

IN THE SUPREME COURT  
OF THE STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff/Appellee,	)	Supreme Court No. 20200247
	)	
-vs-	)	Burleigh County Case No.
	)	08-2020-CR-01734
Jose Enrique Amaro Molina,	)	
	)	
Defendant/Appellant	)	

BRIEF OF APPELLEE

APPEAL FROM ORDER ON WRIT OF PROHIBITION

Burleigh County District Court  
South Central Judicial District  
The Honorable Thomas Schneider, Presiding

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**ORAL ARGUMENT IS REQUESTED**

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## **JURISDICTIONAL STATEMENT**

[¶1] The appellant, Jose Amaro Molina (hereinafter “Amaro Molina”), appeals the District Court’s Order denying his Writ of Prohibition. The North Dakota Supreme Court has jurisdiction to hear such appeal under North Dakota Century Code § 29-28-06(5).

## **STATEMENT FOR ORAL ARGUMENT**

[¶2] Oral argument is requested to emphasize the Appellee’s arguments and to help clarify the complex factual issues. The ability to address these arguments with this Court, and to respond to questions from this Court, will help this Court in resolving the issues.

## **STATEMENT OF THE ISSUES**

- [¶3] I. **Is a Writ of Prohibition an appealable issue?**
- II. **Did the State follow the Proper Procedure in recharging Amaro Molina for good cause?**

## **STATEMENT OF THE CASE**

[¶4] The state charged Amaro Molina on May 14, 2020 by information with two counts. Count 1, Possession with intent to manufacture or deliver – Marijuana a Class B felony. Count 2, Aggravated Assault – Dangerous Weapon – Domestic Violence. (Appendix (App.) 3).

[¶5] On May 15, 2020 Amaro Molina had his initial appearance on those charges. (App. 3).

[¶6] On June 30, 2020 Amaro Molina had his Preliminary Hearing after which the case was dismissed without prejudice. (App. 4).

[¶7] On June 30, 2020 the State refiled charges on Amaro Molina by Information with two counts. Count 1, Possession with intent to manufacture or deliver – Marijuana a

Class B felony. Count 2, Aggravated Assault – Dangerous Weapon – Domestic Violence. (App. 5).

[¶8] On July 1, 2020 an initial hearing was held on the new case. (App. 5).

[¶9] On July 1, 2020 Amaro Molina filed a Writ of Prohibition. (App. 5).

[¶10] On August 25, 2020 the Court held a hearing on the Writ of Prohibition. (App. 6).

[¶11] On September 10, 2020 Judge Thomas Schneider ruled in favor of the State and denied the Writ of Prohibition. (App. 6).

[¶12] On September 16, 2020 Amaro Molina filed an appeal on the District Court’s Order on the Writ of Prohibition to the North Dakota Supreme Court. (App. 6-7).

#### **STATEMENT OF THE FACTS**

[¶13] Amaro Molina had a Preliminary Hearing on case 08-2020-CR-01327 on June 30, 2020 in front of The Honorable Bobbi Weiler. During the Preliminary Hearing the State had Officer Bryce Klein testify due to the fact that the case agent Officer Erik Johnson was unavailable. Officer Klein was able to testify to each element of the offenses charged; however, was unable to identify Amaro Molina.

[¶14] After the Preliminary Hearing Judge Weiler stated that the State had proven each element by probable cause with the exception of identity. Because the State had not identified Amaro Molina Judge Weiler would have to dismiss the case. Judge Weiler told Amaro Molina, “the State has the option to re-file if they want to do that.” (Pr. Tr. 11). That dismissal was without prejudice.

[¶15] The State then chose to recharge Amaro Molina as there was an officer who could identify Amaro Molina, which would meet the identification element as required by the Preliminary Hearing.

[¶16] Amaro Molina filed a Writ of Prohibition against the new charges arguing the State first had to seek an appeal of the District Court dismissal of the charges at the Preliminary Hearing and that the prosecutors on the case be found to have committed prosecutorial misconduct and be sanctioned. (App. 5).

[¶17] Judge Schneider heard arguments for the Writ of Prohibition. Judge Schneider then entered an order in the case finding for the State. In the Order Judge Schneider said that the fact that the State had a witness that could identify the defendant, there was good cause to charge Amaro Molina by new Information with the same counts that were dismissed at the Preliminary Hearing. (App. 8-10).

## **LAW AND ARGUMENT**

### **I. Is a Writ of Prohibition an appealable issue?**

[¶18] What a defendant may appeal is found in North Dakota Century Code 29-28-06. “An appeal may be taken by the defendant from: 1. A verdict of guilty; 2. A final judgement of conviction; 3. An order refusing a motion in arrest of judgement. 4. An order denying a motion for a new trial; or 5. An Order made after judgment affecting any substantial right of the party.” N.D.C.C. 29-28-06. This Court has heard argument on a Writ of Prohibition in the past in *Schneider v. Seaworth* where Mr. Schneider requested a Writ of Prohibition in order to prevent the city of Bismarck from charging him with a crime. *Schneider v. Seaworth*, 376 N.W.2d 49, 50(N.D. 1985). The Court found that in order to overturn the District Court, this Court would have to find that there was an abuse of discretion by the District Court in denying the Writ of Prohibition. *Id.* at 51.

[¶19] Here, the State would agree that Amaro Molina has a right to appeal the Writ of Prohibition as they have been appealed in the past, and it could affect his substantial rights. The main difference between *Schneider's* Writ of Prohibition and the Writ of

Prohibition filed in this case is that in *Schneider* the writ was filed in a civil case. Here, Amaro Molina has made it part of the criminal case. None the less, because it affects the dismissal of the case at the Preliminary Hearing, which is a critical stage, and recharging of the same charges against Amaro Molina. This is noted by Amaro Molina in his brief at paragraph 26, “a preliminary hearing is a critical state in the criminal process.” Appellant’s Brief ¶ 24 citing *State v. Iverson*, 187 N.W.2d 1, 34(N.D. 1971). Just as in *Schneider* the State would contend that this Court should review the decision under abuse of discretion by the District Court in Denying Amaro Molina’s Writ of Prohibition.

[¶20] Therefore, while this issue is appealable under North Dakota Century Code 29-28-06(5) the review should be abuse of discretion and the District Court did not abuse its discretion when it denied the Writ of Prohibition.

## **II. Did the State follow the Proper Procedure in recharging Amaro Molina for good cause?**

[¶21] This Court has held that when the State loses a preliminary hearing, “the prosecution may (1) seek district court review of a magistrate’s adverse ruling on probable cause, or (2) issue a new complaint upon the offer of additional evidence or other good cause.” *Walker v. Schneider*, 477 N.W.2d 167, 174-175 (N.D. 1991). This Court further stated that “Good cause may include, among other things, the unavailability of prosecution witnesses, or when a prosecutor innocently miscalculates the quantum or type of evidence required to obtain a bindover and further investigation clearly would not be dilatory.” *Id.* at 175 This Court gave two examples of what were not good cause to file a new information when the State loses the Preliminary Hearing, “good cause does not include harassment or magistrate ‘shopping.’” *Id.*

[¶22] Here, the State met every element of the charged offenses at the Preliminary

Hearing with the exception of the identity of the defendant. The State met those elements though the testimony of Officer Klein. The State knew that Officer Johnson was not available for the preliminary hearing so it substituted Officer Klein who testified before the court. The State did not seek a continuance in the case to allow for Officer Johnson to testify because at a Preliminary Hearing hearsay is admissible. N.D.R.Crim.P. 5.1(a). Officer Klein was unable to identify Amaro Molina during the Preliminary Hearing. Judge Weiler stated that the State met all the elements by probable cause with the exception of identity. Judge Weiler dismissed the case but told the defendant “the State may recharge.” In *Walker*, the Court gave the State the choice, it could appeal or it could file a new information for good cause. With a review of this case the State filed a new information believing it had good cause to do so.

[¶23] With the present case, the State believed there was good cause to file a new criminal information. The State did not file a new information to harass Amaro Molina or for the effect of magistrate shopping which this Court has found to not be good cause; however, because there was a witness who could meet the last element of probable cause who was not available the day of the Preliminary Hearing. In *Walker*, this Court found that the unavailability of a witness was good cause. The State reviewed the case and knew that Officer Johnson would be able to identify the defendant. The State based off of this Court’s rulings felt that was good cause to recharge Amaro Molina with the same two counts that were just dismissed. With the testimony of Officer Johnson, the State would be able to identify Mr. Amaro Molina. That is the only element of probable cause that the State failed to meet during the first Preliminary Hearing.



[¶24] Therefore, when the State lost the Preliminary Hearing there were two choices, to appeal or to file a new information for good cause. There was good cause to file a new information on Amaro Molina based on the unavailability of a witnesses.

### **CONCLUSION**

[¶25] The State followed the proper Rules of Criminal Procedure and the rulings of this Court when it choose to file a new information for good cause against Amaro Molina. The State had good cause as this Court has found to file a new information based off of the unavailability of a witness. This Court has never found that the State must first seek a continuance in order to have a showing of good cause to file a new criminal information after a dismissal at the Preliminary Hearing. The State asks This Court to uphold the ruling of the District Court denying the Writ of Prohibition.

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**CERTIFICATE OF COMPLIANCE**

[¶ 1] COMES NOW Joshua Amundson of Bismarck, North Dakota, and hereby certifies that the attached Brief of the Appellee is in compliance with Rule 32(a)(8)(A), North Dakota Rules of Appellate Procedure.

[¶ 2] The number of pages in the principal Brief, excluding any addenda, is nine (9) pages, according to the page count of the filed electronic document.

Dated this 4th day of January, 2021.

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I, Joshua Amundson, do certify that on January 4, 2020, I served the following documents:

1. Brief of Plaintiff - Appellee
2. Affidavit of e-service

by electronic filing to the following:

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