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ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

The City of Harvey, Plaintiff - Appellant, vs. Kyle Fettig, Defendant - Appellee	SUPREME COURT No. 20000185 District Court No. 99-K-282

APPELLANT'S BRIEF

APPEAL FROM BENCH RULING AT

MAY 9, 2000, EVIDENTIARY HEARING,

DENYING ADMISSION OF

DEFENDANT'S PRIOR CONVICTION TESTIMONY

SOUTHEAST JUDICIAL DISTRICT

THE HONORABLE JOHN E. GREENWOOD, PRESIDING

CRIMINAL NO. 99-K-282

APPEAL FROM THE ORDER GRANTING, IN PART,

DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

DATED MAY 31, 2000

SOUTHEAST JUDICIAL DISTRICT

THE HONORABLE JOHN E. GREENWOOD, PRESIDING

CRIMINAL NO. 99-K-282

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STATEMENT OF THE ISSUES PRESENTED ON APPEAL

I. Whether the Court erred in denying the admission of testimony about the Defendant's prior Minor in Possession of Alcohol conviction, as evidenced by Plaintiff's Exhibit 10, as evidence of the Defendant's knowledge and voluntariness in making admissions in this case, and Officer Balfour's knowledge of the Defendant's conviction?

II. Whether the District Court erred in granting the motion to suppress evidence, relating to alcohol, obtained from the search of Defendant's vehicle because the evidence is the result of an illegal warrantless search without probable cause and an inventory search that was used as a tool for criminal investigation.

III. Whether the District Court erred in granting the motion to suppress the Defendant's statements regarding evidence discovered in the Defendant's illegally searched vehicle because it is the fruit of the poisonous tree.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

The case on appeal is a criminal case wherein the Defendant/Appellee, Kyle Fettig [hereinafter Defendant], was charged by uniform traffic summons and complaint with one count of the Class B misdemeanor offense of Minor in Possession of Alcohol in violation of Section 5-01-08 of the North Dakota Century Code, and said uniform traffic summons and complaint was overridden with the Complaint issued by the City Attorney for the City of Harvey, Kathleen K. Trosen [hereinafter City Attorney]. [A. at 5-6]. The Complaint charged Defendant with five counts as follows: Count I: Care Required, in violation of Section 39-09-01.1 of the North Dakota Century Code, a $30.00 fee; Count II: Minor in Possession of Alcohol, in violation of Section 5-01-08 of the North Dakota Century Code, a Class B Misdemeanor; Count III: Open Bottle Law, in violation of Section 39-08-18, a

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$50.00 fee; Count IV: Fleeing a Peace Officer, in violation of Section 12.1-08-11, a Class B Misdemeanor; and Count V: Parking Regulations, in violation of Section 39-10-50, a warning of illegal parking. [A. at 5-6].

II. COURSE OF THE PROCEEDINGS

On November 5, 1999, the Defendant was charged by City of Harvey Police Officer Marc Balfour, [hereinafter Officer Balfour], by uniform traffic summons and complaint with one count of the Class B misdemeanor offense of Minor in Possession of Alcohol in violation of Section 5-01-08 of the North Dakota Century Code. [A. at 7]. On December 13, 1999, said uniform traffic summons and complaint was overridden with the Complaint issued by the City Attorney. [A. at 5-6]. The Complaint charged Defendant with five counts as follows: Count I: Care Required, in violation of Section 39-09-01.1 of the North Dakota Century Code, a $30.00 fee; Count II: Minor in Possession of Alcohol, in violation of Section 5-01-08 of the North Dakota Century Code, a Class B Misdemeanor; Count III: Open Bottle Law, in violation of Section 39-08-18, a $50.00 fee; Count IV: Fleeing a Peace Officer, in violation of Section 12.1-08-11, a Class B Misdemeanor; and Count V: Parking Regulations, in violation of Section 39-10-50, a warning of illegal parking. [A.at 5-6].

On November 17, 1999, Defendant made a first appearance in Municipal Court, City of Harvey, the Honorable Judge Dean Klier presiding, and a plea of not guilty was entered. [A. at 7]. Defendant's attorney, Michael S. McIntee [hereinafter Counsel for Defendant] timely requested a jury trial, and transferred the proceedings to Wells County District Court. [A. at 7-8].

On March 21, 2000, the Depositions of Officer Balfour and City of Harvey Police Officer Greg Brower, [hereinafter Officer Brower], were taken by Counsel for the Defendant at the City Attorney's Office. [Tr. Contents Exhibits F, G].

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On April 4, 2000, Defendant made a first appearance in Wells County District Court, Honorable Judge John E. Greenwood [hereinafter Judge Greenwood] presiding, and a plea of not guilty was entered.

On April 4, 2000, Counsel for Defendant brought a Motion to Suppress Evidence without filing an Affidavit nor Brief Supporting Motion. [A. at 9-10]. The Motion sought to suppress evidence obtained as a result of a warrantless search of the Defendant's vehicle by Officer Balfour, and admissions made by Defendant to Officer Balfour that he, the Defendant, was driving on November 5, 1999, that he had been stopped by Officer Balfour, that he exited his vehicle away from Officer Balfour, and that he had in his possession three (3) cans of Bud Light Beer. [A. at 11-14]. On April 14, 2000, the City of Harvey, by and through its City Attorney, filed a Response in Opposition to the motion to suppress evidence with Brief in Support of Response in Opposition to Motion to Suppress. [A. at 11-14]. The City Attorney argued that Defendant's motion should be denied because all of the evidence was legally obtained based upon probable cause and a standard inventory search of an impounded vehicle, and alternatively that the evidence had an independent source and would have inevitably been discovered. [A. at 11-12]. The City Attorney argued that Defendant's motion should be denied because none of the statements were illegally obtained, as the Defendant was not "in custody" and *Miranda* does not apply, and all of the statements were voluntary, and there is an independent source for the statements and the Defendant's identity. [A. at 12-13]. The City Attorney argued that the Defendant's motion should be denied because the Defendant failed to file an Affidavit and/or Brief in support of said Motion to Suppress and the motion is deemed without merit. [A. at 14].

On May 9, 2000, an evidentiary suppression hearing was held in the Wells County District Court, the Honorable John E. Greenwood presiding. [Tr. at 1-2]. At the evidentiary hearing, Officer Balfour appeared and testified. [Tr. at 5-88, 112-

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122]. Kyle Fettig, Defendant, appeared and testified, but cross exam was limited to questions asked on direct. [Tr. at 91-103]. Pius Fettig, Defendant's Father, appeared and testified. [Tr. at 103-111].

III. DISPOSITION OF THE COURT BELOW

At the evidentiary hearing, Honorable Judge Greenwood denied admission of testimony evidence regarding Defendant's prior conviction for Minor in Possession of Alcohol, as evidenced by Plaintiff's Exhibit 10, even though Defendant's Counsel agreed to Plaintiff's Exhibit 10 and Plaintiff's Exhibit 10 was received into evidence. [Tr. at 32-34, 63]. The Court did not issue a ruling from the Bench and allowed counsel to make a written argument. [Tr. at 122].

The Court later issued its Order Suppressing Evidence. [A. at 15-23]. In its Order, the Court held, "the officer did not have probable cause to search the vehicle for contraband. . . . The automobile exception to the warrant requirement does not apply in this case." [A. at 17]. In its Order, the Court held, "'[t]he search was used as a tool for criminal investigation, and it appears the sole purpose of the search was 'to discover evidence of crime and not to fulfill a caretaking function.' (citing State v. Kunkel, 455 N.W.2d 208, 211 (N.D. 1990)." [A. at 18]. In its Order, the Court held, "Officer Balfour's search was an impermissible search under the Fourth Amendment and the evidence should be suppressed." [A. at 19].

In its Order, the Court held, "[a]lthough the search of the vehicle was in violation of the Fourth Amendment the statement received from the Defendant following the search is not fruit of the poisonous tree. The independent source doctrine prevents 'the exclusion of evidence when knowledge thereof can be attributed to a source other than the source learned of through a constitutional violation.' (citing In the Interest of M.D.J., 285 N.W.2d 558, 563 (N.D. 1979)." [A. at 19]. In its Order, the Court held, "any of Officer Balfour's questions regarding the illegally discovered evidence would be fruit of the poisonous tree

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because it exploits the unlawful action and there is no independent source to purge the primary taint. Id." [A. at 20]. In its Order, the Court held, "there is no question the defendant was interrogated, but . . . the defendant was not arrested or in custody and therefore the *Miranda* warnings do not apply in this case. (citing State v. Martin, 543 N.W.2d 224, 226 (N.D. 1996)." [A. at 21]. In its Order, the Court held, "[t]he defendant was not in a vulnerable condition at the time of the interrogation." [A. at 22]. In its Order, the Court held, "[i]n this case the totality of the circumstances shows that the defendant's will was not overborne. (citing State v. Newman, 409 N.W.2d 79, 84 (N.D. 1987)." [A. at 22]. "The statements were given voluntarily and no constitutional violation occurred." [A. at. 23].

It is from that Order Granting, In Part, Defendant's Motion to Suppress Evidence, that the State brings this appeal, pursuant to Rule 37 of the North Dakota Rules of Criminal Procedure, and pursuant to Section 29-28-07 of the North Dakota Century Code, which states in pertinent part: "From what the state may appeal." An appeal may be taken by the state from: 5. An order . . . suppressing evidence, or suppressing a confession, or admission, when accompanied by a statement of the prosecuting attorney asserting that the appeal is not taken for the purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding. The statement must be filed with the Clerk of district court and a copy must accompany the notice of appeal." NDCC, Section 29-28-07(5) (1985). [A. at 31-32].

FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

On November 5, 1999, at approximately 12:07 a.m., Officer Marc Balfour was in full uniform and was patrolling the City of Harvey in one of the City of Harvey's marked police vehicles, and he noticed a black Chevy pickup driving around. [A. at 85-86, and Tr. at 38] He decided to conduct a random license plate check (a "28") on the pickup to determine the owner, and possible driver, as well as, if any potential violations for this vehicle, and if the vehicle had been stolen, and

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so, Officer Balfour followed the pickup until the response to the license plate check came back. [Tr. at 36, 61-62]. Officer Balfour believes that the Defendant heard the license plate check over a scanner, which was later discovered in the Defendant's pickup, but this fact is in dispute. [Tr. at 69] After Officer Balfour received confirmation that the registered owner was the Defendant, Kyle Fettig, and that there were no apparent violations at the time, and the vehicle was not stolen, Officer Balfour did not follow the Defendant when he turned off onto Adams Avenue and headed South, and instead Officer Balfour continued to go straight on North Street. [A. at 85-86, Tr. at 36-37, 41, 51]. The Defendant, Kyle Fettig, admitted that he was driving on November 5, 1999. [Tr. at 28].

Officer Balfour turned South onto Burke Avenue, and as he approached Fourth Street, Officer Balfour noticed that the Defendant's pickup approaching him from the West, and was traveling diagonally across Officer Balfour's lane without any lights on. [Tr. at 37]. The Defendant and Officer Balfour were still driving their vehicles sometime after 12:07 a.m. [A. at 85-86]. Officer Balfour immediately activated his red rotating lights while the Defendant's pickup was still moving toward the curb, and then, Officer Balfour stopped in front of the Defendant's pickup. [A. at 85-86, Tr. at 37-38]. Then, the Defendant's pickup stopped, but Officer Balfour visually noticed that the front end of the Defendant's pickup was parked 3-4 feet away from the curb, and the rear of the Defendant's pickup was in the driving lane. [Tr. at 42-43] Officer Balfour could not see anyone in the pickup, and had not seen the driver of the pickup. [Tr. at 38]. Officer Balfour attempted to effect a traffic stop from the front of the Defendant's pickup, and walked up to the pickup and looked in the driver's side window, and still could not see anyone. [Tr. at 38]. Later, Officer Balfour was able to put together an idea of the identification of the Defendant. [Tr. at 41].

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As Officer Balfour attempted to walk around to the rear of the Defendant's pickup, he heard the passenger's door open and slam shut, and then, Officer Balfour saw movement, about an arm's length away, [Tr. at 75], and saw that the Defendant, a young male, with a slim build, short, approximately 5'6" tall, very short cut hair, wearing a baseball cap, began sprinting Southwest, away from the passenger side of the pickup, and away from Officer Balfour, through an adjacent yard. [A. at 85-86, Tr. at 39-40] Officer Balfour immediately yelled, "POLICE! STOP!" [A. at 85-86, Tr. at 39-40] The Defendant kept sprinting away from Officer Balfour, and Officer Balfour pursued the Defendant through several yards. [Tr. at 40]. Officer Balfour continued to yell, "STOP! POLICE!" but the Defendant kept running away from Officer Balfour. Officer Balfour chased the Defendant for approximately 2 and 1/2 blocks, eventually losing sight of the Defendant near the skating rink. [A. at 85-86, Tr. at 40]. Officer Balfour returned to the police vehicle and the Defendant's vehicle because he became concerned for officer safety, and contacted Chief Larry Hoffer, and Officer Greg Brower. [Tr. at 40]

Chief Hoffer and Officer Brower arrived at the scene and Officer Balfour appraised them of the situation, and both Chief Hoffer and Officer Brower visually inspected the scene and looked for the Defendant. [Tr. at 41, A. at 84-85]. Chief Hoffer told Officer Balfour to contact Gary Wuitschick to impound the pickup because it was illegally parked, and the rear of the pickup was in the driving lane. [Tr. at 7-9]. Then, Chief Hoffer proceeded to search for the Defendant, but was still unable to locate the Defendant. [Tr. at 41]. The Defendant's pickup doors were locked. [Tr. at 42]. It is disputed whether or not the wooden box in the back of the Defendant's vehicle was open or locked. [Tr. at 42]. Officer Balfour testified that the wooden box was unlocked, and that he looked into the wooden box prior to the pickup being impounded. [Tr. at 117].

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Following standard police procedure, Officer Balfour obeyed Chief Hoffer's directions and contacted Gary Wuitschick, and Gary Wuitschick towed the Defendant's pickup to the Harvey Armory. [Tr. at 7, A. at 85-86]. No attempt was made by any of the law enforcement officers to obtain a search warrant. [Tr. at 79]. The Harvey Armory is not completely secure because all City Employees and All Volunteer Firemen have keys and access to the Armory, and the City of Harvey does not have a secure impound lot. [Tr. at 11]. There were concerns in leaving the vehicle in the Armory because it is not secure, and they did not want any claims of lost or stolen property, and they did not want to leave any potentially dangerous objects in an abandoned vehicle. [Tr. at 10, 81].

Officer Balfour and Officer Brower followed standard police procedure and conducted a proper inventory search of an impounded vehicle. [Tr. at 7, 10, Brower Depo. at 14, 20, Balfour Depo 37] The City of Harvey does not have a written inventory search policy. [Tr. at 9]. The procedure involved thoroughly searching the vehicle for any valuables and any contraband. [Tr. at 10]. Any valuables and contraband are removed, tagged for an inventory list, and then, later the tagged items are listed in the Officer's police report. [Tr. at 10] The tagged valuables and contraband are then, securely stored in the locked police station for evidence, and the police station is either guarded by a Harvey Police Officer, or it remains locked at all times, and only Harvey Police Officers have keys to this room. [Tr. at 10].

During the standard inventory search, the Officers located a 6" double edged knife / dagger behind the driver's seat. [Tr. at 11]. Also behind the driver's seat were three (3) unopened cans of Bud Light Beer, and a partially full bottle of Karkov Vodka with the seal broken. [Tr. at 11] In the driver's seat pocket, the Officers located a leather checkbook/wallet with the Defendant's driver's license, and other personal property items of the Defendant, including the Defendant's social security card. [Tr. at 11] The search also revealed a scanner inside the

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pickup. In the unlocked back tool box, the Officers found seven (7) unopened cans of Keystone Light Beer. [Tr. at 11] All of the removed items were labeled and then, secured in the locked police station. [Tr. at 11, Brower Depo at 15, Balfour Depo at 28]. Officer Balfour has never made an "inventory list" but rather only a list of the evidence. [Tr. at 46-47]. It is the policy of the Harvey Police Department to conduct inventory searches after a vehicle has been impounded. [Tr. at 7].

During the inventory search of the vehicle, Officer Balfour, in good faith, attempted to remove valuables, such as the wallet, cash, credit cards, checkblanks, a scanner, and also contraband, but inadvertently, did not remove all items from the vehicle, including some CDs, a cell phone, and a jacket. [Tr. at 11, 46, 47, 68, 80, 81]. Officer Balfour testified that the City of Harvey does not have a specific inventory list or catalog sheets for the inventory, and rather they just label everything, and they take out the valuables, and they wouldn't verify everything. [Tr. at 10, 11, 46, 47, 77]. However, these items are written down on the police log, and then, in the police report. [Tr. at 77].

After conducting the search, Officer Balfour contacted Pius Fettig, the Defendant's father, at the Defendant's residence as the Defendant lives with his parents. [A. at 85-86, Tr. at 23-24]. Officer Balfour asked Pius Fettig if Kyle had been driving that night. [Tr. at 23]. Pius Fettig stated that Kyle had been driving his pickup that night. [Tr. at 23-24]. Officer Balfour asked Pius if Kyle was home, and Pius said yes, and that Kyle had come home at approximately 1 a.m. [Tr. at 23-24]. Officer Balfour asked Pius if he knew where his truck was, and Pius said "No, where is the truck?" and Officer Balfour said "well, we have it impounded." [A. at 85-86]. Officer Balfour gave a brief summary of the events, and asked if he could come to the Fettig house to talk to them about the situation. [Tr. at 24]. Pius Fettig said he would wake up Kyle, it would be okay. [A. at 85-86]. Pius Fettig invited Officer Balfour out to his residence. [Tr. at 24].

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Officer Balfour contacted Wells County Sheriff's Deputy Jeff Roerick, and asked if he would accompany him to the Fettig home since it was out of Harvey city limits, and Officer Balfour was unsure of the location of the Fettig residence. [Tr. at 24-25]. Deputy Roerick made arrangements with Officer Balfour to meet, and then, show Officer Balfour the location of the Fettig residence. [Tr. at 25]. Deputy Roerick accompanied Officer Balfour to the Fettig residence. [Tr. at 25].

When Officer Balfour and Deputy Roerick arrived at the Fettig residence at approximately 2:15 a.m., the Pius and Tami Fettig invited them into their residence. [Tr. at 25, A. at 85-86]. Pius Fettig asked Officer Balfour what was going on, and Officer Balfour gave a brief summary of the incident. [Tr. at 25]. Pius Fettig stated that the Defendant, Kyle, had given them a different story. [Tr. at 25]. Pius Fettig called the Defendant into the kitchen where Officer Balfour, Deputy Roerick, and Mr and Mrs Fettig were sitting at the kitchen table. [Tr. at 25]. Officer Balfour asked the Defendant to explain his version of the events. [Tr. at 25-26].

The Defendant said that he had just dropped off his girlfriend when he saw the police vehicle following him, and then, the Defendant decided to go to his brother's house, and that's when Officer Balfour stopped him, he got out of his vehicle, and began walking away from it. [Tr. at 28-29]. The Defendant stated that he was the only one in the vehicle and that he just wanted to go to his brother's house. [Tr. at 28]. Officer Balfour corrected the Defendant and said that no, he didn't get out and walk away, but he sprinted away, and continued to run despite the activated red rotating lights and commands to stop for the police. [Tr. at 28-29].

The Defendant asked if they searched the vehicle, and Officer Balfour said yes. [Tr. at 29]. The Defendant asked what was found in the search, and Officer Balfour asked the Defendant if he knew what was in the Defendant's vehicle, and the Defendant confessed to the possession of three (3) cans of Bud Light Beer. [Tr. at 29-30]. Officer Balfour informed the Defendant of the others items that were

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found during the search, and that Officer Balfour would send a copy of the report to the State's Attorney, Ted Seibel, and the City Attorney, Kathleen K. Trosen, and the attorneys would make the final decisions regarding the charges. [Tr. at 30]. Officer Balfour completed a citation for minor in possession of alcohol, the Defendant signed it. [Tr. at 30, A. at 86]. The entire time of the questioning the Defendant's parents were present. [Tr. at 31]. The Defendant was not taken into custody, and was free to move about while the officers were at the Fettig residence. [Tr. at 30-31]. Then, Officer Balfour and Deputy Roerick left the Fettig Residence. [Tr. at 30-31]. The Defendant has a prior minor in possession conviction that Officer Balfour knew about prior to November 5, 1999. [Tr. at 33].

The Officers never issued *Miranda* warnings to the Defendant while at the Fettig residence. [Tr. at 26]. The Defendant was not asked if he wanted an attorney present during the discussion, but the Defendant, nor the Defendant's parents, Pius and Tami Fettig, never asked to have an attorney present during the questioning. [Tr. at 27-28]. No one asked the officers to leave the Fettig residence at any time during the discussion. [Tr. at 27]. The discussion lasted approximately 20-30 minutes from approximately 2:30 a.m. until approximately 3:00 a.m. [Tr. at 29].

ARGUMENT

I. STANDARD OF REVIEW

THE DISTRICT COURT'S ORDER TO SUPPRESS THE EVIDENCE IS FULLY REVIEWABLE BY THE COURT ON APPEAL.

The Court restated in State v. Gregg, 2000 N.D. 154 ¶ 20, 615 N.W.2d 515 (ND 2000), that a trial court's determination on a motion to suppress evidence is fully reviewable on appeal because questions of law are fully reviewable. The Court explained its reasoning on the issue of what standard of review to apply to a lower court's decision on a motion to suppress evidence, as the Court said:

> When reviewing a district court's ruling on a motion to suppress, we defer to the district court's findings of fact and resolve conflicts in testimony in favor of affirmance. (citing City of Grand Forks v. Zejdlik, 551 N.W.2d

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> 772, 774 (N.D. 1996)). We affirm the district court's decision unless we conclude there is insufficient competent evidence to support the decision, or unless the decision goes against the manifest weight of the evidence. (citation omitted). Although the underlying factual disputes are findings of fact, whether the findings meet a legal standard . . . is a question of law. Id. at ¶ 20, 774.

In the case on appeal, the facts produced by the depositions, the exhibits, and adduced by the evidentiary hearing demonstrate that Officer Balfour had probable cause to search the Defendant's vehicle, that the warrantless search was from a standard police inventory search of an impounded vehicle that was illegally parked and the evidence could have been obtained from an independent source doctrine or through inevitable discovery, or the attenuation exception. In the case on appeal, the facts produced by the depositions, the exhibits, and facts adduced by the evidentiary hearing all demonstrate that the admissions made by the Defendant to Officer Balfour that he, the Defendant, was driving on November 5, 1999, that he had been stopped by Officer Balfour, that he exited his vehicle away from Officer Balfour, and that he had in his possession three (3) cans of Bud Light Beer contained willful acts by the Defendant and voluntary statements that purge the taint of illegal activity.

II. THE DISTRICT COURT'S SUPPRESSION OF EVIDENCE

THE DEFENDANT'S MOTION SHOULD BE DENIED BECAUSE THE DEFENDANT FAILED TO FILE AN AFFIDAVIT AND/OR BRIEF IN SUPPORT OF SAID MOTION TO SUPPRESS AND THE MOTION IS DEEMED WITHOUT MERIT.

Pursuant to rule 3.2 of the North Dakota Rules of Court, the Moving Party, the Defendant, is required to file a brief or it may be deemed an admission that, in the opinion of party or counsel, the motion is without merit because even if an answer brief is not filed, the moving party must still demonstrate to the Court that it is entitled to the relief requested. N. D. R. Ct. 3.2.

THE COURT ERRED IN DENYING THE ADMISSION OF TESTIMONY ABOUT THE DEFENDANT'S PRIOR MINOR IN POSSESSION OF ALCOHOL CONVICTION AS EVIDENCE OF THE DEFENDANT'S KNOWLEDGE AND VOLUNTARINESS IN MAKING ADMISSIONS IN THIS CASE, AND OFFICER BALFOUR'S KNOWLEDGE OF THE DEFENDANT'S CONVICTION.

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Pursuant to Rule 404(b), of the North Dakota Rules of Evidence, evidence of other crimes is admissible for the purposes of intent, knowledge, or absence of mistake provided that the prosecution shall provide reasonable notice prior to trial. N.D. R. Evid. 404(b). In this case, the prosecution provided notice of the intent to introduce the prior crime of the Defendant in the suppression hearing, which is reasonable notice prior to trial. Id. [Tr. at 32-34, 63]. The Court found that the prior minor in possession conviction of the Defendant did not provide any evidence of voluntariness and found it was inadmissible. [Tr. at 63]. The Court erred in the that fact that the City Attorney specifically stated that the testimony and conviction provided evidence of knowledge and that the Defendant voluntarily made statements regarding the alcohol in his vehicle, [Tr. at 29], with the knowledge and experience the Defendant had with law enforcement. [Tr. at 32-34]. Whether the confession is voluntary is assessed by the totality of the circumstances including: the age of the suspect; the education of the suspect; the intelligence of the suspect; the lack of advice concerning his constitutional rights; the length of the detention; the repeated or prolonged nature of the questioning and the use of physical punishment. See State v. Newman, 409 N.W.2d 79, 84 (N. D. 1987). As it is relevant whether or not the confession regarding alcohol was voluntary, and the prior minor in possession conviction provides evidence of the Defendant's knowledge of and experience with law enforcement officers, this establishes the testimony about the Defendant's prior Minor in Possession of Alcohol was evidence of knowledge and voluntariness. N.D. R. Evid. 404(b).

Also, the specific knowledge about the minor in possession by both the Defendant and Officer Balfour could be the independent source and proof that it was voluntary and an act of free will of the Defendant to admit to the alcohol in his pickup. [Tr. at 29]. [See Brown v. Illinois, 422 U.S. 590 (1975) (providing that the taint of an illegal arrest is purged if the statement is voluntary and the act of free

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will)]. Rather the Court erred in suppressing the evidence of the prior minor in possession conviction and found instead that the Defendant's statements were fruit of the poisonous tree because Officer Balfour's questions regarding the illegally discovered evidence was an exploitation of the unlawful search. [A. at 20, 23]. The Court refused to consider the independent source of Officer Balfour's knowledge of the Defendant's minor in possession conviction that would purge the primary taint of the illegal search because the Court found that the conviction of the Defendant did not provide any evidence of voluntariness and found it was inadmissible. [Tr. at 63]. [A. at 20, 23 citing In the Interest of M.D.J., 285 N.W.2d 558, 563 (N.D. 1979) (citing Wong Sun v. United States, 371 U.S. 471 (1963)]. The City argues rather that Officer Balfour would have known to ask the Defendant why he fled from the vehicle because Officer Balfour knew that the Defendant had been convicted of a minor in possession, and thus, this is an independent source for the Defendant's statements that he had alcohol in his pickup, and the evidence should have been admissible for that purpose.

A. THE OFFICERS HAD PROBABLE CAUSE TO SEARCH THE DEFENDANT'S PICKUP.

The United States Supreme Court indicated that ulterior motives, if present, do not invalidate police conduct that is otherwise justifiable on the basis of probable cause to believe that a violation of law has occurred. Whren v. United States, 517 U.S. 806 (1996). So, when an officer has probable cause to believe that a traffic violation has occurred, the stop of a vehicle is reasonable under the Fourth Amendment of the United States Constitution. See United States v. Pollington, 98 F. 3d 341, 342 (8th Cir. 1996). Any all of the evidence was obtained legally, as the seizure of the Defendant's pickup was a result of its use in the commission of a traffic offense, care required, a parking violation, and the commission of a crime, fleeing a peace officer, and the resultant search was based upon probable cause. [Tr. at 34-35, 37-39, 43]. The Officers had probable cause to suggest that the vehicle

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was used in the commission of an offense based upon the suspicious behavior of the Defendant turning off his lights while still driving, (care required) and fleeing from the vehicle while the Officer was commanding that he stop, (fleeing a police officer). [Tr. at. 37-39]. By fleeing the scene, the Defendant committed a willful act that was not the result of any illegal act by Officer Balfour. See State v. Saavedra, 396 N.W.2d 304 (N.D. 1986).(allowing the admission of evidence of disorderly conduct because the evidence was the Defendant's willful act and not a result from an illegal search). The later discovery of the open bottle of vodka, and the Bud Light Beer cans, and the Keystone Beer cans, all support the fact that the vehicle was actually used in the commission of crimes, open bottle law, and minor in possession of alcohol. [Tr. at. 11]. See NDCC § 5-01-08 and § 39-08-18. The search would have been under the search incident to arrest doctrine, (See New York v. Belton, 453 U.S. 454, 458 (1981)), had the Officers been able to find the Defendant, and thus, this supports the theory of probable cause. The Defendant should not be allowed to subvert that rule just because he was a devious criminal and able to escape. Thus, the Officers had probable cause to search the vehicle.

B. THE AUTOMOBILE EXCEPTION TO THE WARRANT REQUIREMENT ALSO APPLIES TO THE SEARCH

As discussed above, the Officers had probable cause to search the vehicle for the evidence of a crime, and the resultant search revealed that the Pickup was used in the commission of a crime, the open bottle law, and the minor in possession of alcohol law. See NDCC § 5-01-08 and § 39-08-18. The United States Supreme Court explained the reasons for the automobile exception to the warrant requirement, in Pennsylvania v. Labron, 518 U.S. 938 (1996), as follows:

> Our first cases establishing the automobile exception to the Fourth Amendment's warrant requirement were based on the automobile's ready mobility, an exigency sufficient to excuse failure to obtain a search warrant once probable cause to conduct the search is clear. More recent cases provide a further justification: the individual's reduced expectation of privacy in an automobile, owing to its pervasive regulation. If a car is readily mobile and probable cause exists to believe it contains contraband, the

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Fourth Amendment then permits the police to search the vehicle without more. Id. at 940.

Thus, the Automobile Exception to the warrant applies as the area to be searched was a moveable vehicle used for transportation; there was probable cause to believe that the vehicle contained evidence of the crime; there were exigent circumstances to justify the warrantless search such that the development of probable cause and the discovery of the vehicle provided insufficient time and safety to procure a search warrant. [Tr. at 66-67, 99]. The North Dakota Supreme Court has held that to conduct a search under the automobile exception, the officer must have probable cause to believe incriminating evidence is present in the automobile and the search must be limited in scope. State v. Kottenbroch, 319 N.W.2d 465, 469 (N.D. 1982).

In this case, the area is a vehicle, the Defendant's pickup. [Tr. at 36]. There was probable cause to believe that the vehicle may contain evidence of a crime given the Defendant's suspicious behavior and flight. [Tr. at 37-39]. The exigent circumstances were that the Defendant had the keys to the locked vehicle, and could have returned at any time to remove the vehicle, and remaining outside, in the dark, at such a late hour in the evening would be an unreasonable risk of harm to the Officer guarding the vehicle especially when the officer does not know if there are other persons helping the Defendant, or if the Defendant had any weapons. [Tr. at. 66-67, 99]. Plus, the Officers were not able to see into the vehicle, due to tinted windows, and did not want to take any risks that the vehicle may contain dangerous items or concealed weapons. [Tr. at. 11, 57, 79]. Therefore, the Automobile Exception to the warrant requirement also applies to this case, and the evidence obtained from the search should be admissible.

C. THE INVENTORY SEARCH OF THE PICKUP WAS CONDUCTED BY FOLLOWING STANDARD POLICE PROCEDURES CONCERNING THE SEARCH OF IMPOUNDED VEHICLES.

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The Defendant was charged with a violation of NDCC § 39-10-50(1) (1997). [A. at 6]. The Defendant was also charged with the failure to use care required. [A. at 5]. See NDCC § 39-09-01.1 (1997). The facts state that the front of the Defendant's pickup was parked approximately 3 to 4 feet away from the curb with the rear of the pickup in the driving lane. [Tr. at 42]. Another North Dakota Statute authorizes the removal of an illegally stopped vehicle. NDCC § 39-10-48(1) (1997) (referencing a violation of section 39-10-47). Although the Defendant was not charged with a violation of section 39-10-47, both section 39-10-50(1) and 39-10-47 prohibits the parking of a vehicle if it obstructs traffic, which this vehicle was in the driving lane and obstructing traffic. [Tr. at 42]. The Defendant does not have to be actually charged with the underlying violations to validate the reasons for impounding the vehicle. Subsection three of section 39-10-48, allows Officers to remove an illegally parked vehicle to the nearest garage or other place of safety when the person in charge of the vehicle in unable to provide for the custody or removal of the vehicle. See Id.

The North Dakota Supreme Court has held that securing and inventorying the contents of a motor vehicle is to protect the owner's property, protect the police against claims of lost, stolen, or vandalized property and protecting the police against the danger posed by the property in the vehicle. Gregg, at ¶ 36, 615 N.W.2d 515, (citing State v. Kunkel, 455 N.W.2d 208, 211 (N.D. 1990) (citations omitted). An inventory conducted under reasonable police regulations relating to inventory procedures administered in good faith is a permissible inventory search and is an exception to the warrant requirement under the Fourth Amendment. Id. The Court also explained that as long as the warrantless search of an impounded vehicle is not motivated by investigatory purposes, the inventory search is acceptable as a routine caretaking function. Id. (citing South Dakota v. Opperman, 428 U.S. 364 (1976)).

The facts in Gregg are similar to this case because the vehicle was

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impounded and searched because it presented a traffic hazard, just like the Defendant's vehicle in this case. See Gregg, at ¶ 37, 615 N.W.2d at 515. The resulting inventory search was held to be for a caretaking function, and thus, permissible under the Fourth Amendment, and the evidence was admissible under the inventory exception to the warrant requirement. Id. Subsection three of section 39-10-48, allows Officers to remove an illegally parked vehicle to the nearest garage or other place of safety when the person in charge of the vehicle in unable to provide for the custody or removal of the vehicle. See Id. Thus, the impoundment of the Defendant's vehicle was for a caretaking function because of the traffic hazard.

Cases from other jurisdictions have examined the impoundment of illegally parked vehicles. See South Dakota v. Opperman, 428 U.S. 364 (1976); see also Colorado v. Bertine, 479 U.S. 367 (1987); People v. Sullivan, 272 N.E.2d 464 (N.Y. 1971); State v Bales 552 P.2d 688 (Wash. Ct. App. 1976). The police in the New York case towed an illegally parked vehicle to a police storage facility, and an officer observed a briefcase in the back, which contained a loaded pistol. Sullivan. The Defendant was indicted for possession of a loaded gun. Sullivan,. 272 N.E.2d 464. The Court declared the search as valid and not a violation of the Defendant's Fourth Amendment rights because the police had followed standard procedures to inventory the vehicle, which was lawfully in their custody. Sullivan. 272 N.E.2d 464.

The purpose of the impoundment and inventory search was not to discover evidence of wrong-doing, but rather to promote public safety and avoid traffic problems. Sullivan., 272 N.E.2d 464. This was not an unreasonable search since it was incident to the routine inventory of all vehicles which had been taken lawfully into custody of the police department because their owners had left them "unattended in the wrong place." Sullivan. 272 N.E.2d 464. Opperman, 428 U. S. 364, also provided that the police have the authority to remove from the streets vehicles impeding traffic or threatening public safety and convenience.

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The Washington case, Bales, 552 P.2d 688 held that a vehicle may be legally impounded if the impoundment is based upon a statutory authority. Statute-based authority was affirmed in a United States Supreme Court case. See Colorado v. Bertine, 479 U.S. 367 (1987). In the current case, the Officers impounded the Defendant's vehicle pursuant to the statutory authority. See NDCC § 39-10-48(1) (1997). Thus, the impoundment of the Defendant's vehicle was lawful.

The leading case regarding an inventory search is Cady v. Dombrowski, 413 U.S. 433 (1973). The Cady Court was asked to determine whether the search of an impounded vehicle was unreasonable solely because the officer conducting the search had not obtained a search warrant prior to the search. See Id. at 442. The court focused on the factual considerations when determining the validity of the search. First, the issue of control, and the Cady case the vehicle was disabled and thus, impounded. In this case, they issued control because the vehicle was abandoned when the Defendant ran away. [Tr. at 28-29]. The Second fact was the dangerous situation, and in this case, it was dangerous to leave the vehicle abandoned and unattended. [Tr. at 40, 66-67]. The vehicle was a safety risk, in the driving lane; the owner's property could have been stolen, the vehicle could have contained dangerous objects; and finally, the Defendant could have returned to assault the police officers while conducting the search. [Tr. at 7-9, 40, 66-67]. Thus, the vehicle needed to be impounded.

Chief Hoffer also directed Officer Balfour to impound, the vehicle, and there was probable cause to impound the Defendant's vehicle. [Tr. at 7-9]. Officer Balfour was not acting as a rogue police officer acting on his own behalf to search just to find illegal contraband or evidence. It was Chief Hoffer that determined the necessity to impound the vehicle, and thus, Officer Balfour's reasons and thoughts are completely irrelevant, as are the thoughts and reasons of Officer Brower. It was a direct order from the Chief of Police that the vehicle was impounded. The

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grounds for probable cause include Officer Balfour's observations of Fettig driving without his lights on, illegally parking, and then, fleeing from the vehicle, and Officer Balfour had a reasonable and articulable suspicion that Fettig had violated the law, and was legally entitled to stop Fettig's vehicle. [Tr. at 37, 39-40,42-43]. See State v. Kenner, 1997 ND 1 ¶ 8, 559 N.W. 2d 538 (ND 1997) and State v. Smith, 452 N.W.2d 86, 88 (ND 1990). In Kunkel, the officers acted arbitrarily and not in good faith as they stated they impounded to search because the Defendant was a known drug dealer and the Defendant was likely to have drugs in the van. Id. In Fettig, both Officer Balfour and Officer Brower provided statements and testimony that there is a reasonable police procedure that requires they inventory impounded vehicles. . [Tr. at 7, 10, Brower Depo. at 14, 20, Balfour Depo 37]. This would qualify as an unwritten, but standard procedure, that required the impounding officer to conduct an inventory search of an impounded vehicle, and thus, the search is valid. See United States v. Griffiths, 47 F.3d 74, 78 (2d Cir. 1995) (providing that the policy need not be in writing, but it must be a standardized procedure); see also, United States v. Frank, 864 F.2d 992, 1002 (3d Cir. 1988) (providing that the standard procedure is met when unwritten procedures require the impounding officer to conduct an inventory search of an impounded vehicle).

Once a vehicle is impounded, it is standard police procedure to conduct an inventory search of the vehicle. . [Tr. at 7, 10, Brower Depo. at 14, 20, Balfour Depo 37]. The Harvey Armory is not completely secure, and Harvey does not have a secure impound lot. [Tr. at 11]. Thus, any impounded vehicle must be inventoried to not only protect the officers from any dangerous items, but also, to protect the vehicle owners from any claims for lost or stolen property, and to protect the owner's property, as it is tagged and brought into a secure environment, the locked police station. Gregg, at ¶ 36, 615 N.W.2d 515, (citing State v. Kunkel, 455 N.W.2d 208, 211 (N.D. 1990) (citations omitted). See Opperman. 428 U.S. 364

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(1976). See also Cooper v. California, 385 U.S. 58 (1967). An overwhelming majority of Courts have found that, in following standard police procedures, the Officer did not conduct a search which was unreasonable under the Fourth Amendment. In this case, the Officer properly impounded the vehicle upon the order of the Chief of Police. Then, the Officers conducted an inventory search following standard police procedures, which means that they removed all valuables, all illegal evidence, and tagged every item removed, and then, secured it in the locked police station. The locked police station is secure because only the City of Harvey Police Officers have keys to enter the police station. Plus, Officer Balfour then listed all of the valuables that were removed in his Officer's report, and thus, there was a proper inventory of all of the items of the search.

In a North Dakota case, State v. Kunkel, the Court invalidated an inventory search when it determined the search was made only to discover evidence, and not as a police care-taking function. 455 N.W.2d 208, 212 (N.D. 1990). The North Dakota Supreme Court explained that it is the care-taking function of inventory searches which legitimizes the warrantless searches. In Kunkel, the Officers admitted that the sole purpose of impounding and inventorying the van was to look for drugs because the van belonged to a known drug dealer. See Id. However, as previously stated, the Officers did not decide to impound and search the vehicle, it was Chief Hoffer that required the impounded vehicle, and it is standard police procedure for the City of Harvey to inventory any and all impounded vehicles because the City of Harvey does not have a completely secure impound lot, as stated above. [Tr. at 11]. Thus, the inventory search was not solely to discover evidence, and thus, is not a pretext search that would violate the Defendant's Fourth Amendment rights. See United States vs. Hellman, 556 F.2d 442 (9th Cir. 1977); See also State v. Phifer, 254 S.E.2d 586 (N.C. 1979). In Phifer, the Court found the search was a violation primarily because it was not standard police procedure to

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inventory vehicles, and that the Officer had not obtained approval from his supervisor to impound the vehicle. However, as stated above, Officer Balfour was directed by his supervisor to impound the vehicle, and it is standard police procedure to inventory impounded vehicles. [Tr. at 7, 10, 11, Brower Depo. at 14, 20, Balfour Depo 37]. It is also important to note that standard police procedure does not require that it be a written regulation, but rather a department policy is sufficient to establish that a policy exists. See United States v. Lowe, 9 F.3d 43 (9th Cir. 1993).

The North Dakota Supreme Court has specifically stated that "a subsequent search of a vehicle at the station is no greater intrusion on one's privacy interests than a search of the vehicle when it was initially seized. A later search of a vehicle at the station is permissible, we believe, because the police are only doing later what they could have done earlier." State v. Garrett, 1998 ND 173 ¶ 26, 584 N.W.2d 502, 508 (N.D. 1998). The Court specifically stated that a series of United States Supreme Court cases provided that the police do not need to obtain a search warrant to search the Defendant's vehicle that has been impounded to the police station, when it has been impounded for evaluation as evidence and subsequent search of the vehicle and this was reasonable under the Fourth Amendment. Id. at ¶ 18, 506. The North Dakota Supreme Court discussed Chambers v. Maroney, 399 U.S. 42 (1970), and explained that where a vehicle could have been searched on the spot where it was stopped, it is not unreasonable to seize a vehicle and bring it to the station to search because of the mobility of the vehicle, and because it may be impractical and not safe for officers to conduct a search in the middle of the night, in the dark, with the suspect at large. Id. at ¶ 20, 506. The Court further explained that the probable cause developed at the scene was still present at the station house. Id.

The United States Supreme Court has provided a very broad interpretation of what was reasonable in United States vs. Johns, 469 U.S. 478, as the police seized two vehicles, took them to the police station, and waited for three days before

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they searched the packages. See Garrett, 1998 ND 173 ¶ 26, 584 N.W.2d 502, 507 (citing United States vs. Johns). The Garrett court further quoted Johns,

> Our previous decisions indicate that the officers acted permissibly by waiting until they returned to [the station] before they searched the vehicles and removed their contents. There is no requirement that the warrantless search of a vehicle occur contemporaneously with its lawful seizure. The justification to conduct such a warrantless search does not vanish once the car has been immobilized. A vehicle lawfully in police custody may be searched on the basis of probable cause to believe that it contains contraband, and there is no requirement of exigent circumstances to justify such a warrantless search. Id. at 484, 105 S.Ct. 881 (Citations Omitted).

The North Dakota Supreme Court in Garrett found that the Johns case was correct in its premises that a later search at the station of an impounded vehicle was not a greater privacy intrusion than the contemporaneous search of the vehicle at the scene. Garrett, at ¶ 26, 508.

Under the inventory search exception, the "police need neither probable cause nor a warrant to search a vehicle." State v. Holmes, 569 N.W.2d 181, 186 (Minn. 1997). The basis for an inventory search relies primarily upon the administrative and caretaking functions that identify whether or not the vehicle was properly impounded and if the search was carried out in accordance with standard police procedures. Garrett, 1998 ND 173 n.3, 584 N.W.2d 502, n.3. The Officers were acting in good faith and following reasonable standard police procedures when they impounded the vehicle for several reasons: the Chief of police ordered the impoundment of the vehicle, the vehicle was in the driving lane and illegally parked and North Dakota parking statutes allow for the impoundment of such vehicles, the vehicle was abandoned and thus, the caretaking function to protect the Defendant's property comes into play as a reason to impound the vehicle, and the caretaking function of officer safety required that the officers impound the vehicle. Thus, this was a reasonable, standard, and good faith police policy that lead to the impoundment of the Defendant's pickup, and not an investigatory action by Officer Balfour. The impounding of the Defendant's pickup in this case was not done for

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the sole purpose of investigation, and thus, the "inventory search does not somehow become illegal upon the discovery of incriminating objects which do not take the police by complete surprise." Kunkel. 455 N.W.2d, 208, 212. The Court in Kunkel found that inventory searches of property lawfully in police custody is valid, and the abandoned Chevy pickup which was illegally parked was lawfully in police custody. In this case, Officer Balfour not only had probable cause to search the vehicle, but there were also exigent circumstances of it being the middle of the night, the Defendant was at large, and it would have been impractical to search the vehicle outside, but also the Inventory search is also valid, and thus, all of the evidence should be found to be admissible, and should not be suppressed.

D. THE EVIDENCE COULD HAVE BEEN DISCOVERED UNDER THE INDEPENDENT SOURCE DOCTRINE, INEVITABLE DISCOVERY, OR ATTENUATION EXCEPTIONS.

In Gregg, 2000 N.D. 154 ¶ 44, 615 N.W. 2d 515, the Court found that even though the stop and search of Gregg's car occurred shortly after the illegal search, there was no "flagrant" police misconduct such as intentional harassment or excessive force, and thus, the evidence was admissible as an "attenuation exception." In this case, Officer Balfour did not use any excessive force, or intentional harassment, and thus, there is no flagrant misconduct, and any evidence found could have been an attenuation exception to the alleged illegal search. Officer Balfour would have gone to question the Defendant because the identity of the Defendant was known from the license check, registration, and general description of the Defendant, and thus, the Defendant's confessions lead Officer Balfour back to all of the evidence discovered in the vehicle. The intervening actions of the Defendant in fleeing the scene and the willful act of abandoning the vehicle provide the intervening circumstances that lead to the Defendant's confession, and not from misuse of the earlier illegal search. See State v. Saavedra, 396 N.W.2d 304, 305 (N.D. 1986).

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The evidence would have been discovered either by the independent source of the identity, or the inevitable discovery from the confession. The inevitable discovery doctrine provides that the evidence obtained from information procured in an unlawful search or seizure is admissible under the fruit of the poisonous tree doctrine if the evidence would inevitably have been discovered without the unlawful conduct. Gregg, 2000 N.D. 154 ¶ 51, 615 N.W.2d 515 (citing State v. Handtmann, 437 N.W.2d 830, 837 (N.D. 1989). This doctrine applies when the fruit of the poisonous tree doctrine would put the police in a *worse* position than they would have been if there would have been no police error or misconduct. See State v. Winkler, 552 N.W.2d 347 (N.D. 1996). Thus, the evidence, and the statements regarding the alcohol in the vehicle should be allowed as suppressing them put the police in a worse position than they would have been if there had been no alleged illegal search because allegedly Officer Balfour did not properly conduct the inventory search. Evidence is not excluded when knowledge of the evidence can be attributed to an independent source. See Id.

Under either the independent source doctrine, the evidence could have been discovered during a later search from an independent source: the Defendant's confession, or inevitable discovery, because after the Defendant confessed that he was driving the pickup, and that there were at least three (3) cans of beer in the pickup, which was evidence of the minor in possession charge, and thus, the evidence could have been inevitably discovered from an independent source even without prior probable cause, or the inventory search of the pickup. Plus, the prior minor in possession of alcohol also provides an independent source, and/or a source that the evidence would have been inevitably discovered. Thus, the evidence should be admitted because the police should not be in a worse position than if there was no illegal search of the vehicle.

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II. ALL OF THE STATEMENTS, WHETHER CONFESSIONS, ADMISSIONS OR STATEMENTS BY THIRD PARTIES, WERE ALL OBTAINED LEGALLY, AS STATEMENTS AGAINST INTEREST, ADMISSIONS, THEN EXISTING MENTAL IMPRESSIONS, AS THE DEFENDANT WAS NOT IN CUSTODY, WAS NOT INTERROGATED, AND VOLUNTARILY GAVE ALL STATEMENTS, AND NEVER ASKED FOR AN ATTORNEY, AND NEVER ASKED THE OFFICERS TO QUIT QUESTIONING HIM OR TO LEAVE.

A. THE DEFENDANT WAS NOT "IN CUSTODY."

While confession and admissions are hearsay, and therefore, excludable, (See State v. Iverson, 225 N.W.2d 48, 51 (N.D. 1974), they may be admissible under the declaration against interest exception, as a present sense impression, a volunteered statement or excited utterance, or a then existing mental, emotional or physical condition. See N.D. R. Evid. 803 and 804. In this situation, the exceptions apply as the Defendant made various statements against interest, as well as, volunteered statements, and statements of his existing mental, emotional or physical condition. The statements by Mr. Pius Fettig were all present sense impressions, and statements of his existing mental, emotional and physical condition. Thus, the exceptions to the hearsay rule all apply.

Law enforcement may not use statements stemming from custodial interrogations. Miranda v. Arizona, 384 U.S. 436, 445 (1966). While the Defendant may argue that he was the "focus of the investigation" (See Escobedo v. Illinois, 378 U.S. 478 (1964)), and this triggers some kind of *Miranda* warnings and other information to the Defendant, *Miranda* made it clear that this phrase relates to the Sixth Amendment right to counsel only. The focus of the investigation does not apply at all to the circumstances in this case because the Defendant never invoked his Sixth Amendment right to Counsel, as he never requested that he be allowed to consult with an attorney.

Also, the test in Escobedo requires "focus plus custody and interrogation." In State v. Lueder, 242 N.W.2d 142, 145 (N.D. 1976), the court hinged the Defendant's right to counsel during interrogation on whether the "investigation was

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focused upon [the Defendant] and [whether the Defendant had] been taken into custody or otherwise deprived of [his] freedom in any significant way." Compare State v. Fields, 294 N.W.2d 404, 408 (N.D. 1980) (finding that the atmosphere and physical surroundings did not manifest restraint or compulsion.) In this case, the Defendant was never taken into custody, he was in his own home with his parent present the entire time, but short duration of questioning, and the Defendant was free to move around freely and therefore, not deprived of his freedom in any way. The questioning at the Fettig house, was a mere investigatory focus, and so it does not require *Miranda*. See Id. at 406.

The United States Supreme Court has taken several opportunities to determine whether or not the Defendant was in custody when questioning takes place in the Defendant's home. See United States v. Griffin, 922 F.2d 1343 (8th Cir. 1990) (citing Beckwith vs. United States, 425 U.S. 341 (1976). This case is very similar to Beckwith because the questioning was in the Defendant's home, the Officers were invited in, the sat around the kitchen table, and they informed the Defendant that he might be charged with other crimes as per the decision of the attorneys, and this interview was short in duration, and did not involve any coercion to answer any questions if the Defendant chose not to answer, but rather the Defendant volunteered his version of the story. Beckwith, 425 U.S. 341 (1976). The Court in Beckwith found that the situation did not meet the requirements of *Miranda*, namely the law enforcement officials to overbear the Defendant's will to resist. Id. The Defendant was not being interrogated, but volunteered information. The Defendant was not escorted around his house, the parents were not asked to leave, and they did not arrest the Defendant at the end of the evening. See US vs. Griffin, 922 F.2d 1343 (8th Cir. 1990) (stating that the confession was not voluntary because of the "custody" of the Defendant based upon the facts of the case). This case simply involved investigation of a "suspect" but the "suspect"

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was not interrogated, was not "in custody" and never asked for an attorney, and never asked to leave. See State vs. Lueder, 242 N.W.2d 142 (N.D. 1976). The questioning of Kyle was not initiated by the police, but rather, Pius Fettig initiated the discussion and statements by Kyle when Pius called Kyle into the room, and then, told Kyle to tell his version of the story. Thus, the Defendant's statements were voluntary and were not in violation of Miranda and did not violate any of the Defendant's rights, and therefore, all of his statements, and the statements of Pius Fettig should be found to be admissible, and allowed into evidence.

In North Dakota, the Court focused on the ultimate question of whether there was a formal arrest or restraint on freedom. State v. Sabinash, 1998 ND 32 ¶ 14, 574 N.W.2d 827 (N.D. 1998). The Defendant was never formally arrested and never had his freedom restricted because he was only issued a citation and was never taken into custody. Also, the Officers were not interrogating the Defendant, but rather were explaining their presence, and providing explanation of the location of the Defendant's pickup, and the Defendant chose to volunteer his version of the story, and thus, this brief interaction did not constitute a custodial interrogation requiring *Miranda*. See State v. Winkler, 552 N.W.2d 347 (N.D. 1996).

B. THE STATEMENTS WERE VOLUNTARY

While *Miranda* may not be required, the statements must still be voluntary or it will violate a suspects due process under the Fifth and Fourteen Amendments. See Schneckloth v. Bustamonte, 412 U.S. 218, 226-227 (1973). Whether the confession is voluntary is assessed by the totality of the circumstances including: the age of the suspect; the education of the suspect; the intelligence of the suspect; the lack of advice concerning his constitutional rights; the length of the detention; the repeated or prolonged nature of the questioning and the use of physical punishment. See State v. Newman, 409 N.W.2d 79, 84 (N. D. 1987). Considering the facts of this case, the statements were made by an intelligent 18 year old with

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prior experience with law enforcement, specifically, with the charge of minor in possession of alcohol, the officers were invited into the home, the Defendant was not under arrest, and was never arrested or taken into custody, the Defendant was free to leave at any time or ask the officers to leave at any time, the Defendant was free to discontinue questioning at any time, there was no coercion or deceptive tactics, and the Defendant's parents were present the entire time during the discussion, which was brief, lasting only 20-30 minutes, and the Defendant was simply given a chance to explain his conduct and not pressured to answer incriminating questions. See Id. and Compare with State v. Pickar, 453 N.W.2d 783 (N.D. 1990) (the statements were not voluntary because Defendant was suffering from ill effects of a traffic accident, the Defendant had no prior experience with the police, the Defendant was repeatedly pressured about his involvement). Thus, all of the statements by the Defendant, and all of the statements by Pius Fettig were all voluntary.

Also, the Motion to Suppress is not based upon the Sixth Amendment right to counsel, but rather that the statements were made in violation of the Defendant's right against self-incrimination, which is not the Sixth Amendment right to Counsel. Thus, the Defendant has no argument that the statements should be suppressed because he was the "focus of the investigation" and therefore, the statements were obtained in violation of his Sixth Amendment right to counsel.

C. THE STATEMENTS AND IDENTITY OF THE DEFENDANT COULD BE ADMITTED THROUGH THE INDEPENDENT SOURCE DOCTRINE, INEVITABLE DISCOVERY, OR ATTENUATION EXCEPTION.

Confessions have been held to be excludable if the Confession is a result of a previous illegal action of the police. See Taylor v. Alabama, 457 U.S. 687, 690 (1982). While the confession was not the result of an illegal search or any form of illegal police conduct, under the theory of the independent source doctrine, (See Murray v. United States, 487 U.S. 533 (1988)), the police already had obtained the Defendant's identity from the license plate check (ran a 28) and the officer's

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observations that a young male, slim build had exited the pickup before fleeing the officer, and then, later driver's license check after the inventory search was completed revealed the identity of the Defendant. The specific knowledge about the minor in possession by both the Defendant and Officer Balfour could be the independent source and proof that it was voluntary and an act of free will of the Defendant to admit to the alcohol in his pickup. [Tr. at 29]. [See Brown v. Illinois, 422 U.S. 590 (1975) (providing that the taint of an illegal arrest is purged if the statement is voluntary and the act of free will)]. Thus, even if it is determined that there was not probable cause to search the pickup, nor a valid inventory search of the pickup, which resulted in the discovery of the Defendant's wallet, driver's license, checkbook, and checkblanks, the confession is still admissible based upon the independent source doctrine.

As for specifically, the Identity of the Defendant, this would have been discovered because the license plate check revealed that the Defendant was a registered owner of the pickup, the young male fleeing the pickup matched the identity of the Defendant, and further investigation could have revealed other witnesses that saw the Defendant driving, including the Defendant's fathers admission that the Defendant was driving the black pickup on the evening of November 5, 1999. Thus, the Identity of the Defendant was obtained legally, and would have inevitably been discovered even without obtaining the confession from the Defendant that he was driving and that he was in possession of the three (3) cans of beer, and without having found the Defendant's wallet, driver's license, and checkbook and checkblanks. From the identity of the Defendant, the confessions and admissions would have been found, because Officer Balfour was aware of the Defendant's minor in possession conviction. Thus, all of the above arguments relating to the independent source doctrine, inevitable discovery exception, and

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attentuation exception apply to the statements and confessions of the Defendant, as well as, any and all information relating to the Identity of the Defendant.

CONCLUSION

The District Court's suppression of the evidence was manifestly contrary to both the evidence adduced at the depositions, and at the suppression hearing and the great weight of the authority on the issues of probable cause, the inventory search, inevitable discovery, and the attenuation exception, and that willful acts and any voluntary statements purge the taint of illegal activity.

The City of Harvey therefore urges that Court on appeal to make a full review of the District Court's erroneous determinations, and in doing so, to reverse the District Court's ruling from the bench, which suppressed the evidence relating to the Defendant's conviction for minor in possession of alcohol, to reverse the District Court's order, which ordered the suppression of the evidence obtained as a result of a warrantless search of the Defendant's vehicle by Officer Balfour, and ordered the suppression of the admissions made by the Defendant to Officer Balfour that he, the Defendant, was driving on November 5, 1999, that he had been stopped by Officer Balfour, that he exited his vehicle away from Officer Balfour, and that he had in his possession three (3) cans of Bud Light Beer.

Respectfully Submitted:

Dated: September 13, 2000

Kathleen K. Trosen

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

The City of Harvey, Plaintiff - Appellant, vs. Kyle Fettig, Defendant - Appellee	SUPREME COURT No. 20000185 District Court No. 99-K-282

AFFIDAVIT OF SERVICE BY MAIL

SUPREME COURT NO. 20000185

WELLS COUNTY NO. 99-K-282

STATE OF NORTH DAKOTA)
)SS.
COUNTY OF WELLS)

Julie Goldade, being first duly sworn under oath, deposes and states that she is of legal age and that on the 13 day of September, 2000, and that pursuant to the North Dakota Rules of Appellant Procedure, she deposited in the United States Mails at Harvey, North Dakota, a true and correct copy of the following documents in the above-entitled action:

APPELLANT'S BRIEF

APPENDIX OF PLAINTIFF - APPELLANT

The copies of the foregoing were securely enclosed in an envelope with postage duly prepaid and addressed as follows:

Penny Miller
Clerk of Supreme Court
State Capitol
600 E. Boulevard Ave.-Dept. 180
Bismark, ND 58505
[Seven Copies & Original]
[3.5 inch diskette]

Michael S.McIntee
Attorney at Law - for Defendant - Appellee
207 Main Street South
P.O. Box 90
Towner, ND 58788
[One Copy]

Julie Goldade

Subscribed and sworn to before me this 13th, day of September, 2000.

SEAL

Kathleen K. Trosen, Notary Public
Wells County, North Dakota
Harvey, ND 58341