ORIGINAL

20030102

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff/Appellee.	
vs.	Supreme Court No. 20030102
Todd Roth, Defendant/Appellant.	District Court No. 08-02-K-2703

BRIEF OF APPELLANT ROTH

APPEAL FROM THE DISTRICT COURT'S DENIAL OF
ROTH'S MOTION TO SUPPRESS OF MARCH 24, 2003
BURLEIGH COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT
HONORABLE THOMAS SCHNEIDER

STEVEN BALABAN (ND BAR ID# 05204)
418 East Rosser Avenue, Suite 102
Bismarck, ND 58501
(701) 224-0977

Attorney for Defendant/Appellant Roth

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STATEMENT OF THE ISSUE

The District Court improperly denied suppression of evidence obtained from the illegal search of Roth's residence.

STATEMENT OF THE CASE

In this matter, the Honorable Bruce Romanick issued a search warrant on August 20, 2002, in order to search the residence of Defendant Todd Roth (Roth). (App. 11). There was no hearing or oral evidence taken to support said warrant; however an affidavit was presented by Morton County Sheriff's Deputy Dion Bitz. (App. 5). Roth was subsequently arrested and charged with Possession of Methamphetamine, Possession of Paraphernalia and Manufacture of Methamphetamine. (App. 3).

A Preliminary Hearing was held on November 18, 2002. At that hearing, the Court found probable cause existed on the charges and Roth pled not guilty upon his arraignment to an Information. (App. 12).

Roth filed a Motion to Suppress on January 8, 2003. The State filed its State's Response to Motion to Suppress Evidence on January 17, 2003. No brief or supporting documentation was filed with the State's Response; however, the State requested a hearing on the Motion. The State filed its brief in support of its Response on March 14, 2003. On March 20, 2003, Roth filed his Reply to the State's Response. A telephonic hearing was held on March 24, 2003. On that same date, the Court denied Roth's Motion to Suppress.

On March 26, 2003, Roth entered a conditional plea of guilty to the Amended Information under N.D.R.Crim.P 11. (App. 15). Roth was sentenced to a period of incarceration at the North Dakota State Penitentiary, where he presently is incarcerated. (App. 21). Roth now appeals from the denial of his Motion to Suppress.

STATEMENT OF THE FACTS

In this matter, the Honorable Bruce Romanick issued a search warrant on August 20, 2002, in order to search the residence of Defendant Todd Roth (Roth). (App. 11). There was no hearing or oral evidence taken to support said warrant; however an affidavit was presented by Morton County Sheriff's Deputy Dion Bitz. (App. 5). Roth was subsequently arrested and charged with Possession of Methamphetamine, Possession of Paraphernalia and Manufacture of Methamphetamine. (App. 3).

In his affidavit, Bitz did not base his warrant application on any new evidence or new reason to search Roth's residence, but solely on stale evidence and pending criminal charges. (App. 5-10). Bitz claimed that Roth had pending charges and is suspected of manufacturing methamphetamine, and included facts regarding those arrests. (App. 5-6, ¶¶ 3-4, 6, 7). Bitz claimed that individuals suspected of narcotic use or dealing were seen by law enforcement around Roth or his residence. (App. 6-8, ¶¶ 5, 10, 11, 12). Bitz even included allegations that did not involve Roth in any manner. (App. 6-7, ¶ 8). Bitz referred to reports from a confidential source, but did not identify the source by number or any manner, and did not verify the source's reliability. (App. 7-9, ¶¶ 9, 13, 14). Bitz merely stated that the source had been used before with one successful arrest. Id. There was no hard evidence obtained prior to the affidavit, only conjecture, speculation and uncorroborated statements. (App. 5-10, above ¶¶ and ¶¶ 15-16). Thus, no probable cause existed for the warrant.

There were no garbage searches or other investigation performed, nor were any of the informant's tips verified. Surveillance only showed individuals with pending drug charges at the residence many months prior to the warrant's issuance. No controlled buys

or other types of verification were conducted. In essence, the search warrant for Roth's residence was granted simply upon conjecture combined with Roth's present criminal charges. That amounts to mere suspicion and does not sum to probable cause.

Roth maintains that there was no appropriate finding from the Court, in granting the warrant, that a no-knock warrant was even necessary and insufficient appropriate evidence to support probable cause for the warrant. The searches thus violated Roth's Federal and State constitutional rights to be free from unreasonable search and seizure. Roth's Motion to Suppress was denied by the District Court, and Roth now requests on appeal that this Court reverse and overturn the District Court's denial of his Motion to Suppress, and order the matter remanded to the District Court with specific instruction to suppress any and all evidence discovered in those illegal searches.

ARGUMENT

STANDARD OF REVIEW

This Court has jurisdiction under N.D. Const. Art. VI, §§ 2 and 6, to have appellate jurisdiction and act as a court of appeals, and under N.D.C.C. § 29-28-06 to review an order denying the suppression of evidence. This Court reviews such appeals under its set standard:

> On appeal, we review the sufficiency of information before the magistrate independent of the trial court's decision and use the totality-of-the-circumstances test. We give deference to a magistrate's factual findings in determining whether probable cause exists. We consider all information for probable cause together, not in a piecemeal manner. We resolve doubt about the sufficiency of [the evidence] in support of a request for a search warrant in favor of sustaining the search. (quotations and citations omitted).

State v. Guthmiller, 2002 ND 116, ¶ 11, 655 N.W.2d 84.

LAW AND ARGUMENT

ISSUE: The District Court improperly denied suppression of evidence obtained from the illegal search of Roth's residence.

The Fourth Amendment to the United States Constitution provides that:

> [T]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV. The Fourth Amendment has been made applicable to the activities of state law enforcement officials by virtue of the Fourteenth Amendment to the United States Constitution. Mapp v. Ohio, 367 U.S. 643 (1961). Likewise, the North Dakota Constitution mandates:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated;

> and no warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.
>
> N.D. Const. Art. I, § 8.

"The Fourth Amendment to the United States Constitution and Article I, Section 8 of our state constitution require probable cause to issue a search warrant. Whether probable cause exists is a question of law." State v. Duchene, 2001 ND 66, ¶ 11, 624 N.W.2d 668, citing State v. Rangeloff, 1998 ND 135, ¶ 16, 580 N.W.2d 593. North Dakota follows the standard set in Illinois v. Gates, 462 U.S. 213 (1983), the "totality-of-the-circumstances test to analyze whether information before the magistrate was sufficient to establish probable cause." Id. "Probable cause to search does not demand the same standard of proof to establish guilt at trial. Probable cause to search exists if the facts and circumstances relied on by the magistrate would warrant a person of reasonable caution to believe the contraband or evidence sought probably will be found in the place to be searched." Id at ¶13, quoting State v. Thieling, 2000 ND 106, ¶ 7, 611 N.W.2d 861 (citations omitted). Importantly, the Court cautioned that "Information causing mere suspicion and warranting further investigation, however, is not probable cause." Id., quoting Thieling, 2000 ND 106, ¶ 8, 611 N.W.2d 861.

I. No-Knock Warrant

The no-knock warrant in this case was unreasonable, as there were no exigent circumstances to justify a no-knock warrant. State v. Hughes, 1999 ND 24, ¶ 5, 589 N.W.2d 912, citing State v. Herrick, 1997 ND 155, 567 N.W.2d 336. The Herrick Court specifically held that in North Dakota, greater protections are afforded under the North Dakota Constitution, and *probable cause, rather than reasonable suspicion* is required

for no-knock warrants. In addition, "Mere allegations that drugs are present cannot automatically result in the issuance of a noknock warrant." State v. Herrick, 1997 ND 155, ¶ 22, 567 N.W.2d 336, 342; See also Hughes at ¶6..

In Hughes, as for Roth here, the only testimony as to exigent circumstances was that law enforcement had found several bullets in Roth's vehicle when Roth was stopped for a traffic violation several months prior, and that Roth stated he had a gun at his house at that time. Ex. 2, ¶ 16. There was no testimony that Roth had threatened anyone or that Roth was violent in any manner. There are no violent crimes on Roth's criminal record. The only danger cited was that supposed by Bitz – a less than reasonable suspicion that a gun may or may not be present. The Supreme Court held that this type of bare assertion is insufficient to sustain probable cause for the no-knock warrant and that "the no-knock warrant was unreasonable because there were no exigent circumstances justifying it." Hughes at ¶5. In fact, considering the number of hunters and gun owners in North Dakota, this assertion that the assumed presence of any weapon gives rise to a no-knock warrant would allow law enforcement to obtain such a warrant in any and every case.

The only other possibility of exigent circumstances would be the ease of destruction of evidence. In this case, as in Herrick, the warrant sought a number of things that could not be easily disposed of. However, Bitz made no allegation of any possibility of destruction of evidence.

Analogous to Roth's circumstances, the Hughes Court concluded that:

> there was no probable cause to issue a no-knock warrant in the present case. No information . . . indicated . . . reason to believe the drugs sought may be quickly disposed of without a no-knock warrant. Furthermore, [law enforcement] failed to provide any evidence that knocking and announcing may have placed the officers or others in danger. . . . the mere mention of a handgun . . . does not rise to the level of reasonable

suspicion, much less probable cause."

Hughes at ¶ 7.

Bitz's affidavit was signed on August 20, 2002, the same day the search warrant was signed. Yet, the search was not even conducted until a week later. The Court must be curious as to what exigency would allow that delay.

The evidence offered by Bitz consisted of unsubtantiated allegations of drugs, and the alleged possession of a weapon – neither of which is sufficient to show probable cause for a no-knock warrant. Therefore, the no-knock request was not supported by reasonable suspicion, no less the stringent probable cause required in North Dakota.

The District Court agreed with Roth on this aspect of his argument, and specifically found at the telephonic hearing of March 24, 2003, "that probable cause did not exist to support the issuance of the no-knock warrant to search the defendant's residence." (App. 17, lines 5-8). However, the District Court found a good faith exception to the no-knock provision, stating that the provision was not utilized. (App. 17, lines 17-19). The District Court cited a belief, unsupported by fact or testimony, that an Agent Nason "realized that the no-knock provision of the warrant was – should not be used, so the officers did, in fact, knock and announce their authority." (App. 17, lines 19-21). There was never any testimony at any stage of the proceeding from any such Agent Nason, and the District Court's suppositions are entirely without basis.

Roth argues that, if the warrant was defective as to the no-knock provision, the remainder of the warrant was defective, and thus inherently lacked the proper probable cause to allow law enforcement to search his residence. Rather than treat the warrant as a contract with a savings clause in case of invalidation of a portion of the document, Roth

maintains that the warrant as a whole must fail if such a crucial portion of the warrant was found improper and lacking. Simply because a provision of the warrant was not utilized, does not negate the fact that probable cause was improperly given for that provision, and for the remainder of the warrant itself.

II. Reliance on Informant Tip

The District Court, in granting the warrant, improperly relied on testimony from Bitz regarding statements made by the informant, and erroneously granted the warrant. The Supreme Court has held unequivocally that:

> . . . sufficient information, rather than "bare-bones" information, must be presented to the magistrate to allow the magistrate to determine probable cause. Suspicion, without anything more specific, does not amount to probable cause to search. Although the use of a suspect's reputation, with other evidence, can support a determination of probable cause, mere statements of reputation or unsupported conclusions and allegations, without some elaboration of the underlying circumstances for those conclusions or statements, are insufficient to establish probable cause.

State v. Birk, 484 N.W.2d 834, 837 (N.D. 1992) (citations omitted). The Court added "no deference is given to a magistrate's determination of probable cause when the determination is based on conclusory statements." Id at 838.

In Roth's case, Bitz's testimony was comprised exclusively of conclusory statements. Unlike instances in which probable cause and a search warrant has been upheld, there was no independent verification of the informant's reputation for truthfulness, no verification of the accuracy of the informant's statements, no corroboration of the tip and no independent investigation performed. There were no garbage searches performed. Roth did have several serious charges pending, but Roth's entire previous criminal history consisted of one conviction to delivery of controlled substance in 1981 – 21 years ago, and false report to law enforcement in 1992 – 20 years

ago. See State v. Ringquist, 433 N.W.2d 207 (ND 1988) (probable cause found and upheld based on anonymous first time tip, **with corroboration** from investigation including surveillance, prior drug history and other tips on the defendant from informants presumed to be reliable); Birk at 839-840 (same). The conclusory statements by the unnamed and unknown informant that Roth regularly cooks methamphetamine and that he saw Roth cook methamphetamine were never verified.

In denying Roth's Motion to Suppress, the District Court found that the assertions by the informant were valid. in spite of the fact that none of the assertions were verified. (App. 18). The District Court found that simply because the informant had been previously used, that the informant's present assertions were reliable. Roth maintains that, under the above cited case law, the informant's unverified and unsubstantiated claims did not amount to sufficient probable cause for the issuance of the warrant.

III. Stale information and bare assertions.

As cited above, the Supreme Court has held unequivocally that:

> . . . sufficient information, rather than "bare-bones" information, must be presented to the magistrate to allow the magistrate to determine probable cause. Suspicion, without anything more specific, does not amount to probable cause to search. Although the use of a suspect's reputation, with other evidence, can support a determination of probable cause, mere statements of reputation or unsupported conclusions and allegations, without some elaboration of the underlying circumstances for those conclusions or statements, are insufficient to establish probable cause.

State v. Birk, 484 N.W.2d 834, 837 (N.D. 1992) (citations omitted). The Court added "no deference is given to a magistrate's determination of probable cause when the determination is based on conclusory statements." Id at 838. In addition, "[a]n application for a warrant that is based upon stale information of previous misconduct is insufficient because it does not establish probable cause that similar or other improper

conduct is continuing to occur." State v. Ringquist, 433 N.W.2d 207, 213 (N.D. 1988).

In his affidavit, Bitz relies heavily on information of previous misconduct. He cites to the prior charges, and then independently gives fact patterns for these charges in additional references. (App. 5-6, ¶¶ 3-4, 6, 7). The referenced activities date from May, 2002, three months prior to the warrant. Id. In fact, paragraph 4 is simply the bare assertion that Roth is suspected of manufacturing methamphetamine, with no factual support. Bitz refers to stale information, that suspected narcotics users or dealers may have visited Roth's residence in May, 2002, months before the warrant application was submitted. Ex. 2, ¶ 5. There was no evidence submitted that any of these alleged drug dealers or users ever conducted any illicit activities with Roth – only the supposition of overly suspicious law enforcement. In a vain attempt to bolster his affidavit, Bitz even states that one of the alleged visitors to Roth's residence met with another alleged visitor at another residence and was arrested with methamphetamine three days later – a circumstance which in no way involved Roth! Yet, inexplicably, this assertion finds its way into this search warrant affidavit.

Similar to conspiracy law, the mere presence at a crime scene does not constitute engaging in criminal activity. The fact that suspects in different criminal activities were seen at Roth's residence long ago certainly does not give rise to probable cause to search. If so, defense counsel's office would be routinely searched due to the presence of individuals accused of committing various crimes.

The time and distance of the factual allegations renders the information submitted by Bitz vague and remote and resulted in a warrant which was obtained on stale information. The bare assertions of scabs on Roth's roommate's face and miscellaneous

vehicle traffic certainly does nothing in the State's favor. Probable cause was lacking for the search warrant and the evidence seized and gained should have been suppressed by the District Court. However, again the District Court found that the evidence was stale, but amounted to a pattern of conduct. (App. 18, lines 8-10).

Roth agrees and understands that a Judge reviewing an application for a search warrant is to view the totality of the circumstances and not dissect each morsel of evidence. See Illinois v. Gates, 462 U.S. 213 (1983). However, by piling evidence that is stale and conclusory, the State should not be allowed to bootstrap a search warrant simply by a sheer amount of allegations, some of which are irrelevant to the matter at hand.

CONCLUSION

From the arguments set forth above, and from the Record in this matter, Roth requests that this Court reverse and overturn the denial of his Motion to Suppress from the District Court, and remand with direction to the District Court to grant his Motion for Suppression.

Dated this Wednesday, June 18, 2003.

STEVEN BALABAN (ND BAR ID# 05204)
418 East Rosser Avenue, Suite 102
Bismarck, ND 58501
(701) 224-0977

Attorney for Defendant/Appellant Roth

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	Supreme Court No. 20030102
	)	
Plaintiff/Appellee,	)	District Court No. 08-02-K-2703
	)	
vs.	)	**CERTIFICATE OF SERVICE**
	)	
Todd Roth,	)	
	)	
Defendant/Appellant.	)	

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Steven Balaban, the attorney for Appellant in the above action, hereby certifies under N.D.R.Civ.P. 5(f), that on Wednesday, June 18, 2003, he served the attached:

BRIEF OF APPELLANT ROTH and APPENDIX TO BRIEF OF APPELLANT ROTH

upon the representatives of the following office by personally serving a copy of same:

Burleigh County States Attorney
Burleigh County Courthouse
514 East Thayer Avenue
Bismarck, ND 58501

Steven Balaban