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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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SUPREME COURT

JUN 28 2007

NORTH DAKOTA
20070128

State of North Dakota, Appellee, vs. Steven Schmalz, Appellant.	Supreme Court No. ~~20070046~~ Burleigh County No. 06-K-1869 Supreme Court No. 20070127 Morton County No. 06-K-0932

APPEAL FROM THE DISTRICT COURT
BURLEIGH COUNTY, NORTH DAKOTA
SOUTHEAST JUDICIAL DISTRICT

HONORABLE BRUCE HASKELL

BRIEF OF APPELLANT

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ATTORNEYS FOR APPELLANT

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STATEMENT OF CASE

On September 19, 2006, a criminal complaint was filed in Morton County charging Mr. Schmalz (Schmalz) with Possession of a Controlled Substance (Marijuana). (Appendix i, (App.)). On September 25, 2006, a criminal complaint was filed in Burleigh County charging Schmalz with Possession of Marijuana. (App. iii). On May 3, 2007, Schmalz entered a conditional plea of guilty to both charges. (App. 2 - 4). The pleas were entered after the district court denied Schmalz' motions to suppress evidence. (App. 5, 6).

Schmalz filed a timely Notice of Appeal with the North Dakota Supreme Court on May 3, 2007 appealing the district court's judgments and orders denying Schmalz's motion to suppress. (App. 7, 8).

STATEMENT OF FACTS

On May 22nd, 2006, at approximately 11:45 p.m., Deputy Simon Scheett and Detective Eisenmann of the Metro Area Narcotics Task Force (Task Force) conducted a trash can pull at 312 Oxford Drive after receiving intel that Steve Schmalz had involvement with narcotics. (App. 12). In the trash, Task Force discovered packing tape bundled up with an odor of marijuana, cigarette cellophane with an odor of marijuana, and a paper towel that appeared to be used for cleaning marijuana paraphernalia. (App. 12). Also, there was mail addressed to Steve Schmalz, 312 Oxford Drive, Bismarck, North Dakota. (App. 12). The garbage can was located in the front of the residence on the sidewalk

by the driveway of 312 Oxford Drive where the garbage cans in that area are set out for trash pickup. (App. 12).

On May 23, 2006, a hearing was held to determine whether there was probable cause to issue a search warrant for 312 Oxford Drive. (App. 10). Based on the aforementioned facts, Judge Reich issued a search warrant for Schmalz's residence. (App. 13). The search warrant was executed on June 1, 2006. (App. 18, 19). Deputy Scheett initiated telephone contact with Schmalz and made arrangements to meet Schmalz at the Bonanza parking lot in Mandan. (App. 18, 19). In the Bonanza parking lot, Scheett explained to Schmalz that they had a search warrant for Schmalz's residence and provided Schmalz with a copy of the warrant. (App. 19, 20). Schmalz was placed in handcuffs and transported to his residence in Burleigh County. (App. 20). A search of the residence uncovered a small quantity of marijuana. (App. 21).

Fontenot asked Schmalz if there were any controlled substances in Schmalz's vehicle at Bonanza in Mandan. (App. 22, 26). Schmalz denied having anything illegal in the vehicle. (App. 26). Fontenot advised Schmalz that Detective Becker would be running the drug detecting canine around the vehicle to check for the presence of controlled substances. (App. 27). Fontenot also advised Schmalz that if the canine gave a positive indication on the vehicle for controlled substances, officers would seek a search warrant for the vehicle. (App. 27). Schmalz then signed a consent to search form for his vehicle. (App. 22). Schmalz was transported from his residence back to his vehicle which was still parked in the parking lot of Bonanza. (App. 23). A search was performed on

his vehicle, contraband was found, and Schmalz was subsequently charged in Morton County. (App. 23).

STANDARD OF REVIEW

Whether there is probable cause to issue a search warrant is a question of law. State v. Damron, 1998 ND 71, ¶ 5, 575 N.W.2d 912: State v. Hage, 1997 ND 175, ¶ 10, 568 N.W.2d 741. Questions of law are fully reviewable. State v. Seglen, 2005 ND 124, ¶ 5, 700 N.W.2d 702 (quoting State v. Heitzmann, 2001 ND 136, ¶ 8, 632 N.W.2d 1).The totality-of-the-circumstances test is used to review whether information before the magistrate was sufficient to find probable cause, independent of the trial court's findings. Damron, 1998 ND 71, ¶ 7, 575 N.W.2d 912; Hage, 1997 ND 175, ¶ 11, 568 N.W.2d 741. It is essential for a court to have all of the material "circumstances" before it when determining if probable cause exists to issue a search warrant. State v. Duchene, 2001 ND 66, ¶ 26, 624 N.W.2d 668.

LAW AND ARGUMENT

I. Whether there was probable cause to issue a search warrant for Schmalz' residence in Burleigh County?

Probable cause is required for a search warrant under the Fourth Amendment to the United States Constitution, and Article I, Section 8 of the North Dakota Constitution. State v. Wamre, 1999 ND 164, ¶ 5, 599 N.W.2d 268. Probable cause to search exists "if the facts and circumstances relied on by the magistrate would warrant a person of reasonable caution to believe the contraband or evidence sought probably will be found in the place to be searched." State v. Johnson, 531 N.W.2d 275, 278 (N.D.1995). The totality-of-

the-circumstances test is used to determine whether probable cause existed. State v. Ballweg, 2003 ND 153, ¶ 12, 670 N.W.2d 490. The magistrate must be presented with more than "bare-bones" information to establish probable cause. State v. Damron, 1998 ND 71, ¶ 7, 575 N.W.2d 912.

The Court was presented with bare-bones information which was insufficient to establish probable cause for the issuance of the search warrant in this case. When Scheett went before the Court seeking a search warrant for Schmalz's residence, the only information Scheett provided was (1) the Task Force conducted a trash can pull at 312 Oxford Drive after receiving intel that Steve Schmalz was involved with narcotics. (2) In the trash they discovered packing tape bundled up with the odor of marijuana, cigarette cellophane with an odor of marijuana, and a paper towel that appeared to be used for cleaning marijuana paraphernalia. (3) Scheett testified they also found mail addressed to Steve Schmalz, 312 Oxford Drive, Bismarck, North Dakota in the trash can. (4) The garbage can was located in the front of the residence on the sidewalk by the driveway of 312 Oxford Drive where the garbage cans in that area are set out for trash pickup.

It is clear to see from Scheett's testimony, the garbage can was located in an area where other people could have easily accessed it. Was the purported contraband located in a garbage bag or was it lying on top of the trash inside the trash can? Was the mail with Schmalz's name and address on it located in the same garbage bag as the contraband, if the contraband was in a garbage bag at all? Were there other garbage cans from other residents located in the same

area as Schmalz's garbage can? How did they know that this was Schmalz's garbage can? Most troubling, is there was no testimony as to what kind of intel the Task Force received regarding Schmalz's alleged involvement with narcotics that prompted the trash can pull.

A. **Intel**

"If an informant's tip is the source of information, the affidavit must recite 'some of the underlying circumstances from which the informant concluded' that relevant evidence might be discovered, and 'some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed ... was 'credible' or his information 'reliable.'" See Franks v. Deleware, 438 U.S. 154, 165, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

The problem of assessing the validity of a warrant increases when the finding of probable cause is based on information supplied by an anonymous informant. In such a case, the informant must supply information from which one may conclude that the informant is honest and his information is reliable, or from which the informant's basis of knowledge can be assessed. State v. Thompson, 369 N.W.2d 363 (N.D.1985). If the informant does not supply the information necessary to evaluate the tip, the police must, through independent investigation, corroborate the tip or develop other sources of information leading to the conclusion that evidence of a crime will probably be found in a particular place. State v. Birk, 484 N.W.2d 834 (N.D.1992).

The manner in which an affiant acquires his or her information, such as by an anonymous informant, is clearly material to a judicial determination of probable cause. The circumstances of an informant's knowledge of illegal activity allows a magistrate to measure the basis of knowledge and veracity of the information being offered by the affiant. State v. Thieling, 2000 ND 106, ¶ 11, 611 N.W.2d 861 (finding an affidavit did not explain how officer determined defendants were involved with drugs nor indicate corroboration of officer's information).

When Scheet went before the Court seeking a search warrant for Schmalz' residence, he informed the Court he received intel that Schmalz was involved with narcotics. Scheet did not give any specifics about the type of intel he received. We do not know who provided the information, what type of information was given, or whether or not the information was credible or reliable. In addition, the Court had no way to measure the basis of knowledge or veracity of the information being offered by Scheet. Moreover, there was no testimony given regarding when the intel was received. We do not know if it was months before the garbage search or minutes before the garbage search.

"Probable cause is the sum total of layers of information and the synthesis of what the police have heard, what they know, and what they observed as trained officers." Damron, 1998 ND 71, ¶ 7, 575 N.W.2d 912. However, where there is merely information which may cause suspicion and warrant further investigation, there is not probable cause to search. State v. Lewis, 527 N.W.2d 658, 663 (N.D.1995). The affidavit for a

search warrant may be based upon hearsay information and need not reflect direct personal observations of the affiant. State v. Dove, 182 N.W.2d 297, 298 (N.D. 1970). But the magistrate must be informed of some of the underlying circumstances from which the informant drew his conclusions that the things being sought were where he claimed they were and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, was credible or that his information was reliable. Id. That was not done in this case.

B. **Trash Can Pull**

It is common knowledge that garbage left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops and other members of the public. State v. Rydberg, 519 N.W.2d 306, 309-10 (N.D.1994). Warrantless searches of garbage set out for disposal are constitutionally valid under the Fourth Amendment to the United States Constitution. California v. Greenwood, 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988). In Greenwood, the defendants claim the police violated the Fourth Amendment when they seized incriminating evidence from garbage bags left for disposal on the curb in front of Greenwood's home. In analyzing the defendants' claim, the United States Supreme Court concluded a warrantless garbage search would violate the Fourth Amendment only if the defendants has "a subjective expectation of

privacy in their garbage that society accepts as objectively reasonable." Greenwood, 486 U.S. at 39, 108 S.Ct. at 1628, 100 L.Ed.2d at 36.

Voluntary relinquishment of one's interest in an item or one's control over that item is akin to the legal concept of abandonment. Abandonment is defined as '[t]he relinquishment of a right; the giving up of something to which one is entitled." Hawkins v. Mahoney, 1999 MT 296, ¶ 14, 297 Mont. 98, ¶ 14, 990 P.2d 776, ¶ 14. When a person intentionally abandons his property, that person's expectation of privacy with regard to that property is abandoned as well. State v. Hamilton, 2003 MT 71, ¶ 26, 314 Mont. 507, ¶ 26, 67 P.3d 871, ¶ 26.

While the public would not accept as reasonable an expectation of privacy in abandoned garbage, the public would not be entirely comfortable with the image of police officers overtly foraging through curbside garbage. State v. A Blue in Color, 1993 Chevrolet Pickup, 2-Door, Mt 14T-D899 VIN/2GCEC19KOP1153371 Mont., 2005, 328 Mont. 10, ¶ 18 , 116P.3d 800. Nor would the public embrace the idea of police officers conducting random and arbitrary fishing expeditions through garbage cans, in the hopes of finding contraband. Id. Garbage is unique in the sense that, while we may have abandoned it, if we want it hauled away, we are generally obligated to comply with local refuse ordinances by placing it for collection in a particular place. Id. In exchange for such compliance, it seems only fair that certain constraints, inoffensive to legitimate law enforcement interests, should limit the nature and extent of

permissible government intrusion into it. Id. Therefore, we should balance public concerns and the needs of law enforcement when it comes to garbage searches of private citizens.

In Litchfield, the Indiana Supreme Court addressed the reasonableness of a police search of trash recovered from the place where it was left for collection. State v. Litchfield, 824 N.E.2d 356 (Ind. 2005). While the Court upheld the search on abandonment grounds, it concluded that certain limitations should attach to the warrantless seizure of trash. Id. Specifically, the Court imposed two constraints: first, for such a seizure to be reasonable, the garbage must be quickly retrieved by officers "in substantially the same manner as the trash collector would take it." Litchfield, 824 N.E.2d at 363. In other words, officers cannot openly rummage through a person's garbage at the curb or in the alley, to the embarrassment or indignity of the owner. Second, so as to prevent wholesale or random searches, officers must have an articulable individualized suspicion that a crime is being committed, essentially the same as is required for a "Terry stop" of an automobile, in order to justify the garbage seizure. Id. at 364.

The Indiana Supreme Court concluded these constraints are reasonable and justified; they balance the State's interest in conducting a legitimate investigatory search against the public's expectation that, if they place their garbage for collection as the law requires, curbside chaos will not ensue; see also State v. A Blue in Color, 1993 Chevrolet Pickup, 328

Mont. 10, 116 P.3d 800 (2005) (stating the Montana Supreme Court incorporates these limitations into their analysis surrounding garbage searches). Under this analysis, the burden is on the State to prove the Defendant abandoned his trash. In addition, the State must show that the seizure of the garbage was conducted in a reasonable and unobtrusive manner, and that the police had sufficient particularized suspicion to justify the warrantless search of the garbage.

In State v. A Blue in Color, 1993 Chevrolet Pickup, 328 Mont. 10, 116 P.3d 800 (2005), the Montana Supreme Court found the search of the Defendant's trash satisfied both of the constraints they adopted. The garbage bag was seized and removed from the area before it was searched. Id. at ¶20. Moreover, the record reflected that, based on information that the Defendant was operating a methamphetamine lab, the Defendant had been the subject of a several-month investigation prior to the day upon which the search of his garbage was undertaken. Id.

The case at hand is distinguishable from State v. A Blue in Color, 1993 Chevrolet Pickup. In this case, all we know is Task Force conducted a trash can pull. No information was provided about where the search actually took place. We do not know if Task Force rummaged through the garbage at its location or if the trash can was taken to a different site and searched there. We do not know if there were garbage bags inside the trash can or if the trash was loose inside the can. We do

not know if there were other people's garbage cans in the same area or how Task Force knew they had Schmalz' garbage can.

Task Force did not disclose facts that would support an articulable individualized suspicion that a crime was being committed. Scheets informed the Court he had intel regarding narcotics involvement, yet did not give any specifics about what the intel purported. There was no investigation, no surveillance, no dealings with known drug dealers or drug users. Other than this alleged intel that nobody knows what it consisted of, there was nothing presented to the Court that would support an articulable individualized suspicion that criminal activity was occurring. The seizure and search of Schmalz' trash was unreasonable and certainly not justified based on the facts presented to the Court.

C. Further investigation needed to establish probable cause

Whether there is probable cause to search depends on the facts and circumstances of each case. State v. Ringquist, 433 N.W.2d 207, 213 (N.D.1988). It is the task of the issuing magistrate to simply make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. Ringquist, supra at 211. It is this Court's duty to "simply ensure that the magistrate had a 'substantial basis for ... concluding' that probable cause existed." Id. at 211 (citing Illinois v. Gates, 462 U.S. 213, 238-39, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527, 548 (1983).

"Sufficient information, rather that a 'bare bones' affidavit, must still be presented to the magistrate to allow that official to determine probable cause. That determination cannot be a mere ratification of the bare conclusion of others." Id. at 213.

Schmalz contends that Deputy Scheet's testimony regarding intel he received regarding 312 Oxford Drive and Steve Schmalz' is a bare conclusion with no supporting facts about the credibility and reliability of the agent's information. Conclusions alone are insufficient for probable cause. State v. Mische, 448 N.W.2d 415, 421 (N.D.1989). This Court has "consistently required more than unsupported conclusions and allegations to establish probable cause. State v. Handtmann, 437 N.W.2d 830, 835 (N.D.1989).

This case ultimately depends upon the government finding packing tape bundled up with an odor of marijuana, a cigarette cellophane with an odor of marijuana, and a paper towel that appeared to be used for cleaning marijuana paraphernalia after conducting a single search of Schmalz' garbage. The minute quality of evidence gathered is not "substantial evidence" – together with the lack of background information concerning the intel – to conclude probable cause existed that Schmalz was involved in drug activity inside his residence. Moreover, Task Force has not suggested any exigent circumstances were present to prevent law enforcement from conducting a further investigation of the Schmalz' suspected illegal activity. There was not probable cause to issue a search warrant in this case.

D. The totality of the evidence does not support the finding of probable cause

At the suppression hearing, the State cited three cases claiming the North Dakota Supreme Court held that evidence very similar to that found in the current case, under circumstances very similar to those in the current case, is sufficient to support the finding of probable cause to issue a search warrant. These cases are all distinguishable from the case at hand.

In State v. Rydberg, BCI received information from a confidential informant (CI) that Rydberg was a cocaine supplier. State v. Rydberg, 519 N.W.2d 306, 307 (N.D.1994). According to the CI, Rydberg was supplying cocaine for resale to co-employees of a Minot bar. Id. Based on the informant's tip, the Minot Police Department began an investigation of Rydberg. Id. Officers conducted drive-by surveillance of Rydberg's home and searched Rydberg's garbage three times. Id. The first search uncovered no evidence of illegal drug trafficking. The second search uncovered two folded sno-seals, which are commonly used to transport cocaine. During the third search, officers found sno-seals, three plastic baggies containing a white powder residue, and a letter addressed to Rydberg. Law enforcement sought and received a search warrant for Rydberg's residence after the third garbage search. Id.

The Court issued a search warrant for Rydberg's residence based on the following information: Information from the Drug Enforcement Unit's confidential informant, a listing of the items found in Rydberg's garbage and lab confirmation of cocaine residue. State v. Rydberg, 519 N.W.2d 306, 308 (N.D.1994). The detective also included information gathered during the investigation that

Rydberg's car had been seen twice at the residence of a recently convicted drug offender. Id.

Rydberg is distinguishable from the case at hand because there was detailed and specific information presented to the magistrate. In Rydberg, the intel came from a confidential informant who gave specific and detailed information which was relayed to the magistrate. There were three garbage searches conducted along with lab confirmation indicating that the contraband discovered in the garbage tested positive for cocaine. There was an ongoing investigation where law enforcement conducted drive-by surveillance of Rydberg's residence and twice witnessed Rydberg's vehicle at the residence of a known drug offender.

In the case at hand, we do not know who provided the intel nor what the intel consisted of. We do not have an on-going investigation or lab results. We don't know if the contraband located in Schmalz' garbage can was in a trash bag or lying loose in the can. We do not know if other people's garbage cans were located in the same area as Schmalz' or how law enforcement was certain they had Schmalz' garbage can, especially when other people's garbage cans may have been set out in the same area. Unlike Rydberg, the magistrate in the case at hand did not have a substantial basis for concluding that probable cause existed to issue the search warrant for Schmalz' residence.

In State v. Erickson, 496 N.W.2d 555, 557 (N.D.1993), there was an ongoing investigation of Erickson concerning his involvement in transactions involving controlled substances. Information was obtained that Erickson was

involved in the trafficking of controlled substances. Based on this ongoing investigation, police officers removed and inspected a 250-gallon garbage dumpster, located in an alley behind Erickson's duplex. Id. at 57. In the trash, the police found a small zip-lock bag, containing what appeared to be marijuana, cigarette packages and an envelope addressed to Erickson. Id. Officers conducted another search of the dumpster the next day and found several plastic bags that smelled of marijuana, several marijuana cigarettes, a small amount of plant material and seeds, and a traffic citation issued to Erickson. Id. (noting the cigarettes or "roaches" and the plant material field tested as positive for marijuana).

Two days after the second garbage search, officers sought a search warrant for Erickson's home and automobile. Erickson, 496 N.W.2d 555, 557. An affidavit was submitted stating:

> "1. That pursuant to an ongoing investigation of Erickson concerning his involvement in transactions involving controlled substances information has been obtained that Erickson is and continued to be involved in the trafficking of controlled substances.
>
> 2. Evidence has been obtained which illustrates Erickson possesses controlled substances, paraphernalia, records of transactions, money, and other items used in transactions of controlled substances. Said evidence consists of bags, marijuana cigarettes, and white plastic cup with marijuana residue. Said evidence is indicative of the above-referenced activities.
>
> 3. Evidence found was located in the garbage dumpster behind Erickson's home. This was known to be his garbage because a traffic citation with his name on it was located with these materials. Also

> found in the garbage was a letter addressed to Erickson." Id.

Prior to signing the search warrant, the magistrate took statements from Sergeant Scott Busching of the Williams County Sheriff's Department who told the magistrate:

> "I have received information from people that I know who have been involved in drug trafficking and Erickson's name has come up to me more than once as being one who deals to sub-dealers in Williston and the surrounding area. I have also had information that Erickson is armed. I have seen where he has purchased a 9-millimeter hand-gun. I have information that he has a shotgun with him pretty much all of the time. This leads me to believe that he has something that he is hiding, or it is also indicative of somebody that may be dealing in illegal substances." Id.

The magistrate found probable cause and issued a search warrant for Erickson's residence and automobile. Id.

Erickson is distinguishable from the case at hand because the magistrate was presented with detailed information and significant evidence discovered during an ongoing investigation. Unlike in this case, the magistrate was informed who was providing information about Erickson and was given specific facts regarding the criminal activity Erickson was involved in. There was two garbage searches and a substantial amount of contraband was seized from the garbage and field tested positive for marijuana.

In State v. Johnson, 531 N.W.2d 275, 277 (N.D.1995), Drug Task Force received information that Johnson was "involved in drug activity." Based on that information, Johnson's garbage was picked up and searched. Id. The search

revealed twenty-five marijuana seeds, and two bank deposit slips which contained Johnson's name. Id. These items were located in the same garbage bag. Id. Based on this information, Task Force obtained a search warrant for Johnson's house. Id.

Johnson challenged the probable cause to support the search warrant arguing that the search warrant was invalid because it was based on stale probable cause. Id. at 278. Relying on Ringquist, 433 N.W.2d at 213, this court said where the affidavit recites facts indicating a course of conduct or activity of a protracted and continuous nature, the passage of time may be unimportant to the validity of the probable cause. The proper inquiry is whether the magistrate, taking into consideration the nature of the crime, the nature of the criminal, the nature of the thing to be seized, and the nature of the place to be searched could reasonably believe that evidence of a criminal violation was probably at the specified location. Id.

The evidence offered to the magistrate was bank slips and marijuana seeds found in Johnson's garbage sack outside of his home. Id. This court found it reasonable for the magistrate to have concluded, from the presence of marijuana seeds in Johnson's garbage bag, that more marijuana was probably located inside his home. Id. This court believed the presence of the marijuana seeds in the garbage bag, which also contained bank deposit slips bearing Johnson's name, would warrant a person of reasonable caution to believe there was probably more marijuana inside Johnson's home. Id. at 279.

Johnson is distinguishable from the case at hand in several respects. First, the appeal was based on stale probable cause, not lack of probable cause. This Court said "where the affidavit recites facts indicating a course of conduct or activity of a protracted and continuous nature"... which leads a person to believe that detailed facts about the "illegal drug activity" was explained to the magistrate prior to the issuance of the warrant. Another important difference is the bank slips and the 25 marijuana seeds were found in the same garbage sack.

The facts of this case are distinguishable from the three cases the State relied upon to support their position that there was probable cause for the issuance of a search warrant. The magistrate was not informed about what type of intel was received or if the source of the intel was honest and reliable. There was not an ongoing investigation and besides the mysterious intel, the magistrate was not informed of any other information which would support the contention Schmalz was involved with narcotics. The magistrate was not informed about the placement of the items found in relation to the mail found with Schmalz' name on it. We do not know how law enforcement knew that they were pulling Schmalz' garbage versus other people's garbage since the can was in an area where people set the garbage out for trash pick up. We do not know how long the garbage can was sitting out before law enforcement conducted the trash can pull or how many other people had access to the garbage can. Based on these facts, there was not probable cause for the issuance of the search warrant.

II. **Whether the contraband discovered in Schmalz' vehicle in Morton County was "fruit of the poisonous tree" and should have been suppressed?**

The exclusionary rule requires suppression of evidence obtained in a search that violates the Fourth Amendment. State v. Phelps, 297 N.W.2d 769 (N.D.1980). Where there has been an unlawful search and seizure, the exclusionary rule operates as a judicial sanction against law enforcement intrusion into an individual's Fourth Amendment right to privacy. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914). The exclusion of unlawfully obtained evidence serves two underlying policy considerations: (1) compelling respect for the constitutional guaranty against unreasonable searches and seizures by removing the incentive to disregard that guaranty, and (2) bolstering judicial integrity by not allowing convictions based on unconstitutionally obtained evidence. Mapp v. Ohio, supra.

The fruit of the poisonous tree doctrine is an extension of the exclusionary rule and prohibits the indirect use of information obtained in illegal searches and seizures. State v. Phelps, supra. In Wong Sun v. United States, 371 US. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), the United States Supreme Court said that the proper inquiry for determining if proffered evidence is fruit of the poisonous tree is whether the evidence was obtained by exploitation of the illegal action or by means sufficiently distinguishable to be purged of the primary taint. State v. Handtmann, 437 N.W.2d 830, 837 (N.D.1989) (citing Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)). Evidence cannot be

suppressed as fruit unless the government's illegal action is at least the "but for" cause of the later discovery of the evidence. Segura v. U.S., 468 U.S. 796, 815, 104 S.Ct. 3380, L.Ed.2d 599 (1984) (finding the illegal entry into the defendants' home did not contribute to the discovery of evidence seized under a warrant; thus, not even the threshold "but for" test was met).

To decide whether a defendant's actions break the chain of causation and dissipate the taint of an earlier illegal search, the following factors may be examined: "the temporal proximity of the illegality and the fruit of that illegality, the presence of intervening circumstances, and the purpose and flagrancy of the police misconduct." State v. Saavedra, 396 N.W.2d 304, 305 (N.D.1986).

Task Force received consent to search Schmalz' vehicle while they were executing a search warrant of Schmalz' residence. Schmalz was initially asked if there was controlled substances in his vehicle and he denied having anything illegal in the vehicle. Task Force then advised Schmalz that they would be running a drug detecting dog around the vehicle to check for the presence of a controlled substance and if the dog gave a positive indication, they would seek a search warrant for the vehicle. Schmalz then signed a consent to search the vehicle.

The search warrant was the only reason law enforcement was able to have contact with Schmalz on the day of the search. The warrant was the "but for" cause of the discovery of the evidence in Schmalz' vehicle. There were no intervening circumstances between the search of Schmalz' home and the search of his vehicle. The consent form was signed in Schmalz' living room while a

search of his residence was taking place. There was not probable cause to issue the warrant in this case and all of the evidence obtained as a result of this illegal search is fruit of the poisonous tree and must be suppressed.

CONCLUSION

When examining the totality of the circumstances in this matter, the Court did not have probable cause to issue a search warrant for Schmalz's residence. As such, Schmalz's 4th Amendment right to be free of unreasonable search and seizure was violated and all of the evidence discovered during the illegal searches should have been suppressed. Schmalz respectfully asks this Court to reverse the district court's orders denying Schmalz' motions to suppress.

Dated this 28th day of June, 2007.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,	)	Supreme Court No. 20070128
	)	Burleigh Co. No. 06- K-1869
Appellee,	)	Supreme Court No. 20070127
v.	)	Morton Co. No. 06-K-0932
Steven Schmalz,	)	**AFFIDAVIT OF SERVICE**
Appellant.	)	

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

I, Dianne M. Walsh, being first duly sworn, deposes and says that on the 28th day of June, 2007, she served the attached:

BRIEF OF APPELLANT

upon the following person(s) by placing a copy of same in the US mails at Bismarck, ND, with sufficient postage attached, in envelope addressed as follows:

Lloyd C. Suhr
Assistant State's Attorney
Burleigh County Courthouse
514 East Thayer Avenue
Bismarck, ND 58501

Allen Koppy
Morton County State's Attorney
210 Second Avenue NW
Mandan, ND 58554

Dianne M. Walsh

Subscribed and sworn to before me this 28th day of June, 2007.

Jodi L. Colling, Notary Public
State of North Dakota
My Commission Expires: 8/30/07

(SEAL)

JODI L. COLLING
Notary Public
State of North Dakota
My Commission Expires Nov 30, 2012