THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

State of North Dakota,	State of North Dakota,
Plaintiff-Appellee	Plaintiff-Appellee
v.	v.
Melissa Sue Olson,	Bryan James Bienek,
Defendant-Appellant	Defendant-Appellant

Supreme Court No. 20060182 Grand Forks Co. No. 18-05-K-04259	Supreme Court No. 20060183 Grand Forks Co. No. 18-05-K-04260

APPEAL FROM THE DISTRICT COURT,
GRAND FORKS COUNTY, NORTH DAKOTA
NORTHEAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE KAREN BRAATEN, PRESIDING

REPLY BRIEF OF APPELLANTS

AFFIDAVIT OF FILING AND SERVICE BY E-MAIL

Kelly R. Jones, being first duly sworn, deposes and says that on the 9th day of November, 2006, she filed by email the attached REPLY BRIEF OF APPELLANTS, TABLE OF CONTENTS, TABLE OF AUTHORITIES and COVER PAGE according to the N.D. Sup. Ct. Admin. Order 14 upon:

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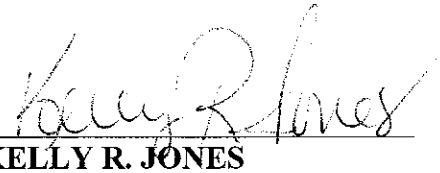
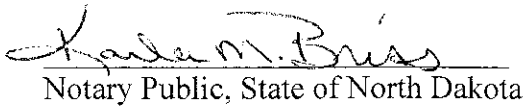


KELLY R. JONES

SUBSCRIBED AND SWORN to before me this 9th day of November, 2006.

KARLA M. BRISS
NOTARY PUBLIC
STATE OF NORTH DAKOTA
My Commission Expires: Jan. 31, 2012



Notary Public, State of North Dakota

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LAW AND ARGUMENT

I. The evidence obtained by the arresting officer was the result of an unlawful stop and seizure which violated the defendant's right to be free from unreasonable searches and seizures under the North Dakota Constitution and the Fourth Amendment of the United States Constitution.

It is true that North Dakota law states that a police officer approaching members of the general population does not seize them, within the meaning of the Fourth Amendment, if the officer "inquires of the [person] in a conversational manner, does not order the person to do something, and does not demand a response." State v. Langseth, 492 N.W.2d 298, 300 (N.D. 1992). This concept is often called the "community caretaker" exception for acceptable police activity under the Fourth Amendment. Id. However, if the encounter does not meet these strict requirements, the officer must have an articulable and reasonable suspicion that a law has been or is being violated before stopping an individual. State v. Sarhegyi, 492 N.W.2d 284 (N.D. 1992). A person is subsequently seized under the Fourth Amendment if, in view of all the surrounding circumstances, a reasonable person would have believed he or she was not free to leave. State v. Guscette, 2004 ND 71, ¶ 8, 678 N.W.2d 126.

The State argues that the stop was under the community caretaker function and that the officers had reasonable and articulable suspicion to initiate a seizure after identifying the individuals and asking if they were okay. (Appellee Brief, ¶ 9). The State supports its argument by analogizing this case to City of Grand Forks v. Zejdlik. 551 N.W.2d 772 (N.D. 1996). Zejdlik, however, is not determinative to the case at hand.

In Zejdlik, the officer approached a stopped vehicle and saw the driver slumped over the wheel. Zejdlik, at 773. The officer awoke the driver. Id. at 773. The first time

the officer ordered the driver to do something was when he asked the driver to exit the vehicle. Id. The court, however, ruled that the officer at this point already had reasonable suspicion that a crime had been committed. Id. at 775. According to the testimony in our case, Officer Lund told Mr. Bienek and Ms. Olson to stop. Mr. Bienek and Ms. Olson were seized at the moment the officer ordered them to stop, yet at that time the Officer did not have any reasonable suspicion of criminal behavior. A person is seized within the meaning of the Fourth Amendment if, in view of all the surrounding circumstances, a reasonable person would have believed he or she was not free to leave. Guscette, at ¶ 8. Surely neither Mr. Bienek nor Ms. Olson felt they could ignore a police officer's command to stop. Had they ignored this command, Mr. Bienek and Ms. Olson possibly could have been in violation of N.D. Cent. Code § 12.1-08-02. See Sarhegyi, at 286 (To choose to ignore a law enforcement official's request to stop is a crime under section 12.1-08-02, NDCC).

It is acknowledged that it is well settled law in North Dakota that it is not a Fourth Amendment seizure for a police officer to approach and talk with a person in a public place. Lapp v. North Dakota Dep't of Transp., 2001 ND 140, ¶ 8, 632 N.W.2d 419. Officer Lund, however, did not simply approach the couple. He used his authority as a police officer and ordered Mr. Bienek and Ms. Olson to stop and talk with him. (Tr. p. 9. l. 3). North Dakota case law has been clear in its requirements for a community caretaker encounter: a police officer's approaching members of the public is not a seizure if the officer "inquires of the person in a conversational manner, does not order the person to do something, and does not demand a response." Langseth, 492 N.W. at 300. Here, Officer Lund did not approach a couple who was stopped on the sidewalk. (Tr. p. 9, l. 3). Olson

and Bienek were walking on University Avenue. According to Olson's testimony, three times Officer Lund asked her if she was ok and three times she stated that she was fine. Tr. P.____ Regardless of this fact, Officer Lund continued his stop and investigation. Officer Lund continued to question Mr. Bienek and Ms. Olson and expected them to respond. In this case, Officer Lund took the encounter out the realm of the community caretaker function. Since we are no longer dealing with the community caretaker function, the officer needed reasonable suspicion that a crime was committed before continuing the investigation and the seizure. Sarhegyi, at 286. Officer Lund did not have the reasonable suspicion needed to initiate this stop. Therefore, the illegal seizure of the couple violated the North Dakota Constitutional and United States Fourth Amendment protection against unreasonable seizures.

CONCLUSION

The trial court erred when it determined that constitutional protection did not occur until Mr. Bienek and Ms. Olson were placed in the squad car. The stop was out of community caretaker function when Officer Lund ordered the couple to stop. Because the stop and detention of Mr. Bienek and Ms. Olson was unlawful, their right to be free from unreasonable searches and seizures under the United States Constitution and the North Dakota State Constitution were violated.

For the above stated reasons, the defendants, Bryan James Bienek and Melissa Sue Olson, respectfully request that the North Dakota Supreme Court reverse the trial court's denial of the suppression motions and reverse their convictions of minor in consumption dated March 21, 2006.

Dated this 9th day of November, 2006.

_____/s/_____

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of November, 2006, a copy of the foregoing Brief for Appellant was electronically filed with the North Dakota Supreme Court Administrator according to N.D. Sup. Admin. Order 14 at:

supclerkofcourt@ndcourts.com

I hereby certify that on the 9th day of November, 2006, a copy of the foregoing Brief for Appellee was served electronically upon Faye Jasmer, Grand Forks County State's Attorney according to N.D. Sup. Ct. Admin. Order 14 at:

Faye.Jasmer@gfcounty.com