ORIGINAL 20040327

IN THE SUPREME COURT

IN THE STATE OF NORTH DAKOTA

State of North Dakota

Appellee,

v.

Dale Matt Ressler

Appellant.

Appeal from the District Court
South Central Judicial District
Morton County, North Dakota
The Honorable Sonna Anderson

SUPREME COURT NO. 20040327
MORTON COUNTY NO. 04-K-0171

****

BRIEF OF APPELLANT

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TABLE OF CONTENTS

1. TABLE OF AUTHORITIES

PARAGRAPH NO.

NORTH DAKOTA CASES:

8th CIRCUIT COURT OF APPEALS CASES:

UNITED STATES SUPREME COURT CASES:

2. STATEMENT OF THE ISSUE

ISSUE: **The nonconsensual, warrantless seizure and search of Ressler's package without probable cause was in violation of the Fourth Amendment of the United States Constitution, by and through the Fourteenth Amendment of the United States Constitution, and even greater protection provided by Article I, Section 8 of the North Dakota State Constitution.**

3. STATEMENT OF THE CASE

Nature of the Case.

4. This is an appeal of the Order Deferring Imposition of Sentence of November 10, 2004, wherein Ressler entered into a conditional plea agreement to the charge of Possession of Drug Paraphernalia, in violation of N.D.C.C. § 19-03.4-03, a class C felony. (App. pp. 7-8; Tr. pp. 58-67).

Course of Proceedings/Disposition of the Court Below.

5. On February 26, 2004, Ressler was charged by Complaint with the charge of Possession of Drug Paraphernalia, in violation of N.D.C.C. § 19-03.4-03, a class C felony. (App. p. 38).

6. On March 18, 2004, the State filed a motion for forfeiture of property, specifically claiming that the $9,800.00 in seized United States Currency should be forfeited in this matter, (App. pp. 34-37), and on May 11, 2004, a preliminary hearing was held and Ressler was bound over for trial, wherein the State then filed an Information formally charging Ressler with Possession of Drug Paraphernalia, in violation of N.D.C.C. § 19-03.4-03, a class C felony. (App. p. 32).

7. On July 22, 2004, Ressler filed a motion to suppress evidence on both the criminal matter and the forfeiture matter, (App. pp. 22-31) and on July 29, 2004, the State filed a response to the motion. (App. pp. 19-21). A consolidated suppression hearing on both the criminal matter and the forfeiture matter was held on September 9, 2004. (See transcript generally; also see Tr. p. 62, lines 20-23; App. p. 13).

8. On October 26, 2004, the Court denied the motion to suppress and ordered the $9,800.00 in seized United States Currency should be forfeited in this matter. (Order; App. pp. 14-18). While the State and Ressler did subsequently enter into a plea agreement to present to the

Court for consideration, Ressler did point out to the Court that he would have been entitled to a forfeiture hearing as a matter of due process. (App. p. 11).

9. Ressler then entered into a conditional plea agreement to the charge of Possession of Drug Paraphernalia, in violation of N.D.C.C. § 19-03.4-03, a class C felony. (Tr. pp. 58-67; App. p7-10). The Court ordered imposition of sentence be deferred for a period of three and one-half years beginning on November 10, 2004. Ressler was also placed on supervised probation and further ordered to pay $525.00 in mandatory court fees. (Tr. pp. 58-67; App. pp. 7-10).

10. The conditional plea agreement further gave Ressler a right to have the suppression issue preserved for the forfeiture proceeding. (Tr. p. 63, lines 7-18; App. p. 11). As a result, the Court ordered the State to hold the $9,800.00 in United States Currency subject to forfeiture until the outcome of this appeal is determined. (Tr. p. 64, lines 11-13). Ressler filed his Notice of Appeal on November 16, 2004. (App. pp. 5-6).

11. STATEMENT OF FACTS

12. On February 24, 2004, Ressler delivered a box to We Ship, in Mandan, North Dakota, addressed to is brother, Dennis Ressler, in San Pablo, California. (Order, p. 1; App. p. 14; Tr. p. 4, line 15-20).

13. When Ressler came into the store, Kent Danielson, the proprietor of We Ship, thought Ressler acted in a very suspicious fashion, in that he was nervous, he kept looking over his shoulder, the package's weight did not coincide with what Ressler stated its contents should be, and that it was odd that the package was important enough that it be shipped next day air, but was not insured. (Order, p. 2; App. p. 15).

14. After Ressler left, Danielson went to the pack room, opened up the box, and found

approximately 11 magazines, some of which had scotch tape around the three open sides. (Order, p. 2, App. p. 15; Tr. p. 12. Lines 9-12). Danielson cut one of them open and there were 20 dollar bills in various pages throughout the magazine. (Tr. p. 12, lines 13-14). Danielson estimated that it was approximately 14 hundred dollars, (Tr. p. 45, lines 21-25), although it later turned out that the amount was $870.00. (Tr. p. 33, lines 22-23).

15. Danielson then opened a second magazine and did not find anything inside of it. (Tr. p. 15, lines 24-25; p. 16, lines 9-21: p. 46, lines 10-17). Danielson then called the Mandan Police Department. (Order, p. 2, App. p. 15). Danielson testified that he had no evidence of a crime taking place. (Tr. p. 17, lines 12-13).

16. Officer Ray Eisenmann came to the store and Danielson showed him the box. (Tr. p. 33, lines 13-17). Eisenmann observed several magazines, some newspaper wrapping, a plastic bag, and packaging material along with the magazines. (Tr. p. 33, lines 13-17). Danielson also showed Eisenmann some of the money that was inside the first magazine Danielson looked through. (Tr. p. 33, lines 16-17).

17. Eisenmann testified that all that Danielson knew was that one magazine had money in it and one didn't and there were other magazines in the box which he could see, and that Ressler was nervous. (Tr. p. 47, lines 17-22; p. 48, lines 8-10). Eisenmann testified that neither he nor Danielson knew what was in the next magazine. (Tr. p. 46, lines 24-25). Eisenmann testified that, as to what Danielson showed him and told him about, there was nothing criminal. (Tr. p. 49, lines 14-16). Eisenmann testified that, at that point, he had dominion and control over that box when he started looking in it. (Tr. p. 47, lines 14-16). Eisenmann also testified that he had control of the box as he looked through it. (Tr. p. 48, lines 23-25).

18. Eisenmann arranged for a narcotics canine to run by the box. (Order, p. 2; App. p. 15).

However, in order to conduct a valid canine search, they needed to set up a couple of ordinary boxes, approximately five feet apart and then run the dog by all three boxes. (Order, p. 2; App. p. 15). The We Ship store was not large enough to conduct the canine test, so Eisenmann removed the box to the law enforcement center, where the canine, Shadow, hit on the suspicious box. (Order, p. 2; App. p. 15). Danielson also testified that his shop was small, and that he had other customers who were coming in throughout the day, and further, that a search of the box in his business would have been disruptive. (Order, p. 2, App. p. 15; p. 3. App. p. 16).

19. After Eisenmann took the box to the police station, it was in his control and no longer in We Ship's control. (Tr. p. 49. lines 8-10). Eisenmann testified that he then dug further in the box and discovered much more than Danielson ever knew about. (Tr. p. 49, lines 11-13). Eisenmann also testified that, until he brought the drug dog in, he still didn't know if there was anything criminal. (Tr. p. 49, lines 17-19).

20. Eisenmann then set up a test of the evidence using Officer Roger Becker and his drug dog, Shadow. (Tr. p. 36, lines 14-20). Eisenmann used a box that came from We Ship from Ressler and two other boxes from inside the Law Enforcement Center. (Tr. p. 36, lines 14-18). Once Shadow hit on the box, the contents of the box were inventoried, and nine of the eleven magazines therein contained currency, mostly in $20.00 bills. totaling $9,800.00. (Order. p. 3, App. p. 16; Tr. p. 36, lines 6-10; p. 37, lines 18-25; p. 38, lines 1-4). Officers then prepared a photo lineup. which contained a picture of Ressler, and Danielson identified Ressler as the person who delivered the box to We Ship to be placed into interstate commerce. (Order, p. 3, App. p. 16).

21. The officers then conducted a garbage search of Ressler's residence by taking trash in a trash

can from an alley behind the residence. Inside the trash, they found drug paraphernalia, including a feather slipper with duct tape, tin foil and baggies with the ends cut off, and were able to then obtain a search warrant from Judge Jorgensen to search Ressler's house. (Order, p. 3, App. p. 16). The search warrant was executed, and methamphetamine paraphernalia was discovered, specifically, a pen barrel for smoking methamphetamine. (Tr. p. 60, lines 11-25; p. 61, lines 1-3). Ressler was then charged with Possession of Drug Paraphernalia, in violation of N.D.C.C. § 19-03.4-03, a class C Felony. (App. pp. 7-8, 32, 38; Tr. pp. 58-67).

22. STANDARD OF REVIEW

23. When reviewing a motion to suppress evidence, this Court gives deference to the district court's findings of fact, and such findings on a motion to suppress will not be reversed if there is sufficient, competent evidence fairly capable of supporting the court's findings and the decision is not contrary to the manifest weight of the evidence. However, matters of law are fully reviewable on appeal. *State v. DeCoteau*, 1999 ND 77, 592 N.W.2d 579, ¶ 6.

24. LAW AND ARGUMENT

ISSUE: The nonconsensual, warrantless seizure and search of Ressler's package without probable cause was in violation of the Fourth Amendment of the United States Constitution, by and through the Fourteenth Amendment of the United States Constitution, and even greater protection provided by Article I, Section 8 of the North Dakota State Constitution.

Jurisdiction.

25. As a preliminary matter, this Court has held an order deferring imposition of sentence, for purposes of appeal, "complies with the requirements of N.D.R.Crim.P. 32(b) for criminal judgments, and therefore serves as the judgment of conviction." *State v. Van Beek*, 1999 ND 53, 591 N.W.2d 112, ¶ 9, *citing State v. Trosen*, 547 N.W.2d 735, 737 n. 1 (N.D.1996).

26. Thus, this Court has concluded that an order deferring imposition of sentence entered complies with the requirements of N.D.R.Crim.P. 32(b) for purposes of appeal, and holds that the case is properly before the Court. *Van Beek, supra*, at ¶ 9.

State has the Burden of Persuasion.

27. A person alleging his rights have been violated under the Fourth Amendment has an initial burden of establishing a prima facie case of illegal seizure. *State v. Smith*, 1999 ND 9, 589 N.W.2d 546, ¶10. After the defendant has made a prima facie case, however, the burden of persuasion is shifted to the State to justify its actions. *Id.* Given this burden of persuasion, "[i]ssues not briefed or argued [by the State] are deemed abandoned." *State v. Keilen*, 2002 ND 133, 649 N.W.2d 224, n. 1.

Fourth Amendment and Article I, Section 8.

28. The Fourth Amendment to the United States Constitution and Article 1, Section 8, of the North Dakota Constitution protect individuals from unreasonable searches and seizures in their homes. *State v. DeCoteau*, 1999 ND 77, 592 N.W.2d 579, ¶ 7. Subject to a few well-delineated exceptions, searches and seizures without a warrant are unreasonable under the Fourth Amendment. *Id.*

29. "A search occurs when the government intrudes upon an individual's reasonable expectation of privacy." *State v. Winkler*, 552 N.W.2d 347, 351 (N.D.1996). Moreover, "[I]t is quite plain that the Fourth Amendment governs 'seizures' of the person." *Terry v. Ohio*, 392 U.S. 1, 16 (1968). "A seizure affects only the person's possessory interests; a search affects a person's privacy interests." *Segura v. United States*, 468 U.S. 796, 806 (1984).

Senders of packages can reasonably expect that the government will not open their packages.

30. The State never raised the issue of standing in this case, and as stated above, this Court has

made clear that "[i]ssues not briefed or argued are deemed abandoned," *State v. Keilen*, 2002 ND 133, 649 N.W.2d 224, n. 1, especially given that, after the defendant has made a prima facie case of an illegal seizure, the burden of persuasion is shifted to the State to justify its actions. *Id. State v. Smith*, 1999 ND 9, 589 N.W.2d 546, ¶10. *Also see State v. Kesler*, 396 N.W.2d 729 (N.D.1986)("the issue of Kesler's standing was not adequately raised by the State."). Therefore, it should be held that the State abandoned this issue. Moreover, in this case the district court concluded that, with regard to the property inside the package, "the Defendant, is known to or is believed to be the owner of the property." (Order, p. 5; App. p. 18).

31. There is a "long accepted, and vitally important, axiom that the sender of a letter retains an expectation of privacy protected by the fourth amendment in the contents of the letter after it is sent." *U.S. v. Barry*, 853 F.2d 1479, 1483 (8th Cir.1988). The sender and intended recipient of a package clearly have "an adequate possessory or proprietary interest in the ... object searched" to give them standing to question the propriety of its search or seizure. *United States v. Haes*, 551 F.2d 767, 769-70 (8th Cir. 1977) (*quoting United States v. Kelly*, 529 F.2d 1365, 1369 (8th Cir. 1976)). Also see *United States v. Villarreal*, 963 F.2d 770, 773-74 (5th Cir.1992):

> Individuals do not surrender their expectations of privacy in closed containers when they send them by mail or common carrier. The Supreme Court has long recognized that [l]etters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy. Both senders and addressees of packages or other closed containers can reasonably expect that the government will not open them.

32. *Id.* This Court has also recognized that "[O]ther jurisdictions have concluded that under similar circumstances standing exists, apparently because the defendant had an expectation of privacy as to the contents of the package." *Kesler*, supra, at n. 1. Consequently, Ressler

had an expectation of privacy as to the contents of the package.

Ressler's package was an effect under the Fourth Amendment & Article I, Section 8.

33. Ressler argues three main points:

1. The government seized Ressler's package without probable cause or a search warrant, and such seizure was unreasonable in that Ressler still had an expectation of privacy in the contents beyond the limited private search which had taken place.

2. The government then searched Ressler's package without probable cause or a search warrant, and such search was unreasonable in that Ressler still had an expectation of privacy in the contents beyond the limited private search which had taken place.

3. That even after establishing probable cause to search the package, the government searched Ressler's package without obtaining a search warrant.

To begin this discussion, it is important to review some long established principles:

Letters and sealed packages are protected from government inspection.

34. Since *Ex parte Jackson*, 96 U.S. 727, 24 L.Ed. 877 (1877), it has been the law that letters and sealed packages are protected from government inspection, and therefore, Ressler had a reasonable expectation that the contents of the package would remain private. *See Walter v. United States*, 447 U.S. 649, 651-52, 654, 100 S.Ct. 2395, 2398-99, 65 L.Ed.2d 410 (1980) (material carried by private carrier); *United States v. Van Leeuwen*, 397 U.S. 249, 251-52, 90 S.Ct. 1029, 1031-32, 25 L.Ed.2d 282 (1970); *also see U.S. v. Jacobsen*, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984).

35. Thus, "[W]hen the wrapped parcel involved in this case was delivered to the private freight carrier, it was unquestionably an 'effect' within the meaning of the Fourth Amendment." *U.S. v. Jacobsen*, 104 S.Ct. 1652 (1984). "Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy; warrantless searches of such effects are presumptively unreasonable." *Id.* "Even when government agents may lawfully seize such a package to prevent loss or destruction of

suspected contraband, the Fourth Amendment requires that they obtain a warrant before examining the contents of such a package." *Id.*

Lifting and brief inspecting the outside of a package is not a seizure.

36. "If a government investigator merely observes the outside of a package or lifts it from a conveyor belt and handles it briefly for inspection, then there is no seizure for fourth amendment purposes, and the government action is subject to no scrutiny at all." *United States v. Fuller*, 374 F.3d 617, 621 (8th Cir.2004), *citing United States v. Gomez*, 312 F.3d 920. 923 (8th Cir.2002).

Removal of a package for a more thorough inspection in another part of the mail processing facility is a stop requiring reasonable suspicion.

37. "When the government removes a package from the mail stream and takes it to another part of a mail processing facility for more thorough inspection, generally by a drug-sniffing dog, then it has conducted a stop subject to constitutional scrutiny." *Fuller, supra* at 621, *citing United States v. Morones*, 355 F.3d 1108, 1111-12 (8th Cir.2004). "This kind of stop is analogous to a so-called *Terry* stop and must be supported by reasonable suspicion." *Fuller, supra* at 621, *citing Gomez*, 312 F.3d at 923-24 (*citing generally Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868. 20 L.Ed.2d 889 (1968)).

When the government asserts dominion and control over the package and its contents, the seizure must be supported by probable cause.

38. "[T]here are full-fledged seizures, where the government asserts 'dominion and control over the package and its contents.'" *Fuller, supra* at 621, *citing United States v. Jacobsen*, 466 U.S. 109, 120, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). "These seizures must be supported by probable cause." *Fuller, supra* at 621, *citing Jacobsen, supra*, at 121-22, 104 S.Ct. 1652. "Such containers may be seized, at least temporarily, without a warrant." *Jacobsen, supra*,

121-22. Thus, "[I]n *Jacobsen*, the Court held that a seizure occurred when Drug Enforcement Administration agents took custody of a package and its contents from employees of a private carrier." *Garman v. Foust*, 741 F.2d 1069, 1072 (8th Cir.1984), *citing Jacobsen, supra.*

The government must obtain a search warrant to search the package.

39. "The Supreme Court has indicated that a package in the mail may be detained on the basis of reasonable suspicion to believe it contains contraband pending further investigation directed toward establishing probable cause which will support issuance of a search warrant." *Garman v. Foust*, 741 F.2d 1069, 1072 (8th Cir.1984), *citing United States v. Van Leeuwen*, 397 U.S. 249, 252-53, 90 S.Ct. at 1032-33 (1970). In *Van Leeuwen*, the Supreme Court held that, "[T]he significant Fourth Amendment interest was in the privacy of this first-class mail; and that privacy [could] not [be] disturbed or invaded until the approval of the magistrate was obtained." *Van Leeuwen, supra*, 397 U.S. at 253.

40. Therefore, in *Foust*, the Eighth Circuit held:

> Foust had before him a package which he had probable cause to believe contained marijuana. Foust was permitted to seize the package, at least temporarily, pending issuance of a warrant authorizing a search of the package.

Foust, supra at 1073, *citing United States v. Jacobsen, supra*, 104 S.Ct. at 1660-61; *Texas v. Brown*, 460 U.S. 730, 103 S.Ct. 1535, 1540-41, 75 L.Ed.2d 502 (1983). *See generally U.S. v. Sunby*, 186 F.3d 873 (8th Cir.1999)("After the dog indicated the package contained contraband, authorities applied for a warrant to search the package."); *U.S. v. Jacobs*, 986 F.2d 1231 (8th Cir.1993)("Iowa City police decided to examine the package, and if it was indeed suspicious, to obtain a search warrant and open it."); *U.S. v. Logan*, 362 F.3d 530 (8th Cir.2004)("After the drug-sniffing dog alerted, police obtained a search warrant and found

a stereo speaker inside the package containing approximately one kilogram of cocaine."); *U.S. v. VaLerie*, 385 F.3d 1141 (8th Cir.2004)("After the dog alerted to the package, the officers detained the package, and later obtained a search warrant.").

41. In this particular case, there is no question that the government exercised dominion and control over the box when Officer Eisenmann started looking in it, and he admitted so. (Tr. p. 47, lines 14-16). Moreover, there is no question Eisenmann exercised dominion and control when he removed the box to the law enforcement center, (Order, p. 2; App. p. 15), and again, he admitted so. (Tr. p. 49, lines 8-10). It is also clear that, prior to the drug dog sniff, and more importantly, without benefit of any warrant, Eisenmann testified that he then dug further in the box and discovered much more than Danielson ever knew about. (Tr. p. 49, lines 11-13). Lastly, Eisenmann then "inventoried" the entire contents of the box without benefit of any warrant and without any justification for conducting an inventory search (Order, p. 3, App. p. 16; Tr. p. 36, lines 6-10; p. 37, lines 18-25; p. 38, lines 1-4)(see discussion below).

Government v. Private Search and Seizure.

42. The private search conducted in this case was limited in scope and Officer Eisenmann admitted that all that Danielson knew was that one magazine had money in it and one didn't and there were other magazines in the box which he could see, and that Ressler was nervous. (Tr. p. 47, lines 17-22; p. 48, lines 8-10). Eisenmann also testified that neither he nor Danielson knew what was in the next magazine. (Tr. p. 46, lines 24-25). Moreover, as previously stated, the record is clear that Eisenmann seized the package, dug further into the box, found much more than Danielson ever knew about, and "inventoried" the entire contents of the box without benefit of any warrant and without any justification for

conducting an inventory search.(Order, p. 3, App. p. 16; Tr. p. 36, lines 6-10; p. 37, lines 18-25; p. 38, lines 1-4).

43. "The additional invasions of respondents' privacy by the government agent must be tested by the degree to which they exceeded the scope of the private search." *Jacobsen, supra.* "That standard was adopted by a majority of the Court in *Walter v. United States*, 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980)." *Jacobsen, supra.* "In *Walter* a private party had opened a misdirected carton, found rolls of motion picture films that appeared to be contraband, and turned the carton over to the Federal Bureau of Investigation. Later, without obtaining a warrant, FBI agents obtained a projector and viewed the films. While there was no single opinion of the Court, a majority did agree on the appropriate analysis of a governmental search which follows on the heels of a private one. *Jacobsen, supra.*

Two Justices took the position:

> If a properly authorized official search is limited by the particular terms of its authorization, at least the same kind of strict limitation must be applied to any official use of a private party's invasion of another person's privacy. Even though some circumstances--for example, if the results of the private search are in plain view when materials are turned over to the Government--may justify the Government's reexamination of the materials, surely the Government may not exceed the scope of the private search unless it has the right to make an independent search. In these cases, the private party had not actually viewed the films. Prior to the Government's screening one could only draw inferences about what was on the films. The projection of the films was a significant expansion of the search that had been conducted previously by a private party and therefore must be characterized as a separate search.

44. *Jacobsen, supra*, citing 100 S.Ct., at 2401 (opinion of STEVENS, J., joined by Stewart, J.) (footnote omitted). However, "[T]he Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated. In such a case the authorities have not relied on what is in effect a private search,

and therefore presumptively violate the Fourth Amendment if they act without a warrant."

Jacobsen, supra.

45. In *Jacobsen*, the Court found that the government did not learn anything beyond the private search which had already taken place:

> Similarly, the removal of the plastic bags from the tube and the agent's visual inspection of their contents enabled the agent to learn nothing that had not previously been learned during the private search. It infringed no legitimate expectation of privacy and hence was not a "search" within the meaning of the Fourth Amendment.
>
> * * *
>
> While the agents' assertion of dominion and control over the package and its contents did constitute a "seizure", that seizure was not unreasonable. The fact that, prior to the field test, respondents' privacy interest in the contents of the package had been largely compromised, is highly relevant to the reasonableness of the agents' conduct in this respect. The agents had already learned a great deal about the contents of the package from the Federal Express employees, all of which was consistent with what they could see. The package itself, which had previously been opened, remained unsealed, and the Federal Express employees had invited the agents to examine its contents. Under these circumstances, the package could no longer support any expectation of privacy.

46. *Id.* Ressler's case, on the other hand, is starkly different. The private search conducted in this case was limited in scope, and the record is clear that Eisenmann seized the package, dug further into the box, found much more than Danielson ever knew about, and "inventoried" the entire contents of the box without benefit of any warrant and without any justification for conducting an inventory search.

Inferences to Support Entrance to Home Should be by a Judge.

47. It is of the very essence of our rights under the Fourth Amendment that the inferences to support the search "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *State v. Matthews*, 216 N.W.2d 90, 104 (N.D.1974), *citing Johnson v. United States*, 333 U.S. 10, at 13-14, 68 S.Ct. 367, 369, 92 L.Ed. 436. When police assume the function of the

magistrate. they act beyond the law and the evidence they obtain by so acting is excluded. In regrettable consequence, the guilty may go free, but the alternative--permitting warrantless rummaging through private property--is worse. The remedy for both evils is for police to obey the law, not for the courts to ignore the Constitution. *Id.*

Inventory Search

48. As a preliminary matter, the inventory search exception was neither briefed nor argued to the district court by the State, and this Court has made clear that "[i]ssues not briefed or argued are deemed abandoned," *State v. Keilen*, 2002 ND 133, 649 N.W.2d 224, n. 1, especially given that. after the defendant has made a prima facie case of an illegal seizure, the burden of persuasion is shifted to the State to justify its actions. *Id. State v. Smith*, 1999 ND 9, 589 N.W.2d 546. ¶10. Therefore. it should be held that the State abandoned this issue.

49. An inventory of property in police custody may not be used as a subterfuge for criminal investigation. *State v. Kunkel*, 455 N.W.2d 208 (N.D.1990), *citing Colorado v. Bertine*, 479 U.S. at 372, 376, 107 S.Ct. at 742, 744; *South Dakota v. Opperman*, 428 U.S. at 376, 96 S.Ct. at 3100; *State v. Muralt*, 376 N.W.2d at 27. In *South Dakota v. Opperman, supra,* the Supreme Court approved a warrantless search of an impounded vehicle when the inventory is a routine caretaking procedure rather than one motivated by investigatory purposes. *Kunkel, supra; see also Colorado v. Bertine, supra.* "The practice of securing and inventorying the contents of vehicles in police custody is predicated on the interest in protecting the owner's property while it is in police custody, protecting the police against claims of lost. stolen or vandalized property and protecting the police against danger posed by the inventoried property." *Kunkel, supra, citing Bertine*, 479 U.S. at 372, 107 S.Ct. at 742; *Opperman; Muralt*, 376 N.W.2d at 26: *State v. Gelvin*, 318 N.W.2d 302, 305

(N.D.1982). *State v. Stockert*, 245 N.W.2d 266, 269 (N.D.1976).

50. "Limited to these purposes, inventories conducted according to 'reasonable police regulations relating to inventory procedures administered in good faith' are permissible under the fourth amendment." *Kunkel, supra, citing Bertine*, 479 U.S. at 374 & n. 6, 107 S.Ct. at 742 & n. 6. In *Muralt,* this Court held that the policies underlying the inventory search exception to the warrant requirement justified the search "so long as the purpose of the search is to make an inventory of the items now under police control and not to discover evidence of a crime." *Id.* at 27.

51. "Clearly, the impoundment and the inventory [of Ressler's package] were tools of criminal investigation unrelated to the protection of property or the protection of police." *Kunkel, citing Opperman*, 428 U.S. at 376, 96 S.Ct. at 3100. There is simply no evidence to suggest that law enforcement was ever concerned in the protection of Ressler's package or to protect the police. Rather, "[T]he inventory search was conducted to discover evidence of crime and not to fulfill a caretaking function," *Kunkel, supra*, and this becomes clear in that the so-called "inventory search" was conducted right after the drug dog sniff hit on the package. (Order, p. 3, App. p. 16). "[I]t is the caretaking function which legitimizes an inventory. Absent that justification, an inventory is unreasonable and is an impermissible warrantless search in contravention of the fourth amendment." *Kunkel, citing Bertine*, 479 U.S. at 372, 107 S.Ct. at 742; *Opperman*, 428 U.S. at 376, 96 S.Ct. at 3100; *Muralt*, 376 N.W.2d at 27.

Fruits from an Illegal Seizure.

52. It follows that everything beyond the seizure and search of the package led to the subsequent investigation and search warrant. In other words, but for this package being discovered, the subsequent evidence would not have been discovered.

53. The exclusionary rule prohibits evidence seized during an unlawful search from constituting proof against the victim of the search, as such evidence is "fruit of the poisonous tree". *Wong Sun v. United States*, 371 U.S. 471, 9 L.Ed. 2d 441, 83 S.Ct. 407 (1963). Thus, any subsequent evidence gained as a result of the initial illegally acquired evidence is considered, "fruit of the poisonous tree" and must likewise be suppressed, unless an exception to the warrant requirement for the search exists. *State v. Kitchen*, 1997 ND 241, 572 N.W.2d 106, ¶ 9, *citing Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

Greater Protection under North Dakota Constitution.

54. Article I, Section 8 of the North Dakota State Constitution specifically states:

> 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.

55. While Ressler believes that the protection of the Fourth Amendment should suffice for his prayer of relief, he prays for a higher constitutional standard should this court have any doubts. In essence, he prays that this Court will apply a higher constitutional standard through Article I, Section 8 of the North Dakota State Constitution than that of the United States Supreme Court. On several occasions, the North Dakota Supreme Court has held to this belief, especially regarding the protection against unreasonable searches and seizures.

56. In *State v. Klodt*, 298 N.W.2d 783 (N.D.1980), the Court stated:

> *It is within the power of this court to apply higher constitutional standards than are required of the States by the Federal Constitution.*

Furthermore, the Court stated:

> *We agree that Article 1, section 8, N.D. Constitution, may afford individual greater protection against unreasonable searches and seizures than that which the Fourth Amendment provides.*

57. In *Michigan v. DeFillippo*, 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979), the Supreme Court held that the exclusionary rule is merely a remedial measure for Fourth Amendment violations. The *DeFillippo* court noted that "[t]he purpose of the exclusionary rule is to deter unlawful police action" 443 U.S. at 38 n.3, 99 S.Ct. at 2633 n. 3. *Accord, United States v. Janis*, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976); *United States v. Peltier*, 422 U.S. 531, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975); *United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 61 (1974).

58. By contrast, the emphasis of Article 1, section 8 of the North Dakota State Constitution should be on protecting an individual's right to privacy rather than on curbing governmental actions. *See State v. Lampman*, 724 P.2d 1092 (Wash.App.1986).

59. This Court has also found greater individual rights under our state constitution. *See Grand Forks-Traill Water Users v. Hjelle*, 413 N.W.2d 344 (N.D.1987) [protection from takings for public use]; *State v. Orr*, 375 N.W.2d 171 (N.D.1985) [right to counsel]; *City of Bismarck v. Altevogt*, 353 N.W.2d 760 (N.D.1984) [jury trial rights]; *State v. Nordquist*, 309 N.W.2d 109 (N.D.1981) [grand jury protections]; *State v. Lewis* , 291 N.W.2d 735 (N.D.1980) [right to appeal]; *State v. Stockert*, 245 N.W.2d 266 (N.D.1976) [protection from illegal searches]; *Johnson v. Hassett*, 217 N.W.2d 771 (N.D.1974) [right to uniform application of laws]; *see also State v. Matthews*, 216 N.W.2d 90, 99 (N.D.1974) [broader standing to challenge illegal searches]. *See State v. Herrick*, 1999 ND 1, 588 N.W.2d 847(Maring, concurring in part and dissenting in part).

60. In *State v. Hunt*, 91 N.J. 338, 450 A.2d 952 (1982), the New Jersey Court found greater privacy protection under Article I, para. 7 of the New Jersey Constitution, where the Court stated:

In this case, we are persuaded that the equities so strongly favor protection of a person's privacy interest that we should apply our own standard rather than defer to the federal provision. We do so in the spirit announced in a recent comment, "The Interpretation of State Constitutional Rights," 95 Har.L.Rev.1324, 1367 (1982):

> *In our federal system, state constitutions have a significant role to play as protectors of individual rights and liberties. This role drives its character from the freedom of state Courts to move beyond the protections provided by federal doctrine and from the distinctive character of state Courts and state constitutions. But the state constitutional role is also shaped by the emergence of the federal Bill of Rights in recent decades as the primary constitutional shield against intrusions by all levels of government. The present function of state constitutions is as a second line of defense for those rights protected by the Federal Constitution and as an independent source of supplemental rights unrecognized by federal law.*

61. *Id.* The simplest but perhaps most compelling reason for extending state constitutional rights beyond their federal counterparts is that it strengthens the constitutional safeguards of fundamental liberties. *Id.* (Pashman, J., concurring). "[One of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens." *Id. citing* Brennan, "State Constitutions," 90 Harv. L.Rev. at 530. Justice Pashman noted:

When this Court considers that important constitutional rights are inadequately protected by the federal constitution, we have an obligation under the State Constitution to supply that protection. The virtue of independent sources of constitutional protection is that, as Justice Brennan stated, quoting James Madison, "independent tribunals of justice 'will be naturally led to resist every encroachment upon rights...'" 90 Harv. L.Rev. at 504. The New Jersey Constitution is a separate fount of liberty, and we must enforce it.

62. A second reason for extending state constitutional interpretation beyond the limits imposed at the federal level derives from the resultant diversity of constitutional analysis. "Rather than threaten the federal system, such a process [of state constitutional law] is more likely to create a healthy debate over the interpretation of federal law." *Hunt, supra*, (Parshall, J., concurring), citing "Developments in the Law-The Interpretation of State Constitutional Rights," 95 Harv. L.Rev. 1324, 1396.

63. Similar constitutional concepts can be developed in a variety of ways. The path chosen by

the United States Supreme Court is not necessarily the best, the most protective of our constitutional rights, or the most reflective of the intent of the Framers. *Hunt, supra*, (Parshall, J., concurring), *citing Levinson.* "*'The Constitution' in American Civil Religion,* "1979 The Supreme Court Review 123, 140-41. State supreme Courts, if not discouraged from independent constitutional analysis, can serve, in Justice Brandeis' words, "as a laboratory" testing competing interpretations of constitutional concepts that may better serve the people of those states. *Hunt, supra*, (Parshall, J., concurring), *citing New State Ice Co. v. Liebmann*, 285 U.S. 262, 310-11, 52 S.Ct. 371, 386, 76 L.Ed. 747 (1931)(Brandeis, J., dissenting).

64. A third important reason for extending our interpretation of constitutional rights beyond that offered by the United States Supreme Court is that we do not share the strong limitations perceived by that Court in its ability to enforce constitutional protections aggressively. *Hunt, supra*, (Parshall, J., concurring). Those limitations arise from the structure of our federal system, the Court's role as final arbiter of at least the minimum scope of constitutional rights for a vastly diverse nation, and the Court's lack of familiarity with local conditions. These difficulties do not similarly limit state courts. *Id.*

65. In our federal system, many important governmental roles and decisions are reserved for the states. It is believed therefore that unduly "activist" enforcement of constitutional rights by the federal courts impinges on important state prerogatives. Justice Brennan, in his now famous article, explains that the Supreme Court has repeatedly allowed concerns of federalism to "limit the protective role of the federal judiciary." *Hunt, supra*, (Parshall, J., concurring), *citing* 90 Harv. L.Rev. at 503.

Yet, the very premise of the cases that foreclose federal remedies constitutes a clear call to

state courts to step into the breach. With the federal locus of our double protections weakened, our liberties cannot survive if the states betray the trust the court has put in them.

66. *Id., citing* [Brennan, 90 Harv.L.Rev. at 503]. The United States Supreme Court has also been hesitant to impose on a national level far-reaching constitutional rules binding on each and every state. This reluctance derives first, from the nationwide jurisdiction of the Court. Once it settles a rule, experimentation with different approaches is precluded. *Hunt, supra*, (Parshall, J., concurring), *citing San Antonio School District v. Rodriguez*, 411 U.S. at 43, 93 S.Ct. at 1302, 95 Harv.L.Rev. at 1348-51. Further, the Supreme Court has adverted to its lack of familiarity with local problems and conditions as a reason for hesitance. *Id., citing San Antonio School District, supra*, 411 U.S. at 41, 93 S.Ct. at 1301. Again, this applies with far less force at the state level.

67. For these various reasons, Ressler believes that this Court should not be reluctant to engage in independent state constitutional analysis. Where this Court perceives that the federal constitution has been construed to protect the fundamental rights and liberties of our citizens inadequately, Ressler respectfully requests this Court to find greater privacy protection under the North Dakota Constitution. The Constitution provides the citizens of this state with a fully independent source of protection of fundamental rights and liberties. Ressler believes that it is this Court's role alone to say what those rights are, and that it is this Court's solemn obligation to enforce them.

68. CONCLUSION.

69. This was a nonconsensual warrantless seizure and search, and therefore presumed illegal and unconstitutional. The government seized Ressler's package without probable cause or a search warrant, and such seizure was unreasonable in that Ressler still had an expectation of

privacy in the contents beyond the limited private search which had taken place. Moreover, the government then searched Ressler's package without probable cause or a search warrant, and such search was unreasonable in that Ressler still had an expectation of privacy in the contents beyond the limited private search which had taken place. Furthermore, even after establishing probable cause to search the package, the government searched Ressler's package without obtaining a search warrant.

70. Consequently, the illegal and unconstitutional seizure and search demands that the evidence obtained be suppressed. Wherefore, Ressler respectfully prays that all subsequent evidence obtained as a result of the unconstitutional search and seizure should be suppressed as "fruit of the poisonous tree."

Dated this 29th day of March, 2005.

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71. CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was sent by e-mail on this 29th day of March, 2005, upon:

Allen M. Koppy
Morton County State's Attorney
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Mandan, ND 58554
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CHAD R. MCCABE