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**20050113**

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

NOV - 3 2005

State of North Dakota,	)	
	)	<b>STATE OF NORTH DAKOTA</b>
Plaintiff-Appellee,	)	
	)	Supreme Court No. 20050113
vs.	)	
	)	District Court No. 04-K-00340
Leo Burgard,	)	
	)	
	)	
Defendant-Appellant.	)	

Appeal from the Judgment dated March 15, 2005  
of the District Court, Northwest Judicial  
District, Ward County  
The Honorable Douglas L. Mattson, Presiding  
Civil No. 04-K-00340

APPELLANT'S BRIEF

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## **JURISDICTIONAL STATEMENT**

The Defendant was charged with one count of Illegal Possession of Drug Related Paraphernalia-Methamphetamine in violation of Section 19-03.4-03 of the North Dakota Century Code. Trial to a jury was held in District Court, Northwest Judicial District, Minot, North Dakota, on December 13 and 14, 2005. A Criminal Judgment was filed on the 7<sup>th</sup> day of March, 2005 setting forth the sentence for Appellant. Appeal was taken as a matter of right from District Court to the Supreme Court by the filing of Notice of Appeal, dated April 1, 2005 in accordance with time allowed by Rule 4 of the North Dakota Rules of Appellate Procedure.

## STATEMENT OF THE CASE

On March 2, 2004, Appellant Burgard was arrested at his home after law enforcement completed a search of that home under the authority of a Search Warrant dated the 1<sup>st</sup> day of March, 2004. (App. 4). A jury trial commenced on December 13, 2004. On December 14, 2004 a jury found beyond a reasonable doubt that Appellant Burgard had committed the offense of unlawful possession of drug related paraphernalia (methamphetamine related). On March 7, 2005, Appellant Burgard was sentenced to four years at the North Dakota Department of Corrections and Rehabilitation in Bismarck, North Dakota. His time to serve commenced on March 4, 2005, the date of his sentencing hearing. (App. 12). The Notice of Appeal was filed on April 1, 2005. (App. 18).

## STATEMENT OF FACTS

The Ward County Narcotics Task Force, obtained a Search Warrant, dated March 1, 2004 allowing the search of a residence at 900 55<sup>th</sup> St. SE, Minot, North Dakota. Transcript Page 37. Ward County Narcotics Task Force then exercised that Search Warrant on March 2, 2004 at approximately 9:30 p.m.. Transcript Page 38. The search was concluded at 11:50 p.m.. Transcript Page 39. Present at the residence were Leo Burgard, Tanya Burgard, a/k/a Tanya Clark, Tanya Fletcher, Eric Burgard and three other minor children of Leo Burgard. Transcript Page 39. Leo Burgard was laying in a bedroom in his home. Transcript Page 91. The search of the home found: 1. film cannister with residue, 2. two foils and a pen tube, 3. red case with razor and lighter, 4. baggie with residue, 5. burnt blister packs, unknown number, and 6. beer can with foils. Transcript Page 41-46. Items 1, 2 and 3 were taken from a bedroom in the house. Transcript Page 47. Items 4, 5 and 6 were taken from a family room area that was a converted attached garage. Transcript Page 48. No testing was completed by the state to find evidence of individual possession of these items, specifically fingerprinting. Transcript Page 63. Tanya Burgard plead guilty to possessing items 1, 2, 3, 4, 5 and 6. Transcript Page 157. Tanya Burgard testified that item no. 1, the film cannister was hers and that she kept meth inside it. Transcript Page 151. Tanya Burgard testified that items 2, the pen and tin foil were used by her to smoke methamphetamine. Transcript Page 152. Tanya Burgard testified that item number 4, the baggie with meth residuc was hers and she used it to pour the meth from the baggie into the film cannister. Transcript Page 153. Tanya Burgard testified that item number 3, the lighter and razor blade belonged to her and were not used for meth ingestion. Transcript Page 153. The razor in item 3, had no trace of

methamphetamine residue. Transcript Page 104. Tanya Burgard testified that items 5 and 6 were trash items in the fireplace. Transcript Page 154 and 155. The state lab did not do analysis on items 5 and 6. Transcript Page 47. No methamphetamine residue was found because no test was done.

## LAW AND ARGUMENT

### THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONVICTION OF POSSESSION OF DRUG PARAPHERNALIA

The general theory of criminal possession allows for two types, actual possession and constructive possession. In the Interest of K.S., 500 N.W.2d 603, 606 (N.D. 1993) citing Black's Law Dictionary 1163 (6<sup>th</sup> Ed. 1990). In this case, the state concedes that we are only concerned with constructive possession. Transcript Page 191, Line 7, Page 210, Line 18, Page 213, Line 7. Accordingly, Black's definition of Constructive Possession states "a person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it". K.S. at 606. The court in K.S. goes on to state that constructive possession "may be determined from ability and intent to control". Id.

In the City of Whapeton v. Wilkie, 477 N.W.2d, 216 (N.D. 1991), a co-rentor juvenile alleged to be in possession of alcohol, this court stated that constructive possession necessary for conviction requires that "the facts permit the inference of an intent to possess". Wilkie at 216, also cited in K.S. at 607. Wilkie goes on to state "unless actual control exists, there must be found from the surrounding facts and circumstances, aided by reasonable inferences, an *intent* to exercise control over the prohibited item". *Emphasis added.* Wilkie at 216-17 (quoting In the Interest of R.B., 322 N.W.2d 504 (Wis. Ct. App. 1982) also cited in K.S. at 607. Accordingly, paraphrasing Justice Van De Walle, there simply is not enough evidence in this case to show Leo Burgard's power and capability to exercise control in a



realistic and practical sense over all aspects of his home. Therefore no inference can be drawn that Leo Burgard has constructive possession just by his mere presence in the home. This factual basis is not the same as in Wilkie, but the reasoning is nevertheless controlling.

The Court in K.S. went on to further cite, R.B., stating that “the opportunity to possess, standing alone, does not establish possession. There must additionally be the exercise of some dominion or control over the *substance*.... To be functional, the dominion and control necessary to permit conviction based on constructive rather than actual possession requires that the facts permit the inference of an *intent* to possess.” K.S. at 608. *Emphasis added.*

In the case cited, K.S., the young juvenile went to a house, knowing that alcohol was present and remained there for some thirty (30) minutes. The court states that “those circumstances of knowledge and proximity alone are not enough to establish actual possession, without some evidence that K.S. was there to drink alcohol”. K.S. at 608. The mere presence in a house where drug paraphernalia is accessible, without any actual control of the paraphernalia, is insufficient as a matter of law to support a determination that Leo Burgard was in possession of drug paraphernalia.

The instruction given to the jury under possession requires that Leo Burgard knowingly had the ability and *intent* to exercise control over the paraphernalia in order to be in constructive possession of the paraphernalia. The definition of knowingly requires Burgard to engage in conduct when he knows or has a firm belief, unaccompanied by substantial doubt that he is doing so, whether or not it is his purpose to do so. In this case, there is no evidence, not one individual item that can be pointed to by the prosecution to

show that Burgard engaged in conduct showing an intent to exercise control over drug paraphernalia in this case. Tanya Burgard plead guilty to possession of the paraphernalia in this case. Tanya Burgard testified that the paraphernalia in this case is hers. The state failed to use its resources appropriately to complete testing which would show any other possession different than that testified to by Tanya Burgard. The circumstantial evidence in this case is not of such probative force that the fact-finder could have found Mr. Burgard guilty of constructive possession beyond a reasonable doubt. State of N.D. v. Steinbach, 1998 N.D. 18, ¶16, 575 N.W.2d 193. Accordingly, it is clear that there is not constructive possession of the paraphernalia in this case and the conviction of Mr. Burgard must be reversed.

**THE TRIAL COURT'S DENIAL OF MR. BURGARD'S MOTION FOR CONTINUANCE DATED NOVEMBER 23, 2004 WAS AN ABUSE OF DISCRETION**

Rule 50 of the North Dakota Rules of Criminal Procedure allows for a court to make an order for continuance of a criminal action as may be necessary in the interest of justice. The court in this case, on December 1, 2004, did deny Defendant's request for a continuance with regard to the trial date scheduled for December 13, 2004. The Court's rationale was that a new trial date would be so far down the road,...

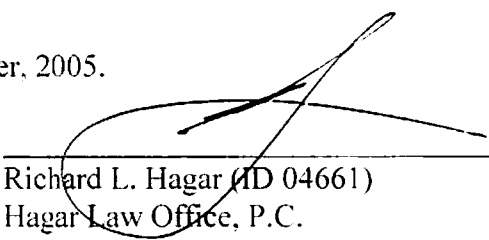
Under Rule 50, the explanatory note states that preference shall be given to criminal proceedings as far as practicable. This is generally recognized as desirable in the orderly administration of justice. In this case, attorney Faron Terry was Mr. Bugard's third attorney. It is conceivable, and more likely than not, that Mr. Terry's request for a continuance on behalf of his client three weeks prior to trial was necessary to give his client a fair representation at seeking justice.

It appears, from the Court's Order, dated December 1, 2004, that the Court was more concerned with expediency than the interest of justice. The Court did, in its Order of December 1, 2004, abuse its discretion in not granting a continuance and allowing for Mr. Burgard to have representation that would satisfy the interests of justice. Mr. Burgard should be allowed to have a new trial.

### CONCLUSION

The Court in this case should find that there was insufficient circumstantial evidence to substantiate guilt by constructive possession beyond a reasonable doubt. The Court should reverse Mr. Burgard's conviction. In the alternative, this Court should find that the Trial Court abused its discretion in not allowing for a continuance prior to trial and thereby give Mr. Burgard a new trial.

Dated this 3<sup>rd</sup> day of November, 2005.



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CERTIFICATE OF COMPLIANCE ON WORD COUNT,  
WORD PROCESSING PROGRAM  
VIRUS-FREE DISK

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I hereby certify that this brief complies with FRAP 32(a)(7)(C); the word count is 2,137 for actual words used in brief.

I certify that the word-processing program is WordPerfect 8.

It is hereby certified that the disk submitted with this brief has been scanned and is virus free.

Dated this 3<sup>rd</sup> day of November, 2005.

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AFFIDAVIT OF MAILING

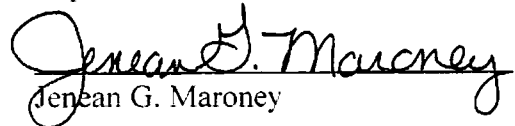
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STATE OF NORTH DAKOTA )  
)  
COUNTY OF WARD )

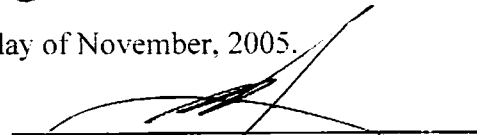
Jenean G. Maroney being first duly sworn, deposes and state that on the 3<sup>rd</sup> day of November, 2005 she served the attached APPELLANT'S BRIEF and APPELLANT'S APPENDIX by placing a true and correct copy in an envelope addressed as follows:

Timothy C. Wilhelm  
Assistant Ward County State's Attorney  
PO Box 5005  
Minot, ND 58702-5005

and depositing same, with postage prepaid, in the United States mail at Minot, North Dakota, and that regular mail service exists between Minot and points of address.

  
Jenean G. Maroney

Subscribed and sworn to before me this 3<sup>rd</sup> day of November, 2005.

  
Richard L. Hagar, Notary Public  
Ward County, North Dakota  
My commission expires: 8/22/2006