20190323 &
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FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MARCH 4, 2020
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

OF THE STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff/Appellee,	)	Supreme Court No.
	)	20190323 & 20190324
-vs-	)	
	)	Burleigh County Case No.
Richard Powley,	)	08-2017-CR-04060
	)	08-2019-CR-00950
Defendant/Appellant	)	

BRIEF OF APPELLEE

APPEAL FROM JURY VERDICT, CRIMINAL JUDGMENT, AND AMENDED CRIMINAL JUDGEMENT

Burleigh County District Court
South Central Judicial District
The Honorable Bruce Romanick, Presiding

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ORAL ARGUMENT IS REQUESTED

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JURISDICTIONAL STATEMENT

[¶1] The appellant, Richard Powley (hereinafter "Powley"), appeals the trial court's criminal judgment entered, a jury found him guilty of three counts of Gross Sexual Imposition on June 21, 2019. The North Dakota Supreme Court has jurisdiction to hear such appeal under North Dakota Century Code § 29-28-06(1).

STATEMENT FOR ORAL ARGUMENT

[¶2] Oral argument is requested to emphasize the Appellee's arguments and to help clarify the complex factual issues. The ability to address these arguments with this Court, and to respond to questions from this Court, will help this Court in resolving the issues.

STATEMENT OF THE ISSUES

[¶3] **I. The District Court did not commit error when it denied Mr. Powley's motion to suppress evidence from a search of Mr. Powley's phone.**

A. Powley failed to object at the district court about the fact that it was not a parole or probation officer who conducted the search.

B. This court has found that probation is not revoked when someone is in custody.

C. This court should adopt the *Sampson* standard for parolee searches.

STATEMENT OF THE CASE

[¶4] Powley was charged with two counts Gross Sexual Imposition, class AA felonies, fourteen counts of Possession of Certain Materials Prohibited, class C felonies, and one count of Possession of Surreptitiously Created Sexually Expressive Image, a class A Misdemeanor, on December 22, 2017 in case 08-2017-CR-04060 (case 4060). (Appellee's Appendix (hereinafter "App.") 20-25). Powley was charged with three counts of Gross Sexual Imposition, Class A felonies, on April 8, 2019 in case 08-2019-CR-00950 (case 950). (App. 37-38)

[¶5] The State dismissed Creation or possession of surreptitiously created sexually expressive image on June 1, 2018 in case 4060. (App. 3-13) The State dismissed fourteen counts of Possession of Certain Materials Prohibited on August 10, 2018 in case 4060. The State dismissed two counts of Gross Sexual Imposition on May 13, 2019 in case 950. (App. 14-19)

[¶6] Powley had a preliminary hearing on February 9, 2019 in case 4060. Powley had a preliminary hearing on May 13, 2019 in case 950. (App. 3-13)

[¶7] The State amended the information in case 4060 on February 27, 2018 to add additional witnesses. (App. 32-36) The State moved to amend the information a second time in case 4060 on May 29, 2018, however; the court denied the motion. (App. 3-13)

[¶8] Powley filed a Motion to Suppress in case 4060 on March 22, 2018 for a search of the phone. (App. 3-13) Powley filed a Motion in Limine on April 5, 2018 to exclude new evidence. (App. 3-13) The district court held a motion hearing on the motion to suppress, the Motion in Limine on May 7, 2019 in which the district court gave the state an opportunity to respond. (App. 3-13) A second hearing on the motion to suppress was held on May 17, 2018. (App. 3-13) The district court filed an order on May 18, 2018 denying Powley's motion to suppress. (App. 3-13)

[¶9] Trial was held on June 20 through June 21, 2019. The State filed 13 exhibits during the course of the trial. (App. 3-13)

[¶10] The jury found Powley guilty of the two counts of Gross Sexual Imposition in case 4060. The jury found Powley guilty of Gross Sexual Imposition in case 950. (App. 62).

[¶11] Powley was sentenced to thirty years with the Department of Corrections with ten years suspended, ten years of supervised probation, collection of DNA, and fingerprinting for both counts in case 4060. (App. 63-65). Powley was sentenced to twenty years with the Department of Corrections with ten years suspended, ten years of supervised probation, collection of DNA, and fingerprinting in case 950. (App. 66-70) The cases were sentenced to run consecutive to each other. (App. 66-70)

[¶12] Powley filed his notice of appeal on October 24, 2019 in both cases. (App. 71-76)

STATEMENT OF THE FACTS

[¶13] Powley was arrested on July 17, 2017. (App. 41). Powley was on parole at the time of his arrest. Powley's phone was seized in a search incident to arrest. Powley's phone was searched by the Bismarck Police Department. (Transcript (hereinafter "Tr.") Preliminary Hearing (hereinafter "P.H.") case 4061 pg. 3). Powley's phone was searched in connection with an unrelated case. (Tr. P.H. case 4061 pg. 3). No warrant was obtained for the phone. No motion to suppress was filed in case 08-2017-CR-02172. (App. 47). When the Bismarck Police searched the phone and discovered a number of videos. Those videos obtained led Bismarck Police to conduct an investigation and led to the charges against Powley.

[¶14] Powley filed a Motion to Suppress evidence based on the search of his phone being illegal. (App. 41-44). In Powley's brief, he stated that the search was not a valid parole search for two reasons. *Id.* First, it was not a parole search as the State could not point to any evidence that gave rise to reasonable suspicion to search the phone. *Id.* Second, it was not a parole search because Powley was in custody and therefore not subject to the search terms of his parole. *Id.* In the State's response, the State made three

counterarguments. (App. 45-47). First, the State argued that Powley was still on parole. *Id.* Second, the *Samson* case should be controlling from the United States Supreme Court. *Id.* Finally, the doctrine of res judicata applied as the case where the search was conducted had already be tried and no objection was made in that case. *Id.*

[¶15] The district court held a motion hearing on May 17, 2018. (App. 54). The district court denied Powley's motion to suppress primarily relying on the *Samson* case. (App. 54-57). The district court found that as Powley was on parole and so a warrantless search of his phone would be reasonable. *Id.* The district court also held that if found nothing in Appendex A nor in 12-59-15 that stated when a parolee was taken into custody that the conditions of parolee are terminated. In fact, that court found "Powley's argument is in direct conflict with Section 12-59-15." *Id.*

[¶16] Powley moved to suppress the videos again in case 950 on June 20, 2019. (App. 58-61). However, Powley did not raise any new arguments with the search. *Id*. On June 20, 2019, this matter came to a jury trial. In the preliminary matters Powley once again renewed his motion to suppress the search on the same arguments. (Tr. Trial pp. 83-84) The district court stated it ruled the same. *Id*. During the trial the officer testified to the search of the phone. (Tr. Trial pp. 100-101) Powley on cross examination never raised that no parole or probation officer were present or authorized the search of the phone. (Tr. Trial pp. 129-134) Powley did renew his objection to the material from the search coming in, however; he based it on the arguments that were already made. (Tr. Trial pp. 100-101).

LAW AND ARGUMENT

I. The District Court did not commit error when it denied Mr. Powley's motion to suppress evidence from a search of Mr. Powley's phone.

[¶17] This Court has well established the standard of review for a district court's decision of a motion to suppress. *City of Dickinson v. Hewson*, 2011 ND 187, ¶ 6, 803 N.W.2d 814. "We defer to the district court's findings of fact and resolve conflicts in testimony in favor of affirmance, recognizing the trial court's superior opportunity to assess credibility and weigh the evidence." *City of Grand Forks v. Egley* 542 N.W.2d. 104, 106 (N.D. 1996) (quoting *State v. Ova*, 539 N.W.2d 857, 858 (N.D.1995)). "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." *Id.* (quoting *City of Fargo v. Thompson*, 520 N.W.2d 578, 581 (N.D. 1994)).

A. Powley failed to object at the district court about the fact that it was not a parole or probation officer who conducted the search.

[¶18] Powley did file a Motion to Suppress the evidence from the search of his cell phone at the district court. (App. 41-44) However, Powley failed to object in his Motion to Suppress or during the Motion Hearing to the fact that it was not a parole or probation officer who searched his phone as was required by his conditions of parole. "It is well-established that '[i]ssues which are not raised before the [district] court, including constitutional issues, will not be considered for the first time on appeal.'" *State v. Kieper*, 2008 ND 65, ¶16, 747, N.W.2d 825 (quoting *State v. Blumler*, 458 N.W.2d 300, 303 (N.D.1990). In *Kieper*, the State brought up an argument on appeal that had not been

used at the trial court and the Supreme Court said appeal was not the time to bring up new arguments. *Id*.

[¶19] To have an issue reviewed on appeal, the party raising the issue must have properly preserved it in the proceedings below. *State v. Doppler*, 2013 ND 54, ¶ 14, 828 N.W.2d 502. "A party's failure to object to evidence admitted at trial generally waives the party's right to complain on appeal about the admission of evidence." *Id*. (quoting *State v. Hernandez*, 2005 ND 214, ¶ 14, 707 N.W.2d 449).

[¶20] Here, Powley is trying to argue a point that was not raised with the district court below. Just as in *Kieper,* Powley never raised issue with who conducted the search of his cell phone with the district court. Powley had several opportunities to raise this point in the several hearings, briefs, preliminary hearing in case 4060, preliminary hearing in case 950, motion to suppress, the renewed motion to suppress, the motion hearing, the renewed objection before the trial, and the objection at the trial. Powley had multiple opportunities to raise who conducted the search. Powley raises in his own brief before this Court, "the court again disregards the actual parole terms that would have been in place, which require the search to be conducted by a parole or probation officer." However, this was never before the district court.

[¶21] Therefore, this Court must find that the issue was not raised at the district court so the issue has not been properly preserved for appeal.

B. <u>This court has found that probation is not revoked when someone is in custody.</u>

[¶22] Powley brief argues that he was in custody and therefore his parole terms no longer applied. Appellant's Brief ¶¶ 11-12 While this Court has not stated that conditions of parole continue after being taken into custody, this Court has found that a probationer

is still subject to the search clause of their conditions of probation even when they are in custody. *State v. Stenhoff*, 2019 ND 106, ¶ , 925 N.W.2d 429. In *Stenhoff*, the defendant was taken in to custody. *Id.* While the defendant was in custody a search of his residence was conducted and drugs were found. *Id*. This Court reasoned that a parolee has a lower expectation of privacy then that of someone on unsupervised probation based on the *Samson* case. *State v. Ballard*, 2016 ND 8, ¶¶ 37-40, 874 N.W.2d 61. This Court further has stated, "a supervised probationer has a lower expectation of privacy than an unsupervised probationer, and the State has a greater interest in monitoring probationers on supervised probation." *State v. White*, 2018 ND 266, ¶ 11, 920 NW.2d. 742. The United States Supreme Court "concluded that the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee." *Samson v. California*, 547 U.S. 843, 857, 126 S.Ct. 2193 (2006). The United States Supreme Court reasoned that "parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment." *Id*. at 850

[¶23] Powley also argues that the plain language of the statute should apply and favors Powley. Appellant's Brief ¶¶ 13-14. The State concurs that the plain language of the statute should apply; however, it does not favor Powley as he argues. Questions of law are fully reviewable by this Court. *State v. Corman*, 2009 ND 85, ¶ 15, 769 N.W.2d. 530. "Words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears, but any words explained in this code are to be understood as thus explained." N.D.C.C. §1-02-02. "Upon issuance of a warrant of arrest for a parole violation, the running of the time period of parole must be suspended until the parole board issues a final order under this section." N.D.C.C. §12-59-15(2). "The parolee is

entitled to credit for time spent in physical custody from the time of arrest until the time the parole board issues a final order." *Id*.

[¶24] Here, Powley was on parole, and so would have a much lower expectation of privacy then someone on unsupervised probation. Just as in *White* where a person on supervised probation has a lower expectation of privacy, Powley was on parole and so his expectation of privacy would be lower than that of an average citizen or even someone on unsupervised probation. Also, Powley was arrested for new crimes: Terrorizing and Assault. Just as in *Stenhoff*, where there was reasonable suspicion of criminal activity in his home, Powley had committed new crimes, and there was reason to believe there may be evidence of those crimes on the phone. The rip of the cell phone and subsequent search of the contents of the phone were initially related to those charges. It was after investigating the images that law enforcement realized they had evidence of a separate criminal act.

[¶25] Additionally, the plain language of the statute states that the running of the time period of parole must be suspended. It does not say the status of the defendant on parole is revoked or suspended. Just as in *Stenhoff*, where a probationer was in custody and a search was still authorized under his probation terms pending revocation, a parolee would still be on parole until their parole is revoked. In this case Powley was not revoked until August 9, 2019, which was after the search of his cell phone was conducted.

[¶26] Powley has argued and is likely to continue to argue that the search was not conducted by or approved by probation or parole as it was in *Stenhoff*. The search in *Stenhoff* was delayed to give law enforcement time to contact Stenhoff's probation

officer. However, that argument does not hold weight as discussed above because it was not raised in the district court.

[¶27] Therefore, this Court should find that based off of the plain language of the statue and that ruling in *Stenhoff* that Powley was still under the terms of his parole and a search of his phone would have been permissible under those terms.

C. This court should adopt the *Samson* standard for parolee searches.

[¶28] In *Samson* the California law for parolees provides, "[E]very prisoner eligible for release on state parole 'shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause.'" *Samson*, 547 U.S. at 847. In that case, Mr. Samson was searched by Officer Rohleder even though he was "in good standing with his parole agent." *Id*. (quoting Brief for Petitioner 4). The search revealed methamphetamine. *Id.* The United States Supreme Court found that "the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee." *Id.* at 857.

[¶29] Here, our case has some variations from the *Samson* case, however; there are some striking similarities. First, terms of the California law and the North Dakota conditions of parolee are not so different. In California, a search of a parolee could be conducted day or night with or without a warrant and with or without suspicion. In North Dakota, the terms of probation generally contain a similar clause which the parolee is required to sign, indicating they have read and understand all the terms contained within. In the case at hand, the search was conducted in furtherance of an unrelated criminal investigation. The fact that there was a criminal investigation shows that there was at least reasonable suspicion to search Powley's phone. Which makes the search in the

present case above the suspicionless standard set by the Supreme Court of the United States.

[¶30] Powley will likely raise the point the that California law authorized a probation officer or any peace officer to conduct the search. However, once again as agued above, there was never any argument as to who conducted the search at the district court. Therefore, that argument is not properly before this Court.

[¶31] Therefore, if this Court were to adopt the standard set forth in the *Samson* case a parolee would be subject to search with or without suspicion. As the United States Supreme Court found in *Samson*, "[A] State has an 'overwhelming interest' in supervising parolees because 'parolees … are more likely to commit future criminal offenses.'" *Samson* 547 U.S. at 853 (quoting *Pennsylvania Bd. Of Probation and Parole v. Scott*, 524 U.S. 357, 365, 118 S.Ct. 2014). "Similarly, this Court has repeatedly acknowledged that a State's interests in reducing recidivism and thereby promoting reintegration and positive citizenship among probationers and parolees warrant privacy intrusions that would otherwise be tolerated under the Fourth Amendment." *Id*. Thus, adopting *Sampson* would give the State the ability to closely monitor those on parole, help prevent recidivism, and to help "promote reintegration, and positive citizenship." *Id.*

CONCLUSION

[¶32] First, in all of the hearings and in Powley's own motion to suppress, the issue of the fact that the search was not conducted by or authorized by a Parole or Probation officer was not raised. Second, there was no objection during trial to have properly raised that argument. Therefore, the argument of who conducted or authorized the search of Powley's phone is not properly before this Court and must be dismissed. Third, the plain

language of the statute and the ruling in *Stenhoff* show that the Powley's conditions of parole still applied even though he was in custody at the time of the search. Finally, this Court should adopt the ruling in *Samson* that allows for supicionless searches of parolees. Based upon the foregoing, the State requests that the jury's verdict and the district court's judgement be affirmed.

Dated this 4th day of March, 2020.

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Defendant/Appellant	)	

CERTIFICATE OF COMPLIANCE

[¶ 1] COMES NOW Joshua Amundson of Bismarck, North Dakota, and hereby certifies that the attached Brief of the Appellee is in compliance with Rule 32(a)(8)(A), North Dakota Rules of Appellate Procedure.

[¶ 2] The number of pages in the principal Brief, excluding any addenda, is fourteen (14) pages, according to the page count of the filed electronic document.

Dated this 4th day of March, 2020.

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I, Joshua Amundson, do certify that on March 4, 2020, I served the following documents:

1. Brief of Plaintiff – Appellee
2. Appellee Appendix
3. Affidavit of e-service

by electronic filing to the following:

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