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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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MAR 12 1998

City of Bismarck,

Plaintiff-Appellee,

vs.

Municipal Court No. 08-97-K-02316
Supreme Court No.

Brian Anthony Glass,

Defendant- Appellant.

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

MAR 12 1998

STATE OF NORTH DAKOTA

APPEALED FROM THE CRIMINAL JUDGMENT AND COMMITMENT
ENTERED BY THE BURLEIGH COUNTY DISTRICT COURT
ON JANUARY 27, 1998
BEFORE THE HONORABLE DENNIS A. SCHNEIDER

BRIEF OF APPELLANT

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ISSUE

1. Are there circumstances in this case that will permit a Bismarck Police Officer to break into the home of Brian Glass without a search warrant?

NATURE OF THE CASE

This case involves the warrant less search of the Brian Glass home in Bismarck, North Dakota.

The search was conducted by Bismarck Police Officer, Craig Calkins.

Mr. Glass believed all evidence and information gained from the warrant less search could be suppressed and he brought a Motion in the trial court asking that all evidence and information be suppressed.

The City of Bismarck's response to Mr. Glass's suppression motion was to claim circumstances existed which would allow the warrant less search.

The trial judge denied Mr. Glass's suppression motion and based his denial on State vs. Paul 548 N.W.2d 260 (Minn. 1996) and United States vs. Santana 427 US 38, 49 L Ed 2d 300, 96 S. Ct 2406.

Mr. Glass then entered a conditional plea of Guilty and appealed the denial of his suppression motion to the North Dakota Supreme Court.

STATEMENT OF FACTS

On June 20, 1997, Bismarck Police Officer, Craig Calkins, was in a police car in a parking lot near the 800 block of East Denver. TR. P.3, L.9-11 & 20-22 and P.4, L.3-10. While parked in that lot he observed a westbound small grey pickup driven by a male, later identified as Brian Glass, in the 800 block of East Denver. TR. P.4, L.21-25. Officer Calkins follows the small gray pickup to 1119 Bozeman, where Mr. Glass' home is located and broke down the door of the home, and arrested Brian Glass for DUI. TR. P.5, L.20-22; TR. P.10, L.25 and P.11, L.1-5; TR. P.15, L.19-25 and P.16, L.A.

According to Officer Calkins report the reason he told Mr. Glass he stopped him was the small gray pickup license plates were expired. TR. P.12, L. 20-25 and P.13, L.1-2 and L.8-12; TR. P.16, L.2-4.

Officer Calkins stated in his testimony that he followed the small gray pickup because the driver appeared to be slumped forward against the steering wheel. TR. P.5, L.1-2. When Officer Calkins was following the small gray pickup he observed it weave in its own lane. TR. P.6, L.10-23. Then the small gray pickup turned onto Bozeman, slowed up, and pulled into the driveway at 1119 Bozeman. TR. P.7, L.14-20. Officer Calkins stopped his patrol car on the street in front of the driveway at 1119 Bozeman, and activated his flashers. TR. P.7, L.21-22; TR. P.8, L.1-4. Officer Calkins never did activate his patrol cars red over head lights. TR. P.8, L.11-12.

Officer Calkins then exited his vehicle and called out "Sir," at which time he thought Mr. Glass turned toward him before Mr. Glass went into his house. TR. P.8, L.8-25; TR. P.9, L.12-16.

Officer Calkins then proceeded to the door of Mr. Glass's house and turned the knob and pushed on the bottom of the door with his foot. TR. P.9, L.18-25; P.10, L.1. This forced the door to open and broke the molding. TR. P.15, L.19-25; P.16, L.1. At the time Officer Calkins broke in the door to Mr. Glass's home, he did not have a search warrant.

After entering of Mr. Glass's home, Officer Calkins told Mr. Glass he followed him because the pickup tabs were expired. TR. P.16, L.2-4. Later Officer Calkins arrested Mr. Glass for a DUI.

Mr. Glass then brought a suppression motion in the trial court asking for the suppression of all evidence obtained as a result of the warrant less entry of his home. The trial court denied Mr. Glass's motion and from this denial Mr. Glass is now appealing to the North Dakota Supreme Court.

ARGUMENT

In this country, the Fourth Amendment to the United States Constitution protects the people from unreasonable search and seizures and warrant less searches of their homes. The North Dakota Constitution in Article I, Section 8 echoes these same principles. Therefore, a person who only reads the above parts of the United States and North Dakota Constitutions, could conclude a search warrant is required in every situation before a person's home can be entered and searched by law officers. The problem with such a conclusion is it fails to consider the fact that the courts have been called upon and have interpreted these parts of the United States and North Dakota Constitutions. These interpretations have found that in some cases there are exceptions that allow warrant less searches. One type of case that allows warrant less searches is a case where there are facts which are found to be "Exigent Circumstances". Exigent Circumstances are defined in 68 Am Jur 2d, Search and Seizure, §76 P.701 as:

The name given to those circumstances which present the need for an immediate search that cannot brook the delay incident to obtaining a warrant.

Therefore, the Court can be called upon in any case involving a warrant less search to decide whether or not there are exigent circumstances in that case which will allow the warrant less search.

If the only circumstance to be considered by the law officers before starting a warrant less search is, will the time it takes to obtain a search warrant allow evidence to be destroyed, officers will always be safe in deciding in favor of the warrant less search.

Fortunately for the people there are other circumstances to be considered.

In the case now before the Court, the other circumstances to be considered before the warrant less search of Mr. Glass's home can be allowed are:

1. Did the following of Brian Glass's pickup by Bismarck Police Officer, Craig Calkins involve a hot pursuit?

2. Did Bismarck Police Officer, Craig Calkins, set in motion the arrest of Brian Glass prior to his warrant less entry of the Glass home?

3. Did Brian Glass try to thwart his arrest by retreating into his home?

According to 68 Am Jur 2d, Search and Seizure, §81 P.708, the "Hot Pursuit" doctrine is unavailable to police officers, no matter what information they have of an impending crime, until the crime has been committed and the criminal is fleeing.

Therefore, the question in the case now before the court is, "When did Officer Calkins decide that Mr. Glass had committed the offense of DUI?" It wasn't when Officer Calkins first saw Mr. Glass because all he saw at that time was an individual in a slumped position behind a steering wheel of a small gray pickup. His seeing a person slumped behind a steering wheel only gave Officer Calkins the suspicion the driver might be under the influence. To see if his suspicion might be correct, he decided to follow the pickup. Then Officer Calkins saw the vehicle weave in its lane. This may have caused him to further suspect the driver might be under the influence, however, had it been enough to make him decide the driver was under the influence, he would have turned on his patrol car's red lights.

The fact that Officer Calkins was still only suspicious when he stopped his patrol

car on the street by Mr. Glass's driveway is indicated by the fact that he never turned on his patrol car's red lights. Instead Officer Calkins only turned on the patrol car's flashers. Then instead of ordering Mr. Glass to stop, all he said to him was, "Sir".

After Mr. Glass went into his home, Officer Calkins decided to break in Mr. Glass's door. The problem is, even after breaking down Mr. Glass's door, Officer Calkins doesn't tell Mr. Glass he was following him because he was going to arrest Mr. Glass for being under the influence, but instead says, "I was following you because your license tabs were expired."

The only reasonable interpretation for the above actions of Officer Calkins are:

1. That Officer Calkins was only following Mr. Glass's pickup because he only suspected Mr. Glass might be under the influence and his following of Mr. Glass for suspicion of DUI never became a hot pursuit.
2. That while Officer Calkins was following Mr. Glass's pickup his suspicion that Mr. Glass might be under the influence never progressed to the point where he decided to arrest Mr. Glass for DUI.
3. That not until after Officer Calkins broke down Mr. Glass's door and observed and talked to Mr. Glass did he decide that Mr. Glass was under the influence and should be arrested for DUI.

When Officer Calkins was following Mr. Glass's pickup, he noticed that the license tabs were expired. In North Dakota expired tabs are a non-criminal traffic violation. Therefore, at anytime after Officer Calkins noticed the tabs were expired he could have put on his red light and stopped the pickup. The procedure to be followed for such stops

is set out in NDCC 39-07-07 which states:

Halting person for violating traffic regulations — Duty of officer halting. When ever any person is halted for the violation of any of the provisions of chapters 39-01 through 39-13, 39-18, 39-21, and 39-24 or of equivalent city ordinances, the officer halting that person, except as otherwise provided in section 39-07-09 and section 39-20-03.1 or 39-20-03.2, may:

1. Take the name and address of the person;
2. Take the license number of the person's motor vehicle; and
3. Issue a summons or otherwise notify that person in writing to appear at a time and place to be specified in the summons or notice.

A halting officer employed by any political subdivision of the state may not take a person into custody or require that person to proceed with the officer to any other location for the purpose of posting bond. Where the traffic violation was noncriminal offense under section 39-06.1-02. The officer shall provide the person with an envelope for use in mailing the bond.

Officer Calkins could have used the above procedure and if he had he could have satisfied his suspicions about Mr. Glass being Under the Influence. Since he didn't, all he knew prior to breaking in Mr. Glass's door, was that the license tabs on the small gray pickup were expired and he had a suspicion that Mr. Glass might be under the influence. Neither suspicion of a DUI or an expired tabs violation will allow a law officer to break in the door of a person's home.

In North Dakota in certain situations an officer can break in a door. These situations are set out in N.D.C.C. 29-06-14 which states:

Officer may break door. An officer may break open any door or window of a dwelling house to execute a warrant of arrest, or to make such arrest for a felony without a warrant, as is provided in section 29-06-15, if, after notice of his authority and purpose, he is refused admittance.

Because the above Statute involves a misdemeanor and not a felony it would appear that it gives a law officer has no authority to break in a door if the crime involved is only a misdemeanor. However, if the above Statute is applicable to the case now before the Court, Officer Calkins would be required to give notice of his authority, purpose and then be refused admittance before he would be allowed to break in the door. Instead of following the above statutory procedure, Officer Calkins decided to just walk up to Mr. Glass's door and break it in.

In this case, the trial judge's denial of Mr. Glass's suppression motion is based on two cases, State vs Paul 548 N.W.2d 260 (Minn. 1996) and United States vs. Santana 427 US 38, 49 L Ed 2d 300, 96 S. Ct 2406. Therefore, the facts of each of these cases should be compared to the case now before the Court to see if they are distinguishable.

In Paul, the Defendant Paul, while he was in a store in Jordon Minn., approached a police officer who didn't know him, put his arm around the officer and said, "Hi, how is it going?" The two then had a several minute conversation about Paul's red pickup truck. During this conversation, the officer noticed Paul had a strong odor of alcohol, slurred

speech, watery eyes, flushed face and some difficulty standing.

A short time later, the officer was going toward his squad car and noticed Paul leave the store and enter a red pickup truck which was parked 15 to 20 feet away from the officer's squad car. Paul started the truck and rolled through a stop sign. The Officer at that point, decided Paul shouldn't be driving and went after Paul and the red pickup. When the officer caught up to the red pickup, he saw it roll through another stop sign and "fishtail" as it entered the highway. At that point, the officer called in the red pickup's license number and activated his red squad car lights. The red light didn't stop Paul. Instead he continued at a "fast" speed, turned off on the street on which he lives, and drove into the driveway of his home.

The officer drove into Paul's driveway and stopped right behind Paul's red pickup, so that Paul couldn't back up. Paul then started getting out of the red pickup truck, and the officer commanded him to stop and get back in his truck. When Paul didn't comply, the officer again ordered him to get back in his truck. At that point, Paul then shut the door to the red pickup and turned away. The officer once again ordered Paul to stop and started to run toward Paul. Paul then went into his garage and locked the door. The officer then tried to open the garage door and shouted, "Sir, come on out, answer the door, and talk to me." When the officer got no response he went to the front door of the house and knocked.

According to the officer, a woman later identified as Paul's wife answered the door and he asked her to get her "husband" so he could talk to him. She replied, "He isn't home." The officer then asked her to search the house to see if he was there. While she

was searching the officer heard her talking to someone. When she came back she told the officer she couldn't find Paul.

The officer then told her if she was trying to conceal her husband she could be charged with a crime. He then asked her if he could search the home and she replied go ahead. The officer then entered the home and searched. He didn't find Paul and started to question Paul's wife. She then began to shout and Paul emerged from the basement.

Paul's wife's testimony presented a different version of the events than those of the officer. Her version said the officer's patrol cars red lights weren't on and he entered the house without her permission.

In Santana, an undercover officer with the Philadelphia Narcotics Squad arranged a heroin "buy" with Patricia McCafferty. Marked money was used. Miss McCafferty told the officer to drive her to Dominga Santana's residence. When they arrived at the residence, the officer stayed in the car and Miss McCafferty went into the Santana residence. After she returned, the Officer as he drove away asked for the heroin. After she gave it to him, he stopped the car and arrested her. He then asked her who had the money and she replied "Mom". He then said to Officer Pruitt, "Mom Santana has the money."

Officer Pruitt then got some other law officers and they drove back to Mom Santana's residence. She was standing in the doorway of her house with a brown paper bag in her hand. The police pulled up to within 15 feet of her and yelled "police" and showed their identification. As they walked toward, Mom Santana, she retreated to the vestibule of her house. The officer followed and caught up to her in the vestibule. When

she tried to pull away two bundles of glazed paper pockets containing white powder fell on the floor. This powder was later determined to be heroin.

Mom Santana was told to empty her pockets and she produced \$135.00, \$70.00 of which was identified the marked money used by Miss McCafferty when she bought the heroin.

The facts in the case now before the Court are set out in the above Statement of Facts.,

Looking at the facts in Paul, hot pursuit could have either begun when the officer turned on his red lights or when he started to run after Paul because Paul had refused three of his demands to stop. In Santana, the officers saw her in her doorway and stopped their vehicle. The hot pursuit began when they went toward her shouting “police” and displaying their badges. In the case now before the Court, Officer Calkins, during the entire time that he followed the small gray pickup, only suspected the driver might be under the influence. Such suspicion is not hot pursuit. Then there are the facts that after officer Calkins parked his patrol car at 1119 Bozeman, he only turned on his flashers and said, “Sir” to Mr. Glass before Mr. Glass went in the house. These facts also don’t show he was in hot pursuit of Mr. Glass after he parked his patrol car.

Finally in Paul and Santana, the officer’s involved had decided they were going to arrest the defendants before entering the Paul and Santana homes. In Glass, Officer Calkins, prior to entering the Glass home hadn’t decided he was going to arrest Glass and all he was sure of was that the pickup license tabs were expired.

The next facts to be examined in each of these cases is, when was arrest set in

motion?

The facts in Paul indicate the arrest was set in motion either when the officer turned on his red lights or when he told Paul to stop outside his garage. In Santana the arrest was set in motion when the officers saw Santana in her doorway, stopped their vehicle, went toward her saying, “police” and showed their badges. In the case now before the Court, Officer Calkins never did set the arrest in motion prior to breaking in Mr. Glass’s door. Only after breaking in the door to Mr. Glass’s home, talking to Mr. Glass, and making additional observations of Mr. Glass, did Officer Calkins decide to arrest Mr. Glass.

The next facts to be examined in each of these cases is did the Defendant retreat to his or her home?

In Paul, the retreat could have started when Paul continued to drive at a high rate of speed after the officer turned on the red lights. Paul’s retreat definitely started when he disobeyed the officer and instead of stopping and staying in his truck, went into his garage, locked the door, and went into his home.

In Santana she retreated into her home when the officers came toward her yelling, “police” and showing their badges.

In the case now before the Court, it can’t be said Mr. Glass ever retreated into his home. This is because when Mr. Glass was driving his pickup he had no reason to know that Officer Calkins was even following him. Then when he drove in his driveway, Officer Calkins turning on his patrol cars flashers and saying, “Sir” wouldn’t inform Mr. Glass he was being pursued or that he was being arrested.

The facts in the Paul and Santana cases show the type of facts needed in order to find the following:

1. The existence of a hot pursuit;
2. What is needed to show an officer has decided to arrest
3. A defendant has retreated into his home.

The above comparisons of the facts in Paul and Santana with the case now before the Court shows that the facts in Glass fall short of what is required to find Officer Calkins was ever on hot pursuit with Mr. Glass, or that Officer Calkins had decided to arrest Glass before he broke in Glass's door or that Glass retreated into his house.

CONCLUSION

For the above and foregoing reasons, the decision of the trial court denying Mr. Glass's Suppression Motion should be reversed and then an order should be entered remanding the case to the trial court and requiring the trial court to grant Mr. Glass's Suppression Motion.

DATED this 10 day of March, 1998

Respectfully Submitted:

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ADMISSION OF SERVICE

Due and personal service by a copy of the attached:

1. Brief of Appellant; and
2. Appendix;

is hereby admitted on this 12 day of March, 1998.

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