

ORIGINAL

20030015

IN THE SUPREME COURT

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

STATE OF NORTH DAKOTA

FEB 14 2003

STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff-Appellant,)	Supreme Court No. 20030015
)	
vs.)	District Court No. 09-02-K-1317
)	
Jessica Lynn Tognott, f/k/a)	
Jessica Lynn Belgarde,)	
)	
Defendant-Appellee.)	

APPEAL FROM THE ORDER GRANTING MOTION TO SUPPRESS
ENTERED IN CASS COUNTY DISTRICT COURT, EAST CENTRAL
JUDICIAL DISTRICT, HONORABLE NORMAN J. BACKES PRESIDING

APPELLANT'S BRIEF

Mark R. Boening, NDID #03797
Assistant State's Attorney
Cass County Courthouse
211 Ninth Street South
P.O. Box 2806
Fargo, North Dakota 58108
(701) 241-5850
Attorney for Plaintiff-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
ISSUE	1
STATEMENT OF CASE	2
STATEMENT OF FACTS	4
LAW AND ARGUMENT	5
CONCLUSION	12

TABLE OF AUTHORITIES

CASES

<u>Dunway v. New York</u> , 442 U.S. 200, 213-214, 99 S. Ct. 2248, 2256-57, 60 L. Ed. 2d 824	11
<u>New York v. Belton</u> , 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed. 2d 768 (1981)	8,9,11
<u>State v. Erbele</u> , 554 N.W.2d 448 (N.D. 1996)	9
<u>State v. Gilberts</u> , 497 N.W.2d 93, 99 (N.D. 1993)	6,7,9,11,12
<u>State v. Grant</u> , 361 N.W.2d 243 (N.D. 1985)	7
<u>State v. Gregg</u> , 2000 ND 154, 615 N.W.2d 515	9
<u>State v. Haverluk</u> , 2000 ND 178, ¶ 7, 617 N.W.2d 652	5,9
<u>State v. Heitzmann</u> , 2001 ND 136, ¶ 8, 632 N.W.2d 1	5
<u>State v. Hensel</u> , 417 N.W.2d 849 (N.D. 1988)	8,9,12
<u>State v. Olson</u> , 1998 ND 41, 575 N.W.2d 649	9
<u>State v. Wanzek</u> , 1999 ND 163, ¶ 5, 598 N.W.2d 811	5,9
<u>Ybarra v. Illinois</u> , 444 U.S. 85 (1979)	7

ISSUE

1

2 1) Whether the District Court erred in suppressing evidence seized as a
3 result of the search of a purse in the interior of a vehicle incident to the arrest of a
4 passenger in the vehicle.

STATEMENT OF CASE

On 25 April 2002 the State filed an Information and Affidavit of Probable Cause with the Clerk of the District Court. The Information charged Jessica Lynn Tognotti, f/k/a Jessica Lynn Belgarde, (hereinafter "Tognotti") with one count of Possession of Drug Paraphernalia, a class C felony.

On 26 April 2002 Tognotti made an initial appearance. The District Court set bail, a public defender was appointed, a preliminary hearing was scheduled and a Felony Scheduling Order was issued.

On 16 May 2002 Tognotti failed to appear at the scheduled preliminary hearing and a bench warrant issued for her apprehension.

On 20 September 2002 Tognotti appeared before the District Court on the bench warrant. The District Court reset bail and the preliminary hearing was rescheduled.

On 17 October 2002 Tognotti appeared before the District Court, waived the preliminary hearing, was arraigned, pled not guilty and bail was continued pending a dispositional conference.

On 6 November 2002 Tognotti filed 1) a Motion to Suppress Evidence, Brief, and Notice of Motion, and, 2) an Affidavit of Jessica Tognotti in Support of Motion to Suppress Evidence.

On 20 November 2002 the State filed its Return to Motion to Suppress.

1 On 11 December 2002 at 1:30 p.m. the District Court heard oral argument
2 on Tognotti's Motion to Suppress Evidence. Both Tognotti and Officer Todd
3 Wahl were present at the hearing, but no testimony was taken. The State and
4 Tognotti agreed that the relevant facts were not in dispute, but were set forth in 1)
5 Tognotti's affidavit and 2) Officer Wahl's report. (12/11/02 1:30 p.m. Tr. p. 3, l.
6 17 - p. 4, l.12) The District Court took the matter under advisement.

7 On 11 December 2002 at 3:00 p.m. the District Court announced its
8 decision and granted Tognotti's motion to suppress evidence. (12/11/02 3:00 p.m.
9 Tr. p. 3, l. 12-15)

10 On 30 December 2002 the District Court entered its written Order Granting
11 Motion to Suppress.

12 On 9 January 2003 the State filed its Notice of Appeal.

1

2

5

1

1 no factual basis for this finding in the Order Granting Motion to Suppress. The
2 District Court did express a hypothetical interest in that fact, but no testimony was
3 taken at the evidentiary hearing on 11 December 2002. (12/11/02 1:30 p.m. Tr. p.
4 10, l. 20 - p. 12, l. 23)

5 Tognotti moved to suppress Officer Wahl's search principally relying upon
6 the North Dakota Supreme Court's decision in State v. Gilberts, 497 N.W.2d 93
7 (N.D. 1993). The District Court made its only finding when it granted Tognotti's
8 motion to suppress stating:

9 “– Gilberts. Now, specifically reviewing Gilberts, this Court is of
10 the opinion that this falls outside of, or is within the purview of
11 Gilberts. Motion to Suppress is granted.” (12/11/02 3:00 p.m. Tr. p.
12 3, l. 12-15)

13 The finding that Officer Wahl directed Tognotti to leave her purse in the
14 vehicle in the Order Granting Motion to Suppress is the result of Tognotti's
15 preparation of the draft Order Granting Motion to Suppress for the District Court.
16 Apart from deciding the motion, the District Court essentially made no findings on
17 11 December 2002.

18 As noted above, Tognotti principally relied upon the North Dakota Supreme
19 Court's decision in Gilberts. The facts in Gilberts are somewhat similar to the facts
20 in this case in that Gilberts was present in a vehicle, Gilberts was not the person

1 originally arrested and incriminating evidence was found in property belonging to
2 Gilberts in the vehicle.

3 In deciding Gilberts Justices Meschke and Levine relied upon Ybarra v.
4 Illinois, 444 U.S. 85 (1979) and State v. Grant, 361 N.W.2d 243 (N.D. 1985).
5 Ybarra and Grant are frisk or pat-down search cases. In Ybarra the U.S. Supreme
6 Court considered the frisk or pat-down searches of persons in a tavern. In Grant
7 the North Dakota Supreme Court considered the frisk or pat-down search of a
8 person entering an apartment at which a search warrant was being executed.

9 In Gilberts Justice Meschke wrote the majority opinion. Justice Levine
10 concurred in Justice Meschke's opinion. Justices Meschke and Levine applied a
11 frisk or pat-down search analysis and concluded that it was improper for the
12 investigating officer to search a jacket left in the vehicle which Gilberts had been
13 wearing until asked to step outside the vehicle by the investigating officer.

14 In Gilberts Chief Justice VandeWalle wrote a special concurring opinion.
15 Surrogate Judge Erickstad concurred in Chief Justice VandeWalle's special
16 concurring opinion. In the special concurring opinion Chief Justice VandeWalle
17 and Surrogate Justice Erickstad essentially agreed that a frisk or pat-down search
18 rationale was appropriate to the specific facts of the case.

19 The facts of this case are different. In this case, the item searched is not an
20 item of clothing that was being worn by the defendant until she was asked to step

1 outside the vehicle. Rather, it is the defendant's purse left in the vehicle.

2 In State v. Hensel, 417 N.W.2d 849 (N.D. 1988) there was a search incident
3 to arrest of a suitcase in a vehicle. The North Dakota Supreme Court sustained the
4 search and noted:

5 The United States Supreme Court issued a "bright-line" test for
6 determining the scope of a search of an automobile pursuant to a
7 lawful custodial arrest in New York v. Belton, 453 U.S. 454, 101
8 S.Ct. 2860, 69 L.Ed. 2d 768 (1981). The court held in Belton that
9 "when a policeman has made a lawful custodial arrest of the
10 occupant of an automobile, he may, as a contemporaneous incident
11 of that arrest, search the passenger compartment of that automobile."
12 [Footnote omitted.] Id. 101 S.Ct. at 2864. The court explained that
13 containers found within the passenger compartment may also be
14 searched incident to the arrest. The court defined "containers":

15 "[A]ny object capable of holding another object. It
16 does include closed or open glove compartments,
17 consoles, or other receptacles located anywhere within
18 the passenger compartment, as well as luggage, boxes,
19 bags, clothing, or the like. Our holding encompasses
20 only the interior of the passenger compartment of an

1 automobile and does not encompass the trunk."

2 [Emphasis ours.] Id. 101 S.Ct. at 2864, n. 4.

3 Hensel, 417 N.W.2d at 852.

4 The North Dakota Supreme Court's decision in Gilberts does not purport to
5 overrule its earlier decision in Hensel. The North Dakota Supreme Court has
6 repeatedly recognized the validity of the search incident to arrest exception to the
7 warrant requirement. See State v. Haverluk, 2000 ND 178, 617 N.W.2d 652; State
8 v. Gregg, 2000 ND 154, 615 N.W.2d 515; State v. Wanzek, 1999 ND 163, 598
9 N.W.2d 811; State v. Olson, 1998 ND 41, 575 N.W.2d 649; State v. Erbele, 554
10 N.W.2d 448 (N.D. 1996).

11 The first sentence of Chief Justice VandeWalle's special concurring
12 opinion in Gilberts is notable for its succinct characterization of the opinion of
13 Justices Meschke and Levine:

14 "So much for the "bright-line" test for determining the scope of a
15 search of an automobile pursuant to a lawful custodial arrest as
16 established by New York v. Belton, 453 U.S. 454, 69 L. Ed. 2d 768,
17 101 S. Ct. 2860 (1981). "

18 State v. Gilberts, 497 N.W.2d 93, 99 (N.D. 1993).

19 In Belton the U.S. Supreme Court addressed the rationale behind a "bright-
20 line" rule and noted:

1 [t]he protection of the Fourth and Fourteenth Amendments "can only
2 be realized if the police are acting under a set of rules which, in most
3 instances, makes it possible to reach a correct determination
4 beforehand as to whether an invasion of privacy is justified in the
5 interest of law enforcement." LaFave, "Case-By-Case
6 Adjudication" Versus "Standardized Procedures": The Robinson
7 Dilemma, 1974 S.Ct.Rev. 127, 142. This is because
8 "Fourth Amendment doctrine, given force and effect
9 by the exclusionary rule, is primarily intended to
10 regulate the police in their day-to-day activities and
11 thus ought to be expressed in terms that are readily
12 applicable by the police in the context of the law
13 enforcement activities in which they are necessarily
14 engaged. A highly sophisticated set of rules, qualified
15 by all sorts of ifs, ands, and buts and requiring the
16 drawing of subtle nuances and hairline distinctions,
17 may be the sort of heady stuff upon which the facile
18 minds of lawyers and judges eagerly feed, but they may
19 be 'literally impossible of application by the officer in
20 the field.' " Id., at 141.

1 In short, "[a] single, familiar standard is essential to guide police
2 officers, who have only limited time and expertise to reflect on and
3 balance the social and individual interests involved in the specific
4 circumstances they confront." Dunaway v. New York, 442 U.S. 200,
5 213-214, 99 S.Ct. 2248, 2256- 57, 60 L.Ed.2d 824.
6 New York v. Belton, 453 U.S. 454, 458 (1981).

7 Since deciding Gilberts the North Dakota Supreme Court has not applied its
8 frisk or pat-down search rationale to other warrantless vehicle searches. It should
9 not be extended to the facts of this case.

10 The facts of this case should be analyzed under a search incident to arrest
11 rationale, rather than a frisk or pat-down search rationale. The facts in this case
12 are different from the facts in Gilberts in that the item searched in this case is not
13 an item of clothing which was being worn by the defendant immediately before
14 she was asked to step outside the vehicle. The purse clearly constituted a closed
15 container in the vehicle as that term was defined by U.S. Supreme Court in Belton.
16 Under the specific facts of this case, Officer Wahl's search of the defendant's purse
17 should fall within the search incident to arrest exception to the warrant
18 requirement.

1
2
3
4
5
6
7
8

9
10
11
12
13
14
15
16
17

CONCLUSION

The District Court erred in suppressing the evidence found in the Tognotti's purse. The District Court should have applied the search incident to arrest analysis first recognized in Hensel, not the frisk or pat-down search analysis recognized in Gilberts.

The District Court's Order Granting Motion to Suppress dated 30 December 2002 should be reversed and the case remanded for further proceedings.

Respectfully submitted this 14th day of February, 2003.


Mark R. Boening, NDID #03797
Assistant State's Attorney
Cass County Courthouse
211 Ninth Street South
P.O. Box 2806
Fargo, North Dakota 58108
(701) 241-5850
Attorney for Plaintiff-Appellant

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,

Plaintiff-Appellant,

vs.

Jessica Lynn Tognotti, f/k/a

Jessica Lynn Belgarde,

Defendant-Appellee.

AFFIDAVIT OF SERVICE BY MAIL

Supreme Court No. 20030015

District Court No. 09-02-K-1317

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

FEB 14 2003

STATE OF NORTH DAKOTA)

) SS.

COUNTY OF CASS)

STATE OF NORTH DAKOTA

Susan Kaufman, being first duly sworn on oath, deposes and states that she is of legal age and that on this date she deposited in the United States Mails at Fargo, North Dakota, a true and correct copy of the following documents in the above-entitled action:

- 1) APPELLANT'S BRIEF
- 2) APPENDIX OF APPELLANT
- 2) AFFIDAVIT OF SERVICE BY MAIL

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

Penny Miller
Clerk of Supreme Court
600 East Boulevard Avenue
Bismarck, ND 58505-0530

Monty G. Mertz
Attorney at Law
P.O. Box 10396
Fargo, ND 58106-0396

Dated this 14th day of February, 2003.

Susan Kaufman
Susan Kaufman

Subscribed and sworn to before me this 14th day of February, 2003.

Lisa M. Fischer
Notary Public

LISA M. FISCHER
Notary Public, STATE OF NORTH DAKOTA
My Commission Expires NOV. 12, 2003