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ABBREVIATIONS

Transcript - T.
Appendix - App.
Page - P.
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Line - L.

STATEMENT OF THE ISSUES

[¶] ISSUES:

I. Do the facts establish that Ronald Brakke had received or should have received proper notice from the Drivers License Division of the State Highway Department of an Opportunity for Hearing on the suspension of his North Dakota drivers license?

NATURE OF THE CASE

[¶2] In this case a citation charging Defendant/Appellant Ronald Brakke with driving under suspension (DUS) was filed on March 5, 2018.

[¶3] On March 8, 2018 a complaint was filed charging Mr. Brakke with DUS.

[¶4] Trial on the DUS was commenced on June 26, 2018.

[¶5] A Criminal Judgment finding Mr. Brakke guilty of DUS was filed on July 3, 2018.

[¶6] A Notice of Appeal and Order for Transcript were filed on July 12, 2018.

[¶7] The Notice of Filing the Notice of Appeal was filed on July 12, 2018.

[¶8] The Clerk's Certificate of Appeal was filed on August 10, 2018.

[¶9] This case is now before the North Dakota Supreme Court.

STATEMENT OF FACTS

[¶10] On March 3, 2018 in Griggs County, Defendant/Appellant Ronald Brakke (Mr. Brakke) was driving his van on Highway 1 near mile marker 124. The highway was very icy and his van slid off the highway and into the ditch. Mr. Brakke's van then struck a highway sign. A tractor was used to pull Mr. Brakke's van back to the highway.

[¶11] On March 3, 2018 Grigg's County Sheriffs Deputy Amberly Michaelis got a call on her cell phone about a traffic accident on highway 1 near mile marker 124. When she arrived at mile marker 124 on highway 1 she saw Mr. Brakke's van being pulled out of the ditch and she saw Mr. Brakke was driving the van. Deputy Michaelis asked Mr. Brakke if he was all right. When he said he was, because of the icy condition of the

highway Deputy Michaelis had him drive his van to Hannaford, North Dakota. There she questioned him and got further identification.

[¶12] Deputy Michaelis during the questioning asked for and got from Mr. Brakke a drivers license. The address on the drivers license was 117 Main St, Grace City, North Dakota. The license was issued on March 7, 2013 and expired on May 20, 2019. She then had motor vehicle check the status of Mr. Brakke's drivers license and learned it was suspended.

[¶13] Five exhibits were offered and accepted into evidence during the trial. The first four were State's exhibits:

1. Exhibit #1 was Mr. Brakke's driving abstract;
2. Exhibit #2 a suspension letter dated March 18, 2016;
3. Exhibit #3 a suspension letter dated May 3, 2017;
4. Exhibit #4 a suspension letter dated April 20, 2018.

Exhibit #5 is a defense exhibit and it is a copy of Mr. Brakke's drivers license.

[¶14] The date that Mr. Brakke was driving his van when it slid off Highway 1 in Grigg's County North Dakota was March 3, 2018. Therefore Exhibit #4 a Notice of Suspension dated April 20, 2018 doesn't apply to this case.

[¶15] There are a number of problems with Mr. Brakke's home address and why he wouldn't have received in the mail the Notices of Suspension from the North Dakota Motor Vehicle Department. These problems are: 1. Mr. Brakke doesn't have a post office box in the post office in Grace City, North Dakota. 2. He does have a post office box 83 right in front of his house but the mailman doesn't deliver Mr. Brakke's mail to that post

office box. 3. The mailman only delivers Mr. Brakke's mail to what Mr. Brakke calls a non-existent address Route 1 Box 7 where somebody else picks it up.

[¶16] The question asked Mr. Brakke in the Tr. At L.12 & 13 and his answer at L14 are: Q and it is your testimony that you never received, nor seen Exhibit #1 through 4? A. That's correct.

ISSUE

[¶17] I. Do the facts establish that Ronald Brakke had received or should have received proper notice from the Drivers License Division of the State Highway Department of an Opportunity for Hearing on the suspension of his North Dakota drivers license?

ARGUMENT

[¶18] According to the trial judge's ruling Tr.P.46,L19 to P.47.L2

In a driving under suspension case, the prosecution must prove that the driver has notice that his license was suspended under N.D.C.C. Section 31-11-0, Sub 24. A letter that is duly directed and mailed - - or there's a rebuttable - - or a disputable presumption that a letter that was duly directed and mailed was received in the regular course of mail. Mr. Brakke testified that any mail that he does receive is addressed to Rural Route 1, Box 7, Grace City, North Dakota. That is the address that the suspension orders were sent to.

[¶19] The case the Court relied on in its finding the presumption has not been rebutted is found in the Tr.P.48, L.21 . . . I am relying - - and just for the parties' information - - on City of Jamestown versus Neumiller. This is 2000 ND 11. 604 N.W.2d 441. And in that case, the North Dakota Supreme Court held that an exhibit received by

the Court without objection indicating a mailing date and an address for the defendant, along with that presumption, is sufficient proof.

[¶20] In this case an issue arose as to what is Mr. Brakke's correct address. Exhibit #5 (App. P. 12) which is Mr. Brakke's drivers license shows his address is 117 Main St., Grace City, North Dakota 58554. T.P.26, L.7-8.

[¶21] Mr. Brakke testified his address is 171 Main Street. Tr.P.29, L.1 to L.5:

Q. Okay. Mr. Brakke, where do you live?

A. I live in Grace City, North Dakota.

Q. What is your address?

A. 171 Main Street. That's it in fact.

Q. Do you also have a box number?

[¶22] Mr. Brakke testified he has a mail box at his house marked 83 but the post office refuses to put mail in it. Tr.P.29, L.5. to L.10:

Q. Do you also have a box number?

A. I have a box sitting right there, but the post office refuses to put mail in it.

Q. What is your box number?

A. 83. So I have to put the mail at a place that doesn't exist in order to get mail.

[¶23] Mr. Brakke also testified that the mailman puts his mail at a non-existing address and somebody else picks it up. That address is Route 1, Box 7 but it doesn't exist at this time. Tr.P.30, L.15 to P.31, L.8:

Q. Where does the mailman put your - -

A. In a non-existed address is where he puts it and somebody else picks it up.

Q. And - - okay. Where - -

A. Well, when the government doesn't want you to get communication they - -

Q. Okay - -

A. - - see to it you don't.

Q. Okay. Mr. Brakke, whose address is Route 1, Box 7?

A. It don't exist anymore.

Q. At some point in time, did it exist?

A. Well, it gets delivered to.

Q. Your mail gets delivered to Rural Route 1, Box 7:

A. Yes.

Q. Okay.

A. Because it doesn't exist and somebody else picks it up for me.

Q. Okay. And how long has that gone on?

A. Many years now.

[¶24] Because of the above address problems for Mr. Brakke there will always be a question if he ever received in the mail Exhibits 2 and 3. App.Pgs. 9 and 10 .

[¶25] Another question arises because of the Court's statement that appears Tr.P.46, L.9-18:

Defendant's arguments are that - - based upon his testimony, he did not receive the notices of suspension. Mr. Brakke today twice testified that he had never seen Exhibits 2 and 3 - - well, he said 2, 3, and 4, but I'm not considering 4 - - but that he had never seen Exhibits 2 and 3 prior to today. But as we discussed at the beginning of this trial, Mr. Brakke just had a trial over in Foster County in File 6-2018-CR-15 and those were the

exact same exhibits that were introduced at that trial, so I question the credibility of Mr. Brakke's testimony.

[¶26] In this case the issue is whether or not a presumption of delivery of a notice of has been rebutted. According to Neumiller... [12] Rather, a trial court's determination of whether the presumption was rebutted is a question of fact which will not be overturned if there is competent evidence to support the finding. See State v. Knittel. This quote makes the Standard of Review whether or not a presumption has been rebutted a question of fact that will not be overturned if there is competent evidence to support it.

[¶27] In this case Exhibit 5 App.P. 12 shows that Mr. Brakke's mailing address on file with the North Dakota Department of Transportation is 117 Main St, Grace City, North Dakota . Exhibits 2 and 3 App.Pgs. 9 and 10 were mailed to R R 1 Box 7, Grace City, North Dakota, 58448.

[¶28] The trial court in its ruling relied on a statement Mr. Brakke made prior to the start of the trial about never seeing Exhibits 2 and 3 App.Pgs. 9 and 10. Therefore the trial judge in this case relied on evidence outside of the trial in determining the credibility of Mr. Brakke's statement he had never seen Exhibits 2 and 3 App.Pgs. 9 and 10 before the trial.

[¶29] According to Neumiller [12] ... We are reluctant to reverse factual findings of juries or trial judges. . . .

[¶30] In this case the trial judge went out side of what occurred during the trial in its determination of the credibility of Mr. Brakke. Therefore the North Dakota Supreme Court shouldn't be reluctant to reverse factual findings that was made by a trial court that was not part of the trial.

CONCLUSION

¶31 For the above and foregoing reasons the findings that the trial court made about Mr. Brakke's not rebutting the presentation of receiving the notice of suspension should be reversed. This case should be remanded to the district court with an Order requiring the trial court to:

- (1) enter an Order finding Mr. Brakke rebutted the presumption that the suspensions of his drivers license had been delivered to him;
- (2) to find Mr. Brakke not guilty of driving under suspension.

DATED this 17th day of October, 2018.

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