

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

---

Flavia Brown,

Supreme Court Case No. 20190390  
District Court Case No. 13-2019-DM-00014

Appellee/Plaintiff,

**APPELLANT’S BRIEF**

v.

**APPEAL FROM THE JUDGMENT OF THE  
DUNN COUNTY DISTRICT COURT,  
THE HONORABLE RHONDA R. EHLIS,**

Nathanael D. Brown,

Appellant/Respondent.

**ORAL ARGUMENT REQUESTED**

---

Thomas F. Murtha IV  
North Dakota Attorney ID#06984  
PO Box 1111  
Dickinson ND 58602-1111  
701-227-0146  
Attorney for Appellant

¶1 TABLE OF CONTENTS

*By paragraph*

|  |        |
|--|--------|
| TABLE OF AUTHORITIES .....   | 2      |
| JURISDICTIONAL STATEMENT .....   | 3      |
| STATEMENT OF THE ISSUE ON APPEAL.....  | 5      |
| I. Did the District Court err in granting a domestic violence protection order against Mr. Brown by denying him a full hearing and the right to be heard as required by N.D.C.C. § 14-07.1-02?   |        |
| II. II. Did the District Court err in its Domestic Violence Protection Order by finding that there was probable cause to believe that Mr. Brown is likely to use, display, or threaten to use a firearm or dangerous weapon in any further acts of violence? |        |
| STATEMENT OF THE CASE.....   | 6      |
| STATEMENT OF THE FACTS .....   | 8      |
| LAW AND ARGUMENT .....   | 13     |
| Standard of Review .....   | 14     |
| I. The District Court erred in granting a domestic violence protection order against Mr. Brown by denying him a full hearing and the right to be heard as required by N.D.C.C. § 14-07.1-02.....   | 15     |
| II. The District Court erred in its Domestic Violence Protection Order by finding that there was probable cause to believe that Mr. Brown is likely to use, display, or threaten to use a firearm or dangerous weapon in any further acts of violence.....   | 20     |
| CONCLUSION.....  | 23     |
| REQUEST FOR ORAL ARGUMENT .....  | 25     |
| CERTIFICATE OF COMPLIANCE.....   | 27, 28 |
| CERTIFICATE OF SERVICE .....   | 29     |

[¶2] **TABLE OF AUTHORITIES**

**NORTH DAKOTA**

Cusey v. Nagel,  
2005 ND 84, 695 N.W.2d 697 .....18

Ficklin v. Ficklin,  
2006 ND 40, 710 N.W.2d 387 .....14

Gullickson v. Kline,  
2004 ND 76, 678 N.W.2d 140 .....16, 17, 18

Lawrence v. Delkamp,  
2000 ND 214, 620 N.W.2d 151 .....14, 24

Lovcik v. Ellingson,  
1997 ND 201, 569 N.W.2d 697 .....14, 24

Skadberg v. Skadberg,  
2002 ND 97, 644 N.W.2d 873 .....17, 18

In Wetzel v. Schlenvogt,  
2005 ND 190, 705 N.W.2d 836 .....18

Wolt v. Wolt,  
2010 ND 33, 778 N.W.2d 808 .....14

**NORTH DAKOTA CONSTITUTION**

Article VI § 8 .....4

Article VI § 6 .....4

**NORTH DAKOTA CENTURY CODE**

N.D.C.C. § 12.1–32.1–01 .....16

N.D.C.C. § 14-07.1-02.....5, 15, 16, 18, 19, 21, 26

N.D.C.C. § 27-05-06.....4

N.D.C.C. § 28-27-01.....4

N.D.C.C. § 28-27-02.....4

**NORTH DAKOTA RULES OF APPELLATE PROCEDURE**

N.D.R.App.P. 4(a)(1) .....4  
N.D.R.App.P. 28(h) .....26  
N.D.R.App.P. 32(a)(8)(A) .....27

**NORTH DAKOTA RULES OF EVIDENCE**

N.D.R.Ev. 801(c) .....18

**[¶3] JURISDICTIONAL STATEMENT**

[¶4] The district court had jurisdiction over this case pursuant to N.D. Const. art. VI § 8, N.D.C.C. § 27-05-06. This Court has jurisdiction over this appeal under N.D. Const. art. VI § 6, N.D.C.C. § 28-27-01 and N.D.C.C. § 28-27-02. This appeal is timely under N.D.R.App.P. 4(a)(1).

**[¶5] STATEMENT OF THE ISSUE ON APPEAL**

- III. Did the District Court err in granting a domestic violence protection order against Mr. Brown by denying him a full hearing and the right to be heard as required by N.D.C.C. § 14-07.1-02?
- IV. II. Did the District Court err in its Domestic Violence Protection Order by finding that there was probable cause to believe that Mr. Brown is likely to use, display, or threaten to use a firearm or dangerous weapon in any further acts of violence?

**[¶6] STATEMENT OF THE CASE**

[¶7] Appellant, Nathanael D. Brown, appeals to the Supreme Court of North Dakota from the Domestic Violence Protection Order with Addendum dated October 9, 2019.

**[¶8] STATEMENT OF THE FACTS**

[¶9] Flavia Brown served Nathanael Brown with a Petition requesting a Domestic Violence Protection Order (Index #1), a Temporary Protection Order (Index #5), and Order for Hearing Procedure (Index #6) on September 29, 2019. Index #8.

[¶10] The Petition for a Domestic Violence Restraining Order makes no reference to firearms. Index #1.

[¶11] On October 8, 2019 counsel for Petitioner filed a notice of appearance and request

to continue the hearing. Index #12 and #13.

[¶12] On October 9, 2019 the District Court held a hearing and denied Mr. Brown’s request to continue the hearing because the request was untimely (Transcript page 3, line 18-20 (T 3:18-20)), denied Mr. Brown’s request for a full hearing because the request was untimely (T 4:7-25; 5:5-7), and did not permit Mr. Brown or his counsel to present argument or cross examine any evidence. T 6:16-17. The District Court stated at the hearing that “the statute does not require a full hearing. The statute requires you - the ability to request an evidentiary hearing.” T 6:4-6.

[¶13] **LAW AND ARGUMENT**

[¶14] **Standard of Review**

A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence supports it, or if, on the entire record, we are left with a definite and firm conviction a mistake has been made. Lovcik v. Ellingson, 1997 ND 201, ¶ 10, 569 N.W.2d 697. Whether the district court has misinterpreted the domestic violence statute is a question of law, fully reviewable on appeal. Ficklin, at ¶ 11; Lawrence v. Delkamp, 2000 ND 214, ¶ 7, 620 N.W.2d 151.

Wolt v. Wolt, 2010 ND 33, ¶ 17, 778 N.W.2d 802, 808–09.

[¶15] **I. The District Court erred in granting a domestic violence protection order against Mr. Brown by denying him a full hearing and the right to be heard as required by N.D.C.C. § 14-07.1-02.**

[¶16] Before a District Court may issue a domestic violence protection order N.D.C.C. § 14-07.1-02(4) requires in relevant part that “[u]pon a showing of actual or imminent domestic violence, the court may enter a protection order after due notice and full hearing.” Mr. Brown argues that he was not provided a full hearing and therefore it was an abuse of discretion and a violation of Mr. Brown’s due process for the District Court

to issue a domestic violence protection order against him. Compare Gullickson v. Kline, 2004 ND 76, ¶ 8, 678 N.W.2d 138, 140 (“The order typically restricts the respondent’s right to be in certain places and subjects the respondent to criminal penalties and arrest without a warrant. See N.D.C.C. § 12.1–32.1–01(7), (8). . . . Clearly these interests create a due process right to a full and fair hearing before issuance of a disorderly conduct restraining order beyond the fourteen-day temporary order.”).

[¶17] By way of comparison to the requirements for a full hearing in a disorderly conduct protection order proceeding Mr. Brown points out that the North Dakota Supreme court in Gullickson explained that the

[t]he statute gives the respondent the right to a “full hearing,” not merely one based upon the affidavits alone. We recognize that in Skadberg we allowed a procedure which was short of a full-blown trial. In Skadberg, both parties had presented affidavits, and the respondent was given a full opportunity to cross-examine the petitioner. When asked if he had anything further to present, the respondent indicated he did not. Nor did the respondent at any time during the hearing object to the procedure employed at the hearing. We concluded that the respondent had received a “full hearing” under the statute. Skadberg, 2002 ND 97, ¶ 14, 644 N.W.2d 873.

Gullickson, at ¶ 11. Because the District Court ordered a hearing procedure on affidavits alone and did not allow Mr. Brown to present any evidence or cross examine any witnesses Mr. Brown was not provided a full hearing.

[¶18] In Wetzel v. Schlenvogt, 2005 ND 190, ¶ 23, 705 N.W.2d 836, 843–44 the North Dakota Supreme Court

stated that the “full hearing” that must accompany a disorderly conduct restraining order is a “ ‘special summary proceeding,’ intended to ‘quickly and effectively combat volatile situations before any tragic escalation.’ ” Gullickson, 2004 ND 76, ¶ 8, 678 N.W.2d 138 (quoting Skadberg, 2002 ND 97, ¶ 13, 644 N.W.2d 873). This Court also noted, because of the restraint and stigma that a restraining order places on the respondent, due process requirements must be met. Id. The petitioner must prove his

petition through testimony, rather than by affidavits alone, with an opportunity for cross-examination. Cusey v. Nagel, 2005 ND 84, ¶ 15, 695 N.W.2d 697. Furthermore, petitions and affidavits themselves are inadmissible hearsay under N.D.R.Ev. 801(c). Id.

Mr. Brown was given no opportunity at the hearing to do anything but listen. The district court denied Mr. Brown due process and a full hearing pursuant to N.D.C.C. § 14-07.1-02.

[¶19] The District Court explained its reasons for denying Mr. Brown a full hearing by stating that Mr. Brown failed to timely request an evidentiary hearing, however, there is no requirement in N.D.C.C. § 14-07.1-02 that a respondent has to request an evidentiary hearing nor is there any reference in the Order for Hearing Procedure that a respondent can request an evidentiary hearing or that there is a specific deadline to do so. The District Court's explanation is not a valid reason to deny Mr. Brown due process and was an abuse of discretion.

[¶20] **II. The District Court erred in its Domestic Violence Protection Order by finding that there was probable cause to believe that Mr. Brown is likely to use, display, or threaten to use a firearm or dangerous weapon in any further acts of violence.**

[¶21] Pursuant to N.D.C.C. § 14-07.1-02(4)(g) before the District Court can require a respondent in a Domestic Violence Protection Order to surrender for safekeeping any firearm the District Court must first find probable cause probable cause to believe that the respondent is likely to use, display, or threaten to use the firearm or other dangerous weapon in any further acts of violence.

[¶22] The District Court in its Domestic Violence Protection Order against Mr. Brown made only a conclusory finding without explanation that there was probable cause to

believe that Mr. Brown is likely to use, display, or threaten to use a firearm or dangerous weapon in any further acts of violence, however, there was no evidence presented at the hearing to support that finding. Therefore the finding of probable cause by the District Court in Mr. Brown's case was not supported by the evidence presented at the hearing and was an abuse of discretion.

[¶23] **CONCLUSION**

[¶24] As Mr. Brown has explained the District Court misinterpreted the domestic violence statute and that interpretation is a question of law, fully reviewable on appeal. Lawrence at ¶ 7. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence supports it, or if, on the entire record, the reviewing court is left with a definite and firm conviction a mistake has been made. Lovcik at ¶ 10. Based on the forgoing arguments and law Mr. Brown respectfully requests that the District Court's Order for a Domestic Violence Protection Order be reversed.

[¶25] **REQUEST FOR ORAL ARGUMENT**

[¶26] Mr. Brown respectfully requests that the North Dakota Supreme Court schedule oral argument for this case as permitted pursuant to N.D.R.App.P. 28(h). This matter involves the statutory interpretation of N.D.C.C. § 14-07.1-02 and what it means to have a full hearing. Oral argument would be helpful to the Court and allow the parties to answer any questions the Justices may have concerning the issues presented in this appeal.

Dated: March 18, 2020

/s/ Thomas F. Murtha IV  
Thomas F. Murtha IV (06984)  
PO Box 1111  
Dickinson ND 58602  
701-227-0146  
murthalawoffice@gmail.com

Attorney for Appellant

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

---

Flavia Brown,

Appellee/Plaintiff,

v.

Nathanael D. Brown,

Appellant/Respondent.

---

Supreme Court Case No. 20190390  
District Court Case No. 13-2019-DM-00014

**CERTIFICATE OF COMPLIANCE**

[¶27] The undersigned certifies that pursuant to N.D.R.App.P. 32(a)(8)(A), that the Brief of Appellant contains 10 pages.

[¶28] This brief has been prepared in a proportionally spaced typeface (Times New Roman 12 point font) using the software program Microsoft Office Word.

Dated: March 18, 2020

/s/ Thomas F. Murtha IV  
Thomas F. Murtha IV (06984)  
PO Box 1111  
Dickinson ND 58602  
701-227-0146  
murthalawoffice@gmail.com  
Attorney for Appellant

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

---

Cordell James Zeien,

Appellant/Petitioner,

v.

Thomas Sorel, Director of the  
North Dakota Department of  
Transportation,

Appellee/Respondent.

---

Supreme Court Case No. 20190264

District Court Case No. 53-2019-CV-00168

**CERTIFICATE OF SERVICE**

[¶29] Thomas F. Murtha IV is an attorney licensed in good standing in the State of North Dakota, Attorney ID 06984, and states that on March 18, 2020 he electronically served the following on the Clerk of the North Dakota Supreme Court through the North Dakota Supreme Court's E-filing Portal, and the Appellee by United States mail addressed to Flavia Brown, 11508 1 U Street NW, Killdeer, ND 58640:

APPELLANT'S BRIEF  
APPELLANT'S APPENDIX

Dated: March 18, 2020

Thomas F. Murtha IV  
Thomas F. Murtha IV (06984)  
PO Box 1111  
Dickinson ND 58602  
701-227-0146  
murthalawoffice@gmail.com  
Attorney for Appellant