

20150287

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

FILED
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CLERK OF SUPREME COURT

JAN 29 2016

STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA)	
)	Supreme Court No. 20150287
Plaintiff/Appellee.)	
)	Ward Co. No. 51-11-K-00481
Vs.)	
Charles Lee Davis II,)	
)	
Defendant/Appellant,)	

APPEAL FROM THE SEPTEMBER 25, 2015 ORDER REGARDING
DISCHARGE FROM CONDITIONAL RELEASE
DISTRICT COURT FOR THE NORTH CENTRAL JUDICIAL DISTRICT,
THE HONORABLE STACY LOUSER PRESIDING

BRIEF OF APPELLEE

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[¶1]STATEMENT OF THE ISSUE

- [¶2] I. District Court did not err or exceed its authority in interpreting NDCC § 12.1-04.1-25(5), finding the defendant to be suffering from mental illness and ordering him to continue to be supervised under Conditional Release.**

[¶3]Statement of Facts

[¶4] The defendant was charged with the murder of Donald Flowers, a Class AA Felony, and theft of a motor vehicle, a Class C Felony. (See Defendant's Appendix "A"-9). The defendant made his initial appearance on March 14, 2011. (Initial Appearance, docket sheet; A-2). The preliminary hearing was held on April 21, 2011. (Preliminary Hearing, docket sheet; A-3). At that time, probable cause was found and the State's Information was subsequently filed. (See A-9). On October 19, 2011, the defendant filed his Notice of Defense of Lack of Criminal Responsibility according to N.D.C.C § 12.1-04.1-03. (Notice, docket sheet No. 48; A-3).

[¶5] On November 16, 2011, an order was issued by the Honorable William W. McLees for evaluation of the defendant by the state hospital. (Order, docket sheet No. 51; A-3). On March 2, 2012, Dr. Lynne Sullivan with the North Dakota State Hospital issued her Competency and Criminal Responsibility Evaluation. (Report, docket sheet No. 54; A-4). At that time, Dr. Sullivan diagnosed the defendant with schizophrenia, paranoid type. (Report, docket sheet No. 54; A-4). Dr. Sullivan indicated that schizophrenia and its symptoms do not go into remission without medication. (Report, docket sheet No. 54; A-4). In addition, the defendant would need to undergo psychiatric monitoring and remain compliant with taking any prescribed medications. (Report, docket sheet No. 54; A-4). Dr. Podrygula filed a Psychological Evaluation-Preliminary Synopsis on behalf of the defendant. (Report, docket sheet No. 60; A-4). He strongly recommended careful monitoring of the defendant's condition, especially to ensure the defendant is taking his medication. (Report, docket sheet No. 60; A-4). He noted that recommended treatment would likely be indefinite in duration and last the defendant's entire life. (Report, docket

sheet No. 60; A-4). Both evaluators concluded that although the defendant was competent to stand trial, he was not criminally responsible for the acts committed. (Report, docket sheet No. 54 and Report, docket sheet No. 60; A-4).

[¶6] After a hearing on March 21, 2012, the defendant entered unresisted pleas of not guilty by lack of criminal responsibility. (See A-11). Thereafter, under N.D.C.C. § 12.1-04.1, the Court issued its Finding of Not Guilty by Lack of Criminal Responsibility and Order for Evaluation and Dangerousness. (See A-11). A subsequent hearing was held on August 17, 2012. (Hearing, docket sheet; A-5).

[¶7] As a result of the hearing, the Honorable William W. McLees found that the defendant, under N.D.C.C. § 12.1-04.1-22(4)(b), was mentally ill or defective. (See A-15; Trial Transcript “Tr” 3). In addition, there was a substantial risk that the defendant would commit a criminal act of violence threatening another individual with bodily injury or inflicting property damage. (See A-15; Tr 3). The defendant was then committed to the North Dakota State Hospital in Jamestown, ND. (See A-15; Tr 3). The defendant was advised that the commitment could be for the remainder of his natural life. (See A-15; Tr 3).

[¶8] An annual review hearing was held in September 2013 pursuant to N.D.C.C. §§ 12.1-04.1-21, 12.1-04.1-22 and 12.1-04.1-23. (Hearing, docket sheet; A-6). The Court found the defendant continued to be suffering from a mental disease and that he was in need of treatment and supervision. (See A-18; T 3-4). However, the Court found that the risk of the defendant committing a crime of violence threatening another individual with bodily injury or inflicting property damage was not substantial. (See A-18; T 3-4). Therefore, the Court entered an Order for Conditional Release. (See A-18; T 3-4).

[¶9] On September 10, 2014, an annual review hearing was held again pursuant to N.D.C.C. §§ 12.1-04.1-21, 12.1-04.1-22 and 12.1-04.1-23. (Hearing, docket sheet; A-6). Prior to this hearing, Dr. Sullivan filed her Treatment Update. (Report, docket sheet No. 136; A-6). It was reported that the defendant still suffered from schizophrenia. (Report, docket sheet No. 136; A-6). It was also noted that his condition was well managed with medication. (Report, docket sheet No. 136; A-6). Dr. Wegner filed a Commitment Evaluation. (Report, docket sheet No. 146; A-6). This Evaluation provided that deterioration is a risk if the defendant stopped taking his medication or life stressors overwhelmed him and his medication routine was disrupted. (Report, docket sheet No. 146; A-6). At the hearing on September 10, 2014, Dr. Sullivan and Dr. Wegner both testified that the defendant did suffer from a mental illness or defect; however, his risk of re-offending was low. (Review Hearing, docket sheet; A-6). It was testified to that if the defendant failed to take his medication, the risk of decomposition and deterioration were high. (Review Hearing, docket sheet; A-6). Based on the hearing, the Court found the defendant had not met his burden and ordered the Order for Conditional Release be maintained. (See Tr 4).

[¶10] On March 18, 2015, pursuant to NDCC § 12.1 -04.1-25(5), the defendant filed his Notice of Motion and Motion for Discharge from Conditional Release. (Motion and Notice, docket sheet No. 156, 157; A-7). The State filed its response. (Response, docket sheet No. 167; A-7). Prior to the hearing, Dr. Sullivan and Dr. Wegner filed reports of evaluation. (See Appelle's Appendix "AA"-1 and AA-3). Both experts found the defendant continued to be suffering from mental illness or defect with a diagnosis of schizophrenia. (See AA-1 and AA-3). It was also noted the defendant required

medication monitoring to ensure all of the prescribed medication is taken daily. In the evaluation, Dr. Wegner noted there is a potential risk of deterioration if the defendant stopped taking his medication. (See AA-3).

[¶11] The annual review hearing was on August 27, 2015. (Review Hearing, docket sheet; A-7). Dr. Wegner testified that the defendant's schizophrenia is stabilized with medication, and that that the defendant is at a low risk for reoffending. (See Tr 10-18). Dr. Sullivan concurred that the defendant was mentally ill, but that he has done well. (See Tr 28-32). Based on the evidence and testimony at the hearing on August 27, 2015, and prior hearings and reports, the Honorable Stacy L. Louser ordered that the 2013 Order for Conditional Release stay in place and remain unchanged. (See A-23).

[¶12] LAW AND ARGUMENT

[¶13] I. District Court did not err or exceed its authority in interpreting N.D.C.C. § 12.1-04.1-25(5), finding the defendant to be suffering from mental illness and ordering him to continue to be supervised under Conditional Release.

[¶14] A. District Court did not err in its interpretation of N.D.C.C. § 12.1-04.1-25(5).

[¶15] The North Dakota Supreme Court has not addressed a case that utilizes N.D.C.C. § 12.1-04.1-25. An applicant's burden under N.D.C.C. § 12.1-04.1-25(5) is preponderance of the evidence. As the defendant is the applicant, he must meet that burden. The District Court's determination should be reviewed under the clearly erroneous standard.

[¶16] "This Court held the State has the burden of demonstrating a defendant's competency to stand trial by a preponderance of the evidence and an appellate court's standard of review is under the clearly erroneous rule." State v. Holbach, 2014 ND 14, ¶

9, 842 N.W.2d 328. The previously referenced case addresses N.D.C.C. §§ 12.1-04-04, 12.1-04-06 and 12.1-04-07; those statutes address a defendant's mental competency to stand trial and provides the procedures for competency examinations. In this matter, N.D.C.C. § 12.1-04.1-22 through NDCC §12.1-04.1-26 are the applicable statutes, as the defendant has already been found not guilty due to lack of criminal responsibility. North Dakota law authorizes the Court to order defendants found to be not guilty by reason of lack of mental capacity to be under the supervision and control of the director of the North Dakota State Hospital for the length of time that he could have been sentenced for the offense he was charged. NDCC §12.1-04.1-20. The defendants are provided a review of the commitment order annually. NDCC § 12.1-04.1-23. Defendants may also petition for a review of the commitment order and for discharge. NDCC §§12.1-04.1-24, 12.1-04.1-25, 12.1-04.1-26. The burden is on the defendant by a preponderance of evidence. NDCC §§12.1-04.1-24 and 12.1-04.1-25. The defendant's mental health is a central factor for review by the Court when he makes application to be released from supervision.

[¶17] "A finding of fact is clearly erroneous if there is no evidence to support it, or if, although there is some evidence to support it, a reviewing court, on the entire evidence, is left with a definite and firm conviction that a mistake has been made." Holbach, ¶ 10 (citing State v. Jacobsen, 2008 ND 52, ¶ 8, 746 N.W.2d 405), State v. VanNatta, 506 N.W.2d 63, 65 (ND 1993). "A trial court is in a better position to judge the demeanor and credibility of witnesses and weigh the evidence than we who have only the cold record to review." Hoggarth v. Kropp, 2010 ND 197, ¶ 12, 790 N.W.2d 22 (quoting Ludwig v. Burchill, 481 N.W.2d 464, 469 (N.D. 1992)). As the trial court is able to weigh the

evidence, they are in the best position to resolve conflicts concerning evidence. “This Court does not reweigh the evidence, make independent findings of fact, or substitute its judgment for that of the district court.” Holbach, ¶ 10 (citing Hoggarth v. Kropp, 2010 ND 197, ¶ 12, 790 N.W.2d 22). The facts in this matter and the findings are not in dispute. The defendant is asserting the Court interpreted the statute wrong and usurped its authority.

[¶18] Statutory interpretation is a question of law, fully reviewable on appeal. Holbach, ¶ 16 (Citing In re P.F., 2008 ND 37, ¶ 11, 744 N.W.2d 724). Under N.D.C.C. § 1-02-02, “words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears.” Id. at ¶ 18. In addition, N.D.C.C. § 1-02-07 indicates “statutes are construed as a whole and are harmonized to give meaning to related provisions.” Id. The Court found, pursuant to N.D.C.C. § 12.1-04.1-25(5)(b) that the defendant is mentally ill or defective. Memorandum Opinion ¶ 34-36.

N.D.C.C. § 12.1-04.1-25(5) provides:

“Upon application by an individual conditionally released, by the director or superintendent of the treatment facility or person responsible for supervisions of an individual pursuant to an order of conditional release, or by the prosecuting attorney, the court shall determine whether to continue, modify, or terminate the order. The court shall consider and dispose of an application promptly. In a proceeding under this section, the applicant has the burden of proof by a preponderance of the evidence. The court shall enter an order in accordance with the following requirements:

- a. If the court finds that the individual is not mentally ill or defective or that there is not a substantial risk that that the individual will commit, as a result of mental illness or defect, a criminal act, it shall order that the individual be discharged from further constraint under this chapter.

- b. If the court finds that the individual is mentally ill or defective, but that there is not a substantial risk that the individual will commit, as a result of mental illness or defect, a criminal act of violence threatening another individual with bodily injury or inflicting property damage, it may modify the conditions of release as appropriate for the protection of society.

- c. If the courts finds that the individual is mentally ill or defective and that there is a substantial risk that the individual will commit, as a result of mental illness or defect, a criminal act of violence threatening another individual with bodily injury or inflicting property damage and that the individual is no longer a proper subject for conditional release, it shall order the individual committed to a treatment facility for custody and treatment. If the court finds that the individual is mentally ill or defective and that there is a substantial risk that the individual, as a result of mental illness or defect, will commit a nonviolent criminal act, it may order the individual to report to any treatment facility for noncustodial evaluation and treatment and to accept nonexperimental, generally accepted medical, psychiatric, or psychological treatment recommended by the treatment facility.”

(emphasis added).

[¶19] N.D.C.C. § 12.1-04-1.25(5) has three distinct subdivisions. It is the State’s position the defendant is relying upon the wrong subsection of NDCC 12.1-04.1-25(5). The subdivisions should be read as a whole and used to provide meaning to the other subdivisions. (See Holbach, ¶ 18, stating “statutes are construed as a whole and are harmonized to give meaning to related provisions.”) The defendant relies upon N.D.C.C. § 12.1-04-1.25(5)(a), for his position that the Court erred. The defendant ignores or chooses to not read subsection (a) of NDCC § 12.1-04.1-25(5) as a whole, “If the Court finds the individual is not mentally ill or defective... It shall order that the individual be discharged from further constraint under this chapter.” (emphasis added). A distinguishing factor between N.D.C.C. § 12.1-04.1-25(5)(a) and (b) is that the former provides for when “the court finds that the individual is not mentally ill or defective”; and

the later provides for when “the court finds that the individual is mentally ill or defective.”

[¶20] The Court cited many factors that it considered when determining which subsection was applicable. First, the Court, in its Memorandum Opinion, found Dr. Sullivan’s testimony relevant

“My opinion is that Mr. Davis suffers from severe mental illness that is usually life-long, would require life-long medication and intervention, and with such intervention the symptoms would hopefully be minimized and likely not recur. But there is a possibility that they could recur spontaneously.” (p. 22, lines 7-11).

“Unfortunately schizophrenia is a type of disorder that does not go away even with medication. If, you know, someone has been treated with medications for ten years and then they suddenly, go off their medication, they will become psychotic again. There’s a very high probability of that.” (p. 26, lines 6-10).

Memorandum Opinion, ¶34. Dr. Sullivan, in her Treatment Update dated June 15, 2015, stated “Davis requires medication monitoring to ensure he takes all prescribed medications daily [...]” Memorandum Opinion, ¶ 36. (See AA-1). At this time, the defendant is required to take his medication and submit to medication monitoring based on the Order for Conditional Release. (See A-18). This ensures protection should the defendant decide to no longer take his medications. Under the Order, the defendant may be taken into custody by the North Dakota Department of Human Services should he not comply with the Order. (See A-18).

[¶21] Second, Dr. Wegner’s testimony provided that should the defendant no longer take his medication, there is a potential risk of deterioration. (See Tr 10-18, Memorandum Opinion, ¶ 38). Dr. Sullivan testified that it is a frequent occurrence for an individual with schizophrenia to cease taking their medications. (See Tr 10-18,

Memorandum Opinion, ¶ 38). Neither Dr. Wenger nor Dr. Sullivan disputed the fact that the defendant will suffer from schizophrenia for his lifetime and that long-term intervention is required.

[¶22] The record clearly indicates that the defendant suffers from schizophrenia and both experts continually find this. Memorandum Opinion, ¶ ¶ 7-11, 17-18, and 34-36. (See AA-1 and AA-3). On August 17, 2012, the Court found that the defendant was mentally ill or defective. (See A-15; Tr 3). In all subsequent annual reviews, the experts continued to find the defendant is a mentally ill or defective individual. Memorandum Opinion, ¶ ¶ 7-11, 17-18, and 34-36. The record has clearly indicated, through the whole process, that the defendant suffers from schizophrenia and that he will continue to suffer with schizophrenia. Therefore, a finding that the defendant is mentally ill is not erroneous as it is supported by evidence in the form of testimony from two physicians.

[¶23] Third, the Court recognized that the defendant took the life of David Flowers during a schizophrenic episode. Memorandum Opinion, ¶ 44. The Court also recognized that the best way to protect society at this time and to ensure that the defendant continued with his medication is for the conditional order to be maintained. Memorandum Opinion, ¶ 39. In State v. Nording, 485 N.W.2d 781, 785-786, this Court recognized the purposes of N.D.C.C. 12.1-04.1: “The statute seeks to protect society from persons who commit violent crimes and who suffer from mental illness or defect. The statute also seeks to secure appropriate treatment for those individuals and to release them from involuntary commitment when neither society’s protection nor their welfare requires continued confinement.” (N.D. 1992)

[¶24] The Honorable Stacy L. Louser provided in her Memorandum Opinion, ¶ 39, stated the following:

“In light of the heinous nature of the seemingly unprovoked and random event that occurred on March 12, 2011, this Court cannot, in good faith, defer to Davis the discretion to decide whether or not to take his medication, as the risk to Davis himself and society at large is simply too great were Davis to stop taking his medication.”

Based on the evidence presented to the Court, the testimony of all the witnesses, and the circumstances surrounding the case, the Court found that there was not a substantial risk that the defendant would commit a criminal act of violence threatening another individual with bodily injury or inflicting property damage but did find the defendant to be mentally ill or defective.

[¶25] The Court further found, “Should Mr. Davis be dismissed from Conditional Release, the Court no longer has jurisdiction over Davis. As such, in the event of a complication or subsequent mental health exacerbation, the recourse would be to petition the Court for a mental health commitment, a process that could take time to accomplish. Again, in consideration of the relatively sudden on-set of Davis’ prior schizophrenic episode, the Court does not believe any delays in time would be in society’s, or Davis’, best interests.” Memorandum Opinion, ¶ 42.

[¶26] N.D.C.C. § 12.1-04.1-25(5)(b) provides that based on the district court’s finding “it may modify the conditions of release as appropriate for the protection of society.” (emphasis added). The statute uses “may” rather than “shall,” therefore it is within the court’s discretion to modify the conditions of release. The Court decided, based upon the testimony, reports, credibility of witnesses and all circumstances in front of it that the defendant had not met his burden of proof and that the best thing for the protection of

society, was for the defendant to remain under the supervision as provided in the Order of Conditional Release.

[¶27] The defendant correctly argues that if N.D.C.C. § 12.1-04.1-25(5)(a) were to apply the Court would have to discharge the defendant as the statute states “it shall order that the individual be discharged from further constraint under this chapter.” However, “A cardinal rule of statutory construction requires interpretation of related provisions together, if possible, to harmonize and to give meaning to each provision.” Martin v. Stutsman Cnty. Soc. Servs., 2005 ND 117, ¶ 3, 693 N.W.2d 278. “Statutes should be read in relation to other statutes involving the same or similar subject matter in an attempt to discern legislative intent.” Trade’N Post, L.C.C. v. World Duty Free Americas, Inc., 2001 ND 116, ¶ 21, 628 N.W.2d 707. The Court found after reading the reports of examination, listening to the testimony of the physicians, determining the credibility of all witnesses, and weighing the evidence that the defendant failed to meet his burden by a preponderance of the evidence that N.D.C.C. § 12.1-04.1-25(5)(a) applied. This is due to the fact the Court did not find, and could not find, based upon the evidence that the defendant “is not mentally ill or defective.” The defendant’s application for release from the Conditional Order of Release was made pursuant to NDCC §12.1-04.1-25. The defendant asserts that the Court usurped its authority by finding that N.D.C.C. § 12.1-04.1-25(5)(b) rather than N.D.C.C. § 12.1-04.1-25(5)(a) applies. The State disagrees. However, if such were the case, the Court’s ultimate order would still remain, as the defendant wholly failed to meet his burden by preponderance of evidence for subsection (a) of NDCC § 12.1-04.1-25(5), in that he does in fact suffer from a mental illness or

defect. Subsection (a) requires that the defendant be found to not suffer from a mental illness or defect. The defendant does not assert that he is not mentally ill.

[¶28] The defendant argues that because both Dr. Sullivan and Dr. Wenger testified that there is not a substantial risk that the individual will commit, as a result of mental illness or defect, a criminal act, N.D.C.C. § 12.1-04.1-25(5)(a) applies. However, it is the State's position that N.D.C.C. § 12.1-04.1-25(5) shall be read as a whole. The Court heard that testimony and was charged with the responsibility of determining the credibility of the testimony and the weight to give that evidence. As cited above, the Honorable Stacy L. Louser stated various facts and reasons for her finding that the defendant does suffer from a mental illness therefore N.D.C.C. § 12.1-04.1-25(5)(b) applied.

[¶29] Pursuant to NDCC §12.1-04.1-25(5)(b) the Court's findings were not clearly erroneous nor does the defendant assert the Court's findings were erroneous. Subsection (b) goes on to give the Court discretion regarding conditions of release, "but there is not a substantial risk that the individual will commit, as a result of mental illness or defect, a criminal act of violence threatening another individual with bodily injury or inflicting property damage, it may modify the conditions of release as appropriate for the protection of society." (emphasis added). Legislature has given the discretion to the Court to determine the appropriate conditions of release.

[¶30] B. District Court did not abuse its discretion in ordering that the Conditional Order be maintained.

[¶31] A party must show the district court abused its discretion. Shull v. Walcker, 2009 ND 142, ¶ 13, 770 N.W.2d 274. A district court abuses its discretion if it acts in an

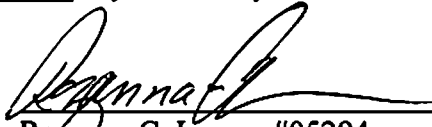
arbitrary, unconscionable, or unreasonable manner, if its decision is not the product of a rational mental process leading to a reasonable determination, or if it misinterprets or misapplies the law. Hartleib v. Simes, 2009 ND 205, ¶ 15, 776 N.W.2d 217. An abuse of discretion is never assumed and must be affirmatively established, and this Court will not reverse a district court's decision merely because it is not the one it would have made had it been deciding the motion. Shull, at ¶13, Anderson v. Baker, 2015 ND 269, ¶ 7, 871 N.W.2d 830.

[¶32] In the Memorandum Opinion the Court found the defendant continued to be an individual that was mentally ill and continues to require medication. The Court also found that medication monitoring, case management and psychotherapy are necessary in order to monitor signs of stress and Davis's ability to cope with stress. The Court did find that, based up the testimony of Dr. Sullivan and Dr. Wegner, at the present time there is not a substantial risk of the defendant committing a criminal act. However, the risk of potential schizophrenic episodes increases if medications stop. Finally, the Court found to ensure the continued protection of society and to ensure the defendant continues to take his medications, the terms and conditions of the Conditional Release shall continue. In this matter the Court weighed the evidence of the fact the defendant took a human life, is mentally ill, continues to require medication and requires monitoring and therapy. The Court considered what was best for the protection of society and ordered the terms and conditions of the Conditional Release to remain. The defendant does not dispute the findings of the Court. The defendant has failed to meet his burden that the Court abused its discretion.

[¶33] CONCLUSION

[¶34] Based on all factors including the protection of society, the Honorable Stacy L. Louser found the Order of Conditional Release was the most appropriate at this time. As there is more than just “some evidence” to support Judge Louser’s conclusion, her actions were not erroneous, she did not usurp her authority and acted within her discretion under the statute. The District Court’s Order continuing the defendant under the supervision as outlined in the Conditional Release Order should be affirmed.

Respectfully submitted this 28 day of January, 2016.



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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA)	
)	Supreme Court No. 20150287
Plaintiff/Appellee.)	
)	Ward Co. No. 51-11-K-00481
Vs.)	
Charles Lee Davis II,)	
)	
Defendant/Appellant,)	

[¶35] AFFIDAVIT OF SERVICE BY MAIL

LeAnn Westereng, being first duly sworn, deposes and says:

That she is a citizen of the United States of America, over the age of twenty-one years, and is not a party to nor interested in the above entitled action; that on the 29 day of January, 2016, this Affiant deposited in the mailing department of the United States Post Office at Minot, North Dakota, a sealed envelope with postage thereon duly prepaid, containing a true and correct copy of the following document in the above entitled action:

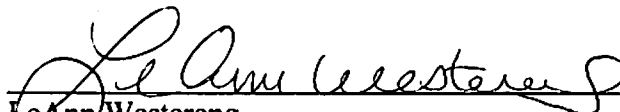
APPELLEE'S BRIEF

That said envelope was addressed to the following person at his address as follows:

RICHARD E EDINGER
ATTORNEY FOR APPELLANT
PO BOX 1295
FARGO ND 58107

PENNY MILLER
CLERK OF SUPREME COURT
JUDICIAL WING 1ST FLOOR
600 E BLVD AVE DEPT 180
BISMARCK ND 58505-0530

That the above document was duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.



LeAnn Westereng

Subscribed and sworn before me this 29 day of January, 2016 by LeAnn Westereng.



Notary Public

