

**ORIGINAL**

20070271

**NORTH DAKOTA SUPREME COURT  
SUPREME COURT No. 20070271**

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

**RICHARD ARDELL HEYEN**

DEC 27 2007

PETITIONER, APPELLANT

STATE OF NORTH DAKOTA

VS

**STATE OF NORTH DAKOTA**

RESPONDANT APPELLEE

**POST CONVICTION RELIEF**

**APPEAL FROM ORDER DENYING APPLICATION FOR POST CONVICTION**

**BRIEF OF APPELLANT**

**RICHARD ARDELL HEYEN  
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State v. Heitzmann, 2001 ND 136. ¶ 15, 632 N.W.2d 1 (citing Illinois v. Wardlow, 528 U.S. 119, 124 (2000)).

# ARGUMENT

**Appellant contends that the trial court erred in its decision to deny the post conviction on the grounds that officer Stangers recollection as recorded in the video was much closer in time to the testimony he provided at the evidentiary hearing, so it is more reliable.**

For the following reasons I will show that officer Stangers testimony is far from creditable and that is actually on the verge of perjury on his actions.

**N.D.C.C. 12.1-11-01, Perjury, provides the following:**

“1. a person is guilty of perjury a class c felony, if, in an official proceeding he makes a false statement under oath or a equivalent affirmation or swears of affirms the truth of a false statement previously made when the statement is material and he does not believe it to be true.

“2. Commission of perjury need not be proved by any particular number of witness or by documentary or other types of evidence.

“3. Where in the course of one or more official proceedings, the defendant made a statement under oath or equivalent affirmation inconsistent with another statement made by him under oath or equivalent affirmation the the degree that one of them is necessarily false, both having them been made within the period of the statute of limitations, the prosecution may set fourth the statements in a single count alleging in the alternative that one or the other was false and not believed by the defendant to be true. Proof that the defendant made such statements shall constitute a prima facie case that one or the there of the statements was false, but in the absence of sufficient proof of which statement was false, the defendant may

be convicted under this section only is each of such statements was material to the official proceeding in which it was made.

First of all officer stenger has given three (3) counts of what he swears happened that night one is the tape of the whole incident. The other is the affidavit of probable cause and the other is his sworn testimony in front of the honorable judge Herman, as an officer of the law I would hope that officer Stanger would be held to a slightly higher plateau as to his sworn testimonies where as appellants testimony does not differ a whole lot from the record. Appellant will admit that the tape has couple areas that the defendant was out of sight of the cameras view. Never the less if the person is watching the tape it shows that appellant was only traveling a short distance in front of the squad car number 79 and its cameras where running and you can see the squad car does not go over 25 miles per hour and how and appellants car is only feet in front of car 79, you can also see that appellants brake lights do come on before he gets to the intersection that appellant has been found guilty of running the stop sign at.

Next officer Stanger testifies under oath that he saw appellant's car approach the intersection come to a screeching halt in the middle of the intersection. If this were true the cameras recording device on squad car 79 should have picked up some noise or sound, which it did not. He then testifies that he observed the appellant after stopping only a second continue left going south which is another thing that the tape and squad car 79 can dispute along with appellant.

Appellant's car can be seen not taking the turn immediately but in actual time from squad car 79 the appellants takes six or more seconds to make the turn to go south.

Next officer Stanger contends that appellant did not signal his turn where appellant asserts that he used his arm to manually signal which is also collaborated by officer Stanger himself, when they are riding back to the cass-

county jail. Officer Stanger says, “so you used the manual signal, that’s what I saw” which is also on the tape from car 79 and is a per of the record in the order from Judge Herman denying appellants post conviction.

Under Brady, the city of Fargo has an affirmative duty to disclose to the defense any “exculpatory”, helpful, or favorable information. The base premise of Brady is that the government must disclose any evidence that tends to be favorable including information that the city of Fargo’s witness is not reliable.

The Brady precepts are not new. The United States Supreme Court has earlier ruled in napue v. Illinois, 360 U.S. 264 (1959):

Some more accounts of officer Stagners unreliable assertions.

1. He first tells me I pulled out into the middle of the tee. In his sworn affidavit, he says I overshot the intersection.
2. then under oath he says I screeched to a halt and ran the stop sign
3. He says in court my car was blue. The affidavit states it is white.
4. in court he says there was lots of traffic. The tape shows maybe one or two cars.
5. He says in affidavit that I did not signal in the car on tape he says I saw you signal with arm.
6. Then in court he states that he never once saw my arm out the window. Also the states attorney knew that to be false because he tried to get him to say that he at least saw me put my arm out but he would not say it.
7. He also in his affidavit says that he was turning around but on the tape, he is just sitting there. Appellant has no proof but makes the assumption that while officer stanger was behind appellants vehicle he called in his plate number and when it came back convicted drug dealer he made up the stop sign violation to see what he could determine after the stop. Car 79 dispatch records could prove or disapprove this assertion.

**B. Appellant Forth Amendment Rights against illegal search and seizure were violated due to the illegal stop that was administered by officer Stanger.**

The stop was unwarranted because appellant did make a full and complete stop at the stop sign and officer Stanger was abusing his authority when he chased down appellant and pulled him over for a traffic violation that appellant did not commit.

The exclusionary rule requires that evidence obtained from the search be suppressed.

The exclusionary rule, announced by the United States Supreme Court in Mapp v. Ohio, 367 U.S. 643 (1961), requires the suppression of any evidence derived as a result of a violation of the Fourth Amendment's protections against unreasonable searches and seizures. Id.; see also Wong Sun v. United States, 371 U.S. 471, 484 (1963); State v. Handtmann, 437 N.W.2d 830 (N.D. 1989)). Evidence obtained as a result of the illegal search of Mr. Fields's vehicle should be suppressed whether it is direct or indirect products of the search. The metaphor created by the Supreme Court to describe this evidence is "the fruit of the poisonous tree." State v. Wahl, 450 N.W.2d 710, 714 (N.D. 1990) (citing to Nardone v. United States, 308 U.S. 338 (1939)).

A pretextual stop occurs when the police use a legal justification, like a traffic stop, in order to investigate a suspicion that the driver is engaged in illegal drug activity. United States v. Guzman, 864 F.2d 1512, 1515 (10th Cir. N.M. 1988).

[¶11] This Court has recognized that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." State v. Koskela, 329 N.W.2d 587, 589 (N.D. 1983) (quoting United States v. Mendenhall, 446 U.S.

[¶13] Whether the facts support a reasonable and articulable suspicion is a question of law, fully reviewable on appeal. See Ovind, 1998 ND 69, ¶6, 575 N.W.2d 901. This Court considers the totality of the circumstances when deciding whether reasonable

suspicion exists. See id. at ¶ 8. "Although we have recognized that the concept of reasonable suspicion is not readily reduced to a neat set of legal rules, it does require more than a 'mere hunch.'" State v. Kenner, 1997 ND 1, ¶ 8, 559 N.W.2d 538 (quoting Salter v. North Dakota Dep't of Transp., 505 N.W.2d 111, 114 (N.D. 1993)). To determine whether reasonable suspicion exists, we apply an objective standard, taking into account the inferences and deductions that an investigating officer would make that may elude a layperson. See Kenner, at ¶ 8. "The question is whether a reasonable person in the officer's position would be justified by some objective manifestation to suspect the defendant was, or was about to be, engaged in unlawful activity." Id. (quoting State v. Smith, 452 N.W.2d 86, 88 (N.D. 1990)).

However, knowledge of a person's criminal history by itself is not enough to support a finding of reasonable suspicion. See id. at 192-93; see also United States v. Sandoval, 29 F.3d 537, 542 (10th Cir. 1994). As the court in Sandoval correctly observed:

[¶19] The fifth factor relates to the officer's testimony that Fields was very nervous during the stop. "Nervous, evasive behavior is a pertinent factor in determining reasonable suspicion." State v. Heitzmann, 2001 ND 136, ¶ 15, 632 N.W.2d 1 (citing Illinois v. Wardlow, 528 U.S. 119, 124 (2000)). However, nervousness alone is not enough to establish a reasonable and articulable suspicion because "[i]t certainly cannot be deemed unusual for a motorist to exhibit signs of nervousness when confronted by a law enforcement officer." Beck, 140 F.3d at 1139.

## C

**Was appellants 6 Amendment Violated when he received ineffective assistance of Counsel. Not just for his trial proceedings but also for his Post Conviction Trial remedies when he had his evidentiary hearing.**

Appellant requested that his initial attorney Jeff Bredahl file a motion to suppress the evidence seized in the illegal stop.

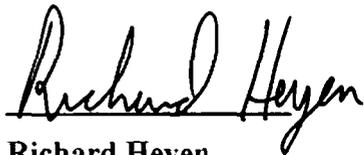
Appellant also asked his attorney to get the tape from car 79 for that night in question. It was not secured from the police department until it was too late to file any motions in the Court. It was actually obtained by one of Mr. Breydahls assistants or law student that works for him at his office. And it was not done until it was way past time to file any more motions.

An evidentiary hearing in this matter could have ended this whole ordeal and just by my attorney not filing the motion to suppress jeopardized defendants defense from the illegal stop that was conducted by officer Stanger.

## CONCLUSION

**Appellant requests the Court reverse the district courts finding that there is no cause for Post Conviction relief and suppress the evidence in this case and make the appellant whole again. At the very least appellant, request a chance for oral arguments.**

Dated this 18 Day of December, 2007



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