

IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota,

Plaintiff/Respondent/Appellee,

v.

Jose Enrique Amaro Molina,

Defendant/Petitioner/Appellant.

Supreme Court File Number:
20200247

Burleigh County District Court
Number: 08-2020-CR-01734

APPELLANT BRIEF

Appeal from the Order on Writ of Prohibition dated September 10, 2020 in Burleigh
County District Court, South Central Judicial District, Bismarck, North Dakota

the Honorable Judge Thomas Schneider presiding

ORAL ARGUMENT REQUESTED

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State v. Jensen, 333 N.W.2nd 686, 691 (N.D.1983) ¶24

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AUTHORITIES

North Dakota Rules of Criminal Procedure 5.1 (b) ¶27

Oral Argument:

Oral argument has been requested to emphasize and clarify the Appellant’s written arguments on their merits.

STATEMENT OF THE ISSUE

[¶1] **ISSUE I.** Does the state waive the good cause exception for a missing witness at a preliminary hearing, when the prosecutor knows a police officer who is a necessary witness in the state's case will be gone but decides rather than asking for a continuance of the preliminary hearing to proceed with the preliminary hearing and call another police officer to testify for the missing police officer?

NATURE OF THE CASE

[¶2] This case number 08-2020-CR-01734 is the state recharges of the same crimes that Defendant Jose Enrique Amaro Molina (Jose) had dismissed at the preliminary hearing in case number 08-2020-CR-01327.

[¶3] On 06/30/2020 in case number 08-2020-CR-01734 an information recharging (Jose) with the following criminal offenses was filed; Possession with intent manufacture/deliver marijuana, a class B Felony, and Aggravated Assault-Dangerous weapon or other weapon-Adult victim-Domestic violence, a class C Felony.

[¶4] The above offenses are the same offenses that were dismissed at the end of a preliminary hearing on 06/30/2020 in case number 08-2020-CR-01327.

[¶5] Other documents filed on 06/30/2020 were; an affidavit of probable cause, proposed order, warrant of arrest issued, Sherriff's return, and warrant of arrest served.

[¶6] On 07/01/2020 a petition for relief with 6 exhibits was filed.

[¶7] A notice and brief in support of 3.2 motion for Defendant was filed 07/07/2020.

[¶8] The state responded to the Defendant's Writ of Prohibition on 07/14/2020.

[¶9] An order denying Defendant's Petition for Writ of Prohibition was filed on 09/10/2020.

[¶10] The notice of appeal, order for transcript, and notice of filing the notice of appeal was filed on 09/16/2020.

[¶11] The clerk's certificate of appeal was filed on 10/12/2020.

[¶12] This matter is now before the North Dakota Supreme Court.

STATEMENT OF FACTS

[¶13] The state charged Jose Enrique Amaro Molina (Jose) with 2 felony offenses in case 08-2020-CR-01734;

1. Possession w/intent manufacture/deliver marijuana, a class B Felony
2. Aggravated Assault-Dangerous weapon or other weapon-Adult victim-Domestic violence, a class C Felony.

[¶14] The above two charges are recharges of the ones dismissed at the end of the preliminary hearing in case number 08-2020-CR-01327. In case number 08-2020-CR-01327 a preliminary hearing was set before Judge Bobbi Weiler for June 30, 2020. The officer, Erik Johnson, who was involved with this case couldn't be at the preliminary hearing. So, the prosecutor knew officer Johnson couldn't be at the preliminary hearing and he could have asked for a continuance. Instead the prosecutor decided to have the preliminary hearing and have another police officer read the police report for his proof at the preliminary hearing.

[¶15] At the preliminary hearing the substitute officer, Bryce Klein, did a good job of reading the report but when asked to identify the defendant Jose he could not.

[¶16] Identification of the defendant at a preliminary hearing is a required element for winning a preliminary hearing. Without an identification of a defendant at a preliminary hearing the case will be and was in this case dismissed without prejudice.

[¶17] After the dismissal because of Walker v. Schneider, 477 N.W.2d 167 (N.D. 1991), the state had two choices:

1. Seek a district court review of the magistrate's adverse determination of probable cause.
2. Issue a new complaint upon the offer of additional evidence or for **other good cause** (emphasis added).

[¶18] The state decided to go under #2 above and claimed the recharging of the same offences were made for good cause because good cause includes any situation involving unavailability of prosecution's witness and they had a missing witness, Erik Johnson. A claim of good cause because prosecution's witness is unavailable really doesn't fit every situation. It doesn't fit a situation where the prosecutor knew, long before the preliminary hearing, the prosecution's witness would not be present. It also doesn't fit a situation where the prosecutor had plenty of time before the preliminary hearing to request a continuance, but decided to proceed with a substitute witness that he selected and have that officer testify at the preliminary hearing. The substitution witness, Bryce Klein, did a good job of reading the missing officer's police report. His reading proved the elements of the crime charged and, proved the state's case except for the identification of the defendant. Officer Bryce Klein couldn't identify the defendant Jose and was honest about the fact he couldn't identify the defendant Jose.

[¶19] Because the state in this case couldn't identify Jose, the district judge Bobbi Weiler had no choice but to dismiss with prejudice.

[¶20] The prosecutor on his own decided he could and did recharge Jose with the same crimes. This recharging was based on his decision it was good cause when the witness you select to replace the state's missing witness at the preliminary hearing can't identify the defendant.

[¶21] Jose after being recharged brought a Writ of Prohibition. Neither he nor his Attorney believe it is good cause for the state to recharge him because the officer the state selected to use, Bryce Klein, at the preliminary hearing in place of officer Erik Johnson couldn't identify Jose.

[¶22] At the hearing in the district court on Jose's Writ of Prohibition district Judge Thomas Schneider ruled it was good cause to recharge a case even though the state decided to replace the police officer Erik Johnson who is involved with the case and not available for the preliminary hearing with another officer Bryce Klein and then preceded with the preliminary hearing. At the preliminary hearing the state made the decision to put that replacement officer Bryce Klein on the stand. The replacement officer then reads the missing officer's police report but can't identify the defendant, Jose. The judge Bobbie Weiler then has no choice but to dismiss the charges against Jose.

[¶23] From Judge Schneider's ruling dismissing Jose's Writ of Prohibition, Jose has appealed.

ISSUE I. Does the state waive the good cause exception for a missing witness at a preliminary hearing, when the prosecutor knows a police officer who is a necessary witness in the state's case will be gone but decides rather than asking for a continuance of the preliminary hearing to proceed with the preliminary hearing and call another police officer to testify for the missing police officer?

STANDARD OF REVIEW

[¶24] According to Walker v. Schneider: "Double jeopardy does not apply to a magistrate's determination at a preliminary hearing." State v. Jensen, 333 N.W.2d 686, 691 (N.D.1983). Still, a preliminary hearing is a critical stage in the criminal process that requires consideration of an accused constitutional rights. State v. Iverson, 187 N.W.2d 1, 34 (N.D.1971).

[¶25] Because of the above quote in Walker v. Schneider, preliminary hearing issues in North Dakota require a consideration of the accused constitutional rights. When constitutional rights are involved in an issue that issue is fully reviewable.

ARGUMENT

[¶26] Jose has a right to relief in the case now before the Court. This is because Jose is facing a repeated filing of a criminal complaint without the prosecution seeking district court review of an adverse determination of probable cause by the Judge. This repeated filing is without a conviction from which Jose can appeal. Because of the above facts Jose is entitled to seek relief under a Writ of Prohibition.

[¶27] According to North Dakota Rules of Criminal Procedure 5.1 (b):

“(b) Discharge of the Defendant. If the magistrate hears evidence on behalf of the respective parties in a preliminary hearing, and finds either a public offense has not been committed or there is not sufficient cause to believe the defendant guilty of the offense, the magistrate must discharge the defendant and dismiss the charge.”

[¶28] Because of the above rule the magistrate in this case at the end of the preliminary hearing when the state’s witness couldn’t at the preliminary hearing identify the defendant, the magistrate had no choice but to dismiss the charges and did dismiss without prejudice.

[¶29] The state, according to Walker v. Schneider, after the dismissed case has two choices:

1. Seek a district court review of the magistrates adverse ruling on probable cause.
2. Issue a new complaint upon the offer of additional evidence or other good cause (emphasis added).

[¶30] In the case now before the Court the state chose other good cause because Walker v. Schneider says “may include among other things the unavailability of witnesses” (Emphasis added).

[¶31] Jose's response to the unavailability of a witness at his preliminary hearing is:

1. The state knew officer Eric Johnson was a necessary witness for the state to call at the preliminary hearing.
2. The state was aware of the fact that officer Erik Johnson would be gone and wouldn't be available to testify at the preliminary hearing.
3. The state, because of the facts above could have, but didn't, ask for a continuance.
4. The prosecutor decided not to ask for a continuance and to proceed with the preliminary hearing on the date set for it.
5. The prosecutor knew what evidence had to be produced at the preliminary hearing and he thought he could produce all of that evidence without officer Erik Johnson.
6. The prosecutor selected another officer, Bryce Klein, to testify at the preliminary hearing in place of officer Erik Johnson.
7. The prosecutor called officer Klein at the preliminary hearing to testify.
8. Officer Klein, during his preliminary hearing, could testify to every fact the state needed to prevail in this case except for one and that fact was that he couldn't identify Jose.
9. In this case the prosecutor didn't innocently miscalculate the quantum or type of evidence to get a bind over because he knew what he had to prove at the preliminary to get a bind over.
10. The problem in this case is the replacement witness, that the prosecutor picked officer Klein, who couldn't identify Jose.

CONCLUSION

[¶32] There is no statute, rule of law, or case law that always allows or permits the state to always have a second preliminary hearing when the state loses the first one.

[¶33] The prosecutor in this case knew long before the preliminary hearing was held what he had to prove and what he could do to get the preliminary hearing continued.

With this knowledge the prosecutor decided to proceed with the preliminary hearing on the date it was set for and call a substitute witness selected by him to prove the state's case.

[¶34] In this case the prosecutor isn't using the excuse he failed to fully question the substitute witness before he called him to testify. The excuse the prosecutor used and raised in the district court is the witness he needed was missing. The defenses response is the prosecutor waived this excuse when he decided to proceed with the preliminary hearing and called a substitute witness.

[¶35] Any claim the prosecutor may make now about a failure to properly question or prepare his substitute witness was not raised in the district court.

[¶36] This case should be remanded to the district court with an order to grant Jose's Writ of Prohibition to dismiss the state's recharging of the same crimes dismissed at the first preliminary hearing.

Dated this 27th day of November, 2020.

/S/ Benjamin C. Pulkrabek

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**CERTIFICATE OF
COMPLIANCE**

[¶1] This Appellant’s Brief and Appendix complies with the pages limit of 38 for the Brief and 100 pages for the Appendix set forth in N.D. R. App. P. 32 and N.D. R. App. P. 25, as the Brief consists of 10 pages and Appendix consists of 55 pages.

Dated this 27th day of November, 2020.

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CERTIFICATE OF SERVICE

¶1 The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Appellant's Appendix
Appellant's Brief

by email/North Dakota Supreme Court efileing system at the below address upon:

Karlei Neufeld
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Bc08@nd.gov

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North Dakota Supreme Court
supclerkofcourt@ndcourts.gov

and by placing a true and correct copy of said items in a sealed envelope with USPS mail with proper postage affixed to:

Jose Enrique Amaro Molina
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Bismarck, ND 58502

Dated this 27th day of November, 2020

/S/ Cassy Larson
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[¶1] The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents with non-substantive corrections:

Appellant's Appendix
Appellant's Brief

by email/North Dakota Supreme Court efilings system at the below address upon:

Karlei Neufeld Burleigh Co. Assistant States Attorney Bc08@nd.gov	Joshua Amundson Burleigh Co. Assistant States Attorney bc08@nd.gov
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and by placing a true and correct copy of said items in a sealed envelope with USPS mail with proper postage affixed to:

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Dated this 1st day of December, 2020.

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