

**IN THE SUPREME COURT**

**STATE OF NORTH DAKOTA**

State of North Dakota,	)	
	)	
Plaintiff-Appellee,	)	Supreme Court No. 20180239
	)	District Court No. 09-2017-CR-04617
vs.	)	
	)	
Steven Gardner,	)	
	)	
Defendant-Appellant.	)	

Appeal from Judgment Entered Upon Conditional Guilty Plea Reserving the Right  
to Appellate Review of the District Court's Order Denying Motion to Suppress  
Entered on June 11, 2018.  
Cass County District Court  
East Central Judicial District  
The Honorable Wade L. Webb, Presiding

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**APPELLEE'S BRIEF**

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**[¶3] ISSUE PRESENTED FOR REVIEW**

[¶4] Whether a person has a reasonable expectation of privacy in a package not addressed to the person, not sent to the person's address, and, of which the person has never claimed ownership?

**[¶5] STATEMENT OF THE FACTS**

[¶6] The State is not satisfied with Gardner's Statement of Facts (Appellant's Brief ¶3-7) and supplements it in the following regards:

[¶7] On page 4 of Gardner's Brief in Support of Motion to Suppress Evidence and/or Dismiss dated 19 February 2018 he alleges, "Mr. Gardner had a possessory interest in the package", but the motion is not supported by any sworn statement by Gardner.

[¶8] On 24 April 2018 an evidentiary hearing was conducted. The State called Fargo Police Department Sgt. Matt Christensen to testify. On direct examination Sgt. Christensen said 1) that he was involved in the investigation and apprehension of Steven Gardner, 2) the copy of Christensen's written report (App. p. 3-5) which was attached to the State's Return to Defendant's Motion to Suppress Evidence and/or Dismiss was true and accurate to the best of his knowledge, and, 3) there was nothing he wanted to change in his report. The State asked the Court to rely on the report and offered no further direct examination testimony by Sgt. Christensen. (24 April 2018 Tr. p. 4, l. 10 - p. 7, l. 18)

[¶9] The only reference to Gardner in Sgt. Christensen's report appears in the first full paragraph of the third page of the report (App. p. 5). It reads as follows:

[¶10] A search of the apartment revealed a small amount of Meth, some paraphernalia, cash and a handgun. See Det. Mendez's supplement for details regarding the search warrant. Through his investigation, they were able to identify an individual that was supposed to pick up the package containing the 3.5 ounces of Meth from Metcalf. He was identified as Steven Gardner. We were able to get Gardner to arrive at the apartment under the impression that he was going to pick up the package from Metcalf. Gardner arrived in his van, ND/070BOK at approximately 1058 hours and parked in the parking lot of 2501 9<sup>th</sup> St. N and entered the building. Gardner took possession of the package and exited the building and was then detained by Detectives. Gardner was transported to the Fargo Police Department for an interview. Gardner then requested an attorney. Gardner was then arrested and taken to the Cass County Jail for Conspiracy to Possess Methamphetamine with Intent to Distribute.

[¶11] Gardner's attorney cross-examined Sgt. Christensen. Sgt. Christensen agreed that 1) Metcalf was acting as a "middle man" between Metcalf's brother and Gardner; 2) packages of drugs were sent to Metcalf and then Gardner picked them up; 3) Metcalf made a call to Gardner in response to which Gardner went to Metcalf's residence; 4) Metcalf said that he was not distributing the drugs; 5) Metcalf said he may have sold some very small amounts; 6) Metcalf did get a small

bit for his personal use; 7) and the majority of the drugs were given to Gardner for distribution. (24 April 2018 Tr. p. 8, l. 1 - p. 10, l. 2)

[¶12] Gardner was present at the evidentiary hearing (24 April 2018 Tr. p. 3, l. 15 - 16), but did not testify. Gardner did not offer the testimony of any other witness.

### [¶13] ARGUMENT

[¶14] In State v. Adams, 2018 ND 18, ¶8-9, 905 N.W.2d 758, this court recently addressed the standard of review on appeal and noted:

When reviewing a district court's decision on a motion to suppress:

We will defer to a [district] court's findings of fact in the disposition of a motion to suppress. Conflicts in testimony will be resolved in favor of affirmance, as we recognize the [district] court is in a superior position to assess credibility of witnesses and weigh the evidence. Generally, a [district] court's decision to deny a motion to suppress will not be reversed if there is sufficient competent evidence capable of supporting the [district] court's findings, and if its decision is not contrary to the manifest weight of the evidence.

State v. Gatlin, 2014 ND 162, ¶ 4, 851 N.W.2d 178 (citation omitted).

Whether an individual has a reasonable expectation of privacy in an area is reviewed under the de novo standard of review. State v.

Williams, 2015 ND 103, ¶ 14, 862 N.W.2d 831.

An individual's capacity to challenge a search or seizure depends on "whether 'the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect.'" In those interests, an individual is said to have "a reasonable expectation of privacy." A reasonable expectation of privacy has two elements: 1) the individual must exhibit an actual, subjective expectation of privacy, and 2) that expectation must be one that society recognizes as reasonable.

Gatlin, 2014 ND 162, ¶ 5, 851 N.W.2d 178 (citations omitted).

"Whether there is a reasonable expectation of privacy in a given area must be decided on a case-by-case basis." State v. Kitchen, 1997 ND 241, ¶ 12, 572 N.W.2d 106.

[¶15] Gardner alleges in Appellant's Brief ¶7, "Mr. Metcalf told law enforcement the methamphetamine in the package was Mr. Gardner's."

[¶16] Gardner argues in Appellant's Brief ¶14, "As established by Mr. Metcalf's statements, Mr. Gardner was the true owner of the intercepted package. .... In other words, the understanding between Mr. Metcalf and Mr. Gardner was that Mr. Gardner was the true owner of the package, with complete interest in the contents thereof."

[¶17] The State does not agree that the record in this case supports either of Gardner's foregoing allegations in Appellant's Brief ¶7 or ¶14.

[¶18] The purpose of the evidentiary hearing was to establish facts under oath and possible penalty of perjury relevant to Gardner’s motion. There were at least three (3) persons who logically might have had knowledge of who “owned” the package of methamphetamine, namely, 1) Metcalf’s brother, 2) Metcalf, and, 3) Gardner. None of those persons testified at the evidentiary hearing.

[¶19] Fourth Amendment rights are personal rights that may not be asserted vicariously. Rakas v. Illinois, 439 U.S.128, 133-134 (1978). “The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure.” Id. at 131 n.1.

[¶20] In Simmons v. United States, 390 U.S. 377, 394 (1968) the Court held, “... that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.”

[¶21] N.D.R.Evid. 104(d) provides, “By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.”

[¶22] It was not the State’s burden to establish that Gardner “owned” the package of methamphetamine. If Gardner wanted the Court to find that he had some sort of possessory interest in the package of methamphetamine, then the burden was on Gardner to establish his possessory interest. There was no reason for Gardner not to testify at the evidentiary hearing to establish his possessory interest in the package of methamphetamine. After Gardner testified to establish his possessory



interest the State would have had an opportunity to cross-examine Gardner, but the State would not have been permitted to cross-examine him on other issues in the alleged conspiracy.

[¶23] Apart from using the phrase “Mr. Gardner’s effects” in the first paragraph of Gardner’s Motion to Suppress Evidence and/or Dismiss dated 19 February 2018 Gardner never claimed that the package was his prior to the evidentiary hearing. The State cannot find a clear claim of “ownership” of the package of methamphetamine even in the statements of Gardner’s counsel at the evidentiary hearing. Gardner’s counsel seems to “dance” around the issue of ownership asking the District Court to infer it from the State’s Information. The statements of Gardner’s counsel at the evidentiary hearing are certainly not evidence. The State was not permitted to cross-examine Gardner’s counsel.

[¶24] After hearing the testimony at the evidentiary hearing and the argument of counsel Judge Webb made lengthy, detailed findings which include the following:

Here, the package of methamphetamine through UPS was addressed to Mr. Metcalf, not Mr. Gardner. He was not addressed. It was delivered to an address of Mr. Metcalf’s that it was addressed to, not Mr. Gardner’s. He wasn’t on the package. This is not where he lived, et cetera. The package was not addressed to Gardner, nor was it sent to a place where he was staying. I see no real connections whatsoever of Mr. Gardner to the package, other than the subsequent

conspiracy, if proved to be true, possession of the methamphetamine thereafter. (24 April 2018 Tr. p. 24, l. 13-22)

[¶25] It should be noted that Judge Webb made no finding that Gardner had a possessory interest in the package of methamphetamine.

[¶26] On appeal Gardner's arguments are all premised on his contention that he was "the true owner" of the package of methamphetamine. The State does not deny Gardner's Appellant's Brief recites various legal authorities for the proposition that a person may have an expectation of privacy in a package shipped to another address bearing the name of another person. The State does not agree that body of case law applies to Gardner.

[¶27] In State v. Adams, 2018 ND 18, ¶11, 905 N.W.2d 758, the North Dakota Supreme Court referred to three (3) cases which considered whether a person has a reasonable expectation of privacy including 1) U.S. v. Parada, 577 F.3d 1275, 1280 (10th Cir. 2009) (finding a defendant did not establish he had standing to challenge the search of the container when he did not respond regarding ownership of the container, did not testify or present evidence establishing possessory interest in the container, and did not have personal belongings in the container); and, 2) U.S. v. Zabalaga, 834 F.2d 1062, 1065 (D.C. Cir. 1987) (holding there is no legitimate expectation of privacy in a container when a defendant fails to assert any claim to the container and when there were no identifying markings on the container or the contents within).

[¶28] In this case the package did not bear Gardner's name and it was not sent to Gardner's address. Gardner had the burden of establishing his possessory interest at the evidentiary hearing. Gardner offered no testimony at the evidentiary hearing. Judge Webb did not find that Gardner had a possessory interest in the package of methamphetamine. There was sufficient competent evidence capable of supporting Judge Webb's findings. Judge Webb's decision denying Gardner's Motion to Suppress was not contrary to the manifest weight of the evidence.

[¶29] **CONCLUSION**

[¶30] For the foregoing reasons, the State respectfully submits the district court correctly denied the Defendant's Motion to Suppress. The defendant's conviction should be affirmed.

Respectfully submitted this 25th day of September, 2018.

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[¶31] **CERTIFICATE OF SERVICE**

[¶32] A true and correct copy of the foregoing document was sent by e-mail on the 25th day of September, 2018, to: lheck@vogellaw.com

Mark R. Boening