ORIGINAL
(e-filed)

20080289

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

JAN 28 2009

STATE OF NORTH DAKOTA

* *

City of Grand Forks,)
)
Plaintiff ♦ Appellee,)
) NDSC Case No 20080289
vs.)
) Dist Ct Case No 18-08-K-0695
Ryan Ray Corman,)
Defendant ♦ Appellant.)

BRIEF OF APPELLANT
On Appeal From The Criminal Judgment Dated 07 Oct 2008,
Entered by the Honorable Sonja Clapp
Judge of the District Court
North East Central Judicial District
Grand Forks County District Court
Grand Forks, North Dakota

BRIEF OF THE APPELLANT

SUBMITTED BY:

Henry H. Howe NDID 03090
Howe & Seaworth, Attorneys at Law
421 DeMers Avenue
Grand Forks ND 58201
701 772 4225
Attorney for Defendant ♦ Appellant

TABLE OF CONTENTS
FOR APPELLANT'S BRIEF

	Page:
Table of Contents	ii
Table of Authorities	iii
	Paragraph:
Statement of the Issue Presented	1
Statement of the Case	2-5
Statement of Facts	6-20
Standard of Review	21
Law and Argument	22-39
Conclusion	40-41

TABLE OF AUTHORITIES

Paragraph

Federal Cases

Case	Paragraph
Argersinger v. Hamlin, 407 U.S. 25, 37 (1972)	Fn 2
Carnley v. Cochran, 369 U.S. 506, 516 (1962)	36
Douglas v. California, 372 U.S. 353, 355 (1963)	23
Faretta v. California, 422 U.S. 806, 835 (1975)	28, 32
Gideon v. Wainwright, 372 U.S. 335, 342 (1963)	23
Griffin v. Illinois, 351 U.S. 12 (1956)	23
Johnson v. Zerbst, 304 U.S. 458, 464 (1938)	36
Patterson v. Illinois, 487 U.S. 285, 292 n.4 (1988)	36
Scott v. Illinois, 440 U.S. 367, 373-74 (1979)	Fn 2

State Cases

Case	Paragraph
City of Bismarck v. Saavedra 397 N.W.2d 455 ND 1986	26
City of Fargo v. Habiger 2004 ND 127, 682 N.W.2d 300	21, 24, 38
City of Grand Forks v. Thong, 2002 ND 48, 640 N.W.2d 721	40
City of Fargo v.Rockwell, 1999 ND 125, ¶ 16, 597 N.W.2d 406	34, 36
People v. Arguello, 772 P.2d 87, 93 (Colo. 1989)	29
State v. DuPaul 527 N.W.2d 238 (N.D. 1995)	23
State v. Dvorak 2000 ND 6, 604 N.W.2d 445	29, 36
State v. Foster, 1997 ND 8, ¶14, 560 N.W.2d 194	13, 31
State v. Gustafson, 278 N.W.2d 358, 362 (N.D. 1979)	36
State v. Harmon, 1997 ND 233, 575 N.W.2d 635, 575 N.W.2d 635	28, 31
State v. Hart, 1997 ND 188, ¶6, 569 N.W.2d 451	28
State v. Holbach 2007 ND 114, 735 N.W.2d 862	37
State v. Kranz, 353 N.W.2d 748, 752 (N.D. 1984)	36, 40
State v. Orr, 375 N.W.2d 171, 177-78 (N.D. 1985)	23
State v. Poitra, 1998 ND 88, ¶ 7, 578 N.W.2d 121	21, 28, 36
State v. Schneeweiss, 2001 ND 120, ¶ 26, 630 N.W.2d 482	23, 24
State v. Wicks, 1998 ND 76, 576 N.W.2d 518	28, 31
State v. Wilson, 488 N.W.2d 618, 620 (N.D. 1992)	36

State Statutes

Statute	Paragraph
N.D. Const. art. I	1, 31
N.D.C.C. 40 18 15.1	6

State Rules

Rule	Paragraph
N.D.R.Crim.P. Rule 44	1, Fn 2, 39

STATEMENT OF THE ISSUE PRESENTED

1. Ryan Corman's conviction should be reversed as he was not afforded his right to counsel as guaranteed by the Sixth Amendment of the United States Constitution, Article I, Section 12 of the North Dakota Constitution, and as directed by N.D.R.Crim.P., Rule 44.

STATEMENT OF THE CASE

2. Ryan Corman was charged in municipal court with driving under suspension on 27 Feb 2008. He timely filed a handwritten request for removal to district court to preserve his right to a jury trial. His efforts to obtain private counsel were unsuccessful, and his repeated efforts in municipal court and district court to request appointment of counsel were ignored, rejected or denied. On two occasions, after the case had been removed from municipal court, Corman was advised in district court that any request for appointed counsel would have to be directed to the <u>municipal</u> court; on a third occasion, he was told to apply to the <u>district</u> court.

3. When he then did apply to the District Court, Corman's long,

rambling, desperate, letter from jail, requesting counsel was expressly denied by the District Court on the basis that "Defendant must apply to Municipal Court for an attorney". The disjointed letter by Corman to the Court stresses his own belief that he cannot represent himself, and objectively sets out a graphic picture of a defendant who doesn't know whether he is "ahorse or afoot" in regard to understanding or applying the law. The trial started - and ended - on 07 Oct 2008, and, unsurprisingly, Mr Corman was convicted and sentenced to time in jail. The issues presented address the fact that there was a denial – amounting to a total disregard – of Mr Corman's constitutional right to have counsel appointed to advise, assist and represent him; that there was no waiver of his right to counsel, and that the Judge erred in taking the position that Corman's eligibility for appointment was exclusively within the purview and discretion of the Municipal Court, after the case had been removed to District Court.

4. In addition, Mr Corman was offered a standard, favorable plea – to have the DUS reduced to a "no license in possession" charge if the license could be reinstated within a reasonable time: unfortunately, he was financially unable to accept until after 01 Dec 2008, and the Court denied him a further continuance of less than 60 days to permit

the plea offer to be implemented.

5. This appeal followed.

STATEMENT OF FACTS

6. This case arose from a DUS arrest in Grand Forks ND, on 27 Feb 2008, when Ryan Ray Corman [Corman] was stopped by Officer Schiller of the Grand Forks Police Department. Corman was issued a citation for Driving Under Suspension, and was ordered to appear in Municipal Court. Following his appearance in Municipal Court, before Judge Eslinger, Corman elected to preserve his right to a jury trial, and filed a timely, handwritten notice pursuant to <u>N.D.C.C. 40 18 15.1</u> to preserve his right to a jury trial and remove the case to District Court. See App p 3. Mr. Corman thereafter made his first appearance, as scheduled, in District Court, on 14 April 2008, before Judge Sonja Clapp. After he received a copy of the information, Judge Clapp enquired as to whether Mr Corman was representing himself, and Mr Corman asked for Counsel to be appointed, indicating that he had talked to a few attorneys and, in essence, that he did not have the $1000.00 that he had been informed was required for a retainer. Tr p 3. Corman indicated that he had applied in Municipal Court but had

been turned down. The judge advised that he could "apply again", Tr p 3, and proceeded with the advisement on the DUS charge, expressly advising that there was a mandatory 4 day jail sentence on an alcohol related DUS. Tr p 4. At the close of the brief hearing, the Court continued the matter to 29 May 2008 at 1.30 [pm], and the Defendant again asked about obtaining appointed counsel, in the following discussion:

> 11 THE DEFENDANT: Will they have the paper work to
> 12 apply?
> 13 THE COURT: They'll have that. This is a transfer
> 14 from the City. Normally, we don't appoint on City transfer
> 15 cases. You would have to re-apply.
> 16 THE DEFENDANT: Thank you for letting me know. The
> 17 Clerk's Office let me know that.
> 18 THE COURT: Because it is a City transfer, you still
> 19 have to go through the City for your application for an
> 20 attorney. So, you would have to re-apply with the City for an
> 21 attorney. And maybe what you need to do is explain your
> 22 situation to that office and maybe they'll reconsider.
> 23 THE DEFENDANT: Where is that?
> 24 THE COURT: That would be in the police building is

25 where they are at. 1 You will need to talk to the Clerk there.

Tr p 6.

7. Corman next appeared in District Court on 29 May 2008. When the Judge asked whether he had counsel, Corman replied

> 11 THE DEFENDANT: No, Ma'am. When I appeared before
> 12 you last time I applied for an attorney. I followed your
> 13 instructions and I went back to Judge Eslinger's Court and I
> 14 spoke to his clerk Darla and basically he said that I should
> 15 sell my car and he wasn't going to have anything to do with
> 16 it. He sent me on my way. That's well and good. The car is
> 17 owned by the finance company. I'm still not working and he
> 18 sent me back to you so I can apply again.

Tr p 7.

8. The Court next reviewed the basis for the license suspension, and ascertained, through the State's Attorney [appearing for the City], that if Corman were able to pay the reinstatement fees of $680, the City would reduce the charge to one of "unqualified operator", with a "$20.00 fine". Tr p 9. After the Court had reviewed the options, the Judge asked Mr Corman, "Do you know what you want to do?" Tr p

---

1 Since completion of the Regional Correction Center, in 2006, the Municipal Court in Grand Forks has been located on Highway 83 North, approximately 4 miles from the "Police Building" that is located directly across 5th Street from the Courthouse.

10, whereupon Mr Corman responded that, "I wish to speak with an Attorney", noting the financial difficulties that he was facing. Tr p 10-11.

9. The Court addressed the application process for appointed counsel, also suggesting that the matter could be continued for "a couple months" to see if Corman could "get [his license] reinstated". Tr p 11-12.

10. On this occasion, the Court said that the application for appointment of counsel could be obtained at, and submitted to, the Clerk's office "across the hall" – the location for the Clerk of the District Court – where the Court advised that he could also get the application. Tr p 12. The case was then continued to 31 July 2008 at 9.00 am.

11. On 31 July 2008, there was a further discussion of the financial issues that would have to be resolved in order for Mr Corman to obtain reinstatement of his Minnesota privilege: a requirement to obtain reinstatement in North Dakota that, because of the costs and Corman's limited income, he would not be able to complete until after 01 Dec 2008, to meet the costs of $680.00 in addition to fees for ND and the cost of the SR 22 Filing that is required. Tr p 13. The Court demurred on continuing the case until after the first of December 2008, and the

City, through the State's Attorney, objected to any further continuance, proposing a guilty plea that would include jail time. Tr p 14. The Court, again, enquired if the charge was alcohol related, and advised that Mr Corman would "have to do the four days in jail", on the new offer. Tr p 15.

12. Mr Corman next asked, "Is it possible that I could get some representation on this thing?" At that point, the following discussion occurred:

> 11 THE CLERK: Judge, for the Attorney, since it's a
> 12 City transfer, he would have to apply to the City.
> 13 THE COURT: You have to apply to the City.
> 14 THE DEFENDANT: We went through this already. They
> 15 told me I had to come back down here since I was incarcerated
> 16 they said I needed to re-apply with your court. Who would
> 17 make the decision? Would Judge Eslinger?
> 18 THE COURT: Let's get a trial date.

Tr p 16.

13. After setting a trial date for 07 Oct 2008 the Court returned to the question of obtaining counsel:

> 11 THE COURT: Now, Mr. Corman, we'll give you a notice
> 12 of this so you can show work release that you need to be here

13 for these hearings.

14 **Make sure you get your application into Judge**

15 **Eslinger and City Court. If they determine you are eligible**

16 **you can get an attorney.**

[Emphasis added]. Tr p 17.

14.Clearly, as of 31 July 2008, the Court believed, and so ruled, that the issue of whether or not the defendant was appointed counsel was solely within the purview – and discretion – of the Municipal Court.

15.The Court set a final pre-trial conference for 30 September 2008, a date that was subsequently continued by the Court to 03 Oct 2008.

16.On 04 Sep 2008 [Stamped as received on 08 Sep 2008] Corman – from the jail where he was serving time on an unrelated charge - sent a completed application for appointed counsel to the District Court, along with a 4 page, handwritten letter asking – pleading – for appointed counsel, emphasizing, in a repetitive matter that he needs counsel, wants counsel, and cannot afford counsel, noting that on a contemporaneous proceeding, Judge Medd had appointed counsel for him in an unrelated case. In no uncertain terms – at pages 3 and 4 of his letter, he declares that,

> I am unable to represent myself, as I have stated many times.... I have no experience in local law... I

> am old enough and wise enough to realize I can provide myself with absolutely no form of effective (much less successful) representation against the odds the State ...will stack against me in any action....I have never from the beginning of this matter EVER had the desire or skill to represent myself. I am begging your Honour [sic] and the Court to relent and appoint an attorney to represent the defense in this matter. I do not want mistrials, appeals, and all sorts of costly, time consuming nonsense...

App 10 – 11.

17. On 16 Sep 2008, without a hearing, the Court, having previously heard that Corman's request for appointed counsel had been twice denied by the Municipal Court, and having expressly advised Corman to file a new request for appointed counsel in District Court, denied Corman's request for appointed counsel on the sole, recited, basis that:

> ***Defendant must apply to Municipal Court for an attorney.***

App p 13.

18. At the pre-trial hearing, on 03 Oct 2008, there was no further reference to the issue of appointed counsel. The discussion by the Court was that:

> 7 Mr. Corman, you are still representing yourself in
> 8 this matter?

9 THE DEFENDANT: Yes.

10 THE COURT: It is a charge of Driving Under the

11 Suspension. That is a Class B Misdemeanor. And, I know, that

12 you were trying to reinstate but it would not happen until

13 December and we couldn't continue it for that long of a time

14 period.

15 Is it correct that is not alcohol related?

16 MS. PETTIT: It is alcohol related.

17 THE COURT: That would be four days.

18 THE DEFENDANT: And according to them it was due to

19 a DWI I had in Minnesota last June. June of '07 and somehow

20 the suspension period got stacked consecutive instead of

21 concurrent. Yes, it was alcohol related.

22 THE COURT: Mr. Corman, it is scheduled for a jury

23 trial on Tuesday. Do you still want to go through with that?

24 THE DEFENDANT: Yes, Ma'am.

25 THE COURT: In a jury trial or at any trial really,

1 you're going to have to be familiar with the Rules of

2 Evidence, the Rules of Criminal Procedure. And I can't assist

3 you with that. So, are you going to be able to do that?

4 THE DEFENDANT: I suspect it's a fairly straight

5 forward matter. I'm not thinking it's too difficult. I don't

6 think she is going to pull any tricks on me. She is going to

7 have the officer tell his story. I'm going to tell my story.

8 I don't see that there is any problem. I don't have any

9 evidence just some testimony. I don't have any physical

10 evidence or anything.

11 I don't know that the State would have any physical

12 evidence except maybe a copy of my driving record.

13 THE COURT: You are entitled to have a copy of

14 whatever the City has. Actually everything should have been

15 served upon you.

16 THE DEFENDANT: I have already had that.

17 THE COURT: Jury selection will begin at 9:00

18 O'clock.

Tr 19-20

19. Significantly, there was no waiver of the right to counsel by Corman, nor was the question of such a waiver ever raised by the Court. The jury trial thereafter commenced – ***and*** ended – on 07 Oct 2008, without counsel being appointed for Corman, and he was convicted of the charge of DUS, with sentence, including a jail sentence, imposed on Corman by a criminal judgment dated 07 Oct 2008. See App pp 15-16.

20. This appeal followed. See App. P 17

STANDARD OF REVIEW

21. The standard of review on an alleged denial of the constitutional right to counsel is ***de novo***. State v. Poitra, 1998 ND 88, ¶ 7, 578 N.W.2d 121. "[T]he denial of the right to counsel at trial requires reversal of a defendant's conviction because prejudice is presumed." Id.

City of Fargo v.Habiger 2004 ND 127, 682 N.W.2d 300

LAW AND ARGUMENT.

22. Corman's conviction should be reversed as he was not afforded his right to counsel as guaranteed by the Sixth Amendment of the United States Constitution, Article I, Section 12 of the North Dakota Constitution, and as directed by N.D.R.Crim.P., Rule 44.

23. As explicated in State v.DuPaul 527 N.W.2d 238 (N.D. 1995):

> The right to counsel in a criminal case is the subject of the Sixth Amendment of the United States Constitution:
>
> In all criminal prosecutions, the accused shall enjoy the right . . to have the Assistance of Counsel for his defense.
>
> This "provision of the Bill of Rights . . . is 'fundamental and essential to a fair trial' [and] is made obligatory upon the States by the Fourteenth Amendment." Gideon v. Wainwright, 372 U.S. 335, 342 (1963). And "a State may not grant appellate review in such a way as to discriminate

against some convicted defendants on account of their poverty." Douglas v. California, 372 U.S. 353, 355 (1963), citing Griffin v. Illinois, 351 U.S. 12 (1956).1 What's more, the North Dakota Constitution directs:

> In criminal prosecutions in any court whatever, the party accused shall have the right . . . to appear and defend in person and with counsel. . . .
>
> ND Constitution, Art. I, 12

"We have traditionally recognized that the right to counsel under our Constitution is fundamental because it enables an accused to procure a fair trial." State v. Orr, 375 N.W.2d 171, 177-78 (N.D. 1985).

24. Appointment of Counsel is addressed at N.D.R.Crim.P, Rule 44. The responsibility of the court having jurisdiction over a defendant for appointing counsel is succinctly set out in City of Fargo v.Habiger 2004 ND 127, 682 N.W.2d 300:

> [¶20] Indigent defendants have the right to appointed counsel under N.D.R.Crim. P. 44(a), which provides:
>
> > Absent a knowing and intelligent waiver, every indigent defendant is entitled to have counsel appointed at public expense to represent the defendant at every stage of the proceedings from initial appearance before a magistrate through appeal in the courts of this state in all felony cases. ***Absent a knowing and intelligent waiver, every indigent defendant is entitled to have counsel appointed at public expense to represent the defendant at every stage of the proceedings from initial appearance before a magistrate through appeal in the courts of this state in***

all non-felony cases unless the magistrate has determined that sentence upon conviction will not include imprisonment. The court shall, appoint counsel to represent a defendant at the defendant's expense if the defendant is unable to secure the assistance of counsel and is not indigent.

[Emphasis added]

25. In this case, Corman, as noted above, repeatedly asked for counsel to be appointed. There were contradictory messages given by the Court as to what Corman needed to do to apply for counsel, and, indeed, what Court – District or Municipal – was responsible for the appointment and even where that court was located – e.g. "across the hall"; "in the police building" or at the Municipal Court – that is, at the Grand Forks Correction Center Building on North Washington St. Even in regard to this aspect of the procedure, Mr Corman was given confusing and contradictory messages.

26. Corman presents a much more serious violation of a defendant's rights that that presented in City of Bismarck v.Saavedra 397 N.W.2d 455 ND 1986: in Saavedra, the error by the County Court was in never addressing the issue of representation for the defendant, whereas in Corman, the Court erred in rejecting Corman's continuing

requests for appointment of counsel: in Court, by application, and by a long, pleading letter.

27.Mr. Corman made it clear in his appearances that he had attempted to obtain counsel; advising that he had contacted attorneys, but did not have the requisite $1,000 retainer to obtain representation Tr p 4; That when the Municipal Court had advised him to sell his car, he had responded that he had no equity in the car – that it was owned by the finance company. Tr p 7, telling the Court on 29 May 2008 that:

10 THE COURT: You are representing yourself today?
11 THE DEFENDANT: No, Ma'am. When I appeared before
12 you last time I applied for an attorney. I followed your
13 instructions and I went back to Judge Eslinger's Court and I
14 spoke to his clerk Darla and basically he said that I should
15 sell my car and he wasn't going to have anything to do with
16 it. He sent me on my way. That's well and good. The car is
17 owned by the finance company. I'm still not working and he
18 sent me back to you so I can apply again.
19 THE COURT: Is this an alcohol related offense? Do
20 we know?

28.In State v.Poitra 1998 ND 88, 578 N.W.2d 121, the Court considered the responsibilities of the Trial Court, reversing the convictions, in holding that:

> **[¶8] A corollary to a defendant's right to counsel is a defendant's constitutional right to self-representation if the defendant knowingly and intelligently waives the right to counsel. Faretta v. California, 422 U.S. 806, 835 (1975); State v. Hart, 1997 ND 188, ¶6, 569 N.W.2d 451. A knowing and intelligent waiver of the right to counsel depends on the facts and circumstances and requires the defendant to be made aware of the dangers and disadvantages of self-representation so the record establishes the defendant knows what he is doing and his choice is made with eyes open. State v. Harmon, 1997 ND 233, 575 N.W.2d 635, ¶22. In Wicks, 1998 ND 76, ¶18, we explained the trial court must establish on the record the defendant knew what he was doing and his waiver of the right to counsel was made with his eyes open.**
>
> .....
>
> **[¶10]....Under Harmon, 1997 ND 233, 575 N.W.2d 635, ¶23, n.1, a specific colloquy about the dangers and disadvantages of self-representation is not required, but trial courts should eliminate any ambiguity about functional waivers by making a specific on-the-record determination that the defendant unequivocally, knowingly, and intelligently waived the right to counsel.**
>
> ....
>
> **[¶13]**Although an indigent defendant is not entitled to appointed counsel of his choice, State v. Foster, 1997 ND 8, ¶14, 560 N.W.2d 194, this record does not establish the trial court considered other options for representation of Poitra. See Wicks, 1998 ND 76, ¶28. There is no indication Poitra's actions were intended primarily to delay the trial. On this record, we decline to equate Poitra's request for removal of court-appointed counsel and his later inability to hire counsel to the functional equivalent of a knowing and intelligent

waiver of the right to counsel. We therefore hold Poitra did not knowingly and intelligently waive his right to counsel.

29.In State v.Dvorak 2000 ND 6, 604 N.W.2d 445, the Court again considered and analyzed the factors under which the Court determined whether there was a "knowing and intelligent waiver" of the right to counsel. Clearly, a factor in both Poitra and Dvorak was the issue of whether the defendant had used the issue of counsel as a delaying tactic in the case. While the Court expressly noted that in Poitra, "There is no indication Poitra's actions were intended primarily to delay the trial", in Dvorak, the Court observed that: "The record reveals a pattern of conduct by Dvorak that can best be described as an attempt to avoid the trial of the charge against him. Perhaps Dvorak hoped the charge would be dismissed as he expressed at the March 8, 1999 pretrial conference where he indicated he wanted the case tried to the court "or dismissed."", Id. ¶14 and, further, citing: "People v. Arguello, 772 P.2d 87, 93 (Colo. 1989) (stating implied waiver of right to counsel by misconduct is more accurately described as forfeiture of right). Rather, the right to counsel becomes a means by which a defendant can further obstruct the legal process by rejecting court-appointed counsel or retaining and discharging private counsel, all the while insisting the desire for and right to counsel". Id. ¶15

30. The situation presented in Corman has no element of "on again – off again" representation [Dvorak] or demands that he be appointed a lawyer of his choice [Habinger] or any indication whatsoever that Corman's repeated requests for appointment of counsel – any counsel – were for any purpose of delay. In fact, the general pattern of the appearances before the Court were that Mr Corman refreshed the Judge's understanding of the case, and, again, requested appointment of Counsel. What then appeared to happen is that the Court considered the issue in terms of whether the Defendant could reinstate his license in some finite time period, and whether the matter could be resolved by providing that no jail sentence would be imposed. From this standpoint, there as an "apples and oranges" disconnect between the requests of the Appellant and the responses of the Court.

31. In State v. Wicks, 1998 ND 76, 576 N.W.2d 518, this Court observed that the trial Court would have had other options than the "forced waiver" of her right to counsel:

> [¶28] Similarly, on the day of trial in this case, when the district court became aware of the disciplinary complaint, the court was left with other options. For instance, considering Wicks's expectation and willingness to proceed with Martin as her

> attorney, the court could have denied Martin's request for withdrawal and proceeded to trial that morning. Neither Wicks nor Martin were asked, on the record, whether that would be an agreeable option. The court may have also considered whether Wicks and Martin would have been willing to go to trial with Martin as standby counsel. See Harmon, 1997 ND 233, 575 N.W.2d 635. If neither of these options were satisfactory, the court could have allowed Martin to withdraw and granted a continuance to arrange for new counsel, notwithstanding the opposition of the State. The wishes of the parties and counsel may guide which direction to take, but the final decision is within the discretion of the district court. Cf. Foster, 1997 ND 8, ¶6, 560 N.W.2d 194. The district court's belief in the existence of an irreparable conflict prevented consideration of the other options within its discretion.
>
> [¶29] The court chose to allow Martin to withdraw and force Wicks to proceed pro se. Under the facts of this case, that was a denial of Wicks's right to counsel. See U.S. Const. amends. VI & XIV, § 1; N.D. Const. art. I, § 12.

32. As there was no express waiver of the right to counsel at any point in the proceedings, and there was no proposal that Corman would not be incarcerated upon conviction, 2and there was no purpose of delay to be derived from Corman's conduct, it is left to examine the record to consider whether the circumstances meet the standard set out in Habiger, Id, that:

---

2 State v. DuPaul, 509 N.W.2d at 273: When the potential sentence will not include imprisonment, NDRCrimP 44 clearly says that an accused is not entitled to appointment of counsel at public expense. See Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) ("absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial"); Scott v. Illinois, 440 U.S. 367, 373-74 (1979)

> [¶23] This Court has previously held, "[c]riminal defendants who proceed pro se must voluntarily, knowingly, and intelligently relinquish the benefits of counsel." State v. Schneeweiss, 2001 ND 120, ¶ 26, 630 N.W.2d 482 (citing State v. Dvorak, 2000 ND 6, ¶ 10, 604 N.W.2d 445). In order for a waiver to be knowing and intelligent, defendants should be made aware of the danger and disadvantages of proceeding pro se. Schneeweiss, at ¶ 26 (citing Faretta v. California, 422 U.S. 806, 835 (1975)). The record must reflect satisfaction of a two-part test employed to determine whether a waiver of the right to counsel was effective: (1) whether the waiver was voluntary; and (2) whether the waiver was knowing and intelligent. Schneeweiss, at ¶ 26 (citing Dvorak, at ¶ 12).
>
> [¶24] The first part of the analysis does not require the defendant to make an unequivocal statement, as asserted by Habiger in his brief. Schneeweiss, at ¶ 27. A defendant's behavior may rise to the functional equivalent of a voluntary waiver of the right to counsel. Id. This Court has previously held a "manipulative pattern of obstructing the legal process is the functional equivalent of a voluntary waiver of right to counsel." Id. (citing Dvorak, at ¶ 15).

33. The only record in this case permitting review of whether the, "…defendant's behavior may rise to the functional equivalent of a voluntary waiver of the right to counsel", would be that in the record on 03 Oct 2008, three days before trial, at the final pre-trial conference:

1 October 3, 2008

2 Approximately 3:00 p.m.

3 THE COURT: Then, Mr. Corman. You are Mr. Corman?

4 THE DEFENDANT: Yes, Ma'am.

5 THE COURT: And this is entitled City of Grand Forks

6 versus Ryan Corman, 08-K-695.

7 Mr. Corman, you are still representing yourself in

8 this matter?

9 THE DEFENDANT: Yes.

10 THE COURT: It is a charge of Driving Under the

11 Suspension. That is a Class B Misdemeanor. And, I know, that

12 you were trying to reinstate but it would not happen until

13 December and we couldn't continue it for that long of a time

14 period.

15 Is it correct that is not alcohol related?

16 MS. PETTIT: It is alcohol related.

17 THE COURT: That would be four days.

18 THE DEFENDANT: And according to them it was due to

19 a DWI I had in Minnesota last June. June of '07 and somehow

20 the suspension period got stacked consecutive instead of

21 concurrent. Yes, it was alcohol related.

22 THE COURT: Mr. Corman, it is scheduled for a jury

23 trial on Tuesday. Do you still want to go through with that?

24 THE DEFENDANT: Yes, Ma'am.

25 THE COURT: In a jury trial or at any trial really,

1 you're going to have to be familiar with the Rules of

2 Evidence, the Rules of Criminal Procedure. And I can't assist

3 you with that. So, are you going to be able to do that?

4 THE DEFENDANT: I suspect it's a fairly straight
5 forward matter. I'm not thinking it's too difficult. I don't
6 think she is going to pull any tricks on me. She is going to
7 have the officer tell his story. I'm going to tell my story.
8 I don't see that there is any problem. I don't have any
9 evidence just some testimony. I don't have any physical
10 evidence or anything.
11 I don't know that the State would have any physical
12 evidence except maybe a copy of my driving record.
13 THE COURT: You are entitled to have a copy of
14 whatever the City has. Actually everything should have been
15 served upon you.
16 THE DEFENDANT: I have already had that.
17 THE COURT: Jury selection will begin at 9:00
18 O'clock.

Tr pp 19-20.

34. As with other hearings, there was a "disconnect" between the Judge and Corman and he did not directly respond to the two questions asked by the Judge – i.e. did he have any "familiarity with the Rules of Evidence or the Rules of Criminal Procedure", nor did the Judge make any further enquiry in this regard – or of the understanding of Mr Corman about the process of jury selection, the order of trial, the

procedure: opening statement, closing statement, jury instructions, etc. Contrast this with the Court's analysis in Dvorak, Id, where in addition to the Court's determination that, "The record reveals a pattern of conduct by Dvorak that can best be described as an attempt to avoid the trial of the charge against him". Dvorak Id. ¶14, the Court further noted that:

> [¶17] In Rockwell, 1999 ND 125, ¶ 16, 597 N.W.2d 406, the defendant informed the trial court he wanted to represent himself and did not want court-appointed counsel. The trial court advised the defendant if he represented himself, he would be responsible for making his own statements, cross-examining the prosecution's witnesses, and calling his own witnesses for his defense. Id. The trial court also informed the defendant he would be expected to conform to rules and procedure of the court. Id. The defendant responded he would "do whatever the lawyer is supposed to do, [and be] responsible for the aspect of the lawyer." Id. We concluded the record established the defendant knowingly and intelligently waived his right to counsel. Id.

Dvorak, Id. At Paragraph 17.

35. What is evident is that Mr Corman, from the answers that he did give: ***"She is going to have the officer tell his story. I'm going to tell my story"…. "I'm not thinking it's too difficult",*** leaves every possible indication that Mr Corman is completely ***clueless*** about the law, the jury trial, the Rules of Evidence, and the Rules of Criminal Procedure. The docket in this case is entirely devoid of any motion, Rule 16

Discovery request – or even proposed jury instructions – filed by Mr Corman and his only actions taken in "representing" himself were [a] to appear in court and [b] to keep asking for appointment of an attorney, <u>except</u> at his last pre-trial appearance where his request had – again – been denied and he seemingly has accepted his fate. In this context, one can only hope that if Mr Corman required brain surgery he would not despair of not having the required fees, and conclude, in the end, that ***"I'm not thinking it's too difficult".*** For a lay person to indicate on any level that he doesn't see any problem with proceeding pro-se for a jury trial, communicates, at best, a foreshadowing of impending doom, particularly when viewed in the light of Corman's letter submitted 04 Sep 2008, that:

> **I am unable to represent myself, as I have stated many times.... I have no experience in local law... I can provide myself with absolutely no form of effective (much less successful) representation against the odds the State ...will stack against me in any action....I have never from the beginning of this matter EVER had the desire or skill to represent myself. I am begging your Honour [sic] and the Court to relent and appoint an attorney to represent the defense in this matter.**
>
> App 10-11.

36. In State v.Dvorak 2000 ND 6, 604 N.W.2d 445, citing Harmon, 1997 ND 233, 575 N.W.2d 635, ¶ 23, this court:

> ¶11]...acknowledged increasing problems with defendants who proceed pro se, and suggested "[t]rial courts should be careful to make specific on-the-record determinations about whether a defendant unequivocally, knowingly, and intelligently waived either his right to counsel or self-representation. Such a determination should make clear the dangers and disadvantages of self-representation."Although we have not required trial courts to engage in a specific colloquy with a defendant who appears pro se, we prefer that trial courts eliminate any ambiguity about a waiver by making a specific on-the-record decision the defendant voluntarily, knowingly, and intelligently waived the right to counsel. Rockwell, 1999 ND 125, ¶ 15, 597 N.W.2d 406; Poitra, 1998 ND 88, ¶ 8, 578 N.W.2d 121; Harmon, at ¶ 22. Our preference for an on-the-record determination parallels the well-established principle that a waiver of the right to counsel will not be presumed from a silent record and courts will indulge every reasonable presumption against waiver. Carnley v. Cochran, 369 U.S. 506, 516 (1962); Johnson v. Zerbst, 304 U.S. 458, 464 (1938); State v. Gustafson, 278 N.W.2d 358, 362 (N.D. 1979). See State v. Wilson, 488 N.W.2d 618, 620 (N.D. 1992) (stating similar principle for waiver of right to new trial); State v. Kranz, 353 N.W.2d 748, 752 (N.D. 1984) (stating similar principle for waiver of right to jury trial).
>
> [¶12] We have applied a two-step inquiry to analyze a criminal defendant's waiver of the right to counsel and decision to proceed pro se: (1) whether the defendant's waiver of the right to counsel was voluntary; and (2) whether the defendant's waiver was knowing and intelligent. Rockwell, 1999 ND 125, ¶ 9, 597 N.W.2d 406; Harmon, 1997 ND 233, 575 N.W.2d 635, ¶ 22, 575 N.W.2d 635. See Patterson v. Illinois, 487 U.S. 285, 292 n.4 (1988) (stating waiver of right to counsel must be voluntary and knowing and intelligent).

37.In this case, there were never any findings - or enquiry - by the Court to consider the issues raised in Corman's letter: the court, without a hearing or facts to support a knowing and intelligent waiver or a waiver by conduct as in Holbach [State v.Holbach 2007 ND 114, 735 N.W.2d 862], where the defendant fired the 5th Lawyer appointed to represent him in open court [the four previous lawyers having withdrawn]. What happened in Corman was that there was no waiver at all, nor was there any element of voluntariness. Mr Corman was told that he was simply not going to be appointed counsel – in part because the municipal court and the district court could not even agree on which court was responsible, despite the fact from his uncontested statements that Mr Corman that he could not retain counsel, and was presumptively eligible for an appointment. From the totality of the evidence in this case it is appears to be impossible to conclude that Mr Corman's "decision" regarding counsel was "**voluntary**", or was made "unequivocally", "knowingly", ***or*** "intelligently" – and that what occurred was that Corman was simply -- and summarily -- denied representation by counsel, and given a limited choice between pleading guilty and going to trial without counsel, in disregard of the 6th Amendment.

38. In this instance, as in Wicks, Id, the Court clearly would have had other options. If the Municipal Court will not appoint counsel, the District Court could – and require that the City pay; or that counsel, as an officer of the court, be appointed to represent Mr Corman, subject to reimbursement by the City, the State or by Mr Corman, to address the goal, as set out, above, in Habiger, Id. at ¶20 that counsel be appointed. In this case, as in Poitra and Wicks, there was a failure to consider alternatives to effectively forcing the Defendant to go forward to trial without counsel: in the end, the process is under the control of the trial Court – who has the responsibility to ensure that the defendant is afforded their constitutional rights – and, literally, their right to a fair trial.

39. As with Mr Corman's response that "I'm thinking that it's not too difficult [to represent myself in a jury trial]".. the district court took a far too limited view of its responsibilities under N.D.R.Crim.P., Rule 44, erring in its determination that the sole responsibility for appointment of counsel rests with the Municipal Court, and disregarding the responsibilities of the Court under the constitution for appointment of counsel. Who appoints counsel may be procedural, and is intimately tied up with court budgets – but ***whether*** counsel is

appointed for a person who has repeatedly asserted – and never waived – his 6th Amendment Right to Counsel is a failing of constitutional dimension.

CONCLUSION.

40. As in City of Grand Forks v. Thong, 2002 ND 48, **640 N.W.2d 721**, at [¶17], a virtually identical situation was presented to the one here in that:

> Thong was entitled to a jury trial as a result of his request and the failure to obtain an express waiver of the right to a jury trial from Thong constituted an error of constitutional dimension affecting Thong's substantial rights. Cf. State v. Kranz, 353 N.W.2d 748, 752 (N.D. 1984) (holding waiver of a jury trial "must be a matter of certainty and not implication"). In district court, waiver of the right to a jury trial must be express. Id. (observing "[i]t is . . . . the trial court's responsibility to jealously preserve the right to trial by jury"). Upon our review of the entire record we find no express waiver of the right to trial by jury.

And, further, as applicable here in regard to the consideration of Mr Corman's repeated requests for appointment of counsel:

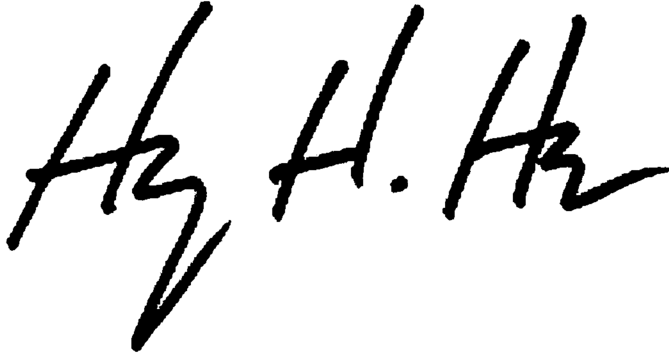
> Informality of procedure may have certain advantages, but it does not facilitate, and may not survive, appellate review.

Thong, Id, ¶20

41. In view of the fact that Mr Corman's fundamental, constitutional right to appointment of counsel were simply disregarded and denied

throughout this proceeding, the conviction should be vacated and the matter remanded.

Dated this 26 Jan 2009



Henry H. Howe, NDID 3090
Howe & Seaworth, Attorneys at Law
421 DeMers Ave.
Grand Forks ND 58201
701 772 4225
Attorneys for Ryan Corman, Appellant.

ATTORNEY'S STATEMENT OF SERVICE

City of Grand Forks vs. Ryan Ray Corman

NDSC Case No. 20080289

The Undersigned a licensed attorney in the State of North Dakota states and affirms that a copy of:

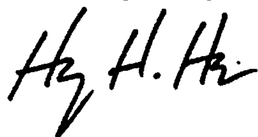
1. Appellant's Brief
2. Appellant's Appendix

Was served upon:

Kristen Pettit, Attorney at Law 311 S. 4th Street, Ste. 103 Grand Forks, ND 58201 701 780 9276 ND License No. 05637 kristipettit@qwestoffice.net	

All in accordance with the Rules of Appellate Procedure [check one]:

- ☐ by mailing the same, with postage affixed, to the address listed above, in Grand Forks ND on
- ☐ by faxing the same to the fax number, above, listed for said person in the current attorney directory, or published on the Attorney's office stationery, on _________before 5:00 pm.
- X by emailing the same to the above email address as listed in the directory of Lawyers and Judges for said party, published by the North Dakota State Board of Law Examiners, on 28 January 2009.



Henry H. Howe ND Lic No. 03090
Howe and Seaworth Law Office
421 DeMers Ave
Grand Forks, ND 58201
701 772 4225
hhhowe2@hotmail.com

\\Cdh3\r\client\C\CORMAN\04005H.D090128 AffidavitServiceNDSCt..doc

ATTORNEY'S STATEMENT OF SERVICE

City of Grand Forks vs. Ryan Ray Corman

NDSC Case No. 20080289

The Undersigned a licensed attorney in the State of North Dakota states and affirms that a copy of:

1. Appellant's Brief [corrected]

Was served upon:

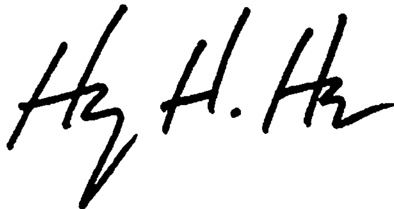
Kristen Pettit, Attorney at Law 311 S. 4th Street, Ste. 103 Grand Forks, ND 58201 701 780 9276 ND License No. 05637 kristipettit@qwestoffice.net	

All in accordance with the Rules of Appellate Procedure [check one]:

❑ by mailing the same, with postage affixed, to the address listed above, in Grand Forks ND on

❑ by faxing the same to the fax number, above, listed for said person in the current attorney directory, or published on the Attorney's office stationery, on _________before 5:00 pm.

X by emailing the same to the above email address as listed in the directory of Lawyers and Judges for said party, published by the North Dakota State Board of Law Examiners, on 06 Feb 2009.



Henry H. Howe ND Lic No. 03090
Howe and Seaworth Law Office
421 DeMers Ave
Grand Forks, ND 58201
701 772 4225
hhhowe2@hotmail.com

\\Cdh3\r\client\C\CORMAN\04005H.D090206 AttyStmtSvcNDSCt.doc