

20060183

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STATEMENT OF THE ISSUES

- I. WHETHER THE DEFENDANTS' FOURTH AMENDMENT RIGHTS WERE VIOLATED WHEN OFFICERS ENGAGED IN A LAWFUL COMMUNITY CARETAKING ENCOUNTER AND A SUBSEQUENT SEIZURE BASED ON REASONABLE AND ARTICULABLE SUSPICION?

STATEMENT OF THE CASE

[¶1] Melissa Sue Olson and Bryan James Bienek (Ms. Olson and Mr. Bienek and Defendants herein), appeal from judgment of criminal conviction in the District Court of Grand Forks County. The Defendants were arrested on December 9, 2005 for Minor in Consumption of Alcohol. Subsequently, the Defendants made a Motion to Suppress and a motion hearing was held on March 21, 2006. (Appellant's App. at 2.) On April 11, 2005, the District Court denied the Defendants' Motion to Suppress and the Defendants later entered conditional pleas of guilty and were sentenced. (Appellant's App. at 39-47.) The Defendants now appeal the District Court's decision denying the Defendants' Motion to Suppress.

STATEMENT OF THE FACTS

[¶2] On December 8, 2005 at approximately 2:31 a.m., Officer Lund of the University of North Dakota Police Department (UPD) observed what appeared to be a domestic disturbance occurring at the 3100 block of University Avenue. (Tr. p. 7-8). Officer Lund observed a female individual running away from a male individual. (Tr. p. 8). Officer Lund turned his patrol vehicle around to make further observations about this possible domestic situation. (Tr. p. 8). Upon doing so, Officer Lund further noticed that the female individual appeared to be crying and the male individual appeared to be talking quite loudly. (Tr. p. 8). In order to determine the safety of the individuals, Officer Lund stopped and exited his patrol vehicle, and asked the individuals if they would stop to speak with him. (Tr. pp. 8, 15). After approaching the individuals, Officer Lund made several observations. First, Officer Lund observed that the individuals appeared to be under the age of twenty-one. (Tr. p. 17). As part of standard procedure, Officer Lund requested identification from both individuals. (Tr. p. 9). Officer Lund identified the female individual as Melissa Olson, nineteen (19) years of age, and the male individual as Bryan Bienek as twenty (20) years of age. The second observation Officer Lund noted was a strong odor of alcoholic beverage emanating from either one or both individuals. (Tr. p. 9). After observing that the individuals were under the age of twenty-one (21), confirming through identification that they were under the age of twenty-one, and noting the strong odor of alcoholic beverage, Officer Lund requested an assist from Officer Beland, also of the UPD. (Tr. p. 10).

[¶3] When Officer Beland arrived on scene, the defendants were asked to sit in separate patrol vehicles. (Tr. p. 11). Officer Beland spoke with Ms. Olson and Officer

Lund spoke with Mr. Beinek. (Tr. p. 12). Both officers indicated that the odor of alcoholic beverages continued in their respective patrol vehicles. (Tr. pp. 11, 24). Ms. Olson did submit to a voluntary preliminary breath test, blew a .13, admitted to consuming alcoholic beverages, and was subsequently cited for Minor in Consumption of Alcohol. (Tr. p. 25). Mr. Beinek did not submit to a preliminary breath test, however, based on Officer Lund's observations of the Defendant having an odor of alcoholic beverage, slurred speech, and red bloodshot eyes, Mr. Beinek was also cited for Minor in Consumption of Alcohol. (Tr. p. 12). Officers then ensured the safety of both individuals by making sure they left the scene separately. (Tr. pp. 12, 26).

ARGUMENT

- I. THE DISTRICT COURT DID NOT ERR WHEN IT DETERMINED THAT THE DEFENDANTS' FOURTH AMENDMENT RIGHTS WERE NOT VIOLATED WHEN A LAWFUL COMMUNITY CARETAKING ENCOUNTER ENSUED AND LED TO A SEIZURE SUPPORTED BY REASONABLE AND ARTICULABLE SUSPICION.

[¶4] With respect to law enforcement-citizen encounters, three tiers of interactions may ensue, each ensuring citizens various levels of protection from police intrusion. State v. Langseth, 492 N.W.2d 298 (N.D. 1992). These three tiers of encounters are arrests which must be supported by probable cause, “Terry” stops which must be supported by reasonable and articulable suspicion, and community caretaking encounters which do not implicate Fourth Amendment rights. Id. All citizen-law enforcement encounters do not implicate a citizen’s Fourth Amendment rights, and a seizure only occurs when a law enforcement officer by means of physical force or show of authority in some manner restrains the liberty of a citizen. Rist v. North Dakota Department of Transportation, 2003 ND 113 ¶8; 665 N.W.2d 45. At the District Court level, the Defense raised issues regarding the community caretaking encounter and later seizure of the Defendants. The District Court determined that law enforcement’s initial encounter with the Defendants was a valid community caretaking encounter and that the later seizure was supported by reasonable and articulable suspicion.

[¶5] When reviewing a district court’s finding of fact on a motion to suppress, this Court has ruled that deference should be given to the district court’s finding because the district court is in a superior position to assess the credibility of the witnesses and weigh the evidence. State v. DeCoteau, 1999 ND 77, ¶6; 592 N.W.2d 579. Conflicts should be resolved in favor of affirmance. Id. A district court’s finding of fact on a

motion to suppress should not be reversed if there is sufficient competent evidence fairly capable of support the court's findings and the decision is not contrary to the manifest weight of the evidence. Id.

A. The Initial Encounter With The Defendants Was A Lawful Community Caretaking Encounter And Did Not Implicate Defendants' Fourth Amendment Rights.

[¶6] Law enforcement officers frequently act in the role of community caretaker and such encounters justify law enforcement contact, including stops, without reasonable suspicion of unlawful conduct. Lapp v. North Dakota Department of Transportation, 2001 ND 140, ¶8, 632 N.W. 2d 419. Approaching someone to talk to them in a public place has been held to not constitute a Fourth Amendment seizure. Id. The United State's Supreme Court has repeatedly held that mere police questioning does not constitute a seizure. Florida v. Bostick, 501 U.S. 429, 434 (1991). Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street, by asking him if he's willing to answer some questions or by putting questions to him if he's willing to listen. Id. Further, the United States Supreme Court has held that even when officers have no basis for suspicion officers may ask questions of an individual or ask to examine an individual's identification. Id. at 434-435. This Court has also held that it is clear from North Dakota case law that a police officer's approaching members of the general population is not a seizure if the officer "inquires of the person in a conversational manner, does not order the person to do something, and does not demand a response." State v. Langseth, 492 N.W.2d 298, 300 (N.D. 1992); see also State v. Page, 103 P.3d 454 (Idaho 2004) (holding that an officer approaching a

defendant who was walking on a public roadway, asking him a few questions, and examining his identification was within the scope of a community caretaking encounter).

[¶7] In the case at hand, Officer Lund observed what he believed to be a potential domestic dispute based on his training and experience as a police officer. Officer Lund stopped his vehicle and observed Ms. Olson to be upset and crying and Mr. Beinek to be talking quite loudly. (Tr. at 8). Officer Lund also described that from his vantage point it appeared that Ms. Olson was running away from Mr. Beinek. (Tr. at 8). When approaching the individuals, Officer Lund asked both Defendants if they would stop and speak with him. (Tr. at 29). Officer Lund specifically described his request as “Could you please stop? I need to speak with you.” (Tr. at 29). After the Defendants chose to stop, Officer Lund then asked if they were okay based on his concerns regarding a potential domestic dispute. (Tr. at 16). Following standard police procedure, Officer Lund then requested the Defendants identification. (Tr. at 17).

[¶8] As this Court has held in Langseth, inquiring of someone in a conversational manner, such as “Can you please stop? I need to speak with you”, does not exceed the scope of a community caretaking encounter. Further, Officer Lund reasonably believed that a domestic dispute was occurring and was attempting to secure the safety of the Defendants and the community at large, which is the fundamental purpose of a community caretaking encounter. Contrary to the assertions of the Defendants, the DeCoteau and Keilen cases do not provide reasonable guidance in this case regarding the scope of community caretaking encounters as both of those cases involve an intrusion into a home. Both this Court and the United States Supreme Court have consistently held that approaching an individual in a public place or street and asking questions of that

individual do not implicate Fourth Amendment concerns. Additionally, although this Court has not addressed a case factually similar to the one at hand, the case law in North Dakota, United States Supreme Court, and other state courts such as the ruling in State v. Page, clearly indicate that this type of encounter is exactly what was intended when permitting community caretaking encounters.

[¶9] The Defendants argument, based on Wibbens, that law enforcement should have simply waited to see if a domestic assault would have occurred is a ridiculous proposition and could not logically be what this Court intended when encouraging the minimization of governmental intrusion. The State would contend that Officer Lund had an obligation as law enforcement to ensure the Defendants were in fact safe, and simply watching events transpire from the street would not have met that obligation. Furthermore, the Defendants' argument that Officer Lund had a pretext to stop and initiate contact with the Defendants for the purpose of crime detection is devoid of support on the record. Officer Lund specifically stated at the Motion to Suppress Hearing that he was concerned for the Defendants' safety, that the purpose for asking them if they would stop was because he wanted to ensure there had not been or would not be a physical domestic situation, and that asking for their identification was part of standard police procedure. (Tr. at 8-9). Only after identifying the individuals and asking if they were okay, did Officer Lund develop reasonable and articulable suspicion to initiate a seizure. Because there is sufficient competent evidence fairly capable of supporting the District Court's finding that this was a permissible community caretaking encounter and the decision is not contrary to the manifest weight of the evidence the District Court's decision should be affirmed.

B. Officers Had Reasonable And Articulate Suspicion To Support A Seizure After Smelling An Odor Of Alcohol And Confirming The Defendants Were Underage.

[¶10] Although a community caretaking encounter does not constitute a seizure, such encounter does not preclude an officer from making an observation that leads to reasonable suspicion justifying investigation, seizure, and even an arrest. City of Grand Forks v. Zejdlik, 551 N.W.2d 772, 775 (N.D. 1996). In Zejdlik, officers made initial contact with an individual who was slumped over the steering wheel of his vehicle to see if he was okay. Id. at 773. During the initial contact with the individual, officers discovered that the driver had a beverage in his hand and asked him to step back into their police car. Id. While in the patrol vehicle, officers noted a strong odor of alcohol and cited the defendant for actual physical control. Id. The defendant alleged that the officer's actions were not justified because the defendant was not in need of help and that there was no reasonable and articulable suspicion to justify further detention. Id. However, despite the defendant's arguments, this Court determined that the officer was acting in a community caretaking role when he approached the defendant's vehicle to determine if he was okay. Id. at 775. Additionally, after the initial encounter, officers were justified in further investigation, seizure, and/or arrest as their observations during the initial encounter led to a reasonable and articulable suspicion that the defendant was in actual physical control of a vehicle while under the influence. Id.

[¶11] As in Zejdlik, in the case at hand the District Court properly held that Officer Lund's initial encounter with the Defendants was a permissible community caretaking encounter. The District Court also determined that the Defendants were in fact seized when placed in the separate patrol cars, however that this seizure was

supported by reasonable and articulable suspicion due to the fact that prior to placing the Defendants in the patrol vehicles the officer had observed that the individuals appeared to be under the age of twenty-one, confirmed their age, and noted an odor of alcohol emanating from them. Similar to Zejdlik, in this case the officer developed reasonable and articulable suspicion during the brief community caretaking encounter, which justified the seizure of the Defendants. The factual circumstances in this case are similar to Zejdlik and the ruling of the District Court is supported by this Court's opinion in the Zejdlik case. Because there is sufficient competent evidence fairly capable of support the court's findings and the decision is not contrary to the manifest weight of the evidence, the District Court decision should be upheld.

CONCLUSION

[¶12] The State respectfully requests that this Court affirm the District Court's decision denying the Defendant's Motion to Suppress.

Respectfully submitted this _____ day of October, 2006.

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**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

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|----------------------------|---|----------------------------------|
| The State of North Dakota, |) | |
| |) | |
| |) | Supreme Court No. 20060182 |
| |) | District Court No. 18-05-K-04259 |
| |) | |
| Plaintiff and Appellee, |) | |
| |) | |
| |) | |
| vs. |) | |
| |) | |
| Melissa Sue Olson, |) | |
| |) | |
| Defendant and Appellant. |) | |

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| The State of North Dakota, |) | |
| |) | |
| |) | Supreme Court No. 20060183 |
| |) | District Court No. 18-05-K-04260 |
| |) | |
| Plaintiff and Appellee, |) | |
| |) | |
| |) | |
| vs. |) | |
| |) | |
| Brian James Bienek, |) | |
| |) | |
| Defendant and Appellant. |) | |

AFFIDAVIT OF SERVICE BY E-MAIL

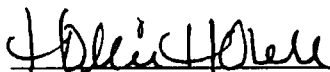
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| STATE OF NORTH DAKOTA |) | |
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| COUNTY OF GRAND FORKS |) | SS. |

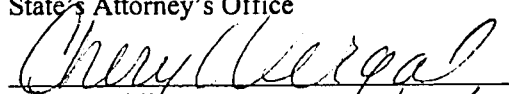
The undersigned, being of legal age and a resident of Grand Forks County, North Dakota, being first duly sworn, on oath deposes and says: That on the 26th day of October, 2006, she served via e-mail the following documents:

BRIEF OF APPELLEE

and that said e-mail was served on the address of Alexander F. Reichert, Attorney at Law, whose e-mail address is:

alex@reichertlaw.com



State's Attorney's Office


Notary Public
My Commission Expires 6/19/08
