

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff-Appellee,)	
)	
vs.)	SUPREME COURT NO. 20120418
)	
Ryan Michael Zueger,)	
)	
Defendant-Appellant.)	

APPELLANT'S BRIEF

APPEAL FROM THE NOVEMBER 16, 2012 JUDGMENT
THE MORTON COUNTY COURT IN MANDAN, NORTH DAKOTA
THE HONORABLE DAVID E. REICH PRESIDING

ATTORNEY FOR APPELLANT

RICHARD E. EDINGER
Attorney at Law
P.O. Box 1295
Fargo, ND 58107
(701) 298-0764
ND No. 05488

TABLE OF CONTENTS

TABLE OF AUTHORITIES	i
STATEMENT OF THE ISSUES PRESENTED	1
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	3
ARGUMENT	
I. An illegal search occurred where the police conducted a warrantless inventory search of the package and where exigent circumstances did not exist because the police had complete control and dominion over the package.	10
II. The State committed prosecutorial misconduct with improper statements during rebuttal by intentionally sandbagging the defendant.	22
III. There was insufficient evidence for the conspiracy to deliver synthetic cannabinoids conviction because there was no agreement between the two defendants.	27
CONCLUSION	31

TABLE OF AUTHORITIES

TABLE OF CASES

<u>Coolidge v. New Hampshire</u> , 403 U.S. 443 (1971).	14
<u>Coreas v. United States</u> , 565 A.2d 594 (D.C. 1989). . .	23
<u>Horton v. California</u> , 496 U.S. 128 (1990).	17
<u>In Re Winship</u> , 397 U.S. 358 (1970).	28
<u>State v. Avila</u> , 1997 ND 142, 566 N.W.2d 410.	10
<u>State v. DeCoteau</u> , 1999 ND 77, 592 N.W.2d 579.	15
<u>State v. Duncan</u> , 2011 ND 85, 796 N.W.2d 672.	22
<u>State v. Gagnon</u> , 2012 ND 198, 821 N.W.2d 373.	17
<u>State v. Garrett</u> , 1998 ND 173, 584 N.W.2d 502.	14
<u>State v. Gelvin</u> , 318 N.W.2d 302 (N.D. 1982).	12
<u>State v. Himmerick</u> , 499 N.W.2d 568 (N.D. 1993).	27
<u>State v. Kolb</u> , 239 N.W.2d 815 (N.D. 1976).	13
<u>State v. Koskela</u> , 329 N.W.2d 587 (N.D. 1983).	14
<u>State v. Kringstad</u> , 353 N.W.2d 302 (N.D. 1984).	27-28
<u>State v. Page</u> , 277 N.W.2d 112 (N.D. 1979).	13
<u>State v. Planz</u> , 304 N.W.2d 74 (N.D. 1981).	14
<u>State v. Ressler</u> , 2005 ND 140, 701 N.W.2d 915.	11-13 16
<u>State v. Rode</u> , 456 N.W.2d 769 (N.D. 1990).	18-19
<u>State v. Salter</u> , 2008 ND 230, 758 N.W.2d 702).	11
<u>State v. Schimmel</u> , 409 N.W.2d 335 (N.D. 1987).	26
<u>State v. Schneider</u> , 550 N.W.2d 405 (N.D. 1996).	28
<u>State v. Serr</u> , 1998 ND 66, 575 N.W.2d 896.	30
<u>United States v. Jacobsen</u> , 466 U.S. 109 (1984).	18-20

<u>United States v. Johnson</u> , 333 U.S. 10 (1948).	10
<u>United States v. Mulder</u> , 808 F.2d 1346 (9th Cir. 1987).	19-20
<u>Wong Sun v. United States</u> , 371 U.S. 471 (1963).	15
 <u>NORTH DAKOTA CENTURY CODE</u>	
12.1-06-04	1,28
19-03.1-23(1)(b).	1
 <u>RULES OF CRIMINAL PROCEDURE</u>	
N.D.R.Crim.P. 41(c)(2).	15
 <u>UNITED STATES CONSTITUTION</u>	
Fourth Amendment	10

STATEMENT OF THE ISSUES PRESENTED

- I. Whether an illegal search occurred where the police conducted a warrantless inventory search of the package and where exigent circumstances did not exist because the police had complete control and dominion over the package?

- II. Whether the State committed prosecutorial misconduct with improper statements during rebuttal by intentionally sandbagging the defendant?

- III. Whether sufficient evidence existed for the conspiracy to deliver synthetic cannabinoids conviction because there was no agreement between the two defendants?

STATEMENT OF THE CASE

Defendant-Appellant Ryan Michael Zueger appeals from the November 16, 2012 Judgment. (A-37)¹ Defendant seeks reversal on the primary grounds that the police conducted an illegal search and seizure of his package.

On February 6, 2012, the State filed a Complaint charging Defendant with Conspiracy to Deliver Synthetic Cannabinoids, a Class B Felony, in violation of N.D.C.C. § 12.1-06-04(1) and 19-03.1-23(1)(b). The co-defendants were William Nickel and Casandra Nickel. (A-7) On March 30, 2012, after a contested preliminary hearing, Defendant was

¹ Appendix

charged via Information with Conspiracy to Deliver Synthetic Cannabinoids. (A-13)

On May 25, 2012, Defendant filed a Motion to Suppress, arguing an illegal search and seizure. (Motion to Suppress, docket sheet, No. 24) On July 31, 2012, the motion hearing was held before the Honorable David E. Reich. On August 22, 2012, Judge Reich issued his Order Denying Motion to Suppress Evidence and Motion to Dismiss. (A-15) The court held that the warrantless inventory search was legal because the police had probable cause and the plain view exception applied. (A-22 to A-23) Moreover, the court held that the testing at the state crime laboratory was not a search and exigent circumstances existed for the multiple searches and seizures of the package. (A-27)

On August 23, 2012, a two day jury trial was held. At the close of the evidence, the court granted Casandra Nickel's Rule 29 Motion for Judgment of Acquittal, but denied the other two co-defendants' motions. (T 224)² The jury returned guilty verdicts on Defendant and Mr. Nickel. (T 328-329)

On November 16, 2012, the court entered Judgment and sentenced Defendant to five years' imprisonment, with all but two years suspended for a period of five years of supervised probation. The court stayed imprisonment pending appeal. (A-31) Subsequently, on November 30, 2012, Defendant filed his Notice of Appeal. (A-37)

² Trial Transcript

STATEMENT OF THE FACTS

The facts relevant to the issues are in dispute.

On October 4, 2011, at approximately 2:20 p.m., Metro Area Narcotics Task Force Officer (TFO) Casey Miller received a call from Lieutenant Lori Flaten of the Mandan Police Department. Lieutenant Flaten informed Officer Miller that Kent Danielson, the owner of We Ship, Etc. was at the police department to report a suspicious package from the store, Big Willies, ATP. Danielson was concerned about the contents of the package. (ST 4)³ However, Danielson had not opened the package. (PT 3)⁴

Danielson told the officers that Casandra Nickel came to his store earlier in the day to ship a package next day air for Big Willies, ATP. Danielson asked Ms. Nickel what was in the package, but she did not respond right away. Eventually, she said that it was returnable merchandise. Danielson got suspicious because of the cost of the next day air was \$143.55 and because in the past he had concerns about the legality of items being shipped. Danielson told the officers that he has a store policy that allows him to open and inspect suspicious packages. (ST 4-5) Danielson wanted officers to go with him to the store so he could open the package in their presence. (ST 5,17) TFO Miller testified that it was decided that all four officers would go with Danielson to open the package. (ST 17)

³ Suppression hearing transcript

⁴ Preliminary hearing transcript

The officers arrived at We Ship and accompanied Danielson to the back of the store where the package was being held. (ST 6) The officers examined the package and reviewed the shipping labels. (T 138) The officers did not observe anything unusual about the package. (ST 18-19)

Danielson cut open the packaging tape and then unfolded the box. Danielson said "I told you," or "I knew it" and stepped aside without ever touching or removing any of the package's contents. (PT 5,15; ST 6-7) TFO Miller testified that when Danielson opened the package, the other officers could see in plain view multiple large Ziploc bags, each containing clear plastic tubes with plant material. (ST 7; PT 5) When the box was opened, there was a sheet of packaging paper laying on top of the bags. The paper was covering a portion of the contents, but the officers were still able to see some of the Ziploc bags containing tubes with plant material. (ST 16)

TFO Miller testified that just by looking in the box, he could tell that the tubes contained plant material, but he had no idea what the plant material was. The majority of the tubes were labeled "Green Cross Private Reserve." (ST 7-8) The plant material was not something that TFO Miller had ever seen before. (ST 9-10; PT 9) It did not have the same appearance of other synthetic cannabinoids that TFO Miller had seen in the past. (PT 9) At first glance, it had the appearance of marijuana, but after taking a closer

look, TFO Miller was able to tell that it definitely was not marijuana, but a completely new substance. (ST 10; PT 10) TFO Miller testified, based on his training and experience, that synthetic cannabinoids can be applied to any type of substance. It doesn't have to necessarily be the substances he had observed in the past. (ST 10)

TFO Miller explained that the term "synthetic cannabinoid" includes both legal and illegal substances. He testified that there was no way for him to determine the legality of the plant material in the package just by looking at it. (ST 25-26,31-32) TFO Miller testified he believed the substance was a synthetic cannabinoid, but he had no idea if it was a legal or illegal. (ST 26)

After Danielson unfolded the box, and stepped out of the way, the officers removed all of the bags from the package and counted them. They counted a total of fifteen bags. (ST 8) Each bag contained plastic tubes with plant material. There were between 8 to 30 tubes per bag. (PT 6) A warrantless inventory was performed by the officers. They opened all fifteen bags and removed and counted each tube. The officers counted a total of 315 tubes. (ST 11) After the inventory was complete, TFO Miller decided he would take one of the tubes to the North Dakota State Laboratory for testing to determine whether or not the plant material contained a controlled substance. (T 141) TFO Miller testified there is no field test available to officers for

synthetic cannabinoids. (ST 11,23) All testing must be done at the State Laboratory. (ST 11)

While TFO Miller was at the State Laboratory, the other officers took custody of the package and removed it to their Bismarck office. (ST 12-13) The officers waited for the results.

Later that evening, the State Laboratory notified TFO Miller that the plant material had tested negative for controlled substances. (ST 12) TFO Miller then notified Danielson of the results. It was decided that TFO Miller would take the package to UPS for shipping. The package was resealed and TFO Miller delivered it to UPS. (ST 12; PT 7)

The next morning, October 5, 2011, TFO Miller was informed by the State Laboratory that they may have performed the wrong test and the substance may be a controlled substance. The State Laboratory would contact TFO Miller after the correct test had been performed. Shortly thereafter, the State Laboratory told TFO Miller that preliminary testing indicated a strong likelihood that the substance was JWH-122. The State Laboratory still needed confirmation via peer review, and would notify TFO Miller when testing was finalized. (ST 13)

TFO Miller then contacted Danielson. The package was out for delivery in Los Angeles, California. Miller and Danielson decided that Danielson would attempt to stop delivery of the package. (ST 13-14,23) TFO Miller then

received final confirmation from the State Laboratory that the product had tested positive for JWH-122. Shortly thereafter, Danielson stopped the package and arranged to have it returned to We Ship. (ST 14)

On October 6, 2011, Danielson informed TFO Miller that the package had arrived. TFO Miller retrieved the package from Danielson at approximately noon. TFO Miller testified that the package appeared to be in the same condition as it was on October 4, 2011. (ST 14-15; PT 9)

At no point did the officers obtain a warrant to search or seize the package. (ST 21-22,25-28; PT 22-23) TFO Miller conceded the officers had control and dominion of the package and could have applied for a warrant. (ST 26)

On October 6, 2011, Defendant and Mr. Nickel told law enforcement that they had purchased Green Cross Private Reserve from Intermedia since August 2011. (T 151) Defendant had been dealing with three different salesmen from Intermedia via email and telephone. (T 230) Defendant was concerned about the legality of the product, so before any orders were placed, he gave Intermedia a copy of the North Dakota statute. (T 155,230) Subsequently, Intermedia provided Defendant with a laboratory report from Research Triangle Laboratories, Inc. (T 155,237) Defendant was not satisfied with the report because it didn't specifically name Green Cross Private Reserve, nor did it cover all of the synthetic cannabinoids listed in the statute. (T 156-

157,237,253) Defendant expressed his concerns to the Intermedia and requested that a test be performed on Green Cross Private Reserve. On August 18, 2011, Defendant received an email from Intermedia stating that the product was not illegal in North Dakota. (T 237)

Subsequently, Defendant placed several orders between August 18, 2011 and September 18, 2011. Defendant provided officers with invoices and cashier's checks from the orders. (T 152-153) Defendant also gave the officers his email correspondence with Intermedia and the laboratory report Intermedia had provided. (T 157,160)

On either October 3 or 4, 2011, Defendant received a phone call from the owner of Intermedia. The owner told him that North Dakota was on the "no send" list. (T 158,239) The owner said his employees should not have been selling the product to him and he needed to recall the product. (T 238) Intermedia wanted Defendant to return the product and he would receive a refund. (T 159,239) TFO Miller believed Defendant and Nickel were truthful with law enforcement about their dealings with Intermedia. (T 161)

Defendant called Mr. Nickel and told him to package up what was left of the Green Cross Private Reserve because it had to go back. (T 241) Both Defendant and Mr. Nickel testified that Defendant did not tell him why the product needed to go back and Mr. Nickel didn't ask. (T 241,263, 270-271)

Defendant is solely responsible for ordering products, contacting companies, paying bills, and setting up accounts. (T 243,270) Whereas, Mr. Nickel was responsible for helping out on the premises. (T 244) Mr. Nickel was not involved in ordering products or merchandise. (T 244) Mr. Nickel was not involved in ordering or dealing with Intermedia. (T 274) Mr. Nickel did not review the Laboratory results provided by Intermedia. (T 276) However, Mr. Nickel did sell Green Cross Private Reserve to customers. (T 273) Mr. Nickel admitted there was a theoretical risk that some of their products could contain controlled substances. (T 277)

Big Willies spent between \$40,000 and \$50,000 on Green Cross Private Reserve from August 2011 to September 21, 2011. (T 154) Big Willies was selling the one gram quantities for \$30 and three gram quantities for \$50. (T 154) Green Cross Private Reserve was a popular seller. (T 250,275)

ARGUMENT

- I. An illegal search occurred where the police conducted a warrantless inventory search of the package and where exigent circumstances did not exist because the police had complete control and dominion over the package.

The Fourth Amendment of the United States Constitution and Article I, § 8 of the North Dakota Constitution prohibits unreasonable searches and seizures. The Fourth Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

"The point of the Fourth Amendment which often is not grasped by zealous officers is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate, instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." United States v. Johnson, 333 U.S. 10, 13-14 (1948). The State has the burden of proof to show that a warrantless search falls within an exception to the warrant requirement. State v. Avila, 1997 ND 142, ¶ 16, 566 N.W.2d 410.

In State v. Salter, 2008 ND 230, ¶ 5, 758 N.W.2d 702, this Court announced the well established standard of review in a motion to suppress case:

"This Court defers to the district court's findings of fact and resolves conflicts in testimony in favor of affirmance. This Court will affirm a district court decision regarding a motion to suppress if there is sufficient competent evidence fairly capable of supporting the district court's findings, and the decision is not contrary to the manifest weight of the evidence. Questions of law are fully reviewable on appeal, and whether a finding of fact meets a legal standard is a question of law."

A. The search was illegal because the officers did not have probable cause and they conducted an inventory search without a warrant.

The trial court ruled that the initial search was a private party search because Danielson was not acting as a State agent. For purposes of this appeal, this Court does not have to decide the issue because the officers clearly conducted a search immediately after Danielson's search.

In State v. Ressler, 2005 ND 140, ¶ 24, 701 N.W.2d 915, this court held that the inventory search of a package during a criminal investigation requires a search warrant absent an exception to the warrant requirement. In Ressler, Danielson became suspicious of the defendant because he

appeared nervous about a package he wanted shipped next day air. Id. at ¶ 2. After the defendant left, Danielson opened the package and discovered numerous magazines. Danielson cut the magazines open and found money concealed therein. Id. An officer arrived at the store and observed what Danielson had discovered. Id. at ¶ 3. The officer then took the package to a nearby police station for a canine sniff test. After the canine alerted, the officer inventoried the full contents of the box without a warrant. Id. at ¶ 4. With regard to the officer's search in Ressler, this Court held as follows:

"Here, Officer Eisenmann's search of Ressler's package was carried out in the midst of a criminal investigation. Officer Eisenmann searched the package immediately after the canine test and there is no evidence the police were concerned with protecting or safeguarding either their interests or Ressler's property interests. See State v. Gelvin, 318 N.W.2d 302, 307 (N.D. 1982) (upholding inventory search of wallet conducted pursuant to standard jailhouse procedures). Absent a warrant or a valid exception to the warrant requirement, the search of Ressler's package at the law enforcement center contravened the Fourth Amendment." Id. at ¶ 24.

Here, Ressler is dispositive of the issue. Not only did the officers not obtain a warrant, they didn't even

have probable cause to search.

A full fledged search of a package requires probable cause. Id. at ¶ 19. "Probable cause exists when the facts and circumstances within a police officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a man of reasonable caution in believing that an offense has been or is being committed." State v. Page, 277 N.W.2d 112, 115 (N.D. 1979) (quoting State v. Kolb, 239 N.W.2d 815, 816 (N.D. 1976)).

Here, TFO Miller did not have probable cause, but just a subjective hunch that the material was illegal. "Just looking into the box, I could see it was some type of plant material, had no idea what the plant material was." (ST 7) Without the benefit of a canine sniff or field test, Miller conceded it was just a guess on whether the material was illegal:

"Q. So in looking at a substance of the nature that you discovered in the package, there's no way you could determine whether that was an -- a legal or an illegal substance; is that correct?

A. Correct.

Q. At that time did you have -- had you in your own mind made a determination as to what you thought you were dealing with?

A. Believing it was just a synthetic cannabinoid. That's all I knew at the time. I -- like you said

before, there's no way to tell if it's illegal or not."

(ST 25-26)

As an officer engaged in the often competitive enterprise of ferreting out crime, Miller testified "it would be unfeasible to get a search warrant every time that we would run into a synthetic cannabinoid because they're everywhere." (ST 26)

The trial court's reliance on the plain view exception for the warrantless search and seizure is clearly wrong. Plain view in and of itself is not an exception to the warrant requirement.

"Plain view alone, however, is never enough to justify the warrantless search or seizure of evidence. It has been stated 'that no amount of probable cause can justify a warrantless search or seizure absent exigent circumstances.' Coolidge v. New Hampshire, 403 U.S. 443, 465, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); see also [State v. Planz, 304 N.W.2d 74, 81 (N.D. 1981)]. In other words, an officer with a plain view of contraband which gives rise to probable cause is not immunized from our rule that a 'warrantless search and seizure is unreasonable unless it falls within one of the exceptions to the constitutional requirements that a search be conducted pursuant to a valid search warrant.' State v. Koskela, 329 N.W.2d 587, 591 (N.D. 1983)."

State v. Garrett, 1998 ND 173, ¶ 16, 584 N.W.2d 502.

Likewise, exigent circumstances is inapplicable. This Court has defined exigent circumstances as "an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence." State v. DeCoteau, 1999 ND 77, ¶ 15, 592 N.W.2d 579.

The Rules of Criminal Procedure provide that search warrants may be issued via the telephone or through other electronic means. N.D.R.Crim.P. 41(c)(2). Therefore, only in the most drastic situations will exigent circumstances truly exist.

Here, there were no exigent circumstances whatsoever because TFO Miller conceded that the officers had control and dominion over the package and had ample opportunity to apply for a warrant. (ST 26) Hence, there was no chance of the destruction of evidence. The officers had ample time to telephone in the search warrant application, fax in the search warrant application, or drive to the courthouse with the search warrant application. However, because it was "unfeasible" and inconvenient, they decided not to get a search warrant.

Clearly, no exigent circumstances existed. Hence, the warrantless search of the package was illegal and as such, pursuant to Wong Sun v. United States, 371 U.S. 471 (1963), all resulting evidence from the illegal search and seizure was the fruit of the poisonous tree and must be

suppressed.

B. The full fledged seizure was illegal when the officers transported the package because the officers did not have probable cause, nor a search warrant.

The trial court conceded that a warrantless full fledged seizure of the package occurred when the officers removed the package from We Ship and took it to their Bismarck office. (A-22)

“A seizure of a package based on reasonable suspicion affords government officials less command, dominion, or control over the package than they would possess if executing a full-fledged seizure based on probable cause or a warrant. A contrary conclusion would distend the rationale for a Terry stop to a point where it envelops a seizure based on probable cause or a seizure supported by a warrant.” Ressler at ¶ 19.

In Ressler, the police seized a package to a greater extent by placing it in their exclusive control, then removing it from the location where it was submitted for shipping, and transporting it to a law enforcement center. Id. The North Dakota Supreme Court held that “[t]his full-fledged seizure required either probable cause supported by an exception to the warrant requirement or a warrant to be valid.” Id. (citations omitted).

The trial court held that the full fledged seizure was reasonable because it was supported by probable cause and plain view. (A-23) As previously indicated, the officers

did not have probable cause to seize this package. A subjective hunch or guess is not probable cause. Hence, the evidence must be suppressed.

The trial court's reliance on Horton v. California, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed. 112 (1990), was misplaced. The trial court failed to recognize the well established limitations to the plain view doctrine. The Supreme Court explained that there are two requirements that need to be met, in addition to the requirement that the Fourth Amendment not be violated, in arriving at the place where the object can be viewed. In order to lawfully seize objects in plain view without a warrant: (1) The object's incriminating character must be "immediately apparent"; and (2) the officer must have a lawful right of access to the object itself. Horton, at 128-29. "This is simply a corollary of the familiar principle discussed above, that no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.'" Horton, at 137. (citations omitted). In State v. Gagnon, 2012 ND 198, ¶ 12, 821 N.W.2d 373, this court held that plain view is never enough to justify warrantless searches and seizures.

As previously stated, exigent circumstances did not exist because the officers had control and dominion over the package and had ample opportunity to apply for a warrant. (ST 26) The officers had ample time to telephone in the search warrant application, fax in the search warrant

application, or drive to the courthouse with the search warrant application. However, because it was "unfeasible" and inconvenient, they decided not to get a search warrant.

The warrantless search and seizure was illegal. Hence, the evidence must be suppressed.

C. The comprehensive testing at the State Crime Laboratory constituted a Fourth Amendment search.

The trial court held that the laboratory test performed without a warrant was not a search because it did not compromise Defendant's expectation of privacy. (A-30-32) The trial court relied on United States v. Jacobsen, 466 U.S. 109 (1984). In Jacobsen, the United States Supreme Court held that a field test which merely discloses whether or not a substance is cocaine is not a Fourth Amendment search. Id. at 123. The trial court also relied on State v. Rode, 456 N.W.2d 769 (N.D. 1990). In both Jacobsen and Rode, the field test was simplistic and could only reveal whether or not the substance was cocaine. In Rode, the officer was "fairly certain" the substance was cocaine before he submitted it to testing. Rode, at 769. Here, the officers had no objective evidence that the substance was illegal. Hence, complex laboratory testing was required.

The officers had no means of testing for synthetic cannabinoids. All testing has to be performed at the State Laboratory. (ST 11,23) Here, the testing was much more complex and time consuming than the tests in Jacobsen and

Rode.

The Ninth Circuit Court has held that a comprehensive laboratory test is a Fourth Amendment Search. United States v. Mulder, 808 F.2d 1346 (9th Cir. 1987).

"The facts are sufficiently different from those in Jacobsen that we do not believe its 'field test' exception to the warrant requirement can be extended to the case at bar. First of all, this case does not involve a field test, but a series of tests conducted in a toxicology laboratory several days after the tablets were seized. Secondly, the chemical testing in this case was not a field test which could merely disclose whether or not the substance was a particular substance, but was a series of tests designed to reveal the molecular structure of a substance and indicate precisely what it is. Because of the greater sophistication of those tests, they could have revealed an arguably private fact. As the Jacobsen Court held, 'governmental conduct that can reveal whether a substance is cocaine, *and no other arguably private fact, compromises no legitimate privacy interest.*' Id. (emphasis added). While the circumstances of the visual search and seizure of the bags of tablets did not infringe the fourth amendment, and undoubtedly provided probable cause to seek a warrant, these circumstances do not justify a

further extension of the Jacobsen field test exception to the warrant requirement." Id. at 1348-1349.

Here, the test was not a field test. The State Laboratory test was a complex test designed to reveal the molecular structure of the substance. Hence, it did not fall within the Jacobsen and Rode exceptions and therefore, was a full fledged search. As previously discussed, the officers lacked probable cause and the plain view exception did not apply. Therefore, the warrantless search was illegal and the evidence must be suppressed.

D. The subsequent seizures are illegal because probable cause did not exist and exigent circumstances did not exist.

Here, at least two more warrantless seizures occurred. First, when Danielson and Miller stopped the package whilst it was out for delivery. Second, when Miller retrieved the package from Danielson after it had been out for delivery. In both cases, exigent circumstances did not exist. As previously discussed, the officers had ample time to telephone in the search warrant application, fax in the search warrant application, or drive to the courthouse with the search warrant application. While the box did appear to be in the same condition, the only way to confirm that the evidence had not been tainted would have been to open the package and examine its contents. Once the package was delivered to Danielson, the officers had complete control

and dominion over the package. Clearly, exigent circumstances did not exist. Since the warrantless search and seizures were illegal, the evidence must be suppressed.

II. The State committed prosecutorial misconduct with improper statements during rebuttal by intentionally sandbagging the defendant.

If prosecutorial misconduct so infected a trial with unfairness, the resulting conviction constitutes a denial of due process, which mandates a reversal. State v. Duncan, 2011 ND 85, 796 N.W.2d 672. This Court has said:

"prosecutorial misconduct may 'so infect the trial with unfairness as to make the resulting conviction a denial of due process.' However, we have also recognized that not every assertion of prosecutorial misconduct, followed by an argument the conduct denied the defendant his constitutional right to a fair trial, automatically rises to an error of constitutional dimension. 'To constitute a due process violation, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial.' To determine whether a prosecutor's misconduct rises to a level of a due process violation, we decide if the conduct, in the context of the entire trial, was sufficiently prejudicial to violate a defendant's due process rights." Id. at ¶ 12.

Here, the State engaged in prosecutorial misconduct during rebuttal argument. The nature of Mr. Emerson's violation has been referred to in other jurisdictions as

"sandbagging." Sandbagging occurs when the government argues a theory of its case that was not raised in its initial closing argument. Coreas v. United States, 565 A.2d 594, 600 (D.C. 1989). Mr. Emerson changed the theory of the State's case in his rebuttal argument and sandbagged Defendant.

The State's theory throughout the entire case was that the defendants delivered the controlled substance when they returned the product. (A-13) In the State's opening statement, Ms. Lawyer explained to the jury why the time frame of September 21, 2011 through October 4, 2011 was being used:

"Since they had ordered Green Cross somewhere around -- received it around September 21, 2011, sometime between September 21 and October 4 of 2011, they became aware that this substance was illegal to have in North Dakota. They didn't want anybody to find out they had been illegally accepting the substance, they packed it up and took it to We Ship to deliver it back to the distributor.

The evidence is going to show the defendants agreed that that delivery was going to take place. And that's the facts that you are going to be looking at. And once you heard those, I am going to ask you to find them guilty."

(T 120-121)

When the defendants made their Rule 29 Motions for Judgment of Acquittal, Ms. Lawyer represented to the

court that the State's theory was that the October 4, 2011 "delivery" was the delivery as set forth in the Information:

"In this case we have all three individuals who were involved in this shipment of the product to this Intermedia company. The overt act was obviously Ms. Nickel taking the package to We Ship to be shipped."
(T 208)

Prior to closings, Defendant made a preemptive objection to content expected in the State's closing argument. Defendant requested the State not be allowed to present irrelevant argument concerning the amount of product purchased, how much was sold, and how much was earned.

(T 287) In response, Ms. Lawyer once again represented to the court that the State's theory was that the profit and sales argument were going to be used to show that Defendant knew why Green Cross Private Reserve needed to be packaged and returned. (T 288-289)

Throughout the entire case, the only delivery that the defendants were accused of conspiring to carry out was the October 4, 2011 delivery. Even in the State's closing argument, Ms. Lawyer remained consistent with the State's case theory.

"They further tried to couch this delivery as we were just returning a product that we never should have got in the first place. It wasn't what we ordered; we never would have ordered it, so we were just returning

it for a refund.

Well, what does a return involve? It involves the actual constructive or attempted transfer from one person to another. That's the definition. And that's exactly what happened here. There was a delivery. There was an attempted transfer. It didn't get to the company in California, but not for want of the defendants. They packaged all of it up and took it to the shipping store to have it transferred to another person. And it is clear that it was a controlled substance." (T 291-292)

However, during rebuttal, Mr. Emerson argued that their own previous theory of the case was bogus; claiming Defendants are guilty because they have done 1,800 drug deliveries, not one delivery.

"This is a diversionary tactic to get you to focus on that return of that product. That's just one of hundreds of transactions. . . . So don't go into the jury room and worry about the only transaction that happened was the return of the package, because they were trying to do the right thing. They sold 1800 units of this, that's 1800 deliveries."

(T 314)

The State continued with the improper argument arguing that since each of the 1,800 deliveries was \$30.00 a transaction, the defendants knew that the product was illegal and

therefore, are guilty. The defendants renewed their previous objections. (T 315)

The State clearly sandbagged Defendant's defense by creating new arguments and accusations against Defendant on rebuttal. The State went so far as to accuse Defendant of engaging in diversionary tactics. "To be prejudicial, absent a fundamental error, improper closing argument by the state's attorney must have stepped beyond the bounds of any fair and reasonable criticism of the evidence, or any fair and reasonable argument based upon any theory of the case that has supported in the evidence." State v. Schimmel, 409 N.W.2d 335, 342 (N.D. 1987). The State clearly engaged in prosecutorial misconduct when it intentionally exceeded the scope of the Information in its argument. Here, it is even more egregious because the State claimed the defendants had engaged in a diversionary tactics by zealously defending against the charges in the Information when the State had engaged in the same "tactics."

Here, according to the Information, Defendant was accused of conspiring to commit one controlled substance delivery. This was the State's theory of the case during the entire trial. However, during rebuttal, the State argued Defendant was now guilty because he had committed 1,800 controlled substances deliveries. Defendant's conviction was not based on the evidence. Instead, it was based on unfair prejudice and the character evidence argument that

since Defendant had 1,800 bad acts he had acted in conformity with the allegations in the Information. This improper argument violated Defendant's due process rights, and mandates a reversal of the Judgment.

III. There was insufficient evidence for the conspiracy to deliver synthetic cannabinoids conviction because there was no agreement between the two defendants.

Under State v. Himmerick, 499 N.W.2d 568, 572 (N.D. 1993), a motion for judgment of acquittal at the close of the State's case, in a jury trial, preserves the issue of insufficiency of evidence for appellate review. Here, Defendant moved for a judgment of acquittal and hence, preserved said issue for appeal. (T 207)

The standard of review for insufficient evidence states that:

"A conviction rests upon insufficient evidence when, even after viewing the evidence in the light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor, no rational factfinder could have found the defendant guilty beyond a reasonable doubt. When a court, be it an appellate court or a trial court on motion for entry of a judgment of acquittal, concludes that evidence is legally insufficient to support a guilty verdict, it concludes that the

prosecution has failed to produce sufficient evidence to prove its case. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution bars retrial in such a case." State v. Kringstad, 353 N.W.2d 302, 306 (N.D. 1984).

The State must prove all of the essential elements of the crime charged by proof beyond a reasonable doubt. State v. Schneider, 550 N.W.2d 405 (N.D. 1996); In Re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970). Beyond a reasonable doubt requires that a firm and abiding conviction of the Defendant's guilt exist based on a full and fair consideration of all the evidence presented at trial and not from any other source.

This is not a typical drug delivery case. According to the Information, the defendants were charged because they had allegedly agreed to return a product to a company from where the product was purchased after learning that the product contained an illegal substance. (A-13)

The evidence was not sufficient to sustain a conviction on conspiracy to deliver a controlled substance. N.D.C.C. § 12.1-06-04 provides:

"A person commits conspiracy if he agrees with one or more persons to engage in or cause conduct which, in fact, constitutes an offense or offenses, and any one or more of such persons does an overt act to effect an objective of the conspiracy. The agreement need not be

explicit but may be implicit in the fact of collaboration or existence of other circumstances.”

Here, there was not a scintilla of evidence that Defendant had an agreement with Mr. Nickel. There existed no reasonable inference of an agreement. All the evidence in regard to the October 4, 2011 delivery dealt with Defendant. By law, Defendant cannot have an agreement solely with himself. All dealings with Intermedia went through Defendant, and it was Defendant that ordered all of the Green Cross Private Reserve. (T 274) Mr. Nickel also did not review the laboratory report that Intermedia provided Defendant, which the State relied upon in arguing that Nickel’s conduct was reckless. (T 276) TFO Miller testified he didn’t know who packaged up the Green Cross Private Reserve. (T 158) However, Mr. Nickel admitted that he packaged up the product because Defendant told him to do it. (T 270-271) Both defendants testified that Mr. Nickel did not know why the product needed to be returned. (T 241,246, 270-271) TFO Miller testified that he assumed the defendants were in agreement to have the package sent back and that they both knew why it was being sent back. (T 158) However, this assumption is not a sufficient basis to infer guilt beyond a reasonable doubt.

The State argued that because Green Cross Private Reserve was such a hot selling product, Mr. Nickel had to have known why he was boxing up the product. However,

the State's argument was not evidence.

A criminal conspiracy requires two elements: an agreement and an overt act. State v. Serr, 1998 ND 66, ¶ 11, 575 N.W.2d 896. The relevant evidence was that: Mr. Nickel packaged up the product and Mr. Nickel and Defendant are co-owners of Big Willies. There is no other evidence in regard to the delivery of October 4, 2011! Mr. Nickel's status as co-owner, or association with Defendant, does not establish a conspiracy. See Serr, at ¶ 14.

Here, the facts simply do not permit an inference that Defendant was involved in a conspiracy because there was no agreement with the other defendant. Judge Reich granted Defendant Casandra Nickel's Rule 29 motion. (T 223) His reasoning is exactly why Defendant's conviction must be reversed:

"Certainly, there was an overt act, the mailing, but the criminal act would have had to be an agreement that [Mr.] Nickel knew that there was an illegal substance being sent back." (T 223)

CONCLUSION

WHEREFORE, the reasons stated herein, Appellant respectfully requests that this Honorable Court reverse the November 16, 2012 Judgment; reverse the trial court's August 22, 2012 Order Denying Motion to Suppress Evidence and suppress all evidence resulting from the illegal search and seizure as fruit of the poisonous tree; and enter a judgment of acquittal because there is insufficient evidence.

Dated this 13th day of March, 2013.



Richard E. Edinger
P.O. Box 1295
Fargo, North Dakota 58107
(701) 298-0764
ND No. 05488
Attorney for Defendant-Appellant

20120418
20120395

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF
CLERK OF SUPREME COURT

MAR 13 2013

State of North Dakota,)	
)	
Plaintiff-Appellee,)	STATE OF NORTH DAKOTA
)	
vs.)	SUPREME COURT NO. 20120418
)	
Ryan Zueger,)	
)	
Defendant-Appellant.)	

CERTIFICATE OF SERVICE

Richard E. Edinger, hereby certifies and swears that:

On March 13, 2013, I served a true and correct copy of Appellant's Brief and Appendix onto Appellee.

I put a true and correct copy of the aforementioned documents in a first class postage prepaid envelope addressed to Ms. Julie Lawyer, Special Assistant Attorney General, at her last reasonably ascertainable post office address, that being P.O. Box 699, Bismarck, North Dakota 58502-0699 and deposited the envelope in the U.S. mail in Fargo, North Dakota.

Dated this 13th day of March, 2013.



Richard E. Edinger
P.O. Box 1295
Fargo, ND 58107
(701) 298-0764
Attorney for Defendant-Appellant
ND No. 05488

