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DECEMBER 14, 2020
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	**)**	
Plaintiff/Appellant,	**)**	
	)	
v.	**)**	**Supreme Court No.: 20200236**
	)	
Nicholas Dean Lelm,	**)**	
Defendant/Appellee,	**)**	

Appeal from the Order Granting Defendant's Motion to Suppress Evidence Entered on August 6, 2020 by the District Court, South Central Judicial District, Burleigh County, North Dakota, the Honorable Pamela A. Nesvig, Presiding

State of North Dakota v. Nicholas Dean Lelm
Case No.: 30-2019-CR-00881

BRIEF OF DEFENDANT / APPELLEE NICHOLAS DEAN LELM

JOSHUA L. WEATHERSPOON (# 08641)
AARON D. PULANCO (# 09032)
MULLOY LAW, PLLC
101 Slate Drive, Suite 7
Bismarck, North Dakota 58503
PH: 701-390-8580
FX: 701-639-2845
josh@mulloylaw.com
aaron@mulloylaw.com

Attorneys for Defendant/Appellee Nicholas Dean Lelm

TABLE OF CONTENTS

Paragraph No.

[1] TABLE OF AUTHORITIES

Paragraph No.

NORTH DAKOTA CASES

OTHER AUTHORITIES

[2] STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the District Court Properly Concluded that the Consent Exception to the Warrant Requirement did not Apply as it Relates to the Search of Mr. Lelm's Backpack.

II. Whether the District Court Properly Concluded that the Automobile Exception to the Warrant Requirement did not Apply as it Relates to the Search of Mr. Lelm's Backpack.

III. Whether the District Court Properly Concluded that the Officer Safety Exception to the Warrant Requirement did not Apply as it Relates to the Search of Mr. Lelm's Backpack.

IV. Whether the District Court Properly Concluded that the Inevitable Discovery Doctrine to the Warrant Requirement did not Apply as it Relates to the Search of Mr. Lelm's Backpack.

[3] STATEMENT OF THE CASE

[4] On August 28, 2019, Nicholas D. Lelm ("Mr. Lelm") was arrested and charged with four (4) controlled substance violations. Appellant's Appendix A-7-8. Specifically, Mr. Lelm was charged with: Count I Possession of a controlled substance (methamphetamine greater than 50 grams) with intent to deliver; Count II Possession of a controlled substance (heroin); Count III Possession of drug paraphernalia (other than marijuana); and Count IV Possession of a controlled substance (marijuana). Appellant's Appendix A-7-8.

[5] On January 14, 2020, Mr. Lelm filed a *Motion to Suppress* evidence that was obtained during a search of his backpack. Appellant's Appendix A-11-12; *see also* Appellee's Appendix A-8. The State of North Dakota responded on January 28, 2020 and a hearing was subsequently set for March 11, 2020 before the Honorable Pamela A. Nesvig. Appellant's Appendix A-13-20. The parties stipulated to continuing the hearing on March 11, 2020. Appellant's Appendix A-21. The *Motion to Suppress* hearing was heard by the Court on August 5, 2020. Appellant's Appendix A-23-29. On August 6, 2020, Mr. Lelm's *Motion to Suppress* was granted by the District Court. Appellant's Appendix A-23-29. On September 3, 2020, the State filed its *Notice of Appeal*. Appellant's Appendix A-6, Index # 95.

[6] STATEMENT OF FACTS

[7] On August 28, 2019, a traffic stop was performed on a red Subaru in Mandan, Morton County, North Dakota. Appellant's Appendix A-9. Jeremy Bloom ("Mr. Bloom") was identified as the operator of the motor vehicle and the front seat passenger of the motor vehicle was identified as Mr. Lelm. Appellant's Appendix A-9. Mr. Bloom was arrested

on an active warrant and driving under suspension/revocation. Appellant's Appendix A-9. Mr. Bloom consented to the search of the automobile. Appellant's Appendix A-36, Line 8.

[8] After law enforcement obtained consent to search the automobile, law enforcement spoke to Mr. Lelm who had possession of his backpack. Appellant's Appendix A-37, lines 4 and 8-9. Mr. Lelm disclosed to law enforcement that there was a gun on the floorboard of the vehicle. Appellant's Appendix A-37, lines 9-10. Law enforcement requested that Mr. Lelm exit the vehicle. Appellant's Appendix A- 37, lines 17-18. Mr. Lelm nervously exited the vehicle with his backpack in his arms. Appellant's Appendix A-37, lines 17-19. Law enforcement then detained Mr. Lelm, pat searched him, placed him in handcuffs, and ultimately secured him in the back of Officer Leo Belgarde's ("Officer Belgarde") patrol vehicle. Appellant's Appendix A-24, paragraph 3. As law enforcement detained Mr. Lelm, they removed his backpack from him and placed it by the rear passenger tire. Appellant's Appendix A-37, lines 20-22. Mr. Lelm's backpack remained on the ground where it was originally placed after Mr. Lelm was placed in the patrol vehicle. Appendix A-38, lines 9-11. Before the K-9 sniff search was conducted on the vehicle, the backpack was moved further away by law enforcement. Appellant's Appendix A-38, lines 9-11.

[9] Officer Scott Warzecha ("Officer Warzecha") conducted the K-9 sniff search with K-9 Officer Kupper ("Officer Kupper"). Appellant's Appendix A-24, paragraph 4. Officer Kupper made a positive indication on the front passenger door seam. Appellant's Appendix A-24, paragraph 4. Officer Warzecha testified this is consistent with drugs either being present in the vehicle, drugs recently being in the vehicle, or drugs having been smoked recently within the vehicle. Appellant's Appendix A-24, *see also* Appellant's

Appendix A-66, lines 2-14. Law enforcement then searched the vehicle, locating drugs or drug residue in the center console and a firearm under the passenger seat. Appellant's Appendix A-38, lines 13-16. Officer Warzecha testified that he was not sure how long odor from a controlled substance would be present in a location. Appellant's Appendix A-69, lines 16-25 and A-70, lines 1 – 6.

[10] After a brief search of the vehicle, law enforcement then searched Mr. Lelm's backpack. Appellant's Appendix A-38, lines 17-18. The search of Mr. Lelm's backpack resulted in the discovery of items alleged to be drug paraphernalia and marijuana. Appellant's Appendix A-9; *see also* Appellant's Appendix A-25. Mr. Lelm began to experience chest pain, and ultimately requested medical assistance. Appellant's Appendix A-24, *see also* Appellant's Appendix A-38, lines 18-20 and 23-25. An ambulance was called for Mr. Lelm and he was subsequently transported to the hospital for treatment. Appellant's Appendix A-38, lines 24-25. Officer Belgarde testified at the *Motion to Suppress* hearing that ambulance paramedics will request law enforcement to accompany an individual who is in handcuffs. Appellant's Appendix A-40, lines 8-10. Officer Belgarde testified that Mr. Lelm's backpack would not have been searched prior to Mr. Lelm to being transported. Appellant's Appendix A-62, Lines 7-14. Officer Belgrade testified that the backpack would be been held until Mr. Lelm would have been able to pick it up. Appellant's Appendix A-62, Lines 7-14.

[11] STANDARD OF REVIEW

[12] This Court will affirm a district court's decision on a motion to suppress evidence if "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."

State v. Sommer, 2011 ND 151, ¶ 8, 800 N.W.2d 853 (*citing State v. Beane*, 2009 ND 146, ¶ 8, 770 N.W.2d 283, *quoting City of Fargo v. Thompson,* 520 N.W.2d 578, 581 (N.D.1994)). But determining whether a trial court's findings of fact meet a legal standard is a question of law, which is fully reviewable on appeal. *State v. Dudley*, 2010 ND 39, ¶ 6, 779 N.W.2d 369 (*citing State v. Zwicke*, 2009 ND 129, ¶ 6, 767 N.W.2d 869).

[13] ARGUMENT

[14] The State argued three points on appeal for why it believes the District Court erred in granting Mr. Lelm's *Motion to Suppress*. First, the State argues that the District Court erred in finding that the search incident to arrest exception did not apply to the warrantless search of Mr. Lelm's backpack. Second, the State argues that the District Court erred in finding that the automobile exception did not apply to the warrantless search of Mr. Lelm's backpack. Third, the State argues the District Court erred in finding that items in the backpack would have inevitably been discovered.

[15] The District Court did not make a ruling regarding the search incident to arrest exception because the State did not raise this issue in their *Response to Motion to Suppress Evidence*. Appellee's Appendix A-13-19. In fact, the District Court noted that the State argued the consent exception, automobile exception, officer safety exception, and the inevitable discovery doctrine should apply to the warrantless search of Mr. Lelm's backpack. "It is well established that 'issues 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 497 (*quoting State v. Blumer*, 458 N.W.2d 300, 303 (N.D. 1990); *see also State v. Miller*, 2001 ND 132, 631 N.W.2d 587; *State v. Nickel*, 2013 ND 155, 836 N.W.2d 405). Furthermore, this Court has said, "Issues not raised before

the district court are generally not reviewable on appeal absent obvious error under N.D.R.Crim.P. 52(b)… 'We cautiously exercise our power to notice obvious error only in exceptional situations in which a defendant has suffered serious injustice.'" *State v. Scott*, 2020 ND 160, 946 N.W.2d 704 (*quoting State v. Freed*, 1999 ND 185, ¶ 14, 599 N.W.2d 858).

[16] During the State's closing arguments, the State mentioned "search incident to arrest exception" twice. Appelle's Appendix A-72, lines 10-18 and A-76, lines 8-14. The State never expounded on any of its mentions of "search incident to arrest exception." Appellee's Appendix A-76-77. The State mentioned "search incident to arrest" in relation to Mr. Lelm as another reason for law enforcement to search the backpack only in closing, without offering any law or facts to support its argument. Appellee's Appendix A-76, lines 20-25 and A-77, line 1. The State uttered eight (8) words to "raise" the issue for the District Court to consider. Therefore, this Court should not consider the State's argument related to the search incident to arrest exception because the State did not argue that the warrantless search of Mr. Lelm's backpack fell under the search incident to arrest exception in its *Response* or at the evidentiary hearing. Thus, this issue cannot be raised on appeal.

[17] I. The District Court Properly Concluded that the Search of Mr. Lelm's Backpack Was Unconstitutional.

[18] The ultimate touchstone of the Fourth Amendment is reasonableness. *Riley v. California*, 134 S. Ct. 2473, 2482 (2014).

> Unreasonable searches and seizures are prohibited by the Fourth Amendment of the United States Constitution, made applicable to the states under the Fourteenth Amendment, and by Article I, Section 8, of the North Dakota Constitution. *State v. Birchfield*, 2015 ND 6, ¶ 8, 858 N.W.2d 302. Warrantless searches are unreasonable unless they fall within one of the recognized exceptions to the warrant

> requirement. *City of Fargo v. Wonder*, 2002 ND 142, ¶ 18, 651 N.W.2d 665. "In suppression cases, the defendant has the initial burden of establishing a prima facie case that the evidence was illegal seized." *State v. Glaesman*, 545 N.W.2d 178, 182 n.1 (N.D. 1996). Thereafter, the State has the burden of proving warrantless search falls within a recognized exception to the warrant requirement. *State v. Nickel*, 2013 ND 155, ¶ 22, 836 N.W.2d 405. Absent an exception to the warrant requirement, the exclusionary rule requires suppression of evidence obtained in violation of the federal and state constitutions' protections against warrantless searches or seizures. *Id*.

State v. Morales, 2015 ND 230, ¶ 8, 869 N.W.2d 417.

[19] The Fourth Amendment establishes a strong preference for law enforcement officers to obtain warrants. *Nickel*, 2013 ND 155, at ¶ 22 (*citing State v. Dodson*, 2003 ND 187, ¶ 27, 671 N.W.2d 825). A warrantless search or seizure is constitutionally impermissible unless it falls within a recognized exception to the warrant requirement. *Nickel*, 2013 ND 155 at ¶ 22, *citing State v. Salter*, 2008 ND 230, ¶ 6, 758 N.W.2d 702; *State v. Woinarowicz*, 2006 ND 179, ¶ 21, 720 N.W.2d 635; *State v. Genre*, 2006 ND 77, ¶ 17, 712 N.W.2d 624. Absent an exception to the warrant requirement, the exclusionary rule requires suppression of evidence obtained in violation of the Fourth Amendment's protections against warrantless searches or seizures. *Nickel*, 2013 ND 155 at ¶ 22 (*citing State v. Haibeck*, 2004 ND 163, ¶ 9, 685 N.W.2d 512). The State has the burden of showing a warrantless search or seizure falls within a recognized exception to the warrant requirement. *Nickel*, 2013 ND 155 at ¶ 22 (*citing State v. Mitzel*, 2004 ND 157, ¶ 12, 685 N.W.2d 120; *State v. Avila*, 1997 ND 142, ¶ 16, 566 N.W.2d 410).

[20] a. The District Court Properly Concluded that the Consent Exception Did Not Apply to the Search of Mr. Lelm's Backpack.

[21] The North Dakota Supreme Court has previously concluded that an individual's personal bag is an area subject to Fourth Amendment protection from unreasonable searches and seizures. *State v. Daniels*, 2014 ND 124, ¶ 6, 848 N.W.2d 670; *see also State v. Tognotti*, 2003 ND 99, ¶ 20, 663 N.W.2d 642 (explaining "A purse, like a billfold, is such a personal item that it logically carries for its owner a heightened expectation of privacy, much like the clothing the person is wearing.")

[22] Consent to a search is one of the exceptions to the warrant requirement of the Fourth Amendment. *State v. DeCoteau*, 592 N.W.2d 579, 582 (ND 1999). The individual who is granting consent must have apparent common authority or a sufficient relationship to the property or individual. *State v. Zimmerman*, 529 N.W.2d 171, 174 (1995). Generally, apparent common authority is based upon mutual use of the premises by persons generally having control over or joint access to the property for most purposes. *Id*. The question of whether a person is deemed to reasonably hold apparent authority to consent to search is based on the facts available at the time to the officer. *Illinois v. Rodriguez*, 497 U.S. 177, 188-89 (1990).

[23] In *Daniels*, Jennifer Daniels ("Daniels") was a passenger in a vehicle that was pulled over for expired registration. *Daniels*, 2014 ND 124, at ¶ 2. After all individuals in the vehicle provided the Burleigh County Sheriff Deputy with their identification, the driver consented to the search of the vehicle. *Id*. at ¶ 2-3. All parties exited the vehicle, Daniels left her purse in the vehicle, and the deputy subsequently searched her purse. *Id*. at ¶ 3. The deputy never acquired consent from Daniels to search her purse and Daniels never provided the same. *Id*. Upon the search of Daniel's purse, pills were found and after lab

test confirmed their identity, Daniels was arrested. *Id*. at ¶ 4. The district court denied Daniels' motion to suppress the evidence found in her purse. *Id*. at ¶ 5.

[24] On appeal, this Court overturned the district court's decision because Daniels did not provide consent for the search of her purse and it was held that the consent exception did not apply. *Id*. at ¶ 25. Furthermore, because the warrantless search of Daniels' purse infringed upon her Fourth Amendment rights, the evidence recovered from her purse was required to be suppressed. *Id*. at ¶ 25. The district court's decision to not suppress the evidence was ultimately reversed. *Id*. at ¶ 27.

[25] In the instant case, Mr. Bloom's consent to the search of the vehicle did not extend to Mr. Lelm's backpack. As such, any item that belonged to Mr. Bloom, in his vehicle, could have been search by law enforcement. However, Mr. Bloom's consent only went as far as his items in his vehicle. Mr. Bloom's consent could not extend to the search of Mr. Lelm's backpack. In uncontroverted testimony, law enforcement testified they were reasonably aware that the backpack in question belonged to Mr. Lelm. Appellant's Appendix A-58, lines 11-14. Law enforcement testified the backpack was on his lap when they approached Mr. Bloom's vehicle and that he exited the vehicle with the backpack in his possession. Appellant's Appendix A-37, lines 18-19. Therefore, Mr. Lelm's consent was necessary to search his backpack.

[26] Unlike in *Daniels*, law enforcement was reasonably aware that the backpack belonged to Mr. Lelm. Law enforcement testified that Mr. Lelm exited the vehicle with the backpack, furthering the belief that the backpack in fact belonged to Mr. Lelm, not Mr. Bloom. Appellant's Appendix A-37, lines 18-19. While the purse in *Daniels* was readily apparent that it did not belong to the consenting party, law enforcement testified that Mr.

Lelm possessed the backpack. When they initially approached the vehicle, law enforcement testified that Mr. Lelm had the backpack in his lap while sitting in the front passenger seat. Appellant's Appendix A-58, line 12. Here, it is readily apparent that Mr. Lelm was the owner of the backpack. Additionally, law enforcement provided no testimony concerning Mr. Bloom's ownership of the backpack nor was testimony provided to the district court about Mr. Bloom's apparent authority over the backpack. Furthermore, law enforcement never acquired consent from Mr. Lelm to search his bag and Mr. Lelm never provided the same.

[27] The District Court ultimately found that based on the facts presented by law enforcement at the hearing, that law enforcement knew or were reasonably aware that the backpack belonged to Mr. Lelm, not Mr. Bloom, and therefore the consent of Mr. Bloom did not extend to the search of the backpack. Accordingly, this Court should find the district court properly concluded that the consent exception does not apply to the search of the backpack.

[28] b. The District Court Properly Concluded that the Automobile Exception Did Not Apply to the Search of Mr. Lelm's Backpack.

[29] The automobile exception of the warrant requirement allows law enforcement officials to search a vehicle when law enforcement has probable cause the vehicle contains contraband or evidence of a crime. *State v. Gefroh*, 2011 ND 153, ¶ 8, 801 N.W.2d 429, 432; *Carroll v. United States*, 267 U.S. 132, 153-54 (1925). The scope of the automobile exception is limited to containers or places that are capable of concealing the object of the search. *See generally Wyoming v. Houghton*, 526 U.S. 295 (1999). "[M]ere association with a known or suspected criminal, or mere presence in that person's automobile, does not

create probable cause to arrest." *Interest of K.V.*, 2020 ND 169, ¶ 9, 946 N.W.2d 518 (*quoting U.S. v. Caves*, 890 F.2d 87, 94 (8th Cir. 1989)).

[30] Two important items that *Gefroh* illustrates concerning the automobile exception are when probable cause is determined and when containers in a vehicle are subject to a search. 2011 ND 153, 801 N.W.2d 429. In *Gefroh*, Ward County Narcotics Task Force had information suggesting Kevin Gefroh ("Gefroh") had been selling controlled substances. *Id*. at ¶ 2. One evening, law enforcement noticed three registration tabs displayed on Gefroh's license plate and he was subsequently pulled over for a traffic violation. *Id*. The officer was a K-9 unit, that conducted a sniff search which led to a positive indication on the passenger side door while Gefroh and two other passengers were in the vehicle. *Id*. Upon stepping out of the vehicle, Gefroh's vehicle was searched, and a bag with marijuana residue was found. *Id*. Gefroh was subsequently patted down and law enforcement found four bundles of cocaine in his pocket. *Id*.

[31] On appeal, it was first explained that, "Once probable cause that a vehicle contains contraband is established, law enforcement may search the vehicle because the ready mobility of the vehicle is an exigent circumstance justifying the exception to the warrant requirement." *Gefroh*, 2011 ND 153 at ¶ 8 (citing *Zwicke*, 2009 ND 129, at ¶ 11). Secondly on appeal, this Court cited to a decision from the United States Supreme Court in *United States v. Di Re* to differentiate between searching persons and their belongings. In that case, the court "found no grounds to expand the automobile exception to justify the arrest and search of the person within a car." 332 U.S. 581, 587 (1948). Due to that, the United States Supreme Court stated, "We are not convinced that a person, by mere presence

in a suspected car, loses immunities from search of his person to which he would otherwise be entitled." *Id.*

[32] Furthermore, in *Houghton* the United States Supreme Court recognized the "heightened protection afforded against searches of one's person," and reiterated that case law supported a distinction between the person and a container within a vehicle. *Gefroh*, 2011 ND 153 at ¶ 12 (*quoting Houghton*, 526 U.S. 295, 303 (1999) (*citing Di Re*, 332 U.S. 581 (1948); *Ybarra v. Illinois*, 444 U.S. 85, 100 (1979))). Therefore, with these cases taken into consideration, this Court held that the automobile exception does not justify the warrantless search of Gefroh's person.

[33] Similarly to the facts of *Gefroh*, it is undisputed that Mr. Lelm's backpack was outside of the vehicle at the time probable cause for the search of the vehicle was established. However, Mr. Lelm was not in the vehicle at the time law enforcement completed the sniff search, unlike the sniff search in *Gefroh*. In this case the State argues that since the backpack was recently inside in the vehicle, the automobile exception extends to items that were recently located in the vehicle. However, this Court has limited the scope of an automobile search to the vehicle and containers therein. *Gefroh*, 2011 ND 153 at ¶ 13. While the scope of the search of containers in the vehicle is particularly generous, it is well established that the automobile exception is limited to containers that may possess the object of the search inside the vehicle.

[34] Probable cause to search the vehicle was established under the automobile exception after the K9 sniff search. It is undisputed at the time of the K9 sniff search, the backpack was not located inside the vehicle. The State argued at the evidentiary hearing that odors from controlled substances can linger in a location allowing K9 officers to detect

them. However, Officer Warzecha provided no further testimony and had no knowledge as to the amount of time an odor may be present. Further, Officer Warzecha could not provide more information on Officer Kupper's own ability to detect odor for an item that may or may not be located in the vehicle. The District Court determined that it could not reasonably tie the backpack to the positive alert detected on the vehicle, given that items were found in the center console of Mr. Bloom's vehicle.

[35] It is undisputed that Officer Kupper did not indicate on the backpack as he walked around the vehicle. The District Court concluded the State presented insufficient evidence to support any connection between the backpack being located in the vehicle and the odor that Officer Kupper indicated, since items were found in Mr. Bloom's center console. Therefore, this Court should find the district court correctly found that the automobile exception did not apply to the warrantless search of the backpack.

[36] c. The District Court Properly Concluded that the Officer Safety Exception Did Not Apply to the Search of Mr. Lelm's Backpack.

[37] Officer safety is also an exception to the warrant requirement of the Fourth Amendment. *Interest of K.V.,* 2020 ND 169, at ¶ 12 (*citing State v. Scheett*, 2014 ND 91, ¶ 9, 845 N.W.2d 885). A law enforcement officer may conduct a frisk or a pat down search of a person only when the officer possesses an articulable suspicion the individual is armed and dangerous. *Tognotti*, 2003 ND 99, at ¶ 16 (*citing State v. Heitzmann,* 2001 ND 136, ¶ 11, 632 N.W.2d 1). In addition, if a police officer lawfully pats down a suspect's outer clothing and feels an object where the contour or mass makes immediate identity apparent, it is no greater an invasion of privacy beyond that already authorized by the search for weapons. *Interest of K.V.,* at ¶ 12 (*citing Minnesota v. Dickerson,* 508 U.S. 366, 375 (1993). "A valid *Terry* frisk consists solely of a limited patting of the outer clothing of the

suspect for concealed objects which might be used as instruments of assault." *Heitzmann,* 2001 ND 136 at ¶ 13. Furthermore, a pat down is not simply a routine precursor to a more extensive search. *Id.*

[38] In *State v. Heitzman,* there was unsubstantiated information that the driver of the vehicle was involved in narcotics trafficking. *Heitzman,* 2001 ND 136 at ¶ 2. Law enforcement pulled over the vehicle because the driver had a suspended license. *Id*. After law enforcement arrested the driver, the driver informed law enforcement there was an unloaded firearm in the backseat of the vehicle, they then asked the passenger to exit the vehicle, and the passenger then began to make erratic movements which made officers concerned for their safety. *Id*. at ¶ 2-3. Law enforcement subsequently conducted a pat down of the passenger's person and discovered bulges on his person, which later turned out to be controlled substances. *Id*. at ¶ 3-4. The Supreme Court upheld the search of the passenger's person based on the officer safety exception. *Id*. at ¶ 14.

[39] Although the results of the search of the passenger in *Heitzman* are not comparable to the search in the instant case, the Court's discussion is very applicable to the case at hand. In the instant case, Mr. Lelm was asked, like the passenger in *Heitzman,* to step outside of the vehicle by law enforcement following a valid traffic stop. As Mr. Lelm stepped out of the vehicle, he was surrounded by law enforcement and informed them there was an unloaded firearm on the floorboard of the vehicle. Mr. Lelm made movements which was described as nervous by law enforcement. Like the passenger in *Heitzman,* because of the presence of the firearm and Mr. Lelm's movements, law enforcement detained Mr. Lelm and removed the backpack from him. Mr. Lelm was placed in the squad car and the backpack was placed on the side of the road

[40] As Mr. Lelm was detained, a pat down search was conducted, and nothing was found on Mr. Lelm's person. It is undisputed that at the time of the search of the backpack Mr. Lelm was detained in the back of a police car. In fact, law enforcement testified that the search of the backpack was not done for officer safety. Appellant's Appendix A-60, lines 17-20. Mr. Lelm could not have accessed the backpack. Therefore, this Court should find the district court correctly concluded that because Mr. Lelm could not have access to the backpack, and testimony from officers indicating they were not in fear for their safety, the search of the backpack did not fall within the officer safety exception.

[41] d. The District Court Properly Concluded that the Inevitable Discovery Exception Did Not Apply to the Search of Mr. Lelm's Backpack.

[42] The inevitable discovery doctrine "establishes that evidence derived from information obtained in an unlawful search is not inadmissible under the fruit-of-the-poisonous-tree doctrine where it is shown that the evidence would have been gained even without the unlawful action." *State v. Friesz*, 2017 ND 177, ¶ 26, 898 N.W.2d 688, (*quoting State v. Phelps*, 297 N.W.2d 769, 774 (N.D. 1980); *see also State v. Smith*, 2005 ND 21, ¶ 31, 691 N.W.2d 203). In *Phelps*, the North Dakota Supreme Court adopted a two-part test to decide when the State may rely on the inevitable discovery exception to the exclusionary rule:

> First, use of the doctrine is permitted only when the police have not acted in bad faith to accelerate the discovery of the evidence in question. Second, the State must prove that the evidence would have been found without the unlawful activity and must show how the discovery of the evidence would have occurred.

Id. at 775. "The first criteria is necessary because one purpose of the exclusionary rule is to prevent and deter shortcuts in law enforcement." *Friesz*, 2017 ND 177 at ¶ 26 (*quoting*

State v. Johnson, 301 N.W.2d 625, 629 (N.D. 1981)). Regarding the test's second criteria, "the United States Supreme Court has held evidence obtained because of unlawful police conduct may be admissible if the State proves by a preponderance of the evidence that the challenged evidence would have otherwise been discovered by lawful means in the course of the investigation." *Friesz*, 2017 ND 177 at ¶ 26 (*quoting State v. Asbach*, 2015 ND 280, ¶ 16, 871 N.W.2d 820 (*citing State v. Olson*, 1998 ND 41, ¶ 16, 575 N.W.2d 649; *Nix v. Williams*, 467 U.S. 431, 444 (1984))).

[43] In *State v. Olson*, law enforcement was made aware of a vehicle, with a bicycle in its trunk, that was suspected in connection to a domestic disturbance at a nearby hotel. *Olson*, 1998 ND 41 at ¶ 3. Law enforcement came upon the vehicle swerving in and out of its lane for a mile and a half. *Id*. Law enforcement made a traffic stop and learned the driver did not have a valid license. *Id*. Law enforcement arrested the driver for driving under suspension, the passenger of the vehicle was asked to step out and take the bike out of the trunk. *Id*. at ¶ 5. As the passenger was taking the bike out of the trunk, law enforcement saw a firearm and closed containers. *Id*. Law enforcement subsequently searched the vehicle and found additional firearms and controlled substances. *Id*. at ¶ 6. The district court suppressed the evidence as there was no probable cause for the search of the trunk. *Id*. at ¶ 7. The North Dakota Supreme Court overturned the district court's ruling because the State would have inevitably discovered the items during an inventory search as the vehicle would be impounded. *Id*. at ¶ 17. Also, the trunk was already exposed to plain view. *Id*. at ¶ 14.

[44] Similarly to Mr. Lelm's case, law enforcement conducted a traffic stop because the driver did not have a valid license. Unlike *Olson*, Mr. Lelm's backpack was located on

the side of the road instead of in the trunk. The backpack was also closed and subsequently to Mr. Lelm being detained, he was free to leave.

[45] Mr. Lelm began to experience chest pains and requested a paramedic. Officer Belgarde testified that even though Mr. Lelm requested a paramedic, he would have still needed Mr. Lelm's consent to search the backpack. Officer Belgarde further testified that if Mr. Lelm declined to consent to the backpack, the backpack would have been taken to the law enforcement center and not been searched. The State failed to provide evidence to support any other theories as to how the backpack would have been searched absent a warrant.

[46] Furthermore, there was no proof or testimony offered to determine if law enforcement was acting in good or bad faith in searching Mr. Lelm's backpack. More importantly, Judge Nesvig concluded in the *Order* that, "insufficient evidence was provided that the evidence would have inevitably been discovered inside of the backpack." Appellants Appendix A-28, ¶ 15. Therefore, this Court should find that the district court correctly concluded that the inevitable discovery doctrine did not apply.

[47] CONCLUSION

[48] The District Court did not error in finding that no exception to the warrant requirement existed at the time of the search of Mr. Lelm's backpack. Therefore, Mr. Lelm respectfully requests that this Court affirm the district court's August 6, 2020 *Order Granting Motion to Suppress*.

Respectfully submitted this 14th day of December, 2020.

MULLOY LAW, PLLC
Attorneys for/Respondent/Appellee Nicholas Dean Lelm
101 Slate Drive Suite 7
Bismarck, North Dakota 58503
PH: 701-390-8580
FX: 701-639-2845
E-mail: josh@mulloylaw.com

By:

/s/ Joshua L. Weatherspoon
Joshua L. Weatherspoon (ID# 08641)

CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for the Appellee in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional typeface, and there are twenty-five (25) pages in the above brief.

Dated this 14th day of December, 2020.

MULLOY LAW, PLLC
Attorneys for/Respondent/Appellee Nicholas Dean Lelm
101 Slate Drive Suite 7
Bismarck, North Dakota 58503
PH: 701-390-8580
FX: 701-639-2845
E-mail: josh@mulloylaw.com

By:

/s/ Joshua L. Weatherspoon
Joshua L. Weatherspoon (ID# 08641)

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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State of North Dakota v. Nicholas Dean Lelm
Case No.: 30-2019-CR-00881

CERTIFICATE OF SERVICE BY ELECTRONIC FILING

Joshua L. Weatherspoon states that on the 14th day of December, 2020 a true and correct copy of the ***Brief of Defendant / Appellee Nicholas Dean Lelm; and Appellee's Appendix*** was filed and served electronically with the North Dakota Supreme Court Clerk through the North Dakota Supreme Court's Electronic File & Serve ("EFS"), and that EFS will send a Service Notification to the following:

Paul E. Jensen / Austin Gunderson
mortonsa@mortonnd.org

Dated this 14th day of December, 2020.

JOSHUA L. WEATHERSPOON
MULLOY LAW, PLLC
Attorneys for Defendant/Appellee
101 Slate Drive, Suite 7
Bismarck, ND 58503
PH: 701-390-8580
E-mail: josh@mulloylaw.com
By:
/s/ Joshua L. Weatherspoon
Joshua L. Weatherspoon (ID # 08641)