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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff/Appellant vs. Taelor Brown, Defendant/Appellee	Supreme Court No. 20180091 District Court No. 12-2018-CR-00010

BRIEF OF PLAINTIFF-APPELLANT

APPEAL FROM ORDER DISMISSING CASE WITH PREJUDICE

DIVIDE COUNTY DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT
HONORABLE BENJAMEN J. JOHNSON, PRESIDING

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STATEMENT OF THE ISSUES

[¶1] Whether the District Court erred in failing to find probable cause to support the charge of Possession of a Controlled Substance with Intent to Manufacture on the Information.

[¶2] Whether the District Court erred in determining that since the defendant was manufacturing the controlled substance for personal use the defendant was authorized to manufacture the controlled substance.

STATEMENT OF THE CASE

[¶3] The State of North Dakota ("State") appeals from the District Court's order dismissing the charge of Possession of a Controlled Substance with Intent to Deliver against Taelor Brown ("Brown"). The State charged Brown by information and affidavit filed on February 7, 2018, with Possession of a Controlled Substance with Intent to Manufacture under North Dakota Century Code (N.D.C.C.) 19-03.1-23(1)(b) and 19-03.1-05(5), a Class B Felony, (Appellant's Appendix 1). The State alleged Brown had committed these offenses on or about October 31, 2017, (App. 1). The Preliminary Hearing was held on March 2, 2018 (App. 2). At the conclusion of the hearing, the district court dismissed the charge with prejudice holding there was not sufficient evidence to find Probable Cause (App. 4).

[¶4] The State filed a timely notice of appeal of the order dismissing the charge (App. 39). This appeal ensued.

STATEMENT OF THE FACTS

[¶5] On October 31, 2018 the Divide County Sheriff's Office responded to a shooting at Nooner's Tavern located in Noonan, North Dakota within Divide County (App. 11). Law enforcement believed that the suspect was located at 201 Adams Street in Noonan, North Dakota and therefore requested a search warrant for evidence relating to the shooting at the residence listed above (App. 12). Law enforcement executed the search warrant and upon entering the residence multiple items consistent with narcotics and narcotics paraphernalia were found. (App. 12)

[¶6] During the search of the residence, law enforcement found marijuana, a marijuana smoking device, hash oil, additional paraphernalia that based upon the law enforcements' training and experience was used to manufacture hash oil (App. 12-13). It was determined by law enforcement that the residents of the house were Taelor Brown and Mitchell James (App. 12, 15).

[¶7] Based on the items found in the residence and who was residing at the residence both Taelor Brown and Mitchell James were charged with Possession with the Intent to Manufacture (App. 1).

[¶8] The District Court, at the conclusion of the preliminary hearing held on March 2, 2018, signed an order of dismissal of the charge of "Possession of a Controlled Substance with Intent to manufacture" against Taelor Brown and Mitchell James (App. 4). In its ruling from the bench, the court held the quantity of marijuana was "a very small amount" (App. 34) and stated "We didn't have any evidence regarding any cell phone, any communication with a third party, no pay sheets, no cash, none of the regular things found in these types of cases" (App. 34).

ARGUMENT

I. The District Court erred in failing to find probable cause to support the charge of Possession of a Controlled Substance with Intent to Manufacture on the Information.

[¶9] North Dakota Century Code § 29-28-07(1) states: "An appeal may be taken by the state from [a]n order quashing an information or indictment or any count thereof." [A]n order dismissing a criminal complaint . . . is the equivalent of an order quashing an information . . . and therefore appealable under the statute [N.D.C.C.§ 29-28-07(1)]. State v. Gwyer, 1999 ND 15, ¶11, 589 N.W.2d 575. The standard of review for a trial court's decision to dismiss a criminal charge is the abuse of discretion standard. Id.

> A trial court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, its decision is not the product of a rational mental process leading to a reasoned determination, or it misinterprets or misapplies the law.

Ritter, Laber and Associates, Inc. v. Koch Oil, Inc., 2007 ND 163, ¶21, 740 N.W.2d 67.

[¶10] The purpose of a preliminary hearing is to determine whether or not there is probable cause (North Dakota Rules of Criminal Procedure (N.D.R.Crim.P.) 5.1(a)). Probable cause is a minimal burden of proof, Healy v. Healy, 397 N.W.2d 71, 73 (N.D., 1986). In order to justify . . . holding an accused for trial, it is not required that the evidence submitted be of such convincing character as to establish the guilt of the accused beyond a reasonable doubt. State ex rel. Germain v. Ross, 39 N.D. 630, 170 N.W. 121, 123, (1918).

[¶11] It is an abuse of the trial court's discretion to find probable cause lacking when this determination is based on findings that should be decided by the jury at trial simply because the judge believes there is an alternate explanation of the evidence. [P]robable cause exists when the facts and circumstances "are sufficient to warrant a person of reasonable caution in believing an

offense has been . . . committed," and "[k]nowledge of facts sufficient to establish guilt is not necessary to establish probable cause." State v. Blunt, 2008 ND 135 ¶16, 751 N.W.2d 692 citing Hoover v Director of N.D. Dep't of Transp., 2008 ND 87 ¶9, 748 N.W.2nd 730 (internal citations omitted). In its decision from the bench, the court held that because the amount of the marijuana was a small amount and without knowing more about if there was any additional evidence of distribution, there were really no indicators of distribution (App. 34). This case was charged out in the alternative as a manufacturing case or a delivery case. Based on his law enforcement training and in looking at the totality of the evidence found in the residence, Special Agent Sean Banet ("Banet") determined this was a case involving more than simple personal use (App. 24). Even if the Court did not find probable cause that there was enough evidence to support the delivery charge the State submits to this Court that there was ample evidence that the drugs were being manufactured in the residence. Banet testified that both Mitchell James and Taelor Brown told law enforcement that they were living at the residence (App. 12, 15). Banet also testified what hash oil was and how it was made (App. 12). Banet also testified that he found all the items required to manufacture hash oil in the residence. (App. 13). Banet also testified that he found the raw product in the device, along with the additional items needed to convert the raw product and the final product (App. 13). The State submits to this Court that there is more than enough proof to establish probable cause that the Defendant was manufacturing hash oil inside the residence.

II. The District Court erred in determining that since the defendant was manufacturing the controlled substance for personal use the defendant was authorized to manufacture the controlled substance.

[¶12] The State hereby reincorporates the law and arguments set forth in paragraphs nine (9) through eleven (11) aforementioned. The North Dakota Century Code defines manufacture as,

> “"Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis and includes any packaging or repackaging of the substance or labeling or relabeling of its container. The term does not include the preparation or compounding of a controlled substance by an individual for the individual's own use or the preparation, compounding, packaging, or labeling of a controlled substance:
>
> a. By a practitioner as an incident to the practitioner's administering or dispensing of a controlled substance in the course of the practitioner's professional practice; or
>
> b. By a practitioner, or by the practitioner's authorized agent under the practitioner's supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale.” N.D.C.C. §19-03.1-01.

The State cannot deny that if the Defendant had a prescription for the controlled substance and prepared it or compounded it for personal use then the charge would have been appropriately dismissed by the District Court. There is no evidence in the record that the Defendant was authorized to have the controlled substance. Banet also testified that the process by which the raw marijuana was turned into oil was a conversion of the controlled substance (App. 12). Banet also testified that the process increases the THC concentration up to ninety six percent (App. 12). Banet also testified that it converts approximately a pound of marijuana into about two ounces (App. 12).

Banet testified that a common dose of hash oil is zero point zero two (0.02) grams. (App. 13). Banet also testified that he found approximately two (2) grams at the residence (App. 19). Simple mathematics would conclude that there was approximately 100 doses found at the residence. The State submits to this Court that 100 doses of a controlled substance is much more than an amount for personal use.

[¶13] In determining whether a reversal of the district court's findings of fact in preliminary proceedings this Court has held "we will not reverse . . . if sufficient competent evidence exists that is fairly capable of supporting the court's findings . . . " Blunt at ¶14, citing State v. Foley, 2000 ND 91, 610 N.W.2d, 49. As in Blunt, the district court erred in this case when it required the State to produce a higher burden of evidence to satisfy it that a crime had been committed and the accused was probably guilty. This Court found that there was sufficient evidence to reverse the dismissal by the District Court at the preliminary hearing when approximately an ounce was found in the possession of the defendant. State v. Turbeville, 2017 ND 139, 895 N.W.2d 758. If the Defendant in that case was to sell the controlled substance in gram increments, that defendant would have only had approximately 28 doses on them, where in this case the Defendant was in possession of nearly four (4) times as many doses. Section 19-03.1-23 of the N.D.C.C., does not provide a statutorily defined minimum amount of controlled substance required to support a charge of possession of a controlled substance with intent to deliver. Id. at ¶11. Here in this case the District Court also stated that there was a very small amount of the controlled substances found (App. 34).

CONCLUSION

[¶14] Probable Cause is an incredibly low burden of proof. It is all that is required to move a case forward after a preliminary hearing. Based on his training and experience, Banet determined that based upon the amount of hash oil, the paraphernalia to manufacture the hash oil, and the scale, this was not simply for personal use but intended for distribution and was being manufactured in the residence by the Defendant. The District Court erred when it determined the amount of hash oil was not sufficient for probable cause instead of considering the totality of the circumstances.

Dated this 3rd day of May, 2018.

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State of North Dakota,	)	
	)	
Plaintiff- Appellant,	)	
	)	**CERTIFICATE OF SERVICE**
vs.	)	
	)	Supreme Court No. 20180091
Taelor Brown,	)	
	)	District Court No. 12-2018-CR-00010
Defendant-Appellee.	)	

I hereby certify I made service of the foregoing **Brief of Plaintiff-Appellant; Appendix of Plaintiff-Appellant; and Certificate of Service** upon Jeff Nehring, Attorney for Defendant, by e-mailing a true and correct copy of the same to info@nehringlaw.com this 3rd day of May, 2018.

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