

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No. 20160196

District Court No. 30-2015-CR-01024

State of North Dakota,	)
	)
Plaintiff/Appellee,	)
	)
vs.	)
	)
Michael Phelps,	)
	)
Defendant/Appellant.	)

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**BRIEF OF THE APPELLEE**

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APPEAL FROM THE DISTRICT COURT'S DENIAL OF THE DEFENDANT'S  
MOTION TO SUPPRESS EVIDENCE OF APRIL 15, 2016 AND THE  
SUBSEQUENTLY ENTERED CONDITIONAL PLEA AND CRIMINAL JUDGMENT

MORTON COUNTY, NORTH DAKOTA  
SOUTH CENTRAL JUDICIAL DISTRICT  
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## **TABLE OF CONTENTS**

<b>Table of Authorities</b>	<b>ii</b>
<b>Statement of the Issues</b>	<b>¶1</b>
<b>Statement of the Case</b>	<b>¶3</b>
<b>Statement of the Facts</b>	<b>¶5</b>
<b>Argument</b>	<b>¶13</b>
<b>I. Standard of Review</b>	<b>¶13</b>
<b>II. The District Court did not err in deciding the K-9 sniff occurred during and not after the completion of the traffic stop</b>	<b>¶15</b>
<b>III. The District Court did not err when it ruled the Defendant was detained within a reasonable time</b>	<b>¶21</b>
<b>Conclusion</b>	<b>¶28</b>

## **TABLE OF AUTHORITIES**

### **United States Supreme Court Cases:**

Rodriguez v. United States, 575 U.S. \_\_\_\_\_, 135 S.Ct. 1609 (2015) \_\_\_\_\_ ¶6, 16, 21

### **North Dakota Supreme Court Cases:**

City of Fargo v. Thompson, 520 N.W.2d 578, 581 (N.D. 1994) \_\_\_\_\_ ¶14

State v. Asbach, 2015 ND 280, 871 N.W.2d 820 \_\_\_\_\_ ¶21, 22

State v. Bergstrom, 2004 ND 48, 676 N.W.2d 83 \_\_\_\_\_ ¶13

State v. Fields, 2003 ND 81, 662 N.W.2d 242 \_\_\_\_\_ ¶16, 17, 20

State v. Johnson, 2011 ND 48, 795 N.W.2d 367 \_\_\_\_\_ ¶14

State v. Mertz, 362 N.W.2d 410, 412 (N.D. 1985) \_\_\_\_\_ ¶17

State v. Zimmerman, 529 N.W.2d 171 (N.D. 1995) \_\_\_\_\_ ¶14

### **Eighth Circuit Cases:**

United States v. Jones, 269 F.3d 919, 924 (8th Cir. 2001) \_\_\_\_\_ ¶16

## **STATEMENT OF THE ISSUES**

¶1 Whether the District Court erred in denying the Defendant's Motion to Suppress in Morton County case number 30-2015-CR-01024?

¶2 Specifically, whether the District Court erred in its determination that the K-9 sniff occurred prior to the completion of the traffic stop, and the Defendant was not detained beyond the reasonable time necessary to conduct duties relating to a common traffic stop and issuing a warning citation?

## **STATEMENT OF THE CASE**

¶3 The Appellant (Defendant Phelps), had filed a Motion to Suppress Evidence and Brief in Support. See Register of Actions, Documents 33-35. The District Court held a motion hearing during which testimony and evidence were submitted to Judge Romanick, who took the matter under advisement to review the testimony and exhibits. On April 15, 2016, the Honorable Bruce A. Romanick, the presiding District Court Judge in Morton County case number 30-2015-CR-01024 signed an Order Denying Motion to Suppress Evidence. (Appendix to Brief of Appellant Phelps at pages 7-14.)

¶4 Defendant Phelps entered a conditional plea of guilty to the offense of Possession of Methamphetamine with Intent to Deliver, reserving his right to appeal the denial of his motion to suppress (Appendix to Brief of Defendant Phelps at pages 15-19). Defendant Phelps now appeals the findings of the District Court, arguing the District Court erred in denying Defendant Phelps's Motion to Suppress Evidence. See Supreme Court No. 20160196. Defendant Phelps presents one issue on appeal: Whether the District Court erred in denying his Motion to Suppress, narrowing the argument to contend the K-9 sniff was conducted after the completion of the traffic stop, rendering the resulting seizure of alleged methamphetamine a violation of the Defendant's Fourth Amendment rights of unreasonable search and seizure.

## **STATEMENT OF FACTS**

¶5 Defendant Phelps was charged in District Court for Morton County with the offense of Possession of Methamphetamine with Intent to Deliver occurring on or about September 16, 2015.

¶6 Defendant Phelps filed a Motion to Suppress Evidence arguing evidence gained as a result of a vehicle search in Morton County on September 16, 2015, was illegally seized. See Register of Actions, Documents 33-35. Defendant Phelps argued there was no basis to stop the vehicle, the stop violated mandates of Rodriguez v. United States, 575 U.S. \_\_\_\_, 135 S.Ct. 1609 (2015), the dog's "alert" did not constitute probable cause of drugs in the car at the time. See Register of Actions, Documents 33-34.

¶7 For the facts of the traffic stop before the Court, the State relies upon the testimony of Mandan Police Officer Brent Brandner at the suppression hearing contained in the Transcript of Suppression Hearing and police audio and video from the arrest (Exhibit 3).

¶8 Mandan Police Officer Brandner testified at the suppression hearing. On or about September 16, 2015, Officer Brandner received a telephone call from a MANTF narcotics investigator describing a vehicle located in Mandan. Tr. 4, line 14-18. On patrol, Officer Brandner observed a red pickup matching the investigator's description. Tr. 5, lines 3-17. The vehicle was spotted hauling a boat trailer without a functioning light or visible license plate. Tr. 5 3-17.

¶9 Officer Brandner followed the driver and initiated a traffic stop, at or around 4:06:00. Tr. 7, lines 4-7; Exhibit 3. Officer Brandner used lights and sirens. Tr. 6, lines 8-14. Officer Brandner attempted to get the vehicle to pull over by pulling to the

left inside of the lane, crossing the lane a little bit to ensure the driver saw Brandner. Tr. 6, lines 22-25; Tr. 7, lines 1-3. The suspect vehicle took an additional few blocks to pull over, concerning Officer Brandner that the driver was about to take off or was taking the opportunity to reach for or conceal something. Tr. 7, lines 8-16. Officer Brandner approached the vehicle and made contact with the driver, a male identified as the Defendant, Michael Phelps. Tr. 7, lines 24-25. After contact, Phelps was informed of his equipment violations. Tr. 8, lines 14-17. During this process, Officer Brandner felt uncomfortable as he observed Phelps's extremely nervous, shaking and sweating appearance. Tr. 8, lines 9-13.

[¶10] Sergeant Sass with the Bismarck Police Department arrived on scene, and was noted by Officer Brandner when he turned around from speaking with Defendant Phelps. Tr. 9, lines 6-14; Exhibit 3. After a brief contact with Phelps, during which Brandner asked for Phelps's license and registration, Officer Brandner walked back to his vehicle to run Phelps' information. Tr. 9, lines 9-25; Exhibit 3. Meanwhile, Sergeant Sass was preparing to conduct a K-9 sniff test. Tr. 10, lines 7-9; Tr. 36, lines 5-8. Before initiating the K-9 test on Phelps' vehicle, Sergeant Sass requested everyone within the vehicle be removed. Tr. 10, lines 17-19. Officer Brandner exited his vehicle with a piece of paper. Officer Brandner does not remember, however, printing out a warning due to the K-9 sniff being requested. Tr. 24, lines 1-6. At about 4:13:30, Phelps exits his vehicle and met Officer Brandner behind the boat trailer. Exhibit 3. At about 4:14:50, a K-9 sniff test was conducted on Phelps' vehicle. Exhibit 3. The K-9 test was finished at or around 4:17:00. At this time, Officer Brandner was still issuing the citations/warnings. Tr. 14, lines 9-11. The test resulted in a positive indication of the presence of drugs. Tr. 11, lines

12-16; Tr. 32, lines 14-17. Defendant Phelps was then detained for further investigation. Tr. 12, lines 17-19.

**[¶11]** Officer Brandner searched Phelps and found a large quantity of money in his pocket. Tr. 11, lines 18-19. Officer Brandner searched the vehicle and found multiple ammo boxes containing several bags of methamphetamine. Tr. 12, lines 20 – 31. Phelps was placed under arrested. Tr. 13, lines 14-15. Officer Brandner issued the citation/warnings to the Defendant on the jail room floor, by placing them in his property. Tr. 13, lines 17-19.

**[¶12]** Phelps was arrested and charged in Morton County. Phelps pled guilty conditionally to the charges in Morton County after his Motion to Suppress Evidence was denied. Phelps now appeals the findings and Order Denying Suppression Motion and the resultant judgments and sentences.

## **ARGUMENT**

### **I. Standard of Review**

[¶13] This Court can review an order denying suppression of evidence, pursuant to N.D. Const. Art. VI §§ 2 and 6 and N.D. Cent. Code § 29-28-06. This Court will affirm the trial court's findings on appeal unless the interpretation of the law is wrong or the finding is adverse to the manifest weight of the evidence. State v. Bergstrom, 2004 ND 48, 676 N.W.2d 83.

[¶14] This Court will not reverse a district court decision on a motion to suppress on appeal if there is sufficient competent evidence capable of supporting the court's findings. State v. Johnson, 2011 ND 48, ¶ 9, 795 N.W.2d 367. Further, this Court affirms the district court's decision unless, after resolving conflicting evidence in favor of affirmance, this Court concludes there is insufficient competent evidence to support the decision, or unless the decision goes against the manifest weight of the evidence. City of Fargo v. Thompson, 520 N.W.2d 578, 581 (N.D. 1994). Questions of law are fully reviewable. State v. Zimmerman, 529 N.W.2d 171, 173 (N.D. 1995).

### **II. The District Court Did Not Err in Deciding the K-9 Sniff Occurred During And Not After The Completion Of The Traffic Stop.**

[¶15] At issue is the District Court's findings of fact and application of law in denying a suppression motion in Morton County case 30-2015-CR-01024. Defendant Phelps argues the K-9 sniff was conducted after the completion of the traffic stop, rendering the resulting seizure of alleged methamphetamine a violation of the Defendant's Fourth Amendment Rights of unreasonable search and seizure.

[¶16] "When conducting a traffic stop, an officer can temporarily detain the traffic violator at the scene of the violation." State v. Fields, 2003 ND 81, 662 N.W.2d

242. The authority to detain the traffic violator is only temporary. The authority to detain “ends when tasks tied to the infraction are – or reasonably should have been – completed.” Rodriguez v. United States, 575 U.S. \_\_\_\_\_, 135 S.Ct. 1609 (2015). These tasks, according to the Court of Appeals for the Eight Circuit, may include:

Requesting the driver’s license and registration, requesting that the driver step out of the vehicle, requesting that the driver wait in the patrol car, conducting computer inquiries to determine the validity of the license and registration, conducting computer searches to investigate the driver’s criminal history and to determine if the driver has outstanding warrants, and making inquiries as to the motorist’s destination and purpose.

State v. Fields, 2003 ND 81, ¶ 8, 662 N.W.2d 242 (quoting United States v. Jones, 269 F.3d 919, 924 (8th Cir.2001)). The detention may continue as long as reasonably necessary to conduct these activities and to issue a warning or citation. Id.

[¶17] Writing a citation or warning, however, is not conclusive that the traffic stop is over. Id. “A traffic violator is subject to the arresting officer’s authority and restraint until the officer completes issuance of the traffic citation and expressly releases the violator.” Id. (quoting State v. Mertz, 362 N.W.2d 410, 412 (N.D. 1985)). In Fields, the officer issued Fields a citation for the expired tabs and expressly released Fields by saying goodbye, turning around, and walking back to his vehicle.

[¶18] Defendant Phelps alleges the current case involves a K-9 sniff conducted after the completion of a traffic stop, and therefore the K-9 sniff and resulting seizure of alleged methamphetamine violates the Fourth Amendment. (Appendix to Brief of Defendant Phelps at page 2.) More specifically, the Appellant claims that upon receiving the written citation the Defendant was free to leave and the completion of the stop was

over. This argument is neither supported by facts or law. An Officer is allowed to conduct a variety of tasks related to the traffic stop, including but not limited to running a driver's license check, writing and issuing citations. Completing one of these tasks does not place limitations on the completion of others.

[¶19] The record shows, at or around 7 minutes into the traffic stop, the Appellant was requested to meet Officer Brandner toward the back of the trailer. Officer Brandner has a piece of paper in his hand. The defense claims the defendant is free to leave at this time. At that time, however, Officer Brandner had not finished the issuing of the citations. He had not finished the other tasks related to the traffic stop. Nor does the record show the Defendant was expressly released from police authority.

[¶20] “A traffic violator is subject to the arresting officer's authority and restraint until the officer completes issuance of the traffic citation and expressly releases the violator.” State v. Fields, 2003 ND 81, 662 N.W.2d 242. The record shows, Officer Brandner had not completed and did not give Defendant Phelps his citations until after his arrest and placement into custody. The record shows, Officer Brandner, did not expressly release Defendant Phelps from the traffic stop. Defendant Phelps was subject to the arresting officer's authority before, during, and after the completion of the K-9 sniff. This Court should find the District Court did not err when deciding the K-9 sniff occurred during and not after the completion of the traffic stop. Defendant Phelps's argument to the contrary is completely without factual or legal substantiation and ought to be denied in whole.

**III. The District Court Did Not Err in Deciding Defendant Phelps Was Properly Detained within a Reasonable Time.**

[¶21] The authority to detain the traffic violator “ends when tasks tied to the infraction are – or reasonably should have been – completed.” Rodriguez v. U.S., 575 U.S. \_\_\_\_, 135 S.Ct. 1609 (2015). This test should remain a case-by-case analysis. There is no bright line rule, yet the Court has previously agreed that twelve minutes of inquiry is not an unreasonable amount of time for an officer conducting a traffic stop to spend verifying the passenger and vehicle information, and inquiring as to the motorist’s destination and purpose. State v. Asbach, 2015 ND 280, ¶ 14, 871 N.W.2d 820, 823.

[¶22] In Asbach, Asbach and Walker were pulled over for a traffic violation. Id. Trooper Bohn approached the vehicle and requested the identification and vehicle information from both passengers. Id. Trooper Bohn inquired as to the motorists’ destination and purpose, and verified their information. Id. He directed Asbach out of the vehicle, and requested for consent to search the vehicle. Id. After being told Asbach could not consent to the search, Trooper Bohn approached Walker. Id. Trooper Bohn then inquired as to Walker’s destination and purpose before asking for consent to search the vehicle. Id. Walker granted consent. Id. At that time, twelve minutes had passed since the vehicle was stopped. Id. This Court concluded that 12 minutes was not unreasonable and agreed with the trial court’s finding that, “the length of the traffic stop was related to Bohn’s performance of his duties related to the stop.” Id.

[¶23] In the instant case, the District Court concluded the Defendant was detained within the reasonable time necessary to conduct duties relating to the common traffic stop based on facts particularized by the District Court in his Order Denying

Motion to Suppress. See Appendix to Brief of Defendant Phelps at pages 13-14, paragraphs 17 and following unnumbered.

[¶24] Sergeant Sass arrived on scene before Officer Brandner turned around on his initial approach of Defendant Phelps's vehicle. Brandner began running Phelps's information and writing citations before asking Phelps out of his vehicle. Defendant Phelps met Officer Brandner toward the back of his trailer. The two were in discussion and relocated during the sniff test. As soon as they moved, Sgt. Sass and his dog began. The K-9 sniff test took two minutes to conduct. At this point, the Defendant had only been detained for approximately eleven minutes, during which time Brandner had engaged in the usual duties associated with a traffic stop.

[¶25] The District Court decided:

“The minimal amount of time noted above for Sergeant Sass to run the dog around the car was easily a reasonable amount of time for Brandner to explain the process to Defendant and give him the warning. [A]ny investigatory detention of Defendant did not go beyond the time reasonably necessary to conduct duties relating to a traffic stop and issue the citation or warning. Once the dog had alerted and Sergeant Sass notified Officer Brandner of this, reasonable suspicion kicked in and the further detention of the Defendant pending the search of the pickup was appropriate.” See Appendix to Brief of Defendant Phelps at pages 13-14, paragraphs 17 and unnumbered following.

[¶26] A trial court's findings of fact in preliminary proceedings of a criminal case will not be reversed if, after the conflicts in the testimony are resolved in favor of affirmance, there is sufficient competent evidence fairly capable of supporting the trial court's findings, and the decision is not contrary to the manifest weight of the evidence. The Court must evaluate the evidence presented to see, based on the standard of review, if it supports the findings of fact. Id.

[¶27] In the instant case, there is sufficient competent evidence capable of supporting the trial courts findings that Defendant Phelps was properly detained within the reasonable time necessary to conduct the tasks related to the traffic stop. The facts show Defendant Phelps had only been detained for eleven minutes. Officer Brandner had not yet finished his duties and tasks related to the traffic stop and had not unreasonably delayed them. Officer Brandner had not addressed or completed his citations nor had he fully explained the issuing process to Defendant Phelps. This Court should agree with the District Court's ruling in which Defendant Phelps was detained within the reasonable time necessary to conduct the tasks related to the traffic stop. Defendant Phelps's argument to the contrary is completely without factual or legal substantiation and is refuted by the District Court's findings. The District Court did not err in finding Defendant Phelps was properly detained within a reasonable time.

## **CONCLUSION**

**[¶28]** For the reasons stated above the State of North Dakota respectfully requests the Court uphold the findings of the District Court and his Order Denying Motion to Suppress Evidence in the instant case.

**[¶29]** Respectfully submitted this 25th day of November, 2016.

**/s/ Gabrielle J. Goter**

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Michael Phelps,	)
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Defendant/Appellant.	)

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**CERTIFICATE OF SERVICE**

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[¶1] I hereby certify that on November 21, 2016, the following documents: Brief of Appellee in PDF and Microsoft Word format was/were emailed to the Clerk of the North Dakota Supreme Court @ [supclerkofcourt@ndcourts.gov](mailto:supclerkofcourt@ndcourts.gov) and a copy was emailed to Michael Hoffman, Counsel for the Appellant: [hoffmanmike@yahoo.com](mailto:hoffmanmike@yahoo.com)

**/s/ Gabrielle J. Goter**

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[¶1] I hereby certify that on November 25, 2016, the following documents: Brief of Appellee in PDF and Microsoft Word format was/were emailed to the Clerk of the North Dakota Supreme Court @ [supclerkofcourt@ndcourts.gov](mailto:supclerkofcourt@ndcourts.gov) and a copy was emailed to Michael Hoffman, Counsel for the Appellant: [hoffmanmike@yahoo.com](mailto:hoffmanmike@yahoo.com)

**/s/ Gabrielle J. Goter**

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