

ORIGINAL

Supreme Court Number 20050277
District Court Number 02-K-2703

20050227

IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA

Todd Roth,

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

Applicant/Appellant,

SEP 14 2005

vs.

STATE OF NORTH DAKOTA

State of North Dakota,

Respondent/Appellee.

APPEAL FROM ORDER DENYING POST-CONVICTION APPLICATION,
DISTRICT COURT OF BURLEIGH COUNTY

REPLY BRIEF OF APPELLANT

Todd A. Roth, pro se
P.O. Box 5521
Bismarck, N.D. 58506
Phone: none

TABLE OF AUTHORITIES

	page
Eagleman v. State, 2004 ND 6, 673 N.W.2d 241	1
Elkins v. U.S., 364 U.S. 206, 80 S.Ct. 1437 (1960)	3
People v. Ovellette, 373 N.E.2d 114 (Ill.App. 1978)	2
Sabbath v. U.S., 391 U.S. 585 (1968)	2
State v. Dodson, 2003 ND 187, 671 N.W.2d 825	3
State v. Fields, 2005 ND 15, 691 N.W.2d 233	2
State v. Hinton, 415 N.W.2d 138 (Neb. 1987)	3
Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984)	1
U.S. v. Agrusa, F.2d 690 (8th Cir. 1976)	2
Article I, §23-24, North Dakota Constitution	3

Reitering and being more careful, Roth restates his ineffective assistance of counsel issue.

Roth's trial and appeal attorney, Steven Balaban, did not raise the four issues raised in the Brief, before the trial court nor on direct appeal.

If Roth's counsel had raised the issues, it would have resulted in suppression of the evidence. And thus the charges would have been dismissed or the conviction overturned for lack of evidence to support the charges or for failure to charge an offense. See pages 9-10 of the Appendix.

Roth's counsel was ineffective for not raising the four issues. And prejudice exists because there would have been suppression, the charges would have been dismissed, the outcome different. Strickland v. Washington, 466 U.S. 668, 687, 694, 104 S.Ct. 2052, 2064, 2068 (1984); Eagleman v. State, 2004 N.D. 6, ¶6, 673 N.W.2d 241, 243.

Page 3 of the State's brief says that Roth was "conclusory". Thus Roth adds that the deficient performance kept suppression from occurring. This fact was stated in the post-conviction application. See pages 9-10 of the Appendix.

Generally, or supposedly, a party will not make a 'failure to state a claim' defense when one knows that the other party can produce the fact or issue. The reason is that it would be a waste of time to make the defense. But the State did what it did.

Second:

After submitting his Appeal Brief, Roth came across

some points which are applicable. Rule 28(k), N.D.R.App.P., says a party can submit court cases which are pertinent and of significance. Thus Roth submits the below:

On page 5 of his Brief, Roth cites that the notice much be such that the homeowner can read the warrant. The case of People v. Ovellette, 373 N.E.2d 114 (Ill.App. 1978), says that: The notice requirement provides a time in which the occupant can point out any error in the address or other details of the warrant and examine the nature of the warrant to guard against invasions of privacy in excess of those authorized.

Also on page 5, with respect to the Federal statute: 18 U.S.C. 3109 codified the common law. Sabbath v. U.S., 391 U.S. 585 (1968); U.S. v. Agrusa, 541 F.2d 690, 699, (8th Cir. 1976), certiorari denied, 429 U.S. 1045 (1977).

On pages 10-11, supplementing the citation of "State v. Knudson" with respect to probable cause for nighttime searches, the case of State v. Fields, 2005 ND 15, ¶10, 691 N.W.2d 233, 237, says the same thing.

On pages 14-16 of the Brief, mention is made by the cases of "Weeks v. U.S." and of "State v. Fahn", and other cases that suppression could not be had on the basis that the illegally seized evidence was not incompetent under the rules of evidence because illegal seizure does not make it incompetent. However, a rule of privilege from introduction of illegally seized evidence can be recognized, just as the common law recognizes the spousal privilege, lawyer-

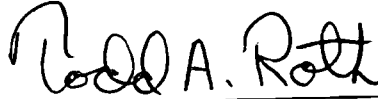
client privilege, doctor and minister privilege, privileges which suppress or keep evidence from being introduced. See Elkins v. U.S., 364 U.S. 206, 216, 80 S.Ct. 1437, 1443 (1960). Article I, §8 of the N.D. Constitution and the Fourth Amendment of the U.S. Constitution are self executing, creating a constitutional privilege. The above listed privileges bars otherwise competent evidence because of the status or relationship of the defendant and the witness. Likewise, §8 and the Fourth Amendment bars otherwise competent evidence because of the status and relationship the Constitutional provisions create. It is by the consent of the governed that the State can prosecute Roth, and thus a status and relationship is created between Roth and the State or Prosecution which bars the State from using illegally seized evidence. See State v. Hinton, 415 N.W.2d 138, 147 (Neb. 1987).

Also with respect to pages 14-16 of the Brief: It is said that the state courts must comply with the "good faith exception" and the case of "U.S. v. Leon" when applying the Fourth Amendment. That is, state courts cannot overrule "U.S. v. Leon" or ignore it. State v. Dodson, 2003 ND 187, ¶22-26, 671 N.W.2d 825, 833-834. However, stare decisis does not forbid reasons why the case of "U.S. v. Leon" is in error. Thus this N.D. Supreme Court does have the power and jurisdiction and duty, Article I, §23-24, N.D. Constitution, to rule on the Fourth Amendment of the U.S. Constitution according to reasons why "U.S. v. Leon" did not consider all the issues and thus is in error. Not only should this

Court dispose of the "good faith exception" with respect to state law, but also with respect to the Fourth Amendment.

Wherefore, Roth respectfully prays this Court him relief on all of his issues.

Dated this 13th day of September, 2005.

A handwritten signature in black ink that reads "Todd A. Roth". The signature is written in a cursive style with a horizontal line underneath it.

Todd A. Roth
P.O.Box 5521
Bismarck, ND
58506-5521



CERTIFICATE OF SERVICE BY MAIL
DEPARTMENT OF CORRECTIONS & REHABILITATION
PRISONS DIVISION
SFN 50247 (Rev. 04-2001)

STATE OF NORTH DAKOTA)
) SS. Appeal No. 20050227.
COUNTY OF BURLEIGH)

The undersigned, being duly sworn under penalty of perjury, deposes and says: I'm over the age of eighteen years and on the 14th Day of September, 2005, M, I mailed the following:

Reply Brief of Appellant

Letter addressed to Clerk of Court

Mailed one unbound and seven bound copies of each to Clerk of Court and one copy to State's Attorney

by placing it/them in a prepaid envelope, and addressed as follows:

Ms. Penny Miller
Clerk of N.D. Supreme Court
600 E. Blvd. Ave., Dept. 180
Bismarck, N.D. 58505-0530

Ms. Cynthia Feland
Assistant State's Atty.
514 E. Thayer Ave.
Bismarck, N.D. 58501-4413

and depositing said envelope in the Mail, at the NDSP, P.O. Box 5521, Bismarck, North Dakota 58506-5521.

AFFIANT

Wanda A. Roll
P.O. Box 5521
Bismarck, North Dakota 58506-5521

Subscribed and sworn to before me this 14 day of September, 2005.

Notary Public

Daniel P. Ebach

My Commission Expires On

DANIEL P. EBACH
Notary Public
State of North Dakota
My Commission Expires Aug. 22, 2006