

ORIGINAL

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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SUPREME COURT
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State of North Dakota)
Plaintiff/Appellee,)
vs.)
Leo Dean Burgard,)
Defendant/Appellant.)

Supreme Court No. 20050113

District Court No. 04-K-00340

APPEAL FROM THE DISTRICT COURT OF WARD COUNTY
NORTHWEST JUDICIAL DISTRICT
DISTRICT COURT NO. 04-K-00340
THE HONORABLE DOUGLAS L. MATTSO

20050113

APPELLEE'S BRIEF

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STATE OF NORTH DAKOTA

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ISSUES PRESENTED

- I. Was There Sufficient Evidence to Support the Conviction of Possession of Drug Paraphernalia?

- II. Did the Court's Denial of the Defendant's Motion for a Continuance Constitute an Abuse of Discretion?

STATEMENT OF THE CASE

The State of North Dakota as Plaintiff/Appellee in this matter agrees with the jurisdictional statement and statement of the case contained in the Appellant's Brief.

STATEMENT OF THE FACTS

The State of North Dakota as Plaintiff/Appellee in this matter accepts the Statement of Facts given in the Brief of the Appellant. In addition to the facts laid out in the Appellant's recitation, the State would point out that the testimony of Task Force Officer, Travis Andersen, which makes it clear that Leo Burgard specifically admitted the seized items of methamphetamine paraphernalia were his. (Tr. page 48, lines 12 through 24)

LAW AND ARGUMENT

I. WAS THERE SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION OF POSSESSION OF DRUG PARAPHERNALIA?

The Appellant has contended that there was insufficient evidence to support his conviction for Unlawful Possession of Methamphetamine Related Drug Paraphernalia. This Court has stated on many occasions that in reviewing the sufficiency of the evidence to convict, the Court will look only to the evidence most favorable to the verdict and the reasonable inferences therefrom to see if there is substantial evidence to warrant a conviction. A conviction rests upon insufficient evidence only when no rational fact finder could have found the defendant guilty beyond a reasonable doubt after viewing the evidence in a light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in it's favor. State v. Schill, 406 NW 2d 660 (N.D. 1987); State v. Kunkel, 548 NW 2d 773 (N.D. 1996); and State v. Knowles, 2003, 203 ND 180 ¶ 6, 671 NW 2d 816.

In reviewing the sufficiency of the evidence, the Court will not weigh the conflicting evidence or judge the credibility of witnesses. State v. Bastien, 436 NW 2d 229 (N.D. 1989). Further, the Court will not substitute it's Judgement for that of the jury. State v. Jacobson, 419 NW 2d 899 (N.D. 1988).

Aside from the defendant's direct admission to an officer that the drug paraphernalia seized was his, reasonable inferences could also be made showing his constructive possession of the paraphernalia based upon several of the items being found in Mr. Burgard's bedroom. Additionally, it is relevant that Mr. Burgard was actually in the bedroom at the time of the police arriving at the residence. (Tr. page 90, lines 16-18; Tr. page 91, lines 2-4).

While it is true that Mr. Burgard's wife's in testimony at trial attempted to claim sole responsibility for the paraphernalia items, it is entirely reasonable that the jury did not find her testimony credible given her lack of candor to the Court as exemplified by her unwillingness, despite a directive of the Court, to divulge the source of the methamphetamine associated with the paraphernalia. (Tr. page 160, lines 10-25). This Court has clearly indicated in reviewing the sufficiency of evidence, it will not judge the credibility of witnesses. Bastien at 233. Additionally, as was stated above, this Court will not substitute its Judgment for that of the jury. Jacobson at 901. In this case the jury was instructed with relation to a witness that if they found the witness had testified falsely, they could wholly disregard the witnesses testimony as was laid out in the standard jury instruction on impeachment.

In brief summary, it is clear there was sufficient evidence from which the jury could find the defendant guilty based upon his admissions as well as direct proximity to the drug paraphernalia involved in the case.

II. DID THE COURT'S DENIAL OF THE DEFENDANT'S MOTION FOR A CONTINUANCE CONSTITUTE AN ABUSE OF DISCRETION?

A Trial Court abuses its discretion when it acts in an arbitrary, unreasonable or unconscionable manner. Routledge v. Routledge, 377 NW 2d 542, 547 (N.D. 1985). The appellant offers no support for his claim that the Trial Court's denial of a continuance was an abuse of discretion. Certainly he cannot show that the denial of a continuance represented an arbitrary unreasonable or unconscionable action by the Court. Rule 6.1 of the North Dakota Rules of Court indicates in relevant part as follows:

Rule 6.1 CONTINUANCES

(a) ATTORNEY ENGAGED. A party is entitled to a continuance on the ground that his attorney is actually engaged in another trial or hearing, but only for the duration of the particular trial or hearing in which the attorney is then engaged.

(b) OTHER CONTINUANCES. Motion for a Continuance shall be promptly filed as soon as the grounds therefore are known and will be granted only for good cause shown, by affidavit or otherwise. Stipulations for continuance will not be recognized except for good cause shown. Every continuance or postponement granted upon Motion shall be upon such terms as the court may impose.

In viewing Rule 6.1 with relation to continuances, it is clear that legitimate reasons for continuance were not present in this case. As is clear from item 34 in the register of actions filed in this matter, a letter from defense counsel indicates the request for continuance was predicated merely upon a preference to try other pending criminal matters against the same defendant prior to this case. There was never any claim raised that not granting a continuance would in any way prejudice the defendant's ability to respond to the charges.

CONCLUSION

For the foregoing reasons the State of North Dakota as Plaintiff/Appellee in the matter respectfully requests that the Court affirm the conviction of the defendant.

Dated this 2nd day of December, 2005.



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