ORIGINAL

IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota Plaintiff and Appellee vs. Jesse Lynn Smith Defendant and Appellant.	Supreme Court No. 20050264 Criminal Case No. 02-K-090

RESPONSE TO
APPEAL FROM THE JUNE 29, 2005, MEMORANDUM DECISION AND ORDER
OF THE WELLS COUNTY DISTRICT COURT IN FESSENDEN, NORTH DAKOTA
SOUTHEAST JUDICIAL DISTRICT
HONORABLE JAMES M. BEKKEN, PRESIDING

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUES

1. Whether the Defendant Timely Filed An Appeal To the Supreme Court.

2. Whether The Lower Court Incorrectly Granted the Defendant-Appellant's Motion to Suppress Evidence Because of Lack of Consent.

STATEMENT OF THE CASE

This is the State's Response in opposition to the Defendant's appeal from a judgment of conviction, dated March 31, 2004, upon a twelve (12) person Jury Verdict of Guilty to the offense of Unlawful Delivery of Alcohol to a Minor, Wells County Criminal Case 02-K-090. (A. 39). The Defendant states the appeal is from the District Court's Memorandum Decision and Order, dated June 29, 2005, (A. 6-14).

First, the Defendant-Appellant did not preserve his right to appeal because the Defendant-Appellant did not timely appeal Wells County Criminal Case 02-K-090. On October 11, 2002, the Defendant filed a Motion to Suppress for Wells County Criminal Case 02-K-089. (A. 18). The Defendant did not file a Motion to Suppress for case 02-K-090. Both, the Court's Memorandum and Order Denying Motion to Suppress, (A. 23-35), and the Register of Actions do not list the Motion to Suppress for Wells County Criminal Case 02-K-090, (A. 1). The Defendant's original Notice of Appeal was only for Wells County cases 02-K-087, 02-K-088, 02 - K-089, (A. 15), and does not list Wells County case 02-K-090. The North Dakota Supreme Court stated that it was clerical error to omit Wells County Criminal Case 02-K-087, and 02-K-088, (State v. Smith, 2005 ND 21 ¶10, 691 N.W.2d 203), and did not in any way mention Wells County Criminal Case 02-K-090. The North Dakota Supreme Court dismissed the appeal on Wells County Criminal Case 02-K-089, as there was an acquittal on that case, (A. 7). The North Dakota Supreme Court stated that the Defendant is appealing Wells County Criminal Case 02-K-087, and 02-K-088. State v. Smith, 2005 ND 21 ¶10, 691 N.W.2d 203.

The North Dakota Supreme Court issued a Judgment Reversing and Remanding Wells County Cases 02-K-087, and 02-K-088, (State v Smith, 2005 ND 21 ¶33, 691 N.W.2d 203) and the lower court was to determine whether or not the search of the vehicle may have

been valid because the Defendant consented to the search. The State v. Smith, opinion is final, as stated in the letter from North Dakota Supreme Court Clerk, Penny Miller, dated March 4, 2005. (Appellee Appendix P. 26). On February 25, 2005, Honorable District Court Judge James M. Bekken issued a letter regarding Wells County Cases 02-K-087, 02-K-088, 02-K-089, (Appellee Appendix P 23-24), and the letter does not address Wells County case 02-K-090. While Attorney Thomas Glass responded to the lower court's letter on March 21, 2005, (A. 8), the Defendant's response did not indicate anything about an alleged clerical error in omitting Wells County Case 02-K-090 from the Notice of Appeal. The State orally requested that the lower court review the video tape in response to the court's letter, (A. 8). On June 2, 2005, the Defendant filed a motion for a refunding of fines and fees. (A. 8). In response to the remand for Wells County cases 02-K-087, and 02-K-088, the lower court, in part I, issued its Memorandum Decision and Order, dated June 29, 2005. (A. 6-14). In response to the Defendant's Motion for a refunding of fines and fees, the lower court, in part II, issued its Memorandum Decision and Order, dated June 29, 2005, (A. 6-14), and the court considered the Defendant's motion as a Rule 35 motion and suspended the jail sentence, (A. 13-14). See N.D.R.Crim.P 35. The Defendant's Notice of Appeal for Wells County case 02-K-090, was filed on July 29, 2005. (A. 2).

Second, the Plaintiff-Appellee argues that on remand the trial court incorrectly granted the Defendant-Appellant's motion to suppress the evidence. The Plaintiff-Appellee argues that there were no Fourth Amendment violations and therefore, the convictions should be affirmed. Law Enforcement had consent to search. The Defendant Voluntarily Consented to the Search, and this Consent purged the taint from the unlawful stop. In conclusion, the State prays that the Court will affirm the convictions against the Defendant-Appellant, and deny the appeal of the Defendant-Appellant as to all issues.

STATEMENT OF THE FACTS

On May 25, 2002, after an unlawful stop, (See State v. Smith, 2005 ND 21, ¶24, 691 N.W.2d 203), Officer Balfour approached the Defendant's car. The time of the stop was 12:43 a.m. on public US 52. (A. 26). Officer Balfour immediately saw an open case of Miller Lite in the back seat. (Appellee Appendix 14 [9]). Officer Balfour detected a strong odor of alcoholic beverages, and asked the driver, the Defendant, to accompany him to the police vehicle. (Appellee Appendix 15 [10]). The Defendant was in the front seat of Officer Balfour's vehicle (Appellee Appendix 8 [42]). Officer Balfour told the Defendant of the suspicious activity in the Cenex lot in Fessenden, and that the Defendant may have taken something or tampered with something. (Appellee Appendix 15 [10]). Officer Balfour asked the Defendant for consent to search his car, and the Defendant said "yeah, go ahead." (Appellee Appendix 16 [11]).

The Defendant's contention is that he gave Balfour consent to just get the beer out of the vehicle, and not for any further search of the vehicle. (A. 27). The lower court said that there was no evidence to support the Defendant's contention. (A. 27). Officer Balfour stated that he "just asked [the Defendant] if [Officer Balfour] could search through his car." (Appellee Appendix 18 [19]). The Defendant's testimony was that "it was along the lines of can [Officer Balfour] search the vehicle, and [the Defendant] told him explicitly the alcohol is under the seat, the alcohol is in the back seat, you can go in for that." (Appellee Appendix 22 [63]). The Defendant specifically volunteered that "there were two (2) cans that were open that [the Defendant and the passenger] were drinking out of that were underneath the seat, and that there was a case of beer. . . . it was sitting on the center bench. . . . There was no attempt to hide it." (Appellee Appendix 21 [62]). The Defendant said that he "openly told [Officer Balfour] where all of it was." (Appellee Appendix 22 [63]).

After a short time that Officer Balfour was with the Defendant, Trooper Skogen arrived. (Appellee Appendix 18 [19]). When Trooper Skogen arrived, Officer Balfour informed Trooper Skogen that the Defendant had been consuming alcohol, and he asked Trooper Skogen to conduct drinking and driving testing on the Defendant, (Appellee Appendix 16 [11]), and Balfour also told Trooper Skogen that the Defendant gave his consent to search his car. (Appellee Appendix 17 [12]).

When first arriving Trooper Skogen went to the passenger still seated in the car, and obtained his identification that revealed the passenger was only 20 years old. (Appellee Appendix 8 [42]). Trooper Skogen detected the odor of alcohol on the passenger's breath, and also noticed the Miller Lite beer in the vehicle. (Appellee Appendix 8-9 [42-43]). Trooper Skogen then went to talk to Officer Balfour, and Officer Balfour asked Skogen to perform alcohol sobriety tests on the Defendant because Skogen has more training in it. (Appellee Appendix 8 [42]). While the Defendant went to Trooper Skogen's car, Officer Balfour went to secure the passenger. (Appellee Appendix 17 [12]). Officer Balfour took the passenger to his vehicle, explained why they were stopped, and confirmed that the passenger was 20 years old. (Appellee Appendix 17 [12]).

The Defendant was not under arrest while speaking to Officer Balfour, or when the Defendant first went with Trooper Skogen. (Appellee Appendix 4-5 [9-10]). As soon as the Defendant got into Trooper Skogen's car, Trooper Skogen reaffirmed that the Defendant had consented to search the Defendant's vehicle. (Appellee Appendix 11 [47]). The Defendant volunteered that there was no problem in searching because they had just been drinking. (A. 27). Trooper Skogen confirmed that the Defendant consented to the search before Balfour began the search of the Defendant's vehicle. (Appellee Appendix 11 [47]). The Defendant sat in the front seat of Trooper Skogen's car during the initial conversation, (Appellee

Appendix 5 [10], and while Trooper Skogen was performing the DUI alcohol sobriety tests, (Appellee Appendix 6 [40]). The Defendant passed the sobriety tests. (A. 27). Trooper Skogen asked again if the Defendant gave Officer Balfour consent to search inside the vehicle, and the Defendant said "yeah." Then, Trooper Skogen placed the Defendant in the back of his patrol car.

After Balfour was done securing the passenger, and placing the passenger in the back seat of his police vehicle, Officer Balfour began searching the Defendant's car. (A. 27). Officer Balfour found two (2) open cans of beer in the front passenger side. (A. 27).

Trooper Skogen went to talk to the passenger in Officer Balfour's squad car, and the passenger agreed to take the SD-2, and the results were positive. (A. 28). Trooper Skogen placed the passenger under arrest for Minor in Consumption of Alcohol. (A. 28). Trooper Skogen went to search the Defendant's vehicle, and Officer Balfour showed him the open cans of Miller Lite. (A. 28).

Trooper Skogen Mirandized the passenger in the Harvey squad car, and the passenger stated that he had provided some money to help the Defendant purchase the Miller Lite. (A. 28). Trooper Skogen then Mirandized the Defendant in the Trooper's Patrol car, and the Defendant admitted that he purchased the alcohol in Fargo, and the passenger had supplied some money to pay for a portion of it. (A. 28). Trooper Skogen placed the Defendant under arrest for Delivering Alcohol to a Minor, and other offenses. (A. 28).

LAW AND ARGUMENT

I. THE DEFENDANT DID NOT TIMELY APPEAL TO THE SUPREME COURT.

The District Court had jurisdiction under N.D. Const. Art. VI, § 8, and NDCC § 27-05-06. The State asserts its same arguments that the Defendant did not "preserve" his right

to appeal by failing to file a motion to suppress in Wells County case 02-K-090, as was made in Wells County cases 02-K-087, and 02-K-088. However, as the Court ruled that the case numbers on the Memorandum and Order Denying the Motion to Suppress, dated October 30, 2003, (A. 23-35), was a clerical error, and that the Defendant properly preserved his right to appeal in Wells County cases 02-K-087, and 02-K-088, State v. Smith, 2005 ND 21, ¶10, 691 N.W.2d 203, the State expects that the Court will rule that the Defendant preserved his right to appeal in Wells County case 02-K-090.

Even if the Defendant "preserved" his right to an appeal, the Defendant still had to timely file an appeal in Wells County case 02-K-090, which in a criminal case, a Defendant's Notice of Appeal must be filed with the Wells County Clerk of District Court within 30 days after entry of the Judgment or order being appealed. N.D.R. App. P. 4(b)(1)(A). The Statutory authority for appeal by the Defendant to the North Dakota Supreme Court is NDCC § 29-28-06. State v. Jenkins, 339 N.W.2d 567 (N.D. 1983). A Verdict of Guilty and a Judgment of Conviction are appealable. NDCC § 29-28-06(1-2). In Wells County Case 02-K-090, the Verdict of Guilty and Judgment of Conviction were entered on March 31, 2004. (A. 38). The Defendant's appeal in Wells County case 02-K-090 was filed on July 29, 2005, (A. 2), and is not timely as it was not within 30 days from the Judgment. N.D.R. App. P. 4(b)(1)(A). The District Court found that Wells County case 02-K-090 was not appealed, and therefore, the Court will not be entering an order of dismissal. (A. 12).

The Defendant argues that because the cases were consolidated for the suppression hearing, for the jury trial, and for sentencing, and because the Supreme Court stated that the omission of the criminal case numbers, on the motion to suppress and following order, was determined to be a clerical error that preserved the Defendant's right to appeal, that the Defendant properly appealed Wells County Case 02-K-090. (Appellant's Brief 3-5).

The Defendant's argument has many flaws. Just because the cases were consolidated for the hearing, trial and sentencing, there were still separate judgments entered in all of the Wells County cases 02-K-087, 02-K-088, 02-K-089, and 02-K-090. (A. 36-40). The North Dakota Supreme Court ruled that the motion to suppress contained a clerical error, and therefore, the Defendant "preserved" the right to appeal. State v. Smith, 2005 ND 21, ¶10, 691 N.W.2d 203. The North Dakota Supreme Court did not say that all of the Wells County cases were actually appealed by the Defendant's Notice of Appeal, dated April 16, 2004. (A. 15). Instead, the North Dakota Supreme Court stated that the Defendant was only appealing two criminal judgments, Wells County 02-K-087, and 02-K-088, State v. Smith, 2005 ND 21, ¶10, 691 N.W.2d 203. The North Dakota Supreme Court dismissed Wells County case 02-K-089 because that case was a judgment of acquittal. (A. 7 & 40). The North Dakota Supreme Court not only did not mention that Wells County case 02-K-090 was omitted from the Defendant's Notice of Appeal, dated April 16, 2004, (A. 15), but also, the North Dakota Supreme Court did not even discuss or consider and did not make any rulings in Wells County case 02-K-090. (A. 12, 15).

The Defendant argues that it was brought to the attention of the North Dakota Supreme Court that the Notice of Appeal, dated April 16, 2004, (A. 15), did not contain Wells County criminal case number 02-K-090. (Appellant's Brief 4). However, until the Notice of Appeal, dated July 29, 2005, (A. 2), and the Appellant's Brief, the Defendant did not do anything to bring to the District Court's attention, and the Defendant did not do anything to bring to the North Dakota Supreme Court's attention, that Wells County case 02-K-090 was omitted by a clerical mistake. Even after the District Court wrote a letter, dated February 25, 2005, (Appellee Appendix 23-25), and requested that the parties provide input about how the Wells County cases 02-K-087, 02K-088, and 02-K-089 should proceed after

the North Dakota Supreme Court case reversed and remanded, the Defendant still did not bring to the District Court's attention that the appeal should have included Wells County case 02-K-090. The District Court's letter, dated February 25, 2005, did not contain Wells County case 02-K-090. (Appellee Appendix 23-25). Further, when the Defendant filed the Motion for Refunding of Fines and Fees, the Defendant still did not make a motion or provide other notice that Wells County case 02-K-090 was mistakenly omitted from the original notice of appeal.

If it was a clerical mistake to omit Wells County case 02-K-090 from the Notice of Appeal, dated April 15, 2004, (A. 15), the Defendant should have brought this to the sentencing court for correction to correct this alleged clerical error. See N.D. Crim. P. 36, Explanatory Note (stating that only the sentencing court may correct clerical errors). The Defendant's attempt to appeal from the Memorandum Decision and Order for Wells County case 02-K-090 is not proper because an order denying a motion to suppress is not appealable under NDCC § 29-28-06. State v. Decoteau, 2004 ND 139, ¶ 7, 681 N.W.2d 803. Also, even if the Defendant were to attempt to call the Motion for Refund of Fees and Fines as a motion for a Judgment of Acquittal, this is also not contained in NDCC § 29-28-06, and is not appealable per se. State v. Jenkins, 339 N.W.2d 567 (N.D. 1983).

The filing of a notice of appeal does not divest a District Court of jurisdiction to correct a sentence under Rule 35 of the North Dakota Rules of Criminal Procedure. N.D. R. App. P. 4(b)(5); N.D. Crim. P. 35. The District Court treated the Defendant's Motion for Refund of Fines and Fees as a Rule 35 motion for a reduction of the sentence. (A. 13). The District Court did suspend all of the jail sentence (saving the Defendant from serving 30 days), but did not refund the fines and fees in Wells County case 02-K-090. (A. 14). This Rule 35 Motion is not appealable under NDCC § 29-28-06.

Res judicata bars the defendant from raising the issue about the clerical error in omitting Wells County case 02-K-090 in the Notice of Appeal, dated April 16, 2004, (A. 15). "Res judicata, or claim preclusion, prohibits the relitigation of claims or issues that were raised or could have been raised in a prior action between the same parties or their privies, and which were resolved by final judgment in a court of competent jurisdiction." Chapman v. Wells, 557 N.W.2d 725, 728 (N.D. 1996) (citing Wetch v. Wetch, 539 N.W.2d 309, 311 (N.D. 1995). The Defendant had numerous opportunities to raise the alleged clerical error in not listing Wells County case 02K-090 from the Notice of Appeal, dated April 16, 2004, (A. 15), and therefore, the Defendant is now barred from bringing that allegation. Therefore, the Court should dismiss the Defendant's appeal.

II. THE LOWER COURT INCORRECTLY GRANTED SMITH'S MOTION TO SUPPRESS EVIDENCE BASED ON A LACK OF CONSENT TO SEARCH.

A. The Search And Seizure Of The Defendant's Vehicle Was Legal, Based Upon The Voluntary Consent To Search and Intervening Circumstances.

The Fourth Amendment to the United States Constitution and Article I, Section 8 of the North Dakota Constitution prohibit **warrantless** searches and seizures, unless there is an exception to the warrant requirement. See State v. Gregg, 2002 ND 154, ¶23, 615 N.W.2d 515. A traffic stop is a seizure within the meaning of the Fourth Amendment to the United States Constitution. State v. Sarhegyi, 492 N.W.2d 284, 286 (N.D. 1992). An investigatory stop requires that the officer have a reasonable and articulable suspicion that the motorist has violated or is violating the law. City of Minot vs. Johnson, 1999 ND 241, ¶5, 603 N.W.2d 485, 487. In State v. Smith, 2005 ND 21, ¶ 27, 691 N.W.2d 203, the Court determined that the stop was unlawful as there was no reasonable and articulable suspicion, and the lower court must determine if there was voluntary consent to search, and if the consent was voluntary if the consent purged the taint of the unlawful stop of the Defendant.

1. The Defendant Voluntarily Consented to the Search.

One of the exceptions to a warrantless search is consent. State v. Decoteau, 1999 ND 77, ¶ 9, 592 N.W.2d 579. The North Dakota Supreme Court indicated that it uses the totality-of-the-circumstances test to determine whether the consent is given voluntarily. State v. Mitzel, 2004 ND 157, ¶25, 685 N.W.2d 120. Whether consent to search is voluntary is a question of fact. Id. The North Dakota Supreme Court stated that the "singular totality-of-the-circumstances approach" in United States v. Beason, 220 F.3d 964, 967 (8th Cir. 2000), was abandoned, in United States v. Becker, 333 F.3d 858, 862 n. 4 (8th Cir. 2003). State v. Smith, 2005 ND 21, ¶26, 691 N.W.2d 203. Although Beason has been abandoned, it may still be useful to help determine the initial inquiry of the voluntariness of the consent.

In United States v. Beason, 220 F.3d 964, 967 (8th Cir. 2000), the Court looked at whether or not the consent was an act of free will, and in Beason, at 967, the Court found that the consent to search was an act of free will and was voluntary. The facts of Beason are similar to the facts in this case as both involve a traffic stop and search of a vehicle. There were no traffic violations in both Beason, at 965, and in Smith, at ¶2. During the initial encounter with the Defendants, there were additional facts observed by the officer, as in Beason, at 966, the officer smelled burnt marijuana, and Officer Balfour immediately saw an open case of Miller Lite Beer, and Officer Balfour smelled alcoholic beverages when speaking to the Defendant, (Appellee Appendix 14-15 [9-10]). The Defendant Driver verbally consented to a search in both Beason, at 966, and in this case when the Defendant said "yeah, go ahead," (Appellee Appendix 16 [11]). See United States v. Ramos, 42 F.3d 1160, 1164 (8th Cir. 1994) (finding the consent voluntary despite the fact that the request for consent followed immediately upon the 4th Amendment violation) cert denied, 514 U.S. 1134

(1995). The Defendant Driver also confirmed the consent, as in Beason, at 966, the Defendant signed a consent form, and in this case, as soon as the Defendant got into Trooper Skogen's car, Trooper Skogen reaffirmed that the Defendant had consented to search the Defendant's vehicle, (Appellee Appendix 11 [47]), and the Defendant volunteered that there was no problem in searching because [the Defendant and the passenger] had just been drinking, (A. 27). Also, this second consent to search was before Officer Balfour began the search of the Defendant's car. (Appellee Appendix 11 [47]). The officers in both cases informed the Defendant why they wanted to search. Beason, at 967, and (Appellee Appendix 15 [10]). In both cases, the Defendant driver was not under arrest when providing the consent and reaffirming the consent. Beason, at 967, and (Appellee Appendix 4 [9]).

In Beason, at 967, the Court found that there was no evidence that any of the officers threatened, coerced, or intimidated the Defendant, and similarly, in this case, the District Court found that there were no actions by the law enforcement officers which show that the consent was not voluntary, nor that there was any coercive activity shown by the officers in the discussions they had with the Defendant, Smith, (A. 33). See State v. Mitzel, 2004 ND 157, ¶26, 685 N.W.2d 120 (stating that when consent is the product of a free and unconstrained choice is not the product of duress or coercion, it is voluntary). In Beason, at 967, the Court noted that the Defendant even assisted officers with the search by providing keys to open various portions of the trailer. In this case, the Defendant did not physically assist with the search, but the Defendant volunteered specific details of the location of the beer as the Defendant specifically told Officer Balfour that the Defendant and the passenger were drinking two open cans of beer, that were under the seat, and that there was a case of beer on the back seat, (Appellee Appendix 21-22 [62-63]), and during Officer Balfour's search he found two cans of beer under the seat, (A. 27) and the case of Miller Lite Beer was

in plain view on the back seat, (Appellee Appendix 14 [9]). Both of the traffic stops were on a public highway. Beason, at 967, and (A. 26).

The North Dakota Supreme Court stated that when determining voluntariness, the focus is on two elements: (1) the characteristics and condition of the accused at the time of the consent, and (2) the details of the setting in which the consent was obtained. City of Fargo v. Ellison, 2001 ND 175, ¶ 13, 635 N.W.2d 151. In Mitzel, the Defendant was arrested and in handcuffs when he consented to the search. State v. Mitzel, 2004 ND 157, ¶ 29, 685 N.W.2d 120. However, in this case, as in Beason, at 967, the Defendant was not arrested and was not in handcuffs. (Appellee Appendix 4[9]). The characteristics of the Defendant in this case shows that the Defendant passed the alcohol sobriety tests, then volunteered specifics, the Defendant openly provided admissions about his actions, and this shows the free acts of the Defendant. The details of the setting also show that the Defendant was on a public highway, and during the initial verbal consent the Defendant was in the front seat of Officer Balfour's car, (Appellee Appendix 8[42]), and when the Defendant reaffirmed his consent, he was in the front seat of Trooper Skogen's car, (Appellee Appendix 6 [40]), and this was prior to any search being conducted, (Appellee Appendix 11 [47]). Thus, all of the evidence reveals that the Defendant voluntarily consented to the search.

2. 2.The Consent Purged the Taint of the Unlawful Stop.

Even if there is a voluntary consent to search, the North Dakota Supreme Court stated that there is a second inquiry necessary to determine whether the taint is purged from the evidence seized during the allegedly unlawful detention by considering the "following factors: (1) the temporal proximity between the illegal search or seizure and the consent; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct." State v. Smith, 2005 ND 21, ¶26. 691 N.W.2d 203 (quoting United States v.

Becker, 333 F.3d 858, 862 (8th Cir. 2003)).

The temporal proximity between the illegal seizure, the unlawful stop, and the consent to search were very close in time, as the consent to search immediately followed the Fourth Amendment violation, but this alone is not enough to make the consent invalid. See United States v. Ramos, 42 F.3d 1160, 1164 (8th Cir. 1994) (finding the consent voluntary despite the fact that the request for consent followed immediately upon the 4th Amendment violation) cert denied, 514 U.S. 1134 (1995). In United States v. Becker, 333 F.3d 858, 862 (8th Cir. 2003), the Court found that the Defendant's consent was not too close in time to the moment when his detention became unlawful even though it was almost immediately after the Defendant's Fourth Amendment violation.

The next factor is to determine whether there were any intervening circumstances that purge the taint of the Fourth Amendment violation. United States v. Becker, 333 F.3d 858, 862 (8th Cir. 2003). If the consent is not purged of the illegal police action, it is still fruit of the poisonous tree. State v. Smith, 2005 ND 21, ¶ 26, 691 N.W.2d 203. In United States v. Becker, 333 F.3d 858, 862 (8th Cir. 2003), the Court found that the concern expressed by the officers at the scene about whether or not the Defendant was under the influence of narcotics was a sufficient intervening circumstance to purge the taint of the Defendant's unlawful detention. In Becker the facts supporting the reasons for the concern regarding the Defendant being under the influence of narcotics involved the fact that the officials knew the Defendant was involved in narcotics, and the Defendant's behavior at the domestic dispute. In this case, the officers had the plain view of an open case of Miller Lite Beer, (Appellee Appendix 9 [43] and 14 [9]), the Defendant smelled of alcohol, (Appellee Appendix 15 [10]), and the Defendant admitted that he and the passenger were drinking beer and that there were open cans of beer in the Defendant's car. (Appellee Appendix 21 [62]). The officers

both felt that the Defendant needed to perform alcohol sobriety tests for drinking and driving, as Officer Balfour asked Trooper Skogen to perform the sobriety tests upon the Defendant, and Trooper Skogen did perform the alcohol sobriety tests upon the Defendant. (Appellee Appendix 16 [11] and 5 [10]). Not only was the concern about the alcohol violations an intervening factor, but the Defendant's admissions that he delivered the alcohol to the passenger, and that the alcohol was in plain view also serve as intervening factors in this case. The evidence in this case appears to be even stronger than the evidence in the Becker case, and therefore, the officers concerns to determine whether the Defendant, Smith, was under the influence of alcohol and able to drive and get back behind the wheel, were an intervening circumstance that purged the taint of the unlawful stop of the Defendant. In this case the consent is purged of the unlawful stop, and therefore, the evidence and statements are not fruit of the poisonous tree.

The last factor involves the purpose and the flagrancy of the official misconduct. United States v. Becker, 333 F.3d 858, 862 (8th Cir. 2003). In this case, the District Court found that there were no actions by the law enforcement officers which show that the consent was not voluntary, nor that there was any coercive activity shown by the officers in the discussions they had with the Defendant, Smith, (A. 33). Similar to Becker, there was no purposeful violation of the Defendant's constitutional rights in the continued detention of the Defendant because the police officers were concerned about whether or not the Defendant was under the influence before he would be allowed to drive again, (Appellee Appendix 10 [45] - Trooper Skogen said they needed to investigate the alcohol violations). United States v. Becker, 333 F.3d 858, 862 (8th Cir. 2003). In Becker, the Court said that the police officers acted in good faith when the administered the sobriety test after the Defendant's arrest. United States v. Becker, 333 F.3d 858, 862 (8th Cir. 2003). In this case, the officers

acted in good faith when Trooper Skogen administered the alcohol sobriety tests to the Defendant. Therefore, the record does not support any inference of flagrant misconduct on the part of law enforcement officials in continuing to detain the Defendant. In this case, the consent is voluntary under the totality-of-the-circumstances test, and the consent is purged of the unlawful activity, and therefore, this consent to search is a valid exception to the warrant requirement for this warrantless search and there was no violations, and all of the evidence and statements from the search should have been admissible in the trial against the Defendant, and the Court should affirm the conviction of the lower court.

CONCLUSION

In conclusion, the State prays that the Court will affirm the conviction against the Defendant-Appellant, and deny the appeal of the Defendant-Appellant as to all issues.

If the Defendant is now allowed to appeal this matter, and relitigate the issues relating to the Defendant's initial appeal on this matter, then, the State requests that the Court consider this consent issue and affirm all of the convictions in all of the Wells County Cases, namely Wells County 02-K-087, 02-K-088, and 02-K-090 because these matters are still before the Court pursuant to the Court's remand of the issues in the cases.

Dated this 8th day of November, 2005.

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