

ORIGINAL

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SUPREME COURT OCT 17 2008

20080186

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,

Respondent-Appellee

-VS-

Daniel J. Myers,

Petitioner-Appellee,

*Appellant*

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

OCT 17 2008

STATE OF NORTH DAKOTA

) Supreme Ct. No. 20080186

) District Ct. No. 08-03-K-1839

) SA File No. F 282-03-04

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BRIEF OF PLAINTIFF-APPELLEE

APPEAL FROM ORDER DENYING POST CONVICTION RELIEF FROM  
JUNE 11, 2008

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

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STATEMENT OF THE ISSUES

- I. Trial counsel was not defective in failing to challenge the validity of the search warrant
- II. Probable Cause existed to support the issuance of a search warrant.
- III. An ineffective assistance of counsel claim cannot be established absent a showing of actual prejudice.

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**STATEMENT OF THE CASE**

In April of 2003, the defendant, Daniel J. Myers (hereinafter Myers) was charged with Possession a Controlled Substance (Marijuana) with Intent to Deliver, (Class B Felony), Possession of Drug Paraphernalia (methamphetamine), (Class C Felony), and Possession of Drug Paraphernalia (marijuana), (Class A Misdemeanor) by complaint and pled not guilty to the offenses.

On June 24, 2005, a jury trial was conducted with Myers being found guilty of the offenses.

The relevant facts and procedural background of this case have been developed in a prior appeal: State v. Myers, 2006 ND 242, 724 N.W.2d 168. Additional facts as they relate to each issue shall be brought out in the brief.

## ARGUMENT

In a claim for ineffective assistance of counsel, it is the defendant's burden to prove (1) that his counsel's representation fell below an objective standard of reasonableness, and (2) that he was prejudiced by counsel's deficient performance. Klose v. State, 2005 ND 192, ¶ 9, 705 N.W.2d 809; see also, Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Establishing the first element requires a defendant to overcome the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Klose, at ¶ 9. To establish the second element, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id.

“The issue of ineffective assistance of counsel is a mixed question of law and fact which is fully reviewable” upon appeal. State v. Steen, 2004 ND 228, ¶ 8, 690 N.W.2d 239. Assistance of counsel is plainly defective when the record affirmatively shows ineffectiveness of a constitutional dimension. Roth v. State, 2006 ND 106, ¶ 12, 713 N.W.2d 513.

### **I. Trial counsel was not defective in failing to challenge the validity of the search warrant**

“Failure to file a pretrial suppression motion, by itself, does not equate to ineffective assistance of counsel.” Roth v. State, 2007 ND 112, 735 N.W.2d 882, citing, Ernst v. State, 2004 ND 152, ¶ 11, 683 N.W.2d 891. “In order to prove an ineffective assistance claim based on counsel's failure to move to suppress evidence, the petitioner must show actual prejudice, not merely possible prejudice.” Id. at ¶ 10. Citing Kimmelman v. Morrison, 477



1 U.S. 365, 373-75, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986), this Court adopted  
2 the standard set forth by the United States Supreme Court which applies to a  
3 petitioner's claim that counsel was ineffective for failing to raise a Fourth  
4 Amendment issue.

5  
6 “Where defense counsel's failure to litigate a Fourth  
7 Amendment claim competently is the principal allegation of  
8 ineffectiveness, the defendant must also prove that his Fourth  
9 Amendment claim is meritorious and that there is a reasonable  
10 probability that the verdict would have been different absent  
11 the excludable evidence in order to demonstrate actual  
12 prejudice.”

13  
14 Id. at 375, 106 S.Ct. 2574; see also, Williams v. Locke, 403 F.3d 1022,  
15 1026 (8th Cir.2005); Bailey v. Newland, 263 F.3d 1022, 1029 (9th  
16 Cir.2001) (“[P]etitioner must show that he would have prevailed on  
17 the suppression motion, and that there is a reasonable probability that  
18 the successful motion would have affected the outcome.”).

19  
20 In the present case, Myers sought post conviction relief on the grounds that  
21 his trial counsel failed to file a pretrial suppression motion. The district  
22 court's denial of Myer's application for relief was based solely on Myer's  
23 failure to provide any evidence of trial counsel's alleged deficient  
24 performance. Trans. of Post Conviction Hrg., Pp. 21-22. Myers presented  
25 no evidence of defense counsel's reasons for not making a motion to suppress.  
26 Trans. of Post Conviction Hrg., Pp. 1-21. The district court found that  
27



1 absent any testimony as to trial counsel's reasons for not filing a motion to  
2 suppress, Myers did not provide the court with sufficient evidence to whether  
3 Myer's trial counsel met that standard. Trans. of Post Conviction Hrg., Pp.  
4 21-22.  
5

6 However, even if Myer's trial counsel had filed a motion to suppress, the  
7 motion would not have been granted because there was probable cause to  
8 support the warrant.  
9

10 **II. Probable Cause existed to support the issuance of a search  
warrant.**

11 Whether probable cause exists is a question of law. State v. Birk, 484  
12 N.W.2d 834 (N.D.1992). Probable cause exists when the facts and  
13 circumstances relied upon by the judge who issues the warrant would lead a  
14 person of reasonable caution to believe the contraband or evidence sought  
15 probably will be found in the place to be searched. State v. Thieling, 2000  
16 ND 106, ¶ 7, 611 N.W.2d 861, citing State v. Johnson, 531 N.W.2d 275, 278  
17 (N.D.1995). "Although each piece of information may not alone be sufficient  
18 to establish probable cause and some of the information may have an innocent  
19 explanation, 'probable cause is the sum total of layers of information and the  
20 synthesis of what the police have heard, what they know, and what they  
21 observed as trained officers'". State v. Thieling, 2000 ND 106, ¶ 7, 611  
22 N.W.2d 861, quoting, State v. Damron, 1998 ND 71, ¶ 7, 575 N.W.2d 912).  
23 "Courts must take into account inferences and deductions that a trained and  
24 experienced officer makes." State v. Thieling, 2000 ND 106, ¶ 8, 611 N.W.2d  
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1 861, quoting, State v. Mische, 448 N.W.2d 415, 419 (N.D.1989). Thus, courts  
2 are to use the totality-of-the-circumstances test in reviewing the sufficiency of  
3 information before the magistrate, independent of the court's decision. State  
4 v. Nelson, 2005 ND 59, ¶ 16, 693 N.W.2d 910; and State v. Rydberg, 519  
5 N.W.2d 306, 308 (N.D.1994).  
6

7 To establish probable cause, there must be a nexus between the place to be  
8 searched and the contraband sought. State v. Nelson, 2005 ND 59, ¶ 17, 693  
9 N.W.2d 910. Circumstantial evidence may be used to establish that nexus. Id.  
10 citing, State v. Dodson, 2003 ND 187, ¶¶ 11-12, 671 N.W.2d 825). “Probable  
11 cause exists when ‘there is a fair probability contraband or evidence of a  
12 crime will be found in a particular place.’ ” State v. Corum, 2003 ND 89, ¶ 27,  
13 663 N.W.2d 151 quoting, State v. Guthmiller, 2002 ND 116, ¶ 10, 646  
14 N.W.2d 724). The touchstone of probable cause is “probability,” not  
15 “certainty.” See, United States v. Reivich, 793 F.2d 957, 963 (8th Cir.1986).  
16

17 However, mere suspicion that criminal activity is taking place, which may  
18 warrant further investigation, does not rise to a level of probable cause to  
19 search. See State v. Thieling, 2000 ND 106, ¶ 8, 611 N.W.2d 861. “The  
20 relevant inquiry is not whether conduct is innocent or guilty, but what degree  
21 of suspicion attaches to it.” State v. Ballweg, 2003 ND 153, ¶ 18, 670 N.W.2d  
22 490) citing, Illinois v. Gates, 462 U.S. 213, 245, 103 S.Ct. 2317, 76 L.Ed.2d  
23 527 (1983), and State v. Guthmiller, 2002 ND 116, ¶ 13, 646 N.W.2d 724).  
24

25 The North Dakota Supreme Court has acknowledged that making a  
26 determination as to probable cause becomes more difficult when information  
27

1 is presented from an informant. See, State v. Birk, 484 N.W.2d 834, 836  
2 (N.D.1992). “The reliability of an informant remains pertinent to a  
3 determination of whether or not probable cause exists for the issuance of a  
4 warrant based upon that informant's statement, particularly when that  
5 informant is a member of the ‘criminal milieu.’ ” State v. Dahl, 440 N.W.2d  
6 716, 718 (N.D.1989).

8 Ryan Brelje, the informant in this case, cannot be classified as a citizen  
9 informant. See, State v. Rangeloff, 1998 ND 135, ¶ 4 n. 3, 580 N.W.2d 593  
10 (stating that a citizen informant is someone who volunteers information  
11 without wanting anything in return and who is not at risk or in fear of going to  
12 jail). Brelje more accurately falls into that category of informants who are  
13 criminals, or drug addicts. Reliability for such an informant must be  
14 established. State v. Dahl, 440 N.W.2d 716, 718 (N.D.1989).

16 Myers argues that the Detective Kaiser recklessly or intentionally omission  
17 that Brelje had prior criminal convictions including a conviction for false  
18 report to law enforcement from 1999 would have defeated probable cause if  
19 added into the warrant application. The judge who issued the search warrant  
20 in this case, however, was told that Brelje was involved with Myers and James  
21 Chrisikos in the sale of methamphetamine. Trans. of App. for Search  
22 Warrant, March 25, 2003, p. 3, lines 4-9. Brelje’s vehicle was stopped for a  
23 traffic violation and he was found in possession of 9 grams of  
24 methamphetamine; his share of the 1 ounce. Trans. of App. for Search  
25 Warrant, March 25, 2003, p. 4, lines 4-9. The magistrate, therefore, knew  
26  
27



1 Brelje's was actively involved in drug trafficking and his credibility was  
2 questionable. See, State v. Holzer, 2003 ND 19, 656 N.W.2d 686 (Magistrate  
3 knew informant's credibility was questionable due to information about  
4 informant's possession of drug paraphernalia). Any additional information as  
5 to Brelje's dishonest behavior would have only confirmed what the magistrate  
6 already knew. See, State v. Holzer, 2003 ND 19, 656 N.W.2d 686.  
7

8 Further, the information Brelje provided was a first-hand account of what  
9 he participated in, including detailed information regarding the location and  
10 amounts of methamphetamine. Trans. of App. for Search Warrant, March 25,  
11 2003, Pp. 3-7. Brelje's level of specificity in describing the drug activity that  
12 was taking place including the location where the methamphetamine was  
13 purchased, the price of the initial purchase and division of the  
14 methamphetamine between himself, Danny Myers and James Chrisikos made  
15 it more likely that the information provided was accurate. See, State v. Dahl,  
16 440 N.W.2d 716, 719-20 (N.D.1989) (an informant who presents specific  
17 details about a crime and crime scene is more likely to be reliable).  
18

19 Finally, Brelje talked about a payment he had made to Thomas Biebe and  
20 that he was on his way to see Biebe at the time he was stopped. Trans. of  
21 App. for Search Warrant, March 25, 2003, Pp. 6-7. Detective Kaiser had  
22 information from a different reliable informant who provided information  
23 about activities at Biebe's residence that were consistent with drug trafficking.  
24 Trans. of App. for Search Warrant, March 25, 2003, Pp. 7-8. Thomas Biebe  
25 was stopped later that same night on a traffic violation and found to be in  
26  
27

1 possession of \$1,600.00. Trans. of App. for Search Warrant, March 25, 2003,  
2 Pp. 9-10.  
3

4 Thus, considering the totality of the circumstances, especially the detailed,  
5 first-hand knowledge Brelje provided, failure to inform the magistrate as to  
6 the specifics of Brelje's did not defeat probable cause to issue the search  
7 warrant for Myer's residence.

8 The search warrant for Myer's hotel room is equally valid. Myers argues  
9 the information presented to the magistrate did not support a finding of  
10 probable cause. He states the information presented to the magistrate in  
11 support of the second search warrant was inconsistent with the information  
12 provided for the first warrant and that Detective Kaiser again failed to mention  
13 Brelje's criminal record.  
14

15 Detective Kaiser presented information that detective Gaddis was working  
16 with social services on the case and had obtained information through an  
17 anonymous source that Myers was selling drugs out of a hotel room at the  
18 Comfort Inn. Trans. of App. for Search Warrant, March 28, 2003, Pp. 2-3.  
19 The district court was also presented with information that Myers had been  
20 located at the Comfort Inn, had registered under a fictitious name, and had  
21 been refusing maid service. Trans. of App. for Search Warrant, March 28,  
22 2003, Pp. 2-3. Kaiser also testified that Myers had stayed at the Comfort Inn  
23 3 to 5 times in the past year, usually 2 days at a time. Trans. of App. for  
24 Search Warrant, March 28, 2003, p. 3, lines 17-18.  
25  
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1 The district court was also presented with information that Myers had  
2 complained about the TV not working but refused to let maintenance enter the  
3 room. Trans. of App. for Search Warrant, March 28, 2003, p. 3, lines 19-21.  
4 Later, Myers requested assistance, prior to being given permission to enter;  
5 the maintenance man could hear a commotion like Myers was moving things  
6 into the bathroom. Trans. of App. for Search Warrant, March 28, 2003, Pp. 3-  
7 4. Myers yelled for the man to and remained in the bathroom throughout the  
8 time the maintenance was in Myer's room. Trans. of App. for Search Warrant,  
9 March 28, 2003, Pp. 3-4. Finally, Detective Kaiser stated that during his  
10 initial conversation with Brelje on March 25, 2008, he learned that Myers  
11 would be traveling to Belcourt to hook up with someone to buy crystal  
12 methamphetamine to bring back to Bismarck. Trans. of App. for Search  
13 Warrant, March 28, 2003, p. 4, lines 11-18.

16 Myer's counsel's views the information about going to Belcourt as being  
17 inconsistent with going home. That Myer's could not go home and to  
18 Belcourt. Contrary to counsel's position, the information can just as easily be  
19 interpreted that Myers went home before going to Belcourt which would  
20 explain why law enforcement had been unable to locate Myers after getting  
21 the initial search warrant on March 25, 2003.

23 Again, in reviewing the information presented to the district court, the  
24 reviewing court must look at the totality of the circumstances. "Although  
25 each piece of information may not alone be sufficient to establish probable  
26 cause and some of the information may have an innocent explanation,  
27



1 'probable cause is the sum total of layers of information and the synthesis of  
2 what the police have heard, what they know, and what they observed as  
3 trained officers.' ” State v. Thieling, 2000 ND 106, ¶ 7, 611 N.W.2d 861,  
4 quoting, State v. Damron, 1998 ND 71, ¶ 7, 575 N.W.2d 912).

6 Under the totality of the circumstances, the evidence presented to the  
7 district court established that there was probable cause to warrant that a person  
8 of reasonable caution would believe evidence of drug use and trafficking  
9 would be found in Myer’s hotel room. As such, there was a substantial basis  
10 for the district court's conclusion that probable cause existed to search Myer's  
11 hotel room.

13 Even if the upon review, this court finds that there was insufficient  
14 evidence to establish probable cause for the issuance of either of the warrants,  
15 the search is still valid under the good faith exception. Under the good faith  
16 exception to the exclusionary rule, suppression is not the appropriate remedy  
17 for an illegal search if an officer's reliance on the search warrant was  
18 objectively reasonable. State v. Utvick, 2004 ND 36, ¶ 26, 675 N.W.2d 387.  
19 The good faith inquiry focuses upon whether a reasonably well-trained officer  
20 would have known that the search was illegal despite the magistrate's  
21 authorization. State v. Van Beek, 1999 ND 53, ¶ 25, 591 N.W.2d 112.

23 When reviewing an officer's reliance upon a warrant, the reviewing court  
24 must determine whether the underlying documents are devoid of factual  
25 support, not merely whether the facts they contain are legally sufficient.  
26 United States v. McKneely, 6 F.3d 1447, 1454 (10th Cir.1993).  
27

1 Under the facts of this case, the good faith exception would apply because  
2 Deputy Kaiser's reliance on the search warrant was objectively reasonable.  
3 There is no evidence that the issuing magistrate was misled by false  
4 information or failed to act in a neutral manner. The warrant itself was not  
5 facially deficient. Detective Kaiser presented particularized facts in the  
6 supporting of the warrant which he gathered from Brelje, and a confidential  
7 informant. Brelje was stopped and subsequently met with Detective Kaiser  
8 providing him with information that he had gotten his share of the drugs  
9 shortly before he was pulled over at approximately 11:00 p.m. and that  
10 Chrisikos and Myers had gotten equal shares and had taken them back to their  
11 respective residences. Trans. of App. for Search Warrant, March 25, 2003,  
12 Pp. 3-4. The information was not so lacking in indicia of probable cause that  
13 Detective Kaiser's belief in its existence was entirely unreasonable. Therefore,  
14 Detective Kaiser reasonably relied on the issuing magistrate's determination  
15 that the search warrant was justified.  
16

17  
18  
19 **III. An ineffective assistance of counsel claim cannot be established**  
20 **absent a showing of actual prejudice.**

21 Myer's second argument for post conviction relief is that his due process  
22 rights were violated the information had not be amended to reflect the trial  
23 court's pretrial order that the paraphernalia counts be joined. As a result the  
24 defendant stood trial for two counts of possession of drug paraphernalia  
25 instead of one.  
26  
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1 As stated above, in order to prove an ineffective assistance claim, the  
2 petitioner must show actual prejudice, not merely possible prejudice.” Roth v.  
3 State, 2007 ND 112, ¶ 10, 735 N.W.2d 882. Here Myer’s current counsel  
4 acknowledges that in his brief that “no actual prejudice to Mr. Myers has been  
5 demonstrated in this record.” Brief of Appellant, ¶ 48. Thus, Myers has  
6 failed to meet his burden.  
7

8 **CONCLUSION**

9 Based upon the foregoing, the State requests that the district court’s  
10 order denying post conviction relief from June 11, 2008, be affirmed.  
11

12 Dated this 15<sup>th</sup> day of October, 2008.

13  
14   
15 Cynthia M. Feland  
16 Burleigh County Assistant State’s Attorney  
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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

State of North Dakota, )  
)  
Plaintiff-Appellee )  
)  
)  
-vs- )  
)  
Daniel J. Myers, ) Supreme Ct. No. 20080186  
)  
Defendant-Appellee, ) District Ct. No. 08-03-K-1839  
..... ) SA File No. F 282-03-04  
STATE OF NORTH DAKOTA )  
) ss  
COUNTY OF BURLEIGH )

Kim Bless, being first duly sworn, depose and say that I am a United States citizen over 21 years old, and on the 17<sup>th</sup> day of October, 2008, I deposited in a sealed envelope a true copy of the attached:

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

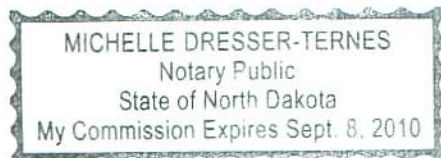
in the United States mail at Bismarck, North Dakota, postage prepaid, addressed to:

JUSTIN VINJE  
ATTORNEY AT LAW  
523 NORTH 4<sup>TH</sup> STREET, STE. #3  
BISMARCK, ND 58501

which address is the last known address of the addressee.

Kim Bless  
Kim Bless

Subscribed and sworn to before me this \_\_\_\_ day of October, 2008.



Michelle Dresser-Ternes  
Michelle Dresser-Ternes, Notary Public  
Burleigh County, North Dakota  
My Commission Expires: 9-8-2010.