

**IN THE SUPREME COURT**

**FOR THE STATE OF NORTH DAKOTA**

|                        |   |                                      |
|------------------------|---|--------------------------------------|
| State of North Dakota, | ) |                                      |
|                        | ) |                                      |
| Plaintiff - Appellant, | ) |                                      |
|                        | ) |                                      |
| vs.                    | ) | Supreme Court No.: 20180092          |
|                        | ) | District Court No.: 12-2018-CR-00009 |
| Mitchell James,        | ) |                                      |
|                        | ) |                                      |
| Defendant - Appellee.  | ) |                                      |

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**APPEAL FROM DISMISSING CASE WITH PREJUDICE  
DATED MARCH 6, 2018**

**DIVIDE COUNTY DISTRICT COURT**

**NORTHWEST JUDICIAL DISTRICT**

**THE HONORABLE BENJAMEN J. JOHNSON, PRESIDING**

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**BRIEF OF THE DEFENDANT-APPELLEE**

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## STATEMENT OF THE ISSUES

- [¶1] I. COMPETENT EVIDENCE EXISTS THAT IS FAIRLY CAPABLE OF SUPPORTING THE DISTRICT COURT'S FINDING OF FACT THAT PROBABLE CAUSE WAS LACKING TO BIND OVER THE CRIMINAL CHARGE OF POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER FOR TRIAL.
- [¶2] II. THE DISTRICT COURT DID NOT ERR IN APPLYING THE DEFINITION OF MANUFACTURE TO DETERMINE WHETHER THE PREPARING OF THE HASHISH OIL FOR PERSONAL USE SATISFIED THE ELEMENTS OF NDCC §19-03.1-23(1)(b).

## STATEMENT OF THE FACTS

[¶3] On October 31, 2018, the Divide County Sheriff's Office executed a search warrant on the residence of Taelor Brown and Mitchell James. (App. 10-11) During the search of the residence, law enforcement found suspected marijuana, marijuana paraphernalia and hash oil. (App.11) Based upon the items found, both Taelor Brown and Mitchell James were charged with a class B felony, Possession with Intent to Manufacture or Deliver a Controlled Substance. (App. 2) The criminal information alleged that Taelor and Mitchell possessed marijuana and marijuana paraphernalia that are consistent with the manufacture of hashish oil. (App. 2)

[¶4] A preliminary hearing was held on March 2, 2018, in which Northwest Narcotics Agent Shawn Banet testified for the State. (App. 6, 11) Agent Banet testified on direct examination that during the search a tube suspected of being used to create hashish oil was found. (App. 13) According to the testimony of Agent Banet, the tube had several small holes drilled into it, which would allow marijuana to be heated and hash oil would drip out. (App. 13) Agent Banet testified that he suspected one of the scales had hashish oil residue on it. (App. 13) In addition, Agent Banet stated that scales indicate that either a person is using them to verify the weight of controlled substances or for use to weigh a product they are selling. (App. 14) Agent Banet did not express an opinion as to the particular reason why he believed Taelor and Mitch owned the scales during direct examination. There was no testimony on direct examination that either Taelor or Mitch were suspected of selling hash oil or marijuana.

[¶5] On cross examination, Agent Banet was asked a series of questions regarding evidence typically found in drug investigations involving the delivery of a

controlled substance. (App. 15-23) Agent Banet testified that cell phones were useful in the investigation of narcotics trafficking, but he did not have any knowledge of whether Taelor or Mitch's cell phones had been searched. (App. 17-18) In addition, Agent Banet testified that you find pay/owe sheets or transaction lists when you investigate drug dealers. (App. 18) He testified that he was not aware of finding any pay/owe sheets or transaction lists in this case. (App. 18) On cross examination Agent Banet stated that when you sell narcotics, such as hash oil, you will package your product to sell. (App. 19) Agent Banet testified that there was no packaging material found other than one plastic or glass container found in the dryer. (App. 19) Agent Banet confirmed that if you use hashish oil for personal use, it would be consistent to have one container. (App. 20) There was no money or other financial transactions that Agent Banet was aware of that would indicate drug sales. (App. 20) Agent Banet testified that there was no evidence of unusual traffic at the residence. (App. 20). Moreover, Agent Banet testified that he was not aware of anyone who allegedly purchased hash oil or other controlled substances from either Taelor or Mitch. (App. 21)

[¶6] On redirect examination, Agent Banet was asked about finding suspected hashish oil on one of the scales. (App. 24) Agent Banet opined that the suspected hash oil found on the scale would be there because the scale was being used to weigh the hashish oil for repackaging. (App. 24) On re-cross examination, this opinion was questioned. (App. 25) Agent Banet admitted that it was unlikely the hashish oil would be poured directly on the scale in order to weigh it. (App. 25) His testimony continued by agreeing that the hashish oil would have been placed in a container. (App. 25)

[¶7] At the conclusion of the preliminary hearing, the Honorable Benjamin

Johnson stated held that the definition of manufacturing requires some evidence that the hashish oil was manufactured for purpose of distributing it to other people. (App. 33) Judge Johnson made a finding of fact that the State had not provided any evidence that Taelor or Mitch had previously distributed controlled substances. (App. 34) Next, Judge Johnson found that the State had not provided any evidence that the amount of hashish oil found was consistent with amounts for distribution and that it was a very small amount found. (App. 34) The Court also made findings that the State did not present any evidence of intent to distribute the hashish oil based upon cell phone evidence, communications with third parties, pay sheets, cash or other evidence typically found in drug distribution cases. (App. 34) Ultimately the Court found that the State had not provided sufficient evidence to show probable cause that the Defendant committed the offense of possession with intent to manufacture or deliver a controlled substance. (App. 4)

## ARGUMENT

### **A. Standard of Review**

[¶8] A trial court's findings of fact in a criminal case's preliminary proceeding is a question of law which can be reviewed on appeal. State. vs. Smith, 2010 ND 89, ¶6. This Court has stated that it "will not reverse the trial court's findings of fact in preliminary proceedings in a criminal case if, after resolving conflicts in the evidence in favor of affirmance, sufficient competent evidence exists that is fairly capable of supporting the court's findings and the decision is not contrary to the manifest weight of the evidence. State v. Blunt, 2008 ND 135, ¶14. The preliminary hearing requires the court to examine the evidence and decide whether the evidence is sufficient for probable cause that the accused might have committed a crime. Smith, 2010 ND 89, ¶7. It has been described as a screening tool "to determine the existence or absence of probable cause". Blunt, 2008 ND 135, ¶17.

### **B. Argument**

- I. COMPETENT EVIDENCE EXISTS THAT IS FAIRLY CAPABLE OF SUPPORTING THE DISTRICT COURT 'S FINDING OF FACT THAT PROBABLE CAUSE WAS LACKING TO BIND OVER POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER FOR TRIAL.

[¶9] Mitchell was charged with Possession with Intent to Manufacture or Deliver a Controlled Substance in violation of North Dakota Century Code §19-03.1-05(5), §19-03.1-23(1)(b) and §12.1-32-01(3). (App. 1) This statute makes it unlawful for a person to willfully manufacture, deliver or possess with intent to deliver a controlled substance. NDCC §19-03.1-23(1)(b). Mitchell's charge is based upon Agent Banet's testimony that



the tube with small holes was suspected to be a device used to prepare hashish oil by heating marijuana. (App. 13) As the record reflects, the State's direct examination was focused upon the preparation of marijuana to hashish oil, in support of probable cause for the criminal charge. The North Dakota Legislature defines what it means to manufacture in the context of the Uniform Controlled Substances Act. NDCC §19-03.1-01(17) In order to manufacture a controlled substance under the Uniform Controlled Substance Act, the person must be doing so with the intention of distributing it to another person. Id. The North Dakota Legislature specifically excludes "preparation or compounding of a controlled substance by an individual for the individual's own use" from the definition of manufacture. Id. Therefore under NDCC §19-03.1-23(1)(b), the State must provide some evidence that Taelor intended to deliver the hashish oil to another person.

[¶10] This Court in State vs. Serr, reviewed a district court's finding that the State's evidence was insufficient to support a probable cause determination in a conspiracy to deliver a controlled substance case. State vs. Serr, 1998 ND 66. In affirming the district court, this Court referenced North Dakota Rules of Criminal Procedure Rule 5.1, which requires a district court judge to discharge a defendant "if it appears either a public offense has not been committed, or there is not sufficient cause to believe the defendant guilty of the offense..." Id. at ¶10, See State v. Morrissey, 295 N.W.2d 307, 310 (N.D. 1980). In Serr, the State presented evidence at the preliminary hearing to support its contention that Karmen Knoble and Jamie Moe conspired with each other and others to deliver controlled substances. Id. at ¶10. The appeal centered upon the evidence of the agreement requirement. Id. at ¶12. During the preliminary hearing, the State presented testimony that Jamie Moe stated he usually gets his drugs from Karmen Knoble for further sale. Id. at 13.

In reviewing this evidence, this Court stated “while the evidence indicated Moe was reselling, there is no evidence – not even evidence which would be an inference – Knoble and Moe had agreed to distribute. Id. at ¶13.

[¶11] This case is similar in many aspects to State vs. Serr. The State’s only evidence that was presented at the preliminary hearing consisted of hashish oil residue on a scale. During the State’s direct examination of Agent Banet, the only information provided to the district court was Mitchell constructively possessed a scale, which was typical in cases both where the individual used it to weigh their own drugs and in cases where the individual used it to weigh drugs intended for sale. The State did not introduce evidence during its direct examination that would give the district court an inference that the scale found was used for weighing hashish oil to distribute. During the State’s re-direct of Agent Banet, testimony was elicited that Agent Banet did not have a good reason why a user of hashish oil would weigh it if they produced it. Therefore, he testified the most logical reasoning would be for weighing the packaging for sales. On re-cross, Agent Banet admitted that it was unlikely a person would pour the hashish oil directly on the scale but would rather transfer it to a container. (App. 25) Based upon Agent Banet’s earlier testimony that they did not find multiple containers indicative of distribution, it is reasonable the district court found that Agent Banet was merely speculating on why there was suspected hashish oil on the scale. The State did not even provide evidence that the substance on the scale had been tested. The search occurred on October 31, 2017 and the preliminary hearing was held on March 2, 2018. Four months had elapsed. This Court has stated that the trier of fact “can best evaluate testimony because it observes the demeanor and credibility of the witness, and we do not substitute our judgment for that of the trier of

fact when reasonable evidence supports the findings.” Montgomery vs. Montgomery, 2003 ND 135 at 11.

[¶12] The primary issue is whether district court erred when it heard testimony that suspected hashish oil residue was found on a scale and did not find that this information was sufficient to establish probable cause that Mitchell intended to distribute the hashish oil. The competent evidence supporting the district court’s findings came from the State. This evidence consisted of information that possession of a scale is typical in cases of people who use drugs. The district court then looked for any additional evidence from the State which would have supported a probable cause finding. This included a long list of evidence typically found in drug distribution cases. The record shows that State did not present any evidence to support probable cause. Furthermore, the record is clear that the State did not provide any evidence that Mitchell had used the tube to prepare hashish oil. The State did not provide any evidence that Mitchell used the scale. The State did not provide any evidence on how the suspected hashish oil got on the scale or even if the hashish oil had been on the scale prior to coming into Mitchell’s residence. The district court was in the best position to evaluate the testimony of the State and found no evidence to support a finding of probable cause that Mitchell possessed the scale with suspected hashish oil with the intent to distribute it.

II. THE DISTRICT COURT DID NOT ERR IN APPLYING THE DEFINITION OF MANUFACTURE TO DETERMINE WHETHER THE PREPARING OF THE HASHISH OIL FOR PERSONAL USE SATISFIED THE ELEMENTS OF NDCC §19-03.1-23(1)(b).

[¶13] In this case, the State is alleging that Mitchell used a tube with holes to heat marijuana in order to extract hashish oil. The relevant statute states:

"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. NDCC §19-03.1-01(17).

The relevant part of this statute is “[t]he term does not include the preparation or compounding of a controlled substance by an individual for the individual's own use...”

The term “hashish” is defined in NDCC §19-03.1-01(15).

"[h]ashish" means the resin extracted from any part of the plant cannabis with or without its adhering plant parts, whether growing or not, and every compound, manufacture, salt, derivative, mixture, or preparation of the resin. Id.

The language contained in the definition of hashish is very similar to the language in the definition of manufacture. Both statutes refer to “compounding” and “preparing”.

[¶14] This Court has recognized that the application and interpretation of statutes are questions of law, which are fully reviewable. Public Service Com’n v. Wimbledon Grain Co, 2003 ND 204 at 20. In order to determine the Legislature’s intent, this Court has held the first step is to give the statutory language “its plain, ordinary, and commonly understood meaning.” Id. at 20. Moreover, this Court has stated “[w]e interpret statutes to give meaning and effect to every word, phrase and sentence, and do not adopt a construction which would render part of the statute mere surplusage. State vs. Laib, 2002 ND 95 at 13. In construing a criminal statute, this Court avoids ludicrous and absurd results. Id.

[¶15] The definition of manufacture starts out by grouping several terms together. These terms are “production, preparation, propagation, compounding, conversion, or processing of a controlled substance”. NDCC §19-03.1-01(15). Both preparation and compounding are included in the initial grouping. Next, a comma indicates a break between this first part of the sentence. The second part states, “either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis”. Therefore, the second language grouping is added information to the first grouping. This means any of the words used in the first grouping, would also include using

the extraction process or chemical synthesis. According to Wikipedia, pharmaceutical compounding is defined as “the creation of a particular pharmaceutical product to fit the unique need of the patient”. Compounding, Jan. 18, 2018, In Wikipedia. Wikipedia gives an example of changing the form of the medication from a solid to a liquid. Id. This is exactly the process described by Agent Banet, heating the solid form of the marijuana plant to change it to a liquid (oil).

[¶16] The plain meaning of the NDCC §19-03.1-01(15), would exclude the process of heating the solid form of marijuana in a tube in order to extract the oil, which would be in liquid form, from the definition of manufacture. Although it is still a crime to possess the marijuana and the tube, these crimes would not arise to the level of the class B Felony possession of a controlled substance with intent to deliver.

### **CONCLUSION**

[¶17] Based on the foregoing, Mitchell James respectfully requests this Court affirm the decision of the District Court.

DATED this 4<sup>th</sup> day of June, 2018.

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**IN THE SUPREME COURT**

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|                          |   |                                      |
|--------------------------|---|--------------------------------------|
| State of North Dakota,   | ) |                                      |
|                          | ) |                                      |
| Plaintiff and Appellant, | ) | CERTIFICATE OF SERVICE               |
|                          | ) |                                      |
| vs.                      | ) | Supreme Court No.: 201800292         |
|                          | ) | District Court No.: 12-2018-CR-00009 |
| Mitchell James,          | ) |                                      |
|                          | ) |                                      |
| Defendant and Appellee.  | ) |                                      |

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[¶1] I hereby certify I made service of the foregoing Brief of the Defendant-Appellee and Certificate of Service upon Seymour R. Jordan, by emailing a true and correct copy of the same to 'srjordan@nd.gov' and 'dividesa@nd.gov,' on this 4th day of June, 2018.

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