

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

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STATE OF NORTH DAKOTA,	)	
	)	
Respondent / Appellee,	)	Supreme Court No.
	)	20180055
vs.	)	
	)	District Court No.
JOHN PHILLIP HAMRE,	)	09-2017-CR-02433
	)	
Petitioner / Appellant.	)	

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**APPELLANT’S BRIEF**

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**Appeal from Criminal Judgment Entered on January 25, 2018  
by Cass County District Court, East Central Judicial District,  
State of North Dakota, The Honorable Steven L. Marquart  
Presiding.**

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Samuel A. Gereszek (ND Bar ID # 07040)  
**HAMMARBACK & SCHEVING, P.L.C.**  
308 DeMers Avenue  
East Grand Forks, MN 56721  
Telephone: (218) 773-6841  
Facsimile: (218) 773-2845  
Email: sam@egflawyer.com  
**ATTORNEY FOR THE APPELLANT**

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**[¶ 3] STATEMENT OF THE ISSUES**

[¶ 4] Whether the district court denied John Phillip Hamre’s (hereinafter “Hamre”) Constitutional Right to a Speedy Trial?

[¶ 5] Whether the district committed reversible error by failing to provide Hamre an evidentiary hearing following a pro se filing of a motion to dismiss?

[¶ 6] Whether there was sufficient evidence to support the conviction of Hamre of Simple Assault on a Peace Officer, Preventing Arrest, and Fleeing or Attempting to Elude a Police Officer?

**[¶ 7] STATEMENT OF THE CASE**

[¶ 8] Hamre appeals from a criminal judgment, dated January 25, 2018. (Appellant’s Appendix “A.A.” at 33.) Hamre was convicted of two counts of simple assault on a peace officer in violation of N.D.C.C. § 12.1-17-01(1)(a) & (2)(a), a C Felony; one count of preventing arrest in violation of N.D.C.C. § 12.1-08-02(1), a C Felony; and, one count of fleeing or attempting to elude a police officer in violation of N.D.C.C. § 39-10-71. (A.A. at 33.) Hamre was then sentenced to 36 months with 18 months suspended, followed by 18 months of supervised probation. (A.A. at 33.)

[¶ 9] Hamre then filed a timely notice of appeal on February 1, 2018, which was docketed by This Court on February 7, 2018, pursuant to N.D.R.App.P. 4. (A.A. at 42, & 5 – Index # 66). The District Court had jurisdiction under N.D.C.C. § 27-05-06 and N.D. Const. art. VI, § 8. The Supreme Court has jurisdiction under N.D.C.C. § 29-28-06 and N.D. Const. art. VI, § 2.

## **[¶ 10] STATEMENT OF THE FACTS**

[¶ 11] The statement of facts is derived mostly from the incident reports contained within the appendix on pages 9 and 11, additional information will be cited accordingly. On June 5, 2017, a detective from the Fargo police department made contact with Hamre at a storage unit facility. While having contact with Hamre, the detective ran the plates on the vehicle Hamre was driving and discovered them to be expired. The detective then waited for Hamre to leave the storage unit facility and initiated a traffic stop. At some point during the stop, Hamre drove off, but was not pursued by the detective, nor was his “flight” radioed to any other Fargo police officer.

[¶ 12] On June 15, 2017, ten days after the traffic stop, the same detective came in contact with Hamre in the same storage unit facility from the previous encounter. Two detectives approached Hamre on foot and verbally stated they were “Fargo Police.” It should be noted the detective who drafted the two separate incident reports, made special reference to his appearance on the June 5, 2017 encounter. The detective’s appearance on June 5, 2017 was plain clothes with readily identifiable “badge, gun, handcuffs, and extra magazine,” to include a traffic stop conducted via emergency lights from a law enforcement vehicle. The June 15, 2017 incident report, drafted by the same detective makes no reference to attire, in addition, the approach to Hamre was on foot and not as a result of exiting a Fargo police department vehicle. In fact, during trial, one of the detectives confirmed that the two detectives approached Hamre on June 15, 2017 after exiting an unmarked car, in plain clothes, without flashing lights. (Tr. 160; In. 15-20).

¶ 13] Upon making contact on June 15, 2017 by the two detectives, Hamre became combative, striking one officer with a vehicle door and kicked at the second detective hitting him in the chest in chin. Hamre was eventually subdued by the two detectives and placed under arrest for Clay County Felony warrant. Hamre was not arrested for his June 5, 2017 fled traffic stop, nor was he arrested for his aggression toward the detectives.

¶ 14] Hamre made his initial appearance before the district court the following day, June 16, 2017 at 2:30 in the afternoon before the Honorable Judge Wade L. Webb. (A.A. at 3.) By that time, Hamre's charging information had been filed which included the simple assault on the peace officers, resisting arrest, possession of drug paraphernalia (later dismissed and not relevant to this appeal), and the June 5, 2017 fleeing a police officer. (A.A. at 3, Index # 1.)

¶ 15] Following the initial appearance Hamre requested to represent himself, and after a hearing before Judge Webb on October 17, 2017, his request was ultimately granted. Hamre made 4 separate speedy trial demands, October 6, 2017, November 2, 2017, November 24, 2017, December 8, 2017, and December 24, 2017. (A.A. at 12, 13, 24, 25, & 28.) In the midst of speedy trial demand # 3 and # 4, the State of North Dakota submitted a letter to Judge Webb on December 8, 2017, blaming the delay of trial on Hamre's conduct in requesting self-representation. (A.A. at 25.) This response, after three separate demands for a speedy trial, was filed with the district court 64 days after the first demand for a speedy trial.

**[¶ 16]** In between speedy trial demands # 2 and # 3, on November 16, 2017, Hamre filed a pro se notice of motion, motion to dismiss, and brief in support of the motion to dismiss. (A.A. at 14-22.) The State responded on November 27, 2017, with a one page indicating the pro se motion did not articulate any theory as to why evidence should be suppressed or the case dismissed. (A.A. at 23.)

**[¶ 17]** Then on December 12, 2107, subsequent to speedy trial demand # 3, with no explanation, Judge Webb recused himself from the case, a case he had presided over for 180 days, 5 separate hearings, and 3 speedy trial demands. (A.A. at 26.) At that point the case was re-assigned to the Honorable Judge Steven L. Marquart, whose first official act was to deny the pro se motion to dismiss, without a hearing, and 10 days after taking over the case. (A.A. at 27.)

**[¶ 18]** Hamre was finally brought to trial, 222 days after his arrest, after four separate demands for a speedy trial, and finally in front of a second judge of the district court. At the conclusion of the State's case, Hamre made a motion for acquittal under N.D.R.Crim.P. 29 based on insufficient evidence, based in large part that the trial elicited no further information than is contained above and in the two short incident reports, which was ultimately denied. (Tr. 172, ln. 15-25). Hamre was subsequently convicted of the two counts of simple assault on peace officers, resisting arrest, and fleeing a police officer.



## [¶ 19] ARGUMENT

[¶ 20] Hamre’s Constitutional right to a speedy trial was utterly ignored by the district court, and ultimately blamed on Hamre’s own conduct as a deflection mechanism once the sheer perversity of the situation was identified.

[¶ 21] The district court was obligated to, at the very least, hold an evidentiary hearing regarding Hamre’s motion. (See State v. Fitterer, 2002 ND 170, ¶ 7, 652 N.W.2d 908; holding prima facie evidence to support a motion is not required by a moving party’s moving papers.) Thus, if the State and/or the district court needed further information to rule on the motion, per This Court’s jurisprudence, the district court was obligated to permit Hamre a hearing to further outline his position. A defendant “need only provide adequate notice of the issues raised in order to reach a hearing on his motion.” Id. at ¶ 9.

[¶ 22] Finally, there is insufficient evidence to sustain Hamre’s conviction for simple assault on a peace officer, resisting arrest, and fleeing a police officer. By the officer’s own incident report regarding the June 5, 2017 traffic stop, which was originated by “casual contact with Hamre.” (A.A. at 11.) The detective initiated a traffic stop, then waited for backup to arrive. (A.A. at 11.) Hamre then started his vehicle and simply drove away, the detective did not pursue, did not call in a fleeing suspect, instead, simply turned off his lights. (A.A. at 11.) This Court, as far back as 1992 has emphasized the language of N.D.C.C. § 39-10-71 which is operable is the “*pursuing police vehicle...*” State v. Langseth, 492 N.W.2d 298, 301 (N.D. 1992). In follow-on cases This Court continues to hold that the stopped vehicle’s operator’s actions are paramount to determining “seizure.” (See State v.

Halfmann, 518 N.W.2d 729, 731 (N.D. 1994) (because Halfmann did not move her vehicle, and the officer did not pursue, the stop was not a seizure.) (See also (State v. Schneider, 2014 ND 198, ¶ 17, 855 N.W.2d 399) (“Schneider did not move his vehicle, and the deputy did not pursue Schneider...Schneider also failed to argue his liberty was restrained in any way.”))

[¶ 23] By this Court’s 26 years of jurisprudence since Langseth, Hamre’s conduct on June 5, 2017 is not only legally authorized, but is also mandatory in order to establish a potential defense of “seizure” under the Fourth Amendment. Therefore, there exists no current legally sufficient foundation for which to have convicted Hamre of fleeing a police officer, as he was never “seized” under the Fourth Amendment.

[¶ 24] Moreover, the June 15, 2017 encounter between Hamre and the detectives fails to rise to criminal activity as well. It is undisputed the two detectives approached in plain clothes, after exiting an unmarked, unidentifiable police car. Ibid. ¶ 12. It is also undisputed that one detective stated “Hi John, Fargo Police.” (A.A. at 9.) Hamre then immediately began an attempted “escape” of the area. His escape was thwarted by two men, neither one displaying a police badge, neither one saying anything about John Hamre being “under arrest.” The two men simply attempted to, and eventually were successfully able to, subdue Hamre. The criminal statute of preventing arrest requires a defendant to “intend” to prevent the effectuating of an arrest. N.D.C.C. § 12.1-08-02. At no point, was evidence introduced that Hamre was ever made aware, until after he was subdued, that the officers were there to place him under arrest. Additionally, there was no evidence

presented whatsoever that these two plain clothes detectives presented themselves as actual law enforcement, other than to simply say, “Hi John, Fargo Police.” No badge presentation or other form of identification was ever presented, thus Hamre could not have officially formed the requisite “intent” to prevent an arrest (that he did not know was happening) from a public servant (that could have simply been two random men about to rob Hamre himself).

[¶ 25] The burden Hamre bears in challenging the sufficiency of the evidence against him is a heavy one and with full understanding that this Court must “look only to the evidence most favorable to the verdict...” State v. Kunkel, 548 N.W.2d 773, 773 (N.D. 1996). Hamre raises this issue at this time in light of that burden.

[¶ 26] The applicable standards of review for appeals relating to the insufficient evidence issue have long been set forth by this Court:

When the sufficiency of evidence to support a criminal conviction is challenged, this Court merely reviews the record to determine if there is competent evidence allowing the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction. The defendant bears the burden of showing the evidence reveals no reasonable inference of guilt when viewed in the light most favorable to the verdict. When considering insufficiency of the evidence we will not reweigh conflicting evidence or judge the credibility of witnesses....A jury may find a defendant guilty even though evidence exists which, if believed, could lead to a verdict of not guilty.

State v. Nakvinda, 2011 ND 217, ¶12, 807 N.W.2d 204 (quoting State v. Kinsella, 2011 ND 88, ¶7, 796 N.W.2d 768; and State v. Wanner, 2010 ND 121, ¶9, 784 N.W.2d 143)(see also State v. Bruce, 2012 ND 140, ¶16, 818 N.W.2d 747).

**[¶ 27] A. The District Court Denied the Defendant's Multiple Requests for a Speedy Trial.**

[¶ 28] “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...” U.S. CONST. Amend. 6. “In criminal prosecutions in any court whatever, the party accused shall have the right a speedy and public trial...” the N.D. Const. art. I, § 12. This Constitutional right to a speedy trial is deeply rooted in our history and fundamental rights as citizens. However, “speedy” may have multiple variable meanings, but in present case, Hamre’s trial did not begin until 222 days after his initial appearance, and 110 days after his first of four separate demands for a speedy trial.

[¶ 29] The four-part test to evaluate a speedy trial challenge, balances four factors, the length of the delay, the reason for the delay, the proper assertion of the right, and actual prejudice. State v. Hall, 2017 ND 124, ¶ 11, 894 N.W.2d 836. A one year or more delay is considered ‘presumptively prejudicial,’ which admittedly is not the case here, however 222 days falls a mere 143 days short, and is well over half of a year.

[¶ 30] Considering the second factor, the reason for the delay, the State attempted to place the blame on Hamre with the December 8, 2017 letter to the judge. (A.A. at 25.) However, as previously noted, that letter only comes after 3 separate demands for a speedy trial. The State also cites Hamre’s “firing” of his counsel as the reason for the delay. However, Hamre was self-represented since October 17, 2017, an entire 53 days prior to the December 8, 2017 letter. The State cites Hamre’s re-application for counsel as another reason for delay. Yet Hamre’s re-application only came after 3 separate demands for a speedy trial, a motion to

the court for dismissal, with no action whatsoever taken by the court or the State. In 53 days, nothing had been done, Hamre's action to re-apply comes out of frustration from continued pre-trial detention with no action on his case, but was then used against him to continue to deny him a Constitutional right to a speedy trial. Moreover, under the second factor, the judge's recusal after 180 days and 3 separate demands for the speedy trial with no explanation whatsoever places Hamre in an impossible position of asserting a "questionable" reason for the delay, when no reason for the recusal at the eleventh hour was even provided.

[¶ 31] Factor three regarding the proper assertion of the right, Hamre asserted that right four separate times, in writing each and every time. Everyone involved in the case was on notice of his demand. There can be little to no question his demand was properly asserted. Thus, the length of the delay and prejudice. Hamre was in pre-trial custody the entire time. Under the Constitutional presumption of innocence, it would be Constitutionally offensive to make an argument Hamre was not "prejudiced" by this delay. A man, constitutionally presumed to be innocent of criminal activity, is deprived of his very Constitutional right of liberty for a period of 222 days, while he is innocent of the crimes alleged. The hypocrisy contained within the prior sentence can leave no doubt of the prejudice served upon Hamre in this case.

**[¶ 32] B. The District Court Committed Reversible Error by Failing to Provide the Defendant an Evidentiary Hearing.**

[¶ 33] “Case law confirms [defendants] need only provide adequate notice of the issues raised in order to reach a hearing on his motion.” Fitterer, 2002 ND 170, ¶ 9, 652 N.W.2d 908. Here, Hamre was quite clear, he was challenging the validity of the arrest itself, and then by its very nature, the resisting charge. (A.A. at 15-17, 21-22.) Therefore, the court and the State was on notice, and pursuant to This Court’s holding in Fitterer, Hamre was entitle to an evidentiary hearing on the issues, and by not permitting the hearing, the district court committed reversible error.

**[¶ 34] C. There Was Insufficient Evidence to Support a Guilty Verdict of Simple Assault on a Peace Officer, Preventing Arrest, & Fleeing or Attempting to Elude Police.**

[¶ 35] Under North Dakota law, a person is guilty of simple assault if a person “[w]illfully causes bodily injury to another human being.” N.D.C.C. § 12.1-17-01(1)(a). The offense is a C Felony if the victim is a peace officer acting in the capacity of employment. N.D.C.C. § 12.1-17-01(2)(a). Bodily injury is defined as “and impairment of physical condition, including physical pain.” N.D.C.C. § 12.1-01-04(4).

[¶ 36] By the definition contained within the North Dakota Century Code, the officer’s duty, by his own testimony, and by fact the Hamre was ultimately arrested, outlines the officer was not “impaired of physical condition.” Therefore, given the circumstance of the effectuated arrest, the officer’s physical pain in and of itself was, and remains, irrelevant. There is a specific North Dakota Century Code that deals with this exact issue, that being; N.D.C.C. § 12.1-08-02.

[¶ 37] Under N.D.C.C. § 12.1-08-02, the act for which Hamre may have actually committed is resisting arrest. However, therein lies another problem for the sufficiency of the evidence. The officers never informed Hamre he was under arrest until after they had effectuated the arrest. Thus, Hamre could not have formed the requisite “intent” to prevent the arrest, as he did not know one was occurring.

[¶ 38] Addressing the fleeing or eluding charge, as outlined above, This Court’s jurisprudence effectively mandated Hamre’s conduct on June 5, 2017. In order to adequately argue being “seized,” Hamre would have had to tried to leave and be stopped and/or prevented by law enforcement. The failure of law enforcement to pursue Hamre, thus, indicates he was not “seized” under the Fourth Amendment and therefore could not have committed the crime of fleeing or attempting to elude police.

[¶ 39] Moreover, if this Court is unpersuaded by its own jurisprudence, the statute of fleeing or attempting to elude a peace officer requires a person to fail or refuse to bring a vehicle to stop, or flee or elude a pursuing police vehicle. N.D.C.C. § 39-10-71. Here, Hamre stopped the vehicle, thus he did not fail to, or refuse to stop the vehicle. Hamre then had contact with the detective before simply driving away. The detective admittedly did not “pursue” Hamre, thus Hamre did not flee or elude a “pursuing police vehicle.”

**[¶ 40] CONCLUSION**

[¶ 41] For the foregoing reasons, Hamre's Constitutional right to a speedy trial was violated, the district court committed reversible error by failing to provide Hamre an evidentiary hearing, at the very least, and the evidence presented was insufficient to warrant a conviction of the charges against Hamre. Therefore, the guilty verdicts should be vacated and the case against Hamre be dismissed with prejudice for the Constitutional violation alone, in the alternative, this case should be reversed and remanded with instructions regarding an evidentiary hearing.

Respectfully submitted this Thursday, August 30, 2018.

*/s/ Samuel A. Gereszek*

Samuel A. Gereszek (ND Bar ID # 07040)  
**HAMMARBACK & SCHEVING, P.L.C.**  
308 DeMers Avenue  
East Grand Forks, MN 56721  
Telephone: (218) 773-6841  
Facsimile: (218) 773-2845  
Email: sam@egflawyer.com  
**ATTORNEY FOR THE APPELLANT**



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<b>John Phillip Hamre,</b>	)	
	)	
<b>Petitioner / Appellant.</b>	)	
	)	

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**CERTIFICATE OF SERVICE**

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I, Samuel A. Gereszek, attorney for the Petitioner / Appellant, and officer of the court, hereby certify that I served a true and correct copy of the following:

1. *Appellant's Brief (.pdf and word via email); and,*
2. *Appellant's Appendix;*

On the following:

**Clerk of the Supreme Court  
North Dakota Supreme  
Court**

**Tristen Jones Van de Streek  
Attorney for Appellee**

Mr. John Hamre  
2201 23<sup>rd</sup> Street NE, Ste. 101  
Wilmar, MN 56201

[supclerkofcourt@ndcourts.gov](mailto:supclerkofcourt@ndcourts.gov)

[sa-defense-notices@casscountynd.gov](mailto:sa-defense-notices@casscountynd.gov)

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Dated this Thursday, August 30, 2018.

**HAMMARBACK & SCHEVING, P.L.C.**

*/s/ Samuel A. Gereszek*

**Samuel A. Gereszek (ND Bar ID # 07040)**  
308 DeMers Avenue  
East Grand Forks, MN 56721  
Telephone: (218) 773-6841  
Facsimile: (218) 773-2845  
[sam@egflawyer.com](mailto:sam@egflawyer.com)  
Attorney for Petitioner/Appellant