20140355
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
NOVEMBER 24, 2014
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff,	)	
	)	Supreme Court No. 20140355
vs.	)	
	)	District Court No. 27-2014-CR-00492
Rebekah Maxine Pogue,	)	
	)	
Defendant.	)	

BRIEF OF PLAINTIFF-APPELLANT

APPEAL FROM ORDER GRANTING MOTION TO SUPPRESS

MCKENZIE COUNTY DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT
HONORABLE ROBIN A. SCHMIDT, PRESIDING

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STATEMENT OF THE ISSUES

[¶1] Whether the district court's order suppressing evidence obtained as the result of an inventory search should be reversed, because there is insufficient competent evidence capable of supporting its findings and its decision is contrary to the manifest weight of the evidence.

[¶2] Whether the district court's order suppressing evidence obtained as a result of a search warrant should be reversed, because the good-faith exception to the exclusionary rule applies.

STATEMENT OF THE CASE

[¶3] The State of North Dakota ("State") appeals from the district court's order granting the motion to suppress of Rebekah Maxine Pogue ("Pogue"). The State charged Pogue by complaint filed on 28 March 2014 with six controlled substance-related offenses, five class C felonies and one class A misdemeanor. The State alleged Pogue had committed these offenses on or about 1 March 2014. The State subsequently filed an amended complaint, alleging the same offenses and offense classes but revising the particular controlled substance in counts two and five. At the preliminary hearing in mid-July, the district court found probable cause on the five felonies. The State filed an information containing all six counts on which Pogue was arraigned and pleaded not guilty.

[¶4] Pogue on 22 August timely moved to suppress the evidence giving rise to the charges against her. The evidence, controlled substances and paraphernalia, had been obtained from an inventory search of the motor vehicle from which she had been arrested on 1 March 2014 and after the inventory search from execution of a search warrant on the same vehicle. Pogue argued only the inventory search was invalid and therefore all evidence obtained found in the vehicle must be suppressed. Pogue offered her arrest report prepared by the Watford City Police Department ("WCPD") as an exhibit in support of her motion.

[¶5] The State filed a response brief opposing Pogue's motion on grounds the inventory search was valid and the execution of the search warrant was in good

faith such that suppression was not an appropriate remedy. The State submitted a WCPD written directive for impounding vehicles, the affidavit in support of application for search warrant of the vehicle in question, the search warrant for the vehicle in question, and the search warrant receipt and inventory for the vehicle in questions as exhibits in support of its arguments.

[¶6] Neither party requested a hearing, nor was a hearing held. The district court decided the motion on briefs and exhibits. In its order entered 18 September the district court suppressed all of the evidence from both searches, finding the inventory search invalid, which it said consequently could not have supported probable cause for the search warrant the court itself had issued.

[¶7] The State filed a motion for reconsideration. Pogue resisted. Before the district court decided the motion for reconsideration, the State filed a timely notice of appeal of the order granting motion to suppress, along with a prosecutor's statement accompanying notice of appeal. This appeal ensued.

STATEMENT OF THE FACTS

[¶8] At approximately 10:54 pm on 1 March 2014, Sergeant Andrew Langowski ("Langowski") of the WCPD made a traffic stop on a black 2011 Mazda with license plates from the State of Washington. (App. 14, 23). The Mazda stopped in a private driveway, and Langowski discovered a female driver. (App. 14, 23). The vehicle had expired registration and did not belong to the driver. (App. 14, 23). When Langowski asked, the driver could not produce any identification but identified herself as Sarah Hernandez. (App. 14). Langowski would later discover the female driver was in fact Pogue. (App. 16, 23).

[¶9] Langowski detected the odor of an alcoholic beverage coming from inside the vehicle, the driver had watery bloodshot eyes, the driver slurred her speech, and the driver displayed slow, sluggish movements. (App. 14). He requested Pogue perform field sobriety tests, which she did unsatisfactorily. (App. 14-15). Pogue submitted to an onsite screening test, the result of which was a .19. (App. 15). Langowski placed Pogue under arrest for driving under the influence and with Pogue's permission moved the car from the private driveway to the public street. (App. 15, 23).

[¶10] Pogue submitted to a blood draw at the local hospital and was taken for booking to the county jail. (App. 15). During the booking process, Langowski discovered an inconsistency between the social security number Pogue had given him and what records were showing as Sarah Hernandez's number. (App. 16). It

appeared to Langowski that Pogue had provided him false information. (App. 16). At this point, due to the vehicle not belonging to Pogue, its expired registration, and the false information, Langowski impounded the car. (App. 16, 23). Pogue admitted to a deputy sheriff with whom she previously had contact she had used her sister's name, Sarah Hernandez, out of revenge. (App. 16).

[¶11] After completing the booking process on Pogue for the criminal charges, namely, false information, driving while license suspended, and driving under the influence, Langowski then proceeded to the impound lot to perform an inventory search of the Mazda in accord with a written department directive. (App. 16, 21, 23). During the inventory search, performed in the early morning hours of 2 March, he found a black cloth bag containing multiple items of drug paraphernalia and a white crystalline substance he believed to be methamphetamine, which a field test confirmed. (App. 16, 23, 26-27).

[¶12] Langowski ceased his inventory search and on 3 March submitted an affidavit in support of application for search warrant. (App. 16, 23-24). The affidavit contained the reasons Langowski had impounded the vehicle, described his having conducted an inventory search per departmental directive, and identified what he had found during the inventory search. (App. 23-24). The district court issued a search warrant for the Mazda on the basis of the affidavit. (App. 25). Langowski executed the search warrant on 6 March and discovered additional used syringes and a possible drug transaction ledger. (App. 17, 26-27).

ARGUMENT

I. The court incorrectly concluded the inventory search was invalid.

[¶13] The district court found the vehicle was not impounded to further a caretaking function, and specifically that there was no evidence the vehicle was impounded for caretaking or safety concerns. (App. 29). Insufficient competent evidence supports this finding and the decision is contrary to the manifest weight of the evidence. This Court should reverse the district court's findings that the vehicle was not impounded to further a caretaking function.

[¶14] This Court's standard for reviewing a district court's decision on a motion to suppress evidence is well established:

> In reviewing a district court decision on a motion to suppress, we give deference to the district court's findings of fact, and we resolve conflicts in testimony in favor of affirmance. State v. Tognotti, 2003 ND 99, ¶ 5, 663 N.W.2d 642. We "will not reverse a district court decision on a motion to suppress … if there is sufficient competent evidence capable of supporting the court's findings, and if the decision is not contrary to the manifest weight of the evidence." State v. Gefroh, 2011 ND 153, ¶ 7, 801 N.W.2d 429. Questions of law are fully reviewable on appeal, and whether a finding of fact meets a legal standard is a question of law. Id.

State v. Reis, 2014 ND 30, ¶ 8, 842 N.W.2d 845. Whether the findings of fact meet a legal standard is a question of law. See State v. Gregg, 2000 ND 154, ¶ 8, 615 N.W.2d 515 (citing City of Grand Forks v. Zejdlik, 551 N.W.2d 772, 774). The justification for an automobile inventory search is a question of law. Id. at ¶ 36.

[¶15] In Gregg, this Court refreshed its prior holding that:

> Securing and inventorying the contents of a motor vehicle "in police

> custody is predicated on the interest in protecting the owner's property while it is in police custody, protecting the police against claims of lost, stolen or vandalized property and protecting the police against danger posed by the inventoried property." State v. Kunkel, 455 N.W.2d 208, 211 (N.D. 1990) (citations omitted). An inventory conducted using "reasonable police regulations relating to inventory procedures administered in good faith" is permissible under the Fourth Amendment. Id. In addition, a warrantless search of an impounded vehicle is acceptable "when the inventory is a routine caretaking procedure rather than one motivated by investigatory purposes." Id. (citing South Dakota v. Opperman, 428 U.S. 364, 376 1976).

Gregg, at ¶ 36. The Gregg Court upheld an inventory search on the grounds the defendant's car was parked on a public highway, constituted a traffic hazard, and was uninsured. Id. at ¶ 37. The Court upheld these as legitimate grounds for impounding the defendant's vehicle even in the context of a known, active criminal investigation pertaining to the defendant for possession of drug paraphernalia. See Gregg, at ¶¶ 3—12. The district court's holding in this case that the same caretaking and safety concerns did not exist on a vehicle that lacked current registration and did not belong to the driver who had given false information to a law enforcement officer cannot be squared with Gregg.

[¶16] This Court has upheld vehicle inventory searches even when, unlike in Gregg, a traffic hazard is not among the reasons offered for impoundment and inventory. See e.g., State v. Muralt, 376 N.W.2d 25, 26 (N.D. 1985) (where the driver, who had been driving his own car, was arrested for driving under the investigation); State v. Syvertson, 1999 ND 137, ¶ 23, 597 N.W.2d 644 (where the driver, who had been driving his own car, was arrested for driving under

suspension). Indeed, in one of the hallmark federal cases regarding the reasonableness of an automobile inventory search, the United States Supreme Court upheld a law enforcement officer's impoundment and subsequent inventory search of a vehicle when the driver was arrested for driving under the influence. See Colorado v. Bertine, 479 U.S. 367 (1987). Nothing in this case distinguishes its impoundment and inventory search from those above.

[¶17] In this case, no underlying factual disputes exist, but the district court simply mischaracterized whether the facts presented constitute caretaking or safety concerns to justify impoundment of the vehicle. The undisputed facts show Langowski impounded the vehicle due to its not belonging to Pogue, its expired registration, and the false information charge against Pogue. (App. 16, 23). Pogue did not argue to the contrary in the court below. (See generally, App. 10, 12). The district court's finding "[it] does not have any evidence the vehicle was impounded for caretaking or safety concerns" overlooks the bulk of the evidence stating otherwise. (See App. 29).

[¶18] When this Court has overturned an automobile inventory search, it was due to evidence showing the very purpose of the search was to discover evidence of crime. See State v. Kunkel, 455 N.W.2d 208, 211—12 (N.D. 1990). That is not the case here. In Kunkel, the law enforcement officers admitted the purpose of impounding and inventorying the vehicle was to search for drugs. Id. at 211. The purpose for impounding here the vehicle was plainly not to search for

evidence. There is no fact in evidence or contended Langowski suspected the vehicle contained contraband or evidence crime, or that he had as any part of his purpose to search for evidence of crime. This case does not resemble Kunkel.

[¶19] The reasons Langowski impounded the vehicle are justified by the manifest weight of the evidence, and the record lacks sufficient competent evidence to find otherwise. There was no showing that in conducting the inventory search the police "acted … for the sole purpose of investigation. Bertine, 479 U.S. at 372. This vehicle impoundment and inventory search is consistent with cases where this Court has previously upheld vehicle inventory searches. If impoundment of a vehicle does not constitute a caretaking concern when a non-owner driver lies about her identify and the vehicle lacks current registration, this Court should abrogate its holdings where impoundment after the arrest of the driver-owner for a criminal offense was alone sufficient to be found caretaking. Consequently, as a matter of law, this Court should find the impoundment and inventory search of the vehicle was not unreasonable.

II. The court incorrectly concluded the good-faith exception did not apply.

[¶20] The district court held that because it had found the inventory search invalid and probable cause for the search warrant rested exclusively upon the evidence obtained from the inventory search, there was no probable cause. (App. 30). In support of its conclusion, the district court cited State v. Kunkel, 455 N.W.2d 208, 211 (1990), presumably relying upon the following: "Illegally

obtained evidence cannot be the basis of a magistrate's finding of probable cause." Id. (citing United States v. Vasey, 834 F.2d 782 (9th Cir. 1987)). Having concluded thus, the district court conducted no further analysis, such as would be required under the good-faith exception to the exclusionary rule. See United States v. Leon, 468 U.S. 897 (1984).

[¶21] This Court's standard for reviewing a district court's decision on a motion to suppress evidence is well established:

> In reviewing a district court decision on a motion to suppress, we give deference to the district court's findings of fact, and we resolve conflicts in testimony in favor of affirmance. State v. Tognotti, 2003 ND 99, ¶ 5, 663 N.W.2d 642. We "will not reverse a district court decision on a motion to suppress … if there is sufficient competent evidence capable of supporting the court's findings, and if the decision is not contrary to the manifest weight of the evidence." State v. Gefroh, 2011 ND 153, ¶ 7, 801 N.W.2d 429. Questions of law are fully reviewable on appeal, and whether a finding of fact meets a legal standard is a question of law. Id.

State v. Reis, 2014 ND 30, ¶ 8, 842 N.W.2d 845. Whether probable cause exists to issue a search warrant is a question of law." State v. Ebel, 2006 ND 212, ¶ 12, 723 N.W.2d 375. This Court has adopted the totality-of-the-circumstances test to review the 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. In making this independent decision whether probable cause exists, "the reviewing court may not look beyond the four corners of the affidavit or application for issuance of the warrant." State v. Schmalz, 2008 ND 27, ¶ 13, 744 N.W.2d 734 (citing State v. Roth, 2004 ND 23, ¶ 25, 674 N.W.2d 495).

[¶22] This Court's standard for reviewing a district court's decision on whether to apply the good-faith exception to the exclusionary rule is not so well established, but it appears to be whether "there is [ ]sufficient competent evidence to support the district court's decision that a good faith exception applies." State v. Lunde, 2008 ND 142, ¶ 19, 752 N.W.2d 630.

[¶23] In this case, under a totality-of-the-circumstances test, there is probable cause within the four corners of the affidavit to support the issuance of a search warrant for the vehicle. The district court itself recognized this by acknowledging probable cause had existed but for its later disregarding the evidence. (App. 30). The State concedes probable cause for the search warrant would have been lacking without the evidence obtained from the inventory search. However, this Court should abrogate Kunkel to the extent it creates a bright-line test in favor of the exclusionary remedy by its reliance upon Vasey, and instead adopt the Eighth Circuit's "close-call" test. See United States v. Fletcher, 91 F.3d 48, 51—52 (8th Cir. 1996) (finding that the Leon exception was applicable to a subsequent warrant-authorized search of luggage when the initial detention of the luggage was a Fourth Amendment violation).

[¶24] On the question of whether the good-faith exception can overcome a taint from prior unconstitutional conduct, Fletcher is the binding or persuasive federal precedent in North Dakota, not the Ninth Circuit's Vasey. Federal precedent controls here, because Pogue did not adequately raise below whether the state

constitution afforded her heightened protection in applying Leon. See State v. Dodson, 2003 ND 187, ¶ 21, 671 N.W.2d 825; State v. Backlund, 2003 ND 184, ¶ 38, 672 N.W.2d 431 ("A party raising a constitutional challenge should bring up the heavy artillery or forego the attack entirely.") This Court has recognized:

> "[W]e are required to apply the good faith exception to the exclusionary rule under the Fourth Amendment when evaluation a federal constitutional claim because, if we do not, we will be imposing greater restrictions on police activity when the United States Supreme Court specifically refrained from doing so in Leon.
>
> We are also required to apply the good faith exception to the exclusionary rule under the Fourth Amendment in the same manner as the federal courts apply it."

Dodson, at ¶¶ 22—23. This Court should undo its prior reliance upon Vasey in order to correct the contours of the good-faith exception in North Dakota.

[¶25] In Fletcher, 91 F.3d at 51, the United States Court of Appeals for the Eighth Circuit held that the purpose of the exclusionary rule, deterrence of police misconduct, would not be served when the facts surrounding a prior violation of the Fourth Amendment subsequently used to obtain a warrant are close enough to the line of validity that the officers were entitled to a belief in the validity of the warrant. This was not ground-breaking for the Eighth Circuit. See United States v. White, 890 F.2d 1413, 1419 (8th Cir. 1989) (finding "evidence seized pursuant to a warrant, even if in fact obtained in violation of the Fourth Amendment, is not subject to the exclusionary rule if an objectively reasonable officer could have believed the seizure valid"); United States v. Kiser, 948 F.2d

418 (8th Cir. 1991) (finding "Were we free to reject White, we would refuse to do so, as we find its reasoning persuasive").

[¶26] There is a circuit split among those who appear to have answered this question; three have sided with the Eighth Circuit, two not. See e.g., United States v. Massi, 761 F.3d 512, 528 (5th Cir. 2014) (adopting the reasoning of United States v. McClain, 444 F.3d 556, 565—66 (6th Cir. 2005) (finding "the Leon good faith exception should apply despite an earlier Fourth Amendment violation")); United States v. Thomas, 757 F.2d 1359, 1368 (2d Cir. 1985) (finding Leon applicable to a warrant-authorized search of an apartment where the affidavit supporting the warrant contained evidence obtained in violation of the Fourth Amendment). But see, United States v. McGough, 412 F.3d 1232, 1239—40 (11th Cir. 2005); Vasey, 834 F.2d at 389—90.

[¶27] The district court here is the same court who issued the search warrant. It issued given an affidavit that described how the evidence supporting the warrant had been obtained, including the basis for impoundment and conduct of an inventory search. (See App. 23). Suffice it to say, the inventory search was close enough to the line of validity for the district court that it issued the warrant. What is good for a court ought to be good for a law enforcement officer. Langowski did not have the benefit of the district court's judicial hindsight as he executed the warrant. Langowski had not concealed the source of his evidence for probable cause, and on its face his affidavit established probable cause.

[¶28] The inventory search in this case is close enough to the line of validity that the subsequent search warrant evidence should not have been suppressed. The district court should have analyzed the search warrant issue further to determine whether the evidence obtained from its execution should nevertheless remain admissible. Had it done so, the manifest weight of the evidence below showed the officer in good faith objectively relied upon the magistrate's probable cause determination. None of the four situations where law enforcement's reliance on a warrant cannot be objectively reasonable exist here. See Leon, 468 U.S. at 923.

[¶29] This Court should abrogate its holding in Kunkel to the extent of its reliance upon Vasey. Thus should the Leon good-faith exclusionary rule be considered and found applicable. Even if this Court affirms with respect to the inventory search, it should reverse suppression of the evidence obtained from the search warrant and find the Leon good-faith exception applies. In the alternative, this Court should reverse and remand to the district court for its consideration on the briefs previously filed whether the Leon good-faith exception applies here.

CONCLUSION

[¶30] The inventory search of the vehicle in this case was valid considering the manifest weight of the evidence. The search warrant obtained in part as a result of the evidence obtained in the inventory search was also validly obtained and executed. Even if the inventory search were invalid, the good faith exception to

the exclusionary rule should apply for the evidence obtained as result of the execution of the search warrant. Therefore, the State requests this Court reverse the district court's order granting motion to suppress.

Dated this 24th day of November, 2014.

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	)	District Court No. 27-2014-CR-00492
Defendant.	)	

I hereby certify I made service of the foregoing **Brief of Plaintiff-Appellant; Appendix of Plaintiff-Appellant; and Certificate of Service** upon Daniel El-Dweek, Attorney for Defendant, by e-mailing a true and correct copy of the same to deldweek@nd.gov this 24th day of November, 2014.

/s/ Jacob T. Rodenbiker

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