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SUPREME COURT
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IN THE SUPREME COURT, STATE OF NORTH DAKOTA

State of North Dakota, Appellee, vs. Scott Norman Seglen, Appellant.	)	Supreme Ct. No. 20040094 **APPELLANT'S REPLY BRIEF**

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STATE OF NORTH DAKOTA

ON APPEAL FROM A CRIMINAL JUDGMENT

DISTRICT COURT FOR GRAND FORKS COUNTY,
NORTHEAST CENTRAL JUDICIAL DISTRICT
HONORABLE LAWRENCE JAHNKE, JUDGE OF DISTRICT COURT, PRESIDING
Case No. 03-K-3193

SUBMITTED BY:

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I. Jensen v. City of Pontiac is factually and legally distinguishable from Seglen's case.

In an attempt to urge this Court to depart from long-standing precedents set forth in other state and federal courts in these types of cases, the State urges this Court to misconstrue the facts and interpret them in such a way as to find this search to be a "reasonable search" under a very narrow precedent set forth by the Michigan Court of Appeals in Jensen v. City of Pontiac. 317 N.W.2d 619 (Mich. App. 1981). Scott urges this Court to turn down the State's invitation to take a path leading to nothing more than unwarranted judicial activism.

In Jensen, the Michigan Court of Appeals reviewed the constitutionality of the procedures taken by the City of Pontiac in maintaining security at the Pontiac Silverdome during a professional football game. Id. at 620. Significantly, the Jensen court reviewed, with approval, many of the cases previously cited by Seglen, including Gaioni v. Folmer, 567 F. Supp. 10 (M.D. Ala 1978), Stroeber v. Commission Veteran's Auditorium, 453 F. Supp. 926 (S.D. Iowa 1977), Collier v. Miller, 414 F. Supp. 1357 (S.D. Tex 1976) and State v. Carter, 267 N.W.2d 385 (Iowa 1978). Jensen, 317 N.W.2d at 621-623. After doing so, the Court noted several facts which made the nature and scope of the searches conducted at the Pontiac Silverdome constitutionally permissible.

First, the Jensen Court noted that the record clearly indicated that the searches were focused on preventing injuries and potential deaths in the stadium caused by patrons throwing objects during the football games. Id. at 623. In fact, the evidence showed that, after implementing the policy, the number of injuries were substantially reduced. Id. at 624. Furthermore, in a footnote, the Court stated plainly that their case was distinguishable from others because the main purpose was for "public safety" and that the "requisite public necessity to justify this degree of intrusion for enforcement of drug and alcohol laws was not present." Id. at 624-625, n.5.

In Scott's case, Officer Inocencio stated that preventing outside food and beverages, photographic equipment, and even bottled water from coming into the arena was part of his duties that night. (Motion Trans. pgs. 9, 11). In fact, the trial court even found that the reason individuals with oversized jackets were searched was because of past violations of the arena's "no alcohol transport" policy. (Appellant's Appendix, A-11). In addition, the record is devoid of any testimony that the physically intrusive searches were necessary because of past injuries caused by attendee's throwing items, including presumably deceased gopher carcuses. Obviously, enforcement of the policies of Arena Holdings Charitable, LLC was the major concern, not "public safety".

Second, the Jensen Court quite clearly noted that the searches were visual only. 317 N.W.2d at 624. Unlike Ms. Jensen, Scott Seglen was touched and, in turn, the pat-down search led directly to finding the beverage container. (Motion Trans., pg. 7). Despite the State's belief otherwise, physical searches are not "but an extension of the visual observations". (Appellee's Brief, pg. 10). Even the case on which the State places so much reliance notes that "[a] physical pat-down search by a guard is more intrusive than a limited visual search." Jensen, 317 N.W.2d at 624.

Third, the Jensen Court noted that the use of security guards rather than uniformed, armed officers made a significant difference in the propriety of the search. Id. As the Court is well aware, Officer Inocencio was on duty and presumably armed. When an individual's own body is physically intruded upon by armed law enforcement for no reason, the public cannot but think less of our law enforcement. In fact, contrary to what the State asserts, the REA's ability to protect their patron's will not be "crippled". (Appellee's Brief, pg. 7). Regardless of the holding of this Court, the REA will, if they so desire, be able to hire private security guards to conduct pat-down searches to protect there searches. As private individuals working for a private entity, private security guards are not obligated to recognize the constitutional protections granted by the Fourth Amendment. See e.g. Burdeau v. McDowell, 256

U.S. 574 (1921).

Finally, the ability to obtain a refund for those who refused to be searched was also a critical fact to the Jensen Court. Id. While no testimony was presented concerning this issue, according to the State, an individual's recourse, when confronted with the possibility of being search, is to just turn around and leave. (Appellee's Appendix, pg. 16).

As the State noted, this case is a case of first impression as this Court has never ruled on the propriety of pre-admittance searches at stadiums and arenas. (Appellee's Brief, pg. 5). Appellant Scott Seglen urges this Court to follow the well-worn path made by this Court's bretheran in other jurisdictions. The creation of a new exception to the warrant requirement to allow police officers to utilize evidence--which would otherwise be unconstitutionally obtained--while conducting searches in the name of "security" would simply gut the heart and soul of the protections afforded Fourth Amendment of the United States Constitution and Article I, Section 8 of the North Dakota Constitution.

II. The State has failed to preserve for appellate review the issue of whether or not Seglen's production of the can was consentual.

The State now maintains that, even if the search intiated by Officer Inocenio was unconstitutional, the fruits of the search should not be suppressed since Mr. Seglen allegedly consented by reaching into his pocket and turning the can over to the officer. (Appellee's Brief, pg. 12).

Regardless of the merits of this argument, this is the first time Appellant has even heard this issue raised in this case. The State did not argue in it's brief before the District Court that such was the case. (Appellant's Appendix, A-7 - A-10)[1] Furthermore, at the Motion hearing held on January 3, 2004, there is absolutely no suggestion even made by the State that the Mr. Seglen's act of producing the can to Officer Inocencio was a voluntary act. (Appellee's Appendix, pgs. 12-16). In addition, the trial court decision does not reflect that such an issue was raised by the court itself or any of the parties. (Appellant's Appendix, A-11 - A-12).

"One of the touchstones for an effective appeal on any proper issue is that the matter was appropriately raised in the trial court so it could intelligently rule on it." State

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1 In fact, the State actually argued that no pat-down search even occurred. (Appellant's Appendix, A-9 - A-10).

v. Osier, 1999 N.D. 28, ¶14, 590 N.W.2d 205. As a result, this Court will not address issues raised for the first time on appeal. Chapman v. Chapman, 2004 N.D. 22, ¶7, 673 N.W.2d 920 (quoting Bay v. State, 2003 N.D. 183, ¶14, 672 N.W.2d 270). The purpose of an appeal is to review the actions of a trial court, not grant a party the "opportunity to develop and expound upon new strategies or theories." Id. (quoting Gonzalez v. Tounjian, 2003 N.D. 121, ¶31, 665 N.W.2d 705). In this case, the State is attempting to just that.

Based upon the above-state argument and law, the Court should properly not address the issue as it is now being brought forth in a completely untimely manner.

III. Scott's act of handing the beverage container to Officer Inocenio was not a voluntary act.

Even if this issue was timely preserved, the State's contention that the evidence is admissable because Scott voluntarily turned over it over to the Officer is completely unpersuasive.

In this case, Scott was stopped and subjected to a pat-down search of his person. (Motion Trans, pg. 10-11). The Officer than felt a "can of some sort." (Motion Trans, pg. 7). However, Officer Inocencio knew it was a beverage container and not a weapon, (Motion Trans., pg. 11). Regardless of the fact that it is not illegal to carry a beverage container into the REA, Officer Inocencio asked Scott to remove it because of REA policy. (Motion Trans., pg. 6).

Under Terry v. Ohio, "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." 392 U.S. 1, 16 (1968). In this case, the officer clearly restrained Scott and no rationale person would believe, under the totality of those circumstances, that they were able to refuse to follow the officer's request. See State v. Mitzel, 2004 N.D. 157, ¶17 (finding "grave doubts" about the voluntariness of consent given after a Defendant was arrested in violation of his constitutional rights). Consent needs to be proven by clear and convincing evidence and should not be lightly inferred. Id. "[C]onsent

is the product of free and unconstrained choice and not the product of duress or coercion." Id. at ¶25. Under these circumstances, one can hardly say that Scott, who is a 20 year old college student, made a unconstrained choice to turn over the can to the officer.

Also, Officer Inocencio "knew" Scott did not have a weapon, but nevertheless insisted that Scott take out the item in his coat. Even if the officer had the authority to conduct a pat-down search, under the rationale of State v. Tollefson, once the officer determined that he was not in a possession of a weapon any further he had no authority to proceed with any other inquiry. 2003 N.D. 73, ¶13, 660 N.W.2d 575 (holding that law enforcement cannot conduct a pocket search after a pat-down when they determine that an object is not a weapon).

Based upon the above-stated law, Scott's act of giving the Officer Inocencio the beverage container from his pocket was clearly not a voluntary and consentual act.

Conclusion

Based upon the above stated law and reasoning as well as that presented in Appellant's Brief, Appellant Scott Seglen requests that the evidence should be suppressed and in turn Judgment of Conviction entered by the Grand Forks County District Court be in all things **REVERSED** and that this case be remanded to the district court with instructions to dismiss the case.

Dated: This the 25th day of August, 2004.

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