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SEPTEMBER 4, 2014
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota	)	**Supreme Court No.**
Plaintiff & Appellee	)	**20140147**
	)	
v.	)	**Stutsman County No.**
	)	**47-2013-CR-00201**
Gayne Alan Gasal	)	
Respondent & Appellant	)	

APPELLEE'S BRIEF

Appeal from the Judgment
of the District Court
Entered March 28, 2014,
Issued in Stutsman County District Court
by the Honorable Thomas E. Merrick
Judge of the Southeast District Court

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[¶5] Whether the District Court correctly denied the suppression of the statements made by Gayne Gasal because he was never in custody for the purposes of Miranda.

[¶6] JURISDICTIONAL STATEMENT

[¶7] Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provisions, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06, N.D.C.C., which provides as follows:

> "An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03. An appeal may be taken by the defendant from:
>
> 1. A verdict of guilty;
>
> 2. A final judgment of conviction;

3. An order refusing a motion in arrest of judgment;

4. An order denying a motion for new trial; or

5. An order made after judgment affecting any substantial right of the party."

N.D.C.C. § 29-28-06.

[¶8] STANDARD OF REVIEW

[¶9] The standard of review is well established for reviewing a district court's decision on a motion to suppress:

> We will defer to a trial court's findings of fact in the disposition of a motion to suppress. Conflicts in testimony will be resolved in favor of affirmance, as we recognize the trial court is in a superior position to assess credibility of witnesses and weigh the evidence. Generally, a trial court's decision to deny a motion to suppress will not be reversed if there is sufficient competent evidence capable of supporting the trial court's findings, and if its decision is not contrary to the manifest weight of the evidence.

State v. Tollefson, 2003 ND 73, ¶ 9, 660 N.W.2d 575 (quoting State v. Heitzmann, 2001 ND 136, ¶ 8, 632 N.W.2d 1). Questions of law are reviewed under the de novo standard of review. Tollefson, at ¶ 9.

[¶10] STATEMENT OF THE CASE

[¶11] On March 14th, 2013, the Defendant, Gayne Gasal, (hereinafter referred to as "Gasal") was charged with Hunting, Trapping or Fishing Without A License. Gasal filed motions to suppress for violations of both the 4th and 5th amendments to the United States Constitution on May 13th, 2013. A suppression hearing was held on June 21st, 2013. The District Court denied both motions. A jury trial was held on March 27th and 28th, 2014 before the Honorable Thomas E. Merrick. The jury found Gasal guilty of Hunting, Trapping or Fishing Without A License. A Notice of Appeal was filed on April 16th, 2014.

[¶12] STATEMENT OF THE FACTS

[¶13] On November 12, 2012, Game Warden Mark Pollert (hereinafter referred to as "Pollert") received a tip that Gasal had shot a deer and it was on land that was not listed on Gasal's gratis license. Suppression Hearing Transcript, Page 3, Lines 17-23. The informant had also provided the location and description of Gasal's vehicle. S.H. Tr. P. 4, ll 3-7. Pollert did a traffic stop on one of two vehicles leaving that general area, and made contact with Gasal. S.H. Tr. P. 4, ll 8-15. Gasal acknowledged that a deer had been shot and was being transported in a pick-up ahead of him back to his farm. S.H. Tr. P. 4, ll 17-19. The pickup was being driven by Gasal's son, Jarred. S.H. Tr. pp 25-26. Pollert told Gasal that he would like to go to the farm to visit with everyone involved and Gasal agreed. S.H. Tr, P. 4, ll 21-22.

[¶14] At the farm, Pollert spoke to Gasal, Jarred Gasal, and B.G., Gasal's juvenile grandson. S.H. Tr. P 4-5, ll 23-25, 1-3. Pollert spoke to all three Gasals together at times and Jarred and B.G. together at another time. S.H. Tr. P. 5, ll 13-17. The conversation took place in the Gasal family's shop and outside where the deer was located. S.H. Tr. P. 5, ll 18-24. In the interest of maintaining the confidentiality of any informants, Pollert told the Gasals that he was the one who witnessed the violation. S.H. Tr. P. 25, ll 6-14. Pollert was told that B.G. was the

one who shot the deer. S.H. Tr. P. 5 ll 8-9.

[¶15] After speaking with the Gasals, Pollert informed them that he felt the deer had been illegally taken and seized it. S.H. Tr. P.6, ll 7-9, 16-18. Pollert was at the Gasals' farm for approximately an hour, including a 20 minute period where the Gasals took Pollert up on his offer to let them field dress the deer. S.H. Tr. pp. 5-6, ll 25, 1-5. Pollert did not arrest anyone that evening. S.H. Tr. P.6, ll 19-20. Pollert conducted two follow-up interviews with B.G. and his mother. S.H. Tr. P.6, ll 21-24. Pollert also conducted a follow-up interview with Gayne Gasal and Jarred Gasal at the Game and Fish Department Office. S.H. Tr. pp 6-7, ll 24-25, 1.

[¶16] Once the deer was seized, Pollert conducted a visual examination of the deer and recovered a single bullet. S.H. Tr. P.7, ll 9-15. The bullet was submitted to the State Crime Lab in Bismarck for examination. S.H. Tr. P.7, ll. The initial results were that the bullet could not have come from B.G.'s gun. S.H. Tr. P.7, ll 19-22. B.G.'s gun was Ruger bolt-action rifle and Gasal had a Browning bolt-action rifle, both of which were 30-06 in caliber. S.H. Tr. P. 7, ll 23-25. After speaking with a technician at Ruger, Pollert was able to ascertain that a Ruger would have six lands and grooves on the bullet and that a Browning would could possible have four lands and grooves. The bullet that was recovered

from the deer had four lands and grooves. S.H. Tr. pp. 7-8, ll 25, 1-8.

[¶17] Pollert then applied for and was granted a search warrant for both rifles through the Honorable Jay Schmitz on December 10th , 2012. The warrant was executed on December 12th, 2012. S.H. Tr. P.9, ll 8-9. Two rifles were recovered when the search warrant was executed; the Ruger rifle belonging to B.G. and the Browning rifle belonging to Gasal. S.H. Tr. P.10, ll 5-8. On December 12th, 2012, as Pollert was getting ready to return the search warrant inventory to the court, he realized that there was no date of issuance on the search warrant. S.H. Tr. P.9, ll 10-18. Pollert sought to remedy the situation and documented it in a supplemental note that was read aloud at the suppression hearing by Mr. Goff: "Realized the search warrants were not dated as of 11:30 a.m. on 12-12-12. Called Judge Schmitz at 11:47 a.m., 12-12-12 to notify of same. Was at VC, 845-8512. He remembered the date and time of issuance as 12-10-12, 4:15 p.m." S.H. Tr. P.17, ll 8-12. Pollert testified that this oversight was not intentional. S.H. Tr. P. 10, ll 3-4.

[¶18] The guns that were recovered during the execution of the search warrant were sent to the State Crime Lab for ballistics testing. The testing was conducted by LaMonte Jacobson. S.H. Tr. P. 10, ll 9-13. Pollert spoke with Mr. Jacobson after the testing was complete. S.H. Tr. P. 10, ll 14-15. Mr. Jacobson informed

Pollert that it appeared that the recovered bullet did not come from the Ruger rifle, but appeared to have the characteristics similar to the Browning rifle. S.H. Tr. P. 10, ll 17-21.

[¶19] LAW AND ARGUMENT

[¶20] 1. Whether the District Court correctly denied the suppression of the evidence obtained by the search warrant because the listing of an issuance date on a warrant is not a requirement under Rule 41 of the North Dakota Rules of Criminal Procedure. In the alternative, whether the omission of an issuance date on a search warrant is only a ministerial error under Rule 41 of the North Dakota Rules of Criminal Procedure.

[¶21] The Plaintiff respectfully asks this Court to affirm the district court's decision to deny Gasal's Fourth Amendment motion to suppress evidence; specifically, that placing an issuance date on a search warrant is not required by Rule 41 N.D.R.Crim.P. and thus its omission does not invalidate the warrant. (App. 20). In the alternative, the Plaintiff asks that the Court find the omission to be only a ministerial error under Rule 41 N.D.R.Crim.P. and not in violation of the Fourth Amendment.

[¶22] Rule 41, N.D.R.Crim.P., "is designed to implement the provisions of

Article I, Section 8, of the North Dakota Constitution and the Fourth Amendment to the United States Constitution." State v. Iverson, 187 N.W.2d 1, 32 (N.D.1971). Rule 41 also contains a number of ministerial requirements. State v. Runck, 534 N.W.2d 829, 830 (N.D. 1995). The North Dakota Supreme Court notes that Rule 41 was drawn from Rule 41 of the Federal Rules of Criminal Procedure (Rule 41 F.R.Crim.P.), and, therefore, the Court has deferred to the construction of the rule as dictated by the federal courts. State v. Rueb, 249 N.W.2d 506 (N.D.1976). Federal courts have construed Rule 41, F.R.Crim.P., so that a violation of the ministerial aspects of the rule very seldom results in the suppression of evidence. United States v. Kelly, 14 F.3d 1169, 1173 (7th Cir.1994). A violation of Rule 41(d) can lead to exclusion, however, when there is a showing of prejudice, or an intentional and deliberate disregard of the rule. Id.

[¶23] The district court in this case denied Gasal's Fourth Amendment motion to suppress, concluding that, while technical errors do not invalidate a warrant under State v. Bollingberg, 2004 ND 30 ¶, 19, 674 N.W. 2d 281, the omission of the date "is not a technical error, or any sort of error, since placing the issuance date on a search warrant is not required by Rule 41 N.D.R.Crim.P. or N.D.C.C. Chapter 29-29." (App. 20) Under Rule 41, the only mention of a date on a warrant

is under subsection (d), which states that the person who executes the warrant must enter the date and time of the execution on the face of the search warrant. N.D.R.Crim.P. Rule 41(d). Warden Pollert complied with this requirement (App. 10.)

[¶24] Alternatively, whether an undated warrant is a ministerial violation of Rule 41 N.D.R.Crim.P. and whether this error is severe enough to suppress evidence are both addressed by this Court in State v. Runck, 534 N.W.2d 829, 830 (N.D. 1995) and argued by Gasal in this case. In Runck, the Defendant was appealing from a theft conviction. Id. at 830. One of the issues he raised on appeal was the warrants and their execution; specifically, he argued that the warrants violated Rule 41 because "a copy of the [warrant was not served], and the copy was not dated, signed, and all of the blank spaces were blank, and none of the Affidavits were signed where they were supposed to be on the copies." Id. The Court ultimately considered such omissions to be ministerial errors of Rule 41, and, therefore, not enough to suppress evidence. Id. Because these errors were only of a ministerial nature, the Court also found that the Defendant failed to show that he was prejudiced as a result of the warrants being undated. Runck at 830.

[¶25] The circumstances of Runck and the instant case are fairly similar. Both cases deal with the situation of an undated search warrant. In both cases, law

enforcement officers acknowledged a lapse in protocol in the issuance and execution of a warrant. In Runck, the officer at the suppression hearing testified that "they always bring the original search warrant, signed by a judge, to the premises to be searched and that they 'always show that original warrant to the person at the property.' Runck at 830. Warren admitted that the warrant copy left with the farmhand who lived on the property was undated and unsigned, but testified that was "the way that search warrants are always done on a routine basis." Id. At the suppression hearing in the instant case, Pollert testified that he had applied for and executed warrants in the past in other counties such as Dickey County and LaMoure County, but had not done so for Stutsman County before this incident. S.H. Tr. P.10, ll 18-25. Pollert noted that, ordinarily, the State's Attorney is the one who prepares the affidavit, application and the search warrant. S.H. Tr. pp. 11-12. Pollert stated that the standard operating procedure in Stutsman County was that the requesting officer prepares the warrant. S.H. Tr. P.11, ll 21-25. For a reference, Pollert had the Jamestown Police Department send him a copy of the forms that they used, which did not include a portion for the date. S.H. Tr. P. 13, ll 17-23.

[¶26] In Runck, this Court emphasized the importance of compliance with Rule 41, finding that members of law enforcement were bound to follow Rule 41. Id.

However, this Court also found that the conduct of law enforcement in Runck did not rise to the level of violating the Fourth Amendment because their actions did not evidence a "deliberate institutional disregard that requires a judicial response to protect the integrity of [the] system. Runck at 830, citing, e.g., Madison v. North Dakota Department of Transportation, 503 N.W.2d 243, 246–47 (N.D.1993). This Court also found that law enforcement's actions in Runck were not part of "continued noncompliance . . . [which], if commonplace, may warrant suppression." Id. In the instant case, the omission of a date was cited by Pollert to be an unusual occurrence and one that Warden Pollert promptly sought to correct. There is no indication of deliberate disregard for Rule 41 on the part of Pollert, nor is there any indication that Pollert's conduct was commonplace. Therefore, the actions of Pollert, much like the actions of law enforcement in Runck, do not constitute a violation of the Fourth Amendment and therefore do not call for a suppression of the evidence.

[¶27] The Plaintiff asks this Court to affirm the district court's decision to deny Gasal's Fourth Amendment motion to suppress in that the district court found that omission of a date was not a requirement and therefore not a violation of Rule 41 N.D.R.Crim.P. However, if the Court does find that there was, in fact, a violation under Rule 41 N.D.R.Crim.P, that it was only ministerial in nature and does not

rise to the level of violation of the Fourth Amendment and a subsequent suppression of the evidence.

[¶28] 2. Whether the District Court correctly denied the suppression of the statements made by Gasal because he was never in custody for the purposes of Miranda.

[¶29] In Miranda v. Arizona, the United States Supreme Court held that the prosecution may not use statements obtained during the "custodial interrogation" of a defendant unless there is compliance with the procedural safeguards of the Miranda warning. 86 S.Ct. 1602, 1612 (1966). The Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda at 1630.

[¶30] The question "whether a suspect is 'in custody' is an objective inquiry." J.D.B. v. North Carolina, 131 S.Ct. 2394, 2402 (2011). "Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave," J.D.B. at 2402 (quoting Thompson v. Keohane, 116 S.Ct. 457, 465 (1995)), "or in

this case, to terminate the interrogation and cause the [officers] to leave," United States v. New, 491 F.3d 369, 373 (8th Cir.2007).

[¶31] When examining the circumstances of the interrogation, Gasal is correct in pointing out that the court may consider the six factors laid out by the 8th Circuit under U.S. v. Griffin:

> (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; or, (6) whether the suspect was placed under arrest at the termination of the questioning.

922 F. 2d 1343, 1349 (8th Cir. 1990). However, the 8th Circuit has also said that "[t]here is no requirement ... that the Griffin analysis be followed ritualistically in every Miranda case." United States v. Czichray, 378 F.3d 822, 827 (8th Cir. 2004). "When the factors are invoked, it is important to recall that they are not by any means exclusive, and that 'custody' cannot be resolved merely by counting up the number of factors on each side of the balance and rendering a decision accordingly." Czichray at 827. "The ultimate inquiry must always be whether the defendant was restrained as though he were under formal arrest." Id. at 828.

[¶32] The 8th Circuit made such an inquiry in U.S. v. Lowen, 647 F.3d 863 (8th Cir. 2011). In Lowen, the Defendant was convicted of bank robbery. Id. at 863. On appeal, the Defendant argued that the lower court should have suppressed his statements he made to police because he was in custody and should have been Mirandized at that time. Id. at 866. After considering the circumstances of the interrogation, the appellate court affirmed the lower court's denial of Lowen's motion to suppress. Id. Their reasoning behind the affirmation was because Lowen voluntarily agreed to speak to police, he agreed to speak to them in his home, the conversation took place at his dinner table, his freedom of movement was not restrained by handcuffs or other means, he was not confined during the questioning and was not arrested at the conclusion of the questioning. Lowen at 868.

[¶33] It should also be noted that the police officers did not inform Lowen that he was under arrest. However, the Court in Lowen held this was "not dispositive . . . as the touchstone of [the] inquiry remains whether Lowen was restrained as though he were under formal arrest." Lowen at 868. The Court concluded that Lowen was not formally restrained, citing United States v. Lawson, 563 F.3d 750, 753 (8th Cir.2009) (determining that the defendant was not in custody because he "was not restrained, he was interviewed in his own home, ... he was not physically

threatened, and he was interviewed for less than one hour"). Id. Given Lowen's circumstances, the Court found that a reasonable person in Lowen's position would have felt at liberty to terminate the interrogation and cause the officers to leave. Id.

[¶34] In examining the circumstances in the instant case, Gasal complied with Pollert's request to come to his farm. He also complied with Pollert's request to visit with everyone involved in the shooting of the deer, which included Gayne Gasal, Jarred Gasal, and B.G. Pollert spoke to 2 or 3 of the individuals at the same time. Pollert was at the farm for approximately an hour. Pollert did not make any arrests; rather, he seized the deer, and he did so after giving the option to the Gasal family to field dress it, which they did.

[¶35] When taking all of the circumstances of the instant case into account, Gasal was not in custody for the purposes of Miranda. Gasal was not under any restraint associated with formal arrest, and a reasonable person in Gasal's position would have felt that they were at liberty to terminate the investigation and ask Pollert to leave.

[¶36] CONCLUSION

[¶37] For the foregoing reasons, plaintiff and appellee the State of North Dakota

respectfully requests that the district court's decision to deny both of Gasal's motions to suppress evidence be affirmed.

RESPECTFULLY SUBMITTED this 9th day of September, 2014.

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STATE OF NORTH DAKOTA		IN DISTRICT COURT
COUNTY OF STUTSMAN		SOUTHEAST JUDICIAL DISTRICT
STATE OF NORTH DAKOTA Plaintiff/Appellee	))	**Supreme Court No. 20140147** **Stutsman Cty No. 47-2014-CR-201**
v.	)	**CERTIFICATE OF SERVICE**
GAYNE ALAN GASAL, Defendant/Appellant	)	

1. On September 9th, 2014, a copy of the document "Appellee's Brief: Appeal from the Judgment of the District Court Entered March 28, 2014, Issued in Stutsman County" was e-served on the following individuals:

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