

AUG 01 2012

IN DISTRICT COURT, NELSON COUNTY, NORTH DAKOTA

Auth Stevens, Clerk
By: _____ Deputy

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3 State of North Dakota,) MEMORANDUM DECISION AND
4 Plaintiff,) ORDER DENYING MOTION
5) TO DISMISS
6 v.)
7 Rodney Brossart,)
8 Defendant.)

) 32-2011-CR-00049, 00071

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10 State of North Dakota,)
11 Plaintiff,)
12 v.)
13 Susan Brossart,,)
14 Defendant,)

) 32-2011-CR-00074

14 State of North Dakota,)
15 Plaintiff,)
16 v.)
17 Abby Brossart,)
18 Defendant,)

) 32-2011-CR-00050, 00076

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20 State of North Dakota,)
21 Plaintiff,)
22 v.)
23 Alex Brossart,)
24 Defendant.)

) 32-2011-CR-00046

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State of North Dakota,)
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Plaintiff,)
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v.) 32-3011-CR-00048
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Thomas Brossart,)
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Defendant.)

State of North Dakota,)
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Plaintiff,)
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v.) 32-2011-CR-00047
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Jacob Brossart,)
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Defendant.)

Each of the Defendants (collectively "Brossarts") jointly move for a dismissal of the criminal charges or in the alternative suppression of evidence. Bruce D. Quick of the Vogel Law Firm of Fargo, ND represents Rodney Brossart (Brossart) while Daniel Gast of Brandborg & Gast also of Fargo, ND represents the other Brossarts. Where individual Brossarts are referred to, their first name may be used.

The State is represented by Douglas Manbeck, Nelson County States Attorney.

FACTS & CONCLUSIONS

For the purpose of this motion the following facts appear. A neighbor of Rodney Brossart, Chris Anderson (Anderson) noticed that three of his cow calf pairs were missing, presumed that they had gotten out and went looking for them. Anderson testified that a tree

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2 had fallen on a fence allowing the animals to escape. This was between 6:30 a.m. and 9
3 a.m.. He followed cattle tracks on a township road and followed the tracks to where some
4 ATV tracks joined the cattle's tracks. He saw his cattle fenced in at a missile site.
5 Anderson went to get his pickup to see Rodney Brossart who rented the missile site. The
6 Brossart farm is about a half to quarter mile away from the missile site. At about 11 a.m.
7 Anderson talked to Rodney and said that he looked like he found the cattle. Brossart stated
8 that the cows were trespassing. Anderson stated that he would get his trailer and get the
9 cows. Brossart stated that Anderson would be trespassing and stated that Anderson could
10 "buy them back". Anderson stated that he would go home and think about it. Anderson
11 then called the Nelson County Sheriff's office. A member of the North Dakota Stockmen's
12 Association, a Field Agent, Fred Frederickson was contacted and came to assist to resolve
13 the problem. Deputy Sheriff Eric Braathen and Frederickson met with Anderson and
14 Anderson gave Frederickson the brand papers showing Anderson's ownership of the cattle.
15 Braathen and Frederickson were going to drive out to the Brossart farm to arrange for
16 Anderson to get the cattle back. They located Rodney Brossart pumping water across a
17 township road. Braathen introduced Frederickson to Brossart. Frederickson stuck his hand
18 out to shake with Brossart and explained that he was with the stockmen's association.
19 Brossart wouldn't shake hands with Frederickson. Jacob, a son, was also there as well as a
20 "guy" with a red Ford pickup, who left. Frederickson said that they were there to get the
21 stray cattle back which were his neighbors. Brossart got upset and asked if they had any
22 proof. Frederickson said he had the brand papers of Anderson. Frederickson and Braathen
23 were going to go look at the cattle at the missile site. Brossart said to the effect that "if you
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2 go onto the property you're not coming back". Frederickson took this as a threat and told
3 Brossart to not make any threats. Braathen and Frederickson were going to go over to look
4 at the cattle. Braathen told Brossart that they were going to go over to take care of getting
5 the cattle returned. Brossart said that he was going to finish what he was doing. Brossart
6 went back to the tractor and Braathen told him if he did not cooperate he would be arrested.
7 Brossart said "show me the writ". Braathen told Brossart he was under arrest and reached
8 for his handcuffs. Brossart stepped back and Braathen grabbed Brossart's arms. Brossart
9 made a comment to Jacob go get something from the pickup. Brossart pulled away.
10 Braathen told Brossart to get on the ground or he would be tazered. Brossart did not
11 comply. Braathen tazered Brossart with two prongs into Brossart's chest. Brossart stumbled
12 back 8 to 10 feet. Brossart then stood there, didn't comply and came toward Braathen, who
13 reactivated the tazer. Brossart then stumbled or fell and rolled down the ditch into the mud.
14 Frederickson detained Jacob. Braathen believes that Jacob came at Braathen after Brossart
15 was tazered the second time. Jacob was detained and handcuffed. Brossart came out of the
16 ditch, and Braathen put a fresh tazer cartridge in the gun. The probes had come loose from
17 Brossart. Brossart was told to stay on the ground and he was told if he got up he would be
18 tazered. Brossart asked for his glasses and cell phone. Braathen told Frederickson to put the
19 handcuffs on Brossart. Brossart tried to get to his feet and was tazered with another jolt.
20 Brossart was tazered several times, but the exact number is unclear. Braathen kept telling
21 Brossart not to move. They had to force his hands behind his back to be handcuffed.

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23 Brossart was then walked to the patrol car. Brossart said he was ill and about 1:30
24 Braathen called for an ambulance and Brossart appeared to be passed out and unresponsive.
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2 The McVile ambulance crew came and Brossart was taken from the patrol car to the
3 ambulance and examined by the EMT and Brossart was taken to the hospital in Devils Lake.
4 Brossart was examined and released, to be arrested and taken to the Correction Center in
5 Devils Lake.

6 Abby and Thomas arrived; and Abby was arrested when she approached Braathen
7 and allegedly pushed Braathen. Frederickson told Thomas that he wanted to go check on the
8 cattle. Thomas then was asking "what the f--- is going on" and "who the f--- are you".
9 Frederickson explained the law to Thomas about getting the cattle back to the owner and any
10 damages paid. Thomas said that dad said that they needed a search warrant. At about 4
11 p.m. a search warrant was secured to get the cattle and they drove to the missile site. Alex
12 and Thomas showed up. Thomas said it was private land that "they didn't agree to the sale"
13 and repeated it. Alex and Thomas were told that the deputy had a search warrant and then
14 those two drove away. Alex said something like if the cattle go they are entitled to \$15,000
15 per animal.
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17 Sheriff Janke and another deputy went to the Brossart farm to serve the warrant.
18 Frederickson served as a backup as Janke and the deputy drove into the yard. There was a
19 string of twine drawn over the driveway. Janke and a deputy were on the way to the house
20 when the three Brossart sons came out with firearms in the air. The Sheriff drew his
21 sidearm and retreated to the patrol vehicle and told the three sons to put down their
22 weapons. Janke testified that the three lowered their weapons, pointing them at law
23 enforcement. The three sons then went back to the house. Janke stated that it is always his
24 practice to serve the owner or occupant of the property a copy of the search warrant.
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2 Thomas testified that about 6 p.m. the day before, he had seen the cattle walk into the
3 missile site where there was hay. Abby testified as to pictures showing tracks of the cattle
4 across a field toward the missile site.

5 An unmanned aerial vehicle (UAV) was offered by Border Patrol and was used for
6 surveillance. The next morning officers arrived and got the cattle from the missile site.

7 While at the missile site the three Brossart sons showed up and were arrested.

8 The Court received into evidence a DVD video recording of the confrontation where
9 Brossart and Abby were arrested. The Court reviewed the DVD and has considered it as
10 evidence for the proceedings.

11 Several sections of the law are cited and may apply. They are:

12 **§ 36-11-10. Trespassing livestock may be distrained--Notice to owner--**
13 **Security for release**

14 1. The person suffering damages by reason of the trespass of any livestock
15 may take up the offending livestock. The person suffering damages shall
16 notify the owner, or the person in possession of the livestock at the time of
17 the trespass, of the seizure of the livestock without unnecessary delay, if the
18 owner or person in possession is known to the person suffering damages and
19 is a resident of, and present within, the county in which the trespass occurred.
20 The person suffering damages may retain the livestock in that person's
21 custody until:

18 a. The damages sustained by reason of the trespass and the costs in the action
19 to recover the damages have been paid; or

20 b. Good and sufficient security for the payment of the damages and costs is
21 given, provided the security is approved by a district judge serving the county
22 in which the livestock is taken up.

22 2. If the owner of the offending livestock elects to give security, the owner
23 shall give to the person holding the livestock notice that security will be
24 given and the date and hour when the security will be submitted to the district
25 judge for approval. The notice must be given at least one day before the date
set for the submission of the security to the judge. The cost of serving notices

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2 required under this section may be taxed as costs in the action.

3 3. Where applicable, the provisions of section 36-11-07 may be raised as an
4 affirmative defense in any proceedings under this section, and the owner or
5 person entitled to possession of the livestock may apply to a court of
6 competent jurisdiction for the return of the livestock. If the court finds that
7 the livestock has been wrongfully distrained, the person who causes the
8 livestock to be wrongfully distrained is liable for all damages suffered by the
9 owner or person entitled to possession of the livestock, together with the
10 costs of the action and reasonable attorney's fees.

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18 **§ 36-13-01. Estrays--Possession**

19 A person may take possession of an estray when it is on property that the
20 person owns or controls, provided the person does not know who owns the
21 estray. As soon as practicable the person shall examine the estray to
22 determine the presence and identity of any brand, the location of the brand,
23 and any other marks or scars that may identify the estray. The person shall
24 notify the sheriff of the county in which the estray was found or the chief
25 brand inspector. Once notified, the sheriff or the chief brand inspector shall
record the date and time of the notification and all information obtained from
the person which may be helpful in determining ownership of the estray. The
chief brand inspector shall direct a brand inspector to examine the estray for
marks and brands.

18 **§ 36-13-05. Lawful charges**

19 1. A person that takes possession of an estray in accordance with this chapter
20 may charge for any actual damage done to the person's crops or property by
21 the estray.

21 2. A person that takes possession of an estray in accordance with this chapter
22 may charge for any costs incurred after the person has notified either the
23 sheriff or the chief brand inspector, provided the costs were incurred for the
24 care and feeding of the estray or were incurred in complying with this
25 chapter.

24 3. If the person who takes possession of the estray and the owner of the estray
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2 cannot agree as to the amount of charges that are payable, each shall choose
3 one person and the two so chosen shall choose a third person. The three
4 persons so chosen shall arbitrate and determine the amount of the charges. A
5 determination under this subsection is final.

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9 **§ 36-13-07. Liability for death, theft, or escape of estray**

10 If the person that takes possession of an estray notifies either the sheriff or the
11 chief brand inspector, as provided in this chapter, the person is not liable if,
12 without fault on the part of the person, the estray dies, is stolen, or escapes
13 and wanders away.

14 It is undisputed here that Brossart did not give notice to the Sheriff or Chief Brand
15 Inspector that cattle had strayed onto his property. When Brossart was informed by
16 Anderson that his cattle had gotten out and he wanted to get them back, Brossart simply
17 stated that Anderson would have to buy the cattle back.

18 The Defendants assert 7 grounds for dismissal of the State's case:

- 19 1. Outrageous governmental conduct;
- 20 2. Unlawful warrantless arrest of Rodney Brossart;
- 21 3. Provocation and excessive use of force against Rodney Brossart;
- 22 4. Unlawful defacto arrest of Jacob Brossart;
- 23 5. Warrantless occupation of the farm;
- 24 6. Warrantless use of unmanned military-like surveillance aircraft; and
- 25 7. Use of commandos to infiltrate the Brossart ranch.

26 First, the Defendants claim that Brossart lawfully possessed the cattle and that the
27 Police's conduct was unlawful.

28 The Brossarts assert that the cattle were not estrays, contending that according to the

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2 NDCC § 36-22-01 definition the cattle were not "estrays". Under N.D.C.C. 36-22-01 an
3 Estray is defined as "Any marked or branded cattle, horse, or mule found at any livestock
4 market, to which a shipper cannot produce title or satisfactory evidence of ownership, is
5 considered to be an estray."

6 Brossart contends that he had every right to detain the cattle under N.D.C.C. 36-11-
7 10 and had no obligation to surrender the cattle until Anderson fulfilled his statutory
8 obligations under 36-11-10 which requires either paying for any damages sustained by
9 reason of the trespass or provide sufficient security for payment of damages.

10 Brossart contends further that he had no obligation to notify Anderson of the cattle
11 because Anderson appeared and asked for the animals return.

12 Brossart contends that his being charged with failure to comply with the estray
13 chapter fails as a matter of law, first because the cattle were not estrays and secondly, he had
14 no obligation to notify either the sheriff or the brand inspector. The charge is that Brossart
15 "failed to notify either the sheriff or chief brand inspector" after "taking possession and
16 control of estray cattle." He is also being charged with theft of property and terrorizing and
17 also preventing arrest or discharge of other duties.

18 First, as a matter of law it appears that these cattle were estrays. The definition of
19 "estrays" in N.D.C.C. § 36-22-01, concerning the sale of cattle at a "public livestock
20 markets", clearly does not apply here. The case of Campbell v. Hamilton, 172 N.W. 810
21 (N.D. 1919) defines an estray as: "[a]n estray is a wandering animal whose owner is
22 unknown - an animal that has strayed away and lost itself." That case goes on to state that:
23 "[u]nder the estray statute a person has no right to impound an animal as an estray unless it
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2 is in truth and in fact an estray, and, when a person does take up an estray he must comply
3 strictly with all the provisions of the statute.”

4 The question then is whether under contested facts here Brossart could be convicted
5 of violating the Estrays statute pursuant to N.D.C.C. §36-13-08.

6 The Court finds that under the facts here, considered in the light most favorable to
7 the State, the Defendant could be found to have violated this statute.

8 The Defendant was lawfully arrested for possibly violating this statute, when he was
9 informed that the cattle were Anderson’s and he did not cooperate in their recovery,
10 pursuant to statute. There was also sufficient grounds to arrest Brossart for terrorizing, in
11 stating that if the law enforcement officers went onto his property they would not come
12 back. The Deputy stated that Brossart said “if you set foot on my property you will not be
13 leaving”. When Brossart pulled away and would not cooperate with being arrested there
14 appears to be sufficient reason for him to be tazered; even multiple times if he would not
15 cooperate and if he kept coming at the police. It was a lawful arrest and the type of
16 resistance that Brossart was demonstrating appears to not be justifiable. There is at least a
17 fact question of whether excessive force was used. In a somewhat similar case, State v.
18 Brossart, 729 N.W.2d 137 (N.D. 2007), Brossart was found guilty of preventing arrest or
19 discharge of other duties. The deputies there attempted to handcuff him and he resisted. He
20 claimed there that his resistance was justified because law enforcement was using excessive
21 force. The same deputy was involved in that case. The North Dakota Supreme Court held
22 there that the officers were justified in handcuffing Brossart for the officers safety.
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24 There is also a question of fact of whether the cattle went onto Brossart’s property
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1 voluntarily or whether they were herded into the missile site.

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3 In this case Brossart did not either notify the Sheriff or the Stockman's Association
4 representative that he had someone's cattle. The cattle had clear tags on them.

5 It appears that Brossart never did state that the cattle had caused some damages and
6 that he was holding the cattle for damages. Anderson testified that Brossart told him that he
7 could "buy them back" when Anderson said that he planned to get a trailer and retrieve
8 them.

9 Jacob Brossart

10 The testimony at the hearing indicates that the detention of Jacob Brossart (Jacob)
11 was not improper. The testimony at the hearing was to the effect that he was to go to the
12 pickup and Frederickson testified that he saw guns in the pickup. It was not improper to
13 detain Jacob for the officer's safety. He was not arrested at that time as Frederickson stated
14 he was not creating any trouble after being detained.

15 Abby Brossart

16 Deputy Sheriff Braathen testified that "Abby slapped my arm out of the way" and
17 that it "stung". The charge against Abby is Simple Assault on a peace officer. This
18 involves infliction of bodily injury. Bodily injury is defined as follows:

19 **12.1-01-04. General definitions.**

20 As used in this title, unless a different meaning plainly is required:

21 4. "Bodily injury" means any impairment of physical condition, including
22 physical pain.

23 There is at this point at least a question of fact whether this offense was committed.

24 Entry at the Brossart Farm

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2 Sheriff Janke testified that he was going to serve the search warrant on the owners of
3 the site to be searched when Alex, Thomas and Jacob came out with guns. This was a
4 permissible entry onto the Brossart property

5 Use of the UAV

6 There was no improper use of an unmanned aerial vehicle. It appears to have had no
7 bearing on these charges being contested here.

8 Use of force during the arrest of Rodney Brossart

9 The use of the tazer multiple times against Brossart is not so excessive as to mandate
10 dismissal of any charges at this point as a matter of law. Whether excessive force was used
11 may be a factual question presented at trial. Brossart was warned to not resist or he would
12 be tazered. This may have been safer for Brossart than his being tackled with possible
13 worse consequences.

14 ORDER

15 Based on the foregoing the Brossarts' Motion to dismiss is DENIED.

16 Dated at Grand Forks, North Dakota this 31st day of July,
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18 2012.



19 BY THE COURT

20 *Joel D. Medd*
21 Joel D. Medd
District Judge

22 copy to: Mr. Bruce D. Quick
23 Mr. Daniel Gast
24 Mr. Douglas Manbeck, Nelson Co. States Att
25