

2019 SENATE JUDICIARY

SB 2292

2019 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

SB 2292
1/22/2019
#31169 (24:50)

☐ Subcommittee
☐ Conference Committee

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| Committee Clerk: Meghan Pegel |
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Explanation or reason for introduction of bill/resolution:

A BILL for an Act to amend and reenact section 40-18-15.1 of the North Dakota Century Code, relating to transfer of municipal court cases to district court.

Minutes:

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| 2 Attachments |
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Chair Larson opens the hearing on SB 2292.

Larry Luick, District 25 Senator, testifies in favor of the bill.

Senator Luick: This has to do with the transferring of legal cases between courts to courts. I'm going to let the people who are in charge of that handle that

(1:47) Stephen Dawson, Fargo Municipal Judge, testifies in favor (see attachment #1)

(13:40) Chair Larson: You said of these cases that request a jury trial, only 2 actually went to a jury trial. Why?

Judge Dawson: They get to district court where they wanted to get.

Chair Larson: and waive it?

Judge Dawson: Correct. They waive the jury then plead guilty.

Chair Larson: So it's usually the defendant's choice to waive it.

Judge Dawson: It's always the defendant's choice.

Senator Myrdal: Are these cases largely DUIs or under the influence cases? Explain the language difference from this and what the legislature passed 2 years ago.

Judge Dawson: Probably a large number would be DUIs for a host of reasons. Other cases such as shoplifting or disorderly conduct oftentimes involve people who might not be in a position to hire a private attorney. DUIs are not necessarily the case and because of the significant consequences of a DUI with insurance and driving privileges, people are very inclined to hire a private attorney. Private attorneys do oftentimes utilize this provision. The change in 2017 addressed a real concern where a defendant would be waiving his or her right to a jury trial. Defendants alone could not keep the case in district court. If a defendant reaches an agreement and it automatically transfers back to the Municipal Court without any avenue to return for a jury trial, the if the case were ever rejected by the Municipal Court, the

defendant would have no options but to try the case to the Municipal Judge. It denied the defendant an opportunity for a jury trial. It reverses the 2017 change to the extent that it provides that definite avenue for a jury trial if a defendant wants to exercise that right.

Chair Larson: Municipal Court judge Bill Severn emailed me yesterday and said he agreed with this bill.

Vice Chairman Dwyer: These district court judges are very busy. Is it that they're much more lenient in terms of if they waive their jury trial and just get a better sentence?

Judge Dawson: Not necessarily more lenient, but different. For example, in Fargo's East Central Judicial District for second offense, DUI has the option of electronic home monitoring versus actual incarceration. What will one judge impose versus what the Municipal Court will use? Administrative fees versus fines. Sometimes I think defense attorneys might feel they have more leverage when they get to the District Court in negotiating with a looming jury trial on the prosecutor's already very busy desk. A good example would be the minor in possession in Fargo back in the early 2000s where Judge Davies was very passionate about that issue. District Court judges have their own docket and busy with that. To ask them to take up the mantle for an issue that is unique to only one of the municipalities in their very large district might be unreasonable to expect.

Vice Chairman Dwyer: Why would a Municipal Court reject the terms of a plea agreement?

Judge Dawson: I don't know, it would be unusual and a far-fetched scenario.

(20:30) Stephanie Dassinger, League of Cities, testifies in favor (see attachment #2)

Dassinger: This is testimony from Brittany Hatting, a Whapeton city attorney. In one of the smaller jurisdictions, she took a look at their docket just for 2017. In their instance they had 14 jury trial demanded and only 2 jury trials actually occurred. That causes in a problem in their office because preparation for a jury trial is much different than the way you'd prepare a case for a trial in front of a judge or something that's going to plea. They're seeing a significant rise in the amount of money they are spending preparing for a jury trial that doesn't actually happen.

Chair Larson: Are you also appearing in favor of the bill for the League of Cities?

Dassinger: Yes, I am.

Vice Chairman Dwyer: If you're saying that the city is preparing for a jury trial- I thought all jury trials were transferred to District Court?

Dassinger: When they're transferred to District Court, the city continues to bear the burden and costs for preparing for prosecution. Often that city prosecuting attorney will travel with the court case and present the court case to the District Court.

Chair Larson closes the hearing on SB 2292.

Senator Luick Moves a Do Pass.

Vice Chairman Dwyer Seconds.

Senator Myrdal: For me these are very complicated issues. I personally need more time to look into it; it's a comprehensive change from what we discussed last session.

Senator Luick Withdraws his motion.

Vice Chairman Dwyer Withdraws his Second.

2019 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

SB 2292
1/23/2019
#31303 (16:56)

☐ Subcommittee
☐ Conference Committee

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| Committee Clerk: Meghan Pegel |
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Explanation or reason for introduction of bill/resolution:

A BILL for an Act to amend and reenact section 40-18-15.1 of the North Dakota Century Code, relating to transfer of municipal court cases to district court.

Minutes:

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| 1 Attachment |
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Chair Larson calls the committee to order to discuss SB 2292.

Chair Larson: Senator Myrdal has offered to do some work on this. I received an email from Mark Frieese, a Fargo private attorney (**see attachment #1**). He has some real concerns about this bill.

Senator Luick: Who is Mark Frieese?

Chair Larson: He is an attorney and good friends with our previous chairman. He suggested I speak further with Congressman Armstrong regarding this issue and when doing so he said this is actually one of the reasons he even ran for the Senate. He opposes the bill, so I felt it would be a good idea to listen to this. Mark Frieese was a Bismarck police officer when I worked at the Bismarck police department. He left the department to go back to law school and has been very involved in law and education at the University.

Senator Myrdal: I visited with a couple of district judges who were equally concerned and also at length with the Supreme Court. I remember last session when we did pass this and the reasoning for it. My concern is that probably a large amount of these cases are most are DUIs and DWIs. It's back and forth between district and municipal with an enormous amount money involved. I do not support this bill however there may be an opportunity for us to at least keep the 28 to 42 days provision in there.

(3:57) Stephanie Dassinger, ND League of Cities

Dassinger: There are 2 main changes under this bill. The first is to extend the period of time which the defendant has to remove a case from the Municipal Court to the District Court. The second change has to do with ultimately where a case is resolved. Under the existing laws, a defendant can remove a court case for the purpose of having a jury trial. We don't have

any jury trials in Municipal court. It goes to the District court and it stays there unless both attorneys agree to send it back regardless of whether they agree to enter a plea agreement or not. This would change it so that if those parties reach a plea agreement, it goes back to the Municipal Court, adds to their calendar, and the plea is taken.

The difference between this and the 2015 law is that this has a safety net provision where someone can enter what's called a "non-binding plea agreement", meaning that I will plead guilty and here are the terms of my sentence, and the judge can either accept or reject that plea. If the judge rejects the plea, that defendant would still have the opportunity to go to the district court and have a jury trial. That is to resolve that issue, and concerned offense attorneys raise that if plead anything and it goes back to Municipal Court, we've waived our right to a jury trial.

The way the law currently exists: you have a court case, it's in municipal court with a class b misdemeanor or less, the offense happened in the city, a city police officer writes the ticket or citation, goes to court, if that defendant who is accused of committing that violation asks for a jury trial, it automatically gets removed and goes to district court because we can't have a jury trial. It sits in district court and their time periods for doing this is usually longer. Their docket's are generally busier and it takes more time to do the type of cases they're doing. It sits there until they either they have a jury trial, they enter a plea agreement and the district court answers judgment, or both attorneys agree to send it back to municipal court.

Vice Chairman Dwyer: in which case they're agreeing not to have the jury trial.

Dassinger: Correct. This would change it so that it automatically goes back to Municipal Court once a plea agreement is reached but they would still have that option, if they had negotiated, what is called a "nonbinding plea agreement" where if the judge does not like the terms of the plea agreement or the sentence that has been agreed upon, they can then have a jury trial afterwards.

(7:55) Senator Osland: assuming the defendant doesn't request going to district and there's a fine. Municipal court gets that money, is that correct?

Dassinger: Correct. What goes through the municipal court is city collected.

Senator Osland: What about the same situation that goes to district court and it's settled there. Where does that fine money go?

Dassinger: There is some type of agreement on how those are divided up but generally the district court would get the larger portion of the fee associated with that case.

Senator Myrdal: Municipal courts don't do courts of records so there's no transcripts of the proceedings correct?

Dassinger: Correct.

(9:18) Senator Luick: What's the benefit of moving from municipal to district court? Why does somebody want to consider doing this in the first place? What will I get out of that besides time delay?

Dassinger: A defendant will likely by default remove a case just because this time line is so short. It sometimes provides what I would perceive as leverage on the political subdivision because now they're facing a jury trial, which is more expensive, to prepare for and we're heading towards what is presumably going to be a jury trial, and you can't assume it's not going to be. So a city and a city attorney are preparing for that and it's costing the city money.

I think it's seen as leverage for a defendant to be able to garner what may be a more advantageous plea agreement.

Senator Luick: Does that work? Do they cower to that kind of proposition?

Dassinger: Not cower but there is some amount of leverage in any type of court case, whether civil or criminal, if the attorney on the other side thinks you're moving toward a jury trial. Not many attorneys enjoy jury trials.

(12:05) Chair Larson: Why is the League of Cities supporting this bill?

Dassinger: We have cities that are incurring larger amounts of city attorney time bills in order to be able to prepare for these jury trials that will never happen. There are not many cities in North Dakota that have a city attorney on staff where it's a known cost, so most of our cities have city attorneys who are sitting in an office and do many different things, one of which is providing city attorney and city prosecution work. That work is billed at an hourly rate and it is not cheap.

Vice Chairman Dwyer: The defendant can waive a jury trial and it goes back to municipal court or the parties can agree to conditionally waive a jury trial and it goes back to municipal court under this bill.

Dassinger: Under this bill that would be the change. Right now, they have to waive the right for a jury trial for it to go back to municipal court. With this bill, any times you would enter any type of a plea agreement, whether it waives the right to a jury trial or not, it would go back to municipal court.

Chair Larson: rather than staying in district, and currently they would stay in district.

Dassinger: unless there was an agreement between the two parties to go back.

Chair Larson: There's a concern about bouncing back and forth.

Dassinger: That's a valid concern. If you're uncomfortable with the transfer provisions, I urge you to take a look at the first sentence that extends the amount of time from 28 to 42 days for allowing the defendant to remove the case. The situation is passing information from the police to the city prosecutor to the defense attorney. All of that takes time and some of it is not always gathered within that 28 days. We believe that switching it to 42 days to allow more time for transfer of information may give the defense attorneys more time to look at it and to make a more reasonable decision on whether removal is in the best interest or whereas now it's an automatic removal to district court. We suspect that will provide some similar relief. I don't believe defense attorneys would object to that change.

Chair Larson: Let's consider this more and bring it up next week. There are more people I'd like to discuss this with.

Chair Larson ends the discussion on SB 2292.

2019 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

SB 2292
1/28/2019
#31590 (25:20)

☐ Subcommittee
☐ Conference Committee

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| Committee Clerk: Meghan Pegel |
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Explanation or reason for introduction of bill/resolution:

A BILL for an Act to amend and reenact section 40-18-15.1 of the North Dakota Century Code, relating to transfer of municipal court cases to district court.

Minutes:

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| No Attachments |
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Chair Larson calls the committee to order to discuss SB 2292.

Senator Myrdal: I've looked into this in detail and will be a no vote on this. I believe it overturns what we worked hard on last session and it is a turf war between district and municipal court. With all due respect to League of Cities and the Municipal courts, to me it becomes a matter of financials, so I will not be in favor of this bill.

Chair Larson: Can you give specifics about the concerns you have?

Senator Myrdal: It leaves the defendants with less opportunities. There is a reason a defendant hires a lawyer. That lawyer usually will recommend a jury trial to go to district court. When I asked the judge mostly what were the cases, he said petty theft were the minority of it because those people don't have monies and don't get lawyers. DUs generally do get a lawyer and transfer to district court. There is ample opportunity in the current process for them to get there and decide not to take the jury trial and make a deal. There are already mechanisms in the law that we changed last time. We need to look into municipal court- you don't necessarily have to be a certified judge to sit in judgement at a municipal court at times. For the sake of the defendant and the system we have, I think the way changed it to last time is better. In all my conversations with District court, Former Chairman Armstrong, and the Supreme Court, I found nobody who supported this of the people who I trust to give me input.

Chair Larson: Stephanie Dassinger from the League of Cities who was hear testifying in favor spoke with me and said she would like to retract what she said earlier about keeping the 42 hours. She found out that would be a bad thing to do. If we can't keep all parts of the bill, it's better to keep none of it.

Vice Chairman Dwyer: I'll present the other side on this. If I was a defense attorney, I would not want to change the law because you can get it moved it up to district court and the only way it comes back, is if the attorneys agree to a remand. So it stays in district court and if I was a defense attorney, I would want that because they are very busy and the likelihood of getting a plea agreement that the approves is so much better. I know I'm not going to do a jury trial, but I want to get the best deal for my client, and I'm mostly speaking of DUIs, so I'm not going to agree to a remand. What is proposed in this bill is that it gets remanded to municipal court if the defendant waives a jury trial, if there's a plea agreement and the only way it stays up is if the parties agree that it stays up, so it's just the opposite. If the municipal court rejects the please agreement- let's say it's a DUI and the city is trying to crackdown on DUIs and so they've entered into a plea agreement for a \$50 fine, and the municipal court rejects it, then it goes back up to district court under this proposal. The district court can only retain jurisdiction if the parties agree. I placed a call to Mark but I was unable to reach him. If I was a defense attorney, I would prefer what we have because I would have a much better chance for getting a better deal for my client. We're not going to have a jury trial no matter what, and they've confirmed that by the fact that of the 200 or 500 or whatever it is, 2 or 3 have jury trials because it's too expensive among other factors. This bill says it gets remanded to municipal court if the defendant waives the jury trial or if there's a plea agreement, and the only way it stays up is if the attorneys agree. If the parties don't agree, it goes back down.

(7:33) Senator Luick: When this began, the assistant attorney from Whapeton brought this to me and the judge from the municipal court of Fargo then a few others had a little bit of input in it as well as League of Cities. What we are seeing in Whapeton is that they are doing what Vice Chairman Dwyer is explaining- they are taking their lower case court dealings and moving them to district court and asking for the jury trial. With the jury trial, they don't have any choice; it has to be done that way. Then what happens is that the municipalities go through the process of getting a jury trial set up, all the expenses and the time to do this, and when that is all completed, the defense attorney will come in and say "we're going to plead guilty for this crime". I'm told that now the municipality has the costs of getting all of this jury trial set up and then it goes away. The cities are still hung with the cost of getting that set up even though it didn't happen. That's how the phrase "judge shopping" comes about. These defense attorneys understand the differences between the judges. It gets into a very expensive situation for these municipalities to get everything in order and then it goes away. That is their biggest concern- they are being straddled with a bunch of expenses that are not necessary. It's not whether a court, whether district or municipal, determines what the charges and violations are, it is the process that everybody is going through and the cost coming back to municipalities. It's not all about money, it's about the costs of setting up the process of the adjudication. The fines don't cover near what the costs of setting all of this up is. It's an expensive situation for the municipalities to have it as it is today. The Whapeton assistant attorney is requesting to wait two years so they can get statistics because they want to find out if it's only Whapeton to Fargo that has this problem or if there are other jurisdictions around the state that are seeing this same thing. The information is not clear to all of us.

Chair Larson: and what the actual costs instead of anecdotal.

Senator Luick: They are getting expensive because there's a lot of time in getting these juries lined up; there were several hundred cases in the last 2 years.

Senator Myrdal: I'm more concerned about the constitutional and procedural protections of the defendant. To Vice Chairman Dwyer- I want my hired defense attorney to find me the best deal; that's part of our system, innocent until proven guilty. Also with municipal court, you have no recourse afterwards. There's no appellate chances for the defendant at all. Municipal court doesn't have record keeping like there is in district courts. My concern is not about the cost of the cities or the municipality. If they get the 500 cases back or whatever the testimony claimed, they is a lot of money. I talked to a lot of people who paid fines up to \$18-2,500; it's a huge amount of money to the cities. I'm not accusing them of that, but it's just the fact that has been brought up. I don't see any way I can vote on this bill when I feel like the defendant is worthy of due process in the best court of their choice. That's why we have defense attorneys. We have rights as individuals and as defendants. There is a thought that we need to review the whole procedures of municipal court. There's more back and forth paperwork now with this new suggestion than there was before that there's actually two different numbers on that case and can look like two different convictions. That's how poor the communication and record keeping is. I can't see how we can prefer an entity financially over constituents' individual rights to the best defense and court proceedings.

(14:46) Vice Chairman Dwyer: Cost isn't an issue for me. If someone is charged, they have a constitutional right to a jury trial. If they ask for that right, it gets moved up to district court. If there is a trial, as Senator Myrdal said, there's good documentation with a court reporter and a record. However, if that defendant for some reason waives his constitutional right, then under our current law, that case still stays with district court. If he waives the jury trial what's left is for them to enter into a plea agreement to dispose of the case, so there's really not a critical need for a court reporter or documentation. All they're doing is negotiating a plea agreement but it has to stay in district court unless these parties agree, which if I was a defense attorney I'd never agree because I know I'm going to get a better deal. Under the proposal if there's a plea agreement, it goes back to the municipal court. This is only when the defendant has waived a jury trial, his or her constitutional right. If they waive that right, then under this proposal it goes back to municipal court to be disposed of as both sides agree. The city has to provide both the prosecuting and defense attorney if it's an indigent situation. Once that defendant has waived, it makes sense to take it back to take it back to municipal court.

Chair Larson: Why?

Vice Chairman Dwyer: The district court dockets are packed; there's no longer going to be a jury trial. Now it's just a matter for the prosecuting and defense attorney to sit down and negotiate. Also the cost. Under the proposal, the parties can agree that the jurisdiction remains with the district court if they want to.

Chair Larson: They have to agree for it to remain district and now they have to agree to send it back to municipal?

Vice Chairman Dwyer: Correct. That's the difference.

Vice Chairman Dwyer: The constitutionality of the person's right is protected because he has a right to have it in district court, so long as he doesn't waive it. I asked the judge when the city would reject a plea. Well, if the plea was a one-day suspended sentence- no problem. But the prosecuting and defense attorney won't do that. They'll make him pay a fine, lose his

license for a week, do community service or something like that. That's just an answer to the constitutionality of the defendant's right to a jury trial.

Chair Larson: Your opinion is to pass the bill?

Vice Chairman Dwyer: I wanted to talk to Mark Friesse about this.

(20:14) Senator Luick: The reasons why they would bring it back to municipal court is that there's always a plea deal after that jury is waived. That plea deal is always going to be a lesser infraction from what it came up there to be. I agree with Senator Myrdal; we want to make sure that we have that opportunity as citizens to do whatever we can to get the best representation that we can, but I feel what we're doing is providing loopholes for our legal staffs for judge shopping or manipulating the system that we the legislature put in place. I think we created a loophole in 2017 that wasn't anticipated. We should spend more time to think about this.

Senator Bakke: Let's say I am caught drunk driving- they send me to municipal court, I say I want a jury trial so they send me to district court. When we get to district court, I change my mind because I get a better deal and according to the current law, I would get 28 days to change my mind to go back to municipal. This bill would say that I want a jury trial, I go up there, I decide to do a plea agreement so then I go back to municipal court, then can I leave municipal court and go back to district court? I'm confused about this process, are we making it more complicated?

Senator Myrdal: The big concern is line 17 "upon remand to the municipal court". So Senator Bakke you're back in municipal. "If the municipal court rejects the terms of a plea that provided for a conditional waiver of a jury trial"- that's the key provision that I'm concerned about. So you're with your lawyer, your lawyer says to go to district court, you decide then, you have a good plea so you don't do jury trial, now potentially with this new language you go back to municipal court and they don't agree with it. Now you have to go back to a jury trial is what I read there in line 17-19 of the bill. The paper trail here is so enormous. What does that do for the defendant? It only does something for the municipal court systems. I recall going through this last time when we changed it to what it currently is, and I don't see a loophole, but may stand corrected if we get more information.

Chair Larson: We're dealing with complicated issues, so we will do research and come back to take action later.

Chair Larson ends the discussion on SB 2292.

2019 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

SB 2292
1/29/2019
#31628 (04:40)

☐ Subcommittee
☐ Conference Committee

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| Committee Clerk: Meghan Pegel |
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Explanation or reason for introduction of bill/resolution:

A BILL for an Act to amend and reenact section 40-18-15.1 of the North Dakota Century Code, relating to transfer of municipal court cases to district court.

Minutes:

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| 1 Attachment |
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Chair Larson calls the committee to order to discuss SB 2292.

Chair Larson: We just went through how the diagram looks if we're trying to figure out which courts will be used under which circumstances. **(see attachment #1)**

Senator Myrdal: I think the newly proposed law does more judge shopping and that's what my impression is when I talk to people in the Supreme Court too.

Senator Luick: What is the waiver or conditional waiver?

Chair Larson: They can waive their jury hearing or they can say "I'll waive it for now".

Vice Chairman Dwyer: I asked when the judge was here. He told me conditional waiver is a plea agreement.

Chair Larson: It's the waiver of a jury trial.

Vice Chairman Dwyer: It's saying "here's our plea agreement, but we're having a conditional waiver because if the court doesn't accept it, we're going to go back to district court."

Stephanie Dassinger, ND League of Cities

Dassinger: On conditional waiver, I would say that's part of the plea agreement. Usually your plea agreement has the terms you're agreeing to then you'll say "if the judge accepts this, then everything is good; if he or she doesn't, we still want to have a jury trial". It's conditional if the judge doesn't accept it. You've spent a lot of time with this bill and I really appreciate this. It's a complicating issue. From our perspective, there's more work that needs to be done.

Senator Bakke: I want to be fair to the defendant but not bog down the courts. If every defendant is taking the full 42 days, that's a long time to deal with a case. I don't know what kind of backlog would come from this.

Senator Myrdal: I commend the League of Cities. This is what an open debate of issues do and that's why we are honored in North Dakota to have these open, rigorous debates.

Senator Myrdal: Moved a Do Not Pass

Senator Osland: Seconds.

A Roll Call Vote Was Taken: 6 Yeas, 0 Nays, 0 Absent. Motion carries.

Senator Luick will carry the bill.

**2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2292**

Senate Judiciary Committee

☐ Subcommittee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☐ Do Pass ☒ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar
Other Actions: ☐ Reconsider ☐ _____

Motion Made By Senator Myrdal Seconded By Senator Osland

| Senators | Yes | No | Senators | Yes | No |
|------------------|-----|----|---------------|-----|----|
| Chair Larson | X | | Senator Bakke | X | |
| Vice Chair Dwyer | X | | | | |
| Senator Luick | X | | | | |
| Senator Myrdal | X | | | | |
| Senator Osland | X | | | | |
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Total (Yes) 6 No 0

Absent 0

Floor Assignment Senator Luick

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2292: Judiciary Committee (Sen. D. Larson, Chairman) recommends **DO NOT PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2292 was placed on the Eleventh order on the calendar.

2019 TESTIMONY

SB 2292

1
SB 2292
1/22

**CITY OF FARGO
MUNICIPAL COURT**

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page 1

January 22, 2019

The Honorable Diane Larson
Chairperson
North Dakota Senate Judiciary Committee
State Capitol
600 East Boulevard
Bismarck, ND 58505-0360

BY: E-MAIL TO dklarson@nd.gov and hand delivered

RE: Testimony of Stephen Dawson, Fargo Municipal Judge
in support of SB 2292

Dear Senator Larson,

I testify today in support of S.B. 2292 which would amend North Dakota Century Code 40-18.15.1, entitled, "Transfer to district court - Expenses of prosecution - Division of funds and expenses between city, county, and state".

In North Dakota, Municipal Courts do not preside over jury trials. Therefore, when a Defendant wishes to exercise his or her right to a jury trial, his/her case is transferred to the District Court for that purpose. N.D.C.C. 40-18-15.1, first passed in 1987, establishes the procedure for that transfer.

In 2011, this statute was amended in order to dissuade the practice of judge shopping. Judge shopping is an attempt by one party in a case to move that case from one judge to another for the sole purpose of finding a judge more likely to render a decision more favorable to that party. It is a practice strongly discouraged and, in Federal Courts and other jurisdictions, sanctionable as unethical, as it is seen as impeding on the integrity of the court by allowing one party to unduly influence the court's docket. Prior to the 2011 amendment, a defendant could transfer a case to the District Court under the guise of seeking a jury trial and, upon arrival at the District Court, waive his right to a jury trial and proceed to final disposition in hopes of finding a judge more favorable to the Defendant.

The 2011 amendment added the following, "After a transfer to district court, if the defendant waives a jury trial, the matter must be remanded to the municipal court unless the defendant and the prosecuting attorney agree that jurisdiction for the matter should

#1
SB 2292 1/22

Letter to the Honorable Diane Larson

January 22, 2019

RE: Testimony of Stephen Dawson, Fargo Municipal Judge, in support of SB 2292

page 2

remain with the district court. If the defendant does not waive a jury trial, the district court shall retain jurisdiction for sentencing."

In the five years leading up to the 2011 law change, the Fargo Municipal Court averaged in excess of 560 cases transferred to the District Court each year, few of which were actually tried to a jury. Following the 2011 changes made to NDCC 40-18-15.1, the number of transfer cases from the Fargo Municipal Court to the District Court dropped significantly from a high of 669 in 2007 to 207 in 2015. Of the 207 transferred in 2015, only 59 remained in District Court through final disposition. The remaining 148 cases were returned to Fargo Municipal Court for final disposition. Also interesting to note, according to the Fargo City Prosecutor's Office, of the cases transferred to District Court in 2016, only three were actually tried to a jury.

In 2017, the law was again changed effectively reversing the, the unless the defendant and the prosecuting attorney agree language to if the defendant and prosecuting attorney agree... [to a remand]. This new language, designed to ensure that a Defendant would not lose an avenue to pursue his right to a jury trial in the unlikely event that a negotiated plea agreement was rejected upon remand to the Municipal Court, once again allowed for the undesirable practice of judge shopping by allowing a Defendant to insist that his/her case remain at the District Court. Additionally, this current procedure not only unintentionally facilitates the undesirable practice of judge-shopping but burdens the District Courts by adding to its docket transfer cases which are never intended to be tried to a jury.

The 2011 amendment was aimed at curbing judge shopping and it was very effective in doing so however. it also had the unintended consequences of impeding a Defendant's right to a jury trial in the unlikely event of a negotiated plea agreement being rejected upon remand to the Municipal Court. The 2017 amendment, aimed at correcting this loop hole, also had the unintended consequences of reversing the curb on judge shopping and effectively codified judge shopping as evidenced by the sharp increase in cases since transferred under the guise of seeking a jury trial only to be pleaded at the District Court, whether pursuant to a plea agreement or an open plea. In 2018, over 500 Municipal Court cases in the East Central Judicial District transferred to the District Court with nearly all of them remaining in the District Court through final disposition. Of those Fargo Municipal Court cases transferred to District Court for a jury trial in 2018, only two, less than one half of one percent, have actually been tried to a jury.

Prior to the 2017 change and after the 2011 amendment, about 200 cases each year were transferred from the Fargo Municipal Court to the District Court with nearly all of them returning to the Municipal Court for final disposition. Many of these cases were transferred by defense attorneys who needed additional time to review discovery and who made the transfer request in order to preserve the jury trial option until after a full discovery review could be had. By expanding the window within which to request a jury trial, it is anticipated fewer cases will be transferred for this reason.

S.B. 2292 returns this statute to the pre-2017 regulation with the added features of: ensuring that a Defendant always retains his/her right to a jury trial in the unlikely event a Municipal Court Judge rejects a plea agreement. It also increases the window, from 28 days to 42 days, within which a Defendant can elect to transfer a case to the District Court to allow for a more practical review of discovery material before having to elect transferring.

As previously noted, judge shopping is improper and discouraged. In Walker v. Schneider, 477 N.W.2d 167 (N.D. 1991), a case in which the prosecution was alleged to have committed judge shopping, the North Dakota Supreme Court, interpreting NDR CrimP 5.1, favorably cited an Idaho decision (Stockwell v. State, 98 Idaho 797, 573 P.2d 116 (1977)) [refiling a criminal complaint for purposes of harassment, delay, or forum shopping may violate due process] and a Michigan decision (People v. Walls, 117 Mich.App. 691, 324 N.W.2d 136 (1982) [refiling criminal complaint violated due process where prosecutor's conduct constituted judge shopping and harassment as opposed to ineptness]) both of which were critical of judge shopping and inferred that judge shopping may violate due process.

In Farm Credit Bank of St. Paul v. Brakke, 512 N.W.2d 718, 722 (N.D. 1994) the North Dakota Supreme Court, when asked to disqualify a trial judge, states, "Of principal importance is whether it appears the litigant is using the claim as a vehicle for judge shopping, *or for some other improper agenda.*" (emphasis added)

In Thompson v. Peterson, 546 N.W.2d 856, 860 (N.D. 1996) the Court made a similarly disparaging reference to judge shopping by saying, "The selection of the judge sought by Thompson, and the sweeping disqualification of the judges in the proper judicial district would contravene the correct procedures for changing a judge detailed in NDCC 29-15-21, and would permit judge-shopping in its worst sense."

Letter to the Honorable Diane Larson

RE: Testimony of Stephen Dawson, Fargo Municipal Judge, in support of SB 2292

January 22, 2019

page 4

#1
SB 2292
1/22

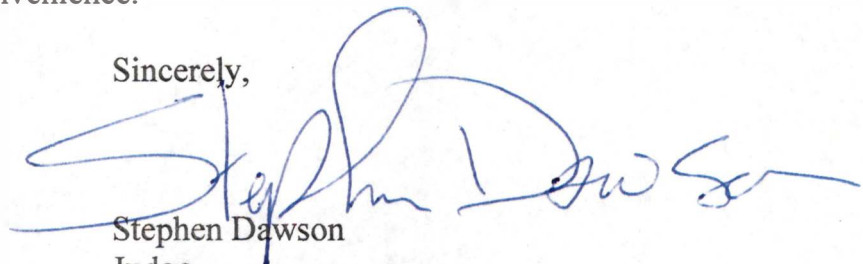
In Vaqueria Tres Monjitas, Inc. V. Rivera Cubano, 341 F. Supp. 2d 69 (2004), the District Court, citing Bellsouth Corp., 334 F. 3d 941, 951 (11th Cir. 2003), fined each of Plaintiff's attorneys \$1,000.00 after finding they had committed judge shopping.

There may be a concern that this amendment might be seen as being motivated by municipalities because of the financial impact. That is, the added financial burden of having to provide for additional prosecution services for so many cases now being transferred to the District Court and what may be seen as a loss of revenue to the Municipal Court. I can assure you that, in my experience, this has never been the focus of any discussion or concerns regarding this proposal.

I believe that matters involving alleged violation of municipal ordinances are, by design, best dealt with in the Municipal Court system. That is to say, the clerks' offices, prosecutors' offices, public defense bar and others involved in the Municipal Court System operate judiciously and efficiently in the somewhat less formal, perhaps more approachable and certainly, as a court of non-record, more cost effective system while still jealously guarding every protection to which an accused is guaranteed. The Municipal Court is the face of the judiciary for a large segment of those called to appear before a court. As such, it is an important and key component of our justice system. It is my position S.B. 292 allows the Municipal Courts to better serve our communities and provides greater efficiency throughout the entire court system by curbing the number of frivolous transfers along with the associated costs and added workload in the District Courts and helps maintain the integrity of the entire judicial system by curbing judge shopping.

Thank you for your attention to our proposed bill. If you have any questions, please feel free to contact me at your convenience.

Sincerely,


Stephen Dawson
Judge,
Fargo Municipal Court

cc: Committee members

STEVEN J. LIES
JOHN BULLIS
BRITTANY L. HATTING
WILL BUDKE

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#2
SB 2292 1/22
page 1
FROM THE DESK OF
BRITTANY L. HATTING
bhatting@liesandbullis.com

January 21, 2019

To: Members of the Senate Judiciary Committee
From: Brittany L. Hatting, Wahpeton Assistant City Attorney

RE: Recommend DO PASS on Senate Bill 2292, relating amending N.D.C.C. 40-18-15.1 relating to the transfer of municipal cases to district court

Good Morning, Madam Chairwoman, Members of the Committee:

My name is Brittany Hatting and I currently have the honor of serving as the Assistant City Attorney for the City of Wahpeton, as well as a number of small cities in the southeastern part of the state. As part of my private practice, I also practice criminal defense. I am writing to you to provide testimony on the proposed amendments to N.D.C.C. 40-18-15.1 relating to the transfer of municipal criminal matters into the district court for a jury trial. I am joined in this letter by Wahpeton City Attorney Steven J. Lies and Wahpeton Assistant City Attorney Will Budke.

While the current language of N.D.C.C. 40-18-15.1 succeeds in protecting the defendant's right to a jury trial, it has also had some unintended side effects. The current statutory construction imposes a duty upon district courts to manage municipal cases even when the case will not be tried by a jury. Municipal transfer cases take up valuable time on the district court dockets, taking time away from other matters, and take up staff time at the district court level. Having to keep matters in district court has increased the costs of prosecution to our municipality, as matters tend to be more formal and time consuming in district court. Looking back at our records, since the beginning of 2017, there have been 14 jury trials demanded and only 2 have actually been tried by a jury. That may not seem like a lot to some, but it has been a significant increase for the City and has by extension increased the amount of attorney fees and costs incurred by the City.

But the most concerning part is that we are also seeing is that the current statute has unintentionally encouraged judge-shopping or forum-shopping. In essence, a defendant requests a transfer of a case from the municipal court under the auspices of requesting a jury trial but is in actuality seeking to find a court which the defendant believes will be more favorable towards the defendant on sentencing than the municipal court, sometimes even demanding a change of judge at the district court level as well. I do want to note that the majority of defense attorneys we have the occasion to work with do not engage in forum or judge shopping. It is the few that are causing this issue to come up, but it happens all too often. It could also be said that the prosecution could prevent the remand of a case to the municipal court if the prosecution feels a more agreeable sentence from the city's perspective could be obtained in the district court.

A defendant's right to a jury trial is and should be inviolate. However, if a jury trial is not going to happen, municipal cases should be dealt with in municipal court. The proposed amendments

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contained in Senate Bill 2292 provide that in the event that the defendant either desires to enter an open plea or the parties enter into a plea agreement (i.e. a jury trial is not going to happen), the matter will be remanded to the municipal court unless both parties agree to stay in the district court. An additional amendment clarifies that in the event that a plea agreement is rejected by the municipal court, the defendant shall retain his right to have a jury trial in district court. This protects the defendant in the rare occasion that a municipal judge rejects a plea agreement and prevents both parties from engaging in forum or judge shopping. The amendments proposed also allow the defendant to have an extended period to analyze whether or not they would like to demand a jury trial. At times defendants may request a jury trial simply to delay proceedings since jury trials in district court are scheduled further out than court trials in municipal court. It is hoped that this will allow defendants and their attorneys to have a better opportunity to analyze the case prior to be forced to demand a jury trial or waive that right.

Thank you to Senator Luick, Senator Dotzenrod, and Senator Lee for introducing SB 2292, and thank you, Madam Chairwoman, for the opportunity to testify this morning. I appreciate the consideration of the committee and request a DO PASS on SB 2292.

Sincerely,


Brittany L. Hatting

#1
SB 2292
1/23

From: Mark A Frieze <mfrieze@vogellaw.com>

Date: January 23, 2019 at 7:52:45 AM CST

To: "Larson, Diane K." <dklarson@nd.gov>

Subject: SB2292

Dear Senator Larson,

I am a private practice attorney in Fargo, and regularly represent clients in municipal courts throughout the eastern half of North Dakota. Since 2007, I have also instructed an undergraduate course at NDSU which evaluates American courts. Although I agree with and appreciate the proposal to enlarge the amount of time to transfer municipal cases to district court, I write in opposition to SB2292, because it would remove procedural protections for citizens charged in city courts. Modifications to this statute have been made in virtually every session over the past 10 years. As both a testifying citizen and later as a lawmaker, Congressman Kelly Armstrong did an enormous amount of information gathering and analysis to assist in the implementation of the current statute. I urge your Committee to reach out to him.

Aside from elimination of the arbitrary 28-day transfer provision (which should be removed altogether), I would ask that your Committee recommend no other modifications to the existing statute.

Municipal courts are not courts of record. Accordingly, there are no transcripts of proceedings, nor is there development of a record for appellate review. Municipalities of less than 5,000 can appoint non-law trained judges. Presiding over the majority of ND municipal courts are judges who have never been to law school, never passed a bar examination, and have never taken a professional ethics examination. Municipal courts cannot conduct post-conviction relief proceedings (so illegal sentences in municipal courts cannot be challenged except by initial appeal to the district court). Many municipal courts fail to follow rules of court, rules of procedure, and many are typified by unpredictability and inconsistency. As my student learn, most states which undergo court reform are abolishing municipal courts.

There are many municipal courts which operate well—consistently and predictably. I suspect this bill is not being advanced by those courts.

Municipal and district court clerks have expressed frustration about cases bouncing back and forth between district and municipal courts. In most instances, once transferred to district court, returning the case to municipal court simply creates additional expense and inconvenience for the parties and the court clerks. I have personally witnessed direct pressures on municipal prosecutors when municipal judges have inserted themselves into the prosecution

#1
SB 2292
1/23

of cases, urging prosecutors to remand. If SB2292 passes in its present form, that highly inappropriate behavior is likely to recur.

Many municipal cases are transferred for development of a record (for example at a suppression motion). A defendant may conditionally plead guilty, seeking review by the supreme court without a trial on the merits. I fear this bill will require parties to try cases in district court when the cases would otherwise be resolved by a conditional plea of guilty. Unfortunately, there are instances where litigants would prefer to spend the resources to try cases to a jury knowing a conviction is likely rather than permitting their cases to be returned to a court where they will be treated unfairly.

I am happy to answer any questions you might have, and I appreciate your willingness to review my comments. Please feel free to share my comments with your fellow members of the Senate Judiciary Committee, bill sponsors, or others.

Respectfully,

Mark A. Frieese



218 NP Avenue

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Current Law

Municipal Court

Did the defendant request a jury trial w/in 28 days of arraignment?

If yes, the case transfers to district court.



District Court

Did the defendant waive their right to a jury trial?

If yes, continue below.

If no, case remains in district court.



Do both the defendant and prosecutor agree to transfer to municipal court?

If yes, the case goes to municipal court.

If no, the case remains in district court.

Proposed Law

