

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff and Appellant,)	Supreme Court No. 20160301
vs.)	District Ct. No. 09-2015-CR-04077
)	
Caroline Marie Conrad,)	
)	
Defendant and Appellee.)	

APPELLANT’S REPLY BRIEF

Appeal from the August 5, 2016 Order Granting Defendant’s Motion to Dismiss
Pursuant to N.D.R.Crim.P. 12(b)(3)(v)
East Central Judicial District
the Honorable Steven E. McCullough, Presiding

Cherie L. Clark, NDID #06306
Reid A. Brady, NDID #05696
Assistant State’s Attorneys
Cass County Courthouse
211 Ninth Street South
P.O. Box 2806
Fargo, North Dakota 58108
(701) 241-5850
Attorneys for Plaintiff/Appellant

[¶ 1] TABLE OF CONTENTS

	<u>Paragraph No.</u>
Table of Contents	¶ 1
Table of Authorities	¶ 2
Argument.....	¶ 3
I. The Defendant’s argument shows that the district court’s order was based on factual findings – not a unique question of law – and accordingly that dismissal under the civil dispute doctrine was erroneous.....	¶ 6
II. The district court’s order is appealable because it was a pretrial determination that “as to the conduct alleged” the Defendant is entitled to dismissal.	¶ 10
Conclusion.....	¶ 14
Certificate of Service.....	¶ 17

[¶ 2] **TABLE OF AUTHORITIES**

Paragraph No.

North Dakota Cases

First Nat'l Bank & Trust Co. v. Green, 262 N.W. 596 (N.D. 1936) ¶ 9

In re Estate of Paulson, 219 N.W.2d 132 (N.D. 1974)..... ¶ 9

Liebelt v. Saby, 279 N.W.2d 881 (N.D. 1979)..... ¶ 9

State v. DuPaul, 509 N.W.2d 266 (N.D. 1993)..... ¶ 11

State v. Goldmann, 2013 ND 105, 831 N.W.2d 748..... ¶ 12

State v. Gwyther, 1999 ND 15, 589 N.W.2d 575 ¶ 12, 13

State v. Howe, 247 N.W.2d 647 (N.D.1976) ¶ 11

State v. O'Boyle, 356 N.W.2d 122 (N.D. 1984)..... ¶ 11

State v. Ritter, 472 N.W.2d 444 (N.D. 1991)..... ¶ 11

State v. Serr, 1998 ND 66, 575 N.W.2d 896..... ¶ 11

State v. Swanson, 407 N.W.2d 204 (N.D. 1987) ¶ 11

State v. Thill, 468 N.W.2d 643 (N.D. 1991)..... ¶ 11

Statutes

N.D.C.C. § 29-28-07(1)..... ¶ 11, 12, 15

[¶ 3] ARGUMENT

[¶ 4] Although the pronounced basis for dismissal was the unique question of law prong of the civil dispute doctrine, neither the Defendant nor the district court identified the unique question of law. The Defendant's brief shows that the district court's dismissal order was based on findings about Morrell's intent and whether a gift occurred. These are factual issues that should be resolved by trial.

[¶ 5] Besides replying to the merits of the Defendant's argument, the State includes an appealability discussion, as this Court requested. The dismissal order is appealable because it is a pre-trial order dismissing the charges as to the conduct alleged. The without prejudice nature of the dismissal order does not impact its appealability. Nor is appealability impacted by the fact that the State, if it found sufficient supporting evidence, could recharge the Defendant for different misconduct, e.g., wrongfully inducing Morrell to open the joint bank account.

[¶ 6] I. The Defendant's argument shows that the district court's order was based on factual findings – not a unique question of law – and accordingly that dismissal under the civil dispute doctrine was erroneous.

[¶ 7] The Defendant acknowledges that the pronounced basis for the dismissal order was the unique issue of law prong of the civil dispute doctrine. (Def.'s Br. ¶¶ 12, 13, 20.) Yet nowhere does the Defendant identify a unique issue of law. Instead, the Defendant throughout her brief indicates that the dismissal was based on factual findings.

[¶ 8] In her statement of the facts, the Defendant notes that “[t]he district

court, citing the civil dispute doctrine, determined a gift from Ms. Morrell to [the Defendant] occurred” and “[f]actually, the court found, the requirements of an inter vivos gift were present.” (Def.’s Br. ¶ 12.) In her standard of review section, the sole standard the Defendant cites is one for review of findings of fact. (Def.’s Br. ¶ 14.) And in her argument, the Defendant expressly contends that the district court appropriately made the findings supporting dismissal: “The district court properly determined that Ms. Morrell intended to gift [the Defendant] access and ownership of the funds in their joint bank account.” (Def.’s Br. ¶ 23.) Also telling in the Defendant's argument is the selection and characterization of certain facts. For instance, the Defendant asserts that before signing the contract with Affinity, Morrell and the Defendant were "bifurcated and counseled independently by a bank officer in separate rooms." (Def.’s Br. ¶ 25.) The Defendant then uses that assertion to support her argument about Morrell's intent: "Morrell's independent review of the Terms and Conditions is extremely probative of her intent." (Def.’s Br. ¶ 25.) The State would challenge the accuracy of the Defendant's assertion. Further, to prove the intent of both Morrell and the Defendant, the State would emphasize facts that the Defendant ignores - Morrell's and the Defendant's repeated statements that the funds in the account belonged to Morrell. (Aff. of Det. Sara Gunther, April 12, 2016, Doc. ID# 71; State’s Response to Def.’s Motion to Dismiss Pursuant to Civil Dispute Doctrine, April 12, 2016, Doc. ID# 70, at 4-6.) This dispute illuminates the factual nature of the controlling issues.

[¶ 9] The Defendant’s analysis, like the district court’s, is inconsistent with

the civil dispute doctrine. Both the district court and the Defendant recognized that application of the doctrine in this case required existence of a unique issue of law. (App. 19; Def.'s Br. ¶¶ 19-20.) Neither relied on any unique issue of law. Instead, both pointed out the controlling law on intent (First Nat'l Bank & Trust Co. v. Green, 262 N.W. 596 (N.D. 1936) and on gifts (In re Estate of Paulson, 219 N.W.2d 132 (N.D. 1974)). (App. 19-21; Def.'s Br. ¶ 24.) The controlling law shows that determining a joint account depositor's intent and a whether a gift occurred are factual issues to be determined based on all the circumstances. Green, at 596-98; Paulson, at 135-36; see also Liebelt v. Saby, 279 N.W.2d 881, 886 (N.D. 1979) (explaining that "[w]hether or not personal property is held in joint tenancy with the right of survivorship depends on the intentions of the parties and is determined in light of all of the circumstances"). And indeed, both the Defendant and the district court actually analyzed the issue as a factual one: whether the elements of a gift existed. (App. 21-23; Def.'s Br. ¶¶ 23-25.) That is an appropriate issue for trial. But it is an inappropriate one for resolution upon a pre-trial motion.

[¶ 10] II. The district court's order is appealable because it was a pretrial determination that "as to the conduct alleged" the Defendant is entitled to dismissal.

[¶ 11] A dismissal of criminal charges is appealable under N.D.C.C. § 29-28-07(1). That subsection authorizes the state to appeal from "[a]n order quashing an information or indictment or any count thereof." N.D.C.C. § 29-28-07(1). This Court has repeatedly indicated that dismissal of charges qualifies as an appealable

order under N.D.C.C. § 29-28-07(1). See State v. Howe, 247 N.W.2d 647, 652 (N.D.1976); State v. O'Boyle, 356 N.W.2d 122, 123 (N.D. 1984); State v. Swanson, 407 N.W.2d 204, 205–06 (N.D. 1987); State v. Thill, 468 N.W.2d 643, 645 (N.D. 1991); State v. Ritter, 472 N.W.2d 444, 447 (N.D. 1991); State v. DuPaul, 509 N.W.2d 266, 269 (N.D. 1993); State v. Serr, 1998 ND 66, ¶ 7, 575 N.W.2d 896).

[¶ 12] The fact that the dismissal of criminal charges is without prejudice does not alter its appealability. See State v. Gwyther, 1999 ND 15, ¶ 11, 589 N.W.2d 575; State v. Goldmann, 2013 ND 105, ¶ 6, 831 N.W.2d 748. That is because N.D.C.C. § 29-28-07(1) “does not specifically limit appealability to an order quashing with prejudice[.]” Id.

[¶ 13] The State’s theoretical option to recharge the Defendant based on wrongfully creating the joint account does not impact appealability. The district court indicated it “takes no position at this time on whether the creation of the account, by itself or in conjunction with any withdrawals, might lay the basis for any criminal charges[.]” but “as to the conduct alleged to have given rise to the charges... [the Defendant] is entitled to dismissal without prejudice[.]” (App. 24-25.) A charge based on the creation of the account would involve different misconduct and require different evidence. Moreover, this Court has held that the dismissal of a charge based on a mere failure to allege an essential element in the charging document is appealable. See Gwyther, 1999 ND 15, ¶ 11, 589 N.W.2d 575. In other words, an appeal is not precluded by the option to simply recharge

with a complete allegation. Id. Nor should the appeal here be precluded by the State's option to recharge based upon different misconduct - which the State never presented evidence of, or asserted it even had.

[¶ 14] CONCLUSION

[¶ 15] The district court's dismissal order is appealable under N.D.C.C. § 29-28-07(1). The order should be reversed because it was a pre-trial resolution of factual issues and had nothing to do with a unique question of law under the civil dispute doctrine.

[¶ 16] Respectfully submitted this 17th day of November, 2016.

Cherie L. Clark, NDID #06306
Reid A. Brady, NDID #05696
Assistant State's Attorneys
Cass County Courthouse
211 Ninth Street South
P.O. Box 2806
Fargo, North Dakota 58108
(701) 241-5850
Attorneys for Plaintiff-Appellant

[¶ 17] CERTIFICATE OF SERVICE

[¶ 18] A true and correct copy of the foregoing document was sent by e-mail to Ariana Meyers at ameyers@vogellaw.com & Peter Welte at pwelte@vogellaw.com on the 17th of November, 2016.