

In the Supreme Court
State of North Dakota

2017 ND

Brief in Support of Petition to the Supreme Court for a Supervisory Writ
Ward County Case No. 51-2016-CR-02130

James Peter Barton,

Petitioner

Vs.

State of North Dakota and The Honorable Judge Douglas Mattson,

Respondents.

[¶ 1] James Peter Barton petitions this Court for a supervisory writ directing the District Court to vacate its order allowing testimony to come into a jury trial in the matter of State of North Dakota v. James Peter Barton, pending in Ward County case number 51-2016-CR-02130. We assert that allowing in the testimony from one doctor who was qualified as an expert as an ER Physician, while he testifies to reports and observations that require specialized training, that he admits he has not received the proper training and education, is highly prejudicial to Mr. Barton.

Facts

[¶ 2] James Peter Barton was charged with aggravated assault on October 10, 2016. Trial was commenced on July 11, 2017 before the Honorable Judge Mattson. A motion in limine on evidence issues was filed by defense counsel on July 3, 2017 requesting that the prosecution be prevented from introducing any evidence in the trial that has not been disclosed to the defense. A hearing was held the morning of July 11, 2017 prior to the commencement of trial where the Judge held off on a formal ruling on the motion in limine on evidence stating when an issue was brought

before the court, the court would address it.

[¶ 3] Further, prosecution failed to disclose any CAT scans or x-rays to defense counsel until the morning of trial stating that they were not in the possession of the State's Attorney's Office until that morning. During the motion in limine hearing, defense counsel advised the court that x-ray and CAT scan reports were not provided to defense counsel and further the radiologist who viewed the x-ray and CAT scan was not noticed as an expert. Defense counsel requested that the x-ray and cat scans be excluded, and that the expert be prevented from testifying during the trial. After the motion in limine hearing and prior to the commencement of trial that day, prosecution handed defense counsel a DVD with x-ray and CAT scan images. The alleged assault took place in October 2016 where the alleged victim signed an authorization releasing all medical records to the State's Attorney's Office. The Court's order allowing testimony to come in regarding the x-rays, CAT scans, or confirmation of bone fractures is highly prejudicial to Mr. Barton. Defense counsel had no opportunity to inspect the x-rays, CAT scans, or be able to find an expert to rebut any testimony. The evidence being allowed into the trial is a key element of the State's case and the late disclosure of the evidence (the morning on trial, nine months later) is extremely prejudicial. The Judge requested that the two doctors be presented to offer the court a proffer.

[¶ 4] Dr. John Nelson testified to the Judge that he is an ER physician, conducted the initial consult of the alleged victim, and had a "suspicion" that the alleged victim may have bone fractures in the face due to some bruising, swelling, and hemorrhaging. Dr. Nelson testified that he ordered further testing to be conducted. Dr. Nelson stated that he has had no radiology residency in his past and cannot read the CAT scans and x-rays with a medical degree of certainty. Dr. Nelson's curriculum vitae was provided to defense counsel prior to trial, with a note that he

would be called as an expert. No descriptive summary was provided to defense, only notes that he would refer to certain bates stamped pages in discovery and provide explanation for those pages.

[¶ 5] Dr. Hajiani testified to the Judge that he is a specialist in radiology. Further that his training to specialize took an additional five years in residency. That he relied on that five years in his residency to be able to look at and analyze CAT scans and x-rays. His training and experience allows him to be able to determine bone fractures. Doctors without this training are not allowed to diagnose bone fractures. Dr. Hajiani was never noticed as an expert, no curriculum vitae was provided and no summary was provided. The state argued that Dr. Hajiani should be allowed to testify as a lay witness because he could observe the CAT scans and x-rays and tell that bone fractures existed.

[¶ 6] The Judge ordered that Dr. Hajiani would be prevented from testifying as he was clearly an expert and was not noticed.

[¶ 7] The Judge ordered that Dr. Nelson, who conducted the initial consult of the alleged victim who had a “suspicion” there was a bone fracture, could testify. He could testify to the initial consult with the alleged victim, and to his suspicions that bone fractures existed. Further, the Judge ordered that Dr. Nelson would be allowed to testify that bone fractures were confirmed in the x-rays and CAT scans he had ordered.

[¶ 8] Defense counsel objected on the basis that the conclusion that there were bone fractures could only be diagnosed by someone with the training and experience in radiology. Dr. Nelson is not qualified as an expert in radiology and therefore cannot observe, make the diagnosis, or relay that bone fractures existed. Dr. Nelson was only there to make the initial observations of injuries and order further testing. He prescribed some pain medication and requested a follow up visit. Defense counsel requested that a stay or continuance be granted in the matter so defense

counsel could address the issue with the Supreme Court. The Judge denied any stay or continuance in the matter.

[¶ 9] Defense counsel understands that it is rare that the Supreme Court would exercise a supervisory writ when requested by defense counsel. However, evidentiary issues during the course of a trial are highly prejudicial. In this particular case, Mr. Barton would be convicted of an aggravated assault. Mr. Barton is not a U.S. citizen and is facing automatic deportation if convicted.

Conclusion

[¶ 10] THEREFORE, Mr. Barton requests that the Supreme Court:

1. Order a halt of the trial commencing in Ward County Case No 51-2016-CR-02130;
2. Address the evidentiary issues concerning the x-rays and CAT scans in this matter;
3. Address the evidentiary issues in allowing an expert to testify as an expert in areas which he has not received the proper medical training; and
4. Requests that the Supreme Court impose any other such relief as it may deem fair and just.

Dated: July 12, 2017

/s/ Patrick W. Waters

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In the Supreme Court
State of North Dakota

2017 ND

Petition to the Supreme Court for a Supervisory Writ
Ward County Case No. 51-2016-CR-02130

James Peter Barton,

Petitioner

Vs.

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Respondents.

To: The Honorable Judge Douglas Mattson, 315 Third St S.E. Minot, N.D. 58702; Ward County State's Attorney Caitlyn Pierson, 315 Third St. S.E. Minot, N.D. 57702

1. PLEASE TAKE NOTICE that the above named Petitioner hereby appeals to the North Dakota Supreme Court the Trial Court's Order, orally issued July 12, 2017, in which the Trial Court order that the State's expert witness who was declared an expert witness in being an ER Physician, could testify to CAT scans and x-rays which displayed bone fractures. Testimony proffered through two doctors clarified that specialized training and knowledge required a five year training minimum to be able to observed and diagnose bone fractures on an x-ray or CAT scan. Further, prosecution failed to disclose any CAT scans or x-rays to defense counsel until the morning of trial stating that they were not in the possession of the State's Attorney's Office until that morning. The alleged assault took place in October 2016 where the alleged victim signed an authorization releasing all medical records to the State's Attorney's Office. The Court's order allowing testimony to come in regarding the x-rays, CAT scans, or confirmation of bone fractures is highly prejudicial to Mr. Barton. Defense counsel had no opportunity to inspect the x-rays, CAT scans, or be able to find an expert to rebut any testimony. The evidence being allowed into the

trial is a key element of the State's case and the late disclosure of the evidence (the morning on trial, nine months later) is extremely prejudicial.

2. WHEREFORE, Mr. Barton requested the District Court grant the Defendant's request for stay of proceedings and the District Court denied the request.

3. WHEREFORE, the District Court failed to issue a written order at this time.

4. WHEREFORE, Mr. Barton has filed a brief but may file an additional brief to supplement this matter.

5. WHEREFORE, Mr. Barton prays the North Dakota Supreme Court grant supervision and order a stay of proceedings pending the appeal.

Dated: July 12, 2017

/s/ Patrick W. Waters

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**IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA**

James Barton,)
) Supreme Court No.
Petitioner,)
) District Court No. 51-2016-CR-02130
)
vs.)
)
State of North Dakota,)
The Honorable Douglas L. Mattson)
)
)
Respondents.)

AFFIDAVIT OF SERVICE

Jenean G. Jessen, being first duly sworn deposes and states:

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 12th day of July, 2017, this Affiant provided a true and correct copy of the following documents in the above-entitled action.

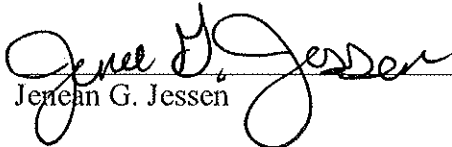
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By ELECTRONIC SERVICE to the following:

Honorable Douglas L. Mattson
Judge of the District Court
dmattson@ndcourts.gov

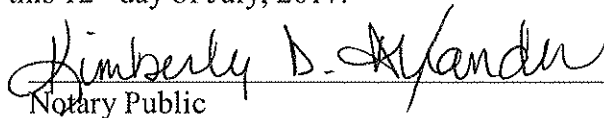
Caitlyn A. Pierson
Assistant Ward County State's Attorney
51wardsa@wardnd.com

Dated this 12th day of July, 2017.



Jenean G. Jessen

Subscribed and sworn to before me this 12th day of July, 2017.



Kimberly D. Alexander
Notary Public

KIMBERLY D ALEXANDER
Notary Public
State of North Dakota
My Commission Expires April 21, 2022