IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota ,	)
	)
Plaintiff-Appellee,	)
	) Supreme Court No. 20140333
-vs-	)
	) Divide Co. No. 12-2014-CR-00054
Jeremy Ballard,	)
	)
Defendant-Appellant.	)

APPEAL FROM THE DISTRICT COURT OF DIVIDE COUNTY
NORTHWEST JUDICIAL DISTRICT
DISTRICT COURT NO. 12-2014-CR-00054
THE HONORABLE PAUL W. JACOBSON

APPELLANT'S BRIEF

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I. The district court erred in denying Ballard's Motion to Suppress Evidence and Dismiss Charges when it determined the suspicionless probationary search at issue did not violate Ballard's constitutional rights against unreasonable search and seizure.

STATEMENT OF THE CASE

[¶ 1] On March 28, 2014, Defendant/Appellant Jeremy Ballard ("Ballard") was cited for Possession of Methamphetamine, a class C felony, and Possession of Drug Paraphernalia, also a class C felony, in Divide County, North Dakota. Appx. at 5-6.

[¶ 2] Following Ballard's citations and related arrests, a series of bond procedures and hearings transpired, none of which are material to the current appeal. Appx. at 2-3.

[¶ 3] On April 10, 2014, Ballard requested a preliminary hearing which was conducted on June 19, 2014. Appx. at 2 and Preliminary Hearing Trans.

[¶ 4] At the preliminary hearing, Deputy Coby Hubble ("Hubble") was called to testify. Hubble served as the only witness for the State and Ballard at the preliminary hearing. Preliminary Hearing Trans. at 2. Hubble testified the events leading up to Ballard's arrest consisted of Hubble's awareness of three existing criminal judgments, all filed under the same prior action against Ballard, under which Ballard was still subject to unsupervised probation and under which a search clause existed, providing that Ballard must submit to searches of his "person, place, and vehicle at the request of law enforcement without a warrant". Preliminary Hearing Trans. at 5-6, 13; Appx. at 39-42. Hubble testified it was on this premise, and this premise alone, that he stopped Ballard and subjected him to a search of his person, vehicle, and ultimately, his home. Hubble testified that until he completed the search of Ballard's home, he had no reasonable suspicion of any form of criminal activity. Preliminary Hearing Trans. at 13-17. At the end of the preliminary hearing, counsel for Ballard argued the "probation search", taken without reasonable suspicion, was a violation of Ballard's 4th Amendment rights and requested the matter be dismissed at that juncture, based on such violation and, more particularly, a violation of

the North Dakota Supreme Court's holding in State v. Maurstad, 2002 ND 121, 647 N.W.2d 688, and the United States Supreme Court case United States v. Knights, 534 U.S. 112 (2001). The district court bound the charges over for trial at the completion of the preliminary hearing. Preliminary Hearing Trans. at 24-26.

[¶ 5] Thereafter, on July 11, 2014, Ballard moved the district court to suppress and dismiss his charges, alleging a 4th Amendment violation. Appx. at 9-27 (containing Ballard's Motion to Suppress Evidence and Dismiss Charges, together with his brief and exhibits in support of the same).

[¶6] On July 28, 2014, the State responded to Ballard's Motion to Suppress, resisting the same. Appx. at 28-48 (containing Plaintiff's Response to Defendant's Motion to Suppress, together with exhibits affixed thereto).

[¶7] On September 11, 2014, the court conducted a hearing on Ballard's Motion to Suppress. Motion Hearing Trans. at 1. The State did not call any witnesses at the hearing, and the parties stipulated to the fact pattern presented by Ballard in his Motion and brief, which relied exclusively on Hubble's testimony at the preliminary hearing. Motion Hearing Trans. at 5-6. At the conclusion of the hearing, the district court denied Ballard's Motion to Suppress. Motion Hearing Trans. at 21. Thereafter, on September 16, 2014, the district court issued a written Order Denying Defendant's Motion to Suppress Evidence and Dismiss Charges. Appx. at 49.

[¶8] On September 18, 2014, Ballard, his counsel, and counsel for the State entered into a plea agreement, under which Ballard's charges were amended to misdemeanors, and Ballard entered conditional pleas of guilty to the amended misdemeanor charges. Appx. at 50-57. The conditional plea expressly reserved Ballard's right to appeal, noting

the specific basis for the appeal would be the district court's adverse determination of the Motion to Suppress, which raised the 4th Amendment to the United States Constitution. Appx. at 52-53. The Criminal Judgment issued on September 19, 2014. Appx. at 58-59.

[¶9] Ballard timely filed a Notice of Appeal on September 23, 2014, arguing the district court erred in denying his Motion to Suppress Evidence and Dismiss Charges. Appx. at 62-63.

STATEMENT OF THE FACTS

[¶10] Ballard was charged with the offenses of Possession of Methamphetamine, a class C felony, in violation of NDCC 19-03.1-23(7), and Possession of Drug Paraphernalia (Methamphetamine), a class C felony, in violation of NDCC 19-03.4-03, on March 28, 2014 in Noonan, Divide County, North Dakota. Appx. at 5-6.

[¶11] Ballard requested a contested preliminary hearing, which was conducted on June 19, 2014, in Divide County district court before the Honorable Paul W. Jacobson. Ballard subpoenaed the investigating officer involved in the events giving rise to the charges at issue, Coby Hubble, Sergeant, Divide County Sheriff's Department. Appx. at 1-4. Hubble appeared for the preliminary hearing on June 19, 2014 and gave testimony relevant to the circumstances giving rise to the charges at issue. Preliminary Hearing Trans. at 1.

[¶12] Hubble testified he was a member of the Divide County Sheriff's Department, having worked for the Sheriff's Department for a period of approximately four years and having attained the position of Sergeant and night shift supervisor. Preliminary Hearing Trans. at 3-4. Hubble further testified he had law enforcement experience and training relevant to drug identification and was a certified drug recognition expert with the State of North Dakota. Preliminary Hearing Trans. at 4. Hubble testified he was on duty for the Divide County Sheriff's Department on March 28, 2014, at approximately 7:30 p.m. in Noonan, Divide County, North Dakota, and was familiar with the matters that gave rise to the charges. Preliminary Hearing Trans. at 4, 12.

[¶13] Hubble testified during his direct examination he was on patrol in Noonan near the South Side Tavern when he observed a vehicle and further "observed two out of the

three people inside of the vehicle [he] knew to be on unsupervised probation through Divide County for recent drug charges, and had previous knowledge that, as part of their probation, they were subject to a search clause and UA clause without probable cause or a warrant". Preliminary Hearing Trans. at 5-6. Hubble further testified he activated his lights and the vehicle pulled over near 209 Adams Street, a home belonging to Cindy Albecher, where Ballard allegedly told law enforcement he was "visiting" or "staying". Preliminary Hearing Trans. at 6. During his direct examination, Hubble testified he ultimately conducted a "probation search" of the bedroom the Defendant purported to be staying in at 209 Adams Street. Preliminary Hearing Trans. at 7. According to Hubble's testimony during direct examination, various items of paraphernalia were found in the room to include alleged methamphetamine pipes with residue and a baggie with a "clear crystalline substance", which Hubble believed to be methamphetamine. Preliminary Hearing Trans. at 9-10. Based upon the contraband found in the home at 209 Adams Street, Hubble charged and arrested Ballard for the class C felony charges described above. Preliminary Hearing Trans. at 10.

[¶13] During cross-examination, the following colloquy between counsel for Ballard and Hubble occurred:

"Q: Okay. And I guess I want to start – what time did this – what time did you first observe the vehicle belonging to Mr. Ballard, do you recollect?

A: I believe it was 7:30 p.m. roughly.

Q: Okay. And it was light out at that time?

A: Yes.

Q: Okay. And you observed – was Mr. Ballard the driver of the vehicle?

A: Yes.

Q: And Ms. Olsen was in the front seat, is that correct?

A: No. Edwin Garza, another individual I know, and then was in the front right passenger seat. Sandra was seated behind Edwin in the backseat.

Q: Okay. But could you clearly see Mr. Ballid [sic] and – or Ballard rather, and Ms. Olsen within the vehicle when you passed it or came near it?

A: I was parked and they drove by me.

Q: Okay.

A: So, I could see it.

Q: Okay. And it was on that premise, seeing two probationers in the vehicle that you pulled them over?

A: Yes.

Q: And on that premise alone?

A: Yes.

Q: Okay.

A: Because I knew they were on unsupervised probation with their clauses.

Q: Okay. And that is you're referring to their prior criminal judgments, rather, for drug related crimes out of Divide County?

A: Yes.

Q: And those – well good you have them there. Let's just make sure we see the case numbers for the record. You're talking about 12-2013-CR-131, count one?

A: Yes.

Q: Count two?

A: Yes.

Q: And count three?

A: Yes.

Q: Okay. So you affect a stop of the vehicle on the exclusive premise that you're to conduct a probation search, correct?

A: Yes.

Q: And they are unsupervised probationers, correct?

A: Unsupervised.

Q: Yep, unsupervised. I should be clear, I'm sorry, I have a cold. And when you – well, let's walk through this. So, you stopped the vehicle?

A: Yes.

Q: You approach the vehicle?

A: Yes.

Q: And on approaching the vehicle, do you have any suspicions at this point or are we still at a – we're still doing a probation search?

A: Probation check.

Q: Okay, and do you ask these folks outside of the vehicle? Do you ask them to exit the vehicle, how does that work? Tell me about that.

A: Initially I did. I spoke with them while they were inside the vehicle and I asked Mr. Ballard to step out. Which I patted him down for weapons at that point.

Q: Okay. So we have a couple of things going on here. So, you're speaking with Mr. Ballard in his vehicle, you've testified that you're an expert in drug training and recognition, at the point of conversation with Mr. Ballard are you suspicious of any drug use at that moment?

A: It's too early to tell at that point.

Q: Okay. So, you're not suspicious at that point, of any drug use?

A: Nope.

Q: Okay, so, then you ask Mr. Ballard out of the car, you pat him down. Basically, you're doing a terry stop, a weapons check, is that correct?

A: I was patting him down for weapons for my safety.

Q: Okay. And during the pat down search, do you find any contraband on Mr. Ballard's person?

A: No.

Q: Okay. So at that juncture, do you have reasonable articulabl[e] suspicion of criminal activity?

A: Nope.

Q: Okay. You're just doing a probation search?

A: Absolutely.

Q: Okay. And then you conversed with Mr. Ballard, correct?

A: Briefly.

Q: Okay. And during your conversation with him, and your training and expertise, is there any reason to think that he's got any contraband after the search [,] stop and brief conversation?

A: Well, I did – I didn't observe anything at that particular time. I was going forward with a probation check.

Q: Okay. So we're just basically – I mean the bottom line is, Deputy Hubble, we're strictly a probation check here?

A: At this time, yes.

Q: Okay. Then you enter the home of a Cindy Albecher, was that correct?

A: Yes.

Q: Okay. Do you know Cindy Albecher?

A: Not personally no.

Q: Have you ever had a run in with her?

A: No[.]

Q: Know anything about her criminal history?

A: No.

Q: Okay. And you certainly didn't at the date of that stop, correct?

A: Nope.

Q: Okay. Have you ever been to 209 Adams Street?

A: Never.

Q: Never, okay. You know of any law enforcement run ins at 209 Adams Street?

A: Not of my personal knowledge at the time.

Q: Okay. So you have no reason to suspect the house, in and of itself, would be reasonabl[y] or articulable[y] related to criminal activity, correct?

A: I take that back. I would enlighten you with that. That actually was, to the best of my recollection, Cindy Albecher is Randy Fish's mother, who we have dealt with on numerous drug cases. And I know Randy to have resided at that residence. So, I've known that criminal activity has taken place there regarding to Randy and probation violations.

Q: Okay. How recently?

A: I don't recollect an exact date. I would have to look.

Q: But within a week of the search?

A: No.

Q: Within a month of the search?

A: I'd say to the best of my recollection, it would be within the past year.

Q: Okay. So, some remoteness with time, but you're familiar with the house?

A: Yes.

Q: Okay. But no allegations of this house urge you to want to search Mr. Ballard? This was just your run of the mill, see a probationer, stop him, kind of deal?

A: Yes."

Preliminary Hearing Trans. at 12-17.

[¶14] Hubble went on to testify that no contraband was found until he entered the unlocked door of the bedroom of Ballard in the unlocked home of 209 Adams Street belonging to Cindy Albecher. Preliminary Hearing Trans. at 19-20. Hubble stated that it was "a possibility" that others may have lived in the home, but he did not recall or know who they were. Preliminary Hearing Trans. at 19.

[¶15] The Judgments on which Hubble relied to stop, seize, and ultimately search the person of Ballard, his vehicle, and his home, without more, provide for the following condition of unsupervised probation (among other conditions):

> "The Defendant will submit to a search of his person, place, and vehicle at the request of law enforcement without a warrant."

Appx. at 39-42.

[¶16] In sum, the unequivocal testimony of Hubble was he had no reasonable suspicion of criminal activity in stopping Ballard's vehicle. His unequivocal testimony provided that he had no reasonable suspicion of criminal activity after speaking with Ballard, both inside and outside of the vehicle, immediately following the initial stop. Hubble's unequivocal testimony was that even after a Terry pat down search, he had not developed any reasonable and articulable suspicion of prospective criminal activity, and in his police report at paragraph 12 Ballard further explains: "I searched the vehicle that Jeremy and Sandra were in when I first saw them. No contraband or paraphernalia was found in the vehicle." Appx. at 48. Without equivocation or question, Hubble testified with clarity and in absolutisms that he had no suspicion of any criminal activity through the entire "probation search" until such time as he entered the unsecured bedroom apparently belonging to Ballard at 209 Adams Street.

[¶17] Based upon the foregoing facts, Ballard argued at his preliminary hearing that binding the charges over for trial would be inappropriate because of the total lack of reasonable suspicion of criminal activity. Specifically, Ballard argued:

> "Law enforcement can invade Mr. Ballard's Fourth Amendment Rights more so than yours or mine, because he is a probationer. But Knights makes clear that he is not entirely without those rights. And the State has absolutely failed to demonstrate that they had reasonable and articulab[le] suspicion to encounter him at all and to subject him to the search despite the language of his probationary terms. Your Honor, they haven't met the initial threshold. They haven't demonstrated that they could walk into his life and invade his liberties, and for that reason everything else they've said is irrelevant to the determination. The Defendant maintains that, I know that this is a complex legal issue, and it's probably not one that's frequently visited, but it's visited enough to have been visited by both our State Supreme Court and the United States Supreme Court here in the last 15 years. This case fails, and there is certainly not sufficient evidence to bind this over for trial in light of the holding in State v. Ma[u]rstad and the United States Supreme Court holding in State v. Knights."

Preliminary Hearing Trans. at 25-26. The Court advised the arguments of Ballard may be more properly placed in the form of a suppression motion and bound the matter over for trial, proceeding to arraignment, at which time Ballard entered not guilty pleas to both of the offenses charged. Preliminary Hearing Trans. at 26.

[¶18] On July 11, 2014, Ballard moved the district court to suppress and dismiss his charges, alleging a 4th Amendment violation, arguing Hubble's failure to have reasonable suspicion of criminal activity in conjunction with a search clause authorizing searches without a warrant, violated Ballard's diminished rights against unreasonable searches and seizures. Appx. at 9-27.

[¶19] On July 28, 2014, the State responded to Ballard's Motion to Suppress, resisting the same, arguing reasonable suspicion was unnecessary where probationers had search clauses which permitted searches without probable cause or a warrant. Appx. at 28-48.

[¶20] On September 11, 2014, the district court conducted a hearing on Ballard's Motion to Suppress. Motion Hearing Trans. at 1. The State did not call any witnesses at the hearing, and the parties stipulated to the fact pattern presented by Ballard in his Motion and brief, which relied exclusively on Hubble's testimony at the preliminary hearing. Motion Hearing Trans. at 5-6. At the conclusion of the hearing, the district court denied Ballard's Motion to Suppress. Motion Hearing Trans. at 21. The district court, in reaching such conclusion, stated as follows:

> "THE COURT: Okay. Well, what I do find factually is the facts are as testified to by Deputy Hubble, as reflected in the brief of the Defendant. And the conclusions that I draw from that testimony, that evidence is that the search that was being conducted was a suspicionless probationary search done pursuant to the probation that Mr. Ballard was under. And I concluded from also that information that the search was not done in an intimidating or harassing fashion. It was done by a police officer, who I understand under our case law can conduct a probationary search[].
>
> And therefore, my reading of the Maurstad case and what it said about the U.S. Supreme Court Knights case, is that Maurstad is not precedent for this kind of search. And essentially where our state of the law is in North Dakota, as I understand it, is what the Court had previously said in the Perbix case still applies, other than the Court does not take into consideration the motive for the search which I think was the only think overruled in Perbix. And therefore, I will deny the Suppression Motion."

Motion Hearing Trans. at 21. Thereafter, on September 16, 2014, the district court issued a written Order Denying Defendant's Motion to Suppress Evidence and Dismiss Charges. Appx. at 49. The Order provided the reasons for the said denial were those stated on the record at the conclusion of the Suppression Motion hearing.

[¶21] On September 18, 2014, Ballard, his counsel, and counsel for the State entered into a plea agreement, under which Ballard's charges were amended to misdemeanors, and Ballard entered conditional pleas of guilty to the amended misdemeanor charges. Appx. at 50-57. The conditional plea expressly reserved Ballard's right to appeal, noting

the specific basis for the appeal would be the district court's adverse determination of the Motion to Suppress, which raised the 4th Amendment to the United States Constitution. Appx. at 52-53. The Criminal Judgment issued on September 19, 2014. Appx. at 58-59.

[¶22] Ballard timely filed a Notice of Appeal on September 23, 2014, arguing that the district court erred in denying his Motion to Suppress Evidence and Dismiss Charges. Appx. at 62-63.

LAW AND ARGUMENT

[¶ 23] The district court had jurisdiction under N.D. Const. art. VI, § 8, and N.D.C.C. §27-05-06. See also State v. Maurstad, 2002 ND 121, ¶ 9, 647 N.W.2d 688. This Court has jurisdiction under N.D. Const. art. VI, §6, and N.D.C.C. §28-27-01.

[¶ 24] Ballard timely filed this appeal under N.D.R.App.P. 4(a)(1), in that the Criminal Judgment from which Ballard appeals is dated September 19, 2014, and was filed with the district court on September 22, 2014, therefore complying with the thirty day time period set forth under the said Rule with the Notice of Appeal having been filed on September 23, 2014.

I. STANDARD OF REVIEW

[¶ 25] This appeal turns entirely on a question of law; the district court was presented with a stipulated fact pattern on which to consider the 4th Amendment issues presented by Ballard. There are no questions of fact presented in this appeal. Thus, as this Court has previously articulated, "[w]hether a violation of the constitutional prohibition against unreasonable searches and seizures has occurred is a question of law." State v. Maurstad, 2002 N.D. 121, ¶11. Questions of law are fully reviewable on appeal. See, e.g., State v. Eide, 2012 ND 129, ¶8, 118 N.W.2d. 711 (citing State v. Stavig, 2006 ND 63, ¶12, 711 N.W.2d. 183).

II. THE DISTRICT COURT ERRED IN DENYING BALLARD'S MOTION TO SUPPRESS EVIDENCE AND DISMISS CHARGES WHEN IT DETERMINED THE SUSPICIONLESS PROBATIONARY SEARCH AT ISSUE IN THIS MATTER DID NOT VIOLATE BALLARD'S CONSTITUTIONAL RIGHTS AGAINST UNREASONABLE SEARCH AND SEIZURE.

[¶26] The North Dakota Supreme Court has previously explained that in "reviewing the constitutionality of probationary searches, we have interpreted the North Dakota

Constitution to provide the same protections for probationers as provided by the United States Constitution." State v. Maurstad, 2002 ND 121, ¶11 (citing State v. Smith, 1999 ND 9, ¶24, 589 N.W.2d. 546). This Court has addressed the constitutionality of warrantless probation searches on several occasions. One of the preeminent discussions regarding such searches occurred in State v. Perbix, 331 N.W.2d. 14 (N.D. 1983).

[¶27] In Perbix, this Court provided that law enforcement officers, in addition to probation officers, were permitted to conduct probation searches. Moreover, in Perbix, the Court declined to "impose a requirement that such searches may be permitted only upon a showing of 'reasonable suspicion' or 'probable cause'". State v. Perbix, 331 N.W.2d. at 21. However, the cases that followed Perbix did not deviate from the touchstone 4th Amendment consideration of the reasonableness of the search. See State v. Maurstad, 2002 ND 121 at ¶18.

[¶28] Four years after the Perbix decision, the United States Supreme Court addressed the constitutional concerns surrounding probationary searches in Griffin v. Wisconsin, 483 U.S. 867 (1987). In Griffin, the United States Supreme Court stated where "reasonable grounds" exist in conjunction with a probationary search clause, a search of a probationer's home is lawful. Griffin, 483 U.S. at 880. Noting the holding in Griffin, this Court attempted to reconcile Griffin and Perbix in addressing another probation search case, State v. Smith, 1999 ND 9, 589 N.W.2d. 546.

[¶29] In Smith, this Court again "declined to impose a requirement" that probationary searches may be carried out upon a showing of probable cause or a reasonable suspicion. Then, following Smith, the United States Supreme Court was called upon once again to address the legality of probationary searches in United States v. Knights, 122 S.Ct. 587

(2001). The principle dispute in Knights was the subjective intent of the search, considering whether such search was "investigatory" or "probationary" in purpose. Knights, 122 S.Ct. at 590. In Knights, the United States Supreme Court determined the subjective intent of the search was not controlling, and rather, the "reasonableness" of the search was the more important consideration, with such analysis to consider "on one hand the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests". Knights 122 S.Ct. at 591 (citing Wyoming v. Houghton, 526 U.S. 295, 300 (1999)). The Supreme Court stated where a probationer is subject to a search clause, these considerations "require[] no more than reasonable suspicion to conduct a search of th[e] probationer's house". Knights 122 S.Ct. at 592. However, the Knights Court expressly left open the issue of a completely suspicionless search:

> "We do not decide whether the probation condition so diminished, or completely eliminated, [the probationer's] reasonable expectation of privacy (or constituted consent) that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment. The terms of the probation condition permit such a search, but we need not address the constitutionality of a suspicionless search because the search in this case was supported by reasonable suspicion."

Knights at 592 n.6. (emphasis added). Here, however, this Court is forced to consider, under the stipulated fact pattern, whether Ballard's rights, as an unsupervised probationer, under the 4th Amendment are "so diminished, or completely eliminated, [such that] reasonable expectation of privacy ... without any individualized suspicion [will] satisf[y] the reasonableness requirement of the Fourth Amendment". Id.

[¶30] Ballard asserts the district court erred in determining he is devoid of the right to a reasonable expectation of privacy, as an unsupervised probationer, to the extent the

district court found law enforcement had no obligation under the 4th Amendment to develop individualized reasonable suspicion of criminality on the part of Ballard in conducting the search of his person, vehicle, and home. The district court found the search was a "suspicionless probationary search"; thus, it is clear that Deputy Hubble possessed no fact or information that would give rise to a reasonable suspicion of criminality or violation on the part of Ballard. When Hubble stopped Ballard's vehicle, searched it, searched Ballard's person, and then searched Ballard's home, the evidence and testimony made plain that he never had any indicia of any suspicion regarding Ballard's activities.

[¶31] The district court, despite the stipulated fact pattern and its related finding of a suspicionless series of searches, attempted to create reasonableness to save the search from a violation of the 4th Amendment and related exclusionary rule suppression. First, the district court stated "the search was not done in an intimidating or harassing fashion". The district court does not provide any specific factual findings for this conclusory determination. In fact, the facts giving rise to, and existing through, the totality of the encounter between Hubble and Ballard seem totally contrary to the notion of 4th Amendment reasonableness; Hubble entered the life of a private citizen on the basis of an unprovoked traffic stop. This conduct itself is harassing and unreasonable on its very face, even where a search clause for an unsupervised probationer exists.

[¶32] Next, after suffering an unprovoked traffic stop, Ballard was subjected to a search of his person, by way of the Terry pat-down/weapons search. Hubble testified with clarity that after searching the person of Ballard and conversing with him and having no indications whatsoever of either weapons or criminality of any kind, he was continuing

on with his "probation search" despite a total lack of suspicion of anything. Again, such actions on the part of Hubble are unreasonable – no individualized suspicion arose here. At this juncture, he had not only stopped Ballard, together with the two other occupants of the vehicle, but he had subjected Ballard's person to search and found nothing. Nonetheless, Hubble continued the search, making it unreasonable due to Hubble's own confirmation that there was no suspicious activity afoot after the initial unprovoked encounter. Again, irrespective of the existence of the search clause, this type of law enforcement activity is unreasonable under the circumstances due to a total lack of suspicion.

[¶33] Then Hubble testified he searched the vehicle Ballard was driving, conversed with Ballard, and after this phase of the search, Hubble still had no suspicion of any criminality or wrongdoing on the part of Ballard. Nonetheless, Hubble persisted in his "suspicionless" invasion into the privacy of Ballard's life, and then told Ballard he would be searching Ballard's residence. It was not until Hubble had searched the alleged bedroom of Ballard that he found any evidence of criminality. Thus, Ballard was subjected to three seizures and/or searches before any suspicion came to pass, i.e. 1) the unprovoked traffic stop of Ballard's vehicle; 2) the search of Ballard's person; 3) the search of Ballard's vehicle; and 4) the search of a bedroom allegedly belonging to Ballard. There is nothing "reasonable" about a law enforcement officer's continued invasions into the privacy of an unsupervised probationer without any suspicion or cause. Hubble made very clear there was not a single circumstance leading up to, or during, the series of searches that would have reasonably led him to encounter Ballard to begin with (no basis for the stop), and Hubble further testified in absolutisms, during his searches of

Ballard's person and vehicle, which predicated the search of Ballard's home, he did not develop a single suspicion of any form of criminality or wrongdoing. It simply does not get any more unreasonable than that. The district court's imposition of a label calling this series of events non-harassing and non-intimidating does not change the character of what plainly transpired. The district court did not state what about these instances made them "not harassing", which is imperative due to the total absence of any suspicion on the part of Hubble in attempting to conduct a probation search.

[¶34] The next basis on which the district court attempted to create reasonableness to save the search at issue was by finding the search was conducted by a police officer. Essentially, the district court seemed to intimate that the fact that a law enforcement officer is permitted to conduct a probation search necessarily leads to the conclusion the search is reasonable. This circular logic simply does not play out in the present case (or any other case for that matter). The fact that the individual undertaking the search of Ballard's person was a law enforcement officer does little or nothing to further a determination of reasonableness. Indeed, because a law enforcement officer is an arm of government, all that official capacity and title does is invoke constitutional protections for Ballard that may exist in the face of law enforcement, where they would not had this encounter been one between Ballard and a private citizen. The fact that Hubble is a Deputy does not lend to the analysis or finding of reasonableness in this case, it simply calls into consideration constitutional applicability.

[¶35] While Knights and Maurstad presented fact patterns under which a direct constitutional inquiry regarding suspicionless searches of probationers could not be had, the United States Supreme Court has had occasion to examine suspicionless searches of

parolees. In Samson v. California, 547 U.S. 843 (2006), a police officer stopped an individual on a public sidewalk; the officer knew the person to be a parolee and believed him to have an at-large warrant. Id. The officer spoke with the parolee, Samson, and Samson told the officer there was no outstanding warrant, which the officer confirmed through radio dispatch. Id. However, after confirming the fact that no warrant had issued for Samson, the officer relying "solely on [Samson's] status as a parolee" searched Samson and found on his person a plastic baggie containing methamphetamine. Id. The question presented to the Supreme Court was "whether a condition of release can so diminish or eliminate a released prisoner's reasonable expectation of privacy that a suspicionless search by a law enforcement officer would not offend the Fourth Amendment". Id. The Supreme Court did, however, at footnote 1 in Samson, articulate that Samson would not be the analysis to be applied in the context of a probation condition search for a probationer, rather than a parolee, without individualized suspicion. Id. at n.1. Thus, Samson gives guidance to the issue at bar, but does not serve as on-point authority to answer the question at issue.

[¶36] The manner in which Samson helps guide the discussion relevant to the legal consideration here is that Samson clearly explained the nature of a parolee and the related limitations a parolee suffers as a result of that status inasmuch as his reasonable expectation of privacy is concerned:

> "As we noted in Knights, parolees are on the 'continuum' of state-imposed punishments. On this continuum, parolees have fewer expectations of privacy than probationers, because parolee is more akin to imprisonment than probation is to imprisonment. As this Court has pointed out, 'parole is an established variation on imprisonment of convicted criminals ... the essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abides by certain rules during the balance of the sentence'".

Id. (internal citations omitted; and emphasis added). The foregoing distinctions between parolees and probationers is highly relevant to establishing the level of privacy to be expected and enjoyed by the respective parties subject to the search, and, in Ballard's case, would tend to indicate that he was entitled to more privacy than that afforded to Samson in light of the fact that Ballard was an unsupervised probationer, and not a felon parolee. On the "continuum" of punishments and diminishment of rights, Ballard received a dose of lesser medicine. United States v. Cardona, 903 F.2d 60, 63 (CA1 1990) ("[O]n the Court's continuum of possible punishment, parole is the stronger medicine; ergo, parolees enjoy even less of the average citizen's absolute liberty than do probationers."). In Ballard's Criminal Judgments, under which the search clause exists, he was afforded completely suspended sentences, meaning that he was not released from imprisonment like Samson. Instead, he was placed on unsupervised probation, and his probation term relevant to search clauses read as follows: "The Defendant will submit to a search of his person, place, and vehicle at the request of law enforcement without a warrant". Appx. at 39-42. In Knights and Samson, the search clauses themselves were more stringent.[1]

[¶37] Moreover, a review of the other search conditions to which Samson was subjected demonstrates a very reduced level of privacy; Samson's conditions, in addition to the search clause at issue, required that he take mandatory drug tests, restrict his associations

[1] In Knights, the language of the condition at issue stated that Knights was to "submit his ... person, property, place of residence, vehicle, personal effects, to search at any time, with or without a search warrant, warrant of arrest, or reasonable cause by any probation officer or law enforcement officer". Similar language appeared in the Samson supervised probation terms. In Knights, his term appears to have waived even the reasonable cause basis, while Ballard's term only stated searches could occur without a warrant, which, of course would be a probable cause standard, rather than a lower threshold of reasonable suspicion. Ballard's search terms did not expressly waive the reasonable suspicion standard.

with felons and gang members, make mandatory meetings with parole officers, advise of changes to his employment status, seek permission to travel more than fifty miles from home, and refrain from possession of firearms, etc. The Supreme Court went on to note that parolees may also be subject to other significant conditions, including psychiatric treatment programs, mandatory abstinence from alcohol, residence approval, and other conditions deemed appropriate by the Department of Corrections. Id. The Supreme Court explained that the "extent and reach of these conditions clearly demonstrate[s] that parolees like [Samson] have severely diminished expectations of privacy by virtue of their status alone". Id. The totality of Ballard's probationary terms were that he not possess drug paraphernalia, pay his fines and fees within ninety days, submit to searches of his person, submit to random drug testing, and not possess or consume any controlled substance without valid prescription. Two of the conditions, namely, the prohibitions against possession of drug paraphernalia and controlled substances without a prescription, would be criminal offenses to any citizen within the boundaries of North Dakota, and thus, would not be deemed unusual or stiff conditions for Ballard. Thus, Ballard, unlike a parolee, would expect to suffer a much lesser limitation on freedom and privacy.

[¶38] At the motion hearing, the State did not call any witness or present any evidence that would have tended to indicate Ballard was under such conditions of unsupervised probation so as to deprive him of his expectation of privacy to the same extent as Samson. In fact, the State did not call any witnesses at the hearing to demonstrate the invasion was "needed for the promotion of legitimate government interest". Knights at 118-119. The State did allege in its brief various "facts", which it asserted made the

nature and circumstances "reasonable", but the State did not call a witness at the hearing to present those facts to the court. The State failed to meet its burden after Ballard's initial showing by virtue of his motion; as this Court has repeatedly said, after a motion to suppress has been filed, "[a] defendant then has the burden of establishing a prima facie case at the motion hearing before the State is required to put on evidence." State v. Canfield, 2013 ND 236, ¶ 7, 840 N.W.2d 620 (citing State v. Fitterer, 2002 ND 170, ¶ 10, 652 N.W.2d 908). "To do so, the defendant must make an evidentiary showing that the search and seizure was illegal." Id. (citations omitted). "However, after the defendant has made a prima facie case, the burden of persuasion shifts to the State to justify its actions." State v. Tester, 1999 ND 60, ¶ 15, 592 N.W.2d 515 (citing State v. Swenningson, 297 N.W.2d 405, 407 (N.D. 1980)). Here, the State did not call a witness or produce additional evidence allowing it to "justify its actions". The lack of such evidence or testimony was specifically noted by Ballard in his concluding remarks at the motion hearing, when Ballard argued the State "hasn't presented evidence outside of the stipulated facts that would've led to an opportunity for this Court to rule contrary to our position". Motion Hearing Trans. at 20. Moreover, Ballard reiterated facts raised during the preliminary hearing, to which the parties had stipulated for fact pattern purposes, and for which the State offered nothing to overcome:

> "Mr. Ballard was on unsupervised probation. This wasn't a call from a supervised probation officer ... saying, hey, I have some concerns about this probationer, maybe he failed a UA, maybe he hasn't shown up, maybe he hasn't checked in, maybe he's unemployed. There was no reason that – Deputy Hubble could articulate sitting on that witness stand that led him to stop that car other than frankly he had nothing better to do. They didn't even commit so much as a traffic violation ... there was no reason to suspect that those folks were doing anything other than being law abiding citizens, and that's unreasonable."

Motion Hearing Appx. at 15-16. Even these facts deviate from Samson in that, at least in Samson, in addition to recognizing Samson as a parolee (and not a probationer), the officer who approached Samson believed he had an at-large warrant. Here, Hubble had nothing except time on his hands and he decided to invade Ballard's liberties for lack of something better to do. Because the State failed to present any additional evidence at the hearing, it failed in its burden after Ballard's prima facie showing of illegality due to the lack of reasonableness under the circumstances and a lack of demonstrating a competing government interest to overcome what rights Ballard retained under the 4th Amendment as a probationer.

CONCLUSION

[¶ 39] The district court erred as a matter of law in determining the "suspicionless probationary search" did not violate Ballard's 4th Amendment rights against unreasonable search and seizure. Thus, the Order Denying Defendant's Motion to Suppress should be reversed, together with the criminal judgment in this matter, and Ballard should be permitted to withdraw his conditional guilty plea.

Dated this 5th day of December, 2014.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I, Elizabeth L. Pendlay, do hereby certify that a true and correct copy of the foregoing **Appellant's Brief** and enclosed **Appellant's Appendix,** was, on the 5th day of December, 2014, hand-delivered by me, to the following individual, at the Divide County Courthouse located in Crosby, Divide County, North Dakota:

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Dated at Crosby, North Dakota, this 5th day of December, 2014.

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