ORIGINAL (e-filed)

20070250

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	Supreme Court No. 200700250
Plaintiff/Appellee,	)	
	)	
vs.	)	
	)	Cass Co. No. 06-K-0978
Edward Dana Curtis,	)	
	)	
Defendant/Appellant.	)	

APPEAL FROM THE CRIMINAL JUDGMENT AND COMMITMENT ENTERED BY THE DISTRICT COURT FOR THE EAST CENTRAL JUDICIAL DISTRICT THE HONORABLE BURT L. RISKEDAHL PRESIDING ON AUGUST 16th, 2007.

BRIEF OF THE APPELLANT

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STATEMENT OF THE CASE

NATURE OF THE CASE AND PROCEDURAL HISTORY

¶1 This appeal is taken from a Criminal Judgment entered by the Honorable Burt L. Riskedahl, Judge of the District Court for the East Central Judicial District on August 16th, 2007, convicting the Defendant and Appellant Edward Curtis of theft of property. (Docket 144). Notice of Appeal was filed on August 22, 2007. (Docket 147; App. 7).

STATEMENT OF FACTS

¶2 On October 14, 2007 Mr. Curtis opened an account at Northland Educator's Federal Credit Union. App. 48. Mr. Curtis used a check from a Canadian company, in Canadian funds, to open his account in the amount of $55,450 or $45,341 in U.S. dollars. App. 49. Mr. Curtis was told that the check would be sent to the credit union's corporate office and that he would be notified when the check had cleared and the funds were available to withdraw. App. 52.

¶3 On October 27, 2007 Shelly Flaagan, a teller at the credit union, called Mr. Curtis and told Mr. Curtis that the check had cleared. App. 59. That same day Mr. Curtis went to the credit union and purchased money orders and two cashier's checks. App. 59-60. The money orders were not dated. App. 62.

¶4 On October 28, 2007 Marietta Wahl, manager of the credit union, received a call from Midwest Corporate Federal Credit Union and was told that Mr. Curtis's check was no longer a "good check" and that the check was being returned to the credit union. App. 67-68.

¶5 On that same date, at approximately 5:00 p.m., Ms. Wahl called Mr. Curtis and notified him that the check was no longer good check. App. 68. Mr. Curtis responded saying, "Holy shit, I've already spent some of that money. The teller testified that I've given some of those checks out and I've given some of those money orders out." App. 68. Mr. Curtis testified that he had disposed of all of the certified checks and money orders. App. 128.

¶6 A jury trial was held on August 14, 2007. See Transcript of Proceeding. App. 25-167. At the conclusion of the State's case and prior to the presentation of the defense,

Mr. Mottinger, Mr. Curtis's stand-by counsel, moved the Court under N.D.R.Crim.P. 29 for a judgment of acquittal. App. 102-104. The district court denied this motion, noting it was probably as close as it had ever been to granting a rule 29 motion. App. 106.

¶7 A Notice of Appeal was filed by Mr. Curtis through his stand-by counsel, Attorney Mottinger, on August 16, 2007. App. 7. In this manner, Mr. Curtis brings before the Court the question of whether the evidence was sufficient as a matter of law to support Mr. Curtis' conviction of theft of property and he was denied due process by not being allowed to subpoena witnesses.

LAW AND ARGUMENT

I. MR. CURTIS WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND OF SECTION 13 OF THE NORTH DAKOTA CONSTITUTION WHEN HE DID NOT RECEIVE ASSISTANCE IN SUBPOENAING HIS WITNESSES.

¶8 The United States Supreme Court acknowledged that "where the defendant waives counsel and chooses to exercise his *Faretta* right of self-representation, the trial judge 'may-even over the objection by the accused-appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused, in the event that termination of the defendant's self-representation is necessary.' " Faretta v. California, 422 U.S. 806, 834 n. 46, 95 S.Ct. 2525, 2541 n. 46, 45 L.Ed.2d 562 (1975) (footnote). A fair trial in a fair tribunal is a basic requirement of due process, Tumey v. Ohio, 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749 (1927). When reviewing a due process claim, this Court reviews the record de novo. State v. Campbell, 2006 ND 168, ¶ 6, 719 N.W.2d 374, *cert. denied*, --- U.S. ----, 127 S.Ct. 1150, --- L.Ed.2d ---- (U.S. Jan. 22, 2007) (No. 06-564); State v. Blue, 2006 ND 134, ¶ 6, 717 N.W.2d 558.

¶9 At the June 7, 2007 hearing the Court stated Mr. Curtis would be representing himself but would have Mr. Mottinger available to assist Mr. Curtis. App. 19. Mr. Mottinger advised the Court that he did not want to be put in the position of having to issue subpoenas for Mr. Curtis. App. 15.

¶10 While in chambers on the morning of the trial Mr. Curtis advised the Court that he had requested subpoenas in for various people Mr. Curtis wanted to testify on his behalf. App. 35. Once again, while in chambers after the State had rested, Mr. Curtis advised the Court that he had requested from Mr. Mottinger and from the clerk five witnesses to be subpoenaed. App. 107. Mr. Curtis believed these witnesses had relevant testimony as officers who had interviewed him in regard to the case.

¶11 The record is vague on when Mr. Curtis specifically asked Mr. Mottinger to subpoena his witnesses. However, the record clearly reflects that Mr. Curtis asked for assistance in subpoenaing his witnesses. App. 109.

¶12 On the day of trial, the Court was made aware that Mr. Curtis' witnesses had not been subpoenaed but did not make any further inquiries into why these witnesses were not subpoenaed. Rather, the Court allowed Mr. Mottinger to make the strategic decision not to call witnesses Mr. Curtis thought were important to his case. It was as if Mr. Mottinger was running the case in spite of Mr. Mottinger having informed the Court that the reason he was stand by counsel was that he disagreed with Mr. Curtis's strategic decision to subpoena those witnesses.

¶13 The job of stand-by counsel is to assist the pro se defendant with issues defendant requests, and the pro se defendant makes the strategic decisions of the case. Standby counsel does not represent the defendant for the defendant represents himself

and may or may not chose to consult with his standby counsel during the course of the proceedings. United States v. Taylor, 933 F.2d 307, 312-13 (5th Cir.1991). The duties and responsibilities of standby counsel are understandably less than the obligations of retained or appointed counsel. United States v. Schmidt, 105 F.3d 82, 90 (2nd Cir.1997).

¶14 On appeal, this Court does not second-guess matters of trial tactics such as whether to call certain witnesses. *See* Sayler v. State, 2005 ND 166, ¶ 10, 704 N.W.2d 559. " '[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.' " State v. Schlickenmayer, 364 N.W.2d 108, 112 (N.D.1985) (quoting Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

¶15 Mr. Curtis made the strategic decision to call five witnesses and to have them subpoenaed. Mr. Mottinger had an obligation to assist Mr. Curtis when he asked, or in the alternative, the Court had the obligation to ensure Mr. Curtis received assistance in subpoenaing witnesses. Mr. Curtis asked for assistance in issuing subpoenas Mr. Curtis felt were relevant to his case. Mr. Curtis was denied assistance and, therefore, was denied due process of the law.

II. THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN ALLOWING MR. CURTIS' CRIMINAL PROCEEDING TO CONTINUE WHEN THE MATTER SHOULD HAVE BEEN ADJUDICATED CIVILLY.

¶16 In a criminal case, a citizen is deprived of his personal liberty; a civil case deals merely with property rights and there are other remedies. Kostelecky v. Engelter, 278 N.W.2d 776, 779 (N.D. 1979). The issue for this Court to determine is whether this action is in the atmosphere of civil, rather than criminal, litigation. This is the procedure that has been commonly used in North Dakota in the past. See, e.g., Mohr v. Tescher,

313 N.W.2d 737 (N.D.1981); Backhaus v. Renschler, 304 N.W.2d 87 (N.D.1981); Keidel v. Rask, 290 N.W.2d 255 (N.D.1980); Berger v. Berger, 88 N.W.2d 98 (N.D.1958); Berger v. Morton County, 57 N.D. 305, 221 N.W. 270 (1928). From these cases, it appears this Court reviews the record as a whole to determine whether it should fall within the criminal or civil realm and therefore, the standard of review is de novo.

¶17 The credit union contacted Mr. Curtis and informed Mr. Curtis that his check had cleared. At that point, Mr. Curtis was authorized by the credit union to take the money out of his account. Mr. Curtis then purchased certified checks and money orders from the credit union with the majority of the money in Mr. Curtis' account. At the point in which Mr. Curtis purchased the money orders and certified checks, the money in Mr. Curtis' account was transferred with authorization from the credit union. The fact that Mr. Curtis purchased a liquid asset with the money does not negate the fact that the credit union had already authorized Mr. Curtis to use the money in his account to make a purchase.

¶18 Through no fault of Mr. Curtis, the check was subsequently deemed not good. It was an error on the part of the credit union to accept the check as a good check. For Mr. Curtis to be charged with the criminal act of theft by unauthorized transfer of money after the credit union had authorized Mr. Curtis to transfer the money and make a purchase with the money flies in the face of justice.

¶19 In order for a criminal act to have been committed, there must be a showing that at the time Mr. Curtis purchased the certified checks and money orders, Mr. Curtis somehow knew the check was not good and that Mr. Curtis acted with deceit in obtaining the money. Clearly, the State has not alleged this scenario. The fact that Mr. Curtis was

subsequently notified that the check was not good after making a purchase with the money deemed good at the time does not meet the burden that a criminal act has been committed. This is a purely civil matter that has already been resolved.

¶20 This Court has addressed the issue of whether a criminal matter should be adjudicated civilly, most notably in the cases of State v. Brakke, 474 N.W.2d 878 (N.D.1991) and State v. Meyer, 361 N.W.2d 221 (N.D.1985).

> In *Brakke*, this Court held, where there was a legitimate dispute as to ownership of growing crops, a criminal action for theft and attempted theft of the crops was an inappropriate method to resolve the ownership issue. Accordingly, judgments of conviction were reversed. Similarly, in *Meyer*, this Court held, where there was a legitimate dispute whether a road had become a public road by prescription, criminal action for obstruction of a public road was inappropriate. Again, this Court reversed the judgment of conviction.

State v. Trosen, 547 N.W.2d 735, 738 (N.D. 1996).

¶21 In the present case, the credit union authorized Mr. Curtis to exercise control of the money at the time Mr. Curtis received the certified checks and money orders. The State did not present any evidence to the contrary. Upon learning that the check was actually no good, the credit union's remedy would be commencing a civil lawsuit against Mr. Curtis, which the credit union did, to resolve this matter civilly.

¶22 This Court has also addressed this issue in the case of State v. Trosen, 547 N.W.2d 735 (N.D. 1996). In Trosen, Trosen was charged with theft by deception. Trosen argued that there was a contractual dispute and that his matter was that of civil nature, not a criminal act. Although this Court, in Trosen, found that there was not a contractual dispute over Trosen double-billing and paying himself because Trosen offered no explanation as to why his case was appropriate for civil resolution. This Court reasoned, "A contractual dispute is not created by the fact an employee who believes the time and

service devoted to the employer merit increased compensation, increases that compensation without the knowledge of the employer." State v. Trosen, 547 N.W.2d 735, 738 (N.D. 1996).

¶23 The present case is distinguishable from that of State v. Trosen, 547 N.W.2d 735 (N.D. 1996). In the present case Mr. Curtis obtained the money from the credit union through authorization and error by the credit union whereas Trosen obtained money through deception.

¶24 Because Mr. Curtis made a purchase with complete authorization from the credit union, this matter is purely civil and without any basis for any criminal proceeding. The appropriate vehicle for resolution of the present case is through civil remedies, not criminal action.

III. THE EVIDENCE WAS NOT SUFFICIENT AS A MATTER OF LAW TO SUPPORT THE DEFENDANT'S CONVICTION OF THEFT OF PROPERTY.

¶25 The standard of review regarding a claim of insufficiency of the evidence has been well-settled by this Court. On appeal, when considering the sufficiency of the evidence, this Court will sustain the guilty verdict if "upon reviewing the evidence in a light most favorable to the verdict, we determine that there is substantial evidence to support it." State v. Ohnstad, 359 N.W.2d 827, 834 (N.D. 1984). This Court views the evidence and all reasonable inferences in the light most favorable to the prosecution and then determines whether a rational factfinder could have found guilt beyond a reasonable doubt. State v. Lambert, 539 N.W.2d 288, 289 (N.D.1995).

¶ 26 "This Court will reverse a conviction on the ground of insufficient evidence only if, after viewing the evidence and all reasonable inferences in the light most

favorable to the verdict, no rational factfinder could have found the defendant guilty beyond a reasonable doubt." State v. Steen, 2000 ND 152, ¶ 17, 615 N.W.2d 555. (citation omitted).

¶27 Even under this high standard, Mr. Curtis' conviction should be overturned. Mr. Curtis was charged with class B theft of property under N.D.C.C. § 12.1-23-02(1), which provides:

> A person is guilty of theft if he:
> Knowingly takes or exercises unauthorized control over, or makes an unauthorized transfer of an interest in, the property of another with intent to deprive the owner thereof;

¶28 To establish theft of property under NDCC § 12.1-23-02(1), the State must prove three elements: (1) knowingly (2) takes or exercises unauthorized control over, or makes an unauthorized transfer of an interest in, the property of another (3) with intent to deprive the owner thereof. State v. Bourbeau, 250 N.W.2d 259 (N.D.1977).

¶29 Mr. Curtis was notified by the credit union that the check had cleared and authorized by the credit union to take the money out of his account. Mr. Curtis then purchased certified checks and money orders from the credit union with the majority of the money in Mr. Curtis' account. Although the money orders and certified checks Mr. Curtis were purchased at the credit union, they were from a third party, not directly from the credit union. App. 71. At the point in which Mr. Curtis purchased the money orders and certified checks, the money in Mr. Curtis' account was transferred with authorization from the credit union.

¶30 It was not until the day after the transfer was made that the credit union was notified that Mr. Curtis' check did not clear. The issue of whether Mr. Curtis had any of the remaining money orders in his possession after he was notified is irrelevant. Mr.

Curtis had already spent the money by buying purchasing money orders and certified checks. Mr. Curtis did not exercise unauthorized control over the money at the time he disposed of it – i.e. at the time he purchased the money orders and certified checks from a third party. The evidence indisputably shows that Mr. Curtis was fully authorized to dispose of the money at the time he did so.

¶31 Nevertheless, the State relies upon Mr. Curtis' alleged statement to Ms. Wahl that he had already given some of the money out to support the charge of theft. This statement fails to reflect the fact that at the time Mr. Curtis disposed of the money by purchasing certified checks and money orders, he was authorized by the credit union to do so.

¶32 An essential element of a conviction of the offense of theft of property under N.D.C.C. § 12.1-23-02(1) is knowledge that the use is unauthorized. The word "knowingly" applies to an actor who knows, or has a firm belief unaccompanied by substantial doubt, that he is engaging in the proscribed conduct. NDCC § 12.1-02-02(1)(b): State v. Kaufman, 310 N.W.2d 709 (N.D.1981).

> Ordinarily, where culpability is required, that kind of culpability is required with respect to every element of the conduct and to those attendant circumstances specified in the definition of the offense. NDCC § 12.1-02-02(3)(a). This means that not only does the State have to prove defendant knowingly performed the proscribed act, *i.e.*, taking or exercising control, but also that defendant knew of the existence of the specified attendant circumstances, *i.e.*, that his control was unauthorized. Accordingly, in order to convict Johnson of theft of property by exercising unauthorized control, the State must prove that he knew he was exercising control over the property, and that he knew his control was unauthorized. *See* National Commission on Reform of Federal Criminal Laws, II Working Papers at 920 (1970).

State v. Johnson, 425 N.W.2d 903, 905 (N.D. 1988).

¶33 To satisfy the element of knowledge, the State must show that after Mr. Curtis had knowledge that the check had not cleared, he exercised unauthorized control over the money in the his bank account. There was no evidence presented by the State showing Mr. Curtis exercised unauthorized control over any money after he was notified the check did not clear. It is undisputed Mr. Curtis was clearly given authorization to withdraw money out of his account. In fact, the evidence shows that Mr. Curtis had already made a purchase with the money with full authorization from the credit union.

¶34 Lastly, there is no evidence to support the finding that Mr. Curtis intended to deprive the credit union of the money. NDCC § 12.1-02-02(1)(a) defines an intentional act as conduct that a person engages in with a purpose to do so. Mr. Curtis transferred the money with full authorization from the credit union. There is no other evidence from which the jury could reasonably infer that Mr. Curtis intended to deprive the credit union of the money.

¶35 In reviewing the evidence in a light that is most favorable to the verdict. Mr. Curtis submits that it is clear that there is no evidence in the record to support the fact that at the time Mr. Curtis purchased the money orders and certified checks he had knowledge that he was not authorized to do so. Such a finding is necessary for Mr. Curtis to be convicted of unauthorized control Mr. Curtis submits that based on the evidence before the trial court, no rational factfinder could have found Mr. Curtis guilty beyond a reasonable doubt after drawing all inferences in favor of the verdict and viewing all the evidence in a light most favorable to the State. State v. Schill, 406 N.W.2d 660 (N.D. 1987). There is no competent evidence that would allow a reasonable factfinder to draw a reasonable inference that Mr. Curtis is guilty beyond a reasonable doubt. See State v.

Gagnon, 1999 ND 13, 589 N.W.2D 560 (N.D. 1999). Mr. Curtis respectfully submits that the evidence presented during the trial does not support the fact that, at the time Mr. Curtis distributed the money orders and certified checks, he was not authorized to do so.

IV. THE CONVICTION WAS OBTAINED AGAINST THE WEIGHT OF THE EVIDENCE SO AS TO REQUIRE THAT THE CONVICTION BE OVERTURNED.

¶36 When a court is asked to review an appeal based on the issue of whether or not the conviction is against the weight of the evidence, that court must evaluate for itself the credibility of the evidence. State v. Yineman, 2002 ND 145 ¶9, 651 N.W.2d 648, 952 (N.D. 2002). "If the [trial] court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury." Id. (quoting U.S. v. Lincoln, 630 F.2d 1313, 1319 (8th Cir.1980)).

¶37 On challenges based on the weight of the evidence a trial court the court asks only if the prosecution's case could have been believed by a rational factfinder. While a Court may find that there is sufficient evidence to sustain the verdict, a verdict can be set aside if the preponderance of the evidence is against the verdict. In challenges based on the weight of the evidence, the reviewing court acts as a "thirteenth juror" and independently assigns value to and weighs the evidence. State v. Yineman, 2002 ND 145 ¶10, 651 N.W.2d 648, 952.

¶38 If this Court concludes that there was sufficient evidence to support Mr. Curtis' conviction, the verdict should still set aside since the evidence presented in Mr. Curtis' case goes against his conviction causing a miscarriage of justice.

¶39 The State must prove beyond a reasonable doubt that Mr. Curtis knew that he was not authorized to use, dispose of, or transfer money from his check at the time he purchased the money orders and certified checks. Mr. Curtis was notified by the credit union that his check had cleared. That same day Mr. Curtis purchased certified checks and money orders therefore disposing of most of the money in his bank account with full authorization by the credit union. Since Mr. Curtis was authorized to dispose of the money the evidence does not support the conviction that Mr. Curtis exercised unauthorized control over the money at the time he purchased the money orders and certified checks. Rather, the evidence indisputably shows Mr. Curtis disposed of the money with full authorization to do so.

¶40 Construing the evidence in a light most favorable to the State, the evidence presented is insufficient to convict Mr. Curtis of theft of property. There is no finding in the record by the trial court that Mr. Curtis knew that he had no authority to do so at the time he spent the money; the presence which is essential to uphold any conviction of Mr. Curtis for theft.

¶41 Mr. Curtis respectfully submits that the evidence presented here does not show beyond a reasonable doubt that Mr. Curtis knew that he had no authority to dispose of the money at the time he dispensed it. A showing of such knowledge on the part of Mr. Curtis is crucial to the State gaining a conviction. Since the record does not indicate that such a showing of knowledge on the part of Mr. Curtis, Mr. Curtis' conviction should be overturned.

CONCLUSION

¶42 Based upon the submission, pleadings, testimony, argument and authority contained herein, Appellant respectfully requests that this Court find that this is a purely civil matter and that as matter of law, and that as a matter of law the evidence was insufficient to support Mr. Curtis' conviction of theft of property, or if the evidence was sufficient to support the conviction, that the weight of the evidence does not support the conviction. In the alternative, that this Court find Mr. Curtis was denied due process of law when Mr. Curtis did not receive assistance in subpoenaing his witnesses.

¶43 Mr. Curtis respectfully requests that this Court reverse the District Court's criminal judgment enter a judgment of acquittal. In the alternative, Mr. Curtis respectfully requests that this Court remand this case to the District Court for a new trial based upon the finding that Mr. Curtis was denied due process of law.

Dated this 16th day of November, 2007.

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IN THE SUPREME COURT 20070250
STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff, vs. Edward Curtis, Defendant.	AFFIDAVIT OF SERVICE Supreme Court No. 200700250 Cass Co. No. 06-K-978

The undersigned, being of legal age, being first duly sworn deposes and says that on the 16th day of November, 2007, she served true copies of the following documents:

Appellant's Brief
Appendix of the Appellant

And that said copies were served upon:

Gary Delorme
Cass Assistant State's Attorney
Fax: (701) 241-5838
Gary.Delorme@co.cass.nd.us

by email.

Dated this 16th day of November, 2007.

Holly Bicker

Subscribe and sworn to before me this 16th day of November, 2007.

Notary Public