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STATE OF NORTH DAKOTA

FILE NUMBERS 20140355

In The

Supreme Court of North Dakota

STATE OF NORTH DAKOTA,

Plaintiff and Appellant

versus

REBEKAH MAXINE POGUE

Defendant and Appellee.

On appeal of District Court's Order Granting Motion to Suppress

The Honorable Robin A. Schmidt, Presiding

Appellee's Brief

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STATEMENT OF ISSUES

[¶1] The District Court properly found that the search of the vehicle was unreasonable, and in violation of the 4th Amendment of the United States Constitution and Article I, Section 8 North Dakota Constitution, because it was not pursuant to a valid warrant exception.

[¶2] Is the State's appeal unripe for review since the District Court has not ruled on the State's motion to reconsider?

STATEMENT OF THE CASE

[¶3] Rebekah Pogue was charged with a 6 count complaint filed on March 28, 2014. Specifically, she was charged with four counts of possession of a controlled substance, and two counts of possession of drug paraphernalia. All were charged as Class C felonies, with the exception of one count of drug paraphernalia being charged as Misdemeanor. All offenses are have alleged to have occurred on March 1, 2014.

[¶4] After an amended complaint was filed, a preliminary hearing was held on July 17, 2014 where the Court found probable cause for the 5 felony charges. Ms. Pouge was arraigned and held to answer on the charges and pled not guilty. On August 22, 2014 a timely motion to suppress the evidence as a result of an inventory search was filed. Briefs were filed and a hearing was waived by both parties.

[¶5] In her brief, Pogue argued that the vehicle search was unreasonable under Article I, Section 8 of the North Dakota Constitution, and the Fourth Amendment of the United States Constitution. In particular, Pogue argued the initial search of the subject vehicle was warrantless, and that no valid exception to the warrant requirement applied. The

parties agreed in their briefing below that the search could only be characterized as an inventory search. Pogue further argued that the inventory search was not valid, because it was not pursuant to a caretaking function, that the State provided no evidence that there were standard procedures for impounding vehicles, and if there were standards, they probably were not followed in this case. Lastly, Pogue argues that because the evidence was discovered illegally, it must be suppressed.

[¶6] The State argued that the inventory search is valid, because the car did not belong to Pogue and the fact the registration was expired. The State also argues that there was probable cause for the search, because a warrant was eventually obtained. Finally, the State argues that the officer relied in good faith upon the policy and law regarding inventory searches, and the search warrant eventually issued by the court.

[¶7] The District Court granted Ms. Pogue's motion. The Court reasoned that the vehicle was not impounded to further a caretaking or safety function. Accordingly, the Court found that the inventory exception to the warrant requirement was inapplicable, and the warrant that was subsequently issued was based exclusively upon evidence illegally obtained in the warrantless search. Therefore, the evidence must be suppressed.

[¶8] The State filed a motion to reconsider, which was resisted by Ms. Pogue. Prior to the District Court ruling on the motion, the State appealed.

STATEMENT OF THE FACTS

[¶9] On March 1, 2014 at 10:54 PM Watford City police Sargent Langowski conducted a traffic stop on 3rd Avenue Southwest in Watford City. (App. 14) The vehicle was registered to a Kyle Wilson in Washington State. (App. 14) Langowski saw two people in the car: the driver was eventually identified as Pogue and an unknown male passenger. (App. 14) Langowski told Pogue that he stopped her because she was in his lane of travel. (App. 14) Pogue was unable to produce registration, proof of insurance, driver's license, or any form of identification. (App. 14) After a second request for insurance and registration, the unknown male front passenger started rummaging through the glove box. (App. 14) Meanwhile, Langowski continues to question Pogue, asking who owns the vehicle, and asking for her identification again. (App. 14) Pogue informs that her ID had been stolen. (App. 14)

[¶10] Upon the officer asking, Pogue gave the name of Sarah Elaine Hernandez and her date of birth of August 8, 1981 and informs that her license is out of Washington state. (App. 14) Prior to returning to his patrol car, Langowski indicates that he smelled the odor of alcohol from inside the vehicle, as well as watery and bloodshot eyes, slurred speech, and slow movements. (App. 14) Upon return to the vehicle Pogue was driving, Langowski asked her Pogue of the vehicle. (App. 14)

[¶11] Langowski proceeded to initiate a driving under the influence investigation. (App. 14) Due to the cold weather, he asked Pogue to sit inside his vehicle. (App. 15) Langowski asked her how much she had to drink and conducted the HGN test, and a number of non-standardized field sobriety tests including the so-called "partial alphabet

test" and the "reverse count." (App. 14-15) Pogue also consented to the Alco-sensor test. (App. 15)

[¶ 12] At this point, Langowski put Pogue under arrest. (App. 15) She stepped out of the officer patrol vehicle, was handcuffed, and Mirandized. (App. 15) Langowski then told the passenger that Pogue had been arrested. (App. 15) Pogue granted the officer permission to move the car out of the private driveway, and Langowski parked the car on the public street and locked the doors. (App. 15) At his request, the officer gave the unknown male a ride to Outsider's Bar and Grill. (App. 15)

[¶13] Pogue was taken to the hospital for a blood examination. (App. 15) Pogue submitted to the blood draw and had a sample of her blood taken at 11:56 PM. (App. 15) Langowski then took Pogue to jail, where he noticed two different Social Security numbers were given during booking. (App. 15) Eventually, Pogue admitted to a jailor that she had used her sister's name in the arrest. (App. 16)

[¶14] Sometime later, Langowski decides to impound the vehicle. (App. 16) Langowski never personally identified the vehicle to be impounded, never completed a through physical inspection of the vehicle prior to impoundment, and did not meet with the tow driver and follow the vehicle to the impound lot. (App. At 16, 21). Further, Langowski never ensured that the gate to the impound lot was secure after the car was towed to the lot. (App. 16).

[¶15] At approximately 3 AM, Langowski performed a vehicle inventory at the impound lot where the car had been taken, and photographed the interior. (App. 16). He found a black, cloth bag. (App 16). He continued to looked inside the bag and found a container with a white crystalline substance, and later, he found 4 syringes. (App. 16) At

this point, Langowski seized the bag as evidence, locked the doors to the vehicle, and secured the impound lot gate. (App. 16) Langowski returned to the police department and searched the cloth bag further and found a number of items that Langowski suspected to be controlled substances or paraphernalia. (App. 16) At least three items were NARK tested, and other items were collected to be sent to the State Lab. (App. 16)

[¶16] Only after searching the entire contents of the black cloth bag found in the car did Langowski apply for a search warrant. (App. 16) The probable cause for the warrant was based solely on the evidence discovered in the search of the black cloth bag. (App. 16, 23, 30) The District Court grants the warrant and Langowski executes the same. (App. 17). In his report, Langowski indicates the warrant search began at approximately 2:27 AM, but it must have been later because he did the initial inventory at approximately 3 AM. (App. 16, Record on Appeal 53, p. 13 lines 6-8) Upon execution of the warrant, several more syringes and writings were seized by Langowski. (App. 17)

STANDARD OF REVIEW

[¶17] The standard of review on motions to suppress is long standing:

> When reviewing a district court's ruling on a motion to suppress, we defer to the district court's findings of fact and resolve conflicts in testimony in favor of affirmance. We affirm the district court's decision unless we conclude there is insufficient competent evidence to support the decision, or unless the decision goes against the manifest weight of the evidence.

State v. Nagle, 2014 ND 224, ¶5, 857 N.W.2d 374, 377 (N.D. 2014).

LAW AND ARGUMENT

THE INVENTORY SEARCH OF THE VEHICLE BY POLICE WAS ILLEGAL, AND SUCH A SEARCH CANNOT BE THE BASIS FOR A SUBSEQUENTLY OBTAINED WARRANT.

[¶18] Officer Langowski's search of the vehicle was violative of both the Fourth Amendment of the U.S. Constitution, and Article I, Section 8 of the North Dakota Constitution. In order for an inventory search to be valid, they must be 1) conducted pursuant to a caretaking function, 2) conducted for the purpose of protecting the owner's property, and protecting the police from claims of stolen, vandalized, or lost property, and 3) conducted according to reasonable police regulations. State v. Kunkel, 455 N.W.2d 208, 210-211 (N.D. 1990).

[¶19] Kunkel involved a phone call from a known informant that Kunkel, McGrath and their girlfriends would be passing through Devils Lake in a van containing drugs. Id. at 209. The State's Attorney informed police that this was insufficient probable cause to get a search warrant, so the police applied for an arrest warrant for an alleged drug sale by McGrath that was conducted 8 months earlier. Id. The next morning, armed with the arrest warrant, the van was stopped by police. Id. All occupants of the vehicle were pat-searched, and McGrath was arrested. Id. The van was impounded, and everyone, save for McGrath, was driven home. Id.

[¶20] The van was impounded, and pursuant to an inventory search, a film canister with marijuana was discovered. Id. The Police than stopped the search and sought a search warrant, which was granted. Id. Other drugs were found in the van, and search of Kunkel's house was conducted, which turned up even more evidence. Id. On the basis of this search, Kunkel and the other occupants of the van were arrested. Id.

[¶21] Kunkel moved to suppress because the search and seizure of the van violated his rights under the Fourth Amendment and Article I, Section 8 of the North Dakota Constitution. Id. The trial court denied the motion, reasoning that because the Police had a warrant to arrest McGrath, based on probable cause, that the search of the van was incident to arrest, and a valid inventory search. Id.

[¶22] The North Dakota Supreme Court reversed, holding that the search of the van was not done for a caretaking function, but because the police wanted to search for evidence. Id. at 211. The Court points out that the U.S. Supreme Court in South Dakota v. Opperman 428 U.S. 364 approved of an inventory search in "a routine caretaking procedure rather than one motivated by investigatory purposes." Id. Indeed, the Court held that "an inventory of property in police custody may not be used as a subterfuge for criminal investigation." Id. citing Colorado v. Bertine 479 U.S. 367, 372, 376 (1987). The Court rejected the trial court's view that the search of the van was done incident to arrest because the vehicle was not searched "contemporaneous, temporally or spatially, with the arrest of McGrath." Id. at 210.

[¶23] The District Court in this matter properly found that there was no caretaking function furthered by impounding the vehicle in this matter. In its decision, the District Court rightly observes that after Ms. Pogue was arrested, Officer Langowski moves the vehicle across the road onto a public street, unattended until sometime before 3 AM. The record is devoid of any emergent safety concern that developed an hour or more after the stop of the vehicle by Langowski. Without this caretaking function, an inventory search cannot be justified. See Id. at 211(…it is the caretaking function which legitimizes an inventory. Absent that justification, an inventory is unreasonable and is an impermissible

warrantless search in contravention of the fourth amendment.) Further, like the subject vehicle in Kunkel, the vehicle was not searched contemporaneously with the time of arrest.

[¶24] The police were not justified in impounding the vehicle on concerns of protection of property. The record in this case is clear that Officer Langowski left the vehicle on the side of a public street unattended and decided only after Ms. Pogue had completed the blood draw at the hospital to impound the vehicle. If protection of the vehicle itself, and its contents were of concern, the vehicle would not have been left unattended by Officer Langowski. Presumably, the protection of property is the very reason why the Watford City Police Department's written directive for impounding vehicles requires that the officer meet with the tow truck driver and follow the car to the impound lot. As stated previously, the officer neither met with the driver, nor followed the car to the impound lot that night.

[¶25] Moreover, Officer Langowski failed to follow the written directive of his Department for impounding vehicles. The record is silent as to whether or not dispatch had generated a impound incident report, which is one of the initial steps in impounding a vehicle (App. 21). Further, as mentioned previously, Officer Langowski did not meet with the tow truck driver, ensure the correct vehicle is impounded, follow the vehicle to the impound lot, or secure the gate when the tow was complete. The record is devoid of any indication that a Call for Service was initiated by the officer, or that there was a Vehicle Impound form completed. These are all steps required by the WCPD's written directive. In sum, Officer Langowski's actions failed to meet any one of the three requirements for a valid inventory search.

[¶26] The State argues that the District Court's finding that there was no evidence of a caretaking or safety concern was not supported by the evidence, because this Court has found that an impound and subsequent inventory search was valid when a car was parked on a public highway, it presented a traffic hazard, and was uninsured. See State v. Gregg, 2000 ND 154, ¶37, 615 N.W.2d 515 522. However, the instant case is radically different than Gregg, namely, the vehicle in this case was parked in a private drive, therefore presented no traffic hazard. Furthermore, the record is silent as to whether or not the car was uninsured. Arguably, Officer Langowski made the vehicle more of a potential traffic hazard by parking it on the street.

[¶27] The State downplays the emphasis the District Court places upon the traffic hazard justification for impounding a car by citing cases where such a hazard was immaterial. However, the District Court cited safety concerns as only one possible reason for impounding a vehicle: "[t]he vehicle sat on the side of the road until it was towed to the impound lot, sometime before 3:00 am that evening. The Court does not have any evidence that the vehicle was impounded for *caretaking or safety concerns*." (App. 29) (emphasis added). Without citing authority, the State attempts to equate the vehicle not belonging to Ms. Pogue, expired registration, and the suspected false information as evidence that there is a valid caretaking or safety concern that justifies impounding the vehicle.

[¶28] The State indicates, without citing authority, that the instant case is consistent with cases where this Court has previously upheld inventory searches. However, even if there is some authority that supports this view, it is clear in the instant case that Officer

Langowski did not follow procedures promulgated by the WCPD. (See App. 21-22). This undermines the validity of the search/

[¶29] Furthermore, the caretaking concerns do not apply because the police abandoned the car once Langowski decided to give the unknown male a ride to the bar and then continue to the hospital with Ms. Pogue. The record is clear that Officer Langowski failed to follow the written directives of his police department that he acknowledged that he read and understood. (App. 22). Written directives are important because they "…vitiate concerns of an investigatory motive or excessive discretion…" United States v. Marshall, 986 F.2d 1171, 1174 (8th Cir. 1993) citing South Dakota v. Opperman 428 U.S. 364, 372 (1976). The State bears the burden of showing that an exception to the warrant requirement applies and that the police conduct fell within the bounds of the exception. Vale v. Louisiana 399 U.S. 30, 35 (1970). The State has not shown that either a valid caretaking or safety concern was exhibited in this case. Even if there was such concerns, the inventory search of the vehicle in this matter fell outside the bounds of the inventory exception, because the WCPD written directive was not followed.

[¶30] The State argues that the District Court erred by making no findings on the good faith exception to the warrant requirement. The State presumes that the District Court relied upon the Kunkel Court holding that "Illegally obtained evidence cannot be the basis of a magistrate's finding of probable cause" Kunkel 455 N.W.2d at 211, citing United States v. Vasey, 834 F2d 782 (9th Cir. 1987). The State indicates, that a totality of the circumstance test should apply, and that since there is probable cause within the four corners of the warrant, that the warrant was validly issued. The State further argues that because Kunkel relies upon Vasey, a Ninth Circuit case, Kunkel

should be abandoned because Vasey is not binding. Instead, a so-called "close-call" test should be used because it was adopted by the Eighth Circuit, which the State argues should be more persuasive than Ninth Circuit authority.

[¶31] However, the focus of the inquiry is not whether or not the good faith exception applies, but whether or not evidence derivative of illegally obtained evidence is subject to exclusion. As the Eighth Circuit has noted, "The exclusionary rule 'reaches not only primary evidence obtained as a direct result of an illegal search or seizure ... but also evidence later discovered and found to be derivative of an illegality or fruit of the poisonous tree.'" United States v. Swope, 542 F.3d 609, 613 (8th Cir. 2008) citing Segura v. United States, 468 U.S. 796, 804 (1984). However, if the government can show that the evidence in support of a warrant was obtained from a source independent of the illegally obtained evidence, then the exclusionary rule is inapplicable. Id. citing Wong Sun v. United States, 371 U.S. 471 (1963). To show an independent source, both these propositions must be true: 1) "would the police have applied for the warrant had they not acquired the tainted information" and, 2) "do the application affidavits support probable cause after the tainted information has been redacted from them" Id. citing United States v. Murray 487 U.S. 533, 542 (2008).

[¶32] In this case, the record supports, and the State concedes, that there would have been a lack of probable cause without the evidence seized as part of the inventory search. Accordingly, there is no independent source outside the illegal inventory search by which the police could have obtained the warrant. The District Court properly observed that, "[p]robable cause for the search warrant subsequently issued for the vehicle *was based exclusively upon* the evidence illegally obtained in the warrantless search." (App. 30)

(emphasis added). This implies that there can be no independent source to support the affidavit of probable cause for the warrant. As the State notes in its brief, the reviewing Count cannot look beyond the four corners of the affidavit for application or issuance of the warrant, State v. Schmalz, 2008 ND 27, ¶13, 744 N.W.2d 734, 738-739, and that this Court makes a totality of the circumstances review to determine sufficiency of the information before the magistrate, independent of the District Court's decision. State v. Nelson 2005 ND 59, ¶16 693 N.W.2d 910, 916. In this case, at the time of the issuance of the warrant, there is no way the magistrate could have known that the inventory search was constitutionally infirm and could only rely upon the four-corners of the affidavit. The State seems to suggest that the District Court cannot, at one time issue the warrant, then subsequently find that it was invalid. However, the Court is under different mandates in these two roles: as warrant issuing magistrate, the District Court can only look at the four-corners of the affidavit; in considering the motion to suppress, the District Court must consider circumstances beyond the four-corners of the affidavit.

[¶33] The State misapplies Leon in this case. Leon deals with the police reliance on a search warrant that was subsequently invalidated, where the issuing magistrate, and not necessarily the officers that executed the warrant, should have known that the information in the affidavit for the search warrant was stale, and the reliability of the informants was not established. United States v. Leon, 468 U.S. 897, 904 (1984). In this case, the record indicates that Officer Langowski acknowledged and understood the rules regarding impoundment and inventory (App 22), did not follow this directive, but claimed that he did follow the directive in the affidavit in support of the warrant (App 23, ¶9). As the Leon court stated, the officer does not rely on good faith when, "relying on a

warrant based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" Id. at 923 citing Brown v. Illinois, 422 U.S. 590, 610-611 (1984). This warrant lacked probable cause because the inventory search was not done pursuant to police directives, and Officer Langowski knew that to be the case.

[¶34] The State argues that United States v. Fletcher should be injected into Kunkel instead of United States v. Vasey, and that this should change the result in this case. However, a closer analysis of Fletcher reveals that those facts are inapplicable in this case. In Fletcher, police thought that the suspect was acting suspiciously in an airport, and upon seizing a piece of the his luggage, he initially gave then withdrew consent to search the luggage. United States v. Fletcher, 91 F.3d 48, 49-50 (8th Cir. 1996). Based on those observations, the Court noted that there was not reasonable and articulable suspicion that a crime had been committed, but the officers still had an objective reason to suspect that a crime was committed. Id. at 52. Put another way, the Court determined that the officers had a "…objectively reasonable belief that they possessed a reasonable suspicion…" that drugs would be found as the result of the search of the bag. Id. In this case, the record is devoid of any finding that prior to the inventory search that Officer Langowski even had a hunch that narcotics or paraphernalia would be found. This case is about an illegal inventory search which yielded suspected narcotics and paraphernalia conducted on the basis of possible false information, expired registration, and the fact Ms. Pogue did not own the vehicle. The Fletcher case is about an illegal search that yielded narcotics based on a suspicion of narcotics trafficking. The facts in Fletcher are much closer to the "line of validity" than the instant case. Whatever the case, this Court

found Vasey persuasive in developing its decision in Kunkel, and the State has provided no reason why the Court should abandon this well-established rule.

THIS APPEAL IS UNRIPE FOR REVIEW BECAUSE THE DISTRICT COURT HAS NOT RULED THE STATE'S MOTION TO RECONSIDER

[¶35] The State filed its notice of appeal after Ms. Pogue filed her response to the State's Motion to reconsider. That makes this appeal unripe for review before this Court. "An issue is not ripe for review if it depends on future contingencies which, although they might occur, necessarily may not, thus making addressing the question premature." State v. Hammer 2010 ND 152, ¶ 30, 787 N.W.2d 716, 725 citing Bies v. Obregon, 1997 ND 18, ¶ 9, 558 N.W.2d 855. In this case, one of the alternative prayers for relief asked for by the State is remand to district court to inquire whether or not the good faith exception applies. While Ms. Pogue believes that the State's argument must fail, either on re-consideration or before this Honroable Court, it is possible that the district court might have addressed this issue if allowed to rule on the motion to re-consider. Therefore, this appeal is not ripe for review by this Court.

CONCLUSION

[¶36] The inventory search of the vehicle in this matter was in violation of both the Fourth Amendment of the U.S. Constitution and Article I, Section 8 of the North Dakota Constitution. The officer did not act in good faith when gathering or presenting the evidence to the magistrate for her decision on whether to issue the warrant. Consequentially, because the evidence was illegally obtained, and no valid warrant exception applies, Ms. Pogue prays this Honorable Court affirm the judgment of the District Court.

Dated this 6th day of February, 2015

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA, PLAINTIFF, versus REBEKAH MAXINE POGUE, DEFENDANT.	CERTIFICATE OF SERVICE SUPREME COURT NO. 20140355

I, Daniel El-Dweek, certify that the Appellee's Brief (revised) in the above-captioned matters was served by electronic service on this 17th day of February, 2015, upon the following parties:

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Dated this 17th day of February, 2015

/s/ Daniel S. El-Dweek