

RECEIVED BY CLERK  
SUPREME COURT APR 11 2008

ORIGINAL

IN THE SUPREME COURT

20080058

STATE OF NORTH DAKOTA

20080059

---

SUPREME COURT NO.: 20080058 & 0059

---

State of North Dakota,

Plaintiff-Appellee,

- vs -

Darrell Huber,

Defendant-Appellant.

---

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

APR 11 2008

STATE OF NORTH DAKOTA

---

APPEAL FROM THE CRIMINAL JUDGMENT  
SOUTH CENTRAL JUDICIAL DISTRICT  
MORTON COUNTY CASE NO. 07-K-0650 & 0651  
THE HONORABLE DAVID REICH, PRESIDING

---

APPELLANT'S BRIEF

---

BENJAMIN C. PULKRABEK  
Attorney for Appellant

402 First Street NW  
Mandan, ND 58554  
(701)663-1929  
N.D. Bar Board ID No. 02908

**TABLE OF CONTENTS**

Table of Contents . . . . .	i
Table of Cases, Statutes and Other Authorities . . . . .	ii
Statement of the Issues . . . . .	1
Nature of the Case . . . . .	2
Statement of the Facts . . . . .	4
Argument . . . . .	6
Issues Presented:	
I. Did the trial court err when it failed to grant Defendant’s Rule 29 Motion? . . . . .	6
II. Did the trial court err when it failed to instruct the jury that the Defendant, Darrell Huber didn’t have to testify? . . . . .	7
Conclusion . . . . .	9

**TABLE OF CASES, STATUTES AND OTHER AUTHORITIES**

**TABLE OF CASES**

<u>Lakeside v. Oregon</u>	
98 S.Ct. 1091 (1978) . . . . .	9
<u>State v. Ohnstad</u>	
359 N.W.2d. 827 (ND 1987) . . . . .	6

**STATUTES**

NDCC 39-08-01 . . . . .	2
NDCC 29-21-11 . . . . .	8
Rule 29 . . . . .	6, 7, 10

**OTHER AUTHORITIES**

Black's Law Dictionary Fifth Edition . . . . .	7
Amendment 5 . . . . .	7
Article 1, § 12 . . . . .	8

## STATEMENT OF THE ISSUES

- ISSUE:
- I. Did the trial court err when it failed to grant Defendant's Rule 29 Motion?
  - II. Did the trial court err when it failed to instruct the jury that the Defendant, Darrell Huber didn't have to testify?

## NATURE OF THE CASE

On June 30, 2007, Darrell Huber ("Mr. Huber") was charged in North Dakota Uniform Complaint and Summons with:

1. Driving a Motor Vehicle While Under the Influence of Alcohol in excess of 10% blood alcohol (4<sup>th</sup> in 7 years).
2. Driving While License Privilege is Suspended in this state (6<sup>th</sup> offense).

An Amended Complaint was filed on August 23, 2007, alleging Mr. Huber was driving under the influence of intoxicating liquor or with an alcohol concentration of at least .08% within two hours after the driving or being in actual physical control of a vehicle. It is further alleged that a conviction of the instant offense would constitute a fourth (4<sup>th</sup>) offense in violation of Section 39-08-01 of the North Dakota Century Code or equivalent municipal ordinance within a seven-year period.

A jury trial was held in the Morton County Courthouse in Mandan, North Dakota on December 18, 2007. That jury trial ended with Mr. Huber being found:

1. Guilty of the offense of driving under the influence of an alcoholic beverage and/or driving at a time when he had a blood alcohol concentration of at least .08% by weight as measured by a chemical list performed within two hours after driving as charged in the Complaint.
2. Guilty of the offense of driving while license privilege is suspended as charged in the complaint.

Judgment and Sentence were entered on February 26, 2008. On the DUI Charge, Mr. Huber was sentenced to 1 year with all but 180 days suspended for 2 years, a fine of

\$1000 and mandatory fees of \$325.00 and a chemical evaluation requiring him to follow through with any treatment recommended by the addiction counselor. On the driving under suspension charge, Mr. Huber was sentenced to one year with all but 60 days suspended for 2 years and the 60 days were to run concurrent with the 180 days of the DUI sentence. This order was stayed pending appeal.

The Notice of Appeal from the Criminal Judgment and the Order for Preparation of Trial Transcript was on February 26, 2008. The Notice of Filing the Notice of Appeal is dated February 27, 2008.

This matter is now before the North Dakota Supreme Court.

## STATEMENT OF THE FACTS

The Defendant, Darrell Huber ("Mr. Huber") was charged with two offenses:

1. Driving under the influence of alcohol with an alcohol content of .08 percent or greater.
2. Driving while his license was under suspension. Tr. P. 3, L. 13 - 21.

A jury trial began in Morton County on February 26, 2008 on the above charges.

At that trial, the State called two witnesses and the defense called none. Tr. P. 2.

The State's first witness was Justin O'Hara, who is a Morton County Deputy Sheriff. Deputy O'Hara is stationed in Glen Ullin, North Dakota. Tr. P. 16, L. 8 - 9. While testifying, Deputy O'Hara said he knew Mr. Huber and that Mr. Huber was in the courtroom. Tr. P. 17, L. 6 - 25 and P. 18, L. 1 - 11. The S-10 pickup that was involved in this case, didn't have a front license plate. It is a violation of North Dakota law to drive a vehicle without a front license plate. Tr. P. 18, L. 15 - 19.

Deputy O'Hara testified the alley where he saw Mr. Huber driving was a place that the public had access to. Tr. P. 38, L. 2 - 6.

Before Deputy O'Hara got up to the S-10 pickup, the individual driving it had gotten out of the pickup and was walking toward the back door. Deputy O'Hara got the individual to stop and had a conversation with that individual. During that conversation, Deputy O'Hara asked the individual's name and date of birth which he then ran through dispatch. Tr. P. 20, L. 5 - 21.

Also, during Deputy O'Hara's conversation with dispatch he was informed that Mr. Huber's license was suspended. Tr. P. 21, L. 21 - 23. Deputy O'Hara then asked Mr.

Huber if his license was suspended and Mr. Huber admitted it was. Tr. P. 22, L. 4 - 11.

While Deputy O'Hara was getting the general information from the individual, he detected an odor of an alcoholic beverage coming from Mr. Huber. Tr. P. 20, L. 22 - 25.

Deputy O'Hara then used different divided attention tests to determine whether or not Mr. Huber might be under the influence. Tr. P. 22, L. 12 - 25, P. 23, L. 1 - 25, P. 24, L. 1 - 25, P. 25, L. 1 - 25, P. 26, L. 1 - 25, P. 27, L. 1 - 7.

After giving Mr. Huber the divided attention tests, Deputy O'Hara arrested Mr. Huber, Tr. P. 27, L. 8 - 9.

Deputy O'Hara then testified about the procedures used in drawing blood from Mr. Huber and the sending of the blood drawn to the State Crime Lab. Tr. P. 27, L. 12 - 25, P. 28, L. 1 - 25, P. 29, L. 1 - 25, P. 30, L. 1 - 25, P. 31, L. 1 - 25, P. 32, L. 1 - 25, P. 33, L. 1 - 25 and P. 34, L. 1 - 16.

The other witness called by the State was Michelle Burkett a forensic scientist for the State Crime Lab in Bismarck, North Dakota. Tr. P. 38, L. 18 - 22. Ms. Burkett testified how she tested the blood that was drawn from Mr. Huber and that the result was 0.12 percent by weight. Tr. P. 40, L. 17 - 25, P. 41, L. 1 - 25 and P. 42, L. 1 - 8.

The State rested its case. Tr. P. 44, L. 18 - 19. The Defense then made a motion for acquittal. Tr. P. 45, L. 15 - 18. The State resisted the defenses motion. Tr. P. 45, L. 20 - 22. The Court then denied the motion. Tr. P. 45, L. 23 - 25.

The defense then rested without calling any witnesses. Tr. P. 47, L. 6.

Closing arguments and the States rebuttal were given.

The Court then gave its closing jury instruction. Tr. P. 51, L. 1 - 2.



The jury then began deliberation and returned guilty verdicts on the charge of driving under the influence and driving under suspension. Tr. P. 52. L. 5 - 19.

### **ARGUMENT**

**ISSUE I.** Did the trial court err when it failed to grant Defendant's Rule 29 Motion?

At the conclusion of the State's case, Mr. Huber made a motion for acquittal. That motion was resisted by the State and denied by the trial judge. Tr. P. 45, L. 15 - 25.

The standard of review for insufficiency of the evidence is a strict standard of review that only allows a Motion for Judgment of Acquittal to be granted if the evidence is insufficient to sustain a conviction of the offenses charged State v. Ohnstad. 359 N.W.2d 827 (ND 1987).

In order to know who the Defendant is, that Defendant must be identified by some witness during the trial. In the case now before the Court ("the Case"), the State's witness, Deputy Sheriff, Justin O'Hara testified he knew Mr. Huber, that he was in the Courtroom and that he encountered Mr. Huber on June 30, 2007. Tr. P. 17. L. 1 - 8. Such testimony didn't ever identify which individual in the courtroom was Mr. Huber.

In criminal trials the procedure used in identifying a Defendant for the jury is to follow up the question about the Defendant being in the courtroom with questions about:

1. Where is he in the courtroom?
2. What is he wearing?
3. Can you point at him for the jury?

Then, after the Defendant is identified for the jury, the prosecutor says. "Let the record show that the witness has identified the Defendant."

The above procedure was never used to identify Mr. Huber. Without such identification procedure, the jury had to decide on its own who in the courtroom was Mr. Huber.

The State according to the jury instruction entitled, "Proof Beyond a Reasonable Doubt", must prove all of the essential elements of the crime charged by proof beyond a reasonable doubt. App. P. 23. One of those elements is to identify for the jury who Mr. Darrell Huber is.

Black's Law Dictionary Fifth Edition at page 671 defines identification as:

"Proof of identity. The proving that a person, subject, or article before the court is the very same that he or it is alleged, charged, or reputed to be; as where a witness recognizes the prisoner as the same person whom he saw committing the crime; or where handwriting, stolen goods, counterfeit coin etc., are recognized as the same which once passed under the observation of the person identifying them."

In the case since no one identified Mr. Huber as the Defendant. the Defendant's Rule 29 Motion at the end of the State's case should have been granted.

**ISSUE II.** Did the trial court err when it failed to instruct the jury that the Defendant, Darrell Huber didn't have to testify?

The Defendant in a criminal case has a constitutional and statutory right not to testify:

Amendment 5 to the United States Constitution:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land

or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.” (Emphasis added)

Article 1, § 12. of the North Dakota Constitution:

“In criminal prosecutions in any court whatever, the party accused shall have the right to a speedy and public trial: to have the process of the court to compel the attendance of witnesses in his behalf; and to appear and defend in person and with counsel. No person shall be twice put in jeopardy for the same offense, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law.” (Emphasis added.)

N.D.C.C. 29-21-11:

“In the trial of a criminal action or proceeding before any court or magistrate of this state, whether prosecuted by information, indictment, complaint, or otherwise, the defendant, at the defendant’s own request and not otherwise, must be deemed a competent witness, but the defendant’s neglect or refusal to testify does not create or raise any presumption of guilt against the defendant. Nor may such neglect or refusal be referred to by any attorney prosecuting the case, or considered by the court or jury before whom the trial takes place.” (Emphasis added.)

In the Case, Mr. Huber decided not to testify, and he didn’t request an instruction on the Defendant’s failure to testify. The trial judge has the ultimate responsibility to

conduct a fair trial and after learning Mr. Huber wasn't going to testify, should at least have inquired whether an instruction on Mr. Huber's not testifying should have been given.

In the Case, the trial judge made no inquiry about whether or not an instruction on Mr. Huber's not testifying should be given and in the jury instructions there was no instruction regarding the Defendant's failure to testify.

The purpose of a jury charge and who is to give that charge are set out in Lakeside v. Oregon, 98 S.Ct. 1091 (1978):

"The very purpose of a jury charge is to flag the jurors' attention to concepts that must not be misunderstood, such as reasonable doubt and burden of proof. To instruct them in the meaning of the privilege against compulsory self-incrimination is no different." Id. at 1095.

"It is the judge, not counsel, who has the ultimate responsibility for the conduct of a fair and lawful trial." Id. at 1096.

Therefore, according to Lakeside, it is the obligation of the trial judge, during a criminal trial, to protect a Defendant's constitutional rights and not give any jury instruction on a Defendant not having to testify until after the Defendant has rested and didn't testify.

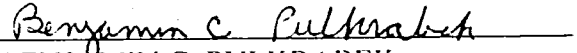
The trial judge's error in not instructing the jury about the Defendant's right not to testify effects a Defendant's constitutional rights and also effects a Defendant's substantial rights.

**CONCLUSION**

For the above and forgoing reasons:

1. The trial judge should have granted Mr. Huber's Rule 29 Motion for Acquittal and the case against Mr. Huber should have been dismissed.
2. The trial court's failure to instruct the jury on the Defendant's failure to testify requires this case to be remanded for a new trial.

DATED at Mandan, North Dakota, this 11 day of April, 2008.

  
BENJAMIN C. PULKRABEK  
402 - 1<sup>st</sup> Street NW  
Mandan, North Dakota 58554  
(701)663-1929  
N.D. Bar Board ID #02908  
Attorney for Defendant-Appellant

**CERTIFICATE OF SERVICE BY MAIL**

The undersigned hereby certifies that she is an employee in the office of Pulkrabek Law Firm and is a person of such age and discretion as to be competent to serve papers.

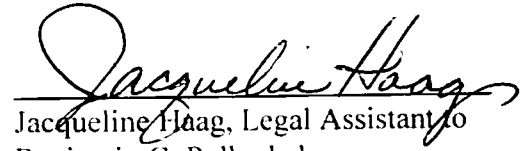
That on April 11<sup>th</sup>, 2008, she served, by mail, a copy of the following:

APPELLANT'S BRIEF

by placing a true and correct copy thereof in an envelope and depositing the same, with

Chris Nyhus  
Attorney at Law  
210 2<sup>nd</sup> Avenue NW  
Mandan, ND 58554

The undersigned further certifies that on April 11<sup>th</sup>, 2008, she dispatched to the Clerk, North Dakota Supreme Court, an original and seven copies of the APPELLANT'S BRIEF and emailed the same containing the full text of the Brief.

  
Jacqueline Haag, Legal Assistant to  
Benjamin C. Pulkrabek