

RECEIVED BY CLERK  
SUPREME COURT JUL 25 2007

20070127

20070128

Supreme Ct. No. ~~20070046~~ 20070128  
Burleigh County No. 08-06-K-1869

Supreme Ct. No. 20070127  
Morton County No. 30-06-K-0932

SA File No. M 1275-06-08

**FILED**  
IN THE OFFICE OF  
CLERK OF SUPREME

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

JUL 25 2007

STATE OF NORTH DAKOTA

Burleigh County District Court  
South Central Judicial District  
The Honorable Bruce Haskell, Presiding

Matthew Ramage-White  
3rd Year Law Student  
514 East Thayer Avenue  
Bismarck, North Dakota 58501  
(701) 222-6672

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

**TABLE OF CONTENTS**

Page No.

Table of Authorities .....	i
Statement of the Issues.....	1
Statement of the Case.....	2
Statement of the Facts.....	3
Argument .....	5
Conclusion .....	16

**TABLE OF AUTHORITIES**

Page No.

**Cases**

State v. Carriere  
545 N.W.2d 773 (N.D.1996) ..... 6

State v. Damron  
1998 ND 71, 575 N.W.2d 912 ..... 10

State v. Ebel  
2006 ND 212, 723 N.W.2d 375 ..... 9

State v. Erickson  
496 N.W.2d 555 (N.D.1993) ..... 14

State v. Graf  
2006 ND 196, 721 N.W.2d 381 ..... 5

State v. Herrick  
1997 ND 155, 567 N.W.2d 336 ..... 6, 8

State v. Johnson  
531 N.W.2d 275 (N.D.1995) ..... 6,9,12,13

State v. Mische  
448 N.W.2d 415 (N.D.1989) ..... 10

State v. Rydberg  
519 N.W.2d 306 (N.D.1994) ..... 6,8,13

State v. Stewart  
2006 ND 39, 710 N.W.2d 403 ..... 10

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

<u>State v. Utvick</u>	
2004 ND 36, 675 N.W.2d 387.....	14,15
<u>State v. Woinarowicz</u>	
2006 ND 179, 720 N.W.2d 635.....	5
<u>California v. Greenfield</u>	
486 U.S. 35 (1988).....	8
<u>Litchfield v. State</u>	
824 N.E.2d 356 (Ind. 2005).....	7,8,9
<u>State v. A Blue in Color, 1993 Chevrolet Pickup (A Blue Pickup)</u>	
328 Mont. 10 (Mont. 2005).....	7,8,9
<u>Rules</u>	
N.D. R. Crim. P. 11(a)(2).....	2

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

**STATEMENT OF THE ISSUES**

I. Did the district court err in denying Appellant's Motion to Suppress Evidence?

a. Abandoned garbage may be acquired and examined by law enforcement.

b. The totality of evidence presented to the magistrate supported a reasonable person to conclude that evidence of criminal activity would be found at Appellant's residence.

c. Alternatively, if probable cause did not exist to support the search warrant, the good faith exception to the exclusionary rule mandates against suppressing the evidence.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

**STATEMENT OF THE FACTS**

Burleigh County Sherriff's Deputy Simon Scheett (Deputy Scheett), in his role as member of the Metro Area Narcotics Task Force, received information that Appellant, who resided at 312 Oxford Drive, Bismarck, North Dakota was involved with narcotics. (Application for Search Warrant, 3, lines 1-3.) As a result of this information Deputy Scheett began an investigation of Appellant. On May 22, 2006 Deputy Scheett and Detective Eisenmann, who was also with the Metro Area Narcotics Task Force, retrieved trash from near Appellant's residence. (Id. at p. 3. lines 3-5.) This trash had been placed on the sidewalk in front of 312 Oxford Drive. (Id. at p. 3, lines 23-24.) This is the area where trash is usually placed for trash removal. (Id. at p. 3. line 25.)

When the trash was examined, Deputy Scheett discovered a paper towel which had a dirty blackish residue. (Id. at p. 3, lines 8-10.) Using his training and experience, Deputy Scheett determined that the residue had the odor of burnt marijuana and that the paper towel appeared to have been used for cleaning marijuana paraphernalia. (Id. at p. 3, lines 8-10.) Deputy Scheett also discovered a bundle of packaging tape in the garbage. (Id. at p. 3, line 6.) With his training and experience, Deputy Scheett determined that this packaging tape contained the odor of marijuana. (Id. at p. 3. lines 6-7.)

1           The garbage which Deputy Scheett had removed from 312 Oxford  
2 Drive also contained a package of cigarette cellophane. (Id. at p. 3, line 7.)  
3 With his training and experience Deputy Scheett identified the odor of  
4 marijuana upon this item as well. (Id. at p. 3, lines 7-8.) Within the garbage  
5 Deputy Scheett also discovered mail which was addressed to Appellant and  
6 listed his address as 312 Oxford Drive, Bismarck, North Dakota. (Id. at p. 3,  
7 lines 11-12.)  
8

9           On May 23, 2006, Deputy Scheett, accompanied by Assistant Burleigh  
10 County State's Attorney Brandi Sasse-Russell, appeared before the Honorable  
11 David E. Reich, Burleigh County District Judge, in an appearance requesting a  
12 search warrant for 312 Oxford Drive, Bismarck, North Dakota. (Application  
13 for Search Warrant, p. 1.) Deputy Scheett testified under oath that he had  
14 received over 1700 hours of training in narcotics investigation and drug  
15 identification. (Id. at p. 2, lines 18-23.) Deputy Scheett then recounted that  
16 he had received information that Appellant was involved with narcotics, and  
17 detailed the trash retrieval and examination described above. (Id. at 3.) The  
18 magistrate then asked if the address for which the search warrant was being  
19 requested was a single family residence, and Deputy Scheett stated it was.  
20 (Id. at p. 4, lines 22-23.) After Deputy Scheett's sworn testimony, the  
21 magistrate found probable cause to issue a search warrant for 312 Oxford  
22 Drive, Bismarck, North Dakota, and signed the warrant. (Id. at p. 4, lines 24-  
23 25.)  
24  
25  
26  
27



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

**ARGUMENT**

**I. Standard of Review**

Upon reviewing a district court's ruling on a motion to suppress, the North Dakota Supreme Court defers to a district court's findings of fact and resolves any conflicts in testimony in favor of affirmance. State v. Graf, 2006 ND 196, ¶ 7, 721 N.W.2d 381. The North Dakota Supreme Court has recognized that the district court is in a superior position to assess the credibility of witnesses and weigh the evidence. State v. Woinarowicz, 2006 ND 179, ¶ 20, 720 N.W.2d 635. A district court's decision to deny a motion to suppress will not be reversed if there is sufficient competent evidence capable of supporting the district court's findings, and if the district court's decision is not counter to the evidence presented. Id. Questions of law are fully reviewable on appeal, and whether a finding of fact meets a legal standard is a question of law. Graf, 2006 ND at ¶ 7.

**II. The district court's denial of Appellant's Suppression Motion was not erroneous.**

In denying Appellant's Motion to Suppress, the district court correctly ruled that evidence discovered through the examination of Appellant's trash did not violate Appellant's Constitutional rights. The district court also properly found that the search warrant issued was supported by sufficient evidence such that it was reasonable to believe that evidence of marijuana use and marijuana paraphernalia possession would probably be located at Appellant's residence. If the district court erred in upholding the finding of

1 probable cause, then Defendant's Motion to Suppress must still have been  
2 denied pursuant to the good faith exception to the exclusionary rule.  
3

4 **a. Law enforcement legally examined Appellant's garbage.**

5 An individual may only invoke their rights under the Fourth  
6 Amendment to the United States Constitution and Article I, Section 8, of the  
7 North Dakota Constitution, if that person possess a subjective expectation of  
8 privacy which society recognizes as objectively reasonable. State v. Carriere,  
9 545 N.W.2d 773, 775 (N.D.1996). When garbage is placed in an area  
10 accessible to the public with the purpose of abandoning it to the garbage  
11 collector, there is no subjective expectation of privacy to that garbage which  
12 society recognizes as objectively reasonable. and a search of that garbage does  
13 not violate an individual's rights. State v. Herrick, 1997 ND 155, ¶ 9, 567  
14 N.W.2d 336; State v. Rydberg, 519 N.W.2d 306, 310 (N.D.1994). The fact  
15 that law enforcement cannot testify as to when garbage is placed out for  
16 collection does not defeat the use of that garbage by a magistrate in finding  
17 probable cause to issue a search warrant. State v. Johnson, 531 N.W.2d 275,  
18 278 (N.D.1995).  
19  
20

21 In the present case, Appellant placed garbage in front of his residence  
22 on the sidewalk, an area where garbage cans are placed to be picked up for  
23 disposal. (Application for Search Warrant, p. 3. lines 23-25.) As this Court  
24 held in Herrick, Carriere, Johnson, and Rydberg, placing garbage out for  
25 collection in a public space meant that Appellant no longer maintained a  
26 subjective expectation of privacy in that garbage which the public would find  
27

1 objectively reasonable. Without such a reasonable subjective expectation of  
2 privacy, Appellant may not claim that an examination of his garbage by law  
3 enforcement was improper. Nor may Appellant claim that law enforcement's  
4 lack of testimony regarding when the garbage was placed out prevents the  
5 items found from being presented at an application for a search warrant. All  
6 evidence found as a result of law enforcement collecting and examining the  
7 trash placed upon the sidewalk in front of Appellant's residence was  
8 appropriate to use in order to obtain a search warrant from a neutral  
9 magistrate.  
10

11  
12 Appellant attempts to revise existing Federal and North Dakota  
13 jurisprudence to avoid this result. Appellant would alter the current system  
14 and require articulable individualized suspicion of a crime before law  
15 enforcement can acquire and examine abandoned garbage. To support this  
16 modification, Appellant relies on two non-controlling cases, Litchfield v.  
17 State, 824 N.E.2d 356 (Ind. 2005), and State v. A Blue in Color, 1993  
18 Chevrolet Pickup (A Blue Pickup), 328 Mont. 10 (Mont. 2005).  
19

20 In Litchfield, the Indiana Supreme Court interpreted the Indiana  
21 Constitution to require articulable individualized suspicion before a trash  
22 search. 824 N.E.2d at 360, 363-64. However, Indiana's state constitutional  
23 jurisprudence is distinctly different from North Dakota's. More than a decade  
24 ago Indiana abandoned the expectation of privacy test used to examine Fourth  
25 Amendment protections. See, id. at 359. The expectation of privacy test is  
26 the test currently used by the United States Supreme Court and the North  
27

1 Dakota Supreme Court to construe Fourth Amendment protections. State v.  
2 Herrick, 1997 ND 155, ¶¶ 9-10, 567 N.W.2d 336; State v. Carriere, 545  
3 N.W.2d 773, 775 (N.D.1996). Due to this difference as to when  
4 Constitutional rights are invoked, the holding in Litchfield did not contain an  
5 expectation of privacy analysis. Instead, the Indiana Supreme Court declared  
6 that trash searches without reasonable suspicion are "unreasonable," under  
7 Indiana's particular constitutional jurisprudence. Litchfield, 824 N.E.2d at  
8 363-64. In reaching their decision, the Litchfield Court recognized that the  
9 trash search at issue was legal under the Fourth Amendment and the majority  
10 of state constitutions. Id. at 358-59.

13 The Montana Supreme Court, in the case of A Blue Pickup, attached  
14 Indiana's reasonableness test onto the Montana Constitution, without  
15 performing any constitutional analysis of how that attachment related to Art.  
16 II. §§10, 11 of the Montana Constitution, or the Fourth Amendment. 328  
17 Mont. at 17-18. Instead, the Montana Supreme Court, held that to "guide the  
18 conduct of police in the future," "articulable individualized suspicion" would  
19 be required. Id. at 18.

21 In North Dakota the right to be free from unreasonable searches is  
22 found in the Fourth Amendment to the United States Constitution and Article  
23 I, Section 8 of the North Dakota Constitution. These Constitutional  
24 protections are not implicated until a reasonable expectation of privacy is  
25 invaded. See, e.g., California v. Greenfield, 486 U.S. 35, 41-42 (1988); State  
26 v. Rydberg, 519 N.W.2d 306, 310 (N.D.1994). As neither federal nor North  
27

1 Dakota's jurisprudence recognizes a privacy expectation in garbage placed  
2 within the public's access, there can be no constitutionally based  
3 individualized articulable suspicion requirement as there is not a  
4 Constitutionally recognized interest in the abandoned garbage. The holding in  
5 Litchfield, which recognized the legality of the garbage search under the  
6 Fourth Amendment and based it's holding of unconstitutionality entirely upon  
7 Indiana's Constitution. is therefore inapplicable. For a similar reason, the  
8 holding in A Blue Pickup, based upon Litchfield, and which failed to  
9 independently examine the constitutional issues raised in Litchfield, is also  
10 inapplicable.  
11

12  
13 **b. There was sufficient evidence to support probable cause for**  
14 **a search warrant.**

15 The Fourth Amendment of the United States Constitution and North  
16 Dakota Constitution Article I, Section 8, require warrants to be issued only  
17 upon a showing of probable cause. State v. Ebel, 2006 ND 212, ¶12, 723  
18 N.W.2d 375, 380. Probable cause for a search warrant does not require the  
19 same standard of proof necessary to establish guilt at trial: instead, probable  
20 cause to search exists if it is established that certain identifiable objects are  
21 probably connected with criminal activity and are probably to be found at the  
22 present time at an identifiable place." State v. Johnson, 531 N.W.2d 275,  
23 277 (N.D.1995). Although each piece of information may not alone be  
24 sufficient to establish probable cause and some of the information may have  
25 an innocent explanation. "probable cause is the sum total of layers of  
26  
27

1 information and the synthesis of what the police have heard, what they know,  
2 and what they observed as trained officers." State v. Damron, 1998 ND 71, ¶  
3 7, 575 N.W.2d 912. In reaching a finding of probable cause it is proper to  
4 take into account the inferences and deductions of a trained and experienced  
5 officer. State v. Mische, 448 N.W.2d 415, 419 (N.D.1989). So long as a  
6 substantial basis exists for a magistrate's conclusion that probable cause  
7 exists, the Court will resolve doubtful or marginal cases in favor of the  
8 magistrate's conclusion. State v. Stewart, 2006 ND 39, ¶ 6, 710 N.W.2d 403.  
9 405.

10  
11  
12 In this case, a search warrant was issued by District Judge David E.  
13 Reich on May 23, 2006. (Application for Search Warrant, p. 4. lines 24-25.)  
14 The magistrate's finding of probable cause was based upon testimony  
15 presented by Burleigh County Sheriff's Deputy Simon Scheett (Deputy  
16 Scheett). (Id. at pages 1-4.) Deputy Scheett is a narcotics investigator for the  
17 Metro Area Narcotics Task Force with extensive training in law enforcement,  
18 including over 1700 hours of training in narcotics investigation and drug  
19 identification. (Id. at p. 2, lines 10-11, 18-23). Deputy Scheett received  
20 information that Appellant was involved with narcotics at his 312 Oxford  
21 Drive residence. (Id. at p. 3, lines 1-3.) Based upon this information, Deputy  
22 Scheett and Metro Area Narcotics Task Force Detective Eisenmann acquired  
23 and examined trash from Appellant's residence. (Id. at p. 3, lines 3-5.) The  
24 trash was located in front of Appellant's residence on the sidewalk. (Id. at p.  
25  
26  
27

1 3. lines 23-24.) Deputy Scheett stated that this was the area where garbage  
2 cans are placed for trash collection. (Id. at p. 3, lines 24-25.)  
3

4 As a result of an examination of the trash acquired from Appellant's  
5 residence, Deputy Scheett discovered a paper towel which had a dirty blackish  
6 residue upon it. (Application for Search Warrant, p. 3, lines 8-10.) Using his  
7 training and experience in drug identification, Deputy Scheett identified an  
8 odor of burnt marijuana on this paper towel and the black residue. (Id. at p. 3,  
9 lines 10-11.) Based upon his training and experience, Deputy Scheett  
10 deduced that this paper towel had been used for cleaning marijuana  
11 paraphernalia. (Id. at p. 3, lines 8-9.) In addition, Deputy Scheett discovered  
12 cigarette cellophane in the trash which he also identified as having an odor of  
13 marijuana. (Id. at p. 3, lines 7-8.) Deputy Scheett's examination of the trash  
14 also revealed a bundled up piece of packaging tape. (Id. at p. 3, line 6.) Using  
15 his training and experience, Deputy Scheett identified the odor of marijuana  
16 on the packaging tape. (Id. at p. 3, line 7.)  
17  
18

19 During this examination, Deputy Scheett also discovered mail in the  
20 trash removed from Appellant's sidewalk. (Id. at p. 3, line 11.) This mail was  
21 addressed to Appellant and listed his address as 312 Oxford Drive, Bismarck,  
22 North Dakota. (Id. at 3, lines 11-12.)  
23

24 In reaching a finding of probable cause, the magistrate determined that  
25 the paper towel identified as having a blackish residue smelling of marijuana  
26 and identified as likely being used for cleaning drug paraphernalia, the  
27 packaging tape smelling of marijuana, and the cigarette cellophane which also

1 smelled of marijuana, were probably connected with marijuana use, a criminal  
2 activity. The location of the trash in which these items were found, as well as  
3 the presence of mail properly addressed to Appellant in that trash, provided  
4 the nexus between the probable criminal activity and 312 Oxford Drive,  
5 Bismarck, North Dakota.  
6

7 Based upon this evidence, the magistrate determined that there was  
8 probable cause to believe that marijuana and marijuana paraphernalia were  
9 located and being used at 312 Oxford Drive, Bismarck, North Dakota, and  
10 properly issued a search warrant for that residence. This warrant was not  
11 based upon a "hunch," but upon physical evidence and the testimony and  
12 conclusions of trained and experienced law enforcement officers.  
13

14 This Court has held similar evidence discovered in a garbage pull  
15 sufficient to establish probable cause. In State v. Johnson, this Court  
16 examined whether un-germinated marijuana seeds discovered as a result of a  
17 trash pull were a sufficient basis for probable cause to issue a search warrant.  
18 531 N.W.2d 275, 279 (N.D.1995). This Court upheld the search warrant, and  
19 determined that although un-germinated marijuana seeds are not illegal and  
20 may have come from birdseed, their presence in the Defendant's trash was  
21 sufficient for a magistrate to determine that it was probable that marijuana  
22 would be located at the address where the trash was originally located. Id.  
23

24 Appellant attempts to characterize Johnson as distinguishable because  
25 it was an appeal based solely upon stale probable cause. This is an incorrect  
26 characterization. Johnson challenged the search warrant based upon stale  
27



1 probable cause and upon a contention that law enforcement withheld  
2 information from the issuing magistrate. 531 N.W.2d 275, 276 (N.D.1995).  
3  
4 To decide whether the information withheld from the magistrate was  
5 sufficient to invalidate the warrant, the Court examined whether the  
6 undisclosed information would have been material to the magistrate's finding  
7 of probable cause. Id. at 277. It was this line of inquiry which led the Court  
8 to declare that un-germinated marijuana seeds and bank slips naming a  
9 defendant provided both a nexus to the location and a sufficient likelihood of  
10 criminal activity to support the issuance of a search warrant. Id. at 279.  
11

12 In the present case, as in Johnson, law enforcement conducted a trash  
13 pull and discovered mail linking the trash to the location to be searched and  
14 evidence of marijuana. In the present situation the evidence of criminal  
15 activity is even stronger as the paper towel with black residue demonstrated  
16 that Appellant was likely using marijuana by burning it in a device which was  
17 then being cleaned. As drug use can be a habituating and continuing offense,  
18 Johnson, 531 N.W.2d at 277, this would lead a reasonable person to believe  
19 that there was more marijuana at Appellant's residence, as well as the  
20 smoking device which Appellant had taken the time to clean.  
21

22 Although Johnson is the case most applicable to the facts of this case,  
23 this Court has held on multiple occasions that drug related items discovered in  
24 an individual's trash are sufficient to establish probable cause to issue a search  
25 warrant. See, e.g., State v. Rydberg, 519 N.W.2d 306 (N.D.1994) (holding  
26 that search warrant issued primarily because of cocaine residue in Rydberg's  
27

1 garbage was appropriate); State v. Erickson, 496 N.W.2d 555 (N.D.1993)  
2 (holding evidence of marijuana combined with citation and envelope in  
3 Erickson's name in the garbage supported a determination of probable cause).

4  
5 The evidence discovered in the trash placed outside of Appellant's  
6 residence was sufficient for a reasonably cautious person to conclude that  
7 marijuana and marijuana paraphernalia would probably be located at 312  
8 Oxford Drive. As such, the district court's denial of Appellant's Suppression  
9 based upon his finding that a reasonable person would come to the conclusion  
10 that a controlled substance was likely to be found in Appellant's residence  
11 was properly supported by the evidence and not in error.  
12

13 **c. Alternatively, if there was insufficient evidence for a**  
14 **finding of probable cause, Appellant's Motion to Suppress**  
15 **should have been denied pursuant to the good faith**  
**exception to the exclusionary rule.**

16 Under the good faith exception to the Fourth Amendment, suppression  
17 of evidence is not the appropriate remedy if law enforcement relies on an  
18 objectively reasonable search warrant. State v. Utvik, 2004 ND 36, ¶ 26, 675  
19 N.W.2d 387, 397. A search warrant is objectively reasonable unless; the  
20 issuing magistrate was misled by false information intentionally or negligently  
21 given by the affiant, the magistrate totally abandoned their judicial role and  
22 failed to act in a neutral and detached manner, a warrant is based upon an  
23 affidavit which is so lacking in indicia of probable cause that official belief in  
24 its existence is entirely unreasonable, or a reasonable law enforcement officer  
25 could not rely upon a facially deficient warrant. Id. The North Dakota  
26  
27

1 Constitution has not been found to provide greater protections than the Fourth  
2 Amendment which would preclude the application of the good faith exception  
3 to North Dakota's exclusionary rule. Id. at ¶ 28.

4  
5 In the present case, if this Court finds that there was insufficient  
6 evidence for the issuance of the search warrant, suppression of evidence is not  
7 the appropriate remedy. The search was conducted in good faith reliance on a  
8 search warrant issued by a magistrate. There is no evidence that the warrant  
9 was obtained as a result of false information given by Deputy Scheett or  
10 through a magistrate who was not acting in a neutral and detached manner.  
11 Nor can a warrant based upon the discovery of multiple items associated with  
12 marijuana and drug paraphernalia use be said to be totally lacking in indicia of  
13 probable cause. There has also been no allegation that the warrant was drafted  
14 in such a way as to be facially deficient for the search conducted.  
15

16 The purpose of the exclusionary rule is deterring police misconduct.  
17 Utveck, 2004 ND at ¶ 26. If police conduct a search based upon a warrant  
18 stating that there is probable cause to conduct the search, and there has been  
19 no misconduct in obtaining that warrant, then the police are doing exactly  
20 what the people and laws of North Dakota want them to do. The good faith  
21 exception rule promotes the use of warrants because police know that they can  
22 use the evidence obtained with that warrant. Without the good faith  
23 exception, police will be more likely to bypass the warrant system through the  
24 use of other exceptions to the warrant clause. This action would weaken the  
25 supervision of police conduct by a neutral judiciary and threaten the  
26  
27

1 protections the judiciary provides. As the good faith exception promotes  
2 proper police action and the protections afforded by a neutral judiciary,  
3 excluding it from North Dakota Constitutional jurisprudence would defeat the  
4 purpose of the exclusionary rule and harm our legal system.

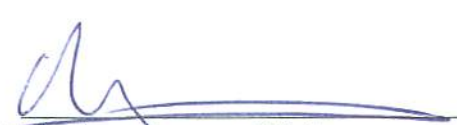
5  
6 As the police relied on an objectively reasonable warrant, obtained  
7 without misconduct, suppression is not the appropriate remedy if the issuing  
8 magistrate erred in finding probable cause.

9  
10  
11 **CONCLUSION**

12 Based upon the foregoing, the State requests that the Order Denying  
13 the Motion to Suppress be affirmed in all things.

14 Dated this <sup>25<sup>th</sup></sup> day of July, 2007.

15  
16   
17 Lloyd C. Suhr, Assistant,  
18 Burleigh County State's Attorney  
19 Courthouse, 514 East Thayer Avenue  
20 Bismarck, North Dakota 58501  
21 Phone No: (701) 222-6672  
22 BAR ID No: 05405  
23 Attorney for Plaintiff-AppelleeAppellee

24   
25 Matthew Ramage-White  
26 3rd Year Law Student  
27 Courthouse, 514 East Thayer Avenue  
Bismarck, North Dakota 58501  
Phone No: (701) 222-6672

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

20070127  
20070128

State of North Dakota, )  
)  
Plaintiff-Appellee, ) AFFIDAVIT OF MAILING  
)  
-vs- ) Supreme Ct. No. 20070046  
) Burleigh County No. 08-06-K-1869  
Steven Schmalz, )  
) Supreme Ct. No. 20070127  
Defendant-Appellant, ) Morton County Ct. No. 30-06-K-0951  
..... ) SA File No. M 1275-06-08

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

JUL 25 2007

STATE OF NORTH DAKOTA )  
) ss  
COUNTY OF BURLEIGH )

STATE OF NORTH DAKOTA

Jeanie Nolz, being first duly sworn, depose and say that I am a United States citizen over 21 years old, and on the 25<sup>th</sup> day of July, 2007, I deposited in a sealed envelope a true copy of the attached:

1. Brief of Plaintiff-Appellee
2. Affidavit of Mailing

in the United States mail at Bismarck, North Dakota, postage prepaid, addressed to:

JODI L. COLLING	ALLEN KOPPY
ATTORNEY AT LAW	MORTON COUNTY STATE'S ATTORNEY
PO BOX 1896	210 SECOND AVENUE NW
BISMARCK ND 58502-1896	MANDAN, ND 58554

which address is the last known address of the addressee.

Jeanie Nolz  
Jeanie Nolz

Subscribed and sworn to before me this 25<sup>th</sup> day of July, 2007.

KIMBERLY S BLESS  
Notary Public  
State of North Dakota  
My Commission Expires February 24, 2010

Kimberly S. Bless  
Kimberly S. Bless, Notary Public  
Burleigh County, North Dakota  
My Commission Expires: 2/24/10.