

STATE OF NORTH DAKOTA
COUNTY OF MORTON

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL COURT

STATE OF NORTH DAKOTA,)
)
Plaintiff,)
)
vs.)
)
LAWRENCE MALCOLM, Jr.)
)
Defendant.)

File No. 30-2019-CR-917

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
LACK OF PROBABLE CAUSE

Defendant Lawrence Malcolm, Jr., by counsel Bruce D. Nestor of De León, Nestor & Torres, states as follows in support of his Motion to Dismiss for Lack of Probable Cause:

INTRODUCTION

For the purposes of probable cause, the Probable Cause Affidavit filed by the State of North Dakota establishes that a cigarette butt, containing the DNA of the Defendant, was found “in the area” of property damage and a riot that occurred on September 6, 2016, in Morton County, North Dakota. The Affidavit, however, does not link Lawrence Malcolm, Jr, to any of the alleged crimes that occurred on that date nor establish probable cause that Mr. Malcolm committed any of the elements of the offense charged. The Criminal Complaint in this matter should be dismissed at this time, prior to any preliminary hearing, to prevent Mr. Malcom from being subjected to a groundless and improvident prosecution.

LEGAL STANDARDS

Defendant is charged by a Criminal Complaint filed on September 5, 2019. A complaint is a “written statement of the essential facts constituting the elements of the offense charged.” N.D.R. Crim. P. 3(a). The Complaint must establish “probable cause to believe that a criminal

offense has been committed by the defendant.” N.D.R. Crim. P. 4(a)(1). The Complaint must establish both cause to believe that a public offense has been committed and “sufficient cause to believe the defendant guilty of the offense.” State v. Goldmann, 831 N.W.2d 748, 751 (N.D. 2013).

Ordinarily, once a Complaint is signed by a Magistrate, probable cause for a felony offense would be tested at a preliminary hearing under N.D.R. Crim. P. 5.1. Defendant seeks a probable cause determination at this time, however, on the basis that the Criminal Complaint is facially insufficient to establish probable cause for the offense charged. Defendant contends that such review at this time is required to ensure that the probable cause requirement for a criminal prosecution is applied to fully protect his right to not be subject to a “groundless and improvident prosecution.” State v. Blunt, 751 N.W.2d 692, 698 (N.D. 2008). This Court, in connection with other charged felony offenses resulting from protests against the Dakota Access Pipeline (DAPL), has previously dismissed meritless felony charges without holding a preliminary examination. See, e.g., State v. Martinez, 30-2016-CR-01577 (Order by District Judge Cynthia M. Feland, 11/2/2016)(dismissing Class C felony charge of Conspiracy to Endanger by Fire, in violation of N.D.C.C. §12.1-21-02 and §12.1-06-04 and filed in approximately 139 separate cases). As argued below, because the charges against this Defendant, based upon the Affidavit of Probable Cause currently filed with the Court, are similarly groundless as those in the 139 cases dismissed by Judge Feland, the charges in this file should also be dismissed for lack of probable cause.

ARGUMENT

Defendant concedes that for purposes of probable cause, the State has established that the felony offense of Conspiracy to Commit Criminal Mischief, in violation of N.D.C.C. §12.1-06-04 and 12.1-21-05, and misdemeanor offense of Engaging in a Riot, in violation of N.D.C.C. §12.1-25.03, were committed on September 6, 2016, in Morton County, North Dakota. However, the probable cause determination to be made by this Court requires that the State must show that a crime has been committed and that the accused is probably guilty of committing it. State v. Perreault, 638 N.W. 2d 541 (N.D. 2002).

Deposit of Cigarette Butt at Crime Scene – For purposes of probable cause, the State has established that a cigarette butt, containing the Defendant’s DNA profile, was found by law enforcement on September 6, 2016, “in the area” of damaged construction equipment on the north side of Morton County Road #135. (Probable Cause Affidavit, ¶1, 4 and 5). The Affidavit, however, contains no information that would establish when that cigarette butt was left at that location. As such, the finding of the cigarette butt by itself does not even establish that Lawrence Malcom, Jr. was present at this location on September 6, 2016, much less that he participated in any of the criminal activity alleged. The cigarette butt could have been tossed out of a moving car days before, been deposited by someone emptying any ashtray, or have been left by Mr. Malcolm at any time in a period of days or weeks preceding September 6, 2016.

Presence of Defendant at Scene of Crime – The Probable Cause Affidavit seeks to establish that Mr. Malcom was present on September 6, 2016, by alleging that law enforcement reviewed video collected that day and could not identify Mr. Malcolm as being present. Because some persons present had their faces covered, the Affidavit then makes the improbable deduction that Mr. Malcolm must necessarily be one of the persons whose face was covered. It is simply

impossible for law enforcement to establish that they captured a video or photographic image of each person present on September 6, 2016. The Affidavit acknowledges that the events of that day were chaotic, occurred over a substantial period of time, and that law enforcement was outnumbered and pulled back to observe events from a distance. The mere fact that Mr. Malcolm was not identified as being present (which in anything other than an Alice in Wonderland version of events would tend to negate probable cause that he was present during the alleged riot), does not mean that he could not have been present and had his face uncovered. The State has not established any facts to support a belief that Mr. Malcolm was probably present and had his face covered.

The combination of the fact that the State can not establish when the cigarette butt was deposited “in the area” to the north side of a public road, and can only seek to infer his presence because he was not identified among the persons whose faces were exposed, falls far short of establishing that Mr. Malcom was “probably present” at that location on September 6, 2016, during the time that any criminal offense was committed.

Involvement in the Offense – “Mere presence at a riot is not an offense under [N.D.C.C. §12.1-25-03].” N.D.C.C. §12.1-25-03(2). Even if the Affidavit can be construed so as to establish that Mr. Malcolm was probably present “in the area” of a riot and damage to property, that fact does not establish his participation in the offense charged. The State’s allegations fall even farther short of establishing Mr. Malcolm’s involvement in a Conspiracy to Commit Criminal Mischief, in violation of N.D.C.C. §12.1-06-04 and 12.1-21-05. As noted by Judge Feland in dismissing 139 felony conspiracy charges arising from DAPL related events on October 27, 2016, a charge of conspiracy requires “an explicit or implicit” agreement between defendants to commit the offense charged. “[A]n agreement is not established by mere

knowledge of an illegal activity, by mere association with other conspirators, or by mere presence at the scene of conspiratorial deeds.” State v. Clark, 868 N.W.2d 363 (N.D. 2015).

The Affidavit in this case suffers from the same deficiencies as the affidavit filed by the State in State v. Martinez, et. al., and analyzed by Judge Feland in that case. The Affidavit “provides no specifically named defendants who committed this crime and how and when they each committed it. In addition, the Affidavit does not explain how the defendants agreed to commit the crime.” See, Judge Cynthia Feland’s Order, 11/2/2016, State v. Martinez, 30-2016-CR-01577). Even assuming that Mr. Malcolm, Jr. was present, and that his face was concealed, the Affidavit of Probable Cause does not even seek to assert or claim that each and every individual observed by law enforcement with their face covered, was observed committing a criminal act on September 6, 2016. Even assuming that Mr. Malcolm, Jr. was present, and that his face was concealed, his face could have been concealed to protect him from dust, from the sun, or from the clouds of teargas used by law enforcement at DAPL demonstrations prior to September 6, 2016. No North Dakota law makes it illegal to cover one’s face in public, while present at a demonstration, or even while present at a location where others may be committing a crime. A legal interpretation which sought to criminalize the act of partially or fully concealing one’s face would both be unduly vague and violate First Amendment rights. See, Ghafari v. Municipal Court, 150 Cal.Rptr. 813 (Cal. App. 1978)(statute barring concealment of face could apply to celebrities seeking to avoid paparazzi by wearing sunglasses or large hats and reaches protected First Amendment right to engage in anonymous political activity).

CONCLUSION

The Probable Cause Affidavit does not establish sufficient facts to believe that Mr. Malcom was probably present at any particular location in Morton County on September 6,

2016. It certainly does not establish that he engaged in criminal activity if present, or that he conspired with others to engage in criminal activity. Count I and Count II of the Criminal Complaint should be dismissed.

Dated this 14th day of September, 2019.

S/BRUCE D. NESTOR

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