

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA
Supreme Court File No. 2018 0384

State of North Dakota,)
)
Appellant,)
)
v.)
)
Perry Wayne Odum,)
)
Appellee.)

APPELLEE'S BRIEF

Appeal from Dismissal Granted in Favor of Appellee
Honorable Mark T. Blumer, Judge of District Court
Case No. 39-2017-CR-00166
Richland County, North Dakota
Southeast Judicial District

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STATEMENT OF FACTS

¶1 Appellee does not dispute the Appellant's Statement of Facts, but does want to clarify and add the following.

¶2 In support of the application for the search warrant, Agent Kriel testified in part as follows:

¶3 1. Agents received "an anonymous tip regarding a Perry Odum being out of state and recently coming back with a quantity of marijuana." (App. p. 10, l. 13.) **No dates were given.**

¶4 2. Agent Kriel "obtained information from Mr. Odum's driver's license that he does reside at 112 3rd Street Southeast in Lidgerwood." (Id., l. 15.) **No dates were given.**

¶5 3. In bag number 1 of the garbage bags seized on May 9, 2018, "there was three plastic packages with labels indicating the contents of the packages to **have contained** THC . . . and there was also 4 plastic tubes. Each tube also contained labels indicating the content of the tubes to contain THC and marijuana." Based on the description on the tubes, "it **would have contained** a pre-rolled marijuana cigarette." (Emphasis added.) (App. 10, l. 23 to p. 11, l. 24.) **These were empty bags and tubes.**

¶6 4. Bag number 2 "contained a plastic package with a label indicating . . . it contains THC and it also contained green leafy flakes appearing to be marijuana, in my training and experience." (App. p. 11, l. 8.) **No quantity given regarding the flakes. No odor of marijuana was mentioned, and no**

field or other testing was done on the flakes.

¶7 5. Garbage bag number 2 “also contained a plastic tube that was similar to the one in garbage bag 1 containing a label indicating the contents to have THC and a pre-rolled marijuana cigarette. And there was also zig-zag paper packages contained in garbage bag number 2.” (App. p. 11, l. 12.) The tube was empty, and the zig-zag packages were empty.

¶8 6. “With those labels, it appeared it was from a state where it was legal.” (App. p. 11, l. 21.) One of the labels indicated the specific state was Washington. (App. p. 11, l. 21.) There was no evidence Odum had ever been in the State of Washington.

¶9 7. “On the mail box it indicated the last name [of Odum] as well.” (App. p. 12, l. 11.) The garbage did not contain envelopes or other indicia with Odum’s name on it. Nothing in the garbage established that the contents had been placed there by Odum.

¶10 In sum, the search warrant was based on an anonymous tip, empty bags with marijuana labels from a state where it was legal to purchase marijuana, an unspecified amount of green leafy flakes that appeared to be marijuana, and some empty Zig-Zag packages.

ARGUMENT

¶11 The district court properly granted Appellee's Motion to Suppress Evidence.

¶12 Appellant argues that "the district court reviewed each piece of evidence separately rather than applying the totality-of-the-circumstances test" as required by case law. (App. Br. ¶ 25.) This is not true, as the district court, after reviewing all of the evidence in this case, then states in his Memorandum Opinion and Order:

However, the analysis does not end here. As noted in Schmalz, the insufficiency of one piece or layer of evidence does not, in and of itself, defeat the possibility of finding probable cause. Rather, probable case is the sum total of layers of information and all of the evidence must be viewed cumulatively to determine whether the standard has been met.

App. p. 24, ¶ 11.

¶13 The Appellant then argues that "The district court's Order in the instant case is in direct conflict with this Court's decision in State v. Johnson, 531 N.W.2d 275 (1995). In Johnson, officers received information that the defendant was "involved in drug activity." Id. at 277. Officers searched a garbage bag they found in front of Defendant's home. Id. Inside, they found 25 marijuana seeds and two bank deposit slips which contained Johnson's name. Id. Officers then obtained a search warrant for Johnson's home, during which search they found additional marijuana seeds and drug paraphernalia. The district court upheld the validity of the search warrant. On appeal, the North Dakota Supreme Court affirmed, stating:

We believe the presence of the marijuana seeds in the garbage bag, which also contained bank deposit slips bearing Johnson's name, would warrant a person of reasonable caution to believe there was probably more marijuana inside Johnson's home.

Johnson at 279.

¶14 Johnson cannot be viewed in a vacuum, but rather in the context of two North Dakota cases decided in 2008, being State v. Kieper, 2008 ND 65, 747 N.W.2d 497 and State v. Schmalz, 2008 ND 27, 744 N.W.2d 734. Judge Blumer relied heavily on Kieper and Schmalz in finding that probable cause for a search warrant did not exist in this case.

¶15 In Kieper, the district court issued a search warrant based on evidence found by law enforcement agents in Defendant's garbage. The Defendant appealed the denial of his Motion to Suppress.

¶16 On appeal, the Supreme Court reversed, concluding that probable cause did not exist to issue a search warrant. In doing so, the Supreme Court first summarized the evidence submitted in support of the search warrant, as follows:

¶17 1. The application for the search warrant was based mainly on a search of the trash placed on the curb for pickup in front of Defendant's residence. (Kieper, ¶2.)

¶18 2. In the trash were two butter knives with black burn marks and white residue, a baggie corner, and two pieces of mail with Defendant's name and address. Id.

¶19 3. The residue on the knives could not be field tested, but the agent testified that in his training and experience drug users used metal devices such

as butter knives as tools to help ingest the narcotic by placing the narcotic on top of the knife, applying a heat source to the bottom of the knife, and ingesting the fumes from the heated narcotic. Id.

¶20 4. The agent testified that in his training and experience, baggie corners may be used to package narcotics by placing the narcotic in the little baggie and twist-tying. However, he did not say whether the baggie in the trash showed signs of being twist tied. Id.

¶21 5. The agent did not testify about what type of housing Defendant lived in, whether the trash was placed in closed garbage bags, whether the bags were in garbage cans, or whether the evidence the officers believed was related to drug activity was found in the same container as the mail. Id.

¶22 6. When the agent was asked why law enforcement collected and searched the trash at Defendant's home, he said, "[W]e received information from the last few years, we received information from a confidential informant, we received information from two unanimous [sic] sources, we received information from Parole and Probation, and have also received information from the Bismarck Police Department on a Jarret Kieper in regards to distributing narcotics." Id.

¶23 The high court stated that search warrants may only be issued upon a showing of probable cause. Id., ¶6. Probable cause exists "if the facts and circumstances relied on by the magistrate would warrant a person of reasonable caution to believe the contraband or evidence sought probably will be found in

the place to be searched.” Id., ¶7. Probable cause exists if it is established that certain identifiable objects are probably connected with criminal activity and will probably be found at the present time at an identifiable place. Id. The information used to establish probable cause should be considered together and not in a piecemeal fashion. Id.

¶24 Applying the law to the facts, the Supreme Court in Kieper noted the following:

¶25 1. **Common household items.** The evidence consisted only of common household items and did not greatly raise the degree of suspicion. While the butter knives with black burn marks and white residue may raise some suspicion because of their altered state, they do not raise a high degree of suspicion because they are common household items and there was no evidence the residue on the knives was drug resin. Id., ¶10. Likewise, the baggie corner supported probable cause that Defendant was packaging something, but there was no evidence he was packaging illegal drugs. Id.

¶26 2. **Details regarding the trash.** The facts surrounding the trash search were limited. Id., ¶11. The search warrant application did not contain information describing Defendant’s residence, whether trash belonging to others may be placed in this location, whether the evidence was found in a trash bag, or whether the alleged contraband was found in the same bag as the mail. Id. Thus the nexus between the alleged contraband and Defendant’s residence was tenuous. Id.

¶27 3. **Informant.** Finally, the agent testified the trash was searched based on information from various sources over the past few years indicating Defendant was distributing narcotics. Id., ¶12. The Supreme Court found this information did not support probable cause because there was no evidentiary support for the allegation, noting, “Sufficient information, rather than ‘bare bones’ information, must be presented . . . an affidavit expressed in conclusions without detailing underlying information is insufficient for probable cause.” Id. Furthermore, the officer did not disclose the names of the informants or what specific information law enforcement had received from each of the informants. Id.

¶28 If the above factors are considered in this case, the result is the same: probable cause did not exist for the search warrant.

¶29 1. **Empty bags, tubes, and rolling paper package - common household items?** As noted by Agent Kriel, the empty bags and tubes with labels indicated they once contained marijuana and appeared to be “from a state where it was legal.” Zig-zag paper packages were also found. While these bags, tubes, and packages are not “common household items,” they are items that are perfectly legal to own. It is not a crime to own empty bags or packages. There was no residue found in the bags – rather, the residue was found in the garbage bag. As noted in State vs. Thieling, 2000 ND 106, ¶ 9, 611 N.W.2d 261, “The relevant inquiry is not whether particular conduct is ‘innocent’ or ‘guilty,’ but the degree of suspicion that attaches to particular types of

noncriminal acts.” Id. In this case, the bags and tubes might raise suspicion as to marijuana use in the State of North Dakota, but there is also a strong inference that the marijuana in those bags was used in a State where it was legal to do so, as those bags and tubes had to have been purchased in a State where it was legal to do so. Furthermore, the informant stated Defendant had just returned from another State. As for the zig zag paper packages, the question again becomes whether an empty package contributes to the “degree of suspicion” that is needed for probable cause. Were the rolling papers utilized in the State where the marijuana was legally purchased, or were they used in the State of North Dakota? And if they were used in North Dakota, were they used for marijuana or for cigarettes? Defendant submits these empty bags, tubes, and packages, without any indicia of drugs in them, are a “thin layer” in the probable cause analysis. (Note: green leafy flakes were found in the garbage bag - see argument below.)

¶30 2. **“Green leafy flakes appearing to be marijuana, in my training and experience.”** This evidence is no different than the white residue found on the two butter knives in Kieper. No testing was done on the residue in Kieper, and no testing was done on the “green leafy flakes.” Significantly, the Agent did not even do a “smell” test of the green leafy flakes or the bags and tubes. If he had, and any of it had smelled of marijuana, things might be different. In State v. Schmalz, 2008 ND 27, officers received “intel” that Schmalz had been involved with narcotics. A garbage search revealed a paper towel with dark residue

believed to be burnt marijuana residue, as well as packaging tape and cellophane packaging that smelled of marijuana. The garbage also contained mail addressed to Defendant. The Supreme Court affirmed the validity of the search warrant, but in doing so, found it to be “a marginal or doubtful case.” Id., ¶17. The nail in the coffin in Schmalz appears to be the odor of marijuana, as the Court stated:

The mere smell of marijuana, as detected by a trained and experienced officer, has been held by this Court to create a sufficient factual basis upon which to establish probable cause. . . . Based upon Officer Scheett’s testimony regarding his training and experience as a police officer, the smell of marijuana on all three pieces of evidence, and the existence of residue that looked like burnt marijuana, there was a sufficient factual basis to issue a warrant.

Id. at ¶s20-21.

¶31 In this case, the “green leafy flakes” appeared to be marijuana, just as the burnt residue in Schmalz appeared to be marijuana. However, in Schmalz, there was additional evidence to support the appearance of marijuana, that being the odor of marijuana, which sealed the deal. This case is more like Kieper, in which residue appeared to be a narcotic, but no odor was detected and no testing done. Thus Kieper is more on point than Schmalz, and the green leafy flakes, like the empty packages, are marginal evidence supporting probable cause. As a bonus to Defendant in this case, no quantity is given regarding the green leafy flakes. Was this a fraction of a gram, residue in the bags, or more? Obviously the smaller the quantity, the more likely it is the officer was mistaken in his perception of the substance.

¶32 3. **Details regarding the trash.** In this case, as in Kieper, “[T]he search warrant application did not contain information describing Defendant’s residence, whether trash belonging to others may be placed in this location . . . or whether the alleged contraband was found in the same bag as the mail.” In fact, no mail or other indicia with Defendant’s name and address were found in the trash. While the Agent indicated the evidence was found in two different trash bags, he did not testify regarding whether those bags were sealed. (See Kieper at ¶2 – The officer “did not testify about . . . whether the trash was placed in closed garbage bags.”) Based on those facts, the Kieper court found, “The information provided to the magistrate to show a nexus between the alleged contraband and Kieper’s residence is tenuous.” Id. at ¶11. So it should be found in this case as well.

¶33 4. **Anonymous tip.** In this case, the name of the informant was not disclosed to the magistrate, but was noted to be an anonymous tip. No times or dates were given as to when the tip was given. No times or dates were provided as to the information in the tip – i.e., how recently had Defendant resided there and when did he return from out of state? In Kieper, the high court noted that the officer “did not disclose the names of the informants or what specific information law enforcement had received from each of the informants . . . and [therefore] does not sustain a finding of probable cause.” Kieper at ¶12. See also Schmalz at ¶14 – “Intel’ . . . does not sustain a finding of probable cause.” The same conclusion must be reached in this case – the anonymous

and vague tip does not sustain a finding of probable cause.

¶34 However, the analysis does not end here. As noted in Schmalz, the insufficiency of one piece or layer of evidence does not, in and of itself, defeat the possibility of finding probable cause. Schmalz at ¶14. Rather, “probable cause is the sum total of layers of information and all of the evidence must be viewed cumulatively to determine whether the standard has been met.” Id. That standard is whether all of the facts and circumstances relied upon by the judge who issues the warrant would lead a person of reasonable caution to believe the contraband or evidence sought probably will be found in the place to be searched. Schmalz at ¶11. The facts and circumstances in this case can be summarized as follows:

¶35 1. An anonymous tip that Defendant just returned from another State with a quantity of marijuana, but no date or time given as to when that occurred.

¶36 2. Empty bags and tubes that once contained marijuana legally purchased in another state are found in the trash at Defendant’s residence.

¶37 3. Empty packages of rolling papers found in the trash at Defendant’s residence.

¶38 4. Green leafy flakes appearing, in the officer’s experience, to be marijuana are found in the trash. No quantity is given. No other indicia such as smell supports the officer’s belief it is marijuana.

¶39 5. No indicia of Defendant residing there is found in the trash, such as letters or other documents with Defendant’s name and address. There is no

evidence that the garbage bags pulled were sealed at the time. There is no evidence regarding whether someone else lived at that residence.

¶40 Thus Johnson, the case upon which Appellant heavily relies, can be distinguished from the facts in this case, for three reasons.

¶41 **First**, in Johnson, a specific number of marijuana seeds – 25 – were found. Here, no quantity is given as to the amount of the green leafy substance found, nor is any other description given. Furthermore, the green leafy substance was found outside of the commercial bags but inside the garbage bag, making it less likely it was actual marijuana.

¶42 **Second**, the garbage bags in Johnson contained two bank deposit slips which contained Johnson's name. In this case, no evidence was found in the garbage bags with Odum's name on it, nor was there any document or writing containing the address to be searched. As correctly noted by Appellant, the search warrant application must establish a sufficient nexus between 112 – 3rd Street SE and the probability of finding additional marijuana there. (App. Br. ¶ 37.) Other than the bags being found outside of that residence, there is no basis for connecting that garbage to the 112 address. Anyone could have placed those garbage bags in the Odum garbage container. That is the reason our court has stressed the importance of some written or other indicia with names, addresses, or other evidence that the person in the residence is the same person who placed the garbage bags in the garbage containers. That test was not met in this case, and thus Johnson can be distinguished.

¶43 **Third**, as noted in Johnson, “[W]e give deference to the magistrate’s factual findings on probable cause.” Johnson at 278.

¶44 **To conclude:**

¶45 1. Johnson – 1995 decision. Valid search warrant, but can be distinguished. A quantity of marijuana seeds is designated, and two deposit slips with Johnson’s name are found in the bag containing the seeds. Here, no quantity given regarding a “green leafy substance,” nor was any testing done. No documents or other indicia containing Odum’s name or address which would connect the contents of that garbage to the residence to be searched.

¶46 2. Kieper – 2008 decision. Invalid search warrant, on point. Anonymous tip, garbage search, butter knives with burn marks and white residue indicative of narcotics ingestion, baggie corners, mail with Kieper’s name and address on it, and unknown if the mail was in the same bags as the butter knives and baggies. In this case, anonymous tip, empty commercial marijuana bags, empty package of rolling papers, unknown, untested quantity of green leafy substance, and no names or addresses in garbage.

¶47 3. Schmalz – 2008 decision. Also on point. Valid search warrant, but can be distinguished. Anonymous tip, garbage search, paper towel with dark residue believed to be burnt marijuana residue, packaging tape and packaging that smelled of marijuana, and mail addressed to Schmalz. Found to be marginal or doubtful to support probable cause, but the odor of marijuana was significant in finding sufficient probable cause to issue the warrant. Here, much

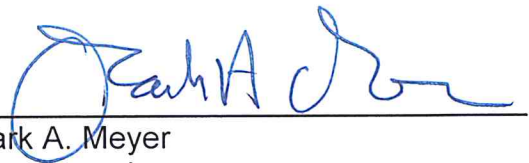
the same. Anonymous tip, garbage search, unknown and untested quantity of green leafy substance officer believed was marijuana, and empty packaging, but no marijuana smell or mail.

¶48 If this is considered a close case, deference should be given the magistrate's findings, and the search warrant should be found to be invalid.

CONCLUSION

¶49 The trial court's Order granting Appellee's Motion to Suppress should be AFFIRMED.

Dated this 23rd day of January, 2019.



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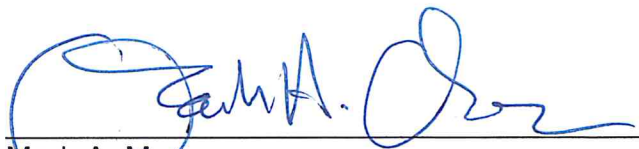
Mark A. Meyer, Attorney for Defendant / Appellee, hereby certifies that on January 23, 2019, the following document:

1. Appellee's Brief

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