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AUGUST 20, 2018
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellee, vs. Falesteni Ali Abuhamda, Defendant and Appellant.	)	Supreme Court No. 20180127 McKenzie Co. No. 27-2017-CR-00673

BRIEF OF APPELLEE

APPEAL FROM ORDER ACCEPTING PRETRIAL DIVERSION AGREEMENT AND CRIMINAL JUDGMENT DEFERRING IMPOSITION OF SENTENCE, ORDERED MARCH 2ND, 2018

MCKENZIE COUNTY DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT
HONORABLE ROBIN A. SCHMIDT, PRESIDING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF THE ISSUES

[¶1] This court does not have jurisdiction to hear this appeal on Counts 1, 2, and 5.

[¶2] The District Court properly denied the motion to dismiss and suppress, finding that CBD is illegal under North Dakota law as applied in this case, at that stage of the proceeding.

STATEMENT OF THE CASE

[¶3] The State would agree with the Statement of the Case as laid out by Respondent-Defendant.

STATEMENT OF THE FACTS

[¶4] On April 5th, 2017, law enforcement executed a search warrant on Tobacco Depot locations in Watford City and Alexander, North Dakota. App. pg. 10, ¶ VIII. These locations were owned by the Defendant. App. pg. 9, ¶ IV. The basis for the search warrant was Facebook ads promoting CBD, as well as controlled buys performed in February and March of 2017 at these locations. App. pg. 10-11, ¶¶ III, V, VI, VII. CBD is considered illegal according to the DEA and ND State Crime Lab. App. pg. 10, ¶ XIV. Found during the search warrant were items that contained CBD, THC, Delta-9-tetrahydocannibinol ("Delta-9"), as well as paraphernalia to use said items. App. pg. 10-11, ¶¶ III, V, VI, VII Also found in a

residential portion of the Alexander store was marijuana and substance believed to be marijuana wax. App. pg. 10, ¶ IX. The defendant identified these substances and it was believed he was living in this location. Id. The State Crime Lab confirmed that the item seized were positive for CBD, THC, Delta-9, hashish, and marijuana. App. pg. 11, ¶ XIII; App. pg. 13-14. The defendant did not have a hemp grower's license. Motion Tr. pg. 3, l. 22-35; pg. 4, l-7.

[¶5] The State Crime Lab, based on testimony by Lamonte Jacobson, tested both the stalk and flowering part of the Cannabis plant, including what would be considered hemp. Motion Tr. pg. 10, l. 20-25; pg. 11, l. 1-5; pg. 12, l. 1-11. CBD was found in the flowering portion, along with THC. Id. A little bit of CBD was found in the stalk. Id. This confirms the guidance from the DEA that very little, if any, CBD is basically found in the mature stalks, and that CBD is located in the flowering portions. Id. Any CBD found in the stalks would have come from the resin of the flowering portions falling onto the stalks. Id.

STANDARD OF REVIEW

[¶6] The Defendant filed both a Motion to Dismiss and a Motion to Suppress in the same motion. Under a motion to dismiss:

> "the purpose of a motion to dismiss is to test the sufficiency of the information or indictment. It is not a device for summary trial of the evidence, and facts not appearing on the face of the information cannot be considered. [citations omitted] The court is obliged to confine itself to the face of the information. See United States v. Quinn, 116 F.Supp. 802 (D.C.N.Y.1953). Further, for purposes of the motion, all well-pleaded facts are taken to be true. United States v. Luros, supra.

> …Where a Rule 12 motion presents mixed questions of fact and law, "the use of affidavits in support of the motion is neither a satisfactory nor desirable method of proving the facts on which the defense is predicated." State v. King, 355 N.W.2d 807, 809 (N.D.1984). If the defense is "founded upon and intertwined with the evidence to be presented at trial" [King, 355 N.W.2d at 809 n. 2], "cannot be resolved apart from the facts which are yet to be determined" [State v. Swanson, 407 N.W.2d 204, 206 (N.D.1987)], or "raises factual questions embraced in the general issue" [Zeno, 490 N.W.2d at 709; O'Boyle, 356 N.W.2d at 124; State v. Kolobakken, 347 N.W.2d 569, 570 (N.D.1984)], dismissal under Rule 12 is inappropriate."

State v. Davenport, 536 N.W.2d 686, 689–90 (N.D. 1995).

[¶7] When reviewing a Motion to Suppress:

> "we defer to the district court's findings of fact and resolve conflicts in testimony in favor of affirmance. We affirm the district court's decision unless we conclude there is insufficient competent evidence to support the decision, or unless the decision goes against the manifest weight of the evidence.
>
> Whether a finding of fact meets a legal standard is a question of law, which is fully reviewable on appeal. The existence of consent is a question of fact to be determined from the totality of the circumstances. Whether consent is voluntary is generally decided from the totality of the circumstances. Our standard of review for a claimed violation of a constitutional right is de novo."

State v. Smith, 2014 ND 152, ¶ 4, 849 N.W.2d 599.

ARGUMENT

I. This court does not have jurisdiction to hear this appeal on Counts 1, 2, and 5.

[¶8] This appeal comes from two different agreements, a Pretrial Diversion Agreement on Counts 1, 2, and 5, and a criminal judgment deferring imposition

of sentence on Counts 3, 4, 6, and 7. As this court stated in State v. Jorgenson, 2018 ND 169, 814 N.W.2d 485, the right to appeal is governed and limited by statute, though that statute should be liberally construed. Id at ¶3. Even so, this court specifically stated that because there is no trial, verdict, or final judgment, a pretrial diversion agreement does not fit within the statute allowing appeals by defendants, and thus this court does not have jurisdiction over Counts 1, 2, and 5. Id; N.D.C.C. 29-28-06.

[¶9] While there was no specific writing in regards to a conditional plea of guilt on Counts 3, 4, 6, and 7, the criminal judgment does reflect that it appears that the plea of guilty was conditioned on the Defendant's ability to appeal to the North Dakota Supreme Court. App. pg. 39. While no writing between the State and the Defendant appears in the record, this Court has stated "ritualistic compliance" with N.D.R.Crim.P. 11(a)(2) is not required and has upheld the validity of conditional guilty pleas absent a writing in certain circumstances. State v. Trevino, 2011 ND 232, 807 N.W.2d 211, ¶¶8, 12.

II. The District Court properly denied the motion to dismiss and suppress, finding that CBD is illegal under North Dakota law as applied in this case, at that stage of the proceeding.

[¶10] If the Court rules the Defendant cannot appeal Counts 1, 2, and 5, then the only remaining count that touches on CBD is count 4. A Rule 12(b) motion to dismiss is appropriate where a defense is capable of determination without

making a determination of the underlying facts, so that there is no summary trial of the evidence. State v. O'Boyle, 356 N.W.2d 122, 124 (N.D. 1984). "Recently, in State v. Kolobakken, 347 N.W.2d 569, 571 (N.D.1984), this Court reversed a county court judgment granting the defendant's pretrial motion for dismissal based on her asserted defense of lack of criminal responsibility because such a defense "has a bearing on the very issue of a defendant's legal guilt or innocence and, as such, raises a factual question to be submitted to and determined by the trier of fact." In Kolobakken, supra, 347 N.W.2d at 570, we stated:

> "[Rule 12(b), NDRCrimP] provides no authority for a court to grant a pretrial motion to dismiss based on a defense 'which raises factual questions embraced in the general issue.' United States v. Brown, 481 F.2d 1035, 1041 (8th Cir.1973).
> "For this reason, courts have denied pretrial efforts to have charges dismissed which were based on defenses of entrapment ... withdrawal ... and insufficiency of the evidence ...." [Emphasis added; citations omitted.]

State v. O'Boyle, 356 N.W.2d 122, 124 (N.D. 1984). When testing the sufficiency of the charging document through a motion to dismiss, the affidavit of probable cause filed with the complaint can be read alongside the charging document, as that is the basis for the charge. State v. Gray, 2017 ND 108, 893 N.W.2d 484, ¶7.

[¶11] While a portion of the remaining case deals with the legality of CBD, it is important to remember that items were also found to contain THC, Delta-9, and hashish, all of which are specifically listed as controlled substances in North Dakota. CBD and THC (through Delta-9) were detected in various items that

were seized pursuant to the search warrant in question. The items were sent to the State Crime lab, which tested the items and confirmed the presence of CBD and THC. This was stated in paragraph XIII of the Affidavit of Probable Cause that supported the complaint, as well as the results attached to the affidavit. App. pg. 11-15. THC, Delta-9, and hashish are specifically listed controlled substances at N.D.C.C. 19-03.1-05(5)(e); 19-03.1-05(5)(n). So the mere presence of THC, Delta-9, and hashish alone is illegal under North Dakota law. This is more than enough to pass from the Motion to Dismiss stage and bring this case to trial.

[¶12] The State concedes that non-synthetic cannabinoids are not specifically enumerated under the North Dakota Uniform Controlled Substances Act. While synthetic cannabinoids are listed, Forensic Scientist Jacobson stated there is a clear difference between natural and synthetic cannabinoids. Motion Tr. pg. 15, l. 18-24. In this case, where CBD is illegal, is under the definition of marijuana at both the state and federal level. CBD is derived from the cannabis plant, of which certain portions are illegal under the definition of marijuana at the state level. Motion Tr. pg. 28, l. 3-11. What the defense to this is, and was raised at the Motion to Dismiss stage, is that the fact-finder must determine is which portion of the cannabis plant did the CBD come from. Forensic Scientist Jacobson stated that the State Crime Lab does not determine which portion of the plant this CBD comes from, but did not say that NO lab in the country could make that determination. Whether this can be proven by the State beyond a reasonable

doubt is a trial issue for the ultimate fact-finder.

[¶13] Taken one step further, the federal government, through the Drug Enforcement Agency, has classified CBD as illegal. Attached to the Affidavit of Probable Cause that was filed with the complaint is guidance from the DEA which makes that case. App. pg. 16. That is what the district court relied upon for assessing probable cause in both approving the complaint and finding probable cause at the preliminary hearing. The DEA is the main agency responsible for classifying and working with controlled substances at the federal level. What is important to point out to this court, and the Defendant fails to cite, is that there is a provision of the North Dakota Uniform Controlled Substances Act which adopts the federal Controlled Substances Act. N.D.C.C. 19-03.1-02(4), any designation, rescheduling, or deletion of a controlled substance under federal law shall be noticed to the North Dakota State Board of Pharmacy. If the Board doesn't object to it after 30 days of notice, then such substance shall similarly be controlled in North Dakota. Evidence of such notice by the DEA was provided. No objection is noted by the Board. Therefore, under the notice provision of the Century Code, CBD is classified as illegal under North Dakota law.

[¶14] The Defendant argues that the drug paraphernalia charge should be dismissed because the Defendant has no idea what someone is going to do with an item when it leaves his store. N.D.C.C. 19-03.4-01 lays out the definition and examples of drug paraphernalia, and N.D.C.C. 19-03.4-02 lists the factors to use

when viewing an item as drug paraphernalia. N.D.C.C. 19-03.4-01(12) even states that an object that is designed or intended to be used to inhale marijuana. As the State argued and the Preliminary Hearing and again at the Motion Hearing, a potato can be classified as drug paraphernalia if crafted to inhale/ingest marijuana. As stated in the Affidavit of Probable Cause, the vape pens were sold with the understanding that they would be used for inhaling/ingesting CBD. As argued above, the CBD in this case was illegal as a controlled substance under North Dakota law. Therefore, the vape pens fit the definition of drug paraphernalia. Coupled with that, the advertisements that are at issue advertised different items that could be used to ingest/inhale CBD. Again, as the CBD in this case in considered illegal, the advertisements of items to inhale/ingest CBD would also be illegal.

CONCLUSION

[¶15] In this case, the Court should not even consider the appeal of the counts that were handled by Pretrial Diversion, as there is no right to appeal those counts. For the remaining counts, there was sufficient illegal substances found to bring this case to a jury. Even the sole count remaining that includes CBD, the court has sufficient information in the complaint and affidavit to deny a motion to dismiss.

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I certify that a true and correct copy of the **Brief of Plaintiff-Appellee** was emailed to the following parties via electronic mail on the 20th of August, 2018:

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