

**IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA**

Eric Smith,)	
)	
Petitioner,)	Supreme Court No. 20210004
)	
vs.)	Bismarck Municipal No. BI-2020-CR-02426
)	
Charles R. Isakson, Municipal Judge,)	
Bismarck, and City of Bismarck,)	
)	
Respondent.)	
)	

ON PETITION FOR SUPERVISORY WRIT
FROM THE OCTOBER 28, 2020 ORDER
DENYING APPELLANT’S REQUEST FOR A JURY TRIAL
FROM MUNICIPAL COURT
FOR THE CITY OF BISMARCK
THE HONORABLE CHARLES ISAKSON

BRIEF OF RESPONDENT

Ashley Hinds (ID 08379)
Assistant City Attorney
221 N. Fifth Street
P.O. Box 5503
Bismarck, ND 58506-5503
(701) 355-1340

TABLE OF CONTENTS

Table of Authorities ¶1

Statement of the Issue ¶2

Statement of Jurisdiction ¶3

Statement of the Case..... ¶5

Statement of the Facts ¶19

Law and Argument ¶22

 I. Whether the petition is moot since the Petitioner has already had a trial? ¶23

 II. Whether a supervisory writ is the appropriate remedy? ¶26

 III. Whether the municipal court erred in denying the Petitioner’s request for a jury trial when he has been charged with an infraction? ¶31

Conclusion ¶42

Certificate of Service ¶44

[¶1] TABLE OF AUTHORITIES

Constitutional Provisions

N.D. Const. art. VI § 2 ¶4, 26
N.D. Const. art. I § 13 ¶40

Ordinances/Statutes

N.D.C.C. § 12.1-32-03.1 ¶33, 41
N.D.C.C. § 27-02-04 ¶4, 26
Bismarck City Ordinance 10-05.1-01 ¶6, 32

North Dakota Cases

Bland v. Comm’n on Med. Competency, 557 N.W.2d 379 (N.D. 1996) ¶23
Bolinske v. N.D. State Fair Ass’n, 522 N.W.2d 426 (N.D. 1994) ¶23
Council of Sch. Adm’rs v. Sinner, 458 N.W.2d 280 (N.D. 1990) ¶23
Forum Publ’g Co. v. City of Fargo, 391 N.W.2d 169 (N.D. 1986) ¶23
Hughes v. State, 2002 ND 28, 639 N.W.2d 696 ¶24
In re Anderson, 2007 ND 50, 730 N.W.2d 570 ¶40
In re Estate of Shubert, 2013 ND 215, 839 N.W.2d 811 ¶23
In re R.Y., 189 N.W.2d 644 (N.D.1971) ¶40
Johnson v. Raftevoll, 505 N.W.2d 110 (N.D.1993) ¶23
Nord v. Herrman, 1998 ND 91, 577 N.W.2d 782 ¶23
Pelkey v. City of Fargo, 453 N.W.2d 801 (N.D. 1990) ¶23
Riemers v. Eslinger, 2010 ND 76, 781 N.W.2d 632 ¶35, 36, 37
State v. \$17,515.00 in Cash Money, 2003 ND 168, 670 N.W.2d 826 ¶40
State v. Brown, 2009 ND 150, 771 N.W.2d 267 ¶37, 38, 39, 40, 41

<u>State v. Jorgenson</u> , 2018 ND 169, 914 N.W.2d 485.....	¶26
<u>State v. Liberty Nat'l Bank & Trust Co.</u> , 427 N.W.2d 307 (N.D. 1988).....	¶23
<u>State ex rel. Dakota Trust Co. v. Stutsman</u> , 24 N.D. 68, 139 N.W. 83 (1912).....	¶24
<u>State, ex rel. Harris v. Lee</u> , 2010 ND 88, 782 N.W.2d 626.....	¶26
<u>Schwarzenberger v. McKenzie Cty. Bd. of Cty. Comm'rs</u> , 2017 ND 211, 901 N.W.2d 64.....	¶23
Other	
Rule 37 of the North Dakota Rules of Criminal Procedure	¶27

[¶2] STATEMENT OF THE ISSUES

- I. Whether the petition is moot since the Petitioner has already had a trial?
- II. Whether a supervisory writ is the appropriate remedy?
- III. Whether the municipal court erred in denying the Petitioner's request for a jury trial when he has been charged with an infraction?

[¶3] STATEMENT OF JURISDICTION

[¶4] The North Dakota Supreme Court’s authority to issue a supervisory writ is derived from N.D. Const. art. VI, § 2, and N.D.C.C. § 27-02-04. Section 2 of the Constitution of North Dakota states, “The supreme court . . . shall have appellate jurisdiction, and shall also have original jurisdiction with authority to issue, hear, and determine such original and remedial writs as may be necessary to properly exercise its jurisdiction.” N.D. Const. art. VI, § 2. Section 27-02-04 of the North Dakota Century Code states:

A writ of mandamus may be issued by the supreme and district courts to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled and from which the party is precluded unlawfully by such inferior tribunal, corporation, board, or person.

N.D.C.C. § 32-34-01.

[¶5] STATEMENT OF THE CASE

[¶6] On September 2, 2020, the City filed a Complaint against Smith alleging he committed the offense of Commercial Use of Sidewalks, Streets, and Public Grounds Restricted in violation of City Ordinance 10-05.1-01. App. 4.

[¶7] On September 16, 2020, at Smith’s arraignment, Smith requested that his case be transferred to district court for a jury trial. Id. Judge Severin denied Smith’s request stating, “no right to jury trial.” Id. Later on September 16, 2020, Smith filed a formal request to transfer his case to district court for a jury trial. App. 26. On September 21, 2020, the City filed a Response to Defendant’s Request to Remove from Municipal Court to District Court/Demand for Jury Trial. App. 43. Neither Smith’s request, nor the City’s

response requested oral argument.

[¶8] Between October 10, 2020 and October 27, 2020, Smith repeatedly e-mailed Judge Severin regarding his request for a jury trial, including an additional Motion/Brief/Demand Removal to District/Jury Trial. See, App. 49-52. On October 27, 2020, the City filed a Response to Defendant's Motion/Brief/Demand Removal to District/Jury Trial. App. 53.

[¶9] On October 27, 2020, the Court e-mailed Smith stating:

I am denying your request for removal of an infraction to district court for a jury trial. I do not believe you are allowed a jury trial for an infraction under current ND law. If you wish to file a [sic] with the district court and need more time, on a timely request I can consider a continuance.

App. 51. On October 28, 2020, the Court filed an Order denying Smith's request for a jury trial, stating: "No right to jury for infraction. NDCC 12.1-32-03.1." App. 70.

[¶10] Between December 1, 2020 and December 7, 2020, Smith filed a flurry of documents including, but not limited to, an untimely Notice of Appeal (App. 72, 73), a Motion/Request to Recuse (App. 77), a Request for Continuance/Electronic Hearing on Motion to Recuse Motion (App. 83), a Motion to Dismiss (App. 84), a Complaint (against the undersigned) (App. 85, 86), a Brief For Contempt of Court/ Abuse of Process from Defendant (App. 88), and a Judicial Conduct Commission Complaint (App. 90). On December 7, 2020, Judge Severin recused himself and requested Judge Romanick appoint another judge. App. 93. On December 9, 2020, Judge Isakson was assigned to the case. App. 95.

[¶11] On December 11, 2020, the City filed a Response to Defendants Motion/Brief for Contempt of Court/Abuse of Process from Defendant (App. 99) and Response to Defendant's Motion to Dismiss (Index #125). On January 2, 2021, Smith filed

a Supervisory Writ for Jury Trial and Unconstitutional Ordinance Ruling. App. 111. On January 4, 2021, Judge Isakson indicated that Smith's pre-trial filings would be addressed at the start of trial. App. 114. On January 5, 2021, Smith filed a Petition for Supervisory Writ for Jury Trial. App. 117.

[¶12] Trial was held on January 7, 2021. The City was represented by the undersigned. Smith represented himself and appeared by telephone. Before trial, Judge Isakson addressed Smith's pre-trial filings, denying all. After trial, Smith was found guilty and ordered to pay a \$100 fine. App. 131. This writ followed. On February 8, 2021, Smith filed a Notice of Appeal to district court, appealing the final judgment. App. 134.

[¶13] STATEMENT OF THE FACTS

[¶14] At 4:16 p.m. on August 2, 2020, Central Dakota Communications received a call from an employee at McDonald's on Expressway regarding flags on the nearby boulevard. Shortly thereafter, Central Dakota Communications received a call from Smith requesting that police respond to the McDonald's on Expressway. Smith reported that he had his Trump flags on the public right of way and that an employee at McDonald's removed the flags. Smith asked for officers to respond to his "Trump stand."

[¶15] When officers arrived, they located Smith's "Trump stand" on the boulevard between the sidewalk and Washington Street. Smith informed officers that he was selling merchandise for fundraising purposes. Police informed Smith of Bismarck City Ordinance Code 10-05.1-01, which states that commercial use of sidewalks, streets, and public grounds owned or controlled by the City is restricted unless the seller has a permit. Smith continued to sell merchandise on the public right of way or other public grounds owned or controlled by the City. Smith did not have a permit.

I. Whether the petition is moot since the Petitioner has already had a trial?

[¶17] Smith's petition is moot. Generally, this Court does not address moot issues:

Mootness is a threshold issue we consider before reaching the merits of an appeal. Bland v. Comm'n on Med. Competency, 557 N.W.2d 379, 381 (N.D. 1996). This Court does not render advisory opinions, and an appeal will be dismissed if the issues become moot or academic, leaving no actual controversy to be determined. Nord v. Herrman, 1998 ND 91, ¶ 12, 577 N.W.2d 782; Pelkey v. City of Fargo, 453 N.W.2d 801, 803 (N.D. 1990). An appeal becomes moot when, due to the lapse of time or the occurrence of events, an appellate court is unable to render effective relief. Nord, at ¶ 12; Bland, at 381; Pelkey, at 803. However, an appeal in which subsequent events have eliminated an actual controversy is not moot if the controversy is one of great public interest and involves the authority and power of public officials, or alternatively, if the matter is capable of repetition yet evading review. In re Estate of Shubert, 2013 ND 215, ¶ 12, 839 N.W.2d 811; Bland, at 381; Bolinske v. N.D. State Fair Ass'n, 522 N.W.2d 426, 430 (N.D. 1994); N.D. Council of Sch. Adm'rs v. Sinner, 458 N.W.2d 280, 283 (N.D. 1990); Pelkey, at 803; State v. Liberty Nat'l Bank & Trust Co., 427 N.W.2d 307, 308-09 n.1 (N.D. 1988). Public interest means more than mere curiosity; it means something in which the public or the community at large has some pecuniary interest, or some interest by which their legal rights are affected. Shubert, at ¶ 13; Forum Publ'g Co. v. City of Fargo, 391 N.W.2d 169, 170 (N.D. 1986). Public interest does not mean something as narrow as the interest of a particular locality affected by the matter in question. Shubert, at ¶ 13; Forum Publ'g, at 170. In Johnson v. Raftevold, 505 N.W.2d 110, 111 (N.D.1993), this Court declined to review the lower court's order under its constitutional power of superintending control because the petitioner was no longer involuntarily confined and because the issue could be resolved by an appeal.

Schwartzenberger v. McKenzie Cty. Bd. of Cty. Comm'rs, 2017 ND 211, ¶ 6, 901 N.W.2d 64.

[¶18] In Hughes v. State, 2002 ND 28, ¶ 15, 639 N.W.2d 696, this Court declined to treat the appeal as a request to exercise its supervisory jurisdiction because the petitioner was no longer confined on the convictions. In State ex rel. Dakota Trust Co. v. Stutsman, 24 N.D. 68, 86-86, 139 N.W. 83 (1912), as far as the writ of prohibition was

concerned, this Court determined the question was largely moot because the original bonds expired.

[¶19] In the instant case, Smith was found guilty. Therefore, the case has expired and there is no actual controversy to be determined by the Supreme Court. Instead, and because an appeal has been filed, the district court must now take up the case anew.

II. Whether a supervisory writ is the appropriate remedy?

[¶20] Assuming, without finding, that the Court finds that the petition is not moot, a supervisory writ is not the appropriate remedy. Instead, an appeal is the appropriate remedy. This Court's authority to issue supervisory writs arises from Article VI, Sec. 2 of the North Dakota Constitution and N.D.C.C. § 27-02-04.

The authority is discretionary, and it cannot be invoked as a matter of right. We issue supervisory writs only to rectify errors and prevent injustice when no adequate alternative remedies exist. Further, we generally do not exercise supervisory jurisdiction when the proper remedy is an appeal, even though an appeal may be inconvenient or increase costs. This authority is exercised rarely and cautiously and only in extraordinary cases. Finally, determining whether to exercise original jurisdiction is done on a case-by-case basis.

State v. Jorgenson, 2018 ND 169, ¶ 4, 914 N.W.2d 485 (citation and quotation omitted) (emphasis added). “Exercise of supervisory jurisdiction may be warranted when issues of vital concern regarding matters of important public interest are presented.” State, ex rel. Harris v. Lee, 2010 ND 88, ¶ 6, 782 N.W.2d 626 (citations omitted). The standard is not whether a party has lost its right to appeal due to tactical choices or procedural errors. Id. at ¶ 21 (Maring, J., dissenting).

[¶21] Rule 37 of the North Dakota Rules of Criminal Procedure provides a means for appellate review. Under Rule 37(a), “[a]n appeal permitted by law as of right from a municipal court to the district court may be taken only by filing a notice of appeal with the

municipal court clerk within the time allowed by Rule 37(b).” Under Rule 37(b), “[a] defendant's notice of appeal must be filed with the municipal court clerk within 30 days after the entry of the judgment or order being appealed.”

[¶22] In the instant case, Smith has filed two appeals to district court. First, Smith filed an untimely notice of appeal regarding the municipal court order denying his request for a jury trial. The order was dated October 28, 2020. The notice of appeal was dated December 1, 2020, which is thirty-four days after the order was filed. Therefore, he failed to file the appeal within thirty days of the entry of the order and the notice of appeal is untimely.

[¶23] Second, Smith filed a notice of appeal regarding the final judgment. The judgment was dated January 7, 2021. The notice of appeal was dated February 8, 2021, which is within thirty days of the judgment under Rule 37(b) of the North Dakota Rules of Criminal Procedure and Rule 6 of the North Dakota Rules of Civil Procedure. As a result, a trial anew has scheduled in district court.

[¶24] Therefore, the proper remedy is an appeal, which has now been filed. Smith is not entitled to relief in the form of a supervisory writ. Because there already exists an adequate alternative remedy in the form of an appeal to district court, the Court should not exercise its supervisory jurisdiction and should not issue a supervisory writ.

III. Whether the municipal court erred in denying the Petitioner’s request for a jury trial when he has been charged with an infraction?

[¶25] Assuming, without finding, that the Court takes up the issue of whether the municipal court erred in denying the Petitioner’s request for a jury trial when he has been charged with an infraction, the City asserts that the Court did not err and that Smith is not entitled to a jury trial for an infraction-level offense.

[¶26] On June 23, 2015, Bismarck adopted Bismarck City Ordinance 10-05.1-01

which states:

Except as authorized by this Chapter, no person, firm, or entity shall sell, offer, or expose for sale any food, goods, wares, or merchandise, upon any public street, alley, sidewalk, public right-of-way or other public grounds owned or controlled by the City.

Under Bismarck City Ordinance 10-05.1-04, a violation of [Chapter 10-05.1] shall be an infraction.

[¶27] Section 12.1-32-03.1 of the North Dakota Century Code provides, “[a] person charged with an infraction is not entitled to be furnished counsel at public expense nor to have a trial by jury unless the person may be subject to a sentence of imprisonment under subsection 7 of § 12.1-32-01.” Subsection 7 of Section 12.1-32-01(7) provides:

Infraction, for which a maximum fine of one thousand dollars may be imposed. Any person convicted of an infraction who, within one year before commission of the infraction of which the person was convicted, has been convicted previously at least twice of the same offense classified as an infraction may be sentenced as though convicted of a class B misdemeanor. If the prosecution contends that the infraction is punishable as a class B misdemeanor, the complaint must specify the offense is a misdemeanor.

[¶28] Here, Smith is not subject to a sentence of imprisonment under subsection 7 because he has not previously been convicted of an infraction. Therefore, the present Complaint against Smith has not, and cannot, be enhanced to a class B misdemeanor level offense. Since Smith was charged with an infraction-level offense that has not, and cannot, be enhanced to a class B misdemeanor level offense, he is not entitled to a jury trial.

[¶29] Smith relies on Riemers v. Eslinger, 2010 ND 76, 781 N.W.2d 632 in support of his argument. In Riemers, the North Dakota Supreme Court addressed whether an individual has a right of trial by jury under the Constitution of North Dakota for a noncriminal municipal traffic citation punishable by a twenty-dollar fine. The Court

explained:

The vast majority of traffic offenses are “noncriminal.” *See* N.D.C.C. § 39-06.1-02. Therefore, N.D.C.C. § 29-01-06 does not provide the right of trial by jury for most traffic citations. Nevertheless, where a driver is cited for violating a municipal traffic ordinance, the driver “may request a hearing on the issue of commission of the violation charged.” N.D.C.C. § 39-06.1-03(1). The hearing may take place before a municipal judge. *See* N.D.C.C. §§ 39-06.1-02, 39-06.1-03(7). If the municipal judge finds the driver violated the municipal traffic ordinance, the driver “may ... appeal that finding to the district court for trial anew.” N.D.C.C. § 39-06.1-03(5)(a). Chapter 39-06.1, N.D.C.C., does not provide the right of trial by jury for noncriminal municipal traffic citations in either municipal court or district court.

Id. at ¶6.

[¶30] The North Dakota Supreme Court continued, however, that the Constitution of North Dakota reserves the right of trial by jury “as defined by the statutes which existed prior to and at the time of . . . adoption.” Id. at ¶12. At the time the state constitution was adopted, territorial law provided the right to a jury trial for alleged violations of municipal ordinances where the ordinance authorized a punishment of imprisonment for ten or more days or a fine of twenty or more dollars. Id. In Riemers, the Defendant was accused of violating a Grand Forks municipal ordinance for which the City Code provides a twenty-dollar fine. Id. Therefore, because he was accused of violating a municipal ordinance for which the fine is twenty or more dollars, the North Dakota Supreme Court held that he had the right to a jury trial under the constitutional guarantee that the right of trial by jury shall remain inviolate. Id.

[¶31] Riemers does not apply to the instant case because it pertains to noncriminal traffic citations, not infractions. In fact, the North Dakota Supreme Court distinguished noncriminal traffic citation from infractions within Riemers, citing State v. Brown, 2009 ND 150, 771 N.W.2d 267.

[¶32] In Brown, the North Dakota Supreme Court directly addressed whether an individual is entitled to a jury trial for an infraction. In Brown, the district court held a bench trial regarding a citation issued to Brown for violating a Cass County animal control ordinance. Id. at ¶44. Like Riemers, Brown argued the state constitution provided her the right to a jury trial because the ordinance authorized a fifty-dollar fine and the constitutional right of trial by jury applied to violations of municipal ordinances where the ordinance authorized a fine of twenty or more dollars. Id. at ¶46.

[¶33] In its analysis, the Supreme Court found that, when creating the infraction-level offense in 1975, the legislature intended for infractions to constitute “an entirely new category of lesser criminal offenses with its own unique procedural requirements.” Id. at ¶50. Furthermore, the Court found that the legislature expressly provided that a person charged with an infraction is not entitled to counsel furnished at public expense and has no right to a jury trial unless it is a second offense charged as a misdemeanor carrying a potential sentence of imprisonment. Moreover, the North Dakota Supreme Court found that Brown did not have the right to a jury trial because the animal control ordinance created a criminal infraction, whereas criminal law only recognized misdemeanors and felonies at the time the state constitution was adopted. Id. at ¶¶49-50.

[¶34] Because the legislature created a new category of crimes and procedures which did not exist at the time the Constitution of North Dakota was adopted and because the legislature expressly provided that a person charged with an infraction has no right to a jury trial unless it is a second offense charged as a misdemeanor carrying a potential sentence of imprisonment, the North Dakota Supreme Court held that “a person charged with violating an infraction-level offense . . . which carries no possibility of imprisonment,

is not entitled to a jury trial under N.D. Const. art. I, § 13.” Id. at ¶ 52. See also In re Anderson, 2007 ND 50, ¶ 19, 730 N.W.2d 570 (“The involuntary civil commitment provisions of N.D.C.C. ch. 25-03.3 create a statutory proceeding that was unknown at the time our constitution was adopted in 1889. Consequently, there is no right under article I, § 13, to a jury trial in proceedings under this chapter.”); State v. \$17,515.00 in Cash Money, 2003 ND 168, ¶ 10, 670 N.W.2d 826 (“It is axiomatic that, because there was no available action in this state for forfeiture of proceeds from illegal drug transactions at the time the constitution was adopted, there was no right to a jury trial in such an action.”); In re R.Y., 189 N.W.2d 644, 651 (N.D.1971) (holding the state constitution does not provide juveniles with the right of trial by jury in delinquency proceedings because juvenile courts did not exist prior to the constitution's adoption).

[¶35] The instant case is comparable to Brown. Here, Smith, like Brown, was charged with an infraction-level offense. Under Section 12.1-32-03.1 of the North Dakota Century Code and under Brown, an infraction-level offense carries no possibility of imprisonment. Therefore, Smith is not entitled to a jury trial.

[¶36] CONCLUSION

[¶37] For the above-stated reasons, the Respondent respectfully requests that this Court deny the Petition as moot. In the alternative, the Respondent requests that this Court affirm the municipal court’s Order.

Dated this 16 day of February, 2021.

/s/ Ashley Hinds
Ashley Hinds (08379)
Assistant City Attorney
P. O. Box 5503
Bismarck, ND 58506-5503
(701) 355-1340

[¶38] CERTIFICATE OF SERVICE

[¶39] I, Ashley Hinds, hereby certify that on February 16, 2021 the Respondent's Brief and Appendix was electronically filed through the North Dakota e-filing portal to the Honorable Charles Isakson (charles.isakson@mortonnd.org). The Respondent's Brief and Appendix was also electronically filed to Eric Smith at ericandemily201313@gmail.com and eric.smithpcs@gmail.com.

Dated this 16 day of February, 2021.

/s/ Ashley Hinds
Ashley Hinds (08379)
Assistant City Attorney
P. O. Box 5503
Bismarck, ND 58506-5503
(701) 355-1340