20090098

20090099

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff-Appellee, -vs- Eric Wayne Loh, Defendant-Appellant,	Supreme Ct. No. 20090098, 20090099 District Ct. No. 08-07-K-2752, 08-07-K-2753 SA File No. F879-07-12, F880-07-12

BRIEF OF PLAINTIFF-APPELLEE

APPEAL FROM
CRIMINAL JUDGMENTS
Burleigh County District Court
South Central Judicial District
The Honorable Robert O. Wefald, Presiding

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STATEMENT OF THE ISSUES

I. Whether the district court properly denied Loh's Motion to Suppress because a warrant is not required for the use of a wire

II. Whether the district court imposition of twenty year mandatory minimum sentences was proper

STATEMENT OF THE CASE

The Defendant, Eric Wayne Loh (hereinafter "Loh"), was charged with two counts of Delivery of Methamphetamine in separate informations. Appellant's Appendix, pp. 5-6. Each count was a third or subsequent offense. Appellant's Appendix, pp. 5-6. Loh filed motions to suppress evidence in both cases on September 11, 2008. Appellant's Appendix, pp. 7-8. These motions were denied on September 26, 2008. Appellant's Appendix, pp. 9-10; and Trans. of Hearing, p. 15, September 26, 2008.

On October 1, 2008, Loh filed objections to the imposition of the twenty year mandatory minimum sentence. Appellee's Appendix, pp. 38-40. Loh entered conditional pleas on October 2, 2008, reserving his right to appeal the denial of his suppression motions. Trans. of Change of Plea, p. 2, October 2, 2008; Conditional Plea (08-07-K-2752 Docket No. 41; 08-07-K-2753 Docket No. 40).

Loh was sentenced to twenty years of imprisonment on each count, the sentences to run concurrently. Appellant's Appendix, pp. 11-14. Notices of appeal in both cases were timely filed by Loh. Appellant's Appendix, pp. 15-16. This appeal follows.

STATEMENT OF FACTS

Loh was charged with delivering methamphetamine on August 5, 2007, and October 8, 2007. Appellant's Appendix, pp. 5-6. On both occasions, Loh entered the car of a confidential informant and sold the informant methamphetamine for two hundred dollars. Trans. of Hearing, pp. 3-4, September 26, 2008. The confidential informant was wearing a wire and officers were listening to and recording the conversations between Loh and the informant. Trans. of Hearing, p. 3, lines 21-25, September 26, 2008.

On September 11, 2008, Loh filed motions to suppress all evidence of the wire. Appellant's Appendix, pp. 7-8. Loh argued that the evidence should be suppressed pursuant to Article I, §§ 8 and 12 of the North Dakota Constitution, because the officers did not obtain a warrant prior to using the wire. Trans. of Hearing, pp. 4-5, September 26, 2008. The district court denied Loh's motions, explaining, "The Court finds as a matter of constitutional law that Loh had no right to privacy when he put himself in the CI's vehicle for the purpose of selling her methamphetamine." Appellant's Appendix, p. 10.

Loh entered conditional guilty pleas, reserving the right to appeal the denial of his motions. Trans. of Change of Plea, pp. 2-3, October 2, 2008. Loh also filed objections to the imposition of the twenty year mandatory minimum sentence for each count. Appellee's Appendix, pp. 38-41.

In Burleigh County Criminal Case No. 08-95-K-3202, Loh pled guilty to one count of delivery of marijuana stemming from a sale of marijuana on

May 13, 1995 and one count of delivery of marijuana and methamphetamine, stemming from the sale of methamphetamine on May 17, 2005. Appellee's Appendix, pp. 17-37; and Trans. of Sentencing, p. 2, lines 4-14, February 25, 2009. Loh argued that the conviction for delivery of marijuana should not enhance his sentence on the current charges, and that he should only be given a five year minimum mandatory sentence for a second offense. Trans. of Sentencing, pp. 4-5, February 25, 2009. The district court rejected this argument and imposed the twenty year minimum mandatory sentence for each count, stating, "[T]he Court has no choice in this matter. The legislature has set the rules. The Court has to follow those." Trans. of Sentencing, p. 5, lines 10-16, February 25, 2009.

ARGUMENT

I. The district court properly denied Loh's Motion to Suppress because a warrant is not required for the use of a wire

The North Dakota Supreme Court's standard of review for a district court's denial of a motion to dismiss is well established:

> [T]his Court defers to the district court's findings of fact and resolves conflicts in testimony in favor of affirmance. This Court will affirm a district court decision regarding a motion to suppress if there is sufficient competent evidence fairly capable of supporting the district court's findings, and the decision is not contrary to the manifest weight of the evidence. Questions of law are fully reviewable on appeal, and whether a finding of fact meets a legal standard is a question of law.

State v. Salter, 2008 ND 230, ¶ 5, 758 N.W.2d 702 (quoting *City of Devils Lake v. Grove*, 2008 ND 155, ¶ 7, 755 N.W.2d 485). In this case, the district court's denial of Loh's motions to suppress was not contrary to the manifest weight of the evidence. By statute, the police were not required to obtain a court order or warrant prior to using the wire. N.D.C.C. § 29-29.2-05. In addition, Loh had no reasonable expectation of privacy in the confidential informant's vehicle and had no reasonable expectation that the informant was not wearing a wire. Thus, the district court properly denied Loh's motions and his convictions should be affirmed.

A. The Century Code allows police to use a wire without first obtaining a warrant or court order

Police need not obtain a warrant or court order before using a wire. N.D.C.C. § 29-29.2-02 explains how an ex parte order can be issued for wiretapping, eavesdropping, or both. N.D.C.C. § 29-29.2-05 states:

> This chapter does not apply to the interception, disclosure, or use of a wire, electronic, or oral communication if the person intercepting, disclosing, or using the wire, electronic, or oral communication
>
> 1. Was a person acting under color of law to intercept a wire, electronic, or oral communication and was a party to the communication or one of the parties to the communication had given prior consent to such interception; or
>
> 2. Was a party to the communication or one of the parties to the communication had given prior consent to such interception and such communication was not intercepted for the purpose of committing a crime or other unlawful harm.

N.D.C.C. § 29-29.2-05. The North Dakota Supreme Court discussed this statute in *State v. Kummer*, 481 N.W.2d 437 (N.D. 1992).

In *Kummer*, an informant cooperating with police wore a wire while selling cocaine to the defendant in a hotel room. 481 N.W.2d at 438-39. The Court explained that N.D.C.C. § 29-29.2-05 parallels the federal eavesdropping statute. *Id.* at 439 (citing 18 U.S.C. § 2511(2)(c)). The Court looks to the federal courts' interpretation of the federal statute for guidance in interpreting N.D.C.C. § 29-29.2-05. *Id.* (citing *Land Office Co. v. Clapp-Thomssen Co.*, 442 N.W.2d 401, 403 (N.D. 1989)). Pursuant to federal interpretation of the statute, the prosecution bears the burden of proving that the informant's consent was voluntary and uncoerced. *Id.* (citing *United States v. Kolodziej*, 706 F.2d 590, 593 (5th Cir. 1983)). This burden can be met by "showing that the informant proceeded with the transaction after knowing that it would be monitored." *Id.* at 439-40 (citing *Kolodziej*, 706 F.2d at 593; *United States v. Jones*, 839 F.2d 1041, 1050 (5th Cir. 1988);

Annot., Interception of Telecommunication By or With Consent of Party as Exception . . . To Federal Proscription of Such Interceptions, 67 A.L.R. Fed. 429, 433 (1984)).

In *Kummer*, there was no dispute that the informant continued with the transaction, knowing that it was being monitored. *Id.* at 440. Thus, the informant's consent was established and the evidence related to the wire was admitted. *Id.* The Court also concluded that the defendant's Fourth Amendment rights were not violated. *Id.* at 440-41. The defendant did not have a reasonable expectation of privacy during the three to five minute time period he spent in the hotel room. *Id.* (citing *Stoner v. California*, 376 U.S. 483, 490 (1964); *People v. Rada*, 532 N.Y.S.2d 973, 976 (1988)). Thus, the evidence of the wire was properly admitted. *Id.* at 441.

In these cases, like in *Kummer*, there is no dispute that the confidential informant was cooperating with police, wore a wire, and knew that the transactions were being recorded. Appellant's Brief, pp. 2-3. Thus, the confidential informant's consent was established and a foundation was laid for the admission of evidence related to the wire. *Id.* at 439-40 (citing *Kolodziej*, 706 F.2d at 539; *Jones*, 839 F.2d at 1050; 67 A.L.R. Fed. at 433). In addition, Loh did not have a reasonable expectation of privacy when he sold methamphetamine to the confidential informant in the informant's vehicle.

B. Loh had no reasonable expectation that the confidential informant was not wearing a wire

The United States Supreme Court has previously stated that a defendant has no reasonable expectation that his associate is not wearing a wire or cooperating with police. *United States v. White*, 401 U.S. 745, 749 (1971) (citing *Hoffa v. United States*, 385 U.S. 293 (1966)). The Court stated that the Fourth Amendment "affords no protection to a 'wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.'" *Id.* (quoting *Hoffa*, 385 U.S. at 302). The Court went on to explain, "If the law give no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State's case." *Id.* at 752 (citing *Lopez v. United States*, 373 U.S. 427 (1963)). No warrant is required when an informant communicates with the police, when an officer or informant conceals his identity and purchases narcotics, or when an officer or informant wears a wire or carries recording equipment. *Id.* at 749 (citing *Lewis v. United States*, 385 U.S. 206 (1966); *Lopez*, 373 U.S. 427). Thus, Loh had no reasonable expectation that the confidential informant was not wearing a wire or cooperating with police. The police were not required to obtain a warrant or ex parte order prior to using the wire.

C. The Court should not interpret the North Dakota Constitution to apply more broadly than the Fourth Amendment

Loh contends that the North Dakota Supreme Court should construe the North Dakota Constitution to provide greater protection from unreasonable search and seizure than the United States Supreme Court provides under the Fourth Amendment. Appellant's Brief, p. 5 (citing *State v. Lunde*, 2008 ND 142, ¶ 17, 752 N.W.2d 630). Loh also asks this court to strike down N.D.C.C. § 29-29.2-05 as unconstitutional. *Id.*

While the North Dakota Supreme Court has stated that "[i]t is axiomatic our state constitution may provide greater protections than its federal counterpart," the Court has often chosen not to interpret Article I, § 8 of the North Dakota Constitution more broadly than the United States Supreme Court interprets the Fourth Amendment. See, e.g., *State v. Lunde*, 2008 ND 142, ¶¶ 17-18, 752 N.W.2d 630 (explaining that the North Dakota Supreme Court has not decided whether the state constitution recognizes the good-faith exception to the exclusionary rule) (citing *State v. Utvick*, 2004 ND 36, ¶ 28, 675 N.W.2d 387); *State v. Dodson*, 2003 ND 187, ¶ 21, 671 N.W.2d 825; *State v. Van Beek*, 1999 ND 53, ¶ 26 n.4, 591 N.W.2d 112; *State v. Hughes*, 1999 ND 24, ¶ 5, 589 N.W.2d 912; *State v. Herrick*, 1999 ND 1, ¶¶ 26-27, 588 N.W.2d 847; *State v. Lewis*, 527 N.W.2d 658, 663 (N.D. 1995); *State v. Mische*, 448 N.W.2d 415, 422 (N.D. 1989); *State v. Thompson*, 369 N.W.2d 363, 372 (N.D. 1985)); and *State v. Wanzek*, 1999 ND 163, ¶ 20, 598 N.W.2d 811 (refusing to apply N.D. Const. Art. I, § 8 differently from the

Fourth Amendment when distinguishing between an arrest of a person in a car and an arrest of a recent occupant of a car).

In *Kummer*, the Court looked to federal precedent to interpret the state's eavesdropping statute and whether the defendant had a reasonable expectation of privacy. *State v. Kummer*, 481 N.W.2d 437, 439-41 (N.D. 1992) (citing *Stoner v. California*, 376 U.S. 483, 490 (1964); *People v. Rada*, 532 N.Y.S.2d 973, 976 (1988); *United States v. Jones*, 839 F.2d 1041, 1050 (5th Cir. 1988); *States v. Kolodziej*, 706 F.2d 590, 593 (5th Cir. 1983)). It is thus proper for the Court to look to federal precedent to determine how to interpret state statutes and the state constitution.

As justification for his contention that Article, I, § 8 should provide greater protections than the Fourth Amendment, Loh cites a recently decided Montana case, *State v. Goetz*, 2008 MT 296, 345 Mont. 421, 191 P.3d 489. *Goetz* consolidated two cases, *State v. Goetz* and *State v. Hamper*. *Id.* at ¶¶ 4-8. In *Hamper*, a confidential informant, wearing a wire, purchased marijuana from the defendant. *Id.* at ¶ 7. The transaction took place in the informant's vehicle. *Id.* The police did not obtain a warrant for the use of the wire. *Id.* The Montana Supreme Court determined that the police should have obtained a warrant and suppressed the evidence related to the wire under the state constitution. *Id.* at ¶ 54.

Article II, § 10 of the Montana Constitution states, "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." *Id.* at ¶ 14

(citing Mont. Const. art. II, § 10). Article II, § 11 of the Montana Constitution mirrors the language of the Fourth Amendment. *Id.* The Montana Supreme Court interprets Section 11 in conjunction with Section 10 when dealing with a search and seizure issue that implicates the right to privacy. *Id.* The Court has stated previously, "In light of the constitutional right to privacy to which Montanans are entitled, we have held that the range of warrantless searches which may be lawfully conducted under the Montana Constitution is narrower than the corresponding range of searches that may be lawfully conducted pursuant to the federal Fourth Amendment." *Id.* (quoting *State v. Hardaway*, 2001 MT 252, ¶ 35, 307 Mont. 139, ¶ 35, 36 P.3d 900, ¶ 35). The defendants in *Goetz* did not dispute that the use of the wires did not violate the Fourth Amendment. *Id.* at ¶ 13 (citing *United States v. White*, 401 U.S. 745 (1971).

Goetz is inapposite to these cases. The result in *Goetz* turns on the right to privacy contained in Article II, § 10 of the Montana Constitution. *Id.* ¶ 54. The North Dakota Constitution has no such right to privacy provision. Article I, § 8 of the North Dakota Constitution mirrors the language of the Fourth Amendment. N.D. Const. art. I, § 8; U.S. Const, amend. IV. In addition, the North Dakota Supreme Court has previously looked to federal precedent when deciding whether the use of a wire requires a warrant or violates a reasonable expectation of privacy. *State v. Kummer*, 481 N.W.2d 437, 439-41 (N.D. 1992) citing *Stoner v. California*, 376 U.S. 483, 490 (1964); *United States v. Jones*, 839 F.2d 1041, 1050 (5th Cir. 1988); *United States v. Kolodziej*, 706 F.2d 590, 593 (5th Cir. 1983)).

Loh has not provided any applicable case law showing that the North Dakota Supreme Court should interpret Article I, § 8 to apply any more broadly than it has in the past, or more broadly than the Fourth Amendment. The North Dakota Supreme Court has also previously stated in dicta that a passenger in a vehicle does not have a reasonable expectation of privacy in the vehicle. *State v. Huether*, 453 N.W.2d 778, 782 n.2 (N.D. 1990) (citing *United States v. Veatch*, 674 F.2d 1217 (9th Cir. 1981)). Thus, Loh had no reasonable expectation of privacy in the informant's vehicle, or a reasonable expectation that the informant was not wearing a wire. Because Loh had no reasonable expectation of privacy, and N.D.C.C. 29-29.2-05 provides that a warrant or court order is not required for the use of a wire, the district court properly denied Loh's motions to suppress and his convictions should be affirmed.

II. The district court's imposition of a twenty year mandatory minimum sentence was proper

Loh argues that only his prior conviction for delivery of methamphetamine, and not his conviction for delivery of marijuana, can be used to enhance his sentence in these cases. Appellant's Brief, p. 10. Loh acknowledges that the North Dakota Supreme Court has previously decided this issue in the State's favor in *State v. Laib*, 2002 ND 95, ¶¶ 10-17, 644 N.W.2d 878. *Laib* was properly decided. Thus, Loh's sentences should be upheld.

Laib contended that a conviction for delivery of controlled substances is only a prior conviction for the purposes of N.D.C.C. § 19-03.1-23(1)(a) if it was for the delivery of "a controlled substance classified in schedule I or II which is a narcotic drug, or methamphetamine." *Id.* at ¶ 12. *Laib* argued that marijuana-related offenses should not be used to enhance sentences for subsequent methamphetamine-related offenses, because marijuana is not a narcotic drug. *Id.*; N.D.C.C. § 19-03.1-01(17) & (18). Loh's arguments here mirror those made by the defense in *Laib*. Appellant's Brief. pp. 10-11.

In *Laib*, the North Dakota Supreme Court stated that "[c]onstruction of a criminal statute is a question of law fully reviewable by this Court." *State v. Laib*, 2002 ND 95, ¶ 13, 644 N.W.2d 878 (citing *State v. Rambousek*, 479 N.W.2d 832, 834 (N.D. 1992)). The Court's goal is to ascertain the Legislature's intention. *Id.* (citing *State v. Brossart*, 1997 ND 119, ¶ 14, 565 N.W.2d 752). First, the Court gives the statutory language its plain, ordinary, and commonly understood meaning. *Id.* (citing *State v. Thill*, 468 N.W.2d 643, 646 (N.D. 1991)). The language is interpreted to give meaning and effect to each word, phrase and sentence. *Id.* (citing *Bruns v. N.D. Workers Comp. Bureau*, 1999 ND 116, ¶ 16, 595 N.W.2d 298; *Little v. Graff*, 507 N.W.2d 55, 59 (N.D. 1993)). No part of the statute is interpreted as mere surplusage. *Id.* (citing *Bruns*, 1999 ND 116, ¶ 16, 595 N.W.2d 298; *Little*, 507 N.W.2d at 59).

A statute is ambiguous if it is "susceptible to differing but rational meanings." *Id.* (citing *State v. Rambousek*, 479 N.W.2d 832, 834 (N.D.

1992)). The Court can look to extrinsic aids when interpreting ambiguous statutes. *Id.* (citing *Rambousek*, 479 N.W.2d at 834). Ambiguous statutes are also construed in favor of the defendant. *Id.* (citing *State v. Rubey*, 2000 ND 119, ¶ 16, 611 N.W.2d 888; *State v. Brossart*, 1997 ND 119, ¶ 14, 565 N.W.2d 752; *State v. Larson*, 479 N.W.2d 472, 473 (N.D. 1992)).

The Court explained that N.D.C.C. § 19-03.1-23(1)(a) is not ambiguous. *Id.* at ¶ 14. Section 19-03.1-23(1)(a) must be read in conjunction with N.D.C.C. § 19-03.1-23(5), which states, in pertinent part, "A violation of this chapter or a law of another state or the federal government which is equivalent to an offense under this chapter committed while the offender was an adult and which resulted in a plea or finding of guilt must be considered a prior offense under subsections 1, 3, and 4." *Id.*: N.D.C.C. § 19-03.1-23(5). This provision clears up any potential ambiguity in N.D.C.C. § 19-03.1-23(1)(a). *Id.*

According to the plain language of the statute, a conviction for delivery of marijuana violates N.D.C.C. ch. 19-03.1, and is thus a prior offense for purposes of N.D.C.C. § 19-03.1-23(1)(a). *Id.* The Court stated, "It is impossible to give a sensible construction to the phrase, 'violation of this chapter,' and conclude this language somehow contemplates only prior offenses involving a schedule I or II narcotic drug or methamphetamine." *Id.* The Court thus upheld the imposition of the twenty year minimum mandatory sentence. *Id.* at ¶ 17.

Loh contends that N.D.C.C. § 19-03.1-23(5) "is simply a clarification that the law of another state or the federal government which is the equivalent to an offense under Chapter 19-03.1 counts the same as a conviction under Chapter 19-03.1." Appellant's Brief, p. 11. However, this reading of N.D.C.C. § 19-03.1-23(5) renders the first part of the section, "A violation of this chapter," mere surplusage. The Court will not "adopt a construction which would render part of the statute mere surplusage." *State v. Laib*, 2002 ND 95, ¶ 13, 644 N.W.2d 878 (citing *Bruns v. N.D. Workers Comp. Bureau*, 1999 ND 116, ¶ 16, 595 N.W.2d 298; *Little v. Graff*, 507 N.W.2d 55, 59 (N.D. 1993)).

According to Loh. N.D.C.C. § 19-03.1-23(5) deals only with the law of other states and the federal government, but not with prior violations of N.D.C.C. ch. 19-03.1. Appellant's Brief, pp. 11. That is not consistent with the plain reading of the statute. Further, the Court has never given the impression that is how it should be interpreted. *State v. Laib*, 2002 ND 95, ¶ 13, 644 N.W.2d 878.

The application of *Laib* to this case shows that the district court imposed the proper mandatory minimum sentence. Loh has two prior convictions for delivery of controlled substances. Appellee's Appendix, pp. 17-37; and Trans. of Sentencing, p. 2, lines 4-14, February 25, 2009. The fact that one offense involved only marijuana and the other involved methamphetamine is irrelevant. *State v. Laib*, 2002 ND 95, ¶ 14, 644 N.W.2d 878. Because both offenses violated N.D.C.C. ch. 19-03.1; they are prior

offenses for purposes of N.D.C.C. § 19-03.1-23(1)(a). *Id.* Thus, Loh's offenses in the cases on appeal are his third and fourth. A twenty year minimum mandatory sentence was required for each offense. N.D.C.C. §§ 19-03.1-23(1)(a)(2). 19-03.1-23(5). The district court imposed the proper sentence and its decision should be upheld.

CONCLUSION

Based upon the foregoing, the State respectfully requests that Loh's convictions and sentences be affirmed.

Dated this 22nd day of July, 2009.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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STATE OF NORTH DAKOTA COUNTY OF BURLEIGH	) ss	

Kim Bless, being first duly sworn, depose and say that I am a United States citizen over 21 years old, and on the 23rd day of July, 2009, I deposited in a sealed envelope a true copy of the attached:

1. Brief of Plaintiff-Appellee
2. Appendix-Appellee
3. Consent to Appearance Under Limited Practice Rule
4. Affidavit of Mailing

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

MICHAEL R. HOFFMAN
ATTORNEY AT LAW
PO BOX 1056
BISMARCK, ND 58502-1056

which address is the last known address of the addressee.

Kim Bless
Kim Bless

Subscribed and sworn to before me this 23rd day of July, 2009.

MICHELLE DRESSER-TERNES
Notary Public
State of North Dakota
My Commission Expires Sept. 8, 2010

Michelle Dresser-Ternes
Michelle Dresser-Ternes, Notary Public
Burleigh County, North Dakota.