

**IN THE SUPREME COURT  
OF THE STATE OF NORTH DAKOTA**

**State of North Dakota,** )  
 )  
 ) **Supreme Court No. 20190305**  
 ) **Petitioner/Appellant,** )  
 ) **District Court No. 51-2019-CR-00630**  
 )  
 )  
 ) **vs.** )  
 )  
 )  
 ) **Richard Dwayne Cook,** )  
 )  
 ) **Respondent/Appellee.** )

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**APPELLANT'S REPLY BRIEF**

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**APPEAL FROM ORDER GRANTING MOTION TO SUPPRESS EVIDENCE  
DATED SEPTEMBER 3, 2019  
NORTH CENTRAL DISTRICT COURT  
WARD COUNTY CRIMINAL NO 51-2019-CR-000630  
THE HONORABLE STACY LOUSER, PRESIDING**

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**ORAL ARGUMENT NOT REQUESTED**

Christopher W. Nelson (#08708)  
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## LAW AND ARGUMENT

### I. Appellee Did Not Establish a Prima Facie Case

[¶1] Appellee’s Brief makes the unsupported argument that a district court is correct in determining defendants are not required to put on evidence to establish a prima facie case of an illegal search and seizure. Appellee Br. ¶ 9. See State v. Meador, 2010 ND 139, ¶ 15, 785 N.W.2d 886 (“[A]n argument is without merit when a party does not provide supportive reasoning or citations to relevant authorities.”); State v. Cone, 2014 ND 130, ¶ 19, 847 N.W.2d 761 (finding conclusory assertions are not sufficient; courts do not need to consider arguments that are not adequately supported and briefed); McMorrow v. State, 2003 ND 134, ¶ 12, 667 N.W.2d 577 (finding party’s conclusory arguments were without merit since party failed to provide supportive reasoning to relevant authorities). Appellee fails to support his argument because there is nothing to support it.

[¶2] State v. Canfield makes perfectly clear what must occur before the burden at a suppression hearing shifts to the State:

A defendant has the burden of establishing a prima facie case at the motion hearing before the State is required to put on evidence. To do so, the defendant must make an evidentiary showing that the search and seizure was illegal. Once a prima facie case has been established, the burden of persuasion shifts to the State.

2013 ND 236, ¶ 7, 840 N.W.2d 620 (internal citations omitted). Establishing a prima facie case is done *at* the hearing, not before. Id. Emphasis added. Appellee’s argument is entirely wrong regarding evidence received prior to the motion hearing. Appellee Br. ¶ 9. The district court did not require Appellee make an evidentiary showing at the hearing. Appellee concedes the district court did not require an evidentiary showing at the hearing when he states the district court determined a prima facie case entirely based on prior testimony and his own brief. Id.

[¶3] Appellee cannot legitimately argue the district court properly determined a prima facie case had been established. The district court improperly shifted the burden of persuasion at the suppression hearing to the State by not requiring Appellee establish his prima facie case through evidence at the hearing. Canfield ¶ 7.

## II. The Traffic Stop Was Not Unconstitutionally Extended

[¶4] Appellee's Brief fails to account for the actual facts of the case. Two people were involved in the traffic stop, Chief of Police Schmidt with 25 years of experience and unlicensed Reserve Officer Pinske. App. p. 84, p. 96. Reserve Officer Pinske made the initial contact with the driver. App. p. 96. Chief Schmidt took control of the traffic stop upon discovering the driver had narcotics convictions. Id. Chief Schmidt approached the driver and noted the driver's nervousness and that his "pupils were extremely constricted, which I know in my experiences is common with people who use opiates." App. p. 47-48. Chief Schmidt's experience includes serving on the Cass County Drug Task Force, the Drug Enforcement Administration task force, and attending numerous drug interdiction classes. App. p. 84. Appellee leans heavily on an unlicensed reserve officer not mentioning concerns to his training officer and ignores direct observations indicating opiate use made by a chief of police with extensive narcotics experience. Appellee Br. ¶ 16, 21.

[¶5] Chief Schmidt's direct observations of the driver, combined with prior narcotics convictions, provided reasonable suspicion that criminal activity was afoot. When an "officer develops reasonable suspicion that other criminal activity is afoot, the officer may expand the scope of the encounter to address that suspicion." State v. Asbach, 2015 ND 280, ¶ 12, 871 N.W.2d 820. See also United States v. Davis, "[a] traffic stop is constitutionally limited to the time required to complete its purpose but may be extended due to an officer's reasonable suspicion of criminal activity. A reasonable suspicion is

‘some minimal, objective justification’ for suspicion beyond an ‘inchoate hunch.’” 943 F.3d 1129 at 7 (Internal citations omitted). Chief Schmidt lawfully expanded the scope of the encounter to address his suspicions that the driver was involved with narcotics.

CONCLUSION

¶6 Based upon the foregoing, the State respectfully requests the district court’s Order Granting Motion to Suppress Evidence be reversed and that the case be remanded to the district court for further proceedings.

Dated this 13<sup>th</sup> day of January, 2020.

/s/ Christopher Nelson  
\_\_\_\_\_  
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**CERTIFICATE OF COMPLIANCE**

[1] The undersigned hereby certifies that the Reply Brief of Petitioner/Appellant, is in compliance with Rule 32 of North Dakota Rules of Appellate Procedure and the brief contains 6 pages.

Dated this 14<sup>th</sup> day of January, 2020.

/s/ Christopher Nelson  
Christopher W. Nelson (#08708)

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**AFFIDAVIT OF SERVICE**

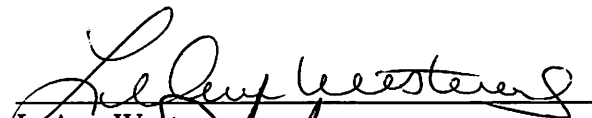
LeAnn Westereng, being first duly sworn, deposes and says:

That she is a citizen of the United States of America, over the age of twenty-one years, and is not a party to nor interested in the above entitled action; that on the 13<sup>th</sup> day of January, 2020, this Affiant provided a true and correct copy of the following documents in the above entitled action:

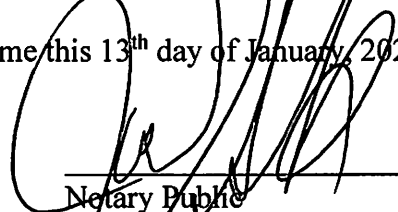
**APPELLANT'S REPLY BRIEF**

By electronic service to the following:

**TYRONE TURNER**  
**tturner@bismarcklaw.com**

  
\_\_\_\_\_  
LeAnn Westereng

Subscribed and sworn to before me this 13<sup>th</sup> day of January, 2020, by LeAnn Westereng

  
\_\_\_\_\_  
Notary Public

JENNIFER SCHLECHT  
Notary Public  
State of North Dakota  
My Commission Expires April 14, 2021



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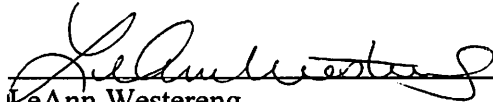
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By electronic service to the following:

**TYRONE TURNER**  
**tturner@bismarcklaw.com**

  
\_\_\_\_\_  
LeAnn Westereng

Subscribed and sworn to before me this 14<sup>th</sup> day of January, 2020, by LeAnn Westereng

  
\_\_\_\_\_  
Notary Public

