

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.)

**FILED**  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

**DEC 21 2007**

**STATE OF NORTH DAKOTA**

APPEAL FROM THE CRIMINAL JUDGMENT AND COMMITMENT ENTERED BY  
THE DISTRICT COURT FOR THE EAST CENTRAL JUDICIAL DISTRICT THE  
HONORABLE BURT L. RISKED AHL PRESIDING ON AUGUST 16<sup>th</sup>, 2007.

REPLY BRIEF OF THE APPELLANT

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STATE OF NORTH DAKOTA

## INTRODUCTION

¶1 Appellant, Edward Curtis, offers the following Reply Brief on certain points raised in the Appellee's Brief. Some, but not all, of the arguments already raised by Appellee are discussed in this brief.

## REBUTTAL 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.**

¶2 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.

¶3 The State argues Mr. Mottinger, “properly indicated to the court at that time that he would not subpoena the requested witnesses because they had nothing relevant to offer.” Appellee Brief ¶21.

¶4 As stand-by counsel, Mr. Mottinger’s duty was to assist Mr. Curtis, if asked, not to determine whether or not Mr. Curtis’ witnesses have relevant testimony. Mr. Curtis asked for assistance in subpoenaing his witnesses. Mr. Curtis did not ask for Mr. Mottinger’s opinion whether the witnesses had relevant testimony. Rather, Mr. Curtis determined, as a pro se defendant, that these officers had relevant testimony and asked for assistance in drafting up subpoenas. Mr. Curtis was denied assistance in subpoenaing five witnesses he felt were important to his case.

¶5 The State goes on to argue, “The court agreed and did not find a need to issue the requested subpoenas.” Appellee Brief ¶23. In reviewing the transcript the transcript shows the Court was made aware that Mr. Curtis’ witnesses had not been subpoenaed on the day of trial. The record also shows the Court did not make any further inquiries into

why these witnesses were not subpoenaed. In addition, the transcript is void of any ruling by the Court regarding the issue of subpoenas. The Court had an obligation to make further inquiries into this issue and assist Mr. Curtis in issuing the subpoenas.

¶6 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.**

¶7 The State argues, “[t]he issue is simply whether the Defendant acted knowingly in exercising unauthorized control over the property of Northland with the intent to deprive them thereof.” Appellee’s Brief ¶29. Even if the issue turns on this argument, the State fails.

¶8 On October 27, 2005 Mr. Curtis used most of the money in his account to purchase cashier’s checks and money order from Traveler’s Express. At the time the cashier’s checks and money orders were purchased, Northland transferred its interest in the money, with full authorization, over to Mr. Curtis. At that time, Mr. Curtis became the drawer and Traveler’s Express became the drawee.

¶9 The State has charged Mr. Curtis with theft of property, unauthorized control on the factual basis that, “Edward Dana Curtis, knowingly presented, uttered and cashed money orders for goods and services from Northland Educators Federal Credit Union which he knew were not properly purchased from the Credit Union.” App. 6.

¶10 An essential element of this crime is that Mr. Curtis exercised unauthorized control over property of Northland credit union. N.D.C.C. §12.1-23-02 (1). Had the credit

union had an interest in the money orders and cashier's checks. the credit union would have had the authority to stop payment on the money orders and cashier's checks. The credit union never stopped payment on the money orders and cashier's checks because the credit union did not have any interest in the money orders.

¶11 Mr. Curtis used money in his account with complete authorization from the credit union to purchase money orders and cashier's checks from Traveler's Express therefore divesting the credit union of all properly interest in that money. After learning that the original check had actually not cleared, the only remedy for the credit union was to commence a civil lawsuit against Mr. Curtis for damages. 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.**

¶12 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).

¶13 The State argues. "[t]he physical evidence offered at trial indicated that Curtis uttered money orders long after being informed by Northland that he needed to return the money." Appellee Brief ¶36. This evidence presented by the State fails to prove any criminal wrongdoing by Mr. Curtis. Rather, this evidence shows that Northland did not have any property interest in the money orders or cashier's checks.

¶14 An essential element of this crime is that Mr. Curtis exercised unauthorized control over property of Northland credit union. N.D.C.C. §12.1-23-02 (1). The State

failed to met this essential element and therefore, Mr. Curtis' Rule 29 motion should have been granted.

¶15 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.**

¶16 In view of this Court's recent decision in State v. Barendt, 2007 ND 164, 740 N.W.2d 87, it is conceded that a motion for a new trial properly preserves this issues for appeal and that Defendant has not properly raised this issue.

**CONCLUSION**

¶17 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.

¶18 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.

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IN THE OFFICE OF THE  
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DEC 27 2007

Dated this 21<sup>st</sup> day of December, 2007.

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State of North Dakota,  
Plaintiff,

vs.

Edward Curtis,  
Defendant.

AFFIDAVIT OF SERVICE

Supreme Court No. 200700250  
Cass Co. No. 06-K-978

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The undersigned, being of legal age, being first duly sworn deposes and says that on the 26<sup>th</sup> day of December, 2007, she served true copies of the following documents:

Corrected Reply Brief of the Appellant

And that said copies were served upon:

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Cass Assistant State's Attorney  
Fax: (701) 241-5838  
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by email.

Dated this 26<sup>th</sup> day of December, 2007.

\_\_\_\_\_  
Holly Bicker

Subscribe and sworn to before me this 26<sup>th</sup> day of  
December, 2007.

\_\_\_\_\_  
Notary Public

20070250

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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State of North Dakota,  
Plaintiff.

vs.

Edward Curtis,  
Defendant.

AFFIDAVIT OF SERVICE

Supreme Court No. ~~200700249~~  
Cass Co. No. ~~07-K-158~~

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The undersigned, being of legal age, being first duly sworn deposes and says that on the 21<sup>st</sup> day of December, 2007, she served true copies of the following documents:

Reply Brief of the Appellant

**FILED**  
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CLERK OF SUPREME COURT

And that said copies were served upon:

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**STATE OF NORTH DAKOTA**

by email.

Dated this 21<sup>st</sup> day of December, 2007.

\_\_\_\_\_  
Holly Bicker

Subscribe and sworn to before me this 21<sup>st</sup> day of  
December, 2007.

\_\_\_\_\_  
Notary Public