

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20100218

State of North Dakota,

Plaintiff-Appellee,

- vs -

Salome F. Hinojosa,

Defendant-Appellant.

APPEAL FROM THE CRIMINAL JUDGMENT
EAST CENTRAL JUDICIAL DISTRICT
CASS COUNTY CASE NO. 09-09-K-3331
THE HONORABLE WICKAM CORWIN, PRESIDING

APPELLANT'S BRIEF

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ABBREVIATIONS

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[¶1] STATEMENT OF THE ISSUES

ISSUE I: Did the trial court err when it found that a State's witness going on vacation was good cause to grant a continuance?

ISSUE II: Do the measurements in Exhibit 2, docket number 68 properly measure the distance from the place where the Methamphetamine was sold to the real property of the university or university building?

ISSUE III: Should the Defendant's Rule 29 Motion have been granted?

NATURE OF THE CASE

¶2 Defendant, Salome F. Hinojosa (Hinojosa) on September 24, 2009 in an Information was charged with Delivery of Methamphetamine within one thousand feet of a University.

¶3 The above offense was to have occurred on or about June 3, 2009 and was Mr. Hinojosa's third or subsequent offense.

¶4 The prior two convictions were for Possession of Heroin with Intent to Deliver on April 4, 1994 in Federal District Court in Texas and Possession of a Controlled Substance on March 18, 2002 in Grand Forks County, North Dakota.

¶5 On September 24, 2009 an Amended Information charging Mr. Hinojosa with the same crime was signed by Assistant State's Attorney Gary E. Euren. This Amended Information was filed on January 7, 2010.

¶6 An arrest warrant for Hinojosa on the above Methamphetamine charge was issued on September 25, 2009.

¶7 On September 30, 2009 Mr. Hinojosa made an inmates request for Disposition of Indictments, Information, or Complaints and Notice of Place of Imprisonment. (Request) The Request was filed in Cass County on October 2, 2010.

¶8 On October 28, 2009 East Central District Judge Steven L. Marquart issued an Order for a Writ of Habeas Corpus Ad - Prosequendum commanding the Warden of the State Penitentiary to bring Mr. Hinojosa before the District Court immediately and lodge him in the Cass County Jail during the pendency of these proceedings and upon completion return him to the North Dakota State Penitentiary.

[¶9] A Felony Scheduling Order was signed by East Central Judicial District Judge Wickham Corwin on November 10, 2009.

[¶10] A sheriff return shows Mr. Hinojosa was arrested on November 9, 2009.

[¶11] On November 30 East Central Judicial District Judge Wickham Corwin signed an Order that stated Mr. Hinojosa's case must be set for trial within 90 days of October 2, 2009.

[¶12] On December 15, 2009 a Notice of Hearing for a Preliminary Hearing and/or Arraignment was issued. It set the Preliminary Hearing and/or Arraignment for December 21, 2009 at 1:30 p.m.

[¶13] On December 15, 2009 the State made a Motion to Extend Time for Trial and Continue Trial.

[¶14] On December 21, 2009 East Central Judicial District Judge Wickham Corwin signed an Order extending the scheduled trial for 150 days from October 2, 2009 and the trial scheduled for December 29, 2009 to January 26, 2010.

[¶15] On December 28, 2009 a Notice of Hearing Scheduling a Felony Jury Selection Trial was signed. The trial was set for February 23, 2010 at 9:00 a.m.

[¶16] A Notice of Hearing Scheduling the Preliminary Hearing and/or Arraignment for January 7, 2010 at 1:30 p.m. was signed by the calendar clerk.

[¶17] A joint Motion to Continue the jury trial was signed by Assistant States Attorney Gary E. Euren and Mr. Hinojosa's attorney Rebecca Heigaard-McGurran on February 17, 2010.

[¶18] East Central Judicial District Judge Wickham Corwin signed an Order

granting the joint Motion to Continue on February 17, 2010.

[¶19] A Notice of Hearing Scheduling a Felony Jury Selection and Trial on March 23, 2010 at 9:00 a.m. was signed by the calendar clerk on February 19, 2010.

[¶20] A Notice of Hearing Scheduling a Felony Jury Selection Trial on April 20, 2010 at 9:00 was signed by the Calendar Central Clerk.

[¶21] Defendant, Hinojosa's attorney Rebecca Heigaard-McGurran made a Motion and Order to Continue trial she signed that Motion on March 22, 2010. This Motion contains the following language: "This language applies only to the defendant's ability to argue that his right to a speedy trial was violated at some time in the past. As part of this motion, defendant has stipulated that any delays resulting from this continuance will not violate his speedy trial rights. Instead, defendant has agreed to waive or extend those rights on a prospective basis. W.C."

[¶22] A Second Amended Information was signed on March 23, 2010 by Assistant State's Attorney Gary E. Eurin. This information charged Mr. Hinojosa with Delivery of Methamphetamine within 1000 feet of a school when he had a prior conviction of Possession of a Controlled Substance on March 18, 2002 in Grand Forks, North Dakota.

[¶23] The pre-trial conference in this case begins on April 19, 2010 at 3:30 p.m.

[¶24] The jury trial in this case begins on April 20, 2010 at 8:55 a.m.

[¶25] Jury verdict of guilty was signed by the Foreperson Troy Erickson on April 21, 2010.

[¶26] The Criminal Judgment and Commitment was signed and filed on June 21,

2010.

[¶27] The Notice of Appeal was signed on July 2 and filed on July 8, 2010.

[¶28] The Notice of Filing the Notice of Appeal was signed and filed on July 8, 2010.

[¶29] This case is now before the North Dakota Supreme Court.

STATEMENT OF THE FACTS

[¶30] In this case Salome F. Hinojosa was charged with and convicted of delivery of a controlled substance methamphetamine within one thousand feet of a University. Tr I P.114, L.25 to P.115, L.5, Tr II P.129, L.4-6.

[¶31] The confidential informer in this case, who worked with the Fargo Police to set up the delivery of Methamphetamine, was Tonya Gange. Tr I P.136, L.1-8. Ms. Gange told the Fargo police the person with whom she could made a methamphetamine buy was Alan Weaver Tr I P.137, L2-20. The Fargo police officer with whom Ms. Gange made the arrangements for the Methamphetamine buy was Detective Dane Hjelden. Tr II P.53, L.4-7. Detective Hjelden gave Ms. Gange \$220.00 to buy the methamphetamine and drove her to Mr. Weaver's apartment. Tr I, P.137, L.1-25, P.138, L.1. To record what was said during the buy the Fargo police had Ms. Gange wear a wire. Tr II P.67, L.18-21.

[¶32] While Ms. Gange was in Mr. Weaver's apartment Detective Hjelden and Detective Tom Morris were outside of Mr. Weavers apartment in automobiles doing surveillance. Tr II P.68, L.1-4.

[¶33] When Ms. Gange arrived at Mr. Weaver's apartment he had no

methamphetamine for sale. Tr I, P.133, L.22-25. In order to get some methamphetamine Mr. Weaver made a phone call. Tr I, P.139, L.3-5. About an hour later he went downstairs in his apartment building. Tr I, L.9-17. Five or ten minutes later he returned with the methamphetamine and gave it to Ms. Gange. Tr I, P.140, L.1-4. Ms. Gange, then gave a little methamphetamine to Ms. Weaver, took the rest and left Mr. Weaver's apartment. Tr I, L.5-6. Ms. Gange then went to Detective Hjelden's car and gave him the methamphetamine.

[¶34] While Detective Hjelden and Detective Morris were doing surveillance of Mr. Weaver's apartment they saw Mr. Hinojosa arrive in a van. Tr II, P.70, L.19-24, P. 41, L.1-23.

[¶35] At Mr. Hinojosa's trial Mr. Weaver testified that he called Mr. Hinojosa to get the methamphetamine he sold to Ms. Gange Tr I, P.178, L.17-21. That after his phone call Mr. Hinojosa brought the methamphetamine to the front door of his apartment building and there they exchanged money and methamphetamine. Tr I, P.178, L.21-23, Tr I, P.180, L.9-17, P.181, L.5-21.

[¶36] Mr. Weaver also identified Mr. Hinojosa in court. Tr I, P.178, L.21-23.

[¶37] The Fargo police officer who did the measurements of the distances between the corners of the two properties and the distance between the two buildings was Detective Leo Rognlin. Tr II, P.20, L.9-10, P.28, L.3-9. The exhibit that these measurements are taken from is Exhibit 2, docket entry 68 which was received into evidence at Tr II, P.26, L.5. The corner of the two real properties involved in the is case are according to Detective Rognlin and Exhibit 2, docket entry 68 are 778 feet apart. Tr

II, P.28, L.3-6 and the corners of the building are 904 feet apart.

ARGUMENT

[¶38] ISSUE I. Did the trial court err when it found that a State's witness going on vacation was good cause to grant a continuance?

[¶39] The Defendant-Appellant, Salome F. Hinojosa on September 3, 2009 signed an Inmate Request for Disposition of Indictment Information or Complaint and Notice of Placement of Imprisonment to Demand a Speedy Trial (Request). This Request was filed with the Clerk of the District Court of Cass County on October 2, 2009 App. P.17.

[¶40] The Order for Writ of Habeas Corpus Ad Prosequendum was signed by District Judge Steve L. Marquart on the 28th day of October, 2009. App. P.20.

[¶41] A Sheriff's Return filed with the Cass County Clerk of the District Court states that Mr. Hinojosa was arrested on November 11, 2009. App. P. 24.

[¶42] On December 21, 2009 a hearing was held in the Cass County Courthouse in the District Court chambers to discuss problems that had developed in this case and a motion the State had made to extend the trial deadline which has been set for December 29, 2009 Tr. of Pro' dated December 21, 2009.

[¶43] The above motion to extend the trial date was supported by an affidavit of Gary E. Euren, Assistant Cass County States Attorney. App. P. 32. This affidavit stated that State chemist who tested the substance to determine it was methamphetamine would be on vacation and would not be available for a trial on December 29, 2009.

[¶44] Mr. Hinojosa also had a problem if the trial were on December 29, 2009. That problem was a conflict of interest with all of the attorneys who do public defender

work in Cass County. In spite of this problem Mr. Hinojosa didn't ask for a continuance. Tr. of Pro dated December 21, 2009.

[¶45] At the December 21, 2009 hearing Mr. Hinojosa's court appointed attorney was Monty Mertz. At that hearing Attorney Mertz said:

[¶46] MR. MERTZ: It's your decision, Your Honor. I'm not going to concede it. I'm not going to waive anything on behalf of Mr. Hinojosa. And just for what it's worth, I object. And fully understanding what the Moore case says and what Your Honor - - this is such a serious case, I'm just not going to - - I'm not going to be put in a position of waiving anything or conceding anything.

[¶47] The procedure to be followed when a Defendant makes a Request is set out in NDCC §29-33-03.

[¶48] **29-33-03. When charges brought to trial – Dismissal.** Within ninety days after the receipt of the request and certificate by the court and prosecuting official or within such additional time as the court for good cause shown in open court may grant, the prisoner or the prisoner's counsel being present, the indictment, information, or complaint must be brought to trial, but the parties may stipulate for a continuance or a continuance may be granted on notice to the attorney of record and opportunity for the attorney to be heard. If, after such a request, the indictment, information, or complaint is not brought to trial within that period, no court of this state any longer has jurisdiction thereof, nor may the untried indictment, information, or complaint be of any further force or effect, and the court shall dismiss it with prejudice.

[¶49] NDCC §29-33-03 allows a Defendant who makes such a Request to appear

either by himself or with counsel. Any Defendant who makes such a Request knows from the language in NDCC §29-33-03 that his Request requires him to go to trial within ninety days of the Request. Mr. Hinojosa from the time he signed the Request wanted to go to trial in ninety days and never at any hearing in 2009 requested or agreed to any continuance.

[¶50] The trial judge used the following language in NDCC §29-33-03 “or when such additional time as the court for good cause shown in open court may grant” when he decided the State’s chemist going on vacation was good cause.

[¶51] According to State vs. Moore, 2007 ND 7, 725 NW2d 910 the standard of review for determining whether good cause exists for a grant of additional time:

“Legal logic dictates sound discretion is the proper standard to be applied on the question whether or not good cause existed for extension or continuance, and that an appellate court will not reverse such decision except in instances where the trial judge abused his discretion. We have repeatedly stated that abuse of discretion is the equivalent of acting unreasonably, arbitrarily or unconscionably.”

[¶52] Mr. Hinojosa doesn’t believe a State’s witness going on vacation is good cause for a continuance.

[¶53] Everett vs State 2008 ND 199, 757 N.W.2d 530 is a good example of what a trial court should require for good cause for a continuance. In Everett to get a continuance the State had to establish:

(1) the victim couldn’t make it to the trial because of mechanical problems with the car.

(2) The State was precluded from getting the victim and bringing her to the trial because of bad weather.

(3) By an affidavit from the victim show that she was willing to come to the trial.

¶54] State vs Ripley 2009 ND 105, 766 NW2d 465 is a good example of facts that aren't sufficient for a Defendant can't get a continuance. In Ripley the Defendant's attorney made a motion for continuance because he needed more time to prepare for trial. The trial court denied that motion and said there was enough time from the August 11, 2008 appointment to September 4, 2008 for a defense attorney to prepare for a sexual assault and or abuse and neglect of a child trial.

¶55] Ripley's attorney also made a motion to withdraw as counsel because with so little time he was unable to properly represent Ripley. The trial court denied this motion and said Defense Council had enough time to prepare for trial.

¶56] According to Moore ¶6]:

¶57] ¶6] The factors we consider when deciding whether good cause exists to grant additional time are: the length of delay; the reason for delay; defendant's assertion of his right; and, prejudice to the defendant. Foster, 1997 ND 8, ¶7, 560 N.W.2d 194 (relying on Barker v. Wingo, 407 U.S. 514 (1972)). Each of the factors must be given weight, but no factor, including the length of the delay, is controlling. State v. Murchison, 541 N.W.2d 435, 438-39 (N.D. 1995). "Delay is not presumptively prejudicial." Foster, 1997 ND 8, ¶12, 560 N.W.2d 194. A lack of prejudice substantially weakens a claim. Murchison, 541 N.W.2d at 439.

¶58] In the case now before the court Mr. Hinojosa believes that going on a

vacation is no good reason for the continuance. He also believes his Request entitles him to have a trial within ninety days of his Request.

[¶59] In the case now before the court, the trial court has ruled it is good cause if a State's witness wants to go vacation instead of testifying at trial. Such a ruling fails to consider the State's witness was hired for and is paid for a job that requires him to testify at court trials. The writer of this brief is not aware of any Defendant's trial that has been continued because the Defendant wants to go on a vacation instead of being at his trial.

[¶60] Mr. Hinojosa has a statutory right to demand a trial in 90 days. The State is aware of that right and didn't have to charge out his crime until the State's case was ready for trial. In this case at the very least the State could have had the trial on December 29, 2009 by taking deposition before trial or the State could have had another State Chemist test the methamphetamine.

[¶61] **ISSUE II. Do the measurements in Exhibit 2, docket number 68 properly measure the distance from the place where the Methamphetamine was sold to the real property of the university or university building?**

[¶62] The statute involved in this issue is 19-03.1-23.1(1)(a)

19-03.1-23.1. Increased penalties for aggravating factors in drug offenses.

1. A person who violates section 19-03.1-23 is subject to the penalties provided in subsection 2 if:

a. The offense involved the manufacture or distribution of a

controlled substance in or on, or within one thousand feet [300.48 meters] of, the real property comprising a public or private elementary or secondary school, public career and technical education school, or a public or private college or university;

[¶63] In this case, according to the testimony of Alan Weaver, the sale of Methamphetamine took place at or inside the door of his apartment building. The measurements of from the corner of the University building to the corner of his apartment building and from the corner of the apartment lot to the corner of the university lot don't include any measurements from the place where the sale is actually took place. Therefore the State in its case failed to prove that the place where the sale took place is within one thousand feet of either the university lot and or university building.

[¶64] Proving the sale took place within one thousand feet of either the university lot and or university building is an essential element of this offense.

[¶65] ISSUE III. Should the Defendant's Rule 29 Motion have been granted?

[¶66] In order to successfully challenge the sufficiency of the evidence on appeal the appellant must show the evidence viewed in the light most favorable to the verdict permits no reasonable inference of guilt *State vs Fashing*, 461 NW2d 102 (ND 1990).

[¶67] The standard of review for insufficiency of the evidence is a strict standard of review that allows a motion for judgment of acquittal to be granted if the evidence is insufficient to sustain a conviction of the offenses charged. *State vs Ohnstad* 359 NW2d 827 (ND 1987).

[¶68] In this case the Defendant's attorney, Rebecca McGurran made a motion

pursuant to Rule 29 of the North Dakota Rules of Criminal Procedure for a judgment of acquittal Tr Vol II P. 92, L.16-15. That motion was denied at Tr Vol II P.99, L.13.

[¶69] According to element 3 of the Essential Elements of the Offense: “ The delivery occurred within one thousand feet of the real property comprising a public or private elementary or secondary school, career and technical education school or a public or private college or university.” In this case there was no measurement from the place where the sale of methamphetamine was to have taken place, Mr. Weaver’s apartment house’s door, and the closest part of the university’s real property or the closest part of the university’s building. Therefore Mr. Hinojosa’s Rule 29 Motion should have been granted as to one thousand feet of the university lot or university building and the jury should have decided the case on the alternative lesser included offense.

CONCLUSION

[¶70] In this case :

1) Issue one should be remanded to the trial court with an order to dismiss for failure to have the case tried within 90 days of Mr. Hinojosa’s Request.

2) Issue 2 and 3 should be remanded to the trial court with an order to reduce the conviction to the lesser included offense because there is no measurement to show that the place of the sale was within one thousand feet of university real property or one thousand feet of a university building.

DATED at Mandan, North Dakota, this 17th day of November, 2010.

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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 November 17th, 2010, she served, by e-mail, a copy of the following:

APPELLANT'S BRIEF

The undersigned further certifies that on November 17th, 2010, she electronically filed with the Clerk of the North Dakota Supreme Court, APPELLANT'S BRIEF and emailed the same containing the full text of the Brief to:

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