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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellee vs. Andrew Philip Mittleider Defendant and Appellant.	SUPREME COURT NO. 20110203 Civil No.: 22-10-K-00074
State of North Dakota, Plaintiff and Appellee vs. Ricky Lee Mittleider, Defendant and Appellant.	SUPREME COURT NO. 20110204 Civil No.: 22-10-K-00075

ON APPEAL FROM THE COURT'S ORDERS ADOPTING
CONDITIONAL GUILTY PLEAS
SOUTHCENTRAL JUDICIAL DISTRICT
STATE OF NORTH DAKOTA

BRIEF OF APPELLANTS

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[94]

STATEMENT OF THE ISSUES

1. Did the Court err when it concluded the Mittleiders were not entitled to present evidence of mistake of fact to the Jury?
2. Did the Court err when it failed to find that the Officers' first search of the Mittleiders' farmstead violated Article 1, Section 8 of the North Dakota Constitution?

[¶5]

STATEMENT OF THE CASE

[¶6] These are the consolidated appeals of father and son Ricky and Andrew Mittleider. Both were charged with hunting-related misdemeanor offenses after they mistakenly hunted on the Lake George National Wildlife Refuge in violation of North Dakota law. After the District Court denied the Mittleiders' motions to suppress evidence, and to present evidence of affirmative defenses, they entered conditional guilty pleas preserving their rights to challenge the District Court's decisions.

[¶7] The Mittleiders request this Court conclude they were entitled to present evidence at trial that the Lake George National Wildlife Refuge was not signed properly as required by federal regulation and that, as a result, neither knew they were hunting on the Refuge in violation of state law.

[¶8] Additionally, the Mittleiders ask that this Court, under Article 1, Section 8, of the North Dakota Constitution to hold that law enforcement officers violated their rights when they ignored no trespassing signs and searched their farmstead.

[¶9] The Mittleiders are farmers who live and work in Kidder County, North Dakota. (Appendix "A" at 83 at ¶4-7.) The 2010 deer-hunting season opened at Noon on November 5, 2010. (Id.) The Mittleiders unknowingly began the hunting season within the boundary of the Lake George National Wildlife Refuge. (A at 84 at ¶11.) Shortly thereafter, Andrew shot a deer within the Refuge. (A at 84 at ¶19.)

[¶10] On November 17, 2010, the State of North Dakota charged Ricky Mittleider with the offense of Hunting in a Closed or Restricted Area, a Class B misdemeanor, in violation of N.D.C.C. §20.1-08-01, for hunting white tail deer on the Refuge. (A at 12.)¹

[¶11] On November 17, 2010, the State charged Andrew Mittleider with the offenses of Illegal Hunting, Taking, Attempting to Take, or Possession of Big Game, a Class A Misdemeanor, in violation of N.D.C.C. §20.1-05-02², for shooting and killing a buck white tailed deer on the Refuge and Hunting in a Closed or Restricted Area, a Class B misdemeanor, in violation of N.D.C.C. §20.1-08-01, for hunting white tail deer on the Refuge.

¹Section 20.1-08-01, N.D.C.C. provides:

Any order or proclamation issued by the governor has the force of law. Any person who violates a provision of such order or proclamation for which a noncriminal penalty is not provided for in the order or proclamation is guilty of a class B misdemeanor. The maximum noncriminal penalty that may be set in an order or proclamation is a fine of two hundred fifty dollars.

Section 9 of the 2010-2011 North Dakota Deer Hunting Proclamation states in part:

“Federal or state properties such as refuges, sanctuaries, military installations, parks, or historic sites posted no trespassing or no hunting are closed to the hunting of deer.” Lake George National Wildlife Refuge was not one of the refuges open during deer gun season under Section 12 of the 2010-2011 North Dakota Deer Hunting Proclamation.

(A at 36 and 37-38.)

² Section 20.1-05-02, N.D.C.C. provides:

No person may hunt, harass, chase, pursue, take, attempt to take, possess, transport, ship, convey by common or private carrier, sell, barter, or exchange any big game animal except as provided in this title.

[¶12] The Mittleiders entered not guilty pleas on November 29, 2010. (A at 15 and 23.)

[¶13] On February 24, 2011, the Mittleiders moved for permission to submit evidence at trial of affirmative defenses – the fact that the Refuge was not properly signed and that they did not know they were hunting within the boundary of the Refuge. (A at 24.)

[¶14] On March 1, 2011, the Mittleiders moved to suppress evidence claiming that law enforcement illegally entered and searched their farmstead in violation of Article 1, Section 8 of the North Dakota Constitution. (A at 25.)

[¶15] As part of the two motions, the parties stipulated to the admissibility of certain exhibits and as to the facts surrounding the Mittleiders' actions and the search and questioning conducted by law enforcement. (A at 83.)

[¶16] On April 11, 2011, the District Court denied the motion to suppress. (A at 97.)

[¶17] On April 21, 2011, the District Court denied the motion to submit evidence of affirmative defenses. (A at 98.)

[¶18] Pursuant to Rule 11(a)(2), N.D.R.Crim.P., on May 27, 2011, the Mittleiders offered to plead guilty subject to their rights to appeal from the District Court's rulings. (A at 101 and 107.) The conditional pleas were accepted by the State and the Court. (Id.) The Parties subsequently submitted written plea agreements which were adopted by the District Court via Orders entered on June 13, 2011. (A at 109-113.)

[¶19] Each appealed the Court's Order adopting the conditional plea in his case on

July 11, 2011 by filing a Notice of Appeal. (A at 114-115.) This Court consolidated the two appeals.

[¶20]

STATEMENT OF THE FACT

[¶21]

The parties stipulated to the following facts:

- (4) Ricky Mittleider and his son, Andrew Mittleider, are residents of North Dakota.
- (5) Rick and Andrew both live at 4190 40th Ave. SE in Tappen, North Dakota;
- (6) Both Ricky and Andrew obtained the appropriate tags and licenses to hunt deer in 2010;
- (7) Deer hunting season opened at Noon on November 5, 2010; (A-3)
- (8) On November 5, 2010 Ricky and Andrew went deer-hunting;
- (9) They had previously seen some deer on their game cameras;
- (10) The morning of November 5, 2010, they saw a deer located near the Lake George Wildlife Refuge;
- (11) They crossed the property and proceeded to a small haystack, which they thought was located outside the refuge (A-49);
- (12) They waited for deer season to open at Noon;
- (13) The haystack was located near the edge of Lake George (A-38-40, 49, RA4)
- (14) The area is geographically open and visible for miles;
- (15) Several hunting parties were in the area;
- (16) The Lake George Wildlife Refuge is not properly signed as required by the Service Sign Manual published by the US Fish and Wildlife Service (A-.31);
- (17) The signs are located as RA4;
- (18) The Service Sign Manual requires that two signs be posted at every boundary; Id.

(19) After the season officially opened, Andrew Mittleider shot a deer at the location indicated at deer kill site. (A-45, 46; RA4);

(20) Andrew then tagged the deer as required by law; Id.

(21) Andrew then had pictures taken of himself and the deer; Id.

(22) Another member of the Mittleider hunting party texted friends to tell them where and when they had shot a deer;

(23) The Mittleider hunting party continued to celebrate, high five each other, a take pictures;

(24) The deer was then loaded into the back of Ricky Mittleider's pick-up and taken back to the Mittleider farmstead;

(25) The pick-up box is 19 inches deep and the deer was placed in the box; (A-54)

(26) The Mittleider pick-up was driven back to the Mittleider farmstead and parked in front of the house; (A-53, 54)

(27) The pick-up was parked 207 feet from the public right of way;

(28) There were two "No Trespassing" signs posted near the entrance to the Mittleider farmstead; (A-57, 58)

(29) Under North Dakota law, the general public did not have the right to enter the Mittleider farmstead;

(30) Shortly, thereafter, Kidder County Deputy Sheriff Lemieux entered the Mittleider farmstead and parked near the house;

(31) Several people were standing by the back of the pick-up;

(32) Deputy LeMiux got out of his patrol car and walked over to the pick-up;

(33) Deputy Lemieux looked inside the pick-up box and saw the deer;

- (34) Deputy Lemiux returned to his patrol car and called Game Warden Myhre;
- (35) Deputy Lemiux did not have a search warrant;
- (36) Deputy Lemiux did not have permission to enter and/or search the property;
- (37) The deer was removed from the pick-up and placed in the yard by the Mittleiders;
- (38) Game Warden Myhre then drove into the Mittleider farmstead;
- (39) Game Warden Myhre did not have a search warrant;
- (40) Game Warden Myhre did not have permission to enter the Mittleider farmstead;
- (41) Game Warden Myhre exited his patrol car and proceeded to conduct a criminal investigation;
- (42) Game Warden Myhre placed Andrew Mittleider in this patrol car and questioned him;
- (43) Game Warden Myhre did not advise Andrew Mittleider of his Miranda rights;
- (44) After conducting the search and questioning, Game Warden Myhre and Deputy Lemiux left the Mittleider farmstead;
- (45) Game Warden Myhre returned to the Lake George area and utilized his GPS to determine that the deer was shot on the Lake George Wildlife Refuge; (A-47, 48)
- (46) Later that day, Game Warden Myhre and the Kidder County State's Attorney applied for a search warrant;
- (47) The affidavit application for the Search Warrants were prepared by or with the assistance of the Kidder County State's Attorney;
- (48) In support of the application for the search, an affidavit of Game Warden Myhre was submitted; (A-33,34)
- (49) There is no transcript of the search warrant application.

(A at 83.)

[¶22] The Mittleiders' Motion to Suppress contended the State conducted two searches. The first search occurred when law enforcement officials ignored "no trespassing" signs and entered the Mittleiders' farmstead in violation of their rights to privacy. The second search occurred after Game Warden Myhre, with the assistance of the Kidder County State's Attorney, obtained a search warrant from the Court. The specificity of the warrant application makes clear that Game Warden Myhre's affidavit, which formed the basis for the warrant, relied on the evidence obtained as part of the first search. (A at 57-58.) The Mittleider's contend the first search violated their rights under the North Dakota Constitution and the evidence from that search must be suppressed, including evidence obtained via the warrant on the grounds that the warrant was obtained based on the results of the first search³.

[¶23] The Mittleiders' Motion to Submit Evidence of Affirmative Defense contended that although the charged offenses are strict liability offenses, the Mittleiders should be allowed to present evidence of the fact that they did not know they were hunting within the boundaries of the Refuge. The Mittleiders noted that in criminal cases, the prosecution is entitled to introduce a jury instruction on "flight" to support its theory of culpability. See N.D.J.I. K-5.4 Flight [Concealment] ("The voluntary flight [concealment] of a Defendant immediately after [the commission of a crime] [being accused of a crime that has been committed] is not sufficient in itself to establish guilt,

³ The Mittleiders also contended the search warrant was invalid because Game Warden Myhre did not inform the Judge issuing the warrant of the officers' prior unlawful entry onto the Mittleiders' property and that some information in the affidavit in support of the warrant was false and misleading. The Court rejected these arguments (A at 97-98).

but it is a circumstance which, if proved, you may consider in the light of all other evidence of the case, in determining guilt or innocence. You alone must determine whether the evidence of flight [concealment] shows a consciousness guilt and the significance of that evidence.”) The Mittleiders contended that the open manner in which the hunting was conducted, along with the fact that the Refuge was not properly signed, should be admissible, along with a jury instruction on the subject, to establish that they did not know they were hunting on a federal wildlife refuge.

[¶24] The District Court denied the Motion to Suppress. (A at 92-98.) Applying Fourth Amendment jurisprudence, the Court concluded that “no trespassing” signs in open fields do not create an increased expectations of privacy. (A at 94.) Without analysis, the Court concluded the result would be the same under the North Dakota Constitution. (A at 95.)

[¶25] The District Court also denied the Motion to Submit Evidence of Affirmative Defenses. The Court recognized that in some circumstances affirmative defenses may be raised in cases involving strict liability offenses. The Court, however, concluded the circumstances of these cases did not warrant an affirmative defense. (A at 99.)

[¶26]

LAW AND ARGUMENT

[¶27]

I. STANDARD OF REVIEW

[¶28]

This Court recently explained its standard of review on a motion in limine concerning the admissibility of evidence of an affirmative defense is the abuse of discretion standard. A trial court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner. State v. Kleppe, 2011 ND 141 ¶ 8, 800 N.W. 2d 311.

[¶29]

In reviewing a trial court's decision on a motion to suppress, this Court will defer to the court's findings of fact and conflicts in testimony will be resolved in favor of affirmance. Here, however, because the parties stipulated to the facts, the suppression issue before this Court is a question of law, fully reviewable on appeal. State v. Graf, 2006 ND 196, ¶ 7, 721 N.W. 2d 381 Whether findings of fact meets a legal standard is a question of law. Id.

[¶30]

II. THE COURT ERRED WHEN IT CONCLUDED THE MITTLEIDERS WERE NOT ENTITLED TO PRESENT EVIDENCE OF MISTAKE OF FACT TO THE JURY.

[¶31]

North Dakota has a strong public policy both promoting the right of its citizens to hunt and protecting them from unnecessary recrimination and reproach. See James v. Young, 43 N.W.2d 692, 697 (N.D. 1950) (noting that anything which "conflicts with the morals of the time, and contravenes any established interest of society is against public policy," and that public policy of a state "is to be found in its constitution and statutes."). While the State certainly has the right to set limits to regulate hunting within its borders, as set forth in the Constitution of North Dakota, "Hunting, trapping, and fishing and the taking of game and fish are a valued part of our heritage and will be

forever preserved for the people and managed by law and regulation for the public good.” N.D.C.C. Const. Art. 11, § 27; see also 2006 N.D. Op. Atty. Gen. No. L-23 (Aug. 16, 2006) (noting the Public Trust Doctrine which provides that the discretionary authority of state officials to allocate vital state resources is limited by their obligation to hold such resources in trust for the benefit of the people, and that the Doctrine is commonly held to protect public interests in hunting and fishing) (citing United Plainsmen Ass’n v. North Dakota State Water Conservation Comm’n, 247 N.W.2d 457 (N.D. 1976); Parks v. Cooper, 676 N.W.2d 823, 839 (S.D. 2004); Shokal v. Dunn, 707 P.2d 441, 451 (Idaho 1985); Montana Coalition for Stream Access Inc. v. Curran, 682 P.2d 163, 171 (Mont. 1984); et.al.).

[¶32] Strict liability offenses have a “generally disfavored status.” State v. Holte, 2011 ND 133, ¶ 11, 631 N.W.2d 595. Affirmative defenses may be applied to a strict liability offense in some circumstances. State v. Kleppe, 2011 ND 141, ¶ 25, 800 N.W.2d 311. This Court has specifically found that affirmative defenses may be permitted to strict liability offenses “when public policy factors support the defense,” and as “a logical accommodation which recognizes the reasons for both the legislative designation of the crimes as strict liability offenses and the constitutional interests of the accused.” Holte, 2011 ND 133, ¶ 11, 631 N.W.2d 595; see also State v. Rasmussen, 524 N.W.2d 843, 845 (N.D. 1994) (applicability of defense to strict liability offense requires a balancing of whether public interest in efficient law enforcement is outweighed by other public interests protected by the defenses claimed).

[¶33] The mistake of fact defense is recognized under North Dakota law as the affirmative defense of “excuse.” City of Mandan v. Willman, 439 N.W.2d 92, 94 (N.D.

1989); see also N.D.C.C. 12.1-05-08 (“A person’s conduct is excused if he believes that the facts are such that his conduct is necessary and appropriate for any of the purposes which would establish a justification or excuse under this chapter, even though his belief is mistaken.”). By excusing certain criminal conduct, the courts essentially recognize the unfairness in punishing “the actor [who] reasonably but mistakenly believed that circumstances actually existed which would justify that conduct.” See City of Bismarck v. Lembke, 540 N.W.2d 155, 157 (N.D. 1995). However, a mistake of fact defense can never be premised on negligence by the party raising the defense. State v. Schmidt, 2002 ND 43, ¶ 6, 640 N.W.2d 702.

[¶34] In In re Jennings, 95 P.3d 906 (Cal. 2004), the California Supreme Court contemplated whether to allow the affirmative defense of mistake of fact to the criminal charge of statutory rape where a defendant asserted he was mistaken about the actual age of the alleged victim. Id. at 919. The Court noted the mistake of fact defense traditionally was applied to criminal charges to disprove criminal intent, and therefore would generally not be available unless the mistake disproved an element of the offense on the *mens rea* of the defendant. Id. at 919-20.

[¶35] However, the Jennings Court went onto recognize the shifting focus in criminal law toward allowing mistake of fact defenses for strict liability offenses, and noted several occasions when it had allowed for such application for charges which traditionally lacked an intent requirement. Id. at 921 (citing People v. Vogel, 299 P.2d 850 (Cal. 1956) (mistake of fact allowed as affirmative defense to bigamy, holding defendant would not be guilty “if he had a bona fide and reasonable belief that facts existed that left him free to remarry”); People v. Hernandez, 393 P.2d 673 (Cal. 1964)

(allowing for mistake of fact defense to statutory rape and noting, "At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which the person is indicted an innocent act, has always been held to be a good defense[I]t has never been suggested that these exceptions do not equally apply to the case of statutory offenses unless they are excluded expressly or by necessary implication.")). The court held that, while the prosecution would not be required to prove intent where the crime did not make the same an element, a petitioner should be "entitled to raise an affirmative defense, for which he would bear the burden of proof" that he was mistaken on facts which excused his behavior. Id. at 922.

[¶36] California is not alone in its decision to provide for affirmative defenses in strict liability offenses. Alaska, Wisconsin and South Dakota have all distinguished between "strict" and "absolute" liability crimes, noting that where a defendant is charged with a strict liability crime he should be able to prove conditions in which the person involved could not reasonably be expected to know that he was omitting or committing an act contrary to the statute or be expected to act otherwise, while an "absolute" liability crime would utterly eliminate a defendant's state of mind from consideration, as the offender would be "guilty without exception." See Clucas v. State, 815 P.2d 384, 388 (Alaska App. 1991) (discussing State v. Brown, 318 N.W.2d 370 (Wis. 1982) and State v. Willers, 64 N.W.2d 810 (S.D. 1954)). As the Willers court recognized, while the prosecution of a violation in which intent is not a factor places no burden on the State to prove specific criminal intent or guilty knowledge:

This does not mean however that the statute is absolute in the sense that every violation of its express terms renders one guilty under the law. Circumstances could very well exist under which a violation would be excused. Such

circumstances are those arising from conditions in which the person involved could not reasonably be expected to know that he was omitting or committing an act contrary to the statute or having such knowledge could not under the circumstances reasonably be expected to act otherwise than contrary to the statutory provisions. It is our view however that proof of such extenuating circumstances are matters of defense.

64 N.W.2d at 811.

[¶37] Here, it is clear that the public policy concerns underlying the defense of mistake of law under the Century Code allow for the defense to be plead against the offense charged against the Mittleiders. It is undisputed that the Refuge was not properly signed. Moreover, in its Order Denying Motion to Suppress, the District Court made a specific finding of fact that “Andrew and Ricky did not realize they were within the boundaries of the refuge.” (A at 93).

[¶38] Our state’s strong public policy favoring the right of its citizens to hunt game based in the North Dakota Constitution demands that a level of protection be provided for hunters from unnecessary recrimination and reproach based on unintended criminal conduct. In this case, public policy is squarely in favor of the application of a mistake of fact defense where even the District Court acknowledged the Mittleiders were without ill will and were so devoid of intent that they were not aware they had been on a wildlife refuge until so informed by the authorities. It should be noted that the authorities were unable to determine the boundary of the Refuge without the aid of GPS equipment. (A at 85.)

[¶39] Based on the facts of this case, the District Court erred when it denied the Mittleiders the opportunity to plead the affirmative defense of mistake of fact.

[¶40] III. THE COURT ERRED WHEN IT FAILED TO FIND THAT THE OFFICERS' FIRST SEARCH OF THE MITTLEIDERS' FARMSTEAD VIOLATED ARTICLE 1, SECTION 8 OF THE NORTH DAKOTA CONSTITUTION.

[¶41] The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, and Article 1, section 8 of the North Dakota Constitution, protect an individual from unreasonable searches and seizures. State v. Winkler, 552 N.W.2d 347, 351 (N.D. 1996). A search occurs when the government intrudes upon an individual's reasonable expectation of privacy. Id. When an individual possesses a reasonable expectation of privacy in a given area, the government must obtain a warrant before searching that area subject to limited, established exceptions. Id.

[¶42] While the Fourth Amendment has historically been recognized to protect an individual's dwelling and the curtilage surrounding it, open fields have traditionally not been granted the same protection. State v. Larson, 343 N.W.2d 361, 363 (N.D. 1984). This Court has further noted that police with legitimate business may enter certain areas surrounding a home where persons may have a reasonable expectation of privacy, such as curtilage, but which are "impliedly open to use by the public." Winkler, 552 N.W.2d at 352. Moreover, the Court has recognized that, under the United States Constitution, "no trespassing" signs in open fields cannot effectuate an increased expectation of privacy. State v. Kochel, 2008 ND 28, ¶ 9, 744 N.W.2d 771 (citing Oliver v. United States, 466 U.S. 170, 179 (1984)).

[¶43] However, while under the United States Constitution the officer's intrusion onto the Mittleiders land may not have offended their rights, the North Dakota Constitution should be interpreted as providing additional protection to the Mittleiders

under the facts of this case. The parties have stipulated that at the time of the first search, the Mittleiders' pick-up was parked 207 feet from the public right of way and that there were two "No Trespassing" signs posted near the entrance to the Mittleider farmstead informing the general public that they did not have the right to enter the property. The parties have further stipulated that under North Dakota law, the general public did not have the right to enter the Mittleiders' farmstead. Any person entering the farmstead without permission would be committing a Class B Misdemeanor. See N.D.C.C. § 12.1-22-03 (3).

[¶44] The North Dakota Constitution may provide more protection to individuals than that available under the United States Constitution. See State v. Utvick, 2004 ND 36, ¶ 28, 675 N.W.2d 387. This Court has noted it has "continued to leave [the] issue undecided" as to whether the state constitution may provide greater protections than the Fourth Amendment. State v. Lunde, 2008 ND 142, ¶ 18, 752 N.W.2d 630. Therefore, it has not been established under North Dakota law whether the clear posting of "No Trespassing" signs on rural property provides an individual with a reasonable expectation of privacy from having unwanted law enforcement officers driving onto their land.

[¶45] While this issue may be untested under North Dakota law, several other states have interpreted their constitutions to provide for the exact protection sought by the Mittleiders. In State v. Webb, 943 P.2d 52 (Idaho 1997), the Idaho Supreme Court held that a broader level of protection than provided by the United States Constitution was necessary to "better serve[] the citizens of Idaho in view of the rural nature of much of" the state. Id. at 57 (emphasis added). Specifically, the Idaho Court noted that the factors

of what constitutes protected curtilage need to be applied in the context of the setting or locality of the residence itself. Id. As the Court astutely reasoned:

[T]he curtilage of a home located within the city limits of Boise may not be the same as the curtilage of a ranch located in one of Idaho's rural counties. The trial court must therefore take into consideration the differences in custom and terrain within different areas of the state when contemplating particular expectations of privacy.

Id.

[¶46] The New Mexico Court of Appeals reached a similar result in State v. Sutton, 816 P.2d 518 (N.M.App. 1991), when it noted that the protection available for "'open fields' depends on concepts that appear to have evolved in areas with very different customs and terrain." Id. at 523. The Court held that, with large lot sizes in rural areas and plentiful land, any interpretation of when a reasonable expectation of privacy exists for such property "must take into account the possibility that such differences in custom and terrain give rise to particular expectations of privacy." Id. While the Sutton Court determined the particular defendant did not have an expectation of privacy in the land where he had an ample amount of marijuana growing, it was specifically because the defendant "placed no signs declaring the property to be private property or declaring the land to be off-limits to trespassers," that no fences were erected around the plots, and that law enforcement officers were "able to walk up and view the plots unimpeded from a public road." Id. at 524.

[¶47] In State v. Bullock, 901 P.2d 61 (Mont. 1995), the Montana Supreme Court noted the state had a strong tradition of respect for the right to individual privacy, and stated, "the rule that an individual may never have an expectation of privacy in open

fields would be repugnant” to the state’s view on privacy rights. Id. at 75. The Court continued by holding:

[I]n Montana a person may have an expectation of privacy in an area of land that is beyond the curtilage which the society of this State is willing to recognize as reasonable, and that where that expectation is evidenced by fencing, “No Trespassing,” or similar signs, or “by some other means [which] indicate[s] unmistakably that entry is not permitted,” entry by law enforcement officers requires permission or a warrant.

Id. at 75-76 (emphasis added; other alterations in original).

[¶48] In Bullock, much like the present matter, the Court contemplated the privacy interests of an individual who was arrested for hunting violations after law enforcement entered his land and discovered an elk carcass. Id. at 76. The Court noted the defendant’s cabin was 334 feet down a private road from public property, that a fence separated his property from the public road and a large metal gate controlled access to the property. Id. at 76. The Court stated that, while the gate was open on the occasion in which law enforcement officers entered his property and discovered evidence of illegal activity, “No Trespassing” signs were posted on the sides of the gate. Id. Given the defendant’s “numerous precautions to ensure that others would not enter his property without permission,” the Court held his “expectation of privacy was reasonable,” and the law enforcement’s entry onto the land violated the state’s constitutional provisions against unreasonable search and seizure. Id.

[¶49] Here, whether the Mittleiders had a reasonable expectation of privacy in their property should be contemplated under the well-reasoned analyses of Webb, Sutton, and Bullock given the stark similarities between the present matter and those cases. First, like Idaho, Montana and New Mexico, North Dakota gains much of its general character

from its expansiveness and the rural nature of much of the land. On private property in rural North Dakota, an individual's expectation of privacy is not limited to the curtilage directly surrounding a house, but rather envelopes much of the land. It is axiomatic that a North Dakota resident who lives on a piece of rural property - away from the bustle and ever-present reminders that one is immediately surrounded by thousands of his or her fellow citizens that is inherent in our cities - has made such a decision with a consideration of the serenity and privacy that comes with rural life.

[¶50] Second, the actions of the Mittleiders mirror those core concepts in Webb, Sutton, and Bullock which the courts recognized as indicative of establishing a reasonable expectation of privacy in the land. While the District Court in this matter focused its attention on the fact that there was no gate or "No Trespassing" sign directly on the road to the Mittleiders' residence, like the defendant in Bullock (and unlike the unsuccessful appellant in Sutton), they specifically posted signs around their property. The Court's analysis appears to suggest that a landowner posting a "No Trespassing" sign could only expect that an unwelcome outsider would be prevented from entering his property at the exact location where the sign is situated. In reality - and particularly in North Dakota, where "No Trespassing" signs are customary in rural communities - a landowner who posts his or her land with such signs should be secure in the knowledge that a trespasser cannot skirt the purpose of the sign by simply walking several yards away and entering the property on an access road, regardless of whether a "No Trespassing" sign graces the entry point of that road.

[¶51] If this Court concludes the first search violated the North Dakota Constitution, then this Court should suppress all evidence including evidence seized

pursuant to the subsequently obtained warrant. "It is well established that illegally obtained evidence cannot be used to establish probable cause to issue a search warrant." State v. Fields, 2005 ND 15, ¶ 6, 691 N.W.2d 233; see also State v. Corum, 2003 ND 89, ¶ 9, 663 N.W.2d 151 (noting that where evidence obtained from illegal search or seizure is crucial to the validity of a warrant, the warrant would not be supported by probable cause). Nothing seen or found on the premises during an illegal search may be used to legally form the basis for an arrest or search warrant. Alderman v. U.S., 394 U.S. 165, 177 (1969). Here, the illegal search of the Mittleiders property was crucial to the subsequent search warrant obtained by the officer, and therefore the subsequent search pursuant to the warrant was invalid. See State v. Winkler, 1997 ND 144, 567 N.W.2d 330 (noting a source independent of the illegal search must provide probable cause for a warrant to uphold a search pursuant to the warrant).

[¶52]

CONCLUSION

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

Dated this 22nd day of August, 2011.

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