

Original

20130397

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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SUPREME COURT

MAY 05 2014

Jason Gullickson,)
)
Petitioner and Appellant,)
)
vs.)
)
State of North Dakota,)
)
Respondent and Appellee.)

Supreme Court No. 20130397

District Court No. 08-
2012-CV-01471

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

MAY -2 2014

STATE OF NORTH DAKOTA

SUPPLEMENTAL RULE 24 BRIEF OF APPELLANT GULLICKSON

APPEAL FROM THE DISTRICT COURT'S ORDER DENYING
APPLICATION FOR POST-CONVICTION RELIEF OF NOVEMBER 22, 2013
BURLEIGH COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT
HONORABLE SONNA ANDERSON

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STATEMENT OF SUPPLEMENTAL ISSUES

[¶1] ISSUE: The District Court improperly denied Appellant's Petition For Post-Conviction Relief on the Ground, that the executing officers exceeded the scope of the search warrant.

[¶2] ISSUE: The District Court improperly denied Appellant's Petition For Post-Conviction Relief on the Ground, that the majority of the search was made outside the time-frame of day-time hours.

[¶3] ISSUE: The District Court improperly denied Appellant's Petition For Post-Conviction Relief on the Ground, that the warrant-less trash pull was unlawful.

STATEMENT OF THE CASE

[¶4] Appellant does stand and states, that the Statement of the Case in Brief of Appellant Gullickson, which was filed and served by and through Steven Balaban, Appointed Counsel for Appellant, is Correct. See, Brief of Appellant Gullickson, ¶¶2-4.

STATEMENT OF THE FACTS

[¶5] Appellant does stand and states, that the Statement of the Facts in Brief of Appellant Gullickson, which was filed and served by and through Steven Balaban, Appointed Counsel for Appellant is Correct. See, Brief of Appellant Gullickson, ¶¶5-7, but Appellant further shows this Court:

[¶6] That on the 30th day of August, 2004, Morton County Deputy Sheriff Rob Fontenot conducted a garbage pull at the residence of 507 Stratford in Bismarck, North Dakota. App. p. 14, Ln's. 18, 19. That this residence belongs to Don Gullickson, Appellant's natural Father. App. p. 14, Ln's. 24-25. That based on Deputy Rob Fontenot's testimony at the Application for Search Warrant Hearing, held on this same day, the Honorable Bruce B. Haskell, Judge of the District Court, issued a search warrant. App. p. 18, Ln's. 1-4, See Also, Search Warrant, App. p. 70-71.

ARGUMENT

[¶7] Appellant does stand and states, that the Standard of Review is the same as the Standard of Review in Brief of Appellant Gullickson (hereinafter referred to as "Appellant's Brief"), which was filed and served by and through Steven Balaban, Appointed Counsel for Appellant (hereinafter referred to as "Appointed Counsel"). See, Appellant's Brief, ¶8.

LAW AND ARGUMENT

[¶8] Appellant brought the following issues before the District Court under the category of Ineffective Assistance of Counsel, a valid claim in a Post-Conviction Relief Claim under NDCC Chapter 29-31, See, App. p. 3-58. Further, Appointed Counsel made the proper argument for a claim of ineffective assistance of counsel under the Sixth Amendment of the United States Constitution, and the companion North Dakota State Constitutional provision Article I, §12. See, Appellant's Brief ¶¶10-13, and 19.

[¶9] ISSUE: The District Court improperly denied Appellant's Petition for Post-Conviction Relief on the Ground, that the executing officers exceeded the scope of the search warrant.

[¶10] That on the 31st day of August, 2004, the Honorable Bruce B. Haskell, Judge of the District Court issued a search warrant, App. p. 70-71, which allowed officers to search for "controlled substances and drug paraphernalia". See, App. p. 70, Paragraph 2.

[¶11] That Judge Haskell had stricken the language of: "other indicia of drug trafficking", from the Search Warrant. See, Transcript of Application for Search Warrant, App. p. 18, Ln's. 1-3.

[¶12] The Search Warrant in this matter did not authorize seizure of an entire class of items. The search warrant here provided a means by which any reasonable Officer could distinguish the items that may be seized from those items that may not. The Search Warrant here had sufficient particularity so

as to leave "nothing...to the discretion of the officer executing the warrant." See, Steele v. U.S., 267 U.S. 498, 503 (1925). The Search Warrant Court, whom authorized the Search Warrant clearly ruled that the State did not establish probable cause for drug trafficking. See, Transcript of Application for Search Warrant. App. p. 87, Ln's. 204; See Also, Search Warrant App. p. 88, Paragraph 2, Ln. 4. Therefore, the authorizing Court here limited the scope of the Search Warrant to a single project of controlled substances and it's needed paraphernalia, for the use of controled substances.

[¶13] Clearly the Search Warrant limited the Officer's search to a single project as there was no probable cause to believe drug-trafficking was taking place. The Search Warrant was sufficiently particular, and any reasonable officer would understand that he was not allowed to search for anything "indica of drug-trafficking" as the Search Warrant Court removed the "vague" language "indica of drug-trafficking", as the vague allegations during the Application for Search Warrant Hearing did not establish probable cause of drug-trafficking. Law Enforcement exceeded the terms of the authorizing Search Warrant Court when making the search, pursuant to the Search Warrant, by seizing items clearly "indica of drug-trafficking", which were subsequently used to charge Appellant with crimes of drug-trafficking. See, Evidence Inventory and Receipt. App. p. 90-91, including but not limited to items ##1, 3, 7, 7d, 14 and 15. Therefore, Law Enforcement clearly exceeded the scope of the Search Warrant. See, U.S. v. Robbins, 21 F.3d 297, 300 (8th Cir. 1994).

[¶14] Law Enforcement had both Appellant's and Appellant's Father in handcuffs and the home was secured. Clearly Law Enforcement could have contacted a Magistrate and requested an additional Search Warrant for the items "indica of drug-trafficking: as there was no chance any item would go missing or be destroyed.

[¶15] It would have been reasonable for Appointed Counsel to conduct a reasonable amount of research on the fact that

on the 31st day of August, 2004, during a search pursuant to the Search Warrant the Metro Area Narcotics Task Force (hereinafter referred to as "MANTF") seized evidence which was subsequently used to charge Petitioner with the offense's of: Manufacturing Methamphetamine (Count I), and Possession of Methamphetamine (CountII). Both of these offense's clearly crimes of drug-trafficking and the evidence used to charge out both of these crimes, clearly would be "indica of drug-trafficking".

[¶16] Failure to investigate or conduct any research into the fact that the Search Warrant Court only allowed a "... search for controlled substances and drug paraphernalia", and ruled out a search for any "indica of drug-trafficking:, and subsequently timely request a Hearing to Suppress Evidence prior to the Preliminary Hearing fell below what is expected and required by an reasonable attorney in this situation. See, Johnson v. State, 2006 ND 122, ¶20, 714 N.W.2d 832, 841. This error was so serious that Applicant was not accorded the counsel guarranted by the Sixth Amendment, and clearly below an "objective standard of reasonableness considering pre-vailing professional norms." See, Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Clark v. State, 2008 ND 234, ¶12, 758 N.W.2d 900; Lange v. State, 522 N.W.2d 179, 181 (N.D. 1994), (quoting Strickland, at 688), See Also, North Dakota Rules of Professional Conduct("N.D.R. Prof. Conduct").

[¶17] ISSUE: The District Court improperly denied Appellant's Petition for Post-Conviction Relief on the Ground, that the majority of the search was made outside the time-frame of day-time hours.

[¶18] The Search Warrant Court allowed Officers to serve "... this warrant and making this search in the day-time-- 6:00 A.M. to 10:00 P.M." See, Search Warrant, App. p. 70, Paragraph #3, Ln's. 2, 3. (emphasis added).

[¶19] Rule 41(h)(2)(B0 of the North Dakota Rules of Criminal Procedure ("N.D.R.Crim.P.") states "Daytime" means

the hours from 6:00am to 10:00pm according to local time.

[¶20] MANTF served the Search Warrant in this matter at "approximately 2130 hours:. This being the same day the Magistrate issued the day-time Search Warrant. See, Report of Investigation, App. p. 53, DETAILS. MANTF then secured the scene. At 9:50pm, with only ten (10) minutes left in the time-frame for a day-time search, officer's initiated the search pursuant to the day-time Search Warrant. See, Evidence Inventory and Receipt, App. p. 72, 73, Date/Time Search Initiated. Clearly any reasonable officer would have known that they could not make the search in less than 10 minutes. In fact, officers here terminated the search at 11:30pm. See, Evidence Inventory and Receipt, App.p. 73, Date/Time Search Teminated. This is clearly outside the time-frame of day-time local hours of 6:00A.M.-to-10:00P.M. (*Note* It must be stated here that there appears to be no documentation of Chain of Custody on the Evidence Inventory and Receipt. See, App. p. 72, 73).

[¶21] Rule 41(c)(1)(E) of the N.D.R.Crim.P. states "The warrant must be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime." In the present matter the issuing judge did not authorize a nighttime search by appropriate provisions in the Search Warrant, as required by this rules' requirements. This Court determined in State v. Schmeets, 278 N.W.2d 401 (N.D. 1979) that:

"This rule's requirement that the issuing judge must authorize a nighttime search "by appropriate provision in the warrant" prevents nighttime searches unless the issuing judge has considered the matter, has found reasonable cause for a night search, and has affirmatively authorized it."

[¶22] In the present matter no officer expressed concerns about safety and there was no showing that the evidence sought may be quickly and easily disposed of, and there is no indication that the Search Warrant Court would have permitted a "nighttime search". This Court has also stated that the purpose of Rule 41(c) of the N.D.R.Crim.P. "is to protect citizens

from being subjected to the trama of unwarranted nighttime searches. Courts have long recognized that nighttime searches constitute greater intrusions on privacy than do daytime searches" State v. Fields, 2005 ND 15, ¶9, 691 N.W.2d 233. There is no information in the Record or provided by officers, which would amount to probable cause for a nighttime search in this matter and there is nothing in the Record to indicate that without the nighttime search, the evidence would have been destroyed or removed from the premises before the validation of the Search Warrant in the morning hours.

[¶23] MANTF failed in "making" the "search in the daytime--6:00A.M.-to-10:00P.M." as required in the language in the Search Warrant. See, Search Warrant, App. p. 70, Paragraph #3, Ln. 3. (emphasis added). Making means bringing about the success of the search, not just starting the search but also finishing the search. The search subsequent to the Search Warrant was clearly outside the allowable time-frame perimeters, which were clearly stated in the Search Warrant.

[¶24] Not only did the Search Warrant Court only allow a daytime search, but the Court and the North Dakota Rules of Criminal Procedure only allow the success (making) and fulfillment (execution) of the search during the local daytime hours of 6:00A.M.-to-10:00P.M. Clearly Law Enforcement's search was outside the local daytime hours in this matter.

[¶25] Failure to investigate or conduct any research into the fact that Law Enforcement did a nighttime search, when the Search Warrant Court and the Rules only allowed a daytime search, and subsequently timely request a Hearing to Suppress Evidence fell below what is expected and required by an reasonable attorney in this situation. See, Johnson v. State, 2006 ND 12, ¶20, 714 N.W.2d 832, 841. This error was so serious that Appellant was not accorded the counsel guaranteed by the Sixth Amendment, and clearly below the "objective standard of reasonableness" considering prevailing professional norms." See, Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Clark v. State, 2008 ND 234, ¶12, 758

N.W.2d 900, See Also, N.D.R.Prof.Conduct.

[¶26] ISSUE: The District Court improperly denied Appellant's Petition for Post-Conviction Relief on the Ground, that the warrant-less trash pull was unlawful.

[¶27] The Post-Conviction Relief Court in her ORDER, App. p. 99, Paragraph #17 stated that:

"In North Dakota, a citizen does not have a reasonable expectation of privacy in his trash once he has placed it out in public for disposal. State of North Dakota v. Schamlz, 2008 ND 27, 744 N.W.2d 734 (ND 2008). Gullickson had placed his trash on the sidewalk for collection. He no longer had a reasonable expectation of privacy in the trash." (emphasis added)

Both the Search Warrant Court and the Post-Conviction Court were misled by false information intentionally or negligently given by Morton County Sheriff's Deputy Rob Fontenot as he testified as to the results of the trash pull when he applied for a Search Warrant as follows, beginning at App. p. 17, Ln. 16 through Ln. 23:

THE COURT: Where is the garbage container itself?

DEPUTY FONTENOT: Last night it was placed out on the curb for collection.

THE COURT: Okay and where in relation to 507 Stratford Drive was it?

DEPUTY FONTENOT: Directly in front of the residence.

THE COURT: Okay, on the street or on the sidewalk?

DEPUTY FONTENOT: It was right up on the sidewalk.

At first Deputy Fontenot states "it was placed out on the curb for collection", but as the Search Warrant Court inquired by leading the Deputy by stating "Okay, on the street or on the Sidewalk?" the Deputy finally stated "It was right up on the sidewalk." It would have been impossible for the trash can to be placed on the sidewalk directly in front of the Trailer House in the trailer park, as Appellant's Father always parked his pick-up directly in front of the Trailer House on the sidewalk, and when Appellant's Father would leave for the farm in the morning hours, Appellant's Father would then move the trash to the sidewalk.

[¶28] Deputy Fontenot would have had to walk around Appellant's Father's Pick-up Truck and walk up to the entry door of the Trailer House and then conduct the trash pull,

clearly Deputy Fontenot misled the Search Warrant Court. In fact, Appellant testified at the Post-Conviction Relief Hearing as follows, beginning at, Post-Conviction Transcripts, p. 5, Ln. 17 through Ln. 21.

Q. And, finally, you indicated the trash pull was improper, Why was it improper?

A. The trash was still on my lawn, on my property.

Q. So it wasn't out at the curb?

A. No.

[¶29] Deputy Fontenot, first testifies that the trash was on the curb for collection, but then on further leading inquires by the Search Warrant Court, Deputy Fontenot states it was now on the sidewalk directly in front of the Trailer House, where Appellant's Father's Pick-up Truck was parked. But in fact on Monday night the 30th day of August, 2004, the trash was by the Trailer House, and was not placed out for collection until the morning hours of Tuesday the 31st day of August, 2004. Clearly Deputy Fontenot conducted the trash pull when the trash was not out for collection.

[¶30] Further, Law Enforcement has procedures in place for a trash pull and subsequent garbage search. Deputy Fontenot was required to contact Waste Management and follow them and once Waste Management picked up the trash, then Deputy Fontenot should have seized the trash bags. Clearly Deputy Fontenot failed to follow proper procedure in the trash pull and subsequent garbage search.

[¶31] The trash pull was improper and unlawfull, and then Deputy Fontenot misled the Search Warrant Court to secure a Search Warrant. Therefore, all evidence gained from the trash pull and Search Warrant should have been suppressed.

[¶32] Universally, courts have held that a person possesses an expectation of privacy in areas intimately connected with the home--even areas which are accessible to the public. See, O'Connor v. Ortega, 480 U.S. 709, 730 (1987)(Scalia J., concurring). Governmental agents may not, without a warrant, enter the area "immediately surrounding and associated with the home," Petitioner should have received this same protection here. See, Oliver v. United States, 466 U.S. 170, 180

(1984)(holding the 4th Amendment protects the "curilege" or areas intimately connected to the home, regardless of whether the public might meander across these areas). Even if the right to exclude is limited or incomplete, there exists no rational basis to deny constitutional protections. After all, the United States Supreme Court held that a person possesses an expectation of privacy in a public place, on a public pay phone, near a public street. Katz v. United States, 389 U.S. 347, 351 (1967)("[T]he Fourth Amendment protects people, not places."). Clearly Petitioner should not have been denied constitutional protections, when Deputy Fontenot conducted a trash pull and subsequent garbage search in an area intimately surrounding Appellant's home. The constitutional protections against unreasonable warrantless searches and seizures are at their highest in areas intimately connected to a home. See, California v. Ciraolo, 476 U.S. 207, 213 (1986). The areas around Appellant's home are intimately connected to the adjoining home, which Appellant lives in, and are inaccessible to the general public. Accordingly, this area is legitimately protected by a high level of constitutional protection.

[¶33] In analyzing the historical framework of the 4th Amendment, it is evident the 4th Amendment was designed to safeguard privacy and limit the discretion of the police. See, Thomas Y. Davies, Recovering the Original Fourth Amendment, 98 Mich.L.Rev. 547, 580, 601 (1999). The Framers opposition to allowing governmental officers to search private places at will, was designed to stop the "abhorred practice" of searching people's homes and surrounding areas without warrants issued by magistrates. See, Katz v. United States, 389 U.S. 347, 367 (1967)(Black J., concurring). The Framers' motivation to ban general warrants and to protect the sanctity of private property against governmental searches requires recognition that constitutional protection is extended to a Trailer House and the area intimately surrounding the Trailer House, which is on private property. It is simply undersirable to allow governmental officers, regulated by nothing other than their own discretion, to trespass and conduct a trash pull and search,

as the Framers intended that "[t]he right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted." See, McDonald v. United States, 355 U.S. 451, 455-56 (1948).

[¶34] It is not too much to ask a police officer to obtain a warrant before a Trash pull on private property and subsequent garbage search for evidence of a crime. In fact, the constitution so requires. Here Appellant should not have been relegated to a watered-down version of his constitutional rights. When a governmental officer circumvents these rights-"the Government becomes a lawbreaker, it breeds contempt for the law, it invites every man to become a law unto himself, it invites anarchy." See, Olmstead v. United States, 277 U.S. 438, 485 (1928)(Brandies, J., dissenting). "To declare that in the administration of the criminal law the end justifies the means-to declare that the Government may commit crimes in order to secure the conviction of a private criminal-would bring terrible retribution." Id. Clearly the officers here trespassed in order to secure evidence for a search warrant.

[¶35] It is incumbent upon the Appellant to identify the evidence that must be suppressed. See, State v. Wannve, 1999 ND 164, ¶18, 599 N.W.2d 268 (citation omitted). In this case, starting with the unlawful warrantless trash pull all evidence must be suppressed, including all physical evidence, and any evidence derived from these unlawful searches.

[¶36] It is axiomatic that any protection afforded by our state constitution must be interpreted to be equal to or more expensive than the corresponding protection afforded by the federal constitution. In State v. Stockert, 245 U.W.2d 266 (N.D. 1976), the court concluded a search did not comply with current federal standards. Stockert, at 271. It then went on to indicate it would not feel constrained by federal law in any event, as states are free to impose higher standards. Stockert.

[¶37] In evaluating the failure of Counsel to bring these claims before the Original Court, Appellant asks the Court here to consider Mr. Justice Jackson's admonition:

These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.

Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

[¶38] Here Counsel failed to show the Original Court that the officers used an unconstitutional shortcut by gathering evidence in unlawful searches. Clearly, had Counsel shown the Original Court, that these officers acted in bad faith to accelerate the discovery of evidence and information, which would not have been obtained without the unlawful search and unconstitutional shortcut, there would be more than a reasonable doubt that the outcome of the proceeding would be different.

[¶39] When there is an absence of an exception to the warrant requirement evidence obtained in violation of the protections against unreasonable searches afforded by the 4th Amendment, See, U.S. Const. Amend. IV, must be suppressed as inadmissible under the exclusionary rule. Any evidence obtained as a result of illegally acquired evidence must also be suppressed as Fruit Of The Poisonous Tree. See, Payton v. New York, 445 U.S. 573 (1980). Therefore, all evidence in this matter must be suppressed.

CONCLUSION

[¶40] For the foregoing reasons, Appellant respectfully requests that this Court allow Appellant to remove his guilty plea, as it was entered with ineffective assistance of counsel, and that this Court suppress any and all evidence obtained as a result of the unlawful and incremental constitutional injuries suffered by the Appellant.

Dated this / day of May, 2014.

Jason Gullickson
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CERTIFICATE OF SERVICE

[¶41] I hereby certify that I served, by United States Mail (PrisonMail Box System), a copy of the foregoing Supplemental Brief upon the following party:

Dawn M. Dietz
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514 E. Thayer Ave.
Bismarck, ND 58501

Dated this 1 day of May, 2014.

Jason Gullickson
Jason Gullickson