subsequent activity of the Defendant and his aggressive behavior towards the arresting officers. See, also, State v. Indvik, at 627. Therefore, the Court acted appropriately in dismissing the charge of disorderly conduct and finding the Defendant guilty of violating Fargo Municipal Code §10-0317.

C. **Whether there is sufficient evidence to support the conviction of resisting a police officer when the Defendant used force and violence to resist being handcuffed by police officers who were attempting to secure their safety and arrest the Defendant for what they believed to be disorderly conduct.**

“Our evidentiary standard of review for a criminal bench trial is the same as if the case had been tried to a jury.” State v. Treis, 1999 N.D. 136, ¶ 9, 597 N.W.2d 664. (Citations omitted) In a review of the sufficiency of the evidence, the Court only considers evidence most favorable to the verdict and reasonable inferences therefrom. State v. Roberson, 1998 N.D. App. 15, ¶ 6, 586 N.W.2d 687.

The Defendant has attempted, as was attempted at trial, to dispute the credible and convincing nature of the evidence presented. However, the reviewing court does not reweigh conflicting evidence or witness credibility, unless the Defendant shows that the evidence establishes no reasonable inference of guilt. See, e.g., Roberson at ¶ 6; City of City of Fargo v. Brennan, 543 N.W.2d 240, 243 (N.D. 1996).

The evidence presented to the Court is sufficient to support the Defendant’s conviction of resisting a police officer and violating Fargo Municipal Code §10-0317. Officers Potter and Hudson described in detail the Defendant’s attempts to avoid being handcuffed by forcefully placing his hands beneath his body and the Defendant’s attempts to avoid arrest by kicking and physically threatening numerous Fargo Police Officers. The Defendant relies on the fact that, according to his testimony, he was 100 percent cooperative even though he was scared and had just been hit in the eye. This argument fails to consider the testimony of Officers Potter, Hudson and Ternes who present an entirely different story and picture of the Defendant’s level of cooperativeness. Judge Dawson heard testimony that was favorable to the verdict and was in a better position to make inferences, including observing the Defendant’s lack of cooperation during the criminal proceedings. While the Defendant may have been injured during his

arrest, the testimony of the officers was that the Defendant's own actions caused any injuries he may have sustained, and not the actions of any officer in willfully or excessively attempting to harm the Defendant.

The Defendant argues that it was inevitable he would be detained by the officers. However, whether inevitable or not, the Defendant still violated the ordinance by kicking the officers, attempting to get off the ground, and attempting to avoid being handcuffed by jamming his hands underneath his body. While it is true that he did not flee, he still violated the ordinance through the use of violence and force exerted while the officers were performing their duties. Their duties were to secure the Defendant who was suspected of criminal behavior and who may have been concealing a weapon.

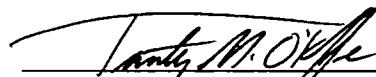
The record is clearly not void of evidence that this Defendant used force and violence to knowingly resist the efforts of the Fargo Police Department in their attempt to arrest him.

The evidence, when viewed most favorably towards the verdict, is sufficient to affirm the conviction for a violation of Fargo Municipal Code § 10-0317.

CONCLUSION

The Defendant's conviction of resisting a police officer should not be dismissed simply because he was found not guilty of disorderly conduct. Even if Officer Potter acted unlawfully in attempting to detain or arrest the Defendant, it does not result in a necessary suppression of the evidence of the Defendant's further uncooperative behavior or provide the Defendant with an irrebuttable justification for resisting arrest. The actions of the Fargo Police Officers on the night in question were not unwarranted, nor were they exhibiting excessive force. The Defendant was unjustified in his claim of self-defense in this situation. Further, there is sufficient evidence on the record that the Defendant acted with force and violence in an attempt to knowingly resist the officers as they were attempting to carry out their official duties. The City of Fargo respectfully requests this Court affirm the conviction of the Defendant for violating Fargo Municipal Code §10-0317.

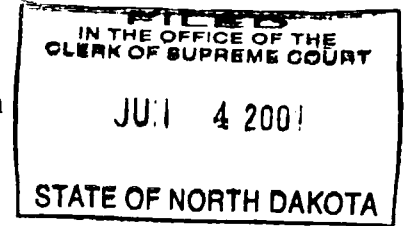
Dated this 4th day of June, 2001.



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20010038

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RE: City of Fargo v. Robbie Del James Roberson
Supreme Court No. 20010038

STATE OF NORTH DAKOTA)
: ss.
COUNTY OF CASS)

BECKY J. SHEA, being first duly sworn, deposes and says that on June 4, 2001, she served the following documents:

Brief of Appellee City of Fargo

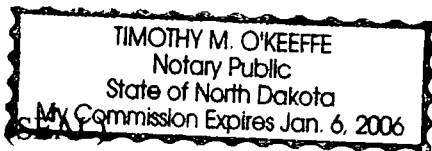
by placing a true and correct copy thereof in an envelope addressed as follows upon:

Mr. Michael Montgomery
PO Box 9199
Fargo, ND 58106-9199

and depositing the same, with postage prepaid, in the United States mails.

Becky J. Shea

Subscribed and sworn to before me this 4th day of June, 2001.



Timothy M. O'Keefe, Notary Public
Cass County, North Dakota
My Commission Expires: 1/6/06