

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

FILED
INTERMEDIATE APPEAL
CLERK OF SUPREME COURT

SEP 9 2013

State of North Dakota,

Plaintiff-Appellee,

-vs-

Wayne Otto,

Defendant-Appellant,

STATE OF NORTH DAKOTA

Supreme Ct. No. 20130096

District Ct. No. 08-2012-CR-01764

SA File No. F749-12-07

BRIEF OF PLAINTIFF-APPELLEE

APPEAL FROM THE JANUARY 8, 2013
ORDER ON MOTION TO SUPPRESSBurleigh County District Court
South Central Judicial District
The Honorable Soma M. Anderson, PresidingDawn M. Deitz
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Courthouse, 514 East Thayer Avenue
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STATEMENT OF THE ISSUES

Whether the District Court erred as a matter of law in denying the Appellant's
Motion to Suppress.

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STATEMENT OF THE CASE

On or about July 26, 2012, the State filed a complaint alleging Possession of Methamphetamine with Intent to Deliver (3rd offense), a class A felony, Possession of Marijuana with Intent to Deliver, a class B felony, and Possession of Drug Paraphernalia, a class C felony. Appellant Appendix at 7-9. A preliminary hearing was held and probable cause established to bind the matter over for arraignment.

On or about October 23, 2012, the Defendant filed a motion to suppress evidence requesting suppression of all evidence seized from law enforcements' entry into the camper. Id. at 13-19. The State filed a response arguing exigent circumstances and inevitable discovery. Id. at 20-24. A hearing was held on December 21, 2012. At that hearing, testimony was elicited from Officer Scarlett Vetter and Sergeant Jesse Hellman of the Bismarck Police Department. See, Motion Transcript (Trans.). Officer Vetter testified in length concerning the area the camper was observed in as well as her belief that a burglary was in progress. Trans. at 3-19. During Sergeant Hellman's testimony, he described his concern for the area in which they were in with the camper as well as the features of a camper. Id. at 19-36. Sergeant Hellman testified to his concerns regarding bullet penetrability of the camper as well as the quick mobility option of a camper. Id. at 23-24.

At the conclusion of testimony, the District Court heard closing arguments from the parties. Id. at 37-41. Otto argued that officers' entrance into the camper was a warrantless search and therefore unconstitutional and

1 all evidence subsequently seized should be suppressed. Id. at 38-41. In
2
3 addition to the arguments set forth in its brief, the State argued the application
4 of the automobile exception to the warrant requirement. Id. at 37-38. The
5 District Court took the matter under advisement. On January 8, 2013, the
6 District Court issued its Order on the motion to suppress. Appellant Appendix
7 at 33-35. The District Court ruled exigent circumstances existed and denied
8 the motion. Id.
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STATEMENT OF THE FACTS

On or about July 26, 2012 at approximately 3:30 am, Officer Scarlet Vetter of the Bismarck Police Department observed a camper with an open door and what appeared to be a flashlight moving around inside on the 2000 block of Frontier Drive in Bismarck, ND. Given the area being primarily used for commercial purposes and time of day, officer suspicion was raised and Officer Vetter radioed for backup. Officer Vetter believes a burglary was in process. Officer Vetter waited for backup and while doing so, maintained a visual on the camper.

Once backup arrived, officers approached the camper. Officers made contact with Loretta Stroud. When Ms. Stroud exited the camper, officers observed a strong odor of marijuana. Officers asked Ms. Stroud whether additional individuals were inside the camper to which she replied in the negative. While officers were questioning Ms. Stroud, officers observed movement from within the camper. Eventually, the Defendant, Wayne Otto, exited the camper upon law enforcement's command. Detective Mike Bolme had responded to the scene and, based upon the information that was relayed to him to include the odor of marijuana when Stroud exited the camper, a determination was made to apply for a search warrant.

Sergeant Hellman had also responded to the scene. While being briefed on the situation, he inquired whether the camper had been cleared. Based upon the location of the camper, the incorrect information previously relayed, and concerns for officer safety, Sergeant Hellman conducted a

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protective sweep of the camper. This information was relayed to officers who were en route to obtaining a search warrant. A search warrant was applied for and was granted by Honorable Judge Bruce Romanick. Officers executed the search warrant and found a substantial amount of marijuana, methamphetamine, and materials indicative to the distribution of controlled substances.

1
2 **ARGUMENT**

3 The North Dakota Supreme Court summarized the standard that
4 applies when reviewing a trial court's decision on a motion to suppress as
5 follows:

6 In reviewing a district court's decision on a motion to
7 suppress evidence, we defer to the district court's findings
8 of fact and resolve conflicts in testimony in favor of
9 affirmance. We will affirm a district court's decision on a
10 motion to suppress if there is sufficient competent evidence
11 fairly capable of supporting the trial court's findings, and
12 the decision is not contrary to the manifest weight of the
13 evidence. Our standard of review recognizes the
14 importance of the district court's opportunity to observe the
15 witnesses and assess their credibility. Questions of law are
16 fully reviewable on appeal, and whether a finding of fact
17 meets a legal standard is a question of law.

18 State v. Doohen, 2006 ND 239, ¶ 8, 724 N.W.2d 158, quoting State v. Graf,
19 2006 ND 196, ¶ 7, 721 N.W.2d 381.

20 The Fourth Amendment of the United States Constitution and Article
21 I, section 8, of the North Dakota Constitution provide for protection against
22 unreasonable searches and seizures by the government. State v. Gregg, 2000
23 ND 154, ¶ 22, 615 N.W.2d 515. A warrantless search and seizure is
24 presumptively unreasonable. City of Fargo v. Lee, 1998 ND 126, ¶ 8, 580
25 N.W.2d 580. Warrantless searches are unreasonable unless they fall within
26 one of the recognized exceptions to the warrant requirement. State v. Genre,
27 2006 ND 77, ¶ 17, 712 N.W.2d 624.

Exigent circumstances qualify as an exception to the warrant
requirement. State v. Huber, 2011 ND 23, ¶ 12, 793 N.W.2d 781, 784.

1 Exigent circumstances are analogous to “an emergency situation requiring
2 swift action to prevent imminent danger to life or serious damage to property,
3 or to forestall the imminent escape of a suspect or destruction of evidence.”
4 State v. DeCoteau, 1999 ND 77, ¶ 15, 592 N.W.2d 579.

6 There are three requirements that must be met in order for the
7 emergency exception to apply. Huber, 2011 ND 23, ¶ 13, 793 N.W.2d 781,
8 785. An objective standard must be used “in evaluating an officer's
9 reasonable belief that an emergency existed.” Id. at ¶ 14. “Whether an
10 objective officer would believe an emergency existed is a question of fact.”
11 State v. Gill, 2008 ND 152, ¶ 20, 755 N.W.2d 454. When reviewing a district
12 court's finding of exigent circumstances, this Court reviews the district court's
13 findings of fact, giving due weight to the inferences drawn from those facts by
14 judges and law enforcement. State v. Morin, 2012 ND 75, ¶9. Whether the
15 facts ultimately constitute exigent circumstances is reviewed de novo. State v.
16 Morin, 2012 ND 75, ¶9. In a United States Supreme Court case, the Court
17 held that under certain circumstances, a protective sweep incident to arrest
18 was constitutionally permissible. Maryland v. Buie, 949 U.S. 325, 327
19 (1990). A “protective sweep” was classified as a “quick and limited search of
20 the premises, incident to an arrest and conducted to protect the safety of police
21 officers or others.” Id. A protective sweep is permissible if the officer has a
22 reasonable belief, based upon specific articulable facts which caused the
23 officer to believe that the area swept harbored an individual posing a danger to
24 the officer or others. Id.

1 The first prong of the emergency exception dictates “[t]he police must
2 have reasonable grounds to believe that there is an emergency at hand and an
3 immediate need for their assistance for the protection of life or property.”
4 Huber, 2011 ND 23, ¶ 13, 793 N.W.2d 781, 785. This prong is met under the
5 facts of the case currently before this Court. Officer Vetter noticed suspicious
6 activity at a fifth wheel camper in an area that is prone to high crime. The
7 officer noticed light from a flashlight moving around this camper and the door
8 was open. She believed a burglary to be in progress. The officer called for
9 backup and never lost visual contact with the camper while waiting for
10 additional officers.
11

12 When additional officers arrived, they approached the camper and
13 spoke with Loretta Stroud. Ms. Stroud exited the camper. At that time, the
14 officers detected a strong odor of raw marijuana coming from the camper.
15 Additionally, Ms. Stroud told the officers that no one else was in the camper.
16 Because of movement in the camper, the officers ascertained this information
17 to be false. The defendant, Mr. Otto, then exited the camper. He refused the
18 Officers’ request to search the camper so based on the overwhelming odor of
19 raw marijuana emitted from the camper, Detective Bolme left to obtain a
20 search warrant.
21

22 During this time, Sergeant Hellman discerned that no one had
23 performed a safety sweep of the camper and surrounding area. Noting the
24 surroundings, there would be little opportunity for cover in the event someone
25 wished to harm the officers. There were a number of reasons the sergeant had
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1 to fear for officer safety. They were in a neighborhood prone to high crime.
2
3 Ms. Stroud had already claimed no one was in the camper, a fact the officers
4 later learned to be false. There could still be additional people in the camper.
5 The shop that the camper was hooked up to for electricity was a known drug
6 hangout. At this time, officers performed a safety sweep of the camper and
7 found no additional people in the camper. They did, however, notice large
8 quantities of marijuana and methamphetamine. After the search warrant was
9 executed, officers also found drug paraphernalia.
10

11 Using an objective standard, these circumstances satisfy the first prong
12 of the test. The officers were in an area that offered little to no shelter in the
13 event someone was hiding in the camper and wished to harm the officers.
14 There were no structures to hide behind in the event something dangerous
15 would happen. Additionally, the codefendant had already lied to officers
16 about any additional persons in the camper. Officers had no way of knowing
17 if any dangerous person was still in the camper. When objectively
18 considering what was known by the officer prior to entry, it is clear there was
19 cause for valid concern for officer safety.
20

21 The second prong of the exigent circumstance analysis requires “[t]he
22 search must not be primarily motivated by intent to arrest and seize evidence.”
23 Huber, 2011 ND 23, ¶ 13, 793 N.W.2d 781, 785. Throughout the whole case,
24 Sergeant Hellman was consistent in saying that entering the camper was not to
25 obtain evidence, rather to ensure no one else was in there who could possibly
26 harm officers. Furthermore, the decision to apply for a search warrant had
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1 been made and Detective Bolme had already left to obtain a search warrant.
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3 The odor of marijuana established probable cause to obtain the warrant. Law
4 Enforcement had no notion that they would not receive a warrant, therefore,
5 there was no imminent evidentiary need to enter the camper; entrance was
6 necessary to ensure officer safety. No property was seized at this time.
7 Therefore, the entry into the camper was not motivated by intent to arrest or
8 seize evidence.
9

10 The third and final prong of the test is “[t]here must be some
11 reasonable basis, approximating probable cause, to associate the emergency
12 with the area or place to be searched.” Huber, 2011 ND 23, ¶ 13, 793 N.W.2d
13 781, 785. This requirement is satisfied as the officers were in a location that
14 provided no protection. Additionally, it was a reasonable belief that someone
15 may be in the camper. If a person who wished to harm the officers had been
16 in the camper, an emergency situation could have transpired. Due to the
17 neighborhood and the additional information already provided, the officers
18 had reason to associate an emergency with the situation
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20 There is sufficient competent evidence fairly capable of supporting the
21 trial court’s findings, and the trial court’s decision to deny the motion to
22 suppress is not contrary to the manifest weight of the evidence. The trial court
23 found Sergeant Hellman’s testimony to be credible, and concluded from his
24 testimony that exigent circumstances were present in this instance.
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CONCLUSION

Based upon the foregoing, the State requests that the Order Denying
the Motion to Suppress be affirmed.

Dated this 9 day of September, 2013.



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-vs-)
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Wayne Otto,) Supreme Ct. No. 20130096
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Defendant-Appellant,) District Ct. No. 08-2012-CR-01764
) SA File No. F749-12-07
.....)
STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

Katie A. Wangler, being first duly sworn, depose and say that I am a United States citizen over 21 years old, and on the 9th day of September, 2013, I deposited in a sealed envelope a true copy of the attached:

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

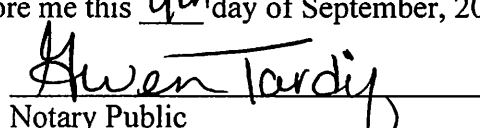
in the United States mail at Bismarck, North Dakota, postage prepaid, addressed to:

THOMAS J. GLASS
ATTORNEY AT LAW
418 EAST ROSSER AVE, SUITE 102
BISMARCK, ND 58501

which address is the last known address of the addressee.


Katie A. Wangler

Subscribed and sworn to before me this 9th day of September, 2013.


Notary Public
Burleigh County, North Dakota

GWEN TARDIF
Notary Public
State of North Dakota
My Commission Expires June 11, 2015