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SUPREME COURT

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IN THE NORTH DAKOTA SUPREME COURT

JULY 26, 2002

20010292 -

20010293

STATE OF NORTH DAKOTA, )  
 )  
 PLAINTIFF/APPELLEE, )  
 )  
 vs. )  
 )  
 BRENT MAURSTAD, )  
 )  
 DEFENDANT/APPELLANT. )  
 \_\_\_\_\_ )

District Ct. No.01-K-193/194

Supreme Court Nos. 20010292  
20010293

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

JUL 26 2002

STATE OF NORTH DAKOTA

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PETITION FOR REHEARING OF JUDGMENT ENTERED JULY 16, 2002

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BRIEF OF APPELLANT

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## ISSUES PRESENTED

- I. WHETHER THERE ARE FACTUAL INACCURACIES IN THE OPINION WHICH WERE ADOPTED FROM THE LOWER COURT WHICH ARE NOT SUPPORTED BY THE EVIDENCE STATED IN THE TRANSCRIPT.
  
- II. WHETHER THE REASONABLE SUSPICION FINDING BY THE SUPREME COURT WAS BASED ON ERROUNEOUS FINDINGS OF FACT BY THE LOWER COURT.

STATEMENT OF THE CASE

On July 16, 2002, the North Dakota Supreme Court issued its Order Affirming the lower courts decision denying Defendant's Motion to Suppress. *State v. Maurstad*, 2002 ND 121.

Defendant respectfully submits this Petition for Rehearing for the following reasons:

1. The opinion contains factual inaccuracies when compared to transcript on record.
2. The analysis of reasonable and articulable suspicion is not supported by the facts.

I. THERE ARE FACTUAL INACCURACIES IN THE OPINION WHICH WERE ADOPTED FROM THE LOWER COURT WHICH ARE NOT SUPPORTED BY THE EVIDENCE STATED IN THE TRANSCRIPT.

The lower court Memorandum which is cited by this Court as rationale for its holding is not supported by the testimony of the officers. *See State v. Maurstad*, 2002 ND 121, ¶8. The words in question are as follows:

In the present case Mr. Maurstad was already on probation for drug related offenses. The probation officer received information the defendant was suspected of engaging in the manufacturing of methamphetamine. The probation officer after verifying through police surveillance that the defendant was at his fathers [sic] work building and that people known to be involved with controlled substances were coming to this place, directed officers to stop and search him if he left.

*Id.* at ¶¶ 8, 34.

It was never stated that Mr. Laticer was a "known drug user" as mentioned in the court's findings. The officer stated that he was a *suspected* drug user. T. at 29. This is a significant difference which impacts the opinion.

The next inaccuracy centers around the time this statement is referring to. It is not clear whether the lower court is describing events of May 10, 2001, or May 17, 2001. Either way, the record does not support the facts as stated in the lower court's Findings of Fact nor this Court's opinion. It appears that the lower court is referring to the night of May 10, 2001 because that is the time that the Probation Officer informed police of his request to stop Defendant if they saw Defendant at the shop and he left that area. T. at 7, 28.

However, if the lower court is describing the events that occurred on May 10, 2001, the lower court would be in error because surveillance by the probation officer on May 10, 2001 did not establish if Defendant was present at the shop when people were entering or leaving the shop late at night. T. at 6. Nor was there any testimony from the officers that a crime was being committed.

The lower court could also be describing the events of May 17, 2001. However, in reference to that particular time, there is absolutely no evidence that "people known to be involved with controlled substance were coming to this place. . . ." as stated in the lower court's Findings of Fact and adopted by this Court.

See T. at 29. As noted in Defendant's main brief, the testimony was that

On May 17, 2001 at approximately 8:10 p.m., Deputy Kraft was at the Dairy Queen in Drayton when he saw a person named David Laticer emerge from behind the Dairy Queen. T. at 29.

Kraft then looked behind the Dairy Queen and saw Defendant's vehicle at his dad's Shop. T. at 29. Kraft called Gilpin to inform him of that Defendant's vehicle was at the Tree Service shop and that Laticer had come from behind the Dairy Queen. T. at 42. Gilpin had been suspicious that Laticer was involved in narcotics. T. at 29. However, Kraft did not say that Laticer had come from the shop. T. at 42.

Defendant's Main Brief, pgs. 3-4. At no point in the hearing did any officer testify that Laticer was going to Maurstad's shop. Nor does any officer say that Laticer came directly from Maurstad's shop. T. at 42, ll. 11-16. Additionally, there are other places that Laticer could have come from before he emerged from behind the Dairy Queen. T. at 42, ll. 20-25. Thus, the lower court's findings were not supported by the testimony provided in the transcript.

The Supreme Court relied on the lower court's stated findings, however, since the lower court's findings are clearly erroneous, Defendant respectfully requests this Court to review the transcript and allow rehearing on the issue.

II. THE REASONABLE SUSPICION FINDING BY THE SUPREME COURT WAS  
BASED ON ERROUNEOUS FINDINGS OF FACT BY THE LOWER COURT.

As noted above, this Court relied on Finding of Fact from the lower court and based its opinion on these clearly erroneous findings.

A review of the reasonable and articulable suspicion standard, however, is necessary to illustrate why the court should allow rehearing. As this Court stated on many occasions a hunch is insufficient to reach a reasonable and articulable suspicion standard. *State v. Sarhegyi*, 491 N.W.2d 284 (N.D. 1992).

In order to stop a moving vehicle for investigation purposes, the patrol officer must have a reasonable and articulable suspicion that criminal activity has occurred or is occurring. *City of Fargo v. Ovind*, 1998 ND 69, ¶ 8, 575 N.W.2d 901; *State v. Kenner*, 1997 ND 1, ¶ 8, 559 N.W.2d 538. The key question is whether the officer has an objective reason to believe criminal activity has or is taking place. *State v. Hornaday*, 477 N.W.2d 245, 246 (N.D. 1991). In *Hornaday*, this Court stated that "[t]he question is whether a reasonable person in the officer's position would be justified by some objective manifestation to suspect



criminal potential activity." *Hornaday*, 477 N.W.2d at 246.

(emphasis added).

In cases where there is a tip that someone is committing an illegal act, this Court has made clear the procedure for ensuring that a person's liberty is not unilaterally infringed upon. This Court has discussed on several occasions the criteria to justify a stop based on one type of tip or another. *State v. Kenner*, 1997 ND 1, 559 N.W.2d 538; *City of Fargo v. Ovind*, 1998 ND 69, 575 N.W.2d 901. In *Ovind*, the Court noted the criteria as previously discussed in *Kenner*.

We have previously discussed the following three situations which provided grounds for reasonable suspicion stops: (1) where the officer relied upon a directive or request for action from another officer; (2) where the officer received tips from other police officers or informants, which were then corroborated by the officer's own observations; and (3) where the officer directly observed illegal activity.

1998 ND at ¶ 10.

In the present case, there was no direct police observation of criminal activity nor was there a directive from another officer to stop/seize Defendant because of reasonable and articulable suspicion. There was a directive based upon a probation clause. Thus, situations 1 and 3, noted above, do not apply. The second situation, concerning a tip from an

informant and corroboration, does apply.

The North Dakota Supreme Court recognized that tips often times give information that is easily ascertainable such as make and color of a car, license plate numbers, location of the alleged violator. *See State v. Miller*, 510 N.W.2d 638, 642 (N.D. 1994).

For those reasons corroboration of the tip by the officer is necessary.

In the present case, there is absolutely no corroboration of the alleged tip. The officers testifying about the surveillance admit that there was no evidence of wrong doing on the part of the Defendant. There is no verification that the "suspected" drug user, Laticer came from the shop.

The Officer first noticed Laticer as he came to the front of the Dairy Queen. When he looked behind the Dairy Queen, he saw Defendant at the Tree Shop across and down the street.

As the *Maurstad* opinion noted:

Although the district court did not review the probationary searches of Maurstad and his vehicle to determine whether Maurstad's probation officer had a reasonable suspicion to conduct the search, *the district court made sufficient findings of fact to allow us to review whether the facts support a reasonable suspicion.*

*Maurstad, supra*, at ¶ 34 (emphasis added). However, the Finding of Facts which this Court relied on to make its analysis are not supported by the record.

WHEREFORE, pursuant to Rule 40 of the North Dakota Rules of Appellate Procedure, Defendant respectfully requests this Court to grant the Petition for Rehearing and allow oral argument on the matter.

Dated this 25<sup>th</sup> day of July, 2002.

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20010292—20010293

CERTIFICATE OF SERVICE

State of North Dakota v. Brent Maurstad, Dist. Ct. No. 01-K-193, 194, Supreme Court Nos. 2001092, 2001093.

I, Robin L. Olson, attorney for Defendant, hereby certify that a true and correct copy of the foregoing APPELLANT'S BRIEF PETITION FOR REHEARING and CERTIFICATE OF SERVICE was on this 26 day of July, 2002, MAIL SERVED, postage prepaid from Grand Forks, ND 58201 to:

Ms. Barbara Whalen  
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301 Dakota St. W. #9  
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CERTIFICATE OF SERVICE

20010292

State of North Dakota v. Brent Maurstad, Dist. Ct. No. 01-K-193, 194, Supreme  
Court Nos. 2001092, 2001093.

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AUG 1 2002

STATE OF NORTH DAKOTA

I, Robin L. Olson, attorney for Defendant, hereby certify that a true and correct copy of the foregoing APPELLANT'S BRIEF PETITION FOR REHEARING (pages 4, 5, 6) and CERTIFICATE OF SERVICE was on this 31 day of July, 2002, MAIL SERVED, postage prepaid from Grand Forks, ND 58201 to:

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