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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

Eric Smith, Petitioner, v. James S. Hill, Judge of the District Court; and City of Bismarck, Respondents.	)	Supreme Court No. 20210057 District Court No. 08-2021-CR-00394

ON PETITION FOR SUPERVISORY WRIT
FROM THE FEBRUARY 19, 2021, ORDER
DENYING PETITIONER'S REQUEST FOR A JURY TRIAL
FROM BURLEIGH COUNTY DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE JAMES S. HILL

BRIEF OF RESPONDENT CITY OF BISMARCK

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III. Whether Smith is entitled to a jury trial under the Sixth and Fourteenth Amendments to the United States Constitution.

[¶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. State ex rel. Roseland v. Herauf, 2012 ND 151, ¶ 3, 819 N.W.2d 546 (citation omitted). Section 2 of Article VI 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. This Court exercises its supervisory authority "rarely and cautiously and only to rectify errors and prevent injustice in extraordinary cases in which no adequate alternative remedy exists." Herauf, 2012 ND 151, ¶ 3, 819 N.W.2d 546 (citation omitted).

[¶5] STATEMENT OF THE CASE

[¶6] On September 2, 2020, the City filed a Complaint against Eric Smith alleging that he committed the offense of Commercial Use of Sidewalks, Streets, and Public Grounds Restricted in violation of Bismarck City Ordinance 10-05.1-01 as an infraction-level charge. 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. Bismarck Municipal Judge William C. Severin denied Smith's request stating, "no right to jury trial." Id. Later that day, Smith filed a formal request to transfer his case to district court for a jury trial. App. 26–27. 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. 43–48. Neither Smith's request nor the City's response requested oral argument.

[¶8] Between October 9, 2020, and October 27, 2020, Smith repeatedly e-mailed Judge Severin regarding Smith's 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. 53–54.

[¶9] On October 27, 2020, Judge Severin 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, Judge Severin 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. 72–74), a "Motion/Request to Recuse" (App. 77), a "Request for Continuance/Electronic Hearing on Motion to Recuse Motion for Certification of Order" (App. 83), a "Motion to Dismiss" (App. 84), a "Complaint" (against then-Assistant City Attorney Ashley Hinds) (App. 85–87), a "Motion/Brief for Contempt of Court/Abuse of Process" (App. 88–89), and a "Judicial Conduct Commission" complaint against Judge Severin (App. 90–92). On December 7, 2020, Judge Severin recused himself and requested that District Judge Bruce A. Romanick appoint another judge. App. 93. On December 9, 2020, Judge Chuck Isakson was assigned to the case. App. 95.

[¶11] On December 11, 2020, the City filed a "Response to Defendant's Motion/Brief for Contempt of Court/Abuse of Process" (App. 99–101) and "Response to Defendant's Motion to Dismiss" (App. 125–129). On January 4, 2021, Smith filed a

"Supervisory Writ for Jury Trial and Unconstitutional Ordinance Ruling." App. 111–13. That same day, 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. 117–21.

[¶12] Trial was held on January 7, 2021. The City was represented by then-Assistant City Attorney Hinds. Smith represented himself and appeared by telephone. Before trial, Judge Isakson addressed Smith's pre-trial filings, denying them all. After trial, Smith was found guilty and ordered to pay a $100 fine. App. 131. On February 8, 2021, Smith filed a Notice of Appeal to district court, appealing the final judgment for trial anew. App. 134. That same day, the case was transferred to district court. App. 205.

[¶13] Trial in district court was set for March 1, 2021 before District Judge James S. Hill. App. 228. On February 11, 2021, Smith filed a "Demand for Change of Judge," which was denied the following day. App. 221, 227. On February 11, 2021, Smith also filed a "Demand for Jury Trial." App. 222–26. On February 16, 2021, the City filed a "Response to Defendant's Demand for Jury Trial" (App. 230–34) as well as a "Motion to Declare Eric Smith to Be a Vexatious Litigant" (App. 237–39). That same day, Smith filed a "Response to City Regarding Vexatious Litigant." App. 241–43. Judge Hill denied Smith's request for a jury trial on February 19, 2021. App. 244.

[¶14] On February 22, 2021, Smith filed a second "Petition for Supervisory Writ for Jury Trial" with this Court. Smith then filed several motions in district court on February 23, 2021, and February 24, 2021, including a "Request/Demand for Discovery" (App. 250–51), a "Motion for Continuance" (App. 252), a "Motion to Stay Proceeding" (App. 253), a "Request for Hearing on Motion for Continuance and Stay" (App. 254), a

"Motion to Suppress" (App. 255–56), a "Motion to Recuse" (App. 259), and a "Request for Hearing on Motion to Recuse" (App. 261).

[¶15] On February 24, 2021, Judge Hill issued an order that, among other things, directed court administration to cancel the March 1, 2021, trial and set a new date once this Court has acted upon Smith's two petitions for supervisory writ. App. 262–76. On February 27, 2021, this Court issued an order staying the district court trial, consolidating the two cases that are before this Court, and ordering a response to Smith's second petition. App. 278.

[¶16] STATEMENT OF THE FACTS

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

[¶18] When officers arrived, they located Smith's "Trump stand" on the boulevard between the sidewalk and Washington Street. Smith informed the responding officers that he was selling merchandise for fundraising purposes. In response, officers informed Smith of Bismarck City Ordinance 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.

[¶19] LAW AND ARGUMENT

I. A supervisory writ is not an appropriate remedy in this case.

[¶20] As an initial matter, this case is not one where it would be proper for this Court to exercise its supervisory jurisdiction no matter the merits of Smith's argument that he is entitled to a jury trial. Article VI, Section 2 of the North Dakota Constitution and N.D.C.C. § 27-02-04 provide the Court with the authority to issue supervisory writs. Herauf, 2012 ND 151, ¶ 3, 819 N.W.2d 546 (citation omitted). The Court has made clear, however, that supervisory jurisdiction is reserved for extraordinary cases:

> 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 (quoting Holbach v. City of Minot, 2012 ND 117, ¶ 12, 817 N.W.2d 340).

[¶21] The Court should decide not to exercise its supervisory jurisdiction in this case because Smith has an adequate alternative remedy, namely the ability to appeal. Smith has already exercised this right once, appealing the municipal court judgment of conviction to district court for a trial anew as authorized by N.D.C.C. § 40-18-19 and Rule 37 of the North Dakota Rules of Criminal Procedure. Nothing prevents Smith from taking similar action again.

[¶22] In City of Grand Forks v. Lamb, 2005 ND 103, 697 N.W.2d 362, this Court directly addressed the right to appeal in a case strikingly similar to Smith's case from a procedural standpoint. After being found guilty of an infraction in municipal court for

violating a city ordinance, Lamb appealed to district court for a trial anew. Id. at ¶ 4. After a trial de novo, Lamb was again found guilty, and he appealed the district court judgment to this Court. Id. This Court concluded that it had jurisdiction over Lamb's appeal, explaining that as a general rule, "[i]f the district court finds a violation it enters a judgment of conviction, which is appealable to this Court under N.D.C.C. § 29-28-06." Id. at ¶ 7. "[A] prohibition on appeals to this Court will not be inferred unless the statute expressly states that appellate jurisdiction is conferred upon the district court and expressly prohibits any further appeal." Id. at ¶ 9. For example, N.D.C.C. § 39-06.1-03(5)(a) authorizes appeals of noncriminal traffic violations to district court but expressly provides that there may be no further appeal. Id. at ¶ 8.[1]

[¶23] Like in Lamb, the City is unaware of any statutory provision that prohibits appeals to this Court from a district court judgment of conviction for an infraction under a city ordinance. Therefore, Smith has an adequate alternative remedy if he is found guilty in district court; at that time, he can appeal from the district court judgment of conviction and raise the jury trial issue. N.D.C.C. § 29-28-06(2); see also State v. Brown, 2009 ND 150, ¶¶ 44–52, 771 N.W.2d 267 (considering on appeal from the district court's judgment the defendant's argument that she was erroneously denied a jury trial). It would be premature for this Court to consider Smith's jury trial arguments at this time. The Court should not take the rare step of issuing a supervisory writ.

[1]For this reason, supervisory jurisdiction was proper in the case relied heavily upon by Smith, Riemers v. Eslinger, 2010 ND 76, 781 N.W.2d 632. Riemers had no other remedy to rectify the district court's denial of his right to a jury trial for a noncriminal traffic violation. The same is not true for Smith in this case involving an infraction under city ordinance.

II. Smith is not entitled to a jury trial under Article I, Section 13 of the North Dakota Constitution.

[¶24] If the Court decides, however, to take up Smith's argument on the merits, the City asserts that neither municipal court nor district court erred in denying Smith a jury trial. Under both the North Dakota Constitution and the United States Constitution, Smith is simply not entitled to a jury trial for an infraction in violation of this city ordinance. The City turns first to Smith's argument that the state constitution provides him a right to a jury trial.

[¶25] Some background is necessary to address this argument. On June 23, 2015, the City 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.

A violation of this ordinance is an infraction. See Bismarck City Ordinance 10-05.1-04.

[¶26] Pursuant to state statutory law, "[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." N.D.C.C. § 12.1-32-03.1. That subsection reads as follows:

> 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.

N.D.C.C. § 12.1-32-01(7).

[¶27] Here, Smith is not subject to a sentence of imprisonment under subsection 7 because he has not previously been convicted of an infraction in violation of Bismarck

City Ordinance 10-05.1-01. Therefore, the present charge against Smith has not—and cannot—be enhanced to a class B misdemeanor offense. Since Smith was charged with an infraction-level offense that cannot result in any term of imprisonment, he is not entitled to a jury trial according to state statute.

[¶28] The question remains whether Smith nonetheless has a state constitutional right to a jury trial for this infraction-level offense under city ordinance. Article I, Section 13 of the North Dakota Constitution delineates the right to a jury trial as follows:

> The right of trial by jury shall be secured to all, and remain inviolate. A person accused of a crime for which he may be confined for a period of more than one year has the right of trial by a jury of twelve. The legislative assembly may determine the size of the jury for all other cases, provided that the jury consists of at least six members. All verdicts must be unanimous.

N.D. Const. art. I, § 13. This Court has repeatedly explained that this constitutional provision is not absolute and does not provide a right to a jury trial in all cases:

> This provision neither enlarges nor restricts the right to a jury trial, but merely preserves the right as it existed at the time of the adoption of our constitution. This provision preserves the right to a jury trial in all cases in which it could have been demanded as a matter of right at common law at the time of the adoption of our constitution.

Brown, 2009 ND 150, ¶ 45, 771 N.W.2d 267 (citations omitted). It is therefore necessary for the Court to examine the right of trial by jury as of 1889, the year that North Dakota adopted its constitution. Riemers, 2010 ND 76, ¶ 9, 781 N.W.2d 632 (citing City of Bismarck v. Fettig, 1999 ND 193, ¶ 7, 601 N.W.2d 247).

[¶29] The Court's decision in Brown makes clear that the North Dakota Constitution does not require that Smith be provided a jury trial for this infraction in violation of city ordinance. In that case, the Court concluded that "a person charged with violating an infraction-level offense, including a county ordinance creating an infraction-

level offense, which carries no possibility of imprisonment, is not entitled to a jury trial under N.D. Const. art. I, § 13." Brown, 2009 ND 150, ¶ 52, 771 N.W.2d 267.

[¶30] The Court noted in Brown that at the time the state constitution was adopted in 1889, territorial law provided the right to a jury trial for alleged violations of municipal ordinances where the ordinance authorized a sentence of imprisonment for ten or more days or a fine of twenty or more dollars. Id. at ¶ 46 (citing Compiled Laws of the Territory of Dakota § 937 (1887)). The Court nonetheless concluded that Brown had no right to a jury trial for an infraction-level offense. The Court explained that in 1889, territorial law only recognized two categories of criminal offenses: felonies and misdemeanors. Id. at ¶ 47 (citation omitted). Infraction-level offenses did not exist until 1975 when "the legislature created a new, lower level of criminal offense, denoted as an infraction, with its own procedures and penalty provisions." Id. at ¶ 48. In creating the infraction-level offense, the legislature explicitly "provided for certain variances from the procedures employed in other criminal cases," including no right to counsel furnished at public expense and no right to a jury trial (unless for a second offense charged as a misdemeanor). Id. at ¶ 50.

[¶31] In sum, when the legislature created infraction-level offenses in 1975, it "created a new statutory category and procedure which did not exist at the time the constitution was adopted in 1889." Id. at ¶ 52. The right to a jury trial under N.D. Const. art. I., § 13 therefore did not apply. Id. Following that reasoning, Smith is not entitled to a jury trial for this infraction-level offense that carries no potential imprisonment.

[¶32] Smith argues that this Court should instead follow its decision in Riemers where it held that the state constitution provides the right to a jury trial "for a noncriminal

municipal traffic citation punishable by a twenty-dollar fine." Riemers, 2010 ND 76, ¶ 27, 781 N.W.2d 632. In Riemers, the Court did not overturn Brown but merely distinguished it. Id. at ¶¶ 13–16. The Court rejected the City's argument that there was no constitutional right to a jury trial because "territorial law did not comprehensively regulate traffic prior to the adoption of the state constitution and the legislature created a new category of offenses with unique procedural requirements by adopting N.D.C.C. ch. 39-06.1, entitled 'Disposition of Traffic Offenses,' in 1973." Id. at ¶ 13. To the contrary, the Court reasoned that territorial law at the time of the adoption of the state constitution "permitted cities to comprehensively regulate traffic, establish fines for violations of traffic ordinances, and imprison persons for failing to pay the fines." Id. at ¶ 14. Further, the City of Grand Forks had adopted traffic ordinances as early as 1887 and provided a right to a jury trial because the maximum fines exceeded twenty dollars. Id. at ¶ 15. Therefore, Riemers was entitled to a jury trial for a noncriminal traffic citation because such a right existed at the time the constitution was adopted.

[¶33] Smith points to no authority demonstrating a right to a jury trial existed in 1889 for the infraction-level offense at issue in this case, and the City is unaware of any such authority. As discussed above, infraction-level offenses did not exist until 1975, and the section (and chapter) of municipal ordinance that Smith is alleged to have violated was only passed in 2015. As such, Article I, Section 13 of the North Dakota Constitution does not entitle Smith to a jury trial for this infraction-level offense under city ordinance.

III. Smith is not entitled to a jury trial under the Sixth and Fourteenth Amendments to the United States Constitution.

[¶34] Smith also does not have a federal constitutional right to a jury trial in this case. Smith argues that the Sixth Amendment, made applicable to the states through the

Due Process Clause of the Fourteenth Amendment, guarantees a right to a jury trial in all criminal prosecutions. The federal constitutional right to a jury trial is simply not as broad as Smith argues.

[¶35] The Sixth Amendment reads in relevant part, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI. This Sixth Amendment right has been made applicable to the states through the Due Process Clause of the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

[¶36] The proper extent of this right is well-established under federal case law. "[T]he Sixth Amendment, like the common law, reserves this jury trial right for prosecutions of serious offenses, and . . . 'there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision.'" Lewis v. United States, 518 U.S. 322, 325 (1996) (quoting Duncan, 391 U.S. at 159). To determine whether an offense is "petty," courts consider the maximum penalty attached to the offense. Id. at 326. "An offense carrying a maximum prison term of six months or less is presumed petty, unless the legislature has authorized additional statutory penalties so severe as to indicate that the legislature considered the offense serious." Id. (citations omitted); see also Riemers, 2010 ND 76, ¶ 18, 781 N.W.2d 632 (stating that the defendant likely had no federal constitutional right to a jury trial for a municipal ordinance violation punishable only by a fine).

[¶37] The Sixth Amendment right to a jury trial is inapplicable here because it does not apply to "petty" offenses such as the infraction-level offense in this case. This

offense does not carry any potential term of imprisonment, let alone any potential for more than six months of imprisonment. This infraction-level offense is punishable merely by a fine, and the lack of severe additional statutory penalties indicates that the offense is not "serious" as that term has been interpreted by federal case law. In short, Smith has no right to a jury trial under either the state constitution or the federal constitution.

[¶38] CONCLUSION

[¶39] For the above-stated reasons, the Court should decline to exercise its supervisory jurisdiction. In the alternative, the Court should deny Smith's petition because he is not entitled to a jury trial for this infraction-level offense under both the state constitution and the federal constitution.

Dated this 24 day of March, 2021.

/s/ Brittany Gefroh
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[¶40] CERTIFICATE OF COMPLIANCE

[¶41] I, Brittany Gefroh, hereby certify that the Respondent's Brief is in compliance with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure.

[¶42] The number of pages in the Respondent's Brief, excluding any addenda, is seventeen (17) pages, according to the page count of the filed electronic document.

Dated this 24 day of March, 2021.

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[¶43] CERTIFICATE OF SERVICE

[¶44] I, Brittany Gefroh, hereby certify that on March 24, 2021, the Respondent's Brief and Appendix was electronically filed through the North Dakota e-filing portal to the Honorable James S. Hill (jhill@ndcourts.gov). The Respondent's Brief and Appendix was also electronically filed to Eric Smith at ericandemily201313@gmail.com and eric.smithpcs@gmail.com.

Dated this 24 day of March, 2021.

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