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DECEMBER 13, 2018
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellant, -vs- Shannon David Keola Stenhoff, Defendant and Appellee.	)	Supreme Court No. 20180300 District Court No. 27-2018-CR-00235

BRIEF OF APPELLEE SHANNON DAVID KEOLA STENHOFF

APPEAL FROM ORDER GRANTING MOTION TO SUPPRESS

McKenzie County District Court
Northwest Judicial District
Honorable Robin A. Schmidt

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Constitution:

North Dakota Constitution:

Cases:

Statutes:

Rules:

JURISDICTIONAL STATEMENT

[¶1] This Court has jurisdiction to hear this case pursuant to the provisions of N.D.Const., art. VI, §§ 2, 6; N.D.R.App.P. 3, 4; and N.D.C.C. § 29-28-07(5).

STATEMENT OF THE ISSUE

[¶2] Whether the District Court properly granted Stenhoff's Motion to Suppress Evidence.

STATEMENT OF THE CASE

[¶3] The State of North Dakota ("State") appeals from the District Court's Order (Appellant's Appendix (App. 27.)) granting Shannon David Keola Stenhoff's ("Stenhoff") Motion to Suppress Evidence (App. 13.) On February 20, 2018, the State charged Stenhoff with child endangerment pursuant to N.D.C.C. § 19-03.1-22.2(2), unlawful possession of a firearm, and numerous drug-related offenses. (App. 1, 3.) The State alleged Stenhoff committed these offenses on or about February 6, 2018. (App. 3.) After a preliminary hearing April 26, 2018, District Judge Robin A. Schmidt bound over three felony counts against Stenhoff, dismissing a fourth without prejudice. (App. 11.) An Information was filed and Stenhoff was arraigned, pleading not guilty to all remaining counts. (App. 1, 8.)

[¶4] On May 21, 2018, Stenhoff timely moved to suppress the evidence against him asserting the warrantless search of the premises under the given circumstances violated his Fourth Amendment rights. (App. 13, 14.) The State opposed Stenhoff's motion arguing the search was conducted at the direction of his probation officer as a condition of supervised probation. (App. 23.) The probation search of Stenhoff's residence took place fourteen hours after he was arrested and transported to the county correctional center. (App. 5.)

[¶5] A hearing on Stenhoff's motion was held June 20, 2018. (App. 2.) The Court granted Stenhoff's motion to suppress evidence finding no exception and no exigency to circumvent the warrant requirement, concluding the search was unreasonable under the totality of the circumstances. (App. 27.) The State then filed a Notice of Appeal from the Court's Order Granting Motion to Suppress, and the requisite statement accompanying the notice of appeal under N.D.C.C. § 29-28-07(5). (App 30, 31.)

STATEMENT OF FACTS

[¶6] On November 22, 2017, in case number 27-2017-CR-00633 Shannon David Keola Stenhoff ("Stenhoff"), was sentenced to two years of supervised probation requiring compliance with certain specified conditions, namely a search clause. (App. 33, 37.) After allegedly failing to report to his probation officer as directed following entry of the Criminal Judgment and Appendix A, a Petition for Revocation of Probation was filed on January 30th, 2018, and an Order to Apprehend was issued later the same day. (App. 39-41, 42.) In the Petition for Revocation, probation officer Ted Truedson ("Truedson") specifically stated: "[Stenhoff's] current whereabouts are unknown." (App. 40.)

[¶7] On February 5, 2018, officers of the Watford City Police Department asked deputies of the McKenzie County Sheriff's Office to assist in serving a felony warrant on Stenhoff. (Suppression Hr'g Tr. 4:15-16, 9:6-11.) Law enforcement involved in serving the warrant were all under the same mistaken belief Stenhoff was wanted on a felony warrant. (Tr. 9:12-21.) It is undisputed, however, Stenhoff was on supervised probation for a single misdemeanor count of ingesting a controlled substance. (App. 32-33.) Despite Stenhoff's probation officer being unaware of his current location, local law enforcement suspected Stenhoff was inside the trailer at 1808 3rd Street Southeast in Watford City from

information they obtained. (App. 40; Tr. 11:14-15.) A nighttime search warrant was applied for by Deputy Ingram to enter the premises for the sole purpose of fugitive apprehension based upon the believe Stenhoff was inside. (Tr. 4:17-24.)

[¶8] After receiving the signed apprehension warrant, the deputies used a battering ram to force open the door and law enforcement flooded the home, performing a sweep of the entire residence. (Tr. 5: 3-16.) Stenhoff was located in a bedroom near the back of the residence and placed under arrest (Tr. 5:15-20.) Law enforcement had been on scene approximately four hours by the time the apprehension warrant was signed and Stenhoff was ultimately arrested. (Tr. 6:19-20.) Inside the residence law enforcement also made contact with another adult, Tabitha Corneille, and five minor children. (App. 5.) One of the older children later made a vague comment about law enforcement being there because of drugs. (Tr. 6:13-17.) Following the arrest of Stenhoff and Corneille, law enforcement performed a final sweep of the premises, but did not observe any contraband in plain view. (Tr. 10:2-12.) Based on the child's "drugs" comment and Stenhoff's status as a probationer, law enforcement attempted to contact his probation officer, but did not reach him. (Tr. 10:17-20.) After seeing nothing in plain view, law enforcement did not believe it necessary to obtain another warrant to perform a full search of the home for narcotics. (Tr. 10:2-25.)

[¶9] Law enforcement secured the premises by pushing a couch in front of the door that had been breached and locked the back door on their way out. (Tr. 8:11-17.) No one, however; including the probation officers, could say with certainty that the premises at 1808 3rd Street Southeast in Watford City had not been entered by anyone or otherwise disturbed between 1:15 a.m. that morning and 3:15 p.m. that afternoon. (Tr. 27: 5-8, 35:7-16.) After law enforcement contacted Truedson later that same day and shared the comment

made by one of the children, Truedson decided to perform a probation search. (Tr. 32: 4-12.) Contrary to the State's assertion (Appellant Br., ¶ 8, Nov. 13, 2018), nowhere in the record of these proceedings did Stenhoff state his residence was 1808 3rd Street Southeast as it pertained to supervised probation in this matter, reiterating again what Truedson included in his sworn petition: "[Stenhoff's] current whereabouts are unknown." (App. 40.)

[¶10] Truedson hesitated to perform a warrantless search of 1808 3rd Street Southeast in Watford City as a "probation search" with Stenhoff in jail, so he reached out to his supervisor, Steven Hall of Minot, and to (former) McKenzie County State's Attorney Todd Schwarz. (Tr. 35: 22-25, 36:1-6.) Truedson did not know where Stenhoff was residing until he received a phone call from law enforcement indicating Stenhoff was arrested during the early morning hours of February 6, 2018. (Tr. 36:19-25.) Truedson was apparently reassured that he could perform the search as a condition of supervised probation because he did so at approximately 3:15 p.m. the same day. (Tr. 35:7-11.)

[¶11] Because it was unknown if the premises were safe to enter, Officer Ryan Chaffee of the task force was asked to accompany Truedson and his partner to clear the premises and secure the area prior to performing the probation search. (Tr. 21:16-22.) Chaffee acknowledged that his role included "search[ing] the residence for probation violations as well as narcotics and paraphernalia." (Tr. 22:10-14.) Everyone involved in the probation search knew Stenhoff had been arrested some fourteen hours earlier and was inside the McKenzie County Correctional Center at the time of the search. (Tr. 20:17-22, 27:23-25, 33:1-4.) During the search of the area where Stenhoff and Corneille were arrested, numerous items of contraband were found, including controlled substances and a firearm. (Tr. 23:16-20.)

[¶12] On February 20, 2018, the State charged Stenhoff with child endangerment under N.D.C.C. § 19-03.1-22.2(2), unlawful possession of a firearm, and numerous drug-related offenses. (App. 1, 3.) Following a preliminary hearing on April 26, 2018, District Judge Robin A. Schmidt bound over three felony counts against Stenhoff, dismissing a fourth without prejudice. (App. 11.) The Information was filed and Stenhoff was arraigned, pleading not guilty to all remaining counts. (App. 1, 8.) On May 21, 2018, Stenhoff timely moved to suppress the evidence against him asserting the warrantless search of the premises following his arrest and off-site detention violated his Fourth Amendment rights. (App. 13, 14.) The State opposed Stenhoff's motion arguing the search was conducted at the direction of his probation officer as a condition of supervised probation. (App. 23.) A hearing on Stenhoff's motion to suppress evidence was held June 20, 2018. (App. 2.) The Court granted Stenhoff's motion finding no exception and no exigency to circumvent the warrant requirement, concluding the search was unreasonable under the totality of the circumstances and unreasonable under the Fourth Amendment. (App. 27.) The State filed a Notice of Appeal from the Court's Order Granting Motion to Suppress and a statement accompanying the notice of appeal required by N.D.C.C. § 29-28-07(5). (App 30, 31.)

STANDARD OF REVIEW

[¶13] When reviewing a district court's decision regarding a motion to suppress, we defer to the district court's findings of fact to resolve conflicts in testimony in favor of affirmance. State v. Kitchen, 1997 ND 241, ¶ 11, 572 N.W.2d 106. We affirm a district court decision on a motion to suppress if there is "sufficient competent evidence fairly capable of supporting the court's findings, and the decision is not contrary to the manifest weight of the evidence." State v. Nickel, 2013 ND 155, ¶ 12, 836 N.W.2d 405 (internal

quotation marks and citations omitted). Questions of law are fully reviewable, and whether a finding of fact meets a legal standard is a question of law. State v. Schmidt, 2015 ND 134, ¶ 5, 864 N.W.2d 265. "Whether a violation of the constitutional prohibition against unreasonable searches and seizures has occurred is a question of law." State v. Maurstad, 2002 ND 121, ¶ 11, 647 N.W.2d 688.

LAW AND ARGUMENT

[¶14] I. The District Court properly granted Stenhoff's Motion to Suppress Evidence after considering the totality of the circumstances surrounding the warrantless probation search.

The Fourth Amendment to the United States Constitution and art. I, § 8, of the North Dakota Constitution protect individuals from unreasonable searches and seizures. When reviewing the constitutionality of probationary searches, this Court has interpreted the North Dakota Constitution to provide the same protections for probationers as provided by the United States Constitution. State v. Ballard, 2016 ND 8, ¶ 8, 874 N.W.2d 61, 64; State v. Maurstad, 2002 ND 121, ¶ 11, 647 N.W.2d 688, 691. "[U]nder our general Fourth Amendment approach we examin[e] the totality of the circumstances to determine whether a search is reasonable within the meaning of the Fourth Amendment." Ballard, 2016 ND 8, ¶ 8, 874 N.W.2d 61, 64 (quoting Samson v. California, 547 U.S. 843, 848 (2006)). To determine reasonableness of a search, a court must consider the totality of the circumstances and balance the degree to which the search intrudes upon an individual's privacy against the degree to which the search is needed to promote a legitimate government interest. Ballard, 2016 ND 8, ¶¶ 8, 34, 874 N.W.2d 61, 64, 70.

[¶15] In United States v. Knights, 534 U.S. 112, 122 (2001), the United States Supreme Court considered the totality of the circumstances, balanced governmental and private

interests, and held a warrantless probationary search was reasonable when it was supported by reasonable suspicion and authorized by a condition of probation. The Court explained that probationers have a lesser expectation of privacy:

> Probation, like incarceration, is a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty. Probation is one point . . . on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service. Inherent in the very nature of probation is that probationers do not enjoy the absolute liberty to which every citizen is entitled. Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens.

Id. at 119 (internal citations and quotations omitted).

[¶16] Shortly after Knights, this Court decided State v. Maurstad, 2002 ND 121, 647 N.W2d 688. In Maurstad, the probationer argued the warrantless search was a subterfuge for law enforcement's investigatory purpose and thus invalid. Maurstad, 2002 ND 121, ¶ 12, 647 N.W2d 688, 691. This Court rejected the claim, holding Knights utilized an "ordinary Fourth Amendment analysis that considers all the circumstances of a search . . . ." Id. at ¶ 29 (quoting Knights, 534 U.S. at 122). According to Knights, "[t]he touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." Knights, 534 U.S. at 118-19. In applying this test, the Knights Court stated, "We hold that the balance of these considerations requires no more than reasonable suspicion to conduct a search of this probationer's house." 534 U.S. at 121. "Although the Fourth Amendment ordinarily requires the degree of probability

embodied in the term 'probable cause,' a lesser degree satisfies the Constitution when the balance of governmental . . . interests makes such a standard reasonable." Id.

[¶17] Probation restrictions are meant to ensure that probation serves as a period of rehabilitation and that the community is not harmed by the probationer's being at large. Griffin v. Wisconsin, 483 U.S. 868, 875 (1987). These same goals require and justify the exercise of supervision to assure that the restrictions are observed. Id. Probationers do, however, have greater expectations of privacy than do parolees or prisoners. State v. Ballard, 2016 ND 8, ¶ 35, 874 N.W.2d 61, 70 (quoting Samson v. California, 547 U.S. 843, 850 (2006)).

[¶18] The North Dakota Supreme Court thoroughly considered the constitutionality of a probation search in State v. Ballard, 2016 ND 8, 874 N.W.2d 61. This Court applied a totality of the circumstances balancing test and held that a suspicionless search of an unsupervised probationer was constitutionally unreasonable and violated the Fourth Amendment. Id. at ¶¶ 41-42. The Court noted the State's interest in restraining the liberty of an unsupervised probationer was much less than its "overwhelming" interest in supervising parolees upon release from prison, and an unsupervised probationer with minimal probation conditions had a greater expectation of privacy. Id. at ¶¶ 37, 40. The Court held that the government's interests did not outweigh the probationer's expectation of privacy and a suspicionless search was not reasonable under the Fourth Amendment. Id. at ¶ 41.

[¶19] The facts in the instant case are slightly different from Ballard, but still applicable when performing a comparative analysis on a totality-of-the-circumstances approach. The issue in Ballard was whether a suspicionless search of an unsupervised probationer was

constitutional. In this case, Stenhoff was on supervised probation for a single misdemeanor conviction for ingesting a controlled substance, like Ballard in that Ballard was also on probation for misdemeanors, although he was not being supervised. It is conceded that a supervised probationer has a lower expectation of privacy than an unsupervised probationer. See Ballard, 2016 ND 8, ¶ 35, 874 N.W.2d 61, 70. It follows that the State has more interest in monitoring a supervised probationer compared to an unsupervised probationer. See Ballard, at ¶ 37. However, Stenhoff argues that one of the factors to consider under the totality of the circumstances is that he was on supervised probation for a single misdemeanor and he was not on parole or release following incarceration.

[¶20] Among the conditions of Stenhoff's supervised probation outlined in Appendix A of the Criminal Judgment in file 27-2017-CR-00633 (App. 33.) was the requirement to "submit your person, place of residence and vehicle, or any other property to which you may have access, to search and seizure at any time of day or night by a parole/probation officer, with or without a search warrant." (App. 37.) When the warrantless probation search occurred, Stenhoff had already been arrested, removed from the premises, and was detained inside the correctional center for alleged probation violations. Therefore, before the so-called "probation search" even took place, Stenhoff's probation was effectively in a state of suspension because he was incarcerated. An individual cannot be both incarcerated and on probation simultaneously when both restrictions relate to the same underlying matter. See gen. United States v. Knights, 534 U.S. 112, 119 (2001) ("Probation, like incarceration, is a form of criminal sanction imposed by a court . . . [p]robation is one point . . . on a continuum of possible punishments ranging from [incarceration to community service].")

[¶21] When a court suspends all or part of a sentence, the court must place a defendant on probation. N.D.C.C. § 12.1–32–02(3). Thus, once a defendant is taken into custody on a probation issue, his status as a probationer is effectively usurped until such time as there is a hearing on the merits of formal revocation. However, in some situations, the defendant may be allowed to post bond and then be released from jail pending a hearing, although the probationer would then be subject to similarly stringent probation-like bond conditions. As stated previously, probation restrictions are meant to ensure that probation is a period of rehabilitation so the community is not harmed by the probationer's being at large. Griffin v. Wisconsin, 483 U.S. 868, 875 (1987). If a probationer is in custody, he is no longer "at large" and as such, is no longer a risk to society according to Griffin. Id.

[¶22] Furthermore, because Stenhoff was incarcerated when his probation officer and the task force returned to the location of his arrest fourteen hours later, the 1808 3rd St. SE address was no longer accessible to Stenhoff or his immediate control, nor was it the residence subject to search. The law is clear that a person only has one residence at any given time. "Every person has in law a residence where such person remains when not called elsewhere for labor or other special or temporary purpose and to which he returns in seasons of repose; that he can have but one residence, and the one residence to which he is entitled he cannot lose until another is gained." State ex rel. Sathre v. Moodie, 258 N.W. 558, 563 (1935).

[¶23] When probation officers and the task force entered the home at 1808 3rd St. SE in Watford City, they did so unlawfully and without an exclusion to the warrant requirement. Probation Officer Truedson questioned his ability to enter the residence given the fact that it was no longer occupied by Stenhoff and no longer the premises to which Stenhoff had

access. (Tr. 35: 22-25, 36:1-6.) The residence had already been searched during a cursory sweep by the McKenzie County Sheriff's Deputies after entering the home to execute the arrest warrant. (Tr. 10:2-12.) If there was any sign of criminal activity to go along with the statement of the minor child, the sheriff's deputies would have confiscated, or at least noted, anything in plain view while executing the arrest warrant. (Tr. 9:22-25, 10:1-12.) The evidence shows Stenhoff had been away from the premises at 1808 3rd St. SE for a period of at least fourteen hours when law enforcement returned to search the residence. The State cannot show with any confidence that no one entered the home or tampered with its contents during the fourteen hours that elapsed until probation officers and the task force returned for their "probation" search. (Tr. 27: 5-8, 35:7-16.)

[¶24] The current test for reviewing challenges to probation searches relies on the totality of the circumstances to determine if a warrantless search involving a probationer is constitutionally reasonable under the Fourth Amendment. Ballard, 2016 ND 8, ¶¶ 41-42, 874 N.W.2d 61, 72. Here, the search of the unoccupied premises over fourteen hours after Stenhoff was apprehended and removed from an area to which he no longer had access, cannot in good faith be considered a valid probation search under the totality of the circumstances. Law enforcement used the guise of a probation search to circumvent the paperwork required to obtain a legitimate search warrant for a home that was, at the time of the search, no longer the accessible residence of Stenhoff. The "probation search" also contained an element of independent, unrelated criminal investigation as stated by task force officer Chaffee, who admitted he was "search[ing] the residence for probation violations as well as narcotics and paraphernalia." (Tr. 22:10-14.) While it is conceded that

Stenhoff was on supervised probation for a misdemeanor ingestion charge, the petition to revoke his probation alleged no actual drug-related or criminal misconduct. (App. 40.)

[¶25] Within the litany of probation search cases preceding the case at bar, including Ballard, each situation involved circumstances where a probationer was either present at the scene or had legitimate access to items, a vehicle, or property around the time of the search. The State offers no precedent upholding a probation search where the search was completed some fourteen hours after a probationer was arrested removed from the residence. The State argues that the probation search was reasonable because there was reasonable suspicion for Truedson to return to conduct a probation search based upon an alleged statement made by an unidentified child in the home at the time of Stenhoff's arrest. Reasonable suspicion alone is no longer the standard to determine the reasonableness of a probation search, especially considering law enforcement observed nothing in plain view that would give rise to an objectively reasonable suspicion that criminal activity was afoot. Stenhoff maintains the alleged statement and the fact that he was on supervised probation does not fortify the totality of the circumstances to the point of making the warrantless probation search reasonable under the Fourth Amendment.

CONCLUSION

[¶26] The State argues repeatedly that the lower court erred in suppressing evidence obtained during the warrantless search of the premises by focusing on the specific finding that no exigency or other time constraints existed which prevented law enforcement from obtaining a warrant. However, the District Court found more than just a fourteen-hour delay in completing the search. The District Court found, after a full recitation of facts that considered the totality of the circumstances, that the warrantless search was unreasonable

and a violation of the Fourth Amendment's prohibition against unreasonable searches. Based upon the above law and argument supporting the reasons stated herein, Appellee Shannon David Keola Stenhoff asks this Court to affirm the District Court's Order Granting Motion to Suppress in favor of Stenhoff.

Respectfully submitted this 13th day of December, 2018.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellant, -vs- Shannon David Keola Stenhoff, Defendant and Appellee.	)	Supreme Court No. 20180300 District Court No. 27-2018-CR-00235 **AFFIDAVIT OF SERVICE**

STATE OF NORTH DAKOTA)
ss
COUNTY OF STARK)

[¶1] JARED GIETZEN, being duly sworn, deposes and states that on December 13, 2018, he electronically served the APPELLEE BRIEF upon:

Penny Miller, Clerk
North Dakota Supreme Court
supclerkofcourt@ndcourts.gov

McKenzie County State's Attorney
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and deposited the same with the United States Postal Service for service upon:

Shannon Stenhoff
PO Box 2173
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Jared Gietzen

[¶2] Subscribed and sworn to before me on December 13, 2018.

Toni Van Orman

(SEAL)

TONI VAN ORMAN
NOTARY PUBLIC, STATE OF NORTH DAKOTA
MY COMMISSION EXPIRES DEC 22, 2021