ORIGINAL
20020076

IN THE SUPREME COURT

STATE OF NORTH DAKOTA



State of North Dakota,

Plaintiff/Appellee,

v. Supreme Court No. 20020076

Larry Fitterer,

Defendant/Appellant.

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# BRIEF OF APPELLANT

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Appeal from Criminal Judgment

Burleigh County District Court
South Central Judicial District

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### ISSUE FOR REVIEW NO. 2

Should defendant's motion to suppress evidence have been granted in that the State failed to provide to defendant any discovery regarding the checkpoint in violation of Rule 16, NDRCrimP?

## STATEMENT OF THE CASE

This is a criminal case wherein defendant Fitterer was charged by a North Dakota Uniform Complaint and Summons with DUI, a class B misdemeanor (A.3). Fitterer pleaded not guilty to the charge, and a jury trial was had. The jury found Fitterer guilty of the offense of DUI, and Fitterer appeals from the order containing the judgment of conviction (A.15).

This appeal involves defendant's motion to suppress evidence (R.10). Defendant's motion to suppress evidence alleged that defendant's vehicle was stopped in a sobriety checkpoint, that defendant had committed no traffic offense, that defendant was not stopped for any apparent safety defect, and that the checkpoint was illegal under the Fourth Amendment of the U.S. Constitution (R.10).

In the State's response to defendant's motion to suppress evidence, the State acknowledged that defendant's vehicle was stopped in a sobriety checkpoint and did not deny that defendant did not commit a traffic offense or that there was no apparent safety defect. The State wrote, "The checkpoint was not illegal and was conducted within strictures to adequately advance the public interest and limit interference with individual liberty as set forth in Uhden", citing City of Bismarck v. Uhden, 513 N.W.2d 373 (N.D. 1994). (R.11).

The State also filed a motion to dismiss defendant's motion to suppress evidence, arguing that defendant failed to specify how the checkpoint violated the Fourth Amendment of the U.S. Constitution (R.14). Defendant answered that North Dakota case law required the State to prove that the procedures used by the officers in

the checkpoint were in compliance with the Fourth Amendment, and also that the State had to show record evidence that the checkpoint was constitutional (R.15).

Further, defendant pointed out to the court that the State had totally failed to provide to defendant any discovery regarding the validity of the checkpoint (R.15). Defendant had previously made a request for discovery and the State had previously responded to that request for discovery (see R.7). The State replied that Rule 16, NDRCrimP, does not require any such disclosure by the State (R.17). The State wrote, "Rule 16 only requires disclosure of statements of the defendant, the defendant's record, documents which will be introduced by the State in its case in chief, and names and statements of witnesses to be called in the State's case in chief." (R.17). The State did not address Rule 16(a)(1)(C), which provides for discovery of documents and tangible objects material to the preparation of the defendant's defense. The State also wrote, "The Defendant can obtain the information he seeks from the appropriate law enforcement agency on his own behalf." (R.17).

A hearing was held on these matters (A.5-14). At the conclusion of the hearing, the court dismissed defendant's motion to suppress evidence (A.13), and a written order to that effect followed (A.4).

## ARGUMENT

### ISSUE FOR REVIEW NO. 1

Should defendant's motion to suppress evidence have been granted in that the State failed to go forward with record evidence that the checkpoint stop of defendant's vehicle was in compliance with the Fourth Amendment of the U.S. Constitution?

Defendant has found six North Dakota Supreme Court cases dealing with checkpoints. Defendant feels it best to discuss each of those cases, and to do so in chronological order.

In State v. Goehring, 374 N.W.2d 882 (N.D. 1985), Goehring was pulled over by a North Dakota Highway Patrolman for the sole purpose of conducting a routine safety check of Goehring's vehicle. Goehring had committed no traffic offense and his vehicle had no apparent safety defects. The Highway Patrolman testified. He testified that the safety check was conducted according to the policies and procedures established by the North Dakota State Highway Patrol, but the record did not reflect what those policies and procedures were. Id. at 883-884.

Goehring looked to Delaware v. Prouse, 440 U.S. 648, 99 S.Ct.1391, 59 L.Ed. 2d 660 (1979), which judged checkpoints by balancing certain factors. Id. at 886-887. The court also focused on the discussion in Prouse dealing with the patrolman's "unconstrained exercise of discretion." Id. at 888. The court wrote:

> "[T]he underlying principle still remains: that is, there must not be 'unbridled discretion' vested in police officers. We acknowledge that Officer Brand testified several times that he was acting in accordance with standard procedures that he had learned in the academy. However, nowhere in the record or Officer Brand's testimony is it indicated what these procedures are. [Footnote omitted]. We have no way of knowing whether these procedures allow officers no discretion, some discretion, or total discretion in deciding which vehicles are flagged over and checked. Without knowing what these procedures are, and the amount of discretion vested in the police officers, we can hardly rule that these procedures are in conformity with the Constitution and the principles of Prouse."

Id. at 888.

The court in Goehring then went on to hold:

> "Where the defendant asserts a violation of the Fourth Amendment search provisions, the burden of proof on a motion to suppress is on the State.

> [Citations omitted]. Here, the State submitted no evidence to prove the procedures used by Officer Brand were in compliance with the Fourth Amendment. The State has not met its burden and the judgment of the trial court must therefore be reversed."

Id.

In State v. Wetzel, 456 N.W.2d 115 (N.D. 1990), the State contended that the checkpoint and the procedures for stopping vehicles therein were constitutionally permissible. Id. at 116. At the hearing on Wetzel's motion to suppress in the trial court, the North Dakota Highway Patrolman testified in detail as to the procedures he used in the checkpoint. Id. at 116-117. The sole issue on appeal was whether the procedures used by the patrolman in stopping vehicles at the checkpoint were constitutionally impermissible. Id. at 117. The court pointed out that the checkpoint in Wetzel was more like a roadblock as opposed to a random spot-check as in Prouse (and Goehring), and found that the procedures used in Wetzel passed "constitutional muster" in that the procedures sufficiently minimized the officer's discretion in choosing whether to stop a particular automobile. Id. at 120.

In upholding the checkpoint in Wetzel, the court distinguished State v. Goehring by pointing out that the State in Goehring did not adequately demonstrate compliance with Delaware v. Prouse. The court wrote, "In the instance case, Trooper Stanley testified as to the procedures utilized for stopping automobiles at his vehicle safety checkpoint and that those procedures were in compliance with the Highway Patrol policy. That policy is a matter of public record." Id. at 119, fn. 3.

In State v. Everson, 474 N.W.2d 695 (N.D. 1991), the highway patrol's procedures for the checkpoint, and the sheriff's procedures for that same checkpoint, were specifically set forth in an Operation Order of the highway patrol, a

memorandum by the sheriff, and by testimony of the involved police officers. Id. at 696-698. The issue before the court was whether the checkpoint in the case was "reasonable" under Fourth Amendment standards. Id. at 698-699. The court cited Prouse and Goehring, and indicated that in Goehring the trial court's denial of the defendant's suppress motion was reversed "because the record did not show the guidelines or procedures that the patrolman was operating under in conducting the safety checks". Id. at 699. The court also cited Wetzel, indicating that the procedures used in that case were constitutionally valid. Id.

The court in Everson also discussed Michigan Department of State Police v. Sitz, 110 S.Ct. 2481 (1990), wherein the U.S. Supreme Court found that a Michigan sobriety checkpoint was "consistent with the Fourth Amendment" after a balancing of certain factors. Id. at 699-700. The court in Everson then looked at the record evidence of the procedures in the checkpoint before them, and found that the North Dakota checkpoint also did not violate the Fourth Amendment. Id. at 700-703.

City of Bismarck v. Uhden, 513 N.W.2d 373 (N.D. 1994), also involved a sobriety checkpoint. In Uhden, the prosecution called one witness, the arresting officer. "The officer's testimony concerned both the general operation of the roadblock and the stop and arrest of Uhden." Id. at 374. Uhden, early on in the opinion, recognized Goehring as a case wherein there was no evidence in the record regarding the standards, guidelines, or procedures used in the vehicle stop and hence no ability to determine whether that stop was in compliance with the Fourth Amendment. Id. at 375.

Uhden primarily involved the question of whether checkpoints are per se unconstitutional. The court found that few states have adopted per se constitutional bars to checkpoints. Id. at 377. Looking at Minnesota law, the court wrote, "Although checkpoints are not per se unconstitutional under Article I, section 10, Minnesota Constitution, that section requires the State to present greater evidence that the checkpoint advances the public interest than is required under Fourth Amendment analysis." Id. Quite clearly, under Minnesota law, the State, too, has the burden to show that the checkpoint is constitutional.

Uhden went on to cite Everson for the proposition that the court will use a balancing test to determine whether "a stop" is reasonable under the Fourth Amendment. Id. at 377-378. The court looked at the specific guidelines and factors involved in the checkpoint before them, and found that the record evidence supported the lower court's finding of constitutionality in regard to the checkpoint. Id. at 378-379. In clarifying, Uhden wrote:

> "We note that in Everson . . . and Wetzel . . . we did not hold that all police checkpoints were per se constitutional under the Fourth Amendment, nor did the United States Supreme Court so hold in Sitz . . . Likewise, we do not today hold that all sobriety checkpoints are per se constitutional under Article I, section 8, of the North Dakota Constitution. However, Uhden points to nothing in the record to rebut the evidence of reasonableness, and we decline his invitation to hold all checkpoint stops per se unconstitutional under our State Constitution."

Id. at 379. (Emphasis added).

Therefore, the holding in Uhden is that checkpoints are not per se constitutional, the State must go forward with record evidence to show that they are constitutional, and a defendant may rebut the evidence put on by the State.

Wheeling v. Director, ND DOT, 1997 N.D. 193, 569 N.W.2d 273, involved a Game and Fish Department checkpoint, but the court concluded that the validity of the checkpoint was irrelevant in that a traffic violation provided probable cause for the stop before Wheeling reached the checkpoint. Id. at ¶ 6. The court distinguished Goehring as a case in which there was no traffic offense and the vehicle had no apparent safety defects. Id. at ¶ 7.

Finally, there is State v. Albaugh, 1997 N.D. 229, 571 N.W.2d 345, which also involved a Game and Fish Department checkpoint. That checkpoint was conducted under a "specific written policy adopted by the Department", and the conduct of the checkpoint was put into evidence by the testimony of Game Warden Supervisor Floyd Chrest. Id. at ¶¶ 2-3. The court in Albaugh assessed the reasonableness of the checkpoint using a three-part balancing analysis, and concluded that the checkpoint was constitutional. Id. at ¶¶ 7-19. The court based its conclusion in part on the following:

> "Here, the checkpoint was conducted under a comprehensive policy formally adopted by the Department. Approval was obtained by the local State's Attorney before conducting the checkpoint. The wardens and officers attended a briefing before conducting the checkpoint to insure all policy directions were complied with. All vehicles were stopped, a single question was asked, and drivers who had not been hunting were detained only momentarily. Under these circumstances, the officers had little or no discretion in the conduct of the checkpoint."

Id. at ¶ 16.

With this language, the North Dakota Supreme Court came full circle back to Goehring. The only difference is that, in Albaugh, the prosecution met its burden of putting on record evidence that the checkpoint was constitutional.

The law in North Dakota regarding checkpoints appears to be very clear in these following regards. First, checkpoints are not per se constitutional. Second, the burden is upon the State to put on record evidence that a checkpoint is in compliance with the Fourth Amendment. Finally, a defendant can rebut the evidence which is put on by the State. In the case at bar, as in Goehring, the State failed to go forward with record evidence that the checkpoint was constitutional.

There are two recent opinions from jurisdictions other than North Dakota which defendant wishes to bring to the attention of the court. The first is Indiana v. Gerschoffer, 2002 IN 137, No. 71S05-0102-CR-106, decided March 5, 2002, which involved a sobriety checkpoint and in which the defendant moved to suppress all evidence obtained from the checkpoint, claiming improper seizure under both the Fourth Amendment of the U.S. Constitution and Article I, Section 11 of the Indiana Constitution. In that case, the Supreme Court of Indiana assessed the reasonableness of the roadblock by discussing a variety of factors "pertinent to assessing the constitutionality of specific checkpoints." The court appeared to assess six different factors. In assessing one of the factors, the plan of the appropriate officials, the court wrote, "Here, Sergeant Gary Coffie, the officer in charge for the State Police, testified that he followed written federal and state police guidelines. . . Those guidelines are not part of the record, however, so we cannot assess their efficacy."

In discussing three other factors, the Indiana Supreme Court found that the prosecution either submitted no evidence or insufficient evidence to satisfy the factor. The court then wrote, "the State did not meet its burden to show that this roadblock

was constitutionally reasonable under Article I, Section 11. The trial court therefore correctly suppressed the fruit of this seizure."

The other case is Baker v. State, 556 S.E.2d 892 (Ga.App. 2001), decided December 3, 2001. This case is pending certiorari in the Georgia Supreme Court. The Georgia Court of Appeals wrote:

> "During the hearing on Baker's motion to suppress all evidence gathered at the roadblock, Officer Wright testified that he was not present when one of his supervisors decided to implement the roadblock, and that he could not remember which of the two supervisors had made the decision. In light of this testimony and the fact that Officer Wright was the State's only witness, Baker contends that the State failed to prove the roadblock was lawful. Thus, he argues, his motion in limine seeking suppression of the evidence should have been granted. We agree."

Id. at 895.

In Baker, the State attempted to prove, in response to the defendant's motion, that the roadblock was constitutional. Id. at 897. The court wrote, "The burden was on the state to prove that the seizure, i.e. the stopping of Baker's vehicle was constitutionally valid. . . . We will not presume from a silent record that constitutional requirements have been satisfied. [Citation omitted]. Because the required showing was not met, the trial court erred in not excluding evidence gained by the police at the roadblock. Therefore we must reverse the conviction." Id. at 897-898.

Going on, the Georgia Court of Appeals discussed City of Indianapolis v. Edmond, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000). The court wrote:

> "The new guidance of Edmond indicates that perfunctory compliance will no longer suffice. Now the State must prove not only that the decision to implement the roadblock was made by supervisory personnel but also must prove what 'primary purpose' motivated the supervisors. . . . [W]hat we hold is that the State must present some admissible evidence, testimonial or

> written, of the supervisor's purpose. i.e., purpose at the 'programmatic level.' in the words of Edmond. In the case at bar. Officer Wright did not know which supervisor decided to implement the roadblock, nor was he present when the decision was made."

Id. at 898-899.

These two decisions solidify defendant's argument that the State has the burden of going forward to prove the constitutionality of a checkpoint. For the State's failure to do so in this case. defendant requests this court to reverse his conviction.

ISSUE FOR REVIEW NO. 2

Should defendant's motion to suppress evidence have been granted in that the State failed to provide to defendant any discovery regarding the checkpoint in violation of Rule 16, NDRCrimP?

The State failed to provide to defendant any discovery regarding the checkpoint in question, and refused to do so arguing that Rule 16 did not require it to do so (R.17). The State's position in this case would force a defendant into a hunting expedition (see A.5-14), including that a defendant would have to start by taking the deposition of the arresting officer (A.7, lines. 4-6). What if that officer only assisted temporarily in the checkpoint and had no information as to how the checkpoint was set up or the guidelines used in the checkpoint? A defendant would be forced to hunt more to try to determine whom else he needed to depose after the arresting officer. This position is unreasonable and totally at odds with North Dakota case law and with the Georgia discussion regarding Edmond.

Further, Rule 16(a)(1)(C) provides for discovery of any documents and tangible objects which are material to the preparation of the defendant's defense. If there existed here any written guidelines, policies, standards, orders, or other

memorandums of law enforcement, such as in Everson, then defendant was entitled to those. At this point, defendant just does not know whether any of those items exist. For the State's failure to provide defendant any discovery regarding the checkpoint in this case, defendant requests the court to reverse his conviction.

## CONCLUSION

Wherefore, Larry Fitterer requests the Supreme Court of North Dakota to reverse the judgment appealed from and to direct the trial court to enter a judgment of acquittal.

Respectfully submitted this 1 day of May, 2002.

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CERTIFICATE OF SERVICE

I hereby certify that I made service of a copy of the forgoing document, by mail, on this 1 day of May, 2002, on:

Ms. Leann Bertsch
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Michael R. Hoffman