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20110204

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
OCTOBER 5, 2011
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

State of North Dakota, Plaintiff and Appellee vs. Andrew Philip Mittleider, Defendant and Appellant.	SUPREME COURT NO. 20110203 Civil No.: 22-10-K-00074
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State of North Dakota, Plaintiff and Appellee vs. Ricky Lee Mittleider, Defendant and Appellant.	SUPREME COURT NO. 20110204 Civil No.: 22-10-K-00075
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**ON APPEAL FROM THE COURT'S ORDERS ADOPTING
CONDITIONAL GUILTY PLEAS
SOUTHCENTRAL JUDICIAL DISTRICT
STATE OF NORTH DAKOTA**

APPELLANTS REPLY BRIEF

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STATEMENT OF THE FACTS

[¶1] In its Brief of Appellee, the State contends: “In this matter, the Mittleiders chose to pay more attention to the buck that they were chasing, and less attention to the boundaries and limits on the day that they stepped foot onto the federal refuge.” (Brief of Appellee at ¶15.) Similarly, the State contends it was the Mittleiders’ “negligence” that caused them to take a deer on a federal refuge. (Brief of Appellee at ¶17.) Nothing in the record, however, supports these factual assertions. The stipulated facts establish just the opposite: that the Mittleiders mistakenly believed they were not on a federal refuge and that belief was reasonable because the refuge was improperly signed. (A at 84.) The State’s factual assertions also miss the point of the appeal. The Mittleiders should be allowed to present the facts of their mistaken belief to a jury as an affirmative defense. The State can then argue that their mistaken belief was negligently formed.

[¶2] The State also alleges “the Mittleiders were standing around a deer lying on the gravel, in the middle of their driveway, in plain view of any passing traffic passing nearby on the road.” (Brief of Appellee at ¶25.) The stipulated facts, however, establish that when the illegal search was conducted by Kidder County Deputy Sherriff Lemieux, the deer was hidden from public view in a pick-up box that was 19 inches deep. (A at 84.) The deer was certainly not visible from the public right of way, which was 207 feet away. (A at 84.) To view the deer, Lemieux had to ignore the “no trespassing” signs posted near the entrance to the Mittleiders’ farmstead, drive 207 feet, exit his car, and look in the back of the pick-up. (A at 84-85.) After this initial search was completed the Mittleiders removed the deer from the pick-up. (A at 85.) The State’s assertion that the deer was visible from the public right-of-way prior to the illegal search is not accurate.

CONCLUSION

[¶3] The decisions of the District Court should be reversed and the matter remanded.

Dated this 5th day of October, 2011.

By: /s/ Monte L. Rogneby

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